

History in the Balance:

Copyright and Access to Knowledge

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A. INTRODUCTION

Copyright law is generally understood to encompass within its policy embrace the interests of three constituent groups: users, creators and copyright industries.¹ Each of these groups has found enough support in the history of copyright law to argue that its interests should predominate within the legal framework. As interested parties, their advocacy position is to be expected. The role of Parliament is different however. It is the legislature's responsibility to be dispassionate, to mediate between these often competing interests in order to craft appropriate legislation in the name of the greater good. And by "appropriate," I mean balanced in setting the appropriate parameters between adequate protection and adequate access.

The idea of "balance" within copyright law is not a new concept nor is it the creation of "radical extremists"² or "pro-user zealots."³ Rather, as the

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- 1 In this paper, I will refer to authors and creators interchangeably. I will also speak of publishers, content providers and industry to designate the same constituent group. The term copyright holder will be used to designate both creators and content providers.
 - 2 Minister of Canadian Heritage and Official Languages, James Moore, in a speech to the Chamber of Commerce IP Council on June 22, 2010. See CBC, "Copyright Debate Turns Ugly," online: www.cbc.ca/technology/story/2010/06/23/copyright-heritage-minister-moore.html.
 - 3 Sarmite Bulte, former Chair of the Standing Committee on Canadian Heritage. See www.robhyndman.com/2006/01/12/controversy-over-bulte-comments-at-all-candidates-debate.

history of copyright law demonstrates, the entire legislative system required a balancing between the various interests in order to achieve its primary policy objective: that of fostering an environment for the generation, dissemination and acquisition of knowledge. The focus was not on pitting creators against industry or industry against users as we are wont to do in this modern era. Rather, the law reflected a tripartite, integrated system that encouraged creators to generate knowledge, industry to disseminate it and users to acquire it and, hopefully, reshape it into new knowledge. As such, the genesis of copyright law, including the earliest Canadian experience, has much to teach modern copyright policy-makers about establishing the appropriate normative policy framework. This is especially so in relation to the latest attempt at copyright reform, *An Act to amend the Copyright Act* (Bill C-32), introduced on 2 June 2010.⁴

Part 1 of this paper will discuss the nature and purpose of copyright law by canvassing the early experiences of the UK, France, the US and Canada. Part 2 will turn to review of Bill C-32 in light of the policy lessons gleaned from history.

B. PART 1: THE NATURE AND PURPOSE OF COPYRIGHT LAW: LESSONS FROM HISTORY

The first copyright statute originated 300 years ago in England in the form of the Statute of Anne or *An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*.⁵ Although its very title sets out its underlying purpose, tracing its contours has posed somewhat of a challenge to scholars.

The traditional view of the law was that it was designed primarily with publishers in mind—in other words, that it sought, first and foremost, to meet the needs of the book trade.⁶ However, in the last decades of the twentieth century, scholars began to place more emphasis on situating

4 59 Eliz. II, 2010. Text of Bill available at www2.parl.gc.ca/content/hoc/Bills/403/Government/C-32/C-32_1/C-32_1.PDF.

5 8 Anne c. C19 (1709/11710).

6 A. Birrell, *Seven Lectures on the Law and History of Copyright in Books* (London: Cassell, 1899). L.R. Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968). See also in this regard the work of book historian J. Feather Publishing, *Piracy and Politics: An Historical Study of Copyright in Britain* (London: Mansell, 1994); J. Feather “The Book Trade in Politics: The Making of the *Copyright Act 1710*” (1980) 8 *Publishing History* 19; J. Feather “The Commerce of Letters: The Study of the 19th c. Book Trade” (1984) 17 *Eighteenth-Century Studies* 405.

the author within the copyright paradigm as one of, if not the principal beneficiary of the legislation.⁷

The new millennium has seen yet another shift in focus. This time the spotlight is on the public interest in access to knowledge and learning both at the local and the international levels.⁸ Scholars have begun retracing the historical record to study the extent to which early policy-makers were concerned about “user rights’ or more broadly, the public interest in the circulation of knowledge.⁹ I would suggest that this most recent revisiting of the past is a direct reaction to the global trend towards increased copyright controls.¹⁰ This does not mean, however, that in pursuing a particular agenda there isn’t truth to be found within the pages of history.

As I see it, the evolution of the historical scholarship has been a progressive panning out to capture more within the lens of inquiry.¹¹ This has

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- 7 See in this respect the work of M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Harvard University Press, 1993); B. Sherman & L. Bently *The Making of Intellectual Property Law* (Cambridge: Cambridge University Press, 1999); J. Feather “Publishers and Politicians: The Remaking of Copyright Law in Britain 1775–1842 Part II: The Rights of Authors” (1989) 25 *Publishing History* 45; J. Feather “From Rights in Copies to Copyright: The Recognition of Authors’ Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries” (1992) 10 *Cardozo Arts & Ent L.J.* 455.
- 8 See, for example, R. Okediji “The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries” Issue Paper 15 UNCTAD-ICTSD (2005) (http://ictsd.net/downloads/2008/12/okediji_copyright_2005.pdf); U. Suthersanen “Education, IPRs and Fundamental Freedoms: The Right to Knowledge” (2005) at www.iprsonline.org/unctadictsd/docs/Suthersanen_A2K.pdf; P.K. Yu, “A Tale of Two Development Agendas” (2009) 35 *Ohio Northern U. L.R.* 466. See as well the Access to Knowledge movement at www.a2knetwork.org.
- 9 For example, R. Deazley, *The Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695–1775)* (Oxford: Hart Publishing, 2004); E. Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (London: Hart Publishing, 2010); T. Ochoa & M. Rose, “The Anti-Monopoly Origins of the Patent and Copyright Clause” (2002) 84 *J. Patent & TM Office Soc’y* 909; L.R. Patterson & C. Joyce “Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power to Congress in Article I, Section 8, Clause 8 of the US Constitution” (2003) 52 *Emory L.J.* 909; C. Dallan, “The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest” (2004) 44 *Santa Clara L.R.* 365; M.J. Madison, “Beyond Creativity: Copyright as Knowledge Law” (forthcoming 2010, *Vanderbilt Journal of Entertainment and Technology Law*).
- 10 For example, much of the recent American scholarship on the intent behind the Constitutional Clause arose out of the *Eldred v. Ashcroft* litigation (537 U.S. 186, U.S. Supreme Court 2003) relating to the constitutionality of extending the term of US copyright law. See Ochoa & Rose and Patterson & Joyce above note 9.
- 11 Ironically, the Internet that is often characterized as the bane of the music and film industries has been a boon for legal historians who are now able to engage online

manifested itself in greater scrutiny of the involvement of all the key players in the copyright paradigm as well as an enlargement of the scope of investigation to consider broad socio-political and cultural contexts. In so doing, we are moving closer to a more genuine and complete understanding of the nature and purpose of the law.

1) Copyright Laws reflect Enlightenment Values on Education and Learning

It is highly significant that copyright laws originated during the Enlightenment.¹² Although copyright scholars have discussed the role that Enlightenment ideas played in establishing the rights of authors within the legal construct,¹³ the influence of another key pillar of Enlightenment thinking has been left largely unexplored. Enlightened societies placed an enormous value on knowledge and learning as both necessary for individual human fulfillment and for socio-economic and cultural development. I would suggest that this aspect played a more significant role in both the emergence of the law and in its substance than we have generally acknowledged. As Mark Rose points out “. . . the establishment of the author as the owner and the establishment of the rights of the public at large were both Enlightenment products, embedded in Enlightenment modes of thought.”¹⁴

with the primary historical texts and sources. One excellent example can be found at *Primary Sources on Copyright (1450–1900)* www.copyrighthistory.org. A joint project between the University of Cambridge, UK, and Bournemouth University, UK, the website provides free public access to multi-jurisdictional primary sources. Access to learning has never been more robust thanks to the advent of the Internet and its immense potential for global education should be celebrated.

- 12 Roughly 18th century Europe and characterized by an emphasis on individual freedoms, democratic values and political emancipation grounded in rational inquiry and critical thought. On the Enlightenment in Europe see, for example, Porter, below note 17; T. Munck, *The Enlightenment: A Comparative Social History 1721–1794* (London: Arnold Publishers, 2000); J. Van Horne Melton, *The Rise of the Public in Enlightenment Europe* (Cambridge: Cambridge University Press, 2001). For the US and Lower Canada see, for example, H.F. May, *The Enlightenment in America* (NY: Oxford University Press, 1976); M. Trudel, *L’Influence de Voltaire au Canada*, vol. I (Montreal, Fides, 1945); F. Ouellet, *Lower Canada 1791–1840: Social Change and Nationalism* (Toronto: McLelland and Stewart, 1980); Y. Lamonde, *Histoire Sociale des idées au Québec* (Montreal: Fides, 2000).
- 13 See for example, M. Woodmansee & P. Jaszi, eds., *Copyright and the Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994); D. Saunders, *Authorship and Copyright* (London: Routledge, 1992).
- 14 M. Rose “Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric

Enlightened societies were especially mindful of encouraging the creation and diffusion of “useful knowledge”—a term that frequently appears in the writings of the time. In fact, one need only reflect on the Preamble of the Statute of Anne itself that refers to the “encouragement of learned men to compose and write useful books” to recognize that the term “useful” had a central meaning at the time. Useful knowledge was didactic, scientific, practical, utilitarian, and inured to the benefit of society at large.¹⁵ The more educated and learned the population, the more civilized and economically advanced the society.

Coupled with the need to encourage learned individuals to generate useful knowledge lay the public interest in diffusing or disseminating that knowledge. The culture of knowledge characteristic of this period manifested itself in the emergence of a multitude of agencies through which useful knowledge could be widely disseminated. We find, during the long eighteenth century and into the nineteenth, a proliferation of learned societies and scientific associations.¹⁶ Other important vehicles to promote the dissemination of knowledge included the establishment of circulating libraries and eventually the public library system. Similarly, energies were directed towards the establishment of institutions of higher learning such as Universities and cultural and scientific institutions such as museums. This was also a period marked by heightened attention to developing affordable systems of public education—especially elementary education. A society could not continue to grow, develop and flourish without providing for the means to educate successive generations and this was particularly true in developing societies like the United States and British North

of the Public Domain” (2003) 36 *Law and Contemporary Problems* 76 at 76. See also in this regard C. Hesse, “The Rise of Intellectual Property 700BC–AD2000: An Idea in the Balance” (2002) *Deadalus* (Spring) 26.

- 15 On “useful knowledge” see J. Gascoigne, *Joseph Banks and the English Enlightenment: Useful Knowledge and Polite Culture* (Cambridge: Cambridge University Press, 2003); J. Burns, “From ‘Polite Learning’ to ‘Useful Knowledge’ 1750–1850” (1986) 36 *History Today* 21.
- 16 Examples include the august Royal Society of London established in 1660 and the American Philosophical Society founded by Benjamin Franklin in 1745. The first such society to be formed in Canada was the Literary and Historical Society of Quebec founded in 1824. According to *History of the Book in Canada* vol. 1 (Toronto: University of Toronto Press, 2004) at 176: “. . . these first societies (for men only) focused on debate, discussion and essay reading in the period prior to 1840. They often provided public cultural amenities such as lecture series and *conversazioni*, and sometimes they attempted to establish library collections.” See also J.E. McClellan III, “Learned Societies” in Alan Charles Kors, ed., *Oxford Encyclopedia of the Enlightenment* (New York: Oxford University Press, 2002) 4, vol. 4, at 43–47.

America where poverty and illiteracy were the greatest barriers to socio-economic development.

It was, however, print technology that provided the most important vehicle for the mass dissemination of knowledge. As Roy Porter has suggested: “Central to enlightened modernizing were the glittering prospects of progress conveyed through print.”¹⁷ The printed book as the material repository of knowledge was the ideal medium for the diffusion of ideas. It could be easily multiplied, was highly portable, and could circulate widely. What was needed was a regulatory scheme to encourage book production so as to effect the broad policy objective of encouraging learning. It is therefore within this framework that copyright law must be cast. Copyright law should be understood as the “law of the book.” Its focus was on encouraging book production and distribution within circumscribed limits so as to ensure that useful knowledge would not only be generated but that it would also be widely disseminated.

2) Copyright Law in the Developed and Developing Worlds of the Eighteenth and Nineteenth Centuries

It is instructive to look back at the historical record of the UK and France who were, in the eighteenth and nineteenth centuries, highly developed societies with sophisticated publishing industries as well as a growing professional authorial class. These jurisdictions were also book-exporting nations and yet, in step with the ideals of the time, they nevertheless remained mindful of the role copyright law played in the advancement of education and learning.

Although publishers were the most vocal lobbyists for copyright legislation, the Statute of Anne was not exactly what they had wished for.¹⁸ The legislation gave them exclusive rights only for a limited time and the House of Lords forever dashed any claim to perpetual rights in 1774.¹⁹ Further, although authors do figure in the Statute of Anne and its later iterations and judicial interpretations, their interests did not predominate for reasons that author and lexicographer Samuel Johnson explained in 1773:

There seems . . . to be in authors . . . a right, as it were, of creation which should from its nature be perpetual; but the consent of na-

17 R. Porter, *Enlightenment* (London: Penguin Books, 2000) at 13–14.

18 R. Deazley, *On the Origins of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775)* (Oxford: Hart Publishing, 2004).

19 *Donaldson v. Beckett* (1774), 98 Eng. Rep. 257.

tions is against it; and indeed reason and the interests of learning are against it; for were it to be perpetual, no book however useful, could be universally diffused amongst mankind should the proprietor take it into his head to restrain circulation . . . For the general good of the world, therefore, whatever valuable work has once been created by an author, and issued out by him, should be understood as no longer in his power, but as belonging to the publick; at the same time, the author is entitled to an adequate reward. This he should have by an exclusive right to his work for a considerable number of years.²⁰

The overall construction of the legislation ensured that users could access the latest knowledge and ideas. The law achieved this by protecting the interests of authors and publishers, certainly. But it also set parameters or limits to the monopoly. It did so through a number of devices. These included registration requirements and other formalities, a limited term of protection, a free library book deposit for the benefit of University libraries and a complaint process for usurious book pricing. In fact, the Statute of Anne can be understood as anti-monopolistic in nature and designed to enable access to education and learning.²¹

As Ronan Deazley concludes:

A statutory phenomenon, copyright was fundamentally concerned with the reading public, with the encouragement and spread of education, and with the continued production of useful books. In allocating the right to exclusively publish a given literary work, the eighteenth century parliamentarians were not concerned primarily with the rights of the individual, but acted in the furtherance of these much broader social goals. The pre-eminence of the common good as the organizing principle upon which to found a system of copyright regulation is revealed. This element of the public interest, overlooked or perhaps ignored in other historical tales of the origin of copyright, once lay at its very core.²²

20 *Boswell's Life of Johnson*, vol. 2 at 220 — entry dated 1773.

21 Deazley, above note 18; M. Rose above note 14; L.R. Patterson & C. Joyce above note 9; T. Ochoa & M. Rose above note 9. See as well D.W.K. Kong, "The Historical Law and Economics of the First Copyright Act" (2006) 2 *Erasmus Law and Economics Review* 35.

22 Deazley, above note 18 at 226.

The same considerations were at play in post-revolutionary France when it passed its first Act in 1793 — the *Décret de la Convention Nationale du dix-neuf juillet 1793 relatif aux droits de propriété des Auteurs d'écrits en tout genre, des Compositeurs de musique, des Peintres et des Dessinateurs*.

Even though France is considered a strong “author-centric” jurisdiction, there is evidence to suggest that early French policy-makers were equally concerned with encouraging the diffusion of knowledge. Indeed, French parliamentarians debated the extent to which creators’ rights ought to interfere with the public interest in education and learning. As Anne Latournerie notes: “*En France également, même si on s’est longtemps focalisé sur la défense des droits d’auteur, la propriété publique est la règle, dans l’esprit des législateurs révolutionnaires, et le droit d’auteur est l’exception.*”²³

Significantly, the copyright file was given to the Committee on Public Instruction whose mandate was to establish a system of public education for the country.²⁴ This would suggest that early French legislators understood copyright law and the advancement of formal education as intimately connected. Thus, the French legislation included similar limits on the copyright monopoly as the Statute of Anne including a fixed term of protection, registration and other formal requirements and a library deposit for the benefit of the National Library. As Jane Ginsburg suggests “. . . without denying the presence of a strong authors’ rights current in the revolutionary laws . . . revolutionary legislators generally resolved that public-versus-private tension by casting copyright primarily as an aid to the advancement of public instruction.”²⁵

It is important to understand as well that the discourse was no different at the international level. At the inception of the *Berne Convention for the Protection of Literary and Artistic Works* in 1886, the Chair of the Berne Convention Drafting Committee, Swiss politician Numa Droz remarked:

Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be

23 A. Latournerie, “Droits d’auteur, droits du public: une approche historique” (2004) 22 *L’Economie Politique* 21–33 at 22. See too J. Ginsburg “A Tale of Two Copyrights: Literary Property in Revolutionary France and America” (1990) 64 *Tul. L. Rev.* 991.

24 D.S. Muzzey, “State, Church and School in France I: The Foundations of the Public School System in France” (1911) 19 *The School Review* 178; C. Hesse, “Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793” (1990) 30 *Representations* 109. See also Ginsburg, above note 23.

25 Ginsburg above note 23 at 1014.

met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses.²⁶

Thus, the *Berne Convention* and its later revisions as well as agreements like the WIPO Internet Treaties,²⁷ which Bill C-32 is designed to implement, contain “reservations of certain reproduction facilities” in the name of public instruction and learning, among other public interest considerations. None of these treaties vest absolute control over the copyright work in any one of the three constituent groups within their contemplation.²⁸

Nowhere is the link between copyright and the dissemination of knowledge more apparent than in the history of the developing country that was nineteenth century America. Article 1, Section 8, Clause 8 of the US Constitution empowers Congress “to promote the progress of science and useful arts by securing for a limited times to authors and inventors the exclusive right to their writings and discoveries.” At the time, the term “progress” would have signified “diffusion”²⁹ and the term “science” would have been used in its broad sense as “knowledge.”³⁰ Thus, Congress’ mandate was to promote the diffusion of knowledge by giving exclusive rights to authors for the limited time necessary to achieve that overarching policy goal. Confirming this public policy orientation of the Constitutional clause, George Washington observed: “. . . there is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is, in every country, the surest basis of public happiness.”³¹

To add further gloss to the intent behind the Constitutional clause, the original recommendation regarding copyright was part of a larger list of proposals for Congressional powers. The various suggestions, most of which were lost in the final Constitution, are most telling in identifying the overall context within which copyright law was situated. Among

26 M. Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties — Their Interpretation and Implementation* (Oxford: Oxford University Press, 2002) at 258.

27 WIPO Copyright Treaty (WCT) 36 ILM 65 (1996) and WIPO Performers and Phonograms Treaty 36 ILM 76 (1996) [WIPO Internet Treaties].

28 See M.J. Tawfik, “International Copyright Law: W[h]ither User Rights?” in M. Geist ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005).

29 Malla Pollack, “What is Congress Supposed to Promote? Defining ‘Progress’ in Article 1, Section 8, Clause 8 of the US Constitution or Introducing the Progress Clause” (2002) 80 Nebraska L. Rev. 754.

30 From the Latin “*scientia*” meaning knowledge. See M. Madison, above note 9.

31 Speech to both Houses of Congress delivered on 8 January 1790. See J. Sparks, ed., *The Writings of George Washington*, vol. XII (Boston: American Stationers’ Company, 1837) at 9.

twenty enumerated items, following appear in direct succession or closely together:

- To secure to literary authors their copy rights for a limited time
- To establish a University
- To encourage by proper premiums and provisions, the advancement of useful knowledge and discoveries
- ...
- To establish seminaries for the promotion of literature and the arts and sciences
- ...
- To grant patents for useful inventions
- To secure to Authors exclusive rights for a certain time . . .³²

One clearly grasps the extent to which it was deemed to be Congress' responsibility to provide for vehicles through which citizens could access knowledge and learning including through the mechanism of a copyright law.

The first US Act, modeled on the Statute of Anne, was similarly entitled *An Act for the Encouragement of Learning by securing the copies of Maps, Charts and Books to the authors and proprietors of such copies, during the times therein mentioned*.³³ It reflected the same balance of rights or exclusive entitlements coupled with similar limitations such as a fixed term, a mandatory book deposit and compliance with registration and other formalities. In addition, the US Act limited eligibility for protection to American citizens or permanent residents thereby enabling the free circulation of the works of foreign authors. In nineteenth century America, copyright law was understood as an agent to advance the country's socio-political goals by rejecting any restrictions on book circulation that would inhibit the ability of Americans to access the latest knowledge and ideas. As Meredith McGill notes:

[t]he notion that an individual author had a natural right to his printed text . . . was fundamentally incompatible with the political philosophy that associated the depersonalization of print with a kind of selfless publicity, the exercise of civic virtue. Perpetual private ownership and control over printed texts was unacceptable in

32 D. Oliar, "The (Constitutional) Convention on IP: A New Reading" (2009) 57 UCLA L.R. 421 at 437-38.

33 1 Statutes at Large 124 (1790). The one difference related to the use of the term "securing" in the US Act as opposed to "vesting" in the Statute of Anne. The US decision in *Wheaton v. Peters*, 33 U.S. 591 (1834), held that the change in term was of no consequence.

a culture that regarded the free circulation of texts as the sign and guarantor of liberty.³⁴

British copyright laws impeded timely and affordable access to the latest knowledge. As a result, US copyright law disregarded the interests of British authors and publishers and allowed for the wide circulation of unauthorized cheap American reprints of British works. Indeed, as scholars like McGill have demonstrated, the “culture of reprinting” characteristic of this period was an essential element of US economic and cultural development.³⁵ So inextricably tied were copyright law, the free flow of ideas and knowledge and America’s political ideology that one nineteenth century US Senator expressed it thus: “The multiplication of cheap editions of useful books, brought within the reaches of all classes, serves to promote that general diffusion of knowledge and intelligence, on which depends so essentially the preservation and support of our free institutions.”³⁶

It is truly ironic that it was this liberal policy regarding access to knowledge that has enabled the US to become, today, the strongest advocate for access controls.

3) The Emergence of Copyright Law in Canada

The first Canadian copyright statute, *An Act for the protection of Copy Rights/Acte pour protéger la propriété littéraire* was passed in Lower Canada in 1832

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- 34 M. McGill, *American Literature and the Culture of Reprinting 1834–1853* (Philadelphia: University of Pennsylvania Press, 2003) at 48. McGill argues further at 82: “Foreign authors’ disenfranchisement under American law was not inconsistent but integral to many Americans’ understanding of the nature and scope of domestic copyright protection.”
- 35 In addition to McGill, see also Z. Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development (1790–1920)* (Cambridge: Cambridge University Press, 2005); R.A. Gross, “Building a National Literature: The United States 1800–1890” in S. Eliot & J. Rose, eds., *A Companion to the History of the Book* (Oxford: Wiley-Blackwell, 2007); and C. Dallon above note 9.
- 36 Khan, above note 35 at 225. This 19th century copyright policy of allowing cheap British reprints to circulate freely in the US market had deleterious consequences on Canada during the latter half of the century. See in this regard, G. Parker, *The Beginnings of the Book Trade in Canada* (Toronto: University of Toronto Press, 1985); P.E. Moyses, “Canadian Colonial Copyright: The Colony Strikes Back” in Y. Gendreau, *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Cheltenham: Edward Elgar, 2008); M. Nair, “The Copyright Act 1889: A Canadian Declaration of Independence” (2009) 90 *The Canadian Historical Review* 1; S. Bannerman, *Canada and the Berne Convention 1886–1971* (forthcoming, UBC Press).

and was derived from US law.³⁷ This first Lower Canadian Act was replicated in the *Copyright Act* of the Province of Canada in 1841,³⁸ which was, in turn, adopted by the Dominion of Canada in 1868.³⁹

A study of the documents surrounding the enactment of this statute offers insight into what first motivated policy-makers to bring copyright law to Lower Canada. Not surprisingly, Enlightenment ideas about education and learning were as much a part of Lower Canadian values as anywhere else and, as we will see, played a very prominent role in the decision to enact a copyright law. Indeed, in the first decades of the 19th century Lower Canada saw a proliferation of the same agencies for the diffusion of knowledge that were to be found in the UK, Europe and the United States. These included the establishment of learned societies whose benefits were seen to extend beyond individual edification to the betterment of society as a whole. As one anonymous commentator stated in reference to the establishment of the Literary and Historical Society of Quebec in 1824, “[t]he number and importance of the Institutions or Societies, in any country, afford a very sure criterion, whereby we may judge of the progress it is making in civilization, and of its remoteness from barbarism.”⁴⁰ This was also a period marked by an increase in the availability and variety of print material — newspapers, pamphlets and books — published domestically as well as imported from abroad signaling a thirst for knowledge on the part of a growing readership.⁴¹

However, one of the most significant preoccupations of those early decades remained the problem of devising an affordable State-run public education system. It was this particular legislative portfolio that led directly to the enactment of the first Canadian *Copyright Act*.

The difficulties in bringing public education, especially elementary education, to nineteenth century Lower Canada have been well-documented.⁴²

37 2 Will IV c. 53. It was copied from the US Act of 1831, 4 Stat. 436 (1831).

38 4 & 5 Vict c. 61.

39 31 Vict c. 54.

40 *Canadian Magazine and Literary Repository*, Volume 2, No. 8, February 1824 (Montreal: N. Mower) at 111. Other notable civic initiatives of the period designed to encourage learning included, among others, the founding of McGill College in 1821.

41 See Trudel, Ouellet, & Lamonde, above note 12. See also G. Gallichan, *Livre et Politique au Bas-Canada 1791–1849* (Sillery: Les Editions du Septentrion, 1991).

42 See J.J. Jolois, *Joseph-Francois Perrault (1753–1844) et les Origines de l’Enseignement Laïque au Bas-Canada* (Montreal: Presses de l’Université de Montreal, 1969); J.D. Wilson, F.M. Stamp, & L-P. Audet, *Canadian Education: A History* (Scarborough: Prentice-Hall, 1970); B. Curtis, “Tocqueville and Lower Canadian Educational Networks” (2006) 7 *Encounters on Education* 113.

In 1800, the House of Assembly first debated the need to provide for a system of free public education for the colony and in 1801, the first *Education Act* was passed.⁴³ This Act did not achieve the desired results and the ensuing decades were marked by a series of failed legislative initiatives. Breakthroughs began in the late 1820s and the early 1830s as more schools were established. This led to a greater need for a stable supply of affordable schoolbooks. As a result, Lower Canadian teachers began to write or compile their own teaching manuals and schoolbooks. Preferring these to British or American imports and wanting to print multiple copies for use in their schools, they quickly discovered that the cost of printing their manuscripts was well beyond their means. Consequently, they began to petition the House of Assembly asking that it either assume the cost of printing or grant a sum of money to defray the costs.

In the fall of 1831, the House of Assembly was seized of two petitions from schoolteachers that it referred to the Standing Committee on Education and Schools (“the Committee”).⁴⁴ One of the petitions came from Joseph Lancaster, the British education pioneer who had recently settled in Montreal, in which he sought an “Act to secure the Copyright of any of his Publications respecting Education.”⁴⁵ Lancaster had become familiar with copyright law and its advantages while residing in the United States.⁴⁶ The other petition was from William Morris, Master of the British and Canadian School at Quebec whose plea to the Committee was as follows:

I lay before the Committee a Manuscript Book containing a treatise on Arithmetic and practical Geometry. I have adopted in my School,

43 *An Act For the Establishment of Free Schools and the Advancement of Learning in This Province*, 41 Geo III, c. 17.

44 *Journals of the House of Assembly of Lower Canada*, 2 Will. IV, at 49 and 102.

45 2 Will. IV, 23 November 1831, at 49. Lancaster arrived in Montreal in 1829 but his monitorial school system was already well-known in Lower Canadian educational and political circles as his system had been officially adopted by the Lower Canadian legislature in 1815. William Morris, the other petitioner, was the head of the British and Canadian School at Quebec, a Lancasterian school. On Lancaster’s influence on Lower Canadian education see B. Curtis, “Joseph Lancaster in Montreal (*bis*): Monitorial Schooling and Politics in a Colonial Context” (2005) 17 *Historical Studies in Education* 1.

46 Lancaster first arrived in 1818 and secured a US copyright in 1820 for his publication *Letters on National Subjects Auxiliary to Universal Education and Scientific Knowledge*. Although Lancaster had published teaching manuals and other books on his pedagogical method prior to his arrival in the US, he did not secure copyright in his native England. On Joseph Lancaster, see D. Salmon, *Joseph Lancaster* (London: Longmans, Green & Co, 1904).

as much as I could, the system contained in my Book; the want of printed Copies has prevented me from making use of it altogether. I am of opinion that if my work was printed and put into practice, children could learn all the rules that it contains in one year. I have not dared to get it printed. . .I believe the work would cost about 81 pounds for 1000 which would make about 2 shillings per Copy, for the printing solely, which added to the binding, would make it too dear to expect an extensive sale.⁴⁷

The Committee recommended that Morris be given an allowance of 50 pounds as an aid to publication. It also stipulated that one thousand copies should be produced and sold at the affordable price of 2 shillings each. Finally, it concluded its report on Morris' petition with the hope that: "this very valuable Book may be improved and translated in French for the use of the Elementary Schools throughout the Province."⁴⁸

The Committee went further, however. Its deliberations led it to the following conclusion:

The necessity of such Books, and the little encouragement existing at present for time, talents and capital employed in this way, as well as the special application of Mr. Lancaster for a Copyright induced your Committee to recommend the introduction of a Bill securing Copyright.⁴⁹

Unfortunately, a detailed analysis of the Committee's copyright recommendation is beyond the scope of this paper but, for our purposes, it is enough to highlight the clear underlying rationale that led to the law's introduction. Firstly, it is telling that, just as in France, a committee established to deal with public instruction was seen as the appropriate body to address matters pertaining to copyright law. Further, the Committee's recommendation was a direct response to the problem of providing for an affordable and adequate supply of schoolbooks. The barrier that existed at the time was the high cost of printing. The belief was that copyright law would reduce the cost of printing by encouraging publishers to take advantage of economies of scale secured by exclusive printing rights for a fixed duration. However, the Committee's response to Morris' petition is not limited to the concern over facilitating book production in and of itself. In its estima-

47 First Report of the Standing Committee on Education and Schools, 23 January 1832, 2 Will. IV, Appendix I.i. at 10.

48 *Ibid.* at 2–3.

49 *Ibid.*

tion, schoolbooks and other books were to be affordable, printed in sufficient numbers to ensure wide distribution and, ideally, accessible in both French and English. Thus, it expressly established both the maximum cost per volume and the minimum print run as conditions of the grant to Morris; conditions that were designed specifically to ensure that the general population would have access to this useful book. In recommending the enactment of a copyright law to address similar concerns, the Committee would have been thinking along the same policy lines, believing that copyright would result in greater public accessibility to useful works.

It is worth stressing that although he was one of the most prominent Quebec publishers of his time, John Neilson, who chaired the Committee, had never expressed an interest in copyright law in his capacity as publisher. Rather, Neilson is remembered for, among other things, his championing of the cause of education.⁵⁰ Further, although the legislation originated out of petitions from authors, these petitioners were not asking specifically to be rewarded for their intellectual exertions. Rather, they petitioned as teachers seeking to provide their students with access to the teaching tools they had developed.

4) Copyright History: Remembering Copyright's Educative Function

In undertaking this brief historical survey, I am not suggesting that time has stood still and that we ought to be considering copyright revisions in light of nineteenth century law. Obviously we have moved well beyond the particular legislative agenda that so exercised Lower Canadian policy-makers in 1832. Nor am I intending to suggest that the substantive provisions of these early statutes should be the models for contemporary legislative drafting. There is no question that modern copyright legislation looks very different from the Statute of Anne or its early North American progeny. Rather, understanding the historical origins of the law reminds us of the way in which copyright policy was conceived — a conception that is as relevant today as it was then.

Unfortunately, contemporary copyright discourse often places too high a premium on rewarding “creativity” at the expense of other equally important interests such as those of users. The mistaken assumption is that copyright law is a vehicle for the protection of authors and industry but,

50 On John Neilson, see *Dictionary of Canadian Biography*, vol. VII, online at www.biographi.ca.

as we have seen, copyright law has never been about that dimension alone. Nor, frankly, should it be.

History teaches us that copyright law emerged out of Enlightenment ideas about the benefits of learning and the diffusion of knowledge. Viewed in this light, it is clear that authors and publishers were never intended to be the primary beneficiaries of the legislative scheme. Rather, they were the means by which a greater public interest purpose could be achieved. As Michael Madison aptly captures it: “Copyright began as knowledge law, and knowledge law it should remain.”⁵¹

The recent pronouncements by the Supreme Court of Canada are a clear affirmation that this conception of the law remains very much a part of the contemporary legal framework. In the Court’s estimation:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator The proper balance . . . lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.⁵²

The Supreme Court’s conceptualization of “fair dealing” also reflects a similar appreciation:

The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively. As Professor Vaver . . . has explained . . . : “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”⁵³

Indeed, all the key players, authors, publishers and users were and remain integral parts of a larger public interest whole. They each play a role in the development and dissemination of knowledge and learning and the law must be triangulated so as to ensure that, together, they achieve this goal. For creators, this means offering exclusive rights in order to encourage them not only to create but also to make their works public. On the industry side this goal manifests itself in offering exclusive rights to en-

51 Madison, above note 9 at 12.

52 *Theberge v. Galerie d’Art du Petit Champlain*, [2002] 2 S.C.R. 336 at paras. 30–31, online at: <http://csc.lexum.umontreal.ca/en/2002/2002scc34/2002scc34.pdf>.

53 *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 at para. 48, online at: <http://csc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.pdf>.

courage investment in production and distribution. On the user side this means setting limits to the exclusive rights of copyright holders to ensure reasonable access and use of copyright content in order to acquire, share, transform and advance knowledge. The idea has always been about properly calibrating the law to ensure its overall purpose — a purpose that transcends any one group’s exclusive interests.

C. PART 2: ASSESSING BILL C-32 IN SAFEGUARDING ACCESS TO KNOWLEDGE AND LEARNING

Bill C-32 provides for a number of legislative reforms to bolster the rights of each key constituent in the copyright equation.⁵⁴ Importantly, it offers a number of safeguards and enhancements for users of copyright works. One of the more salient features is the addition of “education” as an enumerated category within the fair dealing provision but there are a number of initiatives within the Bill that provide allowances for educational, personal or other public interest uses.⁵⁵ All of the proposed measures are designed to ensure that users can access and engage with copyright works outside of the direct control and oversight of the copyright holder.

Not surprisingly, these proposals have elicited criticism from certain creator and industry groups. For example, Canadian copyright licensing body, Access Copyright, argues that these provisions undermine the copyright holder’s entitlement to compensation.

[Bill C-32] . . . introduces new exceptions and greatly expands existing ones. These changes undercut the existing rights and abilities of content owners to monetize their works. New exceptions, which create a sudden increase in uncompensated uses of works, will result in significant lost sales and millions of dollars in revenue losses to

54 The official website is entitled *Balanced Copyright* at www.balancedcopyright.gc.ca. Press releases speak of a “fair, balanced and common-sense approach.” See for example, “Government of Canada Introduces Proposals to Modernize the *Copyright Act*” at http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rpo1149.html.

55 Proposed sections 29–30 and their respective subsections. For a summary of these initiatives see the Government of Canada Fact Sheets “What the New *Copyright Modernization Act* Means for Consumers” and “What the New *Copyright Modernization Act* Means for Teachers and Students” at www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rpo1157.html.

Canadian content owners from collective licences alone. Canadian content owners rely on these important sources of income.⁵⁶

But we have seen that copyright law is not designed for the sole purpose of providing revenue streams for copyright holders. The goal of encouraging learning is equally essential and can only be achieved by providing limitations and exceptions to the copyright holder's rights. There are and always will be legitimate uses of a work that the copyright holder will not, as a matter of policy, be able to monetize. Bill C-32 is giving due recognition to a normative feature of the law that is centuries old.

When all is said and done, however, critics of the educational provisions may be agitating unnecessarily. The recognition and enhancement of user rights in Bill C-32 may well be nothing but smoke and mirrors when considered in light of the provisions relating to "technological protection measures" (TPMs).⁵⁷ The Bill makes it an infringement of copyright to circumvent TPMs that are designed to control access to and infringements of the work.⁵⁸ Bill C-32 does not discriminate between tampering with TPMs for infringing or non-infringing purposes and leaves it entirely to the discretion of the copyright holder to decide whether and how to use these controls. Further, it provides copyright holders with a wide range of remedies.⁵⁹

56 Access Copyright, "Improving Canada's Digital Advantage" at <http://de-en.gc.ca/wp-content/themes/clf3/upload/2266/Access%20Copyright%20Digital%20Advantage%20Submission%20%28final%29.pdf>. See also the statement of ANEL (the Quebec French-language book publishing lobby), "Le projet de loi sur le droit d'auteur C-32 constitue une atteinte sans précédent aux droits des créateurs" at www.anel.qc.ca/PDFAutoG/1_20100630133222.pdf.

57 David Fewer of the Canadian Internet Policy and Public Interest Clinic (CIPPIC) aptly describes the bill as "Jekyll and Hide" in its approach. See www.cippic.ca/uploads/Media_Release--Copyright_Bill_C-32--7June10.pdf.

58 The proposed definition of "technological protection measure"

... means any effective technology, device or component that, in the ordinary course of its operation,

(a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or

(b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19. [s. 41]

It is to be noted that the TPM provisions apply to both copyright holders and performers in respect of their performances.

59 See proposed s. 41.1(2). The bill does restrict the availability of certain remedies. See ss. 41.2, 41.1(3), and 41.19.

It is true that Bill C-32 does provide for certain allowable exceptions. Importantly, circumventing TPMs to permit individuals with perceptual disabilities to enjoy copyright works is expressly deemed non-contravening.⁶⁰ However, the other limitations are all targeted towards narrowly circumscribed activities by specific users such as for law enforcement and national security, computer program interoperability, encryption research, personal information privacy, network or computer security, ephemeral reproductions by broadcasters or for receiving radio signals.⁶¹ Nowhere does the Bill permit circumvention for fair dealing or any similar legitimate use. By providing such unregulated discretion on copyright holders to use digital locks, Bill C-32 entirely disregards the educative mission that is a foundational aspect of the law; one that requires that all users have the ability to use copyright works for purposes deemed reasonable and in the public interest.

To reflect back on Samuel Johnson's observation, copyright law must guard against the possibility that a "proprietor" will take it into his or her head to restrain the circulation of books and the knowledge they contain. Are we so convinced that copyright holders are that much more generous now than they were in eighteenth century England that this fear is no longer justified — that it is no longer the role of the State to guard against the risk of denial of access?⁶² Are contemporary circumstances that different that we can justify disregarding the legacy of our earliest Canadian policy-makers who understood the law's purpose as one of dismantling, rather than erecting, barriers to knowledge and learning?

Do the WIPO Internet Treaties require such an absolutist approach to TPMs? Opinion remains divided on this question⁶³ but if the lessons from

60 Section 41.16.

61 See ss. 41.11–41.18.

62 The proponents of the "Access to Knowledge" movement at the international level have highlighted the harms of overprotection on access and use of copyright material. This is as much a modern concern as it was an historic one. See for example the sources cited in note 8 and more generally the Consumer Project on Technology at www.cptech.org/a2k/ and Consumers International at <http://a2knetwork.org/about>.

63 The argument raised to defend the absolutist position such as that adopted in Bill C-32 is that there is no meaningful way of protecting the legitimate interests of the copyright holder if there are allowances for fair dealing uses in that once a TPM is circumvented copyright content can be circulated with impunity. The commentary is divided on whether this fear is sufficient to justify such a displacement of basic copyright principles and on the correct interpretation of the WIPO Internet Treaties. On these issues see the differing opinions compiled by G. D'Agostino, "A Sampling of

the past offer any guidance then Canada should be aligning itself with those who take the position that our international treaty obligations can be met by limiting liability for circumvention to infringing uses.⁶⁴

In defending the position taken in respect of TPMs, federal government representatives have dismissed concerns about the reach of their proposals.⁶⁵ Firstly, they claim that the provisions will not lead to an increased use of digital locks because their use is so unpopular. They argue that these measures will only be used routinely by those industries that are hardest hit by unauthorized copying. The Government seems to be placing inordinate faith on the fact that as digital delivery of content becomes the norm, copyright holders, especially big industry, will act with generosity (or at the very least with generous self-interest) in the way they manage their use of digital locks so as not to unduly “restrain circulation” of copyright works. It is also relying on the fact that individuals will protest their use so as to cause copyright holders to hesitate in the face of a resistant customer base. The Government expressly acknowledges that “[t]he success of TPMs depends on market forces. Creators may decide whether or not to use a TPM, and consumers can then decide whether or not to buy the product.”⁶⁶ In this way, policy-makers are gambling that public pressure will compel copyright holders to use TPMs sparingly. However, to leave such important policy issues to be decided outside of the reach of the legislature is, in my estimation, a clear abdication of Governmental responsibility over defining the appropriate contours of the law.

Secondly, Government officials claim that abuses by copyright holders can be remedied by regulation—in effect recognizing the potential for

Commentary on Technological Protection measures” at www.iposgoode.ca/2010/06/bill-c-32-a-sampling-of-commentary-on-technological-protection-measures.

- 64 See for example: C. Craig, “Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of Prescriptive Parallelism” (2010) 13 *The Journal of World Intellectual Property* 503; B. Fitzgerald & N. Suzor, “Getting the Balance Right: A Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs—Inquiry into technological protection measures (TPM) exceptions” (2005) available at http://nic.suzor.com/_media/publications/quit_gettingthebalanceright.pdf; E. Dellit & C Kendall, “Technological Protection Measures and Fair Dealing: Maintaining the Balance between Copyright Protection and the Right to Access Information” (2003) *Digital Technology Law Journal* 1.
- 65 Technical Briefing on the *Copyright Modernization Act*, teleconference hosted by Heritage Canada and Industry Canada on 2 June 2010. See as well Industry Canada, *Copyright Modernization Questions and Answers*, http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rpo1153.html#amend.
- 66 Industry Canada, *Copyright Modernization Questions and Answers*, *ibid*.

abuse. It is true that Bill C-32 allows the Governor in Council to make regulations if, in particular cases, a TPM “would unduly restrict competition in the aftermarket sector.”⁶⁷ Further the Governor in Council may exclude the application of the anti-circumvention prohibitions in specific circumstances taking into account factors such as whether the TPM “could adversely affect” a number of enumerated activities including criticism, review, parody, teaching, scholarship or research.⁶⁸ However, relegating these concerns to regulation by the Governor in Council reinforces the entire orientation of the Bill, which appears geared towards providing the copyright holder with near-absolute discretionary control over the work through the use of digital locks.

Only time will tell if the Government is correct in its gambit should the Bill pass in its current form. In the meantime, I make no apologies for my cynicism. It seems to me that more than one copyright holder might well take it into his or her head to restrain circulation through the indiscriminate use of digital locks and that public opposition will not be sufficient to temper the generous bounty the Bill has provided. Further, by refusing to expressly recognize allowances for the legitimate exercise of user rights in TPM controlled works, Bill C-32 has, in one simple but sweeping legislative device, entirely forsaken the educative function that has been an essential feature of the law from its inception. Remaining faithful to the policy lessons of the past would have required a more measured — indeed, a more balanced — response.

67 Section 41.21 (1).

68 Section 41.21 (2).