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The Copyright Board and Tribunals Process: Users in the Balance

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Abstract

The wholesale adoption of copyright collective management as a public policy tool has had an extraordinary impact on the information landscape. The unfettered expansion of collective rights organizations throughout the 20th century has resulted in increased social costs and a burgeoning bureaucracy surrounding the collective use of rights.

This thesis considers the role of copyright tribunals within that process, and more importantly within a critical historical frame. While some work has been done with respect to copyright tribunals and their role in the policy process, none of it has considered the tribunals within a critical frame. This thesis considers those agencies, and the Copyright Board of Canada in particular, within the context of their initial creation as oversight on copyright collectives, their subsequent regulatory practice and their current role within the larger policy frame. Utilizing Antonio Gramsci's conception of hegemony, the thesis views the current capture of those agencies as a further indication of the growing hegemony surrounding copyright in general and collective management regimes in particular.

Keywords: music; performance right; copyright law, copyright collectives, copyright tribunals, intellectual property; critical analysis; Gramsci.

Dedicated to my sons,
Louis Michael Richard D'Alton
&
Sean William Erik D'Alton

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Statement of Problem

Within the larger frame of intellectual property, the generally unknown public performance right and its varied interpretations have grown exponentially in the last thirty years. Performance rights organizations have been responsible for the massive growth of copyright collectives worldwide, but nowhere more than in Canada. Prior to the 1988 Phase I revisions to the *Copyright Act*,¹ there was a single copyright collective authorized under Canadian law, for the collection of music performance rights. Since the Phase I revisions were enacted, more than thirty-eight copyright collectives² have been registered with the Copyright Board of Canada. With thirty-eight registered collectives, Canada has more than double the copyright collectives of any other nation.³

The continued growth of copyright collectives reflects their unique ability to extract value from previously existing works. New collectives mean new revenue streams on works already in circulation as well as those yet to be created. The current Canadian copyright collectives owe their existence to the establishment and expansion of the public performance right in Canada. While initially limited to the public performance right in musical works, copyright collectives have now expanded their scope to encompass other areas.⁴ Several Royal Commissions have

¹ *Copyright Act*, RSC 1985, c C-30 s. 1 [*Act*].

² A copyright collective is an agency created under the terms of the *Copyright Act* which collects royalties or licensing fees on behalf of registered copyright owners. Note however that of the 38 collectives listed there are only 35 separate collectives; 3 collectives (Societe du Droit de Reproduction des Auteurs Compositeurs et Editeurs au Canada [SODRAC], Canadian Mechanical Reproduction Rights Agency [CMRRA] and Society of Composers Authors and Music Publishers of Canada [SOCAN]) collect in multiple areas.

³ Daniel J. Gervais, “Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective” (2002) 1 CJLT 2 at 18 table 3.

⁴ For example, Access Copyright collects for the reproduction rights of works published in books,

been created in response to the concerns⁵ from users⁶ brought forward in the wake of the creation of the original Canadian collective. Canada established a copyright tribunal in 1936, well in advance of other common-law countries.⁷ While some form of this tribunal has been in operation for almost eighty years there has been very little scholarship in regard to its operation and almost none that attempts to critically engage the issue beyond simple economic or legal function.

The intent of this thesis is to consider the history and expansion of the Copyright Board of Canada with particular reference to its regulatory oversight role on behalf of users. Contextualizing the issue within the frames of information policy, legal theory and critical historical analysis will provide a holistic approach to understanding the establishment and expansion of the board and its powers. Using a critical historical holistic approach will enrich the policy analysis with factors beyond simply the purely economic or legal. This approach is not intended to derogate the importance of such factors, but rather to recognize that legal and economic institutions operate in a larger public realm and not only impact that realm, but are also impacted by it. As an example, the massive expansion of copyright collectives following the 1988 revisions to the *Act* can be seen as a

magazines, journals and newspapers. The Producers Audiovisual Collective of Canada collects fees from the sale of blank audiovisual recording media and devices (often referred to as "private copy levies"), from the rental and lending of video recordings, from exhibition or public performance rights, and from educational copying and performance of audiovisual works.

⁵ These commissions will be discussed in chapter three but primarily concerned the level of tariff being charged, and the legitimacy of works for which tariff was sought.

⁶ User in this context would refer to anyone person or group requiring the use of a copyrighted work subject to collective license.

⁷ Daniel Gervais, "A Uniquely Canadian Institution: The Copyright Board of Canada" in Ysolde Gendreau, ed, *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Cheltenham: Edward Elgar, 2008) at 207. Mario Bouchard, "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia" in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights* (The Netherlands: Kluwer, 2006) at 310.

strategic policy initiative on the part of the government. Generally, such far-reaching initiatives are the result of factors beyond the simply legal, leading to the question of how the function of the board has impacted the larger policy process, and was in turn impacted by it.

Viewing the problem within a critical historical frame, the primary focus will be upon the changing role of the board over time, in particular the decisions of the Board given the direction of the Supreme Court of Canada (SCC) in 2004 & 2012.

Justification

Intellectual Property (IP) regimes have traditionally depended upon the container to provide the physical embodiment of artificial scarcity. Maintaining the myth of scarcity and the control of intellectual works is increasingly difficult in our expanding digital society. Increasingly one of the responses being used to address that concern is that of collectivization. While the expansion of collectives within the copyright regimes has largely gone unnoticed by the public, these agencies collect yearly rents in excess of \$342 million from Canadian users. Even using this undoubtedly low figure,⁸ it still amounts to almost \$10 for every man, woman and child in Canada.

⁸ This figure is based on information available from only four of the registered collectives, and while it did include the largest, SOCAN, it is not a true reflection of the actual per capita cost which will be undoubtedly higher. The data was gathered in 2015 and reflects revenues in the 2014 fiscal period (with respect to Societe Quebecise de Gestion Collective, des Droits de Reproduction (COPIBEC) the 2013-2014 fiscal year) See Society of Composers Authors and Music Publishers of Canada (SOCAN) "SOCAN Annual Report" online: <<http://www.socanannualreport.ca>>, Societe Quebecise de Gestion Collective, des Droits de Reproduction (COPIBEC). "Annual Report 2014-2015" online: <http://www.copibec.qc.ca/Portals/0/Fichiers_PDF_anglais/rapp_annuel_copibec_2014-15_ang_web.pdf>; Canadian Private Copying Collective, Financial Highlights" online: <<http://www.cpcc.ca/en/the-cpcc/financial-highlights>> and Access Copyright at "Annual Report" online: <https://www.accesscopyright.ca/media/91810/2014_ar_final.pdf>.

Unlike much of the policy analysis done in the copyright arena, this thesis takes a critical approach to the topic, viewing it not only from its economic outcomes, but also within the context of its social and cultural impacts. While the increasing recourse to collective licensing as a policy response is of great concern, the complete absence of a critical analysis of the functions of the Copyright Board within this process illustrates a significant absence in the literature. It is the contention of the author that the primary reason for this lack of critical analysis has been the extremely successful hegemonic process, which has surrounded the regimes of collective management from their earliest stages.

Theoretical Framework

Gramsci's theoretical interpretation provides a strong analytic framework for this study, as the standard economic and philosophic rationales surrounding the policy process raise significant questions.⁹ The economic literature in particular seems to indicate a reality contrary to the justifications historically offered.

Gramsci's hegemonic theory will be used to construct an organizing rationale behind the successful imposition, and expansion of collective management. The copyright board, collective societies and the copyright and policy experts within the larger community can in analysis be seen to be indicative of the hegemonic process.

In a previous work¹⁰ the author utilized this frame to form an analysis of the establishment and expansion of the public performance right within the Canadian

⁹ For a more complete discussion see D'Alton 2014, "A Gramscian Analysis of the Public Performance Right", in *Intellectual Property for the 21st Century Interdisciplinary Approaches*, B. Courtney Doagoo, Mistrale Goudreau, Teresa Scassa and Madelaine Saginur ed., (Irwin Law, Toronto, 2014).

¹⁰ Louis J. D'Alton, *A Critical Historical Analysis of the Public Performance Right* (PhD Dissertation, University of Western Ontario, 2012) [unpublished].

copyright environment. That work traced the creation and establishment of a public performance right in the common-law tradition and its eventual widespread implementation. The primary issue underlying the creation and expansion of the public performance right in musical works, when viewed within a critical Marxist frame, was the essential struggle between authors/composers and the dominant publishing interests, which dictated their terms of employment and recompense. In particular, the previous work considered the initial establishment of what Gramsci referred to as the 'historic bloc', a cross class alliance between traditionally opposing interests, publisher and composer.

The initial study encompassed the history of the public performance right from its beginnings in the United Kingdom in the 19th century through its global expansion in the 20th century with a particular emphasis on the Canadian experience. While much of the focus was on the latter part of the 20th century the work ended with the 1988 phase one revision to copyright in Canada and the massive expansion of collective management of copyright in Canada.

In part this thesis can be seen to be a companion piece to that previous work. Some of the material presented in chapter two and the historical discussion surrounding the creation of the first tribunal in section 3.1 can also be found in the earlier work. This material provides the foundational context on which this current thesis is structured. Where the focus previously was on the creation and dominance of the hegemonic frame, this thesis concerns itself with the role of the tribunal within that larger process, and specifically the ways in which the process has changed since the 1988 revisions to copyright. Additionally, while the initial work

concerned itself with the United Kingdom and Canada, and to a lesser extent the United States, this work focuses primarily on Canada while also considering the United Kingdom and Australia, which share the common law tradition and a common root of copyright legislation.

In terms of contextualizing the appropriateness of the theoretical 'fit' to the current research the author notes that the performance rights organizations initially balked at the notion of an oversight agency, but over time it appears that the hegemonic process encapsulated and expanded the role of the board¹¹ to serve the dominant agenda of the hegemonic process. This process might also be viewed as a form of regulatory capture, however that does not diminish the theoretical value of the Gramscian interpretation.

Thesis

The general thesis of this work is that the collective management of rights within copyright as established within the Anglo-American legal tradition exists and has been successfully expanded only as a result of capital interests. Contemporary copyright policy relies upon the use of administrative tribunals within the copyright environment with little critical evaluation of their nature, justifications or impact upon the larger society of information users. As will be discussed in chapter two the original purpose of the Copyright Appeal Board was to provide regulatory oversight

¹¹ Earlier research revealed a number of attempts by collectives to evade their obligations to the board. Such behavior can be seen to peak with their attempt to discredit the Copyright Appeal Board's right to oversee them during an appearance before the Ilesley Commission. More recently Knopf has commented on the collectives use of the Copyright Board hearing process to acquire private information that would otherwise be unavailable, Howard P. Knopf "Canadian Copyright Collectives and the Copyright Board: A Snap Shot in 2008" (paper delivered at Law Society of Upper Canada Continuing Legal Education Program, 28 February 2008) online: <http://www.macerajarzyna.com/pages/publications/Knopf_Canadian_Copyright_Collectives_Copyright_Board_Feb2008.pdf>.

over the collective (singular at that point) on behalf of users. That initial role of oversight and protection has been lost over time and the tribunals now are generally promoted as agencies driving economic development.

Through a critical historical study of the establishment of the Copyright Board its predecessor, the Copyright Appeal Board, and copyright tribunals of other common law jurisdictions, the author will posit a model to explain the changing role of the tribunal from one of oversight to participant and its eventual absorption, along with the policy process, into the policy network surrounding the collective rights management regimes. This general thesis leads to a series of research questions, which seek to identify the key actors in the area and consider their influence on the various sectors.

It is presumed that the readers of this work have at minimum a perfunctory understanding of copyright,¹² and while there will be no attempt to explain the regime as a whole, it is necessary to provide some definitions of recurring terms relevant to the discussion of this thesis. The term intellectual property is the broad designation given the area of law which encompasses works of the intellect. Specifically, intellectual property includes Copyright, Patent and Trademark. Within the larger area of intellectual property, copyright is unique insofar as it deals with literary, dramatic, musical and artistic works as opposed to mechanical contrivances or inventions.

A Copyright Board or Tribunal is a national regulatory agency established by legislation through the Copyright Act of its country of origin. Their primary role is

¹² For a detailed discussion of copyright and intellectual property as a whole see Vaver, David, *Intellectual Property Law: Copyright, Patent, Trade-marks*, (Irwin Law, Toronto, 2011).

the regulation of tariffs levied by copyright collectives for the use of copyrighted works. Copyright collectives are also established by virtue of their national legislations for the purpose of collecting licence fees or royalties for the use of copyrighted works on behalf of copyright owners who have assigned their rights to the collective.

Objectives and Research Questions

The objective of this research is to attempt to discern the role of the Copyright Board, and copyright tribunals generally, in the acceptance and expansion of collective management within the policy environment and with particular reference to the impact on users of copyrighted works and other subject matter. Note that within this context the notion of ‘user’ can be convoluted. With respect to the tariff rulings of the Board, they are generally perceived to be directed at large scale users such as media broadcasters, as well as smaller users such as motels, hotels, churches and service clubs. However, as the Supreme Court noted in *Alberta Education v Access Copyright*, while tariffs are generally crafted based on an aggregate amount of users, they should in fact be considered on the basis of the individual user when it comes to issues regarding the implementation of the *Act*.¹³

To accomplish this objective, the following research questions are posed:

1. In what ways has the Copyright Board changed with respect to its scope and oversight role since its creation as the Copyright Appeal Board in 1936?
2. How well are user interests represented in the practices of the Board?

¹³ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [Alberta v AC].at 29.

3. Has lobbying by the various industries represented by collective management shaped/impacted Board practice?

4. Is there evidence of a shift in the policy or findings of the Board as a function over time?

5. Has the influence of the original public performance right collectives continued to significantly impact the Board since the 1988 copyright revisions, or has the network seen the establishment of new key players?

Methodology

This study is situated within the critical-historical paradigm and will utilize both empirical and theoretical inputs. Such research “typically goes beyond mere description and attempts to interpret the facts as reconstructed. . . . the historian attempts to give meaning to the facts in light of a relevant theory”.¹⁴ This investigation will begin with a contextual framing of the justificatory theories underpinning copyright law, and thus the existence of copyright tribunals. It has been noted by several copyright scholars that the rules of administrative tribunals greatly impact the policy process with regard to the nature of information which can be sought, the costs of appearance and the often ‘one sided’ appearance of information flow in related hearings.¹⁵

The study will outline the establishment and expansion of collective management regimes and their accompanying oversight tribunals, with a particular

¹⁴ Ronald R. Powell, *Basic Research Methods for Librarians*, 2d ed (Greenwich CT: Ablex, 1991) at 137.

¹⁵ For further discussion on these issues see Daniel Gervais, “A Uniquely Canadian Institution: The Copyright Board of Canada” in Ysolde Gendreau, ed, *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Cheltenham: Edward Elgar, 2008), and Howard Knopf, “Canadian Copyright Collectives and the Copyright Board: A Snap Shot in 2008” (28 February 2008), *supra note 11*.

emphasis on the Canadian experience. The analysis will be framed using multiple data sources including legal decisions, government policy documents, stakeholder internal publications, and other sources of data reflecting the positions of the various stakeholders within the policy process. Particular emphasis will be given to those decisions of the Board that were later reviewed by the Federal Court.

The case being studied is defined as the actors and roles performed within the system surrounding collective rights management in Canada. The term *surrounding* provides linkage to both the foundational networks, which led to the creation of the system, as well as to extended collective management organizations, such as the Copyright Board, which can be seen to have derived from the collective rights management system. While the focus of the research is the operations of the copyright board, noting the linkage recognizes that the collective management network exists as an outcome of the foundational networks and their successful inculcation.

Discussions of copyright policy and process will often situate themselves solely on the basis of legal rulings. Cyril Ehrlich has commented “[s]uch interpretations of history give undue weight to intricacies of law, a common tendency in this field of study, and pay scant regard to economic realities”.¹⁶ While legal systems may provide the coercion necessary to insure adherence to whatever regimes are established, they do not create law purely for their own interests. In issues of copyright the law is usually responding to economic concerns and as Paul Romer notes in the *American Economic Review*, it behooves economists to “explain

¹⁶ Cyril Ehrlich, *Harmonious Alliance: A History of the Performing Right Society*, (Toronto: Oxford University Press, 1989) at 3.

that the policy goal should be to maximize consumer welfare, not such popular proxies as ‘exports’ or ‘industry revenues’”.¹⁷ Thus, the focus will be upon the holistic nature of the network itself and the socio-economic framework surrounding it as opposed to purely law or economic theory.

Organizational Plan

The study will proceed along the following organizational plan. This chapter will introduce the problem under study and place it within the context of policy analysis. It will also outline the justification for the research and its proposed implication for the field.

Chapter two will briefly consider the justificatory rationales for copyright and their dependence on the creator myth. The centrality of creator as justification for the existence and promulgation of copyright will be considered within historical context. It will also introduce the theoretical work of Antonio Gramsci, whose conception of hegemony provides the theoretical framework that will be used to construct an organizing rationale behind the successful imposition, and expansion of the collective management process. The hegemonic framework explains the success of the process as well as the ultimate acceptance and support of the Copyright Board.

Chapter three will consider the operation of the Copyright Board in comparison with similar tribunal based systems in other jurisdictions, specifically England and Australia. The chosen jurisdictions all share the same root for their initial copyright legislation in the United Kingdom Copyright Act of 1911. However,

¹⁷ Paul Romer, “When Should We Use Intellectual Property Rights?” (2002) *American Economic Review* 92 at 215.

the UK Act of 1911 did not provide provision for the creation of copyright tribunals. Each nation would eventually create an administrative tribunal to deal with the issues surrounding the collective management of copyright but the timeline and approach to the imposition of tribunal-based administration was very different, thus indicating the impact of different policy goals.

Chapter four will consider the status of the user under the three regimes. Particular attention will be given to the expansion of the status and role of the user within copyright following the 2004 decision of the Supreme Court of Canada (SCC), as well as the reconsideration of Fair Dealing by the court. This contemporary Canadian standard for Fair Dealing and the user will be contrasted with the parallel regimes.

Chapter five will review Copyright Board decisions that reached the Federal Court of Appeal in the period 2004-2014. This period was chosen as it coincides with the landmark ruling of *CCH Canadian Ltd. V. Law Society of Upper Canada*¹⁸ in 2004, which fundamentally changed the interpretation of copyright law with respect to users in Canada. The period also encompasses the Pentalogy rulings of July 2012, which would further elaborate the understanding of copyright and the role of users in Canada. These will also be discussed.

Chapter 6 will review inquiries into copyright and the tribunals. In addition to the Canadian Royal Commissions of the early and mid twentieth century there have also been numerous (and more recent) reviews in both England and Australia, though only one single review devoted solely to the tribunals themselves outside of

¹⁸ *CCH Canadian Ltd. V. Law Society of Upper Canada*, 2004 SCC 13 [CCH].

the early Canadian ones. While no new reviews have taken place in Canada since the 1950s, the current internal review process taking place within the Copyright Board of Canada will also be considered.

Chapter seven will be divided into two parts. The first section will provide a brief review of the salient points of the history of the Copyright Board and its parallel tribunals within a Gramscian hegemonic frame. The final part will consider the effectiveness of the thesis with respect to the research questions posed, and consider possible alternatives to the current policy solutions that might more effectively achieve the intended policy objectives, but with a reduced social cost.

Chapter 2 Contextualizing the Copyright & Tribunal Discussion

“The great enemy of truth is very often not the lie – deliberate, contrived and dishonest – but the myth – persistent, persuasive, and unrealistic.” John F. Kennedy¹⁹

There are two primary streams of justification most often cited in the defence of copyright, the natural right of the author or ‘right’ based system and one based on economic efficiency or utilitarianism.²⁰ These two systems are often idealized in the French author centric system of “Droit d’Auteur” and the English common-law system centred on economic efficiency. Some theorists, such as von Lewinski, posit the notion that the incompatible nature of the author versus economic driven philosophies has been the basis for much of the problems that have accompanied international agreements with respect to copyright. Conversely, Jane Ginsburg has noted that the gulf between the two variant systems is not nearly as great as has been portrayed, and that in fact there is a great deal more in common than at odds. Regardless of the theoretical basis for justification, the notion of author plays a central role in both variants. While the author lies at the core of the rationale within right-based systems, even within utilitarian/economic frameworks the author plays a critical role in justifying the system. However, one standpoint is rarely if ever considered, the irrelevance of the author.

It is the contention of this author that the most significant purpose of copyright since the onset of the industrial era (which coincides with the expansion of

¹⁹ John F. Kennedy, Commencement Address at Yale University, Old Campus, New Haven, Connecticut, June 11, 1962.

²⁰ Murray, Laura J., Trosow, Samuel E., *Canadian Copyright A Citizen’s Guide*, 2nd Edition (Between The Lines, Toronto, 2013) p 4.

copyright systems in the western world) has been to further the creation and circulation of capital and that the role of the author within copyright has simply been to provide the human connection needed to sell an unpopular product. When viewed within that context the centrality of the author loses its import and rather can be seen simply as an effort to justify a tenuous scheme that intuitively holds little validity for the average user.

2.1 Copyright Myths

While one tends to think of copyright in respect of the creator, and certainly the rhetoric surrounding any copyright dispute will generally clothe itself in terms of the “creator”, with respect to economic rights, copyright does not in fact protect the creator, but rather the owner. While the creator is usually the first owner of the copyright,²¹ under normal circumstances (at least historically in the case of music and the book trade) the copyright owner is usually the publisher, as the assignation of copyright to the publishing house is a normal condition of publication.²²

Assignment may be for a limited time or may be permanent, but rights guaranteed under the Act protect the owner of the copyright, not the creator. As copyright scholar David Vaver has pointed out, the first myth of copyright law is that it “is designed to protect authors. In locating itself around the central character of the author . . . copyright law is politically astute.”²³

²¹ The *Copyright Act* at s. 13 (1) states the general rule in Canada; however, there are exceptions to this, for example work done in the employ of others may be owned by the corporate employer unless contractually stipulated otherwise. Similarly, photographs or works of fine art done in return for recompense are owned by the commissioner, unless an agreement to the contrary is made at s. 10 (2).

²² Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity*, (Athens, Georgia: University of Georgia Press, 2006) at 12.

²³ David Vaver, “Intellectual property Today: Of Myths and Paradoxes” (1990) 69:1 Can Bar Rev at 102.

The other myth to be dispelled is that despite the nomenclature, Intellectual Property is not in fact property in the traditional sense. Property is by its nature rivalrous in consumption, which is to say that ownership and use of a piece of physical property denies anyone else the use of it at the same time. The ownership of a piece of property by one individual can (at the discretion of the owner) limit the use of the property by others regardless of whether or not it is in use by the owner. Likewise, at the discretion of the owner, uses may be made of the property, which make it unusable for any other purpose in the future. By contrast, many people may use works of the intellect without diminishing the ability of anyone else to use them. In many instances the more use that is made of the work the greater its value becomes (for example books, music, fine art).

At first blush this distinction between intellectual property and real property might seem to be simply semantic, but it is vitally important to the discussion of copyright. The fundamental reason we perceive and treat works of the intellect as extensions of property is because we have been taught to do so. As the economists Boldrin and Levine noted in their inquiry into intellectual property, " For at least three thousand years, musical and literary works have been created in pretty much every society, and in the complete absence - in fact, often under the explicit prohibition - of any kind of copyright protection."²⁴ However as a society we have been increasingly inculcated into the notion and necessity of intellectual *property*, in large part by the legal system which administers it. Reviewing the growth of intellectual property systems over the last two hundred years, William Fisher stated

²⁴ Boldrin, Michele. Levine, David, *Against Intellectual Monopoly*, (New York, Cambridge University Press, 2008) p30.

the “final force that has contributed to the growth of intellectual-property rights consists of a gradual shift in the terminology used by lawyers to describe and discuss those rights -- in a word, the “proPERTIZATION” of the field.”²⁵ Thus, authority figures throughout society regularly profess that works of the intellect are property, but they are not property in the traditional sense and that must always be kept in mind whenever intellectual *property* is discussed. As Vaver points out, “Capitalists want to ‘own’ whatever their enterprise produces . . . tangible or intangible. . . . Those who imitate or appropriate such assets can then be called thieves and pirates. . . .”²⁶ As will be discussed later, this is hegemonic in its form and function, the inculcation of processes favourable to those dominating the social order.

2.2 Common-law Model

While there are historical predecessors, the first copyright legislation in the Anglo-American legal tradition, and one that would also have great impact on the French tradition, was *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned*,²⁷ While much can be made of the history leading up to this Act,²⁸

²⁵ Fisher, William W. III, “The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States” online: <<https://cyber.law.harvard.edu/property99/history.html>>.

²⁶ David Vaver, “Agnostic Observations on Intellectual Property” (1991) 6 IPJ 125 at 3.

²⁷ *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, Copyright Act 1709*, 8 Ann c 19. [Statute of Anne]

²⁸ Patterson in his treatise makes much of the connection between the state and the book trade in his understanding of the ultimate purpose of the *Act*, conversely Feather’s history seems to focus on the inequity of power relations exhibited in the author-publisher relationship. Deazley however views the *Act* as fundamentally one of balance, a bargain “It was the free market of ideas, not the marketplace of the bookseller, which provided the central focus for the *Statute of Anne*” Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth- Century Britain (1695–1775)*, (Oxford, Hart Publishing, 2004) at 46.

ultimately it can be viewed as an attempt at balance. As the full title of the Act makes clear, its intended purpose was to encourage learning. It did so in several ways. First by securing to authors the exclusive rights to their works for a period of 14 years and also by requiring duties of the publishers. As part of their duties publishers were required to make free copies of the best quality available to the centres of learning. Penalties were prescribed for failure to do so. Publishers were also required to keep prices reasonable. Again failure to do so could lead to financial penalties as well as the price of the book being reduced.²⁹

We tend to think of the history of copyright in terms of rights, be they author's rights or publisher's rights. However, as the initial legislation indicates users' rights were also delineated, specifically the protection from usurious fees. More poignant however is the notion of duties, obligations upon the publishers. These concepts of users' rights and publishers' duties seem to have been largely forgotten in the history of copyright debate. Ultimately copyright in its present form is most commonly viewed as an efficient means to ensure economic investment in information industries.

2.3 Justification on the Basis of Economic Efficiency

The Economic Efficiency model (also sometimes treated as the Utilitarian model) is often cited as the justificatory basis for the common law tradition.³⁰ Within this model, intellectual property is seen as a necessary response given that the nature of intellectual works makes control difficult. Without such regimes,

²⁹ Statute of Anne, *supra* note 21 at s. 4.

downstream users could make use of works freely without any of the costs normally associated with creation and development, and thus bring goods to the market at a significantly reduced cost than could the originator. Ultimately, this free riding would result in market failure, as creators would have no incentive to invest in creation given that the costs of research and development would be less likely to be recovered. Within this framework, copyright operates as a tool of public policy, utilizing a statutorily created limited monopoly to ensure sufficient return to incentive creation. This is often portrayed as a balance between the creator and the user, in which the interests of the user (access to works) are balanced against those of the creator (incentive to create). Thus the copyright monopoly, while limiting access, is justified by virtue of the fact that works are created and disseminated and should eventually become available within the public domain.

2.4 Limitations on the Economic Efficiency Model

While the economic efficiency model may seem a reasonable approach there are nonetheless a number of issues raised to contest it. First and foremost, not all works are created for monetary gain. This is of course particularly true of works of an artistic nature. Artists (of any medium) create because they feel a need to do so, not only for economic incentive, and often despite the lack of economic success. As Service Canada has noted on their website “Like many other occupations in the arts, multiple employment is common...their income from activities in this occupation alone is often not enough to make ends meet”.³¹ Nigel Parker has noted that

³¹ The Service Canada website noted that in the 2011 National Household Survey, 46% of all self identified musicians and singers earned less than \$10,000 in annual income, online: http://www.servicecanada.gc.ca/eng/qc/job_futures/statistics/5133.shtml.

“Creators do not create for the joy or prestige of owning a copyright - or even for the money which that copyright may earn. Copyright does not itself generate creativity.”³² This is not to suggest that artists should not be rewarded for contributing to the culture of our societies, rather it is simply to note that they would likely do so regardless. Thus, incentive as a *necessity* for creation becomes suspect.

There is also a growing body of economic research into copyright that indicates that the incentive rationale of copyright simply does not hold up. Birgitte Andersen, R. Kozul-Wright, and Z. Kozul Wright’s “The Social and Economic Effects of Copyrights in the Music Industry”³³ examines many of the copyright stereotypes existing in the music industry. Within the study, Andersen et al. comment on the fact that the distribution of incomes is due as much to “strategic interaction and bargaining power of individuals and firms, and the governance structures of copyrights, as to the presence of musical talent or market forces.”³⁴ Andersen et al. also note areas of conflict within the copyright regimes, which, while perhaps fruitful economically for those in superior bargaining positions, do not necessarily benefit either creators or cultural expression. Ultimately they state, “[w]hereas the copyright system in its current form is good in facilitating income and rent creation from musical ideas, we must recognize the problem that it is enormously bad in

³² Parker, Nigel, *Music Business: Infrastructure, Practice and Law*, (London: Sweet and Maxwell, 2004) at 3.

³³ Birgitte Andersen, Richard Kozul-Wright, and Zeljka Kozul-Wright, “The Social and Economic Effects of Copyrights in the Music Industry: A Contribution to the Convergence versus Divergence Debate” in F. MacMillan, ed, *New Directions in Copyright Law* (Cheltenham: Edward Elgar, 2005).

³⁴ *Ibid* at 26.

creating a 'fair' income distribution, acknowledging creativity throughout the industry, and also somewhat unsuccessful in generating cultural expansion."³⁵

Martin Kretschmer has also considered the author-driven rhetoric of the copyright regimes, seeking empirical evidence of their effect. Kretschmer determines that copyright is in fact structured to benefit investors not creators, with the exception of those artists who have become so large that they are in essence corporate entities (e.g. Springsteen, U2, Dylan). Kretschmer concludes:

[O]ur study reveals that orthodox assumptions about the function of copyright in creator's lives are largely invalid. Copyright neither appears to support the creative basis of society nor does it make cultural materials available in a legal form that legitimizes creative digital re-use. Future Copyright policy must be based on a much clearer empirical picture of the role of Copyright in creative production.³⁶

In 2010 Harvard economist Oberholzer-Gee in conjunction with his colleague Strumpf constructed an empirical analysis of the impacts of downloading practices. They determined that practices were affecting music industry sales; however, not to the extent claimed by the industry. Of greater interest however was their contention that despite the fact that file sharing had "considerably weakened copyright protection" there was evidence to indicate that the greater access had resulted in increasing amounts of creative outputs.

Overall production figures for the creative industries appear to be consistent with this view that file sharing has not discouraged artists and publishers. While album sales have generally fallen since 2000, the number of albums being created has exploded. In 2000, 35,516

³⁵ *Ibid* at 27.

³⁶ Martin Kretschmer, "Artists' Earnings and Copyright: A Review of British and German Music Industry Data in the Context of Digital Technologies" (2005) 7.8 *First Monday* at 13.

albums were released. Seven years later, 79,695 albums (including 25,159 digital albums) were published (Nielsen SoundScan, 2008).³⁷

Nor was this increase limited to the music industry, Oberholzer-Gee and Strumpf noted similar increases in the film and publishing industries. Such a conclusion is a direct contradiction of the fundamental copyright justification that incentive is required for creation.

The impact of this economic research underscores the need for clarity in the roles of policy instruments such as copyright. If the purpose of copyright is to reward and benefit creators, then the policies are not working given the economic outcomes these researchers are seeing. While this discussion of policy outcomes was precipitated by the incentive justification within the Anglo-American tradition, the outcomes are the same regardless of the author centric nature of the regimes. While Oberholzer-Gee & Strumpf were focusing on America (common-law) and Kretschmer on Germany (author-centric) Andersen et al were looking internationally. Regardless of the geographic source of data the author did not benefit significantly relative to the industrial interests.

2.5 Natural Right of the Creator

While this thesis is concerned with the operation of copyright in a common law tradition, the centrality of the author/creator to the justifications of copyright historically warrants a brief consideration of the natural right theory. The continental vision of copyright law is generally seen to have derived from the notion of a natural right of an author to his work, in particular Georg Wilhelm Friedrich Hegel's notion of personhood. Margaret Radin interprets Hegel as stating that "to

³⁷ *Ibid* at 24.

achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment.”³⁸ Radin notes, “Because the person in Hegel’s conception is merely an abstract unit of free will or autonomy, it has no concrete existence until that will acts on the world.”³⁹ In acting upon the resources of the physical world the abstract self unites with its physical self and infuses its will into the objects of the world.

Though this philosophy might form the romantic rationale for continental copyright, Jane Ginsburg has presented some very convincing scholarship that suggests that it was economic issues rather than philosophical that were the driving force in the French legislation. While reiterating points of the historic debates between Condorcet and Le Chapelier, Ginsburg also clarifies that much of the *myth* comes from the ways in which the figures are quoted, and as with many such reports quotes taken out of context can have a very different meaning. Remarking on Le Chapelier’s famous quote “the most sacred, the most legitimate, the most unassailable, and ...the most personal of all properties, is the work which is the fruit of a writer’s thoughts.”⁴⁰ Ginsburg points out that the quote was directed toward unpublished works. Once published however the work was no longer a private thing but rather the work was “give[n] over to the public...by the nature of things, everything is finished for the author and the publisher when the public has in this way acquired the work.”⁴¹ Essentially Le Chapelier was advocating for a right of

³⁸ Radin, Margaret, “Property and Personhood” (1982) 34 *Stanford Law Review* [957] at 957.

³⁹ *Ibid* at 972.

⁴⁰ Le Chapelier cited in Jane C Ginsburg, “A Tale of two Copyrights” (1990) 64.5 *Tulane Law Review* [991] at 1006.

⁴¹ *Ibid*.

public domain far more than an author's right. It might also be said he was advocating for an inalienable moral right of the author to make the work known to the world, however once it was released he seemed to feel the work possessed a public life of its own. Such a viewpoint might seem well placed in the contemporary copyright discourse given the increasing awareness of the impact of mass mediated culture in the human experience. Within such contexts works of art take on a life of their own in their absorption and transformation as cultural objects arguably clearly evidenced in the massive amounts of user generated content on websites such as YouTube.

Not simply content with pointing out that the framers of the 1793 legislation may have had different viewpoints about authorial rights than generally accepted in the modern discourse, Ginsburg looked further into the rulings of the courts following enactment of the legislation to draw out proof that authors were not necessarily the focus of the *Act*. In the judgement of *Veuve Buffon - C. Behmer*⁴² the court held that the decrees of 1789 did not impact on an author's right to compensation for his work but at the same time noted the policy that the copyright regime should reward authors in return for the distribution of knowledge and the advancement of public learning.⁴³ Note that the court stated not that the author had an inalienable right to the fruits of his intellect, but rather that he should be rewarded for the distribution of knowledge and the advancement of public learning. Such a position was clearly far more in line with the Anglo-American tradition as it is generally understood. Similarly, the ruling in regard to the *Dictionary* of the

⁴² *Veuve Buffon - C. Behmer*, Cour de cassation, Therm. 29, S. Jur. I, an 11 at 851.

⁴³ Jane C Ginsburg, "A Tale of two Copyrights" (1990) 64.5 *Tulane Law Review* [991] at 1018.

Academie francaise supported the right of a producer over an author.⁴⁴ Again such a position seems in clear contravention of the accepted mythic place of the author in the French regime.

2.6 Reconsidering Natural Right Theory

The personhood theory posits that intellectual works are the product of the “self” and lie at the core of what it means to be human, our ability to think and reason. To deny one the right to control the creations of their intellect would be in effect to deny their personhood. This position proved very popular during the late nineteenth century. The notion of romantic genius was seen to be an extension of the divine spark within humanity and became a rallying point for authorial existence and rights ascribed to it. The natural-right theory however does not take into account the historical practice of simply borrowing works from other creators, nor does it recognize that virtually all intellectual products are the by-products of the material that has been infused and digested. To suggest that new works have sprung “a priori” from the void is arguably the greatest romantic fantasy. Artistic works are often based on pre-existing works, inspired by other works and virtually always reflect and reference other works albeit not necessarily in an obvious fashion. As Sir Isaac Newton said, “If I have seen further than others it is because I was standing on the shoulders of giants,”⁴⁵ which is simply to say that all intellectual growth depends upon both the great and minor works which have preceded it to inspire and provoke.

⁴⁴ *Ibid.*

⁴⁵ Sir Isaac Newton in a letter to a fellow scientist, Robert Hooke, Feb 5, 1675. *The Quotations Page* online: <http://www.quotationspage.com/quotes/Isaac_Newton/>.

2.7 The Economic Core at the Heart of Copyright

While the French regime has couched itself in the fabric of authorial genius Ginsburg has made clear this is not the case in historical context. Similarly, while the Anglo-American tradition has justified itself in terms of economic efficiency it has nonetheless relied on the public face of the author to lend credibility to these regimes. However as stated at the outset these two traditionally disparate organizing principles share one fundamental purpose in common, the creation of capital.

We have long been inculcated to revere the notion of authorial genius, and in that respect, as David Vaver has noted, copyright is “politically astute”. Dressed in that romantic concept copyright regimes can maintain a tenuous justification in our contemporary world. However, there is an irony in the fact that given the neo-liberal obsession with economic rationalization, it is the economic literature being promulgated within the copyright discourse that is proving the failure of these regimes to achieve their stated policy purpose. More importantly the economic literature is removing the romantic mantle from copyright’s justifications.

The primary purpose of copyright is to create capital; the author is only of value insofar as he or she can provide a suitable justification for the regime. As Nigel Parker has noted copyright is not intended to incent creation,

[I]t is an incentive to invest. The music business has grown up based on long-tail income from established copyrights. Accumulations of copyrights spread risks and generates funds to finance new music. Without long term profits from the most successful creators, investment in new music would be almost non-existent.⁴⁶

⁴⁶ Supra note 27.

In *Copyright and the Cultural Industries: Incentives and Earnings*⁴⁷ Ruth Towse drew together as much data as possible to determine what income artists derive from copyright sources. She found that despite high aggregate earnings from copyright “the large sums of royalty income that copyright law enables to be collected goes mainly to the publishers (music publishers and record companies) and to a small minority of high earning performers.”⁴⁸

But the tentative conclusion is that the economic power of firms in the cultural industries, which are for the most part vertically integrated oligopolies, strengthened as they are by copyright law, is such that conceivable changes to that law could not vastly improve the earnings of artists. At a time in which the future of copyright law is being considered in the light of technological upheaval, we must also ask if it has anyway served the public well.⁴⁹

As posited at the outset, the actual status of the author is irrelevant to copyright as a whole. As long as an author or a creator, or an artist can serve as a rallying point for public opinion they will be called forth and put on display.

However increasingly the author as a concept has been called into question, and more importantly the contemporary ease of information transfer and manipulation is giving birth to a new generation of creators, citizen journalists and creativity as evidenced by the massive growth of YouTube, Flickr and literally millions of blogs⁵⁰. As a critical mass of consumer/user/creator is reached the

⁴⁷ Ruth Towse, “Copyright and the Cultural Industries: Incentives and Earnings” (Paper delivered at the Korea Infomedia Lawyers Association, 2003) [unpublished].

⁴⁸ *Ibid* at 16.

⁴⁹ *Ibid* at 17.

⁵⁰ While it is difficult if not impossible to capture all the blogs actually operating, as of October 2015, there were 260.5 million operating just within Tumblr, “Cumulative total of Tumblr blogs between May 2011 and October 2015” online: <<http://www.statista.com/statistics/256235/total-cumulative-number-of-tumblr-blogs/>>.

justifications for an increasingly irrelevant copyright regime become more difficult to maintain.

2.8 Gramsci, Hegemony & Copyright

While this analysis focuses on a single aspect of copyright, it is essential to remember that copyright as a process controls the flow, distribution, use and reuse of information throughout society. Within that context, copyright can and has been used as tool of capital within business and publishing dimensions. Copyright has provided those interests with a means to deny or limit the use of information by society, and in particular those members of society who make up the working class/users of the information. The successful imposition of the public performance right created the precedent for the establishment of further owners' rights across a spectrum of information and not merely the public performance of musical works. The recent critical discourse surrounding the collective licensing of educational materials is directly attributable to the success of that hegemonic order.

Gramsci's concept of hegemony is situated within a political economic view of society, and is formulated in relation to some fundamental Marxist positions. Economic relations are the base in a base-superstructure hierarchy and within the historical processes delineated by Marx, determine derivative structures that form the superstructure (the realms of the political, the social and the intellectual). An orthodox interpretation holds that the movements and goals of the independent units of society are a result of these established and inherited property structures,

and within these units of organization, cultural activity is an expression of controlling economic interests.

For Gramsci however, society is the sum of all its cultural and ideological parts and is not simply driven by economic divisions. Therefore, the dialectic nature of the social order, with its varying influences and exchanges, can and does have political outcomes regardless of class status. In his analysis of the French revolution Gramsci makes it clear that the upheaval was not simply determined by economic inequalities:

In any case, the rupture of the equilibrium of forces did not occur as the result of direct mechanical causes -- i.e. the impoverishment of the social group which had an interest in breaking the equilibrium, and which did in fact break it. It occurred in the context of conflicts on a higher plane than the immediate world of the economy; conflicts related to class "prestige" (future economic interests), and to an inflammation of sentiments of independence, autonomy and power.⁵¹

As evidenced by this analysis Gramsci rejects a rigid base-superstructure model because it relies too heavily upon class status, and does not sufficiently appreciate the intellectual and philosophical impact of the culture and individuals within it.

Within a Gramscian hegemonic framework, the dominant class relies not only upon coercion and naked power to subvert the subordinate class to their goals, but also manufactures consent through the creation of cross-class alliances. This theory assumes a consent given by the majority in a particular direction as suggested by those in power. Consent is not always peaceful and may also be induced by means of coercion through physical, legal or cultural processes. The consent is taken to be "common sense," but is in reality an ideology of dominance

⁵¹ Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (New York: International Publishers, 1971) at 184 [Gramsci].

that has become so widespread, powerful and increasingly unnoticeable that over time society's members no longer question it: "The 'spontaneous' consent given by the great masses of population to the general direction imposed on social life by the dominant fundamental group; this consent is 'historically' caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production."⁵² This pattern can be seen in the journals crisis endemic within academic libraries.

Gramsci does not suggest that the interests of the dominant group must be imposed on the subordinate group, but rather that the dominant group's interests *become the interests of the subordinate*. "A third moment is that in which one becomes aware that one's own corporate interests, in their present and future development, transcend the corporate limits of the purely economic class, and can and must become the interests of other subordinate groups too."⁵³ Herein lies the notion of consent that is at the heart of hegemony.

Within Gramsci's view of society as a hegemonic order, the subordinate class participates in and consents to the historical processes of change. The subordinate members of society are empowered through a participatory process, and because of this they experience a sense of agency and involvement when changes take place. While the system is participatory, it is not equal, and the very nature of the hegemonic order ensures that the values of the dominant order will perpetually be inculcated into the culture as a whole.⁵⁴

⁵² *Ibid* at 12.

⁵³ *Ibid* at 181.

⁵⁴ *Ibid*.

2.9 The Public Performance Right

It is the *owner* of the work that enjoys all the economic rights delineated in subsection 3(1) of the *Copyright Act*, including the “sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof.”⁵⁵ These economic rights provide the means of compensation for the owner of the work. With respect to the economic rights delineated in the *Copyright Act*, it is the right to “perform the work or any substantial part thereof in public” that provides the basis for copyright collectives and this work. It is also important to note that the public performance right is a particular form of recompense unique to cultural goods, and is fundamentally dominant in the area of musical goods.

The public performance right is literally the right to perform a work in public, be it spoken text, a dramatic text or a musical work. Note that this is an additional economic right given beyond what would normally be the case with other goods. The economic rights assigned by virtue of the “right to produce or reproduce” includes the right of sale or rental of the work. Thus, either directly or as a function of their contracts with their publishers, owners are compensated via the reproduction right for sales or rental of their works. The performance right however is an economic right in addition to the rights of sale and rental. Thus the copyright owners are in fact recompensed for both the sale, and the use of the work. It is

⁵⁵ *Supra* note 1 at s 3(1).

particularly important to recognize that a right of public performance is also an extension of the traditional medium of copyright into an ephemeral realm.

Historically copyright has dealt with the right to copy an existing work. That work might have been a book, a sculpture, a piece of music manuscript or a work of fine art. In each instance there was a single extant work originally and a copy was made of it. However, with respect to a public performance there is no copy. A single piece of music manuscript exists prior to the performance, and only a single piece of manuscript exists following. The performance itself is ephemeral. It exists in the moment and then is gone forever. In this respect a performance differs markedly from a recording.

While a performance may be captured in a recording, once this is done it is no longer a performance, but rather a recording and as such triggers an economic right within copyright for the reproduction of the musical work now enclosed in a container, be that vinyl, tape, CD or the binary code held in a storage medium. Even if we were to consider a recording to be synonymous with a performance, there remains a significant problem in the historic acceptance of a public performance right in music. The creation of a public performance right in music took place during a period in which there was no aural recording medium yet in existence. A legal right of ownership was extended to something without physical form or substance, and that legal right would be extended extensively throughout the twentieth century and provide the basis for collective licensing.

Though the costs of the public performance right are not transparently borne by the individual user, it nonetheless impacts significantly in the operating

costs of the larger community. In 2014, the three major North American performing rights organizations, the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music International (BMI) collected a little over \$2.315 billion.⁵⁶ In Canada, the four largest collectives, SOCAN, Access Copyright, SODRAC and CPCC reported revenues of 342,280 million⁵⁷. Given the current population of just over 35 million⁵⁸ the combined cost of SOCAN, Access Copyright, CPCC and SODRAC to end users was \$9.78 per capita.

Most intriguing is the question of why music was treated differently to begin with. We do not pay additional fees to the engineer who designed our cars every time we take a drive, or to the architect who designed our homes for every time we use them. Arguably, our lives are enriched in significant ways by the end results of these efforts, and yet there are no ongoing royalty payments made to these creators, nor to the industrial interests that support them. Nor are aggregate uses of them licensed after the point of sale.

Despite our contemporary conception (both legal and social) of what may constitute a performance now, and perhaps more significantly what the performing rights organizations want us to believe constitutes a performance, historically during the period of its inception and for a significant time period to follow, the *only* type of performance that existed with respect to music was a live in the moment

⁵⁶ BMI 2014 revenue press release online: <<http://www.bmi.com/press/entry/572180>> and ASCAP 2014 annual report online: <http://www.ascap.com/~media/files/pdf/about/annual-reports/ascap_annual_report_2014.pdf>, SOCAN 2014 annual report online: <<http://www.socanannualreport.ca>>.

⁵⁷ *Supra* note 8.

⁵⁸ CIA World Factbook (July 2015) online: <<https://www.cia.gov/library/publications/the-world-factbook/docs/guidetowfbook.html>>.

transmission between audience and performer(s). Thus the public performance right is not only an additional economic right that was unique to musical works beyond the traditional rights of reproduction and distribution, but in its historic inception it was attached to something that had no physical form. Perhaps a performance is better viewed as the light which radiates from a streetlamp. While it is there and we are aware of its existence, we can not touch it, and when the current is stopped, or in the case of music the performer stops performing, the performance and the light no longer exist, they are only a memory.

2.10 Hegemonic Resistance

Gramsci recognized that at various times within the hegemonic process, crises would develop, and while some would be insignificant others would be organic, representative of deep pockets of discontent within society. "If the ruling class has lost its consensus, i.e. is no longer 'leading' but only 'dominant,' exercising coercive force alone, this means precisely that the great masses have become detached from their traditional ideologies, and no longer believe what they used to believe previously."⁵⁹ If unsuccessful, the class attempting to wrest control would simply fade back into the social frame until such time as another opportunity arose.

Within the performance rights framework there were numerous instances of such resistance ranging from the publishing class themselves at the outset, through various trade and social unions as well as larger media interests. The establishment of the Canadian Performing Right Society would result in the creation of two Royal Commissions to investigate its operation within the first ten years of operation. The

⁵⁹ *Supra* note 41 at 275-76.

Royal Commissions would eventually lead to the establishment of the Copyright Appeal Board (now simply the Copyright Board) to deal with complaints. Despite the ongoing opposition none of the adversaries have ever successfully challenged the dominant group, though they have influenced some outcomes. In fact, as Gramsci predicted would happen in the hegemonic process, most adversaries to the hegemonic process established by the performing rights collectives have ultimately been assimilated into the process and have become part of that which they opposed. Indeed, that has been the overwhelming success of the hegemonic order.

The current discourses surrounding file sharing and copyright generally reflect new modes of thought with respect to the conception of copyright; owning and sharing, notions which are certainly not those being advocated by the dominant order. The way in which our contemporary society views copyright with respect to reuse and sharing within our social frames is very different from the way in which industrial concerns would like it to be seen. It is now quite common for young children to create works in various media and post them to the web. The growth of MakerSpaces in libraries and community centres speaks to the level of growing interest in creation and sharing.⁶⁰ Theorists such as Lawrence Lessig⁶¹, Siva Vaidyanathan,⁶² James Boyle⁶³ and Joanna Demers⁶⁴ (to name just a few) have made

⁶⁰ In a 2013 survey of librarians in practice, Gary Price found that 41% were currently providing makerspaces in their libraries and 36% were planning to add one: “Results From “Makerspaces in Libraries” Study Released” (16 December 2013), online: Library Journal <<http://www.infodocket.com/2013/12/16/results-of-makerspaces-in-libraries-study-released/>>.

⁶¹ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books, 2004).

⁶² Siva Vaidyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001).

⁶³ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008).

clear that there is a distinct clash between the growing user-generated culture and established industrial interests. The simple fact that intellectual property issues and policies have become an increasingly common source of debate and point of discussion in the popular media indicates a general awareness that did not exist twenty years ago. This new mode of thinking has led to a new discourse, which has begun to question the foundations of the dominant order and may lead to a restructuring of the hegemonic process.

The questioning of the dominant order's ideology in regard to copyright is evidenced by the significant response to the proposed Access Copyright tariff for colleges and universities filed in 2010. Considering the general lack of awareness surrounding copyright collectives, the response to the proposed tariff was unparalleled. As has historically been the case with collectives they looked for an increase in tariff to offset losses due to changes in their business environment.⁶⁵

In the case of Access Copyright, the drop in income was primarily attributable to the increased use of electronic serials and other open or licensed resources combined with a significant drop in the use of course packs. While tariff requests are made public via the Canada Gazette, they are largely unknown except to the interested parties. This is one of the reasons the model has been so successful for the collectives. The general public is unaware of their existence, and while the large scale users may wish to reduce their operating costs with respect to the tariffs

⁶⁴ Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (Athens, GA: University of Georgia Press, 2006).

⁶⁵ In the 1935 Royal Commission Judge Parker specifically noted that the collectives were looking for an increase in tariffs to offset their losses in sheet music sales. Similarly, in the United Kingdom the establishment of the Performing Right Society followed significant losses in the publishing industry due to falling sheet music sales and the advent of mechanized musical machinery (player pianos, gramophones etc.). See also *supra* note 10.

they know that ultimately they will pass on the costs to the end user. However, in this instance the proposed tariff of \$45 per student, as well as onerous and invasive reporting requirements, resulted in an outpouring of protest and anger in the general academic community. The opposition was only strengthened with the pentalogy rulings, which would follow the tariff request.

In addition to the broad response to the Access Copyright tariff proposal, the July 2012 copyright pentalogy rulings of the Supreme Court of Canada may also be seen to indicate the disconnection between the ruling hegemony and the changing copyright discourse.⁶⁶ Within that context the dominant voice of the publishing concerns⁶⁷ has always held the balance of power in the negotiations, however the courts' expansive definition of fair dealing and the enhanced status of the user in the process has led to remarkable changes. As Raymond Williams has noted “[a] lived hegemony is always a process. It is not, except analytically, a system or a structure. It is a realized complex of experiences, relationships, and activities, with specific and changing pressures and limits.”⁶⁸ Thus hegemony is a dialectic process, the “push and pull” of relationships and cultures within the social structure which impact, and are impacted by, the processes surrounding it—cultural, social, legal and political.

⁶⁶ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

⁶⁷ While copyright collectives are in theory collections of creators the reality of copyright ownership and the distributive nature of the economic rights within copyright has always resulted in industry having a disproportionate level of power and representation in these organizations. For a greater discussion of this issue see *supra* note 10.

⁶⁸ Raymond Williams, *Marxism and Literature* (Oxford: Oxford University Press, 1977) at 112.

Constantly shifting, changing and negotiating yet fundamentally driven by the ideology of the dominant group as it responds to challenges and crises.

It was this hegemonic process that led to the creation of the Copyright Board. Though it was originally formed as oversight on behalf of users its recent operations had distanced it from that original purpose. However, the changing policy landscape surrounding copyright, and the rulings of the Supreme Court of Canada in particular, seem to have brought the perspective of the user back into focus as will be discussed in later chapters.

Chapter 3: Parallel Evolutions of Copyright Tribunals

This chapter will consider the nature of the copyright tribunals, their enabling legislation, structure and operation. Beyond simply the historical justifications, this chapter will attempt to situate the role of the tribunals within the context of current social construction. Given the transformations of society and culture between the early and late twentieth centuries, the issue of how well the historical entity fits within contemporary social thinking will be considered.

The history of the collective administration of copyright is interwoven with the history of the public performance right in music, and their interdependent growth. Without the inculcation of music performing rights organizations there would likely be no collective licensing within copyright. This topic has been the basis of several books and assorted academic theses and articles.⁶⁹

Canada and Australia both trace their copyright lineage back to the United Kingdom Copyright Act of 1911.⁷⁰ The original Act of 1911 however made no provision for copyright tribunals. All three countries now have active tribunals operating within their copyright regimes. Strangely however the mother country, England, was not the leader in this regard, but it was instead a colony, Canada. The first common-law copyright tribunal, the Copyright Board of Canada, was formed in Canada in 1936. England would follow with its tribunal in 1956, with Australia's Copyright Act of 1968 bringing the Australian tribunal into existence.

⁶⁹ For a full discussion of this issue see *supra* note 10.

⁷⁰ *Copyright Act*, 1911, 1 & 2 GEO. 5. CH. 46 [1911 Act].

3.1 Creation of the First Tribunal

While there were pre-existing performance right collectives under French law as early as 1851⁷¹, and an explicit performance right in music was created in the 1842 Copyright Act in England, collectives did not successfully begin operation in common law regimes until the establishment of the Performing Right Society (PRS) in England in 1914. Shortly after the creation of the PRS the American Society for Composers Authors and Publishers (ASCAP) would be formed in the United States. These collectives represented member publishers, composers and authors⁷² and collected licensing fees in respect of the public performance right granted under Copyright. At the time of ASCAP and the PRS's inception a public performance would have been limited to paid public performances, however the nature of what would qualify as a public performance would change significantly over time.

In 1925 PRS would join forces with their American counterpart ASCAP to set up an office of the Canadian Performing Right Society (CPRS), which would be jointly owned by the parent agencies.⁷³ Perhaps because of the closer geographic relationship between Canada and America, or the shared emerging culture, the CPRS increasingly tracked the aggressive American mandate. Their attempts to impose license fees on varying users across the country would lead to numerous complaints in the Canadian House of Commons, eventually leading to the first of three Royal Commissions charged with investigating their operations.

⁷¹ The Societe de Auteurs, Compositeurs et Editeurs de Musique [SACEM].

⁷² Within this context authors are understood as the lyricists.

⁷³ An initial attempt to create the CPRS had been made by the PRS in 1924. However, it failed due to the fact that 1924 *Copyright Act of Canada*, required registration of works for copyright protection. The initial attempt by CPRS to enforce its license through the courts was dismissed for this reason, see *Canadian Performing Right Society Ltd. v. Famous Players Canadian Corporation Ltd.*, [1927] 2 D.L.R. 928; 60 O.L.R. 280 (Ont. S.C.).

In 1932 the Royal Commission on Activities of the Canadian Performing Right Society Limited, was formed under the direction of the Mr. Justice Ewing. The commission was to ascertain whether CPRS was in compliance with the Copyright Act; whether CPRS had substantial control of performing rights in dramatico-musical or musical works; whether CPRS had unduly withheld the issue or grants of licenses; whether the CPRS fees were excessive and any other matters the Commissioner might deem relevant.⁷⁴

The Ewing Commission consolidated the complaints into a small number, chief among them the fact that though the society claimed control of two to three million musical works, they had failed to list their assignments with the copyright office.⁷⁵ Further, the Society had claimed the right for some musical works that were, in fact, in the public domain (specifically some of the old masters such as Beethoven). The bulk of Ewing's fourteen-page report dealt with the disparity in licensing fees for western radio stations as opposed to those located in the more densely populated regions of eastern Canada.⁷⁶ Ewing found that the Society had not fulfilled its legal obligations and at the same time had dealt unfairly with the public. As a result the Commission recommended that the fees charged be reduced to one-fifth the amount suggested by the Society.⁷⁷

Three years later, in 1935, the Royal Commission to Investigate the Activities of the Canadian Performing Right Society, Limited, and Similar Societies,⁷⁸ was

⁷⁴ *Royal Commission on Activities of the Canadian Performing Right Society Limited*, Albert Freeman Ewing chair, 1932 [Ewing].

⁷⁵ *Ibid* at 5.

⁷⁶ *Ibid* at 8-13.

⁷⁷ *Ibid* at 16.

⁷⁸ Royal Commission to Investigate the Activities of the Canadian Performing Right Society, Limited, and

convened by his Honour Judge Parker, to investigate continued complaints about the CPRS. Unlike the Ewing Commission, the Parker Commission gave public notice of meetings, and heard testimony from interested parties. In his findings Judge Parker made clear that it was the responsibility of the Society to file a list of holdings with the Copyright Office along with a statement of fees (tariffs).⁷⁹ Judge Parker observed that societies controlling these copyrights “have looked to the fees from licenses conferring the performing right on music users to compensate them in part for the losses suffered from the decrease in sales of sheet music and records. This consideration has been one of the factors determining the tariff of fees for performing rights”.⁸⁰ The position being advocated by CPRS in 1935 is one still heard today with respect to losses attributed to online sharing.

Judge Parker noted that CPRS had still failed to file its lists with the Copyright Office despite its legal obligation under the Copyright Act to do so (even though foreign societies had done so on their own).⁸¹ He recommended the broadcast fee be reduced by 22.5%,⁸² and the theatre rate reduced to the 1931 tariff. The judge also said that CPRS was in fact a “super monopoly”⁸³ and though he allowed that there might be valid reasons for its existence, nonetheless Canadians should be protected from any undue burdens as a result. The Parker Report concluded by recommending that a permanent tribunal be established to approve any future

Similar Societies, Report of his Honour Judge Parker, a Commissioner Appointed by the Inquiries Act and the Copyright Amendment Act of 1931, pursuant to Order in Council no. 738, 1935 [Parker].

⁷⁹ *Ibid* at 7.

⁸⁰ *Ibid* at 9.

⁸¹ *Ibid* at 32.

⁸² *Ibid* at 36.

⁸³ *Ibid* at 19.

tariffs and provide a means for music users to appeal any fees or policies set by the performance rights societies.

That the Copyright Act be amended so as to provide for the establishment of an Appeal Tribunal, to determine disputes arising out of performance in public and to approve of the tariffs of the Canadian Performing Right Society Limited from time to time before they become effective. The position now is that the Society, having a monopoly of the performing rights in copyright music, has also the right to impose whatever fees it chooses.⁸⁴

This recommendation led to the establishment in Canada of the Copyright Appeal Board (CAB) in 1936. It is important to note that this was not simply a disagreement between two business interests as is often suggested by rationales of various collectives. Complaints about the CPRS activities by music users had been raised in the Canadian House of Commons, where vivid debate characterized the CPRS as “evil” and that some form of control was needed to “put an end to price fixing and extortion”.⁸⁵ These debates are particularly noteworthy given the fact that over time the notion of oversight and protection of music users seems to have been lost or at the least replaced by notions of economic health and regulation.

Another Royal Commission would consider the issue of copyright collectives less than 20 years later. The Royal Commission on Patents, Copyright and Industrial Designs (Ilsley Commission) sat between 1954 and 1960. Its brief was:

[T]o enquire as to whether federal legislation relating in any way to patents of invention, industrial designs, copyright and trademarks affords reasonable incentive to invention and research, to the development of literary and artistic talents, to creativeness, and to making available to the Canadian public scientific, technical, literary and artistic creations and other adaptations, applications and uses, in a manner and on terms

⁸⁴ *Ibid* at 49.

⁸⁵ *House of Commons Debates*, 17th Parl 20th Sess, No 20 (1936) at 644 (Hon C H Cahan).

adequately safeguarding the paramount public interest.⁸⁶

The Commission delivered its report in two sections. The first section was devoted to copyright, an entire chapter of which was devoted to the issue of Performing Right Societies.

Although the performing right societies presented only one issue⁸⁷ to the Ilsley commission, the same could not be said of music users who filed a long list of concerns with the Commission. Once again, the lack of a complete listing of assignments was among them, an issue that had been raised almost continuously since the appearance of the public performance rights organizations in Canada in 1927. The Commission was relatively sympathetic with respect to many of the music users' positions, however the most important recommendation to arise from the concerns of music users was that the powers of the Copyright Appeal Board should be greatly enlarged and that the Copyright Appeal Board should have the power not only to approve the tariffs, but also to set them. In addition to enlarged powers and increased discretion for the Copyright Appeal Board, the Ilsley Commission recommended that a new Royal Commission be immediately appointed to:

[M]ake a complete investigation in the whole field of performing rights in so far as such rights are owned by performing rights societies. This commission should be empowered to determine the terms and conditions of licenses for all classes of users, including, but not limited to, proposed tariff rates of fees. The users as well as the societies should have the right to make proposals to this commission and the commission should have the power to initiate proposals itself.⁸⁸

⁸⁶ *The Royal Commission on Patents, Copyright and Industrial Design* (Ottawa: Ilsley Commission, 1957) at 7 [Ilsley].

⁸⁷ The collectives questioned the right of the Copyright Appeal Board to regulate them.

⁸⁸ *Supra* note 86 at 106.

No such commission was ever struck.

3.2 Copyright Appeal Board of Canada

In its initial form as the Copyright Appeal Board (CAB) the board dealt with only one collective, the single collective then permissible under the *Act*, the copyright collective for the public performance right in music. Throughout much of this period that right was represented by a single entity, the Canadian Performing Right Society, which in 1945 would change its name to the Canadian Association of Publishers Authors and Composers of Canada [CAPAC].⁸⁹ In 1940 Broadcast Music International⁹⁰ would open a Canadian office thus creating a second collective in Canada.⁹¹ In 1976 BMI Canada officially separated from its US parent corporation and was reorganized as wholly Canadian and non-profit⁹² known as the Performing Rights Organization of Canada (PROCAN).⁹³

Oddly, the government of the day suggested PROCAN and CAPAC form a single monopoly to represent music owners. Given anti-trust concerns neither group was overly eager, but according to Jan Matejcek, in September of 1985 the Copyright Appeal Board urged PROCAN and CAPAC to “Pursue a ‘harmonization’ and ‘uniformization’ of their tariffs.”⁹⁴ Bearing in mind that this ‘harmonization’ would create a single monopoly for public performance rights in Canada, it is quite remarkable that a government body would actually suggest it. According to the

⁸⁹ *Supra* note 10 at 186.

⁹⁰ Broadcast Music International was formed in the United States in 1941 by the National Association of Broadcasters in an attempt to break the monopoly control of music licensing held by ASCAP.

⁹¹ *Supra* note 10 at 188.

⁹² *Ibid* at 36.

⁹³ *Ibid* at 41.

⁹⁴ *Ibid* at 87.

Competition Bureau of Canada, the *Competition Act* “ contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace.”⁹⁵

During this period the CAB was essentially a part time operation involving a single Judge of the Exchequer Court (later known as the Federal Court) and two civil servants. For all those involved their responsibilities to the CAB were part time and done in conjunction with their full time duties.⁹⁶ The role of the CAB, unlike its successor was purely limited to the oversight of rate setting in regard to music collectives performance right tariffs. This would change dramatically following the 1988 revisions to the *Act*, as would the number of collectives seeking tariffs.

3.3 The Copyright Board of Canada

In 1988 Canada would enact the first significant overhaul of the *Copyright Act* since its original inception in 1922. Commonly referred to as the Phase One revisions they would create massive changes in the area of collective management. While previously collectives were only allowed for the collection of the public performance right in music the Phase One revisions would allow collectives to be formed for any group of copyright owners as defined within the scope of section three. Within the *Act* collective societies are defined as,

“collective society” means a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 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, performer's performances, sound recordings or communication

⁹⁵ Competition Bureau of Canada, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html>.

⁹⁶ Supra note 11.

signals of more than one author, performer, sound recording maker or broadcaster, 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, or

(b)"carries on the business of collecting and distributing royalties or levies payable pursuant to this Act;⁹⁷

In a relatively short period of time following the revisions to the *Act* Canada moved from having two copyright collectives, CAPAC & PROCAN, both for the collection of music performance rights to having thirty eight collecting in varied areas.⁹⁸ With the expansion of possible collectives came a reorganization of the board.

The Copyright Board is formed under section 66 of the *Act* and by the terms of the *Act* the board must consist of no more than five persons, two of whom must be the chairman and vice-chairman, all of whom are appointed by the Governor in Council.⁹⁹ While members of the board may be appointed full-time or part-time, the chairman must be a "judge, either sitting or retired, of a superior, county or district court."¹⁰⁰ However, the *Act* does not *require* that there be a chairman and the board has operated without one in the past. In fact, after the retirement of Mr. Justice Vancise in June of 2014, the chairmanship remained unfilled until the appointment of Mr. Justice Blair in June of 2015. In its 2013-2014 annual report the board listed

⁹⁷ *Supra* note 1 at s 2.

⁹⁸ For example, collectives now exist for reprography (Access Copyright), music videos (Audio Visual Licensing Agency [AVLA]), visual arts (Canadian Artists Representation Copyright Collective [CARCC]) and off air taping (Canadian Broadcasters Rights Agency [CBRA]). For a full list of copyright collectives see the Copyright Board of Canada website online: at <<http://www.cb-cda.gc.ca>>.

⁹⁹ *Supra* note 1 at s 66.

¹⁰⁰ *Ibid* s 66 (3).

three board members (Chairman, vice-chairman and one additional member) and an additional fourteen support staff.¹⁰¹

3.4 The Copyright Tribunal of Great Britain

According to Paul Torremans the Mechanical Copyright Licenses Company Ltd. was formed in the U.K. for the collection of mechanical royalties from Gramophone companies even before the 1911 *Act* had been adopted.¹⁰² In 1914 the Performing Right Society was formed for the collection of the public performance right in music. Torremans also notes the addition of a sound recording performance right initiated as a result of the case of *Gramophone Co. Ltd, v Stephen Cawardine & co.*¹⁰³ This would lead to the establishment of Phonographic Performance Ltd. in 1934 (PPL).¹⁰⁴ PPL's Canadian equivalent would be the Canadian Musical Reproduction Rights Agency (CMRRA). However CMRRA was not formed until 1975.¹⁰⁵

The extension of the performance right into sound recordings is noteworthy given that much like our present era, the evolving technologies of the period were stretching the original media boundaries under which the performance right had been established. The early 20th century saw not only gramophones but also recording technology (Dictaphone) radio and even early television

¹⁰¹ Copyright Board of Canada, *Annual Report 2013-14*, online: <<http://www.cb-cda.gc.ca/about-apos/annual-annuel/2013-2014-e.pdf>>.

¹⁰² Paul Torremans "Collective Management in the United Kingdom and Ireland" in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights 2d* (Netherlands: Kluwer Law International, 2010) [Gervais].

¹⁰³ *Gramophone Co. Ltd, v Stephen Cawardine & Co.* [1934] Ch 450.

¹⁰⁴ Interestingly, as is often the case the collective was begun not by artists or creators, but rather by the industry exploiting them, in this instance by EMI & Decca. See Company History online: <<http://www.ppluk.com/About-Us/Who-We-Are/Company-history/>>.

¹⁰⁵ Canadian Mechanical Reproduction Rights Agency 'About Us' online: <<http://www.cmrra.ca/cmrra/about/>>.

experimentation.¹⁰⁶ The issue of whether or not performance rights would extend to radio broadcasts was particularly contentious. In Great Britain, though the BBC contested the existence of a performance right in broadcasting, they nevertheless paid the tariff from the beginning of their public broadcasts.¹⁰⁷ In Canada the issue was settled by the 1931 *Copyright Amendment Act*, which defined a performance as “. . . any acoustic representation of a work or any visual representation of any dramatic action in a work, including such a representation made by means of **any mechanical instrument or by radio communication.**”(emphasis added)¹⁰⁸ In Australia the Australasian Performing Right Association would begin collecting revenues from broadcasters in 1929.¹⁰⁹

In 1952 the report of the Copyright Committee noted that the existence of the three operating collectives in Britain amounted to a ‘quasi’ monopoly, and recommended the creation of a regulatory body.¹¹⁰ In 1956 the Copyright Act would be revised and in the process create what is now known as the Copyright Tribunal.¹¹¹ Similar to the Copyright Appeal Board in Canada the Copyright Tribunal was limited to regulation of tariffs with respect to the musical collectives. As with the Canadian experience the continuing technological change would create new challenges particularly in the areas of reprography. Interestingly the United Kingdom saw the creation of their reprography collective earlier than Canada with

¹⁰⁶ According to *Television History – The First 75 Years* online: <<http://www.tvhistory.tv/Baird%20TV-Early%20Years.htm>>, the first television sets went on sale in Great Britain in 1928.

¹⁰⁷ *Supra* note 16 at 47.

¹⁰⁸ *Copyright Amendment Act* 1931 at s. 2.

¹⁰⁹ Australasian Performing Right Association History online: <http://en.wikipedia.org/wiki/Australasian_Performing_Right_Association>.

¹¹⁰ Copyright Committee, *Report of the Copyright Committee* [Chairman H.S. Gregory] Cmnd 8662 Board of Trade 1952 at paras 136 and 146 quoted in Gervais *supra* note 93.

¹¹¹ *Copyright Act* 1956 4 & 5 Eliz II c 74.

the creation of the Copyright Licensing Agency Ltd. in 1982. Canada's reprography collective would form in 1988 after the phase one revisions to the *Act*,

The United Kingdom would create a new *Copyright Act* in 1988,¹¹² at the same time that Canada was bringing in the Phase One revisions to their own *Act*. Like the Canadian *Act*, the UK *Act* would change the name and enlarge the role of tribunal. Chapter VIII of the 1988 UK *Act* defines the makeup of the Copyright Tribunal. Consisting of a chairman and two deputy chairmen appointed by the Lord Chancellor, the board would have at minimum two more regular members, but no more than eight under any circumstance.¹¹³ The *Act* also requires that the chairman and deputy chairmen meet eligibility standards, specifically,

(a)he satisfies the judicial-appointment eligibility condition on a 5-year basis;(b)he is an advocate or solicitor in Scotland of at least 5 years' standing; (c)he is a member of the Bar of Northern Ireland or solicitor of the Court of Judicature of Northern Ireland of at least 5 years' standing; or (d)he has held judicial office.¹¹⁴

Unlike the Canadian tribunal (and Australian as will be discussed shortly) a judge, sitting or retired, was not required, though was certainly eligible. Also interesting is the fact that other than the executive roles of the board the remaining members have no minimum eligibility, which in practice could allow for true representation of users as opposed to those with inherent interests in the outcomes historically or otherwise. Another interesting point specified in the *Act* allows the Lord Chancellor or the Chairman or Deputy Chairman the freedom to remove a member from the tribunal if "he has become bankrupt or made an arrangement with his creditors or,

¹¹² *Copyright Designs and Patents Act 1988, c 48.*

¹¹³ *Ibid* at 145 2.

¹¹⁴ *Ibid* at 145 3. 145 3?

in Scotland, his estate has been sequestrated or he has executed a trust deed for his creditors or entered into a composition contract.”¹¹⁵ However, unlike Canada there is no limitation on term appointment,¹¹⁶ nor is there any specification against members of the public service such as is contained in the Canadian *Act*,¹¹⁷ or any prohibition in regard to possible conflicts of interest.¹¹⁸ Presently the Copyright Tribunal consists of the maximum Chairman, two Deputy Chairmen and seven members.¹¹⁹

In 1996 the Monopolies and Mergers Commission of the U.K. published a report into performing rights and the agencies and user groups involved with them. Titled *Performing Rights*¹²⁰ it stands alone as the only fully public study of a performance right collective and one of the few inquiries into the growing arena of collective management. While not focusing heavily upon the Copyright Tribunal, the nature of the investigation and those appearing before it raised several concerns about the operation of the tribunal. Given that the purpose of the tribunal as cited by the commission was to “provide a quick, cheap and easy way of resolving disputes.”¹²¹ The commission was greatly disturbed “to hear that those who used the Tribunal felt that it provided neither a quick, cheap nor easy means of settling disputes.”¹²² This is a complaint often made in regard to dealing with copyright tribunals, and one that comes both from industry and users.

¹¹⁵ *Ibid* at 147 3(a).

¹¹⁶ *Supra* note 1 at s 66(5).

¹¹⁷ *Ibid* at s 66(6).

¹¹⁸ *Ibid* at s 66(3).

¹¹⁹ Copyright Tribunal of the United Kingdom Membership online: <<http://www.ipo.gov.uk/ctribunal/ctribunal-about/ctribunal-about-membership.htm>>.

¹²⁰ Monopolies and Mergers Commission. *Performing Rights* (London: HMSO, 1996)

¹²¹ *Ibid* at 2.89.

¹²² *Ibid* at 2.92.

3.5 Copyright Tribunal of Australia

The last of the three nations under discussion to create a tribunal, Australia, would not form their tribunal until they enacted new legislation with their *Copyright Act of 1968*.¹²³ Under section 138 of the Act of 1968 the tribunal shall “consist of a President, and such number of Deputy Presidents and other members as are appointed in accordance with this Division”¹²⁴ Similar to Canada the President (chairman in Canada) “must be a judge of the Federal Court of Australia”¹²⁵ but unlike Canada the Deputy President(s) also “must be, or have been, a judge of a federal court or a State or Territory Supreme Court.”¹²⁶ The criteria for members are on first blush similarly daunting since to qualify “a) he or she is or has been a Judge; (b) he or she is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory and has been so enrolled for not less than 5 years;”¹²⁷ However the following sections allow for greater freedom in appointment,

(c) he or she has had experience, for not less than 5 years, at a high level in industry, commerce, business, public administration, education or the practice of a profession; (d) he or she has obtained a degree of a university, or an educational qualification of a similar standing, after studies in the field of law, economics or public administration; or (e) he or she has, in the opinion of the Governor-General, special knowledge or skill relevant to the duties of a member.¹²⁸

¹²³ *Copyright Act 1968*, Australia [Act of 1968].

¹²⁴ *Ibid* at 138.

¹²⁵ *Ibid* at 140(1).

¹²⁶ *Ibid* at 140(1A).

¹²⁷ *Ibid* at 140 2(A & B).

¹²⁸ *Ibid* at 140 2(C, D & E)

Sections C through E while not guaranteeing anything certainly provide the possibility of a greater range of participation beyond legal professionals, unlike the requirements in Canada. The present Australian Copyright Tribunal consists of five members, three of whom are the President and two Deputy Presidents.¹²⁹

3.6 Considering the Three Regimes

As has been noted in the various national sections, there are many similarities between the regimes. Beyond the obvious common root of the UK 1911 Act, all of them also began their regulatory functions due to the establishment of music collective management organizations. Even more precisely all began their functions as a result of the establishment of the Performing Right Society (PRS). The PRS established itself in the UK in 1914. It established the Canadian Performing Right Society (CPRS) initially in 1924 and then successfully in 1925, and the Australian Performing Right Association in 1926.¹³⁰ To reiterate a position mentioned at the outset, the growth of collective management owes its success to the successful establishment of collectives for the public performance right in music. Clearly, as can be seen from these three nations music collectives have provided not only a successful and lucrative model for others to follow, but also the catalyst for the creation of regulatory bodies.

Despite the fact that a collective for the performance right was established in the United Kingdom well in advance of Canada, the first regulatory agency would appear in Canada. While there was a long history of opposition to the establishment of a performance right in Victorian England, by the onset of the First World War that

¹²⁹ Australian Copyright Tribunal, “Members” online: <<http://www.copyrighttribunal.gov.au/members>>.

¹³⁰ Mario Bouchard, “Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia” in Gervais *supra* note 93 at 310.

battle was essentially finished, and other financial consideration had created unions that would have previously been unthinkable.¹³¹ While that war may have been finished in the U.K it was a fresh battlefield in Canada and as the Debates of the House, and the ensuing Royal Commissions, made clear the behaviour of the collectives was less than exemplary.¹³² Although it is unclear if similar circumstances surrounded the establishment of the APRA, it seems reasonable to think they did as there is often a significant disconnect between the historical fact and the romantic creation myth surrounding such organizations.¹³³

Another similarity between the three groups has been the breakdown of collection revenue. Despite the wide-ranging addition to the number and types of collectives, particularly in the latter half of the twentieth century those connected to music provide the lion's share of revenue. As Gervais noted in his analysis of the Canadian system those collectives operating under section 67 of the *Act*, specifically those concerned with the performance or telecommunication of musical works, or sound recordings of musical works¹³⁴ "collect and distribute more money than all s. 70.1 collectives combined."¹³⁵

Perhaps one of the strongest connections between all the agencies is the general level of dissatisfaction amongst those who are forced to deal with them. Despite what may have been the underlying intent in their creation, as was noted in the Monopolies and Mergers Commission Report *Performing Rights*, they do not

¹³¹ For a detailed discussion of this see *supra* note 9 chapters 5-6.

¹³² *House of Commons Debates*, 17th Parliament, 2nd Session, Vol. 1, at 901 (1935).

¹³³ *Supra* note 10 chapter 7.

¹³⁴ *Supra* note 1 at s. 67 a & b.

¹³⁵ Daniel Gervais "A Uniquely Canadian Institution: The Copyright Board of Canada" in Y. Gendreau, ed, *An Emerging Intellectual Property Paradigm* (Cheltenham, UK: Edward Elgar, 2008).

provide ‘quick, cheap or easy’ resolutions to disputes. Nor is this a complaint limited to one side of the table. As Howard Knopf has noted this affects all parties seeking resolution. “Even in recent times, the Copyright Board has been known to take as much as 18 months to render a decision from the time the hearing is over, which may in turn be some years after the tariff was originally filed.”¹³⁶ In some instances this lag time can be even more problematic because in the case of the Canadian board, decisions are retroactive.

3.7 Systemic Differences

Of the three agencies only Canada has a full time board, the other are both part time.¹³⁷ With respect to the number of collectives in operation, Canada, with thirty-eight, has double the amount of collectives operating in the United Kingdom. Australia manages with only seven collectives, roughly a fifth of Canada’s cohort.¹³⁸ The author has noted in a previous work that much of this is attributable to the Canadian policy decision to actively encourage collective management.¹³⁹

Unlike Canada both the U.K and Australia can award costs in their decisions. This has been something that has been suggested might enhance the operation of the Canadian system, however it was noted in the U.K. investigation *Performing Rights* that “ [u]sers were also concerned that the Tribunal’s present practice of awarding costs so as to reflect the outcome of the case acts as a deterrent, particularly to small users, to recourse to the Tribunal.”¹⁴⁰ However that may also

¹³⁶ *Supra* note 11 at 30.

¹³⁷ *Ibid* at 14.

¹³⁸ For a list of collecting societies see http://en.wikipedia.org/wiki/List_of_copyright_collection_societies.

¹³⁹ *Supra* note 10.

¹⁴⁰ Monopolies and Mergers Commission. *Performing Rights* (London: HMSO, 1996) at 2.94.

be the result of the narrower interpretation taken with respect to Users in the Commonwealth tradition. That historic practice and its variance with the Canadian system were noted in the *Alberta v. Access Copyright* (*Alberta v AC*) decision of the Supreme Court of Canada.¹⁴¹

Another difference between the nations is that Canada does not have an appeals process included within our tribunal system. In Canada the only appeal of a tribunal decision is to the Federal Court. Conversely both Australia and the United Kingdom have an appeals tribunal as part of their systems, however it does not preclude appealing to the federal court if the appellant is not satisfied with the decision of the appeals tribunal.

Arguably the most significant divergence between the three jurisdictions has been the emergence of User's Rights within the Canadian regime. This reached its zenith in July of 2012 when the Supreme Court of Canada handed down five rulings on copyright related cases in the same day. It was a historic moment in the history of Canadian copyright, and perhaps common-law copyright as a whole, though that remains to be seen. Beyond their relationship as copyright cases, the five cases all held something else in common. All five had arrived at the SCC on appeal from the Federal Appeals Court where they had in turn been on review from decisions of the Copyright Board of Canada. These cases will be considered later as part of a review of the judicial appeals of the board and the implications for the Board.

¹⁴¹ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [Alberta v AC].

Table 1.

Tribunal Comparison

	Can.	U. K.	Aus.
Collective Society Established	1925	1914	1926
Extension of Performance Right to Broadcasting	1931	1934	1929
Tribunal Established	1936	1956	1968
Full Time Board (FT) Part Time (PT)	FT	PT	PT
Support Staff (number)	14	1	0****
Chair/President required to be a sitting or former Judge	Y	N*	N
Deputy (#)	1-2	2	2**
Deputies require legal background	N	Y	Y
Additional Members (number)	3max	2min 8max	2***
Additional members require legal background?	N	N	N
Appeal available within tribunal system	N	Y	Y
Appeal available to court of law	Y	Y	Y
Costs awarded	N	Y	Y
Number of collectives monitored	36	18	7
Recognition of Users Rights	Y	N	N

*: President and Deputies must meet a minimum standard of legal knowledge including formal status but not necessarily requiring role of judge.

** Presently 2 Deputies, but more could be created under the Act if needed.

*** 2 presently but under legislation as many as needed may be appointed.

**** The tribunal has no physical resource of its own. The Federal Court of Australia manages necessary funding.

Chapter 4 The User Returns

While all World Trade Organization member nations enforce rights for copyright owners at a minimum standard based on the Berne Convention for Literary and Artistic Works,¹⁴² not all nations similarly enforce a minimum standard of user's rights, or exceptions to the infringement of owner's rights. The simple reason for this is that there is no minimum standard set within Berne or the WTO. This chapter will consider the status of user's rights within the Canadian, British and Australian copyright regimes. In the author's estimation the Canadian regime now represents the benchmark against which all other regimes should be measured with respect to user's rights.

While both the Canadian and Australian copyright regimes are based historically on the British tradition, they contain slight variances likely due to their own unique socio-historical circumstances. While the first Canadian *Act* was almost an exact copy of the British Act, there have been changes over time. Historically Canada has been a nation dominated by both French and English colonial interests. While the battle on the Plains of Abraham may have settled the ownership issues in favour of the English, it did not remove the impact of francophone culture from the Canadian social, economic and legal frames. Thus, while most of Canada follows an Anglo-American common law system derived from the British tradition, Quebec follows the Civil tradition similar to France. Canada is also officially bilingual which means that the official French title for the *Act* is "Droit d'Auteur". This is not an issue of semantics; Myra Tawfik considered this fundamental difference in approach when she noted that the Supreme Court of Canada had split along legal traditions when it rendered its decision in the case of

¹⁴² Berne Convention for Literary and Artistic Works September 9, 1886, amendments through September 28, 1979, available online <http://www.wipo.int/treaties/en/text.jsp?file_id=28369>.

*Théberge v. Galerie d'Art du Petit Champlain Inc.*¹⁴³ With respect to the effect of this dual nature underlying Canadian copyright, Justice Binnie wrote,

It is not altogether helpful that in the French and English versions of the Act the terms “copyright” and “*droit d’auteur*” are treated as equivalent. *While the notion of “copyright” has historically been associated with economic rights in common law jurisdictions, the term “droit d’auteur” is the venerable French term that embraces a bundle of rights which include elements of both economic rights and moral rights (emphasis added).*¹⁴⁴

4.1 Fair Dealing as a User Right

Canada can trace its fair dealing exceptions back to the 1911 Copyright Act of the United Kingdom (1911 Act). “Provided the following acts shall not constitute an infringement of copyright: (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or news summary”¹⁴⁵ The five areas denoted by the 1911 Act would remain the only fair dealing exemptions under Canadian law until the 2012 revision to the *Act*. Following the 2012 revision fair dealing would be expanded to include a right of parody, satire and education. These additions to the specified exemptions were the result of a long period of copyright consideration led in large part by the Supreme Court of Canada.

In March of 2004 the SCC would bring down a landmark ruling that would shake the foundations of Owner’s rights groups in Canada and lead the way for significant discussion about the nature of copyright in the 21st century with the case of *CCH Canadian Limited v. Law Society of Upper Canada*, [2004] 1 SCR 339 (CCH).¹⁴⁶ The case involved a group of publishers who claimed their copyrights had been infringed by

¹⁴³ Myra Tawfik, “Copyright as Droit d’Auteur” (2003) 17 IPJ 58.

¹⁴⁴ *Théberge v. Galerie d’Art du Petit Champlain* 2002 SCC 34 [Theberge].

¹⁴⁵ *Supra* note 70 s 2.1 (i).

¹⁴⁶ *Supra* note 18.

the Great library of Osgoode hall in their provision of document service to distant researchers. The case is particularly important for its establishment of boundaries with respect to fair dealing within Canadian law. For the purposes of this discussion it is also extremely relevant that the court was very specific in noting that limitations to owner's rights were not simply 'loopholes' but were in fact 'user's rights'. Noting "The exceptions to copyright infringement, **perhaps more properly understood as users' rights**, are set out in ss. 29 and 30 of the Act." (Emphasis added)¹⁴⁷ The court also emphasized the importance of the exceptions as users' rights in the balance of copyright.

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, *supra*,¹⁴⁸ has explained, at p. 171: "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."¹⁴⁹ ¹⁵⁰

The court also reasserted the purpose of Copyright, referring to the earlier Thèberge ruling,

As mentioned, in *Thèberge, supra*, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation.¹⁵¹

¹⁴⁷ *Ibid* at 12.

¹⁴⁸ David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000).

¹⁴⁹ *Supra* note 18 at 48.

¹⁵⁰ Anecdotally the author recalls attending a political economy class on the day following the publication of the SCC ruling in which the American legal scholar, Siva Vaidyanathan, was a guest. Mr. Vaidyanathan's reaction was one of shock (pleasurable) that the SCC had stated explicitly that user's had rights.

¹⁵¹ *Supra* note 18 at 21.

This notion of balance first stated explicitly in *Thèberge*, and then reaffirmed in *CCH* is critical to understanding the courts position regarding fair dealing and user's rights. Although the section cited from *Thèberge* was written in regard to the discussion of the threshold of originality, the issue of balance used to justify a threshold of originality also underpins the courts' explicit formulation of both user's rights and the boundaries of fair dealing.

Arguably the greatest impact of *CCH* was the clarification of the boundaries of fair dealing. Referring back to an earlier court of appeal decision the SCC noted that there could be no one single definition of "fair dealing" since the decision of what constituted fair dealing would always depend on the facts of each individual case. Nonetheless the SCC accepted the six criteria suggested by the court of appeal as being factors that should be taken into consideration in any determination of fair dealing. "(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."¹⁵² The court went further however to develop these six points in such a way as to provide guidance for owners and users.

1 The Purpose of the Dealing. It will be fair if it is for one of the allowable

purposes delineated under s .29: research, private study, criticism, review or news reporting (since 2012, education, parody or satire are also included).¹⁵³

It expresses that "these allowable purposes should not be given a restrictive

¹⁵² *CCH supra* note 18 at 53.

¹⁵³ *Ibid* at 54

interpretation or this could result in the undue restriction of users' rights."¹⁵⁴

The Court also stressed the need to give "a large and liberal interpretation"¹⁵⁵ to the definition of research, stating, "lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*".¹⁵⁶

2 The Character of the Dealing. How were the works dealt with? Were multiple copies made, or were copies distributed widely or to a limited group of people? Was the copy destroyed after being used? What is the general practice in the industry?¹⁵⁷

3 The Amount of the Dealing. Not simply the amount of the work, but also the significance of the portion quoted should be taken into consideration. The court commented that "...the quantity of the work taken will not be determinative of fairness, but it can help in the determination".¹⁵⁸ In other words even a trivial amount might not be fair dealing depending on its significance to the whole. Conversely in some instances (photographs for example) use of the entire work might be 'fair' as "there might be no other way to criticize or review certain types of works".¹⁵⁹

4 Alternatives to the Dealing. Was there a "non-copyrighted equivalent of the work"? Was the dealing "reasonably necessary to achieve the ultimate

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid* at 51.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* at 55.

¹⁵⁸ *Ibid* at 56.

¹⁵⁹ *Ibid.*

purpose"?¹⁶⁰ For example is it necessary to use a photograph in which copyright subsists for the purpose of educating a class as to the appearance of a specific genus of flower? If there were a non-copyright version available that would serve the purpose equally well then it would be harder to establish a case for fair dealing.

5 The Nature of the Work. Copying from a work that has never been published could be more fair than from a published work "in that its reproduction with acknowledgement could lead to a wider public dissemination of the work - one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair."¹⁶¹

6 Effect of the Dealing on the Work. If the work that is reproduced might compete in the marketplace with the original, then the dealing may not be fair. However the court also noted "Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair."¹⁶²

While the notion of fairness will always be situational, "whether something is fair is a question of fact and depends on the facts of each case",¹⁶³ the six points provided by the court created a set of guidelines for users to consider prior to use, which is far more than had been available previously. The guidelines would be given

¹⁶⁰ *Ibid* at 57.

¹⁶¹ *Ibid* at 58.

¹⁶² *Ibid* at 59.

¹⁶³ *Ibid* at 52

even more depth in the subsequent rulings of the pentalogy.

4.2 The United Kingdom

Fair dealing under the law of the United Kingdom also allows for the use of copyrighted works without licensing in limited situations. Sections 29 and 30 of the Copyright, Designs and Patents Act 1988, define those circumstances under which fair dealing is a valid defense. Specifically, where the use is for the purposes of research or private study, where it is to allow for criticism or review, and where it is for the purpose of reporting current events. As of 1 October 2014, Section 30A provides for fair dealing as a defense in cases where the infringement was for the purpose of caricature, parody or pastiche.

Under the UK Act research and study are narrowly defined and do not apply to commercial research. They also do not include infringements of broadcasts, sound recordings or film. Research cannot be private (and in a non-academic setting must also not have a future potential commercial purpose), as this exception is justified on the ground that research provides a benefit to society as a whole. A further limitation is set out Section 29(3)(b) which designates that the copying cannot be fair dealing if the copier knows it will result in "copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose."¹⁶⁴ As an example unlike the ruling in *Alberta v AC*, a teacher could not print multiple copies of a work for their students while depending on the fair dealing exceptions.

Infringers must not only demonstrate their copying falls into one of the fair

¹⁶⁴ *Supra* note 112 at 29(3)[b].

dealing categories, but that it is also "fair". Factors taken into account when determining the "fairness" of the use can include the quantity of the work taken, whether or not it was previously published, the motives of the infringer and what the consequences of the infringement on the original author's returns for the copyrighted work will be. Unlike fair dealing within Canada, or perhaps more accurately similar to Fair Dealing in Canada prior to CCH and the Pentalogy, the guidelines for the Fair Dealing criteria in the UK are not well defined. As noted on the United Kingdom Government webpage "There is no statutory definition of fair dealing - it will always be a matter of fact, degree and impression in each case. The question to be asked is: how would a fair-minded and honest person have dealt with the work?"¹⁶⁵

4.3 Australia

In Australia, the grounds for fair dealing are:

- Research and study¹⁶⁶
- Review and criticism¹⁶⁷
- Reporting the news¹⁶⁸
- Legal advice¹⁶⁹
- Parody and Satire¹⁷⁰

The 2006 *Copyright Amendment Act 2006*¹⁷¹ added parody and satire to the fair

¹⁶⁵ Government of the United Kingdom, "Exceptions to Copyright" online: <<https://www.gov.uk/guidance/exceptions-to-copyright>>.

¹⁶⁶ *Supra* note 123 at s 40.

¹⁶⁷ *Ibid* at s 41.

¹⁶⁸ *Ibid* at s 42.

¹⁶⁹ *Ibid* at s 43.

¹⁷⁰ *Ibid* at s 41(a).

¹⁷¹ *Copyright Amendment Act 2006* (Australia) (Cth) No. 158 of 2006

dealing exceptions (though only within certain circumstances) and also added a number of specific and limited exceptions to copyright for personal use of AV material, including time shifting¹⁷² and format shifting.¹⁷³ Generally these exceptions have been narrowly defined, and as the Law Reform Commission for Australia has noted on its webpage “it is for the courts to decide whether particular uses of copyright material constitute fair dealing.”¹⁷⁴ Similar to the criteria used to determine fairness in Canada, Australia reviews the purpose and character of the dealing, the nature of the work, the possibility of obtaining the work commercially within a reasonable time, the effect of the use on the potential market for the work or on its value, and how much of a work is copied. While no specific amount is specified in the Australian *Copyright Act* most educational institutions suggest a 10% guideline under fair dealing provisions for the purpose of research and study.¹⁷⁵ Contrast this with the Canadian approach delineated in *CCH* which stated “...the quantity of the work taken will not be determinative of fairness, but it can help in the determination”.¹⁷⁶

Another important distinction in the Australian approach is that the focus is on the person making the copy, “the current state of the law with respect to fair dealing—which directs a court to look to the purpose of the person *making* the copy rather than the actual *user* of the copy—the ‘maker’ of the copy ... may not be in a

¹⁷² *Ibid* at s 111.

¹⁷³ *Ibid* at s 43C, 547J, 109A and 100AA.

¹⁷⁴ Australian Law Reform Commission, online: <<https://www.alrc.gov.au/publications/7-fair-dealing/current-law>>.

¹⁷⁵ See University of Technology Sydney *Copyright and UTS Students* online: <<https://www.lib.uts.edu.au/sites/default/files/attachments/page/Factsheet%20-%20What%20can%20you%20copy.pdf>><https://www.lib.uts.edu.au/sites/default/files/attachments/page/Factsheet%20-%20What%20can%20you%20copy.pdf>>.

¹⁷⁶ *Supra* note 18 at 56.

position to claim the benefit of the fair dealing exception".¹⁷⁷ Once again contrast this with the rulings of SCC, specifically *CCH & Alberta v AC* where the SCC was clear that it was the position of the user that should be considered.

4.4 Conclusion

When viewed in comparison to the British and Australian regimes, the fair dealing exemptions within Canadian copyright are notably expansive. Given that they have developed from the same fundamental root, the 1911 Act, one might presume the differences between Canada and Australia would not be so significant. However, most common law jurisdictions view fair dealing in the narrow sense of exceptions only. The Canadian approach is very different. First and foremost, as noted in the discussion of *CCH*, the court made clear that these were users' rights and an integral part of copyright not simply a 'loophole'. This approach is fundamentally different from one of mere exception. There are exceptions to a rule but, as of *CCH*, in Canada the exception is part of the rule of law, not merely a defense against it. As Hugenholtz and Senftleben have pointed out, within author centric systems the approach to limitations as exceptions has been critical to maintaining the system in favour of the owners' rights (though couched in the persona of the author).¹⁷⁸ They also point out however that this has played out similarly in utilitarian justified regimes noting that,

[I]nspired by economic theories (and powerful lobbies) that posit copyright as (intellectual) 'property', the economic rights that the law grants to copyright owners are increasingly perceived, by courts, politicians and some

¹⁷⁷ Universities Australia submission to Australian Law Reform Commission *supra* note 164.

¹⁷⁸ P B Hugenholtz and Martin Senftleben, "Fair Use in Europe: In Search of Flexibilities, 2011" at 7, online: SSRN: <<http://ssrn.com/abstract=1959554>>.

scholars alike, as absolute. According to these theories, just as property rights in tangible goods warrant complete and perpetual control, making unauthorized uses unlawful as a matter of principle, copyright should ideally become a perpetual and absolute right that tolerates few or no 'free' uses.¹⁷⁹

The recognition of users' rights in addition to those of owners has precipitated a larger discourse in the area of fair dealing. From a national perspective it is gratifying to see Canada at the leading edge of this discussion though at the same time it is disappointing that our jurisprudence has not had a greater impact on other common-law jurisdictions. The series of changes that took place within eight years at the highest level were absolutely staggering. They have culminated in a fair use regime that is unparalleled in common-law regimes, and one that will hopefully serve as a model for those other regimes. As will be discussed further in chapter five, the recognition of user's rights has had a profound impact on the Copyright Board of Canada. Though it has taken a considerable time for the full impact to be felt, the change in the Board is evident from recent decisions and signals a significant change in the Board's understanding of its role in the process of collective management.

¹⁷⁹ *Ibid.*

Chapter 5: The Copyright Board Under Review

While all tribunals are bound by their enabling legislation and the jurisprudence surrounding their individual areas, they are generally held to be the *experts* in their field. As Chief Justice McLachlin noted in a 2013 address to the Annual Conference of the Council of Canadian Administrative Tribunals, “Acceptance of the specialized expertise and policy perspectives that administrative decision-makers bring to their special tasks of judging and the consequent need for deference is universal”.¹⁸⁰ However, as the Chief Justice noted elsewhere in her speech, this has not always been the case, nor does this mean such tribunals operate entirely without review. Despite the deference shown by the courts, the Copyright Board has not gone unchallenged or unquestioned in its operations.

Howard Knopf, in a 2008 address to the Law Society of Upper Canada, listed a number of concerns with respect to the Board. Noting the Board’s willingness to accept, and its reliance upon, ‘expert’ testimony, and the questionable nature of those experts, he comments,

The Board places considerable reliance on opinion evidence presented by supposed expert although it often does not formally qualify the experts as such. Some of the experts who appear before the board do so quite regularly and have close economic ties if not outright dependency on the party calling them. While these persons may have considerable “expertise,” they may have little or no independence with respect to the party paying for their services.¹⁸¹

While the independence of ‘expert’ witnesses may not have been noted by the court

¹⁸⁰ Chief Justice Beverley McLachlin, “Administrative Tribunals and the Courts: An Evolutionary Relationship” (Address delivered at the Annual Conference of the Council of Canadian Administrative Tribunals, 2013) at 4, online: Supreme Court of Canada <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>>.

¹⁸¹ *Supra* note 11 at 22.

the preponderance of expert testimony certainly has, as evidenced by this statement of the court in *Canadian recording Industry Association v. Society of Composers, Authors and Music Publishers of Canada*,¹⁸² “As is so often the case, the hearings before the Board were, in large part, a contest of experts.”¹⁸³

Another common complaint in regard to Board practice noted in C. Craig Parks’ review of Copyright Collectives for Heritage Canada,¹⁸⁴ as well in more recent submissions to the Copyright Board consultation process, is the long delay in decisions of the board. In a survey of the current responses made to the Board’s request for consultation on procedural issues¹⁸⁵ the two most common concerns noted were the length of time taken for decisions and the uneven nature of the interrogatory process.¹⁸⁶

Howard Knopf’s comments in response to the current consultation process were insightful, though not particularly supportive of the process; however, Knopf makes a very interesting comparison. Despite the claim of the need for more funding and staff to address issues before the board, the 2014 budget for the Copyright Board of Canada is approximately 10% of the Budget for the Supreme Court of Canada. However,

¹⁸² *Canadian Recording Industry Association v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 322.

¹⁸³ *Ibid* at 7.

¹⁸⁴ C. Craig Parks, *A Report on Copyright Collectives Operating in Canada* (2006), online: <http://publications.gc.ca/collections/collection_2007/ch-pc/CH44-125-2007E.pdf>.

¹⁸⁵ Copyright Board of Canada, *Letter to Stakeholders* (5 February 2015), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/about-apropos/pdf/vp-letter.pdf>>.

¹⁸⁶ See comments from collectives, online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/about-apropos/index-e.html>>.

The Copyright Board typically renders only about two or three (more or less) substantive decisions a year that typically require several years to reach the hearing stage. The hearings are rarely longer than a week or two. There is typically a 1.5 to 2 year (or even more) delay after the hearing before a decision is rendered, and the decisions are often then reversed after judicial review. By contrast, the Supreme Court of Canada in 2013 received 529 applications for leave to appeal, heard 75 appeals and rendered judgment in 78 cases. The average time between a hearing and the rendering of a judgment was 6.2 months.¹⁸⁷

Knopf's comment with regard to judicial review is particularly noteworthy given decisions of the Copyright Board have been the subject of review by the Federal Court of Appeals twenty-one times between 2004 and 2014. This is not insignificant given the limited number of decisions released by the Board, and as Knopf noted in in 2008, "[a]lthough the FCA will doubtless continue to defer to the Board, to some extent at least, on 'core' matters relating to fact finding and rate calculation, it would seem that there will be no deference and increasing decisiveness on matters related to legal reasoning."¹⁸⁸

It is also useful to consider the Boards decisions in comparison with other Tribunals, though finding equivalent comparators is difficult. Data from the Canadian Agricultural Review Tribunal (CART) during the period 2008-2014, The Competition Tribunal between 2004-2014 and the Canadian Human Rights Tribunal between 2008 and 2014 can provide a limited frame of reference for tribunal decisions on a very general level. There are no other tribunals dealing solely with copyright issues, and few that have such a narrow focus combined with a small public profile. With respect to the three comparators being proffered, the Human

¹⁸⁷ Letter from Howard P. Knopf to Gilles McDougall, "Re: WORKING COMMITTEE ON THE OPERATIONS, PROCEDURES AND PROCESSES OF THE COPYRIGHT BOARD" (6 March 2015), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/about-apropos/pdf/KNOPF.pdf>>.

¹⁸⁸ *Supra* note 11 at 30.

Rights Tribunal is probably the most widely known, with both the Competition Tribunal and CART known to a smaller group of stakeholders.

During the period 2008-2014 CART delivered 200 decisions. Similar to the Copyright Board, the only avenue of appeal with respect to the CART decisions is to the Federal Court of Appeal. Of the two hundred decisions twenty would be reviewed by the FCA. Of those, sixteen or 80%, would be allowed.¹⁸⁹ Also interesting is the fact that its combined budget for 2013-14, a year in which it would issue forty-three decisions, was five hundred and seventy-four thousand dollars. Conversely in the same year the Board would issue 9 decisions with an operating budget of just under three and one half million.¹⁹⁰

The Canadian Human Rights Tribunal would issue two hundred and eighty-nine decisions between 2004 and 2009, of which thirty-two, or 4.5% would receive judicial review and 41% would be allowed.¹⁹¹ The Competition Tribunal¹⁹² would render two hundred and seventy-four decisions between 2004 and 2014, compared to the Board's sixty-three, of which twenty-one, or 8% of all decisions, would receive review. Of those twelve, or 57% would find against the decisions of the Tribunal. The budget for the Competition tribunal, while varying over the years, averages approximately one and one quarter million a year compared to the Boards three and one half million in 2014.

¹⁸⁹ Canadian Agricultural Review Tribunal *Annual Reports* online <http://cart-crac.gc.ca/eng/annual-reports/?id=1278107179184>

¹⁹⁰ *Supra* note 186.

¹⁹¹ Canadian Human Rights Tribunal *Annual Reports* online <http://www.chrt-tcdp.gc.ca/NS/reports-rapports/ar-ra-eng.asp>

¹⁹² Competition Tribunal of Canada *Annual Reports* online <http://www.ct-tc.gc.ca/Resourcessources/DPR-RSR/DPR-RMR-eng.asp>

One of the more striking aspects of these comparators is the volume of decisions being rendered. All of the tribunals noted issued a minimum of two hundred decisions in the periods cited compared to only ninety decisions throughout the full eleven-year span by the Copyright Board.¹⁹³ An average of 10% or less of total decisions by the other tribunals were subject to judicial review, while the Board had an average of 23%. Also where operating budgets were available (Competition Tribunal and CART), they were less than half of the budget noted for the Board despite all other tribunals delivering more than twice as many decisions. While the Board's reversals on review may reflect a reasonable pattern in comparison with other tribunals, the percentage of cases being reviewed is more than double that of the highest comparator.

It is also important to recognize that the area of administrative law in Canada has been commented upon in recent years for the frequency of change and the lack of stable structural framework which also affect the process of judicial review. Justice David Stratas has stated "Our administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan."¹⁹⁴ This instability may also be a factor in the outcome of judicial reviews.

¹⁹³ Copyright Board of Canada, Annual Reports, online: <http://www.cb-cda.gc.ca/about-apropos/reports-rapports-e.html>.

¹⁹⁴ Stratas, David, *The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency* (February 17, 2016). Available online: SSRN: <<http://ssrn.com/abstract=2733751>>.

5.1 Contextualizing the Federal Court Review

By virtue of section 28 (j) of the *Federal Courts Act*, the Federal Court of Appeal is the only means of judicial review for decisions of the Copyright Board.¹⁹⁵ In her address to the 6th Annual Conference of the Council of Administrative Tribunals, Chief Justice McLachlin noted that over time the standard of review for administrative tribunals has changed considerably.¹⁹⁶ In our current period the Supreme Court decision in *Dunsmuir v New Brunswick*¹⁹⁷ has defined the standard of review for tribunal decisions in Canada. The *Dunsmuir* decision was notable for the fact that it reduced the tripartite nature of the previous standard by reducing two separate standards of review into a single reasonableness standard.¹⁹⁸

As Chief Justice McLachlin has commented it is primarily in this area that deference has been shown based in large part on the presumed expert knowledge of the tribunals in their specific subject areas. In the *Dunsmuir* decision the court noted,

[A] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the **existence of justification, transparency and intelligibility within the decision-making process** and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. [emphasis added]¹⁹⁹

¹⁹⁵ *Federal Courts Act*, RSC 1985, c F-7, s. 1; 2002, c. 8, s. 14.

¹⁹⁶ *Supra* note 170.

¹⁹⁷ *Dunsmuir v New Brunswick*, 2008 SCC 9 [Dunsmuir].

¹⁹⁸ Prior to *Dunsmuir* there existed both a reasonableness (simpliciter) and a patent unreasonableness standard.

¹⁹⁹ *Supra* note 197 at 47 [emphasis added].

5.2 Decisions of the Federal Court of Appeal

The Federal Court of Appeal reviewed twenty-one decisions of the Copyright Board between 2004 and 2014²⁰⁰. Utilizing aspects of a methodology developed by Margaret Ann Wilkinson in her review of the SCC copyright decisions²⁰¹ this section will consider the body of decisions as a whole. All of the decisions reviewed took place following the SCC decision in *CCH* and its ensuing impact on the Canadian Copyright landscape. Of the twenty-one cases heard by the court, nine or approximately 43%, were found in favour of the appellants. Within those, six granted the appeal in whole and three in part. Five of these twenty-one cases would subsequently be appealed to the SCC and provide the basis for what has become known as the Pentalogy. Three of the Pentalogy decisions would overturn the decisions of the FAC, resulting in a total of twelve decisions (or 57%) in favour of the appellants relative to the twenty-one decisions of the board reviewed. Therefore, almost 60% of the Board's decisions were overturned following review by the Federal and Supreme courts..

Of the twenty-one cases reviewed by the FCA sixteen were decided on a basis of correctness, with two of those also submitting issues subject to the reasonableness standard. Including the two cases, which were submitted on both a standard of correctness and reasonableness, seven of the twenty-one cases were considered on the grounds of reasonableness. Of the seven reviewed on the ground

²⁰⁰ See table 2 for a list of all related appeals in this review.

²⁰¹ Margaret Ann Wilkinson "The Context of the Supreme Court's Copyright Cases" in Michael Geist, ed, *The Copyright Pentalogy How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2012).

of reasonableness, three were granted. While it is unnecessary to review all twenty-one cases, some of the more significant decisions are worth noting in detail.

The 2004 *Canadian Private Copying Collective v. Canadian Storage Media Association*,²⁰² case revolved around the decision of the Board to approve a blank media levy in respect of MP3 players such as the Apple iPod. The court noted, “In my respectful view, it is for Parliament to decide whether digital audio recorders such as MP3 players are to be brought within the class of items that can be levied under Part VIII.”²⁰³ Thus the court determined the Board had overstepped its jurisdiction with respect to the interpretation of the *Act*. A similar issue would arise in *Apple v. Canadian Private Copying Collective*,²⁰⁴ in 2008. In this instance the Board publicized a proposed tariff submitted by Canadian Private Copying Collective [CPCC]. Apple sought to have the section’ addressing digital audio recorders removed from the proposed tariff given the decision in *Canadian Private Copying Collective v. Canadian Storage Media Association*, the Board dismissed their concern. In the subsequent decision of the court, the FCA noted that “[I]t is necessary to consider only the principle established in *Canadian Private Copying Collective v. Canadian Storage Media Alliance (C.A.)*, [2005] 2 F.C.R. 654, which is dispositive.”²⁰⁵ Simply put the court had clearly stated that the decision regarding the inclusion of digital audio recorders under the *Act*, was Parliament’s, not the Board’s nor CPCC’s.

The notion of transparency and intelligibility raised in the *Dunsmuir* decision is particularly relevant to decisions of the Copyright Board. As the Federal court

²⁰² *Canadian Private Copying Collective v. Canadian Storage Media Association*, 2004 FCA 424.

²⁰³ *Ibid* at 164.

²⁰⁴ *Apple v. Canadian Private Copying Collective*, 2008 FCA 6.

²⁰⁵ *Ibid* at 3.

noted in *Canadian Association of Broadcasters v. SOCAN*²⁰⁶ “The board is entitled to the greatest deference in the exercise of its discretion... However, it must explain the basis of its decisions that enables the Court on Judicial review to determine on the basis of the reasons, read in context, whether the decision was rationally supportable.”²⁰⁷ And in the following paragraph “It is not enough to say in effect: “We are the experts. This is the figure. Trust us.””²⁰⁸ Howard Knopf has noted that for many years the Board considered its decisions to be ‘bullet proof’,²⁰⁹ however the court’s decision made it clear they were not.

In the 2010 *SOCAN v. Bell*²¹⁰ the issue under review was the Board’s decision that the downloading of a preview of music no more than thirty seconds in length fell within the Fair Dealing exceptions under section 29 of the *Act*, and as such was not compensable by tariff. SOCAN disagreed, taking the position that the Board had erred in their interpretation of section 29. The court however agreed with the Board noting with reference to the Boards’ written decision that “This passage shows that the Board found the amount of the dealing to be the length of each preview in proportion to the length of the complete work. In making this determination, it also considered the user’s objective of researching a purchase.”²¹¹ Ultimately the court believed that the Board had taken the proper approach to the decision with respect to the notion of balance between users and owners as brought forth in *Theberge* and the criteria for Fair Dealing as delineated in *CCH*. Unsatisfied with the outcome,

²⁰⁶ *Canadian Association of Broadcasters v. SOCAN*, 2006 FCA 337.

²⁰⁷ *Ibid* at para 16.

²⁰⁸ *Ibid* at para 17.

²⁰⁹ *Supra* note 11 at 24.

²¹⁰ *Socan v. Bell*, 2010 FCA 123.

²¹¹ *Ibid* at para 27.

SOCAN would appeal this to the SCC and it would be one of the cases released in the pentalogy.

*Alberta (Education) v. Access Copyright*²¹² would also be included in a later appeal to the SCC. At issue was the number of copies made for distribution in the classroom. The Board had included those copies in the number used for setting the tariff rate to be collected by Access Copyright, however the applicants felt the board had erred in their decision. The applicants believed their uses of multiple copies in the classroom fell outside the tariff by virtue of the Fair Dealing provisions. In their discussion of the issue the court ultimately focused on the meaning of 'appropriate medium' as noted within section 29.4(3) of the *Act*, "Except in the case of manual reproduction, the exemption from copyright infringement provided by [...] subsection (2) does not apply if the work or other subject matter is commercially available in a medium that is appropriate for the purpose referred to in that paragraph or subsection, as the case may be."²¹³ The court felt that the Board had not considered the issue of medium sufficiently in their analysis and thus returned it to the Board for review.

2010 was a busy year for the court with respect to the review of Board decisions, with seven cases being heard that year. In addition to *SOCAN v. Bell and Alberta (Education) v. Access Copyright*, the court would hear two more cases that year that would ultimately reach the SCC. In *Shaw Cablesystems G.P. v. Society of*

²¹² *Alberta (Education) v. Access Copyright*, 2010 FCA 198.

²¹³ *Supra* note 1 at s 29.4(3).

Composers, Authours and Music Publishes of Canada,²¹⁴ Shaw would appeal a decision of the Board which determined that the delivery of a musical work over the internet was a 'communication' with respect to the *Act*. Delivery in this instance was the downloading of a musical work purchased online and then downloaded to the individual purchaser's device via the internet. Though the appellants had made the case before the board and the court that the works downloaded had already triggered a payment for reproduction at the point of sale and the addition of a royalty by means of a tariff for communication was in essence double dipping, the court found that the Boards decision was valid.

*Entertainment Software Association v. Society of Composers, Authours and Music Publishes of Canada*²¹⁵ focused on the Boards decision in regard to the downloading of purchased games from online software vendors. SOCAN held that such games, which included music as part of their soundtrack, constituted a communication to the public and as such triggered a tariff. The Board agreed with SOCAN's position. The Entertainment Software Association (ESA) disagreed noting that (similar to the case of *Shaw Cablesystems G.P. v. Society of Composers, Authours and Music Publishes of Canada*) the music in the games was already subject to license prior to sale and that the download was simply the delivery to the individual purchaser and not a communication to the public. The court agreed with the Board and dismissed ESA's appeal. This too would ultimately become part of the Pentalogy.

²¹⁴ *Shaw Cablesystems G.P. v. Society of Composers, Authors and Music Publishes of Canada*, 2010 FCA 220.

²¹⁵ *Entertainment Software Association v. Society of Composers, Authors and Music Publishes of Canada*, 2010 FCA 221.

The final decision appealed to the FAC that would appear as part of the pentalogy of rulings from the SCC was *RE:SOUND v. Motion Picture Theatre Associations of Canada*²¹⁶. The issue revolved around Re: Sound's attempt to create two new tariffs, one for the inclusion of pre-existent recordings into the soundtrack accompanying a movie when shown in a theatre and another with respect to the same works but when broadcast over air, satellite or other such services. The court determined that the Board had acted appropriately given their decision was fundamentally grounded in the definition within the *Act*, specifically, "[S]ound recording" means a recording fixed in any material form, consisting of sounds, whether or not of a performance of a work, **but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work.**"²¹⁷ (Emphasis added)

In July of 2012 the Supreme Court would, as Michael Geist so eloquently noted, 'shake the foundations of copyright law' when it delivered five rulings on copyright in a single day. Generally referred to as the pentalogy, the five cases all dealt with different issues but were united in singular aspect. All of them involved decisions of the Copyright Board of Canada.

5.3 The Pentalogy

ESA v SOCAN

ESA v SOCAN addressed the ruling of the Board in regard to the downloading of purchased games on the Internet. In its original ruling the Copyright Board had determined that the downloading of a purchased game did constitute a

²¹⁶ *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2011 FCA 70.

²¹⁷ *Supra* note 1 at s 2 [emphasis added].

communication to the public and as such was subject to a tariff. The Supreme Court of Canada however would focus on the historical determination of communication ultimately deciding that the intent of parliament with respect to the communication right had always been one based on a performative experience.

In our view, the Board improperly concluded that the Internet delivery of copies of video games containing musical works amounts to “communicating” the works to the public. This view is evidenced by the legislative history of the *Copyright Act*, which demonstrates that the right to “communicate” is historically connected to the right to perform a work and not the right to reproduce permanent copies of the work.²¹⁸

The case demonstrated the willingness of the court to reconsider the previously largely unchecked powers of the copyright collectives, SOCAN in particular and the decisions of the Copyright Board. While CCH had hinted there might be changes with the declaration that the availability of a license was irrelevant in a fair dealing discussion,²¹⁹ *ESA v SOCAN* pointedly addressed the overreaching practice of the collectives and addressed their tendency to double dip, given the owners had already been paid for the licensing of the works.

SOCAN v Bell

In *SOCAN v Bell* the case turned on the issue of whether or not a preview of music was in fact research and as such justified under fair dealing. In its analysis the SCC revisited some of its previous rulings to reiterate several issues. Invoking *Thèberge*, the court returned to the issue of balance within copyright and the necessity of ensuring a fair and equitable balance between owners and users.²²⁰ The

²¹⁸ *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 at 12 [*ESA v SOCAN*].

²¹⁹ *Supra* note 18 at 70.

²²⁰ *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v Bell Canada*, 2012 SCC 36

court also recognized that *Thèberge* had initiated a move away from a historically ‘author-centric’ practice that had informed previous rulings.²²¹ The court went on to note that *CCH* had also played an important role in establishing the necessity of users rights within the balance of copyright and the integral role of fair dealing in the *Act*. The court stressed once again the necessity of not interpreting the notion of research restrictively in the application of fair dealing.²²²

In its deliberation the court noted that SOCAN had argued that the concept of ‘research’ within fair dealing had been misconstrued by the Board and the Court of Appeal in two ways. First SOCAN claimed the use of the term research was overly broad and was not intended to encompass retail activities. Secondly SOCAN argued that research should be viewed from the position of the online vendor, not the end user.²²³ Again returning to *CCH* the court noted its admonition that research not be interpreted restrictively. The court continued to comment that SOCAN’s argument that research must result in some new creative work was contradictory to SOCAN’s second objection since from the vendor’s perspective research into users desires would not result in any new created copyright eligible works.²²⁴

The court then viewed the issue through the six step fair dealing analysis it had posited in *CCH*. With regard to the initial question of the purpose of the dealing the court agreed with both the Board and the lower court that the purpose of the user in listening to the previews was research. While the research was for a

at 8 [SOCAN v BELL].

²²¹ *Ibid* at para 9.

²²² *Ibid* at para 11.

²²³ *Ibid* at para 19.

²²⁴ *Ibid* at para 28.

commercial purpose, the purchase of music, as had been noted in *CCH* that did not automatically negate its qualification under fair dealing. Given the broad interpretation the court had sought with respect to research, consumer research could also be encompassed within it.²²⁵ Looking at the issue of the character of the dealing the court noted that only a single preview was streamed and that the stream would automatically delete itself from the users computer once it had been heard.²²⁶ With respect to the amount of the dealing, SOCAN had noted that the aggregate downloads represented a significant loss to its members, however the court once again noted that with respect to fair dealing the view taken must be from the perspective of the single user, not an aggregate, and within that context a thirty second stream was not egregious.²²⁷ Though alternatives to the work were suggested such as advertising and/or purchase and return of the actual works, the court rejected these as being inefficient or,²²⁸ in the case of advertising, insufficiently able to provide the fundamental need; what the musical work sounds like.

Alberta v Access Copyright

In the case of *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*²²⁹ the Copyright Board had stated that while the purpose was for research or private study, it did not feel it qualified as fair dealing because the

²²⁵ *Ibid* at para 36.

²²⁶ *Ibid* at para 38.

²²⁷ *Ibid* at para 41.

²²⁸ *Ibid* at para 46.

²²⁹ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*. 2012 SCC 37 [*Alberta v AC*].

copying had been done at the teachers direction and not the individual students.²³⁰ The court of appeal had agreed with the board. The SCC however took a different approach.

Again relying on the groundwork laid in *CCH* the SCC returned to the theme, “allowable purposes must be given a “large and liberal interpretation”, and that “research” is not limited to non-commercial or private contexts.”²³¹ The court noted that the cases brought in support of the copying as instruction as opposed to study while somewhat germane, did not reflect the spirit of balance or the users rights perspective brought forth in *CCH*. More importantly the court noted that the cases offered in support²³² “do not stand for the proposition that “research” and “private study” are inconsistent with instructional purposes, but for the principle that copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purposes of the ultimate user.”²³³

While recognizing that the ‘purpose of the dealing’ could well impact the decision as to fairness, particularly in circumstances such as those cited in the UK cases, in this instance the court held that the purpose of the teacher was not separable from that of the student on the basis of instruction, but rather the teachers “are there to facilitate the students’ research and private study.”²³⁴ And moreover that the “teacher/copier therefore shares a symbiotic purpose with the

²³⁰ *Ibid* at para 14.

²³¹ *Ibid* at para 19.

²³² *Ibid* at paras 16-20.

²³³ *Ibid* at para 21.

²³⁴ *Ibid* at para 23.

student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.”²³⁵ ²³⁶

With respect to the remaining factors in a fair dealing consideration, the board had taken the position that because the teacher, a single individual, had made multiple copies it was akin to a single user making multiple requests within the criteria laid out in *CCH*. However, the court found that the Board had erred, in part because it failed to recognize the teacher was acting on behalf of the user student. The teacher was not making multiple copies for himself, but rather individual copies for the individual students.²³⁷ This mirrors the position taken by the SCC in *CCH*, where the librarian was held to be standing in the shoes of the patron²³⁸. More importantly in this decision the amount of the dealing is the proportional relationship between the excerpt and the work as a whole, not the aggregate amount of copies made of the excerpt.²³⁹

With respect to alternatives, the board had suggested that if public domain works were not suitable then the copyrighted works were widely available for purchase. The court dismissed this as being unrealistic.²⁴⁰ Finally with respect to the ‘effect of the dealing on the work’ the court found that board had erred in its tacit acceptance of Access Copyright’s submission that the 30% drop in textbook sales

²³⁵ *Ibid.*

²³⁶ Given the broad interpretation the court has indicated needs to be given to the concept of research this statement of the court might also be interpreted to include guest artist performances and workshops run within schools of music as part of their programming. Arguably these activities support the pedagogical function of the programs but presently they are liable for license under SOCAN tariff. It remains to be seen if this will be challenged.

²³⁷ *Supra* note 229 at para 29.

²³⁸ *Supra* note 18 at para 83.

²³⁹ *Supra* note 229.

²⁴⁰ *Ibid* at para 32.

over a twenty-year period was attributable to illicit photocopying.²⁴¹ Although the onus is on the respondent to prove no negative impact on the copyrighted works' market, as in *CCH* no quantifiable data was forthcoming from the publishers to prove any causal link between the drop in textbook sales and the copying of excerpts.

Given the expansive growth and availability of online journals, coupled with increasing public sources and archives of information available online it seems a bit simplistic to suggest that the drop in textbook sales was the result of illicit photocopying. As Michael Geist noted, the changes with regard to fair dealing had created an environment where collective licensing for reprography was of increasingly little value. Referring to guidelines made available by the Association of Universities and Colleges of Canada, he commented, "the new policies will mean greater flexibility in the use of copyrighted materials, fewer restrictive reporting requirements, and access to more materials as universities reallocate funds from unnecessary collective licenses to digitization of materials and wider access to electronic databases."²⁴²

Rogers Communications Inc. v SOCAN

The case dealt with two issues, whether or not a download of a purchased file was a transmission to the public, and whether a 'on demand' streamed file

²⁴¹ *Ibid* at paras 33-34.

²⁴² Michael Geist, "Schools navigate learning curve for new copyright rules" *The Toronto Star* August 30, 2013, online: http://www.thestar.com/business/2013/08/30/schools_navigate_learning_curve_for_new_copyright_rules_geist.html.

containing musical works was a performance to the ‘public’.²⁴³ The decision in *ESA v SOCAN* applied with respect to the downloading to individuals rendered that aspect of the case moot and thus that portion of the appeal was allowed. However, with respect to the streaming of works the court noted,

[I]t is necessary to consider the broader context to determine whether a given point-to-point transmission engages the exclusive right to communicate to the public. In the case of online music services, it is hardly possible to maintain that there is no intention that the same work ever be transmitted again.²⁴⁴

Re:Sound v Motion Picture Theatre Associations of Canada

In *Re:Sound v Motion Picture Theatre Associations of Canada* the SCC unanimously agreed with the findings of the lower court, that soundtrack includes the use of pre-existing recordings and as such ‘soundtracks’ are excluded from the definition of a ‘sound recording’ when used to accompany a cinematographic work. While *Re:Sound* had argued that “the word “soundtrack” as used in s. 2 refers only to the aggregate of sounds accompanying a cinematographic work and not to the soundtrack’s constituent parts”.²⁴⁵ The court disagreed referring to S 2 of the *Act*, the court noted “According to s. 2, a “sound recording” is a recording consisting of sounds, “but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work”. Therefore, a “soundtrack” is a “sound recording” except where it accompanies the motion picture. Otherwise, the exclusion would be superfluous.”²⁴⁶ The court also pointed out that a soundtrack no

²⁴³ *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35.

²⁴⁴ *Ibid.*

²⁴⁵ *Supra* note 216 at para 2.

²⁴⁶ *Ibid* at para 35.

longer accompanying a cinematographic work, a CD recording of a film soundtrack for example, would trigger the application of s. 19.²⁴⁷

5.4 Impact of *CCH* & Pentalogy

In retrospect *CCH* was a pivotal moment in the history of copyright law both in Canada and for international common-law jurisdictions. While the incident that triggered the case was confined to libraries, the impact was felt across the spectrum of all users of copyrighted materials. In a single instance the Supreme Court had established and championed the existence of user's rights; the viability of fair dealing not only as a defence, but also as an integral part of copyright, and going further defined boundaries in respect of fair dealing. Though *CCH* defined these issues it was the 2012 pentalogy that would strengthen their implementation with an expanded definition of fair dealing and an enhanced conception of user's rights.

SOCAN v Bell served to reaffirm the expanded scope of fair dealing as a whole, and the concept of research specifically. The court made clear that research should be given a broad interpretation and not narrowly construed solely within an educational context. The courts rejection of *SOCAN*'s argument that a music preview was simply a search and not research extensively broadened the scope of what might be construed as research within the fair dealing context, particularly when considered in conjunction with *Alberta v AC*. It also placed a constraint on the ravenous expansion of the copyright collectives.

Alberta v AC also served to broaden the scope of research, making clear that the term 'private' did not require that the research be done in solitude to qualify,

²⁴⁷ *Ibid* at para 36.

and more importantly recognizing the tautological relationship between teaching and private research and study. The courts decision seemed in many ways to look back to the original purpose and intent of the *Statute of Anne*,²⁴⁸ namely ‘the encouragement of learning’. *Alberta v AC* also served to clarify that the restrictive approach taken to fair dealing within the United Kingdom was not appropriate in Canada given the courts previous direction in *CCH* in which it recognized not only the necessity for balance within copyright but the absolute recognition of users rights within that regime.

With respect to the operations of the Copyright Board, *CCH* & the Pentalogy represented a watershed moment in their operation. The court’s recognition of the user within the balance and operation of the *Act* as posited in *CCH* returned an element of oversight on behalf of users that seemed to have been lost despite its seminal role in the creation of the Board. This position would only be strengthened in the subsequent rulings of the Pentalogy. Beyond the simple fact that the decisions of the Board were the basis for all the rulings given in the Pentalogy, the rulings of the court also can also be seen to indicate a greater need for diligence on the part of the board particularly with respect to the interpretation of research and the perspective of the user as a legitimate participant in the copyright equation.

²⁴⁸ *Supra* note 27.

Table 2: FAC Decisions

	Citation	Case	Basis	Dismissed	Granted in Part (P) or Whole (W)
1	2004 FCA 424	CPCC v Can Storage Media Ass	Review of Board decision approving levies on blank media (MP3 players) and issue 2 did they err in setting of rate thereon.		P: FAC says it is responsibility of Parliament to decide if MP3's et al are subject to <i>Act</i> .
2	2006 FCA 336	CRIA v Canada	CRIA requests review to set aside decision of the Board ordering it to inform its' members that it would no be representing "B" class members in a proceeding before the Board.	Y	
3	2006 FCA 337	CAB v SOCAN	CAB has challenged the tariffs on two grounds: the failure of the Board to consider an objection by CAB to the tariffs proposed by the collective societies, and inadequacies in the Board's reasons.		W
4	2007 FCA 338	Apple V CPCC	CRIA requests intervener status with respect to a appeal		P granted but court limits the terms of its involvement in light of CPCC objections.
5	2008 FCA 6	Can Wireless Assn V SOCAN	Request a review of Board decision that ringtones were communication under the <i>Act</i>	Y	
6	2008 FCA 9	Apple v CPCC	Applicants sought to have digital audio recorders dismissed from a proposed tariff. Board denied		W; citing CPCC v CSM
7	2010 FCA 123	SOCAN v BELL	SOCAN feels Board erred in applying 'fair dealing + research" to preview of musical works prior to possible purchase.	Y	
8	2010 FCA 139	SOCAN v BELL	Did Board err in law by refusing tariff request for simulcast of	Y	

			CBC radio service over internet and/or by refusing an 'other sites' category to tariff? Did Board deny procedural fairness by relying on evidence not part of record (agreement between CBC & SOCAN)? Was Boards' finding capricious?		
9	2010 FCA 198	ALBERT A ED v AC	Multiple copies made in course of education still Fair Dealing		W referred back to Board for reconsider with regard to "medium that is appropriate'
1 0	2010 FCA 220	SHAW v SOCAN	Appeal of decision that delivery over internet is a 'communication' under the Act	Y	
1 1	2010 FCA 221	ESA v SOCAN	ESA argues Board erred in finding downloading of a game including music was a 'communication' under the Act.	Y	
1 2	2010 FCA 322	CRIA vs SOCAN	-The Copyright Board made a decision without evidentiary basis. -Should the rate be nominal? -The Copyright Board's reasons are wholly inadequate.	Y	
1 3	2010 FCA 348	SIRIUS CANADA INC v CMRRA/ SODRAC	Appellants challenging the Board's determination of a number of legal issues relating to the royalty entitlement	Y	
1 4	2011 FCA 70	RESOUND v MPTA	Review of the Board's decision that no remuneration was due to collective when sound recording was part of a soundtrack	Y	
1 5	*2012 FCA 22	AUCC & U. Manitoba v AC	AUCC requesting the appeals court consider an additional affidavit that was not placed before the Board in the decision under review.	Y	
1 6	**2012 FCA 96	AUCC & U. Manitoba v AC	Request judicial review of interlocutory decisions of Board re educational tariff	Y	

1 7	2013 FCA 60	CBC v SODRAC; ASTRAL SODRAC	Request for stay of Board decision pending judicial review		W
1 8	2013 FCA 61	CBC v SODRAC	Request for review of interim decision of the Board		W
1 9	2013 FCA 91	Manitoba et al v AC	Board determined provinces are not exempt from Copyright Act, provinces appealing decision	Y	
2 0	2014 FCA 48	RE:SOUN D v. FITNESS INDUSTR Y COUNCI L OF CANADA and GOODLIF E FITNESS CENTRE S INC.	RESOUND requests Board decision on Tariff 6B be set aside		W
2 1	2014 FCA 84	CBC v SODRAC 2003 INC.	CBC et al request review of Board decision which determined ephemeral recordings were still subject to tariff despite SCC decision in ESA v SOCAN		P: supports Board in principle but allows application with respect to amendment of royalty formula.

Chapter 6: Inquiring Into the Process

In addition to the Canadian Royal Commissions, which would result in the creation of the first copyright tribunal, there have been a number of other inquiries in both Australia and the United Kingdom, which have dealt with tribunal issues, albeit often in a peripheral manner. Of all the reports that followed the seminal Canadian inquiries, the most interesting and unique was the 2008 report from the House of Commons in the United Kingdom entitled “*The work and operation of the Copyright Tribunal*”²⁴⁹. This is the only report within the comparative jurisdictions devoted solely to the operations of a copyright tribunal.

The report noted that the Copyright Tribunal was the successor to the previous Performing Right Tribunal, which it replaced in 1988,²⁵⁰ and while commenting on the narrow function of the tribunal it nonetheless recognized the importance of its function “to adjudicate in commercial disputes and to ensure that the monopoly which copyright holders and their agents, the collecting societies, have is not abused”.²⁵¹

At the time of publication, the tribunal had dealt with one hundred and six referrals. Of those ninety-five had been dealt with and eleven were still pending. Of the ninety-five, forty-four were withdrawn, twenty-eight resolved following a hearing, fourteen settled prior to being heard and one was dismissed,²⁵² resulting in

²⁴⁹ UK, HC, Innovation, Universities & Skills Committee, *The work and operation of the Copyright Tribunal*, (Report HC 245), (London: Her Majesty’s Stationery Office, 2008).

²⁵⁰ *Ibid* at 1.

²⁵¹ *Ibid*.

²⁵² *Ibid* at 3.

an average of roughly one and a half hearings per year given the twenty-year operation of the tribunal at the time of the report.

One point made in the report was very misleading however. The report stated, “The collecting societies are non-profit making organisations and the money that they collect, apart from administration costs, goes to their members – writers, composers, artists and performers”.²⁵³ However collecting societies do not collect only on behalf of authors but rather on behalf of owners and, as noted previously in the case of music and literary works, the copyright in the work is almost always assigned to a publisher as a condition of publication. Under such terms the Publisher also shares in the performing rights, and while the terms may differ between legal jurisdictions the publishers share is significant.²⁵⁴ This item reflects back to the pervasive issue of copyright myth noted previously. Given that this is the body charged with oversight, it is unsettling that they would define the role of collectives in an author-centric manner, which only serves to propagate the myth.

The report also references evidence given by the Intellectual Property Office of the United Kingdom stating that in 2005 creative industries in the united Kingdom had been responsible for 7.3% of gross value added to the British economy, which put them on par with the financial sector, and over an eight year period

²⁵³ *Ibid* at 4.

²⁵⁴ As an example in the United Kingdom the Performing Right Society (the music performing right collective) distributes the performance right tariff one third to publisher, one third to composer and one third to lyricist (author). SOCAN, the Canadian equivalent, distributes 50% to Publisher and 50% to composer & lyricist. However, in many instances even these numbers may be suspect as the terms of individual contract can vary greatly. In a 2007 internal investigation of distribution in Access Copyright (the Canadian reprography collective) the Friedland report noted that roughly 60% of revenues were flowing to publishers and 40% to authors. Martin L Friedland, “Report To Access Copyright On Distribution Of Royalties” (15 February 2007), online: Access Copyright <<http://www.accesscopyright.ca/media/1795/FriedlandReport.pdf>>.

(1997-2005) their impact had grown by average 6% per year, double the national average.²⁵⁵ Interestingly, this period also coincides with the creation and peak of the Napster file sharing software, as well as the creation of BitTorrent, Kaaza and numerous other platforms, not too mention overlapping with the impacts research done by Oberholzer-Gee and Strumpf noted in chapter two. All of which underscores the fact that losses alleged to file sharing during this period were highly suspect.

The Society of College, National and University Libraries (SCONUL) commented that current structures are based on a traditional notion that “copyright disputes occur between businesses” and that this assumption was no longer applicable in a digital age when in addition to businesses “educational and cultural institutions and private individuals are increasingly engaged in the distribution of creative works”.²⁵⁶ The traditional position was strongly advocated by Phonograph Performance Limited, which commented, “[t]he mere fact that it is called a Tribunal implies there was a feeling that collecting societies were monopolies, they needed to be controlled in some way”.²⁵⁷ PPL continued to point out that present disputes were between large commercial interests, collectives and industries or associations. The committee seemed to support this representation of the role of the tribunal concluding that the “nub of allegations concerning unfairness in the operations of the Copyright Tribunal is the imbalance in the rights of collecting societies and users to make reference to the Copyright Tribunal.”²⁵⁸ There was no mention of any imbalance in power with respect to users and corporations, nor was there any

²⁵⁵ *Supra* 249 at 10.

²⁵⁶ *Ibid* at 16.

²⁵⁷ *Ibid* at 19.

²⁵⁸ *Ibid* at 21.

thought given to the lack of appearance by the user as being a result of the cost of appearance. Couple this with the lack of awareness with respect to the value of tariffs to the publishing interests and it creates a picture of a tribunal badly out of touch with the reality of the copyright environment.

With respect to the general operations of the tribunal, the length and costs involved have been a regular cause for complaint. As early as 1996 the Monopolies and Mergers Commission noted in their inquiry into the Performing Right Society *Performing Rights*, that “Those who use the [Copyright] Tribunal felt that it provided neither a quick, cheap nor easy means of settling disputes”.²⁵⁹ This inquiry would hear much of the same. British Music Rights noted that its referrals to the tribunal have been “unduly lengthy and costly, involving complex and legalistic procedures, with the result that their members are invariably prejudiced, regardless of the final decisions”.²⁶⁰ Ultimately the report noted that “[w]e are concerned that the complaints about delays and costs at the Copyright Tribunal going back 20 years were not resolved by the Patent Office. We hold it (now operating as the Intellectual Property Office) responsible for this unacceptable failure”.²⁶¹ As evidence of the extremes to which this had gone the President of the Tribunal noted that a single case had amassed costs of over 12 million pounds sterling.²⁶²

Two other interesting points were raised that relate to the Canadian experience: A 2007 IPO report on the tribunal recommended that expert evidence “only be allowed if it was strictly necessary” while Libraries and Archives Copyright

²⁵⁹ *Supra* note 120 at 2.89.

²⁶⁰ *Supra* note 249 at 24.

²⁶¹ *Ibid* at 25.

²⁶² *Ibid* at 47.

Alliance noted that “it would be difficult to find one expert who was able and willing to be expert for both sides”.²⁶³ This is of course the same issue noted by Howard Knopf and discussed earlier. When addressing issues of access for small businesses and independent users, the committee opted not to offer any firm conclusions but did suggest expanding staff support for the tribunal. Pointing specifically to the Copyright Board in Canada it noted that it had a staff of 12 (at that time) and suggested this would allow more cases to be heard in a reduced time which might allow for service dedicated to small scale users. However, there is no evidence with respect to the Canadian experience that would suggest such an outcome. If Howard Knopf’s comparison of the operations of the board versus the operation of the Supreme Court of Canada is taken into consideration it seems even less likely. As is often the case in the copyright debates arguments are often proffered that have no reliable economic basis, as was ably pointed out in the following review.

The Hargreaves Report

The most recent report on copyright issued in the United Kingdom is *Digital Opportunity A Review of Intellectual Property and Growth*²⁶⁴ published in 2011.

While focusing on IP broadly the report did touch on several areas pertinent to this work. Specifically, the report lamented the lack of evidentiary basis underlying policy decisions. Echoing statements made in previous reviews the report noted

The Banks review in the 1970s deplored the lack of evidence to support policy judgments. Thirty years later, the Gowers Review in 2006 made the

²⁶³ *Ibid* at 49.

²⁶⁴ UK, Independent Report, *Digital Opportunity A Review of Intellectual Property and Growth* by Ian Hargreaves (London: Her Majesty’s Stationary Office, 18 May 2011), online: Gov.UK <<https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>> [Hargreaves report].

same point. Our institutional framework appears to have failed to equip itself to conduct evidence-based policy effectively.²⁶⁵

In the same chapter Hargreaves would also draw specific attention to the failure of the policy process to withstand the power of lobbyists and the negative impact this had on government legislation. Referring to the periodic extension of copyright term the report states that terms have repeatedly been extended “[i]n spite of clear evidence that this can not be justified in terms of the core IP argument that copyright exists to provide economic incentives to creators to produce new works”.²⁶⁶ Concurrent with this was the recognition that the data offered to evidence supposed losses to industry as a result of illegal practices (piracy, downloading) was largely useless given either the inability to examine the underlying methodology or where it was possible flaws in the methodology were discovered.²⁶⁷ The need for a sound evidence based policy process was further elaborated in chapter two, “[m]uch of the data needed to develop empirical evidence is privately held. It enters the public domain chiefly in the form of “evidence” supporting the arguments of lobbyists (“lobbynomics”) rather than as independently verified research conclusions”.²⁶⁸

The Hargreaves review also considered whether more extensive copyright exceptions should be pursued, in particular they looked at the U.S. model of Fair Use. Strangely however they seem to have considered only the U.S. Fair Use model, and much of the criticism levelled at the model was the uncertainty it would create given

²⁶⁵ *Ibid* at 10.5.

²⁶⁶ *Ibid* at 10.12.

²⁶⁷ *Ibid* at 8.16.

²⁶⁸ *Ibid* at 2.13.

its basis in American case law. While reference is made to the existence of Fair Use doctrines in Singapore, Israel and the Philippines,²⁶⁹ Canada is conspicuous by its absence. It is surprising that the Canadian model was not considered, particularly given the shared root of copyright legislation and the fact that the *CCH* ruling was already seven years old at this point. In any event, after deliberation they felt that commitments to the European Unions would preclude them from moving in that direction, however they did feel that the United Kingdom could make better use of existing exceptions already allowed under European Union law. As such they recommended that the government allow exceptions for format shifting²⁷⁰, parody²⁷¹, non-commercial research, library archiving²⁷² and private copying²⁷³ as well as an exception under non-commercial research to allow for text mining and data analytics.²⁷⁴

The report also recommended that the exceptions be made mandatory, pointing out that contract language was being utilised to rewrite the limits set by law.²⁷⁵ As noted in the report, it is possible for rights holders to insist, via their contracted licenses, that users consent to terms that effectively negate the exceptions. A submission to the inquiry from the Libraries and Archives Copyright Alliance pointed to an analysis of 100 contracts offered to the British Library which demonstrated numerous examples of contracts overriding the exceptions allowed under copyright law. The Libraries and Archives Copyright Alliance commented,

²⁶⁹ *Ibid* at 5.18.

²⁷⁰ *Ibid* at 5.31.

²⁷¹ *Ibid* at 5.35.

²⁷² *Ibid* at 5.34.

²⁷³ *Ibid* at 5.27.

²⁷⁴ *Ibid* at 5.26.

²⁷⁵ *Ibid* at 5.40.

“licenses should never substitute for legislation on core matters such as exceptions and limitations”.²⁷⁶

6.2 Collecting Societies Codes of Conduct

In 2012 the Intellectual Property Office of the United Kingdom received a report it had commissioned entitled “Collecting Societies Codes of Conduct”. While the report ultimately did not support the creation of a code of conduct for various reasons, it is of interest here because of its inclusion of the Australian regime as a comparator, and specifically its assessment of the Australian Copyright Tribunal with respect to the collective management of copyright. “By, in effect, endorsing the purpose and practices of Australian collecting societies...., the Copyright Tribunal has proved a boon to the societies”.²⁷⁷ However the report goes on to note that since the 1990s this has fuelled increasing hostility amongst licensees, noting that they have been “disturbed by the size of licensing fees and what they perceive as the Tribunal’s uncritical attitude to remuneration arguments advanced by collecting societies”.²⁷⁸

6.3 Lobbyonomics

Another work published in the UK during this period worth noting is *Copyright, Evidence, and Lobbyonomics: The World after the UK’s Hargreaves Report*.²⁷⁹ Though not an official publication of the UK government, it was written by an economist in the Intellectual Property Office, motivated in great part by the

²⁷⁶ *Ibid* at 5.39.

²⁷⁷ UK, Intellectual Property Office, *Collecting Societies Codes of Conduct* (London: Her Majesty’s Stationery Office, 2012) at 17.

²⁷⁸ *Ibid* at 18.

²⁷⁹ Benjamin H Mitra-Kahn, “Copyright, Evidence, and Lobbyonomics: The World after the UK’s Hargreaves Report” (2011) 8.2 Review of Economic Research on Copyright Issues 65.

publication of the Hargreaves report and his desire to “invite the reader inside the bubble that can be government policy making”.²⁸⁰ Particularly interesting in the paper was the acknowledgement that with respect to the Hargreaves report the department had received “more than 200 written submissions, numbering in the thousands of pages, with exactly zero submissions of academic papers on copyright”.²⁸¹ In part the author attributes this to the overwhelming amounts of grey literature which he notes have dominated policy making “not because it is inherently better, but because it is presented in a definite voice, accompanied by press statements, glossy front pages and a concerted effort to send short executive summaries to politicians and policy makers”.²⁸²

Coupled with this is the fact that most of the grey literature focuses on the aggregate impact of copyright²⁸³, not recognizing that with respect to creator distributions it is primarily a winner take all game.²⁸⁴ In fact when the extension of sound recording copyright term was considered in the UK the IPO determined that it would result in a net cost to the UK economy and 80% of affected performers would only see an increase of ten to thirty-eight pounds sterling a year to their income.²⁸⁵ Reviewing one of the most frequently cited economic reports in the copyright policy sector Mitra-Kahn notes that “[d]espite the TERA report’s relative quality, there are methodological limitations and omissions at each stage of

²⁸⁰ *Ibid* at 65.

²⁸¹ *Ibid* at 67.

²⁸² *Ibid* at 77.

²⁸³ *Ibid* at 82.

²⁸⁴ See Parker & Towse p 26-27.

²⁸⁵ *Supra* not 279 at 81.

calculations”.²⁸⁶ Reviewing these associated methodologies, he comments that while the TERA report estimated UK copyright piracy losses had reached a staggering one point four billion pounds sterling in 2008, after review by their office the IPO analysts could “only find evidence for less than half of this in the report itself”.²⁸⁷

6.4 Simpson Report

Delivered in 1995 *A Review of Australian Copyright Collecting Societies A Report to the Minister for Communications and the Arts and the Minister for Justice*²⁸⁸ was written by Shane Simpson²⁸⁹ and is commonly referred to as the Simpson Report. The focus of the report was the review of collection societies in Australia as a whole. Within that context there was a short section devoted to the jurisdiction of the Copyright Tribunal.

In general the report was supportive and illustrative of the role of collecting societies, but given that it was based almost entirely on submissions from those societies and was authored by an active participant in the process this is not surprising.²⁹⁰ There were however definite commonalties between the Canadian and British views of the collectives, in particular complaints in regard to the length and costs involved in appearances before the tribunal. “It was the view of most of the societies and other parties who made submissions to the Inquiry, that proceedings before the Copyright Tribunal are expensive, slow and unnecessarily

²⁸⁶ *Ibid* at 84.

²⁸⁷ *Ibid* at 85.

²⁸⁸ Australia, Commonwealth, *A Review of Australian Copyright Collecting Societies A Report to the Minister for Communications and the Arts and the Minister for Justice* by Shane Smith (Canberra: Australian Government Publishing Service, July, 1995) [Simpson Report].

²⁸⁹ Shane Simpson was an attorney in private practice specializing in entertainment and IP law. His firm continues to be one of the most successful in Australia see online: <<http://simpsons.com.au/our-firm/>>.

²⁹⁰ While a number of large licensees were invited to comment, hearings were not public, nor were public submissions sought as noted in Appendix two of the report at 288.

legalistic.”²⁹¹ The report suggested the creation of an ombudsman for copyright collectives that would operate independently of both the societies and the tribunal but the recommendation was not followed.²⁹²

Interestingly, there has been a significant growth in private dispute resolution since the Simpson report suggested the role of ombudsman though it has yet to impact in Australia. The United Kingdom presently has a private, not for profit independent ombudsman, which deals with copyright licensing issues (as well as other areas). Participation on the part of the collectives is voluntary but it has drawn significant support. Presently there are eleven collectives registered with the service. While the collectives pay for participation, licensees do not, which would seem to allow for a much greater participation of small and independent user in the dispute process given the alternative of expensive and lengthy appearances before a tribunal.²⁹³ Sadly no such initiative is operating in the Canadian context.

6.5 Recent Canadian Developments

Other than the previously mentioned Royal Commissions, there has been painfully little critical discussion of collective management in Canadian policy circles. As commented on in the author’s other works and in the work of Canadian copyright scholar Daniel Gervais there seems to have been a wholesale acceptance of collective management as a policy tool in Canada without reservation. There has however been a recent internal policy process review prompted by the Copyright

²⁹¹ *Supra* note 288 at 32.4.

²⁹² *Ibid* at 32.1.

²⁹³ See Ombudsman Services online: <<http://www.ombudsman-services.org/companies-copyright.html>>.

Board itself under the auspices of its Working Committee on the Operations, Procedures and Processes of the Copyright Board.

The Working Committee on the Operations Procedures and Processes of the Copyright Board, which convened in November of 2012, was asked to consider means by which it might make the processes of the board more efficient and productive. Its first suggestions targeted three issues and released a discussion paper dealing with two of them on February 5, 2015. The areas targeted for discussion were:

- 1: The identification and disclosure of issues to be addressed during a tariff proceeding.
- 2: The interrogatory process.

While some mention will be given to the second area targeted, the majority of this discussion will concern itself with ‘the identification and disclosure of issues to be addressed during a tariff proceeding’.

As is usually the case when dealing with collective issues the stakeholders surveyed in the process were limited to the usual collectives and licensees, there was no attempt to include a broader frame of reference. The Board received fourteen submissions in response to the working paper, and a further six in reply to those comments. Of those fourteen, eight came from collectives or associated members of a collective. Four responses came from licensees, and two from individual lawyers who have a history of appearance before the board on behalf of users. It is also pertinent to note that the working group was made up of ‘representative counsel’ from various firms, and facilitated by a former chairman of

the Copyright Board, Mario Bouchard. There were no representatives of collectives, licensees or small scale/individual users.

The working group delivered a list of forty-three recommendations in their discussion paper. Noting that any tariff process must begin with users being made aware of a tariff request the first five recommendations dealt with the publication of proposed tariffs. While aware that publication in the *Canada Gazette* was the only legally required notice, the group recognized however that “publication in the *Gazette* is no longer functional notice to anyone.”²⁹⁴ They suggested that The Board in cooperation with collectives and users develop new methods of notifying users and that electronic means should be favoured. Additionally, they suggested that collectives bear more of the responsibility of contacting current and prospective users.

The suggestion that collectives should bear more responsibility for notification was generally not well received by the collectives. While they were very supportive of the Copyright Board making greater efforts to ensure that tariffs were circulated they did not feel that they should have to bear the burden of cost for the process. The largest of all the collectives, SOCAN, noted in their response that they were “not convinced that the current notice requirements are insufficient”, and later “SOCAN is concerned about the amount of effort that would be required to attempt

²⁹⁴ Canada, Working Committee on the Operations Procedures and Processes of the Copyright Board, *Discussion Paper On Two Procedural Issues: Identification And Disclosure Of Issues To Be Addressed During A Tariff Proceeding And Interrogatory Process*, (Ottawa: Copyright Board, 4 February 2015) at 2, online: <<http://www.cb-cda.gc.ca/about-apropos/pdf/discussion-paper.pdf>>.

to communicate directly, even through email, with tens of thousands of existing licensees”.²⁹⁵

SOCAN was not alone in this response. The collective Re: Sound stated they had “serious concerns with any suggestion that collectives be required to contact individual businesses and licensees to notify them of a proposed tariff”, and felt that such a requirement “creates an unnecessary and onerous burden on the collective”.²⁹⁶ The Canadian Musical Reproduction Rights Agency (CMRRA) also took this position and while they agreed with the adoption of proactive notification they would “caution that such new methods not place any undue burdens upon collectives”.²⁹⁷ As noted in the earlier discussion of the Access Copyright proposed tariff for colleges and universities, the lack of general awareness with respect to tariffs has always been a benefit to the collectives.

Also of significant interest were recommendations six through eight, which concerned themselves with the early explanation of new tariffs by the collectives. In essence the working group had suggested that on the proposal of a new tariff, the collective tabling the tariff should give a “description of the persons or uses targeted in the tariff” and “a broad indication of how the proposed rate was selected”.²⁹⁸ It was also recommending that where an existing tariff was subject to a significant

²⁹⁵ Letter from D Lynne Wyatt on behalf of SOCAN to Claude Majeau of the Copyright Board, *Re: Discussion Paper on Procedural Issues* (6 March 2015), online: <<http://www.cb-cda.gc.ca/about-apropos/pdf/SOCAN.pdf>>.

²⁹⁶ Letter from Re:Sound to Gilles McDougall, Secretary General of the Copyright Board of Canada, *Re: Re:Sound's Comments on the Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board* (9 March 2015), online: <<http://www.cb-cda.gc.ca/about-apropos/pdf/RESOUND.pdf>>.

²⁹⁷ Letter from Veronica Syrtash, VP Legal & Business Affairs CMRRA to Gilles McDougall, Secretary General of the Copyright Board of Canada, *Re: Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board* (6 March 2015), online: <<http://www.cb-cda.gc.ca/about-apropos/pdf/CMRRA.pdf>>.

²⁹⁸ *Supra* note 294 at 4.

increase the collective responsible should also notify users affected by such an increase.²⁹⁹ In response to this recommendation Re:Sound stated,

Re:Sound strongly disagrees with the recommendation that a collective be required to advise existing users when it proposes significant changes to an existing tariff. Every proposed tariff filed by Re:Sound would constitute a significant change to the existing tariff.³⁰⁰

Given that Re: Sound had filed a proposed tariff rate of 45% of revenues for an initial webcasting tariff³⁰¹ their comment that all their proposed tariffs would ‘constitute a significant change’ is likely understated. The Copyright Collective of Canada also opposed the recommendation, stating “[i]t is the Copyright Collective of Canada’s view that a collective should not be required to provide an explanation of the nature, purpose and ambit of any proposed change, material or otherwise, at the time of filing a proposed tariff”.³⁰²

Surprisingly both SOCAN and the CMRRA agreed with the recommendation in principle. CMRRA stated that it “supports the proposal for collectives to provide early explanations of tariffs, but recommends that clear distinctions be drawn for the form and process as between tariffs of first impression and replacement tariffs”.³⁰³ The CMMRA statement indicates general agreement with the intent of the discussion paper and recommendations given, and CMRRA is, by any definition, responding quite reasonably in suggesting there be more clarity surrounding the

²⁹⁹ *Ibid* at 8.

³⁰⁰ *Supra* note 296.

³⁰¹ Letter from J Aiden O’Neill to Gilles McDougall, Secretary General of the Copyright Board of Canada, *Re: Discussion Paper on Two Procedural Issues (February 4, 2015) The Copyright Board’s Request for Comments – Reply Submissions*, (17 April 2015), online: <<http://www.cb-cda.gc.ca/about-afpropos/pdf/AidanONeill.pdf>>.

³⁰² Copyright Collective of Canada response to working paper online: <<http://www.cb-cda.gc.ca/about-afpropos/pdf/CCC.pdf>>.

³⁰³ *Supra* note 297.

process with regard to an initial 'first' tariff and a new tariff rate for an existing tariff. Similarly, SOCAN also supported the recommendation in principle stating simply "SOCAN agrees with the Board's recommendation that collectives be required to provide a general explanation of the tariffs they file".³⁰⁴ They did however also note that the board had accepted their reasoning limiting the detail of explanation offered and that such explanations not be binding.

Considering their size and revenues, the absence of significant comment from Access Copyright was surprising. Their response to the recommendations was very brief (2 pages), and concerned itself primarily with the interrogatory process, though they did comment on the makeup of the working committee and the lack of collective or user representation.³⁰⁵ One can only speculate as to the reasons but possibly the decisions of the courts in both *CCH* and *Alberta v AC* had played a role. Certainly both those decisions had made that particular collective painfully aware that the rights of the user must be given a balanced reading, and the SCC ruling in *Alberta v AC* had pointedly chastised them for the lack of causal connection in their justification for tariff increases on the basis of market losses.³⁰⁶ Conversely it may simply have been the fact that Access Copyright was dealing with the aftermath of successive blows to its business model and was focusing elsewhere, hoping the other collectives would take the lead in opposing the recommendations.

³⁰⁴ *Supra* note 295.

³⁰⁵ Letter from Erin Finlay, General Counsel Access Copyright, to Gilles McDougall, Secretary General of the Copyright Board of Canada, *Re: Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board* (6 March 2015), online: <<http://www.cb-cda.gc.ca/about-apropos/pdf/ACCESS.pdf>>.

³⁰⁶ *Supra* note 229 at paras 33-34.

The major broadcasters (referred to as BDU's in the exchange: Broadcast Development Undertakings) commented that the interrogatory process in itself was too burdensome in general and this burden was not equally shared. They also drew attention to the fact that would be objectors were often subjected to not only requests for sheer volumes of information, but also information of a particularly private nature. Noting that much of that information was "commercially sensitive and highly confidential"³⁰⁷ and as a result some users have chosen to withdraw, or even not begin submission before the board. They further stated that this was in part because the Board had accepted a very broad scope with respect to the relevance of information sought in these interrogatories, and that in practice this has allowed collectives to request a very 'wide variety of confidential information'.³⁰⁸

The response to the discussion paper from users was small, but as previously noted the invitation to comment was sent to a very limited group. The joint submission from Restaurants Canada and the Hotel Association of Canada responded specifically to the previously mentioned recommendation regarding the publication of tariffs in an unequivocal manner, "[n]otification of proposed tariffs should ultimately be the responsibility of the Collectives".³⁰⁹ Given that the hotels had been on the receiving end of a retroactive tariff from Re:Sound with respect to

³⁰⁷ *Ibid.*

³⁰⁸ Letter from Ariel Thomas for BDU to Majeau of the Copyright Board, *Re: Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board* (6 March 2015), online: <<http://www.cb-cda.gc.ca/about-apropos/pdf/BDUs.pdf>>.

³⁰⁹ Letter from Hotel and Restaurant Associations to Claude Majeau, Vice-Chairman and CEO, Copyright Board Canada RE: *Copyright Board discussion paper on Two Procedural Issues* (20 March 2015), online: <<http://www.cb-cda.gc.ca/about-apropos/pdf/JointSubmission.pdf>>.

the use of music most believed was already covered in their SOCAN fees, it is hardly surprising they supported such an initiative.

The Hotel and Restaurant Associations reacted in similar fashion to the proposal for early explanation, noting that “[c]ollectives should prominently highlight material changes in proposed tariffs that are likely to have significant impact on royalty paying businesses” and that “[r]ationality for proposed tariff price increases should also be included”.³¹⁰ They also agreed with the recommendation that objectors to a tariff (users) should be required to state reasons for their objection in their submission. Similar to Access Copyright, they drew attention to the lack of representation on the working committee and suggested that in “the interest of promoting increased accessibility to the Board’s decision making process and more accessible language, we strongly advocate that an “end user” representative be appointed”.³¹¹

The notion of accessibility in language was also noted in the second of the general comments submitted by the Restaurant & Hotel Associations when they stated, “in the interest of promoting transparency, justice and fairness we urge the Board to pursue the use of simple language (e.g., “Plain English) as a key objective in the administration of its operations”.³¹² This lack of accessibility been commented on in the IP discourse in the past. David Vaver’s *Does the Public Understand Intellectual Property Law? Do Lawyers?*, was an attempt to discern if both

³¹⁰ *Ibid*

³¹¹ *Ibid.*

³¹² *Ibid.*

practitioners and the general public in fact generally understand the Intellectual Property system that currently exists. His conclusion was that they did not:

At a minimum, the IP system should tell the public it serves, and the lawyers and judges who administer it, simply and clearly what qualifies for protection and how far protection reaches, i.e., what people can or cannot do. The system should do that for both specialist and non-specialist lawyers alike. It does not.³¹³

Similar to the Restaurant & Hotel Associations the BDU's (supported by the Entertainment Software Association) offered full support for the recommendations discussed thus far.

The Canadian Association of Broadcasters (CAB) also supported the recommendations noting however that there needed to be recognition of the fact that current participants are an elite group and as such "have a relatively sophisticated means of monitoring and assessing new and evolving tariff liability as compared to other industries and entities that do not have as significant exposure to copyright tariffs".³¹⁴ The BDU's also supported the need for early explanation but indicated that they felt the board suggestions did not go far enough stating the "Board suggests a compromise which clearly favours the collectives and lacks teeth".³¹⁵ Echoing the Hotel & Restaurant Associations, they also advocated for a simpler language noting "the need to better describe proposed tariffs and the

³¹³ David Vaver. "Does the Public Understand Intellectual Property Law? Do Lawyers?" (Keynote address delivered at Meredith memorial lectures, McGill Law School, March 17, 2006) University of Oxford Faculty of Law Legal Studies Research Paper Series, working paper No 23/2006, May 2006, at 4, online: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1036&context=all_papers>.

³¹⁴ Letter from Gabriel Van Loon on behalf of Canadian Association of Broadcasters, to Claude Majeau, Vice-Chairman and CEO of the Copyright Board of Canada, *Re: Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board* (6 March 2015), online: <<http://www.cb-cda.gc.ca/about-apropos/pdf/CAB-ACR.pdf>>.

³¹⁵ *Supra note 308*.

process required to object to them, if applicable, in terms that can be understood by potential licensees”.³¹⁶

The other two responses to the working paper came from J. Aidan O’Neill and Howard Knopf respectively. Mr. O’Neill draws attention to the unequal relationship of the two sides before the board, “[it] must be understood that, as between the collectives and the users in a particular tariff proceeding, their situations with respect to the Board’s interrogatory process are not at all comparable. It is certainly not a level playing field between “equals””.³¹⁷ While O’Neill is specifically referring to the interrogatory process, his comment reflects the general situation with respect to the power imbalance that exists between collectives and licensees.

As was discussed in chapter five, Knopf’s comments with regard to judicial review are particularly noteworthy. Decisions of the Copyright Board have been the subject of review by the Federal Court of Appeals twenty-one times between 2004 and 2014. As Knopf noted in an address to the Law Society of Upper Canada in 2008, “ Although the FCA will doubtless continue to defer to the Board, to some extent at least, on ‘core’ matters relating to fact finding and rate calculation, it would seem that there will be no deference and increasing decisiveness on matters related to legal reasoning.”³¹⁸ Mr. Knopf’s also points out that “[t]he very high cost of Board proceedings has always been a problem for users, especially those who cannot pass

³¹⁶ *Ibid.*

³¹⁷ *Supra* note 301.

³¹⁸ *Supra* note 11 at 30.

on the costs on to their customers. However, these high costs and delays and the uncertainty of the cost/beneficial outcome are now a problem for collectives too”.³¹⁹

Noting the time between filings and hearings, the BDU’s pointed out that while the collaborative process used to implement proceedings was admirable, it wasn’t necessarily in the best interests of those concerned. The time delay between filing, objections, hearing and ruling could often be multiple years. Given the retroactive rulings of such decisions the ability of licensees to adequately anticipate financial liabilities as a result was significant. This was particularly true in the case of an inaugural tariff, as was the case with Re: Sound.

In 2010 the former Neighbouring Rights Collective of Canada reconstituted itself as the collective Re: Sound, for the purpose of collecting performance rights on behalf of performers and record companies in connection with the public performance or telecommunication of music. In 2011 Re: Sound filed a tariff 6A for the use of recorded music to accompany dance. The tariff was to cover the years 2008-2012 and targeted music played and provided by the lessees of rented banquet and conference spaces. Note that most of the facilities affected by this tariff already had licenses in place with SOCAN for their use of music, so they had a not unreasonable expectation that they were abiding by the rules with respect to the use of copyrighted music.

The Copyright Board subsequently approved tariff 6A in 2012. At that time the meetings spaces affected were then expected to deliver to Re: Sound fees for every

³¹⁹ Letter from Howard Knopf to Gilles McDougall, Secretary General, Copyright Board, *Re: Working Committee On The Operations, Procedures And Processes Of The Copyright Board* (6 March 2015), online: <<http://www.cb-cda.gc.ca/about-apropos/pdf/KNOPF.pdf>>.

event that had taken place back to the start date of the tariff. It would be virtually impossible to ascertain which lessees had provided their own music years after the fact. Even if it were possible to identify those lessees who had brought their own music it would still be impossible to collect payment from them for a license not stipulated in their original contract years prior.

On a simple basis of fairness, it seems highly questionable that a collective be allowed to create a new tariff retroactively, or that a board should approve a retroactive tariff. Interestingly in the *Performing Rights* report the commission recommended that the Copyright Tribunal be allowed not only to make the tariffs retroactive but also to charge interest on the sums owed the collectives.³²⁰ That extreme suggestion may be the result of Monopolies and Mergers Commission being primarily an economic analysis forum, thus value for them is understandably rooted in simple economic frames.

This issue also reflects the concern noted by the Board's working group with respect to the publications of tariffs. The publication of proposed tariffs is deemed to be complete once it has appeared in the *Canada Gazette*.³²¹ Few people in the general population are even aware of the *Canada Gazette*, much less its significance to the role of copyright collectives. Again this speaks to the comment of the Restaurant and Hotel Associations with respect to the anticipated increase in the numbers of groups affected by tariffs as new delivery platforms are created and the necessity of plain language.

³²⁰ *Supra* note 120 at 2.130.

³²¹ *Canada Gazette*, online: <<http://www.gazette.gc.ca/gazette/home-accueil-eng.php>>.

Another recent issue was the November 2015 SCC ruling of *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.*,³²² yet another decision with respect to the determinations of the board. In the decision the court dealt primarily with the notion of technological neutrality in respect of ephemeral recordings created in the process of a broadcast undertaking, however, and largely due to the intervention of Mr. Knopf and his colleagues, the court also determined in its decision that the copyright board does not have the authority to compel a licensee to accept a license.

This provision makes it clear that a user whose copying activities were the subject of a s. 70.2 proceeding *may* avail itself of the terms and conditions established by the Board as a way to gain authorization to engage in the activity contemplated in the Board proceeding. The language of s. 70.4 does not, of its own force, bind the user to the terms and conditions of the license.³²³

Though the court did not rule on whether or not the board had authority to impose a license on a collective it did suggest that it might, noting that

However, this case does not require this Court to decide whether the same is true of collective organizations. It may be that the statutory scheme's focus on regulating the actions of collective organizations, and the case law's focus on ensuring that such organizations do not devolve into "instruments of oppression and extortion" (*Vigneux v. Canadian Performing Right Society Ltd.*, [1943] S.C.R. 348, at p. 356, per Duff J., quoting *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at p. 128) would justify finding that the Board does have the power to bind collective organizations to a license based on the user's preferred model — transactional or blanket — on terms that the Board finds fair in view of that model. However, this issue was not argued in this case.

³²⁴

What impact, if any, this decision will have on future dealings between collectives and users is uncertain, but at the minimum it represents yet another limitation on board powers and the presumptive operations of the collectives.

³²² *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.*, 2015 SCC 57.

³²³ *Ibid* at para 106.

³²⁴ *Ibid* at para 112.

One more case appealed to the Federal Court must be considered. In Dec of 2015 the Federal Court of Appeal handed down a decision in favor of the appellant in the case of *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*.³²⁵ The case involved a tariff filed by SOCAN with the Board for the collection of fees associated with the use of copyrighted works on the internet by various agencies, but primarily those concerned with the streaming or downloading of music, such as iTunes, Bell, Shaw, radio podcasters and Netflix. Netflix was not among the original objectors to the tariff when filed, and as such was not included in SOCAN's subsequent efforts to reach agreement with the objectors prior to the Board making a decision.³²⁶ In the subsequent agreement SOCAN was able to extend the original tariff period from 2007-2011 to include the period of 2012 & 2103. More importantly however SOCAN was able to gain agreement to new royalty provisions substantially different from those filed and published in the original tariff.³²⁷ Specifically the terms included the provision for royalties to be charged with respect to subscriptions and the free trial of services.³²⁸ However, none of the objectors to the original tariff³²⁹ offered subscriptions and therefore would not be subject to these fees.³³⁰

Though Netflix had not filed objections to the original tariff, and therefore had not been party the to negotiated agreement with SOCAN, they did make a

³²⁵ *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289.

³²⁶ *Ibid* at para 8.

³²⁷ *Ibid* at para 9.

³²⁸ *Ibid* at para 10.

³²⁹ The original objectors were Apple Canada, Apple Inc., BCE Inc., Canadian Association of Broadcasters, Cineplex Entertainment LP, Facebook Inc., Rogers Communications Partnership, Shaw Communications Inc., Videotron G.P., and YAHOO! Canada Co.

³³⁰ *Supra* note 325 at para 12.

submission to the Board in regard to the negotiated agreement providing the basis for a certification of the tariff. Netflix limited its submission to concerns relating to the appearance of royalties for free trials, which it claimed violated the Supreme Courts jurisprudence on technological neutrality.³³¹ Subsequently the Board issued an order noting that Netflix's submission would not be part of the record of proceedings, and also instigating a new process, with Netflix involved given its dominant role in the marketplace. However, the Board stipulated parties were only to address issues already raised and the introduction of new evidence was to be avoided.³³²

In the ensuing process Netflix did make a submission with respect to the free trial tariff, despite it not being a previously raised issue. In response to these proceedings SOCAN made a submission to the Board stating their position that since Netflix had chosen not to respond to the original tariff submission they should not be allowed to make submissions in respect of the ensuing settlement agreement.³³³ On July 2, 2013 the Board dismissed Netflix's application for leave to introduce new materials.³³⁴ Netflix appealed to the Federal Court.

Ultimately the Federal Court would rule in favor of Netflix, again overturning a decision of the Board. Pointing specifically to the Boards decision in Re: Sound Tariff 5, the court noted that the Board had stated, "[b]efore certifying a tariff based on agreements, it is generally advisable to consider (a) the extent to which the parties to the agreements can represent the interests of all prospective users and

³³¹ *Ibid* at paras 14-16.

³³² *Ibid* at para 19.

³³³ *Ibid* at paras 22-24.

³³⁴ *Ibid* at para 26.

(b) whether relevant comments or arguments made by former parties and non-parties have been addressed”.³³⁵ Given that none of the objectors involved in the agreement with SOCAN were offering subscription services or free trial services they could not possibly represent the interests of all prospective users. Though the Board had stated in its decision with regard to Netflix that no *Re:Sound 5* reasons (as noted above) could justify a refusal to certify, Justice Nadon writing for the Federal Court stated “[i]n my respectful view, the Board was wrong to come to this conclusion”.³³⁶ The Board’s decision in the Netflix case was again disturbingly owner-centric and reflective of the influence of the collectives on the Board process.

The final issue to be discussed involves the recent decision of the Copyright Board with respect to the Access Copyright Provincial and Territorial Governments Tariff. The decision of the Board was given in May 2015, though the start of the process is quite dated; it began in 2004.³³⁷ The eleven-year span between filing and ruling in and of itself underscores the oft stated concern with respect to the length of proceedings before the board. Access Copyright filed the inaugural tariff in 2004 for the period 2005-2009, and then again in 2009 for the period 2010-2015. Access Copyright sought to impose a tariff on the provincial and territorial governments for the reproductive use of copyrighted materials in books, magazines, journals and newspapers for all of Canada with the exception of Quebec.³³⁸ Access Copyright had

³³⁵ *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012 (Parts A to G)* (25 May 2012), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/decisions/2012/ReSound555.pdf>>.

³³⁶ *Supra* note 325 at para 46.

³³⁷ *Fact Sheet: Access Copyright Tariff – Provincial and Territorial Governments* (22 May 2015), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/decisions/2015/fact-sheet-may22.pdf>>.

³³⁸ *Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21: Statement Of Royalties To Be Collected By Access Copyright For The Reprographic Reproduction, In Canada, Of Works In Its Repertoire, Provincial and Territorial Governments Tariff (2005-2014)* (22 May 2015), online: Copyright

originally sought tariff rates of \$10.50 per full time employee (FTE) in the 2004-2009 tariff, and \$11.70 for the 2010-104 tariff.³³⁹ In the decision of the Board the rates were set at 11.56 cents per FTE for the period 2004-2009, and 49.71 cents for the period 2010-2014.³⁴⁰ The Board reduced Access Copyright's tariff to approximately 1% of its original request for 2005-2009, and about 4.5% of the 2010-2014 tariff request. Far more important than the reduction in tariff was the reasoning behind it.

Almost a third³⁴¹ of the decision was devoted to the Fair Dealing Analysis. Of the two hundred and ninety-one events in the volume study the Board determined that only thirty-nine were compensable events.³⁴² Access Copyright attempted to diminish the impact of Fair Dealing by questioning most aspects of the analysis. In its claim Access Copyright argued that Fair Dealing was a defense that must be proven by the objectors. The board however pointed out that while this is correct in litigation, the proceedings before the board are not a suit of copyright infringement.³⁴³ Access Copyright further claimed, "where insufficient evidence has been adduced to evaluate one or more of the CCH factors, the Objectors did not meet their burden to establish fairness".³⁴⁴ However the Board found that "it is possible to evaluate the fairness of a dealing without evidence on every factor",³⁴⁵ thus

Board of Canada <<http://www.cb-cda.gc.ca/decisions/2015/DEC-2015-03-22.pdf>> at 2.

³³⁹ *Ibid* at 508.

³⁴⁰ *Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada of Works in its Repertoire, Provincial and Territorial Governments (2005-2014)* (23 May 2015), Supplement Canada Gazette Part 1, online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2015/TAR-2015-05-23.pdf>>.

³⁴¹ The Fair Dealing section of the decision occupied 50 pages of the total 148 pages in the decision.

³⁴² *Supra* note 338 table 2.

³⁴³ *Ibid* at para 215.

³⁴⁴ *Ibid* at para 217.

³⁴⁵ *Ibid* at para 219.

reiterating that only a sufficient boundary need be reached for the dealing to be fair, not necessarily all 6 factors. Access Copyright also attempted to suggest the governments were hiding behind their employees since the work being done was on behalf of the employers.³⁴⁶ However the Board disagreed, referring to *CCH* and noting “[a]s the lawyer’s clients were in *CCH*, so the provincial and territorial governments, and in certain situations, their citizens, are the beneficiaries of the activities that were accomplished as a result of the dealings in question”.³⁴⁷

Despite the clear statement in *SOCAN v Bell* with respect to the perspective to be taken in a Fair Dealing analysis³⁴⁸, Access Copyright claimed that copies of works should be considered in the aggregate and not on the basis of individual users. The Board disagreed, referring back to both the *CCH* and *SOCAN v Bell* decisions and noting, “[t]his approach ascribes the characteristics of the whole to its constituent elements without justification”.³⁴⁹

The Board also recognized (in an echo going back to the original Royal Commissions that led to the Boards creation) that despite their claims Access Copyright does not in fact have the assignments for all the works it claims in its repertoire.³⁵⁰ Access Copyright has claimed a relationship with copyright owners who are not registered members of their organization by virtue of the fact in those instances they have transmitted to the copyright owner of the work a cheque, which in turn has been cashed thus establishing an agency relationship. The decision noted

³⁴⁶ *Ibid* at para 228.

³⁴⁷ *Ibid* at para 232.

³⁴⁸ *Supra* note 220 at para 41.

³⁴⁹ *Supra* note 338 at 289.

³⁵⁰ *Ibid* at 119.

In the matter before us, payments have not been made by Access in relation to the copying events captured in the Volume Study, including to those with whom Access does not have an affiliate agreement. Since no payments have been made, no agency relationship could have arisen between the relevant owner of copyright and Access.³⁵¹

In the explanation offered by the Board they pointed out that the volume study done in support of the tariff request had found that forty-one of the two hundred and ninety-one copying events involved works not licensed by Access Copyright.³⁵² The Board also commented on other possible ‘irregularities’ (despite the absence of comment from objectors to the tariff) with Access Copyright’s claimed repertoire. The specific example was the appearance of several works in the volume study (which Access Copyright claimed as part of their repertoire) of U.S. origin and as such part of the repertoire of the U.S. Copyright Clearance Centre. The Board noted that on the Copyright Clearance Centre website they stated they “cannot provide a business license”.³⁵³

The decision of the Copyright Board is extraordinarily significant, not only for its outcome, but also because of the nature of the decision itself. As Howard Knopf has commented, “[t]he Board has gone from almost a dearth of legal reasoning and explicit factual underpinning and analysis to possibly the other extreme- which is clearly a preferable excess if one has to choose between the extremes”.³⁵⁴ More importantly with respect to this thesis it indicates a changing dynamic in the decisions of the Board as a result of the direction of the SCC. The

³⁵¹ *Ibid* at 127.

³⁵² *Ibid* at 141.

³⁵³ *Ibid* at 146.

³⁵⁴ Howard Knopf, “Possible Fallout From the Copyright Board’s Access Copyright Provincial And Territorial Government Decision” (25 May 2015), online: *Excess Copyright* <<http://excesscopyright.blogspot.ca/2015/05/possible-fallout-from-copyright-boards.html>>.

decision of the Board is absolutely grounded in the *CCH* and *Pentalogy* rulings indicating a wholesale acceptance of the enhanced status of the user and the redefined understanding of balance within the *Act*.

Chapter 7 Reassessing the Copyright Board in a Gramscian Frame

The Copyright Appeal Board (as it was originally known) was created to ensure oversight on the monopoly powers of the performance right collective (CPRS). To this point this thesis has concerned itself primarily with the history and development of that tribunal, and parallel tribunals in the United Kingdom and Australia. Viewing these agencies through their parallel evolutions and divergences the thesis has attempted to discern patterns in policies and behaviours that would not be possible through an analysis in isolation. The observations thus far have been primarily rooted in empirical frames: case decisions, tribunal constitutions, and economic analyses. This chapter will connect those empirical points through a hegemonic frame.

To begin we should return to the initial starting point, the myths of copyright. Specifically, the myth that it benefits the creator, and that intellectual property is property in the traditional understood sense. Both are untrue. Property is rivalrous, my possession of it denies its use to anyone else and my ownership of it may result in its destruction or damage. Conversely I can possess the intellectual content of a book (having read it) or a piece of music (having heard it) and this does not diminish the ability of another person to possess it. In fact, the more people that possess it the more valuable it will become as it becomes part of the cultural fabric and language of the society. However, the notion of 'property' rights is very attractive to those seeking to expand the circuits of capital. The consistent lengthening of copyright terms as noted in the Hargreaves report is a result of

questionable economic data used to buttress the rationales of copyright term increases, serves to strengthen and inculcate the dominant economic goals of the ruling hegemony. As Hugenholtz and Senftleben stated “[a]ccording to these theories, just as property rights in tangible goods warrant complete and perpetual control, making unauthorized uses unlawful as a matter of principle, copyright should ideally become a perpetual and absolute right that tolerates few or no ‘free’ uses”.³⁵⁵ This notion of an imprescriptible right attached to ever lengthening terms ensures a constant flow of capital to those controlling the process.

With regard to benefit, though the discussion is always framed in terms of the creator, the *Act* is very clear; copyright benefits the owner of the work. Interestingly this was a point also raised by the Board in regard to their inaugural provinces and territories tariff decision, noting that while Access Copyright (Access) had provided a list of creators and publishers, “Access receives its authority to license the copying of a work from a person when they are the owner of copyright; merely being a publisher or an author is not sufficient to validly grant Access such an authorization”.³⁵⁶ This point speaks to the fact that the entire system of copyright relies on the very successful myth of the creator to justify what is really an owner’s benefit, and as noted previously the owners are usually not the creators but rather their publishers. This owner-centric mentality is a result of the proliferation of the creator myth adopted and inculcated to serve the goals of industrial interests. The constant inculcation of the process as justified by the creator myth has led to an unquestioned acceptance, and while this might have been expected in right based

³⁵⁵ *Supra* note 178 at 7.

³⁵⁶ *Supra* note 338 at 148.

copyright jurisdictions (e.g. France, Germany), it has also been extraordinarily successful in utility-based regimes.

From its initial development the copyright tribunal was an effort to maintain some balance in a relationship of extreme power inequity. Despite the regulatory nature of the tribunal it is clear that over time the position of the collectives became the dominant one. While they were the object of investigation in the 1920s 30s and 50s they became a model for economic development in the 1980s with the wholesale expansion of the collective model. As noted in chapter three the initial formation of the performance right collectives can be viewed within the hegemonic frame as an initial cross-class alliance between traditional opponents (publishers and composers) for the purposes of creating new circuits of capital. It was an extraordinarily successful one, a hegemonic process that has grown exponentially, and has dominated the artistic economy.

While the initial alliance was between the publishers and composers, the subsequent growth of the hegemonic process would see the inclusion of many of the user stakeholders into it. Broadcasters who originally entered as users and licensees became collectives themselves with the expansion of the basis for collectives in the 1988 copyright reform (e.g. retransmission rights collective, baseball broadcaster's collective) however the encroachment of the hegemonic process went beyond the traditional oppositional agencies of owners and users.

It is clear from the analysis that the hegemonic process also captured the tribunals charged with oversight. The comment from the UK Copyright Tribunal report regarding the lack of the right for collectives to make references to the board

as being the ‘nub’ of the basis for allegations of unfairness is a clear indication of this. The purpose of the tribunal in any jurisdiction is to ensure oversight of monopolies with respect to their treatment of users. As the court noted in *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.*, “the statutory scheme’s focus on regulating the actions of collective organizations, and the case law’s focus on ensuring that such organizations do not devolve into ‘instruments of oppression and extortion’ (*Vigneux v. Canadian Performing Right Society Ltd.*, [1943] S.C.R. 348, at p.o 356, per Duff J., quoting *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at p. 128).”³⁵⁷ The tribunal should exist to protect the users from the collective, not the collective from the user. Additionally, the UK Copyright Tribunal report completely failed to recognize or acknowledge the publishers as recipients in the collection and distribution of tariffs, thus again conflating the true function of copyright with the romantic myth of protecting the creator. With respect to the North American regimes the publishers generally receive more than 50% of the revenues in music³⁵⁸, and often significantly more than that in reprography, this despite the fact that creators outnumbered publishers by a ratio of almost 8 to 1 in 2010.³⁵⁹

While direct evidence in this regard is less obvious in the Australian regimes, the report on the *Collecting Societies Code of Conduct*³⁶⁰ noted both an overwhelming feeling amongst users that the tribunal is ‘unquestioning’ in regard to tariff

³⁵⁷ *Supra* note 322 at para 112.

³⁵⁸ In the 2014 SOCAN financial report publishers received just under 83 million versus the just over 77 million received by creators (writers): *SOCAN Annual Report 2014*, online: <http://www.socanannualreport.ca/wp-content/uploads/2015/06/SOCAN_Annual_Report_2014_Financials.pdf>.

³⁵⁹ 2010 was the last year that SOCAN listed membership numbers as part of its financial report with respect to disbursement.

³⁶⁰ *Supra* note 277.

increases and that there was a general endorsement of the collectives by the tribunal. Both comments indicate a tribunal that is heavily skewed in favour of the dominant voice of the collectives, the dominant voice in the hegemonic process.

Within the Copyright Board of Canada the evidence of the decisions overturned by the Federal Appeals Court and the Supreme Court of Canada indicate a tribunal process also strongly dominated by the influence of the collectives.³⁶¹ The fact that 23% of all the Boards decisions between 2004 and 2014 were subject to judicial review speaks to systemic issues, particularly given the fact that none of the comparative tribunals had more than 10% of their decisions reviewed, and all of the comparators had delivered at least double the number of decisions the Board had. Concurrent with this is the ongoing internal review process in which licensees, as well as Howard Knopf and J. Aidan O'Neill, have pointed out the board's deference to the collectives with respect to compliance measures, as well as with respect to suggested initiatives regarding publication and accessibility. The processes of the Board itself have undoubtedly favoured the collective's operation. The fact that the only notice required for a new tariff (even one directed to a newly defined user group such as in the case of the hotels and *Re: Sound*) was publication in the *Gazette* gave an extraordinary amount of power to the collective over the user, and only serves to demonstrate the imbalance.

During the period under discussion there was also a growing awareness of copyright and its associated regimes within the larger social context. The backlash

³⁶¹ As an example of the 21 cases heard by the FAC 18 could be viewed as oppositional issues between collectives and users (some were simply procedural) and of these 10 would be found in favour of the licensee by the FAC and SCC.

surrounding the Access Copyright proposed colleges and universities tariff discussed in chapter two and the redefinition of the role of copyright in contemporary society with respect to notions of owning and using has contributed to this shift. While much of the discussion of collectives and tribunals has occurred at corporate levels, be that the collectives or the industries or the large scale users they are focusing upon, the Access Copyright proposed tariff issue raised awareness in a critical and seminal way amongst individual end users, most of which had been completely unaware of the existence of collective licensing.

At the same time, the Supreme Court of Canada contributed to the creation of a moment of organic crisis for the hegemonic process when they recognized the existence of User's rights within the *Act* and posited a redefined Fair Dealing as not merely a defense, but a right. Despite this direction from the Supreme Court, the Copyright Board did not immediately recognize the shift to a more balanced reading and continued to operate in an owner-centric fashion. Given the dominance of the ruling hegemony and its massive expansion in the twenty years preceding *CCH* this was not surprising. The *CCH* ruling would establish new parameters and would provide the foundation for the subsequent rulings of the court in the 2012 Pentalogy, and the eventual impact on the Copyright Board would be particularly significant.

Graham Reynolds has given careful consideration to the decision of the SCC in *Alberta v AC*, in particular, he has been drawn to the dissenting comments of Rothstein. Reynolds posits that Rothstein is saying the court inadvertently applied a correctness standard instead of a reasonableness standard.³⁶² Reynolds notes that

³⁶² Graham Reynolds "Of Reasonableness, Fairness and the Public Interest: Judicial Review of Copyright

in *Alberta v AC* the majority rejected the boards' decision on the ground that given their analysis it was an unreasonable outcome. However, Reynolds sides with Rothstein's dissenting view that the decision of the board was not unreasonable. Why then is the ruling in *Alberta v AC* not in error? Referring to the case of *SOCAN v Bell*,³⁶³ Reynolds notes that Justice Abella "described the author-centric approach to copyright as the 'former framework' and the 'earlier' view of copyright".³⁶⁴ Given the decision handed down in *CCH*, the owner centric approach to copyright that had been standard in Canada and throughout the commonwealth, as evidenced by the cases Access Copyright used in its efforts to support its position in *Alberta v AC*, was no longer good law in Canada. *CCH* had changed that dynamic and the Board had failed to recognize and appreciate the dramatic shift in the interpretation of copyright law in Canada.³⁶⁵

The author posits that this issue goes deeper than Reynolds has stated. The very nature of the legal process and the makeup of the board itself had guaranteed a self-perpetuating approach that was fundamentally owner centric. Consider the membership of the Copyright Board of Canada during the period under review. The chairman, Mr. William J. Vancise, was a justice of the Court of Appeal for Saskatchewan and was the chairman of the board from 2004-2014. Since members are limited by the *Act* to two terms maximum he stepped down from the board in June of 2014. Mr. Justice Vancise graduated from law school in 1960 and was called

Board Decisions in Canada's Copyright Pentalogy" in Michael Geist, ed, *The Copyright Pentalogy How the Supreme Court Shook the Foundations of Copyright Law* (University of Ottawa Press, Ottawa, 2013).

³⁶³ *Supra* note 220.

³⁶⁴ *Supra* note 362 at 17.

³⁶⁵ *Ibid* at 21.

to the bar in 1961.³⁶⁶ J. Nelson Landry joined the board in 2010; he graduated from law school in 1968 and was called to the bar in 1969. He was a member of Ogilvy Renault from 1969 to 2002, leaving as a senior partner.³⁶⁷ Claude Majeau was appointed vice chairman and CEO in August of 2009, he had been secretary general of the board since 1993. Graduating from law school in 1977 and called to the Quebec bar in 1979 Mr. Majeau had spent most of career in various positions within the civil service.³⁶⁸

Thus the members of the Copyright Board had a combined 137 years of practice in intellectual policy issues. If, as has been made clear in the language of the court and subsequent analyses, the owner centric paradigm is the dominant one in commonwealth legal tradition than unquestionably the dominant paradigm taught, learned, ingested and practiced not just by the members of the board, but by the legal profession as a whole, has been the owner centric one. The *CCH* ruling was handed down in 2004; it is unrealistic to think that a fundamentally new approach would have been absorbed quickly enough to counterbalance the prevailing attitudes. Consider the ongoing efforts of Access Copyright to impose unreasonable licenses in their inaugural provinces and territories tariff (despite the *Alberta v AC* rulings, and *CCH*). Such behaviours only emphasize that established practices are

³⁶⁶ Canada, “Archived - William J. Vancise Reappointed to the Copyright Board of Canada” (15 May 2009), online: < <http://news.gc.ca/web/article-en.do?m=/index&nid=450919>>. Press release from Minister of Industry announcing appointment of Vancise to Copyright Board.

³⁶⁷ Canada, “Archived - J. Nelson Landry Appointed to the Copyright Board of Canada” (11 February 2010), online: < <http://news.gc.ca/web/article-en.do?m=/index&nid=511809>>. Press release from Minister of Industry announcing appointment Landry to Copyright Board.

³⁶⁸ Industry Canada, “Claude Majeau Appointed to the Copyright Board Canada” (5 August 2009), online: Market Wired < <http://www.marketwired.com/press-release/claude-majeau-appointed-to-the-copyright-board-canada-1026247.htm>>. Press release from Minister of Industry announcing appointment of Majeau to Copyright Board.

difficult to change despite new realities.

Beyond simply the Board, the lawyers who inform and manage the process are also products of the same system. And, importantly, many of them move back and forth within the policy network, creating and supporting justifications for the system itself. For example, the 2006 Industry Canada Report on Collectives was written by C. Craig Parks, who is also legal counsel for the collective Music Rights Organization of Canada. Shane Simpson one of the most prominent entertainment and media attorneys in Australia wrote the Simpson Report on Collectives in Australia. Perhaps the reason the Hargreaves report came down so strongly on the lack of methodologically sound economic evidence in support of IP policy was the fact that Ian Hargreaves was not part of the historic practice surrounding IP issues, and thus had no preconceived or inculcated expectations.

If user's rights are truly to become an integral part of the system, and not simply as public relations exercises in appeasing growing user discontent with current copyright practice, then there needs to be a genuine representation of the users within the makeup of the Board itself. Arguably the owner-centric industry interests are already represented given that so many members of the board were in fact practicing attorneys prior to their appointment. This is not to suggest any consciously improper behaviour on their part but referring back to the earlier point if one is trained with a certain paradigm in mind and practices that paradigm in their professional career they will carry that paradigm consciously or unconsciously. These lawyers are the 'intellectuals' within Gramsci's framing of hegemony, responsible for inculcating and implementing the goals of the dominant order.

Doris Nadine McDonnell has noted in her work that the insular nature of the legal profession and its inability to accept those not within the “priesthood” of law interferes with the ability of the public to actually participate in the process.³⁶⁹ Thus the policy process is not particularly conducive to entertaining end user concerns or suggestions, and as Samuelson notes, in a rather blunt assessment, “Collective action problems make it difficult for parties that will be negatively affected by higher protection rules to organize effective resistance to copyright industry lobbying. This mix of concentrated benefits and distributed costs is likely to yield the best laws money can buy”.³⁷⁰

It is worth reiterating that despite admonitions to the contrary the initial purpose of the board was to protect users from exploitation by the collectives and even in the current neo-liberal dynamic there is at least a grudging recognition of the disparity in power between the negotiating parties as evidenced by the CAB, SOCAN and CMRRA submissions to the Copyright Board consultation. The presence of a users’ right advocate on the board would go a long way to creating the balance the Court has looked for since *Theberge*. Ultimately it has been the recent rulings of the SCC with their inherently new direction for copyright in Canada that may define the operations of the board such that our path will diverge even further from that of the United Kingdom and Australian tribunals. In practice it remains to be seen how much of the SCC’s rulings the board will take to heart but it has been the SCC and its reinterpretation of the role of copyright that has created the seed for this organic

³⁶⁹ Doris Nadine McDonnell, *Intellectual Property: A Strategy of Reform* (PhD Thesis, Simon Fraser University, 2002) [unpublished].

³⁷⁰ Pamela Samuelson, “Should Economics Play a Role in Copyright Law and Policy?” (2003-4) 1 *University of Ottawa Law & Technology Journal* 1 at 9.

crisis.

The following section will review the research questions stated at the outset in light of the analysis offered in this study.

7.1 Research Questions

1. In what ways has the Copyright Board changed with respect to its scope and oversight role since its creation as the Copyright Appeal Board in 1936?

While the board began its role as one of oversight on behalf of users against the monopoly power of performance right collectives, over time that role became increasingly one of economic advancement. As commented on in the previous section this was something seen in all jurisdictions discussed, though even more so in the UK and Australia. However, with the 2004 and 2012 rulings of the SCC recent decisions of the board seem to be taking greater consideration of the user into the decision making process. This has been particularly evident in its most recent decision with regard to Access Copyright and the Provinces and Territories tariff.

2. How well are user interests represented in the practices of the Board?

In practice the Board has not been overly concerned with user interests, as comments from the various reports have noted. Again however, recent developments at the SCC are encouraging a changing dynamic in Board decisions. For example, while the Board still presented a very owner, or collective-centric approach in the FCA appeal cases, at the SCC level the *SOCAN v Bell* decision (at least) had absorbed the high courts direction with respect to a 'broad' understanding of research. Also, the recent decision of the Board with respect to

provinces and territories tariff shows a far greater inclusion of the principles set forth in *CCH* and the Pentalogy rulings. Similarly, recommendation of the Working Committee on the Operations Procedures and Processes of the Copyright Board to enhance the accessibility of tariff creations and justifications are indicative of a more balanced approach with respect to user interests. While outcomes of this process are still unknown this is at least a hopeful step.

3. Has lobbying by the various industries represented by collective management shaped/impacted board practice?

The economic evidence presented in chapter two as well as the discussion of the Hargreaves report and the Mitra-Kahn offer a preponderance of evidence that the policy process is heavily influenced by industry interests. Mr. Knopf's comments with respect to 'expert' evidence as well as those noted by SCOUNL in the UK Copyright Tribunal Report, and SOCAN's response to the working group regarding the Boards acquiescence to its suggestion, all indicate an owner centric dynamic. This is further supported by the UK report on a Code of Conduct for Collecting Societies, which noted the owner centric nature of the Australian tribunal and the increasing hostility emanating from licensees due to the lack of critical response to tariff justifications. These indicate a significant disparity in the power relations before the tribunals, which has impacted board practice.

4. Is there evidence of a shift in the policy or findings of the board as a function over time?

Bearing in mind its initial role of oversight, the expansion of the role and function of the board as well the staggering growth in the number of collectives operating

following the 1988 revisions to the *Act*, there is strong evidence of impacts upon the board. As noted in the responses to questions 1-3 there is evidence of owner centric patterns in the practice of the Board following this period. However, in fairness it must be noted that as Reynolds pointed out, the tradition of Copyright prior to *CCH* was an owner centric practice.

5. Has the influence of the original public performance right collectives continued to significantly impact the board since the 1988 copyright revisions, or has the network seen the establishment of new key players?

The original performing rights organization in Canada was the Canadian Performing Right Society, its successor today is SOCAN. As has been noted by Gervais and in the initial chapter of this thesis, SOCAN, like all the collectives for music worldwide, is by far the recipient of the greatest proportion of tariff revenues. It is no longer the sole recipient as it once was, but as Gervais noted music collectives collect more revenue than all other collectives in Canada combined. Regardless there are new and key players in the system. Until recently Access Copyright would likely have been one of the strongest, but its successive losses in the courts coupled with its most recent losses at the Board³⁷¹ have significantly weakened its power.

Nonetheless, judging from the submissions in response to the working paper there are a number of strong players in the system, the BDU's and CAB amongst them, however SOCAN is still dominant.

³⁷¹ *Supra* note 338.

Concluding Thoughts

Within the context of IP discussion generally and copyright tribunals specifically there seems to be an overarching need to 'fit' the process to the evolving social practice. For Collectives this has meant enlarging the frames and terms of their collection and the sites of acquisition. For licensees and the small-scale user, it has meant fighting a losing battle (generally) against increasing tariffs and attempting to find ways to pass on costs to the end user. For the Board it has for the most part been business as usual. The change that has occurred (is occurring) is primarily the result of the Supreme Court of Canada. However, the one truly absent point has been the real consideration of any alternatives. Simply because we can charge a toll on our information thoroughfares doesn't mean we should. Is there another way?

If the *true* purpose of copyright is to incent creation, and if the desire is that it genuinely benefit the creator, why do we continue with a system that, as the economic studies have indicated, is clearly not very effective at either? At a time when our global society has begun to rethink the meaning of ownership and creation, who is a creator and with what, should we not also reconsider how we want to incent creativity? Clearly our Supreme Court has noted the change in our world given their uniquely expanded understanding of Fair Dealing and User's Rights. The Hargreaves report was also crystal clear with respect to the changing nature and evolution of intellectual property rights in our contemporary period commenting "[t]he copyright regime cannot be considered fit for the digital age

when millions of citizens are in daily breach of copyright".³⁷²

The standard rationales for copyright are simply not a good 'fit' for modern society. Instead of trying to make copyright fit, we should be seeking alternatives that do fit. What that alternative might be is unclear, but first and foremost clarity as to the purpose of copyright as a policy instrument must be forthcoming. If there is to be any hope of reform, the fundamental purpose of the policy process must be settled. Presently the purpose is either viewed pragmatically, as one of incenting creation, or romantically as one of protecting the rights of creators. Copyright as it presently exists does not serve either of those objectives well.

If the intended purpose is to actually reward creators then we need policies that provide real impact for creators across a broad spectrum, not simply the very few 'winners' at the top of the pyramid. As the economists Boldrin and Levine have noted, "[g]ood economic laws and institutions are designed **not** to make a few lucky people super wealthy, but to make the average consumer better off." (Emphasis added)³⁷³ The most lucrative copyright collectives, those associated with music, disperse somewhat more than half of all revenues to the publishers as opposed to the creators. Recall that the Hargreaves's Report condemned the lack of evidence based policy creation and particularly cited copyright term extension as a poignant example of policy decisions made in spite of economic evidence. Recall also the comments of Towse, Kretschmer and Mitra-Khan, with regard to the 'winner take all' nature of those royalties that are dispersed to creators. If our policy goal with the copyright system is to incent creation and promulgate cultural growth in our

³⁷² *Supra* note 264 at 6.

³⁷³ *Supra* note 24 at 125.

community, our current approach *vis a vis* copyright is akin to trying to address poverty in our society by means of distributing lottery tickets. A few may get lucky, but the majority will continue to suffer. It is clear that the creators are not the big winners in copyright despite all the rhetoric surrounding them, but there are alternatives.

Consider the possibility of tax-free status for artists or a guaranteed minimum wage in return for the loss of copyright. How might that impact the creative process and the artistic community? For the average composer/musician/writer having tax-free status, or a guaranteed minimum income would be vastly more beneficial than the current lottery approach. Nor is this as outlandish an approach as it might at first glance appear. Ireland has had a tax-free status system in place for artists since 1969³⁷⁴, and it has been credited in part with feeding the growth in the technology sector by virtue of creating a large supply of graphic artists and musical designers.³⁷⁵ Couple this with Finland's recently announced intention to provide all citizens with a guaranteed minimum income.³⁷⁶

Finland is not alone in experimenting with the idea of a guaranteed income, Canada did the same in the community of Dauphin Manitoba back in the 1970s,³⁷⁷ and a pilot project is planned for Utrecht in 2016, with Switzerland voting on a

³⁷⁴ For further information on this program see the following online:
<<http://www.revenue.ie/en/tax/it/reliefs/artists-exemption.html>>.

³⁷⁵ Thomas C. O'Connor & Terence M. O'Connor, "Tax exemption as a marketing tool: The Irish Republic and profits derived from artistic creativity" (2009) 62.10 *Journal of Business Research* 1002 at 1005.

³⁷⁶ Daniel Tencer, "Finland's Basic Income Plan Would See All Citizens Receive 800 Euro A Month" *Huffington Post*, December 7, 2015, online: http://www.huffingtonpost.ca/2015/12/07/basic-income-finland_n_8739898.html.

³⁷⁷ Evelyn Forget, *The Town With No Poverty: Using Health Administration Data to Revisit Outcomes of a Canadian Guaranteed Annual Income Field Experiment*. University of Manitoba. 2011 online: <<http://nccdh.ca/resources/entry/the-town-with-no-poverty#sthash.5c3ntlmq.dpuf>>.>.

project as well.³⁷⁸ Funding for such an endeavour directed towards the arts could in part be provided from the savings that would be realized by the dismantling of the bureaucracy surrounding the management of the current systems, the Copyright Board being one. In the 2011 National Household Survey 3,400 Canadians identified themselves as composers, conductors and arrangers.³⁷⁹ Simply dividing the Copyright Board budget for 2014³⁸⁰ among them would mean each would receive an additional \$1033.58, which doesn't sound like a great deal, but is significantly more than the Intellectual Property Office determined the average British artist would receive as a result of the copyright term extension in sound recordings. This example only references the yearly budget of the Copyright Board. If a minimal rate were attached to all commercial tax filings of those industries presently targeted by collectives the amount available for distribution could be quite significant. In addition tax-free status would ensure an additional 15%³⁸¹ in disposable income. Given the generally low income of most artists this would also not place a significant burden on the Canadian tax base particularly if there were a maximum income cap.

Regardless of the method, an equitable solution is needed. The current regime simply does not serve artists well and given the influence of lobbyists it is not ever likely to. As Ruth Towse so eloquently noted, "the tentative conclusion is that the economic power of firms in the cultural industries, which are for the most part vertically integrated oligopolies, strengthened as they are by copyright law, is such

³⁷⁸ *Supra* note 376.

³⁷⁹ Hill Strategies Research Inc., *A Statistical Profile of Artists and Cultural Workers in Canada*, (2014), online: <<http://www.hillstrategies.com/content/statistical-profile-artists-and-cultural-workers-canada>>.

³⁸⁰ See online: <<http://www.cb-cda.gc.ca/about-apropos/annual-annuel/2013-2014-financial-statements-etats-financiers-e.html>>.

³⁸¹ Or more depending on earnings, but the majority of artists are generally in the lowest income brackets.

that conceivable changes to that law could not vastly improve the earnings of artists".³⁸² That outcome is certainly *not* one we should be seeking for our culture and artists.

³⁸² *Supra* note 49.

Bibliography

Legislation

Berne Convention for Literary and Artistic Works September 9, 1886, amendments through September 28, 1979.

Canada

Copyright Act, R.S., c. C-30,

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

Copyright Amendment Act 1931

Federal Courts Act. R.S., 1985, c. F-7, s. 1; 2002, c. 8, s. 14

United Kingdom

An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c 19. [Statute of Anne]

Copyright Act, 1911. [1 & 2 GEO. 5. CH. 46.]

Copyright Act 1956 4 & 5 Eliz. II. c. 74.

Copyright Designs and Patents Act 1988, c 48.

Australia

Copyright Act 1968, Australia.

Copyright Amendment Act 2006 (Australia) (Cth) No. 158 of 2006.

Jurisprudence

Alberta (Education) v. Access Copyright, 2010 FCA 198.

Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37.

Apple v. Canadian Private Copying Collective, 2008 FCA 6. *Canadian Association of Broadcasters v. SOCAN*, 2006 FCA 337.

Canadian Broadcasting Corporation v. SODRAC 2003 Inc, 2015 SCC 57.

Canadian Performing Right Society Ltd. v. Famous Players Canadian Corporation Ltd., [1927] 2 D.L.R. 928; 60 O.L.R. 280 (Ont. S.C.).

Canadian Private Copying Collective v. Canadian Storage Media Association, 2004 FCA 424.

Canadian Recording Industry Association v. Society of Composers, Authors and Music Publishers of Canada 2010 FCA 322.

CCH Canadian Ltd. V. Law Society of Upper Canada, 2004 SCC 13.

Dunsmuir v New Brunswick 2008 SCC 9.

Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34.

Gramophone Co. Ltd, v Stephen Cawardine& Co. [1934] Ch 450.

Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2015 FCA 289.

Re: Sound v. Fitness Industry Council of Canada, 2014 FCA 48.

Re: Sound v. Motion Picture Theatre Associations of Canada, 2011 FCA 70.

Re: Sound v. Motion Picture Theatre Associations of Canada, 2012 SCC 38.

Rogers Communications Inc. v. SOCAN 2010 FCA 220.

Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35.

Society of Composers, Authors and Music Publishers of Canada v Bell Canada 2010 FCA 123.

Society of Composers, Authors and Music Publishers of Canada v Bell Canada, 2012 SCC 36.

Théberge v. Galerie d'Art du Petit Champlain 2002 SCC 34.

Veuve Buffon - C. Behmer, Cour de cassation, Therm. 29, S. Jur. I, an 11, 851.

Secondary Materials

Access Copyright 2014 annual report online Access Copyright

https://www.accesscopyright.ca/media/91810/2014_annual_report.pdf.

American Society of Composers Authors and Publishers (ASCAP) 2014 annual report online ASCAP http://www.ascap.com/~media/files/pdf/about/annual_reports/ascap_annual_report_2014.pdf.

Andersen, Birgitte. Richard Kozul-Wright, & Zeljka Kozul-Wright. "The Social and Economic Effects of Copyrights in the Music Industry: A Contribution to the Convergence versus Divergence Debate." *New Directions in Copyright Law*. Ed. F. MacMillan (Cheltenham: Edward Elgar, 2005).

Australian Copyright Tribunal online Australian Copyright Tribunal

<http://www.copyrighttribunal.gov.au/>.

Australian Law Reform Commission online

<https://www.alrcgov.au/publications/7-fair-dealing/current-law>

Australasian Performing Right Association online <http://apraamcos.com.au>.

BDU. Response to discussion paper online Copyright Board of Canada

<http://www.cb-cda.gc.ca/about-apropos/pdf/BDUs.pdf>.

Boldrin, Michele. Levine, David K. *Against Intellectual Monopoly*, (New York, Cambridge University Press, 2008).

Bouchard, Mario. "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia" in Daniel Gervais, ed., *Collective Management of Copyright and Related Rights* (The Netherlands: Kluwer, 2006).

Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. (New Haven: Yale University Press, 2008).

Broadcast Music International (BMI) 2014 revenue press release, online Broadcast Music International <http://www.bmi.com/press/entry/572180>.

Canada. *Debates of the House of Commons of the Dominion of Canada: Session 1935 Vol. I-IV*. (Ottawa: 1935).

Canada. *Gazette*, online Canada Gazette <http://www.gazette.gc.ca/gazette/home/accueil-eng.php>.

Canada. *House of Commons Debates*, 17th Parl XX Sess, No XX (1936).

Canada. *Royal Commission on Activities of the Canadian Performing Right Society Limited*, Albert Freeman Ewing chair (Ottawa: 1932).

Canada. *Royal Commission to Investigate the Activities of the Canadian Performing Right Society, Limited, and Similar Societies, Report of his Honour Judge Parker, a Commissioner Appointed by the Inquiries Act and the Copyright Amendment Act of 1931*, pursuant to Order in Council no. 738, (Ottawa: 1935).

Canada. *The Royal Commission on Patents, Copyright and Industrial Design*, (Ottawa: 1957).

Canadian Agricultural Review Tribunal *Annual Reports* online
<http://cartcrac.gc.ca/eng/annual-reports/?id=1278107179184>.

Canadian Human Rights Tribunal *Annual Reports* online <http://www.chrt-tcdp.gc.ca/NS/reports-rapports/ar-ra-eng.asp>.

Canadian Mechanical Reproduction Rights Agency. Response to discussion paper, online Copyright Board of Canada <http://www.cb-cda.gc.ca/about/apropos/pdf/CMRRA.pdf>.

Central Intelligence Agency. *World Factbook*, online Central Intelligence Agency <https://www.cia.gov/library/publications/theworldfactbook/docs/guidetowfbook.html>.

Competition Bureau of Canada, online Competition Bureau
http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html.

Competition Tribunal of Canada *Annual Reports* online
<http://www.cttc.gc.ca/ResourcesRessources/DPR-RSR/DPR-RMR-eng.asp>.

Copyright Board of Canada, *Annual Reports* online Copyright Board of Canada
<http://www.cb-cda.gc.ca/>.

Copyright Board of Canada, *Letter to Stakeholders*, 2015, online Copyright Board of Canada <http://www.cb-cda.gc.ca/about-apropos/pdf/vp-letter.pdf>.

Copyright Board of Canada. *Decision Access Copyright Provincial and Territorial Governments Tariff (2005-2014)* 2015, online Copyright Board of Canada
<http://www.cb-cda.gc.ca/decisions/2015/DEC-2015-03-22.pdf>.

- Copyright Board of Canada. *Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada of Works in its Repertoire, Provincial and Territorial Governments (2005-2014)* 2015 online Copyright Board of Canada <http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2015/TAR-2015-05-23.pdf>.
- Copyright Board of Canada. Working Committee on the Operations Procedures and Processes of the Copyright Board. *Discussion Paper*, February 4, 2015, online Copyright Board of Canada <http://www.cb-cda.gc.ca/aboutapropos/pdf/discussion-paper.pdf>.
- Copyright Collective of Canada. Response to working paper, online Copyright Board of Canada <http://www.cb-cda.gc.ca/about-apropos/pdf/CCC.pdf>
- Copyright Committee, Report of the Copyright Committee, (Chairman H.S. Gregory) (Cmnd 8662 Board of Trade 1952).
- Copyright Tribunal of the United Kingdom online Intellectual Property Office <http://www.ipo.gov.uk/ctribunal/>.
- D'Alton, Louis. *A Critical Historical Analysis of the Public Performance Right*, (unpublished, London, Canada, University of Western Ontario, 2012).
- “A Gramscian Analysis of the Public Performance Right.” 2014, chapter 10 in *Intellectual Property for the 21st Century Interdisciplinary Approaches*, Irwin Law, Toronto. 2014.
- Deazley, Ronan. *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775)*, (Oxford, Hart Publishing, 2004).
- Demers, Joanna. *Steal This Music: How Intellectual Property Law Affects Musical Creativity*. (Athens, GA: University of Georgia Press, 2006).
- Digital Opportunity A Review of Intellectual Property and Growth, (HMSO, London, 2011).
- Ehrlich, Cyril. *Harmonious Alliance: A History of the Performing Right Society*. (Toronto: Oxford University Press, 1989).
- Feather, John. *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain*, (New York: Mansell, 1994).
- Fisher, William W. III, “The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States” <https://cyber.law.harvard.edu/property99/history.html>.

- Forget, Evelyn. *The Town With No Poverty: Using Health Administration Data to Revisit Outcomes of a Canadian Guaranteed Annual Income Field Experiment*. University of Manitoba. (2011) online National Collaborating Centre for Determinants of Health <http://nccdh.ca/resources/entry/the-town-with-no-poverty#sthash.5c3ntlmq.dpuf>.
- Friedland, Martin L., "Report To Access Copyright On Distribution Of Royalties" (15 February 2007), online: Access Copyright <<http://www.accesscopyright.ca/media/1795/FriedlandReport.pdf>>.
- Geist, Michael, "Schools navigate learning curve for new copyright rules" The Toronto Star August 30, 2013, online http://www.thestar.com/business/2013/08/30/schools_navigate_learning_curve_or_new_copyright_rules_geist.html.
- Gervais, Daniel J. "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective." (2002) CJLT 1:2.
- "A Uniquely Canadian Institution: The Copyright Board of Canada" in Ysolde Gendreau, ed., *An Emerging Intellectual Property Paradigm: Perspectives from Canada*, (Cheltenham, Edward Elgar 2008).
- Ginsburg, Jane C. "A Tale of two Copyrights" (1990) *Tulane Law Review*, 64:5.
- Government of the United Kingdom "Exceptions to Copyright" online Government of the United Kingdom <https://www.gov.uk/guidance/exceptions-to-copyright>.
- Gramsci, Antonio. *Selections from the Prison Notebooks of Antonio Gramsci* (New York: International Publishers, 1971).
- Hill Strategies Research Inc., *A Statistical Profile of Artists and Cultural Workers in Canada*, (2014) Hill Strategies Inc. <http://www.hillstrategies.com/content/statistical-profile-artists-and-culturalworkers-canada>.
- Hotel and Restaurant Associations, Response to discussion paper, (2015) Copyright Board of Canada <http://www.cb-cda.gc.ca/about-apropos/pdf/JointSubmission.pdf>.
- House of Commons Innovation, Universities & Skills Committee, *The work and operation of the Copyright Tribunal*, HC 245, (Stationery Office Ltd. 2008).
- Hugenholtz, P. B. and Senftleben, Martin, Fair Use in Europe: In Search of Flexibilities (2011), online Social Science Research Network <http://dx.doi.org/10.2139/ssrn.1959554>.

Industry Canada. Press release from Minister of Industry announcing appointment of Vancise to Copyright Board online Government of Canada
<http://news.gc.ca/web/article-en.do?m=/index&nid=450919>.

Industry Canada. Press release from Minister of Industry announcing appointment of Landry to Copyright Board, Industry Canada online
<https://www.ic.gc.ca/eic/site/064.nsf/eng/home>.

Industry Canada. Press release from Minister of Industry announcing appointment of Majeau to Copyright Board, Market Wired online
<http://www.marketwired.com/press-release/claude-majeau-appointed-to-the-copyright-board-canada-1026247.htm>.

Intellectual Property Office. *Collecting Societies Codes of Conduct*, (HMSO, 2012).
 online Intellectual Property Office
<https://www.gov.uk/government/publications/collecting-societies-codes-of-conduct>.

Kennedy, John F. Commencement Address at Yale University, Old Campus, New Haven, Connecticut, June 11, (1962).

Knopf, Howard P. *Canadian Copyright Collectives and the Copyright Board: A Snap Shot in 2008*, Law Society of Upper Canada Continuing Legal Education Program of February 28, 2008, online Moffat & Co. & Macera & Jarzyna online
<http://www.macerajarzyna.com/pages/publications.htm>.

Response to discussion paper, online Copyright Board of Canada 2014
<http://www.cb-cda.gc.ca/about-a-propos/pdf/KNOPF.pdf>.

Kretschmer, Martin. "Artists' Earnings and Copyright: A Review of British and German Music Industry Data in the Context of Digital Technologies." (2005) *First Monday* 7.8.

Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. (New York: Penguin Books, 2004).

McDonnell, Doris Nadine. *Intellectual Property: A Strategy of Reform*. (Burnaby, BC: Simon Fraser University, 2002).

McLachlin, Beverly. Address to the Annual Conference of the Council of Canadian Administrative Tribunals, p 4, 2013, online Supreme Court of Canada
<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.

Mitra-Kahn, Benjamin H., *Copyright, Evidence, and Lobbyonomics: The World after the UK's Hargreaves Report*, (2011) Review of Economic Research on Copyright Issues, v 8(2), pp65-100.

Monopolies and Mergers Commission. *Performing Rights* (London: HMSO, 1996).

Murray, Laura J., Trosow, Samuel E., *Canadian Copyright A Citizen's Guide*, 2nd ed. (Between The Lines, Toronto, 2013).

Newton, Sir Isaac. Letter to Robert Hooke, Feb 5, 1675, online http://www.quotationspage.com/quotes/Isaac_Newton/.

Ombudsman Services online <http://www.ombudsman-services.org/companies/copyright.html>.

O'Connor, Thomas C. & O'Connor, Terence M. "Tax exemption as a marketing tool: The Irish Republic and profits derived from artistic creativity" (2009) *Journal of Business Research* 62(10):1002-1006.

O'Neill, Aidan. Reply comment to stakeholders' comments, online Copyright Board of Canada <http://www.cb-cda.gc.ca/about-apropos/pdf/AidanONeill.pdf>.

Response to discussion paper, online Copyright Board of Canada <http://www.cb-cda.gc.ca/about-apropos/pdf/ONEILL.pdf>.

Parks, C. Craig. *A Report on Copyright Collectives Operating in Canada*, 2006, online http://publications.gc.ca/collections/collection_2007/ch-pc/CH44-125-2007E.pdf.

Price, Gary, "Results From "Makerspaces in Libraries" Study Released" (16 December 2013), online: Library Journal <<http://www.infodocket.com/2013/12/16/results-of-makerspaces-in-libraries-study-released/>>.

Powell, Ronald R. *Basic Research Methods for Librarians*. 2nd ed. (Greenwich CT: Ablex, 1991).

Radin, Margaret. "Property and Personhood." (1982) *Stanford Law Review* 34.

Reynolds, Graham. "Of Reasonableness, Fairness and the Public Interest: Judicial Review of Copyright Board Decisions in Canada's Copyright Pentalogy" Ch. 1 in *The Copyright Pentalogy How the Supreme Court Shook the Foundations of Copyright Law* ed. Michael Geist (University of Ottawa Press, Ottawa, 2013).

- Re:Sound. Response to discussion paper, online Copyright Board of Canada
<http://www.cb-cda.gc.ca/about-apropos/pdf/RESOUND.pdf>.
- Romer, Paul. "When Should We Use Intellectual Property Rights?" 2002 *American Economic Review*, 92.
- Patterson, Lyman Ray. *Copyright in Historical Perspective*. (Nashville: Vanderbilt University Press, 1968).
- Samuelson, Pamela. "Should Economics Play a Role in Copyright Law and Policy?" (2003-04) *University of Ottawa Law & Technology Journal*, 1 p 1-21.
- Simpson, Jeffrey. *A Review of Australian Copyright Collecting Societies A Report to the Minister for Communications and the Arts and the Minister for Justice*, (Commonwealth of Australia, 1995).
- SOCAN 2014 *Annual Report* online SOCAN http://www.socanannualreport.ca/wp-content/uploads/2015/06/SOCAN_Annual_Report_2014_Financials.pdf.
- SOCAN. Response to working paper, online Copyright Board of Canada
<http://www.cb-cda.gc.ca/about-apropos/pdf/SOCAN.pdf> (2015).
- Tawfik, Myra. "Copyright as Droit d'Auteur" (2003) IPJ 17: 58-81.
- Tencer, Daniel. "Finland's Basic Income Plan Would See All Citizens Receive 800 Euro A Month", online *Huffington Post*, December 7 (2015),
http://www.huffingtonpost.ca/2015/12/07/basic-income-finland_n_8739898.html.
- Torremans, Paul. "Collective Management in the United Kingdom and Ireland" ch. 8 in *Collective Management of Copyright and Related Rights* 2nd ed., ed. Daniel Gervais (Kluwer Law International, Netherlands, 2010).
- Towse, Ruth. *Copyright and the Cultural Industries: Incentives and Earnings*, (Paper for presentation to the Korea Infomedia Lawyers Association 2003).
- University of Technology Sydney. *Copyright and UTS Students*, online University of Technology Sydney
<https://www.lib.uts.edu.au/sites/default/files/attachments/page/Factsheet%20%20What%20can%20you%20copy.pdf>
<https://www.lib.uts.edu.au/sites/default/files/attachments/page/Factsheet%20-%20What%20can%20you%20copy.pdf>.
- Vaidyanathan, Siva. *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*. (New York: New York University Press, 2001).

Vaver, David, *Intellectual Property Law: Copyright, Patent, Trade-marks*, (Irwin Law, Toronto, 2011).

“Does the Public Understand Intellectual Property Law? Do Lawyers?” (Keynote address delivered at Meredith memorial lectures, McGill Law School, March 17, 2006) University of Oxford Faculty of Law Legal Studies Research Paper Series, working paper No 23/2006, May 2006, at 4. Online http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1036&context=all_papers.

Copyright Law. (Toronto: Irwin Law, 2000).

“Agnostic Observations on Intellectual Property” (1991), 6 I.P.J. 125.

“Intellectual property Today: Of Myths and Paradoxes” (1990) 69:1 Can Bar Rev.

Wilkinson, Margaret-Ann. *The Context of the Supreme Court’s Copyright Cases*, chapter 3 in *The Copyright Pentalogy How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, ed M. Geist, (University of Ottawa Press, Ottawa, 2012).

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