

PART TWO:

## **Bill C-60: A Closer Analysis**



# Constitutional Jurisdiction Over Paracopyright Laws

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## A. INTRODUCTION

In response to evolving social, technological, economic, and cultural environments, the Government of Canada has been engaged in a decades-long overhaul of copyright law. In the reform process, the need to balance the rights and interests of all stakeholders is obvious. Some aspects of copyright reform, however, are less obvious. As copyright expands incrementally we risk moving away from core organizing principles that underpin the system. Not only is this unwise from a policy perspective, it is quite possibly unconstitutional.

The purpose of this paper is to determine whether Parliament is constitutionally competent to enact new laws in respect of technological protection measures (TPMs) and/or rights management information (RMI) systems for digital materials. In this context, digital materials include mainly pop culture products such as music, movies, books, games, and software, whether in electronic form or encoded on CDs, DVDs, or other tangible media. Laws protecting the technological and informational tools that protect these digital materials are sometimes called “paracopyright” provisions because

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they introduce a new layer of legal protection, above those already afforded by traditional copyrights and technological measures themselves.

The *Constitution Act, 1867* gives Parliament the authority to legislate, among other things, in respect of "Copyrights."<sup>2</sup> Until now, it seems to have been taken for granted that the federal Government can and will include paracopyright provisions in amendments to the *Copyright Act*<sup>3</sup> through Bill C-60, *An Act to Amend the Copyright Act*,<sup>4</sup> and do so pursuant to its jurisdiction under the Copyrights clause. But the Constitution also empowers the Provinces to make laws in respect of Property and Civil Rights.<sup>5</sup> Although paracopyright provisions are in a way connected to copyrights, they simultaneously implicate issues typically reserved for provincial legislators, such as contractual obligations, consumer protection, e-commerce, and the regulation of classic property.

It is tempting to suggest that the easy solution to the constitutional dilemma is to prohibit circumvention and/or tampering only for the purpose of infringing copyrights. Since this is just what the Government intends to do, one might argue that there is no real constitutional issue here. That, however, would underestimate the nature of the problem. The key issue is not whether the provisions reflect the scope of the *Copyright Act* in its present form, but whether they are in pith and substance a mat-

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helpful comments on my ideas, and Scott Lucyk and Barry Steinman for their outstanding assistance with this paper.

- 1 See for example David Nimmer, "Puzzles of the Digital Millennium Copyright Act" (1998-1999) 46 J. Copyr Soc'y U.S.A. 401 at 405; Michael J. Remington, "The Ever-Whirling Cycle of Change: Copyright and Cyberspace" (2002) 3:2 N. C. J. L. & Tech. 213 at 238-241; Dan L. Burk, "Anti-Circumvention Misuse," (2003) 50 UCLA L. Rev. 1095; Kimberlee Weatherall, "On Technology Locks and the Proper Scope of Digital Copyright Laws — Sony in the High Court" (2004) 26:4 Sydney L. Rev. 613 at 615. Peter Jaszi has also used the terms "pseudocopyright" and "metacopyright" to describe similarly new rights: see Peter Jaszi, "Is This the End of Copyright as We Know It?" Address to Nordinfo Conference, 9-10 October 1997, in Stockholm, Sweden; Nordiskt Forum för bibliotekschefer 58-67 (NORDINFO 1998).
- 2 *Constitution Act, 1867*, <[http://laws.justice.gc.ca/en/const/c1867\\_e.html#distribution](http://laws.justice.gc.ca/en/const/c1867_e.html#distribution)>, s. 91(23).
- 3 *Copyright Act*, R.S.C. 1985, c. C-42, <<http://laws.justice.gc.ca/en/C-42/index.html>>.
- 4 First Reading, 20 June 2005, <[www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60\\_1/C-60\\_cover-E.html](http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html)>.
- 5 *Constitution Act, 1867*, above note 2, s. 92(13).

ter of “Copyrights” under the *Constitution Act, 1867*.<sup>6</sup> The provisions’ strict legal operation is only one of several considerations; their true purpose and practical effects are also determinative of constitutional validity. In pith and substance, the true character of the proposed provisions is actually very different from traditional copyright legislation. Moreover, it is unwise to focus solely on Parliament’s ability to legislate on this matter. Attention must be paid to the provinces’ role in the copyright reform process, which thus far has been largely overlooked.

Therefore, this paper first characterizes the pith and substance of the relevant provisions by examining their purpose and legal and practical effects. It then considers whether they fall within the scope of Parliament’s authority under the Copyrights clause, or are more accurately regarded as a matter of Property and Civil Rights. It also queries whether paracopyright provisions fall under other heads of power, such as Trade and Commerce, Criminal Law, or the Peace, Order, and Good Government of Canada.

The analysis leads to three main conclusions. First, provisions that attempt to trace the scope of existing copyright rules are not invulnerable. For reasons discussed in this paper, the mere inclusion of the phrase “for infringing purposes” may not be sufficient for constitutional purposes. As is, the proposed legislation may creep too far into the provincial domain to be salvaged as ancillary to an overall valid copyright scheme. It is arguable that this is a colourable attempt to expand the boundaries of Copyrights further into Property and Civil Rights.

The second theme in this paper is that if the federal government is constitutionally competent to enact legislation on the subject of TPMs and RMI, it must exercise restraint in doing so. The Constitution at least requires the Government to resist pressure to widen the proposed provisions. Similarly, courts must be cautious when interpreting Bill C-60 if and when it becomes law. The broader the provisions, the further they stray from federal jurisdiction, the more they trench into provincial powers, and the more suspect they become.

In any event, the Government’s intention to press forward with Bill C-60 does not necessarily preclude the provinces from enacting legisla-

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6 I am not suggesting here that any or all of the existing *Copyright Act* is constitutionally invalid, but its status ought not be taken for granted. There is little judicial authority on point. See David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 19–21; and Jeremy F. deBeer, “Copyrights, Federalism and the Constitutionality of Canada’s Private Copying Levy” <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=793525](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=793525)>.

tion to deal with certain aspects of TPMs and RMI. The third conclusion, therefore, is that Provincial Attorney Generals should at least contribute to this discussion. Doing so will facilitate democratic involvement in the law reform process and maximize opportunities for effective citizen participation. These are among the foremost goals not only of copyright law, but also of the entire Canadian federal system.

## B. THE PITH & SUBSTANCE OF THIS MATTER

To determine whether legislation is validly enacted according to the constitutional division of powers, one must characterize its “leading feature,” its “true character,” its “pith and substance.”<sup>7</sup> Following characterization of the matter, the legislation can be classified as relating primarily to one or another head of power. Notably, the categories in section 91 and 92 are no longer viewed as “watertight compartments.”<sup>8</sup> Despite the mutual modification<sup>9</sup> of Canada’s constitutional classes to reduce conflicts, there are still overlaps in respect of complex policy issues.

The double aspect doctrine,<sup>10</sup> for example, suggests there are some matters involving aspects of both provincial and federal authority. The necessarily incidental doctrine<sup>11</sup> suggests that particular provisions tethered to valid legislation may stand, despite trenching into the other legislator’s domain. But a particular provision is not constitutionally valid merely because it is included in a valid legislative scheme; the provision must be sufficiently integrated with that scheme.<sup>12</sup> Although we will encounter ambiguities as to the proper constitutional approach at a later stage in the analysis, it is certainly correct to begin by looking at the purpose and legal and practical effects of the Bill C-60.

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7 *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 481, <[www.lexum.umontreal.ca/csc-scc/en/pub/1993/vol3/html/1993scr3\\_0463.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1993/vol3/html/1993scr3_0463.html)>.

8 *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 at para. 354.

9 See R.M. Dawson, *The Government of Canada*, 5th ed., N. Ward, ed. (Toronto: University of Toronto Press, 1970) at 86.

10 See *Reference Re: Liquor License Act of 1877 (Ont.)*, (*Hodge v R.*), [1883] J.C.J. No. 2, [1883] 9 App. Cas. 117 (P.C.).

11 *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641, <[www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol1/html/1989scr1\\_0641.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol1/html/1989scr1_0641.html)> [*General Motors*].

12 *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, <[www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2002/vol2/html/2002scr2\\_0146.htm](http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2002/vol2/html/2002scr2_0146.htm)> at para. 41.

## 1) Purpose

Superficially, the purpose of the proposed legislation is to incorporate the WIPO Internet Treaties into Canadian domestic law. According to the Government's response to frequently asked questions, "The bill will implement all the rights and protections provided for in the WIPO Internet Treaties."<sup>13</sup> This may require a brief explanation.

Provisions addressing the circumvention of TPMs and tampering with RMI had their genesis in the World Intellectual Property Organization (WIPO) *Copyright Treaty (WCT)*<sup>14</sup> and the *WIPO Performances and Phonograms Treaty (WPPT)*.<sup>15</sup> These are collectively known as the "WIPO Internet Treaties." Article 11 of the *WCT* requires that:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.<sup>16</sup>

Digging slightly deeper, the purpose of the WIPO Internet Treaties, as stated in their preambles, is:

to develop and maintain the protection of the rights of authors [and performers and producers of phonograms] in their literary and artistic works [and performances and sound recordings] in a manner as effective and uniform as possible.<sup>17</sup>

The *WCT* and the *WPPT*, however, give national legislators — whether federal or provincial — significant leeway to fulfil this purpose.<sup>18</sup> There is

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13 *Frequently Asked Questions Amendments to the Copyright Act*, (Ottawa: Ministry of Industry and Heritage Canada, 2005), <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01146e.html>>.

14 *World Intellectual Property Organization Copyright Treaty*, 20 December 1996, 36 I.L.M. 65, <[www.wipo.int/clea/docs/new/en/wo/woo33en.html](http://www.wipo.int/clea/docs/new/en/wo/woo33en.html)>.

15 *World Intellectual Property Organization Performances and Phonograph Treaty*, 20 December 1996, 36 I.L.M. 76, <[www.wipo.int/clea/docs/en/wo/woo33en.htm](http://www.wipo.int/clea/docs/en/wo/woo33en.htm)>.

16 **Art. 18 of the WPPT**, *ibid.*, uses similar language in respect of the rights of performers and record producers.

17 Above notes 14–15.

18 Mark S. Hayes, "Memorandum Concerning the Implementation in Canada of Articles 11 and 18 of the WIPO Internet Treaties Regarding the Unauthorized Circumvention of Technological Measures Used in Connection with the Exercise

no obligation to implement “adequate legal protection and effective legal remedies” into *copyright law*. Experts acknowledge that countries could indeed decide to implement the WIPO Internet Treaties in fields of law other than in copyright.<sup>19</sup>

For example, by implementing aspects of the WIPO Internet Treaties into its competition law, not only into its copyright law, Japan has apparently recognized their significant purposes and effects outside of copyright law.<sup>20</sup> Indeed, adequate legal protection can be provided through diverse areas of law, including telecommunications regulation, competition, criminal law, tort, and contract.<sup>21</sup> Circumvention could possibly be a breach of contract, a cyber-trespass,<sup>22</sup> an unfair trade practice<sup>23</sup> or some

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of a Copyright Right” (Ottawa: Ogilvy Renault, 2000), online: Industry Canada <<http://strategis.ic.gc.ca/epic/internet/inipdp-dppi.nsf/en/ip01154e.html>>.

- 19 Séverine Dusollier, “Situating legal protections for copyright-related technological measures in the broader legal landscape: Anti Circumvention Protection Outside Copyright” (General Report presented to ALAI Congress, June 2003), <[www.alai-usa.org/2001\\_conference/1\\_program\\_en.htm](http://www.alai-usa.org/2001_conference/1_program_en.htm)> at 25. See also for example Ian R. Kerr, Alana Maurushat, & Christian S. Tacit, “Technical Protection Measures: Tilting at Copyright’s Windmill” (2002-2003) 34 *Ottawa L. Rev.* 7 at 36-37; and Jacques de Werra, “The Legal System of Technological Protection Measures under the WIPO Internet Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws (Japan, Australia)” *General Report presented to ALAI Congress* (June 2001), <[www.alai-usa.org/2001\\_conference/1\\_program\\_en.htm](http://www.alai-usa.org/2001_conference/1_program_en.htm)> at 12-13.
- 20 *Copyright Law of Japan*, Art. 120bis, <[www.cric.or.jp/cric\\_e/clj/clj.html](http://www.cric.or.jp/cric_e/clj/clj.html)>; and *Japanese Anti-Unfair Competition Law*, Law No. 47, promulgated on 19 May 1993 as amended by Law No. 33, 23 April 1999 and Law No. 160, 22 December 1999. See generally Japan, Copyright Update Japan 1999, *On the Law to Partially Amend the Copyright Law (Part 1) Technological advances and new steps in copyright protection* by Takao Koshida, (Japan: Office of Multimedia Copyright, Copyright Division, Agency for Cultural Affairs), <[www.cric.or.jp/cric\\_e/cuj/cuj99/cuj99\\_5.html](http://www.cric.or.jp/cric_e/cuj/cuj99/cuj99_5.html)> [Japan Update].
- 21 Dusollier, above note 19.
- 22 See for example *Compuserve v. Cyber Promotions, Inc.*, 962 F.Supp. 1015 (S.D. Ohio 1997); *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal., 2000); *Register.Com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y., 2000); *Intel Corporation v. Kourosh Kenneth Hamidi et al.*, 94 Cal. App. 4th 325, 114 Cal.Rptr.2d 244 (2001). See further Richard A. Epstein, “Cybertrespass” (2003) 70 *U. Chi. L. Rev.* 73; John D. Saba Jr., “Internet Property Rights: E-Trespass” (2002) 33 *St. Mary’s L.J.* 367.
- 23 There is case law in countries such as Germany to support this view: Dusollier, above note 19, citing Lehmann, M. “Copyright and technical protections — German report” in *Copyright in Cyberspace*, Otto Cramwinckel ed., ALAI Study Days, June 1996 (Amsterdam, 1997) at 371-72; and A Raubenheimer, “Increasing



other tort,<sup>24</sup> or even a computer crime.<sup>25</sup> The point here is that it ought not be assumed that the WIPO Internet Treaties' provisions naturally dovetail with copyright.

In May 2004, the Standing Committee on Canadian Heritage recommended immediate ratification of the *WCT* and *WPPT*.<sup>26</sup> To accomplish this, the Government introduced Bill C-60. It will be discussed below whether signing the WIPO Internet Treaties is itself enough to empower the federal government to enact domestic legislation to fulfil Canada's obligations (the short answer is it is unclear). Regardless, implementation of the WIPO Internet Treaties is also one aspect of the Government of Canada's desire to enable "copyright stakeholders to address the challenges and opportunities of the Internet."<sup>27</sup> Unfortunately, little has been said about what, precisely, is the role of these provisions in addressing the challenges and opportunities of the Internet.

While normally one might look to legislative debates, speeches, or other Hansard evidence for the purpose of impugned legislative provisions,<sup>28</sup> we do not yet have the luxury of well-reasoned Parliamentary discussion on this topic. The Standing Committee's Interim Report did not offer a rationale for introducing these provisions into Canadian law, except to implement the WIPO Internet Treaties.<sup>29</sup> The Government of Canada did commission two thorough studies by Professor Kerr and others, which astutely describe the nature and function of TPMs, RMI, and circumvention or tampering prohibitions.<sup>30</sup> Moreover, in the decade since these is-

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importance of hardware locks (dongles) in recent German case law" (1998) 7:1 Information & Communications Tech. L. 51.

24 See for example *Sega Enterprises Ltd. v. MAPHIA*, 857 F.Supp. 679, 1994 Copy. L. Rep. P 27,309, 30 U.S.P.Q.2d 1921 (NDCal 1994); *Sega Enterprises Ltd. v. MAPHIA*, 948 F.Supp. 923, 1997 Copy L. Rep. P 27,605, 41 U.S.P.Q.2d 1705 (NDCal 1996).

25 Dusollier, above note 19.

26 Canada, *Interim Report on Copyright Reform: Report of the Standing Committee on Canadian Heritage* (Ottawa: Communication Canada, 2004), <[www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01-e.htm](http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01-e.htm)> [Interim Report].

27 Canada, *The Government of Canada Announces Upcoming Amendments to the Copyright Act: Background* (Ottawa: Ministries of Industry and Canadian Heritage, 2004), <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01140e.html>>.

28 Morgentaler, above note 7 at 484.

29 Interim Report, above note 26.

30 See Heritage Canada, "Technical Protection Measures: Part I – Trends in Technical Protection Measures and Circumvention Technologies" by Ian R. Kerr, Alana Maurushat, & Christian S. Tacit (Ottawa: Department of Canadian Heritage, 2002), <[www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protection/](http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protection/)>

sues surfaced a robust body of literature has developed, which may help to uncover the various reasons paracopyright provisions may be enacted.<sup>31</sup> Note, however, that although much of the literature addresses the wisdom of the policy choices involved, the key question here is not whether the policy choice is the correct one, but whether it is a choice Parliament is entitled to make.<sup>32</sup>

The Government has said: “to better address the challenges and the opportunities presented by the Internet and digital technology in general ... [t]hese amendments will: enhance protection of works in the online environment, both to address infringement and to enable the development of new business models ....”<sup>33</sup> From this, one can infer that paracopyright provisions have something to do with the phenomenon of sharing digital content via peer-to-peer (p2p) networks. Content distributors are concerned that this wildly popular trend is a threat to their business models, and consequently their bottom line.<sup>34</sup> The proposed provisions will help to preserve their existing revenue streams and generate new ones.

One might argue that these provisions will safeguard artists’ interests and thus encourage the production and dissemination of digital materials to the benefit of society at large. Although the provisions will protect corporate distributors, not necessarily human artists,<sup>35</sup> a financially lucrative mass market for digital content might benefit grassroots artists in that greater profits for distributors could lead to greater opportunities for

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index\_e.cfm>; and Heritage Canada, “Technical Protection Measures: Part II – The Legal Protection of TPMs” by Ian R. Kerr, Alana Maurushat, & Christian S. Tacit (Ottawa: Department of Canadian Heritage, 2003), <[www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/index\\_e.cfm](http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/index_e.cfm)>.

31 See for example “ALAI 2001 Congress: Adjuncts and Alternatives to Copyright” (ALAI-USA: New York, 2002), <[www.alai-usa.org/2001\\_conference/1\\_program\\_en.htm](http://www.alai-usa.org/2001_conference/1_program_en.htm)>; and Jeffrey P. Cunard, Keith Hill, & Chris Barlas, “Current Developments in the Field of Digital Rights Management” *Standing Committee on Copyright and Related Rights, Tenth Session* (World Intellectual Property Organization: Geneva 2003), <[www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr\\_10\\_2.pdf](http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_10_2.pdf)>.

32 *Firearms Reference* at para. 18.

33 *FAQ Bill C-60*, above note 13.

34 See, for example, The Canadian Recording Industry Association, “perils of p2p,” <[www.cria.ca/files/sharing.php](http://www.cria.ca/files/sharing.php)>.

35 For an illustration of this phenomenon in practice, one can look to the Apple iTunes Music Store. It is the company that markets and distributes the digital content, not the artist who produces it, that exploits TPMs in its business model. See further Jeremy F. deBeer, “Artist Compensation and the Canadian Copyright Regime” (Toronto: Uniform Law Conference of Canada, 2005).

artists. The benefits, however, are indirect at best.<sup>36</sup> The dominant purpose of these provisions is, therefore, to protect distributors' economic interests, not necessarily artists' wellbeing.<sup>37</sup> One could say that this is true of many parts of the current *Copyright Act*, and therefore unobjectionable. But it will be explained below that protection for artists is at the core of the Constitution's Copyrights clause, whereas protection for distributors may be considered more peripheral. Legislation with a primary purpose related to neighbouring rights — which themselves have not been settled to be constitutionally valid Copyrights — is more vulnerable than would be legislation directly addressing the rights of authors.

Moreover, the proposed provisions may not encourage the dissemination of digital content, one of the primary goals of copyright law generally. Rather, they will likely concentrate control over dissemination in the hands of relatively few distributors.<sup>38</sup> According to Professor Hugenholtz, therefore, "the new regime is difficult to reconcile with one of the most important rationales of the copyright system: promoting the dissemination of culture and knowledge in society."<sup>39</sup> One could argue, in fact, that the purpose of the Government's proposed provisions is actually *inconsistent* with traditional copyrights.

Alternatively, the purpose of these proposed provisions might be characterized as simply to deter or remedy copyright infringement. After all, Bill C-60 prohibits circumvention or services to circumvent "for the purpose of an act that is an infringement of the copyright."<sup>40</sup> This stands in contrast to other countries' implementation of the WIPO Internet Treaties,

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36 And may not be worth the costs: see Lawrence Lessig, *Free Culture How: Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (New York: Penguin Press, 2004).

37 See *Japan Update*, above note 20, wherein Koshida directly addresses this point and comments: "In these amendments, measures "used not at the will of the owner of copyright" are not included in technological measures. This is because it is thought, for example, that a technological measures that is used by a distributor who is not a copyright owner, on his or her own for his or her own profit without regard to the intent of the copyright owner, could not be considered a measure to effectively secure copyright."

38 Indeed, a prohibition on TPMs, rather than a prohibition on circumvention, might best promote the objective of widespread dissemination of digital content. I'm not suggesting here that either prohibition is warranted; a neutral approach that defers to market forces might also be appropriate.

39 B. Hugenholtz, "Copyright, Contract and Code: What Will Remain of the Public Domain" (2000-2001) 26 *Brook. J. Int'l L.* 77 at 86.

40 Bill C-60, above note 4, s. 34.02(1).

most notably the United States' *Digital Millennium Copyright Act* [DMCA],<sup>41</sup> which has been criticized for being vague, overbroad, and skewing the law in favour of content distributors.<sup>42</sup> Certainly, federal legislation wider than that proposed in Bill C-60 would have a more difficult time passing constitutional muster. By prohibiting circumvention for infringing purposes only, the Government has increased the likelihood that its proposed provisions can withstand scrutiny. Yet it would be misleading to suggest that the constitutional conundrum is completely solved.

The reference to the purpose of infringement may help to align the provisions' scope with the existing *Copyright Act*, but it says nothing about their nature. So, the fact that TPMs will be protected only insofar as circumvention is for an infringing purpose may not be enough to change the "true character"<sup>43</sup> of this legislation for constitutional purposes. In determining the pith and substance, the court "will look beyond the direct legal effects ...."<sup>44</sup> In other words, the real issue at this stage has less to do with the scope of the circumvention prohibitions than their nature. In this respect, the proposed provisions are dramatically different from traditional copyright laws. Logic proves this: either (a) the new provisions are entirely superfluous, which begs the question as to why they are being enacted at all; or (b) they are different from existing copyright law in purpose and effect, which raises questions as to their validity.

Traditional copyright law is one way to control the terms upon which digital content is distributed. The scope of copyright law is determined by democratically elected representatives and enforced by an independent judiciary. The scope of TPMs, on the other hand, is determined not by public officials, but by private companies pursuing economic agendas.<sup>45</sup> True, legal prohibitions against circumvention of TPMs will trace the scope of copyright law. But the decision to enact this additional layer of protection nevertheless reveals a purposive shift from one legal regime to another.

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41 *Digital Millennium Copyright Act*, 17 U.S.C. § 1201 (1998).

42 See for example Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised" 14 *Berkeley Tech. L.J.* 520, <[www.law.berkeley.edu/journals/btlj/articles/vol14/Samuelson/html/reader.html](http://www.law.berkeley.edu/journals/btlj/articles/vol14/Samuelson/html/reader.html)>; Dan L. Burk, above note 1; Simon Fitzpatrick, "Copyright Imbalances: U.S. and Australian Responses to the WIPO Digital Copyright Treaty" (2000) 5 *E.I.P.R.* 214; Cunard, Hill & Barlas, above note 31; Kerr, Maurushat, & Tacit, above note 19 at 66; de Werra, above note 19 at 14–15.

43 *Morgentaler*, above note 7 at 481.

44 *Ibid.* at 481–83.

45 Kerr, Maurushat, & Tacit, above note 19 at 42–43.

The proposed amendments would contribute to the transfer of control over the terms of distribution from copyright to contract law. According to Professor Hugenholtz: “Contract law, in particular, appears to have all the makings of becoming a perfect alternative to the copyright system.”<sup>46</sup> Along the same lines, Professor Samuelson has remarked: “There may be nothing for copyright to do, except perhaps to serve as a kind of *deus ex machina* justifying the use of technological and contractual means for protecting works in digital form.”<sup>47</sup> In particular, if and when Bill C-60 comes into force, it will be unnecessary for digital content distributors to invoke copyrights or neighbouring rights at all. The mere act of circumvention for an infringing purpose could entitle the copyright owner to all remedies provided by law. These paracopyright provisions are thus a replacement for, not a part of, traditional copyright laws.

It is arguable that paracopyright provisions protect contracts about copyrights, and are therefore themselves in pith and substance a matter of copyright, not contract. Another way of putting it is that these provisions relate to copyright “licensing” issues, not significantly different from, for example, provisions governing ownership of copyright generally.<sup>48</sup> However, in theory and in practice, paracopyright provisions have a rather different purpose. Mark Hayes refers to the contracts enforced by technological protection measures as “super-copyright.”<sup>49</sup> He says:

the use of the term licence to refer to these types of “super-copyright” agreements is somewhat misleading. ... Properly understood, these “super-copyright” agreements are completely separate from, and additional to, copyright protection and impose contractual restrictions which only should be enforceable if the user is contractually bound to the restrictions and the restrictions are not unconscionable or otherwise against public policy.<sup>50</sup>

This last point — that such contracts should only be enforceable if they are not unconscionable or against public policy — further emphasizes that many of the questions here are essentially about regulating private

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46 Hugenholtz, above note 39 at 78.

47 Pamela Samuelson, “Copyright, Digital Date, and Fair Use in Digital Networked Environments” in Ejan Mackay *et al.*, eds, *The Electronic Superhighway: The Shape of Technology and Law to Come* (The Hague: Kluwer Law International, 1995) 117 at 125–26.

48 See for example *Copyright Act*, above note 3, s. 13.

49 Hayes, above note 18 at 3–6.

50 *Ibid.* at 6.

contractual agreements. Picture a triangle of copyright, contract, and technology. The purposes of the technology and contract are closer to each other than either is to copyright. This becomes even more apparent when one looks at Bill C-60's provisions against tampering with RMI. This is essentially a legislative scheme governing contracts about access to and use of digital content. This is not really about copyright — as Professors Kerr and Bailey have noted: “while we refer to ... ‘rights management’ systems, what these databases *really* manage is information.”<sup>51</sup>

Ultimately, including references to copyright may ostensibly relate the matter to the scope of existing copyright law, but it does not change the “true character” of this legislation. In pith and substance this is perhaps more of a technological, contractual, or commercial matter than a copyright matter. The Government's proposed legislation is best described as a *paracopyright* law — a law going beyond existing copyright law, although not necessarily in scope, certainly in nature.

## 2) Effects

Recommendations to limit the breadth of effects of paracopyright provisions are common among experts who have studied these issues.<sup>52</sup> Until now many of the arguments have been based primarily on sound policy-making. However, tightly focussed legislation is not just wise policy — it is constitutionally mandated. Scholars such as Professors Kerr and Bailey have noted that provisions inconsistent with fundamental rights such as privacy or freedom of expression may violate the *Charter of Rights and Freedoms*.<sup>53</sup> The distinct constitutional point of this paper is often overlooked.

51 Ian R. Kerr & Jane Bailey, “The Implications of Digital Rights Management for Privacy and Freedom of Expression” (2004) 2 J. Information, Communication & Ethics in Soc’y 87, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=705041](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=705041)> at 89.

52 See for example Kerr, Maurushat, & Tacit, above note 19, and the sources cited therein.

53 Ian R. Kerr & Jane Bailey, above note 51. Professor Kerr has also noted that these types of provisions could contain “broad and vague statements that may not withstand constitutional scrutiny.” See Kerr, Maurushat, & Tacit, above note 19 at 56. Experiences in the United States highlight the chilling effect that the DMCA's paracopyright provisions have had on expression. See for example *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (NDCal 2002); *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d. 294 (SDNY 2000), aff'd 273 F. 3d 429 (2d Cir. 2001) [Reimerdes]; *Felten v. Recording Industry Association of America*, Case No. CV-01-2669 (GEB) (DistCtNJ). For a description of the effects of the DMCA in the scientific community, see Jeffrey Sullivan & Thomas Morrow, “Practicing

From the perspective of the division of legislative powers, the broader the effect of the new provisions, the further they are from the core of Parliament's authority under the Copyrights clause and the more they encroach on provincial jurisdiction over Property and Civil Rights. That is, even if the purpose of paracopyright provisions is related to copyright, broader effects of the legislation could render it constitutionally invalid. It is here that the precise scope of the Government's proposal must be considered, so the relevant provisions are reproduced below in full.

There is a general threat that TPMs will undermine copyright law's delicate balance between various stakeholders.<sup>54</sup> This balance seeks to provide sufficient incentives to generate and disseminate new cultural works while at the same time respecting rights such as freedom of expression, privacy, contractual autonomy, and classic private property, as well furthering the public's interests.<sup>55</sup> Although TPMs cannot differentiate between copyright infringement and legitimate activities, legislation concerning TPMs might.

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Reverse Engineering in an Era of Growing Constraints under the Digital Millennium Copyright Act and Other Provisions" (2003) 14 Alb. L.J. Sci. & Tech.

1. Indeed, for various reasons, it has been suggested that the DMCA could be constitutionally infirm. See Glynn S. Lunney Jr., "Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act" (2001) 87 Va. L. Rev. 813 at 848. See also Yochai Benkler, "Constitutional Bounds of Database Protection: The Role Judicial Review in the Creation and Definition of Private Rights in Information" (2000) 15 Berkeley Tech. L.J. 535 at 548–52; Yochai Benkler, "Free as Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain" (1999) 74 N.Y.U. L. Rev. 354 at 414–29; Julie E. Cohen, "Copyright and the Jurisprudence of Self-Help" (1998) 13 Berkeley Tech. L.J. 1089 at 1131–34; William Patry, "The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision" (1999) 67 Geo. Wash. L. Rev. 359 at 361.

54 See for example Kerr, Maurushat, & Tacit, above note 19, at 47–53; Samuelson, above note 42; Dan L. Burk & Julie E. Cohen, "Fair Use Infrastructure for Right Management Systems" (2001) 15 Harv. J.L. & Tech. 41 at 49–51.

55 See, for example *Théberge v. Galerie d'Art du Petit Champlain Inc et al.*, 2002 SCC 34, [2002] 2 S.C.R. 336, <[www.lexum.umontreal.ca/cscscc/en/pub/2002/vol2/html/2002scr2\\_0336.html](http://www.lexum.umontreal.ca/cscscc/en/pub/2002/vol2/html/2002scr2_0336.html)>, at paras. 30–33 [Théberge]; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, <[www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1\\_0339.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0339.html)> at paras. 10, 23–24, 41, 48 and 70; [CCH Canadian]; and *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, <[www.lexum.umontreal.ca/cscscc/en/pub/2004/vol2/html/2004scr2\\_0427.html](http://www.lexum.umontreal.ca/cscscc/en/pub/2004/vol2/html/2004scr2_0427.html)> at paras. 40–41, 46, 88–89, 107, 129–32 [SOCAN v. CAIP]. (LeBel J. dissented for other reasons: *ibid.* at para. 134.).



There are two key aspects of Bill C-60 that may limit its legal effects: only TPMs that ordinarily protect copyrights, neighbouring, and moral rights are protected, and only circumvention for infringing purposes or providing circumvention services that the provider knows or ought to know will result in infringement are prohibited. As mentioned above, it is tempting to conclude that these qualifications are sufficient to eliminate any problem concerning the constitutional division of powers. However, that is not the case. Aside from the fact that (a) the test is not correlation with the present *Copyright Act* but with the *Constitution Act, 1867*, (b) the provisions' strict legal effect is only one of a number of considerations (in addition to their purpose and practical effect) in characterizing the pith and substance of the matter and (c) it is appropriate to look at both Parliament's and the provinces' role in this debate, there is another issue to discuss in respect of the provisions' legal effects: (d) the proposed limitations may not go far enough, as ambiguities make it difficult to draw firm conclusions.

Subsection 1(2) of Bill C-60 defines a "technological measure" as:

any technology, device or component that, in the ordinary course of its operation, restricts the doing — in respect of a material form of a work, a performer's performance fixed in a sound recording or a sound recording — of any act that is mentioned in section 3, 15 or 18 or that could constitute an infringement of any applicable moral rights ....

It is unclear whether the definition of a "technical measure" turns upon the general type of technical measure at issue (i.e., a hardware or software based access control, copy control, encryption, scrambling, etc.)<sup>56</sup> or on the particular use of the measure in a given instance.

The former interpretation seems like the approach taken, for example, in the *German Copyright Act*, which adopts the language of the *E.C. Copyright Directive* almost exactly (Bill C-60 substitutes "ordinary" for "nor-

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56 Specific examples of technological measures protected under this definition might include the Content Scramble System (CSS), which allows motion picture companies to control access to content of DVDs, or the Secure Digital Music Initiative (SDMI), which has been used to control copying, uploading of music to the Internet, and playback on portable devices. For a description of CSS and SDMI technology, see for example Dean S. Marks & Bruce H. Turnbull, "Technical Protection Measures: The Intersection of Technology, Law and Commercial Licences" (2000) 22 E.I.P.R. 198 at 207.



mal”).<sup>57</sup> On this interpretation, the definition would encompass measures that protect copyrights, neighbouring, and moral rights, but could also encompass a wide array of further measures. The phrase “in the ordinary course of its operation” raises problems. The last time the Government used the word “ordinarily” in the *Copyright Act* (as part of the private copying regime) it was interpreted to mean, in effect, not extraordinarily.<sup>58</sup> Adjectives like ordinary and normal don’t necessarily capture proportionality, at least not as interpreted in Canadian copyright law.<sup>59</sup> A measure that is used sometimes or often, even if not primarily or exclusively, in connection with copyright would fall within the proposed definition. The constitutional problem here is that a type of measure could be protected even though the vast majority of uses for that measure are unconnected with rights under the *Copyright Act*, let alone the Copyrights clause. That the constitutionality of the private copying regime has been called into question, in part because of the breadth of the term “ordinarily,”<sup>60</sup> should be taken as a warning to tighten the meaning of a technical measure.

The second interpretation, which would look to the particular use of a measure in a given instance to determine whether it falls within the definition, is also problematic but less so from a constitutional perspective. Although a measure applied to non-copyright materials will not be protected against circumvention, it is uncertain what will happen where a measure protects both copyright and non-copyright materials in the same digital work. A reported legal decision illustrates the potential problem here: the headnote may be subject to copyright whereas the underlying

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57 *German Copyright Act* of 9 September 1965, as amended on 10 September 2003 (English translation) <<http://eurorights.cdfreaks.com/index/14/51>>; and Directive 2002/9/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L167/10, 22/06/2001, <[www.ivir.nl/legislation/eu/copyright-directive.doc](http://www.ivir.nl/legislation/eu/copyright-directive.doc)>. See generally Alexander Peukert “Country Report Germany” <[www.euro-copyrights.org/index/14/49](http://www.euro-copyrights.org/index/14/49)>; and P. Bernt Hugenholtz, “Why the Copyright Directive is Unimportant, and Possibly Invalid” (2000) 22 E.I.P.R. 499.

58 *Private Copying 1999-2000, Tariff of Levies to be Collected by CPCC (Re)* (1999), 4 C.P.R. (4th) 15, <[www.cb-cda.gc.ca/decisions/c17121999-b.pdf](http://www.cb-cda.gc.ca/decisions/c17121999-b.pdf)>, aff’d *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency*, [2000] F.C.J. No. 960, <<http://decisions.fct-cf.gc.ca/fct/2000/a-19-00.shtml>>.

59 *Private Copying 1999-2000*, *ibid.*

60 See deBeer, above note 6, discussing *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, [2004] FCA 424, <<http://decisions.fca-caf.gc.ca/fca/2004/2004fca424.shtml>>.

judgement is not.<sup>61</sup> In such a case the measure is probably encompassed within the definition in Bill C-60, meaning that protection might extend beyond what is now protected by copyright.

The problem of over-breadth could be addressed by replacing the term “ordinary” in the definition of technological measure. Unfortunately, the Bill does not incorporate the suggestion of a Government-sponsored memorandum that a measure should be protected only if it “is ‘*primarily*’ intended to restrict copyright infringement and its effect is to ‘*primarily*’ restrict copyright infringement.”<sup>62</sup> Were the definitions limited to measures that *exclusively* relate to works and activities protected under the *Copyright Act*, the legislation’s constitutional status might be even more secure. But if a technical measure becomes protected against circumvention merely because it protects, sometimes or in part, copyrighted materials, this will expand the law’s boundaries significantly.<sup>63</sup> In effect, the law will not be limited to protecting the technologies that protect copyrights; it will protect TPMs *per se*. This threatens its status as valid copyrights law.

Granted, under section 34.02(1), circumvention of such measures will only be prohibited if done for an infringing purpose. The Bill contains the following three provisions dealing with circumvention of technological measures. In short, copyright, neighbouring, and moral rights holders can prevent: (1) circumvention of TPMs for the purpose of copyright infringement; (2) anyone from offering or providing circumvention services that the provider knows or ought to know will result in an infringement; and (3) trafficking in works from which TPMs have been removed. More particularly,

34.02 (1) An owner of copyright in a work, a performer’s performance fixed in a sound recording or a sound recording and a holder of moral rights in respect of a work or such a performer’s performance are, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a

61 *CCH Canadian v. Law Society of Upper Canada*, 2002 FCA 187 at paras. 77–78, <<http://decisions.fct-cf.gc.ca/fct/2002/2002fca187.shtml>> aff’d. *CCH Canadian*, above note 55.

62 Hayes, above note 18 (emphasis added).

63 In *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 292 F.Supp.2d 1023 (NDIll 2003), 72 U.S.P.Q.2D 1225; 381 F.3d 1178 (CAFed 2004) at 1241 [*Chamberlain*], the court noted that this could “allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial ‘encryption’ scheme, and thereby gain the right to restrict consumers’ rights to use its products in conjunction with competing products.”

person who, without the consent of the copyright owner or moral rights holder, circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work, the performer's performance or the sound recording for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).

(2) An owner of copyright or a holder of moral rights referred to in subsection (1) has the same remedies against a person who offers or provides a service to circumvent, remove or render ineffective a technological measure protecting a material form of the work, the performer's performance or the sound recording and knows or ought to know that providing the service will result in an infringement of the copyright or moral rights.

(3) If a technological measure protecting a material form of a work, a performer's performance or a sound recording referred to in subsection (1) is removed or rendered ineffective in a manner that does not give rise to the remedies under that subsection, the owner of copyright or holder of moral rights nevertheless has those remedies against a person who knows or ought to know that the measure has been removed or rendered ineffective and, without the owner's or holder's consent, does any of the following acts with respect to the material form in question:

- (a) sells it or rents it out;
- (b) distributes it to such an extent as to prejudicially affect the owner of the copyright;
- (c) by way of trade, distributes it, exposes or offers it for sale or rental or exhibits it in public; or
- (d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c).

The reference to a "purpose of act that is an infringement of copyright" means that circumvention for the purpose of fair dealing or other legitimate activities under the *Copyright Act* will be permitted. It could also be possible to circumvent to exercise classic property rights normally associated with ownership of tangible property, just as in the *Théberge* case.<sup>64</sup> Consumers will be allowed to circumvent in accordance with their express

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64 *Théberge*, above note 55.

or implied contractual rights, as an act done with the authorization of the copyright owner is not an infringement.

The details of this qualification, however, remain unclear. It is relatively obvious that the onus to prove an infringing purpose will lie on the plaintiff. Procedurally, the infringing purpose requirement is not a defence or exception. But still, how is the purpose to be determined? What if the purpose was to infringe, but in fact no infringement ultimately occurs? Is the circumventor's subjective intention at the time of circumvention or the ultimate activity carried out following circumvention determinative? If liability for circumvention turns on whether or not the ultimate activities were infringing, the practical effect may be to eliminate fair dealings altogether, as few people would be willing to risk the consequences of an honest but mistaken belief. If a subjective test of intention were adopted, it might enable a person with a *bona fide* claim of fair dealing to exercise his/her putative rights confidently. The adoption of this latter test may have a less drastic effect, and would therefore, be more closely aligned with existing copyright doctrine.

It is also problematic that the implicit right to circumvent TPMs for non-infringing purposes will be practically worthless. As I alluded to, there are two types of "effects" potentially relevant to an analysis of the division of powers: legal effects and practical effects. In appropriate cases, one can look beyond "the four corners of the legislation"<sup>65</sup> at evidence of "the actual or predicted practical effect of the legislation in operation."<sup>66</sup> An explicit right to circumvent for non-infringing purposes, coupled with guaranteed access to the means to do so, would more closely align the effects of the new regime with the scope of existing copyright law. That is, for the limitations in Bill C-60 to be meaningful in practice, there must be mechanisms in place to ensure consumers have not only the right but also the ability to circumvent TPMs.<sup>67</sup> This could be in the form of prohibitions

65 *Reference re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 388–89. Practical effects may not always have great analytic significance: see *Morgentaler*, above note 7 at 485–88.

66 *Reference re: Alberta Legislation*, [1938] S.C.R. 100 at 130.

67 Evidence of the practical effects of paracopyright legislation on would-be fair use can be found in a well-known U.S. case where Hollywood movie studios sued three individuals who posted copies of and links to DeCSS software that decrypted DVDs. The District Court issued an injunction, finding that fair use does not apply under the DMCA: see *Reimerdes*, above note 53. The Appeals Court affirmed this decision, finding that the DMCA does not unduly burden fair use rights, because there was "no authority for the proposition that fair use ... guarantees copying by the optimum method or in the identical format of the original." *Ibid.* at 445, 450–59; *Elcom*, above note 53 at 1134–5; 321 *Studios*

against the use of TPMs in certain circumstances, or a statutory obligation to facilitate certain uses of materials guarded by TPMs. Even this may not be enough however. The *E.C. Copyright Directive* contains a roughly similar requirement, but this has been criticized as seriously deficient (and possibly invalid) in terms of its complexity and lack of practical meaning.<sup>68</sup>

But it seems that the Government does not intend to enact protections against the abuse of TPMs. Perhaps this is because such consumer protection aspects of paracopyright provisions are a matter for the provinces to deal with. If so, this could be evidence that the entire scheme is *ultra vires* Parliament's authority, as the consumer protection issues are an integral element of legislation addressing TPMs and RMI. Or it could be that this is an area of shared responsibility. At this point, it is enough to say that if the Government does not include mechanisms to render the provisions' limited legal effects practically meaningful, this will increase the possibility that the legislation's overall effects could render the provisions constitutionally invalid.

Another question about the legal effect of section 34.02(1) is whether it could create a novel "right of access" to works — the ability of copyright holders to control copyright, performance, distribution, etcetera, and also access to a work. Since it is not presently an infringement to access a copyrighted work, Bill C-60 appears to allow for the circumvention of pure access controls. However, this distinction may not have much practical significance because accessing a digital work usually involves making a copy, albeit ephemeral. This could effectively create a *sui generis* right of access.<sup>69</sup> Although some argue this is a natural evolution of copyright,<sup>70</sup> others say it constitutes an unprecedented expansion.<sup>71</sup> Either way, the likelihood

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*v. Metro Goldwyn Mayer Studios, Inc.* 307 F.Supp.2d 1085 (NDCal 2004). This, of course, ignores the consumers' classic property rights: see Jeremy F. deBeer, "Reconciling Property Rights in Plants" (2005) 8:1 J. World Intellectual Property 5, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=603961](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=603961)>.

68 See Hugenholtz, above note 57.

69 This may not have been intended by the WIPO Internet Treaties: see generally de Werra, above note 19 at 11–12; Burk, above note 1; and Michael Landau, "Has the Digital Millennium Copyright Act Really Created a New Exclusive Right of Access? Attempting to Reach a Balance Between Users' and Content Providers' Rights" (2001) 49 J. Copyr. Soc'y USA 277.

70 Jane C. Ginsburg, "From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law" (2003) 50 J. Copyr. Soc'y USA 113, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=222493](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=222493)>.

71 See for example Samuelson, above note 42; and Kamiel J. Koelman, "The Protection of Technological Measures vs. the Copyright Limitations" (Paper Presented

that the practical effect of this provision will be to create a right of access to digital materials is a departure from existing copyright principles. The debate is simply about the length of this leap.

The most dramatic legal and practical effects of Bill C-60's paracopyright provisions might result from section 34.02(2), which addresses "services to circumvent." This provision is shrouded in ambiguity. On the one hand, it could be meant to cover the operation of a circumvention business, so to speak. Japan, for instance, has adopted such an approach.<sup>72</sup> Although the Japanese government has defined service much more clearly, the *Japanese Copyright Law* prohibits all circumvention businesses, not just circumvention businesses with knowledge of eventual infringement, so this would not be a model for Canada to follow.

Section 34.02(2) of Bill C-60 could also be interpreted simply to close a loophole that might arise where a person arranges for someone else to circumvent a technological measure rather than doing it him/herself, in essence like a principal and agent. In such a case, the principal may not be liable because he/she would not have circumvented the technical measure, and the agent may not be liable because he/she would not have had an infringing purpose. Neither party would fall under section 34.02(1), but section 34.02(2) might apply. If that were the case, then section 34.02(2) would not be much more or less objectionable than any of the other paracopyright provisions. Unfortunately, a court may not give this section such a narrow interpretation. In fact, if this narrow interpretation is correct, the provision is probably unnecessary. There would be no "loophole" if the purpose referred to in section 34.02(1) includes another person's purpose.

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to ALAI Congress, June 2001), <[www.alai-usa.org/2001\\_conference/1\\_program\\_en.htm](http://www.alai-usa.org/2001_conference/1_program_en.htm)>. U.S. cases that raised this issue illustrate the breadth of effects that paracopyright provisions could have on matters otherwise related to property, contract, and local commerce. In one such case, which ultimately rejected the plaintiff's claim, the Federal Circuit stated: "the appropriate deterrents to this [circumvention] behaviour lie in tort law and criminal law, not in copyright law." See *Chamberlain Group v. Skylink Technologies*, 292 F.Supp.2d 1023 (N.D.Ill. 2003); 381 F.3d 1178 (CA Fed 2004) at 1241. Another U.S. case has been criticized for buttressing a fairly naked attempt to use paracopyright law to replace the ordinary rules of contract and commerce. See Dan L. Burk, "Control of the Aftermarket through Copyright" (2003-2004) 17 Harv. J.L. & Tech. 307, criticizing *Lexmark International, Inc. v. Static Control Components, Inc.*, (2004) 253 F.Supp. 2d 943 (USDC E.Ky. 2003), 387 F.3d 522 (C.A.6 Ky.).

72 See *Copyright Law of Japan*, above note 20, art. 2; and *Japan Update*, above note 20.

This is already the case with fair dealing — one can deal fairly for another's purposes.<sup>73</sup> Thus, 34.02(2) could easily be removed from Bill C-60.

Doing so would go a long way toward strengthening the arguments in favour of constitutional validity, as it would eliminate the drastic legal and practical effects that could result from a possible broader interpretation. These provisions could otherwise revolutionize the principles of third-party liability for copyright infringement by replacing Canada's well-settled rules governing the authorization of infringing acts with the American doctrine of contributory infringement.<sup>74</sup> The Supreme Court has explicitly cautioned that such a move "must be scrutinized very carefully because of some fundamental differences in copyright concepts" between the two countries.<sup>75</sup> Such a sudden and radical shift may not be permitted under Canada's Copyrights clause.

Presently in Canada: "a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright,"<sup>76</sup> nor by manufacturing, distributing, or marketing equipment used to infringe copyright unless there is a relationship of care and control.<sup>77</sup> Bill C-60, however, could result in liability for anyone who provides a "service to circumvent." The meaning of "service" is unclear. Copyright holders are likely to argue that the effect is no different from the DMCA's ban on a circumvention "technology, product, service, device [or] component."<sup>78</sup> The DMCA contains a list of alternative factors that can bring a service within its scope, whereas the proposed Canadian legislation would incorporate a requirement of knowledge of infringement. Under Bill C-60, offering or providing a service to circumvent is prohibited only if the provider knows or ought to know that an infringement will result. Although this sounds like a high hurdle for plaintiffs, the evidentiary burden is really not onerous. Actual subjective knowledge is not required, as it is enough that the provider "ought to know" the results of his/her actions. And despite the

73 *CCH Canadian*, above note 55.

74 *Sony Corp. of America v. Universal Studios*, 464 U.S. 417 (1984); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (CA 9th), 125 S.Ct. 1605 (2005). As copyright expert Mark Hayes noted in his government-commissioned memorandum: "The introduction of a regime to ban circumvention devices ... would necessitate some fundamental rethinking of Canadian copyright law." He called this a "fundamental change in Canadian law relating to infringing equipment and authorization." Hayes, above note 18.

75 *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 SCR 357.

76 *CCH Canadian*, above note 55 at para. 38. See also *SOCAN v. CAIP*, above note 55.

77 *CCH Canadian*, above note 55 at para. 38.

78 DMCA, above note 41, § 1201(a)(2).



apparent certainty of the word “will” (as opposed to could or might), the reasonable provider merely ought to know that “an” infringement (not some or many) will result. The number of non-infringing uses of the service would seem to be irrelevant under section 34.02(2), and it isn’t clear what steps a service provider must take to assure him/herself that no infringement will occur. Under existing Canadian law, a provider of products or services that could be used for infringement is entitled to presume lawful use.<sup>79</sup> Will that still be the case?

Lawsuits under the *DMCA* have created the potential for what has been called “tertiary” or “quaternary” liability.<sup>80</sup> The legal effect of this two, three or even four-step departure from existing Canadian copyright law would be to create a brand new form of civil liability under the auspices of the *Copyright Act*. Even if the legal effects are not as drastic as feared, the uncertainty alone may have a chilling effect on the technology sector as manufacturers and distributors seek to avoid litigation. Furthermore, there is also a relationship between section 34.02(2) and section 34.02(1), as potential fair users and other non-infringers may not have access to technologies that facilitate the exercise of their rights. In sum, section 34.02(2) unnecessarily jeopardizes the constitutional validity of the entire scheme.

If circumvention is permitted under sections 34.02(1) or 34.02(2), a person’s subsequent use of the circumvented material may be prohibited under section 34.02(3). Such a provision would seem redundant, as it is usually already an infringement to distribute copyright material. To avoid the risk of unintended consequences that might threaten the constitutionality of the new scheme, this section might simply be eliminated from Bill-60.

The Bill also deals with “rights management information,” which is defined in subsection 1(2) as information that:

- (a) is attached to or embodied in a material form of a work, a performer’s performance fixed in a sound recording or a sound recording, or appears in connection with its communication to the public by telecommunication, and
- (b) identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker or any of them, or concerns the terms or conditions of its use.

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79 *CCH Canadian*, above note 55.

80 Mark A. Lemley & Anthony R. Reese, “Reducing Digital Copyright Infringement Without Restricting Innovation” (2004) 56 *Stan. L. Rev.* 1345, citing Landau, above note 69, and Burk, above note 1.



It is noteworthy that the definition of “rights management information” includes information concerning the terms or conditions of the use of a work that may have nothing to do with the existence or scope of copyright protection. Apparently, information concerning any and all contractual terms will be protected, as long as the contract concerns a work protected by copyright, neighbouring, or moral rights.

The following two provisions prohibit tampering with RMI:

34.01 (1) The owner of copyright in a work ... is, subject to this Act, entitled to all remedies ... conferred by law for the infringement of a right against a person who, without the consent of the copyright owner, knowingly removes or alters any rights management information in electronic form that is attached to or embodied in any material form of the work ... or appears in connection with its communication to the public by telecommunication and knows, or ought to know, that the removal or alteration will facilitate or conceal any infringement of the owner’s copyright.

(2) The owner of copyright referred to in subsection (1) has the same remedies against a person who, without the owner’s consent, knowingly does any of the following acts with respect to any material form of the work, ... and knows or ought to know that the rights management information has been removed or altered in a way that would give rise to a remedy under subsection (1):

- (a) sells it or rents it out;
- (b) distributes it to such an extent as to prejudicially affect the owner of the copyright;
- (c) by way of trade, distributes it, exposes or offers it for sale or rental or exhibits it in public;
- (d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c); or
- (e) communicates it to the public by telecommunication.

The anti-tampering prohibition in section 34.01(1) may have significant effects on the protection of personal privacy. The definitions of TPMs and, especially, RMI could protect computer programs that automatically collect personal information. As a result, it will be an infringement of copyright when a consumer tampers with or circumvents such a program and then engages in any of the subsequent uses prohibited in sections 34.01(2) and 34.02(3). This could, arguably, unduly trench on users’ privacy and property rights.

The last point to make about the effect of the proposed provisions concerns the nature of the remedy provided. Both sections 34.01 and 34.02 offer to a copyright owner "... all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right ...." This is very broad. The remedies available seem not to be limited to remedies under the *Copyright Act*, but ostensibly include all remedies conferred by any law. It would make sense to interpret infringement of a "right" as meaning a copyright, neighbouring, or moral right. This should be clarified however, or the legal effect of this provision could have a broader scope.

### C. ENUMERATED LEGISLATIVE POWERS

The matter of TPMs and RMI is not clearly allocated within the constitutional division of powers. Such paracopyright provisions raise issues of international law, copyright, criminal, property, tort, contract, competition, consumer protection, and other commercial law. In terms of the division of powers, this implicates Copyrights, Property and Civil Rights, Trade and Commerce, Criminal Law, and the Peace, Order, and Good Government of Canada. As mentioned, there is considerable overlap between these categories, and the idea that provincial and federal legislators might share responsibility over TPMs and RMI systems is plausible.

Unfortunately, it is unclear what is the exact manner in which to assess constitutional validity at this stage of the analysis.<sup>81</sup> Certainly, *if* the Government's proposal is in pith and substance within federal jurisdiction, there is no constitutional problem regardless of the degree to which it may also affect a provincial power. Parliament can exercise its powers to the fullest extent necessary for effective regulation of areas within its competence. But, at some point, the provisions will lose their link to federal jurisdiction and become in pith and substance a provincial matter.

If the matter is in pith and substance within provincial jurisdiction, the Government's proposal would seem to be constitutionally invalid. But, it is still possible that it might be salvaged if it is necessarily incidental to an overall valid federal scheme.<sup>82</sup> Constitutional validity will then turn on just how far the provisions have trenched into provincial domain, and

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81 Patrick J. Monahan, *Constitutional Law*, 2d ed. (Toronto: Irwin Law, 2002) at 121–23.

82 *Kitkatla*, above note 12.

how integral they are to the overall valid federal scheme.<sup>83</sup> Given the Supreme Court's advice that the approach must be flexible rather than technical or formalistic,<sup>84</sup> the following discussion simply highlights the key considerations.

### 1) Copyrights

Determining whether TPMs and RMI are sufficiently linked to Copyrights, or whether the Government's proposal goes too far, requires an analysis of the scope of Parliament's authority under section 91(23). The difficulty here is the absence of judicial authority or academic commentary on point. In 138 years of constitutional interpretation, courts have rarely touched on Parliament's authority under the Copyrights clause.<sup>85</sup> Academic commentary is similarly sparse.<sup>86</sup>

Based on rough sketches of historical, international, conceptual and functional perspectives, it seems that the Copyrights clause gives Parliament the authority to enact legislation with the aim and effect of promoting authors' cultural expression.<sup>87</sup> Neighbouring rights, protecting performers, record producers, or other distributors are peripheral. Although their constitutional validity is often taken for granted, this has never actually been settled.<sup>88</sup> Similarly, moral rights may lie nearer to the edge of the Copyrights clause.<sup>89</sup>

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83 *Ibid*; see also *General Motors*, above note 11.

84 *Morgentaler*, above note 7 at 481.

85 See for example *Smiles v. Belford*, [1876] O.J. No. 285 (Ont. Ct. Chancery), aff'd [1877] O.J. No. 20 (Ont. C.A.); *R. v. Ferguson*, [1922] 2 W.W.R. 473 (B.C.C.A.); *Composers, Authors & Publishers Ass'n. of Canada v. Elmwood Hotel Ltd.*, [1956] Ex. C.R. 65; *Composers, Authors & Publishers Association of Canada, Ltd. v. Sandholm Holdings Ltd.*, (1955), 24 C.P.R. 58; *Bishop v. Telemetropole Inc.*, (1985), 4 C.P.R. (3d) 349 (F.C.T.D.); *Doulton Canada Inc. v. Cassidy's Ltd.*, [1986] 1 F.C. 357; *Aldrich v. One Stop Video Ltd.* (1987), 13 B.C.L.R. (2d) 106 (S.C.); *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada*, (1992), 45 C.P.R. (3d) 346; *Evangelical Fellowship of Canada v. Canadian Musical Reproduction Rights Agency*, [2000] 1 F.C. 586 (C.A.); *Private Copying 1999–2000*, above note 58; and *CPCC v. CSMA* above note 60.

86 *deBeer*, above note 6.

87 *Ibid*.

88 See for example Wanda Noel & L.B.Z. Davis, "Some Constitutional Considerations in Canadian Copyright Law Revision (1981) 54 C.P.R. 2d 17.

89 See for example David Vaver, above note 6; and David Vaver, "Authors' Moral Rights in Canada" (1983) IIC 329.

Copyright, neighbouring, and moral rights holders, however, are only part of the equation. The most important thing about copyright law is what it prohibits: copyrights, like all property or monopoly rights, limit what people can do.<sup>90</sup> Copyrights are, by definition, constraints on individuals' rights.<sup>91</sup> So Parliament's authority includes balancing encouragement for authors against the social interest in dissemination, and against other individuals' basic property, contractual, and constitutional rights. Note that there are three spheres of interests, not two, that require balancing: creators, the general public, and individual consumers.<sup>92</sup>

Balance is a fundamental principle in copyright law,<sup>93</sup> but it is also constitutionally mandated. It might be fine to say that authors' interest and society's interest both fall within the scope of Parliament's power over Copyrights. However, we are not merely pitting copyright against the broad and perhaps vague public interest. We are measuring copyright against other identifiable rights — human rights, contractual rights, and classic property rights.<sup>94</sup> In fact, this is what *Théberge* was all about. The Court had to weigh one right (a copyright) against another (a classic property right). This aspect of "balance" implicates not just Copyrights but also Property and Civil Rights.

Accordingly, provincial authority over Property and Civil Rights marks the boundary of valid federal Copyrights laws. This is not to say that all Copyrights legislation is an invalid intrusion into a provincial head of power. Parliament may trench into provincial jurisdiction as an incidental consequence of legislating within its constitutional domain. But, at some point, there is a line that cannot be crossed. Because this is not a bright line, difficult cases arise at the margins — legislation in respect of TPMs and RMI systems is an example. In borderline cases, the Supreme Court has candidly noted that the courts must seek to maintain an "appropriate *balance* . . . between the federal and provincial heads of power."<sup>95</sup> Granted, this sort of balance is different from the traditional balancing for policy reasons, but it would nevertheless be fair to say that balance is constitutionally entrenched in Copyrights law.

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90 Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 68 Chi.-Kent L. Rev. 841 at 842.

91 deBeer, above note 6.

92 *Ibid.*

93 Above note 55.

94 See deBeer, above note 6.

95 *Reference re: Firearms Act*, [2000] 1 S.C.R. 783 at para. 48 [*Firearms Reference*], cited in Monahan, above note 81 [emphasis added].

In light of the above analysis of the purpose and effects of the Government's proposed legislation, it could be difficult to characterize it as, in pith and substance, falling within Parliament's authority over Copyrights. Indeed, the relationship between paracopyright provisions and Copyrights seems to be based on a few tenuous links: the putative purpose of facilitating the commercial distribution of works subject to copyright in order to indirectly encourage authors' cultural creativity, the legally ambiguous and perhaps practically meaningless limitations on the effects, and the fact the provisions will be introduced through amendments to the *Copyright Act*.

However, even if the proposed paracopyright provisions are not themselves a matter of Copyrights, they may be "necessarily incidental" to validly enacted federal legislation. There are three questions to consider: do the provisions trench into provincial jurisdiction, are they part of an overall valid federal legislative scheme, and are they sufficiently integrated with that scheme to be upheld.<sup>96</sup> Since the Government's proposal does seem to trench into provincial jurisdiction over Property and Civil Rights, and we are in presence of an overall valid federal legislation, the *Copyright Act*, the crux of the issue is whether the proposed provisions will be "sufficiently integrated" with the *Copyright Act* to withstand scrutiny.

In different contexts, courts have set down different requirements for sufficient integration. As put by Dickson C.J. in *General Motors*, we must decide "what test of 'fit' is appropriate."<sup>97</sup> Fit, according to Dickson C.J., looks at how well the provision is integrated into the legislation and how important it is for the efficacy of the legislation as a whole. On the facts of *General Motors*, the Court upheld the impugned legislation as *functionally related* to the general objective of the legislation. By comparison, in *Vapor*, the Court held that the provision in question was *entirely unconnected* to the overall scheme.<sup>98</sup> Other possible tests include "rational and functional connection,"<sup>99</sup> "ancillary," "necessarily incidental" and "truly necessary,"<sup>100</sup> "an intimate connection," "an integral part"<sup>101</sup> or "a complementary pro-

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96 *Kitkatla*, above note 12, at para. 58.

97 *General Motors*, above note 11 at paras. 35–47.

98 *Ibid.* at paras. 67–86.

99 *Papp v. Papp*, [1970] 1 O.R. 331; *R. v. Zelensky*, [1978] 2 S.C.R. 940; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 [*Multiple Access*].

100 *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9; *R. v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695.

101 *Northern Telecom Ltd v. Communications Workers of Canada*, [1980] 1 S.C.R. 115; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680.

vision.”<sup>102</sup> In essence, there is really a spectrum of possible tests — with varying degrees of scrutiny — that one could apply to determine whether a provision is sufficiently integrated with an overall valid legislation.

Applying the *GM* “functionally related” test for integration, paracopyright provisions could be upheld if it was successfully argued that the ultimate, albeit indirect, objective was to encourage authors. Such being the same objective as the *Copyright Act* as a whole, paracopyright provisions would be tools permitting the statute in general to be more workable and efficient. However, this relies on a series of assumptions about the merits or demerits of p2p networks, the role of corporate intermediaries in the creative and distribution process, and the relationship between technology, contract, and copyright. Even on the lowest threshold of integration, therefore, Bill C-60’s paracopyright provisions may fail.

Certainly, paracopyright provisions are by no means “truly necessary” and do not have an “intimate connection” with the rest of the Act. They are clearly not pivotal. The *Copyright Act* operates reasonably well as it is, without such provisions. Cases are now working their way through the courts, indicating that copyright law provides plenty of protection for creators and distributors of digital content.<sup>103</sup> Obviously, these provisions would be easily severable from the Act.

Precisely which test of “fit” will be applied all depends upon how far the provision intrudes on provincial powers. A provision that “encroaches marginally” may only require a “functional” relationship, whereas a “highly intrusive” provision calls for a stricter test. The more the provision creeps into the other government’s jurisdiction, the harder it will be to sustain its validity.<sup>104</sup>

Given the degree to which the Government’s proposal trenches into provincial jurisdiction over Property and Civil Rights, as discussed below, it is possible — although far from certain — that these paracopyright provisions can be sustained as valid federal legislation under the Copyrights clause. Of course, if the proposal was modified to take account of the concerns expressed in this paper, the odds that the legislation would withstand constitutional scrutiny might be increased. Certainly, any broader

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102 *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 [*Vapor Canada*].

103 Record producers have and will continue to sue under existing copyright law, and have applauded the “blueprint” for doing so, which was recently provided by the Federal Court of Appeal in *BMG Canada Inc. v. Doe*, 2005 FCA 93, <<http://decisions.fca-cf.gc.ca/fca/2005/2005fca193.shtml>>.

104 *General Motors*, above note 11 at paras. 35–47.

provisions would exacerbate the constitutional problems. At least, therefore, Bill C-60 should not be broadened either by the relevant legislative committee before it is enacted or by the courts after it becomes law.

## 2) Property & Civil Rights

Property and Civil Rights has been interpreted to be among the broadest of all the constitutional heads of power. Monahan notes that starting with *Citizens' Insurance Co. v. Parsons*<sup>105</sup> the Privy Council began to define the provinces' power so as to virtually "encompass the entire field of law-making apart from criminal law."<sup>106</sup> Some might argue, however, that the provinces have jurisdiction over Property and Civil Rights, *except* insofar as Copyrights or certain aspects of Trade and Commerce are involved. While this is generally true to some extent, the lines between these categories are far from clear. And, as mentioned, there is a line that cannot be crossed.

It was suggested above that Bill C-60's paracopyright provisions may be tangentially linked to Copyrights, and despite their intrusion into Property and Civil Rights, could stand if they are sufficiently integrated with an overall valid legislative scheme. However, this may actually state the matter backwards. The Government's proposal might instead fall mainly on the provinces' side of the grey area between Copyrights and Property and Civil Rights. In this light, legislation in respect of TPMs would seem to be in pith and substance a matter of Property and Civil Rights, giving the provinces the right to trench incidentally into Copyrights. It would not seem to be in pith and substance Copyrights, which would give the federal government the right to trench incidentally into Property and Civil Rights. When the true character of the proposed provisions is revealed, this might appear to some to be a "colourable"<sup>107</sup> attempt to expand the boundaries of Copyrights in a constitutionally impermissible manner.

At least, this might be an instance where the double aspect doctrine might apply. This doctrine, although not extinct, is rarely used.<sup>108</sup> Nevertheless, in this case, even if TPMs and RMI systems were mainly a matter

<sup>105</sup> (1881), 7 App. Cas. 96. (P.C.).

<sup>106</sup> Monahan, above note 81 at 311.

<sup>107</sup> *Switzman v. Elbling*, [1957] S.C.R. 285 at 303.

<sup>108</sup> *Bell Canada v. Québec (Commission de santé et de la sécurité du travail du Québec)*, [1988] 1 S.C.R. 749; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59; *Multiple Access*, above note 100; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Russell v. The Queen* (1882), 7 App. Cas. 829.



of Copyrights, the provinces should still have a role to play. Undoubtedly, there are significant consumer protection issues to address; TPMs and RMI systems raise important questions about e-commerce and contracting on and offline. If the federal government is not interested in legislating in respect of these important topics, the provinces can and should.

Provincial Attorney Generals must therefore get involved in this copyright debate. This will broaden the base of stakeholders contributing to the conversation, hopefully leading to a well-reasoned and workable framework to govern TPMs and RMI systems. This would surely be a positive development from the perspective of copyright law reform. Indeed, this is one of the primary goals of Canadian federalism as well: "The advantage of a decentralized federal system, then, is that it maximizes opportunities for effective citizen participation."<sup>109</sup> If the provinces were to get involved, the public good would be more strongly felt and abuses would be less extensive.<sup>110</sup>

### 3) Trade and Commerce

If the Government's paracopyright provisions are to be upheld, a stronger argument might be made based upon Parliament's Trade and Commerce power than its Copyrights power. The aforementioned *Parsons* case<sup>111</sup> addressed the line between Property and Civil Rights and Trade and Commerce. The Privy Council divided the federal government's Trade and Commerce power into two branches: first, inter-provincial or international trade, and second, commercial matters affecting the "whole dominion."

Parliament has the sole jurisdiction over goods, people, capital, or services crossing Canadian or provincial territories for the purpose of trade or commerce. But the federal government has no authority over intra-provincial trade. Courts have considerably restricted Parliament's ability to regulate local trade, even if doing so is necessarily incidental to effective regulation of inter-provincial or international trade.<sup>112</sup> Parliament can "almost never" affect issues such as the production or marketing of a product through federal legislation.<sup>113</sup>

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109 Richard E. Simeon, "Criteria for Choice in Federal Systems" (1982-1983) 8 Queen's L.J. 131 at 151.

110 *Ibid.*, citing Montesquieu's view.

111 Above note 106.

112 Monahan, above note 81 at 284.

113 *Ibid.*



This places a significant constraint on the federal government when it comes to enacting provisions that purport to regulate persons who offer circumvention services. More generally, recall that TPMs enforce contracts governing the sale of digital content, which can either be embedded in a physical medium or distributed electronically via the Internet. An encrypted DVD sold pursuant to certain express or implied conditions is an example of the former, a paid download from the Apple iTunes Music Store an example of the latter.

In terms of distributed physical content, it is difficult to say this is a matter of inter-provincial or international trade. Most aspects of the transaction take place within a particular province. Electronic commerce, however, raises novel questions. Both the federal government and the provinces have legislated in this area, although both in a general manner. The federal *Personal Information Protection and Electronic Documents Act*<sup>114</sup> is expressly qualified so as to apply only to electronic alternatives in respect of federal laws. The *Ontario E-Commerce Act*,<sup>115</sup> on the other hand, applies more broadly. It is presently unclear how a jurisdictional scuffle in this area might be resolved.

As for commercial issues affecting the whole dominion, *General Motors* is a leading authority.<sup>116</sup> According to then-Chief Justice Dickson, there are five criteria for this second branch to apply. For federal legislation to be a valid exercise of the Parliament's jurisdiction over the "general" trade branch of trade and commerce, the act or section must be: (1) part of a general regulatory scheme; (2) monitored by the continuing oversight of a regulatory agency; (3) concerned with trade as a whole rather than with a particular industry; (4) of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) jeopardized by the failure to include one or more provinces or localities in a legislative scheme.<sup>117</sup> Chief Justice Dickson also indicated that these criteria are not determinative, and that the main factor to consider was whether the issue being addressed was a national economic concern and "not just a collection of local ones."<sup>118</sup>

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114 *Personal Information Protection and Electronic Documents Act*, 2000, c. 5, <<http://laws.justice.gc.ca/en/p-8.6/text.html>>.

115 *Electronic Commerce Act*, 2000, S.O., c. 17, <[www.e-laws.gov.on.ca/DBLaws/Statutes/English/ooe17\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/ooe17_e.htm)>.

116 *General Motors*, above note 11.

117 *Ibid.* at 643–44; *Vapor Canada*, above note 103.

118 *General Motors*, above note 11 at 662–63

It would be an uphill battle to convince any court that the matter of TPMs and RMI systems affects the whole dominion. Aside from the fact there is no complete regulatory scheme, nor any regulatory agency overseeing this issue, this issue does not affect trade as a whole. It mainly affects the business models of record producers, motion picture studios, and a limited number of other entities that distribute particular types of digital products. Moreover, the provinces have demonstrated their ability to regulate other aspects of commerce, particularly electronic commerce. The exclusion of a particular province would not jeopardize effective regulation of TPMs and RMI systems.

#### 4) Criminal law

Generally speaking, there are three indicia of valid federal legislation in respect of Criminal Law: there must be a prohibition of certain activity; the prohibition must be accompanied by a penalty for breach; and the law must be enacted for a “criminal . . . public purpose,” defined as including “[p]ublic peace, order, security, health, morality.”<sup>119</sup> Copyright law in Canada and abroad does incorporate some criminal sanctions. One might argue that the paracopyright provisions could stand under the Criminal Law power, given that there is clearly a prohibition and that there apparently are penal consequences for breach of the prohibition. The copyright, neighbouring, or moral rights holder will be entitled to all remedies conferred by law for the infringement of a right. However, even the Canadian Recording Industry Association, one of the principal lobbyists for tougher copyright laws, agrees that this matter is not and should not be about criminal law sanctions.<sup>120</sup>

In the *Margarine Reference*,<sup>121</sup> legislation prohibiting dealings in margarine was enacted in order to protect the dairy industry by banning products that would compete with butter. This was not a valid Criminal Law purpose. Similarly, legislation protecting the copyright industries has an economic purpose of regulating commercial dealings between private parties.

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119 Monahan, above note 81 at 332, citing *Reference re Dairy Industry Act (Canada)* S.5(a), [1949] S.C.R. 1 at 50 [*Margarine Reference*].

120 The Association's president, Graham Henderson, said on CTV's Canada A.M. the week prior to the tabling of the proposed legislation: “This isn't providing a criminal remedy. ... It's a civil remedy. ... I don't think anybody would want to get into the business of applying criminal sanctions to 16-year-olds who are downloading music or film products.” <www.ctv.ca>.

121 Above note 120.

On the other hand, the Supreme Court has given Parliament much leeway with the amorphous concepts such as health and morality under Criminal Law. This stands in contrast to the constraints it has imposed on the Trade and Commerce power, for example.<sup>122</sup> Therefore, although it would be intuitively difficult to see this as a matter affecting public peace, order, security, health or morality, the breadth of Parliament's Criminal Law power could conceivably support the Government's proposal.

## 5) Peace, Order, and Good Government of Canada

Parliament's power to legislate for the Peace, Order, and Good Government of Canada (POGG) encompasses at least three areas: new matters, emergencies, and issues of national importance. Courts are now very reluctant to allow federal jurisdiction over new matters, as such matters usually touch upon other heads of power.<sup>123</sup> Despite the cutting-edge nature of some TPMs, the emergence of new RMI systems and the modern phenomenon of p2p networking, these are clearly not "new matters" for constitutional purposes; they can surely be linked to existing heads of power.

A court last applied the emergency power in the *Anti-Inflation Reference*.<sup>124</sup> It would be inapplicable here since Bill C-60's paracopyright provisions are not temporary. Moreover, it would be inappropriate to say that circumvention is an emergency that warrants the exercise of Parliament's POGG powers.

If the underlying problem addressed by paracopyright provisions is to be considered a matter of national importance, the Government must meet the test set in *R. v. Crown Zellerbach*.<sup>125</sup> This means it must have a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."<sup>126</sup> It is doubtful this issue is a matter of national importance — unless, however, it could be shown that this

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122 Monahan, above note 81 at 133, citing cases such as *RJR-MacDonald Inc v Canada* (A.G.), [1995] 3 S.C.R. 199.

123 The Supreme Court last applied this concept in *R. v. Hauser*, [1979] 1 S.C.R. 984, where the Court held that the *Narcotic Control Act* was a valid expression of Parliament's POGG power because it dealt with a genuinely new problem.

124 *Reference re Anti-Inflation Act*, above note 65.

125 *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401.

126 *Ibid.* at para. 33.

branch of the POGG power includes the authority to implement international treaties.

Recall that the stated purpose of Bill C-60 is to implement the WIPO Internet Treaties into Canadian domestic law. An argument could be made — although it has never yet been successful — that Parliament has constitutional authority to implement international treaties, regardless of whether the subject matter would otherwise fall within provincial jurisdiction.

It is accepted that the federal government has the power to make treaties on behalf of Canada, although neither the power to make nor the power to implement an international treaty is found in the *Constitution Act, 1867*.<sup>127</sup> If legislation is necessary to bring domestic law into compliance with a treaty, constitutional jurisdiction over that legislation follows the division of legislative powers between Parliament and the provincial legislatures. Lord Atkin articulated the generally accepted rule in the *Labour Conventions* case: “there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.”<sup>128</sup>

Some commentators have criticized this statement, and, in *Vapor Canada*,<sup>129</sup> Chief Justice Laskin, revisiting the *Labour Conventions* case, wrote this:

In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference. The Courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation.

It appears from the inclusion of the phrase “in conformity with WCT and WPPT” that the Government may intend to rely on this exact passage.

In recent years, some have argued that Chief Justice Laskin’s *dictum* suggests that Parliament may be able to implement international treaties, even within provincial jurisdictions, as long as Parliament expressly

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127 With the exception of the “empire treaty” provision in s. 132.

128 *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326 at 355.

129 *Vapor Canada*, above note 103.

states its rationale in the legislation.<sup>130</sup> Other experts, however, do not think courts would overrule such a long-standing decision, even though it has proven to be controversial.<sup>131</sup> Canada is still able to act effectively on the international stage.<sup>132</sup> The concurring opinion of L'Heureux-Dubé in *Thompson v. Thompson*,<sup>133</sup> which explicitly recognizes that the implementation of a specific Convention was within the jurisdiction of the provinces, also provides support for the existing rule.<sup>134</sup>

Ultimately, it is unclear whether the Government could justify its proposed paracopyright provisions on the basis of the *WCT* and *WPPT* alone. Other than Chief Justice Laskin's passing remarks, the case law seems to suggest that Parliament cannot gain competence over a matter under provincial jurisdiction by implementing an international treaty obligation assumed by Canada.

## D. CONCLUSION

There are doubts whether Parliament has the authority to legislate in respect of TPMs and RMI systems. In pith and substance, this matter involves the technological, contractual, and commercial terms of distribution of digital materials. Although there is a tangential link to the federal Copyrights power, the matter might more appropriately be placed within provincial authority over Property and Civil Rights. Similarly, although this is a commercial matter, it seems not to fall within the federal Trade and Commerce power and is consequently for the provinces to deal with. This does not seem like a Criminal Law matter, although that particular federal domain has been interpreted broadly. It is unclear whether the federal government has a general treaty-implementation power that would

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130 J-M Arbour, *Droit International Public*, 4e Ed., (Cowansville, QC: Éditions Yvons Blais, 2002) at 166; P.W. Hogg, *Constitutional Law of Canada*, Looseleaf (Toronto: Carswell, 1996) at 11–13.

131 Monahan, above note 81 at 299. Monahan admits the rule may handcuff Canada when it comes to international treaty-making and implementation. However, it could be said that this is one of the prices of federalism, and provincial autonomy could be threatened if every treaty made by the federal government led to an automatic increase in the legislative authority of Parliament. See also P.W. Hogg, *Constitutional Law of Canada*, 4th ed., (Toronto: Carswell, 1997) at 300–3.

132 *Ibid.*

133 *Thompson v. Thompson*, [1994] 3 S.C.R. 551, <[www.lexum.umontreal.ca/csc-scc/en/pub/1994/vol3/html/1994scr3\\_0551.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1994/vol3/html/1994scr3_0551.html)> at 612.

134 Gérard A. Beaudoin, *La Constitution du Canada*, 3d ed., (Montreal: Wilson & Lafleur, 2004) at 773.

justify its proposed legislation. In general, the broader the proposed provisions, the further they are from federal jurisdiction and the more they trench into provincial powers. As is, the proposal may not be sufficiently precise or integrated into an overall valid federal scheme to be sustained as necessarily incidental. At minimum, there are aspects of this matter that fall within the provincial sphere. All of this suggests that provincial Attorney Generals and other provincial policy-makers ought to actively participate in the debate.