

THE CONSUMER'S VIEW OF COPYRIGHT

Written by
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November 2003

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[Table of Contents](#)

Executive Summary	1
Introduction	4
Background.....	6
What is covered by copyright?	6
How long does copyright last?	8
How does an author actually benefit from copyright?.....	9
Are there any limits on copyright?	9
What is copyright infringement?	10
The Debate over Copyright.....	11
Creator's rights vs. the public interest	11
Copyright in the digital age.....	13
“Fair Use” and U.S. copyright law	16
Extension of copyright under U.S. law	21
The U.S. <i>Digital Millennium Copyright Act</i>	24
Lessons for Canada from the <i>DMCA</i>	29
The role and impact of international treaties.....	32
Reform of the Canadian <i>Copyright Act</i>	38
Submissions – what consumers said	39
Why copyright is a consumer issue	43
Recommendations for Reform of the <i>Copyright Act</i>	45
Short-term copyright reform recommendations	46
Recommendation 1: The Canadian government should not model copyright reform on the <i>DMCA</i>	46
Recommendation 2: The government should not proceed with legal protection for technological measures.....	47
Recommendation 3: The “fair dealing” provision of the <i>Copyright Act</i> should be expanded	47
Recommendation 4: The term of protection for unpublished works should not be extended	48
Bibliography	49

Executive Summary

This report examines the relationship between copyright and consumers in light of current federal government initiatives to amend the *Copyright Act*. Specifically, the report looks at the submissions made by individual members of the public to the federal government under the copyright reform consultation, which began in 2001.

The report also focuses on the changing context for copyright created by the digital era and its effect both on the relationship between consumers and copyrighted works and between consumers and owners of copyrighted works. It examines digital copyright issues in relation to important recent developments in copyright law in the U.S. and the increasing importance of copyright in international trade agreements.

Finally, the report makes some recommendations concerning proposed changes to the *Copyright Act*, in light of issues identified by consumers and the immediate reform agenda of the federal government.

Copyright and the public interest

Copyright applies to all original literary, dramatic, musical and artistic works. It protects the expression of an idea in a fixed manner, but not the idea itself. It has been described as a balancing of interests between the creator (or copyright owner) on one side and the public on the other. The reasons for this lie in the original purposes of copyright to promote learning and public consumption of works as well as to protect works in order encourage authors to create works.

Copyright law in Canada, as it has developed, has emphasized the need to find an appropriate balance between creators' rights and the public's interest in those works. The difficulty in finding the appropriate balance between these rights is the source of the tension in copyright law.

Copyright in the digital age

The tension between the public's interest in using works and those of copyright holders in protecting and benefiting from works has been accelerated by the digital age. Ordinary citizens may easily access and use works made available on the Internet in ways that broaden and fundamentally change the way individuals relate to works. At the same time, creators, who are increasingly characterized by copyright owners and representatives of the content industries, are concerned that this change in the relationship between works and users of

The Consumer's View of Copyright

those works, as a result of the digital age, threatens the traditional protections of copyright and therefore the economic benefits that flow from that protection.

One way that copyright owners have asserted their rights in the digital era has been to employ technological measures to protect works from unauthorized uses or even access to those works. However, the concern raised by these measures is that they place potential control over copyright in the hands of copyright owners well beyond what currently exists in copyright legislation. These measures may have the effect of eliminating legal uses of copyrighted works.

Digital copyright and the international context

The struggle between copyright owners and users concerning protection and access is being played out in the international context. In the U.S. it has revolved around some key legislative changes. Extension of copyright terms and the enactment of digital copyright legislation, the *Digital Millennium Copyright Act (DMCA)* have had a significant impact on user rights in the United States.

Copyright is also increasingly the subject of international treaties and trade agreements. This creates pressure on Canada to harmonize its copyright laws with those of other countries, adding further complexity to the challenge of maintaining the balance between copyright owners and the rights of the larger public.

Consumers and copyright

An overwhelming majority of the individual submissions to the federal government under the copyright reform consultation, indicated opposition to amendments that would augment the rights of copyright holders over the public or the consumer in the digital environment. Many of the submissions also stated their opposition to amendments to the *Copyright Act* that would bring Canada closer to a *DMCA* legislative model.

The concern consistently expressed by individuals was that technological protection measures would eliminate legal uses under copyright legislation and tip the balance between copyright holders and the public, in favour of copyright holders. Strong concerns were also expressed that granting further legal protections for copyright holders would diminish scientific enquiry and free speech. Concerns were expressed that consumers had been left out of the copyright debate.

The extent of public reaction to proposals regarding the direction of copyright reform in the digital age is a function of the extent to which copyright now has a very real and direct impact upon consumers. Copyright is a consumer issue

The Consumer's View of Copyright

because the subject matter of copyright has become increasingly important in an information age. The growing importance of information in our economy means that both having access to and controlling that information has an increased economic value.

Copyright is also a consumer issue because the digital age has changed the way the public accesses and uses the content that is subject to copyright. Consumers, as a matter of course, come into contact with copyrighted works using digital technology. This means they are now directly affected by the legal uncertainties around copyright due to the ease of reproduction and manipulation of copyrighted works by computers.

Recommendations for reform of the Copyright Act

The following recommendations address those issues identified by the federal government as part of its short-term reform agenda:

Recommendation 1: The Canadian government should not model Canada's copyright reform on the *DMCA*

Recommendation 2: The government should not proceed with legal protection for technological measures

Recommendation 3: The "fair dealing" provision of the *Copyright Act* should be expanded

Recommendation 4: The term of protection for unpublished works should not be extended

Introduction

If one feature stands out about intellectual property law, including copyright, it is how much the law affects the public, but how little the public affects it – indeed, how little the law lets the public affect it. Intellectual property law is a social construct that shuns social participation, let alone control.¹

This report examines the relationship between copyright and consumers in light of current federal government initiatives to amend Canada's copyright legislation, the *Copyright Act*.²

In June 2001, the federal government released a document outlining a new approach to updating Canadian copyright legislation. It indicated that changes to the Act were needed “to adapt to the current economic, social, technological, and international environment”.³ At the same time, the departments with joint responsibility for copyright, Canadian Heritage and Industry Canada, released a consultation paper and asked Canadians to comment on some key copyright issues specifically relating to copyright in a digital environment. Over 700 submissions were received.

In October 2002, the federal government tabled a report in the House of Commons and Senate on the *Copyright Act*. This report provides the basis for Parliament to review copyright policy, consult Canadians and propose legislative amendments to the Act. The report has been referred to the Standing Committee on Canadian Heritage, which has one year to examine the report, hold public hearings and report back to Parliament.⁴ However, the Heritage Committee recently announced that the October 2003 deadline will not be met and is seeking an extension to June 2004. It has also invited the public to make submissions to the Heritage Committee in the fall of 2003.⁵

This report will examine the submissions made by individual consumers to the federal government under the copyright reform consultation. The report will also examine the changing context for copyright created by the advent of new technologies and make recommendations concerning the proposed changes to the Act, in light of the issues identified by consumers.

¹ D. Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) at 296.

² *Copyright Act*, R.S.C. 1985, c. C-42.

³ Intellectual Property Policy Directorate, Industry Canada and Copyright Policy Branch, Canadian Heritage, *A Framework for Copyright Reform* (Ottawa: 22 June 2001) at 1 [hereinafter *Framework*].

⁴ Copyright Policy Branch, online: http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/neuf-new/index_e.cfm (last modified: March 12, 2003).

⁵ Standing Committee on Canadian Heritage, News Release, “Heritage Committee to Conduct Study on Copyright” (18 June 2003).

The Consumer's View of Copyright

Technological change and its relationship to the subject matter of copyright are the reason why proposed amendments to the *Copyright Act* are of significant interest to consumers. Amendments to the Act have the potential to alter the relationship between the general public and owners of copyright in ways that will make transparent a law and a legal relationship that has for the most part been unnoticeable to consumers until recently. To understand this interaction requires understanding the nature of copyright itself.

Copyright is a term that describes legal rights that are attached to works and other subject matter. In its simplest terms it means the right to copy or reproduce. Copyright has been defined as:

Copyright is the right of the creator of an original work (or certain other subject matter) to authorize or prohibit certain uses of the work or to receive compensation for its use. It may be an exclusive right to control certain uses such as reproduction, or a right to receive compensation, such as for the communication to the public or performance in public of a sound recording.⁶

Copyright is an area of public policy and an aspect of the law of intellectual property that is not well known or understood by the public, mostly because its operation or application has been mostly invisible to the public. Copyright law has traditionally focused more on commercial or institutional actors rather than individual consumers:

[T]raditionally, copyright owners have had control over the sorts of uses typically made by commercial and institutional actors and little control over the consumptive uses made by individuals.⁷

These traditional “consumptive uses” of copyright by individuals include purchasing a published book or borrowing it from a library, renting a DVD or videocassette of a movie, buying a music compact disc or photocopying an article from a publication for private use or study.

A key change in the relationship between consumers and copyright has been the advent of the digital era and the ability of consumers to affect the traditional power of copyright over production or reproduction of an original work. Consumers in rapidly increasing numbers have access to personal computers which give them the ability to access, store and use information in innumerable ways. At the same time, it is the intrinsic nature of the operation of computers that has the potential to alter the traditional relationship in copyright between creators and users:

⁶ Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (October 2002) [hereinafter *Supporting Culture*].

⁷ J. Litman, *Digital Copyright: Protecting Intellectual Property on the Internet* (Amherst: Prometheus Books, 2001) at 18-19.

The Consumer's View of Copyright

A computer works by reproducing things in its volatile Random Access Memory, and anything that exists in volatile memory could, at least in theory, be saved to disk...so each appearance of any portion of a work in any computer's random access memory is a reproduction in a copy...⁸

The implication is that all appearances of works in computers could, in theory, be subject to copyright laws. It has been argued that those who employ this argument with respect to protecting copyright in the digital era are advocating a radical shift in the foundation of copyright:

Until now, copyright has regulated multiplication and distribution of works, but it hasn't regulated consumption. If you buy a book, or even borrow a book, you're free to read it as many times as you like. You can loan it to somebody else. You can sell it or give it away or even rent it out. You can't make copies of it, but you can use it and use it and use it again. But, if every time a work appears in the Random Access Memory of your computer, you are making an actionable copy, then we have for the first time given copyright owners extensive control over the consumption of their works.⁹

The digital era has also created the opportunity for copyright owners to electronically protect copyright works in ways that may prevent consumers from legal access to those copyrighted works. It is this tension between protection and access that has made copyright a much more visible and important issue for consumers in the digital age. However, to understand and evaluate this debate requires a general understanding of some of the key elements of copyright law which are relevant to this debate, which is explored in the following section.

Background

What is covered by copyright?

Copyright applies to all original literary, dramatic, musical and artistic works. It protects the expression of an idea in a fixed manner, but not the idea itself. This notion is somewhat difficult to grasp and often more easily understood in theory than in application. At its simplest level it means that if someone expresses an idea for a plot of a novel to another person in a conversation, and the other person then uses that idea in a play or a book, the copyright belongs to the person who actually put the idea into that fixed expression.

In Canada copyright law has traditionally given authors of original literary, artistic, dramatic and musical works the right to exploit those works, receive proper credit

⁸ *Ibid.* at 26.

⁹ *Ibid.* at 28.

The Consumer's View of Copyright

for those works and ensure that the work isn't changed in a way that harms the author's reputation as represented by the work. This object was expanded in 1997 to give similar rights to performers and an enhanced right to distributors of works and performances (mainly record companies and broadcasters):

The rationale for the reform was that, without authors and works, there would be nothing for performers to perform or for distributors to distribute, while, without performers or distributors, authors and their works would languish. Copyright law is seen as establishing incentives and rewards for all players on the cultural field – from originator to distributor – to fulfil their respective roles for the benefit of themselves and of society generally.¹⁰

Facts and news are not protected by copyright; they are considered part of the public domain, to be accessed and used by the public at large.¹¹

Copyright differs from other forms of intellectual property such as trademarks or patents. Trademarks distinguish the goods or services of a person or company from those of another. Slogans, names of products, unique product shapes or packages are all features that may be registered as trademarks. Patents protect inventions such as processes, equipment and manufacturing techniques. They do not include the artistic or aesthetic qualities of an article. Unlike copyrights, patents can only be obtained by registration.¹²

In Canada copyright is under federal jurisdiction. It is also a statutory right which means that no one has a right to copyright protection other than under and in accordance with the provisions of the *Copyright Act*

All rights in the Act apply to using a *substantial part* of a work. Section 3.(1) of the Act states:

For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof...¹³

If anything less than a substantial part is being used, then the copyright owner has no right to prevent its use. The difficulty is that “substantial part” is not defined in the Act. The case law suggests that the meaning of “substantial” includes a quantitative and qualitative element.

¹⁰ Vaver, *supra* note 1 at 1.

¹¹ *Framework*, *supra* note 3 at 5.

¹² Canadian Intellectual Property Office, *A Guide to Copyrights* (January 2000) at 4 [hereinafter *Guide to Copyrights*].

¹³ *Copyright Act*, *supra* note 2.

How long does copyright last?

Because copyright protects intellectual as opposed to physical property, a key principle of copyright is that it is not perpetual, but limited in time. This aspect of copyright arises from the original principle of copyright as a bargain between authors and the public. Copyright is limited to ensure that the balance between creators' rights and public access to those creative expressions is maintained:

Copyright was originally the grant of a temporary government-supported monopoly on copying a work, not a property right. Its sole purpose was to encourage the circulation of ideas by giving creators and publishers a short-term incentive to disseminate their work.¹⁴

The general rule governing the length of copyright under the *Copyright Act* is that copyright lasts for the life of the author, the remainder of the calendar year in which the author dies, and for 50 years following the end of that calendar year.¹⁵ Moral rights have the same term of protection as copyright.¹⁶

Once the copyright has expired, the work becomes part of the public domain, giving everyone an equal right to produce or publish the work. Well-known examples of work in the public domain are the works of Shakespeare.

The relevance of copyright terms to the current debate about copyright is the issue of who benefits and who loses from extended copyright terms of protection. In the U.S. extensive lobbying by economically powerful copyright holders, such as the Disney Corporation, who stood to benefit from the extension of licensing possibilities for works protected by copyright, resulted in an extension of U.S. copyright terms.

Critics of such extensions suggest that preventing works from entering the public domain for long periods effectively eliminates the copyright 'bargain' and results in a significant loss to the general public. They argue that academic scholarship and cultural pursuits suffer at the hands of lucrative copyright holders.

Canada has also been subject to pressure to extend copyright terms. The federal government indicated it was not examining general copyright term extensions in its immediate reform agenda. However, the pressure to extend copyright terms of posthumous works (works not published, performed or delivered in public during the life of the author) resulted in the passage of a bill to extend copyright terms by a key government committee in the fall of 2003,¹⁷

¹⁴ "A radical rethink", *The Economist* (23 January 2003).

¹⁵ *Copyright Act*, *supra* note 2, s. 6.

¹⁶ *Ibid.* s.14.2(1).

¹⁷ *Canadian New Media*, "Copyright term extensions headed for rubber-stamp vote in Commons" (October 2, 2003).

How does an author actually benefit from copyright?

An owner of copyright benefits from copyright by being allowed to collect fees for certain uses of specific kinds of copyrighted work. The *Copyright Act* allows the owner of a copyright to confer their right to produce or reproduce their work to another person through a legal agreement. A licence is one form of legal agreement that allows someone to use a work for certain defined purposes, without the copyright owner giving up their ownership or rights. Often licences require fees to be paid to the copyright owner for the permission to use the work, in the form of royalties or tariffs.

Given the complexity of setting up and managing these kinds of legal agreements, the *Act* allows for collective management of these rights and a legal tribunal to regulate this aspect of copyright. Collective management societies provide a means of administering the rights of individual copyright owners on their behalf. These organizations authorize, control and receive compensation for the use of owners' copyright material. The Copyright Board is the public tribunal, which regulates the application of tariffs and royalties under the *Act*.

There is a range of collective societies permitted under the *Copyright Act*. They encompass such areas as television and radio broadcasts, sound recordings, reprography (photocopying), performances, video recordings and visual arts. For example, SOCAN (Society of Composers, Authors and Music Publishers of Canada) is the performing rights society that collects royalties on behalf of composers, lyricists, songwriters and music publishers for the public performance or broadcasting of their music. It then distributes the royalties to these various entities according to rules set out by SOCAN's board.¹⁸

Are there any limits on copyright?

Copyright attempts to balance the rights of copyright owners with the rights of users to access works subject to copyright. The *Act* therefore provides a number of exceptions and limitations on copyright to protect the rights of users. One of the most important, from the public's perspective is fair dealing, under section 29 of the *Act*.

Fair dealing allows a user to reproduce the whole of a work or a substantial part of a work for research or private study. Fair dealing is also allowed for the purpose of criticism, review or news reporting, as long as the source of the work is acknowledged.

Similar to many of the key terms of the *Copyright Act*, "fair dealing" is not defined in the *Act* and has not been the subject of extensive case law to assist in

¹⁸ *Guide to Copyrights, supra* note 12 at 15.

interpreting this provision. The fair dealing provision has also not yet been tested in relation to digital copyright issues. Despite the absence of such litigation, the fair dealing provision is a critical piece of the debate about copyright in the digital era for consumers. Both current and proposed methods employed by copyright owners to protect copyright in digital works have the potential to limit or eliminate this important legal use of copyrighted works for consumers.

What is copyright infringement?

As defined above, copyright gives the author or owner the sole right to produce or reproduce a work or to authorize such production or reproduction. Infringement is defined in the Act as doing “anything that by this Act only the owner of the copyright has the right to do.”¹⁹ It is also important to note that the concept “fair dealing” and “infringement” are related because fair dealing is defined as an exception to infringement.

To establish whether a person has infringed production or reproduction rights requires determining whether that person produced or reproduced a substantial part of the work.²⁰ Unlike the infringement of performing rights, which requires that an unauthorized performance of a work be carried out in public, production and reproduction rights concern both public *and* private productions and reproductions.²¹

Copying for private use is another important exception to infringement, in addition to fair dealing that affects users. The *Copyright Act* was amended in 1997 to allow for the making of a copy of a musical sound recording for the private use of the person who makes the copy. This provision applies to cassette tapes and Compact Discs (“CDs”). The provisions of the Act also require a levy to be paid by manufacturers and importers of these blank audio recording media, recognizing the difficulty of ‘policing’ such non-authorized private uses and therefore compensating authors, sound recording makers and performers for these activities.²²

This private copying exception is moving to the centre of the public debate about copyright, raising the question as to what constitutes “private copying” in the digital age. New forms of technology have allowed private copying of music to expand in ways not conceived of when this exception was introduced.

A critical development has been the introduction of electronic music files available for sharing on the Internet, itself the result of the development of technology that enables compression of large amounts of data (the “MP3”). The

¹⁹ *Copyright Act*, *supra* note 2, s. 27.

²⁰ N. Tamaro, *The 2002 Annotated Copyright Act* (Toronto: Carswell, 2002) at 382.

²¹ *Ibid.* at 383.

²² *Copyright Act*, *supra* note 2, ss. 79-88.

MP3 allows for music files to be compressed so that they can be used and transmitted over personal computers. Consumers have embraced this technology in huge numbers, many downloading significant numbers of music files through file sharing with other Internet users. This has pulled consumers into the forefront of the debate about what copyright should be protecting and what constitutes a valid exception to copyright infringement and a legal use in the digital era. This issue is explored in the examination of copyright in the digital age.

Although key concepts in copyright law are similar between Canada and other jurisdictions such the United States, important differences exist, some of which have fuelled the public debate about copyright in the digital era. Examining these differences as well as the debate they have engendered in the United States is important because it provides the context for any present and future debate in Canada about changes to copyright. Pressures on Canada to conform to U.S. laws are being exerted by economically powerful American cultural industries and the international trade interests of the U.S. government.

The Debate over Copyright

Creator's rights vs. the public interest

Copyright should not be meant for Rupert Murdoch, Michael Eisner, and Bill Gates at the expense of the rest of us. Copyright should be for students, teachers, readers, library patrons, researchers, freelance writers, emerging musicians, and experimental artists.²³

As the copyright industries continue to lead the economy, [Jack] Valenti called for the protection of America's most prized possessions. "Protection of our intellectual property from all forms of theft, in particularly [*sic*] online thievery and optical disc piracy, must take precedent [*sic*] if the United States is to continue to lead the world's economy."²⁴

Copyright begins with the premise that neither the author nor the general public has the right to obtain all the benefits that flow from the creation of an original work of authorship. In order to promote learning and public consumption of works as well as to encourage authors to create works, copyright law has always divided up the rights and uses in a work between creators and distributors on one side and the public on the other.

²³ S. Vaidhyathan, *Copyrights and Copywrongs* (New York: New York University Press, 2001) at 5.

²⁴ Motion Picture Association of America, Press Release, "Study Shows Copyright Industries as Largest Contributor to the U.S. Economy" (22 April 2002).

The Consumer's View of Copyright

Competing ideas about the intrinsic nature of copyright are at the heart of the debate over copyright. The principles influencing Canadian copyright law are a mixture of Anglo-American and European legal traditions. The Anglo-American principle is rooted in a collectivist notion of the recognition and encouragement of an author's contribution to general pool of art, knowledge and ideas, or the maximization of wealth through his/her work.²⁵ It also recognizes the importance of limiting this right in order to allow for creativity which is dependant on being able to use, criticise, or add to, previous works:

Therefore, they [framers of U.S. Constitution] argued, authors should enjoy this monopoly just long enough to provide an incentive to create more, but the work should live afterward in the "public domain", as common property of the reading public.²⁶

European copyright law has its origin in the human rights tradition. It emphasizes the link between the author and his/her creation and it presumes that protecting the creation from copying is necessary for reasons of fundamental justice or natural right.²⁷ The result of this approach to copyright is a higher level of protection for authors, since its primary focus is on the creator and the economic and moral rights that flow from the link between the author and the work.

Copyright law in Canada as it has developed, has incorporated these two views by emphasizing the need to find an appropriate balance between creators' rights and users' needs.²⁸ This balancing of rights is described in this often quoted statement from the case of *Sayre v. Moore*²⁹:

We must take care to guard against two extremes equally prejudicial: the one that men of ability, who have employed their time for the service of the community may not be deprived of their just merits and reward for their ingenuity and labour; the other that the world may not be deprived of improvements nor the progress of the arts be retarded.³⁰

A recent Canadian Supreme Court decision concerning the issue of copyright infringement re-affirmed this principle of Canadian copyright law:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and

²⁵ S. Handa, "A Review of Canada's International Copyright Obligations" (1997) 42 McGill L.J. 961 at 972.

²⁶ Vaidhyanathan, *supra* note 23 at 21.

²⁷ Handa, *supra* note 25 at 972.

²⁸ Vaver, *supra* note 1 at 12-13; *CCH Canadian Ltd. v. Law Society of Upper Canada (C.A.)*, [2002] 4 F.C. 213 ¶ 23.

²⁹ *Sayre v. Moore* (1785), 1 East. 36ln, 102 E.R. 139n.

³⁰ *Ibid.* at 140.

The Consumer's View of Copyright

obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).³¹

The difficulty of finding the appropriate balance between these rights has forged the tension in copyright law. This tension has only been exacerbated in the digital era.

Copyright in the digital age

The advent of the digital age has only deepened the inherent tensions between access and protection in copyright law. The interests of both the public in accessing works and those of copyright holders in protecting and benefiting from copyright in those works have been accelerated by the digital age. The reason for this is the nature of digital information and the Internet. The digital era has changed how we view and relate to information and the potential for creative use of information. It has also changed the way works subject to copyright may be accessed by ordinary citizens and the way in which ordinary citizens may relate to those works. This potential is viewed by some analysts as the major reason why traditional notions of copyright should be transformed in the digital age:

Digital technology could enable an extraordinary range of ordinary people to become part of a *creative* process. To move from the life of a “consumer”...of music – and not just music, but film, and art, and commerce – to a life where one can individually and collectively participate in making something new.³²

Now that it is no longer merely the eight major movie studios, or the four television networks, or the six thousand radio stations, or the two-hundred some book publishers, or the fifty-seven thousand libraries in this country who need to concern themselves about whether what they are doing will result in the creation of a “material object...in which a work is fixed by any method,” but hundreds of millions of ordinary citizens, it is crucial that the rules governing what counts as such an object, and what the implications are of making one, be rules that those citizens can live with.³³

At the same time, creators, who are increasingly characterized by copyright owners and representatives of the cultural industries, are concerned that this broadening of the relationship to works threatens the traditional protections of copyright and therefore the economic benefits that flow from that protection.

³¹ *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para. 30, online: Judgements of the Supreme Court of Canada <<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/laraoche.en.html>>

³² L. Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001) at 9.

³³ Litman, *supra*, note 7 at 116.

The Consumer's View of Copyright

The problems they identify for copyright in a digital world flow directly from the ease of production and distribution of works over the Internet. It is extremely difficult to protect copyright in digital form. A work protected by copyright, which is released over the Internet without the consent of the copyright owner, can create huge challenges for policing and control of the infringement. Some of those challenges include the relative ease of creating a perfect digital copy, the anonymity of the Internet and the difficulty of determining where an infringement might have originated.

The Government of Canada's consultation document outlined some of the issues raised by copyright owners:

Some rights holders consider that their ability to assert their copyright in relation to a work or other protected subject matter is considerably diminished in the Internet environment once the material is made available in that environment. In comparison with the analogue world, Internet-based infringers are potentially more numerous, more anonymous, and may operate from within jurisdictions that provide relatively little copyright protection.

Many rights holders wish to avail themselves of the potential benefits of digitizing their material and selling to the large markets now open to them via the Internet. They are using or are contemplating the use of technological means for protecting and identifying their material. Some rights holders are prepared to make material available now, while others would make their material available if they could control when and how their material would be disseminated, though some would prefer that their material not be made available at all.³⁴

A prominent example of how difficult it is to protect copyright on the Internet is the rise of the MP3, a compression format for music files. This file format contains no encryption methodology or other security measure. It has been employed by millions of Internet users to copy original music from a compact disc ("CD"), (which are not yet subject to encryption), onto a computer hard drive where it is then compressed into MP3 format. The result has been a significant decline of retail sales of CDs in recent years as consumers bypass this traditional and more expensive method of acquiring music.³⁵

One way that copyright owners have asserted their rights has been to employ technological protection measures ("TPMs"). There are two main types of technological measures employed by copyright owners to protect works in a

³⁴ Industry Canada and Canadian Heritage, *Consultation Paper on Digital Copyright Issues* (Ottawa: Industry Canada and Canadian Heritage, 2001) at 6 [hereinafter *Consultation Paper*].

³⁵ R. Blackwell, "Music industry struggling to tune in on-line profits" (12 July 2003) *The Globe and Mail* at B1.

The Consumer's View of Copyright

digital environment – access control measures and use control (or copy control) measures. These measures are often combined.³⁶

Rights Management Information or Digital Rights Management (“DRMs”) is another way that copyright owners have exerted control over copyright in the digital environment.

Access control measures prevent unauthorized access to works. One of the most common methods is encryption, which involves coding of plain text into an unreadable form so that it can't be understood unless one knows the code for decrypting the text. Access control technological measures are relevant for consumers because they are intrinsic to digital products like Digital Versatile Disks (“DVDs”). Encrypted files are linked to devices or players that are configured so that an encrypted file can only be decrypted on that specific device or player.³⁷ One of the most common types of access control TPM is the Content Scramble System (“CSS”) which protects movies in DVD format from unauthorized access as well as copying.

Use control TPMs allow the copyright holder to control the use of a work, such as copying. One of the most commonly known use control measures is Macrovision, a copy protection device associated with videocassette recorders, which prevents copying of pre-recorded videotapes.³⁸

Rights management information or Digital Rights Management has been defined as:

[I]nformation that identifies a work or sound recording, such as the title, the author or first owner, the performer and an identifying code. It can also refer to terms and conditions related to the use of copyright material. The ability of rights holders to embed rights management information in their material helps them assert their interest in the material and monitor its use, especially in the network context. It can also facilitate on-line licensing.³⁹

There are two types of Digital Rights Management systems, those that utilize technological protection measures and those that do not. Copyright organizations that represent artists by negotiating fees and terms of use for the works of those artists, collecting the fees and distributing royalties using online technologies, are a form of DRM that does not employ a technological protection measure. DRMs that employ technological protection measures are a very recent development. It involves the use of sophisticated software that embeds rules about how the content of a product (such as an electronic book, digital

³⁶ *TPM Report: Part I, infra* note 97 at 4.

³⁷ S. Kim, “The Reinforcement of International Copyright for the Digital Age” (2002) 16 I.P.J. 93 at 96-97.

³⁸ *TPM Report: Part I, infra* note 97 at 12.

³⁹ *Supporting Culture, supra* note 6 at 21.

The Consumer's View of Copyright

video, or a computer game) may be accessed and used. It may also have conditions of use such as charges associated with the use.⁴⁰

All of these forms of technological measures, many of which are very recent developments, place significant power in the hands of content holders. They allow them to control uses of works or even access to works and in the case of DRMs, they set up terms of use through licensing. These powers place the potential control over copyright in the hands of copyright holders well beyond what currently exists in copyright legislation. Some analysts have expressed the concern that this will upset the balance under current copyright legislation between the rights of copyright owners and the rights of the public of access to works.

The struggle between these interests in copyright law has been brought to light recently in the United States as it has considered two aspects of copyright law: “fair use” and the extension of copyright terms. These two subjects have fuelled the debate about copyright in the digital age because the core of the argument in both these issues is the tension between access and protection.

“Fair Use” and U.S. copyright law

The comparable provision in the U.S. copyright legislation to the Canadian concept of “fair dealing” is the “fair use” provision. This provision has been described as broader in scope than the “fair dealing” provision because the listed purposes for which fair use of a copyrighted work is allowed: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”⁴¹ are not exhaustive. The term “fair use” is not defined in U.S. law, but the Copyright Clause lists factors to be considered in assessing fair use on a case by case basis:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work⁴²

The “fair use” and “fair dealing” provisions have become increasingly important and controversial in the digital era. Despite the apparently more expansive definition of “fair use” in the U.S. legislation, the boundaries of what activities may

⁴⁰ *TPM Report: Part I, infra* note 97 at 19-21.

⁴¹ *Copyright Act*, 17 U.S.C. [*Copyright Act 1976*], § 107.

⁴² *Ibid.*

The Consumer's View of Copyright

be considered legal “fair use” have been clearly tested in the digital era by recent U.S. copyright legislation and resulting litigation. This debate revolves around copyright owners’ efforts to protect copyrighted materials in the digital age and whether these protections impinge on or even eliminate “fair use”.

In the U.S. this issue has been raised most recently in relation to the *Digital Millennium Copyright Act*⁴³ [hereinafter *DMCA*], U.S. legislation enacted to enhance copyright protection in the digital arena. Recent litigation under the *DMCA* has considered both the extent to which the *DMCA* eliminates fair use of copyrighted materials and the extent to which protection for the electronic measures put in place by copyright owners, provided in the Act, may be unconstitutional under the free speech clause or First Amendment of the U.S. Constitution.⁴⁴

*Universal City v. Reimerdes*⁴⁵ [hereinafter *Reimerdes*] examined digital protections or technological protection measures or “TPMs” put in place by copyright owners to prevent access to copyrighted materials on the Internet. These measures, which set up technological barriers to prevent unauthorised access to a copyright protected work, are allowed under the “anti-circumvention” sections of the *DMCA*. The *DMCA*, however, also contains provisions intended to protect “fair use”. The case looked at the scope of the fair use protections under the *DMCA* as well as the constitutionality of the technical measures in the Act.

Reimerdes involved a lawsuit brought by eight major motion picture studios against individuals who had adopted and publicized a computer program that circumvented the electronic protection system which prevented copyrighted movies distributed for home use on DVDs from being copied. The movies were protected by an encryption system called CSS (Content Scramble System). The encryption system meant that CSS-protected movies on DVDs could only be viewed on DVD players and computer drives which were equipped with licensed technology that allowed these devices to decrypt and play, but not copy the movies.⁴⁶

The defendants, who were computer hackers (one of whom published a magazine for computer hackers), adopted a program called DeCSS (designed by a Norwegian teenager) that circumvented the CSS protection system and allowed these DVDs to be copied and played on devices that didn’t have the

⁴³ *Digital Millennium Copyright Act*, 17 U.S.C. § 1201 et seq. (Supp. V 1999) [hereinafter *DMCA*].

⁴⁴ U.S. Const. Amend I: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

⁴⁵ *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp. 2d 294 (S.D.N.Y. 2000) [hereinafter *Reimerdes*]; aff’d sub.nom *Universal Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) [hereinafter *Corley*].

⁴⁶ *Ibid.* at 303.

The Consumer's View of Copyright

licensed decryption technology. They posted the DeCSS program on their website, making it publicly available. The motion picture studios brought an action under the *DMCA* asserting that these activities violated the Act and asked the court for an injunction to prevent them from posting DeCSS and from electronically “linking” their site to others that posted DeCSS.⁴⁷

The defendants made two “fair use”-related arguments. First they argued that the *DMCA* couldn’t be interpreted in a way that would prevent these activities because to do so would mean that even those who wished to gain access to technologically protected works for legal uses such as fair use, would be prevented from doing so. They argued that “the statute therefore does not reach their activities, which are simply a means to enable users of DeCSS to make such fair uses.”⁴⁸

The defendants also argued that the *DMCA* violated the First Amendment as applied to computer programs or code. They asserted that computer code is protected speech and thus the *DMCA*’s prohibition of DeCSS violated the defendants’ free speech rights. They also argued that the *DMCA* was overbroad because its prohibition of the dissemination of decryption technology prevented third parties from making fair use of the plaintiffs’ encrypted works.⁴⁹

The District Court (and subsequently, the 2nd Circuit Court of Appeals) rejected both arguments of the defendants and granted the plaintiffs a permanent injunction barring the defendants from posting DeCSS on their website or linking to other websites that make DeCSS available. Although it acknowledged that the use of technological means of controlling access to a copyrighted work may affect the ability to make fair uses of a work, and created the risk of limiting access to works not protected by copyright, such as works in which copyright has expired, it held that Congress dealt with these concerns within the *DMCA* legislation.⁵⁰

The Court held that Congress had struck the necessary balance between competing interests on the fair use issue by limiting prohibition of the act of circumvention to the act itself “so as not to “apply to subsequent actions of a person once he or she has obtained authorized access to a copy of a ‘copyrighted’ work...” By doing so, it left “the traditional defenses to copyright infringement, including fair use...” fully applicable” provided “the access is authorized.”⁵¹

⁴⁷ *Ibid.*

⁴⁸ *Reimerdes, supra* note 45 at 322.

⁴⁹ *Ibid.* at 325-6.

⁵⁰ *Ibid.* at 322-3.

⁵¹ *Ibid.* at 323.

The Consumer's View of Copyright

The difficulty with this line of reasoning is that any right of fair use becomes meaningless when initial access to a work is not possible due to technological controls.

The Court also considered the defendants' constitutional fair use arguments. it stated that Congress' decision to "leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so is a matter for Congress unless Congress' decision contravenes the Constitution..."⁵²

The Court found that computer code was "speech" for the purposes of First Amendment protection, but that it did not merit the same level of scrutiny as speech that was purely content, because computer code contains a functional or non-speech element:

The critical point is that nonspeech elements may create hazards for society above and beyond the speech elements. They are subject to regulation in appropriate circumstances because the government has an interest in dealing with the potential hazards of the nonspeech elements despite the fact that they are joined with expressive elements.⁵³

The Court had to determine whether the *DMCA* in this application, was a content-based restriction or a content-neutral restriction. The Court concluded that the restriction was content neutral because the computer code at issue did more than just convey a message, it had a functional element. It caused a computer to perform a series of tasks that ultimately decrypted CSS-protected files and enabled anyone who received the code to do the same.

This argument is premised on the assumption that all acts of circumvention are for illegal purposes, ignoring that circumvention may also be for legal uses:

The reason that Congress enacted the anti-trafficking provision of the *DMCA* had nothing to do with suppressing particular ideas of computer programmers and everything to do with functionality...with preventing people from circumventing technological access control measures – just as laws prohibiting the possession of burglar tools have nothing to do with preventing people from expressing themselves by accumulating what to them may be attractive assortments of implements and everything to do with preventing burglaries.⁵⁴

The Court rejected the defendants' argument that the *DMCA* is overbroad because it prevents others besides the defendants from making fair use of copyrighted works since they may lack the technical expertise to circumvent CSS

⁵² *Ibid.*

⁵³ *Ibid.* at 328.

⁵⁴ *Ibid.* at 329.

The Consumer's View of Copyright

without the means of acquiring the necessary circumvention technology to make fair use of the content of the plaintiffs' copyrighted DVDs. The Court provided examples of such possible fair uses: a movie reviewer quoting a portion of the script in an article or broadcast a musicologist playing a portion of a musical sound track, or a film scholar creating and exhibiting segments of different films to students.⁵⁵

The Court rejected the overbreadth argument by suggesting that there wasn't enough evidence to show that potential fair users would be adversely affected by the anti-trafficking provision of the *DMCA*. The Court suggested initially that there were sufficient alternative ways of meeting the requirement for fair use (i.e. purchasing the same movie on videotape) such that the anti-trafficking provisions of the *DMCA* would affect the above-noted examples of fair use, but "only to a trivial degree".⁵⁶

In the Court's view, the argument that there was an inability to make fair use by copying portions of DVD movies which were encrypted or copying works upon which copyright had expired (and were now in the public domain) which were similarly encrypted, only had validity if there was sufficient evidence of a community of fair users being adversely affected:

As the *DMCA* is not yet two years old, this does not yet appear to be a problem, although it may emerge as one in the future...the evidence as to the impact of the anti-trafficking provision of the *DMCA* on prospective fair users is scanty and fails adequately to address the issues.⁵⁷

The 2nd Circuit Court of Appeals upheld the District Court decision based on the same assessment of the constitutional fair use arguments. It even questioned whether fair use was constitutionally required: "...we note that the Supreme Court has never held that fair use is constitutionally required, although some isolated statements in its opinions might arguably be enlisted for such a requirement."⁵⁸

Canadian law to date contains no equivalent to the *DMCA* and the "fair dealing" provision of the *Copyright Act* has not yet been tested in the electronic environment. The Canadian government has focused proposed changes to the *Copyright Act* in the short term around this issue and asked for public input on the specific question of the effect of technological protection measures on user access. In addition, it recently commissioned two studies to examine technological protection measures in the context of copyright reform and make some policy recommendations.⁵⁹

⁵⁵ *Ibid.* at 337.

⁵⁶ *Ibid.* at 337.

⁵⁷ *Ibid.* at 338.

⁵⁸ *Corley*, *supra* note 45 at 458.

⁵⁹ *TPM Report: Part II, infra*, note 97.

The Consumer's View of Copyright

The case of *Reimerdes* is significant for what it says about the relationship between technological measures and legal uses under copyright legislation such as fair use. It shows that technological protection measures can eliminate legal uses under copyright legislation such as fair use. It also shows how legal protections such as fair use may be trumped when technological measures are backed up by legal protections such as those found in the *DMCA*.

Extension of copyright under U.S. law

Another arena where the tension between access and protection is highlighted is the length for which works are protected by copyright in the United States. It is also a critical area of difference between Canada and the United States, as copyright terms for most works have been extended in the U.S beyond Canadian terms.

Legislation passed in the United States in 1998,⁶⁰ called the *Sonny Bono Copyright Term Extension Act*, or “*CTEA*” extended copyright for new and existing works from a term of life of the author plus fifty years, (Canada’s copyright term), to life of the author plus 70 years. The legislation also extended copyrights held by corporations from 75 to 95 years. This change brought American copyright terms in line with European states. The European Union issued a directive in 1993 to its member states to increase copyright terms to the life of the author plus 70 years.⁶¹

Critics of the *CTEA* argue that this latest extension represents a pattern of increasing protection of copyright, which tilts the balance in favour of copyright holders by effectively granting them a perpetual copyright. They point out that the term of copyright was extended only once in the first hundred years of U.S. copyright legislation, but has been extended eleven times in the last forty. They also specifically criticized the legislation for extending existing copyrights for twenty years:

[T]he extension unnecessarily stifles freedom of expression by preventing the artistic and educational use even of content that no longer has any commercial value. As one dissenter, Justice Steven G. Breyer, estimated, only 2 percent of the work copyrighted between 1923 and 1942 continues to be commercially exploited...⁶²

A legal challenge to the legislation, *Eldred v. Ashcroft*⁶³ argued that the U.S. Constitution, the source of American copyright law, had intended that copyright be granted for a limited time to allow works to enter the public domain. The lead

⁶⁰ *Sonny Bono Copyright Term Extension Act* of 1998 (105th Cong. 2d Sess., s. 505).

⁶¹ European Union Directive 93/98/EEC on Copyright Term of Protection.

⁶² L. Lessig, “Protecting Mickey Mouse at Art’s Expense” *The New York Times* (18 January 2003), online: <<http://www.nytimes.com>>.

⁶³ *Eldred v. Ashcroft*, 537 U.S. __ (2003).

The Consumer's View of Copyright

petitioner, Eric Eldred operated an Internet library where he published books with expired copyrights on the World Wide Web for free. When the *CTEA* was passed, and certain works that Eldred had expected to enter the public domain did not, he and other challenged the constitutionality of the *CTEA*

The petitioners argued that the *CTEA* failed constitutional review under both the "limited Times" prescription and the free speech guarantee of the First Amendment. The Copyright and Patent Clause of the Constitution states: "Congress shall have Power....[t]o promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁶⁴

Supporters of the extension argued that the Constitution gives Congress, not the courts, the responsibility to balance the needs of copyright holders and the public. They also argued that private ownership of copyright is necessary as a continued financial incentive to make material widely available. Jack Valenti, the chairman of the Motion Picture Association of America asserted part of the economic argument for the protection provided by copyright:

"Who is going to digitize these public domain movies?" Mr. Valenti said. "To digitize a movie costs a huge amount of money. Who would spend the money if they didn't own it? If you didn't own your house would you spend a lot of money to bring it up to snuff?"⁶⁵

Lawrence Lessig, a law professor who has written extensively about intellectual property and the Internet argued the case on behalf of the lead petitioner, Eric Eldred. He described the issue as one of protecting and advancing culture by ensuring works enter the public domain:

"The most recent [extension] is the Sonny Bono copyright term extension act. Those of us who love it know it as the Mickey Mouse protection act, which of course [means] every time Mickey is about to pass through the public domain, copyright terms are extended. The meaning of this pattern is absolutely clear to those who pay to produce it. The meaning is: No one can do to the Disney Corporation what Walt Disney did to the Brothers Grimm. That though we had a culture where people could take and build upon what went before, that's over. There is no such thing as the public domain in the minds of those who have produced these 11 extensions these last 40 years because now culture is owned."⁶⁶

Critics also argued that lobbying to adopt the 1998 legislation had come, not from individual authors of copyrighted works, but from large cultural industries with a strong financial stake in protecting their copyright interests. The Walt Disney

⁶⁴ Art. I, §8, cl. 8.

⁶⁵ A. Harmon, "Court to Review Copyright Law" *The New York Times* (7 October 2002).

⁶⁶ L. Lessig, "Free Culture" (Address to the Open Source Convention, 24 July 2002).

The Consumer's View of Copyright

corporation, whose copyright on the version of the cartoon character of Mickey Mouse portrayed in Disney's earliest films from the 1920's, would have expired in 2003 without the passage of the *CTEA*, was one of the strongest proponents of the legislation. Newspaper reports indicate that it earned an estimated \$8 billion in 1998 from licensing of Mickey Mouse products alone.⁶⁷

In January 2003, the Supreme Court issued its opinion, upholding the legislation and ruling that the Constitution granted Congress the discretion to set the length of copyright protection.

Canada is also considering whether the copyright term of protection should be extended to 70 years following the author's death, to match U.S. and European Union terms of protection.⁶⁸ It has indicated in its copyright reform process that term of copyright protection is a medium-term priority. This means that it is not subject to immediate legislative consideration but will be considered over the next two to four years. However, the government indicated that an immediate priority is consideration of extension of copyright terms for unpublished works.

A government bill that would amend the Copyright Act to provide a longer term of protection for unpublished works of authors who died between 1930 and 1949, was passed by the Heritage Committee of the House of Commons in June 2003.⁶⁹

Critics of this bill suggested that it was specifically designed to protect the interests of the literary estate of Lucy Maud Montgomery, the author of the children's story *Anne of Green Gables*. Without this extension, Montgomery's unpublished diaries and letters would enter the public domain at the end of 2003. Defenders of the amendment point to problems related to libel and privacy when a work such as a diary enters the public domain (and may make reference to persons still alive).⁷⁰

Critics respond that libel laws already exist to deal with these concerns and that this extension could have a very negative impact on historical research:

Renowned Canadian historian, author and retired professor Jack Granatstein, says the change could have a profound impact on researchers and writers whose area of interest lies in Canadian history and politics in the first half of the 20th century. "If I'm writing a book and want to use a letter written by Joe Dokes to his mother, and I want to quote it, [I] have to get a hold of him, and get permission to use this paragraph from his letter. That's hard enough if he is alive, but if he is dead, and his words are protected under copyright for a long time, since this can go back a century

⁶⁷ C. Lane, "Justices Hear Challenge to Copyright Law" (10 October, 2002) E01.

⁶⁸ *Supporting Culture*, *supra* note 6 at 22.

⁶⁹ Bill C-36, *An Act to establish the Library and Archives of Canada, to amend the Copyright Act and to amend certain Acts in consequence*, 2nd Sess., 37th Parl., 2002 (2nd reading 27 May 2003).

⁷⁰ K. O'Malley, "Archives Bill Could Have Profound Impact on 20th Century" *The Hill Times* (9 June 2003).

The Consumer's View of Copyright

almost, then I have to track down his heirs. It's hugely time-consuming, and it makes it almost inevitable for me to avoid the problem by paraphrasing, and sliding over something that might be better served by a long quote. It doesn't mean you can't do research – you can still read letters – but can't use them in the way that historical art requires.”⁷¹

The bill is scheduled to go before the House of Commons in the fall of 2003 for final reading.

The interpretation of “fair use” in American copyright law and the extension of copyright in the U.S. are important elements in the crucible of debate about copyright in the digital age. The judicial treatment of these two aspects indicates a weighing of the balance between the public at large and copyright holders in favour of the holders of copyright. It has also engendered a vigorous public debate about copyright in the electronic era. This debate is critically important for Canadians because it is the backdrop to and the context for the discussion of reform of copyright law in Canada.

This debate has also been conducted on the legislative front, as the *DMCA* itself has been the subject of much legislative debate and public discussion. It is important, therefore, to examine its provisions and the public analysis that has accompanied it.

The U.S. Digital Millennium Copyright Act

The Courts' interpretation of the *DMCA* in the case of *Reimerdes* shows that sections of the *DMCA* dealing with protections for technical measures have a critical impact on the issue of fair use. Thus it is important to closely examine these sections of the *DMCA* and the wider public response to them in order to understand what kind of model this Act presents for Canadian copyright reform.

The framers of *DMCA* viewed its purposes as twofold and complementary: to protect intellectual property rights in the digital environment, and to promote the growth and development of electronic commerce.⁷² The critical sections in the Act that deal with protections for digital copyright are sections 1201-1204. Section 1201 sets out the prohibitions on circumvention of copyright protection systems. Section 1202 sets out provisions dealing with the integrity of copyright management information. Sections 1203 and 1204 set out the civil remedies and the criminal offences and penalties for infringement of the Act.

⁷¹ *Ibid.*

⁷² Report to Congress: Joint Study of Section 1201(g) of The *Digital Millennium Copyright Act*, February 19, 2003, online: <http://www.copyright.gov/reports/studies/dmca_report.html>.

The Consumer's View of Copyright

Congress was aware of the potentially negative impact of Section 1201 of the *DMCA*. As a result it established a mechanism for review of the effect of decisions related to that section within the Act. Section 1201 (a) sets out a rulemaking procedure to create exemptions for users of a particular class of copyrighted works if these persons are, or are likely to be in the succeeding three-year period, adversely affected in their ability to make non-infringing uses of that particular class of works.⁷³

Under the rulemaking procedure⁷⁴ the Library of Congress is responsible for making a determination every three years (upon the recommendation of the Register of Copyrights) which is also published. The effect of a determination is that the general prohibition on circumvention of access control TPMs⁷⁵ does not apply to these users with respect to a class of works for the following three-year period. The Register of Copyright's ruling on this important section form a critical part of the analysis of Section 1201.

Section 1201 is the focal point of the fair use debate because it creates an absolute prohibition on any circumvention of access control TPMs (unless the copyright holder gives express consent), or making available the tools to do so. Section 1201(a) prohibits the circumvention of a technological measure that "effectively controls access to a work" protected under United States copyright legislation. The term "effectively controls access to a work" is defined as "if the measure, in the ordinary course of its operation, requires the application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work."⁷⁶

Section 1201(a) also contains an anti-trafficking provision related to circumventing access control TPMs. Section 1201(a)(2) prohibits the manufacture, import, offer to the public, provision or other trafficking in any technology, product, service, device, component or part that is designed primarily for the purpose of the circumvention of an "effective access control technological measure."

The concern raised by these provisions is that they are premised on the assumption that copyright *holders* have an inherent right to control *access* to works. However, the U.S. *Copyright Act* creates no such right. Furthermore, the legal right of fair use and other rights created by exemptions to copyright require access to a work in order to exercise the right.

Section 1201(b) would appear to create a protection for fair use exemptions, but in reality the protection is illusory, being premised in the same assumption about absolute right over access. It differs from the previous section in that it does *not*

⁷³ 17 U.S.C. §1201(a)(1)(B).

⁷⁴ 17 U.S.C. §1201(a)(1)(C) and (D).

⁷⁵ 17 U.S.C. §1201(a)(1)(A).

⁷⁶ 17 U.S.C. §1201(a)(3)(B).

The Consumer's View of Copyright

prohibit the *conduct* of circumventing a TPM that protects an exclusive right of a copyright owner in a work. It sets out a prohibition on the manufacture, import, offer to the public, provision or other trafficking in any technology, product, service, device, component or part that is designed primarily for the purpose of circumventing a TPM “that effectively protects a right” of a copyright owner in a work.⁷⁷ This is to be distinguished from the previous section that protects technological measures controlling access to the work itself.

The Register of Copyrights explained the distinction her recommendation to the Library of Congress in the Final Rule⁷⁸ mandated under the Act:

Section 1201(a) thus addressed 'access control' measures, prohibiting both the conduct of circumventing those measures and devices that circumvent them. ... The type of technological measure addressed in section 1201(b) includes copy-control measures and other measures that control uses of works that would infringe the exclusive rights of the copyright owner. ... But unlike section 1201(a), which prohibits both the conduct of circumvention and devices that circumvent, section 1201(b) does not prohibit the conduct of circumventing copy control measures. The prohibition in section 1201(b) extends only to devices that circumvent copy control measures. The decision not to prohibit the conduct of circumventing copy controls was made, in part, because it would penalize some non-infringing conduct such as fair use.⁷⁹

The problem with this explanation is that where access has already been prohibited by Section 1201(a), protecting non-infringing conduct is a meaningless protection. Even if one were to accept the provision with the above-noted limitations, it provides extremely limited protection for legitimate uses, given that the average computer user does not have the level of sophistication needed to access to the required circumvention tools. Thus the right to circumvent control measures that block legitimate uses becomes nothing more than theoretical.

A Canadian study of technological protection measures found that almost all TPMs controlling use are linked with access control measures.⁸⁰ This was an issue considered in the Register of Copyrights' recommendations for the Library of Congress' Final Rule.⁸¹ The Register of Copyrights acknowledged this possibility:

[M]erger of access and use controls would effectively bootstrap the legal prohibition against circumvention of access controls to include copy controls and thereby

⁷⁷ 17 U.S.C. §1201(b)(2).

⁷⁸ Copyright Office, Library of Congress, 37 CFR Part 201 [Docket No. RM 99-7D] "*Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*", Federal Register/Vol.65, No. 209, October 27, 2000/Rules and Regulations, 64556 – 64574 [hereinafter "Final Rule"].

⁷⁹ *Ibid.* at 64557.

⁸⁰ *TPM Report: Part I*, *infra* note 97 at 4.

⁸¹ Final Rule, *supra* note 78.

The Consumer's View of Copyright

prevents a user from making otherwise noninfringing uses of lawfully acquired copies, such as excerpting parts of the material on a DVD for a film class, which might be a fair use.⁸²

The Register's ruling was related to the issue raised by *Remeirdes*, which concerned the impact on fair use of Content Scrambling Systems (CSS) on DVDs. The Register noted that most works available in DVD format were also available in analog format (VHS tape) which were not protected by any technological measures. She also noted that no evidence had been presented which indicated that the copy control aspects of CSS could not be circumvented without also circumventing access controls, (which is a violation under the Act). In other words, there is no violation of the *DMCA* if the copy control aspects of CSS may be circumvented without circumventing a DVD's access controls. However, she recognized that this might only be a question of the current state of the evidence:

The merger of technological measures that protect access and copying [and other use controls] does not appear to have been anticipated by Congress... It would be helpful if Congress were to clarify its intent, since the implementation of merged technological measures arguably would undermine Congress's decision to offer disparate treatment for access controls and use controls in section 1201. At present, on the current record, it would be imprudent to venture too far on this issue in the absence of congressional guidance. The issue of merged access and use measures may become a significant problem.⁸³

Given these admittedly serious gaps in the legislation, it can be argued that the fundamental premise of the *DMCA* that fair use and other rights would be preserved by segregating access from use TPMs is flawed, resulting in a significant shift in the balance of rights.

It is also important to note that the legislation narrowly defined the rulemaking parameters, thus determining that the process would result in narrow interpretations with limited public impact. In its ruling in October 2000,⁸⁴ the Register of Copyright's review was limited to only address users that were being adversely affected in their use of a *particular class of works*.⁸⁵

This restriction had the impact of ignoring important impacts of the legislation on both users and uses. That certain users or the public generally may have been adversely impacted in their use of all or many types of works was beyond the scope of the review. Also, where the adverse impact was the result of a

⁸² *Ibid.* at 64568.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ The Register's ruling defines "class of works" to mean categories of authorship defined in Section 102 of the Act, such as literary works, musical works, dramatic works, or motion pictures and other audiovisual works, *ibid.* at 64559-64561.

The Consumer's View of Copyright

restriction imposed by use rather than access controls (ignoring the fact that access and use controls are usually linked) or other factors (such as licensing terms), was beyond the scope of the Register's mandate under the legislation.

The result was that important public interest concerns regarding the effect of the provision in a number of areas could not be addressed and therefore potentially remedied by the rulemaking process. Many requests for relief were brought before the Library of Congress including those dealing with reverse engineering rights, encryption research and fair use, but only two very narrowly defined and limited exemptions were ultimately allowed.

The Register's ruling resulted in exemptions to the prohibition on circumventing technological measures controlling access to works in Section 1201(a)(1)(A) for two classes of works: 1) the right to circumvent TPMs that protect compilations consisting of lists of websites blocked by filtering software applications and 2) the right to circumvent TPMs that protect literary works, including computer programs and databases, where the access control mechanisms that protect them have malfunctioned, are damaged or are obsolete, prohibiting access.⁸⁶

A final and particularly troubling aspect of the *DMCA* concerns how existing exemptions, such as fair use, were incorporated into the *DMCA* within Section 1201, and the ineffectiveness of these exemptions in preserving these legal rights. Section 1201(c)(1) states: "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title [the *Copyright Act*]." While this provision appears to preserve these rights, a closer reading of it reveals that it does not. This provision deals only with infringement, not circumvention. Thus, even where a use may be legitimate, if the work is protected by access control measures the act of circumvention is an offence.

The Register of Copyrights clearly indicates that some members of Congress were aware of and concerned about the effect of this provision:

The Assistant Secretary noted that the Commerce Committee was concerned that the anticircumvention prohibition of section 1201(a)(1) might have the adverse consequences on fair uses of copyrighted works protected by technological protection measures, particularly by libraries and educators. He echoed the fears of the Commerce Committee that a legal framework may be developing that would "inexorably create a pay-per-use society." He stated that the "right" to prohibit circumvention should be qualified in order to maintain a balance between the interests of content creators and information users, by means of carefully drawn exemptions from the anticircumvention provision. Since fair use, as codified in 17 U.S.C. 107, is not a defense to the cause of action created by the anticircumvention prohibition of section 1201, the Assistant Secretary urges the Register to follow the House Commerce Committee's intent to provide for exemptions analogous to fair

⁸⁶ *Ibid.* at 64574.

The Consumer's View of Copyright

use. He advises the Register to preserve fair use principles by crafting exemptions that are grounded in these principles in order to promote inclusion of all parts of society in the digital economy and prevent a situation in which information crucial to supporting scholarship, research, comment, criticism, news reporting, life-long learning, and other related lawful uses of copyrighted information is available only to those with the ability to pay or the expertise to negotiate advantageous licensing terms.⁸⁷

However, given the narrowness of the review mandate defined in the Act, the Register of Copyrights declined to create an exemption to address this issue, stating that it was beyond the scope of the Library of Congress's authority. The Register viewed that this was an issue for legislative rather than regulatory action.⁸⁸

Lessons for Canada from the *DMCA*

There is evidence both that legitimate uses have been curtailed by the enactment of the *DMCA* and of strong public concern about the negative impact of the legislation. The October 2000 ruling by the Register provides clear evidence of both the 'reach' of the *DMCA* with respect to the anti-circumvention provisions and the limits on public interest protections within it. Her ruling also clearly indicates both her concern and that of many U.S. legislators that the protections for legal exemptions such as fair use are more illusory than real.

An analysis of some of the judicial and legislative responses that have followed the enactment of the *DMCA* suggest that the Register's concerns have been realized.

In *Remeirdes* the defendant was found to have violated Section 1201 of the *DMCA* by posting a decryption code and the applicants, eight major motion picture studios, were awarded a permanent injunction.

Another legal action under the Section 1201 of the *DMCA*, concerned an anti-circumvention device which could also be used to allow people to access copies of books in electronic format for fair use purposes. In July 2001, a Russian computer programmer who was visiting the U.S. was arrested and jailed under the *DMCA*. Dmitry Sklyarov was charged under the criminal offences provision of the *DMCA*, with trafficking in a software program that is alleged to be capable of removing the technological protection from books in electronic format, sold by Adobe Systems. This software program is legal under Russian law, but Sklyarov was charged on the basis that he was identified as the copyright holder of the

⁸⁷ Final Rule, *supra* note 78 at 64561.

⁸⁸ *Ibid.* at 64562.

The Consumer's View of Copyright

program and the program was available for purchase over the Internet from a company based in the state of Washington.⁸⁹

On August 28, 2001, Sklyarov and his employer, Elcomsoft, were indicted by a grand jury with five counts under the *DMCA*. The charges include conspiracy to traffic in anti-circumvention technology and trafficking in anti-circumvention technology.⁹⁰ If convicted, Sklyarov could face 25 years in prison and both he and his employer could *each* be fined up to \$2,250,000. In December, 2001 Sklyarov was released from custody and allowed to return to Russia under a pre-trial diversion agreement. Under the agreement the U.S. government agreed to defer prosecution in exchange for Sklyarov's agreement to testify, if asked, in the government's case against Elcomsoft.⁹¹

There is documented evidence of the reluctance of the scientific community involved in cryptographic research to publish its research as a result of concerns about potential legal action under the *DMCA*.⁹²

The enactment of the *DMCA* has produced a series of legislative responses in the U.S. aimed at redressing the effects of the *DMCA*. The *Digital Consumer Right to Know Act*⁹³ requires the Federal Trade Commission to issue rules regarding the disclosure of technological measures that restrict consumers' ability to use and manipulate digital information and entertainment content. The purpose is to ensure that consumers are informed before they purchase digital technology, of technological features that may restrict their ability to use or manipulate its content.

The *Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003*⁹⁴ seeks to amend copyright legislation to protect fair uses of lawfully obtained digital works. The *Digital Media Consumers' Rights Act of 2003*⁹⁵ would give the Federal Trade Commission to power to ensure adequate labelling of digital music discs to let consumers know of any restrictions on their playability or recordability. The legislation also proposes amendments to the *DMCA* that would allow circumvention of protection measures for the purpose of exercising fair use rights.⁹⁶

⁸⁹ *United States v. Elcom Ltd., a/k/a Elcomsoft Co. Ltd. and Dmitry Sklyarov*, CR 01-20138.

⁹⁰ *Ibid.*

⁹¹ *United States v. Elcom Ltd., a/k/a Elcomsoft Co Ltd. and Dmitry Sklyarov*, CR 01-20138 RMW Pretrial Diversion Agreement.

⁹² *TPM Report: Part II, infra* note 97 at 56-58.

⁹³ Bill S. 692, 108th Congress, 1st Session, introduced March 24, 2003.

⁹⁴ Bill H.R. 1066, 108th Congress, 1st Session, introduced March 4, 2003.

⁹⁵ Bill H.R. 107, 108th Congress, 1st Session, introduced January 7, 2003.

⁹⁶ There have also been a few bills proposed that would enhance the rights of copyright holders. The *Piracy Deterrence and Education Act of 2003*, Bill H.R. 2517, 108th Congress, 1st Session, introduced June 19, 2003 would enhance criminal enforcement of copyright laws.

The Consumer's View of Copyright

The evidence of real constraints upon the scientific community and the vigour of legislative response following enactment of the *DMCA* provide strong evidence of concern about the ineffectiveness and inability of such legislation to protect legal uses of copyrighted material. It also provides an important warning for the Canadian government as it considers enacting any form of anti-circumvention legislation for the protection of TPMs.

There is some indication that the Canadian government is concerned about the implications of reform of copyright legislation along the lines of the *DMCA*. It recently commissioned a study to examine technological protection measures. An overview of the TPMs currently available as of 2002 and the implications of the legal protection of such technology for copyright are contained in a two-part study funded by the Department of Canadian Heritage.⁹⁷

The study contained a basic technical analysis of the nature and function of TPMs followed by a policy analysis of TPMs in the context of copyright legislative reform. The study ultimately recommended that the government not proceed with any new legal measures to protect TPMs at this time. It concluded that there wasn't enough empirical evidence about the current use and circumvention of TPMs to require a legislative response.⁹⁸

The study also criticised the federal government's consultation approach concerning TPMs, which was premised on assessing *how* copyright legislation should protect TPMs without first assessing *whether* TPMs themselves are in the public interest:

Before asking whether and under what circumstances copyright legislation ought to protect TPMs, it is necessary to first ask *whether and under what circumstances TPMs should be permitted to flourish*. As indicated throughout this Study, the waters are mostly uncharted. Still, given the increasing body of literature that is critical of proprietary software and architectures of control that have been referred to and discussed throughout this Study, it is at least possible that the recent focus on the legal protection of TPMs is misdirected. It may well turn out that it is the public and not the private interest groups that will require legal protection.⁹⁹

The United States enacted the *Digital Millennium Copyright Act* in 1998 in order to address aspects of its copyright code that the United States government believed required reform prior to ratifying international Internet Treaties. That legislation has engendered a significant public debate about how the copyright

⁹⁷I.R. Kerr, A. Maurushat, C.S. Tacit, "*Technical Protection Measures: Part I. Trends in Technical Protection Measures and Circumvention Technologies*", National Library of Canada; Department of Canadian Heritage website, [2002], [hereinafter *TPM Report: Part I*] and I.R. Kerr, A. Maurushat, C.S. Tacit, "*Technical Protection Measures: Part II. The Legal Protection of TPMs*" National Library of Canada; Department of Canadian Heritage website, [2003], [hereinafter *TPM Report: Part II*].

⁹⁸ *TPM Report: Part II* at 66.

⁹⁹ *Ibid.* at 68-69.

The Consumer's View of Copyright

balance has been affected by the legislation. Some of the framers of the legislation and those authorized to carry out its provisions have even expressed concern about its scope and impact on legal uses. The issue for Canadians is whether it is necessary for Canada to adopt the same kind of broad and controversial measures as in the *DMCA*.

Canada is a signatory of a number of international copyright treaties, some of which specifically address copyright protections in the digital age. It has been suggested that legislative reform is not required in order for Canada to comply with the TPM-related provisions of the international treaties to which Canada is signatory.¹⁰⁰ There are political pressures, both domestic and international, urging the Canadian government to enact provisions similar to the *DMCA*. The next section examines how these treaties affect Canada's copyright reform initiative.

The role and impact of international treaties

Copyright law is complex because it is both territorial and international:

It is territorial in that a Canadian copyright is effective in Canada only. It cannot be infringed by acts occurring entirely in France. Nor can a French copyright be infringed by acts done in Canada. An infringement in France must be pursued there according to French law; a French owner whose copyright is infringed in Canada must pursue the infringer according to Canadian law in a Canadian court. At the same time, intellectual property rights are international in that their existence does not depend on where the activity creating them took place. A book written by a French author in France automatically has a Canadian copyright; a computer program written in Canada automatically has a French copyright. These rights are protected by a web of interlinking international treaties by which almost every country in the world is bound. These treaties ensure that national laws do not discriminate against foreign producers and owners.¹⁰¹

The Canadian *Copyright Act* uses a model of national treatment, which means that nationals of other designated countries, with which Canada has copyright agreements or where adequate protections are granted to Canadians, are given the same level of protection, or rights as are extended to Canadians under our copyright legislation.¹⁰²

The Berne Convention¹⁰³ is the most significant initial international copyright treaty, first signed in 1886 and joined by Canada (as revised) in 1923 because it

¹⁰⁰ *Ibid.* at 66.

¹⁰¹ Vaver, *supra* note 1 at 14.

¹⁰² *Copyright Act*, *supra* note 2, s.5(1).

¹⁰³ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, Can. T.S. 1948 No. 22, 828 U.N.T.S. 221. Canada ratified the 1971 version of the Berne Convention

The Consumer's View of Copyright

continues to delineate the global minimum standard of copyright protection. It provides for minimum standards in addition to national treatment, to prevent states from implementing trade policies to protect a particular domestic industry and keep out imports. An international trade body called the World Intellectual Property Organization ("WIPO") administers the Berne Convention.

In 1996 the WIPO drafted two international copyright treaties to update the Berne Convention to reflect newer technologies. The WIPO Copyright Treaty ("WCT") provides copyright holders with rights over computer programs (including rights of rental), databases and wire and wireless communication to the public by authors of literary and artistic works.¹⁰⁴ The WIPO Performances and Phonograms Treaty ("WPPT") gives exclusive rights to performers over the recording, distribution and rental rights in their performances in any medium.¹⁰⁵

These treaties play a highly significant role in the digital copyright debate because they contain provisions outlining legal protections against circumvention of technological measures. They are the first treaties to deal significantly with the issue of copyright and neighbouring rights in the digital environment. Canada signed these Internet Treaties in 1997 but has not yet ratified them (because we haven't yet implemented the treaty provisions relating to technological protections into our domestic legislation to make them legally binding).

Article 11 of the WCT states:

Contracting Parties shall provide adequate and effective legal remedies against the circumvention of effective technical measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 18 of the WPPT states:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technical measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict act, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

in September 1998. In August 1952 Canada also adhered to *The Universal Copyright Convention* adopted in 1952. It sets out methods of copyright protection appropriate for all nations; however, it set lower minimum standards than the *Berne Convention* and is therefore not much referenced.

¹⁰⁴ *W.I.P.O. Copyright Treaty*; December 20, 1996, 36 I.L.M. 65 (1997). This treaty entered into force on March 6, 2002.

¹⁰⁵ *W.I.P.O. Performances and Phonograms Treaty*, December 20, 1996, 36 I.L.M. 76 (1997). This treaty entered into force on May 20, 2002.

The Consumer's View of Copyright

The language of these articles is much broader than originally proposed by the U.S. or the WIPO itself. Those initial proposals were both defeated by Member States because they were viewed as prohibiting access to works in the public domain or legally permitted uses such as fair use.

Analysis of these two provisions in light of Canada's copyright reform process has suggested that there is no definitive interpretation of these clauses, which would determine Canada's approach to legal protection of technical measures:

[I]t is clear that there is no singular correct approach to Articles 11 and 18. The WCT and WPPT provide WIPO Members with large degrees of latitude as to how a particular State might choose to fulfill its obligations with respect to the relevant provisions. Consequently, there is considerable flexibility as to how Canada might implement these provisions, should the Government elect to ratify the two WIPO treaties.¹⁰⁶

Some analysts have suggested that a decision not to provide legal protection to TPMs could mean that Canada might not be able to ratify the WIPO treaties. The result would be that Canada would lose the reciprocal protection provided by other States under the WIPO Treaties in the area of copyright. At the same time this decision would give Canada the ability to adopt a national policy on its own terms and time frame after appropriate consultation.¹⁰⁷

It may also be argued that Canada could choose to provide a measure of legal protection of TPMs but under legislative provisions "designed to preserve to the greatest extent possible copyright's delicate balance between private rights and the public interest."¹⁰⁸

Intellectual property rights also form part of multilateral and regional trade agreements to which Canada is a signatory. These treaties and agreements require that Canada employ national treatment and/or most favoured nation treatment¹⁰⁹ in applying the protection and rights granted under the *Copyright Act* to other member countries. This obligation is relevant in considering the consequences internationally of ratifying (or not ratifying) the WIPO Treaties.

These agreements include the General Agreement on Tariffs and Trade¹¹⁰ ("GATT"). A meeting of the member countries of GATT in 1994 produced a

¹⁰⁶ *TPM Report, Part II, supra* note 97 at 9-10.

¹⁰⁷ *Ibid.* at 22.

¹⁰⁸ *Ibid.* at 23.

¹⁰⁹ This means that where a Member State offers preferential treatment to any other country it must also offer similar treatment to all Member States.

¹¹⁰ *General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 194, Can. T.S. 1947 No. 27 [hereinafter GATT.]. The World Trade Organization ("WTO") was established in 1994 to administer the GATT. The Act establishing the WTO together with the GATT 1994 is collectively referred to as the World Trade Agreement ("WTA").

The Consumer's View of Copyright

general intellectual property agreement, the Agreement on Trade-Related Aspects of Intellectual Property Rights¹¹¹ (“TRIPs”). The TRIPs agreement placed new technologies and rights under copyright, such as databases/compilations (where it meets a test of sufficient originality) and rental rights for cinematographic works and computer programs.¹¹²

Canada is also a signatory to regional trade agreements such as the Canada-United States Free Trade Agreement (“FTA”)¹¹³ and the North American Free Trade Agreement (“NAFTA”).¹¹⁴ Intellectual property forms a significant component of NAFTA and the agreement contains measures outlining the procedures for enforcing those rights that must be implemented by member countries.

Chapter 17 of NAFTA deals specifically intellectual property and requires that each of the parties shall, at a minimum, comply with the substantive provisions of the Berne Convention and the Geneva Phonograms Convention. It defines protected works as including those covered by the Berne Convention, 1971 and computer programs and databases (where such compilations of data constitute intellectual creations). It contains protections for sound recordings and semiconductor chips, requiring that member states protect sound recordings in a manner similar to copyright. It also deals with the duration of copyright and qualifies the term of the life of the author plus fifty years defined in the Berne Convention. It would allow for some derogation from the term but it must meet a minimum standard of 50 years from the end of the calendar year of the first authorized publication (or failing publication, making) of the work.¹¹⁵

The implementation of NAFTA has had a very direct effect on Canada's copyright law. Canada was required to amend its copyright legislation to include the concept of a rental right and protections for compilations as a result of implementing NAFTA.

The increasing prominence of intellectual property in international trade is clearly recognition of its economic value in the information age. At the same time, critics point out that there is an inherent conflict between the economic and cultural aspects of intellectual property:

However, at another level, the notion of intellectual property is about cultural sovereignty. It is about protecting culture, and its very ethic is reflective of the

¹¹¹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to GATT 1994: Final Act and Agreement.

¹¹² Handa, *supra* note 25 at 977-978.

¹¹³ *Canada-United States Free Trade Agreement*, 22 December 1987, Can. T.S. 1989 No. 3, reprinted in 27 I.L.M. 281.

¹¹⁴ *The North America Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 32 I.L.M. 289.

¹¹⁵ *Ibid.* Chapter 17.

The Consumer's View of Copyright

national “soul”. It is increasingly apparent that the economic forces are winning this debate. With each successive trade initiative, the world moves one step closer to a universal homogeneous treatment of intellectual property.¹¹⁶

The issue of the impact of international trade on areas that affect cultural sovereignty, such as intellectual property, has been exacerbated by the aggressive approach the United States has taken to international trade in this area. As one of the world's primary exporters of copyrighted works, the U.S. has taken steps to ensure that it maximizes the economic benefits that flow from this trade source.

In 1988 the U.S. amended their trade legislation (section 301 of the *U.S. Trade Act of 1974*) to include protection of intellectual property rights as a priority area. The amendments allow them to take retaliatory actions against countries (after review by the U.S. Trade Representative) upon a determination that “(1) the rights of the United States under any agreement are being denied; or (2) a foreign act, policy or practice violates or otherwise denies U.S. benefits under any agreement, or burdens U.S. commerce.”¹¹⁷

The amendments also require the U.S. Trade Representative (“USTR”) to identify countries, deemed priority areas for trade liberalisation, where major trade barriers exist which “if eliminated would have the most potential to increase U.S. exports.” It specifically requires the U.S. Trade Representative to identify “(1) those countries that deny adequate protection of intellectual property rights or deny fair market access to U.S. persons that rely upon intellectual property protection; and (2) those foreign countries that have been determined by the USTR to be priority foreign countries”.¹¹⁸

These retaliatory tools have already been successfully applied to a number of countries:

On 23 May 1993, the U.S.T.R. commenced a section 301 investigation against Brazil for failing to provide adequate intellectual-property protection to American products. The U.S.T.R. terminated the investigation on 28 February 1995, after the Brazilian government agreed to implement a course of legislative action that assuaged American demands. This situation was mirrored in 1994 with China. On 30 June 1994, the U.S.T.R. named China a “priority foreign country” and launched a section 301 investigation. China finally capitulated and promised to improve its enforcement of intellectual property laws. Examples of other countries that have agreed to comply with American special 301 pressure include Thailand, India, Egypt, South Africa, Korea, Poland and Italy.¹¹⁹

¹¹⁶ Handa, *supra* note 25 at 973.

¹¹⁷ Congressional Research Service Bill Summary & Status for the *Omnibus Trade and Competitiveness Act of 1988*, Pub. L 100-418, 102 Stat. 1851 (1988).

¹¹⁸ *Ibid.*

¹¹⁹ Handa, *supra* note 25 at 985.

The Consumer's View of Copyright

Canada has also been subject to the application of section 301. In 1995 it was placed on the “watch list” under a “special 301” review concerning a Canadian Radio-television and Telecommunications (“CRTC”) decision revoking a broadcast licence of an American-based cable company and issuing the licence to a Canadian competitor. The dispute concerned whether the licence decision had been authorized under the cultural exemption provision of the Free Trade Agreement. Where such exemptions are allowed, section 301 powers do not apply. The U.S.T.R. disagreed with this interpretation. The two broadcasting companies privately settled the issue in 1996 and the USTR withdrew its investigation.¹²⁰ The 2001 “special 301” annual review put Canada on the “watch list” again, indicating that the problems which caused Canada to be placed on the watch list originally, remained “largely unresolved”.¹²¹

The increasing role of international trade law and policy governing copyright has created a difficult tension in Canada between cultural and economic interests. As Canada further develops information products for export, international treaties are increasingly important mechanisms of universal protection of the copyright in those products. At the same time, dominant trading partners such as the U.S. assert their trade leverage to determine what rights copyright should protect:

Canadian philosophical, social and political values, while similar to those of the Americans, have some noticeable differences. The increasing inability to use copyright as a tool to ensure cultural protection will be a loss of power for Canada.

The international context plays an increasingly complex role in copyright in relation to issues of economics, culture and the essential purposes of copyright. It has an increasingly important economic role in international trade as well as a role, through its affect on the ability to protect domestic creative works, on cultural identity. It also has a fundamental impact on the philosophy behind copyright as it affects the balance between protection of works and access to works.

Heightened protection of copyright in international trade treaties has a significant economic impact on countries like Canada who import more cultural content than they export and are therefore more burdened by increased international copyright protections. But as Canada develops its export capabilities in intellectual property, it has an interest in ensuring that the copyright in these products receives international protection. At the same time, the harmonization of copyright ‘rights’ under international treaties has a cultural impact, by diluting the important cultural differences between countries such as Canada and the United States. The Canadian government will have to carefully consider and balance these competing interests as it embarks on copyright reform.

¹²⁰ *Ibid.*

¹²¹ “U.S. gov’t, industry pressure Canadians to overhaul copyright protection regime” *Canadian New Media* (16 May 2002) at 5.

The U.S. copyright reform that produced the *Digital Millennium Copyright Act* has generated an unprecedented public interest in copyright and a significant public concern about the survivability of legal concepts such as 'fair use'. The debate it has generated goes to the essence of the question of maintaining the balance between protection and access in copyright.

These issues raise important questions for Canada as it considers copyright legislative changes. Should Canada follow the example of the *DMCA*? How should it fulfill its treaty obligations concerning digital copyright? Where should the balance between protection and access be drawn? Evaluating these questions requires knowing what constitutes the public interest in Canada's copyright reform. The response of individual Canadians to the copyright consultation process gives some indication of how the larger public, as a key stakeholder in the copyright debate views these issues. The following section looks at the response by individuals to the copyright reform consultation.

Reform of the Canadian *Copyright Act*

The federal government's public consultation on copyright reform began in June 2001 when it released two consultation papers, one of which dealt with digital copyright issues.¹²² The government asked for public input on the consultation papers and by the October 2001 deadline, it had received over 700 submissions from individuals and organizations, which were posted on the government's website.

The submissions overwhelmingly focused on three areas that were outlined in the form of proposals in the consultation document:

- 1) "Making available right" – "Some rights holders have argued for the right to determine whether, and under what circumstances, their works are made available over networks such as the Internet."
- 2) Legal protection of technological measures – should there be legislative intervention; should the issue of technological devices be dealt with in other legislation?
- 3) Legal protection of rights management information, specifically, should rights management information include information that simply identifies the work, the author, and the owner of any right in the work or should it also include information about the terms and conditions of use of the work.¹²³

¹²² *Consultation Paper, supra* note 34.

¹²³ *Ibid.* at 15-30.

Submissions – what consumers said

Approximately 540 individual submissions of the 700 total submissions (by individuals and organizations) indicated opposition to amendments that would augment the rights of copyright holders over the public or the consumer in the digital environment, whether through a “making available right”, legal protection for technical measures, or legal protection for rights management information. Many of the submissions also stated their opposition to amendments to the *Copyright Act* that would bring Canada closer to a *DMCA* legislative model. Only a handful of responses by individuals indicated support for strengthening copyright protections in the digital age.

The respondents generally expressed concern about technological protection measures eliminating legal uses under copyright such as fair use, as exemplified by this submission:

I believe that in a country such as Canada, no law should favour a given party, but be designed to provide equal, mutually beneficial rights to both the consumer, and the copyright holder. Currently, under US law, the DMCA (which you refer to on the site) has been shown to reduce Fair Use and First Sale rights, which is a staple of US copyright law. Similarly, they will prevent Canadian citizens from exerting any control over the software and media they purchase. I do not believe that these laws will protect corporations and small businesses from so-called "pirates" but will instead increase the demands on the average citizen who simply wants to make use of the product he legally purchased.¹²⁴

They expressed concern about legal protections of technological protection measures upsetting the balance between copyright holders and the public in favour of copyright holders:

I am aware that the 1997 WIPO treaty requires the participants to graft laws to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures" - but as others have stated, the United States' DMCA approach of outlawing the creation and possession of devices designed to do the aforementioned act harms fair-use rights of consumers and propagates industry monopoly over content and its delivery.¹²⁵

The proposal to add protection for content control systems to Canadian copyright law is ill-considered and undesirable. The consequences of adding the weight of law to access controls will tip the balance of rights embodied in Canadian Copyright law even further away from Canadian artists and the Canadian public. It will inconvenience the Canadian public and artistic community, increase the technical

¹²⁴ Submission regarding the consultation papers by Paul Aubin, onlinet: <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwGeneratedInterE/rp00025e.html>

¹²⁵ *Ibid.* by Vlad Sedach.

The Consumer's View of Copyright

complexity of intellectual property court cases, and will sacrifice the interests of the average Canadian citizen and the interests of Canadian artists in favor of the financial interests of multinational media conglomerates. It will also decrease public faith in the Canadian government.¹²⁶

They expressed concern that legal protection of rights management information would produce the same effect in terms of deterring legal uses as technological protection measures:

RMI protection is slightly different from the protection of technical measures. Since it is possible to exercise those rights given by the Exemptions, it is conceivable that legal protection of RMI of a sufficiently narrow scope could be implemented without infringing on the rights of consumers. However, it is relatively easy to blend RMI and technical measures in such a way that it is impossible to exercise those rights without tampering with the RMI and thus once again circumventing the intentions of the Copyright Act.¹²⁷

Strong concerns were expressed about these protections diminishing or eliminating scientific enquiry and free speech values.

[S]ome of my own work as a cryptographic researcher, as well as that of my colleagues, has come under question as to whether merely publishing an academic paper is a violation of its anticircumvention provisions. Canada has developed a strong cryptographic industry, partially as a result of a more restrictive US legal regime in this area, and this industry, as well as our high quality of research and education, would be directly threatened if DMCA-like provisions were introduced here. I will not live or work in a country that imposes such restrictions on scientific inquiry. We must not allow academic speech to be chilled, stifled, and censored by any person, group of people, or industry.¹²⁸

Some expressed the concern that consumers were left out of the copyright debate:

My suggestion to the Canadian Government is to give more time and exposure to this issue. These changes to the Copyright Act will have a huge impact on consumers. None of the people I talk to are aware that their freedoms and consumer rights are about to undergo a significant change. Many of these changes cater to the needs of digital content publishers, at the expense of consumer interest. I believe that Canada should give digital content some time to mature before attempting to regulate it. When that time comes, it should be through an open forum, equally represented by

¹²⁶ *Ibid.* by Todd Showalter.

¹²⁷ *Ibid.* by Chris Reuter.

¹²⁸ *Ibid.* by Ian Goldberg.

The Consumer's View of Copyright

the copyright stakeholders and consumer advocates. I believe that the voice of the consumer is clearly understated in today's discussions.¹²⁹

Finally, some submissions implied that the digital age requires a rethinking of the traditional approach to copyright:

Publishers want to have the same level of control over the media they sell as they do with CD's and Books. The very nature of the Internet makes this an unrealistic desire. Computers, by nature, make it easy to copy vast amounts of information cheaply, and the Internet makes it easy to distribute it. Publishers no longer have as much control over the how many copies of their products exist, or where people can obtain it. Trying to pass laws that prevent people from using the Internet and Computers for what they are designed to do is like trying to pass a law that outlaws the making of steel buildings because it harms the Lumber business. Instead of passing unenforceable laws, the effort should be directed at ways of using the Internet to create new ways of making money.¹³⁰

Copyright is a careful balance. The fact that works are easier to copy (both legally and illegally) in the online world does not mean that we should automatically assume everyone an infringer. Rights holders should be looking less towards how to prevent users from making copies that may or may not be infringing, and more towards how to adjust their models in order to thrive in a world where physical distribution is expensive, digital distribution is cheap, and information flows freely between all points on the globe.¹³¹

It may be necessary to take into account, as other countries have not, that it may never again be possible to limit the redistribution and replication of digital media formats and that other, non-Copyright laws need to be created instead.¹³²

It is important to add that a number of individual submissions were similar in content, a fact that led a government-prepared summary of the submissions to discount the content of those submissions.¹³³ The result was that the summary document played down the magnitude of individual views indicating opposition to changes to the *Copyright Act* that would bring it closer to the *DMCA*.

There are two difficulties with this decision by the document's authors, one substantive and the other, procedural. As this analysis has indicated, copyright is a complex subject and has never been easily understood by lawyers, much

¹²⁹ *Ibid.* by Itrat Khan.

¹³⁰ *Ibid.* by Nicki VanKoughnett.

¹³¹ *Ibid.* by Ian Goldberg.

¹³² *Ibid.* by Michael T. Babcock.

¹³³ Canadian Heritage and Industry Canada, "An Overview of Submissions on the Consultation Paper on Digital Copyright Issues" (Prepared for March-April 2002 Consultation Meetings on Digital Copyright Issues) at 3.

The Consumer's View of Copyright

less the general public. In that light, it is significant that a large number of individuals felt strongly enough about the issues raised by copyright in the digital age to make submissions to the government and these submissions should not have been dismissed based on their form.

Secondly, there was nothing in the consultation documents that defined for Canadians the specific form or manner in which they should make submissions on copyright. Thus, any submission that pertains to the issue under consultation, is as valid as any other submission, and should have been counted with respect to viewpoint conveyed.

The public consultation was followed by a report to Parliament by the Minister of Industry.¹³⁴ This report was submitted to the House of Commons Standing Committee on Canadian Heritage, in October 2002, to review and report back to Parliament within a year on its review of the *Copyright Act*. The report outlined the government's copyright reform agenda in terms of time lines.

The short-term (defined as 1 to 2 years) agenda includes some of the issues, which were the focus of the public consultation:

- 1) Digital issues and WIPO Treaties which includes the issues upon which the public consultation focused: the making available right, legal protection of rights management information, and legal protection of technological measures
- 2) Access and educational use with the focus on the nature and scope of access to digital material
- 3) Photographic works and when to recognize the photographer as the author and first owner of the copyright in the work
- 4) Transitional period for the term of protection of unpublished works (this issue is referred to in the discussion above of Bill C-36)¹³⁵

The medium-term reform agenda (2 to 4 years) includes two issues that have particular relevance for consumers: term of protection and the private copying regime.¹³⁶

The vigorousness of individual opposition to enhanced protections for copyright holders in the digital age evidenced by the number of submissions made to the federal government in 2001, suggests the extent to which copyright has moved from its former position at the periphery of public knowledge or concern. It also suggests that the concerns of individual consumers and the public interest side of the copyright balance cannot be ignored and must be carefully considered as the federal government considers copyright reform. The next section explores some of the reasons for the shift in the public significance of copyright.

¹³⁴ *Supporting Culture*, *supra* note 6.

¹³⁵ *Ibid.* at 42-45.

¹³⁶ *Ibid.* at 45.

Why copyright is a consumer issue

As suggested throughout this analysis, the digital age has moved copyright from its former position as the purview of copyright lawyers and the copyright owners, to an issue of wider public interest. The reason for this has to do with the changing importance of the content that forms the subject matter of copyright and the changing relationship of the public to that content.

One of the critical factors underlying the resurgence in importance of copyright is the increased importance of information as an economic driver. The shift in the developed world from industrial-based economies to knowledge-driven economies is a well-documented phenomenon. The concept of a knowledge-based economy is rooted in the increasing importance of human capital as a source of economic growth. Some of the factors influencing this change include: globalization, the effect of technological change on production, and the falling cost and rising efficiency in the transmission, retrieval and analysis of information. These forces are creating a global economy in which knowledge is becoming a critical resource.

The central importance of information is directly related to and dependent upon, the mechanisms, which disseminate that information to the public at large. This requires that societies must ensure the widest possible access to and availability of works that may be subject to copyright, for creative, academic and educational purposes.

This increased economic value of information or intellectual property also exacerbates the existing tension between protection and access underlying copyright. As information becomes a more valuable economic resource, the desire on the part of the content industries (or the representatives of the creators of content) to reap the benefits from ownership and control of this information intensifies.

The Internet is directly involved in the economic ascendancy of information. It is the location where much of this information will be concentrated and disseminated. The Internet is becoming an important focal point of economic and social organization as evidenced by the rise of electronic commerce and the Internet as a source for communication, information and cultural content. The government acknowledged this by stating in its consultation document:

The evolution of a network-based economy is desirable and inevitable as a social, cultural and economic engine.

The Consumer's View of Copyright

Important measures of the success of this economy will be the amount of creative content available on-line and the use made of it.¹³⁷

Thus, it is critical that copyright reform addresses digital copyright issues in a way that will ensure the public's access to and involvement in the network-based economy.

Copyright has also become an issue for consumers because consumers are now directly affected by the legal uncertainties created by the digital age. The digital era has fundamentally altered the relationship between consumers or individual users of 'content' and the producers or 'owners' of that content:

But as existing works are digitized, with or without authorization, or new works are made available solely in digital format, copyright becomes powerless to cope with the manipulation and movement of intangible electronic streams. Detection and enforcement become difficult, sometimes impossible, and rights that appear on the books are ignored in practice. Access to music, art, literature, and other material in digital form has given users the power to modify these works or data at will, replicate them almost infinitely, and transmit them anywhere in the world to others, who in turn have the same capabilities; and power, once given, will inevitably be used. In this world, every user is a potential re/author and re/distributor of material made available electronically to her.¹³⁸

This change has also placed users/consumers of digital content at legal risk, in a way that could not have been predicted under the initial copyright 'bargain' between copyright holders and users.

Recently copyright holders in the United States filed lawsuits against individual personal computer users for copyright infringement as a result of sharing music files on the Internet.¹³⁹ This legal action was specifically allowed by U.S. digital copyright legislation, which does not contain a private copying exemption for musical sound recordings found in the Canadian *Copyright Act* and which grants broad powers to charge users. However, the uncertainties of the application of existing Canadian law to new musical formats such as file swapping, has led the Canadian recording industry to suggest that similar acts in Canada are also illegal:

None of the suits involve Canadians and the Canadian Recording Industry Association, CRIA, says it has no plans to launch similar legal action here... "Obviously we are watching the process in the U.S. with great interest and we

¹³⁷ *Consultation Paper, supra* note 34 at 35.

¹³⁸ Vaver, *supra* note 1 at 295.

¹³⁹ B. McKenna & P. Waldie, "Lawsuits hit Net music downloaders," *The Globe and Mail* (9 September 2003), P. Waldie, "Music industry hails \$2,000 win over child" *The Globe and Mail* (10 September 2003) A1, A. Harmon "261 Lawsuits Filed on Internet Music Sharing," *The New York Times* (9 September 2003).

The Consumer's View of Copyright

will sort of take a look and see the results it may have and we will make some decisions down the line,” said Brian Robertson, president of the recording association. For now the CRIA will continue sending warning messages to people who download music. “It’s a fairly consumer-friendly message,” Mr. Robertson said. “It advises them of the damage that the process does to the music that they enjoy and to the artists and to the creative process. And, that it is illegal.”¹⁴⁰

Consumers have a critical interest in and an important economic and legal stake in the copyright reforms being considered by the federal government. As a result, the reforms must take into account what the public has told the government about their concerns and priorities for copyright reform, which include the importance of maintaining the copyright balance in the digital age.

The government must also engage in the reform process with a clear understanding of the actual state of the current balance between protection and access in copyright.

Recommendations for Reform of the *Copyright Act*

Our recommendations are guided by a general view that copyright holders already enjoy a significant level of protection in the digital age. Related to this is our concern that contract law is already replacing copyright law in the digital environment.

It is also guided by the view that Canadian copyright reform takes place in an international trade context. There is a need for Canada to balance the increasing economic value of intellectual property in a globalized world with recognition of the importance of copyright as a tool of cultural protection and cultural growth.

It has been argued that copyright holders have three levels of protection available to them: technology, existing copyright law and contract law. The current use of technological protection measures and digital rights management systems gives the rights holder the ability to restrict access and/or control the uses made of a work.¹⁴¹

Existing copyright law provides a further level of protection. As long as the work underlying a digital work meets the requirements for copyright (originality, fixation and connection to Canada or state with which Canada has national treatment) it is protected under the Act.¹⁴²

¹⁴⁰ B. McKenna & P. Waldie, *Ibid.*

¹⁴¹ *TPM Report, Part II, supra* note 97 at 19.

¹⁴² *Ibid.* at 19-20.

The Consumer's View of Copyright

The third level of protection is contract law, which, when combined with technological protections, raises significant concerns about the viability of existing copyright law. Contract law is a form of copyright protection because it allows copyright holders to set terms of use through licences. The concern arises when licences are incorporated into digital rights management systems. Critics point out that the terms of these contracts, such as the use that may be made of a work, are usually not freely negotiated between the parties:

The use of DRMs can facilitate the automatic 'negotiation' of contracts between content providers and users. In this environment, the bargaining power between the content providers and users may well be unequal. The combined use of TPMs and contracts in this manner could therefore lead to unconscionable transactions.¹⁴³

The other concern raised by critics is that these contracts may also override copyright law and important legal uses, such as 'fair use':

Where technological constraints substitute for legal constraints, control over the design of information rights is shifted into the hands of private parties, who may or may not honor the public policies that animate public access doctrines such as fair use. Rightsholders can effectively write their own intellectual property statute in computer code.¹⁴⁴

To grant legal protection for technological measures, as provided by the *DMCA*, would arguably create a fourth level of protection for copyright holders. It is highly questionable whether such level of protection is needed, given the existing three levels of protection and the more significant consequence of effectively trumping existing copyright legislation and legal rights such as 'fair dealing' that it preserves.

The following recommendations address those issues identified by the federal government as part of its short-term reform agenda.

Short-term copyright reform recommendations

Recommendation 1: The Canadian government should not model copyright reform on the *DMCA*

The public has clearly indicated their concern about any amendments to the Act that would bring Canada closer to the U.S. approach copyright legislation in the digital era. Approximately 540 individual submissions of the 700 total submissions (by individuals and organizations) to the Federal Government's

¹⁴³ *Ibid.* at 20.

¹⁴⁴ D.L. Burk and J.L. Cohen "Fair Use Infrastructure for Rights Management Systems," 15 Harv. J.L. & Tech. 41 at 51.

The Consumer's View of Copyright

consultation process in 2001, indicated opposition to amendments that would augment the rights of copyright holders over the public or the consumer in the digital environment, whether through a “making available right”, legal protection for technical measures, or legal protection for rights management information. Many of the submissions also stated their opposition to amendments to the *Copyright Act* that would bring Canada closer to a *DMCA* legislative model.

Recommendation 2: The government should not proceed with legal protection for technological measures.

The digital era has also created the opportunity for copyright owners to electronically protect copyright works in ways that may prevent consumers from legal access to those copyrighted works. The U.S. experience under the *DMCA* suggests that the “fair use” protections of copyright have been severely tested and jeopardized by the legal protection of technological measures outlined in the *DMCA*.

There is evidence both that legitimate uses have been curtailed by the enactment of the *DMCA* and of strong public concern about the negative impact of the legislation. The evidence of real constraints upon the scientific community and the vigour of legislative response following enactment of the *DMCA* provide strong evidence of concern about the ineffectiveness and inability of such legislation to protect legal uses of copyrighted material. It also provides an important warning for the Canadian government as it considers enacting any form of anti-circumvention legislation for the protection of technological measures or rights management information.

We would urge the government not to proceed with any new legislative amendments to protect technological measures at this time. As the studies recently commissioned by the Department of Canadian Heritage concluded, there isn't enough empirical evidence about the current use and circumvention of technological protection measures to require a legislative response. We would add that there is also considerable evidence from the American experience to suggest that danger to the public interest and to the legal uses under copyright are the direct result of putting such legal protections in place.

Recommendation 3: The “fair dealing” provision of the *Copyright Act* should be expanded

Preserving and enhancing existing permitted uses is critical to maintaining and restoring the balance in copyright. The Act should be amended to provide for a general “fair use” right. This would be accomplished by setting out evaluation parameters, similar to the United States “fair use” provision found in the

The Consumer's View of Copyright

Copyright clause of the *U.S. Code*, rather than attempting to identify specific uses that should be added to a defined list of permitted uses in Section 29 and 29.1. This would enable a determination by applying consistent principles regardless of the underlying medium at issue or the ongoing technological changes in order to avoid encountering the problem of applicability of “fair dealing” principles to the next generation of transmission technologies.

Recommendation 4: The term of protection for unpublished works should not be extended

We urge the government to rescind the provision contained in Bill C-36 that would extend the term of protection for unpublished works.

The *Copyright Act* contains a provision that sets out the term of copyright for posthumous unpublished works. This provision, based on 1997 amendments to the Act, limits the protection for posthumous unpublished works to 50 years after the death of the author. Where the death of the author occurred more than 50 years prior to the coming into force of this amendment, the Act adds five years to that term of protection. A bill recently introduced by the federal government would extend that term from a period of 14 to 34 years.

The public interest is clearly not served by such an extension. In an information age, there is a need to ensure that works enter the public domain. There is also a significant cultural priority that Canadian works can be easily accessed for research and scholarship. Canadian historians have expressed the concern that extending protection to posthumous works will place significant obstacles upon their work.

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