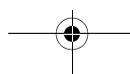
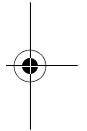
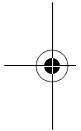
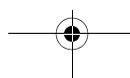
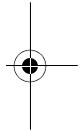
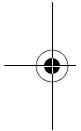
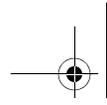


PART TWO

The Global Game







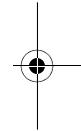
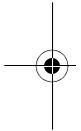
8 Developing Canada's Intellectual Property Agenda

JEREMY DE BEER
AND MICHAEL GEIST

Knowledge is now the most precious resource in the global economy. This valuable intangible profoundly affects commerce, culture, education, health, nutrition and other core economic, social and humanitarian issues. Access to and exchanges of all sorts of knowledge are, therefore, integral to all countries at any stage of development, including Canada.

Knowledge pertaining to revolutionary digital and biological technologies is currently governed by a global regime of institutions and agreements on trade, intellectual property and related topics. The last decades of the twentieth century were marked by an unprecedented convergence between intellectual property lawmaking and global trade policy. Bilateral and multilateral international agreements led to the harmonization of intellectual property standards throughout the world. International intellectual property policy was developed primarily as a response to the trade agendas of a few developed countries. The social and economic interests of developing countries largely ignored.

The dynamic global economic landscape of the twenty-first century requires rethinking international intellectual property policies. New norms are challenging the substance of existing intellectual property rules, as the networked information economy offers previously unimaginable opportunities (Benkler 2006). The procedures for creating international intellectual property laws are changing, as emerging economic powerhouses insist upon equitable participation in negotiations with full information and without coercion (Drahos and Braithwaite 2002, 189–92). The forums for debating policies and making laws are



proliferating, as intellectual property issues affect national, regional and international institutions and interests in a range of fields (May 2007, 96–8).

Canadians are well positioned to help shape emerging intellectual property paradigms. Canada has first-hand experience with what has become a template for bilateral or regional agreements in this area, the North American Free Trade Agreement (NAFTA), and was among the key players in negotiations over the single most important international instrument in the field, the 1994 Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). At the same time, however, as a net importer of intellectual property, Canada struggles to preserve its independent cultural identity and shares many other intellectual property concerns with developing countries.

In this chapter, the new global intellectual property framework is explored in order to identify what room to maneuver exists for Canadian foreign and domestic policies. By taking advantage of flexibilities in existing international agreements and promoting progressive attitudes toward new international initiatives, Canada can advance its own interests while simultaneously facilitating social and economic development in other parts of the world. To seize this opportunity, Canada should leverage its technocratic expertise to positively influence global knowledge governance policies and implement domestic reforms as “middle-ground” models for the information society. Adopting the incisive strategies proposed here will secure a leadership role for Canada in the world’s new knowledge economy.

BACKGROUND

The process of globalizing intellectual property standards began during the late nineteenth century. The first major multinational agreement regarding patents, trade-marks and industrial designs was the Paris Convention for the Protection of Industrial Property, approved and signed in 1883. Copyrights were first the subject of an international treaty in 1886, when the Berne Convention for the Protection of Literary and Artistic Works was formed. In 1891, the Madrid Agreement Concerning the International Registration of Marks became the first international instrument dealing with trade-marks. In 1893, the predecessor to the World Intellectual Property Organization (WIPO)¹ – the Bureaux Internationaux réunis pour la protection de la propriété intellectuelle (BIRPI) – was established to govern international patent, copyright and trade-mark conventions.

Underlying nineteenth century intellectual property agreements were controversies about the relationship between intellectual property and

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trade (May 2007, 14–19). Free trade liberals rejected intellectual property protections as an unjustified constraint on trade in goods. Representatives of industries that stood to gain from extended intellectual property protection, on the other hand, trumpeted the rights of authors and inventors and lamented “theft” and “piracy” by foreigners. As a result of declining enthusiasm for free trade generally, and to make domestic intellectual property systems more palatable, the views of the latter group grew dominant (May 2007, 16).

Throughout the twentieth century the BIRPI grew considerably in scope and in stature. New states were eager to join the organization and intellectual property exporters welcomed the expansion of their markets. Though all states did not share the same normative views on intellectual property, particularly about development-related issues, the BIRPI managed to marginalize differences of opinion among its members.

It did so in several ways. One was to rely on industry associations to evaluate proposals for development-friendly reform, as was done with a 1961 Brazilian resolution that bore a striking resemblance to WIPO's more recent and comprehensive Development Agenda (Koury Menezal, 2006). Similarly, BIRPI used the common practice of employing like-minded technical experts to minimize the influence of intellectual property critics. Another strategy was to promote international agreements that contained stronger and longer intellectual property protections but that preserved states' ability to tailor protections to their own circumstances. Good examples of this latter strategy are the Conventions of Berlin in 1908 and Rome in 1928 that addressed copyrights in the music and broadcasting industries respectively. More generally, during the early and mid twentieth century, countries were rarely forced to add new intellectual property rights or expand existing ones (Gervais 2002, 936–7). Instead, international agreements were premised on pre-existing domestic legislation and political consensus.

Flexible treaty obligations tended to preserve peace among countries with divergent domestic conditions. Christopher May (2007, 21–2) points out that developing countries were not the only ones to take advantage of flexibilities. For instance, countries such as Australia, where broadcasting is a public service connecting sparse populations across vast distances, were not comfortable extending private rights into that sector.

Because Canada is also such a country, unique in other ways as well, it stood on the sidelines of many international intellectual property initiatives during the early and mid twentieth century. Though Canada participated in periodic revisions of the Paris and Berne Conventions (Vaver 2000, 4), it did not vigorously pursue an international intellectual property agenda to suits its own interests. Maybe intellectual

property was not perceived to be a priority issue. Perhaps this was because of Canada's colonial ties to the United Kingdom. Or perhaps it was assumed that our national interests mirrored those of other developed countries, especially the United States.

Canada's ties to the United States were particularly pronounced in the negotiations that led to the Agreement on Trade-Related Aspects of Intellectual Property. During the negotiations, Canada was part of a group known as "the Quad," which also included the United States, European Union (EU) and Japan. Building consensus among Quad members outside of the formal negotiation processes proved key to the eventual securing of a broader agreement in support of the US business agenda (Drahos and Braithwaite 2002, 117). Despite being part of the inner circle, however, Canadian officials played a small, if any, role in designing the new international intellectual property paradigm. Instead, the Intellectual Property Committee (IPC) essentially drafted the entire TRIPS agreement, leaving negotiators to do only the fine-tuning (May 2007, 28–9; Sell 2003, 107; Drahos and Braithwaite 2002, 123–5). This would not be extraordinary, except that the IPC was not a group of delegated officials, as its name might suggest. Rather, it was a lobbying association that included the heads of powerful US corporations, such as the chairs of Pfizer and IBM (Drahos and Braithwaite 2002, 118).

Daniel Gervais (2002, 947) calls the fact that a comprehensive agreement covering all forms of intellectual property was negotiated in a few short years "astonishing," especially given the sluggish pace and partial coverage of intellectual agreements negotiated over the previous hundred years. This incredible agreement exists in part because of concessions on developing countries' demands concerning textiles and agriculture exports (May 2007, 29; Drahos and Braithwaite 2002, 11).

But furthermore, some countries, particularly Japan and members of the European Union, had no reason to oppose a TRIPS agreement that mainly replicated their domestic laws or existing obligations under bilateral treaties or regional agreements. That was the situation Canada also found itself in. The TRIPS agreement resembles the intellectual property provisions contained in Chapter 17 of the 1994 NAFTA in most material respects. Since Canada had already agreed to the substantive requirements of NAFTA, no major amendments to domestic law were required to comply with TRIPS standards specifically.

For example, prior to NAFTA Canada had resisted adhering to revised versions of the Berne Convention but, under hard pressure from the US, altered its stance (Handa 2002, 398–9). NAFTA required compliance with (but not signature of) Berne, so Canadian law was amended to protect computer programs and require cable re-transmitters to pay royalties to US broadcasters. Canada did not ratify the revised Berne

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Convention and the Rome Convention concerning copyrights for performers, sound recording makers and broadcasters until 1998, at least in part because a piecemeal amendment approach was used as a lever in trade negotiations (Handa 2002, 399).

Canadian policy has been to avoid formalizing relationships with other countries as long as Canada can reap the benefits of protection abroad while maintaining flexibility to implement protections that suited domestic needs (Handa 2002, 402). This attitude is reflected in documents prepared by and for the federal government over the past half-century, which demonstrate awareness that intellectual property protection can seriously affect Canada's trade deficit (Handa 2002, 400). One of the most notable was a 1977 report from Andrew Keyes and Claude Brunet in which the authors stated: "[T]he fully developed nations, largely exporters of copyright material, have a stronger voice in international copyright conventions, and a tendency has existed over the past half century for developing countries, including Canada, to accept too readily proffered solutions in copyright matters that do not reflect their economic positions." Thirty years later these remarks still ring true.

Sunny Handa (2002, 402) points out that Canada has been forced to capitulate on intellectual property issues, despite the consequential outflow of dollars which may not be in Canada's best interests. Pressure from the US has played a large part in Canadian policy-making. But Canada has not been the only country to face pressures.

Another reason many countries have agreed to higher intellectual property standards has been the US strategy of threatening and sometimes using bilateral trade sanctions pursuant to section 301 of the United States *Trade Act* of 1974 (Matthews 2002, 31–5; Drahos and Braithwaite 2002, 134–7). In 1993, the Office of the US Trade Representative commenced a section 301 investigation against Brazil, in 1994 it did so against China, and at various times has done the same against Thailand, India, Egypt, South Africa, Korea, Poland, Italy and others including Canada (Handa 2002, 425–6).² Though critics call this for what it is – bullying – sadly many countries find it preferable to negotiate with the US rather than create the risk of an investigation and sanctions under section 301 (Handa 2002, 426).

In this climate, one of US negotiators' most notable accomplishments after TRIPS was the completion in 1996 of a pair of copyright-related treaties known as the WIPO Internet Treaties. The cornerstones of these agreements are prohibitions against tampering with technological protection measures (TPMs) that lock up electronic content, as well as bans on products that might be used for that purpose.

Canada signed these treaties, but has yet to ratify them. As such, it has no binding duty under international law to implement their provisions

domestically through legislation. In the words of one copyright commentator, signing is to ratifying what dating is to marriage (Knopf 2006). Nevertheless, Canada now finds itself facing relentless pressure, primarily from US politicians and industry representatives, to act on its alleged international obligation (Geist 2007). Yet Canadian politicians and bureaucrats remain mired in confusion, without a clear vision of what direction they ought to take.

The present paralysis is directly attributable to a lack of foresight at the end of the twentieth century regarding intellectual property policy. Laws were designed to suit the outdated, hierarchical industrial models of information production, and are ill equipped to exploit the potential of the networked information economy (Benkler 2006). Yet Canada is now in the practical, though not legal, predicament of being bound to follow through on its ill-advised statements of support for now obsolete agreements like the WIPO Internet Treaties.

Though most countries have not ratified the WIPO Internet Treaties, and recent negotiations to establish a new Broadcasting Treaty have collapsed, it would be wrong to assume WIPO has been marginalized. The World Trade Organization's (WTO) challenge to WIPO's competence might be a manner of forum shopping, but May (2007, 33–5) points out that what is really happening is “forum proliferation.”

Indeed, the WTO is not the only other forum where intellectual property is growing in importance. Since the WTO's 2001 Doha Declaration on the TRIPS Agreement and Public Health, which affirms that the TRIPS Agreement should not prevent WTO Members from taking measures necessary to ensure the protection of public health, the World Health Organization (WHO) has increased its awareness of and involvement in intellectual property issues. Other agencies have a long history of intellectual property related activity, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), which has administered the Universal Copyright Convention since 1952. UNESCO's more recent Convention (2005) on the Protection and Promotion of the Diversity of Cultural Expressions addresses publications, movies and broadcasts, which are matters also dealt with under agreements governed by WIPO. WIPO worked with the Internet Corporation for Assigned Names and Numbers (ICANN) to develop a Uniform Domain Name Resolution Policy to address the intersection between trade-marks and domain names.

There is a Convention on Biological Diversity (CBD) that, with adequate support, could impact on patenting practices in the life sciences, as well as the traditional knowledge and genetic resources of indigenous communities. Another key agreement is the International Treaty on Plant Genetic Resources for Food and Agriculture, which is

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governed by the UN's Food and Agriculture Organization (FAO) and contains important provisions on intellectual property.

The involvement of these organizations reflects the breadth of social, cultural, medical, nutritional, scientific and economic issues affected by intellectual property issues. Trade, however, remains among the most influential considerations. And with the Doha Round stalled, negotiations are becoming increasingly bilateral rather than multilateral in nature.

The United States has vigorously pursued bilateral agreements containing "TRIPS-plus" standards, and has successfully completed such agreements with over a dozen countries.³ One of the next bilateral challenges for Canada is to retain sovereignty over its intellectual property policy within the Security and Prosperity Partnership framework it has established with the US and Mexico. A special advisory body of representatives from large North American corporations – the North American Competitiveness Council – has the potential to exert significant influence on this process (Savage 2006). Canadians must be cognizant of this, so as not to repeat the experiences leading to the TRIPS agreement.

Canada is also exploring a number of other bilateral and plurilateral trade agreements. During upcoming negotiations with countries in Latin America and the Caribbean, for example, Canada should not seek to harmonize maximalist intellectual property protections. Far better would be to focus on impact assessments, information sharing, co-operative policy-making and other consultation mechanisms. Canada's recent agreement with the European Free Trade Association (EFTA) countries of Iceland, Norway, Switzerland and Liechtenstein focused on tariff elimination rather than ratcheting up intellectual property standards. Though the lack of intellectual property provisions in this agreement might merely be attributable to high standards already in place, the parties have wisely avoided "the more, the better" mentality that often pervades international intellectual property lawmaking.

OPPORTUNITIES AT WIPO

Despite the engagement of the WTO, WHO, UNESCO, FAO, CBD and other agencies with intellectual property norm-setting and harmonization activities, WIPO remains active in this field. For example, members of WIPO are having serious discussions about harmonizing higher patent protections through a new Substantive Patent Law Treaty. Yet contradictorily, WIPO is facing mounting pressure to institute development-friendly reforms reflective of its role as a specialized agency of the United Nations.

This is a matter Canada must urgently act on if it is to become more proactive in twenty-first century intellectual property policy-making.

The WIPO Development Agenda is the most significant intellectual property matter to confront the international community certainly since TRIPS, and perhaps ever. The Agenda goes to the heart of WIPO's mandate and ongoing relevance in the global governance of intellectual property. It should have broad-ranging impacts on many aspects of international intellectual property law and policy-making in all sectors, from the life sciences to information communications.

The Agenda stemmed from a 2004 proposal submitted by Brazil and Argentina, and supported by a group of countries known as the "Friends of Development" and a contingent of civil society organizations. Like Brazil's 1961 resolution, the proposal sought to put a development-oriented focus on international intellectual property initiatives. May puts it this way: "The key demand of the Development Agenda is to re-establish, at the global level, the traditional public policy aspects of intellectual property, and specifically how public policy ends can be related to [intellectual property rights]" (2007, 79). Topics affected range from restating WIPO's mandate and reforming its governance structures to providing technical assistance and building capacity to modulating norm setting activities and promoting access to knowledge.

In response to a large number of proposals, the WIPO General Assembly constituted a Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) and convened inter-sessional intergovernmental meetings (IIMs). During a series of meetings over the past several years, 111 initial proposals were catalogued, debated, organized and amalgamated into manageable lists of key issues. In September 2007, 45 recommendations will be put before the General Assembly (New 2007), but it remains to be seen what concrete actions might be taken after that.

Canada did not put forward any of its own proposals in respect of the Development Agenda. It did occasionally intervene with comments on others' proposals or on intellectual property issues generally. The Canadian Delegation has made some positive contributions to discussions about the Agenda. During the first IIM, it acknowledged: "In both developing and developed countries alike, effective balance and flexible intellectual property frameworks could serve to promote creativity and disseminate information to both users and developers, resulting in economic, social and cultural benefits for communities" (WIPO 2005a, par. 62). On the topic of intellectual property and anti-competitive practices, the Canadian Delegation indicated its common interests with developing countries, promised to share with the PCDA a series of studies commissioned by the Competition Bureau and Canadian Intellectual Property Office and suggested it could help broker linkages with an international network of competition agencies (WIPO

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2007, par. 137). Canada followed up on its commitment by hosting a side event on this topic at the latest meeting of the PCDA.

At the second meeting, Canada pointed out it was important to remember that the interests of developing countries are not always uniform, and further noted that some of the concerns expressed by specific developing countries were shared by developed countries and their stakeholders (WIPO 2005b, par. 51). The impact of intellectual property on access to knowledge is one example of a shared concern. Yet despite Canada's earlier talk about access to knowledge, at the most recent meetings of the PCDA Canada was one of several countries that expressed concern about referencing this phrase as part of WIPO's norm-setting mandate (Love 2007). This attitude reflects Canada's alignment with a group of other developed countries that agreed to move forward with moderate reforms but resisted fundamental changes.

In many respects, Canada is ideally suited to break from the developed world pack to assume a leadership position on the development agenda. First, intellectual property laws have a heavy impact on wide range of key societal issues, including health, education, agriculture, communications and culture. Cultural policy presents a particularly vivid illustration of the challenges faced by Canada as well as less developed countries. The intellectual property-trade dilemma here is that low protection for foreign cultural products may cause the population to consume more of them at the expense of domestic industries while high protection may cause a large outflow of royalty payments (Handa 2002, 406). It is difficult to strike an appropriate balance, so it is important that Canada, like developing countries, maintain sovereignty over intellectual property laws so that these trade-offs can be judged in light of domestic concerns, not be dictated by foreign special interests.

Furthermore, despite the fact that Canada is a signatory to virtually all major intellectual property treaties, it remains a net importer of copyrighted work and ranks toward the bottom of G8 nations for pharmaceutical research and development. In fact, the bulk of Canada's C\$1.7 billion annual trade deficit in cultural goods (like books, CDs, films and paintings) and over half-billion dollar deficit in cultural services (including broadcasting, television, music and other royalty flows) results from trade with the United States (Canada 2006a, 2006b). According to Industry Canada, from 1992 to 2003, the Canadian trade deficit in pharmaceuticals grew from C\$1.2 billion to C\$5.6 billion.

We are not implying that Canada should reduce or eliminate protections to make knowledge available more cheaply *just* because it is a net importer of intellectual property. After all, one would not make the argument that Canada should not address climate change because it is a net exporter of fossil fuels. However, Canada's status as a net importer

of intellectual property puts it alongside the developing and least developed countries facing pressure from the US to ratchet up standards of protection. Intellectual property proponents argue that Canada and other countries can become intellectual property exporters by increasing levels of protection.

Canada can demonstrate that this argument rests on a fallacy about the impact of intellectual property on development. Stronger intellectual property protections do not necessarily lead to economic, let alone social or cultural development. Canada's experience illustrates that intellectual property laws are important, but serve as only a small part of an overall policy designed to foster innovation, creativity and economic growth. Indeed, intellectual property protections can sometimes stifle development by propping up the monopolies of information industry incumbents at the expense of groundbreaking technologies and business models.

The foregoing discussion suggests that the dichotomy between developed and developing countries is often a false one. As Canadian delegates acknowledged during meetings of the PCDA, in many contexts Canada's interests are the same as those developing countries. Domestic and international policy-makers, therefore, ought simply to strive for balanced intellectual property policies that reflect sensitivity to the range of affected social and economic issues. While the government of Canada has set development assistance as a priority, committing significant new funding towards aid programs, other countries need more than just dollars. Canadian political support for alternative perspectives on intellectual property would carry long-term benefits that would extend well after the current round of aid funding is exhausted.

As the entire world strives to identify effective growth policies, the WIPO Development Agenda has the potential to play an important role in altering the current intellectual property framework. Though general consensus is that advancing proposals on the Development Agenda to the WIPO General Assembly is itself a sign of tremendous success, the litmus test will be whether or not recommendations are implemented in practice. Experts are optimistic, but acknowledge that opportunities could be squandered in implementation (Musungu 2007). For fundamental transformations to succeed, countries such as Canada must also become "friends of development."

DOMESTIC REFORMS

While Canada can establish a strong presence at international fora such as WIPO, its best opportunity for global leadership stems from enacting domestic reforms that can serve as a model for developed and developing

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countries worldwide. WIPO provides technical assistance to developing countries, but its programs do not support novel solutions to intellectual property problems (May 2007, 63). Canadian domestic models, if properly crafted, can be used as templates in WIPO's technical assistance programs. Canada can become a beacon for other countries looking for balanced, middle ground intellectual property solutions.

Canada has begun to take a leadership role by attempting to implement middle-ground models in some areas. It was the first country to act upon the spirit of the Doha Declaration on the TRIPS Agreement and Public Health. Through Bill C-9, part of former Prime Minister Jean Chrétien's "Pledge to Africa," the *Patent Act* was amended to allow generic pharmaceutical companies to obtain compulsory licences to manufacture and sell medicines to developing and least developed countries facing health crises. Norway, India, China and the EU all followed Canada's lead.

Critics have condemned the Canadian reforms as ineffective, though Rwanda just recently announced that it would import hundreds of thousands of doses of HIV/AIDS drugs manufactured under Canada's compulsory licensing scheme. Moreover, while the system could certainly be improved, Canada's action in this respect is an important demonstration of support for the principle that health and human rights are more important than patents and property rhetoric. The Access to Medicines Regime is currently undergoing an accelerated statutory review. Through this process, Canada can and should improve its regime to provide a positive example for other countries.

Canada should also implement progressive patent policies by amending domestic laws to address the problem of "biopiracy" – the misappropriation of biological materials without consent or compensation. To comply with the spirit of the CBD and the FAO's "International Seed Treaty," Canadian patent law should require applicants to disclose the origins of biological materials that are part of their claimed inventions. Canadian patent law should also mandate the equitable sharing of the benefits arising from the utilization of traditional knowledge and genetic resources from developing or least developed countries. Obviously, the same principles ought to be applied in the context of dealings with Canada's First Nations. Concerns over misappropriation go beyond patent policy to affect other areas of intellectual property, especially in respect of cultural issues.

And indeed, patent law is not the only area where Canada can adopt a leadership role. Much can be done in respect of Canadian copyright policy. We have chosen to focus the remainder of this chapter on copyright matters as an illustration of the specific ways in which Canada can exercise its room for manoeuvre vis-à-vis its intellectual property policies.

That opportunities exist for Canada to chart new ground within the confines of existing international copyright law has not escaped the attention of global intellectual property leaders. For example, in late March 2007, McGill University hosted an important conference on the future of copyright and the music industry, bringing together music notables such as famed producer Sandy Pearlman and New Democratic Party's Heritage critic, Charlie Angus. The most interesting – and surprising – comments came from Bruce Lehman, who served as the assistant secretary of Commerce in the Clinton administration and as the chief architect of the WIPO Internet Treaties and the US Digital Millennium Copyright Act (DMCA).

Reflecting on the decade since the WIPO treaties were established, Lehman (2007) acknowledged that “our Clinton administration policies didn't work out very well” and “our attempts at copyright control have not been successful.” Moreover, he suggested that the world is moving toward a “post-copyright era” for music, a development that he believed was the result of the recording industry's failure to adapt to the online environment. Lehman followed his criticism of US policy by issuing a challenge to Canada, urging policy-makers and political leaders to think outside the box on future reform. Indeed, he argued that Canada was well positioned to experiment with new approaches consistent with international copyright law.

Given the Canadian marketplace realities and the Lehman recommendation to chart our own course on copyright, how might Canada respond on the domestic front? There are at least five issues that should be addressed to leverage emerging technologies and to chart a course that enables Canada to establish a world-leading, forward-looking model of intellectual property law.

*i. Greater Creative Flexibility and Innovation –
Expand Fair Dealing*

In 2004, the Supreme Court of Canada issued a critically important copyright decision that has helped reshape the Canadian intellectual property landscape. The *Law Society of Upper Canada v. CCH Canadian*, a 2004 unanimous decision, involved a dispute between the Law Society – the body that governs the legal profession in Ontario – and several leading legal publishers. Unlike today's high profile cases that typically involve the Internet, this case centered on a distinctly old-fashioned copying technology – photocopiers.

The Law Society, which maintains the Great Library, a leading law library in Toronto, provided the profession with two methods of copying cases and other legal materials. First, it ran a service whereby

lawyers could request a copy of a particular case or article. Second, it maintained several stand-alone photocopiers that could be used by library patrons. The legal publishers objected to the Law Society's copying practices and sued for copyright infringement.

The Law Society emerged victorious on most counts. The court ruled that it had neither infringed the publishers' copyright nor authorized others to do so. One of the most important long-term effects of the CCH decision was the Court's strong support for the fair dealing provision, which it characterized as a user right. The Court emphasized the importance of a broad and liberal interpretation to fair dealing, which covers a series of prescribed uses including research, private study, criticism and news reporting.

Unfortunately, the relatively rigid categorization of exceptions runs counter to the very notion of a broad and liberal approach. On this issue, the United States provides the ideal model since its "fair use" provision does not include such limiting language, thereby encouraging innovative, fair uses of existing work.

A full fair use provision – one that would amend the current Copyright Act so that the list of fair dealing rights would be illustrative rather than exhaustive – would help solve many difficult issues. Similarly, a shift to fair use would help bridge the gap on the use of the Internet in Canadian schools by rejecting both the blanket Internet exception for school use proposed by some education groups and the comprehensive Internet licensing scheme advocated by Access Copyright, a leading copyright collective. The change would clear the way for fair use that are not currently covered by the private study or research fair dealing rights, but also ensure that creators are compensated for uses that extend beyond what might reasonably be viewed as fair use.

Canada recognized the benefits of a fair use system in a landmark policy paper in the 1980s, yet failed to introduce legislation to implement the recommendation. With both Australia and the United Kingdom openly considering shifting their laws from fair dealing to fair use, this is the one issue on which Canada can ill-afford to be left behind since an overly restrictive fair dealing regime harms both innovation and creativity.

ii. A Canadian Model for WIPO Internet Treaties' Implementation

The WIPO Internet Treaties, which Canada signed in 1997, are frequently cited as a prime reason for Canadian digital copyright reform. Several of our trading partners, most notably the United States,

are aggressive proponents of the treaties, which mandate new legal protections for technological protection measures.

While the treaties are indeed an important consideration in the policy process, it is important that Canadians separate fact from fiction. The myths associated with the treaties frequently focus on Canada's place in the international copyright world and the impact of WIPO Internet Treaties' ratification on Canadian creators and consumers. The arguments surrounding Canada's place in the international copyright world often imply that Canada has failed to meet its international copyright obligations, that signing the treaty in 1997 now compels Canada to ratify it, and that Canada has fallen behind the rest of the world by moving slowly on ratification.

None of these claims are true. Canada has not failed to meet its international obligations since it has no obligations under the WIPO Internet Treaties – under international law, obligations only arise once a country has ratified a treaty not merely signed it. Canada's decision to sign the WIPO Internet Treaties was simply a sign of support, and did not mean that Canada would have a legal obligation to ratify them. In fact, at the time Canada considered signing the treaties, then-Canadian Heritage Minister Sheila Copps was advised that “international convention is such that signing in no way binds Canada to ratify the treaties. It is a symbolic gesture” (Geist 2005).

The WIPO Internet Treaties' impact has been similarly exaggerated. Supporters argue that failure to ratify will result in diminished protection for Canadian artists outside the country and that ratification will not have an adverse impact on Canadian consumers. Once again, neither of these claims prove to be accurate under close scrutiny. Concerns about the protection of Canadian artists outside the country is based on the premise that Canadians will only enjoy stronger protections elsewhere if foreign artists benefit from equivalent protections in Canada. In reality, ratification of the WIPO Internet Treaties won't provide Canadian artists with any additional protections in countries such as the United States and Japan since these countries are already obligated to extend equal protection – known as national treatment – to local and foreign artists under existing trade agreements.

While WIPO Internet Treaties' ratification will not directly benefit Canadian artists in foreign jurisdictions, foreign artists will enjoy great benefits from ratification to the detriment of Canadian consumers, since formal ratification of one of the WIPO treaties would require additional changes to Canadian copyright law, most notably providing national treatment for the controversial private copying levy. As a result, Canada's private copying levy could double in size simply to support royalty payments to foreign artists.

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Despite their shortcomings, Canada may ultimately decide to implement the WIPO Internet Treaties. In reaching that determination, policy-makers should be guided by the Canadian national public interest, not a series of myths that inaccurately imply that Canada has little choice in the matter.

iii. Striking the Property Balance – Protection for and from Technological Protection Measures

Owners of online databases and other digital content deploy technological protection measures to establish a layer of technical protection that is designed to provide greater control over their content. Some major record labels and movie studios have touted TPMs' promise for more than decade, maintaining that technological locks could prove far more effective in curtailing unauthorized copying, distribution, performance and display of content than traditional copyright laws. While TPMs are frequently associated with encryption protection, TPMs encompass a broad range of technologies including more mundane approaches such as password protections. While TPMs do not provide absolute protection – research suggests all TPMs can eventually be broken – companies continue to actively search for inventive new uses for these digital locks.

Given the flawed protection provided by TPMs, lobbyists have asked for additional legal protections to support them, known as anti-circumvention legislation. Although characterized as copyright protection, this layer of legal protection does not address the copying or use of copyrighted work. Instead, it focuses on the protection of the TPM itself, which in turn attempts to ensure that the underlying content is only accessed and used as controlled by the copyright owner.

As Canadians consider implementing anti-circumvention provisions within domestic law, several lessons learned elsewhere bear repeating. First, anti-circumvention represents an entirely new approach to copyright law. While copyright law seeks to balance creator and user rights by identifying the rights and limitations on rights holders, TPMs, supported by anti-circumvention legislation, creates new layers of protection that do not correlate with traditional copyright law.

In a 2002 Supreme Court of Canada decision, *Théberge v. Galerie d'Art du Petit Champlain inc.*, Justice Binnie stated that “once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.” Anti-circumvention legislation challenges this premise, since activity that is lawful under traditional copyright law, may be unlawful under certain anti-circumvention legislation.

Second, there is considerable flexibility in how a country implements its anti-circumvention obligations into national law. While the US Digital Millennium Copyright Act is the best-known implementation, the approaches in several European countries, as well as some in the developing world, indicate that a country can seek to maintain the copyright balance, avoid regulating technologies and foster a pro-competitive marketplace within the WIPO framework. Canada can implement a middle-ground solution.

Third, the US DMCA experience illustrates that the fears raised by critics of the US approach have come to fruition. In less than a decade, the DMCA has become a heavily litigated statute used by rights holders and non-rights holders to restrict innovation, stifle competition and curtail fair use. This has occurred in large measure due to the US decision to strictly regulate anti-circumvention devices and to downplay the connection between TPM protection and copyright.

Ottawa should ensure that the anti-circumvention provisions feature a direct connection to traditional copyright infringement by limiting the scope of a circumvention offence to users who circumvent for the purpose of committing copyright infringement. Copyright, competition and constitutional law analysis all support this approach (Geist 2005, ch. 4–7).

From a copyright perspective, failure to link anti-circumvention with copyright would alter the balance between creators and users as it would invariably lead to an expansion of the rights attached to copyright. The US experience provides ample evidence in this regard as courts have openly acknowledged that copyright compliant activity or devices are no longer sufficient, since anti-circumvention renders certain activity illegal that is legal under traditional copyright norms. Such an approach would run directly counter to recent Supreme Court of Canada pronouncements on Canadian copyright law that have emphasized the need for an appropriate balance to encourage creativity and innovation in the long-term interests of society as a whole.

The impact of non-linkage would extend the provisions well-beyond works typically associated with copyright. Provisions that open the door to using anti-circumvention provisions beyond traditional copyright norms risk generating uncertainty in the marketplace and the potential for lawsuits that restrain competition and limit consumer choice. This issue has not escaped the attention of many other countries including Germany and Denmark, which have implemented laws that link anti-circumvention legislation to copyright infringement.

Beyond the copyright and competition policy reasons for a direct connection between anti-circumvention and copyright, a strong constitutional law reason exists as well (de Beer 2005). The federal government's

jurisdiction over copyright is derived from s.91(23) of the *Constitution Act, 1867*. Anti-circumvention legislation that is closely connected with traditional copyright principles would be less likely to unconstitutionally entrench on provincial jurisdiction over matters of property and civil rights.

*iv. A Robust Public Domain –
Reject Copyright Term Extension*

The 2002 *Théberge* decision, referenced above, involved a challenge by Claude Théberge, a Quebec painter with an international reputation, against an art gallery that purchased posters of Théberge's work and then proceeded to transfer the images found on the posters from paper to canvas. The gallery's technology was state of the art – it used a process that literally lifted the ink off the poster and transferred it to the canvas. The gallery did not actually create any new images or reproductions of the work since the poster paper was left blank after the process was complete. Théberge was nevertheless outraged – he believed he had sold paper posters, not canvas-based reproductions – and he proceeded to sue in Quebec court, requesting an injunction to stop the transfers as well as the seizure of the existing canvas-backed images.

Although the Quebec Court of Appeal ruled in favour of the seizure, the majority of the Supreme Court overturned that decision, finding that the images were merely transferred from one medium to another and not reproduced in a fashion contrary to the *Copyright Act*.

Writing for the majority, Justice Binnie emphasized the dangers inherent in copyright that veers too far toward copyright creators at the expense of both the public and the innovation process. He noted that “excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization” (para. 32).

Canadian policy-makers are contemplating launching a public consultation to discuss the prospect for extending the term of copyright from the current life of the author plus fifty years to life of the author plus seventy years. A consultation is unnecessary; the government should simply undertake to meet the international standard of life plus fifty years eliminating any consideration of term extensions that provide no real additional incentive to create, yet hold the danger of keeping valuable works out of the public domain.

Indeed, if Canada wanted to lead on this issue, it might consider, as has Professor David Lametti of McGill University, the prospect of

scaling back the length of the term of copyright for certain works (Lametti 2005). For example, the term of copyright for a software program, which is frequently outdated only months after its release, is the same as a novel or musical composition. Reconsidering copyright terms could yield varying term lengths depending on the type of work to provide more suitable terms of protection.

*v. Establishing a Balanced System
for Internet Service Providers*

A critical aspect of digital copyright reform is the role of Internet service providers (ISPs), who serve as intermediaries for online activities. Certain rights holders have aggressively pursued the establishment of a “notice and takedown” system. Under notice and takedown, copyright holders have the right to notify ISPs that one of their subscribers has posted copyright infringing content (the notice). Depending on the system, ISPs respond to the notice by either notifying the subscriber (who may voluntarily take down the content), taking down the content themselves, or awaiting a court order (the takedown). In return for taking action, ISPs qualify for a safe harbour from liability.

The United States implemented a notice and takedown system several years ago. Canada has moved slowly on this issue, however, due in large measure to concerns arising from the US experience. Under the US system, computer generated notices have become the standard, with errors becoming the norm. For example, notices have been sent to take down a child’s Harry Potter book report, a sound recording by a university professor mistakenly identified as a song by a well-known recording artist and an archive of public domain films.

In fact, one study of the US experience found that some ISPs receive tens of thousands of notices every month with only a handful actually relating to materials found on their networks (Geist 2004). Moreover, notices have also been used to suppress free speech and criticism. Diebold, an electronic voting equipment maker used the system to attempt to remove company memos detailing problems with its e-voting machines, while the Church of Scientology has used it to remove web sites critical of its activities.

Canadian policy-makers and parliamentarians should respond to this issue by opting for a “notice and notice” system that respects the rights of copyright holders, the privacy rights of users, the fairness of court review and the need to appropriately limit the burden placed on ISPs. Notice and notice is comprised of a four-step process. First, a copyright holder, having exercised appropriate due diligence in confirming an alleged infringement, sends a notice to the ISP. Second, the

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ISP promptly notifies its customer of the allegation and leaves it to the customer to voluntarily take down the content. Third, if the customer refuses to take down the content, the copyright holder applies to a Canadian court to order its removal. The ISP serves as a conduit to ensure that the subscriber is aware of the court proceeding and can challenge if desired. Fourth, if the court issues an order, the ISP responds to the order by taking down the content. This approach would provide copyright holders with an efficient mechanism for removing infringing content, while also ensuring respect for subscriber privacy and free speech rights as well as granting ISPs limited liability.

CONCLUSION

The changing global economic landscape requires rethinking international intellectual property policies. Canada stood on the sidelines of many international intellectual property initiatives during the early and mid twentieth century as negotiators did not vigorously pursue an international intellectual property agenda to suit national interests.

In many respects, Canada is today ideally suited to break from the developed world pack to assume a leadership position on emerging intellectual property law and policies, such as the WIPO Development Agenda. Canada's own intellectual property position is closer to the developing world than some might think. Despite the fact that Canada is a signatory to virtually all major intellectual property treaties, it remains a net importer of copyrighted work and ranks toward the bottom of G8 nations for pharmaceutical research and development.

While Canada can establish a strong presence at international fora such as WIPO, its best opportunity for global leadership stems from enacting domestic reforms that can serve as a model for developed and developing countries worldwide. Canada should continue to implement progressive patent policies by amending domestic laws to address the problem of "biopiracy." To comply with the spirit of the CBD and the FAO's "International Seed Treaty," Canadian patent law should require applicants to disclose the origins of biological materials that are part of their claimed inventions. Canadian patent law should also mandate the equitable sharing of the benefits arising from the utilization of traditional knowledge and genetic resources from other countries.

On the copyright front, Canada would do well to introduce full fair use provision – one that would amend the current Copyright Act so that the list of fair dealing rights would be illustrative rather than exhaustive. In transposing international law into domestic statutes, it should aggressively adopt a "Canadianized" version of the WIPO Internet treaties, by, for example, establishing protection both for and from

technological protection measures. Canadian leaders should also heed the advice of the Supreme Court of Canada, by facilitating a robust public domain through a freeze on copyright term extension.

Canada had a seat at the table during the TRIPs negotiations as part of a group known as “the Quad.” Despite their presence, Canadian officials said little and played a minor role at best in designing the new international intellectual property paradigm. Years later, as intellectual property policy assumes even greater importance, Canada has an opportunity to atone for its previous silence by implementing forward-looking intellectual property policies that will serve as models for developed and developing countries alike.

NOTES

- 1 The World Intellectual Property Organization was established as a specialized agency of the United Nations in 1967.
- 2 Technically, some of these complaints came after TRIPs (e.g. in Canada’s case), but the US has used the Section 301 bullying strategy as part of a larger pattern of bullying. Had Canada not been a NAFTA signatory, it would have been seen by the US as a TRIPs opponent. Furthermore, Canada’s membership in the “Quad” was a result of US pressure.
- 3 Including Columbia, Peru, Australia, Bahrain, Chile, the Dominican Republic, Israel, Jordan, Malaysia, Morocco, Oman, Panama, Korea, Singapore, South Africa, Thailand, and the United Arab Emirates. See <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html> “TRIPs-plus” means that bilateral agreements require parties to meet the standards of the TRIPs Agreement “plus” provide additional stronger or longer intellectual property protection.

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