
Copyrights, Federalism, and the Constitutionality of Canada's Private Copying Levy

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This paper explores the scope of Parliament's authority under the copyrights clause of the Canadian constitution. Particular consideration is given to the overlap between copyrights, which are within federal jurisdiction, and property and civil rights, which are the legislative domain of the provinces. As a concrete example, this paper assesses the constitutionality of Canada's private copying levy. Because the levy has been interpreted very broadly, it is arguably in pith and substance a matter of property and civil rights. Significant reinterpretation could narrow the scope of the levy and bring it within federal jurisdiction over copyrights. Otherwise, the levy may not be sufficiently integrated with an overall valid scheme to withstand scrutiny. More generally, this paper concludes that Canada's copyrights clause does not give Parliament carte blanche to enact cultural, economic, technological, or regulatory policies under the auspices of the *Copyright Act*. Copyrights legislation must remain tightly linked to authors' cultural creativity, and not unduly compromise matters of property and civil rights.

Cet article explore la portée de l'autorité parlementaire en ce qui a trait à la notion de droit d'auteur telle que définie par la Constitution canadienne. L'article se penche plus particulièrement sur les notions entre chevauchées de droit d'auteur, droit qui relève de la compétence fédérale, et les notions de propriété et droits civils, qui eux relèvent de la compétence législative provinciale. L'article examine un exemple concret : la constitutionnalité de la redevance sur la copie pour usage privé. Cette redevance ayant bénéficié d'une interprétation très large, il est possible de soutenir que son caractère véritable relève d'une question de propriété et de droits civils. Une réinterprétation approfondie de cette notion peut néanmoins réduire l'étendue de la redevance, ce qui la ramènerait dans le cadre de compétence de l'exercice fédérale en matière de droit d'auteur. La redevance ne serait sinon suffisamment intégrée dans un exercice valide de compétence pour défier tout examen en son rencontre. Plus généralement, l'auteur arrive à la conclusion que la disposition visant le droit d'auteur ne défère pas au Parlement une carte blanche en ce qui est de décréter des politiques culturelles, économiques, et technologiques ou soit encore des mesures de règlement dans le cadre de la loi sur le droit d'auteur. La loi sur le droit d'auteur doit rester étroitement liée à la créativité culturelle des auteurs et ne doit pas indûment compromettre des matières de propriété et de droits civils.

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Introduction

Copyright law is evolving in response to changing social values, new modes of expression, economic circumstances, consumer demands, and technological innovations. The Canadian *Copyright Act*¹ is being amended and reamended with increasing frequency.² Though incremental tweaking of copyright legislation is sometimes necessary or desirable, incrementalism has a drawback.³ Bit by bit, it can pull us away from the core values and organizing principles underlying copyright. Eventually, we can find ourselves in a position quite different from where we started.

Relatively recent and dramatic shifts in copyright law and policy have brought this issue to the surface. In the last decade especially, the nature and scope of copyright protection has exploded. Parliament has expanded the *Copyright Act* to envelop new parties, and has granted new powers and privileges to existing rights-holders. Canada is now on the verge of implementing two international treaties to further expand the boundaries of copyright.⁴ Even newer treaties are being negotiated and may soon need to be incorporated into our domestic law.⁵

Not much thought has been given to (or at least not much has been written or litigated about) the constitutional division of legislative powers when it comes to making new copyright laws. Although the Supreme Court has commented numerous times in the past few years about various copyright issues,⁶ it has recently refused to consider copyright's constitutional implications.⁷ This paper looks at whether and

¹ R.S.C. 1985, c. C-42 [*Copyright Act*].

² Sunny Handa, *Copyright Law in Canada* (Markham, Ont.: Butterworths, 2002) at 56; Michael Geist, Address (presented at the Sound Bytes, Sound Rights: Canada at the Crossroads of Copyright Law Conference, 11 February 2005) [unpublished].

³ See Jeremy F. de Beer, "Canadian Copyright Law in Cyberspace: An Examination of the Copyright Act in the Context of the Internet" (2000) 63 Sask. L. Rev. 503 at 536-38.

⁴ *WIPO Copyright Treaty*, 20 December 1996, 2186 U.N.T.S. 121, WIPO Publication No. 226 (entered into force 6 March 2002) [WCT]; *WIPO Performances and Phonograms Treaty*, 20 December 1996, 2186 U.N.T.S. 203, WIPO Publication No. 227 (entered into force 20 May 2002) [WPPT].

⁵ See e.g. World Intellectual Property Organization, *Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations*, 8 February 2006, online: <http://www.wipo.int/edocs/mdocs/sccr/en/sccr_14/sccr_14_2.pdf>.

⁶ *Robertson v. Thomson Corp.*, 2006 SCC 43; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427, 240 D.L.R. (4th) 193, 2004 SCC 45 [SOCAN cited to S.C.R.]; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395, 2004 SCC 13 [CCH cited to S.C.R.]; *Théberge v. Galerie d'Art du Petit Champlain*, [2002] 2 S.C.R. 336, 210 D.L.R. (4th) 385, 2002 SCC 34 [Théberge cited to S.C.R.].

⁷ *Canadian Private Copying Collective v. Canadian Storage Media Alliance* (2004), [2005] 2 F.C. 654, 247 D.L.R. (4th) 193, 2004 FCA 424 [CPCC cited to F.C.], leave to appeal to S.C.C. refused, [2005] 2 S.C.R. vi.

how copyright is permitted to evolve within the limits of subsection 91(23) of the *Constitution Act, 1867*,⁸ Canada's "Copyrights" clause.

The constitutional limits on Parliament's powers have an impact upon a range of controversial issues in modern copyright law.⁹ Questions exist as to the constitutionality of the "neighbouring" rights of performers, record makers and broadcasters,¹⁰ the moral rights granted to various creators,¹¹ and also "paracopyright" provisions addressing technological protection measures and rights management information.¹²

In a nutshell, here is the problem. The constitution grants Parliament, as opposed to provincial legislatures, authority to enact laws in respect of copyrights. But this authority is not unlimited. Suppose, hypothetically, that the federal government decides it is desirable that authors, performers, and record makers be permitted to smoke marijuana. Imagine, for the sake of argument, that there was empirical evidence (of the sort that justifies copyright law generally) to demonstrate that being stoned encourages creativity. Parliament cannot simply enact a new section in the *Copyright Act* granting music creators the right to smoke dope and requiring bong manufacturers to supply it. Calling that a copyright would not make it so, at least not for constitutional purposes. Moreover, the constitution grants provinces the power to legislate in respect of property and civil rights. Although the federal government may enact copyright legislation that incidentally affects property and civil rights, it cannot enact laws that, in pith and substance, deal with matters of property and civil rights.

As a concrete example of the scope of the copyrights clause, this article looks at the constitutional validity of Canada's private copying levy as presently interpreted.¹³ Upon consideration, the private copying levy lies close to the borderline between

⁸ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁹ See David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 21-22; Howard P. Knopf, "The Constitutional Invasion of Intellectual Property Law" (1991) 8 C.I.P.R. 157.

¹⁰ Wanda Noel & Louis B.Z. Davis, "Some Constitutional Considerations in Canadian Copyright Law Revision" (1981) 54 C.P.R. (2d) 17 at 22.

¹¹ Marcel Dubé, "Le pouvoir du Québec de légiférer en matière de contrat d'édition" (1989) 1 C.P.I. 317; Jean Leclair, "La constitutionnalité des dispositions de la *Loi sur le droit d'auteur* relatives aux droits des distributeurs exclusifs de livres" (1998) 11 C.P.I. 141; Jacques A. Léger, c.r., "Protection des artistes — Droit d'auteur — Droit voisin — Une autre approche constitutionnelle" (1992) 5 C.P.I. 7; Jacques A. Léger, c.r., "Partage des compétences législatives en matières de droit d'auteur et de droit civil au Canada" (1993) 10 C.I.P.R. 403.

¹² Jeremy F. de Beer, "Constitutional Jurisdiction over Paracopyright Laws" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 89 [de Beer, "Paracopyright Laws"].

¹³ This scheme allows consumers to copy music for private use, and grants certain authors, performers, and producers of music the right to collect remuneration from manufacturers and importers of blank recording media. Constitutional uncertainty surrounding the levy has been flagged, but not yet fully analyzed in the scholarly literature. See e.g. Malcolm E. McLeod, "Recent Copyright Developments: The Canadian Perspective" (1998) 15 C.I.P.R. 39 (noting "it is not far-fetched to argue in the Canadian context that the blank tape levy is not copyright legislation" at 44).

these two heads of power. The crux of the problem is that the scheme has been interpreted very broadly to affect mainly persons who have little or nothing to do with copying music. If it is to be saved, some interpretative wizardry may be needed.

This article’s more general conclusion is that subsection 91(23) is a significant constraint on Parliament’s legislative powers. It does not give Parliament *carte blanche* to implement cultural, economic, technological, or regulatory policies under the auspices of the *Copyright Act*. The copyrights clause is a part of a living tree that may evolve, but only within its natural limits. In my view, copyrights legislation must remain tightly connected to authors’ cultural creativity and must not unduly compromise matters of property or civil rights.

I. Scope of Jurisdiction Over Copyrights

A. *Jurisprudential Vacuum*

The meanings of many provisions in sections 91 and 92 are well settled, but neither the Judicial Committee of the Privy Council nor the Supreme Court of Canada has ever considered the scope of Parliament’s jurisdiction over copyrights under subsection 91(23). Nor have they considered the meaning of “Patents of Invention and discovery” in subsection 91(22).¹⁴ The Supreme Court has defined and limited the jurisdiction of Parliament to legislate in respect of trademarks, in *MacDonald v. Vapor Canada Ltd.*,¹⁵ and revisited the constitutionality of trademarks legislation in *Kirkbi AG v. Ritvik Holdings*.¹⁶ Notably, however, trademarks are not an enumerated head of power. *Vapor Canada* and *Kirkbi* were really cases about the trade and commerce power. Although these authorities dealt with an intellectual property issue, they are not much more helpful in sorting out the scope of the copyrights clause than cases addressing any other provision regarding the division of constitutional powers.

Very soon after Confederation, the copyrights clause was considered in *Smiles v. Belford*.¹⁷ The dispute concerned the effect of subsection 91(23) on imperial copyright laws in Canada. In the course of addressing this issue, the Ontario Court of Appeal noted that copyrights are a matter for the Parliament of Canada, as distinct from the provincial legislatures.¹⁸ The scope of the federal power vis-à-vis the provinces, however, was not considered.

¹⁴ There are some lower courts decisions addressing this clause: see e.g. *Smith, Kline & French Laboratories Ltd. v. Canada (A.G.)* (1985), [1986] 1 F.C. 274, 24 D.L.R. (4th) 321 (T.D.); *Lilly v. S & U Chemicals Ltd.* (1973), 9 C.P.R. (2d) 17 at 18 (F.C.A.).

¹⁵ (1976), [1977] 2 S.C.R. 134, (*sub nom. MacDonald v. Vapour Canada Ltd.*) 66 D.L.R. (3d) 1 [*Vapor Canada* cited to S.C.R.].

¹⁶ [2005] 3 S.C.R. 302, 259 D.L.R. (4th) 577, 2005 SCC 65 [*Kirkbi* cited to S.C.R.].

¹⁷ (1877), 1 O.A.R. 436 [*Smiles*], *aff’d* (1876), 23 Gr./U.C. Ch. 590.

¹⁸ *Smiles, ibid.* at 442-43, 446-47.

More recently, the division of powers issue was mentioned briefly in an attack on the tariff-setting powers of the Copyright Board of Canada. In *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinema of Canada Ltd.*,¹⁹ the Federal Court, Trial Division responded to the submission that certain provisions were ultra vires Parliament as follows:

This argument moves directly against long-established jurisprudence which has held that the Copyright Board's power to fix licence fees is not a matter of contract, but of statutory fixation which is ancillary to, if not an essential component of, Parliament's jurisdiction with respect to copyright under s. 91(23) of the *Constitution Act, 1867* ...²⁰

It is unclear from a review of the three authorities the court cited in support of that statement what principle, precisely, is "long-established". Two decisions of the Exchequer Court of Canada can indeed be taken to stand for the proposition that licence fees set by the Copyright Board are statutory, not contractual, in nature.²¹ It was asserted in one, and merely echoed in the other, that "[t]he legislation under consideration is clearly legislation on the subject of copyright ..."²² No further explanation was given. The third case cited in *Landmark Cinema* made no mention of the issue whatsoever.²³ Relying on these questionable authorities, the court granted a motion to strike pleadings that raised the division of powers issues, stating that such arguments had "already been thoroughly debated and dealt with."²⁴ That claim does not seem to be true.

In *Royal Doulton Tableware Ltd. v. Cassidy's Ltd.*,²⁵ the Federal Court, Trial Division stated in passing: "Parliament's jurisdiction, as assigned by head 23 of section 91 of the *Constitution Act, 1867*, is with respect to 'copyrights' in general and this amply sustains the comprehensive regime prescribed by the *Copyright Act*."²⁶ No more was said about the issue.

A concern about overlap between copyrights and property and civil rights was evident in *Bishop v. Tele Metropole*.²⁷ The Federal Court, Trial Division considered

¹⁹ (1992), 45 C.P.R. (3d) 346, 60 F.T.R. 161 [*Landmark Cinema* cited to C.P.R. (3d)].

²⁰ *Ibid.* at 353.

²¹ *Composers, Authors and Publishers Association of Canada Ltd. v. Sandholm Holdings Ltd.*, [1955] Ex. C.R. 244, 24 C.P.R. 58 [*Sandholm Holdings* cited to Ex. C.R.]; *Composers, Authors and Publishers Association of Canada Ltd. v. Elmwood Hotel Ltd.* (1955), [1956] Ex. C.R. 65, 24 C.P.R. 77.

²² *Sandholm Holdings*, *ibid.* at 253.

²³ *Maple Leaf Broadcasting Co. Ltd. v. Composers, Authors and Publishers Association of Canada Ltd.*, [1954] S.C.R. 624, 21 C.P.R. 45.

²⁴ *Landmark Cinema*, *supra* note 19 at 353.

²⁵ (1984), [1986] 1 F.C. 357, 1 C.P.R. (3d) 214 (T.D.) [*Royal Doulton* cited to F.C.].

²⁶ *Ibid.* at 380.

²⁷ (1985), 4 C.P.R. (3d) 349, (*sub nom. Bishop v. Stevens*) [1985] 1 F.C. 755 (T.D.) [*Bishop* (T.D.) cited to C.P.R. (3d)], *aff'd* (1987) 18 C.P.R. (3d) 257 (F.C.A.), *aff'd* (*sub nom. Bishop v. Stevens*) [1990] 2 S.C.R. 467, 72 D.L.R. (4th) 97 [*Bishop* (S.C.C.) cited to S.C.R.].

the validity of a provision that deemed tangible objects embodying works in which copyright has been infringed to be the property of the copyright owner. This provision was held to be justifiable, as it had only an incidental effect on tangible property rights.

In the most recent case on point, *CPCC*,²⁸ one of many issues was whether the right to collect levies from manufacturers and importers of blank media is in respect of copyrights for the purposes of subsection 91(23). The Federal Court of Appeal paid attention to the issue of Canadian federalism, but only in the context of whether the levy was an unconstitutional taxation law. Very little was said about the much more direct significance of Canadian federalism for laws in respect of copyrights. The court ruled that the levy was in pith and substance copyright law, essentially because the scheme established a legal framework to remunerate certain rights-holders.²⁹

The court, however, focused solely on the purpose of the scheme. The purpose is only one part, albeit an important part, of the picture. Some consideration must also be given to the nature of the right to remuneration and the identity of those obliged to provide such remuneration. One must ask whether the rights-holders are copyrights-holders, or instead hold some other type of civil right. At issue here is the pith and substance of the right, not—or at least not only—the broad purpose of the legislation. Furthermore, the matter should have been looked at from the perspective of both payers and payees: what relationship do payers of the levy have to copyright? Are they “users”, or simply convenient choke points at which to collect remuneration? To put this in the context of a typical division of powers analysis, one must look at whether or not the rights held, assuming they are copyrights, unduly impinge upon other property and/or civil rights. In *CPCC*, the court failed to fully consider the purpose and the legal and practical effects of the levy.

B. Interpreting Canada's Copyrights Clause

The Supreme Court has recently reaffirmed:

It is trite law that legislative authority under the *Constitution Act, 1867* is assessed by way of a two-step process: (1) characterization of the “pith and substance” or dominant characteristic of the law; and (2) concomitant assignment to one of the heads of power enumerated in ss. 91 and 92 of that Act ...³⁰

It is tempting to immediately embark on an analysis of Canada's private copying levy using this standard framework. But the difficulty, as demonstrated above, is that no constitutional benchmark exists against which to measure impugned legislation. This vacuum demonstrates the need to first ask a more basic question: what are copyrights

²⁸ *Supra* note 7.

²⁹ *Ibid.* at paras. 32-38.

³⁰ *Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 13, 246 D.L.R. (4th) 193, 2004 SCC 79 [*Marriage Reference* cited to S.C.R.] [reference omitted].

about, and how does one determine whether a right is a copyright or something else? Moreover, what is the permissible impact of copyrights legislation on matters otherwise reserved for provincial legislators? Only after these issues are discussed is it possible to properly analyze the concrete constitutional implications for schemes such as Canada's private copying levy.

One might begin from a historical perspective.³¹ It is not possible to provide a full discussion of the origins of copyright in this paper.³² Yet pre-Confederation copyright laws shed some light on the possible intent of the framers of the constitution. The *Statute of Anne*,³³ enacted in 1710, was the precursor to modern Anglo-American "copyright"³⁴ legislation. Early grants of letters patent to book publishers could not accurately be called copyrights. The *Statute of Anne* marked an evolution from a system of Crown-controlled censorship to an author-centred right.³⁵ From the time that concept of the author was embedded in copyright discourse through the *Statute of Anne* until the recent advent of the information age, copyright was "remarkably static".³⁶

There were few Canadian enactments dealing with copyrights prior to Confederation.³⁷ In 1832, the legislature of Lower Canada provided protection to authors of limited types of creative works (books, maps, charts, musical compositions, prints, cuts, and engravings).³⁸ The same protection was granted in the new Province of Canada in 1841,³⁹ and to U.K. residents in 1847.⁴⁰ In *Smiles*, the

³¹ The United States Supreme Court has remarked: "To comprehend the scope of Congress' power under the Copyright Clause, 'a page of history is worth a volume of logic'" (*Eldred v. Ashcroft*, 537 U.S. 186 at 200 (2003) [*Eldred*]).

³² For detailed historical discussion, see *e.g.* Handa, *supra* note 2, c. 3; Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999); Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968); Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass.: Harvard University Press, 1993); Edward Samuels, *The Illustrated Story of Copyright* (New York: St. Martin's Press, 2000); John Feather, "The Book Trade in Politics: The Making of the Copyright Act of 1710" (1980) 8 *Publishing History* 19; John Feather, "The Publishers and the Pirates: British Copyright Law in Theory and Practice, 1710-1775" (1987) 22 *Publishing History* 5.

³³ *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* (U.K.), 8 Anne, c. 19.

³⁴ The Oxford English Dictionary traces the first use of the word "copy-right" to the House of Lords in 1735. It defines "copyright" as: "The exclusive right given by law for a certain term of years to an author, composer, designer, etc. (or his assignee), to print, publish, and sell copies of his original work" (*Oxford English Dictionary*, 2d ed., (Oxford: Clarendon Press, 1989) *s.v.* "copyright").

³⁵ Handa, *supra* note 2 at 36-37.

³⁶ *Ibid.* at 37.

³⁷ Noel & Davis identify two (*supra* note 10 at 20), whereas Handa lists three (*ibid.* at 55).

³⁸ *An Act for the Protection of Copy Rights*, S.L.C. 1832, c. 53.

³⁹ *An Act for the protection of Copy Rights in this Province*, S. Prov. C. 1841 (4 & 5 Vict.), c. 61.

⁴⁰ *An Act to extend the Provincial Copy-right Act to persons resident in the United Kingdom, on certain conditions*, S. Prov. C. 1847 (10 & 11 Vict.), c. 28.

Ontario Court of Appeal said: “no greater powers were conferred upon the Parliament of the Dominion to deal with [copyrights] than had been previously enjoyed by the Local Legislatures.”⁴¹

The static state of pre-Confederation copyright might have suggested a limited role for Parliament under subsection 91(23). However, as affirmed most recently by the Supreme Court in the *Marriage Reference*, “our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”⁴² The meaning of “marriage” is not constitutionally fixed,⁴³ nor, for example, is the meaning of “persons”⁴⁴ or “criminal law.”⁴⁵ One can say the same of copyrights.

Indeed, almost immediately after Confederation, copyright legislation began to expand.⁴⁶ Since Canada first enacted its own copyright statute in 1921,⁴⁷ it has been amended over thirty times, with most of the changes occurring after 1988.⁴⁸ Probably the most significant and dramatic developments were in 1997, when Canada fully incorporated protection for neighbouring rights and a private copying levy into the law.⁴⁹ Most recently, the government introduced Bill C-60 in 2005, which included, among other things, new paracopyright provisions addressing technological measures and rights management information.⁵⁰ The bill died on the Order Paper when an election was called.

Copyright changes are frequently driven by international trends.⁵¹ According to Noel and Davis, “[a]n additional ground for maintaining the flexible nature of copyright is the necessity of giving effect to the federal Government’s changing

⁴¹ *Supra* note 17 at para. 15.

⁴² *Supra* note 30 at para. 22.

⁴³ *Ibid.*

⁴⁴ *Edwards v. Canada (A.G.)* (1929), [1930] A.C. 124, [1929] All E.R. Rep. 571 (P.C.) [*Edwards* cited to A.C.].

⁴⁵ *Proprietary Articles Trade Association v. Canada (A.G.)*, [1931] A.C. 310 at 323-24, [1931] All E.R. Rep. 277 (P.C.) [*PATA* cited to A.C.].

⁴⁶ Copyright was extended to protect all “literary, scientific, and artistic works or compositions” in *An Act respecting Copyrights*, S.C. 1868, c. 54, s. 1. Protection for dramatic works was added in 1921.

⁴⁷ *The Copyright Act, 1921*, S.C. 1921, c. 24. The act came into force in 1924.

⁴⁸ The act was amended in 1923, 1931, 1935, 1936, 1938, 1950, 1966-67, 1967-68, 1968-69, 1970, 1974-75-76, 1980-81-82-83, 1984, 1987, twice in 1988, 1990, 1992, twice in 1993, 1994, 1995, 1997, three times in 1999, twice in 2001, twice in 2002, and 2003. See Geist, *supra* note 2.

⁴⁹ *An Act to Amend the Copyright Act*, S.C. 1997, c. 24.

⁵⁰ Bill C-60, *An Act to amend the Copyright Act*, 1st Sess., 38th Parl., 2005, cl. 29.

⁵¹ For example, moral rights were introduced as required by the *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, Can. T.S. 1948 No. 22, 828 U.N.T.S. 221. See “Treaties and Contracting Parties: General Information” online: World Intellectual Property Organization <<http://www.wipo.int/treaties/en/general/>>; Handa, *supra* note 2 at 67-68, 129-30. Similarly, Canada would implement paracopyright provisions because of the 1996 WIPO Internet treaties (see *WCT*, *supra* note 4; *WPPT*, *supra* note 4).

international obligations and responsibilities ...⁵² Implicitly, they suggest that the federal government can expand its legislative powers simply by committing itself to international agreements.

The real question, however, is whether, in adhering to our international obligations, we move the substance of copyright law away from the purview of federal authority under the constitution. Or, framed differently, one could ask whether our international obligations are truly obligations relating to copyrights. Simply because an agreement was developed under the auspices of the WIPO does not mean it concerns the federal copyrights power. The provinces might conceivably have or share legislative jurisdiction to deal with the matter. While the existence of a general federal power to implement treaties into domestic law is debatable,⁵³ international treaties certainly cannot define the scope of Canada's copyrights clause.⁵⁴

One might also be tempted to look at foreign domestic jurisprudence for guidance in interpreting the copyrights clause. The United States Supreme Court has often considered Congress' powers pursuant to the "Progress" clause of the U.S. constitution: "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ...".⁵⁵ The theme in the American jurisprudence is considerable deference to Congress: "The Copyright Clause ... empowers Congress to *define* the scope of the substantive right."⁵⁶ The Supreme Court of Canada, however, has held that Parliament cannot define the scope of its own constitutional jurisdiction.⁵⁷

When interpreting the Canadian constitutional division of powers, courts have rarely considered foreign jurisprudence in great detail.⁵⁸ Justice La Forest has warned

⁵² Noel & Davis, *supra* note 10 at 21.

⁵³ Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, Ont.: Thomson Carswell, 2006) at 11-11 – 11-13.

⁵⁴ Regarding the impact of international developments on Congress' authority in the United States, see Graeme W. Austin, "Does the Copyright Clause Mandate Isolationism?" (2002) 26 Colum. J.L. & Arts 17 at 58-60.

⁵⁵ U.S. Const. art. 1, § 8, cl. 8. Recent examples of cases interpreting this clause include *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991); *Eldred*, *supra* note 31.

⁵⁶ *Eldred*, *ibid.* at 218 [emphasis in original].

⁵⁷ *Marriage Reference*, *supra* note 30 at para. 38. See also Hogg, *supra* note 53 at 1-5 – 1-25.

⁵⁸ The Privy Council considered the expression "regulations of trade" in the *Act of Union* when defining the "Regulation of Trade and Commerce" in *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 at 112-13 (P.C.) [*Parsons*]. It refused, however, to limit Parliament's jurisdiction to the criminal law as recognized in England in 1867 (*PATA*, *supra* note 45). The Supreme Court has, on occasion, considered international treaties and foreign domestic jurisprudence in interpreting the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982* (being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11). See *e.g.* *United States v. Burns*, [2001] 1 S.C.R. 283 at paras. 82-93, 195 D.L.R. (4th) 1, 2001 SCC 7; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paras. 59-75, 208 D.L.R. (4th) 1, 2002 SCC 1;

that Canadian courts “should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances ...”.⁵⁹ The Supreme Court has been careful to emphasize the distinctions between Canadian and American copyright doctrine in particular.⁶⁰

The Australian constitution,⁶¹ however, is similar to Canada's. It creates a federation based on the Commonwealth parliamentary system. Consequently, some insight can be gained from decisions of the High Court of Australia. In the recent case of *Stevens v. Kabushiki Kaisha Sony Computer Entertainment*, Justice Kirby remarked: “To the extent that attempts are made to push the provisions of Australian copyright legislation beyond the legitimate purposes traditional to copyright protection at law, the Parliament risks losing its nexus to the constitutional source of power.”⁶² In an earlier case, the court had specifically considered whether Australia's former private copying levy was a matter of copyrights under its constitution.⁶³ Although little was said about the meaning of Australia's copyrights provision generally, specific comparisons between the Canadian and Australian levies will be drawn below.

Returning to the idea that the copyrights clause is not frozen in 1867, it is important to note that there are some evolutionary constraints on the constitution. Although the copyrights clause is “capable of growth and expansion” it may only evolve “within its natural limits.”⁶⁴ The argument that same-sex marriage was outside the natural limits of marriage failed because “an objective core of meaning which defines what is ‘natural’ in relation to marriage” could not be agreed upon, beyond the voluntary union of two persons to the exclusion of all others.⁶⁵ It may, however, be easier to identify an objective core meaning of copyrights.

The various philosophical perspectives on copyrights can be roughly segmented into two streams.⁶⁶ One view treats legal protection of creators' rights as a means to

Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 968-69; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 738-44, [1991] 2 W.W.R. 1.

⁵⁹ *R. v. Rahey*, [1987] 1 S.C.R. 588 at 639, 39 D.L.R. (4th) 481.

⁶⁰ *Compo Co. Ltd. v. Blue Crest Music* (1979), [1980] 1 S.C.R. 367 at 367, 105 D.L.R. (3d) 249.

⁶¹ *Commonwealth of Australia Constitution Act* (U.K.), 63 & 64 Vict., c. 12 [*Australian constitution*].

⁶² (2005) 79 A.L.J.R. 1850 at para. 18, [2005] HCA 58 at para. 18.

⁶³ *Australian Tape Manufacturers Association Ltd. v. Commonwealth of Australia* (1993), 176 C.L.R. 480 (H.C.A.) [*Australian Tape Manufacturers*]. See generally Darren Challis, “Ejecting the Blank Tape Levy” Case Comment on *Australian Tape Manufacturers Association Ltd. v. Commonwealth of Australia* (1994) 16 Sydney L. Rev. 537.

⁶⁴ *Edwards*, *supra* note 44 at 136.

⁶⁵ *Marriage Reference*, *supra* note 30 at para. 27.

⁶⁶ See generally Justin Hughes, “The Philosophy of Intellectual Property” (1988) 77 Geor. L. J. 287; Edwin C. Hettinger, “Justifying Intellectual Property” (1989) 18 Phil. & Pub. Affairs 31; Tom G. Palmer, “Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects” (1990) 13 Harv. J. L. & Pub. Pol’y 817; Wendy J. Gordon, “On Owning Information: Intellectual Property and the Restitutionary Impulse” (1992) 78 Va. L. Rev. 149; Wendy J. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual

the end of greater creativity for the benefit of society generally. The other perceives protection of creative work as a natural right simply formalized by legal recognition.

Canada's bijuridical system poses a dilemma here, as copyrights are seen differently in common law and civil law systems.⁶⁷ The common law copyright system focuses mostly on consequentialist theories that justify copyrights in terms of promoting the creation of works for the public benefit. The civil law copyright system draws more from natural rights doctrine, including personhood and Lockean theories. Although neither theory has been ruled out as the basis of Canadian copyright law, the utilitarian perspective tends to dominate.⁶⁸

According to Professor Vaver,

[T]he central object of copyright law is to grant authors rights of exploitation in their original literary, artistic, dramatic, and musical works, and also to grant them rights to ensure that their work is properly credited and is not changed in a way that harms the author's reputation ...⁶⁹

As such, "performers' rights over their live performances ... are categorically different from copyrights historically, and so might not qualify constitutionally as 'Copyrights' ..."⁷⁰ Noel and Davis, however, suggest: "'Copyright', both in conceptual and legal terms, is an umbrella under which creative activities of varying degrees are collected and connected."⁷¹

I believe Professor Vaver's view is the correct one. Noel and Davis' perspective seems to have been skewed by domestic, foreign, and international copyright developments. It is important that the tail not wag the dog. The *Copyright Act* may

Property" (1993) 102 Yale L.J. 1533; Wendy J. Gordon & Kenneth L. Port, eds., "Symposium on Intellectual Property Law Theory" (1993) 68 Chicago-Kent L. Rev. 583; Peter Drahos, *The Philosophy of Intellectual Property* (Aldershot: Dartmouth Publishing Company, 1996); Carys J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law" (2002) 28 Queen's L.J. 1.

⁶⁷ See generally Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" (1990) 64 Tul. L. Rev. 991; Roberta Rosenthal Kwall, "Copyright and the Moral Right: Is an American Marriage Possible?" (1985) 38 Vand. L. Rev. 1; R. J. DaSilva, "Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States" (1980) 28 Bulletin of the Copyright Society of the USA 1; Rudolf Monta, "The Concept of 'Copyright' Versus the 'Droit d'auteur'" (1959) 32 S. Cal. L. Rev. 177. For a historical perspective, see Gary Lea, "Moral Rights and the Internet: Some Thoughts from a Common Law Perspective" in Frédéric Pollaud-Dulian, ed., *Perspectives on Intellectual Property: The Internet and Author's Rights* (London: Sweet & Maxwell 1999). Alain Strowel gives a complete analysis of the differences between the two systems in *Droit d'auteur et copyright: Divergences et convergences; Étude de droit comparé* (Bruxelles: Émile Bruylant, 1993).

⁶⁸ See e.g. Craig, *supra* note 66; Handa, *supra* note 2, c. 4.

⁶⁹ Vaver, *supra* note 9 at 1. See also John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (Scarborough: Carswell, 2003) s. 1:1 at 1:1-1:3.

⁷⁰ Vaver, *ibid.* at 21.

⁷¹ Noel & Davis, *supra* note 10 at 30-31.

have become an umbrella protecting the work of many different parties, but that cannot define the core meaning of copyrights for constitutional purposes.

The basic benchmark of constitutional validity remains the *Constitution Act 1867*. Authors are at the core of the copyrights clause. Other parties—such as performers, producers, or broadcasters—and other activities—such as telecommunication or rebroadcasts—are further from the human creative process.⁷² If these persons and activities are copyrights matters at all, they are nearer to the periphery. The same might be said of non-exclusive rights to remuneration, which are clearly different from the traditional exclusive rights of authors.

In sum, the pluralistic nature of Canadian copyright theory and discourse make it difficult to draw firm conclusions about the boundaries of the copyrights clause. Nevertheless, there is general consensus that copyrights revolve around the core concept of authors’ rights or *droit d’auteur*. It is safe to say, therefore, that valid copyrights legislation must be directly related to authors’ original expressions. Beyond this, there is little agreement.

Fortunately, assessing the constitutionality of a particular legislative provision does not impose “an obligation to determine, in the abstract and absolutely, the core meaning of constitutional terms.”⁷³ Indeed, the most significant problem in evaluating Canada’s private copying levy is not defining the copyrights clause, but delineating the fuzzy boundary between copyrights and exclusive provincial powers, such as property and civil rights. To solve this problem, it is necessary to review the basic constitutional principles governing the overlap between various constitutional heads of power.

C. Copyrights & Trenching

The most important thing about copyright law is what it prohibits: copyrights, like all property or monopoly rights, limit what people can do.⁷⁴ In other words, copyrights, by definition, are constraints on other peoples’ rights. These rights may be constitutional or human rights, such as freedom of expression or privacy. Or they may be property and civil rights, such as freedom of contract or “classic” property rights.⁷⁵

The Supreme Court of Canada recently considered the relationship between copyrights and classic property rights in its landmark decision in *Théberge*.⁷⁶ Although the case did not raise constitutional issues per se, it provides insight into the overlap between matters of copyrights and matters of property and civil rights. An

⁷² Handa, *supra* note 2 at 69.

⁷³ *Marriage Reference*, *supra* note 30 at para. 28.

⁷⁴ Jeremy Waldron, “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property” (1993) 68 *Chicago-Kent L. Rev.* 841 at 842.

⁷⁵ “Classic” property rights flow from ownership of physical, tangible, or corporeal things: see Jeremy de Beer, “Reconciling Property Rights in Plants” (2005) 8:1 *J. World Intellectual Property* 5.

⁷⁶ *Supra* note 6.

owner of a poster had transferred ink from paper to canvas, allegedly infringing the artist's copyright by doing so. In the Court's words, this was a "basic economic conflict between the holder of the intellectual property in a work and the owner of the tangible property that embodies the copyrighted expressions."⁷⁷

Ordinarily, the scope of the former right is a matter of federal jurisdiction over copyrights, while the scope of the latter right would be for provincial legislators to determine as a matter of property and civil rights. Where conflicts exist, the Supreme Court has noted that the courts must maintain an "appropriate balance ... between the federal and provincial heads of power."⁷⁸ Although this sort of balance is different from the typical balancing exercise concerning copyright law and policy, it would be fair to say that balance is constitutionally entrenched in copyright law.

Since copyrights, by definition, are constraints on other property and civil rights, copyrights legislation will always trench on provincial jurisdiction to some extent. The 1894 decision in *Tennant v. Union Bank of Canada*⁷⁹ touched upon the trenching doctrine in respect of copyrights legislation:

[A]mong the enumerated classes of subjects in sect. 91, are "Patents of Invention and Discovery," and "Copyrights." It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces.⁸⁰

On its face, this statement resembles a comment made by the Federal Court, Trial Division in *Bishop* (T.D.):

Just as Parliament can, for example, in the exercise of its criminal law power prohibit the use of firearms and thus seriously impair property rights in such firearms, so can it impair rights in tangible property used for the infringement of copyright.⁸¹

A careful examination of constitutional principles, however, reveals that the latter statement is not entirely true.

Despite the purported mutual exclusivity of sections 91 and 92, overlap between federal and provincial legislative powers is not an uncommon problem.⁸² Unfortunately, the jurisprudence is ambiguous as to the exact manner in which to assess constitutional validity at this stage of the analysis.⁸³ Given the Supreme Court's

⁷⁷ *Ibid.* at para. 33.

⁷⁸ *Reference Re Firearms Act*, [2000] 1 S.C.R. 783 at para. 48, 185 D.L.R. (4th) 577, 2000 SCC 31 [*Firearms Reference* cited to S.C.R.] [emphasis added].

⁷⁹ (1893), [1894] A.C. 31 (P.C.).

⁸⁰ *Ibid.* at 45.

⁸¹ *Bishop* (T.D.), *supra* note 27 at 367-68.

⁸² See e.g. *Friends of the Old Man River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 [*Multiple Access* cited to S.C.R.].

⁸³ See Patrick J. Monahan, *Constitutional Law*, 2d ed. (Toronto: Irwin Law, 2002).

overriding advice that the approach must be flexible rather than technical or formalistic,⁸⁴ the following discussion simply highlights the key considerations.

One possibility is to apply the double-aspect doctrine—some aspects of the law might relate to copyrights and others might relate to property and civil rights. If that were the case, both Parliament and provincial legislators could legislate on the matter.⁸⁵ Because this doctrine undermines the idea that enumerated powers are reserved exclusively for one or the other level of government, it is rarely used, though not extinct.⁸⁶

Alternatively, if the impugned legislation is, in pith and substance, a matter of copyrights, there is no constitutional problem. Parliament can exercise its powers to the fullest extent necessary for effective regulation of areas within its competence. The issue would be how far Parliament can go before the pith and substance actually becomes property and civil rights, at which point the link to federal authority is severed.⁸⁷ At some point, because of their purpose or effect, putative copyright provisions may become in pith and substance a provincial matter of property and civil rights.

If the matter were in pith and substance within provincial jurisdiction, the legislation would seem to be constitutionally invalid. It might still be salvaged, however, if it is necessarily incidental to an overall valid federal scheme. There are three questions to consider: do the provisions trench into provincial jurisdiction, are they part of an overall valid federal legislative scheme, and “are they sufficiently integrated with the scheme” to be upheld?⁸⁸ Of these, the crucial question will usually be whether the impugned provisions are “sufficiently integrated” with the *Copyright Act* to withstand scrutiny.

In different contexts, courts have set down different requirements for sufficient integration. As put by Chief Justice Dickson, a court must decide “what test of ‘fit’ is appropriate”⁸⁹ On the facts of *General Motors*, the Court upheld the impugned provision as “functionally related” to the general objective of the legislation.⁹⁰ The Court contrasted the facts to those in *Vapor Canada*, stating that the provision in

⁸⁴ *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 481, 107 D.L.R. (4th) 537 [*Morgentaler* cited to S.C.R.].

⁸⁵ If there is both federal and provincial legislation, the federal legislation is paramount to the extent a conflict exists: *Saskatchewan v. Rothmans, Benson & Hedges Inc.*, [2005] 1 S.C.R. 188 at para. 11, 250 D.L.R. (4th) 411, 2005 SCC 13.

⁸⁶ *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 at 845-55, 51 D.L.R. (4th) 161; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 at 64-66, 44 D.L.R. (4th) 663; *Multiple Access*, *supra* note 82 at 181-82; *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.).

⁸⁷ *Vapor Canada*, *supra* note 15.

⁸⁸ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 210 D.L.R. (4th) 577, 2002 SCC 31 at para. 58.

⁸⁹ *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 at 668, 58 D.L.R. (4th) 255 [*General Motors* cited to S.C.R.].

⁹⁰ *Ibid.* at 684.

question in that case was “entirely unconnected” to the subject of the legislation.⁹¹ Other possible tests include “rational, functional connection”,⁹² “ancillary”,⁹³ “necessarily incidental”,⁹⁴ and “truly necessary”,⁹⁵ “an integral part”,⁹⁶ or a “complementary provision”.⁹⁷ In essence, there is a spectrum of possible tests, with varying degrees of scrutiny, that one could apply to determine whether a provision is sufficiently integrated with an overall valid legislation.

Precisely which test of “fit” will be applied turns on just how far the provisions have trenched into provincial domain, and how integral they are to the overall valid federal scheme.⁹⁸ A provision that “encroaches marginally” may only require a “functional” relationship, whereas a “highly intrusive” provision calls for a stricter test.⁹⁹ The more the provision creeps into the other government’s jurisdiction, the harder it will be to sustain its validity.

With the foregoing discussion in mind, it is now appropriate to fully consider the constitutionality of Canada’s private copying levy.

II. Canada’s Private Copying Levy

To determine whether legislation is validly enacted according to the constitutional division of powers, one must characterize “its leading feature or true character”, its “pith and substance”.¹⁰⁰ Generally, this task requires consideration of two things: the law’s purpose, and its effect.

A. Purpose

Around the world, levies vary in scope.¹⁰¹ The rationale for private copying levies

⁹¹ *Ibid.* at 690.

⁹² *Papp v. Papp* (1969), [1970] 1 O.R. 331 at 336, 8 D.L.R. (3d) 389 (C.A.); *Multiple Access*, *supra* note 82 at 183.

⁹³ *Peel (Regional Municipality) v. MacKenzie*, [1982] 2 S.C.R. 9 at 17, 139 D.L.R. (3d) 14.

⁹⁴ *R. v. Fowler*, [1980] 2 S.C.R. 213 at 226, 113 D.L.R. (3d) 513.

⁹⁵ *Ibid.* at 22; *R. v. Thomas Fuller Construction Co. (1958) Ltd.* (1979), [1980] 1 S.C.R. 695 at 713, 106 D.L.R. (3d) 193.

⁹⁶ *Northern Telecom Ltd. v. Communications Workers of Canada* (1979), [1980] 1 S.C.R. 115 at 138, 98 D.L.R. (3d) 1; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680 at 708, 54 D.L.R. (4th) 679.

⁹⁷ *Vapor Canada*, *supra* note 15 at 159.

⁹⁸ *Ibid.*; see also *General Motors*, *supra* note 89 at 668.

⁹⁹ *General Motors*, *ibid.* at 669.

¹⁰⁰ *Morgentaler*, *supra* note 84 at 481.

¹⁰¹ See Jeremy F. de Beer, “The Role of Levies in Canada’s Digital Music Marketplace” (2005) 4 C.J.L.T. 153 [de Beer, “Role of Levies”]; Jeremy F. de Beer, “Locks & Levies” (2006) 84 Denv. U.L. Rev. 143; P. Bernt Hugenholtz, Lucie Guibault & Sjoerd van Geffen, *The Future of Levies in a Digital*

also varies between countries, basically along common law and civilian lines.¹⁰² Canada’s private copying levy came into force on 19 March 1998 as Part VIII of the *Copyright Act*.¹⁰³ It expressly allows individuals to copy sound recordings for private use onto blank audio recording media. It also imposes liability upon manufacturers and importers of blank media, requiring them to pay a levy when such is proposed by certain music creators and certified by the Copyright Board. In short, the regime substitutes exclusive copyrights with a unique right to collect remuneration from third parties not directly involved in the use of copyright-protected works.

The broad object of Canada’s private copying levy was to provide compensation to certain authors, performers, and producers of music whose exclusive copyrights were believed to be pragmatically unenforceable at the time the regime was enacted. According to Justice Linden:

The purpose of Part VIII of the Act is mainly an economic one—that is, to fairly compensate artists and the other creative people for their work by establishing fair and equitable levies.¹⁰⁴

Though the rationale that private copying cannot be controlled by legal or technological means is no longer applicable,¹⁰⁵ the levy also overcomes problems in allowing copyright owners to monitor and control Canadians’ private, non-commercial habits.

There are unsettled questions about what sort of private copying the levy scheme was intended to envelop. This is one example where the constitutional question is inextricably linked with the interpretation of other aspects of the regime. The broader the levy, the greater the impact on property and civil rights. The narrower and more precise the levy, the more closely connected it is to copyrights.

It is unclear whether or not Parliament intended the private copying regime to apply to the matter of private copying in today’s digital music marketplace. On one hand, according to transcripts of committee meetings preceding the enactment of the

Environment (Amsterdam: Institute for Information Law, 2003) c. 4, online: Instituut voor Informatierecht <<http://www.ivir.nl/publications/other/DRM&levies-report.pdf>>.

¹⁰² In civilian jurisdictions, the initial view was that creators did not have the legal right to control private copying. An exemption/levy scheme was introduced in response to this lack of legal control. In common law jurisdictions, the initial view was that creators did not have the practical ability to control private copying. An exemption/levy scheme was introduced in response to this lack of practical control: Andrew F. Christie, “Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches” (Melbourne: Intellectual Property Research Institute of Australia, 2004) at 3-7 online: Intellectual Property Research Institute of Australia <<http://www.ipria.org/publications/workingpapers/Occasional%20paper%202.04.pdf>>.

¹⁰³ *Supra* note 1, as am. by S.C. 1997, c. 24, ss. 50, 53; *Order Fixing the Dates of the Coming into Force of Certain Sections of the Act*, P.C. 1998-365, C. Gaz. 1998.II.1150.

¹⁰⁴ *AVS Technologies v. Canadian Mechanical Reproduction Rights Agency* (2000), 7 C.P.R. (4th) 68 at 71 (F.C.A.).

¹⁰⁵ See Hugenholtz, Guibault & van Geffen, *supra* note 101.

levy, the matter addressed was actually quite specific: the use of blank tapes to copy music for private use.¹⁰⁶ Although blank CDs and other digital technologies were envisioned at the time, they were not the matter of immediate concern in 1997. It is also clear that “the jukebox or record store in the sky” was foreseen, but witnesses stressed that a levy could not replace the revenues that might be generated by a market for digital downloads.¹⁰⁷ On the other hand, the *Copyright Act* defines media subject to the levy in a way that could hardly be more broadly drafted, including media ordinarily used for private copying “regardless of its material form.”¹⁰⁸

In *CPCC*, the Federal Court of Appeal decided that memory in digital audio recorders, such as Apple’s iPod, is not subject to the levy.¹⁰⁹ It overruled the Copyright Board, which had approved a levy on such memory. A key reason for the court’s decision was deference to Parliament.¹¹⁰ Unfortunately, by passing the hot potato to government policy-makers, the court perpetuated uncertainty concerning the levy’s purpose. This left the door open for CPCC to once again propose a levy that would impact digital audio recording devices.¹¹¹ The most recently proposed tariff, for the years 2008-2009, would levy devices themselves, as opposed to memory therein. It is arguable that the CPCC is splitting hairs to avoid the doctrine of *res judicata*. Nevertheless, this demonstrates that serious questions linger about the purpose of the levy.

Banal statements about compensating rights-holders are unhelpful. It is exceedingly difficult to use such statements to assess the validity of the levy in a constitutional context. For that reason, it is better to focus on the levy’s effects, not just its purpose.

B. Effect

In *CPCC*, the Federal Court of Appeal disposed of the division of powers argument as follows:

¹⁰⁶ Parliament, Standing Committee on Canadian Heritage, *Evidence of the Committee*, 35th Parl. (3 October 1996).

¹⁰⁷ Parliament, Standing Committee on Canadian Heritage, *Evidence of the Committee*, 35th Parl. (22 October 1996); Parliament, Standing Committee on Canadian Heritage, *Evidence of the Committee*, 35th Parl. (7 November 1996).

¹⁰⁸ *Copyright Act*, *supra* note 1, s. 79. See also Government of Canada, Parliamentary Subcommittee on the Revision of Copyright, “Charter of Rights for Creators” (1985), advocating for a technologically neutral levy.

¹⁰⁹ *CPCC*, *supra* note 7.

¹¹⁰ *CPCC*, *ibid.* at para. 164.

¹¹¹ Supplements, C. Gaz. 2007.I (*Statement of Proposed Levies to Be Collected by CPCC on the Sale, in Canada, of Blank Audio Recording Media for the Years 2008-2009*), online: Canada Gazette <<http://canadagazette.gc.ca>>.

The argument essentially boils down to this. While Part VIII legalizes private copying and provides a practical means for rewarding rightsholders, the price of doing so is arguably borne, in part, by persons who do not private copy.

...

[T]he pith and substance analysis requires that, viewed from its purpose and its legal effects, every aspect of the regime must be tightly linked to Parliament’s goal to compensate rightsholders in respect of the reproduction of music for private use. In my view, all the provisions of Part VIII are so linked.

The [applicants] have been unable to point to any provision in Part VIII that is extraneous to that goal.¹¹²

With respect, this conclusion overlooks several characteristics of the levy that have considerable effects on persons who have nothing to do with the private copying of music. Because the following points were not presented to the Federal Court of Appeal in *CPCC*, it is possible that another court would reconsider the matter. Moreover, because the court interpreted the private copying scheme not to apply to memory in digital audio recorders, it did not consider the constitutionality of a levy on such memory, let alone a levy on devices.

Legislation in respect of copyrights normally imposes liability only upon actual users of copyright-protected works. In some circumstances, one can be liable for authorizing copyright infringement or subject to secondary liability for knowingly dealing with infringing works.¹¹³ It is fairly clear, however, that blank media importers and manufacturers are not liable for copyright infringement by their own acts, nor the ultimate acts of consumers of their products.¹¹⁴ Nevertheless, the private copying levy directly targets these third parties.

This led the High Court of Australia to distinguish private copying levies from traditional copyright royalties.¹¹⁵ Despite ruling that the levies were not copyright royalties, seven Justices of the High Court agreed that the levies were in respect of copyright within the meaning of subsection 51(xviii) of the Australian constitution.¹¹⁶ The plaintiffs had tried to analogize the levy to “a law which sought to impose an exaction on the first sale of paper upon the basis that it could be employed to reproduce a literary work in breach of copyright.”¹¹⁷ The court, however, held that the Australian levy had “a sharper focus” than a levy on blank paper.¹¹⁸ Though it is

¹¹² *Ibid.* at paras. 36-38.

¹¹³ *Copyright Act*, *supra* note 1, s. 27.

¹¹⁴ See *CCH*, *supra* note 6 at paras. 39-46; *SOCAN*, *supra* note 6 at paras. 86-103.

¹¹⁵ *Australian Tape Manufacturers*, *supra* note 63. The four-member majority of the court distinguished the levy from a copyright royalty for two reasons. First, the payers of the levy (tape vendors) receive no benefit, advantage, or licence in exchange for payment of the levy. Second, the payment is not in consideration of, or associated with, the grant by payees of the levy of a right to copy works or the exercise by anyone of such a right (*ibid.* at 497-99).

¹¹⁶ *Supra* note 61, s. 51 (xviii).

¹¹⁷ *Australian Tape Manufacturers*, *supra* note 63 at 518.

¹¹⁸ *Ibid.* The court ultimately struck down the levy as an unconstitutional tax.

tempting to assume that the same is true in respect of the Canadian levy, there are numerous and substantial distinctions between the former Australian and present Canadian private copying regimes.¹¹⁹

For one, the High Court believed it was obvious that in Australia private copying resulted in a loss of sales of sound recordings.¹²⁰ No doubt there are some consumers who may have bought music but for the fact that they could instead copy it from a friend. But it is important to be precise. Private copying for personal use only (not including copying for anyone else, such as one's family, friends, or strangers online) may not be so detrimental. How many people would really choose to purchase a second or third copy of a CD they already own? Generally, the true impact of private copying is far from obvious.

Second, the High Court pointed out that the levy was only applicable to blank tapes that are "ordinarily" used for the private copying of music, and that "blank tapes of a kind which are ordinarily used for other purposes are excluded from the levy."¹²¹ In other words, a blank tape could have only one "ordinary" use under the Australian regime.

The Canadian act uses the same word, but it has been interpreted very differently. The Copyright Board held "ordinarily" to include any "non-negligible" music copying:

[A] person who made two copies of sound recordings onto a type of medium in each of the last two years ordinarily uses that type of medium for private copying, even though that same person may well use many more such media for other purposes: *a medium can have more than one ordinary use.*¹²²

The interpretation of "ordinarily" as meaning, in effect, "not extraordinarily" is logically and grammatically plausible, and indeed was held by the Federal Court of Appeal to be not patently unreasonable. This interpretation contradicts the High Court's views, however, and dramatically broadens the effect of the levy in Canada. The Australian regime therefore had a much sharper focus than Canada's.

The Canadian interpretation means that a levy can be applied to a medium on the basis of raw numbers, irrespective of the proportion used for purposes that have nothing to do with music. Moreover, as is apparent from the Copyright Board's example, the numbers need not be high to trigger the levy.

¹¹⁹ On whether or not the levy is a tax, there seem to be fewer relevant distinctions between Canadian and Australian constitutional requirements and between the details of each private copying regime.

¹²⁰ *Australian Tape Manufacturers*, *supra* note 63 at 518.

¹²¹ *Ibid.*

¹²² *Private Copying 1999-2000* (17 December 1999), (Copyright Board of Canada), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/decisions/c17121999-b.pdf>> at 30 [emphasis added] [*Private Copying 1999-2000*].

The point is explained most easily through the example of the current levy on blank CDs. The Copyright Board held that

between 80 per cent and 90 per cent of individual consumers who buy blank CDs do so in some measure for the specific purpose of copying pre-recorded music. Moreover, it appears that over 40 per cent of individuals use recordable CDs for no other purpose.¹²³

Once other uses and other purchasers are factored in, however, the highest estimates are that roughly one-third of all blank CDs are used to copy music.¹²⁴ At the time of the Copyright Board's first decision, when the levy was initially imposed on blank CDs, the proportion of CDs used for copying music was even smaller.¹²⁵ Now, nearly four years after the Copyright Board's last substantive hearing into the matter, it would not be surprising if the proportion of total CDs used to copy music privately were falling rapidly as digital devices like the iPod gain popularity. The Copyright Board is scheduled to begin its next hearings in 2007, and evidence on this issue will no doubt be presented.

The levy rate is obviously discounted to reflect the proportion of blank CDs used for other purposes. Nevertheless, the point remains that purchasers of two-thirds of all blank CDs subsidize those few consumers who use these media heavily for copying music. Simply put, the levy has a much larger effect on persons who do not engage in private copying than on persons who do.

The statistics are similar in respect of electronic memory cards, which are proposed to be subject to a levy in 2008-2009. Even if it is true, as the CPCC claims, that as much as 25% of content copied onto memory cards is music, three quarters of content copied onto memory cards is *not* music.¹²⁶ The CPCC also claims that 14% of respondents used memory cards only to copy music. The organization does not say how many respondents use memory cards to store only content other than music. It is likely, if not certain, that 100% of the content stored on memory cards by many people, such as digital photographers, is not music.

Though relatively more people might use devices such as iPods for music-related purposes, problems arise as functions converge. Such devices are used not only (and perhaps not even primarily) for music. They store digital photographs, movies and

¹²³ *Private Copying 2003-2004* (12 December 2003), (Copyright Board of Canada) online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>> at 14 [*Private Copying 2003-2004*].

¹²⁴ The data is confusing, because there are different proportions to consider (including consumer vs. business purchasers and music vs. non-music uses). There are also different statistics for different formats, not to mention conflicting evidence on the accuracy of different figures submitted by different parties: *Private Copying 2003-2004*, *ibid.*

¹²⁵ *Private Copying 1999-2000*, *supra* note 122 at 32.

¹²⁶ Canadian Private Copying Collective, "Backgrounder on the Proposed Private Copying Tariff 2008-2009", online: <<http://cpcc.ca/english/pdf/2008-2009ProposedTariffBackgrounder20070208.pdf>>.

television programs, text documents, computer programs, and all sorts of other data. Often, they are also mobile phones, Global Positioning Systems, agendas and/or personal planners. Constitutionally, the effects of a levy on multi-functional devices cannot be ignored.

Third, and intimately related to the above point, the High Court of Australia noted that the Australian legislation contained an exemption mechanism for persons who use blank media for non-music purposes.¹²⁷ In Canada, the Copyright Board and the Federal Court have looked closely at the possibility of an implied exemption for those individuals or businesses that use blank media for data storage or digital photography. After careful consideration, both concluded that no such reprieve exists, as the Supreme Court has been consistently clear that exemptions cannot be implied into the *Copyright Act*.¹²⁸

It should be noted that despite the Federal Court of Appeal's endorsement and elaboration of the Copyright Board's interpretation of the regime as containing no authorized exemption scheme, the organization representing beneficiaries of the levies (the Canadian Private Copying Collective) has initiated an ad hoc "zero-rating" program whereby it may choose to waive the levies for certain entities, when it decides that would be appropriate. As the program is not authorized under the statute, neither the Copyright Board nor the courts have jurisdiction to monitor the program to ensure decisions are made according to principles of natural justice or fairness. Unlike in Australia, the program can hardly be taken into account when assessing the design of the regime from a constitutional perspective.

Fourth, in *Australian Tape Manufacturers* the High Court made note of "the obvious practical difficulty in attempting to attach obligations to the use of blank tapes in the hands of the user"¹²⁹ to justify the levy on third-party proxies. This assumption is no longer valid. By acknowledging the ability of technological protection measures and end user licence agreements to authorize private copying, the industry has precluded itself from arguing that levies are a necessary response to the impossibility or impracticality of licensing music for private copying. In fact, major record labels currently require digital music distributors to take all reasonable technological and other steps to ensure copies made by end users are for personal use only. Purchasers of music from Apple's iTunes Store specifically pay for the right to make a certain number of private copies. This further distinguishes the Australian High Court's ruling from the circumstances in Canada today.

There are some similarities between the Canadian and former Australian regimes. Of course, the underlying concept is the same. Both schemes involved the discretion of an administrative agency in calculating the levy rate. The Australian regime

¹²⁷ *Australian Tape Manufacturers*, *supra* note 63 at 518.

¹²⁸ See e.g. *Bishop* (S.C.C.), *supra* note 27 at 481-85; *Théberge*, *supra* note 6 at para. 73; *SOCAN*, *supra* note 6 at para. 107.

¹²⁹ *Australian Tape Manufacturers*, *supra* note 63 at 518.

included a fixed formula with variable components, whereas the Canadian Copyright Board has the broad mandate to make the levies fair and equitable. Such flexibility has been key in decisions upholding the scheme’s validity.¹³⁰

Overall, however, the distinctions in the details are too great to overlook. Especially given the varying interpretation of “ordinarily”, the absence of any exemption mechanism, and the inapplicability of conventional assumptions about licensing, it is very difficult to find the same connection between the purpose and effect of the Canadian levy. The Canadian net is cast much wider than the Australian one ever was.

To overcome the problems with over-breadth, the levy need not be struck down entirely. If there are two possible interpretations of a statute, one of which will render the legislation constitutionally valid and one of which will render the legislation constitutionally void, obviously the former should be preferred.¹³¹ The *Copyright Act* could be reinterpreted to render the scheme sufficiently tight and precise, and therefore valid copyright law.

At minimum, this would require substituting the current interpretation of “ordinarily” with one more akin to the former Australian definition. Doing so would have the practical result of eliminating the levy on blank CDs and likely precluding the introduction of a levy on memory cards and multi-functional devices, which is certainly a blunt way to solve the underlying problem. Alternatively, a court could imply an exemption scheme of the sort that was found in Australia’s legislation. This approach would presumably legitimize and give the Copyright Board jurisdiction to monitor the currently unauthorized zero-rating program as part of the “terms and conditions” of the tariff.¹³² That could become a logistical nightmare, and it is unlikely that the Copyright Board would take such measures without legislative instructions or a stamp of judicial approval from the Supreme Court. Note that the regulatory powers of the Governor-in-Council built into the regime may offer a compromise solution that would not require the legislative process to start over from scratch.

C. Summary

If one adopts a view of the copyrights clause as revolving around the exclusive rights of authors, then the purpose of the levy may be too far on the periphery to

¹³⁰ See *ibid.*; *Private Copying 2003-2004*, *supra* note 123 at 458-65; *CPCC*, *supra* note 7 at paras. 7, 61-67.

¹³¹ *R. v. MacKay*, [1965] S.C.R. 798 at 804, 53 D.L.R. (2d) 532; *Ontario (A.G.) v. Reciprocal Insurers*, [1924] A.C. 328 at 345, (*sub nom. Re Reciprocal Insurance Legislation*) [1924] 1 D.L.R. 789 (P.C.); Gérald-A. Beaudoin, *La Constitution du Canada*, 3d ed. (Montreal: Wilson & Lafleur, 2004) at 338.

¹³² See *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada* (2003), [2004] 1 F.C. 303, 229 D.L.R. (4th) 205 (C.A.).

withstand constitutional scrutiny. Moreover, the levy has a significant effect on manufacturers and importers—not to mention consumers of blank media—who have nothing to do with the private copying of music. The legal and practical effect of the Canadian levy, therefore, is to trench rather deeply into provincial jurisdiction. If the scheme only, or even primarily, targeted persons directly connected with the private copying of music, it would be much easier to sustain. As is, however, a strong argument can be made that Canada's private copying levy is in pith and substance more a matter of regulating property and civil rights than copyrights.

Assuming that is the case, is the levy sufficiently integrated with an overall valid scheme to be sustained as necessarily incidental to other copyrights legislation? As explained above, the test of fit depends upon two factors: the degree to which the levy trenches over property and civil rights, and the necessity of the levy to a valid copyrights scheme.

Applying the “functionally related” test for integration, the levy could perhaps be upheld if it was successfully argued that the purpose of the right to remuneration is to compensate and encourage authors and other creators. It is possible to argue (though not convincingly) that the levy scheme merely rounds out the *Copyright Act* by providing remuneration to creators who might not otherwise have a pragmatic ability to license their exclusive rights. Such being the same objective as the *Copyright Act* as a whole, the levy is a tool permitting the statute in general to be more workable and efficient. Thus, it could be distinguished from the broad civil action established under subsection 7(e) of the *Trade Marks Act*, which was considered in *Vapor Canada*.

Presumably, one could say that Parliament would be competent to take away the right to control private copying altogether, for example, by specifying the activity as fair dealing. Or Parliament could have simply expanded the notion of authorization or contributory or secondary infringement to make blank media importers and manufacturers liable for copyright infringement, rather than merely payment of levies. If Parliament could do these things, why could it not instead choose the middle ground solution of levies?

The short answer is that either of these alternative solutions are distinguishable from the path Parliament chose. Eliminating liability altogether would not have the same effect on property and civil rights that the levy currently does. The other extreme—imposing actual copyright liability on third parties—might be permissible, but that would still represent a dramatic shift in Canadian copyright law and policy, which could require constitutional scrutiny.

The existence of alternative solutions itself demonstrates that a levy is by no means “truly necessary”. It does not have an “intimate connection” with the rest of the *Copyright Act*, and is certainly not “pivotal”. The *Copyright Act* existed—and operated reasonably well—prior to the enactment of the levy.¹³³ The act would

¹³³ Even if the *Copyright Act* operated for many years without a provision comparable to those found in Part VIII, there is no constitutional impediment to amending the remedies provisions, and

provide extensive and effective protection for copyrights with or without the levy. In general, the levy is easily severable from the rest of the statute.

Most importantly, the levy is simply too broad. The problem isn’t that Parliament is prohibited from enacting *any* levy, but that *this* levy goes too far. That view is most consistent with the conclusions of the High Court of Australia. As presently interpreted, the levy trenches heavily into property and civil rights. This fact also suggests a high burden in respect of the degree of integration with a valid copyrights scheme—perhaps approaching the stringent test applied in *Vapor Canada*. On balance, it seems difficult to conclude that the levy could pass muster on this standard.

Before concluding that Canada’s private copying levy must be either reinterpreted more narrowly, or struck down entirely, it is worthwhile to ask if it can be justified by any other head of federal power under section 91 of the *Constitution Act, 1867*.

III. Other Federal Powers

A. Peace, Order, and Good Government

Historically, Parliament had jurisdiction to pass legislation on any matter that did not come within the exclusive jurisdiction of the provinces.¹³⁴ Through the years, three distinct concepts have developed: new matters, emergencies, and issues of national importance.

Courts are now very reluctant to allow federal jurisdiction over new matters, as ostensibly new issues usually touch upon some existing heads of power.¹³⁵ There are certainly new forms of creative expression and new technologies in response to which Parliament has enacted the levy. But these are not “new matters” for constitutional purposes—these issues can be linked to existing heads of power. As for the emergency power, the Court last applied this in *Reference Re Anti-Inflation Act*.¹³⁶ It would be inapplicable here, since the levy is not temporary.

It remains that if the levy is to be a valid exercise of the POGG power, it must meet the test set in *R. v. Crown Zellerbach Canada Ltd.*¹³⁷ It must have a “singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of

there are no reasons why remedies available should be frozen in time (*General Motors*, *supra* note 89 at paras. 67-86).

¹³⁴ Hogg, *supra* note 53 at 17-1 – 17-4.

¹³⁵ The Supreme Court last applied this concept in *R. v. Hauser*, [1979] 1 S.C.R. 984 at 1000-1001, 93 D.L.R. (3d) 193, where the Court held that the *Narcotic Control Act* was a valid expression of Parliament’s “peace, order and good government” (“POGG”) power because it dealt with a genuinely new problem.

¹³⁶ [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452.

¹³⁷ [1988] 1 S.C.R. 401 at 431-32, 49 D.L.R. (4th) 161.

provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.”¹³⁸ It is almost inconceivable that the private copying levy could pass on this test.

Finally, it is arguable that there is a general federal authority to implement international treaties into domestic law under the POGG power.¹³⁹ There is, however, no international treaty requiring a private copying regime. To the contrary, there is concern that Canada’s private copying regime may violate our international obligations because it creates a perhaps unauthorized exception and treats Canadian and foreign creators unequally.¹⁴⁰ As no treaty specifically deals with private copying, the question of whether there exists a specific federal power to implement treaties is best left for another article.¹⁴¹

B. Trade and Commerce

*Parsons*¹⁴² established that intraprovincial commerce is a matter of provincial jurisdiction under subsection 92(13). Parliament’s jurisdiction over trade and commerce is confined to interprovincial trade and general trade.

There is no doubt that creating and selling music is a commercial endeavour. In the case of the music industry, however, the sale of music cannot be said to be interprovincial. Perhaps the manufacture or importation of blank media can be classified as interprovincial. But to make this argument requires a degree of double-talk. That is, one would have to argue that the regime is in pith and substance about copyrighted music and not blank media, so as to be copyright law. Simultaneously, it would have to be argued that it *was* about blank media, so as to be trade and commerce—an apparent paradox.

More reasonably, any intervention by Parliament would have to be justified under the second branch of the jurisdiction over trade and commerce. For federal legislation to be a valid exercise of the Parliament’s jurisdiction over the “general trade” branch of trade and commerce, the act or section must be: (1) part of a general regulatory scheme; (2) monitored by the continuing oversight of a regulatory agency; (3) concerned with trade as a whole rather than with a particular industry; (4) of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) jeopardized by the failure to include one or more provinces or localities in a legislative scheme.¹⁴³ The levy may have some of these hallmarks. However, the right to remuneration applies only to a limited group of creators, and the levy applies only

¹³⁸ *Ibid.* at 432.

¹³⁹ Hogg, *supra* note 53 at 11-11 – 11-13.

¹⁴⁰ de Beer, “Role of Levies”, *supra* note 101 at 158-59.

¹⁴¹ See de Beer, “Paracopyright Laws”, *supra* note 12.

¹⁴² *Supra* note 58.

¹⁴³ *General Motors*, *supra* note 89 at 661, 662.

to certain media. It does not deal with all copyrighted content, or to all types of blank media. This suggests the levy is not a matter of “general” trade and commerce.

C. Taxation

The federal government would have been permitted to enact the private copying levy as a tax if it chose to do so. It would have needed to comply, however, with section 53 of the *Constitution Act, 1867*, which enshrines the unwritten principle of “no taxation without representation” by requiring the government to table a bill before the House of Commons through a ways and means measure. Canada’s private copying levy was not introduced in this manner. Therefore, the government would not seek to justify the levy as an exercise of its taxation powers. To the contrary, to sustain the validity of the levy, the federal government must argue that the levy is *not* taxation, but is instead a copyrights matter.

The Federal Court of Appeal decided that the levy was not a form of taxation, as defined by the Supreme Court of Canada.¹⁴⁴ A preliminary look at the court’s analysis indicates that further critical study on this point is warranted. It is simply not possible to give the issue the close attention it deserves in this paper. A full discussion of whether the levy is a matter of copyrights or taxation is left for another day.

Conclusion

This paper has explored the scope of Parliament’s authority under the copyrights clause of the Canadian constitution. Particular consideration was given to the overlap between copyrights, which are within federal jurisdiction, and property and civil rights, which are the legislative domain of the provinces.

Essentially, legislative authority over the private copying levy boils down to this. Pursuant to the copyrights clause, Parliament may enact legislative provisions that trench over property and civil rights so long as the matter remains in pith and substance copyrights, or is necessarily incidental to a valid copyrights scheme. If, however, the levy is not in respect of copyrights (because its purpose or effect bring the pith and substance of the matter within provincial jurisdiction over property and civil rights) and the levy is insufficiently integral and overly broad to be sustained as necessarily incidental to a valid copyrights scheme, it is unconstitutional.

As a concrete example, this paper assessed the constitutionality of Canada’s private copying levy. Because the levy has been interpreted very broadly, it is arguably in pith and substance a matter of property and civil rights. Significant reinterpretation could narrow the scope of the levy and bring it within federal

¹⁴⁴ Recent cases defining taxation include *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, 176 D.L.R. (4th) 276; *Re Eurig Estate*, [1998] 2 S.C.R. 565, 165 D.L.R. (4th) 1.

jurisdiction over copyrights. Otherwise, the levy may not be sufficiently integrated with an overall valid scheme to withstand scrutiny.

More generally, this paper concluded that Canada's copyrights clause does not give Parliament carte blanche to enact cultural, economic, technological, or regulatory policies under the auspices of the *Copyright Act*. Copyrights legislation must remain tightly linked to authors' cultural creativity, and not unduly compromise matters of property and civil rights.
