

A Step in the Wrong Direction: The Impact of the Legislative Protection of Technological Protection Measures on Fair Dealing and Freedom of Expression

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Introduction

A single click of a mouse from a personal computer can create a perfect copy of a digital work. In a fraction of a second, this work can be disseminated throughout global networks to countless recipients. With each click, individuals have the opportunity to broadcast their ideas and expressions throughout the interconnected digital world; each click can also be a lost sale for a copyright owner. In response to the concerns of copyright owners regarding the threat of digital technologies to their exclusive rights, some governments have granted legislative protection to technological protection mechanisms (TPMs). TPMs act as a virtual lock on digital works, preventing unauthorized access and giving copyright owners an unprecedented degree of control over digital content.¹ On 20 June, 2005, the Canadian government tabled Bill C-60, *An Act to Amend the Copyright Act*.² Among other copyright reforms, Bill C-60 proposes legislative protection for TPMs.

TPMs preclude unauthorized uses of copyright-protected works. Not all unauthorized uses, however, are infringing. Copyright law's fair dealing defence provides that in certain circumstances, the unauthorized use of another's copyright-protected expression will not constitute copyright infringement. However, as "state of the art TPMs are still unable to distinguish between infringing and non-infringing uses",³ TPMs have the effect of restricting both infringing and non-infringing uses of digital works. TPMs, by locking out all unauthorized users, severely constrain the ability of users to exercise their right to fair dealing.

This paper will investigate whether legislation granting protection to TPMs infringes the freedom of expression (s. 2(b)) guarantee as contained in the Canadian *Charter of Rights and Freedoms*.⁴ This paper will proceed in five parts. Part I will discuss Bill C-60 and the legislative protection of TPMs in Canada. Part II will discuss the effect of TPMs on fair dealing. Part III will analyze whether the freedom of expression guarantee

can be used to challenge provisions in the *Copyright Act*.⁵ Part IV will evaluate whether amendments to the *Copyright Act* granting protection to TPMs are consistent with the freedom of expression guarantee (s. 2(b)) in the *Charter*. Part V will investigate the treaty implications of protecting a right to access works for fair dealing purposes within legislation granting protection to TPMs.

This paper concludes that should the Canadian government amend the *Copyright Act* to provide legislative protection for TPMs, it must create a corresponding right for users to access copyright-protected expression for fair dealing purposes. Otherwise, the provisions may not survive *Charter* scrutiny. Although this paper will discuss this topic with reference to Canada, materials will be used from other jurisdictions in building this discussion. As well, the general argument in this paper may be helpful in addressing the interplay between copyright, fair dealing, and freedom of expression rights in other jurisdictions.

Part I: Technological Protection Measures

What is a TPM?

A TPM is a "technological method intended to promote the authorized use of digital works".⁶ It accomplishes this by "controlling access to such works or various uses of such works, including copying, distribution, performance, and display".⁷ TPMs operate as "virtual fences",⁸ giving copyright holders a "historically unprecedented degree of control over access to and use of digital content".⁹ One example of a TPM in use is a CD protected by copy control technology. The user is allowed to play the CD on certain approved players (for instance, in a freestanding CD player but not in a car). The user is restricted, however, from making a copy of the CD or transferring the songs from her CD to her computer.

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The legislative protection of TPMs in Canada

In 1996, the World Intellectual Property Organization (WIPO) concluded two treaties meant to address a wide array of digital copyright issues: the WIPO Copyright Treaty (WCT)¹⁰ and the WIPO Performances and Phonograms Treaty (WPPT)¹¹. Both treaties contain provisions requiring member countries to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological [protection] measures” (TPMs) used by authors, performers, or producers of phonograms in connection with the exercise of their rights under these treaties or the Berne Convention, and “that restrict acts which are not authorized by the authors or permitted by law”.¹²

In 1997, the Government of Canada signed both the WCT and WPPT. As of May 2006, however, Canada has not ratified either treaty. In May 2004, in its Interim Report on Copyright Reform, the House of Commons Standing Committee on Canadian Heritage expressed frustration and disappointment at “the numerous delays that have impeded the implementation” of the WCT and WPPT, and recommended their immediate ratification.¹³ Should it choose to ratify the treaties, Canada must amend its *Copyright Act* to implement the provisions of the WCT and WPPT (including the provisions requiring adequate legal protection for TPMs).

On 24 March, 2005, the Government of Canada issued both its response to the Interim Report and a Statement announcing its intention to table legislation proposing copyright reforms.¹⁴ Among other reforms, the proposed legislation would implement the provisions of the WCT and WPPT, thus ratifying both treaties. In comparison to the Standing Committee’s Interim Report and its “broad-brush endorsement of extending legal protection to TPMs”, the Statement “recommended what appeared to be more specific, discrete provisions” relating to TPMs.¹⁵ It recommended that:

[T]he circumvention, for infringing purposes, of technological protection measures (TPMs) applied to copyright material would itself constitute an act of infringement of copyright. Copyright would also be infringed by persons who, for infringing purposes, enable or facilitate circumvention or who, without authorization, distribute copyright material from which TPMs have been removed. It would not be legal to circumvent, without authorization, a TPM applied to a sound recording, notwithstanding the exception for private copying.¹⁶

The proposed legislation referred to in the Statement came to fruition in Bill C-60. Receiving its first reading on 20 June, 2005, Bill C-60 addresses a number of digital reforms, among them the implementation of provisions in the WCT and WPPT pertaining to TPMs. Bill C-60 specifically addresses TPMs in two ways. First, it states that it is copyright infringement to circumvent, for an infringing purpose, a TPM applied to a lesson, test, or examination used on the premises of an educational institution or communicated by telecommunication to

the public situated on those premises.¹⁷ Second, Bill C-60 amends the civil remedies section of the *Copyright Act* to entitle rights holders to all remedies that may be conferred by law against a person who, for an infringing purpose, circumvents, removes, or renders a TPM ineffective or provides a service to do so.¹⁸ The provision in Bill C-60 regarding the definition of copyright infringement in the context of TPMs is narrower than that of the Statement. In both Bill C-60 and the Statement, the “infringing purpose” approach to copyright infringement is adopted. Through this approach, an individual infringes copyright by circumventing a technological measure only if the circumvention is done for an infringing purpose. For instance, it would not be an infringement of the *Copyright Act*, as amended by Bill C-60, to circumvent a technological measure for a fair dealing purpose.

When Parliament was dissolved on 28 November, 2005, Bill C-60 died on the order table. It is uncertain whether the Government of Canada will reintroduce legislation implementing the provisions of the WCT and WPPT. As a signatory to both treaties, Canada has committed itself to their ratification. It is not bound to do so. However, failure to ratify the WCT and WPPT could result in Canada being “[deprived] of the benefit of reciprocal enforcement of a number of areas covered by the treaties”.¹⁹ Furthermore, failure to ratify could render Canada subject to trade-related retaliation from trading partners.²⁰ Lastly, as evidenced in the Standing Committee on Canadian Heritage’s Interim Report, at least one segment of the Canadian government appears dedicated to the implementation of the WCT and WPPT.

As a result, it is anticipated that in 2006 the Canadian government will table legislation implementing the provisions of the WCT and WPPT, specifically those provisions instituting legal protection for TPMs. Questions remain as to what form these provisions will take: the sweeping protections of the Interim Report; the specific and discrete protections as set out in the Statement and Bill C-60; or stronger protections in response to pressure from the United States of America (U.S.A.) and other countries.²¹

Any legislative action taken with respect to TPMs must be consistent with the Canadian *Charter of Rights and Freedoms*. In tabling Bill C-60, the Government of Canada stated its intention to create a:

Copyright Act that addresses the Internet in a manner that appropriately balances the rights of copyright owners to control and benefit from the use of their creative works with the needs of users to have reasonable access to those works.²²

Provisions granting users a corresponding right of reasonable access to copyrighted expression protected by TPMs, however, are noticeably absent from the Interim Report, the Statement, and Bill C-60. In this paper, I maintain that amending the *Copyright Act* to extend legislative protection to TPMs, absent a provision

assuring users a right of reasonable access for fair dealing purposes, will infringe the *Charter* guarantee of freedom of expression.

Part II: Fair Dealing

What is fair dealing?

The concept of fair dealing provides that in certain circumstances, the unauthorized use of another's copyright-protected expression will not constitute copyright infringement. This defence exists in various forms in Canada,²³ the United Kingdom (U.K.),²⁴ Australia,²⁵ and New Zealand.²⁶ A similar concept — termed fair use — exists in the USA.²⁷ In Canada, fair dealing is codified in s. 29 of the *Copyright Act*. Section 29 provides that “fair dealing for the purpose of research or private study does not infringe copyright”.²⁸ Section 29.1 states that:

Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) ...²⁹

As well, section 29.2 of the *Copyright Act* states that:

Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) ...³⁰

The term “fair dealing” is not defined in the *Copyright Act*. The question of whether something is “fair” depends on the facts of each case.³¹ The Supreme Court of Canada has set out a list of factors to provide a “useful analytical framework [governing] determinations of fairness in future cases”.³² In assessing whether “fairness” has been established, triers of fact should consider: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.³³

For many years, fair dealing was “all but redundant in the Canadian courts: rarely raised and cursorily rejected”.³⁴ However, two recent Supreme Court of Canada decisions have indicated a shift in the Court's perception of the importance of fair dealing in the context of the Canadian *Copyright Act*. This shift has resulted both from the Court's recognition that the *Copyright Act* has as its goal the establishment of a balance between creators and the public interest, and its acknowledgement that fair dealing plays an integral role in maintaining this balance.

The leading Canadian case on fair dealing is *CCH Canadian Limited. v. Law Society of Upper Canada*.³⁵ CCH Canadian is a Canadian publisher of a variety of

legal works. The Law Society governs the legal profession of Ontario. It maintains a reference library for its members and the judiciary that features free-standing photocopiers. The Law Society also provides a custom photocopying service. For a fee,

single copies of library materials required for research, review, private study, and criticism as well as for use in court, tribunal, and government proceedings could be provided to patrons of the library.³⁶

CCH alleged that the Law Society infringed their copyright both by providing free-standing photocopiers and through their custom photocopying service. The Supreme Court of Canada rejected this contention, holding that the Law Society's dealings with the plaintiffs' works fell under the fair dealing defence. Discussing the nature of the defence, McLachlin C.J. stated that fair dealing should be understood as an “integral part of the *Copyright Act*”.³⁷ In a similar manner, whereas fair dealing had been previously portrayed as a limitation on the copyright holder's exclusive rights, the Supreme Court of Canada stated that:

The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver ... has explained ... : “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”³⁸

In *Théberge v. Galerie d'Art du Petit Champlain*, the Supreme Court of Canada, in discussing the competing goals of the *Copyright Act*, expanded upon the concept of “proper balance”:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator ... The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals.³⁹

As mentioned, fair dealing plays a crucial role in helping maintain the balance between the public interest and creator's rights. It does so by allowing individuals to access, use, and build fairly upon the creator's copyrighted expression for certain purposes. In Canada, these purposes are those which fall within the categories of research, private study, criticism, review, and news reporting.

The effect of legislative protection of TPMs on fair dealing

The equivalent of a virtual lock on digital works, TPMs allow copyright holders to exclude unauthorized access and use. Due to technological constraints, however, TPMs are “unable to distinguish between infringing and non-infringing uses of digital works”.⁴⁰ Thus, though TPMs would have the positive effect of excluding unau-

thorized infringing uses (such as duplication for resale), they would also have the effect of excluding unauthorized uses which are non-infringing (such as those uses that fall within the fair dealing defence).⁴¹

Locked out by TPMs, individuals seeking to access copyright-protected expression for fair dealing purposes have three options. First, they could use a non-TPM protected copy of the work (either a print copy or a digital copy without a TPM). Second, they could seek a licence from the copyright holder to use the work. Third, they could attempt to circumvent the TPM in order to access the copyright-protected expression. The success of the first option is dependent on the existence and accessibility of non-TPM protected copies of the work. Given that rights owners in the digital context are increasingly turning to the use of TPMs “to enforce and protect their rights and to aid in the dissemination of their works”,⁴² it is reasonable to expect that the availability of non-TPM protected digital copies of a work will decrease. Furthermore, given the rapid spread of digital technologies, the low cost of producing digital copies, and the ease in their dissemination, it is reasonable to expect that the availability of print copies of a work may decrease in future years. For instance, companies may decide to release books through the Internet rather than in print editions. Thus, individuals wishing to access non-TPM-protected copies of a certain work would be forced to invest both time and money in tracking down elusive print copies or non-TPM-protected digital copies. Lacking these resources, or simply unable to secure a non-TPM-protected copy, individuals would be compelled either to seek a licence from the copyright holder or circumvent the TPM.

The second option for individuals seeking to bypass a TPM to access a copyright-protected work for fair dealing purposes involves acquiring a licence for its use from the copyright holder. However, individuals are not legally required to seek licences for works in order to use them for fair dealing purposes. The fair dealing defence allows users to access and use works without first receiving the copyright holder’s authorization. Moreover, if the copyright holder levies a fee for its licence, then this option would impose a cost barrier to access that would not ordinarily exist. This cost barrier could deter individuals who do not have the financial means to acquire a licence. There is also a risk that some copyright holders would refuse to licence their work at any price if it is to be used for certain fair dealing uses (namely those that critique the original work or place it in a less-than-flattering light). The U.S. Court of Appeals for the Tenth Circuit has stated that the:

unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.⁴³

Lacking financial resources or facing the copyright holder’s refusal to licence the work, users may be forced to actively circumvent the TPM.

Kerr defines circumvention of a TPM as “the breaking or avoidance of the use of a protection measure”.⁴⁴ Both the Statement and Bill C-60 would only impose liability if a TPM is circumvented for an infringing purpose. Thus, under the proposed Canadian legislation, it would be legal for users to circumvent TPMs to exercise their user rights. However, resorting to circumventing TPMs in order to exercise one’s user rights has three distinct disadvantages. First, this option imposes a technological barrier on users. As Bailey states:

[I]f exercising users’ rights means, for example, developing or implementing decryption programs to circumvent over-broad TPMs, those without superior computer knowledge and programming skills (i.e., most citizens) will be “locked out”. Most of us will be particularly dependent on those with superior skills to develop and distribute the technology necessary to exercise our rights.⁴⁵

Second, the act of circumventing the TPM could impose a cost barrier on users. If users are unable to acquire circumvention technology themselves (either through development or discovery), they would be forced to purchase or licence circumvention technology from programmers. Third, forcing individuals to circumvent TPMs in order to access a work for fair dealing purposes undermines the nature of fair dealing as a user right, as established by the Supreme Court of Canada in *CCH*.⁴⁶ Individuals who circumvent TPMs in order to acquire copyright-protected expression are forced to act in a manner suggestive of criminal behaviour. Acting in such a manner is not compatible with the exercise of a right. Kerr states that “circumvention of a TPM put in place by a copyright owner to control a digital work subject to copyright has been described by some as the electronic equivalent of breaking and entering into a locked room in order to obtain a copy of a work, such as a book”.⁴⁷ Kerr highlights a variety of circumvention techniques, many of which suggest acts of theft, including intercepting decrypted content; brute-force decryption; stealing the key during transmission; hacking closed systems; and pirated plug-ins.⁴⁸

TPMs limit the ability of individuals to exercise their user rights to fair dealing. Their presence could “effectively write [fair dealing] out of copyright law, thereby creating information monopolies”.⁴⁹ In this paper, I maintain the position that the legislative protection of TPMs infringes the freedom of expression guarantee in s. 2(b) of the *Charter*. This position presupposes that Bill C-60 may be challenged on a s. 2(b) basis. This presupposition will be explored in the following section.

Part III: Is Copyright Legislation Subject to Freedom of Expression Scrutiny?

The issue of whether amendments to the *Copyright Act* granting legislative protection to TPMs might be challenged on the basis of freedom of expression

requires close examination. The *Copyright Act* prohibits individuals from expressing their views using the copyright-protected expression of others in ways that infringe the copyright holder's exclusive rights. Consequently, claimants have asserted that the *Copyright Act* violates their right to freedom of expression.⁵⁰ However, arguments made on this basis have traditionally been unsuccessful, as courts have been reluctant to apply a freedom of expression analysis to copyright laws.⁵¹ This section will explore the rationale underlying the courts' reluctance in this regard. It will also demonstrate that this rationale does not apply in the context of TPMs. This section will show that, in the context of TPMs, it is appropriate to apply an external freedom of expression analysis to copyright law.

Rationale underlying the courts' reluctance: internal balance

The rationale underlying the courts' reluctance to apply freedom of expression to copyright law is the belief that freedom of expression concerns are satisfied within copyright law.⁵² Copyright law is believed to satisfy freedom of expression concerns through various internal mechanisms, including the idea/expression dichotomy; the time-limited nature of copyright; the substantial taking requirement, and the fair dealing defence.⁵³ Fair dealing is the only internal mechanism that allows users to express themselves using a substantial amount of unauthorized copyright-protected expression during the period of copyright. Thus, it is the internal mechanism most affected by TPMs. In attempting to describe the impact of TPMs on freedom of expression, this section of the paper will proceed by examining the relationship between fair dealing and freedom of expression.

Courts have not expressly indicated how the fair dealing defence protects freedom of expression concerns within copyright law. The Supreme Court of Canada has held that the core values underlying the protection of freedom of expression can be summarized as follows:

- (1) seeking and attaining the truth is an inherently good activity;
- (2) participation in social and political decision-making is to be fostered and encouraged; and
- (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.⁵⁴

Fair dealing promotes these same values. It does so by protecting certain categories of works which themselves promote the core values of freedom of expression.

There are five categories of works within the Canadian fair dealing defence: research, private study; criticism; review; and news reporting.⁵⁵ These categories of works promote participation in democratic dialogue, the search for truth and communal exchange of ideas, and self-fulfillment. By allowing individuals to reproduce

copyrighted expression, fair dealing for the purposes of research or private study encourages textual interaction and personal reflection, helping individuals develop and challenge their beliefs by weighing them against the expressed beliefs of others. Through reproducing the expression of others, individuals can become better informed. Access without reproduction may not be sufficient. In some situations, individuals may not be able to remain in close enough proximity to the original work in order to make use of it. In other situations, the work may be in such demand that individuals must be permitted to reproduce it in order to become better informed. A better informed polity contributes to a rich democracy, in which a multiplicity of views can emerge. It can also advance the search for truth and communal exchange of ideas. Research and private study also promote the value of self-fulfillment, in that they "[provide] the ingredients for cultivation of knowledge, self-development and informed individual participation in a community's affairs".⁵⁶ The ability to reproduce copies of paintings, written works, and songs (among other forms of expression) in furtherance of research or private study purposes allows individuals to challenge themselves intellectually, achieving self-actualization in the areas that interest them most.

Fair dealing for the purposes of criticism, review, or news reporting allows individuals to respond to the copyright-protected expression of others and disseminate the results of their personal reflection with a broader audience. It allows individuals to test the multiplicity of views created through research and private study. By "facilitating the ventilation of divergent ... ideas", the criticism, review or reporting of copyright-protected expression aids the democratic process.⁵⁷ Fair dealing helps create a vibrant dialogue, which can both engage a democratic polity in political thought and action and advance the search for truth. In attempting to discover or confirm "truth", it is essential that individuals are permitted to quote from the expression of others. Leval notes that:

important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday's theses.⁵⁸

Such a reexamination would be imprecise and inefficient if individuals were not permitted to use the expression of others. For instance, a critique of the accuracy of a historical text will be much more precise if individuals are permitted to cite specific passages with which they disagree.

In the ways described above, the fair dealing defence promotes the core values of freedom of expression. In this regard, freedom of expression concerns are addressed to some extent within the *Copyright Act*. Courts seem to have relied upon the existence of fair dealing as grounds for not applying an external freedom of expression analysis. However, this rationale can be

challenged on the grounds that the existence of a fair dealing defence does not necessarily ensure that adequate protection is given to freedom of expression concerns.

In order to determine whether adequate protection is given to freedom of expression concerns within copyright legislation, one must examine the scope of fair dealing protection. The scope of fair dealing protection is determined by the balance which is struck within copyright legislation between freedom of expression concerns and the property interests of copyright holders. As noted in *Théberge*, the Canadian *Copyright Act* seeks both to promote the public interest and adequately compensate authors.⁵⁹ This balance varies from jurisdiction to jurisdiction. It is questionable whether the Canadian conception of fair dealing balances these competing interests in such a way as to adequately protect freedom of expression concerns. This question is especially pertinent with respect to parody. The fair use defence in United States jurisprudence, as it pertains to parody, is much broader than the defence in either Canada or the U.K. A detailed examination of this issue, however, is beyond the scope of this paper. For the purposes of this paper, it will be assumed that freedom of expression concerns are, for the most part, appropriately satisfied within the Canadian fair dealing defence.

Overcoming the courts' reluctance to apply an external freedom of expression analysis

Canadian courts have not foreclosed the possibility that freedom of expression could constrain the *Copyright Act*. In both *The Queen v. James Lorimer & Co. Ltd.*, a case involving the infringement of a literary work entitled *Canada's Oil Monopoly*, and *Canadian Tire Corp. Ltd. v. Retail Clerks Union*, a case involving the modification of the Canadian Tire logo by the Retail Clerks Union, the courts have stated that there "may be situations where the guarantee of freedom of expression in para. 2(b) of the Canadian *Charter of Rights and Freedoms* may properly limit the protection otherwise given to the owners of copyright".⁶⁰

While leaving open the possibility that freedom of expression could constrain copyright, however, Canadian courts have tended to dismiss freedom of expression claims in copyright infringement cases cursorily. Both the abridgment of the *Canada's Oil Monopoly* text and the modified Canadian Tire logo were quickly deemed to be situations in which the infringer's freedom of expression was not violated. The most recent Canadian case to address the confluence between copyright and freedom of expression, *Cie Générale des Etablissements Michelin–Michelin & Cie v. CAW-Canada et al. (Michelin)*, does so in more detail. However, as it is open to criticism on various grounds, it will be addressed separately, later on in the paper.

Michelin aside, Canadian cases have not discussed the circumstances in which courts should permit an external application of a freedom of expression analysis to copyright laws.⁶¹ As a result, in order to determine when a s. 2(b) analysis should be applied to the *Copyright Act*, this paper will consider decisions from other jurisdictions. The United States Supreme Court has indicated that copyright legislation may be subject to First Amendment scrutiny in situations where Congress has altered the "traditional contours of copyright protection".⁶² This principle was established in *Eldred v. Ashcroft*.⁶³ In this case, the plaintiff asked the United States Supreme Court to declare the *Copyright Term Extension Act of 1998* (CTEA) unconstitutional.⁶⁴ The CTEA extended the duration of copyright protection from "life plus fifty" to "life plus seventy" years.⁶⁵ In dismissing the case, the Supreme Court stated that in situations when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary".⁶⁶ Significantly, however, the Supreme Court refused to adopt the position of the D.C. Circuit Court of Appeal, which had stated that copyright is "categorically immune from challenges under the First Amendment".⁶⁷ It should be noted that the Court in *Eldred* does not define the "traditional contours of copyright protection".⁶⁸ Given the vagueness of this principle, this decision does little to clarify the circumstances in which a freedom of expression analysis should be applied to copyright.⁶⁹

The UK Court of Appeal has indicated in *Ashdown v. Telegraph Group* that in the majority of cases, the "express exceptions to be found in the Act" will satisfy freedom of expression concerns.⁷⁰ However, in some circumstances, the "right of freedom of expression will come into conflict with the protection afforded by the *Copyright Act*". The Court in *Ashdown* indicated that these circumstances will be rare. However, besides the fact that these circumstances are "rare", it does not tell us when they will occur. Thus, like the approach of the U.S. Supreme Court in *Eldred*, the approach of the U.K. Court of Appeal in *Ashdown* gives little guidance with respect to the question of when s. 2(b) can be applied to challenge legislation granting protection to TPMs.

As decisions from other jurisdictions offer little guidance in this regard, this paper will attempt to set out an approach for determining when courts can apply freedom of expression to copyright legislation. This approach is consistent with the courts' rationale underlying their reluctance to apply freedom of expression in the first instance. As stated above, courts have traditionally refrained from applying a freedom of expression analysis to copyright because of the assumption that the core values of freedom of expression are satisfied within copyright law through internal mechanisms such as fair dealing. I maintain the position that where copyright law's internal mechanisms are sufficient to satisfy

freedom of expression concerns, courts should refrain from applying a freedom of expression analysis. To do so would be to consider freedom of expression concerns twice. However, courts should allow the freedom of expression guarantee to challenge the *Copyright Act* in situations where the values underlying freedom of expression are not satisfied within copyright law.⁷¹

As stated above, the introduction of legislative provisions granting protection to TPMs effectively locks out users seeking to use another individual's copyright-protected expression for fair dealing purposes. Fair dealing is effectively precluded; the protection afforded to freedom of expression concerns within copyright law is effectively eliminated. Consequently, the rationale for excluding an external freedom of expression analysis is no longer valid. Based on the approach delineated above, it is therefore appropriate to apply a s. 2(b) analysis to legislation granting protection to TPMs.

Part IV: The Constitutionality of Legislation Granting Protection to TPMs

In Part III, it was determined that amendments to the *Copyright Act* granting protection to TPMs ought to be subject to *Charter* scrutiny. Part IV will subject these amendments to *Charter* scrutiny. In this paper, I maintain that legislation granting protection to TPMs infringes s. 2(b) of the *Charter* by restricting the ability of users to access works for fair dealing purposes. As Canada has not yet passed legislation protecting TPMs, there are no Canadian cases that deal with its constitutionality. Thus, in applying s. 2(b) in the context of TPMs, this part will begin by examining cases and commentary from other jurisdictions in which legislation protecting TPMs has been enacted. Informed by these works, this paper will proceed with a s. 2(b) analysis of legislation granting protection to TPMs.

International decisions

The European Community implemented the provisions of the WCT and WPPT in Directive 2001/29/EC of the European Parliament (the Information Society Directive).⁷² Article 6 of this directive addresses the obligations of Member States as to technological measures.⁷³ Unlike the proposed amendments to the *Copyright Act* contained in both the Statement and Bill C-60, the Information Society Directive (ISD) includes a provision which protects exceptions to copyright infringement (such as the fair dealing defence) from encroachment by TPMs. Article 6(4) of the ISD states that:

[I]n the absence of voluntary measures taken by right-holders ... Member states shall take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation ... the means of benefiting from that exception or limitation.⁷⁴

This provision lessens the negative impact of TPMs on user rights such as fair dealing. Given that fair dealing protects the core values of freedom of expression, Article 6(4) also diminishes the negative impact of TPMs on users' rights to freedom of expression. The existence of this provision in the ISD demonstrates the EC's concern with the encroachment of TPMs upon user rights. It also highlights the potential danger to the rights of users absent any protection for their interests in Canadian legislation.

An illustration of how Article 6(4) protects user rights from TPMs is found in *Christophe R, UFC Que Choisir v. Warner Music*, a case decided by the Tribunal de Grande Instance in France.⁷⁵ After buying the CD "Testify" by Phil Collins, Christophe R. discovered "that he could not play it on his laptop nor could he make copies from the CD".⁷⁶ Christophe R. was unable to perform these tasks due to a TPM which was encoded on the CD. He argued that the legislation granting protection to TPMs conflicted with his "right to private copying".⁷⁷ As noted by Helberger, based on its interpretation of Article 6(4) of the ISD, the Tribunal concluded that TPMs must "respect certain exceptions, including the private copying exception".⁷⁸ In criticizing the scope of TPMs, the Tribunal noted that:

the application of anti-copying protection devices by phonogram producers causes the statutory limitations of the authors' exclusive rights to authorise or prohibit reproductions to fade.⁷⁹

The Tribunal went on to state that "it is the task of the DRM user, here: the phonogram producer, to make sure that private copying remains possible, despite the application of technological protection measures".⁸⁰

It has been suggested that protection for user rights may extend beyond that provided by Article 6(4) of the ISD.⁸¹ Patricia Akester indicates that the encroachment of TPMs on user rights may also infringe a user's freedom of expression rights. She states that freedom of expression may be infringed where certain user rights are denied

because rightholders fail to provide [users] with appropriate means of doing so, especially where they fail to assure that users are able to take advantage of exceptions that fall within the core freedoms.⁸²

Akester identifies exceptions granting individuals "access to political, artistic, literary or journalistic speech" as those falling within the core freedoms, citing, as an example, an instance where a music teacher is unable to make a copy of a sound recording in the context of teaching.⁸³

Applied in the Canadian context, Akester's view suggests that a constitutional breach may occur where users are denied the opportunity to take advantage of exceptions granting individuals access to political, artistic, literary, or journalistic speech. One such exception is the fair dealing defence. Akester's view supports the position

of this paper that instituting legislative protection for TPMs without providing a corresponding right of access to users for fair dealing purposes infringes the s. 2(b) guarantee.

The U.S.A. takes a different approach than that of the E.C. to the legislative protection of TPMs. Enacted in 1998, the *Digital Millennium Copyright Act* (DMCA) implements the WCT and WPPT into United States law.⁸⁴ It contains two provisions that address the circumvention of TPMs. Section 1201(a)(1)(A) of the DMCA prohibits individuals from circumventing technological measures that control access to a copyright-protected work.⁸⁵ Section 1201(a)(2) prohibits the manufacture or trafficking of any technology, service, or device that is primarily designed to circumvent TPMs.⁸⁶ It is no defence to a finding of infringement under s. 1201(a)(1)(A) to argue that the circumvention was done for a fair use purpose. Under the DMCA, the “downstream uses of the software . . . whether legal or illegal, are not relevant to determining whether [one has violated] the statute”.⁸⁷ The DMCA differs in this regard from Bill C-60, which, as noted above, adopts the “infringing purpose” approach. While it would not be an infringement of the *Copyright Act*, as amended by Bill C-60, to circumvent a technological measure for a fair dealing purpose, it would be an infringement of the DMCA to circumvent a technological measure for a fair dealing purpose.

Though the DMCA contains no provision comparable to Article 6(4) of the ISD, some protection is offered for users’ fair dealing rights. Section 1201(c)(1) states that “nothing in this section shall affect rights, remedies, limitations, or defences to copyright infringement, including fair use, under this title”.⁸⁸ It has been suggested that this section could be used to help preserve users’ rights to access works for fair dealing purposes under the DMCA. In *Universal City Studios Inc. v. Corley*, the defendants contended that s. 1201(c)(1) “can be read to allow the circumvention of encryption technology protecting copyrighted material when the material will be put to ‘fair uses’ exempt from copyright liability”.⁸⁹ This contention was rejected by Newman J. for the Court in *Corley*, who stated that s. 1201(c)(1) does not permit such a reading. Instead, Newman J. takes the position that s. 1201(c)(1):

simply clarifies that the DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking tools) . . . [it] does not concern itself with the use of those materials after circumvention has occurred.⁹⁰

More important for the purposes of this paper is the position of American courts with respect to the question of whether the burden placed on the fair use rights of users by the DMCA constitutes a violation of users’ First Amendment rights. This issue was addressed by the United States District Court for the Northern District of California in *321 Studios v. MGM Studios, Inc.*⁹¹ In *321 Studios*, Illston J. concluded that the anti-circumvention provisions of the DMCA “do not unconstitutionally

burden the fair use rights of users of the copyright material”.⁹²

321 Studios is a company that “markets and sells software and instructions for copying DVDs”.⁹³ It sells two products that allow the user to “copy video content from original DVDs regardless of whether they are encoded” with copy control technology.⁹⁴ 321 Studios filed a complaint for declaratory relief seeking, among other relief, a declaratory judgment stating that the provisions of the DMCA that give legislative protection to TPMs violate the First Amendment.

In her decision, Illston J. concluded that the provisions of the DMCA that deal with TPMs do not impermissibly burden the fair use rights of users. In reaching this decision, Illston J. rejected the “plaintiff’s claim that such users have a First Amendment right to make fair use of copyrighted works based on *Eldred v. Ashcroft*”.⁹⁵ Illston J.’s decision can be criticized on various grounds. First, Illston J.’s position that the burdens imposed by the DMCA do not “unconstitutionally impinge fair use rights” is based in large part on her contention that users can access TPM-protected content in other ways sufficient for fair use purposes. As Illston J. states, “fair use is still possible under the DMCA, although such copying will not be as easy, as exact, or as digitally manipulable as plaintiff desires”.⁹⁶ This paper takes the position that this contention is not always valid. Illston J. cites the analysis in *Corley* in support of her position, in which the court states that:

We know of no authority for the proposition that fair use, as protected by the *Copyright Act*, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original . . . The fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use.⁹⁷

The content in question may not be available in any form other than that protected by the technological measure. Illston J. herself acknowledges that “not all content on DVDs may be available in other forms”.⁹⁸ As a result, users could be forced into a position where they must either circumvent the technological measure or take alternate measures to use the TPM-protected content. The nature of such alternate measures, and their level of effectiveness, varies depending on the medium and the level of technological protection. For instance, if the sole copy of a photograph is contained on a DVD protected by a technological measure, the critic seeking to use the photograph for a fair dealing purpose, if constrained from accessing the photograph through circumvention of the technological measure, may have to use a camera to take a picture of the photograph as it is displayed on a computer monitor. Such a picture would, in all probability, be of lower quality than the original, and may be of such poor quality that the fair use purpose is frustrated. Given the varying efficacy of alternate measures, another court may deem that, contrary to the posi-

tion of Illston J., the alternate methods through which users can access TPM-protected content are not sufficient for fair use purposes.

Second, Illston J. conflates different forms of content in order to support her argument that users can, without much difficulty, find ways to make fair use of the content without having to circumvent a technological measure. In building her argument, Illston J. uses a quote from *United States v. Elcom Ltd.*, in which the court stated that “the fair user may find it more difficult to engage in certain fair uses with regard to electronic books, but nevertheless, fair use is still available”.⁹⁹ In this situation, the user, constrained by a technological measure (for instance a read-only copy of a text), is denied the ability to digitally copy and paste large swathes of text for a fair use purpose. However, the user can, without much difficulty, write out the text by hand or work with a second computer to type out the text. In the example given in *Elcom*, fair use is made more difficult by technological measures. Nevertheless, the user is still able to access and copy the work relatively easily, without a loss of quality. As a result, the balance of convenience may fall on the side of the copyright owner, which could justify the presence of the anti-circumvention provisions. Illston J.’s argument becomes much more tenuous when one envisions the content in question as film or photographs, rather than text. In film, the dialogue can be copied by hand without much difficulty. Copying a video without access to the DVD itself, however, is much more difficult. One option could be for the user to use a personal video recorder to film the content required for the fair use purpose as it appears on the screen (in view-only format). However, the quality of this recording could be very poor. Similar problems are posed by photography, as noted above. In dealing with film and photography, the balance of convenience may fall on the side of the user seeking to exercise their fair dealing rights, as opposed to the copyright owner. Illston J. does not address the difficulties posed by video and film, despite the fact that *321 Studios* is a case which deals with the copying of DVDs and not electronic books.

Third, Illston J. minimizes the difficulties noted above through her choice of diction. Through the course of the decision, Illston J. uses phrases that create the impression that users who are denied the opportunity to circumvent technological measures to access protected content for fair dealing purposes experience only a small inconvenience. In reality, their fair use purpose may be completely frustrated. Illston J. cites a passage in *Corley* which states that “the fact that the resulting copy will not be as perfect or as manipulable as a digital copy ... provides no basis for a claim of unconstitutional limitation of fair use”.¹⁰⁰ In addition, Illston J. states that “fair use is still possible under the DMCA, although such copying will not be as easy, as exact, or as digitally manipulable as plaintiff desires”.¹⁰¹ The use of the words “optimum”, “identical”, “perfect”, “easy”, and “desires” (as

opposed to requires) give the reader the impression that the user, though slightly inconvenienced, is still able to accomplish his or her fair dealing purpose. Furthermore, the use of the word “desires” (as opposed to requires) could give the reader the impression that the user is an individual who chooses to use the technologically-protected content, and not one who needs the content locked up by the technological measure for a fair use purpose. While the fact that the resulting copy will not be as perfect as a digital copy may provide no basis for a claim of unconstitutional limitation of fair use, the fact that the resulting copy may be so shoddy as to be unusable for a fair use purpose may provide a basis for a claim of unconstitutional limitation of fair use. In such a case, fair use may not be deemed to be “available”, as TPM-imposed barriers may effectively preclude users from exercising their right to fair dealing. In this situation, *Eldred* may mandate the application of the First Amendment to the anti-circumvention provisions of the DMCA, as copyright’s built-in safeguards may not be adequate to resolve First Amendment concerns.¹⁰²

Fourth, Illston J.’s judgment, by minimizing the impact of the burden placed on the fair dealing rights of users, adopts a restrictive view of fair use and users’ rights. This restrictive view is inconsistent with the approach taken in American jurisprudence, as illustrated by the broad view of fair use taken in *Campbell v. Acuff-Rose* by the United States Supreme Court.¹⁰³ Similarly, Illston J.’s restrictive view of fair use is inconsistent with the Supreme Court of Canada’s decision in *CCH Canadian*, in which fair dealing was characterized broadly as a user’s right.¹⁰⁴ Given these possible criticisms of Illston J.’s decision, this paper takes the position that further judicial support for Illston J.’s position is needed if it is to influence the development of Canadian law in this area.

Canada

Section 2(b) analysis

Informed by cases and commentary from the E.C. and the U.S.A., this paper will proceed by subjecting legislation protecting TPMs to a s. 2(b) analysis. As noted in Part I, Bill C-60 died when the Parliament of Canada was dissolved. The form which future Canadian legislation protecting TPMs will take is uncertain. As a result, the “legislation” which this paper will subject to a s. 2(b) analysis will consist of an amalgam of the Statement and Bill C-60. The Statement reflects the Government of Canada’s broad vision for the statute; Bill C-60 reflects the first attempt to enact such a statute. Consistent with the Statement and Bill C-60, the legislation for the purposes of the s. 2(b) analysis will contain a provision stating that the circumvention, for infringing purposes, of TPMs applied to copyright material will itself constitute an act of infringement of copyright.¹⁰⁵ Furthermore, also consistent with the Statement and Bill C-60, the legislation being subjected to s. 2(b) scrutiny will not contain a

provision granting users a right to access TPM-protected expression for fair dealing purposes.

The Supreme Court of Canada has stated that a s. 2(b) claim proceeds in two steps. First, it must be determined whether the defendant's activity is within the sphere of conduct protected by freedom of expression. This step asks both whether the activity can be considered "expression" and whether there are any special circumstances that warrant removing that activity from the protected sphere of freedom of expression. Second, it must be determined whether the government action in question restricts this activity in purpose or effect.¹⁰⁶

The first stage of the s. 2(b) analysis requires that we determine whether the defendant's activities constitute "expression". The Supreme Court of Canada has stated that an activity is expressive if it attempts to convey meaning.¹⁰⁷ This definition is "very broad and inclusive" and should be given a "generous interpretation".¹⁰⁸ Given the courts' generous interpretation of "expression", fair dealing activities will likely be considered "expression" for the purpose of the freedom of expression analysis. Criticism, review, and news reporting generally fuse the expression of the user/author with that of the copyright holder in the attempt to convey meaning to a broader audience. In research and private study, one generally attempts to convey meaning to oneself through a process of investigation and analysis.

Next, it must be determined whether there are any "special circumstances that would warrant removing [activities falling within the fair dealing defence] from the protected sphere under the *Charter*".¹⁰⁹ For example, violent forms of expression fall outside of the protected sphere under s. 2(b).¹¹⁰ However, "a form need not be violent in order to be prohibited".¹¹¹ In *Cie Générale des Etablissements Michelin–Michelin & Cie v. C.A.W.-Canada (Michelin)*, Teitelbaum J. of the Federal Court Trial Division held that acts that involve the use of another individual's intellectual property are *prima facie* prohibited forms of expression. Acts will be protected where the user can demonstrate that they are consistent with the function of the property.

In *Michelin*, the defendant CAW created leaflets which featured the plaintiff's smiling character "Bibendum" (a "fanciful, happy, marshmallow-like figure ... attired not unlike an astronaut, but with an exposed cartoon-style of head") with its foot raised menacingly over an unsuspecting worker.¹¹² These leaflets were created in furtherance of the defendants' attempts to "become the bargaining agents for the workforce at three plants of the plaintiff in Nova Scotia".¹¹³ The Bibendum was protected under both copyright and trade mark law. The plaintiff sued under both heads. As part of their defence, CAW claimed that certain provisions in the *Copyright Act* infringed their *Charter* right to freedom of expression.¹¹⁴

Teitelbaum J. concluded that "the *Charter* does not confer the right to use private property — the Plaintiff's copyright — in the service of freedom of expression".¹¹⁵ He expanded upon this statement by noting that:

[A] person using the private property of another like a copyright, must demonstrate that his or her use of the property is compatible with the function of the property before the Court can deem the use a protected form of expression under the *Charter*.¹¹⁶

If the defendant cannot demonstrate this compatibility, then the activity will be deemed a prohibited form of expression. Applying this test to the parodic depiction, Teitelbaum J. noted that:

In the present case, subjecting the Plaintiff's "Bibendum" to ridicule as the object of parody is not compatible with the function of the copyright. A "Bibendum" about to stomp hapless workers into submission does not present the original author's intent of a favourable corporate image or provide an incentive for compensating artists for the integrity of their vision.¹¹⁷

Accordingly, Teitelbaum J. concluded that the parodic depiction of "Bibendum" was a prohibited form of expression, and was not protected under the sphere of s. 2(b).¹¹⁸

The *Michelin* approach to the s. 2(b) analysis requires users seeking *Charter* protection for works falling under the fair dealing defence to demonstrate that their use of the property is compatible with the function of the property before their use can be deemed a protected form of expression. Teitelbaum J. defines the "function" of the property according to the author's interests. In *Michelin*, he held that the two functions of the "Bibendum" were to "present the original author's intent of a favourable corporate image or provide an incentive for compensating artists for the integrity of their vision".¹¹⁹

Under this approach, many acts of fair dealing would fall outside the scope of s. 2(b) protection. For instance, acts of fair dealing that are critical of the works from which the underlying copyright-protected expression is drawn would be denied protection on the basis that they neither present the original author's intent of a favourable image, nor provide incentives for compensating authors. It is likely that even if the parodic depiction of "Bibendum" had met the criteria for "criticism" in the *Copyright Act*, it would have been denied protection on the grounds that it presented an unfavourable image of the corporation, contrary to the intent of the original author. Significantly, fair dealing acts which are critical of the copyright holder (in this case, a corporation) promote the core values of democratic dialogue and the search for truth. To deny these forms of fair dealing protection under the freedom of expression guarantee is to impoverish the guarantee itself.

Michelin's approach can be criticized on various grounds. First, Teitelbaum J.'s analysis in *Michelin* "subverts the principle of constitutional supremacy articu-

lated in section 52 of the *Constitution Act, 1982*.¹²⁰ While there is a constitutional right to freedom of expression, there is no constitutional right to property. As noted by Bailey, “the existence of any . . . property right is dependent on the constitutional validity of the legislation purporting to grant it”.¹²¹ Compelling users to demonstrate the compatibility of their expression with the intention of the copyright holder “mistakenly places the statutory property cart before the constitutional expression horse”.¹²²

In addition, Teitelbaum J.’s decision improperly balances the constitutionally protected right to freedom of expression of users with the unentrenched property rights of copyright holders. Though neither freedom of expression nor intellectual property rights are absolute, any balancing that takes place between the two must occur at the stage of a s. 1 analysis.¹²³ As Bailey notes, “there is no principled basis to suggest that economic rights should foreclose inclusion of expression within the scope of section 2(b)”.¹²⁴

Second, Teitelbaum J.’s characterization of the objective of the *Copyright Act* is singularly concerned with the rights of the copyright holder. For instance, Teitelbaum J. states that the objective of the *Copyright Act* is the “protection of authors and ensuring that they are recompensed for their creative energies and works”. This statement is inconsistent with the Supreme Court of Canada’s characterization of the objective of the *Copyright Act* as attempting to create a “balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”.¹²⁵ Rather than existing as a near-absolute right, as presented by Teitelbaum J., creator’s rights are of a “limited nature”.¹²⁶

Third, Teitelbaum J.’s analysis is flawed in that it collapses the distinction between real property and intellectual property. Teitelbaum J. does so by applying principles derived from real property cases to intellectual property issues. For instance, in discussing whether the copyright-protected expression of another can be used in the service of expression, Teitelbaum J. cites a real property case which concluded that “any person who trespasses upon . . . the property of another . . . is guilty of an offence”.¹²⁷ The conceptual distinction between tangible and intangible property is mentioned only briefly during the course of the decision. In discussing the nature of copyright as private property, Teitelbaum J. notes that it is an intangible property right. However, instead of taking this opportunity to address the distinctions between tangible and intangible property (namely that the copyright owner does not possess the “absolute power of a private (real) property owner to control access to and use of public intellectual property”¹²⁸), Teitelbaum J. dismisses the distinctions by stating that “just because the right is intangible, it should not be any less worthy of protection as a full property right”.¹²⁹

Fourth, Teitelbaum J.’s approach is implicitly rejected in *British Columbia Automobile Assn v. Office and Professional Employees’ International Union, Local 378 (BCAA)*.¹³⁰ BCAA dealt with a labour dispute in which the Union “created a web site which was similar to the Association’s web site in appearance and used the Association’s trade-marks in its domain name and meta tags”.¹³¹ The plaintiff contended that “the right of freedom of expression . . . cannot provide justification for appropriating or infringing the plaintiff’s intellectual property rights”.¹³² This position echoes Teitelbaum J.’s decision. Sigurdson J., however, rejects the plaintiff’s claim that the right of freedom of expression cannot provide justification for appropriating or infringing the plaintiff’s intellectual property rights. Instead, Sigurdson J. holds that in determining whether the right of freedom of expression can justify the appropriation of another’s intellectual property, it is necessary to strike a reasonable balance between the property rights of the owner and the freedom of expression rights of the user.¹³³

It is important to note that in his decision, Sigurdson J. did not refer to the aspects of the *Michelin* decision that address the intersection of copyright and freedom of expression. However, Sigurdson J. does discuss *Michelin* in the context of the “ambit of ‘use’ of marks in association with wares or services under Section 20 and Section 22 of the *Trade-marks Act*”.¹³⁴ This indicates that Sigurdson J. was aware of the *Michelin* decision. In establishing his own “balancing rights” approach, Sigurdson J. implicitly rejects Teitelbaum J.’s view that the appropriation of another individual’s intellectual property should be deemed a prohibited form of expression unless it can be demonstrated that the use of the property is compatible with its function.

Fifth, other jurisdictions have not excluded acts from the protected sphere of freedom of expression on the basis that they involved the use of another individual’s copyright-protected expression. In *Laugh it Off Promotions (LIO) v. South African Breweries International (SAB)*, the Constitutional Court of South Africa dealt with a case involving the interrelationship between the freedom of expression guarantee contained in section 16(1) of the *Constitution* and the protection of registered trade marks in s. 34(1)(c) of the *Trade Marks Act 194* of 1993 (an anti-dilution provision).¹³⁵ SAB had brought an action against LIO to enjoin LIO from using its trade mark in making t-shirts displaying a message of “social satire or parody”.¹³⁶ Affirming the importance of freedom of expression, the Constitutional Court held that the anti-dilution provision

must be construed in the light of the *Constitution* and applied in a manner that does not unduly trample upon freedom of expression. This approach would necessitate the weighing-up of the constitutional safeguard of free expression of the unauthorised user against the right to intellectual

property of the trade mark owner and where appropriate the owner's freedoms of trade, occupation or profession.¹³⁷

A similar balancing was carried out in the U.S.A. in *Cardtoons, L.C. v. Major League Baseball Players Association* between freedom of expression and the right of publicity.¹³⁸ In *Cardtoons*, an action was brought to obtain a

declaratory judgment that [Cardtoons] parody trading cards featuring active major league baseball players do not infringe on the publicity rights of the members of the Major League Baseball Players Association.¹³⁹

The U.S. Court of Appeals for the Tenth Circuit stated that "like trademark and copyright, the right of publicity involves a cognizable property interest".¹⁴⁰ However, as the right of publicity does not have any "built-in mechanisms that serve to avoid First Amendment concerns", the right had to be balanced directly with the free speech guarantee.¹⁴¹

Sixth, Teitelbaum J.'s conclusion that acts that involve the use of another individual's intellectual property are *prima facie* prohibited forms of expression is inconsistent with the broad approach taken by the Supreme Court of Canada in determining whether acts constitute protected forms of expression. As noted in *R. v. Keegstra*:

Apart from rare cases where expression is communicated in a physically violent form, the Court thus viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee".¹⁴²

Guided by this broad and generous interpretation of freedom of expression, the Supreme Court of Canada has found that deliberate lies and falsehoods,¹⁴³ defamatory libel,¹⁴⁴ and possession of child pornography¹⁴⁵ are all protected forms of expression under s. 2(b). The breadth of these decisions suggest that fair dealing should constitute a protected form of expression. Given the above stated deficiencies, this paper takes the position that *Michelin* is unpersuasive and should not be followed. Accordingly, contrary to the approach in *Michelin*, activities falling under the fair dealing defence should not be excluded from s. 2(b) protection on the basis that they contain the copyright-protected expression of another individual.

Having determined that the acts in question constitute expression and that there are no special circumstances which warrant removing that expression from the protected sphere under the *Charter*, the next step in the freedom of expression analysis asks whether the purpose or effect of the government action in question is to restrict freedom of expression.¹⁴⁶ The assessment of legislative purpose focuses upon the aims and objectives of the legislature.¹⁴⁷ If the government's purpose was to restrict attempts to convey a meaning, there has been a limitation of s. 2(b) and a s. 1 analysis is required.¹⁴⁸

The purpose of the provisions granting legislative protection to TPMs is to restrict attempts to convey

meaning. The government's main objective in tabling legislation granting protection to TPMs is to implement the provisions of the WCT and WPPT, including those provisions that address TPMs.¹⁴⁹ TPMs seek to preclude infringing uses of copyright-protected expression, many of which attempt to convey meaning. One such example is the parodic depiction of "Bibendum" in *Michelin*. Thus, because the purpose of the provisions is to restrict meaning, a s. 2(b) violation is established.

Though a determination that the purpose of the provisions unconstitutionally restricts freedom of expression is dispositive of the matter, this paper will, for the sake of completeness, investigate whether the effects of the government action restrict expression. In order to determine whether the provisions granting legislative protection to TPMs restrict the claimant's freedom of expression in effect, the claimant must investigate whether the expressive activity at issue promoted at least one of the three core values of freedom of expression.¹⁵⁰ In the case at hand, the "expressive activities" at issue are those activities that fall within the fair dealing defence. These activities, as noted earlier, promote the core values of freedom of expression. By restricting the fair dealing defence, the provisions of Bill C-60 infringe the s. 2(b) guarantee in effect.

Section 1 analysis

Section 1 of the *Charter* states that the rights and freedoms set out in the *Charter* are guaranteed "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".¹⁵¹ In order to justify the infringement of the freedom of expression guarantee, the government must demonstrate that the law meets the s. 1 test as set out in *R. v. Oakes*.¹⁵² There are four parts to the *Oakes* test.

First, it is asked whether the objective served by the measures limiting a *Charter* right is sufficiently important to warrant overriding a constitutionally protected right or freedom.¹⁵³ The objective of the provisions concerning the protection of TPMs is to implement international treaties that seek to protect authors against the unauthorized use of their works. The ease with which dissemination occurs on the Internet renders the need to protect authors' content pressing and substantial. This objective would likely qualify as sufficiently important because it helps ensure authors are compensated for their efforts. Absent protection for authors, the financial incentive to create diminishes, threatening a society's creative output and the future of industries associated with copyright.

Second, it must be demonstrated that the impugned measures are rationally connected to the objective.¹⁵⁴ As noted above, the objective of the provisions concerning the protection of TPMs is to implement international treaties that seek to protect authors against the unauthorized use of their works. The mea-

asures enacted, granting legislative protection to TPMs, seek to carry out these objectives.

Third, the means should impair the Charter right no more than necessary to accomplish the objective.¹⁵⁵ The impugned provisions in the Statement and Bill C-60 are intended to restrict only infringing unauthorized uses. The effect of the provisions is much broader. The provisions restrict all activities that use the expression of another to convey meaning. Consequently, the provisions granting protection to TPMs are overbroad, and thus not the least drastic means of pursuing the objective. On this basis, the provisions granting legislative protection to TPMs cannot be justified. In the interest of completeness, this paper will investigate the fourth branch of the *Oakes* test.

Fourth, there must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.¹⁵⁶ The impact of the impugned provisions on the user is profound. TPMs lock individuals out from copyright-protected expression, effectively preventing them from exercising their fair dealing rights. As discussed in Part II, the denial of fair dealing rights impoverishes the core values of freedom of expression, namely participation in democratic dialogue, the search for truth, and self-fulfillment. The objective of protecting authors would not, in all probability, outweigh the deleterious effects to users’ freedom of expression rights. Thus, the effects of the impugned provisions are disproportionate to the objective.

Remedy

The legislative protection of TPMs infringes the right to freedom of expression guaranteed in s. 2(b) of the *Charter*, and cannot be justified through a s. 1 analysis. Thus, the legislation is inconsistent with the *Charter*. Subsection 52(1) of the *Constitution Act*, 1867 states that:

The *Constitution* of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect.¹⁵⁷

At this point, the legislature may either abandon the legislation or rewrite the impugned provisions in a manner consistent with the *Charter*. A possible “rewriting” of the impugned provisions is discussed in Part V.

Part V: Treaty Implications

Given the discussion in Part I regarding the consequences of Canada’s failure to implement the WCT and WPPT and its commitment to do so, it is doubtful that the Canadian government will choose to abandon its goal of implementing legislation protecting TPMs. As a result, it is likely that Canada will reintroduce

copyright legislation implementing the WCT and WPPT. It must do so in a manner consistent with the Charter. The impugned provisions failed *Charter* scrutiny in part because they had the effect of restricting the core values of freedom of expression. In order for future legislation regarding TPMs to survive *Charter* scrutiny, the core values of freedom of expression must be protected. This paper takes the position that in order to survive *Charter* scrutiny, legislation granting protection to TPMs must contain a provision requiring copyright holders who institute TPMs to provide access to users for fair dealing purposes. Article 6(4) of the ISD may act as a potential model for future legislation.

The addition of such a provision (the fair dealing amendment), however, might cause the legislative scheme to violate Article 11 of the WCT and Article 18 of the WPPT.¹⁵⁸ Articles 11 and 18 require contracting parties to provide “adequate legal protection” for TPMs.¹⁵⁹ The fair dealing amendment would allow individuals seeking to access a work for infringing purposes to do so unimpeded through misuse of the fair dealing exception. Thus, the fair dealing amendment may render TPMs ineffective, and Canada’s legal protection for TPMs inadequate. The predicament that arises should Canada choose to ratify the WCT and WPPT is two-fold. If Canada does not implement the fair dealing amendment, then, based on the above analysis, it will violate the freedom of expression rights of its citizens. If Canada does implement the fair dealing amendment, it may be found to be in violation of Articles 11 and 18 of the WCT and WPPT.

However, the likelihood that the fair dealing amendment would violate Articles 11 and 18 must be examined in more detail. Under the WCT and WPPT, contracting parties need not provide protection against the circumvention of all TPMs. Articles 11 and 18 require contracting parties only to provide “adequate legal protection” against the circumvention of TPMs used by authors/performers in connection with the exercise of their rights under the WCT, WPPT or the Berne Convention, and that restrict acts which are not authorized or permitted by law.¹⁶⁰ The reach of TPMs currently extends far beyond this limited scope. As noted above, one of the main criticisms of TPMs is that they are not technologically sophisticated enough to distinguish infringing uses from non-infringing uses.¹⁶¹ They restrict both acts prohibited by law and those permitted by law. Furthermore, TPMs are currently used by authors to protect both existing rights and rights which do not exist under copyright legislation, such as an exclusive right to control access to a work. It is assumed that if WIPO had intended to require contracting parties to provide protection for all TPMs, then it would have drafted Articles 11 and 18 to reflect this intention. The presence of limitations in Articles 11 and 18 indicates that WIPO wished the protection of TPMs to operate within these restraints.

Thus, even if the effect of altering legislation protecting TPMs to include a right to access TPM-protected works for fair dealing purposes causes the legal protection of TPMs in Canada to become inadequate, it would not breach the WCT or WPPT. Rather, the addition of a right to access TPM-protected works for fair dealing purposes would merely help bring what are now overreaching technological mechanisms closer into conformity with the standards as set out in the WCT and WPPT. The threat of breaching treaty obligations should not deter the Canadian government from including a provision guaranteeing access to TPM-protected expression for fair dealing purposes in any legislation granting protection to TPMs.

Conclusion

This paper takes the position that the legislative protection of TPMs infringes the s. 2(b) guarantee of the Canadian *Charter of Rights and Freedoms* and cannot be justified through a s. 1 analysis. TPMs preclude users from exercising their right to fair dealing. Fair dealing promotes and protects the core values of freedom of expression in the copyright context. By precluding users from exercising their right to fair dealing,

TPMs impoverish the core values of freedom of expression. In order for legislation implementing TPMs to survive Charter scrutiny, it must contain a provision requiring copyright holders who institute TPMs to provide access to users for fair dealing purposes. Such a provision, though it may render TPMs ineffective, would not cause Canada to breach its treaty obligations. In sanctioning TPMs without providing a right for users to access copyright-protected works for fair dealing purposes, the Canadian government is sanctioning the impoverishment of democratic dialogue, the search for truth, and self-fulfillment, “principle[s] of vital importance in a free and democratic society”.¹⁶² As Iacobucci J. noted in *Irwin Toy*:

Our concern should be to recognize that in this century we have seen whole societies utterly corrupted by the suppression of free expression. We should not lightly take a step in that direction, even a small one.¹⁶³

The enactment of legislative protection for TPMs, absent a corresponding right of access for users to exercise their right to fair dealing, leads to the suppression of free expression. In attempting to respond to the challenges posed by digital technologies to the exclusive rights of copyright holders, the Canadian government must not take a step in this direction.

Notes:

¹ Jane Bailey, “Deflating the MichelinMan: Protecting Users’ Rights in the Canadian Copyright Reform Process” in Michael Geist, ed, *In the Public Interest*, online: <http://www.irwinlaw.com/books.cfm?series_id=3&pub_id=120&action=ADD> at 158 [Bailey].

² Bill C-60, *An Act to amend the Copyright Act*, 1st Sess, 38th Parl, 2004-2005.

³ Ian Kerr, “Technical Protection Measures: Tilting at Copyright’s Windmill” (2002-2003) 34 *Ottawa L. Rev.* 7 at 42 [Kerr].

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵ *Copyright Act*, R.S.C. 1985, c. C-42.

⁶ Kerr, *supra* note 3 at 13.

⁷ Kerr, *supra* note 3 at 13.

⁸ Kerr, *supra* note 3 at 13.

⁹ Bailey, *supra* note 1 at 158.

¹⁰ World Intellectual Property Organization Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 36 *IL.M.* 65 [WCT].

¹¹ World Intellectual Property Organization Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002) 36 *IL.M.* 76 [WPPT].

¹² WCT, *supra* note 10 at Art. 11; WPPT, *supra* note 11 at Art. 18.

¹³ Canada, House of Commons, Standing Committee on Canadian Heritage, ‘Interim Report on Copyright Reform: Report of the Standing Committee on Canadian Heritage’ (Canada: May 2004) [Interim Report].

¹⁴ Canada, Minister of Canadian Heritage and the Minister of Industry, Status Report on Copyright Reform (March 24, 2005); Government of Canada Statement on Proposals for Copyright Reform (24 March 2005) [Statement].

¹⁵ Bailey, *supra* note 1 at 129.

¹⁶ Bailey, *supra* note 1 at 129; Statement, *supra* note 14.

¹⁷ Bill C-60, *supra* note 2, s. 15.

¹⁸ Bill C-60, *supra* note 2, s. 27.

¹⁹ Kerr, *supra* note 3 at 77.

²⁰ Kerr, *supra* note 3 at 77.

²¹ The United States government has put pressure on Canada to institute strong protection for TPMs. See Bailey, *supra* note 1 at 128. See also Kerr, *supra* note 3 at 58.

²² Statement (n 14).

²³ *Copyright Act*, *supra* note 5, s. 29.

²⁴ *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48, ss. 29-30.

²⁵ *Copyright Act 1968* (Aus.), 1968, No. 63, ss. 40-42.

²⁶ *Copyright Act 1994* (N.Z.), 1994, No. 143, ss. 42-43.

²⁷ *Copyright Act of 1976* § 107, 17 USC (1976), at 17.

²⁸ *Copyright Act*, *supra* note 5, s. 29.

²⁹ *Copyright Act*, *supra* note 5, s. 29.1.

³⁰ *Copyright Act*, *supra* note 5, s. 29.2.

³¹ *CCH Canadian Limited v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at para. 52 [CCH].

³² CCH, *supra* note 31 at para. 53.

³³ CCH, *supra* note 31 at para. 53.

³⁴ Carys J. Craig, “The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform” in Michael Geist, ed., *In the Public Interest*, online: <http://www.irwinlaw.com/books.cfm?series_id=3&pub_id=120&action=ADD> at 438.

³⁵ CCH, *supra* note 31.

³⁶ CCH, *supra* note 31.

³⁷ CCH, *supra* note 31 at para. 48.

³⁸ CCH, *supra* note 31 at para. 48. See Pierre N. Leval’s article “Toward a Fair Use Standard” (1989-1990) 103 *Harv. L. Rev.* 1105, 1107 [Leval]. Leval states that “fair use should be perceived as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law”.

³⁹ *Théberge v. Galerie d’Art du Petit Champlain*, [2002] 2 S.C.R. 336 at paras. 30-31 [Théberge].

⁴⁰ Kerr, *supra* note 3 at 42.

- ⁴¹ The term “unauthorized” is used here with respect to the relationship between the author and the user, and not the user and the *Copyright Act*. The *Copyright Act* authorizes individuals to use works for fair dealing purposes.
- ⁴² Kerr, *supra* note 3 at 12.
- ⁴³ *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F. 3^d 959 (1996) at 972 [Cardtoons].
- ⁴⁴ Kerr, *supra* note 3 at 23.
- ⁴⁵ Bailey, *supra* note 1 at 160.
- ⁴⁶ *CCH*, *supra* note 31 at para. 48.
- ⁴⁷ Kerr, *supra* note 3 at 23.
- ⁴⁸ Kerr, *supra* note 3 at 24.
- ⁴⁹ Kerr, *supra* note 3 at 33.
- ⁵⁰ *British Columbia Automobile Association v. Office and Professional Employees' Intl Union 378*[2001] 10 C.P.R. (4th) 423 [BCAA] and *Cie Generale des Etablissements Michelin — Michelin & Cie v. CAW-Canada et al.*(1996) 71 C.P.R. (3d) 348 [Michelin].
- ⁵¹ David Fewer, “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada” (1997) 55 U.T.L.R. 175 at 178-179 [Fewer].
- ⁵² Eric Barendt, “Copyright and Free Speech Theory” in Jonathan Griffiths and Uma Suthersanen, eds. *Copyright and Free Speech* (Oxford: Oxford University Press, 2005) 11; See Melville B. Nimmer, “Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?” (1970) 17 U.C.L.A. L. Rev. 1180. See also Carys J. Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” (2006) 56 U.T.L.J. 75 at 78. See Fewer, *supra* 51 at 202; Brent P. Hugenholtz, “Copyright and Freedom of Expression in Europe” in Rochelle Cooper Dreyfuss, Harry First, and Diane Leenheer Zimmerman, eds., *Innovation Policy in an Information Age* (Oxford: Oxford University Press, 2000); Michael Birnhack, “Copyrighting Speech: A Trans-Atlantic View” in P.L.C. Torremans, ed., *Copyright and Human Rights* (London: Kluwer Law International, 2004) 37 at 55 [Birnhack].
- ⁵³ Eric Barendt, *Freedom of Speech*, 2nd ed. (Oxford: Oxford University Press, 2005) at 249. See *Nihon Keizai Shimbun Inc v. Comline Bus Data Inc.*, 166 F. 3d 65 at 74 (3rd Cir. 1999).
- ⁵⁴ *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927 at para. 53 [Irwin Toy].
- ⁵⁵ *Copyright Act*, *supra* note 5, s. 29.
- ⁵⁶ Patrick Masiyakurima, “Fair Dealing and Freedom of Expression” in P.L.C. Torremans, ed. *Copyright and Human Rights* (London: Kluwer Law International, 2004) 87 at 94 [Masiyakurima].
- ⁵⁷ Masiyakurima, *supra* note 63 at 95.
- ⁵⁸ Leval, *supra* note 38 at 1109.
- ⁵⁹ *Théberge*, *supra* note 39.
- ⁶⁰ *The Queen v. James Lorimer & Co. Ltd.*(1984) 77 C.P.R. (2d) 262; *Canadian Tire Corp. Ltd. v. Retail Clerks Union, Local 1518 of United Food and Commercial Workers Union et al.*, (1985) 7 C.P.R. (3d) 415 [Canadian Tire Corp. Ltd.].
- ⁶¹ *Canadian Tire Corp. Ltd.*, *supra* note 60; *Lorimer*, *supra* note 60. See also *BCAA*, *supra* note 50 and *Michelin*, *supra* note 50.
- ⁶² *Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769 (2003) [Eldred].
- ⁶³ *Ibid.*
- ⁶⁴ *Ibid.*
- ⁶⁵ *Ibid.*
- ⁶⁶ *Ibid.* at 791.
- ⁶⁷ *Ibid.* at 789.
- ⁶⁸ Michael Birnhack states that the anti-circumvention sections of the Digital Millennium Copyright Act of 1998 could be considered non-traditional (Birnhack, *supra* note 52 at 56-58).
- ⁶⁹ It could be stated that contrary to the position to the court in *Eldred*, the expansion of copyright term limits in the CTEA to “life plus seventy years” is “non-traditional” in comparison to copyright’s original term (as set out in the *Copyright Act of 1710*) of fourteen years from first publication, with the right returning to the author for a further fourteen years if she was alive at the end of the first fourteen year period (William Cornish and David Llewellyn, *Intellectual Property*, 5th ed. (London: Sweet & Maxwell, 2003)).
- ⁷⁰ *Ashdown v. Telegraph Group (2002)*, [2002] R.P.C. 235 (C.A.).
- ⁷¹ This position is broader than that adopted by the United States Supreme Court in *Eldred*, *supra* note 62. In *Eldred*, the Court stated that free speech rights should apply only in situations where Congress has made a non-traditional alteration of the contours of copyright protection. However, alterations of both traditional and non-traditional contours of copyright protection could cause the values underlying freedom of expression to become impoverished. Thus, it is possible that an extension of the duration of copyright protection to “life plus seventy years” (as seen in *Eldred*), deemed an alteration of a traditional contour of copyright protection in *Eldred*, could engage s. 2(b). Democratic discourse, the search for truth, and personal fulfillment could be limited to such an extent by a twenty-year increase in the length of copyright protection that freedom of expression is infringed.
- ⁷² Council Directive (EC) 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] [ISD].
- ⁷³ *Ibid.* at 6.
- ⁷⁴ *Ibid.* at 6(4).
- ⁷⁵ Trib. gr. inst. Paris, 10 Janvier 2006, *M Christophe R. v. Warner Music France* [Christophe].
- ⁷⁶ Natalli Helberger, “ChristopheR vs Warner Music: French Court Bans Private-Copying Hostile DRM” (2006) INDICARE <http://www.indicare.org/tiki-read_article.php?articleId=180> accessed 20 April 2006 [Helberger].
- ⁷⁷ Helberger, *supra* note 76; *Christophe*, *supra* note 75.
- ⁷⁸ Helberger, *supra* note 76; *Christophe*, *supra* note 75.
- ⁷⁹ Helberger, *supra* note 76; *Christophe*, *supra* note 75.
- ⁸⁰ Helberger, *supra* note 76; *Christophe*, *supra* note 75.
- ⁸¹ Patricia Akester, “The Political Dimension of the Digital Challenge – Copyright and Free Speech Restrictions in the Digital Age” (2006) 1 I.P.J. 16 [Akester].
- ⁸² Akester, *supra* note 81 at 33.
- ⁸³ Akester, *supra* note 81 at 31.
- ⁸⁴ *Digital Millennium Copyright Act of 1998* §512, 17 U.S.C., §1201 (1998) [DMCA].
- ⁸⁵ *Ibid.* at §1201(a)(1)(A).
- ⁸⁶ *Ibid.* at §1201(a)(2).
- ⁸⁷ *321 Studios v. MGM Studios Inc.*, 307 F. Supp. 2d 1085 (2004) [321].
- ⁸⁸ DMCA, *supra* note 84 §1201(c)(1).
- ⁸⁹ *Universal City Studios Inc. v. Corley*, 273 F.3d 429 at 443 (2001) [Corley].
- ⁹⁰ *Corley*, *supra* note 89 at 443.
- ⁹¹ *321*, *supra* note 87.
- ⁹² *321*, *supra* note 87 at 1101.
- ⁹³ *321*, *supra* note 87 at 1089.
- ⁹⁴ *321*, *supra* note 87 at 1089.
- ⁹⁵ *321*, *supra* note 87 at 1101.
- ⁹⁶ *321*, *supra* note 87 at 1102.
- ⁹⁷ *321*, *supra* note 87 at 1101-1102; *Corley*, *supra* note 89 at 459.
- ⁹⁸ *321*, *supra* note 87 at 1101.
- ⁹⁹ *321*, *supra* note 87 at 1102; *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 at 1134-35 (2002).
- ¹⁰⁰ *321*, *supra* note 87 at 1101-02; *Corley*, *supra* note 89 at 459.
- ¹⁰¹ *321*, *supra* note 87 at 1102.
- ¹⁰² *321*, *supra* note 87 at 1101; *Eldred*, *supra* note 62 at 789.
- ¹⁰³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
- ¹⁰⁴ *CCH*, *supra* note 31.
- ¹⁰⁵ Bailey, *supra* note 1 at 129; Statement, *supra* note 14.
- ¹⁰⁶ *Irwin Toy*, *supra* note 54 at para. 55.
- ¹⁰⁷ *Irwin Toy*, *supra* note 54 at 968.
- ¹⁰⁸ Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1997) at 997 [Hogg].
- ¹⁰⁹ *Michelin*, *supra* note 50.
- ¹¹⁰ *Michelin*, *supra* note 50.

- ¹¹¹ *Michelin*, *supra* note 50.
- ¹¹² *Michelin*, *supra* note 50.
- ¹¹³ *Michelin*, *supra* note 50.
- ¹¹⁴ *Michelin*, *supra* note 50.
- ¹¹⁵ *Michelin*, *supra* note 50.
- ¹¹⁶ *Michelin*, *supra* note 50.
- ¹¹⁷ *Michelin*, *supra* note 50.
- ¹¹⁸ *Michelin*, *supra* note 50.
- ¹¹⁹ *Michelin*, *supra* note 50.
- ¹²⁰ *Bailey*, *supra* note 1 at 141.
- ¹²¹ *Bailey*, *supra* note 1 at 141.
- ¹²² *Bailey*, *supra* note 1 at 142.
- ¹²³ *R v. Sharpe*, [2001] 1 S.C.R. 45 at para. 22 [*Sharpe*].
- ¹²⁴ *Bailey*, *supra* note 1 at 142.
- ¹²⁵ *Théberge*, *supra* note 39 at para. 30-31.
- ¹²⁶ *Théberge*, *supra* note 39 at para. 30-31.
- ¹²⁷ *Michelin*, *supra* note 50.
- ¹²⁸ *Hogg*, *supra* note 108 at 1019.
- ¹²⁹ *Michelin*, *supra* note 50.
- ¹³⁰ *BCAA*, *supra* note 50.
- ¹³¹ *BCAA*, *supra* note 50.
- ¹³² *BCAA*, *supra* note 50 at para 109.
- ¹³³ *BCAA*, *supra* note 50 at para 130.
- ¹³⁴ *BCAA*, *supra* note 50 at para 151.
- ¹³⁵ *Laugh it Off Promotions CC v. South African Breweries International (Finance)*, [2005] Case C.C.T. 42/04 (S. Afr. Const. Ct.) [*Laugh it Off*].
- ¹³⁶ *Laugh it Off*, *supra* note 135 at para. 14.
- ¹³⁷ *Laugh it Off*, *supra* note 135 at para. 18.
- ¹³⁸ *Cardtoons*, *supra* note 43.
- ¹³⁹ *Cardtoons*, *supra* note 43 at 962.
- ¹⁴⁰ *Cardtoons*, *supra* note 43 at 967.
- ¹⁴¹ *Cardtoons*, *supra* note 43 at 970.
- ¹⁴² *R v. Keegstra*, [1990] 3 S.C.R. 697 at 729.
- ¹⁴³ *R v. Zundel*, [1992] 2 S.C.R. 731.
- ¹⁴⁴ *R v. Lucas*, [1998] 1 S.C.R. 439.
- ¹⁴⁵ *Sharpe*, *supra* note 123.
- ¹⁴⁶ *Irwin Toy*, *supra* note 54 at para. 47.
- ¹⁴⁷ *Irwin Toy*, *supra* note 54 at para. 47.
- ¹⁴⁸ *R v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 331-32.
- ¹⁴⁹ *Bill C-60*, *supra* note 2.
- ¹⁵⁰ *Hogg*, *supra* note 108 at 995.
- ¹⁵¹ *Charter*, *supra* note 4, s. 1.
- ¹⁵² *R v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*]. *Oakes* has been broadly accepted by both the Privy Council and the House of Lords (*A v. Secretary of State for the Home Department*, [2004] U.K.H.L. 56).
- ¹⁵³ *Oakes*, *supra* note 152 at para. 69.
- ¹⁵⁴ *Oakes*, *supra* note 152 at para. 70.
- ¹⁵⁵ *Hogg*, *supra* note 108 at 878-9.
- ¹⁵⁶ *Oakes*, *supra* note 152 at para. 70.
- ¹⁵⁷ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1).
- ¹⁵⁸ *WCT*, *supra* note 10 at 11; *WPPT*, *supra* note 11 at 18.
- ¹⁵⁹ *WCT*, *supra* note 10 at 11; *WPPT*, *supra* note 11 at 18.
- ¹⁶⁰ *WCT*, *supra* note 10 at 11; *WPPT*, *supra* note 11 at 18.
- ¹⁶¹ *Kerr*, *supra* note 3 at 77.
- ¹⁶² *Irwin Toy*, *supra* note 54 at para. 104.
- ¹⁶³ *Irwin Toy*, *supra* note 54 at para. 104.