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Access to Digital Information: Gift or Right?

*Margaret Ann Wilkinson**

A. INTRODUCTION

There are different factors involved in creating the intellectual property environment within which digital information transactions take place in a networked world. The most important is the attitude of the governments of the various nation states in which aspects of the transactions occur. These attitudes, in turn, shape, and are also shaped by, the second factor involved, international agreements. The third factor is the activity of intellectual property owners. Together these three create the environment within which users experience both digital and non-digital information access to information. That environment, however, is not the same for each nation state, nor does the environment necessarily remain static: for each nation state, the copyright environment reflects a complex interplay between the three factors. This paper will explore the role of “open source” and “open access” movements in Canada and in the United States within the context of the three factors because the blend of the three in the two jurisdictions is different and therefore creates two different environments for access to digital information.

The dominance, among the three factors, of the role of the governments of nation states has been clearly asserted in the Internet environment as the Internet has developed and matured. Despite early notions that the

* Research assistance for this paper was provided by law students Vanessa Bacher and Ann Chmielowski. An earlier version of this paper was delivered at the Digital Copyright in a User-Generated World: Knowledge Policy for the Twenty-first Century Conference, held at The University of Western Ontario in April 2007.

law would be somehow different in the online environment than in the offline environment,¹ nation states have demonstrated their control in this new realm²—although, as in other areas of law where transactions cross jurisdictional boundaries, more than one state at a time can claim jurisdiction in a particular situation.³ This paper will focus on copyright, a historic form of content control that has been virtually universally adopted by governments as appropriate for the digital telecommunications environment. Recalling that copyright laws give the owners of copyright interests certain legislated controls over uses of material that are defined as being “in copyright,” it will become apparent from this paper that, while the open access movement, fuelled as it is by the decisions of copyright owners, appears to have an important and vigorous role to play in the American context, in Canada the role for the movement is much less obvious. The two different approaches, Canadian and American, in providing accessibility to digital content will be tested for “fit” in terms of the international obligations of the two states. Finally, it will be recommended that those copyright holders interested in providing free access to material in the Canadian context consider exploring the opportunity to create a collective.

B. THE DECISIONS OF COPYRIGHT OWNERS

The owner of a copyright interest in a work or other subject matter that is in copyright controls various uses of the work, sound recording, performer’s performance, or broadcast and may therefore make any one of a number of decisions regarding further uses of that information. In the case of a work such as an article or a book, seven possibilities present themselves:

- 1) Assign all the copyright interest to a “traditional” publisher.⁴

1 John Perry Barlow, “The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age (Everything You Know about Intellectual Property Is Wrong)” *Wired* (March 1994), online: www.wired.com/wired/archive/2.03/economy.ideas.html.

2 *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v. Canadian Assn. of Internet Providers*, 2004 SCC 45 [Tariff 22].

3 *Tariff 22*, *ibid.*

4 A traditional publisher, in this context, means a publisher who, following the industrial model of publishing, requires the assignment of an author’s copyright interest in return for giving that author access, through the publisher’s machinery for publishing (originally the printing press itself), to readership.

- 2) Assign some aspects of the copyright interest to “non-traditional” publishers—those publishers who will publish without insisting upon a full assignment of the copyright holder’s interest in the work.
- 3) Retain copyright and grant permissions on a case-by-case basis as requested by potential users.
- 4) Retain copyright and grant certain permissions for use to all users or to certain classes of user.
- 5) Retain copyright and join with other copyright holders in arrangements of collective administration of rights.
- 6) Retain copyright and do not take any steps to enforce the interests.
- 7) Renounce copyright.

The first option was really the only option available to an author who wished to reach any audience up until the late twentieth century. The author, in this historic industrial model, would have had no possibility of self-publishing, particularly to a large audience, because of the expense involved in owning and operating the machinery of reproduction. The publisher would seek full assignment of the copyright in return for the high risk involved in expending the money to publish where the popularity of a publication was usually unknown until the expenses had been incurred. The original industrial reasons for this model of publication have been eroded in the last quarter of the twentieth century, first by the spread of photocopying and then by the spread of digital technology. However, traditional publishers continue to play a role in publishing—and in no small measure due to the value that users place upon the imprimatur of a known press as an indicator of quality. This first choice, therefore, is still a choice frequently made by authors and copyright holders.

The consequences of this first choice, and an environment in which it is entrenched for a number of reasons, can be seen in the academic sphere.⁵ In Canada, copyright is generally taken to belong to professors when they create scholarly works.⁶ During the period of the gestation and writing of

5 See Margaret Ann Wilkinson, “Copyright in the Context of Intellectual Property: A Survey of Canadian University Policies” (2000) 14:2 *Intellectual Property Journal* 141 [Wilkinson, “Survey of Canadian Policies”].

6 In a case such as *Dolmage v. Erskine* (2003), 23 C.P.R. (4th) 495 (Ont. S.C.J.), involving the parties at The University of Western Ontario, the capacity of professors (and not the university) to hold copyright was assumed. In Australia, however, faculty employed by the university, working within the scope of their employment, were found not to hold copyright; the university owned it: *Victoria University of Technology v. Wilson* (2004), 60 I.P.R. 392 (Vic. S.C.). In the Canadian context, it is difficult

the work, the university has borne the costs of the professor's scholarship. In order to be published in established peer-reviewed journals, it has been necessary, at least in the past, to assign the copyright in the work to the publisher of the academic journal.⁷ Then, in order to bring the work back into the scholarly environment of the university, it has been necessary for the university, usually through its library system, to purchase a journal subscription from the publisher.⁸

The second option, partial transfer of copyright, for certain purposes, in exchange for publication, is an option for the copyright holder where the target publication makes this option available. It is slowly becoming more available in certain venues, for example, in university-level academic publishing.

The third option, retaining all copyright interests and giving permission on a case-by-case basis, is becoming more possible for copyright owners, particularly with the increased possibilities for self-publication fostered by the digital telecommunications environment—although, as will

to be certain what the outcome would be of litigation that put this assumption squarely to the test. Under s. 13(3) of the Canadian *Copyright Act*, R.S.C. 1985, c. C-42, as amended, copyright is first owned by the employer when the author is in an employment relationship. What is meant by “employment” is not further defined in the *Copyright Act*. Therefore, presumably, this would be determined with reference to labour law in Canada. Under the labour relations statutes of the various Canadian provinces, a group can only engage in collective bargaining where an employer-employee relationship exists. See Donald D. Carter *et al.*, *Labour Law in Canada* (New York: Kluwer Law International, 2002) at 44 and 250. Since over half of Canada's university faculty have unionized over the past several decades (64 universities out of roughly 78 in Canada (see online: www.caut.ca/pages.asp?page=128) (see “The Register of Post-Secondary and Adult Education Institutions,” online: www.statcan.ca/cgi-bin/imdb/p2SV.pl?Function=getSurvey&SDDS=5075&lang=en&db=IMDB&dbg=f&adm=8&dis=2)), it would appear difficult to argue that Canadian university faculty are not employees, and if they are employees, copyright would be owned by the universities, absent contracts to the contrary.

7 The peer-review process that is an entrenched aspect of promotion and tenure in the university system has reinforced, traditionally, the power of the scholarly presses: the prestigious journals are sought-after by faculty for publication and these are often associated with presses that demand assignment of all copyright interests. Although this situation is slowly changing, particularly in science and medicine, there is still domination by traditional presses.

8 As will become evident below, universities in Canada pay a third time when they purchase licences for reprography from copyright collectives whose members are the publishers of the journals. See Wilkinson, “Survey of Canadian Policies,” above note 5.

be discussed further, it is difficult and time-consuming to police copyright interests as an individual or corporation not usually engaged in publishing.

The fourth option, retaining all copyright interests and giving blanket permissions for certain uses or to certain classes of users, is the foundation for the Creative Commons licensing movement. It is also one option that governments can choose to create for their own creations. Although, as discussed below, it is not a choice available to many American governments, due to other policy decisions of the governments themselves, it is a choice available to Canadian governments. Canada's *Copyright Act*⁹ contains special provisions for government creations but does affirm, at the same time, that governments in Canada hold copyright in works.¹⁰ Various provincial governments have given blanket permissions for use of various copyrighted works held by them to be used.¹¹ The federal government, by regulation, has given the following permission:

- Anyone may, without charge or request for permission, reproduce
 - » enactments,
 - » consolidations of enactments,
 - » decisions, or
 - » reasons for decisions
- Provided
 - » reasonable diligence is used in ensuring accuracy, and
 - » no representation of the copy as official is made.¹²

This copyright permission is only for reproduction of certain works, not for other uses (such as translation) or for all works held in copyright by the Canadian federal government.

The fifth option for copyright holders is to retain their copyrights and join with others in collective administration of their copyrights. This option

9 *Copyright Act*, above note 6.

10 *Copyright Act*, *ibid.*, s. 12.

11 Neither is there uniformity across the provinces about what permissions are given or how they are given. Some, like the federal permission, are given in regulations—others, like Ontario, are in administrative manuals and are less permissions than they are instructions to employees not to enforce copyright interests in certain circumstances (see the sixth option discussed herein). See E. Prokopieva, “Crown Copyright Policy in Provinces and Territories of Canada” (2003, rev. 2007 by Ann Chmielowski) in Margaret Ann Wilkinson, ed., assisted by Vanessa Bacher, *Law 462: Cases and Materials on the Law of Intellectual Property, 2007–2008*, vol. 2 (London, ON: University of Western Ontario, Faculty of Law, 2007) at 267–73.

12 Paraphrased from S.I./97-5 (8 January 1997), C. Gaz. Part II, Vol. 131, No. 1.

is far more commonly selected by copyright holders in Canada¹³ than it is by those in the US. The reasons for this difference between decisions of copyright holders in the two countries lie in choices made by the governments of Canada and the US that will be further discussed in the next section.

The sixth option, retaining copyright but not taking steps to enforce the interests is, in fact, a very frequently selected option by copyright holders: enforcing copyright can be time-consuming and expensive. However, this option is not one that can be relied upon by users, as will be further discussed below.

Copyright legislation does not provide for “renunciation” of copyright interests, but presumably someone who “gives up” their copyright would have no control over subsequent uses of the work¹⁴ and could not exploit the potential of the copyright monopolies for economic value in the future—other than in competition with any others who have decided to exploit the work. The seventh option is also one that is unreliable from the point of view of *users*: it is not clear that a copyright holder’s “renouncing” can be relied upon should that copyright holder subsequently change her or its mind and decide to enforce copyright against a particular user.

Meanwhile, concomitant with the decisions available to copyright holders, users of information can make any one of a series of decisions when faced with an environment involving copyright:

- 1) users can use materials that are not works covered by copyright;
- 2) users can make use of materials in ways not forming part of the copyright holders’ rights bundle;
- 3) users can use materials in ways that do form part of the copyright holders’ rights bundle but are excepted by governments from the purview of the copyright holders’ exercise of their rights; and
- 4) users can use materials in ways that do form part of the copyright holders’ rights bundle but for which they have been given permission by the copyright holders through
 - i) copyright holders’ collectives, or
 - ii) permissions of copyright holders given in advance (open content licensing or Creative Commons), or
 - iii) permissions negotiated directly, from time to time, with copyright holders.

13 The Copyright Board of Canada maintains a list of Canadian copyright collectives: see online: www.cb-cda.gc.ca/societies/index-e.html.

14 Other than through the exercise of moral rights.

It is only in the case of the fourth category of decision by *users* that the choices being made by the copyright holders, described above, become relevant to the availability of information for users. That is, where materials are not covered by copyright, or are not being used in ways governed by copyright, or are being used in ways permitted to users by law despite copyright interests, no action of a copyright holder can affect the activities of users.¹⁵

C. THE ROLE OF PHILANTHROPY IN NATIONAL LIFE

In any of the first four cases of decisions that can be made by *copyright holders*, as discussed above (assigning all the copyright, assigning part of the copyright, retaining the copyright but permitting certain uses on a case-by-case basis, and retaining the copyright but granting certain blanket permissions),¹⁶ the copyright holder has a second decision to make: to seek compensation from users for the assignment or permission or to give it freely. If the copyright holder is not a government but is rather from the private sector, then a decision to give the copyright interest or permission away freely is a form of philanthropy—a gift to users.

Philanthropy plays a large role in many countries—and Canada and the US are no exception.¹⁷ However, philanthropy is proportionately far more

15 As will be discussed further below, when governments enlarge the scope of any of the first three categories available to users, the opportunity of rightsholders to affect the environment of access for users is correspondingly diminished.

16 Where a copyright holder has chosen the fifth option, having a copyright collective administer the copyright holder's rights, the decision about whether to charge for uses or not is part of the administration of the collective and is no longer an individual decision of the rightsholder. Where a copyright holder has chosen the sixth course, to refrain from enforcing the copyright interest, that choice necessarily means the copyright holder will not be compensated for uses—and the implications are the same where the copyright holder attempts to renounce the copyright interest (the seventh option).

17 Both countries have a shared heritage based in the English tradition of philanthropy that developed in Tudor times, when it became standard for gentry to leave grand gifts to their communities. See David Owen, *English Philanthropy 1660–1960* (Cambridge, MA: Belknap Press of Harvard University Press, 1964). See also Peter Dobkin Hall, “Philanthropy (United States)” in John M. Herrick & Paul H. Stuart, eds., *Encyclopedia of Social Welfare History in North America* (Thousand Oaks, CA: Sage, 2005) at 272–74. In the early colonies that later comprised Canada, the British tradition of philanthropy held sway in Upper and Lower Canada (later, roughly, Ontario and Quebec) but the Maritime colonies took government action by enact-

important in the American context than in the Canadian.¹⁸ Much that is created through philanthropy in the US is achieved through government action in Canada. As Michael Hall and Keith Banting point out, some distinctive features of Canadian experience do stand out. For example, the greater

role that the state has played in the development of economic and social life throughout Canadian history, in comparison with the pattern south of the border [in the United States] and in many other countries, is clearly reflected in the sources of funding of the nonprofit sector.¹⁹

In the US, on the other hand, there is a deep-seated avoidance of government involvement in daily life.²⁰ Although the economic conditions of the twentieth century softened this anti-government stance to some degree,²¹ there is still a national preference for philanthropy rather than government social assistance.²²

It is perhaps not surprising that, given this history of philanthropic activity, the open source software movement began in the US during the 1970s.²³ The open source software movement followed upon the “revelation”

ing poor law legislation. See Janice Harvey, “Philanthropy (Canada)” in Herrick & Stuart, *ibid.* at 268–69.

- 18 Charities and nonprofit organizations in Canada rely much more heavily upon federal government funding than do comparable organizations in the United States, which rely much more on private philanthropy. See Michael Hall & Keith Banting, “The Nonprofit Sector in Canada: An Introduction” in Keith Banting, ed., *The Nonprofit Sector in Canada: Roles and Relationships* (Montreal: McGill-Queen’s University Press, 2000) 1 at 2 [Hall & Banting].
- 19 Hall & Banting, *ibid.* at 16.
- 20 After the American Civil War, support for the nonprofit sector became central to American conservative ideology—and it was thought that the problems of poverty and disadvantage could be solved completely by the private sector. See Lester Salamon, “The Nonprofit Sector at a Crossroads: The Case of America” (1999) 10:1 *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 5.
- 21 The New Deal in 1932 was a turning point in the relationship between private and public life in the United States. Private philanthropy was joined by government in meeting the needs of the disadvantaged and social bureaucracy “mushroomed.” See Judith Sealander, *Private Wealth and Public Life: Foundation Philanthropy and the Reshaping of American Social Policy from the Progressive Era to the New Deal* (Baltimore: Johns Hopkins University Press, 1997) at 244.
- 22 Waldemar A. Nielsen, *The Endangered Sector* (New York: Columbia University Press, 1979) at 25–48.
- 23 David Bretthauer, “Open Source Software: A History” (2002) 21:1 *Information, Technology and Libraries* 3. Richard Stallman, who worked in the Artificial Intel-

in law that software ownership and control lay within the sphere of intellectual property.²⁴ Once ownership of rights in software was established in law, a reaction began that saw creators develop a system of not-for-profit control in the software environment that “paralleled” the exploitation by the for-profit sector of software developments. As computers and telecommunications technology were increasingly able to handle content, it became apparent that intellectual property, with its attendant ownership controls, was following the importation of this content into the online and digital environment. This has led, in turn, to the genesis of the open access movement in the US.²⁵ One dominant form of the open access movement is the Creative Commons licensing system. That system has spread from the US into other jurisdictions, including Canada.²⁶ But will it be as successful at its objects outside the US, as it appears to be within? Is the open access ap-

ligence Lab at MIT during the 1970s and 1980s, does not actually identify himself with the Open Source movement but is, nonetheless, considered its originator.

24 In Canada, this “revelation” occurred when all levels of court hearing the case of *Apple Computer Inc. v. Mackintosh Computers Ltd.* found that software came within the existing definition of literary work in the *Copyright Act* and therefore was in copyright for the life of the author plus fifty years as soon as original software was written. See (1986), [1987] 1 F.C. 173 (T.D.), additional reasons (1987), 12 F.T.R. 287 (T.D.), var’d (1987), [1988] 1 F.C. 673, aff’d [1990] 2 S.C.R. 209. For further certainty, Parliament, during the course of the appeals in that litigation, added “computer programs” to the definition of “literary work” in s. 2 of the *Copyright Act*, above note 6, and further defined “computer program” in s. 2 as “a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly, or indirectly in a computer in order to bring about a specific result” (*An Act to Amend the Copyright Act and to Amend other Acts in consequence thereof*, R.S.C. 1985 (4th Supp.), c. 10). In Canada, computer programs *per se* are not subject matter that is patentable (see *Schlumberger Ltd. v. Canada (Patent Commissioner)* (1981), [1982] 1 F.C. 845 (C.A.), leave to appeal to S.C.C. refused, [1981] 2 S.C.R. xi, although computerization can be a novel, unobvious, and useful invention or improvement in an “art, process, machine, manufacture or composition of matter” and therefore can be a material element in a patent (see, for example, *Re Motorola Inc. Patent Application No. 2,085,228* (1998), 86 C.P.R. (3d) 71 (Can. Pat. App. Bd. & Pat. Commr.)). In the US, however, software can be the subject of both copyright and patent, provided that the originality requirement is satisfied in the case of copyright and the other patentability tests for a patent are satisfied (see, for example, *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368, 47 U.S.P.Q.2d 1596 (U.S. Fed. Cir. 1998)).

25 The Creative Commons initiative started as an American nonprofit, registered in Massachusetts, in 2002. See online: <http://creativecommons.org>.

26 As at August, 2007, it offers licences in thirty-eight countries. See *ibid.*

proach, as developed through the Creative Commons approach, a good fit in all jurisdictions? Is it necessary, for example, in Canada? If there is a need in Canada, is open access the best way to fill this need?

D. THE DECISIONS OF GOVERNMENTS

The scope and availability of the various choices for copyright holders just described are directly affected by the decisions of national governments in respect of copyright. Of course, the environment of access to information for users is also shaped by these decisions. A few years ago, American scholar Pamela Samuelson created a map of the public domain situated within the realm of intellectual property²⁷ and reflecting American intellectual property law, but a map drawn from the Canadian perspective, while similar, remains distinctly different.²⁸ The differences are created both by what is and is not included in copyright in each country and also, where there are copyright interests involved, by what exceptions or users' rights (to use the Canadian terminology) are available in each country.

In the first place, copyright is a creation of government. Without the statutory creation of copyright, copyright holders would not have a monopoly interest about which to make decisions. A prime example is the case of copyright interests and the governments themselves. In Canada, as mentioned above, crown copyright is recognized in the *Copyright Act*: the copyright legislation of the US, however, explicitly bars the American federal government from holding copyright in any of its creations.²⁹

In the US, the *Digital Millennium Copyright Act (DMCA)*³⁰ considerably enlarged the scope of the American copyright. On the other hand, in Canada, not only has legislation modelled on the American *DMCA* not been passed by the legislature,³¹ but also the courts have resisted the inclu-

27 Pam Samuelson, "Mapping the Digital Public Domain: Threats and Opportunities" (2003) 66 *Law and Contemp. Probs.* 147.

28 Margaret Ann Wilkinson, "National Treatment, National Interest, and the Public Domain" (2003–2004) 1 *University of Ottawa Law and Technology Journal* 23.

29 17 USC § 105. And many American states have followed suit—although these are examples of choice 7, discussed above (copyright holders renouncing their copyrights), since the state governments cannot legislate directly in the area of copyright (as the provincial governments in Canada cannot).

30 *Digital Millennium Copyright Act of 1998*, Pub. L. No. 105-304, 112 *Stats.* 2860. Section 1201 contains anti-circumvention provisions.

31 Databases are protected under the general copyright regime in Canada where the selection and arrangement of the material meets the originality requirement for

sion of data, facts, or ideas *per se* in copyright. In 2002, it was held that where the software for performance monitoring systems can only be created in one way in order to perform its function, then the expression of the idea of the software is merged with the idea itself and therefore the expression can have no protection in copyright. As the Ontario Court of Appeal put it,

if an idea can be expressed in only one or in very limited number of ways, then copyright of that expression will be refused for it would give the originator of the idea a virtual monopoly on the idea. In such a case, it is said that the expression merges with the idea and thus is not copyrightable.³²

Canada was the first country to legislate in the area of moral rights when they were first included in an international intellectual property instrument.³³ Since 1988, the moral rights in Canada have explicitly included the right of paternity (the right to be associated with the work as the author chooses, whether by name, pseudonym, or anonymously), the right of integrity in the work, and the right not to have the work associated with products, services, causes or institutions that would prejudice the author's honour or reputation.³⁴ In the US, on the other hand, there is no explicit mention of any moral rights protection in copyright legislation and the moral rights aspect of copyright is virtually ignored.³⁵

copyright (see *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1997), [1998] 2 F.C. 22 (C.A.), leave to appeal to the S.C.C. refused, [1998] 1 S.C.R. xv)—and then only to the extent that the whole or a substantial portion of the selection or arrangement of the data is at issue in an infringement suit (see s. 3 of the Canadian *Copyright Act*, above note 6). There was an attempt to introduce American-style protections in Bill C-60, tabled 20 June 2005, particularly ss. 27 and 34, but that bill failed to pass before Parliament was dissolved. Bill C-61 of 2008, below note 85, similarly failed to pass.

- 32 The court of first instance had dismissed the claim of copyright infringement, *Delrina Corp. v. Triolet Systems Inc.* (1993), 47 C.P.R. (3d) 1 at 41 (Ont. Ct. Gen. Div.). The Court of Appeal refused to overturn the judgment: (2002), 156 O.A.C. 166 (C.A.), additional reasons [2002] O.J. No. 3729 (C.A.), leave to appeal to S.C.C. refused (2002), 305 N.R. 398n.
- 33 *Copyright Act Amendment Act, 1931*, 21–22 Geo. V., c. 8, s. 5.
- 34 See *Copyright Act*, above note 6, ss. 2, 14.1, 14.2, 28.1, and 28.2. For a discussion of the role of each of these in society and the relationship between each of them and the moral rights provisions of the *Berne Convention*, see Margaret Ann Wilkinson, “The Public Interest in Moral Rights Protection” (2006) 1 Michigan State L. Rev. 193.
- 35 Congress was somehow persuaded, on the eve of signing the *Berne Convention* in 1989, that American law generally already provided sufficient protection for moral rights and that there was no need to amend the copyright legislation. See Brian E.

In addition to these differences between the two countries in the scope of copyright, there are also important differences in the scope of the exceptions to the rights of rightsholders in intellectual property. In the US, one very important area of exception is the “fair use” provision.³⁶ Again, Canada has a similar but very different set of provisions in its copyright legislation — the fair dealing provisions.³⁷

In Canada the fair dealing provisions, together with the other exceptions to the rights of copyright holders set out in the *Copyright Act*, have been described by the Supreme Court of Canada as embodying a set of “users’ rights.”³⁸ The Chief Justice, in the unanimous decision of the Court in *CCH v. Law Society of Upper Canada*, wrote:

The language [of the fair dealing provision] is general. “Dealing” connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works.³⁹

Moreover, wrote the Chief Justice, under the fair dealing sections of the *Copyright Act*, “Research must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”⁴⁰ Thus, through its judgments in copyright rendered between 2002 and 2006, the Supreme Court of Canada has come to the position that Canada’s *Copyright Act*

- 1) permits agents for users who are exercising fair dealing rights and those agents can claim those fair dealing protections;
- 2) permits claims of fair dealing even where there are special-interest exceptions: not-for-profit “libraries, archives and museums” or “educational institutions”;

Koeberle, “Play It Again, Samantha? Another Argument for US Adherence to Article 6bis of the *Berne Convention*” (1989) 27 Duq. L. Rev. 609. Most commentators agree that moral rights protection is almost completely absent in the United States: see, for example, Edward J. Damich, “The Right of Personality: A Common-Law Basis for the Protection of Moral Rights of Authors” (1988) 23 Ga. L. Rev. 1; and David R. Grant, “Rights of Privacy: An Analytical Model for the Negative Rights of Attribution” (1992) Utah L. Rev. 529.

36 17 USC § 107.

37 *Copyright Act*, above note 6, ss. 29, 29.1, & 29.2.

38 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at paras. 12 & 13 [*CCH v. Law Society*].

39 *CCH v. Law Society*, *ibid.* at para. 63.

40 *CCH v. Law Society*, *ibid.* at para. 51.

- 3) must be interpreted to embody research, private study, criticism, news reporting, review, and other provisions limiting the rights of rights-holders as representing rights for users;
- 4) does not cover information in records where there is not a demonstration of skill and judgment because such information does not lie within an expression included in copyright and therefore is not controlled by a copyright holder: mere copying of information does not create an original work; and
- 5) can encompass alternative means of compensating rightsholders through such mechanisms as the levy on blank tapes and the related private copying exemption.

Canada, therefore, finds itself in a position where many activities of users can be exempt from the copyright holder's control. For example, it is unlikely, but possible, that *every* act done with copyright material within an educational institution, which would otherwise fall within the purview of the copyright holder, will fall under a users' right (or exception): first, all educational institution employees can act as agents for their students and the students themselves have fair-dealing rights to private study, research, criticism, review, and news reporting (the latter three items with acknowledgement where possible); second, the employees of educational institutions themselves have fair-dealing rights for their *own* private study, research, criticism, review, and news reporting; and thirdly, activities by members of non-profit educational institutions (though not those of for profit educational institutions) that fall outside fair dealing may still be exempted under the exceptions provided for educational institutions in the Canadian *Copyright Act*.⁴¹ Indeed, if not all, certainly the majority of the activities within an educational institution will be found to be exempt from the control of copyright holders.⁴²

Another distinguishing feature of the Canadian copyright environment is the extent to which the Canadian legislation encourages the collective administration of copyrights. Beginning in 1988, the Canadian govern-

⁴¹ *Copyright Act*, above note 6, ss. 29.4–30.

⁴² See Margaret Ann Wilkinson, "Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 331 [Wilkinson, "Filtering the Flow from the Fountains of Knowledge"]. This question is one with which the Canadian Copyright Board is currently wrestling in the proceeding concerning Access Copyright's Elementary and Secondary School Tariff 2005–2009.

ment has actively encouraged this approach by making extensive legislative provisions to smooth this avenue of connection between copyright holders and users: collectives of copyright holders⁴³ have been exempted from the purview of Canada's antitrust or anti-combines legislation⁴⁴ and the power of the Copyright Board of Canada to act as mediator for users and collectives has been increased.⁴⁵ These collectives for the holders of Canadian rights have, in turn, created reciprocal agreements with collectives in other countries, including the US. However, in general, American collective rights organizations do not represent the percentage of rightsholders that are represented by their Canadian counterparts.⁴⁶

Canada's collective licensing regime has been strengthened by Parliament and adopted by a wide range of copyright owners to such an extent that it may now be the case that Canada should be classified as a country with an extended repertoire or extended licensing regime.⁴⁷ Under such a regime, collectives are deemed to represent all rightsholders of a given class,

43 It should be noted that the *Copyright Act*, above note 6, does not exempt collectives of copyright users from the purview of the *Competition Act*, R.S.C. 1985, c. C-34, as amended. This point has been fully investigated by Cathy Maskell, *Consortia Activity in Academic Libraries: Anti-competitive or in the Public Good?* (Ph.D. Dissertation, University of Western Ontario, 2006). See also Catherine A. Maskell, "Consortia: Anti-competitive or in the Public Good?" (2008) 26(2) *Library Hi-Tech*, 164–83.

44 *Copyright Act, ibid.*, s. 70.5 exempts collectives from the purview of the *Competition Act, ibid.*

45 *Copyright Act, ibid.*, s. 70.12ff.

46 See Glynn Lunney, "Copyright Collectives and Collecting Societies: The United States Experience," in Daniel Gervais, ed., *Collective Management of Copyright and Related Rights* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006) 311; where it is explained that collectives *per se* probably violate American antitrust legislation and the question is raised of how long the groups in the US that are organized as copyright collectives can last, given that reality. On the other hand, "collecting societies" such as the Copyright Clearance Centre in the US, where the copyright holders set their own terms and conditions for copyright permissions, but the administration is handled for them through the society, would seem to be compliant with antitrust requirements.

47 As pointed out by Daniel Gervais in "The Changing Role of Copyright Collectives," in Daniel Gervais, ed., *Collective Management of Copyright and Related Rights, ibid.*, c. 1. One indication in support of this position is the provision in s. 38.2 that a copyright holder not affiliated with a collective is limited, in an infringement lawsuit for unauthorized reprography against an educational institution or library, archive, or museum (as these institutions are defined in s. 2 of the *Copyright Act*, above note 6), to damages equal to the royalties that would have been payable by the infringer to the collective.

not just those who have chosen to actively become members of the collective. Users, where such a regime is in place, can then rely completely upon a licence from the collective. If Canada is not operating under such a regime, then users must be aware that permissions or licences from the collective will only be effective insofar as rightsholders are members of the collective or are members of collectives that have reciprocal arrangements with the licensing collective.

The Canadian environment surrounding open access initiatives thus differs from the American in at least five ways:

- 1) much of Canada's public information is held in crown copyright, whereas in the US, governments are frequently barred from holding copyright;
- 2) Canada has not enacted the same level of *sui generis* database and anti-circumvention legislation that the US Congress has;
- 3) Canada has actively legislated in the area of moral rights whereas the US has not;
- 4) Canada has strong language from its Supreme Court now characterizing as "users' rights" what are still regarded as "exceptions" to the rights of rightsholders in the American context (and clearly articulating an expansive scope for fair dealing in Canada); and
- 5) Canada has a well-developed system of collective rights administration for copyrights.

These differences put both users and copyright holders in Canada in different positions than their counterparts in the US. Thus the options available to both users and copyright holders in Canada differ from those available in the US. As will be further discussed, these differences would appear to make the selection of philanthropic donation by copyright holders, through participation in open access initiatives like the Creative Commons movement, less central to meeting the needs of users in Canadian society.

But first these differences observed between Canada and the United States must be placed in their constitutional and international contexts to see whether they are differences that are likely to linger, or differences that will be obliterated shortly by government action.

1) Nation States, Governments, and Constitutions

The composition of government in a particular sovereign state is determined by its constitution, whether written or otherwise. In the area of copyright, there is a significant difference between the US and Canada in constitutional terms. The US Congress made huge changes in copyright law toward

the end of the twentieth century. Perhaps inevitably, this engendered constitutional challenge in the courts. Consequently, the US Supreme Court issued a landmark judgment articulating the constitutional position of copyright in the US. There has not been a similar judgment issued by the Supreme Court of Canada.

In the US Constitution, the power to legislate in the area of copyright is articulated as follows: “The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁴⁸

Congress, during the last quarter of the twentieth century, extended the general term of copyright from twenty-eight years (with a possible renewal period of a further twenty-eight years) first to the life of the author of a work plus fifty years, and then to the life of the author plus seventy years. (It should be noted that, throughout this period and even still, the period of copyright in general in Canada has remained the life of the author plus fifty years.) In 2003, in the case of *Eldred v. Ashcroft*,⁴⁹ this second extension was challenged on constitutional grounds, invoking the American constitutional protection of freedom of speech, the First Amendment.⁵⁰ The US Supreme Court held that because of the particular wording of article 8 of the Constitution, Congress had been given wide powers to create an appropriate balance between access to information and the monopolies and controls inherent in copyright ownership. A majority of the Supreme Court held that the copyright extensions passed by Congress had not overstepped its constitutional capacity under this wide wording in article 8.⁵¹

In Canada, on the other hand, the constitutional ability of the federal government to legislate in the area of copyright is articulated in the one word “copyright.”⁵² Thus, the Canadian Supreme Court, were it ever to be

48 US Const., art. I, § 8, cl. 8.

49 537 U.S. 186, 123 S. Ct. 769 (2003), rehearing denied 538 U.S. 916, 123 S. Ct. 1505 (Mem. 2003).

50 US Const. amend. I.

51 Justice Ginsburg delivered the opinion of the court in which Rehnquist C.J., O’Connor, Scalia, Kennedy, Souter, and Thomas JJ., joined. Stevens and Breyer JJ. filed dissenting opinions. Justice Stevens was of the opinion that the impugned legislation improperly extended the lengths of existing copyrights. Justice Breyer would have read the Copyright Clause of the Constitution in light of the First Amendment and held the statute unconstitutional.

52 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(23), reprinted in R.S.C. 1985, App.II, No.5.

faced with the same issue as came before the American courts in *Eldred v. Ashcroft*, would undertake an entirely different analysis than did its American counterpart in that case.

In a constitutional challenge involving Canada's freedom of speech constitutional provision, section 2(b) of the *Canadian Charter of Rights and Freedoms*,⁵³ and the Canadian federal government's enactments with respect to copyright,⁵⁴ Canada's Supreme Court would begin directly with analysis of the impugned legislation in terms of the section 2(b) right to freedom of expression, in light of section 1 of the *Charter*⁵⁵ (which has no direct counterpart in the US Constitution), which makes Canada's guaranteed rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁵⁶

The point here is twofold: first, neither in Canada nor in the US is the legislative arm of government, which is responsible for copyright, beyond the oversight of the courts in terms of constitutional challenges; and, second, the US Congress has been adjudged by the US Supreme Court to have a greater latitude before the courts will interfere than would probably be the case should the Canadian courts review the Canadian situation. It is the first point that reinforces the claim made in this discussion—that the role of the nation state is the most important in determining the environment of copyright in the digital age. In Canada and in the US, as in all countries,⁵⁷ the law of the nation state will govern in any situation where

53 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*].

54 The Supreme Court of Canada, in *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 at paras. 177–82 [the Harvard Mouse case in patent], Justice Bastarache for the majority, indicated a willingness to apply the *Charter* in an appropriate statutory intellectual property case.

55 *Charter*, above note 53, s. 1, states that the freedoms set out in the *Charter* are subject only to such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society. The “*Oakes test*” has become the accepted approach to analysis of this section. It involves three elements: the government measures restricting the freedom must be rationally connected to their objective(s); the measures should only impair the freedom minimally; and, the deleterious effects of the restriction must be proportional to the benefits of the legislation being challenged. See *R. v. Oakes*, [1986] 1 S.C.R.103.

56 *Charter, ibid.*

57 This point is especially clear for countries, like Canada and the US, where treaties and agreements are never self-executing in domestic law, but must be implemented through enabling legislation. Because of issues involving the division of power in federated states like Canada and the US, federated states usually cannot be among

there is conflict between international treaties or agreements to which the country has made itself signatory and the enactments or constitution of the nation state itself.

In the US, the government has dramatically enlarged the reach and the power of the copyright holder over the past quarter century, while the exceptions to the rights of copyright holders legislated by Congress have remained largely static. In Canada, on the other hand, there has been no comparable enlargement of the copyright holders rights, in part because the scope of copyright was larger throughout the first three-quarters of the twentieth century, but also because Canada has not taken copyright legislation as far as the US has in the last quarter of the twentieth century. Meanwhile, in Canada, there has been a very clear articulation of users' rights within the framework of the copyright legislation.⁵⁸

2) The International Context of Copyright

There has been an international dimension to copyright law since the earliest development of copyright itself. The two fundamental approaches to copyright developed in France⁵⁹ and in England⁶⁰ during a period of great international economic rivalry between the two states. Each system of national monopoly was designed to further the economic interests of its nation-state.⁶¹ The decision of the US, for centuries, to legislate copyright in ways that differed markedly from the emerging international norm was a decision of economic positioning in the international environment for

the countries where treaties and agreements are self-executing. For example, in Canada, the federal government has most of the treaty-making capacity (see s. 132, taken together with the "peace, order and good government" language of s. 91 of the *Constitution Act, 1867*, above note 52), but, if it involves Canada in a treaty in an area where it has no constitutional ability to make law, implementation of that treaty must necessarily await the legislative decisions of each of the provinces.

58 Wilkinson, "Filtering the Flow from the Fountains of Knowledge," above note 42.

59 *Droit d'auteur* has been part of law in France since the French Revolution: see André Françon, *Le Droit d'auteur: aspects internationaux et comparatifs* (Cowansville, QC: Yvon Blais, 1993) at 121–22.

60 Copyright in England, beginning with the *Statute of Anne, 1709* (U.K.), 8 Anne, c. 19.

61 See Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (London: Centre for Commercial Law Studies, Queen Mary College, 1987) at liii (in the Preface).

the emerging nation.⁶² As noted by Justice Estey in the Supreme Court of Canada in 1979,

The United States statutes have not been based upon the international copyright treaties of the nineteenth and twentieth centuries, being the *Berne Convention* of 1886 and the *Rome Copyright Convention* of 1928, as the United States of America did not become signatories thereto. Indeed, it was not until the adoption by that country in 1955 of the *Universal Copyright Convention* of 1952 that the United States participated in the field of international copyright law other than by a collection of bilateral agreements.⁶³

However, in the nineteenth century, a number of international initiatives involving information exchange began on a large scale.⁶⁴ One of these, the *Berne Convention* of 1886,⁶⁵ focused on the coordination of copyright between countries. Countries were free to join the *Berne Convention*, or not, and, even after having joined, were free to adopt newer versions of the convention if they wished⁶⁶—but they were also free not to do so. The US, for nearly a

62 See Edward Samuels, *The Illustrated Story of Copyright* (New York: Thomas Dunne Books/St. Martin's Press, 2000) at 7. The US created a form of copyright as early as 1790, but only for works created by Americans. It did not extend protection to foreign works until 1954, and even works by foreigners created in the US did not receive copyright protection until 1891.

63 *Compo Co. v. Blue Crest Music Inc.* (1979), [1980] 1 S.C.R. 357 at 367 [*Compo*].

64 The International Telegraph Union (1865, Paris, now the International Telecommunications Union, see online: www.itu.int/aboutitu/overview/landmarks.html.); the Universal Postal Union (begun with the *Treaty of Berne*, 1874, see online: www.upu.int/about_us/en/history.html.); the *Paris Convention for the Protection of Industrial Property*, 1883; and, most important in this context, the *Berne Convention* on copyright, below note 65 (1886).

65 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 U.N.T.S. 221, as last revised 24 July 1971. See online: www.wipo.int/treaties/en/ip/berne/trtdocs_woo01.html. Canada adhered to this version on 26 June 1998 [*Berne Convention*].

66 Including the *Rome Convention of 1928*, to which Justice Estey referred in the *Compo* decision, quoted above note 53.

century, chose not to join the Berne Union. Canada chose to be a part of the Berne Union,⁶⁷ but to adhere to the convention at only the 1928 level.⁶⁸

Meanwhile, in the context of international trade agreements, with the expansion of the *Free Trade Agreement* of 1989⁶⁹ into the *North American Free Trade Agreement (NAFTA)*⁷⁰ in 1994, Canada and the US first experienced the inclusion of intellectual property in a trade agreement with binding commitments reinforced through a dispute resolution process.⁷¹ The intellectual property provisions of *NAFTA* were structured to include the *Berne Convention* by reference as the basis of the copyright provisions of the *NAFTA* and then make some additions in the text of *NAFTA* itself.⁷² It was the most recent level of the *Berne Convention* that was included (from 1978),⁷³ Canada upgraded its legislation to reflect the 1978 version of the *Berne Convention* and eventually indicated its adherence to the later *Berne Convention*.⁷⁴ The US, for the first time, became a member of the Berne Union.⁷⁵

67 Indeed, Britain was a founding member of the Berne Union and agreed to its obligations immediately (see the *International Copyright Act of 1886* (U.K.), 49 & 50 Vict., c. 33, which applied to Canada as a Dominion) and ratified the *Berne Convention* with effect from 5 December 1887.

68 Canada first became a signatory, in its own right, to the *Berne Convention* at the *Rome Copyright Convention of 1928*. The current *Copyright Act* was first passed by Parliament in 1921: S.C. 1921, c. 24. This Act was revised through *An Act Amending the Copyright Act, 1923* (13–14 Geo. V, c. 10), which came into force in Canada on 1 January 1924.

69 US and Canada, 22 December 1987, Can. T.S. 1989 No. 3 (entered into force 1 January 1989).

70 US, Canada, and Mexico, 17 December 1992, Can. T.S. 1994 No. 2 (entered into force 12 January 1994) [*NAFTA*].

71 Mexico, the third member of *NAFTA*, also, of course, had the same experience.

72 The basis of other intellectual property provisions was the *Paris Convention* which, from 1883, had existed in the industrial property environment of patent, trademark, and unfair competition.

73 The *Berne Convention* 1886, which came into force on 5 December 1887, was followed by the *Additional Act of Paris* 1896, which came into force 9 December 1897, the *Berlin Revision* 1908, which came into force 9 September 1910, and was concluded by the *Additional Protocol of Berne* in 1914, which came into force 20 April 1915, the *Rome Revision* 1928, which came into force 1 August 1931, the *Brussels Revision* 1948, which came into force 1 August 1951, the *Stockholm Revision* 1967, which, for its administrative sections only, came into force in 1970 but which, in terms of its substantive provisions, never came into force and was reviewed and replaced by the *Paris Revision* 1971, which came into force 10 October 1974.

74 *Berne Convention*, above note 65.

75 In 1989.

The intellectual property provisions of *NAFTA* were swiftly emulated in the huge, multilateral World Trade Organization (WTO), of which both Canada and the US were founding members. The *Trade Related Aspects of Intellectual Property Agreement* was a part of the WTO Agreement.⁷⁶ Like the *NAFTA*, as well as containing provisions dealing with various aspects of intellectual property itself, *TRIPS* also incorporated, by reference, virtually all of the text of the *Berne Convention*.⁷⁷ And, again, there is a binding dispute resolution process that forms part of the WTO.

The US lobbied successfully to ensure that *TRIPS* explicitly omits the requirement for adherence to article 6bis of the *Berne Convention*, but moral rights remain a part of the *Berne Convention* and *NAFTA*. The US, of course, is now signatory to the *Berne Convention* itself, but the *Berne Convention* has no sanctions against non-compliance such as exist in the international trade environment. Nevertheless, as described earlier, other countries, including Canada, make a much more robust effort to comply with the moral rights requirements of the *Berne Convention* than does the US.⁷⁸

Both *NAFTA* and *TRIPS* tend to privilege copyright holders over users. Each contains a version of the “three-step test,” which has become common in the international intellectual property environment recently.⁷⁹ Article 13 of *TRIPS* articulates the test as follows:⁸⁰

Members [states] shall confine limitations or exceptions to exclusive rights

76 *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994), 33 I.L.M. 1144 [*TRIPS*].

77 Note that art. 6bis of the *Berne Convention*, on moral rights, which is, by reference, part of *NAFTA*, was deliberately omitted from *TRIPS*: see art. 9(1).

78 Since *NAFTA* incorporates by reference art. 6bis of the *Berne Convention* on moral rights and has a reasonably robust dispute resolution mechanism and enforcement process, it is possible that the US could lose a challenge from Canada or Mexico on moral rights grounds at some future date should occasion arise.

79 The “three-step test” originates in the *Berne Convention*—but there it appears only in connection with the right of reproduction (art. 9(2)). There is a version in *NAFTA*, art. 1709(6). A version also appears in the more recent *WIPO Copyright Treaty*, 20 December 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997), art. 10, and the *WIPO Performances and Phonograms Treaty*, 20 December 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997), art. 30.

80 See also *TRIPS*, above note 76, art. 30. Both *NAFTA* and *TRIPS* are discussed in this connection by Margaret Smith, “Patent Protection for Pharmaceutical Products under the World Trade Organization Agreements and the *North American Free Trade Agreement*” (1997), online: <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/MR/mr145-e.htm#PROVISIONStxt>.

- To certain special cases
- Which do not conflict with a normal exploitation of the work
- And do not unreasonably prejudice the legitimate interests of the right holder.

It may be noted that this language in the international instruments differs considerably from the language now prevalent in the Supreme Court of Canada with respect to copyright. Justice Binnie has written:

The proper balance . . . lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists . . . as it would be self-defeating to undercompensate them . . .⁸¹

Excessive control . . . may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.⁸²

And, in a case directly involving the digital environment, Justice Binnie wrote again, saying,

Under the *Copyright Act*, the rights of the copyright owner and the limitations on those rights should be read together to give “the fair and balanced reading that befits remedial legislation” . . .⁸³

[The exception to the rights of the copyright holder at issue] is not a loophole but an important element of the balance struck by the statutory copyright scheme.⁸⁴

81 *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para. 31.

82 *Ibid.* at para. 32.

83 *Tariff 22*, above note 2 at para. 88.

84 *Ibid.* at para. 89. Now it is true that by 2006, when the most recent copyright case, *Robertson v. Thomson Corp.*, 2006 SCC 43 [*Robertson v. Thomson*], was decided, the Supreme Court that had decided the earlier 2004 copyright decisions had changed in composition: Justices Iacobucci, Major, and Arbour have been replaced by Justices Abella, Charron, and Rothstein. Whereas the Court's decisions in *CCH v. Law Society*, above note 38, and *Tariff 22*, *ibid.*, were virtually unanimous (Justice LeBel wrote a separate judgment in *Tariff 22* in which he was the only justice to raise privacy concerns), the most recent decision in 2006 was a close 5:4 split decision. In *Robertson v. Thomson*, Justices LeBel and Fish wrote for the majority, with Justices Rothstein, Bastarache, and Deschamps joining. Justice Abella wrote for the minority, joined by Chief Justice McLachlin (the author of the unanimous judgment in *CCH v. Law Society*), and Justice Binnie (author of the majority judgments in the

The discrepancies between the kind of balancing language being used by the Supreme Court of Canada and the rightsholder-dominated language of the international trade agreements to which Canada is a party may soon place the Canadian government in a challenging position.

International agreements, once entered into, are perceived as limiting domestic national policy options, although public international law provides few effective sanctions where a nation state fails to live up to its international commitments. Certainly the migration of intellectual property into the international trade environment has upped the stakes for member nations, like Canada, since non-compliance puts a nation at risk of trade sanctions. Even so, international commitments are not binding on Canada's legislatures. On the other hand, if Canada's attempts to implement legislation to put it in compliance with its trade obligations run afoul of Canada's Constitution, the courts will strike down that legislation. International trade obligations are irrelevant to *Charter* concerns.

The use by Canada's Chief Justice of "rights" language in discussing the place of users in the copyright environment gives additional weight to concerns that further erosion of users' rights or exceptions to copyright holders' rights in Canada's copyright legislation will engender *Charter* scrutiny, focused on the right to freedom of expression, by the courts. Because of this, and despite grumbling from the foreign parties citing *TRIPS* or *NAFTA*, the users' rights currently in place in Canada's *Copyright Act* seem robust and likely to continue.⁸⁵

Thus it seems likely that the differences between Canada and the US in terms of the copyright environment surrounding copyright holders and

2002 *Théberge* decision, above note 81 (a 4:3 split) and in the *Tariff 22* decision) and Justice Charron. The majority in *Robertson v. Thomson* says that the "process" is not important to its decision—just the "context" of the presentation of the works at issue, and in this way it distinguishes the approach of the earlier Supreme Court in *Tariff 22*. The minority in *Robertson v. Thomson* says the "process" approach should have been used. The issue in *Robertson v. Thomson* did not involve users' rights directly, although the public ultimately consumes the newspapers and online products that were at issue: the *lis* was between contributors to the newspaper and the newspaper publisher.

85 Bill C-60 of the previous Conservative administration fell when the government called the last election. There have been rumours of new copyright legislation for several years now but introduction of any bill has been long-delayed in the current minority government situation. There was a bill before the House of Commons, Bill C-61, *An Act to Amend the Copyright Bill*, 2nd Sess., 39th Parl., 2008 (first reading 17 June 2008), which also fell because of an election call.

users are likely to continue to exist, despite international pressures for conformity amongst nations, because of differences in constitutions and national character. Given that likelihood, what is the future for “open access” philanthropy in the two nations?

E. OPEN ACCESS IN CANADA AND IN THE US

One problem that the open access movement has encountered as it has branched out from the US is that in most countries there is a second set of rights involved in the copyright environment—the moral rights. Moral rights do not necessarily lie with the holder of the economic rights in copyright. In some cases, the author of a work, who is the holder of the moral rights,⁸⁶ can frustrate the exercise of validly held economic rights in a work.⁸⁷ Thus, acting alone, the philanthropy of the holder of the economic rights in most countries may not be enough to secure for users the right to use the material.⁸⁸ In the US, however, since it is generally agreed that the moral rights are largely absent from the copyright environment,⁸⁹ when a copyright

86 The period of moral rights protection varies from country to country. In Canada the period of protection for the moral rights is the same as the period of protection for the economic rights. Thus, for the author’s lifetime, the author is the owner of the moral rights—but for the fifty-year period following the death of the author, the author’s heirs are the owners. In Canada, while the moral rights cannot be assigned, they can be waived (see *Copyright Act*, above note 6, s. 14.1(2)), but in other jurisdictions, waiver is not permitted (in France, for example, as in most European countries, moral rights are “perpetual, inalienable and imprescriptable,” quoted by Charles R. Beitz from the *French Intellectual Property Code*, L121-1 found in *UNESCO Copyright Laws and Treaties of the World*, vol. 1, in “The Moral Rights of Creators of Artistic and Literary Works” (2005) 13(3) *J. of Political Philosophy* 330 at 332).

87 For example, the holder of the economic right to public display of an artwork could give permission for display of a work but the exercise by the author of her moral right to not have the work associated with products, services, causes, or institutions that would prejudice her honour or reputation could frustrate the efforts of a user to put together a public display which included that artwork.

88 This reality is explicitly acknowledged in the Canadian version of the Creative Commons licence: online, www.creativecommons.ca.

89 J.A.L. Sterling notes that the inclusion of moral rights protection in the *Berne Convention* after 1928 was one of the stumbling blocks for many years for the US (J.A.L. Sterling, *World Copyright Law: Protection of Authors’ Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (London: Sweet & Maxwell, 1998) at 280). The US, since joining the Berne Union, has passed a very limited law in the moral rights area, providing a right of integrity to certain defined groups of artists: *Visual Artists’ Rights Act of 1990*,

holder donates the economic interest to users, it is enough to permit the user to use the material as specified by the donor of the economic interest.⁹⁰

Another challenge for the open-access movement in Canada is that the philanthropy of the copyright holder is unnecessary when either the material that is sought to be used does not attract copyright protection in Canada⁹¹ or, in the case of material that is in copyright in Canada, users are guaranteed a right of access and certain uses of works pursuant to the users' rights aspects of the *Copyright Act*.

The final challenge for the open-access movement in Canada is the reach of the collective regime in Canada. If, as discussed above, Canada *is* operating under an extended repertoire or extended licence regime, the existence of a collective licence with an appropriate collective will protect any user from liability for infringement even from a non-member and will thus render redundant the efforts of copyright holders, such as those using the Creative Commons licence approach, to individually licence uses that are deemed to be administered by the recognized collectives. The open-access permissions would only be relevant for those users who did not have blanket licences in place.

If, on the other hand, Canada *is not* operating under an extended repertoire regime, then all users, even users with collective licences, will be able to breathe more easily about those rightsholders not represented by the collective, where it can be established that those "unrepresented" rightsholders have publicly "donated" their rights. In this event, the public access movement would still provide some value in the Canadian blanket-licence context.

In either case, whether Canada is an extended licensing regime or not, if enough rightsholders decide to be philanthropic and donate their rights,

Pub. L. No. 101-650, H.R. 5316, 17 U.S.C. § 106A. Even within this ambit of this law, however, the moral rights can be waived: see § 106A(e)(1).

- 90 Interestingly though, the American version of the Creative Commons licence, like others, including the Canadian, mentions moral rights toward the end of the contract and explicitly states that the licence does not cover them: see online: <http://creativecommons.org/licenses/by-sa/3.0/US/>.
- 91 Recall that all material in Canada, regardless of source or form, has a shorter term of protection than the life-plus-seventy-years term that is now the norm in the US. For any material being dealt with in Canada, the maximum possible term of protection is only the life of the author plus fifty years. Recall also that the courts in Canada have recognized the doctrine of merger and will not find a copyright interest where the expression of the idea is the only, or one of the only, ways to express a particular idea. And, finally, recall that Canada has not enacted legislation to protect databases and digital rights management as the United States has.

it would seem to be more efficient and better aligned with the Canadian copyright environment if those copyright holders formed a new collective of like-minded rightsholders that could be recognized under the Act.⁹² This would be possible even where there are collectives representing rightsholders in a particular market (since more than one organization can be recognized in a particular market).⁹³ In the electronic rights environment there is not at present a collective in place for literary works,⁹⁴ for example. In the music environment there is.⁹⁵ In either case there would be room and a role for a philanthropically based collective of rightsholders.

92 A “collective society” is defined in s. 2 of the Canadian *Copyright Act*, above note 6, as a society, association or corporation that carries on the business of collective administration of copyright. . . for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and (a) operates a licensing scheme, applicable in relation to a repertoire of works . . . of more than one author . . . pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses . . .

This definition was added to the *Copyright Act* in 1997, see S.C. 1997, c. 24. There are at least four different systems of administration in relation to collective societies legislated in the Canadian *Copyright Act*. For administration of rights in works generally s. 70.1 addresses

a collective society that operates (a) a licensing scheme, applicable in relation to a repertoire of works of more than one author, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of an act mentioned in section 3 in respect of those works . . .

Such a collective does not need to have its tariff set by the Board. In the case of the philanthropic collective proposed here, the collective could set its royalties at \$0 and, pursuant to s. 70.12, “for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses . . . (b) enter into agreements with users.”

93 Although the Copyright Board frowns upon this practice, it is obviously contemplated by the legislation: see, for example, *ibid.*, s. 38.2(2) which assumes the possibility of multiple reprographic societies. See also Mario Bouchard, “Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia” in Daniel Gervais, ed., *Collective Management of Copyright and Related Rights*, above note 46, 283 at 286.

94 Thus, for the moment, a user must locate and approach each individual rightsholder in order, for example, to get permission to post materials in copyright in Canada to the Internet.

95 SOCAN administers this right on behalf of its members: see *Tariff 22*, above note 2.

The “philanthropic” collective would become part of the dominant landscape of copyright ownership in Canada and be visible in that connection to users, as well as recognizable to policy-makers and administrators in government.⁹⁶ Moreover, in an adjudication involving tariffs, the existence of the “philanthropic” collective that was donating its permissions and licences would be squarely before the Copyright Board of Canada as it set the “fair” tariff for any other collective in a particular sector.

Even if those interested in pursuing the philanthropic approach in Canada do not create a collective, at the very least, in order to affect the economics of the copyright environment in Canada, when the Copyright Board is considering any tariff where there is active open access activity in the sector, evidence of the rate of participation in the open access movement (such as numbers of Creative Commons licences issued in Canada for a particular sector represented otherwise by the applicant collective) should be made available to the Copyright Board to take into account when establishing the tariff for the corresponding collective.

F. CONCLUSION

Although there has long been an international dimension to copyright, it is, at the end of the day, a matter for the jurisdiction of individual nation states. Governments within those nation states will find themselves bounded in copyright decision making by a number of factors: their na-

96 As the legislative environment in Canada continues to evolve, such a philanthropic collective would be able to take advantage of all the provisions of the *Copyright Act* provided for collectives and users holding licences from it would also receive all the statutory benefits flowing to those with relationships with collectives. For example, in the current *Copyright Act*, educational institutions who have licences from reprographic collectives receive the benefit of s. 30.3 whereas others do not (although that particular benefit is probably rendered moot by the interpretation of the fair dealing provisions by the Supreme Court in *CCH v. Law Society*, above note 38: see Margaret Ann Wilkinson, “Filtering the Flow from the Fountains of Knowledge,” above note 42). It has also become common practice for copyright collectives to routinely register the interests of their rightsholders in the Copyright Register (although registration is not required, it does have some evidentiary advantages under the *Copyright Act*). Should the proposed philanthropic collective take up this practice, or at least make information about its repertoire available to users, it would help users by providing an increased collection of information about the state of copyright in Canada.

tional histories and traditions, their international agreements, but, perhaps most controlling in many circumstances, their constitutions.

Although Canada and the US now have similar international commitments in the copyright area, their national histories and traditions are dissimilar (and, most especially to this analysis, dissimilar in the realm of copyright) and their constitutions differ with respect to copyright. These differences mean that the role that copyright holders play by philanthropically participating in the open access movement is different in the two countries.

Although providing access to users through the philanthropic activities of copyright holders fits well within the context of the current international trade environment for copyright, it does not guarantee users permanent, free, and universal access to information in the way that legislated users' rights provide those guarantees.

Canada's current copyright environment is more balanced than the current American situation, explicitly providing three sets of rights: for copyright holders, for moral rightsholders, and for users. The American environment has become dramatically tipped toward control by copyright holders over the past twenty years. Given the balance of interests represented in the Canadian legal environment, there is less of a role for copyright holders' philanthropy. This is consistent with Canada's historic nature and probably best in line with its constitutional priorities. On the other hand, the US Supreme Court has already ruled that Congress has latitude to establish the copyright environment in the US and that measures taken by the US (exceeding even the copyright-holder-dominated requirements of the current international trade agreements) are constitutional. In the American environment, then, the copyright-holder-based philanthropy of the open access movement is critical to user access and it is indeed fortunate that philanthropy has such a strong and enduring presence in American society.

In Canada, it is suggested that those copyright holders interested in philanthropic aims explore the option of creating a collective, rather than simply adopting open access initiatives generated from the US. Because of the impact of collectives in Canada and the enlarged regime of legislated users' rights, individual philanthropic gestures through open source licensing using, for example, the Creative Commons licence will be lost, or at least diminished, in the Canadian context. A philanthropically based collective in the Canadian context, on the other hand, could have a greater impact on the copyright environment for Canadian users.