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## Copyright Competition: The Shifting Boundaries of Convergence Between U.S. and Canadian Copyright Regimes in the Digital Age

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# COPYRIGHT COMPETITION: THE SHIFTING BOUNDARIES OF CONVERGENCE BETWEEN U.S. AND CANADIAN COPYRIGHT REGIMES IN THE DIGITAL AGE

## INTRODUCTION

As we move further and further into the digital age, it has become increasingly easy to create, locate, develop, and share information online. With the near universal proliferation of the Internet in North America,<sup>1</sup> measures have been taken to ensure that those who hold copyright in their created works may remain certain that their intellectual property rights remain protected.<sup>2</sup> Additionally, the digital age has afforded users manifold opportunity to both create and share infringing materials, and this ease has led to international tension concerning online media piracy. As the case has been throughout the entire history of intellectual property protection, a theoretical debate rages: Should the law seek to protect the parties that principally create content in order to provide economic incentive for those creators, or should it place an emphasis on free dissemination of information, those seeking to create thereby garnering inspiration from multiple sources?<sup>3</sup>

Throughout the twenty-first century, there has been a continuous shift toward a restrictive system of transnational copyright protection in the digital context. Nonetheless, there has certainly been some pushback to the most extreme forms of digital

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1. As of November 2014, 87.9 percent of North America was connected. *Internet Usage and 2015 Population in North America*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats14.htm#north> (last visited Jan. 14, 2015).

2. See, e.g., Derek J. Schaffner, *The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation*, 14 CORNELL J.L. & PUB. POL'Y 145, 145 (2004).

3. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 5–19 (3d ed. 2010) (explaining the “theoretical underpinnings” of copyright law).

rights protection.<sup>4</sup> In 2011, the Stop Online Piracy Act<sup>5</sup> (SOPA) and the Protect Intellectual Property Act<sup>6</sup> (PIPA) were introduced respectively to the U.S. House of Representatives and Senate. These two bills, and in particular, their more extreme protective measures,<sup>7</sup> were met with outrage from the online community.<sup>8</sup> As a result, neither Act has come into force.<sup>9</sup> Seemingly in response to both SOPA and PIPA and to its prior place on the U.S. Department of Trade's "Priority Watch List" for online piracy,<sup>10</sup> Canada's majority federal government<sup>11</sup> enacted the Copyright Modernization Act (CMA) in 2012<sup>12</sup> to update its Copyright Act.<sup>13</sup> Certain provisions of the CMA resemble those in the Digital Millennium Copyright Act (DMCA) and SOPA, yet the CMA in some aspects goes even further in restrictions such as the digital locks provisions that target subversion of technological protective measures in particular.<sup>14</sup> Consequently, it seems that the major U.S. and Canadian copyright legislation

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4. Jenna Wortham, *Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling: Many Voices on the Web, Amplified by Social Media*, N.Y. TIMES, Jan. 20, 2012, at B1.

5. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

6. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011).

7. See *infra* Part IV.B.

8. Wortham, *supra* note 4.

9. *Id.*

10. See OFFICE OF THE U.S. TRADE REP., 2012 SPECIAL 301 REPORT (2012) [hereinafter 2012 SPECIAL 301 REPORT], [http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report\\_0.pdf](http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf), to be discussed *infra* Part V.

11. A majority government in Canadian Parliament means that one political party controls a proportional majority of seats in the House of Commons. In the 2011 federal election, Prime Minister Stephen Harper's Conservative Party captured 166 of 308 seats, giving the government a wide mandate to enact laws. *Map of Official Results for the 41st General Election*, ELECTIONS (2011), [http://www.elections.ca/res/cir/maps/images/ERMap\\_41.pdf](http://www.elections.ca/res/cir/maps/images/ERMap_41.pdf). For more information on the Canadian electoral process and the 2011 federal election in particular, see generally JON H. PAMMETT & CHRISTOPHER DORNAN, THE CANADIAN FEDERAL ELECTION OF 2011 (2012).

12. Copyright Modernization Act (Bill C-11), S.C. 2012, c. 20 (Can.).

13. Copyright Act, R.S.C. 1985, c. C-42 (Can.).

14. See *infra* Part IV.A; Barry Sookman, *Change and the Copyright Modernization Act*, BARRYSOOKMAN.COM (Nov. 7, 2012), <http://www.barrysookman.com/2012/11/07/change-and-the-copyright-modernization-act/>.

reforms in the past few years have been inspired by one another.<sup>15</sup> Each country looks to the other for stimulus in formulating proposed legislation, with each new draft appearing more extreme.

This Note argues that due to mutual pressures, the United States' and Canada's copyright systems will continue to become further restrictive in efforts to streamline the monitoring of content sharing between the countries and to take greater action against cross-border media piracy. Part I will discuss the inherent philosophical tensions that lie at the heart of copyright law in general: whether to incentivize innovation or to protect the rights of content creators. Part II will undertake a survey of both U.S. and Canadian copyright law principles before the overhauls of both systems that occurred in the current digital age. Due to its breadth and importance, the United States' DMCA and selected landmark cases arising under it will be discussed in Part III. Subsequently, Part IV will examine and evaluate two recent pieces of legislation: Canada's CMA, and the United States' proposed SOPA. Finally, Part V will conclude by discussing the tension between the nations' copyright programs, as well as their many interrelated facets.

Together, the statutory frameworks of the two countries are moving toward a more obstructive model of Internet use and copyright protection, which has the potential to stifle creative production if new copyright and intellectual property regulations are not carefully crafted. The judicial response in Canada has nonetheless been progressive, and Canadian policies on certain copyright elements such as fair use and statutory damages seem to be reformist. The United States should look to Canada for crafting comparatively reasonable provisions, such as the relatively low statutory damages cap in the CMA.<sup>16</sup> Any future legislation should limit Internet service provider liability, allow broad exceptions for fair use, and provide a robust notice-and-notice based system of both service provider and user liability. If

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15. Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada*, in *THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 93, 95 (Michael Geist ed., 2013).

16. The statutory damages cap is a maximum of \$20,000 CAD depending on whether the infringing use was commercial or noncommercial; to be discussed in greater detail *infra* Part V. Copyright Modernization Act (Bill C-11), S.C. 2012, c. 20, s. 38 (Can.).

new copyright regimes in either country are not properly implemented, they may carry the implications of invading the rights of citizens in both nations.

#### I. THE INHERENT THEORETICAL TENSION IN COPYRIGHT

The broad theoretical debate permeating the copyright law regime generally concerns whom the law should seek to incentivize, and what effects a broad, far-reaching copyright regime would have on creative production. The conflict can be summarized as a policy debate: the law may serve to protect the rights of those who have already created works, or it may allow leeway so that inspiration may be taken from more venerated sources, their context lending to a greater collective consciousness of creative property where artists and innovators are free to borrow and garner inspiration from those who preceded them in their respective fields.<sup>17</sup> At the center of this debate is the concept of innovation. Many scholars have spilled ink on the subject of the impossibility to create without inspiration.<sup>18</sup> As a classic example goes, from where would “O Brother Where Art Thou,” “Ulysses,” and “Hamlet” have come had Homer not composed the “Odyssey?”<sup>19</sup> Although some elements of that classic epic poem certainly may have been copyrightable, the essence of the story is not.<sup>20</sup> Insofar as inspiration breeds creativity and vice versa, one can easily come to the conclusion that no work is truly “original.”

At the heart of copyright law interpretation is the struggle between larger corporations that attempt to monitor and enforce copyright, and the artists, authors, and users who wish to en-

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17. COHEN ET AL., *supra* note 3.

18. *See, e.g., id.* at 7.

19. *Id.*

20. Modern North American copyright law turns on the idea/expression distinction. The basis of this theory is that any “idea, procedure, process, system, method of operation, concept, principle, or discovery” is not protectable under copyright law, but tangible expressions of the above may be granted protection. U.S. Copyright Act, 17 U.S.C. § 102(b) (2012). For example, this means that a system or organization or statistical *process* may not be copyright protected, but an essay explaining precisely how to use that system would be copyright protected as a tangible expression thereof. For more information, see, e.g., *Baker v. Selden*, 101 U.S. 99 (1879); *A.A. Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

courage authorship through a robust public domain of materials.<sup>21</sup> However, a concurrent tension arises between creative authorship and technical innovation: “The more artistic production is favored, the more technical innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff.”<sup>22</sup>

Since it is nearly impossible to create any sort of work using no outside inspiration, it becomes necessary for producers and artists to use source materials in ways that encourage the users’ own creativity. In the digital era, one of the primary ways to achieve this is through what is known as “Web 2.0,” an online forum where users generate their own content.<sup>23</sup> Garnering inspiration from materials shared online, artists and authors are able to create content that heavily references the creative expressions that they have discovered by means of Web 2.0. In the course of generating new material, these digital-age artists and producers incorporate themselves within the dialogue of copyright by being part of the “moral economy of fair conduct in which collective, socio-cultural benefit trumps individual profit.”<sup>24</sup> The communal good may certainly outweigh reasons for implementation of protective measures.

The theory that creators draw inspiration from existent content goes hand-in-hand with the concept that access to and utilization of digital-content networks is imperative to the fundamental, basic human rights concepts of modern freedoms of expression.<sup>25</sup> There are myriad examples of how content sharing is beneficial to creative production as a whole, allowing expressive creative works in all forms.<sup>26</sup> It is at times difficult, however, to reconcile user-generated content with copyright law—even

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21. Lisa Macklem, *This Note’s For You—Or Is It? Copyright, Music, and the Internet*, 4 J. INT’L MEDIA & ENT. L. 249, 251 (2013).

22. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005).

23. Susanna Monseau, *Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbor, Secondary Liability and Fair Use*, 12 J. MARSHALL REV. INTELL. PROP. L. 70, 76 (2012).

24. Martin J. Zeilinger, *Chiptuning Intellectual Property: Digital Culture Between Creative Commons and Moral Economy*, 3 J. INT’L ASS’N FOR THE STUDY OF POPULAR MUSIC 19, 19 (2012).

25. Nicola Lucchi, *Internet Content Governance and Human Rights*, 16 VAND. J. ENT. & TECH. L. 809, 837 (2014).

26. Fraser Turnbull, *The Morality of Mash-Ups: Moral Rights and Canada’s Non-Commercial User-Generated Content Exception*, 26 I.P.J. 217, 220 (2014).

when taking into account fair use and fair dealing exceptions, some content is simply too close for comfort to its original source material.<sup>27</sup> Nonetheless, it would be impossible to argue that works like “Kind of Bloop”<sup>28</sup> or “Spockanalia”<sup>29</sup> have no artistic merit or would be copyright deficient in some respect but for adventures of garnering creative inspiration in the digital age.

## II. NORTH AMERICAN COPYRIGHT LAW BEFORE THE DIGITAL AGE

The theoretical battle that exists between those who create, seeking their works to be protected and monetized, versus those who create while seeking the widest sources of inspiration in an ever-broadening content-sharing culture is a concern in all steps of copyright law interpretation. It is necessary for the purposes of expounding on recent developments in both digital-age copyright legislation and the common law to undertake a brief survey of both U.S. and Canadian copyright law. This Part will first examine the foundations of U.S. copyright law, which includes the Copyright Act and relevant international treaties. It will then briefly review the history of Canadian copyright legislation, particularly the effects of the same international law.

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27. See generally Pascale Chapdelaine, *The Ambiguous Nature of Copyright Users' Rights*, 26 I.P.J. 1, 5 (2013).

28. A 2009 “chipmusic” remake of Miles Davis’ “Kind of Blue,” the seminal jazz trumpet player’s magnum opus, “Kind of Bloop” recreated—note for note—the original album using 8-bit electronic hardware found on the sound chips of archaic video game hardware. Taking fair use considerations into account and obtaining all compositional licenses necessary, the artist repurposed obsolete sounds and refashioned them into a “new” work that still generated controversy. The artist, having reproduced the original cover art into a pixelated, 8-bit version, was sued by the original photographer and faced massive statutory damages under the DMCA. For more on the DMCA, see *infra* Part IV. The parties settled out of court for \$32,500 USD. For more information on “Kind of Bloop” and the controversies of chipmusic, see Andy Baio, *Kind of Screwed*, WAXY (July 19, 2011), [http://waxy.org/2011/06/kind\\_of\\_screwed/](http://waxy.org/2011/06/kind_of_screwed/); Zeilinger, *supra* note 24.

29. “Spockanalia,” first printed in 1967, is widely cited as the first-ever “fan-zine” relating to the popular TV series “Star Trek.” For more information on “Spockanalia” and the history of “Star Trek” fan fiction, see JOAN MARIE VERBA, *BOLDLY WRITING: A TREKKER FAN AND ZINE HISTORY 1967–1987* (2003), <http://www.ftlpublications.com/bwebook.pdf>.

*A. U.S. Copyright Law Foundations*

U.S. copyright law has its origins<sup>30</sup> in the Constitution itself—Article I, Section 8, Clause 8 has come to be known as the “Intellectual Property Clause”: “[giving Congress the power] . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>31</sup> Post-Constitution, there have been three major statutes enacted that formed the basis for dealing with the issue: the Copyright Acts of 1790,<sup>32</sup> 1909,<sup>33</sup> and 1976.<sup>34</sup> Arguably, the most significant reform of American copyright law came in 1976, when much of the previous legislation was amended in order to keep pace with the rapidly expanding technology of the latter half of the twentieth century.<sup>35</sup> Among the more noteworthy changes to the statutory framework was a lifetime-plus fifty years<sup>36</sup> protection period for copyright holders, and the enumeration of specific holders’ rights.<sup>37</sup> The 1976 Act also specified exactly what types of works

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30. For more information concerning the history of U.S. copyright, see generally *A Brief Introduction and History*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/circs/circ1a.html> (last visited Oct. 19, 2014).

31. U.S. CONST. art. I, § 8, cl. 8; COHEN ET AL., *supra* note 3, at 23.

32. See Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. Congress modeled the 1790 Act on the Statute of Anne, a British act that was the first to provide for copyright regulation by legislation, rather than private parties. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

33. See Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1075, 1080–81.

34. See 17 U.S.C. §§ 101–1332 (1976).

35. COHEN ET AL., *supra* note 3, at 26. Technology like the computer, personal printer, and VCR.

36. 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304(c)(2). Congress amended these provisions in 1998 by passing the Copyright Term Extension Act (CTEA). Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827–28 (1998). Commonly known as the Sonny Bono Act—or more derisively, the Mickey Mouse Protection Act, due to Disney’s extensive lobbying—the CTEA extended the basic term of copyright to encompass the author’s life and 70 years thereafter, or in the case of corporate authors, to the earlier of 120 years after creation or 95 years after initial publication. Many authors have criticized the CTEA as being overly limiting and protective, accusing it of having the potential to skew the balance between rights holders and the public domain. See generally Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057 (2001).

37. 17 U.S.C. § 106. These “exclusive rights” include reproduction, production of derivative works, distribution, public performance and display, and public performance by digital audiotransmission.



are eligible for protection,<sup>38</sup> expanding the scope of copyright protection from solely published works to any sort of “original works of authorship fixed in a tangible medium of expression.”<sup>39</sup> The doctrine of fair use was also codified in the 1976 Act, providing a categorical framework to be used when evaluating that defense to copyright infringement.<sup>40</sup>

As far as international copyright is concerned, however, the United States was not an original signatory to the Berne Convention, a broad treaty signed in 1886, which intended to offer multilateral protections and substantively high standards of copyright protection for all its signatories.<sup>41</sup> U.S. opposition to the Berne Convention was generally based on both a reluctance to offer protection for “moral rights,” as well as principles of “formalities” (such as mandatory publication of notice of copyright) within its own existent copyright law, which the country did not wish to reconcile with the more far-reaching provisions in the treaty.<sup>42</sup> Nonetheless, the United States eventually did sign on to the Berne Convention in 1989, implementing many of its provisions in the DMCA.<sup>43</sup> The 1976 Act is the basis for current U.S. copyright law. In concert with the rise of new technologies at that point in the century, however, issues continued to arise concerning copyright enforcement, leading toward what has been called an “ad hoc approach” to enforcement that began to skew in favor of copyright and intellectual property rights holders.<sup>44</sup>

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38. 17 U.S.C. § 102(a). The Act expressly enumerated the covered works, which includes literary, musical, dramatic, pantomime, choreographic, pictorial, graphic, sculptural, motion picture, sound recordings, and architectural works.

39. *Id.* On a related note, for additional information on the current state of law regarding the fixation and originality requirements, see generally *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511 (9th Cir. 1993).

40. 17 U.S.C. § 107. The 1976 Act set forth a four-factor test for courts to evaluate whether a given use fell within the fair-use exception, and those factors are as follows: the “purpose and character of the use . . . ; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the . . . work as a whole; and the effect of the use on the potential market.” *Id.*

41. COHEN ET AL., *supra* note 3, at 35.

42. *Id.*

43. See *infra* Part IV.

44. Kevin Newman, *Don't Copy That Floppy: The IP Enforcement Dilemma in the United States*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 191, 196 (2014).

*B. Canadian Copyright Law Foundations*

The original Canadian Copyright Act was enacted in 1924 (the “1924 Act”)<sup>45</sup> but, similar to the doctrine in the United States, the origins of copyright law in the Canadian context date back to the signing of its Constitution in 1867.<sup>46</sup> The 1924 Act’s codification was the first major piece of copyright legislation in the nation’s history<sup>47</sup> and represented a shift away from both the U.K.-based system<sup>48</sup> that the country had previously been beholden to, and the U.S. model.<sup>49</sup> Notably, Canada’s adherence to the Berne Convention was presumed from the get-go: as a Commonwealth country, Canada was bound to the treaty when the United Kingdom signed in 1886, and Canada specifically implemented portions of the Berne Convention in 1928, during the process of distinguishing its own legislation from British origins.<sup>50</sup> Due to the United States’ nonparticipation in the Berne Convention until 1989, Canada came to be at both an advantage and a disadvantage by neighboring a non-Berne nation. Copyrighted-content producers in Canada were afforded protections by the Convention insofar as their rights would be recognized internationally, but this was balanced by restricting Canadian access to U.S. works in terms of being able to license foreign reprints.<sup>51</sup>

Copyright law in Canada was not amended significantly until 1988, when Bill C-88 was introduced in order to deal with emerging issues regarding piracy, computers, and digital technology. It was meaningfully amended once again in 1996, when Bill C-60 provided updates such as abolishing compulsory license practices for sound recordings and affording protection to

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45. Jay Makarenko, *Copyright Law in Canada: An Introduction to the Canadian Copyright Act*, MAPLE LEAF WEB (Mar. 13, 2009), <http://www.mapleleaf-web.com/features/copyright-law-canada-introduction-canadian-copyright-act#history>.

46. As a matter of “greater certainty,” the Canadian Constitution enumerates specific areas of law as being governed by the Federal government, as opposed to by the legislatures of the individual provinces. Constitution Act, 1867, 30 & 31 Vict., c. 11, § 91 (U.K.).

47. *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 43, 68 (Can.).

48. Insofar as this was Canada’s first statute specifically dedicated to the administration of copyright law. See Makarenko, *supra* note 45.

49. *Id.*

50. *Id.*

51. *Id.*

choreographic works.<sup>52</sup> At the close of the twentieth century—just after Canada signed the World Intellectual Property Organization (WIPO) Copyright Treaty and its counterpart Performances and Phonograms Treaty<sup>53</sup>—Canadian copyright law was significantly amended<sup>54</sup> to include a number of “fair dealing” exemptions.<sup>55</sup> The amendments also include many distinguishing differences between U.S. policies and Canadian copyright practices, particularly concerning the scope of works that are protected under the current Copyright Act,<sup>56</sup> differing stances as to registration of copyright,<sup>57</sup> distinct codification of moral rights,<sup>58</sup> and an adoption of the 1961 Rome Convention in order to protect “neighbouring rights.”<sup>59</sup>

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52. Moya K. Mason, *How to Trace Bill C-32 and its Legislative History*, MOYAK.COM, <http://www.moyak.com/papers/tracing-government-bills.html> (last visited Nov. 16, 2014).

53. WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

54. An amendment to the Canadian Copyright Act also passed in 1993 (Bill C-88), though this earlier amendment primarily concerned clarification of the definition of “musical works,” as well as royalty liability for certain transmitters, and has been qualified as “insubstantial” by some scholars. See *History of Copyright in Canada*, GOV'T OF CAN., <http://canada.pch.gc.ca/eng/1454685408763> (last visited May 24, 2016); see also Rosemary Coombe et al., *Introducing Dynamic Fair Dealing: Creating Canadian Digital Culture*, in *DYNAMIC FAIR DEALING: CREATING CANADIAN CULTURE ONLINE 9* (Rosemary J. Coombe et al. eds., 2014).

55. See *An Act to Amend the Copyright Act* (Bill C-32), S.C. 1997, c. 21-29 (Can.).

56. In Canada, protected works must fall into one of four categories: (1) literary works, (2) dramatic works, (3) musical works, and (4) artistic works. See Bob H. Sotiradis, *A Summary of Some Distinctions Between Canadian and American Copyright Law and Practice* (Aug. 1998), <http://www.robic.ca/admin/pdf/584/228-BHS.pdf>.

57. Registering a copyright is not necessary for protection in either country, but in the United States registration is required in order to pursue an infringement action. *Id.* at 5-6.

58. The only moral rights provided for in the United States are for visual arts under the Visual Artists Rights Act (VARA), whereas Canadian copyright holders retain the ability to be protected in terms of association and integrity rights concerning all copyrighted works. For more information on VARA, see generally 17 U.S.C. § 106A (2012); Rachel A. Camber, *A Visual Art Law You Had Better Not Overlook*, FLA. B.J., May 1999, at 69.

59. Sotiradis, *supra* note 56, at 43-44. Neighboring rights protect publishers, producers, performers, and broadcasters who do not hold stake in the direct copyrighted work.

Between 1997, when Canada signed on to the WIPO Treaty, and prior to enacting the CMA,<sup>60</sup> Canada was described as having a statutory framework “in which laws to address digital piracy are weak, ineffective, or non-existent,”<sup>61</sup> leading toward Canada’s placement on the United States’ “Special 301” reports, which identify “areas of continued concern” for the U.S. Department of Trade in regards to piracy and “intellectual property rights protection and enforcement.”<sup>62</sup> While the United States passed the DMCA in order to deal with recent technological developments, Canada’s copyright law seemed to be in need of a complete overhaul.

### III. THE DMCA: NEW MILLENNIUM, NEW TECHNOLOGIES, AND NEW LEGISLATION

Much ink has been spilled on the DMCA. As a sweeping piece of copyright reform legislation, the Act was the first broad effort by the U.S. Congress to consider the implications of digital technology on copyright law. This Part will investigate both the DMCA’s impact on anticircumvention, as well as the new safe harbor provisions that were included in that legislation, and provide examples of relevant case law arising from the DMCA.

#### A. *The DMCA*

In 1998, the U.S. Senate unanimously passed the DMCA in efforts to modernize U.S. copyright law,<sup>63</sup> which had not undergone such significant change since the implementation of the 1976 Act. The DMCA, which implemented portions of the 1996 WIPO treaties,<sup>64</sup> dramatically modified the 1976 Act in order to “conform to almost every international intellectual property

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60. To be discussed in greater detail *infra* Part IV.A.

61. Barry Sookman, *Copyright Reform for Canada: What Should We Do?*, 11 ONE ISSUE, TWO VOICES, Sept. 2009, at 3, 4.

62. OFFICE OF THE U.S. TRADE REP., 2014 SPECIAL 301 REPORT (2014) [hereinafter 2014 SPECIAL 301 REPORT], <http://www.ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf>.

63. Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860, 2877–86 (1998) (codified as amended at 17 U.S.C. §§ 512, 1201–1205, 1301–1322 (2012)); see also COHEN ET AL., *supra* note 3, at 661–62.

64. WIPO Copyright Treaty, *supra* note 53; WIPO Performances and Phonograms Treaty, *supra* note 53.

treaty created since the late nineteenth century.”<sup>65</sup> The specific provisions of the DMCA, however, do not take verbatim the contents of the WIPO treaties. The DMCA includes limitations as reining in the Berne Convention’s<sup>66</sup> broader definitions of protection, as well as stipulating that the provisions of the WIPO Performances and Phonograms Treaty would only apply to musical works in the United States.<sup>67</sup>

The DMCA sought, among other objectives, to provide a framework for dealing with piracy in the age of the rapidly growing Internet.<sup>68</sup> One of the more discussed sections of the DMCA is the “Anti-Circumvention Provisions,”<sup>69</sup> wherein Congress explicitly prohibited circumvention of any technological measures used to control access to copyrighted works.<sup>70</sup> The statute goes even further in restricting dissemination of such materials, insofar as it prohibits any persons from participating in the “manufacture, import[ing], offer[ing] to the public, provid[ing], or otherwise traffic[king] in any technology, product, service, device [or] component” that primarily serves to circumvent the aforementioned technological protections.<sup>71</sup> Statutory civil damages for violation of the anti-circumvention provision may reach as high as \$25,000 USD,<sup>72</sup> with criminal penalties stretching up to \$1,000,000 USD or ten years imprisonment for willful violations

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65. Newman, *supra* note 44, at 197.

66. The Berne Convention is a prototypic international copyright treaty that the United States did not recognize until implementation of the WIPO Treaties. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 24, 1971 and *as amended* Sept. 28, 1979, 1161 U.N.T.S. 30 (entered into force in the United States Mar. 1, 1989).

67. 17 U.S.C. § 104(d). For a more in-depth discussion on the relationship between the WIPO Treaties and the DMCA, see COHEN ET AL., *supra* note 3, at 662.

68. See generally COHEN ET AL., *supra* note 3, at 661; David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of The DMCA's Commentary*, 23 CARDOZO L. REV. 909 (2002).

69. See 17 U.S.C. § 1201; see, e.g., Chamberlain Grp. v. Skylink Tech., Inc., 381 F.3d 1178 (Fed. Cir. 2004); Dan L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, 74 FORDHAM L. REV. 537 (2005); Herbert J. Hammond et al., *The Anti-Circumvention Provisions of the Digital Millennium Copyright Act*, 8 TEX. WESLEYAN L. REV. 593 (2002).

70. 17 U.S.C. § 1201(a).

71. *Id.* § 1201(b).

72. *Id.* § 1203(c)(3).

with the purpose of “commercial advantage or private financial gain.”<sup>73</sup>

Though the DMCA’s anti-circumvention provisions are restrictive—insofar as the potential liabilities for violating the Act are severe enough to certainly deter at least some content sharers from proliferating technologies that flout copyright protection mechanisms—they are mitigated in no small part by a number of enumerated exceptions. Concessions are provided for researchers, minors, security testing, and government agents, along with certain other categories of users.<sup>74</sup> Interestingly, there is also an exemption for “protection of personally identifying information.”<sup>75</sup> The inclusion of provisions that protect personally identifying information might suggest that the drafters of the DMCA aimed for the statute to insulate private infringers to some degree, allowing narrower readings of that provision.

The presence of these enumerated exceptions, as well as of safe harbor provisions that limit liability of the content provider for supplying copyright-protected information so long as the discretion of users is involved,<sup>76</sup> has led some authors to consider that “harsh enforcement is not the aim of the legislation.”<sup>77</sup> However, there has been strong critical backlash against the DMCA.<sup>78</sup> Although many provisions of the DMCA were “initially intended to curb mass copying,”<sup>79</sup> the potential for abuse and even for unnecessary censorship is great, enough for some to fear a chilling effect on innovation due to the broad amount of control that might be exerted upon users of information systems.<sup>80</sup> In the last decade and a half, scholars, legislators, and lawyers have failed to come to a uniform consensus on ways to interpret the DMCA in a manner that is effective in both protecting users’ rights as well as a robust public domain.<sup>81</sup> Since the DMCA was enacted,

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73. *Id.* § 1204.

74. *Id.* § 1201(d)–(j).

75. *Id.* § 1201(i).

76. *See id.* § 512.

77. Newman, *supra* note 44, at 198.

78. *See, e.g.,* Amy E. McCall, *The DMCA and Researchers’ First Amendment Rights*, 3 U. PITT. J. TECH. L. & POL’Y 1 (2002).

79. JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 8 (2006).

80. Macklem, *supra* note 21, at 269.

81. *See* Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA’s Anti-Device Provisions*, 19 HARV. J. L. & TECH. 111 (2005).

numerous cases arising under that statute have been instructive in interpreting its more controversial elements.

### *B. The DMCA Cases*

The following three cases were notable explications of DMCA jurisprudence—and naturally, the rulings have been fraught with controversy. The speed of advancing technology coupled with a statutory framework allowing broad interpretation has provided for sometimes unpredictable results in cases that arise under the DMCA.

#### 1. *Viacom v. YouTube*

In terms of establishing concrete notions of contributory liability as pertaining to digital content providers, *Viacom v. YouTube*<sup>82</sup> provides extremely important insight into current interpretations of the DMCA safe harbor provisions. The media conglomerate Viacom filed suit against YouTube, alleging that the online video content service had engaged in copyright infringement by allowing its users to both view and upload copyright-protected materials.<sup>83</sup> The District Court granted summary judgment to YouTube on the theory that YouTube could not have satisfied the DMCA's requirement<sup>84</sup> that the service provider had to have been on notice and had "the right and ability to control" the infringing activity in question.<sup>85</sup> On appeal to the Second Circuit, the District Court's determination regarding the safe harbor provision of the DMCA was reversed. Instead of the lower court's interpretation that "item-specific knowledge" prompted the inquiry into YouTube's "right and ability to control" the material,<sup>86</sup> the Second Circuit panel went a step further. The Second Circuit panel held that there needed to be further inquiry into YouTube's "ability to remove or block access to materials posted on [its] website,"<sup>87</sup> and remanded the case, instructing the District Court to determine whether or not

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82. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

83. *Id.*

84. 17 U.S.C. § 512(c)(1)(B) (2012).

85. *Viacom Int'l v. YouTube Int'l*, 718 F. Supp. 2d 514, 527–29 (S.D.N.Y. 2010), *aff'd in part, vacated in part*, 676 F.3d 19 (2d Cir 2012).

86. *Viacom*, 676 F.3d at 36.

87. *Id.* at 38.

YouTube was aware of “something more” than the ability to control, remove, or deny access to the protected material in question.<sup>88</sup>

Though the case later settled out of court, *Viacom* is instructive in determining that fact-specific inquiries are necessary to determine the scope of copyright infringement as it relates to service providers. This case provides a good benchmark and indication that it will be difficult in the future for providers to neatly fit into a category of safe harbor protection.<sup>89</sup> “Something more” than the right and ability to control, however, remains both a vague and definition-less standard. It seems that in the DMCA age, due to the fact that the onus is largely on the users of the websites to self-police, and that there is no automatic secondary liability for the service provider, *Viacom* will stand as a case that strikes a balance between the theoretical models of free content dissemination and copyright holders’ entitlements.

## 2. Ouellette v. Viacom

*Ouellette*<sup>90</sup> is unique in DMCA jurisprudence. After the plaintiff’s videos were removed from YouTube after it was notified of potentially copyright-infringing material by Viacom, Ouellette sued Viacom under the DMCA’s section 512(f), which details that any knowing misrepresentations relating to infringing materials, or materials removed (or alternatively, “taken down”) by the content host are actionable.<sup>91</sup> The court, after determining that the proper notice-and-takedown procedure was followed,<sup>92</sup> noted that there is a “high standard” for a section 512(f) claim, which must involve a subjective determination of whether the takedown notice was issued “in good faith.”<sup>93</sup> Ouellette’s claim was dismissed on the grounds that he did not plead facts at the

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88. *Id.*

89. Brett M. Jackson, Comment, *Searching for “Something More”: Viacom Interprets the Control Provision of The DMCA §512(C) Safe Harbor*, 54 B.C. L. REV. E-SUPPLEMENT 85, 93–94 (2013).

90. *Ouellette v. Viacom Int’l, Inc.*, No. CV–10–133–M–DWM–JCL, 2012 WL1435703 (D. Mont. 2011).

91. *Id.* at \*1–2; 17 U.S.C. § 512(f) (2012).

92. Whereupon the copyright holder informs the content host of infringing activity, after which the host removes the infringing material.

93. *Ouellette*, 2012 WL1435703, at \*3–4.



outset of his argument that were sufficient to establish that Viacom acted in bad faith.<sup>94</sup>

In terms of analyzing *Ouellette* alongside recent developments in Canadian copyright law, the case may stand for the proposition that the notice-and-takedown provision of the DMCA<sup>95</sup> is too broad, at least when it comes to misrepresentation. Because *Ouellette* had such a high standard to reach in pleading his claim, it seems that it would have been *per se* impossible for him to establish any kind of bad faith on Viacom's part before the videos at issue were taken down. The Canadian notice-and-notice solution<sup>96</sup> might have the potential to afford a plaintiff like *Ouellette* the opportunity to inquire in greater detail as to the strength of his claim before resorting to litigation.<sup>97</sup>

### 3. Sony BMG Music Entertainment v. Tenenbaum

A further concern with the provisions of the DMCA is that the statutory damages imposed for infringement have the potential to be enormous. In addition to the \$1,000,000 penalties possible for criminal infringement of the anti-circumvention provisions,<sup>98</sup> provisions are built into the "Remedies" section of the Act that allow parties infringed upon to recoup statutory damages, at a minimum of \$750 and maximum of \$30,000 per instance of infringement.<sup>99</sup> That figure rises to a maximum of \$150,000 per instance of infringement if such infringement is proven to have been willful.<sup>100</sup> These elements of the DMCA were at the heart

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94. *Id.* Viacom allegedly acted in bad faith because it used a technological scanning device in attempt to identify potentially infringing videos, rather than specific searches for the content at question. Therefore, the notice portion of the DMCA provisions was defective.

95. Notice-and-takedown is the DMCA-outlined process by which a content owner provides the Internet service provider with good-faith notice of potentially infringing material posted by a third party, whereupon the provider promptly must "take down" the material.

96. In which the copyright holder notifies the provider, who then notifies the user that he or she must remove the infringing material. See Michael Geist, *The Effectiveness of Notice and Notice* (Feb. 15, 2007), <http://www.michaelgeist.ca/content/view/1705/125/>.

97. For a more detailed argument in favor of a Canadian notice-and-takedown regime, as well as a counterargument for a notice-and-notice based system, see Sookman, *supra* note 61, at 8–9.

98. See *infra* Part IV.

99. 17 U.S.C. § 504(c) (2012).

100. *Id.*

of a 2010 decision that dealt with the unfortunate example of a major recording company taking action against a student for willful infringement of copyright.<sup>101</sup>

In *Sony BMG Music Entertainment v. Tenenbaum*, the defendant admitted to using computer programs to download and share songs copyrighted and owned by Sony BMG. Thirty particular recordings were in question in the action.<sup>102</sup> Plaintiffs sought statutory damages instead of actual damages as a remedy in this suit, and the jury awarded \$22,500 per song, adding up to a total of \$675,000.<sup>103</sup> Tenenbaum challenged the award under the due process clause, arguing that such damages were excessive and disproportionate to the harm suffered by the plaintiffs.<sup>104</sup> Tenenbaum was successful in the District Court, where the judge reduced the damages to \$67,500 after taking into account calculations such as the online market prices for the downloads.<sup>105</sup> Judge Gertner reasoned that the legitimate government interest in preventing illegal file sharing over the Internet was entirely disproportionate to the massive statutory award granted by the jury.<sup>106</sup> On appeal to the First Circuit, however, the original award was reinstated. The Court of Appeals ruled that the District Court should not have decided the constitutionality of the jury award before considering the doctrine of remittitur.<sup>107</sup> Therein, the actual constitutionality of the award was not really considered on its merits by the appellate court.

*Tenenbaum* stands for the proposition that imposing statutory damages for proven willful copyright infringement are valid, yet at the same time, have great potential to violate considerations of due process. Though the DMCA sought overall to modernize U.S. copyright law, cases like *Viacom*, *Oulette*, and *Tenenbaum* illustrate the difficulties, moral dilemmas, and room for error in interpreting its many subsections. The Act has been criticized from a number of angles. Nevertheless,<sup>108</sup> since technology is not

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101. *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass 2010), *aff'd in part, vacated in part*, 660 F.3d 487, 509 (1st Cir. 2011).

102. *Id.* at 87.

103. *Id.*

104. *Id.* at 91.

105. *Id.* at 101, 117–18.

106. *Id.* at 121.

107. *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 509 (1st Cir. 2011). Remittitur is the process by which a judge may lower jury-imposed damages in civil actions.

108. See, e.g., Schaffner, *supra* note 2.

static, the law must adapt, and consequently both the Canadian and U.S. governments came to craft further updated statutes that came to fruition in 2012.

#### IV. NEW FRONTIERS: THE CMA AND SOPA

In the aftermath of the DMCA and its resulting litigation, both Canada and the United States contemplated additional copyright reforms. Though only the Canadian bill has become law, the influence of both the CMA and SOPA have been pervasive and controversial in recent years. This Part will review the digital locks and notice-and-notice provisions of the CMA, as well as Canada Supreme Court decisions handed down after the CMA. It will move on to a critique of SOPA's restrictive provisions. It is apparent that the two pieces of legislation track each other in many ways, generally leading to less user-friendly copyright doctrines in both countries.

##### *A. The CMA: A "Canadian-Bred" Solution*

The CMA was Canada's long-debated response to the DMCA and a carefully crafted response in compliance to the WIPO treaties.<sup>109</sup> The legislation incorporates many modifications to Canada's Copyright Act,<sup>110</sup> the most relevant being the digital-locks provisions and the notice-and-notice provision, along with its cap on statutory damages.

##### 1. Canadian Digital Locks

Of particular controversy in the CMA are the provisions regarding digital locks.<sup>111</sup> According to the Canadian government's official "Balanced Copyright" information, the new legislation "makes it illegal to circumvent or bypass technology . . . used to prevent unauthorized access to copyrighted material."<sup>112</sup> At first blush, this language seems analogous to the DMCA. Upon closer inspection, however, the unique nature of the Canadian law comes to light.

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109. Copyright Modernization Act (Bill C-11), S.C. 2012, c. 20, pmbl. (Can.).

110. Canada's copyright act was last substantially amended in 1997 with Bill C-32. *See supra* Part III.B.

111. Copyright Modernization Act (Bill C-11), S.C. 2012, c. 20, s. 41 (Can.).

112. *What the Copyright Modernization Act Says About Digital Locks*, GOV'T OF CAN., <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/rp01182.html> (last visited May 26, 2016); Geist, *supra* note 96.

To briefly recap the U.S. legislation for the sake of comparison, the DMCA's anti-circumvention provisions give rise to liability for individuals who circumvent access controls to copyrighted materials,<sup>113</sup> as well as liability for individuals who make or sell devices that either circumvent such access controls,<sup>114</sup> or allow users to circumvent access controls in order to exercise exclusive rights granted to copyright owners.<sup>115</sup> That statute did not go so far as to incorporate a provision that bans circumvention of access controls designed to prevent exclusive right violations. Therefore, according to the DMCA, it would not be illegal, for example, for a user to circumvent a digital lock designed to allow reproduction of a copyrighted work.

As far as the Canadian Copyright Act is concerned in the post-CMA era, circumvention of technological protection measures is a direct copyright infringement in its own right. There does not need to be a second step or an "underlying infringement" in order to for a violation to occur.<sup>116</sup> Circumvention without an underlying infringement may give rise to a legal claim. This provision is restrictive because it criminalizes the first step in infringement, rather than the actual infringement itself.<sup>117</sup> At the time the CMA was introduced, its digital-locks provisions caused outrage among many Canadian lawmakers<sup>118</sup> and scholars,<sup>119</sup> and have since remained some of the most contentious elements of the legislation.

## 2. Notice-and-Notice and User-Generated Content

The notice-and-notice provision of the CMA has been described as a "Canadian-bred solution"<sup>120</sup> to the issue of how to properly provide Internet service providers and websites with an appropriate scheme for dealing with potential copyright violations. As

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113. 17 U.S.C. § 1201(a)(1) (2012).

114. *Id.* § 1201(a)(2).

115. *Id.* § 1201(b).

116. Copyright Modernization Act (Bill C-11), S.C. 2012, c. 20, s. 41.1 (Can.).

117. Chapdelaine, *supra* note 27, at \*21.

118. Canada, Parliament, *House of Commons Debates*, 41st Parl., 1st Sess., Vol. 134, No. 34 (Oct. 21, 2011), <http://www.parl.gc.ca/content/hoc/House/411/Debates/034/HAN034-E.pdf>.

119. Carys Craig, *Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32*, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 177, 198 (Michael Geist ed., 2010).

120. *See, e.g.*, Geist, *supra* note 96.

opposed to the DMCA model,<sup>121</sup> the Canadian model requires owners of copyrighted material who discover infringing uses or infringement to notify the appropriate Internet service provider, who then has the onus to both forward the notice to the infringing user and monitor that user's online activities for a period of time afterward.<sup>122</sup> This allows a *prima facie* intermediary period wherein users' rights are not immediately impinged upon; due process is generally accepted to be better protected by such a system where the user has an opportunity to remove the content him or herself before litigation or other consequences may commence.<sup>123</sup> Notice-and-notice, unlike the relatively restrictive digital-locks provisions of the CMA, has garnered support from the online community, with some of Canada's leading copyright and privacy scholars arguing that the system does an adequate job balancing the interests of the copyright holders as well as those of the content owners.<sup>124</sup> Nonetheless, the strategy is not without critics, who argue that the U.S. notice-and-takedown strategy is "necessary" to regulate files that are hosted by the Internet service providers at issue.<sup>125</sup>

Though the CMA has still been criticized as a restrictive piece of legislation,<sup>126</sup> the Act has incorporated other progressive elements, particularly in the realm of user-generated content.<sup>127</sup> Section 29.21 of the amended Canadian Copyright Act (post-CMA) codifies an exception for individuals to utilize—without necessarily obtaining permission from the owners—copyright-protected works when creating a new work, so long as that new work satisfies a number of qualifications.<sup>128</sup> Notably, one of the

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121. Wherein Internet service providers must directly "take down" potentially infringing content posted by users upon proper notice by copyright owners. See generally 17 U.S.C. § 512(c)(1)(a)(iii) (2012); Liliana Cheng, *The Red Flag Test for Apparent Knowledge Under the DMCA §512(C) Safe Harbor*, 28 CARDOZO ARTS & ENT. L.J. 195 (2010).

122. Copyright Modernization Act (Bill C-11), S.C. 2012, c. 20, s. 41.25–26 (Can.).

123. Nathan Irving, *Copyright Law for the Digital World: An Evaluation of Reform Proposals*, 10 ASPER REV. INT'L BUS. & TRADE L. 141, 159 (2010).

124. See, e.g., Geist, *supra* note 96; Michael Geist, *Canada's Digital Economy Strategy: Towards an Openness Framework*, 8 CAN. J. L. & TECH. 275 (2010).

125. Sookman, *supra* note 61.

126. See, e.g., Chapdelaine, *supra* note 27.

127. Online content created by users such as fan-fiction or YouTube videos. See *supra* Part II.

128. Copyright Modernization Act (Bill C-11), S.C. 2012, c. 20, s. 21.29 (Can.).

criteria is that the new work must be used solely for noncommercial purposes.<sup>129</sup> The exception has been characterized as “unprecedented.”<sup>130</sup> The potential effect of the user-generated content exception cannot be understated. In terms of generating content for personal websites, blogs, and other not-for-profit considerations, the CMA has considerably loosened the restraints on content creators. The number of factors that must be satisfied before the exception actually kicks in, however, may prove to limit its practical application.<sup>131</sup> Nonetheless, this specific provision of the CMA substantially advances the Canadian model insofar as it has clearly taken care to attempt reformation of one of the issues that has been the most contentious in U.S. copyright litigation post-DMCA.<sup>132</sup>

### 3. The Copyright Pentology and its Implications

On July 12, 2012—just two weeks after the CMA received royal assent<sup>133</sup>—the Supreme Court of Canada handed down five separate copyright-related decisions, an unprecedented move given that the Court rarely chooses to hear copyright cases.<sup>134</sup> The cases have been termed “the Copyright Pentology” by Dr. Michael Geist,<sup>135</sup> widely renowned as one of Canada’s leading experts on copyright law.<sup>136</sup> Though the Court spoke on four distinct issues, the two cases that consider fair dealing as a primary issue are particularly relevant.<sup>137</sup> Though functionally equivalent to the U.S. doctrine of fair use insofar as it is an affirmative

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129. The other provisions are that the new work gives attribution to the original author, uses a noninfringing copy in creating the new work, and does not have an adverse effect on the original.

130. Turnbull, *supra* note 26, at 222.

131. See, e.g., Chapdelaine, *supra* note 27.

132. See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

133. Copyright Modernization Act (Bill C–11), S.C. 2012, c. 20, pmbl. (Can.).

134. Michael Geist, *Introduction*, in *THE COPYRIGHT PENTOLGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* iii (Michael Geist ed., 2013).

135. *Id.*

136. See Michael A. Geist, CAN. RES. CHAIRS (Nov. 26, 2013), <http://www.chairs-chaires.gc.ca/chairholders-titulaires/profile-eng.aspx?profileId=840>.

137. The other three cases have to do with (1) the meaning of the word “communicate” in the context of “public telecommunication” in the Canadian Copyright Act (*Entm’t Software Ass’n v. Soc’y of Composers, Authors and Music Publishers of Can.*, [2012] 2 S.C.R. 231 (Can.)); (2) the meaning of the phrase

defense to copyright infringement,<sup>138</sup> fair dealing nonetheless differs primarily because the doctrine requires the use to be one of five specifically enumerated categories: “research, private study, education, parody, or satire.”<sup>139</sup> A two-step process is used to find fair dealing; the work must first fit into one of the enumerated categories and, only after a determination as such, it must be assessed whether the dealing was fair or not.<sup>140</sup>

In *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v. Bell*, the Supreme Court of Canada decided unanimously that listening to snippets of musical compositions on music purchasing software services (such as iTunes) qualifies as research and is permissible under Canadian standards of fair dealing.<sup>141</sup> Analysts have pointed to the fact that in arriving at its holding in *Bell*, the Court both lowers the required threshold for an act to qualify as research<sup>142</sup> and takes a “balanced approach” to the fair dealing concept, wherein the use is expanded from the country’s previous approach, but still does not reach as wide as the United States’ latitude in fair use.<sup>143</sup> Ostensibly, the defense is marginally narrower than the U.S. model because there still remains (at least as far as the text of the statute is concerned) the primary step of fitting the use into one of the prescribed categories. Nonetheless, *Bell* can be seen not only as a clarification of fair dealing standards in the digital age, but also as an example of the Court taking a firm stance in favor of users rights, leading critics to evince a more advantageous balance of rights for copyright consumers rather than creators.<sup>144</sup>

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“to the public” in the same section of the Act (*Rogers Commc’ns Inc. v. Soc’y of Composers, Authors and Music Publishers of Can.*, [2012] 2 S.C.R. 283 (Can.)); and (3) interpretation of the word “sound recording” in the context of synchronization to video, in film soundtracks, for example (*Re:Sound v. Motion Picture Theatre Ass’ns of Can.*, [2012] 2 S.C.R. 376 (Can.)). For more information, see Cameron J. Hutchinson, *The 2012 Supreme Court Copyright Decisions & Technological Neutrality*, 46 U.B.C. L. REV. 589 (2013).

138. For the four U.S. fair use factors, see *supra* note 40.

139. Copyright Act, R.S.C. 1985, c. C-42, s. 29 (Can.). The secondary work must also adequately cite the source material, following the explicit terms of the statute. *Id.* s. 29.1-2.

140. Iona Harding, *Five Decisions in One Day: The Supreme Court of Canada Takes on Copyright Law*, 8 J. INTELL. PROP. L. & PRAC. 59, 64 (2013).

141. *Soc’y of Composers, Authors and Music Publishers of Can. v. Bell Can.*, [2012] 2 S.C.R. 326, at paras. 6, 13, 20-25, 28 (Can.).

142. Hutchinson, *supra* note 137, at 606.

143. Harding, *supra* note 140, at 65.

144. Hutchinson, *supra* note 137, at 603-06.

Similarly to *Bell*, the Supreme Court in *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright)*<sup>145</sup> interpreted the fair dealing provisions of the Copyright Act. However, the particular element focused on was that of “private study”: the Court had to decide the standard of copyright liability arising when teachers supplied their students with photocopies of textbooks and other educational materials.<sup>146</sup> Focusing on the fact that purchasing hard-copy textbooks for each individual student was not a reasonable alternative to photocopies, the Court ultimately held that when teachers provide students with photocopies of excerpts from books and textbooks for class, they facilitate the “private study” of students.<sup>147</sup> Again, the standard of what is allowable under fair dealing was broadened—analogously to *Bell*, post-*Alberta (Education)*, there is a “low threshold” to attain as far as the five enumerated categories of fair dealing are concerned.<sup>148</sup>

Perhaps, both *Bell* and *Alberta (Education)*—possibly, the whole pentalogy—reflect an attempt by the Supreme Court of Canada to broaden the more restrictive copyright goals advanced in the CMA. Characterized as “liberal, consumer-friendly”<sup>149</sup> approaches to copyright reform, the pentalogy decisions relating to fair use represent a move toward a more user-based copyright economy. In the wake of the CMA, it seems as though the standards for clarification of Canadian copyright law have ample potential to grow much broader, at least in terms of judicial interpretation. An interesting wrinkle to the situation could be that the Supreme Court has tended to lean liberal in recent years, frequently deciding against the Conservative government, even with its parliamentary majority that has been in place since 2011.<sup>150</sup> There is even a possible argument for the

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145. *Alberta (Minister of Education) v. Can. Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345, at para. 1 (Can.).

146. Copyright Act, R.S.C. 1985, c. C-42, s. 29 (Can.).

147. *Alberta (Minister of Education)*, 2 S.C.R. 345 at para. 23. Justice Abella noted that “private” does not necessarily mean “in isolation,” rather, the concepts of studying and learning are “essentially personal endeavours.” *Id.* at para. 27.

148. Samuel E. Trosow, *Fair Dealing Practices in the Post-Secondary Education Sector After the Pentalogy*, in *THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 213, 224 (Michael Geist ed., 2013).

149. Harding, *supra* note 140, at 67.

150. See *Map of Official Results for the 41st General Election*, *supra* note 11.



Court actively attempting to restrain the conservative federal government. The Court has sided against the recently-departed Harper administration on many issues;<sup>151</sup> theoretically, whether the Supreme Court (or any court, for that matter) leans conservative or liberal should not be a factor when considering judicial impartiality, but decisive votes certainly would sway statutory interpretation in either direction—notably here, in the context of copyright.<sup>152</sup> It seems that in the wake of the CMA and the copyright pentalogy decisions, judicial interpretation of recent restrictive copyright legislation is providing a path in Canada toward broadening the exceptions to the rules. The impact of the late 2015 majority election of Liberal-party Prime Minister Justin Trudeau,<sup>153</sup> however, has yet to be realized in the area of copyright: Canada could still be facing major changes in the near future with respect to many areas of legislative reform.

### *B. SOPA: A Disproportionate Response to Infringement?*

In 2011, after much anticipation, the controversial intellectual property bills SOPA and PIPA were introduced, respectively, to the U.S. House of Representatives and Senate.<sup>154</sup> Though the proposed statutes were “essentially, two versions of the same anti-piracy bill,” this Note focuses on SOPA.<sup>155</sup> SOPA’s stated purpose was to “promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property,”<sup>156</sup>

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151. For a more in-depth discussion of the unique ongoing tension in recent years between the Harper administration and the Supreme Court of Canada, see Priya Sarin, *Harper Takes a Swing at the Supreme Court After Losing Yet Another Case*, RABBLE.CA (May 27, 2014), <http://rabble.ca/columnists/2014/05/harper-takes-swing-supreme-court-after-losing-yet-another-case>.

152. See Margaret Ann Wilkinson, *The Context of the Supreme Court’s Copyright Cases*, in *THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 71 (Michael Geist ed., 2013).

153. Ian Austen, *In Canada, Stunning Rout by Trudeau*, N.Y. TIMES, Oct. 20, 2015, at A1.

154. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011).

155. SOPA and PIPA are substantively the same: the bills were named differently in each house of government. See Andrew Couts, *SOPA vs. PIPA: Anti-Piracy Bills, Uproar Explained*, DIGITAL TRENDS (Jan. 16, 2012), <http://www.digitaltrends.com/computing/sopa-vs-pipa-anti-piracy-bills-uproar-explained/>.

156. H.R. 3261.

which was given a chilly reception by the greater online community.<sup>157</sup> Primarily, a contentious point of SOPA was the section designed to “protect U.S. customers” by making websites that are “dedicated to theft of U.S. property” illegal.<sup>158</sup> The statute’s definition of these websites is quite broad in the sense that the statute may act in a way that would sweep in many sites that play no direct role whatsoever in the distribution of pirated content. SOPA designates an illicit site as one that “is marketed by its operator or another . . . for use in, [or for] offering goods or services in a manner that engages in, enables, or facilitates” any one of a number of forms of copyright infringement as defined in the Copyright Act.<sup>159</sup> The potential implications of implementing such an expansive provision are vast.

By creating such a far-reaching basis for finding copyright infringement, SOPA, as originally drafted, would allow legal action to be taken against conscious copyright infringers (for example, the direct-download and streaming website Megaupload before it was shut down<sup>160</sup> or a torrent-based client website like The Pirate Bay<sup>161</sup>), in addition to websites that merely aid users in infringement (for example, a service like the website “Watch Series Online,”<sup>162</sup> where the site in particular does not directly host any infringing content, but does provide the user with a bevy of links to tertiary websites that host the infringing content). The implications to this “facilitate” language, however, are tremendously concerning. If the logic is followed to the extreme, any search engine would be considered illegal under SOPA because a link (to a link, to another link, and so on) would eventually lead to a website providing infringing content, no matter how attenuated the connection.

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157. Wortham, *supra* note 4.

158. H.R. 3261 § 103(a)(1)(B).

159. *Id.*

160. For more information on the Megaupload case, see *United States of America v. Dotcom*, 2012 U.S. Dist. LEXIS 148114 (E.D.Va Oct. 5, 2012) (Trial Pleading).

161. PIRATE BAY, <http://piratebay.org> (last visited May 27, 2016). For more information on the U.S. legal system’s “inadequacy in dealing with issues presented by The Pirate Bay,” see Tara Touloumis, Comment, *Buccaneers and Bucks From the Internet: Pirate Bay and the Entertainment Industry*, 19 SETON HALL J. SPORTS & ENT. L. 253 (2009).

162. WATCH SERIES ONLINE, <http://watchserieshd.eu> (last visited Oct. 7, 2014).

For example, a Google search might turn up a *New York Times* article that contains links to websites that compile popular blogs. That site would in turn link to a particular blog itself, that blog linking again to another user's website, where a link from there to Watch Series Online, and lastly to another party might lead finally to infringing content. Every step in the chain has the potential to be liable for infringement under SOPA. It has been suggested that "[t]he core functionality of nearly every Internet website that involves user-generated content enables and facilitates infringement . . . . The entire Internet itself" could therefore satisfy SOPA's standards of copyright infringement.<sup>163</sup> This particular provision of SOPA gives the Act a particularly "slippery slope" feel; it seems that the drafters of the bill sought to push the limits of exactly how far-reaching enforcement could be, whether consciously or not.

The details of SOPA concerning the measures that Internet service providers must take to prevent illicit content are equally nonspecific in their scope. If a website is found to be displaying infringing content or "facilitating" the access of infringing content, the service provider must take "technically feasible and reasonable measures designed to prevent access by its subscribers" to foreign-based infringing content.<sup>164</sup> Regardless of whether or not the provision has noble purposes at its heart (presumably, to protect the domain of copyright holders), it is ultimately vague. "Technically feasible measures" could be an extremely slippery term that would necessarily lead to case-by-case, fact-specific inquiries that have the potential to both bog down the ostensible intended purpose of securing rights, as well as weigh heavily on courts to determine what measures might be coherently feasible, what may be perhaps unnecessary, and what may even be overbroad in the event of disputes.

A difficult question develops: What is the exact burden that a website must bear to block access to foreign infringers, and must it bear that burden even if the links are so attenuated that multiple clicks lie within the paths of the two? Again, in the case of a search engine, or a link-rich, non-U.S.-specific website like Fa-

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163. Mike Masnick, *The Definitive Post On Why SOPA and Protect IP Are Bad, Bad Ideas*, TECHDIRT (Nov. 22, 2011, 11:55 AM), <https://www.techdirt.com/articles/20111122/04254316872/definitive-post-why-sopa-protect-ip-are-bad-bad-ideas.shtml>.

164. Stop Online Piracy Act, H.R. 3261, 112th Cong. § 102(c)(2)(A)(i) (2011).

cebook or Twitter, the actual process of taking these “reasonable” measures might not seem so reasonable after all when the costs of operating any kind of foreign-reaching site would be outweighed by the responsibility to block access to so much content. Leading copyright scholars have suggested that requirements like the “technically feasible” language in that section of SOPA would unjustly burden websites that “have a tangential relationship to infringement but play an important role in the Internet economy.”<sup>165</sup> It is inherently unjust for Internet service providers to bear the burden of policing users’ browsing, sharing, and streaming habits. Even if the technology were in place for the providers to easily monitor infringing activities, SOPA would “upset the balance struck by existing digital copyright and chill the growth of social media sites that foster free expression.”<sup>166</sup>

Unsurprisingly, due to its restrictive nature, the online response to SOPA was cold.<sup>167</sup> Research suggests there had never previously been such a large-scale Internet protest prior to the House of Representatives’ consideration of the bill in 2011.<sup>168</sup> Across the Internet, SOPA’s many detractors shut down websites in objection to the bill, including the well-known Wikipedia blackout on January 18, 2012.<sup>169</sup> The potential chilling effects that SOPA can impose on the principle of worldwide, cross-border sharing and dissemination of information—arguably, one of the central tenets of the Internet in general—would be negated, or at the very least, severely compromised by restrictive interpretations of the statute across all of the United States’ jurisdic-

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165. Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTELL. PROP. 21, 22 (2013).

166. Anna S. Han, Comment, *Argh, Matey! The Faux-Pas of the SOPA*, 45 U. MICH. J. L. REFORM CAVEAT 45, 48 (2012).

167. Wortham, *supra* note 4.

168. See H.R. 3261.

169. Deborah Netburn, *Wikipedia: SOPA Protest Led 8 Million to Look Up Reps in Congress*, L.A. TIMES: TECH. (Jan. 19, 2012), <http://latimesblogs.latimes.com/technology/2012/01/wikipedia-sopa-blackout-congressional-representatives.html>.

tions. Though the legislation was tabled shortly thereafter, negotiations to reintroduce the bill have been ongoing since SOPA's introduction.<sup>170</sup>

#### V. LOOKING AHEAD: THE CANADA-U.S. TENSION

After the back-and-forth between the passing of the DMCA and the CMA, and the controversial proposal of SOPA, there still are distinct tenets in the laws—the laws enacted and those that merely were proposed—that continue to sit uncomfortably in the complex relationship between the United States and Canada. If the CMA was, in fact, a response to the DMCA, intended to bring Canada into the “Internet age,”<sup>171</sup> it seems to have fallen short in some respects—at least according to SOPA's stringent standards.

The tension between Canadian and U.S. copyright regimes dates back to the nineteenth century. Long before the advent of computers and of P2P technology, and just a mere thirty years after the invention of the first-ever commercially marketed typewriter,<sup>172</sup> the *New York Times* published an article that complained of “Canadian pirates” disseminating illegal copies of popular music of the day.<sup>173</sup> Of course, in 1897, the sheet music versions of popular music were at issue, as opposed to the current difficulties in regulating illegal downloads. These early infringing copies were sold at just 10 percent of the market rate for compositions through an ingenious scheme where a newspaper publisher would advertise a list of compositions. The prospective purchaser was able to pay per composition, and the royalties—instead of being sent to the true publisher of the composition—would be split between the newspaper (for advertising space) and the “pirate.”<sup>174</sup> Though technology since that time has

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170. Paul Kane, *SOPA, PIPA Votes to be Delayed in House and Senate*, WASH. POST: POL. (Jan. 20, 2012), [http://www.washingtonpost.com/blogs/2chambers/post/sopa-senate-vote-to-be-delayed-reid-announces/2012/01/20/gIQAprWVDQ\\_blog.html](http://www.washingtonpost.com/blogs/2chambers/post/sopa-senate-vote-to-be-delayed-reid-announces/2012/01/20/gIQAprWVDQ_blog.html).

171. Kevin P. Siu, *Technological Neutrality: Toward Copyright Convergence in the Digital Age*, 71 U. TORONTO FAC. L. REV., Spring 2013, at 76, 78.

172. Mary Bellis, *Typewriters*, ABOUT: MONEY, <http://inventors.about.com/od/tstartinventions/a/Typewriters.htm> (last updated Dec. 16, 2014).

173. Jared Moya, *Music Industry Angry Over Piracy From...1897?*, ZEROPAID (May 1, 2009), <http://www.zeropaid.com/news/86135/pic-music-industry-angry-over-piracy-from1897/>.

174. *Id.*

certainly undergone dramatic changes, the primary issue remains substantially similar: it seems that the United States' upstairs neighbor is perceived as a haven for media and information pirates, providing an easy space where rampant dissemination of copyright-protected materials is the norm.

Annually, the U.S. Department of Trade publishes a "Special 301 Report" aimed at a broad review of intellectual property regimes, protection, and enforcement globally; in certain years there is a discrete focus on the "continuing challenges of copyright piracy."<sup>175</sup> In 2012, Canada was placed on the "Priority Watch List," alongside countries such as China, Russia, and India.<sup>176</sup> The report criticized Canada for not fully addressing Internet piracy, among other issues such as border enforcement and trademark limitations.<sup>177</sup> The United States was not alone in condemning Canada's copyright framework; the European Union was concerned about Canada's "crucial weaknesses" as well.<sup>178</sup> Though it may have seemed incongruous that a nation with a well-developed history of intellectual property rights protection would have ended up on that list,<sup>179</sup> as of the writing of the report, Canada had not yet implemented the WIPO Copyright Treaties<sup>180</sup> that gave rise to the DMCA.

After the CMA passed in the Canadian legislature—but before that bill was signed into law—the 2013 Special 301 Report removed Canada from its "Priority Watch List," adding the country simply to its "Watch List," "welcoming" the passage of the CMA.<sup>181</sup> Though the subsequent 2014 Report kept Canada on the Watch List,<sup>182</sup> the language used in the report was decidedly warier of the nation's practices: "The United States urges Canada to implement its WIPO Internet Treaties commitments in a manner consistent with its international obligations and to continue to address the challenges of copyright piracy in the digital age."<sup>183</sup> Furthermore, the report noted that Canada engaged in

175. 2012 SPECIAL 301 REPORT, *supra* note 10, at 4.

176. *Id.* at 25–26.

177. *Id.*

178. Sookman, *supra* note 61, at 4.

179. *See supra* Part III.B.

180. *Id.*

181. OFFICE OF THE U.S. TRADE REP., 2013 SPECIAL 301 REPORT 10, 46 (2013), <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>.

182. 2014 SPECIAL 301 REPORT, *supra* note 62, at 49.

183. *Id.*

“commercial-scale [intellectual property rights] infringement,” both by means of websites hosted in Canada and users based in the country as well.<sup>184</sup>

There is clearly a concern on the part of the U.S. Department of Trade regarding adequate rights protection in Canada, but it has been argued that Canada’s copyright protection regime (even pre-CMA) was sufficiently strict; in some cases even more severe than the United States’.<sup>185</sup> Though the fear of international copyright piracy is certainly valid in many respects, stricter developments in copyright legislation like the CMA’s provisions having to do with digital locks and the circumvention of technological measures intended to protect copyrighted material will serve to assuage U.S. concerns that Canada will become a piracy haven. In fact, taking into account the relatively strong provisions in the CMA in conjunction with the restrictive nature of the failed SOPA legislation, it is continually becoming more and more clear that each country is taking steps to safeguard against any piracy whatsoever, and at the same time, curbing the efforts of creative producers that rely upon content-sharing to create their works.

In many ways, current Canadian legislation has grown to resemble an even more restrictive version of the controversial DMCA. The CMA’s provisions on anti-circumvention—the digital locks section—have become renowned for their restrictive nature.<sup>186</sup> Though SOPA was criticized for its harshness on many levels, the proposed statute did not incorporate any provisions that went as far as the CMA’s policy of not necessitating an underlying exclusive right infringement in order to find copyright infringement upon circumvention of technological protection measures.<sup>187</sup> Even though both enacted statutes set out numerous exceptions to liability based on different circumstances such

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184. *Id.* at 21.

185. Howard A. Knopf, *Why Canadian Copyright Law is Already Stronger and Better than that of the USA—And Why the USA Should Look in the Mirror Rather than at its “Special 301” Watch List* (2008), at 1–3, 5–6, [http://fordhamipconference.com/wp-content/uploads/2010/08/Howard-Knof\\_canadian-copyright.pdf](http://fordhamipconference.com/wp-content/uploads/2010/08/Howard-Knof_canadian-copyright.pdf).

186. See Gregory R. Hagen, *Technological Neutrality in Canadian Copyright Law*, in *THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 307, 323–26 (Michael Geist ed., 2013).

187. See *supra* Part IV.A.

as for researchers, minors, security testing,<sup>188</sup> and for interoperability, or encryption research,<sup>189</sup> it is safe to say that the Canadian legislation goes farther than the U.S. model as far as the floor for liability is concerned. Perhaps, the anxieties that the U.S. Department of Trade has with Canada's copyright laws and policies do not extend to issues regarding the circumvention of technological protective measures, particularly considering the CMA's relative strength in this regard.

Even though the CMA is seen as harsh, its notice-and-notice scheme may act in part to mitigate some concerns of Internet users fearing copyright infringement prosecution. Notice-and-notice may afford more opportunities than the DMCA for users to correct any possibly infringing behavior before the threat of litigation looms.<sup>190</sup> Moreover, when the DMCA's notice-and-takedown formula is coupled with its policy on contributory liability in the wake of the *Ouellette* decision,<sup>191</sup> the U.S. system clearly puts the rights of copyright holders before the users. After Todd Ouellette's videos were removed from YouTube pursuant to notice-and-takedown, he had little recourse to take action against Viacom because he failed to establish bad faith on Viacom's part. How this fact pattern might have played out under the CMA's notice-and-notice scheme offers insight into that system's main benefit. If under a notice-and-notice regime, Ouellette's provider would not have pulled the videos off the site in the first place—Ouellette would have first been notified of *possible* infringement, and the onus would have been primarily on him to take appropriate steps to ensure that his videos did not infringe, or at the very least, fit into some kind of statutory exception. Costly litigation could have been easily avoided had Ouellette had the opportunity to independently pursue inquiry into the legal status of his videos before they were "taken down."

Under a SOPA-style regime, the consequences in infringement cases having the added wrinkle of Internet service provider liability would reach even further, implicating the provider website, and the other steps in the online chain that might somehow

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188. 17 U.S.C. § 1201(d)–(j) (2012).

189. Copyright Modernization Act (Bill C-11), S.C. 2012, c. 20, s. 41.12–13 (Can.).

190. Irving, *supra* note 123.

191. That misrepresentation must reach a "high standard" under a §512(f) claim. *See supra* Part IV.B.2.



“facilitate” infringement.<sup>192</sup> The ambiguous term “technically feasible measures” could have an extremely far-reaching effect on actors that only have tangential relationships to infringement.<sup>193</sup> When examined in conjunction with a robustly developed notice-and-takedown scheme, there could be situations where notice to any link in the digital chain of events could lead to immediate takedowns, not to mention consequent liability and litigation.

Though the case law arising from the DMCA has shown that certain concessions have the possibility of being made to Internet service providers, SOPA-style legislation would have the potential to change those. The *Viacom* requirement of needing “something more” than the right and ability to control digital information has the potential to represent a U.S. shift toward a more calculated notice-and-takedown regime.<sup>194</sup> Since it is up to the users (to some extent) to self-police, automatic secondary liability is not necessarily a given. Although, if SOPA’s “facilitation” policy ever does take effect, it would negate the *Viacom* condition of “something more,” perhaps indicating a shift toward a copyright-holder-focused economy, and at the very least altering the delicate balance between users and rights-holders.<sup>195</sup>

In the context of user-generated content, the implications are even bleaker under SOPA. Under the DMCA, content hosts of user-generated material are not liable for the material that their users upload (aside from having to comply with the notice requirement). It has been suggested that SOPA, if enacted, would have an extreme chilling effect on innovation due to the “facilitation” stipulation, discouraging Internet start-ups from incorporating in the United States, and potentially leading to increased extraterritorial formation of such corporations.<sup>196</sup> This could in turn result in even more foreign piracy concerns and additions to Special 301 reports in the future. The Canadian system could mitigate these concerns: notice-and-notice, even if implicated into a SOPA-style system of giving rise to liability for “facilitating-infringement” websites, would not immediately require takedown—again, lowering the chance of litigation. As

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192. Carrier, *supra* note 164, at 6.

193. *Id.* at 7.

194. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012).

195. Newman, *supra* note 44, at 199.

196. Mike Belleville, *IP Wars: SOPA, PIPA, and the Fight over Online Piracy*, 26 TEMP. INT’L AND COMP. L.J. 303, 329 (2012).

well, the noncommercial user-generated content exception to the CMA provides an additional avenue for content-creators to continue producing creative material without fear of infringement and/or litigation.<sup>197</sup> Though the CMA's provisions can be seen as restrictive as far as notice requirements are concerned, they do not reach the high levels of constriction implicit in SOPA's language.

Throughout the CMA, Canada also attempts to mitigate the *Tenenbaum* problem of potentially massive statutory damages. With the DMCA's high limits on such damages, litigation-based and other "copyright troll" type business models have the potential to flourish.<sup>198</sup> Defendants can be pressured into huge settlements when the threat of extreme minimum damages is very real. Ostensibly, in efforts to preempt the U.S. problem of massive liability for noncommercial infringement,<sup>199</sup> statutory damages are capped in the CMA at \$5,000 CAD "with respect to all infringements involved in the proceedings."<sup>200</sup> Commercial infringement is also capped at \$20,000 USD<sup>201</sup>—a far cry from the DMCA's \$1,000,000 USD maximum penalty.<sup>202</sup>

Interestingly, there is an exception carved out in the CMA in terms of statutory damages with respect to copyright infringers who infringe upon works for personal use: recovery of such damages is not possible for copyright owners in these situations.<sup>203</sup> It seems that this exception alleviates the *Tenenbaum* problem.<sup>204</sup> As far as the personal use carve-out is concerned, the CMA can be seen as a more user's-rights-friendly piece of legislation that future lawmakers in the United States could look to in order to mitigate the problem of controversially massive monetary damage awards disproportionate with actual damages.<sup>205</sup>

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197. See *supra* Part IV.A.

198. James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 91 (2012).

199. Geist, *supra* note 124, at 289.

200. Copyright Modernization Act (Bill C-11), S.C. 2012, c. 20, s. 38.1 (Can.).

201. *Id.*

202. See *supra* Part IV.A.

203. Copyright Modernization Act, s. 41.1(3). The specific section of the statute states that "[t]he owner of the copyright . . . may not elect . . . to recover statutory damages from an individual who [infringed] only for his or her own private purposes." *Id.*

204. See *supra* Part IV.B.3.

205. See Geist, *supra* note 124, at 289.

Regardless of their differences, the Canadian and U.S. models of copyright protection are converging in some respects. This has become abundantly clear in the context of fair use and fair dealing in the wake of the copyright pentalogy decisions. Fair use in the United States has been said to function as a “subsidy . . . to permit the second author to make limited use of the first author’s work for the public good,” insofar as the general public stands to reap reward from increased scholarship, as well as a sense of external benefit and understanding.<sup>206</sup> It is inherently flexible.<sup>207</sup> By creating low thresholds to reach the first step of fair-dealing analyses,<sup>208</sup> *Bell* and *Alberta (Education)* assign great importance to public goods—specifically research and scholarship. This signals a shift, at least in terms of judicial interpretation of Canadian copyright law, to an open framework of fair dealing that focuses more on the statutory criteria for fairness, rather than on “whether the intended use qualifies for one of the permitted purposes.”<sup>209</sup> The schemas of the two countries seem to be melding together, and the latter category of fair dealing seems to be perfunctory; easily reachable in the wake of *Bell* and *Alberta (Education)*.<sup>210</sup>

## CONCLUSION

There has been a clear shift in the digital age to a more uniform theory of copyright protection across the U.S.-Canada border. Nonetheless, it is not so simple to determine if the new frameworks favor content producers or copyright owners, and to what extent complete convergence is in store for the future. The Canadian fair use to fair dealing shift is a path toward a U.S.-influenced scheme that presents as more favorable to users, but the positive impact of such shift has the potential to be mitigated by the CMA’s harsh digital-locks provisions. Critics have lauded the Canadian statutory damages caps, however, as a way to solve a “fragmented and inefficient” system in the United

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206. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting).

207. Michael Geist, *Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use*, in *THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 157, 161 (Michael Geist ed., 2013).

208. Macklem, *supra* note 21, at 273.

209. Geist, *supra* note 207, at 158.

210. *Id.* at 178.

States,<sup>211</sup> and notice-and-notice seems to be a more balanced approach to the continued problem of infringement—particularly considering the response to SOPA’s “technically feasible” proposal.<sup>212</sup> As yet, there is no perfect solution to solving the inherent copyright tension between creators and consumers—but will there ever be?

Looking forward, although the U.S. Department of Trade may still keep a watchful eye on Canadian intellectual property laws and policies, the two countries’ convergence in so many respects means that there will be fewer “Canadian pirates” to fear. Another recent development is the signing of the Trans-Pacific Partnership by Canada and the United States,<sup>213</sup> which has the potential to, yet again, reform the copyright law in both nations. The next round of proposed legislation is nevertheless always just around the corner, and since restrictive copyright statutes have been the norm in recent years, the trend could lead to further merging of legal theories in favor of copyright owners. In such a rapidly developing and hotly contested field, there is always room for copyright competition.

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211. Newman, *supra* note 44, at 205–06.

212. Stop Online Piracy Act, H.R. 3261, 112th Cong. § 102(c)(2)(A)(i) (2011).

213. Rebecca Howard, *Trans-Pacific Partnership Trade Deal Signed, but Years of Negotiations Still to Come*, REUTERS (Feb. 4, 2016), <http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S>.

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