

North American Digital Copyright, Regional Governance and  
the Potential for Variation

by

Blayne Haggart  
M.A., Carleton University, 2005  
M.A., University of Toronto, 1997

A thesis submitted to the Faculty of Graduate Studies and Research in  
partial fulfillment of the requirements for the degree of

Doctor of Philosophy

In

Political Science with Specialization in Political Economy

Carleton University  
Ottawa, Ontario

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*Your file* *Votre référence*  
ISBN: 978-0-494-83213-4  
*Our file* *Notre référence*  
ISBN: 978-0-494-83213-4

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## **ABSTRACT**

This dissertation proposes an historical-institutionalist framework for understanding regional governance issues in general and North American governance in particular. Using digital-copyright reform as a test issue, it demonstrates that regional institutionalization can preserve differences and does not necessarily lead to regional policy convergence. This conclusion emerges from historical institutionalism's focus on understanding the interaction of the policy-relevant ideas, institutions and interests shaping a region, no matter on what "level" they may be located. Regional governance processes must be understood within their own particular historical contexts. This approach allows the researcher to account for relevant influences that are either downplayed or ignored in other approaches to regionalism.

With respect to copyright, this dissertation finds that U.S. digital-copyright policy is shaped decisively by its own domestic ideas, institutions and interests, with international and regional factors playing a minimal role. For Canada and Mexico, while the United States has attempted to influence copyright reform in its neighbours, both countries' copyright policies continue to be influenced significantly by domestic factors, and both countries continue to display significant copyright-policy autonomy. U.S. ability to influence its neighbours is constrained by the North American Free Trade Agreement's (NAFTA) guarantee of market access, which limits the U.S. ability to link copyright reform to improved access to its market, suggesting that NAFTA's rules play a role in maintaining policy autonomy and reducing the potential for policy convergence.

## **ACKNOWLEDGEMENTS**

I would like to thank the many people who helped me complete this project. First, my diligent committee, Laura Macdonald, Melissa Haussman and Jeremy de Beer, who were always available with unfailingly sound advice and whose comments infinitely improved the final product. Thanks also to Keith Serry for first suggesting that I use copyright as a way to understand North American governance.

Thanks most of all to my wife and partner Natasha Tusikov. She copyedited this entire document at least three times and endured endless rants about copyright, International Relations theory and policy windows. Without her emotional and financial support – including gamely going along with my insistence that I really do write better at the pub (Diet Coke only during working hours) – I never could have taken five years off to pursue this lifelong dream. It's my turn to return the favour. This is for you.

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## **INTRODUCTION**

### **AN UNLIKELY DEBATE**

In December 2007, the unlikely issue of copyright reform catapulted to the top of the Canadian political agenda. In response to a Conservative government bill that would have implemented two 1996 World Intellectual Property Organization (WIPO) treaties designed to update member countries' copyright laws to deal with the increasing ubiquity of digital reproduction of creative works like movies, books and music, activists successfully sparked grassroots opposition among such disparate groups as consumers, programmers, Internet-based businesses and technology and copyright lawyers. This unexpected opposition caused a minority Conservative government with a reputation for being unconcerned with public opposition to delay introducing the legislation for six months. The delay was fatal: the bill was killed by an election call in September 2008.

This event was notable for several reasons. It marked the first time that a social-network platform – in this case, Facebook – had been used to organize a successful, largely decentralized grassroots political campaign in Canada. It also signaled the politicization of what had been a quiet, if high-stakes, legal backwater. Copyright law is a subset of intellectual property (IP) that covers literary, artistic and dramatic works (May 2000, 8-9). (The other types of IP are patents, which cover industrial processes such as pharmaceuticals, trademarks, which protect phrases and symbols that identify goods or services, and trade secrets). Until recently, the only groups that had paid much attention to copyright law were the creators and the content industries (which refers to the intermediaries who publish and distribute creative works such as music, books, software and motion pictures) whose business copyright law regulates. That copyright could excite such public passion was a revelation to

many, not least to those in government. Since the first modern copyright law in the United Kingdom in 1709, copyright has expanded to cover new forms of expression such as computer programs and actions tangential to creation (i.e., broadcasts and performances, referred to as “neighbouring rights,” which function similarly to copyright). Its application to digital media and the Internet, however, has caused individuals, acting as both consumers and producers of copyrighted works, to become active in debates over copyright to an historically unprecedented degree. Copyright in Canada and elsewhere has morphed from a technical commercial law to a political battleground directly affecting billions of individuals.<sup>1</sup>

Despite the novelty of much of the content of the debate over these two treaties – the WIPO *Copyright Treaty* (WCT) and *Performances and Phonograms Treaty* (WPPT), collectively known as the “WIPO Internet treaties” – the debate itself was framed in terms that even a casual Canadian political observer would recognize. Opponents framed policy concerns with accusations that the Conservative bill was a carbon copy of the equivalent U.S. legislation. The Conservative’s Bill C-61, *An Act to Amend the Copyright Act*, opponents charged, was “Born in the U.S.A.”: the U.S. bill’s acronym – the DMCA (for the 1998 *Digital Millennium Copyright Act*) – became a slur. The Conservative bill was derided as being nothing more than a “Canadian DMCA.” The charge was only partially accurate. While some parts of the Conservative bill mirrored the U.S. DMCA and responded to U.S. demands on behalf of its content industries for stronger digital-copyright protection, others reflected a different approach.<sup>2</sup> As a rhetorical device, however, it was highly effective. The

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<sup>1</sup> The reasons for individuals’ increased interest in copyright and the subsequent politicization of the issue are discussed at length in chapter 2. The 2007-2008 Canadian copyright debate is covered in chapter 4.

<sup>2</sup> Chapter 4 provides a full discussion of the specific similarities and differences in the two countries’ approaches. The following section outlines general similarities and differences among Canadian, U.S. and Mexican copyright.

government was forced to respond that this was, in fact, a made-in-Canada bill to address Canadian issues (Industry Canada 2008).

Anti-Americanism is a recurring theme in Canadian – and Mexican – political history.<sup>3</sup> However, the charge of “Born in the U.S.A.” also puts forward a falsifiable claim: that we are experiencing convergence between Canadian and U.S. copyright policies and that this convergence is the result of U.S. influence. Such concerns are not limited to Canada. Although the Mexican digital-copyright debate is not as advanced as that of its North American neighbours, some Mexican academics have raised concerns about the U.S. influence on the direction of Mexican copyright laws, both as it relates to digital content and to more traditional issues of unauthorized commercial copying of books, CDs and movies.<sup>4</sup> Around the world, the United States, spurred by content industries concerned with protecting and increasing their competitive advantage in this area, has been aggressively pursuing changes to other countries’ copyright and IP laws since the mid-1980s.<sup>5</sup> U.S.-style copyright reform is now a standard demand in its trade agreements: the 1995 Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), which introduced enforceable global standards for copyright and IP, was the U.S. price for the creation of the World Trade Organization (WTO).

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<sup>3</sup> In Canada, one can point to many examples of anti-American sloganeering, from the Conservative party slogan “No truck or trade with the Yankees” in the 1911 free trade election and Pierre Trudeau’s comparison of the Canada-U.S. relationship to that between a mouse and an elephant. In Mexico, late-19<sup>th</sup>-century, early-20<sup>th</sup>-century dictator Porfirio Díaz’s lament – “*¡Pobre México! ¡Tan lejos de Dios, y tan cerca de los Estados Unidos!*” (“Poor Mexico! So far from God, and so close to the United States!”) – continues to strike a chord.

<sup>4</sup> Chapter 5 discusses Mexico’s copyright regime and issues in depth.

<sup>5</sup> As will be discussed in chapter 2, the 1989 Canada-U.S. Free Trade Agreement contained copyright-related provisions. The 1994 NAFTA also had a comprehensive chapter on copyright. Since NAFTA, the United States has become even more intent on including copyright in its trade agreements. Recent examples include Chapter 17 of the 2005 United States-Australia Free Trade Agreement, Article 14 of the 1985 United States-Israel Free Trade Agreement, and Article 4 of the 2001 United States-Jordan Free Trade Agreement.

Yet, when one looks below the surface of these attempts at global convergence, what emerges is a more complicated picture. If one were to think of two countries that would be most vulnerable to U.S. influence, Canada and Mexico would not be unreasonable choices. They are neighbours of the hegemonic regional and global power.<sup>6</sup> Their economies are deeply integrated with that of the United States; U.S.-based content industries are active and important in all three countries. Copyright provisions in the North American Free Trade Agreement (NAFTA), essentially written by the United States, placed the three countries within a common regional orientation for the countries' copyright laws; in the case of Mexico, it required a wholesale rewriting of its copyright law. While the orientation of Canada's copyright law was already substantially similar to that of its U.S. neighbour, and while NAFTA Annex 2106 exempted Canada from implementing NAFTA's copyright obligations, it nonetheless implemented some changes to its copyright law as a result of NAFTA (Doern and Sharaput 2000, 106). As well, as has already been noted, the United States cares deeply about this issue.

Remarkably, however, despite the asymmetrical economic relationship between the United States and its neighbours, and despite U.S. attempts to advance the economic interests of what it perceives as a key industry, domestic institutional, ideational and political factors continue to drive the copyright debates in Canada and Mexico, as they do in the United States. Contrary to the predictions of some analysts (e.g., Acheson and Maule 1996) who

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<sup>6</sup> This dissertation adopts Keohane's definition of hegemony as "a situation in which one state is powerful enough to maintain the essential rules governing interstate relations and willing to do so" (Keohane 2005, 34-35). A hegemonic state must, as the United States does, possess a "preponderance of material resources," particularly "control over raw materials, control over sources of capital, control over markets and comparative advantages in the production of highly valued goods" and be willing to exploit these advantages (Keohane 2005, 32). A hegemonic power will also exploit "nonterritorial power" (or soft power) resources such as ideology (Katzenstein 2005, 2). The definition of hegemon is relational: at heart it implies only the possession of relative advantages in its dealings with other states. It does not imply the ability to control all situations, a key point for this dissertation's argument.

thought that NAFTA presaged the continuing harmonization of North American copyright laws, NAFTA has preserved the potential for divergent copyright policies in North America. NAFTA cannot be changed easily, and its creation of a continental market makes it difficult for any member country to offer improved market access in exchange for concessions on economic issues like copyright. As a result of this institutional structure, even cases of copyright-policy convergence in Canada and Mexico can only be understood by reference to domestic factors, albeit in a regional context. An examination of the process of the development of copyright policies in Canada, Mexico and the United States, therefore, has the potential to reveal a great deal about the governance of the North American region.

### **I. What is copyright?**

Copyright policy presents a useful way to explore regional and domestic governance in North America. Like regional integration itself, copyright touches on issues of politics, economics and culture. It is embedded within domestic, regional, international and global political, economic and legal relations. Copyright law, like all property law, is inherently political. Examining the groups favoured by copyright law, as well as those recognized within the copyright policymaking process, can reveal a great deal about which groups have power in North America when it comes to making copyright law.

Copyright law has a deserved reputation for being ridiculously complex, but at heart it is simply a way in which governments regulate the commercial trade in creative works, such as books, CDs, digital music, motion pictures, computer software and DVDs. While the regulation of this market has “existed from time immemorial,” different societies have regulated this market in different ways. In Ancient Greece, the concept of “author” did not hold. “Greek writers such as Aristotle and Plato regarded themselves as teachers or

philosophers rather than authors” more concerned with recognition than remuneration. As a result, these works were protected mainly by “misappropriation rather than property laws” (Dutfield and Suthersanen 2008, 63-64).

The modern institution of copyright dates from the British 1709 *Statute of Anne*. While the scope of copyright has expanded dramatically since this date, all copyright laws in the Anglo-American tradition are shaped by this original law.<sup>7</sup> Then, as now, copyright denotes a form of property that is a subset of IP rights, “rule-governed privileges that regulate the ownership and exploitation of abstract objects in many fields of human activity” (Drahos 1996, 5). Like all forms of property, copyright is defined in the final instance by the state, which determines what is protected by copyright and the extent of this protection. Similarly, like other forms of property, copyrights are alienable, meaning that they can be bought and sold.<sup>8</sup> In the moment of fixation (e.g., the writing of a book or recording of a song), a creator receives copyright protection in the work. In practice, copyright rarely remains with the creator, who usually assigns it to a publisher and distributor (in return for compensation); these intermediaries hold and benefit from these assigned copyrights. The alienable and tradable nature of copyrights allows them to function as intangible assets for the content industries that hold them (Dutfield and Suthersanen 2008, vi).

Intellectual property involves a set of protections not provided to other types of property. All property involves a monopoly right of use, subject to certain conditions. This right seems “natural” because this monopoly is partly the consequence of the physicality of normal property: if one person is eating an apple, no one else can. For copyrighted works,

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<sup>7</sup> In brief, the Anglo-American tradition in copyright emphasizes economic rights in creative works. It stands in contrast to the Continental European tradition, which emphasizes copyright as an author’s moral rights in his or her creation. This distinction is elaborated further in the next section.

<sup>8</sup> Specifically, economic rights in copyright – the main subject of discussion in this dissertation – are alienable. Moral rights in copyright are generally considered to be inalienable.

and all IP, this “natural” scarcity must be created through the law. Consequently, copyright owners are given the extra right to prevent unauthorized parties from copying, adapting, distributing, performing, or displaying their work (Moore 1997, 8). Copyright thus creates a monopoly in the good: the copyright owner is able to avoid competition from unauthorized copiers. As a result of this right, the copyright owner has the legal market all to herself, preventing others from “using information that they want to use in the way they want to use it” (Benkler 2001, 268).

All copyright laws involve a paradox related to what Doern and Sharaput (2000) call its “protection” and “dissemination” roles, terms that this dissertation also adopts. Copyright laws are justified on the assumption that without their protection, creators would lack sufficient incentive to create, the marginal costs of copying being too low to allow a creator to recover her investment in the initial act of creation.<sup>9</sup> “Stronger” copyright, by which is meant more extensive “protection” from copying and unauthorized uses of a copyright owner’s work, in theory provides a greater incentive to create. The paradox emerges with the realization that this protection diminishes the flow (or “dissemination”) of creative works by making them more difficult and costly to obtain, and restricts future creation, since all creative works are built upon that which has come before.<sup>10</sup> This restriction can have substantial negative effects on the quality of life in a democratic society (which crucially depends on a well-informed electorate).

In practice, all copyright laws express a particular balance between these two roles: providing sufficient protection to encourage production while limiting their damage to

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<sup>9</sup> Discussed further in chapter 2. Whether this assertion is empirically valid is a separate question.

<sup>10</sup> See Landes and Posner (2003 and 1989) for a discussion of the economic costs and benefits from copyright.

dissemination.<sup>11</sup> The monopoly rights enshrined by copyright are limited in duration, scope and use. After a certain period of time has elapsed, the copyright expires and works enter the “public domain,” meaning anyone is free to copy the works without authorization from the original copyright owner.<sup>12</sup> Originally limited to 14 years (renewable once for an equal period),<sup>13</sup> copyright terms have expanded worldwide, reaching life of the author plus 50 years in Canada, life plus 75 in the United States and a world-leading life plus 100 years in Mexico.<sup>14</sup> In terms of scope, some things, such as “facts” and ideas, are considered uncopyrightable and thus are available to be used by anyone. Furthermore, where reproduction has been determined to have a positive social effect – for example, quotations for the purposes of criticism, education and research – users are often granted exceptions without seeking permission of the copyright holder. This limitation is “a judicial safety valve that allows copyright to be fine tuned so that it may better achieve its utilitarian objectives” (Handa 2002, 23). In the United States, this right takes the form of an open-ended “fair use” right.<sup>15</sup> In Canada this user right takes the form of “fair dealing” right, which enumerates the specific instances under which someone can reproduce, a copyrighted work without permission.<sup>16</sup> Mexico’s *Ley Federal del Derecho de Autor* (Federal Copyright Law, LFDA) recognizes a similar right to that of Canada, although it “is particularly strict and rigid in [its] application” (Schmidt 2009).

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<sup>11</sup> This is not to say that the balance is always wisely chosen.

<sup>12</sup> See Boyle (2008) for a discussion and defence of the public domain, as well as for a wider critique of intellectual property laws.

<sup>13</sup> These terms are general; in certain cases, somewhat different terms apply.

<sup>14</sup> NAFTA and TRIPS set member countries’ term of protection at life of the author plus 50 years; countries are free to provide longer terms. As discussed in chapter 5, Mexico’s term was extended in 2003 following lobbying by the collection societies, which represent creators in the Mexican copyright lawmaking process.

<sup>15</sup> As Lessig notes, this right “boils down to ‘the right to hire a lawyer’, to engage in protracted, costly and time-consuming litigation to defend one’s right to speak” (cited in Netanel 2008, 66).

<sup>16</sup> Recent court rulings, specifically *CCH v. Law Society of Upper Canada* seem to have created an explicit user’s right in Canada (Murray and Trosow 2007, 74).

### **i. Economic and moral rights**

In addition to economic rights (*derechos patrimoniales* in Spanish) related to copying, copyright is sometimes also discussed in terms of “moral rights” (*derechos de autor* in Spanish), which provide authors with a “right to attribution, integrity, disclosure and withdrawal” (Towse and Holzhauser 2002, xix). While copyright as an economic right originated in 18<sup>th</sup>-century Great Britain as a pragmatic, utilitarian way to fulfill the societal goal of encouraging the creation and dissemination of creative works, copyright as an author’s right originated around the same time in Continental Europe (notably France) and is based on a discourse of human rights. As a form of human rights grounded in Article 27 of the Universal Declaration of Human Rights,<sup>17</sup> moral rights are taken to be inalienable, in contrast to the contractual and alienable economic rights of “copyright.” Discussions of copyright are often needlessly complicated by the conflation of these two types of rights under the rubric of “copyright.”

Clarifying the differences between the two systems is particularly important in North America. The Canadian and U.S. approaches to copyright emerged mainly from the “copyright,” or Anglo-American, tradition, while Mexican law is descended from the Continental, or moral rights, tradition. Consequently, the three countries legitimize copyright by appealing to different concepts (maximization of production, or the human rights of the author, for example), which in turn can affect the development of a country’s copyright law. In practice, however, copyright regimes in both traditions contain elements of both approaches and differ more in “emphasis and degree” than in kind (Raskind 1998, 478).

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<sup>17</sup> Article 27 reads: “(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Canadian copyright, reflecting the country's French and British colonial roots, explicitly refers both to moral and economic rights. Mexico, especially since the 1997 changes to its copyright law as a result of its adherence to NAFTA and TRIPS, treats copyright as an economic right despite its longstanding emphasis on copyright as a moral right. Even the United States, which more than any other country treats copyright as an economic right, provides creators with rights equivalent to moral rights, although not necessarily in its *Copyright Act*. For example, false attribution is against the law, and publication without authorization can be considered an invasion of privacy (Escobar 2002).

## **II. Statement of objectives and research questions**

This dissertation is an exercise in regionalism theory building. It uses the making of copyright law in Canada, Mexico and the United States to examine the scope that domestic governments, civil-society groups, business have to shape copyright policy within the context of a North America structured by NAFTA. It compares and contrasts the laws that have been proposed or adopted by the three countries in response to the WIPO Internet treaties in order to understand the degree of policy autonomy in the three countries and the extent to which North Americans can exert democratic control over copyright policy.

This dissertation's main research question is: How has copyright law in Canada, Mexico and the United States evolved in response to global, regional and domestic pressures, and what can this evolution tell us about the nature of North American politics and governance in general? This question is linked to a secondary concern: What roles have the state, business and civil society played in the development of the copyright laws in each of these countries, how have these roles changed over time, and with what consequences?

This dissertation will address the balance between continued domestic policy differences and regional convergence; the relative importance of domestic, regional and global influences on copyright policy; and who are the winners and losers in these debates. This dissertation is less interested in the United States' ability to dominate its smaller neighbours than in the conditions under which a policy advocated by one of the three countries could be implemented in the other two. That change in this instance is being pursued by the region's dominant country offers a critical test case for our understanding of whether or not NAFTA or regional factors such as the operation of regional businesses or civil society promote regional copyright policy convergence.

This dissertation proposes an historical-institutionalist approach to understanding North America as a region, based in the "new regionalism" school. Associated with theorists such as Kathleen Thelen and Sven Steinmo (1992), Paul Pierson (2000), and James March and Johan Olsen (1984), historical institutionalism argues that policy developments must be understood in terms of ideas, institutions and interests (i.e., actors). Institutions and policies are characterized by "path dependence," in which initial choices and conditions can constrain the future development of policies and institutions, which can be domestic, regional, international or global depending on the subject being addressed. While change can occur, institutions tend to persist over time. As a result, policy outcomes are likely to be contingent on specific institutional, political and social factors. With respect to changes in North American copyright policies, historical institutionalism reminds us to consider the potential effects of both domestic and regional institutions, and that their interactions may not necessarily lead to convergence.

This focus on all relevant institutions and actors, no matter at which “level” we may find them, places this historical-institutionalist approach within the new regionalism school, notably the work of Louise Fawcett and Andrew Hurrell (1995) and Bjorn Hettne (e.g., 2005).<sup>18</sup> In this approach, regional development is politically, economically, socially, geographically and historically contingent. Regional development is “multidimensional,” involving state and non-state actors, formal and informal institutions, and embedded in a wider global economic and political system (Corina 1999, xvi). Regions do not necessarily develop along a teleological “stages” model of ever-greater institutionalization, and they can focus on a diverse set of issues (e.g., security, trade and/or culture).

Historical institutionalism and related new regionalism approaches argue that regions must be understood within the context of their own development. For North America, this context involves the three key facts of the region: the existence (generally speaking) of a continental economic space guaranteed and structured by a regional economic framework (NAFTA) that is not easily modified; the retention of political decision-making power at the national (and, where applicable, sub-national) level; and the asymmetrical relationship (primarily economic in the case of copyright, but also cultural, political and military) between the United States and its two neighbours. These factors are largely responsible for the tension at the heart of the North American political economy, in which “inexorable pressures for convergence” are matched by “domestic pressures for divergence, and greater room for differences in many policy areas” (Banting, Hoberg and Simeon 1997, 8).<sup>19</sup>

The existence of a continental market, the asymmetrical economic relationship between the United States and its neighbours, and the active participation of U.S. content

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<sup>18</sup> Like Canada’s New Democratic Party, new regionalism is not so new anymore.

<sup>19</sup> The citation refers to Canada-U.S. relations, but this dissertation argues that it holds for the larger regional relationship (i.e., including Mexico) as well.

industries tend to promote policy convergence. At the same time, NAFTA and the continued existence of domestic copyright-policymaking institutional processes tend to support divergence. North America is thus characterized by this enduring (or “persistent,” as Hay (2000) would call it) potential for policy diversity. These persistent differences define North America *as a region*. Understanding North America as a region requires coming to terms with this variation and understanding how it is sustained: in computer terms, this persistence of policy difference in the North American region is a feature, not a bug.

## **II. Contribution to knowledge**

This dissertation offers two original contributions to our store of knowledge. The actual making of copyright policy in Mexico and Canada, especially as it has been influenced by regional factors, has been relatively neglected. By looking at how the WIPO Internet treaties were implemented, this dissertation will help to rectify this deficiency. Second, this dissertation hopes to contribute to a deeper understanding of how North American regional integration is occurring, and how this integration fits in theoretically with other regional integration projects.

It also seeks to offer realistic alternatives to the current business-led North American integration experiment. Ideas are rare commodities: it is easy to critique something; it is infinitely more difficult to come up with workable alternatives. If this dissertation can contribute to the elaboration of possibilities for a more democratic North American integration, this exercise will have been worthwhile.

## **III. Introduction overview**

This introduction provides an overview of the dissertation’s argument, methodology, theoretical framework and case studies. Its first part provides background on the specifics of

the case studies and copyright more generally, including why copyright and the subject matter of the Internet treaties are important subjects in their own right. The second part outlines, without pre-empting the theoretical argument developed in chapter 2, why North American can be analyzed as a political region. The third discusses this dissertation's methodology and case selection, while the fourth formally presents its argument and anticipated findings. The concluding part provides an overview of the dissertation's chapters.

## **PART I: BACKGROUND TO THE CASE STUDIES**

On December 20, 1996, members of the World Intellectual Property Organization, including Canada, Mexico and the United States, adopted the WIPO *Copyright Treaty* (WCT) and the *Performances and Phonographs Treaty* (WPPT).<sup>20</sup> These two treaties are known collectively as the WIPO Internet treaties because their provisions mirror each other: only their subjects (authors in the case of the former, performers and record producers in the latter) differ.<sup>21</sup> They responded to concerns, particularly from the United States, that traditional copyright laws regulating the production and dissemination of physical reproductions of creative works were not well suited to regulate digital works, which can be easily copied and distributed. Their most controversial provision, WCT Article 11 (mirrored in WPPT Article 18), commits contracting parties to providing “adequate legal protection and effective legal remedies” against digital locks, or technological protection measures (TPMs), protecting copyrighted works. They also tangentially addressed the issue of the

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<sup>20</sup> Available at [www.wipo.int/documents/en/diplconf/distrib/94dc.htm](http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm) and [www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html), accessed August 9, 2010.

<sup>21</sup> “Internet treaties” and “WIPO Internet treaties” in this dissertation refer to these two treaties.

liability Internet and online service providers would have for the actions of their customers with respect to infringing uses of copyrighted materials.<sup>22</sup>

The leeway that the Internet treaties provide members in deciding how, or even if, to implement them makes them useful for studying the potential for convergence or divergence in North America.<sup>23</sup> For example, the terms “adequate legal protection” and “effective legal remedies” are, by design, nowhere defined in the treaty. This vague language has provided the grounds upon which the debate over implementation has been fought.

In North America, the implementation of the Internet treaties – in 1998 in the United States, ongoing in Canada and Mexico as of January 2011 – has occurred within the context of NAFTA and the three countries’ domestic copyright histories and institutions. The Internet treaties were concluded only three years after the January 1, 2004, implementation of NAFTA, which has provided a more formal framework for the governance of the North American economy than had previously existed. Canada and the United States had previously negotiated a sectoral trade agreement in the automotive sector (the 1965 Auto Pact), and in 1988 the Canada-United States Free Trade Agreement (CUSFTA) brought an unprecedented degree of institutionalization to a relationship characterized by informal and pervasive “complex interdependence” (Keohane and Nye 1989). NAFTA deepened and extended this institutionalization of regional economic relations to Mexico.

One of the most significant parts of NAFTA was Chapter 17, the IP chapter.

CUSFTA had been relatively silent on copyright: its Article 2006 addressed U.S. concerns

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<sup>22</sup> As chapter 3 discusses, implementation of the Internet treaties was linked to this liability issue over the course of the U.S. debate on digital-copyright reform.

<sup>23</sup> While the Internet treaties cover several other issues, this dissertation focuses exclusively on the implementation of these two key subjects as a proxy for the implementation of the treaties as a whole, in part because their novelty meant that few, if any, WIPO member countries previously had enacted laws to address these issues directly.

about the uncompensated retransmission of U.S. television programs by Canadian broadcasters, and Article 2004 only required that the two countries cooperate to improve IP protection in international negotiations. As well, Article 2005 exempted Canada's "cultural industries" from the CUSFTA, although it allowed the United States to "take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement."<sup>24</sup> NAFTA Chapter 17 was much more detailed.<sup>25</sup> It was designed primarily to bring Mexican IP law in line with that of the United States, the main proponent for including copyright and IP in the Agreement; Canada successfully argued for the continuation of CUSFTA's Article 2005 "cultural exemption" (NAFTA Annex 2106), which exempted it from NAFTA's copyright provisions. Regardless of this exemption, Canadian and U.S. copyright law already shared the same focus on copyright as an economic right and Canada largely already complied with the specific NAFTA copyright provisions.<sup>26</sup> Meanwhile in the Mexican tradition, copyright (or *derechos de autor*, literally author's rights) was primarily an author's right designed to address issues like attribution, plagiarism and other not-directly-economic goals. Referring to the copyright sections of Chapter 17, Acheson and Maule (1996, 351) described NAFTA as a step in the continued harmonization of North American copyright law toward a U.S. model and emblematic of the overall process of harmonization of global copyright on the U.S. model, most notably through the 1995 TRIPS Agreement.

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<sup>24</sup> A hyperlink to the relevant CUSFTA text can be found in Appendix A. CUSFTA defines cultural industries as the publishing, film and video, music recording, music publishing, and the broadcasting industries.

<sup>25</sup> See chapter 2 for a description of the provisions of NAFTA as they relate to copyright. A hyperlink to the relevant NAFTA text can be found in Appendix A.

<sup>26</sup> Again, as already noted, Canada implemented copyright changes in the 1993 *North American Free Trade Agreement Implementation Act* (Doern and Sharaput 2000, 106).

NAFTA thus can be seen as a common baseline for copyright protection in the three countries while the agreement as a whole formalized and strengthened their economic bonds. However, despite this baseline and the strong interest the United States and its U.S.-identified content industries<sup>27</sup> took in promoting globally a particular (U.S.) style of implementation of the Internet treaties, the three countries have approached the implementation of the Internet treaties quite differently. The United States, the main proponent of the treaties, quickly implemented the treaties with the 1998 DMCA, which went far beyond what the treaties required. The DMCA became the preferred model of the United States and its allied content industries (in particular the motion picture and music industries) in their campaign to persuade other countries to implement the Internet treaties. As discussed below and in chapters 2 and 3, the DMCA extended strong legal protections to digital locks, which allow copyright owners (or, rather, whoever controls the locks) to set the terms under which someone can access a work. These terms often go far beyond the rights that traditional copyright protection provide to copyright owners. It also provides a regime for limiting the liability of Internet Service Providers (ISPs) that requires ISPs to remove a user's content from their network upon reception of an accusation of infringement (no due process necessary) in order for the ISP to avoid liability for its customer's alleged infringements.

The situations in Canada and Mexico regarding the status of the WIPO Internet treaties are more fluid and complex. In the ten years since the completion of the Internet treaties, Canada and Mexico have yet to implement fully the treaties, an issue of significant importance to the United States. In Canada, the actions various governments have taken

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<sup>27</sup> This dissertation uses the term "U.S.-identified content industries," rather than simply "U.S. content industries" to acknowledge that while several content-industry corporations, such as Sony Pictures, are non-U.S.-based (Sony, for example, originated in Japan), they tend to identify with the United States, while the U.S. government treats them as U.S.-based interests, (e.g., treating the motion picture industry as "Hollywood").

suggest the potential for both convergence on and divergence from the U.S. standard. Successive governments have proposed implementing policies in ways that did not always follow the U.S. example. A 2005 attempt by a minority Liberal government would have made overriding a digital lock to access a work a crime only if it were done for the purposes of infringing an underlying copyright, while legislation proposed by minority Conservative governments in 2008 and 2010 followed the U.S. lead on TPMs. All three bills eschewed the U.S. “notice and takedown” approach to ISP liability in favour of a more moderate “notice and notice” approach. In this latter approach ISPs would be required only to pass on accusations of infringement to their customers, not take down the offending work, in order to avoid liability for their customers’ actions. In Mexico, full implementation of the Internet treaties is likely several years away, though its domestic situation seems to favour the adoption of legislation modeled on the U.S. DMCA approach for digital locks. With respect to ISP liability, a regime to limit liability is likely, although it is unclear whether or not it would follow the U.S. model.

The policy response to these treaties in North America during the period from 1996 through 2008 has demonstrated the potential for policy divergence on an issue with some particularly interesting characteristics. All three countries are operating under the same regional rules (the same rules that reoriented the entire copyright law of one of those countries); copyright is near the top of the economic agenda of the region’s dominant country, upon whom its neighbours are economically dependent; and all three countries are being lobbied by the same (U.S.-based) transnational corporations that tend to drive the copyright debate.

This situation reveals a great deal about the limits of and potential for the construction of common North American policies. In particular, understanding policy convergence in North America requires understanding both the domestic and regional conditions under which copyright policy is made. As this dissertation will demonstrate, decisions regarding how to implement the WIPO Internet treaties continue to be made by domestic governments shaped by different philosophical backgrounds, interest-group mixes, and institutional structures and mandates. NAFTA itself has the potential both to promote and hinder convergence. Whether the countries move toward increasing similarity or persistent differences is an open question.

### **I. The importance of copyright**

Since its emergence in its modern form in early-18<sup>th</sup> century England, copyright has gone through three phases. As suggested by the theory of change embodied in historical institutionalism developed in chapter 1, these phases have been driven by technological change and linkages to other issues, even as copyright itself has remained recognizable as a limited property right given to creators in their works. In its initial phase, which lasted until the end of the 19<sup>th</sup> century, copyright was a national affair. Violating the copyright of other countries' citizens was a way of ensuring inexpensive access to cultural products and to the technological information and knowledge that could help countries modernize and develop (Draho and Braithwaite 2002, 31-32). In the mid-1800s, copyright was internationalized to a significant degree, first through a series of bilateral treaties of reciprocal protection and then through an international treaty, the 1886 *Berne Convention*.

The current period, dating to the mid-1980s, is characterized by the aggressive pursuit of ever-stronger global copyright laws. These changes have been driven primarily by United

States. U.S. content industries, interested in protecting and expanding their own global economic position, successfully linked U.S. government officials' concerns about declining U.S. global economic dominance to their self-interested calls for increased IP protection as a means of arresting this perceived decline (Drahos and Braithwaite 2002). This period has witnessed attempts (often successful) to commodify what was once seen as a common resource (knowledge and information), creating, in effect, "new enclosures" (May 2000), in which every use of a copyrighted material would require payment to the copyright holder.

A country's copyright laws can have important economic and cultural implications. In addition to their already-noted effect on future creation, stronger copyright protection can raise the cost of acquiring information needed for countries to modernize. The global spread of strong copyright protection in effect acts as a barrier to development.<sup>28</sup> Just as the most-developed states advocate or impose liberal free-trade policies because they provide them with a competitive advantage while ignoring the historical reality that their own economic development depended on protectionist measures (Chang 2003), strong copyright is being pursued by those firms and countries, such as the United States, that currently enjoy a lead in information production and information technology.

## **II. Dealing with digitization**

Current global copyright trends have been favourable to the interests of large corporations.<sup>29</sup> Driven by technological changes that have made information copying and transmission increasingly simple – including the popularization of personal computers and

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<sup>28</sup> Amsden (1989 and 2000) emphasizes the importance of learning and information transfer for late-industrializing countries, in contrast to early industrializers, who developed their knowledge and processes "in house," as it were. As IP (especially patents, but also copyright) increases the cost of obtaining such information, strong IP protection places developing countries at a disadvantage, making it more expensive for them to develop.

<sup>29</sup> See Benkler (2001) for a discussion of how different groups (industry groups, individual creators, and so on) are affected by the strengthening of copyright protection.

the Internet – content industries generally have sought and received “tougher” copyright protection in the form of longer-term protection and the extension of copyright to cover more forms of knowledge and information, like computer software. The U.S. government has been the main regional and global state proponent of stronger protection. Since the mid-1980s, it has made strong IP protection (including copyright) an integral part of its international-trade agenda.

The Internet treaties are a response to the challenges posed by digital-copying technologies to existing business models. Their rules and the way they have been implemented by Canada, Mexico and the United States therefore reveal a great deal about who makes copyright law, and to what purpose. As chapter 2 details, the reactions of individuals, firms and governments to technological change have often driven changes in copyright laws, and the arrival of the digital age has been no different. The digital age’s main effect on copyright policy involves two interrelated developments. First, newly ubiquitous personal computers provided individuals with an easy way to copy digital works, notably compact discs. Second, the Internet, a “network of networks” developed by the U.S. government in the 1960s, has provided individuals with an easily accessible global distribution system for these works.

These new technologies are potentially revolutionary. Where previously only large corporations were able to reproduce and distribute informational goods, individuals and small groups can now easily act as producers and distributors. However, because laws are the outcome of political processes, rules governing digital distribution will not necessarily favour individuals or artists over corporations, no matter the inherent technological biases. One of the primary objectives of this dissertation is to understand how copyright laws in Canada,

Mexico and the United States have been changed in response to these technological and political pressures.

### **III. Technological Protection Measures and the privatization of copyright law**

TPMs have emerged as the central issue in digital-copyright reform and the main lightning rod in debates over implementation of the WIPO Internet treaties. A TPM:

is a technological method intended to promote the authorized use of digital works. This is accomplished by controlling access to such works or various uses of such works, including copying, distribution, performance and display. TPMs can operate as safeguards or 'virtual fences' around digitized content, whether or not the content enjoys copyright protection. Two common examples of TPMs are passwords and cryptography technologies (Kerr *et al.* 2002-2003, 13).

TPMs and digital rights management systems<sup>30</sup> predate the 1990s and the Internet treaties (Brown 2006, 240), although the Internet treaties brought them into the mainstream of political debate. Their main effects are twofold. First, they have the potential to shift the balance of power between copyright owners and users in subtle ways related to authorization and access. TPMs effectively transfer control over a work from the purchaser of a work to whoever put the lock on the work. In the absence of digital locks, a user can exercise her statutory rights without having to seek anyone's authorization. If a work is locked, however, the purchaser effectively must seek the permission of the content owner (or whoever locked the content) in order to exercise her legal rights. As a result, TPMs can allow owners to impose restrictions more onerous than are available to them in the non-digital world (Geist 2005, 220). They can even restrict basic human rights such as freedom of speech and the "transfer of information and knowledge" (Murray and Trosow 2007, 113, 18), partly because TPMs are not yet sophisticated enough to distinguish between situations in which it is legal

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<sup>30</sup> Digital Rights Management (or DRM) systems are "technology systems facilitating the trusted, dynamic management of rights in any kind of digital information, throughout its lifecycle and wherever and however it is distributed" (Kerr *et al.* 2002-2003, 25).

or illegal to copy, access or use a work (Kerr *et al.* 2002-2003, 31). While copyright law is the outcome of a public debate, a TPM allows a single individual or company to set the terms of access (de Beer 2005, 98).

Second, TPMs can potentially regulate activities far beyond copying (May 2007, 69). A TPM can prevent an individual from copying a work, but it can also prevent perfectly legal uses such as playing a DVD bought legally in Canada on a DVD player from a different “region,” such as Australia or Mexico, and restrict competition and trade (de Beer 2009, 5-6). Anti-competitive uses of TPMs include locking consumers into company-specific platforms. For example, videos sold through Apple’s iTunes service are locked by the FairPlay DRM system. FairPlay, in addition to limiting the number of computers to which a video could be copied, makes the videos unplayable on other platforms, such as an Xbox 360. As a result, Apple could use FairPlay to exercise market power over video-playback devices and the online video market. TPMs also raise privacy issues, as they often require a degree of monitoring of consumers’ activities in order to ensure that the locks are not being broken (Kerr *et al.* 2002-2003, 42-43).

TPMs can also affect existing general property rights (de Beer 2005). Just as the monopoly right in copyright affects a purchaser’s ability to use a creative work any way she sees fit, so do TPMs allow the copyright owner to retain much of the control over a work (Murray and Trosow 2007, 111). The issue is best illustrated with the oft-repeated “locked house” analogy. From the copyright owner’s perspective, a TPM is like a lock that someone places on her house, to keep her property from being stolen. However, in the case of a legitimately purchased work, this analogy does not quite hold. The problem arises from who is placing the lock. In the case of an actual house, homeowners place the lock on the house

they own and are legally allowed to use it as they see fit. If they do something illegal with their property, the police can intervene legally. TPMs are like locks, but more like locks that *someone else* places on your house and that require you to get permission to use the thing you have purchased, even for legal purposes.

TPMs therefore represent the embodiment and logical conclusion of a view of copyright that overemphasizes the rights of the copyright owner. Under this approach, copyright owners control all access and approve all uses of their works, while needs and rights of users of copyrighted works, which include future creators, are neglected.

The great danger posed by TPMs is that they threaten to replace negotiated copyright law, which balances the interests of several groups with rules set in the lock itself by whoever controls the lock. In other words, TPMs raise the spectre that copyright law could be overridden and effectively privatized by whoever controls the locks. This owner-centric perspective also elides the central contradiction in copyright, which is that all works build on previously existing works, and that the continued creation of works depends on ensuring that the rights of “authors” do not overwhelm those of “users,” a group that, again, includes future artists.<sup>31</sup>

#### **i. A legal remedy?**

The appeal of TPMs to content owners (who are not necessarily creators) is obvious. Faced with a situation in which their products can be copied and distributed easily by their customers, they offer protection for existing business models, which are based on the artificial construction of scarcity through technological means and the downstream control of their products beyond that allowed by current copyright laws (May 2007, 71; de Beer 2009, 5).

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<sup>31</sup> The idea that “property” itself does not imply absolute rights for owners is discussed further in chapter 2.

However, while TPMs offer copyright owners the possibility of vastly expanded control over creative works, all TPMs share the same Achilles' heel: they can be broken, often quite easily. As a result, copyright owners – especially the content industries – have sought to enshrine in law the protection of TPMs. Such protection is entirely new in copyright law. Copyright has traditionally dealt with the protection of authors' rights and conditions under which works could be copied. These new provisions introduce what de Beer (2005) and others have called “paracopyright,” an additional layer of legal protection above copyright that protects the lock, not the underlying work. The implications of paracopyright laws related to TPMs vary depending on the breadth of the legal provisions contained in the law in question. A “minimalist” law would make it illegal to break a digital lock only for the purposes of infringing the underlying copyright. This approach, while redundant to existing copyright law, would not create any new rights. A “maximalist” law, however, would make it illegal to break a digital lock under any circumstances. Such an approach has the potential to interfere with existing user rights under copyright law and to impair the functioning of other laws including, for example, those related to competition policy.

Typically, this maximalist prohibition against breaking a TPM is accompanied by a prohibition on the traffic in devices (i.e., software programs) that could break these locks, on the grounds that lock-breaking devices (also known as circumvention devices) can be used for both legal and illegal purposes. Effectively making circumvention devices illegal, however, also makes it hard, if not impossible, for regular individuals to break a TPM for perfectly legal reasons, thus restricting their legitimate uses. As a result, such a provision would tilt the balance in copyright law almost completely toward owners, at the expense of everyone else.

## **ii. TPMs and the purpose of copyright**

Almost more important than the potential for TPMs to place control over cultural goods and technological development in the hands of a few individuals is what it signals about copyright's future development. Copyright laws reflect a balance among different groups, interests and activities because they are the outcome of negotiation processes. The philosophy behind TPMs, however, proposes something different: that TPMs and copyright are about protecting the interests of one group – the copyright owner – rather than those of, for example, individuals and future creators. How governments and societies respond to the debate over TPMs reveals a great deal about their view of the future of copyright and the creation and sharing of information and culture. To anticipate the discussion on historical institutionalism in chapter 1, today's choices influence tomorrow's decisions. Tilting the copyright playing field in one direction today can legitimize a particular view of copyright at the expense of other perspectives, setting copyright policy on a particular path that would be difficult to reverse in the future.

## **IV. ISP liability and the copying conundrum**

The digital age has made telecommunications companies such as Verizon in the United States, Telmex in Mexico, and Bell and Rogers in Canada, and Internet companies like Google, increasingly central to economic activity and social interactions (de Beer 2009, 8). It has also brought them into direct contact with copyright law. While they are not broadcasters, rights-holders have successfully argued these companies are similar enough that they should be covered by copyright law (Gervais 2005, 327). Unsurprisingly, ISPs' interests can conflict with those of the content industries. Where content industries wish to control the transmission and use of their works, ISPs and computer manufacturers have

tended to emphasize network and product speed and storage capacities and be indifferent to whether the content on their networks or stored on their computers violates copyright laws (de Beer and Clemmer 2009, 376; Karaganis 2007, 226).

Computers and the Internet function by making copies of files. This poses a challenge for copyright law, which is based on the assumption that copying must be controlled. Under copyright law, telecommunications companies, ISPs and search engines like Google face a legal problem regarding their potential liability for their clients' actions on their networks (de Beer 2009, 8). At the heart of the issue lies the question of how to ensure that copyright law does not impede the development of now-indispensable technologies like computers and the Internet.<sup>32</sup>

As with TPMs, addressing ISP liability raises questions of balance and fairness. The treatment of copying that occurs as a result of the normal functioning of a network has generally been exempted. With respect to hosted content, in the main period covered by this dissertation (the mid-1990s to 2008), countries chose between two general approaches to ISP liability. Under a “notice-and-notice” regime, ISPs are exempt from liability if, when they receive a notice of infringement from a copyright owner, they pass it on to the alleged infringer. Under a “notice-and-takedown” regime, they are required to remove the allegedly offending content. While both provide a straightforward way to shield ISPs from liability, the former is friendlier to users than a notice-and-takedown regime. As it requires the removal of materials based on claims and not findings of infringement, a notice-and-takedown approach can interfere with users' rights, as it places the onus on them to show that they are not infringing copyright.

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<sup>32</sup> Of course, if creators were rewarded otherwise than through the regulation of copy-making, this “problem” would not be a problem at all.

While these two ISP-liability regimes continue to be dominant worldwide, political pressure from content industries seeking to offload enforcement costs onto ISPs has led to the emergence of more extreme approaches have emerged since mid-2007 (de Beer and Clemmer 2009). In these approaches, ISP clients accused of infringement are banned from using the ISP. ISPs, for their part, share a potential common interest with content industries in being able to charge different prices for different levels of service. These developments have the potential to affect significantly not only copyright but also communications policy, specifically the principle that computer networks should be neutral in terms of how they treat content. With this caveat, this dissertation focuses primarily on the main existing approaches to ISP liability that emerged in the immediate aftermath of the Internet treaties, namely, notice-and-notice and notice-and-takedown.

## **V. The under-explored regional dimension of copyright policy**

Typically, copyright is analyzed from a domestic or global perspective: domestic because copyright law is the responsibility of domestic – usually national – governments; global because domestic copyright laws are embedded in a series of international agreements dating to the late 19<sup>th</sup> century. Both of these approaches offer useful insights about copyright-policy formation.<sup>33</sup> As the anecdote that began this introduction suggests, copyright could be analyzed within the extensive literature of comparative politics or, more narrowly, Canada-U.S. relations, after the style of the edited volume by Banting, Hoberg and Simeon (1997).

In addition to these approaches, copyright can also be analyzed from a regional perspective. For North America, a regional analysis of copyright can be justified in three ways. First, copyright in North America has an explicitly regional dimension. As already

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<sup>33</sup> See, e.g., Sell (2003) for an example of a political economy analysis of international copyright development; and Litman (2001) for an exploration of how the United States implemented the Internet treaties and passed the DMCA.

noted, NAFTA Chapter 17 provides a baseline for copyright in the three countries that reoriented Mexico's (and, to a much lesser extent, Canada's) copyright law to be more in line with U.S. copyright law.<sup>34</sup> Even though the 1995 TRIPS Agreement replicated most of NAFTA copyright provisions, the presence of these provisions in NAFTA, combined with the economic integration of Mexico and Canada with the United States, strongly suggests that it would be a mistake to underplay the importance of regional copyright dynamics.

Second, copyright is an issue of great interest to one of the three NAFTA countries, the United States, which (along with its U.S.-identified content industries) has been trying actively to convince its neighbours to adopt U.S.-style copyright law. Third, copyright is reflective of a whole category of regional issues. Unlike such obviously "regional" issues as border security, transboundary environmental issues, and traditional trade issues, action by one country on copyright does not require formal approval or cooperation among the other countries. Copyright can therefore stand in for the myriad other issues in North America – everything from illegal drugs, agricultural policy and health care – on which national parliaments are supreme but which are subject to influence emanating from their neighbours and from the baseline constraints of regional and treaty obligations. This active lobbying by one of the NAFTA parties for changes in the other two countries within a regional framework creates the possibility of using copyright to understand better the governance dynamics of North America.

Beyond its coverage of copyright, NAFTA has one other key defining characteristic that makes it possible to argue that copyright can be examined usefully from a North American perspective. NAFTA guarantees the three countries access to each other's

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<sup>34</sup> The rest of the dissertation discusses this history; see in particular chapter 2 (for copyright in general), and chapters 3-5 (for copyright in the United States, Canada and Mexico, respectively).

domestic markets (with some exceptions). This guaranteed market access reduces significantly member countries' ability to use the threat of withdrawal of access to its market, or the promise of increased access, to effect policy changes in its partner countries. While the market-access card is most important to the United States, as the world's economic superpower, it can also be useful to its smaller neighbours. Limiting Canadian and Mexican access to preferential treatment for domestic countries (thus discriminating against U.S. and other countries' foreign firms) was a main U.S. objective (and result) in the negotiation of NAFTA and the 1989 CUSFTA. In the case of copyright, this limitation on the exercise of U.S. influence is particularly important, given that the United States has pursued a strategy of offering other countries access to its market in exchange for reform of their copyright and IP laws.

## **PART II: COMING TO TERMS WITH THE NORTH AMERICAN REGION**

As chapter 1 argues, North America fits uneasily into the vast literature on world regions, much of which is overshadowed by the example of and comparison to the European Union. Unfortunately, while most theories of regionalization are based on the European Union template, they have not proven useful for understanding the development or internal governance of other world regions (Macdonald 2006, 6). In contrast to dominant-Eurocentric theories/approaches such as neofunctionalism and intergovernmentalism, this dissertation argues for a retroductive approach to theorizing the North American region through the use of historical institutionalism.

Understanding the North American region on its own terms is the first step toward understanding the limits of and means for policy harmonization in North America. Copyright is a particularly interesting subject from a regional perspective. Much of the literature on

North American integration is centred on policies that have an obvious North American dimension, such as immigration, trade and formal trilateral programs. Integration, however, can also occur in more routine, “domestic” policy debates. It is therefore useful to look beyond formal integration projects to examine day-to-day policy work in the three countries for evidence of whether North American jurisdictions are becoming more or less similar, and how these similarities or differences are engendered or maintained. Such an approach can thus allow for a more complete understanding of the more routine aspects of North American politics and policy-making.

### **I. What is a region?**

First, “region” itself must be defined. This dissertation adopts a minimalist definition of a world region as a politically contested, subjectively defined area involving two or more countries characterized by a degree of institutionalization and economic, political, and/or social cross-border linkages.<sup>35</sup> This definition puts to the side important questions such as the relative importance of regional identity, and economic and political linkages, as well as how strong these identities and linkages must be when evaluating considering a region’s “regionness.”

While there exists a lively debate over the sort of linkages that constitute different types of regions,<sup>36</sup> the most important characteristic of a region is that it be recognized as such by political actors. Actor perception will trump all other objective characteristics. If the relevant social actors act as if they are in a region, then the region exists for the purposes of social policy; otherwise, there is no region. This recognition can come from actors either

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<sup>35</sup> This definition, expanded on later in the chapter, draws largely on Hurrell (1995) and Hettne (2005).

<sup>36</sup> For a good typology of political regions types, see Hurrell (1995). Thompson (1973) offers an early synthesis of the characteristics of political regions. On the key issue of the social construction and politically contestable nature of regions, see Hettne (2005, 544); and Hurrell (1995, 37). For a concise overview of regional integration theory see Choi and Caporaso (2005).

internal or external to the region: if internal actors act as if they are in a region, then the region, for political purposes exists; external recognition is not required. Similarly, if external actors treat actors within a region as if they belong to a region, then one can say that the region exists.

“Regionness” can be issue-specific and can have different effects depending on the policy or topic under investigation. As Clarkson (2008) and Banting, Hoberg and Simeon (1997) remark, the degree of policy autonomy exercised by domestic governments varies according to factors such as market structure and the novelty of the issue under discussion. To take a concrete example, border security’s obvious international/regional dimension and centrality to U.S. national interests likely would lead it to be treated differently than copyright policy, which is much more rooted in domestic and international laws and treaties than in regional agreements. In short, the effects of regionness must be investigated on a case-by-case basis.

If one defines a world region loosely as a geographical area, not necessarily contiguous, with a high degree of economic, social, political, cultural and military cross-border interactions, a degree of supranational institutionalization, and a degree of common culture, then North America is a region, of sorts. As already noted, NAFTA provides a set of common “rules of the game” structuring the extensive economic and even political interactions among North American actors in a North American economic market. On the basis of this regional influence on actors within North America, this dissertation argues that North America can be considered a region.

Beyond these definitional concerns, regions are also dynamic entities, “constructed, and constantly reconstructed by collective human action (Payne and Gamble, cited in Hettne

and Söderbaum 2008, 65). Regional integration “refers to a process of complex social transformation that is characterized by the intensification of relations between independent sovereign states and that gives rise to some kind of structure for mutual cooperation based on recurring and stable patterns of behaviour, that is, to institutionalism” (Thakur and Van Langenhove 2008, 28).

## **II. What is North America?**

Defined in the above sense, North America is a region, of sorts. Its claim to “regionness” rests on the presence of two things: the existence of binding and acknowledged regional rules in the form of the institution of NAFTA; and the existence of cross-border linkages, primarily economic in nature. While North America is complicated by the asymmetric power of the United States vis-à-vis its neighbours and the fact that the trilateral relationship among the three countries is, more often than not, actually a double-bilateral one, with the United States serving as the “hub,” these characteristics do not affect the underlying finding of “regionness.”

The cases examined in this dissertation highlight these factors, as well as their implications. Somewhat counterintuitively, the presence of a comprehensive regional trade agreement removes the ability of member countries to use threats of the removal of market access or the promise of increased market access to realize policy goals in the other countries, even in situations of uneven economic interdependence. Furthermore, the lack of Canada-Mexico engagement on copyright mirrors the low level of engagement of the two countries with each other, while intensive Canada-U.S. and Mexico-U.S. copyright relationships exemplifies the double-bilateral nature of the region.

### **i. Weak institutionalization**

On the first criteria of determining what a region is, North America has a limited formal institutional structure. NAFTA regulates trade and investment among the three countries via a complex set of rules that are not easily modified and limited dispute-settlement powers. It therefore meets a general definition of an institution as “the formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy” (Hall and Taylor 1996, 938).

North America under NAFTA is characterized by a narrow economic focus (free trade, not even a customs union) and weak-to-nonexistent supranational institutions that are stronger in paper than they are in reality. These institutions fall far short of Laursen’s (2003, 6) criterion that regionalism be characterized by the “collective decision-making” of the type we see in the European Union. The Free Trade Commission, charged with implementing the agreement, overseeing its “further elaboration, resolving disputes arising from its interpretation or application, and supervising NAFTA committees and working groups” (NAFTA Article 2001(1-2)), is essentially an annual meeting of cabinet-level trade representatives with no independent authority (Mace 2008, 7). NAFTA’s 30-plus working groups are occasionally effective but poorly organized and suffer from a lack of high-level political agreement on policy objectives (Clarkson 2008, 596).

In keeping with NAFTA’s general institutional weakness, the most institutionalized parts of the agreement – the North American Commission for Environmental Cooperation and North American Agreement on Labour Cooperation side agreements – were designed explicitly *not* to be able to affect domestic labour and environmental policies (Clarkson, presentation at Carleton University, March 19, 2008) and have failed to help incubate a North

American civil society (Ayres and Macdonald 2006). As for the dispute-settlement mechanisms, Chapter 14 (financial services) has never been used, while Chapter 19 (anti-dumping and countervailing duty determinations) and Chapter 20 (application and interpretation of the treaty) are highly politicized. Only Chapter 11 (investor-state investment disputes) has demonstrated the ability to influence directly member state policies, in often-unexpected ways (Atik 2003). Layered upon the existing domestic North American legal systems, the persistence of which offers a hint that any theory of North America as a region must take into account the ongoing effects of domestic political institutions, none of these mechanisms create case law. As a result, they cannot serve as a dynamic foundation for a truly “North American” legal system.

Where the European Union is able to change laws as circumstances change, NAFTA negotiators consciously adopted a legalistic approach to continental governance, setting out in great detail the rules governing economic life on the continent, including copyright. The agreement contains no mechanism short of renegotiation to modify these rules, a fact that is central to understanding the development of North America as a region. While NAFTA structures the continent’s internal economy, North America shows no signs of “actorness” on a global level: the three countries may coordinate on various issues, but there is no negotiated “North American” position on issues like trade, the environment or copyright.

**ii. Cross-border linkages: Strong economic interactions, weak civil-society linkages**

If NAFTA is North America’s institutional foundation, the extent to which North America fulfills the other criteria is open to debate. While cross-border economic interactions are strong, if more double bilateral than trilateral, one does not observe much cross-border

activity among civil-society groups. With some small exceptions one cannot speak of a North American civil society (Ayres and Macdonald 2006).

North America is characterized by an integrated economic space that partly predates the 1994 NAFTA and the 1989 CUSFTA, the most formal example of which is the Canada-U.S. 1965 Auto Pact that integrated the two countries' automotive industries. Even before these general trade agreements, transnational corporations (TNCs) "were already treating North America as a single production, distribution, and marketing zone": in 1989, U.S.-based TNCs accounted for 69% of total U.S. exports to Canada (65% of which was intra-firm trade); the corresponding numbers for Mexico were 46% and 52% (Clarkson 2008, 11).

Discussions of the North American market tout its size – it was the world's largest trade area by population and economic activity in 2008, accounting for 22.5% of world GDP (by Purchasing Power Parity), compared to 22.1% for the European Union (World Bank 2009). However, this metric is irrelevant to determinations of regionness. More relevant is the fact that fully half of NAFTA exports in 2008 were intra-NAFTA, far below the 67.4% of intra-EU exports, but well above the 25.5% and 14.9% registered for intra-region trade within the ASEAN (Association of Southeast Asian Nations) and MERCOSUR (*Mercado Común del Sur*, or Southern Common Market, in South America) areas, respectively.<sup>37</sup>

North American trade patterns reveal a double-bilateral relationship, in which the United States is by far the most important trading partner for the two countries (Pastor 2001).<sup>38</sup> In 2008, the U.S. was overwhelmingly the primary destination and source of Canadian and Mexican merchandise exports and imports. In 2008, some 77.6% of Canada's

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<sup>37</sup> The Association of Southeast Asian Nations, and the *Mercado Común del Sur* (Argentina, Brazil, Paraguay and Uruguay). Based on author's calculations from data in the World Trade Organization Statistics database (available at: <http://stat.wto.org/StatisticalProgram/WSDStatProgramHome.aspx?Language=E>, accessed November 17, 2008). See also Clarkson (2008, 25-32).

<sup>38</sup> See Appendix B for tables detailing the trading relationships among the three countries.

exports, and 80.2% of Mexican exports, went to the United States; Canada and Mexico imported 52.4% and 49.2%, respectively from the United States.

The Canada-Mexico relationship is not nearly as economically dynamic. In 2008, Canada sent only 1.2% of its exports to Mexico, up from a mere 0.48% in 1994, while Mexico accounted for 4.1% of Canada's import market in 2008, up from 2.2% in 1994. In 2008, Mexico ranked fifth among Canadian export markets behind the U.S., the United Kingdom, Japan and China). Similarly, Mexico sent only 2.4% of its total exports to Canada in 2008, the number-two destination for Mexican exports, while Canada accounted for 3.0% of total imports into Mexico.

For the United States, Canada and Mexico are by far its most important export markets (with a 20.1% and 11.7% share of total exports in 2008, respectively). However, with respect to imports, China (16.1%) finally surpassed both countries as a source of U.S. imports in 2008, narrowly edging out Canada (16.0%, rounded up) and Mexico (10.3%).

Beneath these numbers, evidence of North America's "regionness" varies according to what is being examined. Clarkson (2008) remarks that evidence of regional governance is strong in some sectors (such as the automotive sector), while others are actually embedded in a global governance regime. In this category he includes IP, specifically pharmaceutical patents, though his analysis can be extended safely to the content industries. While IP is certainly embedded in a global governance regime centred on the WIPO and the TRIPS Agreement, chapter 2 makes the case that copyright policy has a regional governance dimension as well. Regardless, Clarkson's central point – that the existence, nature and effects of regional governance must be investigated on a case-by-case, or sector-by-sector, basis – is valid.

The North American trade relationship mirrors the rest of the relationship. Canada-U.S. political, individual and cultural relations are remarkably complex. Keohane and Nye's seminal 1976 elaboration of "complex interdependence," in which two or more countries possess a large number of tight political, economic, and social ties, offers Canada and the United States as its main example. The Mexican-U.S. relationship is similarly multifaceted. For example, Mexican migration to the United States has been a political problem (and economic necessity) since at least the 1920s. Since NAFTA, migration has exploded, both in size and as a political problem, even though NAFTA was supposed to support Mexican economic growth and reduce incentives to migrate (Fernández-Kelly and Massey 2007). The Mexican-Canadian relationship, meanwhile, is relatively minimal. Despite sporadic cooperation, such as their refusals at the United Nations Security Council to authorize American-desired action against Iraq in the run-up to the Second Iraq War in 2003, Canada and Mexico share few historic ties.

### **iii. Political control and the diffusion of policies**

The most distinctive characteristics of North America as a region are the extent to which political control remains exclusively at the national (and sub-national) level and the asymmetric economic and military strength of the United States, which allows it to define the limits of continental politics (Clarkson 2002). The evidence that the power asymmetry among the three countries has shaped the region predates the terrorist attacks on New York and Washington of September 11, 2001. In the 1987 CUSFTA negotiations, Canadian negotiators walked out over U.S. refusal to agree to Canada's central demand, a binding dispute-settlement mechanism, as it would have severely curtailed U.S. ability to impose anti-dumping or countervailing duties on Canadian firms; instead, Canada eventually settled

for a second-best review system that left Congressional power intact (Ritchie 1997, 91-120). It also left intact the power of the U.S. International Trade Commission, a quasi-judicial federal agency that, among other things, determines whether U.S. industries are being injured by import subsidies.<sup>39</sup>

However, when it comes to the definition of “region,” the exact location of political power is not that significant. The key characteristic of a region is that there exists some set of rules or norms that affects all (not necessarily equally) of the region’s members. The location and balance of power can influence the nature of a particular region – this point is fundamental to this dissertation – but cannot, in and of itself, help ascertain an area’s “regionness.”

Understanding how North America “works” requires understanding how policy ideas spread throughout the region. Absent robust supranational institutions, actors must work through domestic political processes. For the larger question of whether North America is experiencing policy convergence – generally and specifically with respect to the Internet treaties – one must identify the processes fuelling convergence. Policy convergence can occur through four processes: “emulation, where state officials copy actions taken elsewhere; elite networking, where convergence results from transnational policy communities; harmonization through international regimes; and penetration by external actors and interests.” Far from being a sign of the “absence of state autonomy,” policy convergence may reflect the “autonomous preferences of policy makers to fashion convergent policies” and need not “denote an absence of state autonomy” (Bennett 1991, 215). While some of these

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<sup>39</sup> International Trade Commission, General Information, [www.usitc.gov/press\\_room/gen\\_info.htm](http://www.usitc.gov/press_room/gen_info.htm), accessed November 3, 2010.

processes are rarer than others in North American copyright debates, all are present to some degree.

### **PART III: THEORY, METHODOLOGY AND CASE SELECTION**

Starting from the assumptions that regions and copyright are both socially constructed, this dissertation adopts a retroductive research strategy. This approach takes the ontological position that social reality is “a socially constructed world in which episodes are products of the cognitive resources social actors bring to them” and the epistemological view that social-science “laws” express “tendencies of things, as opposed to the conjunctions of events advocated by Positivism” (Blaikie 2000, 208). Specifically, this dissertation applies a configurative-ideographic case study approach (Blaikie 2000, 219) to three cases – copyright reform (or the lack thereof) in Canada, Mexico and the United States following the signing of the WIPO Internet treaties – to examine the nature of North American regionalism. Formally, this dissertation gauges the relative importance of various state, business (national and transnational/regional) and civil society (domestic, regional or transnational) interests on the implementation of the Internet treaties in North America.

Time and financial constraints limit the scope of this work of regional analysis to North America. Although a truly comparative-regional approach to copyright represents a fruitful avenue for future work, there exist compelling reasons to focus solely on North America. Eurocentrism remains one of regionalism studies’ greatest flaws. Tracing the North American integration process without direct reliance on EU-derived regionalism theories offers the potential for a useful corrective to this Eurocentrism and allows for a more “realistic” appraisal of alternatives to the current corporate-led forms of North American

integration, discussed in the following chapter, that do not require a common identity or supranational institutions.

Examining the copyright debate in Canada, the United States and Mexico also exhausts the universe of possible North American cases in this area. The inclusion of Mexico as a case study offers another benefit. At the global level, the debate over IP and copyright pits developing countries against developed countries, with developed countries usually arguing for stricter protection and developing countries arguing that IP amounts to a trade barrier designed to protect developed countries' competitive advantage and access to technology. Unlike Canada and the United States, Mexico remains a developing country, with interests in copyright relatively closer to those of other developing countries. Though this dissertation is mainly concerned with North American integration, an examination of the Mexican debate over the Internet treaties sheds further light on the nature of the interaction between developing and developed countries in the wider intellectual property debate.

Since this dissertation is measuring policy changes among countries, it must account for change – “divergent, convergent, synchronous and identical, or indeterminate” (Seeliger 1996, 289) – over time.<sup>40</sup> For the sake of precision, it focuses on the period of negotiation of the Internet treaties (roughly from 1989-1996, though the most important action occurred near the end of this period) to mid-2008. An epilogue to each case study provides details on relevant events following this period, where necessary. At the beginning of this period, each country had yet to implement the treaties; given this “blank slate,” we can then compare

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<sup>40</sup> Policy change is only one area in which convergence can be measured. Other types of convergence are: input convergence (“convergence in the pressures and constraints placed upon a particular political economy”); policy convergence (“convergence in the policies pursued by (or the paradigms informing) particular states”); output convergence (“convergence in the consequences, effects and outcomes of particular policies”); and process convergence (“convergence in the processes sustaining the developmental trajectories of particular states”). No one type of convergence implies another (Hay 2000, 514). For a discussion of the issues involved in measuring convergence or divergence, see Krasner (1988); Seeliger (1996); Bennett (1991); Holzinger (2005); Holzinger and Knill (2005) Jenson (2003); Heichel *et al* (2005); and Hay (2000).

policy developments over the next decade or so. The choice of mid-2008 as the artificial endpoint in this analysis can be justified by the fact that ten years represents a sufficiently lengthy period for the three countries to implement the treaties and to allow for a full examination of the policymaking process in each. It is very possible that greater convergence or divergence would be observed if the time period were extended into the future. For example, an Anti-Counterfeiting Trade Agreement (ACTA)<sup>41</sup> was concluded in December 2010 among the United States, Canada, Mexico and other countries. The Agreement, initiated in 2006 by the United States in an attempt to globalize its rules on ISP liability and the legal protection of TPMs, represents a further way for the United States to get from Canada and Mexico the decisions on digital copyright that it has as of yet been unable to secure. The tentative results of the ACTA negotiations are discussed in the epilogue to chapter 3.

## **I. Research Methods**

This dissertation employed a combination of semi-structured interviews with experts, policymakers, and business and civil society representatives from all three countries and an examination of primary legal and governmental documents related to the negotiation and implementation of the Internet treaties. In the case of Canada and Mexico, these sources were complemented by media and blog sources that were covering the ongoing debate over the implementation of the Internet treaties. Fifty semi-structured formal interviews were conducted in the three countries. Subjects were selected for their representativeness of the perspectives in the debate, which continues to be focused mainly around policy experts. Consequently, elite interviews were the most appropriate means of approaching the subject.

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<sup>41</sup> The final version of ACTA, released December 3, 2010, is available at <http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf>, accessed December 12, 2010.

Questions were modified depending on the expertise of the subject and for any developments in what remains an ongoing issue. Most participants agreed to participate in on-the-record, for-attribution interviews, although some asked that their comments be not for attribution.

In certain cases, the author was unable to interview those directly involved in the debate. In Canada, entreaties to the Canadian Recording Industry Association and the Canadian Motion Pictures Distribution Association, the two main players in the Canadian debate, were never acknowledged. In Mexico, the author was unable, after eight months of rescheduled meetings, to interview the head of the Mexican delegation to the WIPO Internet treaties. This was a particularly disappointing development, as Mexico is rarely mentioned on its own in the negotiations' official records.

In preparation for the Mexican case study, the author undertook three years of Spanish lessons. Almost all of the primary and secondary sources for the Mexican case study were in Spanish, and several of the interviews with Mexican citizens and officials were conducted in Spanish. Spanish-language citations were translated by the author. Most interviews for the U.S. case study were conducted over a ten-week period in Washington, D.C., in the summer of 2008, financed by scholarship from the Washington Center and the Ontario International Education Opportunity Scholarship. Primary research for the Mexican case study was conducted at the *Centro de Investigaciones sobre América del Norte* (Centre for the Study of North America) at the *Universidad Nacional Autónoma de México* (National Autonomous University of Mexico) in Mexico City from September 2009 to April 2010, financed by a scholarship from the Government of Mexico. Research for the Canadian case study was conducted out of Carleton University in Ottawa from January 2008 to August

2010. The overall project was also partly funded by a doctoral scholarship from the Social Sciences and Humanities Research Council of Canada.

#### **PART IV: ARGUMENT**

This dissertation argues that copyright policy in North America represents a battle between national path-dependence and regional convergence, or as Banting, Hoberg and Simeon (1997) might write, between “inexorable pressures for convergence” and “domestic pressures for divergence.” Regionally, the United States – the dominant economic and political power in North America and the main proponent of copyright reform, acting on behalf of its politically powerful content industries – will work to impose its view on copyright (specifically, its interpretation of the Internet treaties) on its two neighbours. However, NAFTA’s particular institutional form, lacking a decision-making mechanism to easily alter copyright law on a regional basis, means that any convergence on a “North American” standard will be shaped by the domestic political processes in the three countries and their relative balance among involved actors/interests.

Table 1 provides an overview of the defining characteristics of the debates in the three countries as they relate to ideational and material influences, institutional structure and the relative importance of the various actors. As already noted, the main international institutions are WIPO and TRIPS. The WIPO Internet treaties provide leeway for countries to determine how to implement their provisions. Member countries also retain the right not to implement or ratify the treaties. As well, all three countries are member of the TRIPS Agreement. Regionally, NAFTA Chapter 17 has given all three countries a roughly similar orientation regarding copyright (primarily through its effect on Mexican copyright law),

while NAFTA's overall creation of a more-or-less integrated economic space also makes it difficult to link domestic copyright reform to improved market access.

Domestically, the relevant bureaucratic institutions in Mexico and the United States tend to share a similar "protection" outlook on copyright, in terms of Doern and Sharaput's protection/dissemination dichotomy. In Canada, formal responsibility for copyright is divided between two departments whose mandates fall on opposite sides of this division. This situation is further complicated by the centralization of political power in the Prime Minister's Office, which has the ability both to adjudicate departmental disputes and to drive policy.

Copyright policymaking in the United States circa 1998 was a technocratic form of inter-industry negotiations reminiscent of that observed in Mexico. While U.S. copyright policymaking in 1998 was beginning to become politicized, in Mexico it remains largely apolitical, although this may change with the introduction into the debate of the politically powerful Mexican telecommunications industry. In Canada, the situation has been complicated by the existence since 2005 of minority Parliaments and the politicization of copyright.

Ideationally, all three countries currently share the view of copyright as primarily an economic right. This view is strongest in the United States, although it has become stronger in the other two countries since the 1980s. Canada's status as a net importer of copyrighted works reduces its objective material interest in strengthening copyright laws, while Mexico's adherence to the economic view of copyright is sustained partly by its previous tradition of

copyright as an author's human right and reinforced by Mexico's self-image as cultural superpower.<sup>42</sup>

Regarding interests – the actors involved in the copyright debate – in the United States the content industries are the most entrenched drivers of copyright reform, although “user” groups, and increasingly the telecommunications sector, also make their voices heard. At the time of the DMCA, groups and individuals representing a “public interest” separate from the interests of traditional stakeholders were beginning to become involved. In Canada, the primary drivers of copyright reform are the United States (through domestic channels and legislative tools such as its Special 301 process, which “names and shames” countries with IP laws of which the United States disapproves) and the largely foreign-based content industries. They are often supported by domestic creators' groups. As in the United States, user groups and the telecommunications industry are also involved. Since 2007, copyright reform has become an issue of public concern. In Mexico, there is little evidence of significant public involvement, and academics, who play an important role in the legislative process, are only now considering digital-copyright issues in depth. In their absence, the copyright debate is largely driven by *sociedades de gestión colectivas* (collection societies), representing creators, and by foreign- and domestic-based content industries. The United States also plays a significant role promoting Mexican copyright reform.

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<sup>42</sup> The importance of copyright to Mexican trade is unclear. By one measure, Mexico may actually be a *net importer* of copyrighted works. Using royalty payments and licensing fees (defined as “payments and receipts between residents and nonresidents for the authorized use of intangible, nonproduced, nonfinancial assets and proprietary rights (patents, copyrights, trademarks, industrial processes, and franchises) and for the use, through licensing agreements, of produced originals of prototypes (such as films and manuscripts)” as an imperfect proxy for copyright royalty payments, Mexico received \$US70.4 million in royalties in 2005, compared with \$US 111.0 million in payments (all figures current U.S. dollars on a balance of payments basis) (World Bank 2011 <http://data.worldbank.org/indicator/BM.GSR.ROYL.CD/countries>, accessed February 9, 2011).

**Table 1: Copyright Institutions, Ideas and Interests in North America**

<b>Institutions</b>	<b>Description</b>		
<b>Regional:</b> NAFTA	Sets and reinforces the orientation for copyright along U.S.-determined lines; emphasizes economic nature of copyright		
<b>International:</b> WIPO Internet treaties	Sets parameters for debate (i.e., digital-copyright reform should address ISP liability and TPMs); vague on specific rules		
<b>International:</b> TRIPS	Largely mirrored by NAFTA copyright provisions internationally		
	<b>United States</b>	<b>Canada</b>	<b>Mexico</b>
<b>Domestic bureaucratic institutions</b>	Unified approach to copyright; bias toward maximizing copyright protection for copyright owners	Divided approach: two departments with opposing (user/owner) mandates; Prime Minister plays decisive role	Unified approach to copyright; bias toward maximizing copyright protection for creators and owners
<b>Domestic political policymaking</b>	Pluralistic inter-industry negotiations; some industries more powerful than others, but all groups' interests met to some degree; low-to-moderate politicization for DMCA ('98)	Contentious inter-bureaucracy negotiation; presence of parliamentary majority or minority influences degree of effective politicization; high degree of politicization	Inter-industry negotiation (corporatist); low level of politicization & little general public interest
<b>Ideational and material influences</b>	Copyright as economic right; copyright exporter	Copyright as primarily economic right; copyright importer	Copyright as primarily economic right (post-NAFTA), legitimized by traditional approach to copyright as author's human right; self-image as cultural superpower
<b>Dominant interests &amp; role of public</b>	Domestic content industries; domestic telecommunications sector increasingly important; public increasingly active	U.S. content industries; domestic telecoms sector increasingly important; public-interest groups increasingly active, along with musician & new technology groups	Authors' collection societies; U.S. government; domestic & U.S. content industries; domestic telecoms sector increasingly important; no general public involvement in the debate

This dissertation adopts the view that both copyright and regions are politically made and reflect the distribution of power among interested actors. While state power is important (the very existence of copyright depends on state power), the state itself is both a battlefield for societal interests and a quasi-autonomous actor, as in Hall (1993) and is both shaped by and shapes its society. This dissertation argues that historically specific conjunctions of domestic political considerations allow for the maintenance of distinctive copyright regimes in the three countries. The prospects for, and shape of, distinctive policies depend on the relative power of domestic and regional/transnational groups, history (including cultural factors), and institutional factors, including those of a quasi-autonomous state.

## **I. Arguments**

This dissertation offers the following initial arguments:

**In all three countries**, advances in information technology have changed the parameters of the copyright debate, increasing both the stakes facing the public and the ability of civil society to affect the debate over copyright. One would therefore expect to see, in all three countries, greater civil-society involvement in the copyright debate reflective of the spread of digital technology, differing by the degree of technological advancement. Their effectiveness will vary according to the possibilities and constraints offered by the institutional contexts within which they operate.

**For the United States**, as the dominant regional power, it is expected that the implementation of the Internet treaties will be influenced primarily by domestic U.S. institutions, ideas and interests, with little to no role being played by regional or even international influences. Befitting its role as home to the world's most powerful content industries, one would expect a "strong" domestic copyright policy. The policy outcome in

United States, as the driver of copyright policy and continental integration more generally, offers the “standard” toward which one would expect to see policy convergence by the other two countries.

**In Canada**, the U.S. government, exercising global, regional and bilateral pressure, and on conjunction with content industries, will be the main global and regional force acting on Canada, its ability to influence Canadian policy shaped in part by the presence of NAFTA. The nature of Canadian implementation will be affected by the relative lack of economic importance of copyright to Canada, the ability to learn from the experience of the U.S. under the DMCA, the divided responsibility for copyright, the presence or absence of a majority Parliament, and the ability of domestic interests to influence the government. As a result, one would expect both a cautious approach to copyright reform and cautious convergence.

**In Mexico**, as with Canada, the United States (its copyright industry and government acting on behalf of these industries), exercising global, regional and bilateral pressure, will be the main global and regional force acting on Mexico, its efforts shaped by the presence of NAFTA. Reversing their historically isolationist economic policy, Mexican government officials in the 1990s wanted to integrate with the U.S. economy; this impulse led to a reorientation of Mexican copyright law to bring it more in line with U.S. copyright views. This reorientation favours U.S.-style implementation of the Internet treaties. As with Canada and the United States, however, beyond this initial reorientation, Mexico’s policy decisions will reflect domestic institutional and ideational biases, and the relative influence of involved actors within this domestic context.

## **PART V: OUTLINE OF THE DISSERTATION**

The dissertation is structured as follows. Chapter 1 offers an overview and critique of the existing regionalization theory literature and proposes, within the “new regionalism” approach, an historical-institutionalist approach that accounts for North America as it is and takes seriously the persistence of domestic ideas, institutions and interests. Chapter 2 provides some background on the international/regional political economy of copyright. It outlines the development of copyright, as well as the international, North American and domestic institutional contexts in which it operates, the interested parties involved in the debate over copyright law, and the way each has been affected by the rise of digital technologies. Chapters 3 through 5 present the dissertation’s case studies, using an examination of the negotiation and implementation of the WIPO Internet treaties to trace an outline of North American copyright governance through a series of comparative case studies. As the negotiation of the Internet treaties is inseparable from the U.S. policymaking process, chapter 3 covers both the treaties’ negotiation and their implementation in the United States. Chapters 4 and 5, respectively, examine Canadian and Mexican attempts to implement the treaties. The conclusion summarizes the findings of the three case studies and presents a picture of North American governance from the perspective of copyright policymaking. It offers conclusions on how digital technology has affected individuals’ involvement in the copyright debate and implications for greater individual/citizen input into the making of copyright policy.

## **CHAPTER 1: TOWARD AN HISTORICAL-INSTITUTIONALIST THEORY OF REGIONALISM**

### **INTRODUCTION**

The regional dimension of copyright is not usually considered in discussions of copyright policymaking. When considering how copyright laws have developed, the researcher's attention is drawn typically to the international "level" at which copyright treaties are negotiated, or to the domestic fora in which laws are made. Alternatively, one can take a global perspective, emphasizing the attempts by transnational corporations, operating in global markets, to influence both treaties and domestic laws.

While these perspectives are all valuable, casting aside the regional dimension of copyright policymaking threatens to pre-empt a complete analysis of the conditions under which copyright law develops. For example, a traditional domestic or comparative approach would examine the involvement of actors, both domestic and foreign, within the institutional and political context of each country's policymaking process. Such a study would doubtlessly reveal a great deal about copyright in the three countries. However, this type of approach potentially neglects the possible influence of regional institutions, such as the North American Free Trade Agreement (NAFTA), as a constraint on actors and the range of considered policies, as well as a potential resource. Just as the regional nature of any particular policy should not be assumed (Clarkson 2008), neither can it be automatically dismissed, especially when that particular policy is mentioned explicitly in NAFTA.

Understanding the regional dimension of copyright in North America requires developing an understanding of the nature North America as a region. This understanding, in turn requires an assessment of the state of regionalism theory as it applies to North America. This chapter offers a way to think about regional politics in North America, and presents its

argument in three parts. The first part critiques the main theories of regionalism as they apply to North America. The second part presents the argument for the use of historical institutionalism, situated within the “new regionalism” approach, as a way to understand regionalism, particularly North American regionalism, inductively. The chapter then concludes with some brief overall comments that summarize the regional historical institutional framework that will be deployed in subsequent chapters.

## **PART I: THE PROBLEMATIC REGIONALISM LITERATURE**

### **I. The European bias in the regionalism literature: Neofunctionalism and intergovernmentalism**

Though the region of North America remains undertheorized (Spitz 2009, 101), scholars have attempted to remedy this deficit. Some have pointed out the inapplicability of traditional regionalism theories (e.g., Hussain 2006), while others, notably Pastor (2001), have argued the opposite point. Other studies have employed various approaches, such as constructivism (e.g., Macdonald 2006; Jimenez 2005; Mace 2008; Spitz 2009). Generally, however, understandings of “region” and explanations for “regionalization” are rooted in the European post-World War II experience and the subsequent elaborations of the European experiment (Diez and Wiener 2004: 13-14). The two main regionalism theories – neofunctionalism and intergovernmentalism, particularly the former – dominate the imagination of the field, both as theoretical models and, in the case of neofunctionalism, as a “prototheory” that has influenced the formation of other theories (Choi and Caporaso 2005, 486).<sup>43</sup>

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<sup>43</sup> Though see Schmitter (2004) and Rosamond (2005 and 2008) for defences of neofunctionalism and accounts of how it has evolved; see also Warleigh-Lack (2008) and Diez and Wiener (2004) for discussions of how classical European integration theories now share the field with other perspectives, including neo-institutionalism, constructivism, and Critical Theory. For an analysis of multi-level governance, which has

These European-derived theories sit uneasily with attempts to understand the development of North America. Their main concepts, particularly that of “spillover” (discussed below) as well as the attention accorded to formal supranational institutions, the relative lack of attention given to the global political economic context in which regions are formed, and their normative underpinnings, do not travel well outside their European context.

### **i. The importance of context**

That initial conditions shape the development of regions was recognized early on by scholars. Hoffman (1968) argued that a single path to deeper regional integration was unlikely since “every international system owes its inner logic and its unfolding to the *diversity* of domestic determinants, geo-historical situations, and outside aims among its units.” Hoffman also emphasized the semi-autonomous role of states in integration: arguing that “In areas of key importance to the national interest, nations prefer the certainty, or the self-controlled uncertainty, of national self-reliance, to the uncontrolled uncertainty’ of integration.” States, furthermore, may resist the “uncontrolled certainty” of integration (cited in Laursen 2003, 7).

Intergovernmentalism and neofunctionalism, as well as neofunctionalism’s predecessor, functionalism, emerged out of a specific historical moment, namely the desire to promote and understand the economic and (eventual) political integration of Western Europe. It began as a means to avoid another European apocalypse: what became the European Union was made possible by the total devastation of Europe and the consequent collapse of the European public and elite belief in nationalism (Haas 1968, xv-xvi). This collapse in the

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emerged as the third main theory of European integration see Thakur and Van Langenhove (2008, 18-19); see also Risse-Kappen (1996).

belief in nationalist projects opened the door for the consideration of strong supranational projects as a way to create a lasting European peace.

These ideas were first articulated as functionalism, best exemplified by David Mitrany's 1943 work, *A Working Peace System*. Functionalism, the precursor to neofunctionalism, was more normative argument than theory. It took a technocratic approach to politics, arguing that the satisfaction of human needs ("often defined in a rather technical way") should be met by the political "level" (e.g., municipal, regional) that was best suited to them. According to this approach, one could constrain states and thus prevent war through a network of transnational organizations by increasing their degree of interdependence (Diez and Wiener 2004, 7).

Neofunctionalism refined this approach by insisting that technical decisions are actually political: "the technical realm [is] in fact made technical by a prior political decision" (Hettne and Söderbaum 2008, 63). However, it continued to insist on a central role for supranational institutions. In the neofunctionalist telling, regional integration is a functional response to dense social and economic interdependence, in which integration in one area can lead to demand from trans- and cross-border actors for integration in others. Supranational institutions are key to this process: once created, they reinforce and strengthen the tendency toward deeper integration by serving as the focus for the regional-level organizing efforts of actors and as a lobbying force for deeper integration in and of themselves (Schmitter 2004, 46). The result is the creation of a new region-centred (as opposed to nation-state-centred) polity, complete with regional identity (Diez and Wiener 2004, 9). Ever-deeper integration is propelled by functional and political "spillovers": when integration in one area (unintentionally) leads to the functional need (or demand) for

integration in other areas. In this way, economic integration can eventually beget political integration.<sup>44</sup>

In contrast to the neofunctionalist view of integration, which sees it emerging from the demands of social actors, the intergovernmentalist analysis places nation-states at the centre of its analysis. It argues that regions, and regional institutions, are the outcome of member states' domestically determined preferences and inter-state bargaining (Choi and Caporaso 2005, 488-489). While the two approaches differ on the role of supranational institutions – for neofunctionalists they drive integration, for intergovernmentalists they lock it in – both focus on the importance of these institutions for regional governance.

## **ii. Minimal applicability to North America**

Neofunctionalism has been widely criticized for its inapplicability to regions outside Europe, including North America. Regions such as the Association of Southeast Asian Nations (ASEAN), the *Mercado Común del Sur* (MERCOSUR) and the African Union, to take only three examples, may demonstrate certain characteristics of a European-type region, such as regional institutions, trade interdependencies or cultural similarities. However, their specific historical and political circumstances have limited the usefulness of neofunctionalism to our understanding of how these regions work and develop. North America, for example, is certainly characterized by dense economic, political and even cultural linkages, important neofunctionalist variables. However, despite these linkages and in defiance of the expectations of neofunctionalism, continuing deep economic integration in North America has led to few “spillovers,” such as the creation of supranational authorities or institutions to address better the needs of a North American market.

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<sup>44</sup> Neofunctionalist theories also argue that integrating countries must possess similar cultural, economic and political background conditions.

Deepening North American economic integration has not led to the adoption of supranational-institutional solutions to problems. Hindsight suggests that throughout the 1990s the seemingly inevitable movement toward a borderless North America, given its most eloquent expression in Pastor's ill-timed 2001 *Toward a North American Community*, was an atypical moment of calm for the region, and especially the United States. Instead, we seem to be witnessing the re-emergence of traditional "double-bilateral" relationships.<sup>45</sup> The first major challenge to North American integration, the September 11, 2001, attacks on Washington, D.C., and New York City, revealed a regional power, the United States, that largely reacted as a nation-state rather than as part of a region, insisting on "thicker" American borders for security reasons and, later, a walled Mexico-U.S. border designed – however futilely – to keep illegal Mexican migrants out of the United States. Even when it takes a "regional" view of security issues, such as the creation in 2002 of the United States Northern Command (NORTHCOM), which consolidates U.S. military operations related to U.S. homeland defence and which encompasses Canada, Mexico and the Bahamas, its military remains strictly controlled by the United States (United States 2010). In other words, NORTHCOM does not create even a weak shared command such as that enjoyed by Canada and the United States under the North American Aerospace Command (NORAD). Similarly, NORTHCOM is driven by U.S. perceptions of security. Rather than growing more closely together, North America is characterized by "increasingly incompatible policies across the region; ... retreating integration and constrained security interests [that] have produced imperfect interdependence in North America; and ... widening gaps between public preferences and policy outcomes [that] are becoming clearly visible" (Hussain 2008, 108).

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<sup>45</sup> Not everyone was lulled into complacency: Abbott (2000) presciently remarked that the durability of NAFTA could not be judged as of 2000, as it had yet to hit a crisis.

The North American story, however, is not one of American domination. While NAFTA limits the policy options available to Canada and Mexico, it also constrains the hegemon (Bow and Lennox 2008, 15). The NAFTA style of integration is largely based on “hard law,” rather than supranational institutionalization, and “tends to restrain strategic political behaviour” (Abbott 2000, 520) by all signatories.<sup>46</sup> Somewhat ironically, this approach forces actors to rely on “soft law” workarounds to promote cooperation and policy convergence in the absence of strong regional institutions (Kirton and Guebert 2010, 72-73).

North America has not witnessed the emergence of a collective regional identity, with the exception of the emergence of a continental business elite (McDougall 2006), so much as the retrenchment of national identities. The United States continues to be worried about non-white immigration,<sup>47</sup> Canadian nationalism continues to run high, while Mexico is pulled economically northward by an “agenda for political and economic development [that] depends upon Mexico moving into the orbit of the more mature liberal democracies of the U.S. and Canada,” while culturally identifying with Latin America (Welsh 2004, 42).

The 9/11 attacks did lead continental business elites and their academic allies to demand “deeper integration,”<sup>48</sup> as would be predicted by neofunctionalist theory. The results, however, are telling. The Security and Prosperity Partnership of North America (SPP), announced in 2005, was the end result of several years of lobbying by powerful business interests in all three countries. However, despite the seemingly grand scope of the SPP – initially it contained over 300 “deliverables” – it was limited to regulatory changes that would not require legislative approval, as the executives from each country judged correctly

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<sup>46</sup> NAFTA’s largely ineffectual labour and environment side accords represent an exception to this hard-law focus.

<sup>47</sup> See, e.g., Huntington (2006).

<sup>48</sup> See, e.g., Dobson (2002), and Hart and Dymond (2001).

that there was no legislative appetite for deeper formal integration (Savage 2006). Even these ambitious regulatory changes were eventually scaled back following uneven progress and funding by the three governments.

On a more prosaic level, copyright policy remains a domestic concern, and each country retains the ability (even if not always exercised) to pursue autonomous policies, even though NAFTA effectively creates a similar copyright baseline for the three countries. As this dissertation details, the evolution of copyright policy in each country is more complicated than being simply a simple convergence to a North American, or even U.S., standard.

Two characteristics of North America help to explain why it is unlikely to follow the same path as the European Union. Politically, the most significant continental fact of life is the presence of a regional and global hegemon that continues to resist erosion of its federal powers (Katzenstein 2005).<sup>49</sup> Unless this fact changes, “spillover” and the rise of supranational institutions will remain irrelevant to North American governance. Regardless, domestic histories and preferences in *all* three countries played a significant role in the distinctive development of a North America that explicitly rejects the European model (Studer 2007). This is not to say that there will be no “push” for a more integrated region, only that such pressures will be filtered in part through, and be in competition with, domestic (and global) forces and institutions. In the meantime, in the absence of formal supranational (or even consistent domestic political) pushes for deeper integration, North American

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<sup>49</sup> As noted in the introduction to this dissertation, hegemony is defined as “a situation in which one state is powerful enough to maintain the essential rules governing interstate relations and willing to do so” (Keohane 2005, 34-35). A hegemon is a state that possesses a “preponderance of material resources,” particularly “control over raw materials, control over sources of capital, control over markets and comparative advantages in the production of highly valued goods,” and be willing to exploit these advantages (Keohane 2005, 32).

integration is “anarchic and atomistic,” driven by economic concerns (Bislev 1999, 1) rather than the social and political concerns that continue to fuel European integration.

Turning to ideas, this loss of belief in nationalism that in Europe has led to the push for greater regionalism and supranationalism, historically, has been the exception, not the rule. To state the obvious, this widespread collapse in the faith of nationalism has not been observed in North America. Consequently, the flight from national institutions has been muted here. In North America, the NAFTA model explicitly rejects the European example of creating strong independent regional institutions. Similarly, the crafting of a free-trade pact, while desirable to many, is of an order of magnitude less crucial than preventing a third world war, which was the objective of European integration. Overall, the EU possesses “more ambitious social and political objectives” than NAFTA’s explicit goal of trade and investment liberalization (Studer 2007, 54). With some exceptions, such as Pastor (2001) and former Mexican President Vicente Fox’s proposal for a North American social union based on the European Union (Macdonald 2004), which was roundly rejected by Canadian and American leaders (Studer 2007, 53), most proposals for deeper integration continue to focus exclusively on trade integration, with security integration added post-9/11.<sup>50</sup>

### **iii. Theoretical consequences of imprecise theorizing**

While certain elements of these theories can be applied successfully to the North American context, overall they have a tendency to focus the researcher on less-than-fruitful questions. Chief among these is the lack of strong supranational institutions in North America. The path of European integration has led to the development of a “stages” approach to integration, in which the degree of integration of regions is ranked according to the level of institutionalization. Given the low level of regional institutionalization everywhere but

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<sup>50</sup> See, e.g., Granatstein (2002); Gotlieb (2004); and Dobson (2002).

Europe, these resulting rankings are of questionable utility. For example, after noting that the degree of institutionalization in North America is far below that in the European Union, Choi and Caporaso (2005, 494) declare: “the Americas have achieved higher levels of political institutionalization” than in East Asia: “NAFTA, living up to its name as a free trade area, has established a sophisticated system of supranational governance for intra-regional trade and investment.”<sup>51</sup>

In the theoretical and normative literature on North America, this approach has fostered the conclusion that North America suffers from “deficient institutionalization” (e.g., Grinspun and Kreklewich 1999). The finding of “deficient institutionalization” has both positive and normative connotations. Empirically, it is obviously correct: there are fewer, and weaker, institutions in North America; European Union institutionalization “far exceeds” that seen in North America (Choi and Caporaso 2005, 493).

However, “*deficient institutionalization*” is not just an empirical statement, but a theoretical and normative judgment about what kind of and how many institutions should exist in North America. Pastor (2001), Grinspun and Kreklewich (1999), Hurrell (2006), to name three, have remarked that, given the high number of economic, social and security externalities generated by the three countries’ intensely interdependent relationship, we should either expect (based either explicitly or implicitly on *a priori* theoretical assumptions) or strive towards (based on a normative standards of fairness and a functional view of how society works) greater regional institutionalization in North America.

The spectre of “deficient institutionalization” suggests a specific course of action: that governments should consider empowering supranational institutions in response to shared policy problems, even when material and ideational conditions – not least of which is the

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<sup>51</sup> Given the weakness of the NAFTA institutions, this is really not saying much.

U.S. aversion to ceding authority and autonomy – make this unrealistic. Instead of looking at what the best policies are given the specific conditions of North American governance, it proposes a futile course of action, all else being equal.

This focus on deficient institutionality can also lead to a relative neglect of the role and persistence of domestic institutions. Neofunctionalism, in its most general form, suggests that actors will tend to respond to transnational problems with transnational solutions. This functional approach to integration is rightly characterized as being “overly deterministic, technocratic and apolitical” (Hurrell 1995, 60). It not only downplays political conflict within and across borders by societal actors, it also downplays both the role and the resilience of the state as a quasi-independent actor. Moreover, the theory is relatively silent on the potential for interstate conflicts (Hurrell 1995, 60). From a political-economy perspective, neofunctionalism also fails to take into account the role of transnational corporations in the construction of the region, tending to see regional projects in isolation from the global political economy. Again, this theoretical approach is focused more on where countries and the region *should* go, based on the theory, rather than on what policies might actually fit the actual situation of the continent.

#### **iv. Summary**

By the standards laid out in the literature, North America presents many, though not all, of the characteristics of a region: a degree of supranational institutionalization, deep cross-border political, economic and cultural linkages, and some traces of a common identity. However, it is different enough from the European experience that the European-derived theories of neofunctionalism and intergovernmentalism provide little guidance for understanding North America. For example, the functionalist concept of “spillover” can

explain the search for something like the SPP, with its mandate of regulatory harmonization, or “integration by stealth” (Savage 2006). Neofunctionalism would (correctly) see the SPP as a response to growing interdependencies in the region. However, it is less useful for understanding its failure or ongoing regional politics. A more nuanced model, which can address the dynamics of power asymmetries under conditions of weak regional institutionalization, is needed. Instead of a comparison between two things that are superficially similar (both North America and Europe are “regions”) but substantively different (e.g., motivations underlying the creation of the region, and the region’s institutional structure and processes), North America should be examined as it is.

## **II. A homegrown approach: The problems with neoliberal functionalism**

Neofunctionalism and intergovernmentalism are not the only theories that have been applied problematically to North America. Proposals emerging mainly from Canadian pro-business analysts,<sup>52</sup> while not explicitly based on any theory, share a great deal in common with European functionalism and have had a much greater effect on North American politics than neofunctionalism and intergovernmentalism in that they have helped to frame the debate over issues like the SPP. Like functionalism as it was practiced in postwar Europe, these proposals typically argue for deeper regional integration for technocratic reasons. However, where functionalism proposed the creation of state-like institutions in order to foster regional cooperation, these proposals, in keeping with their neoliberal bent, downplay or ignore the importance of governmental institutions and focus on creating a North American economic market to promote the economic objectives and competitiveness in global markets. These proposals themselves are a response to the neoliberal model set up by NAFTA, which

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<sup>52</sup> See, e.g., Hart and Dymond (2001); Hart (2005); Dobson (2002); Granatstein (2002); Gotlieb (2004); and Canadian Council of Chief Executives (2004).

assumed that a continental market could be created without the need for commensurate regional-regulatory institutions.

“Neoliberal functionalism” can be defined as a normative mindset that argues that markets are best organized above the nation-state level, to be regulated (if necessary) by technocratic institutions while democratic political control remains at the level of the nation-state. Where functionalism’s ultimate purpose was economic integration in the pursuit of peace, neoliberal functionalism pursues economic efficiency through market integration. As the name suggests, proponents of neoliberal functionalism tend to focus on the need to reduce barriers to the efficient functioning of what has become a continental market, whose disruption has the potential to hurt both Canada and the United States (many of these proposals, which have primarily come from Canadian academics and business interests, often give Mexico short shrift).

Similar to functionalist accounts, proponents of neoliberal functionalism tend to treat political considerations as technical problems to be overcome once policymakers come to their senses; they thus miss the neofunctional insight that technical issues are also political. For example, Steger (2005, 78) criticizes the architects of NAFTA as “perhaps a bit naïve” for assuming that rules and informal consultations could compel cooperation and compliance.” This critique assumes away the political and institutional constraints that shaped NAFTA, and fails to understand that NAFTA’s lack of strong institutions was not the error of naïve diplomats, but the consequence of an institutional and structural context. These constraints, moreover (namely, the political and cultural reluctance of the three countries to create these institutions (Studer 2007)) have not disappeared.

As with the application of neofunctionalism to a North America in which power is distributed asymmetrically and nationalism has never lost its power, the neoliberal functionalist approach can lead to the advocacy of problematic, often politically unworkable solutions to problems arising from regional economic integration. The proposals referred to above, for example, are characterized by a reliance on technical, rather than representative-democratic, political institutions to address continent-wide issues. These proposals include a long-dreamed-of binding dispute-settlement mechanism; appointed fact-finding/problem-solving commissions (Schwanen 2001, 2004); a comprehensive “Treaty for North America” (Schwanen 2001); a customs union or common market (Dobson 2002); a common security perimeter (Gotlieb 2004); and a common currency (Courchene and Harris 1999).

These proposals represent an attempt to square the circle between the hostility of North America (its governments and peoples, particularly in the United States) toward supranational institutions and the widely held belief that without supranational institutions the emergence of a stable region is unlikely, if not impossible. The exclusion of representative institutions at the supranational level also represents an ideologically motivated attempt to minimize the role of government in the marketplace while assuming that domestic political power in the absence of regional coordination will not cause any problems. These proposals further emphasize economic integration rather than social cohesion or a common identity.

They also assume that U.S. self-interest, backed by Congressional reluctance to cede its power, which had been responsible for persistent U.S. unilateralism and has presented a roadblock to deepening NAFTA, has been changed significantly by the addition of American security concerns to the regional agenda, post-9/11. As Courchene (2004, 13) remarks, “9/11

raised the possibility that linking homeland security and economic security might be the very key to appealing to US interests and, therefore, to deepening NAFTA institutionally.”

Finally, it assumes that only a comprehensive negotiation of economic and security concerns, leading to the creation of supranational institutions, would be sufficient to address the policy problems arising from the needs of an integrated continental economy.

These assumptions are questionable. They posit that bottom-up demand for responses to integration (the consequences of a continental market governed by domestic governments) are best dealt with through “top-down” approaches that do not require political integration, and that tend to push political considerations to the side. Steger, for example, argues that moving North American integration forward is a matter of packaging and selling a technically correct proposal in order to overcome misplaced fears of deeper integration. While in her view Canadians and Americans (she does not discuss Mexicans) fear supranational institutions, “the Europeans ... do not fear giving up regulatory authority to supranational authorities, rather, they speak enthusiastically about the concept of ‘pooling’ sovereignty. They understand that, by working together in a common enterprise, they can create an entity that is greater than the sum of its parts” (Steger 2004, 78).

These approaches fail to consider the politics required to make these proposed technocratic solutions work, and whether they can work given the institutional and political characteristics of North America. In the absence of a supranational authority, any trilateral deals (exchanging security concessions for smoother border procedures, for example) will continue to be vulnerable to political pressure at the domestic level. For example, the assumption that technocratic institutions would reflect “North American,” as opposed to U.S., standards ignores the continent’s power asymmetries. It assumes that the result would

be an EU relationship of equals, rather than a retread of the European Economic Area Agreement, which gives the European union “a clear mechanism of policy control” over Norway, Switzerland and Liechtenstein (Leslie 2005, 66). By ignoring the political nature of even seemingly technical issues like whether or not to create a customs union, these approaches fail to appreciate that “political integration (or at least the existence of common institutions) and economic integration must go hand in hand, the implication being that without the former, progress on the latter may be difficult” (Courchene 2005, 44).

It is unlikely that the circle can be squared: “If it is not possible, or perhaps judged not desirable, to create such [strong political supranational] institutions, one must expect some market barriers to remain and to become more intrusive or burdensome in times of crisis, economic or otherwise” (Leslie 2005, 60). In the absence of institutional political integration, economic supranational institutionalization will not work. Institutionalization in a hegemonic setting is likely to look differently than it would in a more equal setting.

This reality suggests the utility of a different theoretical approach to understanding the North American region. Such an approach would avoid considering North American integration in terms of the supranational institutions it does or does not have. Rather than propose solutions that ignore the reality of the continued relevance of U.S. congressional (as well as Canadian and Mexican parliamentary/congressional) autonomy, and Mexican and Canadian nationalism, it would assess the continent from a perspective that considers North American politics and institutions on their own terms, inefficiencies and all.

## **PART II: HISTORICAL INSTITUTIONALISM AND THE NEW REGIONALISM LITERATURE**

### **I. New regionalism, international political economy, and the central role of the United States**

Neo-institutional approaches to studies of regional development have been employed productively in analyses of the European Union (see, e.g., Pollack (2004); Armstrong and Bulmer (1998); Pierson (1996); Hay and Rosamond (2002)), to the point where it has been said that “the new institutionalisms ... have arguably become the dominant approaches to the study of European integration” (Pollack 2004, 153-154).<sup>53</sup> Historical institutionalism’s primary appeal lies in its ability to help bridge the comparative-IR theoretical gap, by focusing on all institutions, actors and ideas, no matter at which “level” they are found. Its inductive approach – examining the functioning and effects of the relevant institutions – offers an improvement over neofunctionalist and intergovernmentalism-influenced approaches, which tend to start with assumptions about how such institutions and actors work. However, despite the use of institutionalist arguments to analyze convergence and divergence in the Canada-U.S. relationship (e.g., Banting, Hoberg and Simeon (1997); and Hoberg (1986)), it remains underutilized in the field of North American regionalism, which continues to be dominated by normative neoliberal functionalist accounts. For example, a 2003 conference on Canadian-American and North American integration that resulted in the collection of papers *Thinking North America* did not include a single institutionalist-focused paper.

This dissertation argues that HI’s inductive nature allows it to consider regions in all their diversity in a way that respects, in Hoffman’s words, cited above, a specific region’s “inner logic and ... unfolding,” which are driven by “the *diversity* of domestic determinants,

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<sup>53</sup> See also Boin and Kuipers (2008).

geo-historical situations, and outside aims among its units.” Consequently, this dissertation situates itself squarely in the new regionalism school (see especially Hettne 2005), which emerged in the 1990s as an attempt to account for the diversity of regional projects that gained momentum in the 1980s and the 1990s (including NAFTA) in a globalizing world. Its central insight is that regional development is “multidimensional” (Corina 1999, xvi), involving state and non-state actors, formal and informal institutions, and embedded in a wider global economic and political system. Regions in this perspective do not necessarily develop following a teleological “stages” model of ever-greater institutionalization, and they can focus on a wide or narrow range of issues. Crucially, this perspective also argues that regions will develop differently depending on their historical context and geopolitical position.<sup>54</sup>

The new-regionalism school view, that the precise definition of a region varies “according to the particular problem or question under investigation” (Hettne 2005, 544), is compatible with this dissertation’s minimalist definition of a region, which does not presume a specific institutional structure or distribution of power.<sup>55</sup> For example, the location and balance of power within a continent certainly can affect the structure, development and functioning of a particular region, but it cannot, in and of itself, help us distinguish whether or not an area is a “region.” The fact that Washington usually sets the agenda for regional

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<sup>54</sup> As is often the case when discussing conflicting approaches, it is easy to overstate the differences between the “old” and “new” regionalisms. Warleigh-Lack contends that there are few “theoretically salient differences” between the two regionalisms, and that they relate “principally to the need to focus analytically on a broad range of actors, to study both non-institutional and institutional factors in the region-building process, to refer specifically to globalization and the global political economy as exogenous factors having an impact on the regional organization/process, and to adopt a multi-disciplinary focus” (Warleigh-Lack 2008, 47).

<sup>55</sup> Scholars in the new regionalism school have developed several typologies classifying both different types of region and their varying degrees of “regionness”: see, e.g., Hurrell (1995, 39-45); Hettne (2005); Warleigh-Lack (2008, 52). For the purposes of this dissertation, the crucial point is that different types and forms of region will have their own internal logics, which must be investigated.

politics does not reduce the need, when appropriate, to consider the North America as a region.

New regionalism, unlike neofunctionalism and intergovernmentalism, emphasizes the global context in which regions are created and operate, noting that regions are embedded in a larger global system, involving relationships, “within and beyond regions” (Katzenstein 1996). As Studer (2007) remarks, NAFTA owes its existence (such as it is) to U.S. concerns about losing global economic hegemony and its desire to apply pressure to the then-ongoing General Agreement on Tariffs and Trade talks that led to the creation of the World Trade Organization and (from a copyright perspective) TRIPS. On copyright and intellectual property (IP), one could also mention that the impetus for TRIPS (discussed in chapter 2) came primarily from U.S.-based knowledge-intensive transnational corporations in the pharmaceutical and entertainment industries (Drahos and Braithwaite 2002).

New regionalism can also account for the importance and role of the United States in the formation of all world regions, not just North America. This central role of the United States has been examined directly, as in Katzenstein’s (2005) work on the role of the United States in shaping the distinct nature of world regions, and implicitly, as in Calleya’s (1995) observation that the change from a bipolar to a multipolar world after the end of the Cold War has affected the shape and growth of regions.

In Katzenstein’s account of the role of the “American imperium” in the formation of world regions, regions are shaped by the U.S. deployment of the military, economic, political, cultural and ideological power that defines the American imperium. Many of the differences among regions can be accounted for by “the presence or absence of core regional states that support U.S. power and purpose. These states are the hinges that connect regions

to the American imperium” (Katzenstein 2005, 234). Regions are characterized by “porousness”: core regional states are linked to America, “regions to subregions, and America to regions. The American imperium is not only an actor that shapes the world. It is also a system that reshapes America” (Katzenstein 2005, 1).

The political dynamic of the North American region is shaped to a significant degree not only by the fact that North America “is the platform from which the world’s only superpower engages with the rest of the planet” (Clarkson 2008, 16), but also by the absence of a “core regional state” to act as an interlocutor between the U.S. imperium and the region, as Canada and Mexico are too dependent on the United States to play this role (Katzenstein 2005, 230). Hurrell (2006) comes to a similar conclusion, noting that the hegemonic role played by the U.S. combined with its disdain for regional institution-building (usually shared by Canada and Mexico) and support for a liberal economic policy plays a large part in thwarting the ability of the three countries to work together on regional issues.

## **II. An historical-institutionalist theory of North American regionalism**

New regionalism approaches leave open the question of how to theorize the development and functioning of a region, which will discourage those seeking a general theory of regionalism. New-regionalism approaches are also open to the charge that they admit so much diversity that one can be left in a situation in which every region is unique and thus cannot benefit from comparisons.<sup>56</sup> Its emphasis on the need to consider the diversity of combinations of ideas, institutions and interests that construct and comprise regions suggests what factors need to be accounted for in a theory of regionalism, rather than providing the theory itself.

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<sup>56</sup> Warleigh-Lack’s typology, for example, is fascinating in that he places seven regions in five different categories (2008, 52); it leads one to question the utility of a taxonomy that places each unit in a different category.

One's acceptance of new regionalism's general hostility toward "rigid theorization" in favour of a more ecumenical theoretical approach will depend on whether one is seeking or believes in the possibility of such grand theories. Given their documented drawbacks, a grand theory of regions is likely impossible. Regionalism should therefore "be approached from different theoretical angles," depending on the region and issue under discussion (Hettne and Söderbaum 2008, 61). That new regionalism does not result in a single, unified theory of regionalism is, therefore, no great loss.

The challenges of forming a workable theory of North American regionalism can be gleaned from the preceding discussion. Neofunctionalism and intergovernmentalism largely fail to provide tools that explain the basic facts of North American governance: deep regional economic integration under conditions of domestic political control in the presence of a regional hegemonic power. They focus the researcher's attention on questions of how to deal with "deficient institutionalism" rather than asking how countries should structure their politics in order to ensure that the democratically expressed desires of citizens of all three countries are respected. Similarly, neoliberal functionalism fails to consider adequately the actual politics of North America, proposing either unworkable or highly undemocratic supranational solutions that assume away problems like the demonstrated U.S. reluctance to cede authority over its laws. Neither approach, in other words, adequately accounts for the role of the state, neglecting the issue of how state politics and power affect the development of a region. In a world of diverse regions, an approach that examines and accounts for regions, and regional and domestic institutions, as they are would be more relevant than grand deductive theories.

HI offers a useful lens, compatible with the new regionalism approach, through which to consider how regions develop and function. HI is particularly well suited for regional analyses, as it is a mid-range theory, or method (Armstrong and Bulmer 1998, 50), potentially compatible with broader theories of politics (Pollack 2004, 154), that emphasizes how historical contingency can lead to different outcomes in structurally similar cases. As such, any given HI analysis may not necessarily address every researcher's concerns, be it a more International Political Economy-specific focus on the state's place within the wider global political economy (as in Cox (1987), for example), or on the social construction of state roles (as in Mace (2008)), but it will not necessarily be incompatible with these larger theories.

Furthermore, while HI's biases in favour of difference (Immergut 1998, 27), "cross-national variation" (Pontusson 1995, 129), and stability over change (Peters *et al.* 2005) may be considered problems for those seeking generalizable regionalism theories, they may also be seen as proof that HI can address new regionalism's insistence that different processes can lead to different types of regions. Unlike the European-focused regionalism theories and neoliberal functionalism, it is focused more on the roots of a region and its institutions, rather than on a desired end state (Armstrong and Bulmer 1998, 50). These characteristics also allow the researcher to make the hard case for regionalism: if convergence is observed via a status quo-biased theoretical approach like HI, it will be difficult to dismiss these findings.

HI, unlike neofunctionalism, intergovernmentalism or neoliberal functionalism, does not make normative judgments about whether regions are characterized by sufficient or "deficient" institutionality, nor does it emphasize certain institutional levels (e.g., regional or domestic) over others. It requires the researcher to consider all potentially important actors

and institutions without prejudging their importance or desirability. As a result, it is able to recognize regional effects that may not be obvious from, for example, theoretical approaches that focus on, or emphasize the normative benefits of, formal regional institutions. It is similarly useful for an issue like copyright, which is typically considered from either a domestic or global perspective, but which may be affected by regional factors.<sup>57</sup>

The actual claims and objectives of HI are modest. Olsen (2009, 26) nicely sets out its ambitions and limitations:

Institutionalism simply claims that relationships between political agency, large-scale societal processes, normative democratic prescriptions, existing institutional arrangements, and institutional development are complex and that knowledge about the functioning of formally organized institutions adds to our understanding of continuity and change in democratic contexts.

It does not provide an explanation for integration; HI focuses instead on accounts of how regional projects develop or devolve (Pollack 2004, 154). HI makes several claims, of which the most important for the purposes of this dissertation are the following:

1. Institutions – broadly defined as semi-persistent “constraints or rules that induce stability in human interaction” (Voss 2001, 7561) – structure individuals’ and groups’ interactions with each other and with broader social forces, by providing incentives and disincentives for various actions, and by influencing actors’ perceptions of their own self-interests.
2. Actors pursue strategic self-interests within institutional material and ideational constraints, which influence and construct actors’ perceptions of their own self-interest.

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<sup>57</sup> As it is developed here, historical institutionalism’s disregard for according primacy to different levels is similar to the perspective of the “scale” literature that originated in geography and has been applied to political economy. According to the scale literature, the different areas in which politics occurs must all be incorporated into one’s analysis. Scale, in this sense is “a set of dynamic relationships, rather than ... fixed spaces” (Orsini and Smith 2007, 6). The concept of scale has been used fruitfully in studies of Canadian public policy (see, e.g., Mahon and Johnson 2005). Mahon, Andrew and Johnson (2007, especially 51-54) offer a good overview of the “scale” concept.

3. Institutions are historically contingent, the result of political competition among actors in a specific pre-existing socio-political-economic context. Consequently, similar situations (such as economic pressures from globalizations) can lead to different results under different institutional setups.
4. The timing and sequencing of institutional creation and change matter. Changes in one period influence later institutional and policy development.
5. Where at one period institutions confront actors as constraints, they can be modified via political action.
6. Institutions rarely demonstrate either complete internal or inter-institutional (i.e., at a societal level) logical consistency. Differences between periods of revolutionary change (known as “critical junctures”) and periods of stability are differences of degree, not of kind, and are partly the result of a researcher’s methodological choices. This lack of logical coherence, combined with the fact that political questions are rarely (if ever) settled definitively, provides actors with the ability to drive change in HI theory.
7. Exogenous shocks, the main driver of change in most HI accounts (Krasner 1988), can both create new interest groups and serve as a resource to empower existing groups to either uphold or subvert the existing *status quo*.

The following section develops these points, with an eye toward constructing an historical-institutionalist approach to North American integration.

#### **i. Historical roots: New (or neo-) institutionalism and historical institutionalism**

*The new institutionalism is an empirically based prejudice, an assertion that what we observe in the world is inconsistent with the ways in which contemporary theories ask us to talk (March and Olsen 1984, 747).<sup>58</sup>*

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<sup>58</sup> Peters (2008) dates the resurgence of the “new institutionalism” to this article.

Neo-institutionalism “is a specific approach that aspires to make sense of how [formal] institutions emerge, function and change” (Olsen 2009, 8), of which historical institutionalism is one of its subsets. It dates formally to the mid-1980s<sup>59</sup> but with claimed roots stretching back to the 1960s, notably the work of Stinchcombe (1968), and to the classical works of thinkers such as Marx and Weber. Neo-institutionalism was a reaction to both the atomizing tendencies of the dominant paradigm of behaviouralism in American and comparative politics in the 1950s and 1960s and the determinism of Marxist and other forms of grand theorizing. It criticized behaviouralism for obscuring “the enduring socioeconomic and political structures that mould behaviour in distinctive ways in different national contexts” (Thelen and Steinmo 1992, 1), and grand structural theories like Marxism for “not adequately explain[ing] cross-national variation in how interest groups and social classes were organized and why a particular group or class might demand different policies in different places and at different times” (Thelen and Steinmo 1992, cited in Campbell 2004, 24-25).<sup>60</sup>

In contrast to these deterministic and voluntaristic approaches, new institutionalism argued that institutions exert a quasi-independent influence on social and political life. Institutional approaches assume “that institutions are not pawns of external forces or obedient tools in the hands of some master. They have an internal life of their own, and developments are, to some degree, independent of external events and decisions” (Olsen 2009: 4). Change, in institutionalist accounts, is not driven wholly from on high (structuralism) or below

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<sup>59</sup> The 1992 edited volume by Steinmo, Thelen and Longstreth (1992) is generally identified as the first complete articulation of “new institutionalism” as it applies to historical institutionalism (Peters *et al.* 2005); in sociology DiMaggio and Powell (1991, 11) date the new institutionalism to 1977 and the publication of John Meyer’s “The Effects of Education as an Institution” in the *American Journal of Sociology*.

<sup>60</sup> See also Katznelson (1997) for a discussion of the rise of the new institutionalisms.

(individualism/atomism), but through the interaction of both in an institutional structure whose rules and procedures structure these changes.

In short, institutions matter and are not just an epiphenomenal manifestation of individuals' aggregate preferences. Given institutions' role in shaping political outcomes, it makes more sense to "discuss the direction and implications of this bias," and, from a normative perspective, to "suggest ways to improve the justness of institutional outcomes," rather than focus on individual preferences (Immergut 1998, 7-8).

## **ii. Historical Institutionalism**

Historical institutionalism, one of the three main strains of neo-institutionalist analysis,<sup>61</sup> is derived from classical political economy, particularly Marx's historical materialism and Weber's comparative institutional history (Campbell 2004, 23). It draws upon group theories of politics and structural-functionalist theories from the 1960s and 1970s. From group theory it takes the assumption that "conflict among rival groups for scarce resources lies at the heart of politics" and marries it to an institutional analysis of "the way the institutional organization of the polity and economy structures conflict so as to privilege some interests while demobilizing others." From structural functionalism (both its pluralist and neo-Marxist variants), it takes the idea of "the polity as an overall system of interacting parts." However, rather than accept the structural-functionalist view that systems are driven mainly by "the social, psychological or cultural traits of individuals," it argues for

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<sup>61</sup> The others being rational-choice and sociological/organizational (hereafter referred to as sociological) institutionalism (Though Peters (2008) identifies seven forms of institutionalism (including organizational, international policies and international regimes, and interest groups). While all neo-institutionalisms agree on several points – the centrality of institutions in social life as structures that influence human behaviour and sociopolitical outcomes – and overlap in practice, they can be distinguished by their choice of subject matter, descriptions of how institutions influence behaviour, and how agents' preferences are formed. As this dissertation is devoted to the development of an historical-institutionalist model of regional development, it will only discuss rational-choice and sociological institutionalism when they touch directly on historical institutionalism.

“institutional organization of the polity or political economy as the principal factor structuring collective behaviour and generating distinctive outcomes” (Hall and Taylor 1996, 936).

HI is distinguished by a focus on the historical contingency and distinctiveness of institutions even in the face of uniform systemic pressures. It understands actors as being “embedded in institutional milieus.” It insists “that causal relations of elements and variables always are patterned by context and circumstance, and that historical developments are contingently shaped by choices taken by actors about the content of the institutional links connecting state, economy and society at key moments of historical indeterminacy” (Immergut 1996, cited in Katznelson 1997, 104). It argues that individuals and groups act strategically, seeking to realize complex, contingent and often changing goals, in a context that favours certain strategies over others and who must rely upon their incomplete and possibly inaccurate perceptions of the nature of this, primarily institutional, context (Hay and Wincott 1998).

HI argues that institutions are not created from a blank slate, but instead bear the marks of the socioeconomic context in which they came into being; they “are the legacy of concrete historical processes.” As a result, issues of timing and sequencing are central to arguments about how institutions develop (Pierson 2000). Institutional rules are the outcome of political contestation among groups working to promote their own perceived self-interest, with differential access to material and ideational resources, and working within pre-existing institutional structures. Institutions are therefore not necessarily socially efficient (Katznelson 2003). Once established, institutions condition how actors pursue their interests and preferences while also shaping these interests and preferences. While not immune to change

from within and without, institutions tend to persist over time. This institutional inertia makes them difficult to change, meaning that they often survive even when the historical conditions that gave rise to them are long past.

One of the main charges against HI is that its emphasis on how institutions persist and limit change leaves it ill equipped to address periods of both incremental (changes within an institutional structure) and revolutionary (change of institutional structures) change. HI can work as a theory of both stability and change, although it is true that it has a built-in conservative bias (Streeck and Thelen 2005, 1). By stressing institutional constraints on actions, it errs towards assuming continuity rather than change. Such an approach runs the risk of missing (or failing to predict) radical change. However, in a field like regional studies, which is often focused on determining what a region is becoming, HI's tendency to look backwards and consider what the region was and is can act as a useful brake on any tendency toward teleology or ahistorical thinking present in, for example, neoliberal functionalist accounts of regional change.

### **iii. Definition and role of institutions**

Institutions, unsurprisingly, lie at the heart of HI analyses. The social sciences possess no single definition of what an institution is (Streeck and Thelen 2005, 9; Krasner 1988, 72). While they run the gamut from formal institutions to norms that structure individuals' and groups' actions, there is a general agreement that institutions structure human interactions. In HI, institutions both constrain strategic actors with formal and informal rules, while also influencing their preferences. Actors' preferences therefore are not wholly exogenous to institutions, but rather are endogenous to institutional structures.

Institutions are “meso-level” structures that provide the crucial link between social structures like capitalism, class and the nation-state system and individuals or groups (Katznelson 1997). Institutions structure these broader social forces, effectively “constrain[ing] and refract[ing] politics” (Thelen and Steinmo 1992, 11, 3). This refraction often results in different institutional setups leading to different outcomes, even when faced with similar social inputs (Hay 2000, 412). Consequently, even homogenous global forces or technological changes (such as the rise of digital technology and the Internet) can produce heterogeneous results. “Adaptation to common global forces is a function not only of economic and organizational logics but also of explicitly political ones as well” (Kitschelt *et al.* 1999, 440-441). Neoinstitutional approaches to regionalization focus on the way institutional, cultural and ideational specificities within states, can “serve to channel, filter and mediate common challenges in highly specific ways, often reinforcing the distinctiveness (both institutional and cultural) of distinct national (and, indeed, local and regional) capitalisms” (Hay 2000, 512). These specificities include “the relative strength and organizational capacity of producer groups, the configuration of political parties, electoral rules, executive-legislative relations, the capacity of the bureaucracy and the administrative territorial stratification of the state” (Hay 2000, 518). The embeddedness of institutions in social structures is a particularly important point for studies of political economy, such as this dissertation, which requires that one “must (should) either seek to explain economic outcomes or incorporate economic variables into their explanation of policy outcomes” (Pontusson 1995, 120).<sup>62</sup>

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<sup>62</sup> North (1990, 4) further clarifies the distinction between actors, institutions and social structures. Like institutions, groups or organizations “provide a structure to human interaction,” the difference between them being the difference between the rules and the players.

This dissertation adopts Hall and Taylor's (1996, 938) well-known definition of institutions as: "the formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy." It holds that institutions "can range from the rules of a constitutional order or the standard operating procedures of a bureaucracy to the conventions governing trade union behaviour or bank-firm relations." Institutions here encompass formal and informal rule-based structures.<sup>63</sup> Given the lack of formal supranational governance in North America and other regions, including the possible influence of epistemic communities and "informal" cross-border interactions, it is important that any definition of region cover both types of rules in order to pick up non-governmental institutions.

#### **iv. Nature of interests/actors**

HI holds that actors act strategically, seeking to realize complex, contingent and often changing goals, in a context that favours certain strategies over others, and must rely upon incomplete (possibly inaccurate) perceptions of context, seen primarily in institutional terms. In other words, actors act strategically, but their strategic actions are limited cognitively by the ideas and identities promoted by their institutional context (Hay and Wincott 1998). Actors, in this view, exhibit a "situated ... rationality" (Katznelson 1998, 196), "operating within relational structural fields that distinguish the possible from the impossible and the likely from the less likely" (Katznelson 1997, 83).

Institutions therefore affect actors in two ways. First, they provide the rules governing their interactions, shaping their strategies according to a "logic of consequences." At their most basic, institutions divide actors into insiders and outsiders, operating within either pre-

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<sup>63</sup> HI is often characterized by a bias toward formal political institutions, rather than informal social conventions. This characterization, however, reflects more political scientists' research interest rather than any inherent limitation in the theory itself.

set or self-defined boundaries. These boundaries “divide persons and activities inside the institution from persons and other institutions outside; boundaries array institutions in society, bringing their activities to bear on one another or keeping them more distant” (Orren and Skowronek 2004, 82). This insider-outsider dynamic can create a tension between those wishing to defend an institution and those wishing to change it.

Second, institutions also provide actors with a “logic of appropriateness” (March and Olsen 1984; Hall and Taylor 1996), partially constituting actors’ identities. Institutions “create categories and ‘realities’ that seem natural,” comprising “actors with particular identities, values, interests, and strategies – that is, preferences – who seek to manage and solve problems” (Katznelson 2003, 294). An actor’s “behaviour is governed by standardized and accepted codes of behaviour, prescriptions based on a logic of appropriateness, and a sense of obligations and rights derived from an identity, role or membership in a political community and the ethos and practices of its institutions” (Olsen 2009, 9). “By shaping not just actors’ strategies ... but their goals as well, and by mediating their relations of cooperation and conflict, institutions structure political situations and leave their own imprint on political outcomes” (Thelen and Steinmo 1992, 9). By way of example, Thelen and Steinmo offer a comparison of worker demands in different countries, concluding that, “class interests are more a function of class position (mediated – reinforced or mitigated – by state and social institutions like political parties and union structure) than individual choice” (Thelen and Steinmo 1992, 8).

In an HI approach, “goals, strategies and preferences” are “something to be explained” (Thelen and Steinmo 1992, 9). The researcher cannot take an actor’s rationality for granted; she must demonstrate how preferences of similar actors do or do not differ

across institutions (Pontusson 1995, 136). Because actors can also remake institutions, one must also investigate actors' influence on institutional rules.

Since actors possess imperfect information, it is impossible for them to predict the effect of institutions on actors (and vice versa), which leads to the possibility of future unintended consequences in institutional design. As a result, decisions taken in one period can end up having unintended results at a future period. Unintended consequences, and actors' reactions to them, thus become an important driver of change in this model (Hay and Wincott 1998).

#### **v. The role of ideas**

Historical institutionalism is distinctive for its insistence that ideas, anchored to institutions (Richardson 2000, 1019), exert both exogenous (consequences) and endogenous (appropriateness) influences on actors. As already noted, ideas can embody an exogenous logic of consequences, in which actors act in a certain way in order to reap a reward or avoid a punishment. Endogenously, actors may act in a certain way because the logic of the institution means that they are expected to act in a certain way.

Institutions and actors have a dual relationship with ideas. Ideas are constraints, operating in the background: institutions are anchored in the elite and public assumptions regarding the appropriateness of specific social relations. They are also foregrounded: actors can use ideas to frame, promote and legitimize certain policies (Campbell 2004, 384-385).

Theorists have argued that the role of ideas in HI has remained underdeveloped. Campbell (2004, 383) has noted the tendency of HI to focus on ideas as constraints on actors, specifically "on how the background constraints underlying policy debates are normative," rather than on how they constitute actors. Baumgartner and Jones (1993, 7) argue that

institutions are maintained by “a powerful supporting idea ... generally connected to core political values which can be communicated directly and simply through image and rhetoric. The best are such things as progress, participation, patriotism, independence from foreign domination, fairness, economic growth – things no one taken seriously in the political system can contest.”

When considering institutional stability and change, it is important to note that various types of ideas rarely exist uncontested. Institutions can embody conflicting paradigms. Often, the key to a successful challenge to a dominant institution will involve reworking dominant paradigms, including a redefinition of an issue, expressed in a way that deploys powerful symbols (i.e., frames). Policy proposals do best when they are linked to a “strong” paradigm (Baumgartner and Jones 1993, 11, 24-25) that make institutions seem natural, rather than “socially constructed arrangements” (Katznelson 2003, 296). Copyright, as chapter 2 develops, is anchored in core Enlightenment ideas of property and individuality: powerful ideas that are often deployed to defend the concept. However, the positive idea of ownership is in tension with the negative idea of copyright as “monopoly” (i.e., copyright prevents someone who has lawfully acquired a work to do whatever they wish with it), which can be used by those who do not benefit from copyright laws to challenge those laws.

Similarly, institutional challengers can succeed by redefining an issue and linking it to a strong counterparadigm: “‘Losers’ can often redefine the basic dimension of conflict to their advantage, thereby attracting previously uninvolved citizens” (Baumgartner and Jones 1993, 11). This ability of actor (even losing actors) is affected by the nature of the institutions in which they operate. These institutions structure the opportunities to introduce new ideas

and challenge old ones. Actors who control institutions and definitions can control both the type and the amount of change in a political system (Baumgartner and Jones 1993, 16).

In order to effect change in a crisis (i.e., a situation in which the legitimacy, usefulness or validity of an institution is being challenged), alternative ideas must be available. These ideas must be credible (fitting the dominant paradigm), effective (“insofar as it promises a reasonable solution to a decision-making problem”), and legitimate (resonate with public sentiment) (Campbell 2004, 118). “Public” in this usage, it should be noted, refers to that subset of the population whose opinion matters to decision-makers, since the public at large will not be interested in every decision made by, for example, a government. The task of the researcher is to identify the various types of ideas that are at play in a given situation. Classifying ideas in this way helps to understand the effect that they have on the debate.<sup>64</sup>

#### **vi. Emergence and evolution of institutions in HI**

Change in HI is the “consequence (intended or not) of strategic action (intuitive or instrumental) filtered through perceptions (informed or misinformed) of an institutional context that favours certain strategies, actors, perceptions over others. Actors, then, appropriate a structured institutional context which favours certain strategies over others by way of the strategies they formulate or intuitively adopt” (Hay and Wincott 1998, 955). This definition leads into the central HI concept of “path dependence” and the problem of change in HI.

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<sup>64</sup> See Campbell (2004, 94-110) for a particularly useful taxonomy of ideas.

## 1. Path dependence

*If institutions are about preservation, politics is about manipulation and leadership is about overturning constraints. Consequently, institutions are like dried cement. Cement can be uprooted when it has dried, but the effort to do so is substantial. It is easier to alter the substance before it hardens.* “Preface,” Oxford Handbook of Political Institutions (2006, xv)

While it sometimes risks reduction to the banal claim that “history matters” (Mahoney 2000; Pierson 2000, 252), “path dependence” in HI has a much more specific meaning. It argues that the initial establishment of an institution is highly sensitive to historical contingency, in which “relatively small events, if occurring at the right moment, can have large and enduring consequences” (Pontusson, cited in Katznelson 2003, 291).<sup>65</sup> Once established, institutions structure future actions, resulting not so much in institutional stasis, but, rather, “constrained innovation” (Campbell 2004, 8) and institutional persistence: “preceding steps in a particular direction induce further movement in the same direction” (Pierson 2000, 251-252).

According to the concept of path dependence, institutions persist because they are “grounded in a dynamic of ‘increasing returns’,” in which “the costs of switching from one alternative to another will, in certain social contexts, increase markedly over time” (Pierson 2000, 251-252). As a result of these increasing costs, “political alternatives that were once quite plausible may become irretrievably lost” (Pierson and Skocpol 2002, 700). Actors faced with incentives not to abandon an institution will be more likely to undertake incremental institutional change, even in the face of “considerable political change” (Pollack 2004, 140).

Scholars have proposed many different path-dependence mechanisms, each with their own logic. For example, path dependence and increasing returns can result from the utility of the institution. This functional-utility approach depends on two main assumptions: that

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<sup>65</sup> Pierson and Skocpol (2002, 699) offer a similar definition.

institutions are costless to set up, and that actors are fully rational and possess perfect information. Typically, HI argues that the existence of not-fully-rational actors acting with imperfect information in the presence of sometimes large costs to starting and changing institutions. As a result both timing and sequencing play a key role in institutional development and persistence.<sup>66</sup>

However, in the absence of rationality assumptions, institutions can persist even if they cease to be utility maximizing (if they ever were). This can result from two main processes. First, institutions may be seen as being costly to change: They are difficult to create, involving the investment of time, material and ideational resources, to say nothing of the political difficulties of overcoming collective action problems. The greater the cost of creating an institution, the less likely actors will be to abandon it, especially when “powerful interests have grown up around” the institutions (Banting, Hoberg and Simeon 1997, 14-15). Institutions may also be sustained by the difficulty of definitively claiming institutional failure, given the complexity of politics and principal-agent problems (Pierson 2000a, 482). They can also be subject to network effects, in which “buy-in” from an increasing number of actors makes an institution a *de facto* standard that then becomes difficult to change. Adaptive expectations may also play a role: Actors may wish to back a winner because of future potential negative consequences if they instead back a losing institutional proposal (Pierson 2000a, 492).<sup>67</sup>

Institutional persistence can also result from limited institutional competition (Krasner 1988, 84). This example is particularly important in political science because political institutions tend to be monopolies: for example, there is only one NAFTA governing

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<sup>66</sup> See Pierson (2000a) for a critique of functionalist accounts of institutional designs.

<sup>67</sup> See also North (1990).

North American commerce, and only one Government of Canada. Although one can imagine possible rivals to both, at any one time one institution usually holds sway in a particular field or sector. This places potential competitors at a disadvantage, as any potential net positive benefits arising from the implementation of a new institution must be measured against the existing institution.

Institutions can also persist because they provide rules of thumb that actors then adopt. In doing so, they become part of actors' social, political and cognitive landscapes. Actors become used to institutions, and their rules become the accepted, legitimate way of addressing issues (Campbell 2004, 67; Mahoney 2000, 517).

Second, power plays a role. Institutions are “are not neutral coordinating mechanisms but in fact reflect, and also reproduce and magnify, particular patterns of power distribution in politics ...” (Thelen 1999, 391). They create winners and losers, insiders and outsiders. Insider “powerful interests” that benefit from a particular institutional configuration have an incentive to defend their privilege against interlopers. Power-holders in an institution can replicate the institution through their ability to select and socialize their successors (Stinchcombe 1968, 109).

### *Effects of path dependence*

These mechanisms tend to restrict change, making some logically plausible and desirable alternatives (such as the elimination of copyright or the creation of a North American political union) highly improbable in practice. That institutions are the result of partisan political battles, often among groups with asymmetrical resources, means that institutional rules will tend not toward some societal optimum, but will favour some individuals, groups and outcomes over others. Victory depends on skills and resources, and

technical expertise deployed in public and private debates (Baumgartner and Jones 1993, 9). “Inefficient” institutions will not necessarily go gently into that good night (Djelic and Quack 2007, 163). Institutional persistence, therefore, is not an argument for either social utility or effectiveness.<sup>68</sup> As a result, the constrained rationality of actors is as (or more) likely to result in institutional regimes characterized by internal and inter-institutional logic and rule-“gaps” that can be exploited by disgruntled actors to effect change, as they are to result in institutions that reflect a stable, unchanging equilibrium.

### *The importance of investigating path dependence*

Institutional and policy-path dependence cannot simply be assumed. They must be investigated and the specific mechanisms supporting institutional reproduction identified: “who is invested in what particular arrangements, how is it sustained over time, how other groups not invested in the institution are kept out,” and what might impair this form of reproduction and lead to change (Thelen 1999, 391). A dynamic analysis of these mechanisms over a period of time allows one to ascertain “how and under what conditions historical events do – or do not – shape contemporary and future political choices and outcomes” (Pollack 2004, 140), domestically and regionally. The likelihood of institutional change is a function of the degree to which “individuals’ basic self-definitions are determined by a given institutional structure”: the greater the identification, the less likely the change. “Such an institution may collapse because it fails to adapt to changed environmental circumstances, but it will not be undermined by its own members” (Krasner 1988, 74). The ability of opponents of the status quo to influence successfully the development of an institution (or “particular institutional configurations”) will depend “on the particular

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<sup>68</sup> Rational-choice institutionalism can also yield a finding of historical inefficiency, given the assumption of unequal distribution of resources among actors involved in setting up the institution (North 1990).

mechanisms of reproduction that sustain them” (Thelen 1999, 397). For example, if a new group becomes interested in an issue, perhaps because of an exogenous shock or because the “insider” group tried to push its existing advantage beyond the pale, institutional change is possible. “The distribution of intensities of preferences” – the extent to which particular groups care about an issue – is a major source of political institutional stability (Baumgartner and Jones 1993, 19); its change is thus a source of instability, and change.

Identifying the mechanisms of reproduction and the specific rules governing institutional configurations, and tracking their changes over time is thus a key part of understanding North American regional integration, as will be seen in the coming chapters.

## **2. Accounting for change in HI**

Hay and Wincott (1998) note that institutions constrain change, but they elide two main questions: how are institutions created in the first place; and how can institutions both constrain and be remade by actors? The literature has developed two main answers to these questions. The most popular, but also the most problematic, answer involves dividing an institution’s existence into periods of relative stability and dramatic change, referred to as “punctuated equilibrium” (Krasner 1988).<sup>69</sup>

The other approach, found in Streeck and Thelen (1992), Haydu (1998), Peters *et al* (2005), and Thelen and Steinmo (1992), among others, and which this dissertation adopts, sees institutions as inherently unstable, always in the process of being made and remade by actors. In the “unstable institutions” approach, distinctions of “revolutionary” and

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<sup>69</sup> See Pierson (2000b) for a description and defence of dividing “path dependence” into “open” and “closed” stages.

“evolutionary” institutional change emerge largely as the result of a researcher’s methodological choices and choice of research subject and time period.<sup>70</sup>

### ***The problems with punctuated equilibrium***

The main approach advanced to account for institution-establishing change – “punctuated equilibrium” at a “critical juncture” – suggests that an institution’s life cycle can be divided into periods of stability and change, each with its own distinct logic (Mahoney 2000, 512). In periods of stability, institutions undergo “constrained innovation” (Campbell 2004, 8). This approach involves an initial “critical” juncture, when events trigger movement toward a particular ‘path’ or trajectory out of two or more possible ones. Subsequent to this juncture, an institution or policy is reproduced via positive feedback loop. Eventually, however, this path ends, disrupted by some type of shock (Pierson 2000b, 76; Thelen and Steinmo 1992, 15).

While such an idea holds a great deal of intuitive appeal, it fails to reconcile the institutional-stability of the path dependence with the game-changing events that lead to a new path, such as the decisions by Canada and Mexico to seek free-trade agreements with the United States (see Golob 2003). As a result, the concept of path dependence becomes logically incoherent, and institutional outcomes come close to being *sui generis*, determined by pure chance (Schwartz 2004; Streeck and Thelen 2005, 8). Stated more colourfully, this stability/change dichotomy results in a situation in which “institutions explain everything until they explain nothing” (Thelen and Steinmo 1992, 15).<sup>71</sup>

### ***You say revolution, I say evolution***

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<sup>70</sup> See Djelic and Quack (2007) for further discussion of the differences between the two approaches.

<sup>71</sup> See also Haydu (1998) and Mahoney (2000) for a discussion of the uneasy fit between path dependence and critical junctures.

As Streeck and Thelen (2005) argue convincingly, the key problem with the concept of punctuated equilibrium is that it unnecessarily divides an institution's life cycle into separate periods of stability and change. In the vast majority of cases, however, this distinction is largely an artifact of the researcher's choice of time period and subject matter.

In contrast, the "unstable institutions" approach to institutional change is based on four insights. First, institutions are reproduced or modified by actors' actions. Second, taking seriously the HI insight that institutions' roots are historically contingent requires considering the possibility that institutions are shaped by the previously existing historical and institutional context. In other words, in most cases, the researcher's choice of a beginning date for an institution will involve a certain degree of discretion, as institutions are almost always preceded by proto-institutions, although sometimes institutions do emerge suddenly.<sup>72</sup> In a sense, institutional history really is "turtles all the way down."

Third, institutions are never wholly coherent or accepted: "The basic assumptions on which an institution is constituted and its prescribed behavioural rules are never fully accepted by the entire society. Institutions may recede into oblivion because trust is eroded and rules are not obeyed" (Olsen 2009, 11). Fourth, change is change: it can be either larger or smaller, but it remains change, in that what is acted upon is no longer the same as it was before. Taken together, these insights suggest that the degree of continuity observed in a given case depends on the choice of period, and the researcher's definitions of "change" and "continuity."

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<sup>72</sup> In North America, while NAFTA was based on the pre-existing CUSFTA, and the CUSFTA had its predecessors in the 1965 Auto Pact, and had been the subject of discussions going back over a century, the concept of formal institutions to address labour and environmental issues at the regional level was new. On a more dramatic, international level, the formal nature of the League of Nations, the predecessor of today's United Nations, could be argued to be a novel innovation. However, even this could perhaps be traced to the Council of Europe, a subject beyond the scope of this dissertation.

Similarly, a finding of institutional continuity may emerge depending on the time period under examination. Two insights are crucial here. First, institutions are created “from a world already replete with institutions” (Hall and Taylor 1996, 953). While Mahoney (2000, 511) argues that “in a path-dependent sequence early historical events are contingent occurrences that cannot be explained on the basis of prior events or ‘initial conditions’,” in practice this rarely occurs. An emphasis on critical junctures tends to understate the continuity even between supposedly dramatic changes in institutional setups (Streeck and Thelen 2005, 8).

Second, continuity can come from a functional need. Institutions, imperfect as they may be, are functional responses to perceived problems. Continuity between two seemingly disparate institutional periods becomes more obvious if one sees institutions as historically contingent and temporary responses to “enduring problems” (Haydu 1998, 354, 358). In regionalism, part of the critique of depending on the European Union as an appropriate model for North America is the fact that the EU’s (eventual) creation was not just the result of a specific confluence of events post World War II, but was a reflection of the longstanding tendency to see Europe as a community,<sup>73</sup> as well as being a response to the “enduring problem” of how Europeans can get along without killing each other. Similarly, copyright may date to 18<sup>th</sup>-century England, but it was shaped (and continues to be shaped) by the publishers’ monopoly that it supposedly replaced (Dutfield and Suthersanen 2008), to the extent that even technologies that have little in common with physical book publishing continue to be treated as if copyright, a regulatory regime developed for physical books, are appropriate to their regulation.

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<sup>73</sup> See Morgenthau (1985) for a discussion of this phenomenon in 19<sup>th</sup> century Europe.

This is not to argue that sudden, dramatic change never occurs. The United States, for example, consists of “a political system that displays considerable stability with regard to the manner in which it processes issues, but the stability is punctuated with periods of volatile change” (Baumgartner and Jones 1993, 4). However, even the outcome of such volatility often has its roots in earlier institutions and structures. Furthermore, change is change: the difference between dramatic and evolutionary change is a matter of degree, not of kind.

***Punctuated equilibrium as methodological artifact?***

This discussion of institutional change and stability is in large part a replay of the old agent-structure debate. One possible way out of this debate is to treat it as a methodological and sequencing problem. As Hay and Wincott (1998) remark, actors base their strategies in part on the institutional structure within which they find themselves, and then act, either reproducing or changing the institution. As Archer (1995) describes in her elaboration of her “morphogenetic”<sup>74</sup> approach to the agent-structure problem, institutions and social structures are continually being remade by actors. In this sense, the constructivist insight that agents and structures are mutually constitutive is correct, if effectively impossible to model.

Archer’s morphogenetic approach is based on “two basic propositions: (i) That structure necessarily pre-dates the action(s) leading to its reproduction or transformation; (ii) That structural elaboration necessarily post-dates the action sequences which give rise to it” (Archer 1995, 15). It works by using time as a variable, dividing a political analysis into time periods in order to make it easier to capture analytically the relationship between agent and structure. In the first period, agents encounter social structures and institutions as pre-existing entities that set the rules of the game: these institutions act as constraints on actors

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<sup>74</sup> “Morpho,” being “an acknowledgement that society has no pre-set form or preferred state,” and “genetic” as “a recognition that it [society] takes its shape from, and is formed by, agents, originating from the intended and unintended consequences of their activities” (Archer 1995, 5).

(“structural conditioning”). Institutions seem to be solid and unchanging. However, in the second period, agents can act upon that structure, either reinforcing or undermining it (“social interaction”), to create a “new” structure. In the third period (“structural elaboration”), “new” actors see these changed institutions as constraints, though different from the structure encountered in the “first” time period (Archer 1995, 89).<sup>75</sup> In actuality, actors are continually making and remaking (and being made and remade by) institutions. The choice of time period can thus affect whether one finds change or relative stability.

The Canadian and Mexican decisions to enter into a free-trade agreement with the United States offers a useful illustration of the argument that findings of revolutionary change or constrained innovation are largely dependent on a researcher’s choice of subject and their specific interest. Golob’s 2003 paper, for example, was a successful attempt to understand why Canada and Mexico decided to forego their protectionist pasts and join the United States in creating NAFTA. She focused on the economic and political changes that started North America down this new(ish) path. However, the story of NAFTA’s development can also be told in a way that emphasizes institutional continuity. Clarkson (2008) notes that NAFTA has changed significant parts of the continental relationship (agriculture, oil, etc.) but also emphasizes how the NAFTA relationship has tended to reinforce existing dependency patterns between the United States and its neighbours. Golob and Clarkson are both describing the same thing (the North American relationship, formally institutionalized under NAFTA), but stressing different aspects of it. From Golob’s perspective, NAFTA represented a radical break in the continental relationship, while for

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<sup>75</sup> Sell (2003) uses Archer’s morphogenetic approach to great effect to understand the changes in the U.S. intellectual-property regime that culminated in the TRIPS Agreement. As well Katznelson (2003) cites favourably Archer’s work as an aide in helping historical institutionalists periodize their work.

Clarkson NAFTA was, despite Canadian and Mexican novel embrace of neoliberalism, old wine in a new bottle. Both are correct, within the context of their research projects.

### **3. Sources of HI change: Exogenous shocks, endogenous pressures**

In the “unstable institutions” version of HI, institutional change comes from the same place as institutional stability: the mechanisms of institutional reproduction, examined dynamically. One can study identified reproduction mechanisms over time for evidence of strengthening or weakening: when such mechanisms (material or ideational) are seen to weaken, then institutional change is more likely. Focusing on changes in the mechanisms underlying institutions offers a way out of the path dependence-critical juncture standoff. A focus on changes as differing in degree but not in kind is in keeping with Haydu’s (1998) recommendation to treat institutions as contingent responses to enduring problems. It also accords with a call for researchers to “locate the historical construction of politics in the simultaneous operation of older and newer instruments of governance, in controls asserted through multiple orderings of authority whose coordination with one another cannot be assumed and whose outward reach and impingements, including on one another, are inherently problematic” (Orren and Skowronek 2004, 113).

HI effectively leaves the decision of whether to label a change “revolutionary” or “evolutionary” to the researcher (Peters *et al.* 2005, 1287). This result may not be satisfactory to those uncomfortable with making value judgments in their research. However, given the reality that all institutional change involves a chaotic mix of the old and the new, it is at least an honest conclusion.

### *Exogenous and endogenous shocks*

Big or small, evolutionary or revolutionary, change in this version of HI can result from two sources: exogenous shocks or endogenous pressures. Exogenous political or economic shocks involve a break with the status quo. This language, however, tends to gloss over the reality that while institutions may look solid in a static analysis (comparable to the first period in which actors confront institutions as unchanging structures in a morphogenetic analysis), a dynamic analysis reveals that they are always being made and remade by the actions of purposeful actors, even in the absence of exogenous shocks. Just as endogenous change and exogenous shocks can lead to revolutionary changes, exogenous shocks can also lead to evolutionary changes.

Exogenous shocks are equivalent to the introduction of a new resource that can either help or hinder existing and newly created actors. In their groundbreaking article, Thelen and Steinmo (1992, 16-17) identify four distinct, though often empirically intertwined, sources of institutional dynamisms, “situations in which we can observe variability in the impact of institutions over time but within countries.” Exogenous political or socioeconomic changes can work in several ways. They can cause “previously latent institutions” to “suddenly become salient, with implications for political outcomes” and bring new actors, with new objectives, to the fore, reorienting existing institutions toward “different ends,” as the result of “changes in the socioeconomic context or political balance of power.” They can also cause existing actors to adopt new strategies within the context of existing institutions or to change the institutions themselves, leading actors to “adjust their strategies.” As will be discussed in the following chapter, the history of copyright law is often told in terms of exogenous shocks, specifically the way that technological change creates new interests and changes the

relative position of existing ones. Each new technological innovation was accompanied by a degree of social upheaval and political conflict, and, eventually, new *Copyright Acts* that legitimized a new balance of power.

Evolutionary and revolutionary change can also emerge endogenously. Endogenous change is a consequence of the fact that few institutions, born as they are out of political struggle and compromises among actors with imperfect information, are likely to be completely consistent internally or consistent with the domestic and international regimes in which they are embedded (Djelic and Quack 2007, 182). While an institution viewed statically may seem like a solid structure, it may well contain resources that actors desiring “change” can use to undermine rivals *within that institution* without necessarily “changing” it dramatically, since the only thing that would change is the relative balance between various institutional rules. Incremental institutional change occurs as rules and practices are modified in light of experience, organizational learning and adaptation. Consequently, “routines, identities, beliefs, and resources can be both instruments of stability and vehicles of change; institutions of government do not always favour continuity over change” (Olsen 2009, 12).

Actors do not simply wait around for the chance to change an institution. Rather, they exploit conflicting institutional or systemic logics (Orren and Skowronek 1994, 2004).<sup>76</sup> They can also undermine unfavourable rules while seeking to exploit institutional resources: “working around elements they cannot change while attempting to harness and utilize others in novel ways” (Streeck and Thelen 2005, 19). Similarly, institutions do not exist in a vacuum: different institutions often compete for dominance in a particular subject area. Change in this perspective can come about as purposeful actors attempt to promote their interests using institutional and extra-institutional resources (material and ideational). They

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<sup>76</sup> See also Archer (1995, 227); and Thelen (1999, 383).

can do so by appealing to tensions within the institution, or they can challenge institutional precepts by appealing to some external authority or authoritative idea (Streeck and Thelen 2005, 19; Olsen 2009, 15).

If actors act strategically, then their interpretation of institutional rules suggests another possible source of institutional change (Streeck and Thelen 2005, 27). Institutions may also contain rules to routinize change, through processes such as “the institutionalization of critical reflection and debate, legitimate opposition, and the rights for citizens to speak, publish and organize, including civil disobedience” (Olsen 2009, 13). They may also contain contradictory rules, the tensions among which can also be exploited by actors seeking change. As a result, institutional rules can encourage their own transformation (Campbell 2004, 58).

#### **4. Purposeful actors as drivers of change**

Regardless of whether change is exogenously or endogenously derived, in all cases it is enacted and perpetuated by purposeful actors. As the outcome of political disputes among actors with imperfect information, institutions will rarely completely satisfy either winners or losers (who are rarely eliminated completely). Beyond the initial decision to establish an institution “further choice points exist” (Thelen 1999, 385) for actors to press for change. Consequently, there will almost certainly exist agents with a desire to effect institutional change.

While institutions may “solidify” a certain set of relations favouring some agents over others, any one institution is rarely the definitive last word on a subject. Institutions are born out of, and reflect, social conflict, but an initial loss (or victory) does not necessarily mean that the losers will go away or that victors will settle. They may not have the material or

ideational resources to challenge an institution successfully, but so long as losers are present they can be expected to pursue their interests: “patterns of continuance always are marked by resistance” (Katznelson 2003, 297).

Campbell offers two concepts that roughly parallel endogenous and exogenous change: what he calls bricolage and diffusion. Both address how actors use and are constrained by the various types of ideas underlying their institutional contexts. He defines bricolage as the act of recombining “locally available institutional principles and practices in ways that yield change” (Campbell 2004 69). Bricolage can be either (or a combination of) “substantive” (“the recombination of already existing institutional principles and practices to address [substantive] problems [following] a logic of instrumentality”) or “symbolic” (involving “the recombination of symbolic principles and practices”). Both types of bricolage refer to the recombination of already-existing elements, not the introduction of new elements (Campbell 2004, 69-73, citing March and Olsen (1989)).

For example, an issue like copyright can be defined in different ways, with consequences for how it is treated. It can, for instance, be treated as a professional issue (in which case experts prevail), a political issue (politicians prevail), a legal issue (lawyers), a cultural issue (creators), a market issue (let the market decide), or as a matter to be governed by bureaucratic standards (bureaucrats). Actors have the choice of how to define an issue within an institutional set-up. They can also decide on the specific policy venue, which, as always, advantages some at the cost of others (Baumgartner and Jones 1993, 31-32).

Diffusion, meanwhile, refers to “the process whereby imported principles and practices are implemented locally”, where these foreign ideas are combined with “locally available principles and practices” (Campbell 2004, 65). As with all types of institutionally

based change, the form that bricolage and diffusion take, and whether they are successful, will depend on the material, ideational and institutional resources and constraints under which they operate. Even this type of change, however, is dependent on the willingness and ability of actors to work to effect change.

Overall, Campbell (2004, 86) suggests that the amount of change experienced by an institution is a function of:

1. the capacity of entrepreneurs to fit their innovations into the local institutional context;
2. their ability to mobilize political support from interest groups as well as organizational and institutional leaders;
3. the availability of adequate financial, administrative, and other implementation capacities to support their innovations; and
4. whatever additional political, economic, or other resources entrepreneurs may need to get the job done, notably those required to ease the institutional constraints that they face.

Determining the type and degree of change, therefore, is a key requirement for historical-institutionalist analyses.

### **PART III: AN HISTORICAL-INSTITUTIONALIST APPROACH TO THE NORTH AMERICAN REGION**

This chapter has argued that the existing main theories of integration are not adequate to help understand the development or functioning of the North American region. In keeping with new regionalism's emphasis on difference, this chapter has proposed historical institutionalism as a useful approach to regionalism in general and North America in particular. Its main advantage is that it does not assume any specific direction or effect for "regional" or other-level institutions; instead, the dynamics of a regional situation emerge from the interactions of differently situated actors within historically contingent institutional

contexts. This part makes the case for the application of HI to the study of the North American region.

An HI approach makes sense of the possibilities and limitations of North America as a region. NAFTA itself was a response to what was seen as failed economic policies in Mexico and Canadian fears of losing access to the U.S. market (Golob 2003). This exogenous shock knocked the three countries onto a regional path that culminated formally with NAFTA. However, NAFTA's limitations were themselves the product of domestic factors in the three countries, including fear of U.S. dominance (Studer 2007). Most importantly, "the United States has neither the need nor the inclination to coordinate its broader economic policies with Canada or Mexico, as it is far larger, more economically diversified, and less trade-dependent than either country" (Gattinger and Hale 2010, 8). Moving forward, "the constitutionally embedded distinctive histories, legal systems, and national values of the three countries ... made and make any large leap into hard law harmonization [i.e., EU-style institutional integration] unlikely" (Kirton and Guebert 2010, 72). These characteristics shape the regional development of policies in North America.

Regional politics, including any future moves toward policy harmonization must occur within these constraints, favouring the development of what Kirton and Guebert (2010) call "soft law." This is a form of convergence that does not depend on formalized rules or formal supranational institutions, but emerges from coordination, cooperation and semi-formal linkages.

Rather than look for predetermined effects of North American institutions on the region, an HI approach must do four things. First, it must identify the relevant institutions and their rules, including inconsistencies within and among institutions, how they constitute

actors and structure their activities. Second, it must identify the actors involved in a policy debate, as well as their interests, resources and strategies, no matter on which “level” they are located. Third, it must account for the ideational factors influencing the debate, particularly in terms of how they are deployed to set limits on the debate, as well as potential shocks that may disrupt an institution or policy. Finally, an HI approach must account for the causes of policy change and continuity.

The rest of this dissertation outlines in detail this approach as it relates to North American copyright policies and thus, in effect, to the domestic and regional governance of copyright in North America. However, some comments can be made in light of the preceding discussion.

First, the development of copyright policy in each country is, indeed, path-dependent and reflects the particular nature of domestic, regional and global institutions. In particular, NAFTA’s legalistic framework constrains governments and actors by providing a common baseline among the three countries. At the same time, though, NAFTA lacks a legislative dimension, or any mechanism to allow for regional-level change to be made easily. The existence of this brittle institution, combined with the continued institutionalization of political power at the domestic level, somewhat ironically impedes the emergence of a common regional policy. Any convergence must emerge from another route. This regional effect, however, differs by country: the United States is far less constrained in the making of domestic policy than Canada or Mexico.

The very existence of NAFTA makes it difficult for the United States (the main party seeking copyright reform) to link copyright reform (a key economic issue for it, but not on the level of, for instance, energy or national security) to other issues of interest to Canada or

Mexico. In other words, NAFTA, rather than promoting regional integration, constrains the power of the hegemonic power, allowing the three countries to pursue distinctive policies, even as NAFTA sets the boundaries of what is considered possible. Consequently, copyright reform will reflect the domestic institutional (and the underlying social and economic) conditions of the three countries, as well as the relative power of the various actors (domestic, regional and global) – itself a function of the institutional set-up involved. The distinctive institutional regimes in each country will lead to different outcomes in each case.

This path dependence does not mean that copyright policies in North America are immune to change. Rather, change – as Campbell notes above – is the result of purposeful actors exploiting copyright's paradoxical objectives of increasing protection and dissemination and linking their desired changes to exogenous shocks and conflicting objectives of the institutions that govern copyright policy.

Second, one of the key characteristics of North America as a region is, as Kirton and Guebert (2010) note, the persistence of domestic political institutions, even in the presence of a binding continental “external constitution” in the form of NAFTA (Clarkson 2008a), as formal political governance remains at the national (and sub-national) level. As a result, decision-makers dealing with regional issues can find themselves engaged in a “two-level game” (Putnam 1988) in which they must respond to the needs and demands of their regional partners and to the demands of their constituents. How these two levels are reconciled (which one dominates, or if actions on one level are used to influence events on the other) is a matter for empirical investigation. As well, non-state actors can also play on both levels, to similar effect (Putnam 1988, 459). While this two-level game is similar to that described by the liberal-intergovernmental school, in which leaders face demands of regional-institutional and

domestic constituents, in North America, this two-level game is played bilaterally in Ottawa/Mexico City and Washington, where formal decision-making capacities reside.

Although this process amounts to the enshrinement of the potential for difference (or divergence) and not the integration usually thought of as the outcome of a common regional institution, the region-wide influence of this process is a regional effect. The equivalence of regionalization with harmonization, however, makes the fundamental mistake of assuming that regional institutions as a form and regional institutionalization as a process can only have an integrative effect. To make this assumption is to repeat the teleological mistake of unreconstructed neofunctionalism: it assumes that regionalism is a specific form.

“Institutionalization” implies the development of an “organizational identity,” in which actors accept the legitimacy of an institution’s rules and processes (Olsen 2009, 10). However, there is nothing about a regional institution, or any institution, that requires that it promote similarity in outcomes, only that its rules be accepted as binding and appropriate for an entire “region.” An institutional design (accidental or purposeful) could just as easily promote continued difference as similarity among its members. An HI approach to regionalism, therefore, looks for regional effects, not necessarily regional integration in the sense of harmonization. If an institution shapes, enables or constrains the actions of its member actors (individuals, groups, businesses, governments, etc.), then it can be said to have a regional effect. Looking for evidence of policy convergence or divergence remains a useful way to structure a study of regionalism, but HI is agnostic as to whether regional institutions will (or should) be integrative or not.

Third, HI allows for an appreciation of the ideational underpinnings of both copyright and regionalism generally. The lack of legitimacy of the idea of a regional polity, linked to

the persistence of domestic democratic institutions, will be seen to have significant effects on the outcomes of the debates over copyright policy, as does the battle over what copyright “means.” Paying attention to the relative strength of these ideas allows one to address what Pollack (2004) suggests is one of the challenges for HI analyses: explaining “which institutions are subject to lock-ins, how those institutions shape historical trajectories over time, and under what conditions the unintended consequences of early institutional choices will either be constraining ... or easily reversed ...” (Pollack 2004, 149).

As already noted, historical institutionalism is in many ways a modest theory. In the case of North America as developed here, it focuses our attention on a few specific variables – institutional structure, actors and their resources, the mechanisms underlying institutions – without offering any grand predictions. It does, however, suggest that policy outcomes will depend on the:

- institutional set-up (the “rules of the game”);
- relative resources of actors, including their position within and in relation to the institutions in question;
- strength and viability of the mechanisms supporting institutions, wherever they may be; and
- ability of actors to exploit exogenous shocks and institutional inconsistencies.

These observations are of a general nature. It will be the task of the next chapter to apply them to a particular dimension of North America: copyright policymaking as seen through the lens of the implementation of the WIPO Internet treaties.

## CHAPTER 2: THE POLITICAL ECONOMY OF COPYRIGHT

### INTRODUCTION

*Only one thing is impossible for God: to find any sense in any copyright law on the planet. Whenever a copyright law is to be made or altered, then the idiots assemble.*

Mark Twain<sup>77</sup>

Although it has only recently emerged into the mainstream of political debate, copyright has long been a controversial subject. The law tends to depoliticize issues so that they seem technical and settled, even as they remain contested (Cutler 2005, 532). However, underneath the seemingly solid surface of settled law lies an ongoing battle among various business and social groups to expand copyright in some cases and in the service of some interests, and to restrict it in others. In this battle, the United States and its content industries are the primary actors behind the global expansion of copyright since the mid-1980s, as well as the current push for strong digital copyright policies in Canada and Mexico, to match (and sometimes surpass) those in the United States that form the subject matter of this dissertation.

An historical-institutionalist analysis emphasizes that actors deploy material and ideational resources in order to influence the making of copyright law. Ideationally, they do so by exploiting the tensions inherent in copyright between protection and dissemination, and between competing institutions in pursuit of their perceived interests. Materially, they make use of money, political access and other resources in order to influence the decision-makers who actually write the treaties and laws that make up copyright law.

Efforts to influence copyright policies occur within specific and interlocking domestic, regional and international institutional contexts that privilege certain ideas and actors over others and that can be reshaped by actors' actions, intentional and otherwise. Most countries are members of the main copyright treaties (notably the 1886 *Berne*

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<sup>77</sup> Cited in Liebowitz (2005, 37).

*Convention for the Protection of Literary and Artistic Work (Berne Convention)*, the 1961 *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)* and the 1995 Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) at the World Trade Organization (WTO)). Furthermore, around 60 are members of the *WIPO Copyright Treaty and Performances and Phonograms Treaty*, the Internet treaties. Despite the existence of this longstanding thicket of international copyright treaties, each country possesses its own distinctive copyright laws, constrained by these international agreements but also shaped by domestic institutions and actors. Regionally, the North American Free Trade Agreement (NAFTA) placed the three North American countries on the same copyright “path,” while the Security and Prosperity Partnership of North America (SPP) offers an interesting example of a failed institutional attempt to move forward a shared North American vision of copyright. This failure itself holds lessons about the nature of North American governance generally and of the governance of copyright specifically.

This chapter uses the historical-institutionalist approach developed in the previous chapter to better understand the historical, global and regional context of digital-copyright reform in North America. In keeping with this approach’s focus on ideas, institutions and interests, this chapter outlines the presence and development of these three factors in the current debate. The first part of the chapter focuses on the development of copyright. The second part outlines the various types of interests involved in the copyright debate, as well as how their interests are being affected by digitization. The third part addresses the international-institutional context of copyright; because of the United States’ central role in copyright policymaking, its international-institutional dimension is included here. It also

discusses the structure and effects of North American regional copyright institutions, specifically NAFTA and the SPP. The fourth part discusses briefly change in copyright from an historical-institutionalist perspective. Together, these sections provide the context for understanding the Canadian, U.S. and Mexican approaches to the Internet treaties. The chapter concludes with some final comments that set the stage for the dissertation's three case studies.

## **PART I: IDEAS: CONSTRAINTS ON AND RESOURCES FOR CHANGE**

Historical institutionalism is well suited to the study of copyright policy. Copyright is the epitome of a path-dependent policy, in that the direction of change in copyright over several centuries has been constrained by foundational ideas embedded within institutions (including international organizations, governmental departments, laws and treaties) and defended by powerful interests. Ideationally, while the scope of copyright has expanded significantly since the original modern copyright law, the British *Statute of Anne* in 1709, the ideas present in this original law can be found in all copyright laws in the Anglo-American tradition since this date. These include: the limited duration of rights, assignable (i.e., alienable) rights provided to authors, as well as the concept that some things are not copyrightable (e.g., ideas, as opposed to the fixation of ideas) and the notion that copyright has a public-interest aspect, namely the "Encouragement of Learning," in the words of the *Statute of Anne's* title.<sup>78</sup> All debates over copyright involve actors attempting to emphasize

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<sup>78</sup> Its full title is "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." For accounts of the introduction of copyright in Great Britain, see Drahos (1996); Rose (1993); and Bettig (1996, 14-22), among others.

either the need for greater protection or the promotion of dissemination, the two irreconcilable objectives of copyright law.<sup>79</sup>

Copyright, more so than tangible property, depends for its existence and legitimacy on ideological justifications “because intellectual property (by design) changes the characteristics of knowledge and/or information by *constructing* a scarcity in its use” (May 2007a, 27, italics added). Where tangible goods depend on a mixture of social convention and their materiality to construct the boundaries of property in goods – all property norms derive from law or social conventions – informational goods depend exclusively on the law and social conventions to determine their boundaries.

The paradigms and social conventions underlying copyright can limit actors’ perceptions of the range of possibilities available to regulate the market in creative works. As a result, what is actually only one particular, human-created way of regulating the market for creative works is often taken to be *the* means to this specific end. Modern debates tend to focus on copyright (a means) rather than the maximization of creative works (an end). Consequently, copyright can seem “natural,” settled and inevitable.

Copyright touches on two concepts in particular – individuality and private property – that happen to be the foundational concepts underlying Enlightenment society. Although the concept of originality, like the Romantic notion of the individual author, is a myth, or “conceit” (Litman 1990) that ignores the messy reality that all works are created through the direct and indirect use of already-existing works, it is a powerful “construct that is deeply

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<sup>79</sup> While the *Statute of Anne* typically is taken as the starting point for modern copyright laws, the Statute itself emerged from a specific historical and material situation, as a response to the creation of the printing press and the popularization of Enlightenment ideals around individuality, shaped by the historically dominant role of publishers in Great Britain. Its origins provide another reminder of the point raised in the previous chapter, that notions of continuity and change, and of evolutionary and revolutionary change in response to exogenous and endogenous factors, are artifacts of analysts’ methodological choices (see Archer 1995).

connected with notions of originality and uniqueness that are Western in origin and relatively recent” (Dutfield and Suthersanen 2008, 63-64).<sup>80</sup>

Similarly, the idea of copyright as a property right appeals to “the central norm underpinning the market system ... . Intellectual property rights ... are a subset of one particularly important component of late-twentieth, early-twenty-first century capitalism and are embedded in the deep structure of global capitalism” (Sell 2003, 24).<sup>81</sup> The concept of “property” is very powerful and thus politically contested (Hughes 2006, 2009; May 2000; Kretschmer and Kawohl 2004). It is “rooted in the fundamental morality of a given society” (Drahos 1996, 15). In the copyright debate, this tension expresses itself in the discursive use of “piracy” as a way to influence conceptions of what should be considered as property, and to determine what an owner’s rights of exclusion will be. Often, claims of property precede legal determinations of property. This rhetorical move is usually linked to accusations of “piracy” on behalf of copyright owners against what they feel are unfair (though not necessarily illegal) appropriation of their property. In practice, however, property rights are never absolute or natural.<sup>82</sup>

The strength of path dependence in the concept of copyright can be seen in the fact that these concepts are so deeply engrained in modern individuals that Rose (1993, 142) and May (2000, 178), both unfriendly to the notion of property in abstract intellectual works and private property, argue that copyright is unlikely to be abolished. Similarly, few of the critical sources consulted and none of the people interviewed in the course of this dissertation

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<sup>80</sup> On the Romantic notion of the author, see Rose (1993); McLeod (2001); Mitchell, Jr. (2005); Rotstein (1993), Litman (1990), Smiers (2000) and Drahos (1996).

<sup>81</sup> On this point, see also May (2000, 53) and Coombe (1998).

<sup>82</sup> See chapter 2 of Drahos and Braithwaite (2002); May (2000); Hughes (2009); Gervais (2005); and Ginsburg (2002) for a discussion of the rhetoric of piracy; see Hughes (2006 and 2009) for a discussion of property rhetoric.

argued for its abolition.<sup>83</sup> This state of affairs is all the more remarkable when one considers that there a lack of strong evidence that copyright actually promotes the production of creative works (indeed, the very question of copyright’s empirical, as opposed to theoretical, effect on the production of creative works has gone largely unexamined) (Ku *et al.* 2009; Towse 1999, 369). There is also a lack of evidence for how “successful copyright has been in creating incentives for production, reducing transaction costs and keeping deadweight costs low” (Gordon and Bone 2000, 181). Instead, as Patry (2009) remarks, the copyright debate has been driven much more by rhetoric than evidence.

The theoretical and empirical literature on economics and copyright demonstrates that copyright’s effects on the production and dissemination of creative works are, at best, indeterminate (Drahos 1996, 123),<sup>84</sup> dependent on the structure of the specific market in question. Where works are created for reasons other than remuneration (such as to complete a PhD or simply to fulfill the innate human desire to create (Boggs 1993; Hurt and Schumann 1966, 425-426)), copyright protection can be unnecessary and inefficient.<sup>85</sup>

To a large extent, the debate over intellectual-property rights, including copyright, “is ultimately a narrative [battle] where the struggle is to define meaning and control the discourse” (Halbert 2005, 8). In this debate, actors pursue specific interpretations of how copyright should be defined, and they do so within institutional frameworks elaborated

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<sup>83</sup> Notable exceptions in the literature include: Boldrin and Levine (2008), from an economics perspective; Bettig (1996) from a Marxist perspective; and Story (2003) and Smiers (2000) from a developmental/social justice perspective.

<sup>84</sup> The edited volume by Towse and Holzhauser (2002) offers a useful survey of theoretical and empirical economic approaches to intellectual property and copyright.

<sup>85</sup> See Boldrin and Levine (2008 and 2006); Besen (1998); and Lessig (2001) for arguments against the need for copyright. See also Boldrin and Levine (2008) and Boyle (2008) for a discussion of intellectual production in the absence of copyright, and Landes and Posner (2003) for a list of conditions under which copyright would not be needed to limit copying. Hurt and Schumann (1968) offer a neoclassical economics argument against copyright under many circumstances. Even Arrow (1962), who presents a defence of copyright as a necessary evil, somewhat surprisingly concludes with a call for further research into alternative commercial regimes that may be able to deliver creative works without copyright’s pernicious monopoly effects.

below, that favour certain interpretations over others. Actors can choose to emphasize one part of copyright over another in the pursuit of change, or in order to maintain the status quo. For example, they can engage in “symbolic bricolage,” linking copyright protection to a larger narrative about the importance of property rights that must be maintained. Alternatively, they could link it to a narrative that emphasizes copyright’s monopolistic character (monopolies generally being seen as something to be avoided) that should be reduced or eliminated.

One can evaluate both the strength and likelihood of significant “revolutionary” change by evaluating the way in which copyright’s foundational concepts of “property” and “individuality” are either supported or challenged in response to endogenous or exogenous shocks such as lobbying and technological change, respectively. In times of stability, relatively little effort will be expended to defend them, as they will be accepted as being “just the way things are.” In times of upheaval, however, these concepts will have to be defended vigorously against both alternative concepts and counter-interpretations of what they mean, and whether they are the most appropriate way to frame the issue.

The possibilities afforded by digital creation, reproduction and transmission have led to just this type of upheaval. One of the reasons, as the following chapters demonstrate, that the copyright debate has become so contentious and widely politicized is that digital technologies challenge the necessity of the business models and justifications that have grown up around copyright. The digital revolution has led to a situation in which “the realm of intellectual property has become widely contested and problematic,” and that traditional narratives, while perhaps not “completely without merit, ... are of less widespread applicability than hard-line supporters of the extension of the protection of IPRs may suppose

or hope” (May 2007a, 27). The result has been the start of a tough political fight whose outcome is not predetermined.

### **I. Copyright as instrumentalist policy**

Copyright can be considered from several different perspectives. There exist various philosophical justifications for copyright (namely, that a creator deserves to receive a “just desert” for her work; that she deserves property rights because creative works are a manifestation of the creator’s personality; and that copyright should maximize some social utility).<sup>86</sup> Interested rational actors deploy these justifications to legitimize specific policy positions and visions of copyright. However, in practice, drawing up rights in intellectual “works” involves making tradeoffs among various interests, not least of which is society at large. As a result, actual copyright laws by their nature are instrumental, the result of pragmatic choices by officials that take into consideration many competing interests and philosophies. They do not reflect an absolute view that copyrighted works should be controlled by the copyright owner.

Property, intellectual and otherwise, is not a one-dimensional expression of control of an “owner” over something; owners of even material assets “are not always free to set the terms and conditions under which others are allowed to use it” (Brennan 1993, 681). Rather: “Property rights entail relations between two people *and* between a person and an object”, in this case, abstract objects which “take the form of a convenient legal fiction” (Drahos 1996, 4). This “commodity fiction,” to use Karl Polanyi’s term, is a fundamental requirement of capitalism:

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<sup>86</sup> On all three, see Drahos (1996) and May (2000); on “just desert,” see May (2000, 25), Hughes (1998), Gordon (1989), Hettinger (1989, 40-41), Hurt and Schumann (1966, 424); on “personality,” see Hughes (1988). Against “just desert,” see Hardin (1993: 669-670). For a wide-ranging discussion of this issue, see *Chicago-Kent Law Review* 68 (1993).

the rendering of things not originally produced for sale as commodities required a story to be told about these resources that was not linked to their previous existence, or production, as exchangeable goods or social resources; a story needed to be told about the normality of organizing their production and distribution through markets (cited in May 2007, 36).<sup>87</sup>

Property ownership, a relational concept, is never absolute. Ownership of even physical objects never involves complete control. Laws govern the situations under which a firearm can be used; state authorities can enter your house under certain circumstances. All property, including copyrighted works, involves politically determined limits on an “owner’s” control of that property. Debates over copyright, and all property, are always over where to draw these lines, and these lines are all about conferring power. Property itself can be used as a power base from which such property rights can be further extended, usually in favour of those already possessing property (May 2007, 21) and against social relations that depend on the non-commodification of information (McLeod 2001, 9). Where these lines are drawn matters.

Property as a social relation accords with the instrumentalist view of copyright (and property). Instrumentalism denies that there are any natural rights of property (i.e., that property is a good in and of itself), is “skeptical about any theory of property that is based on the idea that property is a subjective right,” and evaluates the justness of any particular property regime on the basis of its effects on society as a whole, often in economic terms, but also in relation to broader standards, such as its effect on privacy or freedom of speech (Drahoš 1996, 213-218). An instrumentalist approach to copyright (and property) explicitly considers copyright not only in terms of societal costs and benefits but also, as a corollary, in

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<sup>87</sup> See McLeod (2001) for a discussion of the effects of the commodification of knowledge; Gordon (1989) offers an interesting ahistorical/natural rights view of property.

terms of winners and losers. In other words, it considers not only the needs of the owner, but also of the copier (Waldron 1993, 887) and society.

Instrumentalism represents both a justification for copyright (i.e., that the needs of all actors, not just those of authors, should be considered) and a description of how copyright policy is actually made. As a justification for copyright, instrumentalism's explicit focus is on copyright as a means to achieve an end –not as an end in itself – with the end being some sort of social utility:

Copyright is not there to 'protect' authors (or other owners of copyright), but rather to maximize the creation, production and dissemination of knowledge and access thereto. In other words, protection is not an end but a means to achieving that purpose, which implies that the level of protection must be properly calibrated (Gervais 2005, 324).

As a description of copyright policymaking, instrumentalism captures the historical-institutionalist view that policies such as copyright are the outcome of political conflict among actors who promote different justifications for copyright in pursuit of their objectives. The origins of copyright are relentlessly pragmatic, which itself accords with instrumentalism. Copyright's 18<sup>th</sup>-century British originators focused on an author's labour as the thing to which rights should be attached because it was "a quantifiable source for a literary property right" (Dutfield and Suthersanen 2008, 68). In 1842 the British copyright term was extended to the length of the author's life plus seven years, or 42 years from the date of publication, to address the practical problem of how to provide for authors' families after the author's death in a period with no social security (Handa 2002, 43). Copyright, in other words, has always been shaped by a healthy dose of pragmatism and instrumentalism, the only question being where the boundaries of copyright would be drawn, and to whose benefit.

## PART II: INTERESTS: ACTORS PROMOTING COPYRIGHT

The dominance of the concepts of individuality and property only explains partly why copyright continues to dominate our conceptions about how to regulate the marketplace in creative works. Specific ideas and concepts about copyright must be defended and promoted by interested groups and individuals. As Drahos and Braithwaite (2002, ix-x) argue, “the intellectual property standards we have today are largely the product of the global strategies of a relatively small number of companies and business organizations that realized the value of intellectual property sooner than anyone else.” Copyright is supported by powerful interests as well as by foundational ideas that have come to set the limits of allowable debate on and shaped actors’ conceptions about how to regulate the market in creative works.<sup>88</sup> Like any path-dependent policy, copyright is sustained in part by the fact that possible alternatives are untested and unlikely themselves to be without costs, whose magnitude cannot be foreseen with perfect accuracy.<sup>89</sup> That copyright provides the underlying structure for a multi-billion dollar global business has led even critics of copyright like Breyer (1970, 322) to argue that, rather than reduce copyright, the law should be changed incrementally, and that a “heavy burden of persuasion should be placed upon those who would extend such protection and that we might look favourably upon proposals to reduce it.”

Actors in the copyright debate as elsewhere differ according to resources (time, money, personnel, and economic and political importance) they can bring to bear on the issue, as well as the extent to which they are recognized and hold influence within the

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<sup>88</sup> An historical example is offered by Carroll (2005, 948), who argues that British musicians were late to demand a performance right around the time of the *Statute of Anne* because “composers and publishers had not come to see the intangible musical work as the resource that could be the subject of property rights because they still had a more limited conception of printed music as the resource that appropriately could be the subject of exclusive rights.” In other words, it was not clear to them that music was equivalent to books, and thus amenable to copyright.

<sup>89</sup> See Slesinger *et al.* (1966) for a defence of copyright along these lines; see Gordon (1989) for a discussion of potential alternatives to copyright.

institutional contexts where copyright policy is considered. Furthermore, the relative power and influence of specific actors/interests varies by country and international forum.

Distinctions among publishers and distributors (i.e., the content industries), creators and “users” of copyrighted works are somewhat misleading because all “creators” create by using existing works; similarly, a creator or user can also be a distributor.<sup>90</sup> Consequently, this dissertation identifies a rough typology of existing groups based on what interests they are pursuing actively, not on what interests they should be pursuing from some objective perspective.

### **I. The content industries**

Technological and material realities historically have allowed publishers and distributors to play the dominant role in copyright. Most creators lacked the means to produce and distribute their works. As a result, they needed to depend on corporate publishers to reach their audience. This power asymmetry gave publishers and distributors the upper hand in negotiations with creators and provides these intermediaries with a crucial and positive social role in promoting the distribution of creative works.

The current situation is not much different in several ways. Materially, publishers and distributors dominate the market for copyrighted works and own the vast majority of commercially important copyrights. Four corporations dominate the global music industry.<sup>91</sup> In the United States, “six [firms] account for 90% of film revenues, two dominate radio, five (and shrinking) own the cable TV market, four dominate cell phone services . . . . Many of these separate markets are dominated by the same vertically and horizontally integrated giants—especially Sony, Viacom, Bertelsmann, News Corp, and General Electric”

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<sup>90</sup> See Doern and Sharaput (2000); Benkler (2001); and Scassa (2005) for examples of various categorizations of interest groups

<sup>91</sup> Sony Music Entertainment; Universal Music; Warner Music Group, and EMI.

(Karaganis 2007, 224). The main drivers behind international efforts for stronger copyright laws (Sell 2003; Drahos and Braithwaite 2002), publishers and distributors act according to a profit-maximization logic, often deploying natural-rights, pro-author rationales in pursuit of this objective.

These firms have a disproportionate influence in copyright policy around the world. Of these industries, the most important from a policymaking perspective are the worldwide recording and motion picture industries, although software makers (represented by the Business Software Association (BSA)) and traditional publishers are also important. More recently, video game manufacturers, represented in the United States by the Entertainment Software Association and in Canada by its sister organization, the Entertainment Software Association of Canada, have also become important since 2000. These industries advocate for policy reform in countries of interest as individual companies as well as through a network of domestic advocacy groups. In the motion picture industry, for example, the most powerful player is the Motion Picture Association of America (MPAA), which has branches in countries and regions around the world. In Mexico, the MPA coordinates its anti-piracy efforts with the main music-industry association, the *Asociación Mexicana de Productores de Fonogramas* (AMPROFON), through the *Asociación Protectora de Cine y Música México* (APCM).<sup>92</sup> In the United States, “probably, in matters of intellectual property, trade and culture, the MPA becomes ‘the [U.S.] State Department’... U.S. political parties have been models of bipartisan cooperation when it comes to working with the MPA[A]. It has been one of the key actors in the global demonization of piracy and the resulting process of criminalization of copyright infringement” (Drahos and Braithwaite 2002, 175). In Canada,

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<sup>92</sup> ACPM. Accessed August 13, 2010. <http://www.apcm.org.mx/index.php?item=menuapcm&contenido=main>.

MPAA members are represented by the Canadian Motion Picture Distributors Association (CMPDA).

In the music industry, the major record companies are represented in the United States by the Recording Industry Association of America (RIAA), whose members are represented in Mexico by AMPROFON (which also includes Readers Digest and Azteca Music; AMPROFON members represent more than 70% of the Mexican music market<sup>93</sup>). In Canada, the Canadian Recording Industry Association has, since 2006, represented primarily the Big Four labels and has been called “the Canadian branch of the RIAA” (Doyle 2006, 17). Internationally, these companies are also part of the International Federation of the Phonographic Industry (IFPI).

The International Intellectual Property Alliance (IIPA) represents another important lobby group for the content industries. Formed in 1984 – the year in which “trade and intellectual property began to merge,” according to former United States Trade Representative official and current counselor to the BSA Emery Simon (Sell 2003, 82) – the IIPA represents over 1,500 corporations, “whose annual output exceeds five per cent of the US Gross Domestic Product” (Sell 2003, 84). It continues to be the main international advocacy group for the content industry. The IIPA “coordinates policy positions based on shared concerns of its members, tracks copyright policies abroad, provides detailed information on foreign copyright practices and infractions, testifies before Congress, and publishes influential reports that it delivers to Congress and the USTR” (United States Trade Representative) (Sell 2003, 84).

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<sup>93</sup> AMPROFON. Accessed August 13, 2010.  
<http://www.amprofon.com.mx/amprofon.php?item=menuAmprofon&contenido=perfil>.

In addition to these copyright-focused associations, these industries (like others) also work through domestic and international business organizations like the Chamber of Commerce (U.S.), the Canadian Chamber of Commerce and the U.S.-Mexico Chamber of Commerce.

Although firms from the United States, Japan and the European Union dominate these sectors, other countries' firms also play an important role. In Mexico, for example, Televisa is the world's largest Spanish-speaking media company (Sinclair 1996, 46), producing *telenovelas* and other works for domestic and foreign consumption, including in the United States. Its interest in stronger copyright would parallel that of its competitors in other countries.

The content industries are characterized by both their ability and desire to focus intently on copyright policy. This has also allowed them to lobby successfully for changes to copyright that favour their interests (Frith and Marshall 2004, 14). As Scherer (2001, 22) remarks, in an article defending intellectual property, "there is reason to believe that the enforcement of intellectual property rights is biased in favour of large, well-established organizations," which are least likely to be motivated by the prospects of a windfall from copyright.

This strong interest stems from the fact that most publishers and distributors, including the large (transnational) publishing houses, record companies and movie and television studios, base their business model on the control of copies: they thus have a vested interest in protecting this business model. These companies "own" a stable of copyrighted assets, which they can deploy to maximize revenues through licensing, new formats, reissues,

and so forth. Unsurprisingly, they are the group that stands to gain the most from both copyright and stronger copyright protection (Benkler 2001, 279-284).

Given their entrenched position in the copyright debate, existing content industries have the power to shape the development of future competitors and creators. Critically, one of the groups most vulnerable to changes in copyright law – future industries that may arise due to changes in technology or copyright law – tend to be underrepresented, or not represented at all (Litman 2006, 47). The incumbency of existing firms gives them the power to attempt to block or redirect pressures for change so that technological change will not necessarily lead to legal changes, or will lead to legal changes that favour their interests. As beneficiaries of the existing system, they have been in a position to shape the evolution of copyright in the face of technological change and the entry of new actors (Litman 2006).

For example, in the United States, prior to 1911 “a large business in mechanical reproduction had been built up by gramophone companies and manufacturers of perforated music rolls and the like, on the assumption that authors and composers had no right to restrain the reproduction of their works by these means. Those who prefer such language might say that the trade coolly pirated musical works” (Plant 1934, 189). Publishers used the U.S. *Copyright Act* of 1911 to bring this burgeoning industry to heel (Plant 1934, 139). Hollywood itself was born when New York-based independent film companies moved west to escape demands for royalty payments from the major producers of film and movie equipment (Boldrin and Levine 2008, 33).

More recently, the content industries were able to use copyright to shut down the file-sharing company Napster, effectively casting a veto over a centralized file-sharing

technology that was a clear advance over both “offline” music distribution and, arguably, the more decentralized (and harder to shut down) systems that replaced it.

### **i. Content industries and digitization**

Digitization threatens traditional content industries’ scarcity-based business model to a much greater extent than previous technological advances. Before personal computers, new entrants to the market for copyrightable goods were much like their existing brethren: corporately organized business interests and individual creators (e.g., songwriters and performers). While these changes necessitated more seats at the table, they did not fundamentally alter the rules of the game. Later, while technologies like the cassette and the photocopier allowed consumers to make copies of protected works, the copies were almost always inferior to the original due to technological limitations. Furthermore, many of these uses, being noncommercial in nature, were often subject to exemptions – whose enjoyment would have been technically difficult to prohibit in any case. Except when performed on a large, commercial scale, copying in this era was not an existential threat to existing players.

Previously, publishers and distributors fulfilled the important social and economic function of making works accessible to the general public. Now, however, the existence of a nearly global distribution network renders this function largely redundant to artists. Publishers’ essential role of providing the capital needed to produce copies of informational goods has also been usurped. A digital, network economy involves a move from “hierarchically assigned actions” to “decentralized peer production” (de Beer 2009, 4) and distribution that has less need of large corporate structures to coordinate creative production and distribution. Since digitization reduces the cost of copying, or even shifts it almost completely to the consumer (as when someone prints a document), this function too becomes

much less important (Karaganis 2007, 224-225). Digitization also challenges the rationale of copyright as an incentive: since it now costs much less to create, reproduce and distribute works, “Publishers should therefore need fewer, not more, property rights to protect their investment” (Economist 2005).

The distribution of digital works “undermines the ability of creators and rights owners to derive profits from their own work, which may in some circumstances lead to the stifling of creativity as the rewards and incentives for producing works disappear” (Dutfield and Suthersanen 2008, 234-235).<sup>94</sup> However, there exists little reliable data on the effects of digital technology on content creation and the value of the content industries, and what data have been produced tend to come from the affected industries themselves and are rife with methodological problems (Boyle 2010).

While many analyses concentrate on the threat posed by digital technologies to existing business models, they also give copyright owners the potential to exert an unprecedented control over creative works once the works have been sold, far beyond what is possible in the analog world (Murray 2005, 26). These include price discrimination based on region, “previous purchases, internet service provider, or membership in studio-specific ‘frequent buyer clubs’,” and personal information that is “tracked, aggregated, analyzed, catered to, and used to set prices based on the best guess of what that user could and would pay” (Gillespie 2007a, 249).

From this perspective, “the answer to the machine [i.e., unauthorized copying] is in the machine [i.e., digital controls on content]” (Goldstein 2003, 170). Whether owners exercise (or are allowed to exercise) greater control over copyrighted works is, in the end, a

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<sup>94</sup> It would actually be more accurate to say that the distribution of digital works “undermines the ability of creators and rights owners to derive profits from their own works” *under the existing copy-based business model*.

political discussion as much as a technical one (Litman 2006, 14). The WIPO Internet treaties represent an attempt to change copyright law to enable this type of digital control.

## **ii. Creators and digitization**

For newcomers to copyright, the extent to which copyright law treats creators' interests as secondary to those of publishers and distributors is somewhat surprising. It is actually possible to tell the story of how international copyright law has been strengthened dramatically with few references to actual creators. While there exist creators' and performers' groups such as unions and collection societies with varying degrees of influence (in Mexico, creators' collection societies, or *sociedades de gestión colectivas*, are particularly important), they tended to be overshadowed by industry interests in the debates, described below, that led to the TRIPS, NAFTA and the Internet treaties. As recently as the late 1990s, intermediaries were able to argue successfully, and with the support of creators, that their interests were the same as creators' interests. Typically, creators' groups tend to favour a maximal approach to copyright, though emphasizing different issues than their industry counterparts.

More importantly, this equivalence of industry and creator interests was accepted with little question by policymakers even though it has long been recognized that publishers/distributors and creators face different incentives, motives and interests (Hurt and Schumann 1966, 425-426). When economies of scale made it difficult for individual creators to create and distribute their works without relying on large publishers and distributors, one could argue that there was a rough alignment between creators' and intermediaries' interests, even though the resulting business models overwhelmingly favour the publisher/distributor

over the creator: only a few ultra-successful creators make significant money from copyright royalties.<sup>95</sup>

Given that copyright restricts distribution, and that most creators profit little directly from copyright and have an interest in wide distribution, it cannot be taken for granted that creators benefit from copyright (especially to the same degree as publishers). As the digital revolution has made it less expensive to create and distribute creative works, creators' realization of their differing interest in copyright from the content industries has grown. For example, the Canadian case study describes the creation of an artists' group, the Canadian Music Creators Coalition, which has articulated a separate position from the copyright industry, calling for the recognition of user rights and a truly artist-centred policy. As the digital economy advances, such groups have risen in significance. This development, however, postdates the signing of the Internet treaties.

While creators' groups are directly affected by much in the Internet treaties (the WPPT was designed explicitly to extend rights to performers and phonogram producers, for example), they are less directly affected by the most controversial part of the treaties, dealing with TPMs. Neither were they much involved in the debate over ISP liability. Copyright is still very much commercial law and therefore the purview of industry interests. This was the case with respect to TPMs and ISP liability, which primarily involved the content industries and ISPs, and other large institutional interests.

## **II. "User" groups**

Against those individuals and groups that create and distribute creative works are all those who make use of these works. This is a tricky and somewhat misleading category, as

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<sup>95</sup> May (1997, 100); see Albin (1994) and Boldrin and Levine (2008, 106) for specific examples of the creator/publisher imbalance under copyright.

even creators and publishers (e.g., movie studios) rely on existing works in order to create new works, though they differ in their ability to (re-)use these works (Benkler 2001).

In the copyright debate several groups and industries can be usefully placed on the “user” side of copyright as favouring broader access to copyrighted works than the absolute control sought by the content industries and some creators groups. Two of the most obvious “user” groups, in theory, are individual consumers and noncommercial creators. Copyright also touches on the noncommercial as well. To the extent that copyright requires the regulation of consumers’ actions (by taking steps to ensure they do not produce and distribute copies), copyright can interfere with the ability to exercise free-speech rights (Netanel 2007). Users’ claims on creative works can also be discussed in terms of culture. In Mexico, copyright is identified with the protection of the national culture. As such, this ideational perspective is roughly similar to the incentive role of copyright emphasized in Canadian and American discourse. However, alongside this authorial right is a – less-emphasized, but still existent – citizen’s right to be able to access this culture. In other words, Mexican citizens, in theory, at least, have the right to access their culture, a right that can (again, in theory) be used to counter claims for stronger copyright protection on behalf of authors or intermediaries.

Despite the stake consumers (and citizens generally) have in copyright, historically citizens and consumers have been excluded (or, more correctly, have not shown an interest in) the formulation of copyright policy. Consequently, until the late 1990s copyright law has reflected a balance between large corporate and institutional interests. Even “fair use”-type provisions that seem to reflect a general public interest in the ability to access works, have been supported in large part by industry groups such as the consumer-electronics industry

(Gillespie 2007), whose interests did not coincide with the control-maximization objectives of the content industries. Until the WIPO Internet treaties, and especially after, this group was not represented directly in the copyright debate. One of the themes of this dissertation is the way that digital technology has given individuals both a greater stake in the copyright debate as well as the means to become involved to a greater degree.

#### **i. Individuals and digitization: Customers as competitors**

Individuals' increasing participation in copyright debates, which dates to the early 2000s in the United States and Canada, with some small civil-society participation in the 1996 WIPO Internet treaties, is the result of the fact that digitization makes it relatively simple for individuals to create new works out of existing copyrighted works.<sup>96</sup> These can run from the mundane – a YouTube video of a birthday party in which a Prince song plays in the background – to the sublime – the music of Girl Talk, a New Jersey musician who combines identifiable bits of popular (and copyrighted) songs to create something wholly new.

More importantly, digitization and the Internet give individuals the ability to copy and distribute copyrighted works quickly and easily, and to make copies in the course of everyday activities such as using a computer. In essence, individuals can now act as publishers. Just as other innovations created new types of distributors, so has the Internet: the only difference this time is that now individual consumers, and not some new industry, are now competing with established producers and distributors. Much of this competition is non-commercial – individual uploaders do not make money by making digital works available on peer-to-peer networks – but even this noncommercial sharing affects existing business models.

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<sup>96</sup> As discussed in chapter 5, Mexico continues to treat copyright as an apolitical, technical issue, though this view is changing.

As a result, what was originally commercial law designed by lawyers for lawyers now directly affects individuals in ways that would have been inconceivable even 40 years ago because computers, which are now ubiquitous in society, work by making copies. Copyright law was meant to settle commercial disputes, not to target end-users (Geist 2005a, 10). When copyright suits were targeted mainly against businesses and institutions, the fact that copyright laws are arcane, complex and internally inconsistent was not that great a problem (Litman 2006, 19); it becomes a problem when the law is deployed against individuals.

Because they are now directly affected by copyright law, both through lawsuits brought against individuals for infringing activity and because copyright law limits their ability to create and distribute digital works, the “broader public” has begun to demand to be heard in a debate traditionally dominated by authors, publishers and other institutional interests (Geist 2005a, 1). Individuals’ direct involvement with copyright changes fundamentally the dynamics of copyright negotiations and, therefore, of copyright itself. With individual consumers in the picture, more points of view must be accommodated, at the cost (for politicians) of potential electoral defeat. More positively stated, rising consumer interest in copyright allows for the recognition of a more general social interest in copyright that has always been there but it has traditionally been neglected during copyright’s years as a creator/distributor battleground.

The ability of individuals to create and distribute perfect copies of digital works also poses a fundamental question for the treatment of exceptions to copyright. This issue pits two contrary views against each other. One side argues that exceptions such as fair use are not simply exceptions to a creator’s (or, rather, copyright owner’s) property right, but are a fundamental part of what copyright is. This view is supported by the main copyright treaties,

which all enshrine various limitations and exceptions, thus acknowledging their legitimacy.

From this perspective:

uncontrolled, noncommercial use had obvious social utility and gradually developed justifying political rationales. Tolerance for these secondary forms of distribution and use, especially in educational contexts, found a home within traditions of republican political thought that viewed the circulation of information and ideas as a positive social good—indeed, as a prerequisite of democratic culture (Karaganis 2007, 228).

Proponents of stronger copyright – including the copyright industry and some creator groups – argue that these private rights and exceptions were previously seen as existing in an unregulatable area “where copyright law abdicated its authority by nature” (Gervais 2005, 329). However, now that perfect enforcement is potentially possible, proponents of strong copyright argue that this balance should be eliminated (Economist 2003).

Whether these technological developments are good or bad news depends on where one stands. For the large corporate interests that control most copyrights and whose business models are built on a copy-distribution model, this is unequivocally bad news (absent any decision to pursue a new business model): “these developments look more like the disintegration of culture – their culture – than like cultural democratization” (Karaganis 2007, 224). It also hurts top-selling artists – the only ones who make significant amounts from royalties.

## **ii. Internet Service Providers and other large “user” groups**

Traditionally, the user/dissemination side of the copyright debate has been represented by large institutional interests, such as research libraries, broadcasters, consumer-electronics manufacturers and, since the popularization of the Internet, telecommunications companies, information-technology (IT) firms, and companies such as Google that make their money by providing access to information, including copyrighted works. In contrast to

the content industries, the IT sector, most notably personal computer manufacturers and Internet Service Providers (ISPs), emphasized speed and storage capacity, and “privileged relatively open technical architectures that, over time, facilitated the transformation of the architectures themselves” (Karaganis 2007, 226). The sector’s general interest is in maximizing their freedom to create products and services to sell to consumers; in other words, they wish to minimize rights in copyright that would require them to undertake measures that would limit interoperability or the functionality of their products.

Unlike relatively resource-poor user groups such as research libraries, user interests such as broadcasters, manufacturers and telecommunications companies are often significant copyright actors, domestically and internationally. These large commercial user groups differ from their copyright-industry counterparts in two ways. First, unlike copyright-industry firms, which have been dealing with copyright law for decades, some commercial-user firms, such as the telecommunications companies and Internet businesses, are relatively new to copyright issues and have faced a learning curve. These newcomers must also deal with the entrenched positions of the content industries. Second, while the content industries have the luxury of focusing almost exclusively on copyright issues, for many commercial users copyright is only one among a series of policy issues that affect their bottom line. Furthermore, vertical integration has also complicated the position of many corporations: Sony, for example, sells content as well as the consumer electronics that play this content. As a result, while user interests cannot be ignored in policy debates, and while several of these (e.g., the consumer-electronics industry) transcend national borders, they are not able to present as unified a front as the copyright industry.

The digital age has brought telecommunications and Internet-based companies into direct contact with copyright law. ISPs and online hosting companies allow users to transmit or store copyrighted materials on their networks. When a file is sent over the Internet from one user to another, servers make copies of the file in the process of transmitting it to the end user. ISPs also host materials on behalf of their users (e.g., hosting a website). In both cases, copies are being made as a function of how the Internet works. Under copyright law, these intermediaries potentially face a legal problem regarding “the extent to which firms might be liable for their customers’ behaviour and what obligations if any they have in respect of infringing content hosted on or transmitted through their networks” (de Beer 2009, 8). Against this policing problem is the question of how to reconcile the conflicts between copyright law and a socially beneficial system that exists by creating copies in a manner consistent with copyright law, as well as other concerns, such as the privacy rights of individuals.

The main question facing ISPs concerns their liability: how should the companies that provide the “tubes” of the Internet be treated? On the first point – copies made as a consequence of the regular functioning of the Internet – ISPs could be made liable for each copy, or they could receive some sort of dispensation. On the second – how to treat the hosting of unauthorized works by someone else over an ISP’s – there exist several options, from full liability to no liability, or liability conditional on the ISP meeting various conditions. This point raises the extent to which ISPs are, or should be, responsible for the use made of their systems by their clients. To use an analog analogy, should Bell Canada be held liable for two people using their telephone system to plan a murder? In the end, this is a political question.

### III. State interests

Being responsible for defining and implementing copyright policy, the state plays a crucial role in mediating among the various interests affected by copyright. Its rules and institutions influence the shape of a nation-state's copyright policy and the interpretation of its international obligations. As a result of institutional, material and ideational peculiarities, domestic copyright laws have historically developed to reflect not-insubstantial differences.

From a regional and global perspective, the state is acted upon by various interests, as well as being an actor in its own right. As actors, representatives of the state conclude treaties with representatives of other states; they can also insert themselves into the domestic debates of other states. A state's copyright regime is socially constructed by actors working within a domestic, regional, and international set of institutions, treaties and norms. Some states are more powerful than others; for example, institutional and ideational changes in the United States are more consequentially globally than changes in other states because of its place at the heart of the international political economy (Sell 2003, 5).

Whether a state favours "strong" or "weak" copyright (and IP generally) depends on several factors. Fink and Maskus (2005, 3, 5), for example, argue that a state's position on copyright and IP is a function of its economic structure and IP/copyright export position. The domestic corollary to this argument is that the more important the copyright industry is to the domestic economy, the louder the voices will be for strong copyright protection. Much as free trade historically has been promoted by developed countries and resisted by developing countries (Chang 2002), strong copyright laws benefit disproportionately copyright owners, who happen to live mainly in developed countries, which themselves benefited from weak IP laws when they themselves were developing. Now-"developed" countries like the United

States may have industrialized through the free appropriation of other countries' "intellectual property,"<sup>97</sup> but TRIPS makes it impossible for today's developing countries to take the same path (Sell 2003, 9). Drahos and Braithwaite (2002, 75) call copyright the "the invisible but effective servant of Western colonial power," allowing publishers, for example, to keep the price of books – including textbooks – high for newly liberated colonies. Those with a vibrant copyright sector – typically the most developed countries – will experience a net inflow of royalties from stronger international copyright laws, while net copyright importers – typically, developing and some developed countries, like Canada – will experience an outflow of royalties.

Specifically, Maskus argues that there are four types of countries, each with conflicting interests in IP rules. *IP exporters* are net producers and sellers of IP, with an interest in strong international rights; *High-income IP importers* are net purchasers of IP, but their industries want access to sophisticated IP products and their consumers want access to high-quality, differentiated products – they favour strong protection but with limits; *IP followers* are industrializing economies that need access to modern technology but need it to be inexpensive – they have mixed incentives on IP protection, perhaps best epitomizing the classic economic copyright dilemma; and *low-income IP importers* produce little IP domestically, relying on foreign suppliers, and have an interest in weak IP rights (cited in Rushton 2002, 8).

This characterization accords with economist Deepak Lall's finding (cited in Dutfield and Suthersanen 2008, 8) of an inverted-U-shaped relationship between the strength of IPRs and income levels. IPR intensity falls with rising income, and then rises with a country's increased "innovation effort." The inflection point, at \$7,750 per capita in 1985 prices,

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<sup>97</sup> Discussed later in this chapter and in chapter 3.

however, is quite high. Lall's finding that poorer countries actually benefit from lax copyright laws is further supported by the historical evidence that "that many of today's economic leader countries were themselves 'knowledge pirates' in the past, and benefited from being so" (Dutfield and Suthersanen 2008, 5). While this finding does not allow one to conclude that stronger IP protection *causes* economic growth, it does show that they act *as if* it were true.<sup>98</sup>

While this taxonomy holds an intuitive appeal, it neglects the extent to which state policy preferences represent not only a state's material situation, but also the outcome of domestic policy debates among decision-makers and interest groups, as well as state representatives' perception of these factors. A state's intellectual-property policy is not determined solely by its level of development, but also by the "domestic priorities and the relative strengths of domestic players in the copyright system" (Rushton 2002, 8). Additionally, as will be developed in the following chapters, governmental institutions provide a non-neutral context within which policy is made. Their structure (the decision-making process, institutions' perceived clients, and the ability of decision-makers within these institutions to make policy) affects which groups get listened to, how policy is made and in what way these policies are biased.

As the following chapter elaborates, the United States is certainly a net exporter of IP and copyrighted works, and has shown an active interest in promoting strong copyright laws internationally. However, its advocacy in favour of strong copyright is the outcome of historically specific policy battles. The framing of copyright and IP as a way to help the

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<sup>98</sup> These figures focus on intellectual property generally, not copyright. Furthermore, studies such as Fink and Maskus, and indeed most studies of "intellectual property" in developing countries, often concentrate on patents and treat copyright as an afterthought. An international comparison of the material and economic effects of copyright alone, while beyond the scope of this dissertation, would be very useful. However, as Ku *et al.* (2009) note, there has been very little study of the empirical effects of stronger or weaker copyright laws.

United States maintain its global economic supremacy was as important to the transformation of the United States into a pro-strong-copyright country as the material situation of its content industries. For example, while important, the U.S. IP industry is dwarfed by the IT sector (Boldrin and Levine 2008, 118). In other words, U.S. policy on intellectual property is not determined by a simple ranking of the material power of its domestic industries.

A similar point can be made about Mexico, a country characterized as a relatively low-income, industrializing economy that, as either the world's first or second-most-important producer of Spanish-language works, possesses both a vibrant cultural sector and the perception of itself as a cultural superpower. That almost one-half Mexico's citizens are below the official poverty line and cannot therefore afford full-priced cultural products gives the Mexican government an incentive either to pursue lax copyright laws or lax enforcement of the same, since stronger copyright policies raises the price of copyrighted works. However, its status as a cultural superpower and important exporter of Spanish-language cultural products would lead it to support stronger copyright laws. As chapter 5 discusses, the Mexican government squares this circle by pursuing ever-stronger copyright laws that it then chooses not to enforce well.

Canada, finally, is a high-income IP/copyright importer whose copyright policies, detailed in chapter 4, fit the profile of a state that desires "strong protection but with limits." Again, however, this preference outcome is the result of a specific configuration of domestic institutional and interest groups.

### **PART III: INTERNATIONAL COPYRIGHT INSTITUTIONS: SUSTAINING COPYRIGHT, CONSTRAINING CHANGE**

Historical institutionalism recognizes that institutions provide the "rules of the game" for actors pursuing their interests. While not immune to change, they embody certain logics

that favour certain policies, ideas and actors over others. Copyright policies in Canada, Mexico, the United States and other countries are embedded in domestic, regional and international copyright institutions that have shaped, and continue to shape, the evolution of domestic copyright laws. Internationally, the history of IP and copyright can be divided into three phases.<sup>99</sup> At its inception in Europe in the 18<sup>th</sup> century, copyright was primarily a domestic matter: states offered protection to their own citizens' works, while works from other countries were fair game. By the end of the 19<sup>th</sup> century, copyright and IP became more international, with the establishment of bilateral agreements among European countries and, in 1886, the multilateral *Berne Convention. Berne*, which eliminated the “increasingly strained patchwork of national legislation,” was based on the principles of non-discrimination (no barriers to entry), national treatment, and the right of priority (i.e., it would protect everyone). Perhaps unsurprisingly, these agreements were driven by trade agendas, copyright and IP generally working, as it does, as *de facto* trade barriers (Drahos and Braithwaite 2002, 32). The past two decades have witnessed the beginning of the third phase. The implementation of the TRIPS represented a break from the consensual nature of the *Berne Convention* by requiring that signatories change and expand their IP and copyright laws, sometimes drastically.

The current international-institutional copyright framework reflects all three phases. Domestic copyright laws depend on tradeoffs between competing ideas (e.g., economic efficiency and fairness) mediated “through a complex set of national and international agencies and institutions, which are in turn pressured by business interests, the IP professions, varied users of IP, and national governments” (Doern and Sharaput 2000, 20).

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<sup>99</sup> The division can be credited to Drahos (1996), cited in Sell (2003, 10-12).

The two main international copyright institutions are WIPO, which is responsible for the *Berne Convention*, the Internet treaties and other related treaties, and the WTO, specifically TRIPS. In North America, copyright is covered by NAFTA Chapter 17. It and TRIPS were created “to establish a (near) uniform legislative arena within which rights holders can enforce their rights ... .” This approach treats cultural products as commodities and is thus more concerned with the rights of manufacturers than creators (Jones 1996, 345-6). They “are not technical solutions to emergent problems but are rather manifestations of structural power within the global political economy” (May 2000, 44). As discussed below, the negotiation of TRIPS within the context of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) talks that led to the creation of the WTO was primarily the result of U.S. pressure on behalf of its content and IP industries (Sell 2003).

To these institutions one can add the Office of the United States Trade Representative (USTR). Although technically a domestic U.S. institution, the USTR has had an outsized effect on international copyright law. In its trade-treaty-making and use of U.S. trade law (notably the Special 301 process) to chastise and sanction countries with poor IP laws and enforcement (in the U.S. view), it has forced many countries to change their IP laws to conform to U.S. interests.

### **I. The World Intellectual Property Organization (WIPO)<sup>100</sup>**

The history of international copyright since the mid-1980s can be understood in part as a political conflict between WIPO and member states (particularly the United States) that believed it was not moving aggressively enough on copyright issues of interest to it, and between it and the WTO, with which it competes for influence.

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<sup>100</sup> See Rickeston and Ginsburg (2006) for a definitive history of the *Berne Conventions* and the WIPO; see May (2007) for a critical history of the WIPO.

WIPO, headquartered in Geneva, Switzerland, was created in 1967 and came into force in 1970, to “promote the protection of IP throughout the world through cooperation among states and in collaboration with other international organizations” (WIPO 2009). It became a specialized agency of the United Nations in 1974. Its core tasks include the development of international IP laws and standards; the maintenance of fee-based services, including registration of trademarks, designs and appellations of origins, international patent applications, and various classification systems; promotion of IP for economic development; and promotion of a better understanding of IP (WIPO 2009a). It is also “one of the key forums for discussions and policy development to extend the global governance of intellectual property beyond the minimum standards set by the TRIPS agreement” (May 2007, 13).

#### **i. The *Berne and Rome Conventions***

WIPO, which has over 151 members, is responsible for administering the *Berne Convention*, along with 23 other treaties. These include the Internet treaties, which are considered to be “special agreements” that fall under the two main international copyright treaties, the *Berne and Rome Conventions*. The 1886 *Berne Convention*, which has been revised six times (most recently in 1971) mainly to keep up with technological changes (Laing 2004, 73), was designed to eliminate the “increasingly strained patchwork of national legislation” that then governed copyright (Sell 2003, 11). Its original membership comprised nine countries; it now includes over 130. It was promoted initially by those popular authors, including Victor Hugo, who had the most to gain from international recognition of copyright. Britain and France had the most to gain from an international copyright convention in the late 19<sup>th</sup> century because of the vast output by their artists and the large-scale copying of their

works in other countries, compounded by the existing reluctance for countries to give coverage to foreign authors (Dutfield and Suthersanen 2008, 26).

The *Berne Convention* requires that all members have minimum levels of production with no registration requirements and extend protection to authors from other member countries (national treatment) (Dutfield and Suthersanen 2008, 27). It also requires that members provide authors with moral rights. The *Berne Convention* was ratified by Canada in 1928 and Mexico in 1967. The United States only joined the *Convention* in 1989; previously, it had refused to join in part because of a reluctance to acknowledge authors' moral rights (in part because of how this acknowledgement would affect its movie industry), though mainly because until then it required, in deference to its domestic publishing industry, that books be produced in the United States in order to qualify for copyright. Before 1989, it and other countries, including Mexico, were members of the *Universal Copyright Convention* under UNESCO, which had fewer requirements than Berne (Dutfield and Suthersanen 2008, 26-27).

The 1961 *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* requires that signatories provide “neighbouring rights” to performers, phonogram producers and broadcasters, alongside approved limitations and exceptions to these rights. The two treaties’ attempt to balance creators’ rights with overall social needs, recognizing “the need to provide for the rights of users to access copyright works in the form of allowable limitations and exceptions and [allow] latitude on the part of domestic policy-makers to enact copyright laws to suit their particular national interests” (Tawfik 2005, 73-75). Canada joined the *Rome Convention* in 1998, Mexico in 1964; the United States is not a member.

## ii. Source of power and political issues

WIPO is unusual among UN agencies in that it does not depend much on state funding, primarily as a result of its administration of the *Patent Cooperation Treaty* (May 2007, 13), which grants it a degree of independence. Until recently, like copyright itself WIPO was seen as, and characterized itself as, “a technical organization” concerned primarily with “the refinement of the relevant international treaties and establishment of better cross-border enforcement of rights” (May 2007, 74). However, starting with the 1996 WIPO Internet treaties and continuing today, it is increasingly recognized that it is in fact “a highly politicized organization” (May 2007, 1) that promotes a particular view of knowledge and intellectual-property rights: “the notion that the WIPO is an organization centrally concerned with socialization is not merely an analysis made by critics, but rather was seen by its long-serving Director General (Arpad Bogsch) as a key element in the organization’s mission and activities” (May 2007, 75).

Much of WIPO’s political clout comes from its employees’ experience and expertise, which have allowed it to maintain its standing as the pre-eminent IP and copyright international organization (May 2007, 2). Nonetheless, in the 1980s and 1990s, it faced a challenge from key members, particularly the United States but also the European Union, which were frustrated by its perceived “inability to change IP policy in the global economy, especially regarding copyright enforcement issues in developing countries” (Doern and Sharaput 2000, 76).<sup>101</sup> This frustration led the United States in particular to engage in “forum shopping,” moving IP issues into the GATT talks that led to the 1995 signing of the TRIPS Agreement.

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<sup>101</sup> For an exhaustive discussion of the WIPO-administered treaties, see Ricketson and Ginsburg (2006); also see Laing (2004).

Since the signing of the TRIPS, WIPO has “fought to maintain its position during a period of forum proliferation” (May 2007, 56): the WIPO Internet treaties were a direct result of this battle for relevance, as the next chapter outlines in detail. Concerns about WIPO’s relevance remain: the negotiations for an Anti-Counterfeiting Trade Agreement (ACTA), which covers copyright as well as trademark issues, was concluded in December 2010 by a plurilateral group of states, led by the United States, outside the WIPO *and* the WTO.<sup>102</sup>

## **II. The United States Trade Representative and Special 301**

Given the importance of domestic U.S. institutions in shaping international copyright law (Sell 2003, 5), U.S. institutions can be considered as at least quasi-international. The main agency responsible for international copyright issues is the Office of the United States Trade Representative (USTR). This Cabinet-level position (since 1974) is responsible for negotiating trade agreements and coordinating the Special 301 process (discussed below), a congressionally mandated annual review where American trading partners’ intellectual property legislation and enforcement are assessed and those countries whose legislation whose processes are not up to American standards are placed on various watch lists, each with different consequences. The State Department also represents American concerns about other countries’ IP regimes and placing the United States’ international IP strategy in the broader context of U.S. interests. Congress, for its part, plays somewhat of an international role, through interparliamentary delegations, which sometimes raise IP issues of concern to United States in their meetings with parliamentarians from other countries, as well as caucuses like the Congressional Anti-Piracy Caucus<sup>103</sup> to express concern about other countries’ protection (or lack thereof) of American intellectual property.

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<sup>102</sup> ACTA is discussed in greater detail in the epilogue to chapter 3.

<sup>103</sup> See <http://schiff.house.gov/antipiracycaucus/>. Accessed July 6, 2009.

### **i. The construction of the U.S. position on copyright<sup>104</sup>**

Historical institutionalism, as developed in chapter 2, argues that policy and institutional change can occur through the exploitation by interested actors of internal policy or institutional contradictions, or through exogenous shocks that actors can harness to their own needs. The history of U.S. copyright bears this out. Although the current U.S. position on international copyright is “without a doubt” (Sohn, interview by author, August 5, 2008) characterized by strong support for strong copyright protection, this position emerged only relatively recently. Until about 1982, U.S. domestic enforcement of intellectual property was relatively lax (Sell 2003, 13). The dramatic turnabout in U.S. policy resulted in the TRIPS and a maximalist interpretation of the WIPO Internet treaties and the U.S. 1998 *Digital Millennium Copyright Act* (discussed in the next chapter). This change was the result of the increased economic importance of the copyright and so-called “knowledge industries,”<sup>105</sup> as well as a concerted effort by a group of these industries to link IP and U.S. trade policy and place strong IP protection (in other words, a particular reading of the user/owner copyright balance) at the heart of U.S. trade policy.

The success of these companies in placing their particular view on the user/owner copyright balance at the heart of the U.S. view on copyright involved movement on two fronts. In the one instance, it required promoting internal, incremental change that exploited copyright’s protection/dissemination tension. They also successfully harnessed exogenous shocks and bricolage, specifically the linkage of trade and IP policy, driven by a general malaise about the declining global dominance of the U.S. economy. There is nothing inherent in IP itself that makes it a trade issue: many issues that affect trade are not covered by the

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<sup>104</sup> Chapter 3 will return to this issue in its domestic context.

<sup>105</sup> That is, those dependent on copyrights and patents, such as the pharmaceutical, software and entertainment industries.

WTO, notably labour and environmental standards. Rather, the trade-copyright/IP linkage was politically constructed over the course of a decade through intense lobbying by IP industries. Drahos and Braithwaite (2002, xi) date the linkage of trade and IP in the United States to U.S. *Trade Act of 1974*, which included an amendment linking trade to intellectual property.<sup>106</sup> The United States, spurred by its trademark industries, also unsuccessfully tried to introduce a code on trade in counterfeit goods during the GATT's Tokyo Round (1973-1979) (Dutfield and Suthersanen 2008, 32).

The IP industries were more successful early in the new decade, when the copyright, patent and semiconductor industries successfully linked their concerns about the international lack of IP enforcement and adequate IP law to concerns that American economic hegemony was being threatened by upstart countries, in particular by those in Asia. The content and IP industries successfully linked American concerns about the potential loss of American economic predominance to a push for stronger IP protection by arguing that protection of American intellectual property (IP sectors being one of the only ones to post consistent current-account surpluses) abroad would support a key sector of American global competitiveness. To do so, they relied on a discursive strategy that blamed U.S. trade problems on the actions of outsiders, specifically “foreign ‘pirates’,” instead of on domestic firms’ bad choices, framed intellectual property as consisting of “property rights,” instead of “grants of privilege” or of consisting of a balance between users’ and creators’ rights, and presented their preference for stronger IP protection as the solution (Sell 2003, 37, 50; see also Drahos and Braithwaite 2002). In this view, “the relative (and sometimes absolute) lack

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<sup>106</sup> Specifically, the Jackson-Vanik amendment applies to non-market economies such as the Soviet Union and “requires compliance with its specific free-emigration criteria in order to receive certain economic benefits from the United States” (Pregeli 2005). It also requires that a bilateral commercial agreement, including adequate protection of intellectual property rights, be concluded before such a country can be granted Most Favored Nation status (United States 1990).

of effective intellectual property protection in overseas markets” became “a trade-related issue *and* a problem for the U.S. economy that the government ought to respond to” (Dutfield and Suthersanen 2008, 32).

This view was first popularly articulated in a July 9, 1982, op-ed article by Barry MacTaggart, Chairman and President of Pfizer International, in the New York Times. In his article, “Stealing from the Mind,” he alleged that countries like Brazil, Canada, Mexico, India, Taiwan, South Korea, Italy and Spain had laws that allowed “U.S. inventions to be ‘legally’ taken” (cited in Drahos and Braithwaite 2002, 61).

The content and IP industries also worked to influence the main U.S. trade policy institutions to influence their direction and biases. Working through the Advisory Committee on Trade Negotiations, “a pipeline for U.S. business to the U.S. Executive on trade issues,” these industries worked in the run-up to the GATT Uruguay Round to ensure that the U.S. negotiating position would be “No IP, no trade round.” Key to this process, which would culminate in the TRIPS and, indirectly, NAFTA, was the 12-member *ad hoc* Intellectual Property Committee, representing the pharmaceutical, entertainment and software industries, as the central player in this change and the creation of the TRIPS (Sell 2003, 1).<sup>107</sup>

Corroborating this view, Drahos and Braithwaite cite “a senior U.S. trade negotiator” who told them that probably less than 50 people were responsible for TRIPS (Drahos and Braithwaite 2002, 10).

## **ii. Economic basis for these claims**

To be sure, their success was not based merely on words. While politics played a role in linking copyright and trade, U.S. support for stronger global copyright rules is based on

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<sup>107</sup> As of 1986, the IPC consisted of Bristol-Myers, CBS, Du Pont, General Electric, GM; Hewlett-Packard; IBM; Johnson & Johnson; Merck; Monsanto and Pfizer (Sell 2003, 2).

economic fact. The United States does have a competitive advantage in IP products. During an era in which the United States has run persistent current-account deficits, it enjoyed a \$47 billion surplus in “Royalties and License Fees” (which includes both copyright and patent royalties) in 2006. This surplus is second only to “other private services,” which includes items such as business, professional, and technical services, insurance services, and financial services (See Table 1).<sup>108</sup> In 2006, according to World Bank data, the United States accounted for over 40% of all global royalties and license fees; on a North American basis, this share was 94%, compared with 4% for Canada, and 2% for Mexico. As Table 2 shows, while Canada accounted for about 2% of global copyright royalties, Mexico is not even in the top 15 (see Table 3 for the North American breakdown). It is also interesting to note that the top 15 royalties-receiving countries account for 96% of all royalties revenues, and all but two were developing countries.<sup>109</sup>

In the simplest accounts, the U.S. bias toward protection is a direct result of the economic strength of its content industries (see, e.g., Maskus 2000). The problem with this account is that it downplays the economic importance of U.S. industries whose interests do not necessarily align with those of the content industries. Royalties and licensing (which includes copyright and patent royalties) do not have an overwhelming share of U.S. exports. With overall exports totaling \$1.6 trillion (see Table 4), royalties and licensing represent a significant, but not earth-shattering, 16.2% of total U.S. service exports and 4.9% of total U.S. exports. Other categories are just as important as royalties. In 2006, exports of

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<sup>108</sup> All tables are in Appendix B.

<sup>109</sup> The two countries are China (although whether it is a developing country is open to debate) and, strangely, Paraguay.

telecommunications equipment, computers and computer accessories totaled \$74.8 billion,<sup>110</sup> \$4 billion more than patent and copyright royalties combined. Absent political lobbying – the crucial factor determining U.S. government support for stronger copyright – the content industries’ contribution to the U.S. bottom line may not be enough to justify the one-sided pursuit of an agenda (stronger copyright) that disadvantages other American companies and interests – some of which, like Google, may have more upside potential than legacy media companies like Disney (Band, interview by author, June 20, 2008).

### **iii. Section 301 and Special 301**

This framing of stronger international copyright and intellectual-property protection as a fundamental U.S. trade concern culminated in amendments in 1984 and 1988 that allowed the U.S. government and IP industries to publicize and punish countries with IP laws that they felt were unfair. In 1984, the *Trade and Tariff Act*, which amended the *Trade Act*, amended the U.S. General System of Preferences (GSP), which provided preferential access to goods and services from developing countries. The amendment required that the President factor the potential GSP recipient country’s IP laws when deciding its eligibility for GSP benefits (Drahos and Braithwaite 2002, 87). In 1987, the U.S. denied Mexico GSP benefits for its failure to offer protection to pharmaceutical products. Mexico refused to comply with U.S. pressure, as it “had long held that the availability of affordable pharmaceuticals was a matter of the public interest” (Sell 2003, 1990-91). This refusal to comply with U.S. wishes offers an interesting contrast to the Mexican willingness to rewrite its copyright laws in order to conclude NAFTA. Mexico’s actions on pharmaceuticals demonstrate that domestic contexts matter and that raw economic power do not always carry the day.

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<sup>110</sup> Data are from the U.S. Census Bureau, U.S. International Trade in Goods and Services - Annual Revision for 2007, Exhibit 6, June 10, 2008.

Congress also amended Section 301 of the *Trade Act* in 1984. Section 301 allows the President to withdraw trade benefits or impose tariffs on goods from countries deemed to have unfair trade laws. The 1984 changes extended the areas examined for unfair trading practices to partners' IP laws. Investigations could be initiated by industry or be "self-initiated" by the USTR (Drahos and Braithwaite 2002, 88-89). These reforms were strongly influenced by the content industries. Drahos and Braithwaite (2002, 86) report that a Washington lobbyist told them: "It was the Motion Picture Association that introduced an amendment to the Bill." The first IP use of Section 301, which had been based on language in a 1982 trade agreement with Caribbean Basin, was to force Japan to protect software with copyright rather than a *sui generis* approach (Drahos and Braithwaite 2002, 90).

Today, the most visible means by which the United States attempts to influence foreign copyright law, including that of Canada and Mexico, comes from an amendment to Section 301 that created the "Special 301 process." Passed in 1988 as part of the *Omnibus Trade and Competitiveness Act*, Special 301 requires that the USTR annually "identify each year those foreign countries that deny adequate and effective protection for IP rights or that deny fair and equitable market access to persons who rely on protection of IP" (Robert 2001, 76) – that is, whether their laws meet U.S. approval, not whether they conform to international standards. In practice, each year, the USTR asks for and receives submissions from industry groups and other interested parties regarding their experiences with other countries' IP laws.

Based on these submissions and their own analyses, those countries that the USTR determines to have IP laws and policies that are not favourable to U.S. companies and products or are not working in good faith to improve their IP policies are placed either on a

“Watch List” or the more serious “Priority Watch List.” The latter is reserved for those countries with the “most onerous or egregious acts, policies, or practices,” whose policies or practices have “the greatest adverse impact (actual or potential) on the relevant US products,” and who are not negotiating in good faith or making significant progress bilaterally or multilaterally to provide adequate and effective provision (cited in Robert 2001, 76).

Though focused outward, the annual Special 301 process is as much about forcing the U.S. government to maintain a coherent IP policy and to keep IP protection at the forefront of U.S. trade policy. Internationally, it is a way of reminding countries and their governments about U.S. IP and copyright views. The weight given by other countries to the Special 301 process varies, from those that use it as an excuse to push through domestically unpopular IP reforms to those that ignore it completely. This process generally no longer serves as it did before the WTO as a prelude to sanctions against targeted countries, as all actions arising out of the Section 301 process now result in a complaint being filed at the WTO. Exceptions include issues that do not fall within the WTO’s mandate, or when the United States is dealing with a non-member of the WTO or one that prefers bilateral negotiations (Cohen, Blecker and Whitney 2003, 175). For North American cases, the United States could use Chapter 20 of the NAFTA dispute-resolution process. No copyright cases have yet been brought under Chapter 20. As Nafziger (1997) remarks, this process is intergovernmental (requiring that an aggrieved party convince their government to file a challenge), and thus, highly political.

Neither the Special 301 process nor the agency that administers it, the USTR, is neutral. The resources needed to file complaints tilt the field toward the content and IP industries. Drahos and Braithwaite (2002, 96-97) document the tight links between the USTR

and the IIPA. A relatively small office, “the USTR came to rely heavily on the figures on piracy provided to it by U.S. companies and business organizations like the IIPA.” Given the size of the process, which involves grading more than 70 countries, Special 301 “is only really possible because corporate America picks up the tab. It provides the global surveillance network, the numbers for the estimates on piracy and much of the evaluation and analysis. The U.S. state in return provides the legitimacy, the bureaucracy that negotiates, threatens and if necessary carries out enforcement actions” (Drahos and Braithwaite 2002, 107). It also benefits from the heft given to its recommendations by its association with these powerful corporations. Trade negotiators could look forward to jobs working for corporations that need trade/IP experience (Drahos and Braithwaite 2002, 96-97). Nonetheless, according to the Assistant USTR for Intellectual Property and Innovation in a 2008 interview, the USTR currently has sufficient resources to make its own independent conclusions (McCoy, interview by author, August 8, 2008).

With such tight linkages and data being supplied by companies facing “no real downside to overestimating the size of the problem” (Drahos and Braithwaite 2002, 97) the Special 301 process reflects the copyright-industries’ view of copyright. This is likely at least partly the result of the composition of groups that have traditionally taken part in the Special 301 consultations. Dominated by content industry groups like the IIPA, interests with a different perspective on copyright, such as Google, and the various U.S.-based public-interest groups concerned with copyright and access issues, have only recently become involved, or even expressed a desire to become involved, in the process.

For example, in 2010 the Computer & Communications Industry Association (CCIA) participated for the first time, filing a brief that recommended a step away from maximalist

copyright: “‘stronger’ is not necessarily better or more effective” (CCIA 2010, 3). As well, U.S. public-interest groups like Public Knowledge unsurprisingly are more concerned with domestic issues (their resource constraints are likely also tighter than those faced by the content industries, though they do have an interest in Special 301 (Sohn, interview by author, August 5, 2008)). Thus, aside from foreign governments (who are invited to participate in the process), there is little reliable representative of consumer/public interests in the Special 301 process.

The result has been a process that is remarkably indiscriminate in identifying countries that do not meet U.S. standards. In 2010, 11 countries, including Canada, were placed by the USTR on the Priority Watch List; these were joined by 29 other countries on the Watch List. In other words, in 2010 over half of the 77 countries that the USTR examined had IP laws with which the U.S. was dissatisfied.

### **III. The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)**

The TRIPS Agreement, created in 1995 by the Uruguay Round of trade talks (1986-1994) as part of the package that begat the World Trade Organization, represents the global “floor” in intellectual-property rights. Since adherence to TRIPS is required of all WTO members, it established a global common baseline for IPR protection, and thus constitutes the background conditions under which the WIPO Internet treaties were negotiated and are being implemented.

The negotiation of what became the TRIPS was part of a coordinated push for stronger international IP protection by the United States and several U.S. IP industries, as detailed above. TRIPS was the price demanded by the United States for the World Trade Organization, and a deal on agriculture desired by developing countries (Sell 2003, 37;

Drahos and Braithwaite 2002, 11).<sup>111</sup> The TRIPS Agreement represented a culmination of an American business and state strategy linking effective copyright/IP enforcement by other countries to American trade preferences (through Section 301 and Special 301 of the U.S. *Trade Act*) and the successful completion of the Uruguay round of GATT talks that culminated with the creation of the WTO:

The insertion of ‘trade-related’ intellectual property rights into the Uruguay Round agenda and the subsequent adoption of an agreed text for an intellectual property agreement could not have been achieved without the effective lobbying activities in the USA of legal and policy activists and corporations, and a government and political establishment that, during the 1980s, was especially receptive to the diagnoses and prescriptions propounded by these individuals, firms and business associations (Dutfield and Suthersanen 2008, 33).

TRIPS was a U.S.-led agreement: “It is widely accepted that the US made virtually no concessions in the Uruguay Round negotiations of GATT and imposed upon the world not only the economic interests of its own IP-based industries ... but a degree of protectionism that is economically and culturally destructive to developing countries” (Towse and Holzhauser 2002, xviii). Despite the United States’ strong position, some countries, such as Brazil and India, opposed greater intellectual property protection on the grounds that it would restrict the flow of advanced technology needed to address social issues (Hughes 1988; Thumm 2000, 63-64).

Drahos and Braithwaite (2002, 192) argue that the agreement passed because, for the most part, other countries did not yet understand the central role that IP was beginning to play in the global economy: countries “did not have a clear understanding of their own interests and were not in the room when the important technical details were settled.” Technical information and expertise was concentrated in the United States. Even a developed

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<sup>111</sup> Sell (2003, 37) remarks, developing countries asked for, and received, the phase-out of the Multi-Fibre Agreement, which protected U.S. textile interests, in return. For background on the concerns and objectives developing and developed countries with respect to the TRIPS negotiations, see Thumm (2000, 63-64).

country like Australia negotiated counter to its objective interests: the more concentrated Australian IP industries out-lobbied their more diverse opponents, such as consumers and public health agencies, who “generally did not even recognize their interests until after the horse had bolted” (Drahos and Braithwaite 2002, 192-194).

TRIPS “constitutes the most significant strengthening ever of global norms in the intellectual property area. Enforcement of TRIPS obligations amounts to a marked movement toward international harmonization of standards and a definite solidification of the international regime” (Maskus 2000, 16). For the content industries, it represented “a U.S.-led [with support from the European Union] attempt to globalize intellectual property protection through the formation of a common IP regime” that moved copyright and IP to the centre of the global political economy (Doern and Sharaput 2000, 10, 20).<sup>112</sup> TRIPS extended property rights and required high levels of protection, effectively narrowing states’ and firms’ IP options; it was “a significant victory for U.S. private sector activists from knowledge-based industries” (Sell 2003, 7-8).

Unlike WIPO agreements and treaties, TRIPS is backed by the WTO’s dispute-settlement body, which “makes it possible for net copyright exporters (such as the UK and U.S.) to impose cross-sectional trade sanctions on those countries which fail to enforce copyright protection (over the last 10 years various countries – such as Ukraine, India and China – have been threatened with such action)” (Frith and Marshall 2004, 13). The TRIPS also has reach: accession to the WTO – which currently stands at 153 members and 30

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<sup>112</sup> Dutfield and Suthersanen (2008, 34), however, caution against seeing TRIPS as something that was simply imposed on the world. Europe and the United States disagreed on several parts of it, and developing countries “were much more involved in the drafting than they are often given credit for,” getting concessions in 10 out of 73 articles.

observers<sup>113</sup> – requires accession to the TRIPS as a “single undertaking.” Because of its reach, scope and strength, it has become the main treaty governing copyright and intellectual property generally.

TRIPS delivered stronger rights to copyright owners, including a minimum 50-year term of protection, the protection of computer programs and databases as literary works, requirements for rental rights for computer programs, audio recordings and, “to a limited extent, cinematographic films,” as well as neighbouring rights protection for phonogram producers and performers. It also requires “civil, criminal measures and border enforcement” (Maskus 2000, 18). Crucially, it does not cover moral rights, at the request of the United States and its motion-picture industry (Kretschmer and Kawohl 2004, 41).

While TRIPS continues to support the concept of limitations in the rights enjoyed by copyright owners, it also limits significantly the conditions under which countries can limit copyright owners’ rights. TRIPS Article 13 expands the *Berne Convention*’s “three-step test” by limiting exceptions to copyright owners’ rights “to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Although the interpretation of Article 13 is evolving, “the three-step test does not undermine the discretion enjoyed by national legislatures to enact limitations and exceptions so long as they remain consistent with the *Berne Convention* and conform to the objectives the test was formulated to achieve” (Tawfik 2005, 77-78); in doing so, it continues to recognize the view of copyright as a “balance.”

From a governance perspective, TRIPS suffers from a significant flaw: it contains no mechanisms for implementing future changes. Since copyright law historically has not dealt

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<sup>113</sup> World Trade Organization, “Members and Observers.” Accessed December 29, 2010. [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

well with the regular exogenous shocks to which it is subject, the significance of this flaw is obvious. TRIPS may be institutionally strong in the sense of defending the status quo embodied in the agreement, but, dynamically speaking, it is quite weak: it is very hard to reform the TRIPS itself, in any direction. The collapse of the 1999 WTO talks in Seattle, as well as the (at present) failure of the WTO's Doha Development Round, are a testament to this fact. As a result, it is not a useful forum for actors wishing to promote future international copyright treaties.

#### **IV. North American copyright governance: The North American Free Trade Agreement**

While the 1994 NAFTA provides the formal regional institutionalization of the North American economy, including copyright, its significance to North American copyright governance is only partly related to its actual copyright provisions. Although the United States had been actively linking intellectual property to trade since the 1980s, NAFTA “was the first regional trade agreement to expressly entrench intellectual property (IP) standards” (Tawfik 2003, 213). The United States saw NAFTA as a way to push forward talks on what would become the TRIPS Agreement, and as a “fallback position – albeit with respect to Canada and Mexico” should its other initiatives fail (Handa 2002, 416), its copyright-related articles largely parallel the TRIPS.

As discussed in chapter 1, change can occur when purposeful actors link issues and subjects. The copyright chapter of NAFTA is no exception to this observation, especially as it relates to Mexico. As with the TRIPS, the United States used the promise of market access to exact concessions on copyright, primarily from Mexico. Prior to NAFTA and the subsequent 1997 overhaul of Mexico's *Ley Federal del Derecho de Autor*, Mexican copyright had been rooted in the Continental moral rights tradition, which was mainly

concerned with authors' rights, and primarily with their moral rights.<sup>114</sup> Unlike the U.S. and (for the most part) Canadian regimes, Mexico did not focus primarily on copyright as a tradable property right. The U.S. view of Mexico as a potentially lucrative market and a source of "pirated" works (Jones 1996) drove the negotiations. The U.S. largely triumphed, as can be seen by the fact that NAFTA "does not impose any obligations on the United States to give effect to [the *Berne Convention*'s] article 6bis<sup>115</sup> on moral rights, pursuant to NAFTA Annex 1701.3," even as it requires that the three countries adhere to the *Berne Convention*.

This was a "major victory for the United States, because it allows authors to transfer their rights to companies and employees without later disrupting the exploitation of their works to the disadvantage of the holder of the economic rights" (Robert 2001, 52). NAFTA also included several new contractual and related rights, including "the free transfer of economic rights by contract for purposes of their exploitation and enjoyment by the transferee," and recognition of the "work-for-hire concept for works and sound recordings" that form the basis of the American entertainment industries. These changes were "a major achievement for the United States. It reverses the trend in other countries – namely in Europe – where regulations often restrict the transferability of copyright and related rights" (Robert 2001, 53).

Like TRIPS, NAFTA's Chapter 17 establishes a (TRIPS-plus) floor of copyright rules that are, in practice, largely harmonized around the American example. For Mexico, it does so directly in the way it required Mexico to adapt its domestic copyright laws. In the case of Canada, which already had copyright rules similar to those in the United States, the effect was more indirect. NAFTA Annex 2106 continues the Canada-U.S. Free Trade Agreement's

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<sup>114</sup> Mexico's decision to accept U.S. copyright demands is explained in greater detail in chapter 5.

<sup>115</sup> Article 6bis of the 1971 text of the *Berne Convention* provides authors with inalienable moral rights.

(CUSFTA) “cultural exemption” (CUSFTA Article 2005). This Annex effectively exempts Canada’s cultural (i.e., content) industries from NAFTA’s copyright provisions, among others. As it relates to copyright, however, the actual effect of this exemption is minimized by the reality that Canadian law already shared the same general economic orientation of U.S. law, and accorded with most of NAFTA’s specific provisions (Acheson and Maule 1996, 369). Furthermore, the 1993 *North American Free Trade Agreement Implementation Act* “contained a significant number of largely trade-mandated changes to the *Copyright Act*” that followed the NAFTA model (Doern and Sharaput 2000, 106).

NAFTA, like TRIPS, represents the continued privileging of copyright owners, undertaken in order to “establish a (near-) uniform legislative arena within which rights holders can enforce their rights; and ... they are intended to remove restrictions on the flow of commodities across borders.” This approach treats cultural products as commodities and is thus more concerned with the rights of manufacturers than creators (Jones 1996, 345-6). NAFTA “homogenized the copyright environment and adopted rules that enhance the making of contracts in the context of ... new technologies” (Acheson and Maule 1996, 369).

#### **i. NAFTA’s effect on North American copyright governance**

While NAFTA reoriented Mexican copyright law (as discussed in greater detail in chapter 5) and seemed to put the continent on track to a harmonized copyright regime, the structure of NAFTA itself actually constrains the ability to achieve future copyright harmonization, for two reasons related to NAFTA’s institutionalized rules.

First, both global and regional copyright reform is being driven by the United States, which must work within the context of NAFTA. Clarkson (2008) argues that intellectual property (specifically patents, but his study can be extended safely to cover copyright as

well) exists as a global-governance regime, albeit one firmly rooted in Washington. Although mentioned in NAFTA, North American IP policy is more correctly seen in a global, rather than a regional context. Similarly, Acheson and Maule (1996, 366-367) argue that copyright's inclusion ("in great detail") in NAFTA was not the result of regional integration pressures, but, rather, that "the dominant forces for harmonizing copyright were international and technological rather than regional and trade-policy related. The copyright sections of the CUSFTA and NAFTA were part of a worldwide set of initiatives taken to strengthen copyright." In the pharmaceutical IP sector "governance issues connecting U.S. transnational corporations and Canada or Mexico have been played out within the global governance provided by the WTO." In this sector, "North America does not exist as a genuine governance zone" (Clarkson 2008, 301).

While these authors are correct in noting that global institutions are more important in supplying governance than NAFTA, and that "transborder governance is still limited to market actors influencing foreign governments' policy indirectly through lobbying in each national polity" (Clarkson 2008, 360), NAFTA does play an important role in how domestic copyright policy is made in North America. NAFTA applies only to Canada, the United States and Mexico. The United States is the main state actor pushing stronger copyright laws; conceivably, it may act differently towards its neighbours than it would toward non-NAFTA countries.

There are two possibilities. First, NAFTA could foster harmonization. This is the view of Acheson and Maule (1996, 369), who argue that NAFTA was one further step in the "ongoing" harmonization of North American copyright laws on what they imply is an American standard; while NAFTA was focused on Mexico, Canadian copyright law was

already substantially similar to U.S. copyright law. However, it may also be a force for divergence: NAFTA sets *de facto* limits on the ability of states to influence copyright policy in their neighbours. As will be discussed in the next chapter, U.S. governments have depended mainly on trade agreements to convince other countries to adopt U.S.-style copyright and IP regimes, specifically, offering market access (or threatening economic sanctions) in exchange for stronger IP protection. However, because NAFTA effectively guarantees Canadian and Mexican access to the U.S. market, it is much more difficult (but not impossible) to link its demands on copyright to something that its neighbours want. The way NAFTA ties the United States' hands is what makes possible the situation that Clarkson observes, namely, that foreign actors (firms and governments) are reduced to lobbying and moral suasion in order to get what they want. That NAFTA exempts Canada from its copyright obligations (rules that, again, Canada already largely followed) further suggests a capacity for continental policy divergence.

While most regionalization theories focus on the degree to which institutions promote integration (i.e., harmonization) – these theories usually assume that they either do or should – it is more correct to note, as was argued in chapter 1, that institutions *structure* interactions among players, and can therefore be a source of either convergence or divergence in public policy. Indeed, NAFTA was designed explicitly to minimize infringements on members' autonomy: “the refusal of the NAFTA members to include any form of supranationalism in the integration process made it necessary to devise an agreement which was both extremely precise in its wording and comprehensive in terms of subject matter” (Mace 2008, 8).

Institutions, the creations of purposeful actors, can be changed. However, institutions that do not contain rules for managing change, like NAFTA, are likely to be more resilient to

actors' attempts to change them. As a result, NAFTA acts like the "external constitution" of North America, imposing obligations and constraints on the three countries, and the various agents within them (Clarkson 2002a). As a result, rather than fostering policy harmonization, NAFTA functions as a *de facto* mechanism for maintaining difference, which would, after all, be in keeping with its negotiators' stated desires to maintain each state's sovereignty.

#### **V. North American copyright governance: The SPP and the difficulty of regional change**

The second reason why harmonization may now be more difficult is that the rules directly regulating North American governance – NAFTA – cannot be easily modified. The 2005 Security and Prosperity Partnership of North America (SPP) represented an attempt, driven primarily by North American business interests, to push deeper integration forward and to avoid a "thickening" of the U.S.-Canada and U.S.-Mexico borders that could disrupt the continental economy. Following much business-group lobbying, the SPP was announced by the leaders of Canada, Mexico and the United States in March 2005 in Waco, Texas.

In retrospect, the most remarkable thing about the SPP is its limitations. In its first iteration, it consisted of an annual meeting of the leaders of the three countries, and a list of over 300 deliverables, which read like a laundry list of every bilateral and trilateral issue currently in play, from the micro (control of zebra mussels in the Great Lakes) to the macro (a North American steel strategy) (Haggart 2005). Since then, it has narrowed considerably, to the point where, while coordination continues among the three countries, the SPP itself no longer exists in the form it was initially envisioned. Throughout its brief lifetime, however, the three countries were careful to limit the SPP's scope to deal only with regulatory issues; anything that might require legislative approval was not included (Savage 2006). This amounted to an implicit acknowledgement that a straightforward program of deeper

integration would not pass legislative muster in at least one, and likely all, of the three countries.

The SPP's copyright section, for example, was devoted primarily to promoting education and information sharing among stakeholders. Implementation of the WIPO Internet treaties, which would have required legislative changes, was expressly not included. According to Canadian documents obtained through Access to Information, WIPO implementation was included in a preliminary draft, but was absent from the final document.<sup>116</sup> Consequently, the SPP's copyright-related objectives focused on best practices, public outreach to business communities and "measuring piracy and counterfeiting," according to the SPP's Intellectual Property Action Strategy (United States 2007).

While it is unclear which government demanded its removal, logic suggests that it was not the United States, which had already implemented the treaties by then and was the strongest proponent for their implementation by its neighbours. Mexico also seems to be an unlikely source of pressure for their removal, as it had already committed to implementing the treaties. The process of elimination, combined with the fact that the Canadian government, in 2005, had recognized that copyright was becoming a sensitive issue, suggests strongly that the Canadian government was behind the removal of the Internet treaties from the list of SPP deliverables.

The SPP was a response to the fact that NAFTA itself contains no mechanism to allow the three countries to modify it easily. However, while the consolidation of the North American economic space, helped on by NAFTA, created the demand for regional policies, the structure of NAFTA, and the fact that legislative power remained at the domestic "level,"

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<sup>116</sup> Email obtained under Access to Information from Douglas George (DFAIT) to Bruce Stockfish (Canadian Heritage) and Susan Bincoletto (Industry Canada), "Canada's Proposed Commitments under SPP re. International Agreement," May 27, 2005. File Number: ATIP PCH ATI 232-ATI-05/06-250, p. 712.

constrained policymakers in their ability to directly form regional policies.<sup>117</sup> Because the SPP brought together the North American leaders to discuss a wide variety of issues of common concern, it created a forum in which linkage among issues could take place – and such linkage appears to have played a role in the Canadian debate over WIPO implementation<sup>118</sup> – but this effect seems neither to have been systematic, nor (since the SPP itself seems no longer to exist) sustained. As a consequence of the nature of these regional-institutional structures, changes to North American copyright policy must come through domestic institutions and processes.

#### **PART IV: COPYRIGHT AND CHANGE**

Change in copyright is always the result of the actions of purposeful actors deploying ideas, exploiting the protection/dissemination contradiction inherent in copyright itself (i.e., the process of bricolage), and linking issues in support of their preferred style of copyright protection (similar to Campbell's (2004) diffusion concept). As Campbell (2004, 86) notes, the degree of change depends on institutional compatibility, actors' resources, the number and type of allies and the ability to deploy resources to ease institutional constraints.

The distribution of these characteristics varies from case to case, as the following chapters will demonstrate. For example, NAFTA's copyright rules are less important as a constraint for the United States than they are for Mexico. More generally, however, we can note that institutional and policy change can occur in two manners. Change can emerge endogenously, as actors exploit existing tensions among and within institutions and policies. As well, change can emerge from actors' responses to external shocks such as technological change (exogenous change) and to actors working within existing institutions and with

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<sup>117</sup> As the Canadian case study will show, the SPP process did have an indirect effect on Canadian copyright policymaking.

<sup>118</sup> See chapter 4.

existing policies (endogenous change). Each has its own logic. Exogenous shocks – technological change or the foreign imposition of changes to domestic copyright law – can create new copyright interests, challenge the viability of existing interests, and provide new opportunities for groups to pursue change to their advantage. However, these shocks offer only the *potential* for change. Changes in copyright law are driven not just by technological change, but by actors' perceptions of their interests expressed in political contexts (Carroll 2005, 910). The rules governing these activities are the outcome of political debate. Incumbent players, threatened by changes, can attempt to preserve their business models by working to shape the law in a way that blunts the effects of these new technologies. In doing so, they will be countered by groups with conflicting interests and ideas about how this market should be structured.

As important as technological innovations like the printing press and the Internet are for disrupting copyright law, these innovations cannot be separated from their social and historical contexts. Technologies are not politically neutral: they can make it easier for some groups to organize than others, and can create new interests where there were none before; they “are socially constructed.... They are built and deployed inside of social and political contexts that shape what gets designed, by whom, and to what ends” (Gillespie 2007, 69).

While the potential for revolutionary change from exogenous shocks is obvious, and while such shocks (particularly technological ones) are usually thought to drive copyright reform, endogenous change has the potential to be just as revolutionary. Through endogenous change, actors exploit inconsistencies and contradictions within the existing institution of copyright, or between copyright and other institutions. Endogenous change does not create new actors, or change the underlying material logic of production; however, it can allow

actors to redraw the boundaries of copyright to favour one interest or policy objective over another. In this way, it can be just as revolutionary as the types of exogenous technological changes that are usually thought to drive copyright reform.

The period under investigation demonstrates evidence of both endogenous and exogenous shocks. The WIPO Internet treaties clearly were a response to technological change. However, the changes pursued in these treaties, as well as in TRIPS and NAFTA, predate the late-1980s popularization of digital technologies. Instead, they, and the Internet treaties, can be seen as an ongoing battle by copyright interest groups to manipulate existing copyright ideas and institutions to their benefit.

## **PART V: CONCLUSION**

As an historical-institutionalist approach would suggest, copyright is an historically rooted, politically contested institution that has developed along a path-dependent track. Like any other human set of rules, copyright creates winners and losers, privileging certain groups (existing publishers and distributors, bestselling authors, developed countries) over others (emerging creators, users, future distributors and creators, developing countries) within a non-neutral institutional setting. At the same time, however, change in copyright policies and laws can occur in two ways. Actors can exploit the contradictions inherent in copyright, in particular the user/owner balance. They can also attempt to link desired changes to external shocks (for example, technological changes) or external events, such as policymakers' worries about declining economic competitiveness in the case of the United States.

As this chapter has shown, various groups, led by the content industries and working primarily with and through the U.S. government, have worked successfully to implement the TRIPS and NAFTA, which have required countries, including Mexico and Canada, to reform

their copyright laws to bring them into line with the U.S. view of copyright as a tradable, economic right that primarily benefits industry groups rather than creators or “users.” At the same time, the lack of a mechanism to modify these agreements easily has made it difficult for countries to change these treaties to react, for example, to technological changes. Similarly, in North America, NAFTA’s guarantee of access to the U.S. market for Canada and Mexico effectively removes from the United States its most potent carrot to convince these two countries to change their laws. Consequently, it is an open question whether copyright harmonization is inevitable or likely in North America. The experience of the SPP suggests that while harmonization may be possible, it will probably not occur uniformly across the whole continent.

While technological change (i.e., digitization) has threatened the central role of publishers and distributors in the marketplace for creative works, as well as the underlying justification for copyright, copyright persists because it is defended by institutions and interests that draw their power and influence from copyright law. Their political and economic power has at least as much of an impact as technological change in shaping future copyright rules.

Materially, copyright depends for its existence on the groups, namely the content industries, concentrated in the U.S. and the European Union, that own the vast majority of copyrights and that benefit from copyright. They work to preserve, extend and strengthen it in their favour. Since copyright, even more than other types of property, depends on the law for its existence, state governments and international institutions play a crucial role in shaping the outcome of copyright policy debates. Ideationally, copyright’s appeal to

Enlightenment notions of individuality and property make it difficult to change, even as digitization challenges what is meant by these two concepts when it comes to creativity.

In a sense, the popularization of the computer and the Internet is similar to previous technological innovations in that it alters the balance of power among copyright stakeholders and introduces new groups. At the same time, however, it allows individuals to do cheaply in many cases what used to require large companies to do – copy and disseminate creative works. This represents a fundamental challenge to copyright, which was shaped not just by ideas of individuality and property, and the power of publishers, but also by technological constraints. The reaction of the various interests involved in this debate – distributors and publishers, creators, users, as well as the governments of Canada, Mexico, and especially the United States – to the challenges posed by the arrival of the digital age, specifically the negotiation and implementation of the WIPO Internet treaties, will be examined in the rest of this dissertation.

## **CHAPTER 3: THE UNITED STATES, THE WIPO INTERNET TREATIES AND THE SETTING OF THE DIGITAL-COPYRIGHT AGENDA**

### **INTRODUCTION**

A regionally focused historical-institutionalist analysis of the U.S. copyright policymaking process reveals a country whose own policies are almost completely a function of domestic ideas, institutions and interests, rather than regional and, to some extent, international institutions. Furthermore, as can be seen in the discussion of the Internet treaties later in this chapter, the United States and its industries are able to use their economic and political influence to affect international treaties in a way unavailable to smaller countries (Sell 2003, 5). The outcome of the Internet treaties – by design – left the United States free to pursue a vision of copyright reform that reflected domestic institutional biases. Furthermore, key parts of the treaties were also arranged in advance by some of the main U.S. actors.

The first part of the chapter outlines the relevant ideas, institutions and interests that have shaped U.S. copyright policy, and provides an historical overview of U.S. copyright law. The second part analyzes the period covering the initial debate (from about 1993 to 1996) over what became the 1998 *Digital Millennium Copyright Act* (DMCA). The third part presents an historical-institutionalist analysis of the negotiations and outcomes of the 1996 WIPO Internet treaties negotiations, which are intertwined with the domestic U.S. debate. The fourth part returns to the United States to discuss and analyze the conclusion of the DMCA debate, while the fifth part provides a brief epilogue covering post-1998 developments as they relate to Internet Service Provider (ISP) liability and technological protection measures (TPMs) in the United States and internationally. The sixth and final part offers some thoughts regarding the application of historical institutionalism to the U.S. case, and what it suggests about North American regional governance.

## PART I: COPYRIGHT IN THE UNITED STATES<sup>119</sup>

### I. Ideas: Copyright, property and the public interest

The direction of, and tensions inherent in, the U.S. concept of copyright can be traced to Article 1, section 8, clause 8 of the U.S. Constitution. The “Copyright Clause,” which covers copyright as well as intellectual property generally, gives Congress the 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 [copyright] and Discoveries [patents].”<sup>120</sup> In other words, the property right embodied in copyright is justified in public-benefit terms: “the philosophical core of U.S. copyright law is that the individual’s right of ownership is lashed to a societal aspiration” (Gillespie 2007, 22). This framing of copyright as a balance between the need to remunerate authors and the desire to encourage the public good of the dissemination of works shows the influence of the original British 1709 *Statute of Anne*, itself “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.” Similarly, the first U.S. federal copyright statute, 1790 *Copyright Act*, was named “An act for the encouragement of learning.”

Change in U.S. copyright policy has both exogenous and endogenous roots. As was discussed in chapter 1, actors can effect change not only by responding to external events, but also by exploiting tensions inherent within institutions and policies (i.e., substantive and symbolic bricolage).<sup>121</sup> U.S. debates over copyright – both with respect to the 1998 DMCA

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<sup>119</sup> For a timeline of key revisions to U.S. copyright law, see Association of Research Libraries, *Copyright Timeline: A History of Copyright in the United States*, <http://www.arl.org/pp/ppcopyright/copyresources/copytimeline.shtml>, accessed August 3, 2009.

<sup>120</sup> While copyright is a federal responsibility, some states legislate in this area. These cases, however, do not affect the overall direction of U.S. copyright nor are they relevant for the implementation of the Internet treaties.

<sup>121</sup> As noted in chapter 1, bricolage refers to the recombination of “locally available institutional principles and practices in ways that yield change.” It can be either “substantive” (“the recombination of already existing

and historically – largely take place within the ideational confines of the Copyright Clause. Content industries, user groups and other domestic actors exploit the tension, discussed in the previous chapter, between authors’ (in practice, copyright owners) exclusive rights, which are seen as necessary to encouraging production, and the public’s interest in limiting these rights in order to encourage dissemination.

### **i. History of U.S. Copyright Law**

Since the mid-1970s, successive U.S. administrations have supported strong copyright domestically and internationally, a position that enjoys strong bipartisan support in Congress. However, as Knopf (2010) points out, it is probably more accurate to say that the United States is in favour of its version of strong copyright, which reflects its uniquely American balance of interests. In some cases, Canadian and Mexican copyright laws are “stronger” than American copyright law. For example, Mexican moral rights go far beyond what is available in the United States, while Canadian copyright law, unlike U.S. copyright law, contains provisions for payments for performances in small business establishments. The United States is a relatively recent convert to the cause of strong intellectual property (Sell 2003, 60). Like many countries in the years before the 1886 *Berne Convention*, which applied the principle of national treatment to member countries’ authors, the United States initially offered copyright protection only to U.S. citizens. This protection both annoyed British authors and led to the proliferation of (legal) reprints of foreign works and inexpensive magazines and newspapers (Sell 2003, 61).

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institutional principles and practices to address [substantive] problems and thus follows a logic of instrumentality”) or “symbolic,” involving “the recombination of symbolic principles and practices” (Campbell 2004 69). These terms share many similarities with the “policy streams” view of policymaking in the American Political Development field (see especially Kingdon 2003). In this approach, identified problems, policies and political considerations exist independently. Successful “policy entrepreneurs” (or actors) are able to get their preferred policies enacted by linking them to identified problems and political considerations.

Copyright law in the United States, as in other countries, has followed a path-dependent development, increasing in strength and scope over the past 200-plus years in response to lobbying and technological change. Copyright terms have expanded from 14 years with a possible 14-year renewal under the original 1790 *Copyright Act*, to life of the author plus 70 years in 1998. As has happened elsewhere, U.S. copyright expanded to cover new forms of expression and now protects works by U.S. citizens and non-citizens alike. U.S. copyright law offsets these protections in two ways. First, the *Copyright Act* includes specific limitations on owners' rights usually negotiated by groups with a commercial or social interest in limiting these rights. Second, section 107 of the current *Copyright Act* also contains a general "fair use" right, permitting copying without permission "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." While this right has been interpreted fairly liberally, the strength and status of this doctrine in the aftermath of the DMCA is a controversial subject.

## **II. Institutions: Copyright in a pluralist arena**

The bias towards expanding copyright's scope and strength discussed in the previous section is largely a result of the institutional context in which negotiations over copyright policy occurs. U.S. domestic institutions responsible for copyright privilege both actors and specific ideas about copyright, and thus help shape outcomes, including the 1998 DMCA. To understand copyright policy outcomes in the United States requires recognizing two aspects in particular. First, copyright negotiations occur in a largely pluralist setting consisting of inter-industry negotiations that reflect the relative political and economic influence of involved groups. These negotiations are ratified by Congress, which ensures that every involved group's interests are reflected, to a greater or lesser degree, in the final legislation.

Second, and related to the first point, until the mid-1990s copyright was seen in the United States as a technocratic (albeit high-stakes) issue, of interest only to those content industries, creators and copyright lawyers directly affected by copyright law. While general interest in copyright began to rise during the debate over the DMCA, copyright did not emerge fully onto the public political agenda until after the law had already been passed.

In the United States, domestic responsibility for copyright is shared among several institutions.<sup>122</sup> Congress passes legislation, which is either signed or vetoed by the President. Administratively, the lion's share of the domestic responsibility for copyright is shared between the U.S. Copyright Office and the United States Patent and Trademark Office (PTO). While the PTO is an Executive agency, the Copyright Office is actually located in the Library of Congress and is therefore formally a creature of the legislature. As the previous chapter outlines, the Office of the United States Trade Representative (USTR), which is located in the Executive Branch, is the United States' lead international agency on copyright. As they were covered in the previous chapter, this section focuses exclusively on the domestic U.S. copyright institutions.

#### **i. The Copyright Office and the Patent and Trademark Office**

The Copyright Office, housed in the legislature, not the Executive Branch, administers U.S. copyright law. Although registration is not mandatory, the Copyright Office also houses a registry for those wishing to register their copyright. Furthermore, it “administers the mandatory deposit provisions of the copyright law and the various compulsory licensing provisions of the law, which include collecting royalties.”<sup>123</sup>

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<sup>122</sup> Chapter 2 examined those U.S. institutions with a direct responsibility for U.S. international copyright policy.

<sup>123</sup> United States. “United States Copyright Office: A Brief Introduction and History.” Copyright Office. Accessed August 14, 2010. <http://www.copyright.gov/circs/circ1a.html>.

The Copyright Office also provides expertise to Congress and the Executive, analyzing and drafting legislation and reports. Alongside the Department of State, the USTR and the Department of Commerce, it provides expertise in multilateral trade negotiations and “provides technical assistance to other countries in developing their own copyright laws.”<sup>124</sup> Formally, the PTO focuses on IP generally, advising the President, the Secretary of Commerce and U.S. government agencies on IP “policy, protection, and enforcement; and promotes the stronger and more effective IP protection around the world.”<sup>125</sup> However, Bruce Lehman,<sup>126</sup> a particularly effective PTO Commissioner, pushed the PTO to the centre of the story of the DMCA and the Internet treaties, temporarily surpassing the Copyright Office as the primary U.S. governmental organization focused on copyright.

Observers agree that the U.S. institutional position on copyright is relatively consistent across agencies. While those interviewed for this dissertation agreed that the Copyright Office and the PTO generally treated their industries fairly, they also agreed that the two offices generally share what copyright lawyer Seth Greenstein, whose background includes involvement in the negotiations of the WIPO treaties on behalf of the consumer-electronics industry, calls a “pro-proprietor” approach to copyright. This approach is itself the result of the shared view “that copyright is better promoted by ensuring proper economic incentives” for copyright owners, and a privileging of content industry issues over “the opportunities for personal use that are opened by digital technology” (Greenstein, interview by author, July 9, 2008). In the congressional hearings for the DMCA, both Bruce Lehman and Marybeth Peters, Register of Copyrights and head of the Copyright Office, were very

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<sup>124</sup> United States. “United States Copyright Office: A Brief Introduction and History.” Copyright Office. Accessed August 14, 2010. <http://www.copyright.gov/circs/circ1a.html>.

<sup>125</sup> United States. “The U.S. PTO: Who We Are.” Patent and Trademark Office. Accessed December 30, 2010. <http://www.uspto.gov/about/index.jsp>.

<sup>126</sup> On whom much more below.

supportive of the Bill that eventually became the DMCA, with the Copyright Office urging “prompt ratification of these treaties” (cited in Herman and Gandy, Jr. 2003, 138).

## **ii. Copyright and Congress**

Congressional divisions on copyright tend to reflect regional and industrial divisions, not partisan ones. The most powerful supporters of stronger copyright come from areas like Nashville and Hollywood where the content industries are the most prominent (Schneider, interview by author, July 25, 2008). For example, House Resolution 2281, whose content formed the basis for the eventual DMCA, was introduced in the House of Representatives in July 1997 by two Democrats (John Conyers and Barney Frank) and two Republicans (Howard Coble and Henry Hyde). In the House of Representatives, the Democratic party is home to one of the most powerful advocates of the motion picture industry and strong copyright (Howard Berman of California) and, until the 2010 midterm elections, the most effective supporter of the myriad groups advocating for a more “balanced” approach, such as the consumer-electronics industry (Rick Boucher of Virginia).<sup>127</sup> In the Senate, copyright lawyer Jonathan Band remarks that the support of Utah Republican Senator Orrin Hatch’s (chair of Senate Committee on the Judiciary during the DMCA hearings) for a reverse-engineering limitation in the DMCA arose from his familiarity with the Utah-based Novell Corporation (Band, interview by author, June 20, 2008).<sup>128</sup>

Although U.S. copyright negotiations are long, complex and contentious process, the underlying rules are relatively straightforward. U.S. copyright policymaking is a pragmatist’s

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<sup>127</sup> Both Berman and Boucher were active in the DMCA debate. Rick Boucher was defeated in the 2010 mid-term elections. The potential consequences of this defeat for future copyright reform are discussed in the epilogue to this chapter.

<sup>128</sup> Reverse engineering refers to the process of taking something apart (hardware or software) in order to determine how it works. It is an important means to realize innovations and, in the case of computer programs, to allow for interoperability across computer systems.

game, involving tradeoffs among various interest groups that have a seat at the table. Analyses of the U.S. copyright policymaking have described a process that is almost stereotypically pluralist in its orientation. That the overall institutional structure of this process should be pluralist is not completely unexpected, given that pluralism itself was developed to describe the U.S. policymaking process (Truman 1951). Truman's seminal analysis saw U.S. politics as involving competing claims of interest groups, easily characterized as "government policy reflect[ing] the vector of forces created by different pressure groups" (Cameron and Morton 2002, 788). Traditional pluralist accounts of policy formation<sup>129</sup> fall short in several areas, particularly from an historical-institutionalist perspective. These areas include traditional pluralism's lack of accounting for the quasi-independent nature of institutions, and the way institutions and "rules of the game" both shape and are shaped by actors.<sup>130</sup> For example, the outcome of the DMCA debate was affected by the presence of certain individuals and institutional characteristics. These include inter-committee battles for control of the copyright issues that go beyond a simplistic pluralist account.

While pluralism as a political theory is somewhat lacking in this case, pluralism (albeit a pluralist system in which relative political influence with Congress matters) remains an apt description of how copyright laws traditionally have been created in the United States. Pluralism as a political theory is individualist in orientation and ahistorical, with institutions treated merely as "necessary scaffolding for interest group activities and for 'game forms'"

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<sup>129</sup> E.g., Easton (1965).

<sup>130</sup> Though see Dahl (1978) for an account of pluralism that sees institutions as both independent and emerging from political society. See Orren and Skowronek (2004) for an historical-institutionalist approach to U.S. politics from the American Political Development approach. Other issues with pluralism as a theory include whether overlapping membership in groups moderates politics (Fiorina 2002, 530), and the importance of relative political and economic influence.

(Orren and Skowronek 2004, 18). However, in the case of copyright, Congress has consciously designed a legislative process based on the pluralist model. As Litman (2006) documents extensively, copyright-law reform has, since the early 1900s, involved inter-industry negotiations overseen by a state that acts an arbiter, ratifying the consensus reached by the players at the table. This process, which Litman dates to the negotiation of the 1909 *Copyright Act*, emerged in response to “the dilemma of updating and simplifying a body of law that seemed too complicated and arcane for legislative revision” (Litman 2006, 36). Historically, Congress’ role has mainly been to ensure that all affected industries are represented in negotiations. This scenario has been repeated regularly up to the present day: only the specific participants and the technology have changed.

Congress has been neither completely absent nor neutral in this process. According to Greenstein, up until the mid-1980s, Congress played the role of a “genuine arbitrator between” the various interests, and “would take various proposals, analyze them, and synthesize their own [view] of what they thought proper policy would be.” Since then, and especially since the 1992 *Audio Home Recording Act*, “more often than not, what you will hear from legislators is: ‘When you [interest groups] agree, come back with the language’” (Greenstein, interview by author, July 9, 2008).

Though this process requires competing interests to negotiate amongst themselves to achieve a sort of balance, Congress itself tends to be biased toward the content industries rather than copyright users like libraries, universities and consumer-electronics groups. This bias towards stronger copyright can be seen in the one-way tendency to strengthen and extend copyright law to cover ever-more creative works. For example, in 1998, the *Sonny Bono Copyright Term Extension Act* (named after former Cher partner and then-recently

deceased Representative) retroactively extended the term of protection for copyrighted works from life of the author plus 50 years to life plus 70 years. As Boldrin and Levine (2008, 251) note, there is no possible economic or philosophical justification for retroactive term extensions other than as a granting of a rent-seeking windfall to owners of copyrighted works, such as Disney (which led the lobbying for the extension (Laing 2004, 78)), leading them to conclude that Congress has been “bought and paid for” by the content industries. It was not lost on critics that this law was enacted just as the copyright term of Disney’s prize asset, Mickey Mouse, was about to expire, and the law has become widely known as the *Mickey Mouse Protection Act*. Events subsequent to the period covered by this dissertation also suggest a copyright-owner bias. In 2008, when fair-dealing proponent Boucher was slated to take over the Judiciary Committee’s Intellectual Property Subcommittee from the pro-IP Berman (who had moved on to chair the more prestigious House Foreign Affairs Committee), Congress eliminated the committee (the Judiciary Committee was chaired by John Conyers, himself a big supporter of the content industries). Following Boucher’s defeat in the 2010 midterm elections (discussed in the epilogue to this chapter), the committee was reinstated (Techdirt 2010).

### **1. Effects of inter-industry negotiations**

The defining characteristic of the U.S. copyright policymaking regime since at least the early 20<sup>th</sup> century has been structured inter- and intra-industry negotiations over the content and direction of copyright law within an institutional setting that ratifies the resulting compromise. For example, in 1905, existing copyright interests, namely composers and music publishers worked to exclude the “then-youthful phonogram industry” and the motion picture industry from negotiations and to put that industry at a disadvantage. While initial

legislative proposals would have ignored their interests, in 1908, all interested parties sat down together and were assured that if every industry could agree on a bill Congress would pass it. The result was the 1909 *Copyright Act* and a legislative process that endures to this day (Litman 2006, 39-41).

Generally, any given actor's ability to influence policy outcomes depends on its access to resources, including personnel, money, access to officials and political and economic importance (Campbell 2004, 86). U.S. copyright law reflects the interests and relative strength (economic and political) of those who have been invited to the table. Generally, already-established groups have the advantage over upstarts, and specific interests (i.e., industries) generally outclass the overall "public interest," and every invited guest does better than the wallflowers.

This style of copyright negotiations historically has been successful in incorporating traditional and new interests, from the sound recording industry to photocopier producers and (as will be seen with the DMCA negotiations) telecommunications companies. However, the process, almost by definition, excludes what can be defined loosely as the "public interest," leading to narrow exceptions that are traded off against one another (Litman 2006, 25). Similarly, the interests of those groups that have yet to be created by future technological change, such as the motion picture industry in 1909 and VCR makers in 1976, are also poorly represented. The end result is a process in which negotiators take pains to protect their existing business models against potential future challengers, using terminology (i.e., narrow exceptions) that could be undermined easily by evolving technology (Litman 2006, 47-48). This process also provides existing interests with the ability to block unsatisfactory legislation and with incentives to trade rights for exceptions, until a consensus that leaves no

existing party worse off than before is reached. This “potential surplus ... most often comes at the expense of outsiders” (Litman 2006, 23).

This type of zero-sum negotiation among groups with specific interests at stake has resulted in a brittle law that has required renegotiation with every new technological advance that creates a new interest group upsetting the status quo. Furthermore, every technological change, be it the invention of motion pictures, the photocopier or the computer has increased the complexity of copyright negotiations, since every technological change has increased the number of stakeholders wanting to be heard, making it harder to come to an agreement (Kupferschmid, interview by author, July 1, 2008). Unsurprisingly, the end result of this institutionalized-pluralist style of negotiations is legislation that is littered with the narrow exceptions required to get all involved to agree to the final draft.

### **III: Interests: All animals are equal, but some are more equal than others**

U.S. copyright policy, then, is made within an institutional process based on inter-industry negotiations. The debate over what copyright should look like is framed by Congress, based on the Copyright Clause, in which “the individual’s right of ownership” coexists uneasily with copyright’s “societal aspiration” related to the promotion of education (Gillespie 2007, 22). In Doern and Sharaput’s (2000) terminology, and as in other countries, U.S. copyright involves a balance between copyright’s “protection” and “dissemination” functions.

Within these parameters, various interests compete to promote their view of what U.S. copyright (and, by extension, the U.S. foreign-policy position on copyright) should look like and where the balance will fall. In the United States, as elsewhere, one can divide copyright interests into two main groups: those that favour stronger protection and those that

favour the dissemination function of copyright. These categories are analytical in nature, as groups in both camps may have objective or conflicting interests in “protection” and “dissemination.” While the protection side tends to dominate for reasons of political and economic clout, groups on both sides of the debate must be accounted for.

Four main groups were most prominent in the debate that led to the 1998 DMCA’s provisions on TPM and ISP liability. On the protection side were the content industries. On the dissemination or user side, were three main groups: industries such as telecommunications companies, consumer-electronics industries, large-scale ISPs, large institutional interests like research libraries; and civil-society groups, including academics and some lawyers.

## **i. Interests promoting protection**

### **1. The content industries**

Of these groups, the content industries were the most important in the DMCA debate. In the United States, copyright policy is driven largely by the content industries. These include the lobbies representing primarily the motion-picture industry (the Motion Picture Association of America (MPAA), generally seen as the main proponent of stronger copyright rules), the music industry (the Recording Industry Association of America, (RIAA)) and the computer software industry (the Business Software Association, (BSA)), as well as the video game industry (the Entertainment Software Association, (ESA))<sup>131</sup> and the publishing industry (the Association of American Publishers, (AAP)). Generally, they have favoured stronger copyright protection, maximalist legal protection of TPMs and strong rules regarding ISP liability.

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<sup>131</sup> While more important in later years, the ESA was not active significantly in the run-up to the 1998 DMCA.

As Kingdon (2003, 46-53) recounts, an interest group's success is at least partly dependent on its resources, which include the ability to affect electoral outcomes, economic importance and the ability to be heard (in the words of one of Kingdon's interviewees, "the louder they squawk, the higher it gets"). The success of the content-industry lobby can be explained by several factors, only one of which (and not even the most important) is its actual financial importance to the U.S. economy. The International Intellectual Property Alliance (IIPA), which represents U.S. content industries, claims that in 2006, the "core"<sup>132</sup> content industries accounted for 6.4%, or \$837.3 billion of overall U.S. gross domestic product (GDP), while "total" content industries – a very permissive definition that includes computer manufacturing, administrative services and wood and paper products, accounted for 11.0%, or \$1.4 trillion, of U.S. GDP (Siweck 2008, 9).<sup>133</sup> However, political lobbying has also been important to their success. As was described in chapter 2, U.S. content industries and IP industries generally have successfully argued that theirs are globally strategic industries for the United States, essentially linking their wellbeing with perceptions of overall U.S. economic strength. In addition to their perceived and actual economic importance,

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<sup>132</sup> Defined as "those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials. These industries include books, newspapers and periodicals, motion pictures, recorded music (including both music and sound recordings), radio and television broadcasting, and computer software (including both business applications and entertainment software) equipment whose function is primarily to facilitate the creation, production, or use of works of copyrighted matter" (Siweck 2009, 9).

There are reasons to believe that the 6.4% of GDP calculation is somewhat misleading, as it includes industries, notably the content industry, whose perspective on copyright is quite different from that of the traditional content industries. As well, the Computer and Communications Industries Association (2007, 44) has fired back at the IIPA with its own statistics, claiming that in 2006 "fair use" industries – those that depend on limitations on copyright rather than on copyright itself – contributed \$4.5 trillion to the U.S. economy (\$2.5 trillion from "core" and \$2.0 trillion from "non-core").

<sup>133</sup> Total content industries are defined as the core industries plus "industries in which only some aspect or portion of the products that they create they can qualify for copyright protection. These industries range from fabric to jewellery to furniture to toys and games," and "industries that distribute both copyright and non-copyright protected materials to business and consumers. Examples here include transportation services, telecommunications and wholesale and retail trade, ... only a portion of the total value added by these [latter] industries is considered to be part of the content industries" (Siweck 2009, 9).

content-industry lobbies like the MPAA and the RIAA have the luxury of focusing on one issue that can be summed up in a few words: stronger copyright protection. In contrast, “user” groups must frame their arguments in terms of “balance,” in which ownership rights must be balanced against rights of use. Where content industries can argue that more is always better, user groups must be more nuanced in their policy prescriptions. As well established, well-funded lobbies that can put forward a relatively simple, coherent message in a way that other industries or public-interest groups cannot, the content industries receive “a lot of deference,” according to Jennifer Schneider, legislative counsel to then-Representative Rick Boucher, a leading supporter of fair-use legislation in Congress until his defeat in the 2010 midterm elections (Schneider, interview by author, July 25, 2008). The content industries, and the motion picture industry in particular, can also draw on cultural resources that dwarf their actual economic contribution to the U.S. economy. As copyright lawyer Seth Greenstein remarks, motion pictures are more “quintessentially American,” while “technology is much more international” (Greenstein, interview by author, July 9, 2008).

Recognizing that debates over copyright and intellectual property are “ultimately ... narrative [battles] where the struggle is to define meaning and control the discourse” (Halbert 2005, 8) and thus are subject to symbolic bricolage, the content industries have worked valiantly, and with no small success, to rhetorically define copyright as equivalent to real, physical property (Patry 2010). The common reference to unauthorized individual downloading as “piracy,” a term that conflates commercial-scare lawbreaking and high-seas nastiness with non-commercial activities is a result of the rhetorical efforts of individuals such as the late Jack Valenti, former chair of the MPAA, pre-eminent copyright lobbyist and undisputed master of copyright hyperbole, promoting the idea that rights in copyright are

equivalent to rights in physical goods.<sup>134</sup> Overall, this combination of cultural capital, economic and political influence, and the successful linkage of the welfare of the copyright/IP industries to perceptions of U.S. international economic competitiveness have allowed the content industries to position themselves to drive (although not dictate) the U.S. copyright agenda, as well as copyright perceptions.<sup>135</sup>

## **ii. Interests promoting dissemination**

Against the content industries, one finds a variety of interest groups whose interests run toward greater protection of users' rights. These include the consumer electronics (CE) industry, research libraries, electronics wholesalers, the telecommunications industry (notably ISPs, but also including telephone companies, and television and radio broadcasters) and public-interest groups. While several of these groups had previously been involved in the negotiations, the DMCA debate that began around 1993 and ended with the bill's passage in 1998 was the first time ISPs and public-interest groups took a strong interest in copyright reform.

These groups lack the single-message and single-issue focus of the content industries. The content industries can focus on promoting stronger copyright, which provided the foundation for their entire scarcity-based business model. However, the primary business concerns of the CE industry, for example, extended beyond copyright and intellectual

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<sup>134</sup> It is hard to understate Valenti's penchant for hyperbole, some of it remarkably offensive. In 1982, when the MPAA was concerned that the VCR would drive Hollywood out of business (rather than act as its saviour, which is what actually happened), Valenti claimed, before Congress "that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone" (cited in Patry 2010, 145). Valenti's evocation of murdered women in defence of his industry's bottom line makes the "pirate" slur leveled against individual computer users who have never hijacked a boat or taken anyone hostage seem benign and enlightened in comparison.

<sup>135</sup> In terms of Kingdon's (2003) "policy streams" model, the content industries (policy entrepreneurs) were able to use their resources to link their preferred policy (stronger copyright protection) to a perceived problem (waning U.S. economic competitiveness) and to exploit the national concern about economic competitiveness to convince Congress (the political "stream") to place strong copyright at the very heart of the U.S. trade agenda. In Kingdon's jargon, concerns about declining U.S. economic power opened a "policy window" that allowed these groups to promote successfully their preferred policy option.

property to include such issues as competition policy and product standards. Furthermore, not all consumer-electronics products directly involve copyright concerns. Even their interest in copyright is not necessarily completely focused on minimizing its burden: that their products are covered by patents, another form of IP, provides them with mixed incentives regarding whether IP should be strengthened or weakened.

### **1. The telecommunications industry**

Of the groups joining the copyright debate at the time of the Internet treaties, the telecommunications industry and ISP providers by far had the most significant impact on the process. With revenues of US\$190 billion in 1995, the telecommunications sector represents a significant part of the U.S. economy.<sup>136</sup> To provide a sense of perspective, in 2002 the motion picture and sound recording industries posted US\$78 billion in revenues, against US\$412 billion for the telecommunications industry.<sup>137</sup> While they were new to the issue, as large companies (including such stalwarts as AT&T and Bell Atlantic (now Verizon)) they had significant resources to spend to lobby for their positions and were well represented during the DMCA hearings before the Commerce and Judiciary Committees, with five out of 37 witnesses appearing, not counting allies in other industries (Herman and Gandy, Jr. 2006, 135).

As the firms over whose networks Internet traffic flowed, their main interest was in avoiding liability and responsibility for their customers' actions. The telecommunications industry unquestionably had a significant effect on the DMCA and the WIPO Internet treaties. Despite their inability to focus only on one issue, the telecoms are not insignificant

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<sup>136</sup> Figures from U.S. Census Bureau, 2010 Statistical Abstract. Accessed December 30, 2010. [http://www.census.gov/compendia/statab/cats/information\\_communications/telecommunications.html](http://www.census.gov/compendia/statab/cats/information_communications/telecommunications.html)

<sup>137</sup> Figures from U.S. Census Bureau, Industry Ratios by Subsector. Accessed December 30, 2010. <http://www.census.gov/econ/census02/data/ratios/USRATI51.HTM#N517>.

players in Washington: in the DMCA debate, the telecommunications industry was seen as being more important than other user groups (Litman 2006, 126). The eventual DMCA hinged on a compromise between the content industries and the ISPs, trading strong TPM protection for an ISP-liability regime favourable to the telecommunications industries.

Some groups' interests are not necessarily easy to determine. Gillespie (2007) notes the potential for change in the CE industry's views on copyright. While the consumer-electronics industry's interest in being able to create devices that allow consumers to watch and copy copyrighted works is similar to the social good promoted by the concept of fair use/fair dealing, vertical integration of content and consumer-electronics companies may realign the industry's interests. According to Band, who was involved in the drafting of the DMCA and has represented clients including Internet companies, providers of information technology, universities, and library associations, the relative importance of fair use in vertically integrated companies "depends on the company." While Google, Verizon and Yahoo! have been relatively consistent in their approach to fair use, for "Microsoft it depends on the part of the company" to which one is talking (Band, interview by author, June 20, 2008).

## **2. The public interest**

Comparing the efforts of the telecommunications industry with those of "public interest" groups demonstrates the validity of Olson's (1971) observation that smaller, richer, more-focused groups have an organizational advantage over larger but poorly coordinated groups, such as consumers. Various industry groups' interests may coincide with the public interest, but this alignment is coincidental and contingent. Congress, which should represent the public interest, had agreed as far back as 1909 to rubber stamp legislation agreed to in

inter-industry talks (Litman 2006, 51-52). However, were “the public” (however one wants to define the term) to take an interest, it would still be at a disadvantage with more focused, better-funded lobby groups. It is difficult, if not impossible to identify *all* affected groups, especially as changes in copyright technology increase the number of affected groups. Although some groups claimed to represent the public interest in certain narrow areas, during the 1976 overhaul of the *Copyright Act*, “the citizenry’s interest in copyright and copyrighted works was too varied and complex to be amenable to interest-group championship”; it was “not somehow approximated by the push and shove among opposing industry representatives” (Litman 2006, 52).<sup>138</sup>

The DMCA debate marked the first time that groups and individuals were involved who represented something other than the narrow interests of interested industry and institutional groups such as libraries. Consumer interests had been present in previous debates, but not in the same way. Just as the content industries often use friendly artists to claim that they are acting in the best interests of creators, the consumer-electronics industry has also used consumers to make similar arguments. For example, in the early 1990s the Home Recording Rights Coalition, an “advocacy arm” of the electronic industries association, was created “to intervene in these sorts of copyright battles on behalf of consumer rights interests and the interests of consumer electronics manufacturers” (Greenstein, interview by author, July 9, 2008).<sup>139</sup> New public interest groups that arose in opposition to the DMCA were more autonomous from existing interests than they had been in this previous debate.

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<sup>138</sup> These public-interest groups are the spiritual descendants of Ralph Nader’s Public Citizen organization, created in 1971.

<sup>139</sup> While this group continues to exist, it was most active in the early 1990s and the *Audio Home Recording Act*.

The debate over the DMCA and the Internet treaties also broke open the technocratic, inter-industry negotiations to involve consumers and groups representing what could be thought of as a public interest; that is, an interest that could not easily be reduced to the defence of a particular industry. In particular, a group of concerned lawyers helped to coordinate a coalition of library groups, online service providers, consumer organizations, writers' organizations, computer hardware manufacturers, Internet civil liberties groups, telephone companies, educators and consumer electronics manufacturers under what was called the Digital Future Coalition (DFC). However, their influence on the final legislation was limited.

#### **IV. Summary: Historical institutionalism and U.S. copyright policymaking**

As the historical-institutionalist model outlines, interests' ability to change policies depends on their resources and their ability to engage in symbolic and substantive bricolage. Within the parameters set by the Copyright Clause of the U.S. Constitution, U.S. content industries have tended to support the protection side of copyright. They do so by exploiting the protection-dissemination contradiction inherent in copyright, as well as the technological shocks that occasionally upset the copyright status quo. On the dissemination side, traditional user groups such as libraries cannot match these resources, while other groups, such as the consumer electronics industry, do not have the singular focus on copyright of the content industries. Among the dissemination/user groups, the telecommunications industry, a new but politically and economically significant industry, stands out as a particularly powerful interest.

Crucially, this debate occurs within an institutionalized policymaking process that tends to favour established actors and those with specific interests over less influential actors

and groups (such as those representing what could be thought of as the overall societal interest in copyright). The content industries have tended to drive the debate, although other groups must also be accommodated. In the case of the Internet treaties, the telecommunications industry in particular is an important, economically powerful newcomer to the debate.

This analysis has been silent on regional and international institutions and actors for the simple reason that, with some small exceptions, their influences have been overshadowed by domestic institutions and practices. North American Free Trade Agreement (NAFTA) copyright provisions, which entered into force in 1994, reflected existing U.S. laws and preferences. While various U.S. actors attempted to use WIPO to influence domestic copyright debates, the next part of this chapter argues that this attempt at policy laundering may have been audacious, but it did not significantly modify the outcome that we would have expected had the Internet treaties never been negotiated.

Based purely on what had come before, and even without considering the wrinkle of the Internet treaties, one would expect the technological shock of digital and computer technology to result in legislation that favours the content industries and further expands copyright protection, while providing specific exceptions to individual interests. In other words, one would expect the same process that had been active since 1909 to yield laws on TPMs and ISP liability that primarily address the concerns of the content industries, with exceptions allowed to other groups depending on their political and economic clout. True to form, and despite an eventful detour to Geneva for the Internet treaties, this is exactly what happened.

## **PART II: 1993-96: U.S. COPYRIGHT REFORM AND THE IMPORTANCE OF BEING LEHMAN<sup>140</sup>**

One of the appealing aspects of historical institutionalism is the agency it allows individuals and interest groups. Actors may have specific interests, and they may act within specific institutional contexts that condition their actions, but they can also try to change the rules of the game. In U.S. copyright policymaking, the central rule since 1909 has been inter-industry consensus: there may be a bias toward the content industries in the resulting legislation, but each industry's interests had to be represented. No consensus, no legislation.

The process that led to the DMCA was characterized by just such an attempt to change the rules, led by a well-placed ally of the content industries, to circumvent this process in favour of the content industries through a series of events that included an attempt to launder a pro-content-owner policy through WIPO in the form of the Internet treaties.<sup>141</sup> The focus of both the WIPO Internet treaties and the U.S. DMCA was largely the result of the efforts of one man who was in the right place at the right time to influence both domestic and international copyright policy. Bruce Lehman, a former representative of the computer software industry on copyright issues (Litman 2006, 90) was Democratic President Bill Clinton's Under Secretary of Commerce for Intellectual Property and Commissioner of the PTO from 1993 to 1998, as well as the chair of Clinton's Information Infrastructure Task Force's (IITF) Working Group on Intellectual Property, whose purpose was to formulate U.S. copyright policy for the "Information Superhighway." Importantly, he was also the main U.S. representative to WIPO.

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<sup>140</sup> This section draws on chapters six and seven of Litman (2006).

<sup>141</sup> For accounts of this policy-laundering episode, see especially Litman 2006; Samuelson 1997; and Herman and Gandy, Jr. 2006.

A forceful personality described by one technology-company lobbyist as a “petty tyrant,” who “knew more copyright law than anyone else in the government” (Interview by author), Lehman made copyright a primary concern of the PTO, building up its staff of copyright lawyers. Kupferschmid, who worked with Lehman at the PTO and helped negotiate the WIPO Internet treaties, attributes Lehman’s interest and desire to run American copyright policy out of the PTO both to his background on copyright and his view that the PTO, as an Executive agency, rather than the Copyright Office, a Congressional agency, should set American IP policy (Kupferschmid, interview by author, July 1, 2008). Lehman’s place at the centre of U.S. and international copyright reform allowed him to influence strongly domestic and international copyright policy. His work on the IITF allowed him to see “the need for legislation in the United States, and also the need for international protection, because the Internet as a global network is only as strong as its weakest link (Greenstein, interview by author, July 9, 2008).

Lehman’s vision of what had to be done to address digital-copyright issues and the Internet was, by all accounts, heavily biased toward the content industries. As chair of the IITF’s IP Working Group, he produced the September 1995 “White Paper” titled *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*. This paper represented the policy position of the Clinton Administration on what U.S. intellectual property should look like in the digital age and was the foundation for the U.S. position during the negotiations over the Internet treaties. It was also overwhelmingly focused on copyright: Although it was supposed to address all forms of intellectual property (Department of Commerce 1995, 2), 135 of its pages concerned copyright, and only 19 addressed patents, trademarks and trade secrets, combined.

Lehman's Working Group was extensively criticized as being too favourable to the content industries. His senior staff, which included former copyright lobbyists for the computer and music and recording industries, controlled the process, maintaining extensive informal communication with private-sector copyright lobbyists (Litman 2006, 90). The Working Group's membership, which came from across the government and the Executive, complained that they were effectively shut out of the process: "all decisions were made and all documents were drafted by the commissioner and his senior staff without any consultation (Litman 2006, 90). The 1995 White Paper reflected these biases. Despite some conciliatory language, the White Paper betrays an overwhelming emphasis on protecting the rights of copyright owners and reflected a vision of creative "works" as tradable products. Users' rights were treated as a residual.<sup>142</sup> It proposed that copyright owners be "given control over every use of copyrighted works in digital form by interpreting existing law as being violated whenever users make even temporary reproductions of works in the random access memories of their computers," and that online service providers become "copyright police," enforcing copyright law. On TPMs, it proposed attaching "copyright management information to digital copies of a work ensuring that publishers can track every use made of digital copies and trace where each copy resides on the network and what is being done with it at any time," and protect every work technologically ... and make illegal any attempt to circumvent that protection (Samuelson 1997, 8). This legal protection for TPMs would have represented a completely new right, signaling an even further reorientation of the U.S. copyright regime away from a protection-dissemination balance toward the protection of owners at the expense of users.

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<sup>142</sup> See Samuelson (1997, 8) for a further list of the White Paper's most radical changes.

The White Paper's recommendations represented a departure from the traditional process of inter-industry negotiations that had characterized previous efforts to negotiate copyright reforms. However, in the U.S. system, a one-sided Executive Branch White Paper is not enough to settle the issue, and once the issue reached Congress, it ran into immediate difficulty with those groups that previously had been sidelined, as well as with their representatives.

Despite bipartisan support for the ensuing White Paper legislation, HR 2441, the *NII Copyright Protection Act of 1995*, introduced in December 1995, groups that had been excluded from the process, such as “library groups, online service providers, consumer organizations, writers’ organizations, computer hardware manufacturers, Internet civil liberties groups, telephone companies, educators, consumer electronics manufacturers, and law professors,” mounted a fierce opposition to the bill. As a result, it was stalled at the House Judiciary Committee (Litman 2006, 122; Samuelson, 3).<sup>143</sup>

This opposition occurred under the umbrella of the Digital Future Coalition (DFC), which represents the first major foray of “public interest” groups into the U.S. copyright debate.<sup>144</sup> The brainchild of Peter Jazi, a law professor at American University in Washington, the DFC initially brought concerned lawyers and library organizations, and, later, members of the technical community who actually understood what the Internet was, to oppose the bill. Initially, its main effect was to raise the temperature on the issue.<sup>145</sup>

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<sup>143</sup> This legislation was introduced in December 1995 by Carlos Moorhead (Republican of California), Patricia Schroeder (Democrat of Colorado) and Coble (Republican of North Carolina).

<sup>144</sup> A current list of DFC members can be found at [http://www.dfc.org/dfc1/Learning\\_Center/members.html](http://www.dfc.org/dfc1/Learning_Center/members.html), accessed November 28, 2010.

<sup>145</sup> Seth Greenstein's experience during the run-up to the WIPO Internet treaties negotiations offers another interesting foreshadowing of the effect civil society would have on the copyright debate. As a representative of the electronics industry, Greenstein posted nightly reports to a mailing list called Cyberia, “which is mostly [for] lawyers and professionals who are interested in this sort of thing, and legal practitioners as well.” The result was “a kind of real time history of what was happening” at the WIPO meetings. In the age of liveblogging

Foreshadowing online anti-copyright protests in Canada a decade later (see chapter 4), the DFC used the Internet to communicate and coordinate their activities, and to publicize the issue (Litman 2006, 122-125). The resulting uproar led to more traditional negotiations among the content industries, the telecommunications industry, computer and consumer electronics manufacturers, and libraries (Litman 2006, 126). However, while the DFC successfully linked these groups and worked behind the scenes to coordinate positions, it wasn't represented "at the copyright negotiating table. Supporters of the legislation essentially ignored them" (Litman 2006, 127).

The end result was a stalemate (Band, interview by author, June 20, 2008). This outcome – stalemate because of an inability of all sides to reach consensus – was very much in keeping with the pluralist mode of negotiations that typically has characterized U.S. copyright policymaking when the sides could not reach a compromise. In an inter-industry negotiation setting, it is relatively easy to block legislation. Going forward, the attempt to use an international treaty (in this case, two treaties) to influence domestic policymaking was a novel, if only partially successful, maneuver.

### **PART III: 1996: THE WIPO INTERNET TREATIES**

Originally, Lehman had planned to build bipartisan support for his White Paper to get legislation introduced in the House and Senate by the end of September 1995, with the bill to be passed in time for the WIPO Committee of Experts' meeting on the proposed treaties in February or May 1996, with U.S. legislation forming the American position. At WIPO, Lehman and the United States would work to instigate, marshal support for and conclude treaties supporting the White Paper-based agenda – including the treatment of temporary

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and Twitter, Greenstein's actions seem routine, almost banal. In the mid-1990s, however, it was nearly unheard of (Greenstein, interview by author, July 9, 2008).

digital copies in computer memory like any other reproduction, and the banning of devices that could circumvent TPMs (Samuelson 1997, 42-43). However, faced with a domestic stalemate, he decided to tackle his problem in reverse. Lehman, also the head of the U.S. delegation to the WIPO Committee of Experts charged with creating the draft treaties, did not shift the U.S. negotiating position on the WIPO Treaties. “Bruce Lehman went to Geneva and got [his digital agenda] included in the treaty there and then he came back and said, ‘Oh, we need to implement the treaty’” (Band, interview by author, June 20, 2008).

According to Greenstein, who attended the WIPO negotiations as a representative of the consumer-electronics industry, “I think there was also some feeling of kind of a triangulation occurring here. Where, the best way for the content owners to achieve their goals in the United States was to be compelled to increase protections domestically through an international treaty instrument.” Asked if the intention was to use the treaties to create the need to change the laws at home, Greenstein replied, “I would say that that is consistent with my personal experience” (Interview by author, July 9, 2008).

While this may have been Lehman’s intention, accomplishing this objective required transplanting the U.S. debate over copyright from a domestic legislative arena to a well-established international treaty-making organization. As an international organization that has existed since 1970 and that administers (among other treaties) the *Berne Convention*, originally negotiated in 1886, WIPO has its particular institutional history and relevant actors, all of which contributed to the outcome of the Internet treaties.<sup>146</sup>

### **I. Institutions, ideas and interests: Forum shifting and WIPO’s bid to stay relevant**

From an historical-institutionalist perspective, the following three issues must be accounted for: WIPO’s decision to address digital-copyright issues; its adoption of the U.S.

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<sup>146</sup> WIPO’s background was discussed in chapter 2.

White Paper's positions into the draft treaties; and the final treaties, which, against initial U.S. wishes and WIPO draft treaties' language, conform to obligations expressed in the existing *Berne Conventions* and Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). These outcomes can best be understood through an examination of WIPO as an institution, and the actors working within it.

### **i. Institutions**

WIPO's decision to negotiate digital-copyright treaties was rooted in the intersection of international-institutional politics and domestic U.S. priorities. As discussed in chapter 2, while WIPO had long been the pre-eminent international organization devoted to copyright and IP issues, in the early 1990s it was running the risk of being eclipsed by the 1995 TRIPS Agreement, hosted at the WTO. Since then, WIPO had been relegated to providing technical support to the WTO and serving as a forum to build upon the minimum standards of the TRIPS.

From the perspective of WIPO officials, the 1996 Internet treaties was part of a "sustained campaign ... to return the organization to the centre of global intellectual property policy making" and an attempt to remain relevant in the WTO era (May 2007, 56, 66, 68). Convening a conference that ended with the signing of the WIPO Internet treaties was a "proactive" move by the WIPO to incorporate the "digital agenda" into its protocol revision process (Ricketson and Ginsberg 2006, 148). This rivalry was also partly personal. In the colourful words of former USTR official and current BSA Counselor Emery Simon, WIPO officials resented the intrusion on their turf by "these filthy trade people .... soiling this fantastic pure universe that they had lived in. ... The WTO's a trade turf. The WIPO is a pure

intellectual property turf, and that [WIPO] community really needed to re-establish its personhood” (Simon, interview by author, August 1, 2008).

WIPO’s quest for continued relevance was helped by the fact that the recently concluded TRIPS Agreement did not address Internet-related issues. While it had settled issues such as the protections of computer programs and databases, the right of rental, and the term of protection of the rights in performances and phonograms, at the time that TRIPS came into force, the Internet was not yet the cultural phenomenon it would eventually become and policymakers were only beginning to come to terms with the implications of the communications revolution. Not surprisingly, TRIPS was seen as having been overtaken by the explosion in digital media (Ficsor 2002, 25) and the full emergence of the “information superhighway.”

What became the WIPO Internet treaties began life around 1989 as an exercise to modernize the *Berne Convention*. The European Commission thought – and the United States agreed – that it would be a good idea to have a “safety net that if TRIPS fails, we can still do something positive on copyright” (Simon, interview by author, August 1, 2008). Internet-related issues were added to the agenda relatively late in the process, as late as 1993 or 1994 (Greenstein, interview by author, July 9, 2008). After TRIPS passed, WIPO had to decide how their treaties would be different from TRIPS, “and that’s when we started including some of these internet-related issues in the treaty,” says Simon (interview by author, August 1, 2008). During the drafting of possible provisions related to traditional copyright concerns, negotiators began to pay attention to TPMs (Brown 2006, 240). The WIPO *Performances and Phonograms Treaty* (WPPT) arose from the desire to bring neighbouring rights (in this case, performers’ and phonogram producers’ rights) in line with authors’ rights, without

modifying the *Rome Convention*, which covers neighbouring rights and of which the United States is not a member (Turkewitz, interview by author, July 17, 2008). Bruce Lehman, who wanted to use the treaties to push White Paper-based copyright reform in the United States, was instrumental in convincing WIPO to focus on digital copyright: his influence can be seen in the draft treaties that served as the starting point for the final negotiations in December 1996.

Lehman worked to build consensus among like-minded industrialized countries, specifically the European Union, the United States, Japan, Canada and some other developed countries (all indications are that the United States, as well as Japan and the EU, were the main actors; Canada played a minimal role). These countries referred to themselves as “Group B,” and were also known as the “Stockholm Group” after their initial meeting place. While the countries had different positions on the issues under discussion, their work kick-started WIPO’s digital-copyright work and originated what eventually became the Internet treaties (Simon, interview by author, August 1, 2008; Greenstein, interview by author, July 9, 2008).

## **ii. Interests and ideas**

Because WTO-based negotiations involve all member countries, the possibility that dissident members would stymie talks was significant. Furthermore, developing countries were unwilling to reopen TRIPS negotiations lest the result be even more extensive IP protection (Ficsor 2002, 51, 52). Moving copyright negotiations to WIPO offered the possibility of being able to “conduct negotiations, and establish treaties among non-comprehensive groupings [of countries], and thus sideline those likely to object to a further expansion of the realm of governance for intellectual property” (May 2007, 89). For the

United States and its allies – primarily the European Union and Japan – negotiations over digital-copyright treaties at WIPO were preferable to negotiations at the WTO.

Despite these advantages, concluding treaties at WIPO nonetheless required negotiation with countries (eventually around 60 countries signed the WCT and the WPPT), many of which had interests that did not necessarily coincide with those of the United States, in a context in which cross-sector tradeoffs of the type that characterize trade negotiations are more difficult. Furthermore, they had to be concluded within the context of the *Berne Convention*. Just as the TPM provisions in the White Paper would represent a significant change in the balance of U.S. copyright law, so would similar provisions involve a shift the balance of international copyright law, whose principles had been established and reinforced over the course of more than a century.

## **II. The Internet treaties: Moving copyright into the digital age**

Several things stand out about the WCT and WPPT diplomatic conferences, held in Geneva from December 2-20, 2006. At the time, the conferences were the largest-ever for copyright and related-rights issues, attended by representatives from 127 countries, including the U.S. (whose delegation numbered almost 30 representatives), Canada (seven representatives) and Mexico (five), and a record number of NGOs and observers. They were also completed in three weeks, an instant in international-treaty-making time (Ricketson and Ginsburg 2006, 150). This speed was especially impressive considering that the first week was consumed by procedural issues (Kupferschmid, interview by author, July 1, 2008).

The treaties also marked the first time that a copyright treaty was negotiated *before* member states had passed laws on the subject under discussion (Dinwoodie 2007). As well, for the first time, the language of “balance” became explicit in a copyright treaty (Dinwoodie

1997, 752), most strikingly in the treaties' preambles' language about "*Recognizing* the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information ... " This language represented a departure not only from the WTO/TRIPS (Tawfik 2005, 80), but also the initial U.S.-influenced draft treaties' "trade-based approach to copyright policy" (Samuelson 1997, 28-29).

In their final form, the WCT consisted of 12 substantive and 13 administrative articles and applies to authors; the WPPT consisted of 19 substantive and 14 administrative articles and applies to performers and phonograms producers' "neighbouring rights" in copyrighted works (i.e., rights exercised by non-authors). Audiovisual works (i.e., movies) were excluded from the WPPT, the result mainly of pressure from the United States (representing the interests of the Hollywood film studios) supported by India; both have film industries based on a contractual system largely incompatible with moral rights in audiovisual works (Ficsor 2003, 72). The WCT builds upon earlier treaties, notably the *Berne Convention*, while the WPPT "is a free-standing treaty that does not seek, like the WCT or the TRIPS Agreement, to build upon what has gone before in earlier treaties such as *Berne*" (Ricketson and Ginsburg 2006 vol. 2, 1235). Both work on the principle of national treatment and set minimum, not maximum, standards. As well, despite the fact that the United States came to Geneva with a clear "maximalist" opinion, the final treaties do not reflect this preferred view. Although the subjects of the treaties, notably the legal protection of TPMs, reflect U.S. concerns, they allow all countries a significant degree of flexibility in choosing how they implement their treaty obligations.

The following analysis is based on a comparison of the draft and final treaties (see Appendix A for hyperlinks to the final treaties), supplemented by primary-source interviews.

It also relies on the extensive account of the treaties' negotiation by Ficsor (2003), the Secretary General to the Conference and WIPO Assistant Director General in charge of the Copyright Sector, and current IIPA consultant, Ricketson and Ginsburg's (2006) magisterial commentary on the *Berne Convention* and related treaties, as well as Litman's (2006) and Samuelson's (1997) accounts of the treaty negotiations. Finally, it notes the Canadian contribution to the debate, primarily around TPMs. Mexico's individual contribution was not obvious from the record and written accounts.<sup>147</sup>

At the beginning of the conference, the draft treaties and the U.S. position largely reflected the views put forward in the White Paper. Greenstein confirms that the official U.S. position was closer to that of the content industry than of, for example, the consumer-electronics industry. The official U.S. position was also reflected in the draft treaties that served as the basis for negotiations (Greenstein, interview by author, July 9, 2008). In his analysis, Brown (2006, 24) concurs, arguing that the White Paper was the "most significant input into the process that resulted in the WIPO Internet treaties."

#### **i. Legal protection of TPMs: Draft provisions**

Draft WCT Article 13, "Obligations concerning Technological Measures" was taken almost straight from the U.S. White Paper:

***Draft WCT Article 13: Obligations concerning Technological Measures***

*(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.*

*(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).*

*(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary*

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<sup>147</sup> Despite several attempts over an eight-month period, the author was unable to secure an interview with the head of the Mexican WIPO delegation.

*effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.*

This Article introduced something new to international copyright laws and treaties: “While the other provisions of the Treaty consist more or less of interpretations and certain adaptations of the existing international copyright norms at the Berne-*plus*-TRIPS level, Article 11, along with Article 12 [on rights management information], includes wholly new provisions” (Ficsor 2003, 544). These provisions “for the first time, provide protection for copyright owners outside the usual framework of a law of authors’ rights with its traditional classifications of conditions for protection, protected subject matter, exclusive rights, and allowable limitations and exceptions” (Ricketson and Ginsburg 2006, 152). The draft Article 13, which became Article 11 in the final WCT, was “closely modeled on the U.S. proposal” (Samuelson 1997, 31).

In the draft treaties, “protection-defeating device” was defined in a “maximal” manner (Ricketson and Ginsburg 2006, 968): “any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the treaty.” As in the eventual Article 11, contracting parties would have been required to provide “appropriate and effective remedies against” the offences covered in the article. This language was very much in the spirit of the U.S. White Paper, and was the model for the DMCA.

### **1. Legal protection of TPMs: Final provisions**

Negotiations over Draft WCT Article 13 were so controversial that “it was an accomplishment to get any provision in the final treaty on this issue” (Samuelson 1997, 33). Supporters were unable to overcome skeptical delegates’ concerns about draft Article 13, as

“even a knowledge-based standard for regulating technologies having infringing uses represented a dramatic change in policy” (Samuelson 1997, 32). This ban is linked in the second part of clause (1) to “the exercise of rights provided under this Treaty.” In the end, these provisions fell victim to worries that these prohibitions were “overbroad and would lead to abuses by copyright holders, particularly if the prohibition could be applied to prevent non-infringing uses of protected works” (Ricketson and Ginsburg 2006, 970-971).

As a result of effective opposition (discussed in further detail below), including from the Canadian delegation (Ficsor 2003, 404), WCT Article 11<sup>148</sup> (mirrored in WPPT Article 18) is much more permissive than Draft WCT Article 13:

***WCT Article 11: Obligations concerning Technological Measures***

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

The final Article 11 is targeted much, much more narrowly than was the draft TPM article, which would have made it illegal to import, manufacture or distribute “protection-defeating devices,” or to offer services with the same effect, by people who would know (or have “reasonable grounds to know”) that they would be used to “exercise ... rights provided under this Treaty that is not authorized by the rightsholder or the law.” This is not directly required by the final treaty language. At the same time, it “is drafted in broad terms and leaves a great deal to the discretion of member states” (Ricketson and Ginsburg 2006, 873).

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<sup>148</sup> WCT Article 11 is often read alongside Article 12, “Obligations concerning Rights Management Information,” (Article 19 in the WPPT), which prohibits the unauthorized removal or alteration of electronic “rights management information” of a work (i.e., “information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information”), or the traffic in “works or copies of works knowing that electronic rights management information has been removed or altered without authority.” As with final WCT Article 11, it also calls for “adequate and effective legal remedies.” According to Ficsor, it was relatively uncontroversial during negotiations (Ficsor 2003, 564).

While it does not seem to prescribe any particular measures, its language has created a great deal of controversy and confusion. The problem lies with the phrase “adequate legal protection and effective legal measures,” which is nowhere defined in the treaties. This absence gives the treaty its flexibility while providing little guidance as to its proper implementation.

There are two schools of thought on the subject. The first argues that “adequate legal protection” and “effective legal remedies” require the prohibition of circumvention devices. Anything less than a wholesale ban of circumvention devices (à la Draft Article 13) would not prove “adequate” or “effective” protection against the circumvention of TPMs. This view is shared by Ricketson and Ginsburg, Ficsor, and representatives from the motion picture, video game and music industries interviewed for this dissertation (Ricketson and Ginsburg 2006, 976; Ficsor 2003, 550).

On the other side of the issue, Geist (2005), Tawfik (2005) and representatives of public-interest groups and the consumer-electronics industry contend that the treaty requires only that circumventions linked to copyright infringement be prohibited. They argue that banning circumvention devices effectively allows copyright owners to control access to works even when other individuals have a legal right to use the work, to expand control over works that may be in the public domain, or to protect locks on works in order to lock individuals into specific platforms. Similarly, Band argues that the “very minimalist” requirement of adequate legal protections and effective legal remedies can be covered with secondary liability laws that already exist in countries like Canada and the United States (Band, interview by author, June 20, 2008).

A 2003 WIPO survey of countries’ laws implementing the treaties found that 22 of

the 39 countries surveyed, including Mexico and the United States, varied widely in their language and coverage (WIPO 2003, 2).<sup>149</sup> This same survey also noted that the line between protection of rights (i.e., copyright) and access (which has nothing to do with copyright) has become blurred. An earlier report on implementation issues noted that “protection of systems monitoring access seems, in fact, to go beyond the scope of the measures in the WIPO treaties” (Strowel and Dussolier 1999, 27). That laws regulating circumvention devices will be used to control access to works not protected by copyright remains a main criticism of such laws.

Though the debate continues, a review of the conference record and the record of implementation provides support for the minimalist interpretation of Article 11. Conference participants, who rejected the more concrete language of Draft WCT Article 13, are on record as being concerned about an unbalanced TPM right for copyright owners. Ficsor remarks that during the deliberations the Canadian delegation spoke up against a too-broad rule regarding the prohibition of anti-circumvention devices.<sup>150</sup> While the United States and the European Union both stressed “the importance of the proposed provisions without which owners of rights could not make their works and recordings available on the global network, ... they also expressed their readiness to consider some changes in order to achieve an appropriate balance between the various interests involved” (Ficsor 2003, 404). A maximalist interpretation of Article 11 implies that the rights of the person controlling the lock are

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<sup>149</sup> Canada was not included, as it had not yet implemented the treaties. The following countries were included in the survey: Albania, Argentina, Belarus, Bulgaria, Burkina Faso, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Ecuador, El Salvador, Gabon, Georgia, Guatemala, Honduras, Hungary, Indonesia, Jamaica, Japan, Kyrgyzstan, Latvia, Lithuania, Mali, Mexico, Mongolia, Republic of Moldova, Nicaragua, Panama, Paraguay, Peru, Philippines, Romania, Saint Lucia, Senegal, Slovakia, Slovenia, Ukraine, and the United States.

<sup>150</sup> An interesting point, given Canada’s struggle with this issue, discussed in the following chapter.

supreme, while Ficsor's account suggests that other groups' rights and interests must be considered as well.

## **2. ISP liability: Draft and final provisions**

WCT and WPPT proposals around ISP liability were also modeled on the U.S. White Paper, notably its assertion that that temporary copies stored in a computer's random access memory (RAM) have "been found to be sufficient fixation" (Department of Commerce 2005, 28). This language was reproduced in WCT Draft Article 7, "Scope of the Right of Reproduction." This Article would have extended copyright to cover "direct and indirect reproductions of [authors'] works, whether permanent or temporary, in any manner or form" (Article 7(1)). Meanwhile, Draft WCT Article 7(2) would have tied any limitations on this right to reproductions for purposes authorized by the copyright holder or permitted by law, subject to the three-step test.

Both the White Paper and the draft treaties' explanatory notes argue that such protection is justified on the basis that "a work that is stored for a very short time may be reproduced or communicated further, or it may be made perceptible by an appropriate device" (WIPO 1996, paragraph 7.05). However, this article "would have given copyright owners control over all temporary copies, even those never fixed in tangible form and those that under United States law would be deemed legal fair use" (Litman 2006, 147, n10). In the treaties' final draft, the issue of ISP liability was addressed tangentially, in two agreed statements. This final result masks both the energy that negotiators and industry lobbyists put into the issue, and the importance of the statements for the development of U.S. and other laws. According to Kupferschmid, the issue was discussed extensively by the U.S. delegation, which "had more discussions on ISP liability than any other topic and ultimately

could not agree. We had huge meetings on that topic” (Kupferschmid, interview by author, July 1, 2008).

Faced with strong opposition from countries and the telecommunications industry, Draft Article 7 was dropped from the final text. In its place was a controversial agreed statement attached to Article 1(4):

*The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.*

The meaning of this Statement is highly contested. One view holds that it means that temporary RAM reproductions are covered by copyright (Ficsor 2003, 443-445), while the other argues that it does no such thing (Ricketson and Ginsburg 2006, 686-687). The situation is further complicated by the fact that, unlike all of the other WCT agreed statements, and the agreed statements attached to Articles 7, 11, and 15 of the WPPT, it was not adopted by consensus (Ficsor 2003, 63).<sup>151</sup> As does the “adequate” and “effective”

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<sup>151</sup> Agreed statements are designed to “provide guidance in the interpretation of particular treaty provisions,” both past (in the case of *Berne*) and future (in the case of the WCT) (Ricketson and Ginsburg 2006, 151). As has been noted, their lack of clarity has complicated this goal. There is also a question of its relevance, given the fact that the agreed statement attached to Article 1(4) was not passed unanimously: a majority of delegates were either absent or abstained from voting (Samuelson 1997, 15). Ficsor (2003, 63) argues that under the *Vienna Convention on the Law of Treaties* consensus was not required, only that the agreed statements “be made between all the parties in connection with the conclusion of the treaty.”

Ricketson and Ginsburg disagree, arguing that the agreed statement cannot be used to interpret the WCT and the application of *Berne* Article 9 because the *Vienna Convention* requires unanimous consent for it to be applied to all countries. Instead, they argue that, following *Vienna Convention* Article 32, it “could clearly be regarded as forming part of ‘the circumstances of [the treaty’s] conclusion’,” though they note that not everyone agrees with this interpretation (Ricketson and Ginsburg 2006, 865). If Ficsor is correct, then all countries are required to provide protection to RAM copies; if not, then it need only be treated “as a supplementary aid to interpretation” (Ricketson and Ginsburg 2006, 866).

Judging these two positions is beyond the scope of this project and the modest legal abilities of the author. Politically, however, it does not matter which side is right, since both make plausible claims. Opponents of extending copyright to temporary copies can point to the fact that Draft Article 7 was explicitly excluded from the final WCT, and that the agreed statement is quite vague and “open to highly variable interpretation,” and

language in Article 11, this agreed system allows interest groups to continue arguing the issue on domestic stages around the world. That copyright experts disagree about the meaning of the agreed statements suggests that, politically (and probably legally), member countries possess a significant amount of leeway in being able to decide how they wish to implement this part of the treaty.

The big reward for telecommunications companies was a broadly written agreed statement attached to WCT Article 8 – “It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the *Berne Convention*”—that limited ISPs’ liability in cases of infringement by their customers. That agreed statement “essentially laid the groundwork for section 512 of the DMCA, the notice-and-takedown-type provisions, as opposed to imposition of secondary liability on passive carriers or on websites or other ISPs that store information” (Greenstein, interview by author, July 9, 2008).

## **ii. Accounting for the final treaties**

The final Internet treaties reflect the balance between users’ and owners’ rights that has traditionally characterized international copyright treaties, including the *Berne Convention*. Given the opportunity to tilt the playing field to owners’ advantage, delegates refused. Instead, they endorsed the language of balance and were careful not to create new rights. Even the articles regarding TPMs required that prohibitions of circumvention devices be linked to an underlying copyright.

Negotiating countries were divided on the issue of the protection of temporary copies. The United States argued that RAM copies should be treated as copies under the *Berne*

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was passed under dubious circumstances. Proponents, meanwhile, can point to the presence of the agreed statement and combine it with a generous reading of *Berne* Article 9.

*Convention*, the European Union called for clarification, and Japan argued against RAM copies as copying (Canada did not put forward any amendments on the issue; neither, apparently, did Mexico) (Ficsor 2003, 109-114, 133). The treaty drafters attempted to argue in their explanatory notes that this was not a new right: “The result of reproduction may be a tangible, permanent copy like a book, a recording or a CD-ROM. It may as well be a copy of the work on the hard disk of a PC or in the working memory of a computer. A work that is stored for a very short time may be reproduced or communicated further, or it may be made perceptible by an appropriate device” (WIPO 1996, paragraph 7.05). Against this interpretation, more moderate language emerged as the result of pushback against the U.S. and draft treaty positions by industry groups and interested NGOs, as well as by the WIPO member states whose votes were required to pass the treaties. ISPs were particularly active in this debate. According to Kupferschmid, “other copyright owners, as well as other copyright users like librarians and museums, generally stuck to trying to convince the U.S. government that this is what the position should be. They really didn’t lobby foreign governments that much. The ISPs just got in front of everybody that would listen to them” (Kupferschmid, interview by author, July 1, 2008).

Delegates objected that these changes would have resulted in an excessive level of protection, leaving ISPs open to infringement claims (Ricketson and Ginsburg 2006, 685); more fundamentally, they argued that such a proposal would make it difficult to run the Internet and computers. Because the negotiations were occurring simultaneously with the debate in the United States, domestic U.S. interests and Congress also challenged the official U.S. position and the draft treaties. Developing countries, most prominently African countries (Goldstein 2003, 174), were reticent about increasing copyright protection, and

some U.S. allies also harboured reservations (Greenstein, interview by author, July 9, 2008); a majority of countries voted down the treaties' most controversial parts (Litman 2006, 129). As a result, the United States and European Union, as the two copyright "superpowers," had to compromise on issues like the treatment of digital transmissions (May 2007, 16-19).

### **1. Path dependence and the Internet treaties**

The Internet treaties are usually discussed in terms of the way that they moderated the initial U.S. position at WIPO in favour of the status quo. In this light, the outcomes of the Internet treaties stand as an excellent example of path dependence, in which institutional rules and ideas, and the particular mix of interests active in the negotiations combined to maintain international copyright on a familiar path. However, the path-dependent nature of the Internet treaties can also be seen in what was not covered in the treaties. Chapter 2 discussed at length the revolutionary nature of digital technology in terms of the possibilities it allows for creation and dissemination. Coming as they did early in the digital age, the Internet treaties represented a perfect opportunity to rethink the foundations of copyright law, embrace these new technologies and promote laws that would leverage the possibilities inherent in these new technologies. Instead, member states chose to defend an existing status quo, not to create a new regime. In all cases, they erred in favour of not creating new rights and reaffirming existing rights. Nowhere in the treaties does one find language that attempts to rethink the very idea of copyright, and whether it is an appropriate tool for the regulation of cultural production in a digital environment. At the same time, the language of the treaty seems to go out of its way to link any new provisions with existing treaty obligations, as with Article 11's linkage of legal protection of TPMs to "the exercise of their rights under this Treaty or the *Berne Convention*."

The ideas of property in intangible works or the Romantic notion of the author were not seriously challenged, as all the major players in the negotiation process were constrained by these ideas or by their material interests. The institutional actors at WIPO had no reason to question copyright, since their job involves administering copyright treaties, not to increase creative production and dissemination. The draft copyright treaties, which were set largely by the U.S. delegation in response to its domestic debate, set the overall parameters for what would be considered as “copyright reform.” Once set, these parameters made it very difficult for any radical ideas to become associated with a digital-copyright-reform agenda.

## **2. The Internet treaties and the domestic U.S. policy debate**

Second, the extent to which the Internet treaties can be seen as an extension of the domestic U.S. debate is fascinating. Important members of Congress, such as Republican Senator and Chair of the Senate Judiciary Committee Orrin Hatch,<sup>152</sup> expressed their displeasure at Lehman’s attempt to sidestep them. Opponents’ lobbying in the United States weakened the position of the main demandeur of strong copyright reform. Invitations for public comment on the draft treaties and a review of the American position a month before the conference resulted in “substantial opposition to the draft treaties insofar as they would implement the U.S. White Paper’s digital agenda”; this reaction tied Lehman’s hands “at least in part” (Samuelson 1997, 46). A proposed Database Treaty, which was to have been negotiated alongside the WCT and WPPT, was also scuttled in part due to stiff domestic opposition from, among others, the National Institute of Medicine and President Bill Clinton’s Science Advisor: they were concerned that it would negatively affect access to

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<sup>152</sup> Hatch wrote Lehman: “Surely you will not want to be in the position of negotiating final language on a treaty that as yet commands no clear support in the full Senate and which may not ultimately be retied. Congress will not wish to be in the position of having its hands tied by international developments on the basis of proposed legislation that has stalled precisely because it contains so many unresolved issues” (cited in Brown 2006, 242).

research data (Samuelson 1997, 40).

### **3. Role of industry groups**

These international treaty negotiations obscure somewhat the crucial role that inter-industry negotiations played in finalizing the treaties. Industry groups helped bridge differences among U.S. interests by lobbying from all perspectives, effectively giving the U.S. delegation “several arms ... to get its position on the digital agenda across to the various delegations.

So, for example, you had groups like the Business Software Alliance who were there and were lobbying in favour of very strict regulation, and you had representatives from the computer industry and from the consumer electronics industry and the library communities, and the telecom companies, who were lobbying for various exceptions or for more ambiguous provisions or for no provisions in some cases (Greenstein, interview by author, July 9, 2008).

The final language of WCT Article 11, the treaties’ centrepiece, was shaped directly by bargaining industry interests. The deadlock over TPMs was broken by finessing the issue – requiring “adequate legal measures and effective legal remedies” rather than the wholesale banning of circumvention devices. Formally, the compromise was offered by the South African delegation (Simon, interview by author, August 1, 2008); however Vinje and Band (1997, 9) report that what eventually became WCT Article 11 “was based on language that had been agreed by certain interested parties in advance of the Diplomatic Conference.”

In an interview with the author, the BSA’s Simon (August 1, 2008) confirmed that the agreement was actually reached between the consumer-electronics and content industries: “the language that ended up in the WIPO treaty...was worked out between the consumer electronics industry and the content industries before all of us actually went to Geneva for the diplomatic conference.... [T]he outcome was pretty much a foregone conclusion.” During the diplomatic conference, “the consumer electronics guys found the South African delegate,

who was kind of an interesting guy and a curious guy, took their issues on board.”

For the consumer-electronics industry, this debate harkened back the Supreme Court’s “Betamax” decision in 1984, which found that VCRs were not illegal simply because they could make copies. The CE industry “was quite adamant to prevent that kind of liability from being part of the treaty” (Simon, interview by author, August 1, 2008). The content owners wanted the question to be clear on its face as to whether a device could be viewed as circumventing and whether circumvention itself should be the act prescribed by law. The manufacturers of equipment, and consumer and library interests wanted to ensure that circumvention for purposes that would otherwise constitute an infringement would lead to liability, but that circumvention that would be considered for fair use purposes would still be permissible (Greenstein, interview by author, July 9, 2008). The resulting article on TPMs “was vague enough to allow either result to emerge, although it probably tilted in the direction of there being some responsibility, some disciplines. But it was deliberately done as a way to avoid that level of confrontation” (Simon, interview by author, August 1, 2008).

Formal negotiations that largely reflect a dominant-power agreement are not unusual. However, that inter-industry negotiations shaped the rules on TPMs is significant given the fact that Bruce Lehman went to Geneva in an attempt to *avoid* making just these types of compromises, or, at the very least, to return to the United States with an agreement that would have strengthened the hand of content owners in their legislative negotiations. In the end, however, the Internet treaties merely allowed the U.S. debate to continue.

### **III. Analysis**

The final treaties were much less ambitious and more vague as the result of domestic U.S. interests lobbying the Clinton Administration “to moderate or abandon parts of its

digital agenda at WIPO” (Samuelson 1997, 4), as well as the objections of other states. From another perspective, however, the treaties were wildly successful. Despite the opposition that overwhelmed the explicit banning of circumvention devices and the treatment of temporary copies, among other things, the final treaty did not take these issues off the table.

Moving to a higher level of abstraction had three results. First, it allowed the U.S. debate to continue in a way that would not restrict any options. It would, for example, allow for the banning of circumvention devices under the 1998 DMCA. The TPM article:

was written in such a way that it would give the United States the flexibility to impose a regime under the DMCA that would be consistent with it but on the other hand it would allow other countries that wanted to link circumvention, only proscribe circumvention that also infringed copyright from enacting legislation of that nature (Greenstein, interview by author, July 9, 2008).

Second, its role in forming the draft treaties allowed the United States to set the parameters for international digital-copyright reform. The treaties’ flexibility essentially tabled countries’ decisions on what was actually required to implement the treaties at the same time that it defined digital-copyright reform to include TPMs and ISP liability. The final treaties should be seen as the first, not the final, word in the debate over copyright in the digital age, a first step along a “path” that rejected any revolutionary changes to copyright while maintaining the possibility that future laws could be tilted in favour of copyright owners. In this, they have played an important role in setting the digital agenda in a way that may not have happened simply from the emergence of a new technology. While the nature of computers suggests that eventually all countries would have had to think about how to treat interactive digital works (as transmissions or as communications to the public), the Internet treaties require that countries also address circumvention devices, even though circumvention devices have nothing to do with copyright, in and of themselves (Samuelson 1997, 49). The

final treaties continued to cast doubt on the treatment of temporary copies. In all of this, the United States, led by its content industries, was central in setting this agenda.

While the maximalist, U.S.-based version of the treaties was stymied, there is nothing in the final treaties to *prevent* a country from implementing a maximalist digital-copyright agenda, or to prevent a country from lobbying in good faith for another country to implement a maximalist policy. Member countries explicitly removed provisions requiring countries to ban circumvention devices; however, one can still plausibly argue that such a ban is required in order to ensure “adequate ... and effective ...” protection of copyrighted works. Similarly, while Draft Article 7 was removed completely, the agreed statement to Article 1(4) keeps the door open to treating works stored temporarily in RAM as copies; this approach has actually been followed in several countries (Samuelson 1997, 48), including Mexico.

Nonetheless, the treaties also leave countries free to disagree with this interpretation or to ignore the treaties completely: signing a treaty does not require its ratification or implementation. The treaties also contain no mechanism to compel members’ adherence. The WIPO Internet treaties should be regarded as norms that frame a debate rather than rules that must be implemented. Unlike a European Union directive, there ultimately is no force standing behind them. Mainly, the treaties allow the digital-copyright debate to continue in other fora and ensure that this debate will focus on issues of concern to the United States and its content industries. Furthermore, in some of these other fora, such as, bilateral trade negotiations, the United States could trade stronger copyright protection against other issues.

## **PART IV: 1997-98: THE DIGITAL MILLENNIUM COPYRIGHT ACT**

### **I. The DMCA negotiations<sup>153</sup>**

Following the conclusion of the Internet treaties, the U.S. digital-copyright debate returned to Washington. The vagueness of the Internet treaties gives member countries a great deal of freedom in deciding how to implement them. As an historical-institutionalist approach would suggest, the DMCA was shaped by the institutional peculiarities of a pluralist-style process that had emerged from a specific historical context (i.e., the increased complexity of an issue that was deemed to be primarily technical). Politically, the Clinton White House wanted to satisfy Hollywood and Silicon Valley, but did not want to spend “significant political capital to do so” (Litman 2006, 130). In Congress, the House Commerce Committee (specifically, Democratic Rep. Rick Boucher), which had jurisdiction over Internet and electronic commerce issues (including the manufacture and sale of anti-circumvention devices) and the House Judiciary Committee, which traditionally covered copyright, each wanted control of the issue. Commerce was seen as sympathetic to the consumer electronics and user lobbies, while Mitch Glazier, the Judiciary Committee’s chief counsel, was close to the content industries.<sup>154</sup> Each produced their preferred version of the DMCA: “At stake was not only the character and shape of digital copyright law, but also the disposition of enormous sums of lobbying and campaign contribution money expended by the major copyright-affected industries” (Litman 2006, 141).

The resulting House bill, shepherded by Glazier, gave the House Commerce Committee oversight while also gutting “many of the safeguards that the library and

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<sup>153</sup> While the most important parts of the DMCA centre on WIPO implementation and the ISP liability limitation needed to make WIPO implementation politically feasible, it also covers other copyright issues like hull design. This dissertation restricts its analysis to Titles 1 and 2 of the DMCA, which deal with WIPO-related issues.

<sup>154</sup> Glazier would eventually work for the RIAA.

education communities had bargained to make part of that procedure” (Litman 2006, 143). The bill satisfied the Commerce Committee and the content industries but not libraries, universities or consumer groups. It “passed the House essentially without debate.” The Senate and House leadership were similarly at odds, with the Senate objecting to the involvement of the Department of Commerce. However, with an election break looming and both sides wanting a resolution, a deal was eventually struck. The resulting legislation was a “hodgepodge, incorporating bits and pieces of both versions,” with several last-minute additions and subtractions. In its final form, the *Digital Millennium Copyright Act* runs to nearly 30,000 words and more than 50 pages” (Litman 2006, 31).

The final bill provides compelling evidence of the persistence of the U.S. copyright policymaking institutions and their effect in shaping the eventual DMCA. Despite the Geneva detour, the DMCA reflects the longstanding multi-stakeholder process that had produced so many other American copyright laws: “long, detailed, counterintuitive, kind to the status quo, ... hostile to potential new competitors, [and] overwhelmingly likely to appropriate value for the benefit of major stakeholders at the expense of the public at large” (Litman 2006, 144-145). The DMCA, in other words, shows clear signs of having emerged from a path-dependent process that favoured some actors over others.

## **II. The DMCA: WIPO-plus and unholy alliances**

The WIPO Internet treaties imposed few, if any, new obligations on the United States. As an industrialized country with a well-developed copyright regime, it, for example, arguably already had a “making available” right, while the obligation to provide “adequate legal protection and effective legal remedies” for TPMs could have been met by existing secondary liability provisions (Band, interview by author, June 20, 2008; Brown 2006, 246).

Initially, U.S. negotiators had thought that changes to U.S. law would not be necessary (Greenstein, interview by author, July 9, 2008). Less than a month after the conference, Lehman himself suggested that U.S. law was already in compliance with the treaties (Goldstein 2003, 174).

The DMCA was made possible due to a compromise between the content industries and the telecommunications industry, the most powerful groups at the copyright table. Before the DMCA, reforms to limit ISP liability and to protect TPMs had been advancing on separate tracks. ISP liability was covered in HR 2180, the *On-Line Copyright Liability Limitation Act*, while HR 2281, the *WIPO Copyright Treaties Implementation Act and WIPO Copyright and Performances and Phonograms Treaty Implementation Act of 1997* (which eventually became the DMCA), addressed WIPO implementation issues, including legal protection of TPMs. However, the two issues “were in essence getting nowhere” (Band, interview by author, June 20, 2008). The content industry argued that the only way the IP committee would get agreement for the WIPO implementation was to agree to ISP safe harbours: once that agreement was made, everything fell into place (Band, interview by author, June 20, 2008). The DMCA’s passage reflected both the process’ compromise/negotiation-based nature and that the process is weighted in favour of those actors with the greatest economic and political resources.

#### **i. Technological protection measures<sup>155</sup>**

Similarly, the TPM provisions reflected the relative power of involved groups, with content industries receiving much of what they wanted and others receiving narrow exceptions. As the content industries wanted, DMCA Section 1201 effectively bans – with

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<sup>155</sup> The analysis in this section is based mainly on Kerr *et al.* (2002-2003); Kerr (2004); and Copyright Office (1998).

narrow exceptions – the circumvention of digital locks and trafficking in the tools that can break these locks. This section is descended directly from the White Paper and the WIPO draft treaty language on TPMs. It deals with two types of TPMs, those that regulate access to a work, and those that control use. With respect to access, the basic provision forbids the circumvention of “a technological measure that effectively controls access to a [copyrighted] work” (DMCA 1201 (a)(1)(A)). This provision bans circumvention that “effectively controls access to a work subject to copyright, regardless of whether or not such access would itself amount to an infringement” (Kerr 2004, 47). Congressman Thomas Bliley, Chair of the House Commerce Committee at the time argued that these were sweeping new changes: “the ‘anti-circumvention’ provisions of the Administration’s bill create entirely new rights for content providers that are wholly divorced from copyright law” (quoted in Goldstein 2003, 175).

With respect to the TPMs that control use, Section 1201(b)(2)(B), protects a TPM if it “in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner”; that is, TPMs that restrict fair use or protect non-copyrighted materials would not be protected (Kerr 2004, 39). While the DMCA distinguishes between acts of circumvention (access, use), it does not distinguish among purposes of circumvention (Gillespie 2007, 179). The DMCA also forbids people to “manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof,” that would allow individuals to circumvent TPMs designed to control access or limits copying of a work, if device is primarily designed for circumvention, is marketed as being such a device, or has only limited commercial significance otherwise (ss. 1201(a)(2) and 1201(a)(3)(b)). Despite Section 1201 (b)(2)(B), this blanket ban reduces legal access to

circumvention devices for non-infringing purposes that have nothing to do with copyright or for fair-use purposes.

User groups received specific exemptions to Section 1201. The DMCA does not formally override fair use and other rights (DMCA 1201 (b)(2)(c)), although individuals must break the locks on their own. It also clarifies that manufacturers of consumer electronics, telecommunications or computing equipment are not required to design their equipment to respond to any particular technological measure (Section 1201(c)(3)), except for analog VCRs (1201(k)). Other exceptions for access and copying were provided for law enforcement, intelligence and other government activities (1201(e)), and for ongoing rule making related to TPMs (s. 1201(a)(1)(B-E); see below), in addition to a number of exceptions that are allowed for access.<sup>156</sup> Kerr argues that “a number of these exceptions are written so narrowly that they are not useful as a matter of practice. For example, [several] exemptions neglect to indicate whether tool making is permitted as a privileged circumvention. This raises serious doubt as to the true availability of these exemptions since many of them simply cannot be exercised without the use of circumvention tools” (Kerr *et al.* 2002-2003, 68). For user groups, the most significant part of this section is a requirement<sup>157</sup> that the Librarian of Congress, in consultation with the Copyright Office and the Commerce Department, review the legislation every three years to determine whether further exemptions should be added to this list (Litman 2006, 145).<sup>158</sup>

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<sup>156</sup> These are: Nonprofit library, archives and educational institutions, to decide whether they wish to obtain authorized access to a work (s. 1201(d), an exception that Litman says was “un-asked-for and unwanted,” and that implied “that ordinary citizens had no privilege to browse” (Litman 2006, 137)); for the purposes of reverse engineering computer programs to ensure interoperability; for the purposes of encryption research; for the purposes of the protection of minors from harmful material on the internet; to protect personal privacy, when the TPM, or the work it protects, can collect or disseminate private personal information; and to test the security of computer networks (s. 1201(d-j)).

<sup>157</sup> In paragraph 1201(a)(1)(C).

<sup>158</sup> This section requires the Librarian to consider: “the availability for use of copyrighted works; the availability

## 1. The negotiation of Section 1201

When the DMCA was being negotiated, many groups with an objective interest in digital-copyright issues had not yet awoken to the importance of copyright law. This state of affairs reflects the reality that in the mid-to-late 1990s relatively few individuals and groups had a strong understanding of the myriad ways that a copyright bill, and particularly one introducing novel concepts such as widespread legal protection for TPMs, could affect their lives and the issues they were concerned about. It also explains why the initial public-interest alarms were sounded by copyright lawyers and computer technologists such as the ones in and affiliated with the DFC.<sup>159</sup> As a result, their interests were either not represented or were addressed in an ad hoc manner. In some cases, groups that should have been at the table chose not to be. Band recounts the efforts made by him on behalf of the American Committee for Interoperable Systems to “broaden our coalition” in order to constrain TPM protection. However, despite identifying issues like TPMs’ potential effects on encryption research, security testing and privacy (“we basically came up with the parade of horrors”), they had difficulty getting groups interested (Band, interview by author, June 20, 2008). Consequently, Band and other industry representatives negotiated the exemptions on encryption research (working with the CCIA and the BSA) and privacy. Lacking experience on this issue, they reached out to encryption research community but were unable to find anyone interested in the issue: “they had no clue what was going on.” Similarly, they were unable to find groups interested in addressing other issues, such as TPMs and the protection of

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for use of works for non-profit archival, preservation, and educational purposes; the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; the effect of circumvention of technological measures on the market for or value of copyrighted works; and such other factors as the Librarian considers appropriate.”

<sup>159</sup> A year after the passage of the DMCA, in 1999, the very public battles over Napster and file sharing would start to make copyright the political and obviously important issue it has become today in the United States.

minors (which would allow the overriding of digital locks in order to allow parents to protect their children. The resulting sections “were just completely something that I made up” (Band, interview by author, June 20, 2008).

## **ii. ISP liability**

Section 512 of the DMCA, which establishes the mechanism for exempting ISP and online service providers from liability, was the price demanded by the telecommunications industry for the DMCA. Its inclusion in the final bill is a testament to the political and economic clout of the telecommunications industry. It sets out the terms under which both online service providers and “information location tools” (such as search engines, online directories and hyperlinks) are liable, or exempt from liability in cases when users of their services are accused of infringing copyrights on sites hosted on their system. The actual wording focuses on actions, such as hosting and linking, because the PTO was unable to draft a definition of ISPs that was narrow enough to satisfy all stakeholders (Kupferschmid, interview by author, July 1, 2008). These provisions were the first of their kind, internationally, to address the issue of ISP liability (Teufel 2004, 37). As for the legislation itself, paragraphs 512(a) and (b) implement U.S. obligations under the WIPO Internet treaties by ensuring, respectively, no liability for routine transitory communications (i.e., routing) or for system caching (intermediate or temporary storage). Non-profit educational institutions are also, in some cases, eligible for access to limitation on liability (paragraph 512(e)).

Paragraph 512(c), the centrepiece of this section [paragraph 512(d) is the equivalent for search engines], implements a “notice-and-takedown” regime. Under notice and takedown, an ISP or search engine is not liable for copyright infringement if, upon receiving a proper notification of claimed infringement, it takes down or blocks access to the material

(it must notify the user that this action has been taken). The service provider must not have actual knowledge of infringement or benefit financially from the infringement. Subscribers alleged to have infringed copyrights have the opportunity to respond to the notice-and-takedown action by filing a counter notification (Copyright Office 1998, 12).

This system satisfied both content owners and ISPs. For ISPs, it provided a degree of certainty and exemption of liability, although Litman (2006, 143) characterizes the reporting requirements and steps involved in avoiding liability as “a long, complicated series of hoops.” Content owners, meanwhile, received the ability to sue copyright infringers without having to prove liability in court: a good deal for ISPs and copyright owners, if not for users.

### **III. Effect of the DMCA**

The DMCA was basically a “draw” between the consumer electronics and content industries, as a consumer-electronics lawyer put it in an interview (Interview by author, July 2). The content industries realized their main objective: a ban on the trafficking of circumvention devices. This ban, however, was subject to certain narrow exemptions obtained by other parties at the table. For example, the consumer electronics industry’s main concern was that their products would not have to respond to two different or contradictory technology measures. They were able to negotiate paragraph 1201(c)(3), the “no mandate clause,” which ensures that their products need not respond to any particular TPM.

#### **i. TPMs**

Observers agree that the DMCA has operated as intended. Early cases, including one involving garage-door openers, led to fears that the DMCA would have a chilling effect on research, even in areas that had nothing to do with copyright.<sup>160</sup> However, the courts

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<sup>160</sup> In *Chamberlain v. Skylink*, Chamberlain, a maker of garage-door openers, sued Skylink for reverse-engineering their (TPM-protected) garage-door-opening code and using this information in its own remote.

generally have interpreted the DMCA to require a “nexus” between copyright infringement and circumvention (Band, interview by author, June 20, 2008). Court decisions have “given good guidance to practitioners, they’ve given good guidance to litigants as to the situations they would be successful in and those in which they likely would not, and there haven’t been any catastrophes,” says Stevan Mitchell of the Entertainment Software Association, an industry group representing computer and video game publishers and one of the groups most affected by TPMs (Mitchell, interview by author, July 8, 2008).

Concerns remain. A review of the academic literature and case law associated with the DMCA finds that the DMCA has been criticized for impairing fair use, freedom of speech, inadequate privacy protections and skewing the balance between “private rights and the public interest” (Kerr *et al.* 2002-2003, 68). There is also the question whether legal protection of TPMs will actually stop infringements, given the fact that “the pirates figure out a way to hack things,” while inhibiting legitimate research or actions, only some of which may be exempted under the triennial rule-making exercise (Sohn, interview by author, August 5, 2008).

Specific cases also raise the spectre that the DMCA has resulted in a chill on research and innovation (Brown 2006, 253; Boldrin and Levine 2008, 109).<sup>161</sup> Michael Petricone, Consumer Electronics Association senior vice-president of government affairs, remarks that the combination of a litigious American society and high statutory damages for digital infringement make it difficult for consumer-electronics manufacturers to innovate (Petricone, interview by author, August 14, 2008). For example, the CSS encryption program, agreed to by the movie and consumer-electronics industries, ensures only authorized machines can play

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<sup>161</sup> See also EFF 2010 for an in-depth critique of the DMCA’s TPM provisions.

DVDs. This authorization not only limits copying, but also “allows the movie studios to dictate the terms for what the technologies allow or prohibit” (Gillespie 2007, 181).

The “rule-making” provisions of the DMCA also continue to be hotly debated. As has already been noted, TPMs can potentially give copyright owners the ability to set unilaterally the terms of access and use of a work, ignoring others’ rights to use a work without seeking permission. The eight exemptions that have been granted in the three “rule-makings” that have occurred between 1998 and 2007<sup>162</sup> have been narrow, the outcome of an expensive process in which each proposed exemption can be challenged but that is not well suited to the involvement of either individuals or resource-constrained groups.

Generally, content owners are satisfied with the process, while users claim that the process is tilted toward those with the resources to navigate a lengthy, expensive process that often (and, to date, usually) results in very narrow exceptions (Sohn, interview by author, August 5, 2008; Petricone, interview by author, August 14, 2008). In response to such complaints, a U.S. Copyright Office official said in an interview that the rule-making process and the DMCA have been successful in achieving their goals, arguing that there has not been the predicted assault on copyright. The official further argues that the narrowness and low number of exemptions (two in the first triennial rule making, four in the second, six in the third) suggest that fair use has not been negatively affected by DMCA Section 1201 (Government official, interview by author, July 1, 2008). While this is one possible conclusion, it is more likely that, given the resources needed to participate in this process and its resulting bias toward well-funded interests, the small number of triennial exemptions likely understates the DMCA’s effect on fair use in the United States.

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<sup>162</sup> The epilogue to this chapter briefly discusses the eventful 2010 rule making.

## **ii. ISPs/Notice-and-takedown**

Content owners and ISPs are relatively satisfied with the notice-and-takedown regime. ISPs are responsive to owners' notices, even though they are not compelled to be. Nonetheless, refusing to take down allegedly infringing content opens ISPs to liability, which they can avoid if they comply with the takedown request. Says Kupferschmid, whose firm represents content and software owners, "in the United States, because of the DMCA, we get near 100% compliance with our notice and takedown because it's the law." At the same time, he adds, accused infringers have the opportunity to file a counter-notice (Kupferschmid, interview by author, July 1, 2008).

Band argues that Section 512 represented a win for the ISPs and a disaster for the content industries because it assumed that content hosted in ISPs' networks, not peer-to-peer filesharing, would be the greatest threat to the content industries' monopoly over distribution. ISPs' blanket exemption if they act only as a conduits means that the content industries "now they have no way of pressuring, or it's very difficult for them to pressure, the Verizons of the world to do anything to help them" (Band, interview by author, June 20, 2008).

## **iii. Overall effect**

The DMCA, which became law on October 28, 1998, continues to attract criticism. "At best, it could be said that the DMCA balances the rights of one industry with the rights of another" (Halbert 2005, 3). The RIAA, one of the main beneficiaries of the DMCA, argues that, viewed from the perspective of 1998, the DMCA was a rational and thoughtful response to pressing policy issues: Congress recognized that U.S. society had a large interest in ensuring continued production of creative goods. From this perspective, the DMCA

represented, on the whole, “a very forward looking perspective” on how to continue to fuel creativity (Turkewitz, interview by author, July 17, 2008).

Even on its own terms, its record is mixed. Congress passed the DMCA to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age” and to “make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius” (Sapp 2005, 18). Discussing the DMCA’s effect on unauthorized uses of copyrighted works, Simon says that the DMCA’s impact has been “substantial but not dramatic.” While it has not solved the “piracy” problem, it has offered some legal certainty without preventing the evolution of the Internet, “which is what people alleged at the time it would do. It has provided some points of leverage and some tools for people to attack particular piracy problems” (Simon, interview by author, August 1, 2008). Neil Turkewitz, RIAA Executive Vice President, expressed relative satisfaction with the way the DMCA has allowed the RIAA to defend its copyrights while noting that it fails to provide sufficient discipline with respect to technological developments that have taken place since its adoption (Turkewitz, interview by author, July 17, 2008).

According to a Copyright Office official, the DMCA was one of the factors that encouraged companies to put their works online (Government official, interview by author, July 1, 2008). Former Future of Music Coalition Executive Director Ann Chaitovitz, agrees that it helped create a “legitimate digital marketplace.” Before the DMCA, “All we had was an illegitimate marketplace. I think what it did was lay the groundwork that persuaded the big content owners to agree to take the risk. And that then enabled a legitimate music market to develop” (Chaitovitz, interview by author, July 22, 2008).

In evaluating these opinions, it is perhaps useful to make a distinction between content owned by the large media conglomerates and that produced by others, and to recall that the pre-DMCA Internet was already full of content, some distributed by corporate entities, and others created by individuals. As a result, it is difficult not to conclude that the DMCA was unnecessary to encourage creative production online – the ostensible purpose of copyright – but rather to create the conditions under which the large content companies would put their works online. It is even difficult to argue that the DMCA has reduced unauthorized uses of copyrighted works; authorized digital sales are still “dwarfed” by unauthorized sales. Neither has it halted the traditional music industry’s decline, which has been hardest hit by file-sharing technologies.

A further irony: while the legal protection of TPMs was championed by the content industries, particularly the music industry, TPMs have failed commercially in the digital-music market: most music sold online is sold without TPM protection. However, predictions of the demise of TPMs are exaggerated. The content industries continue to patent TPMs regularly, and digital books, films, videos, television shows, computer programs and video games continue to depend on TPMs. Even in music, TPMs may yet prove to be resilient. One potential future model for the music industry is the “subscription-based” service, in which consumers pay a monthly fee for access to a library of music that becomes inaccessible to them should they not renew their subscriptions. Such a model is akin to the licensing of a computer program, in which song ownership remains with the copyright owner and does not transfer to the consumer, as happens when one purchases a CD. Whatever the benefits and drawbacks of such services, given the strength of the view that copyright is an absolute property right that allows owners to set conditions of access, TPMs will continue to be

important for content owners, as much for what it implies about the proper protection-dissemination balance in copyright as for the success of any particular business model. The acceptance of the legal protection of TPMs and the legitimization of the position that copyright owners have the right to control access to the use of copyright works has the potential to be an “evolutionary” change in copyright that moves it closer toward copyright being exclusively a right that recognizes only the interests of copyright owners.

## **PART V: EPILOGUE: 1998-2010: POST-DMCA DEVELOPMENTS**

### **I. The United States**

In the United States, the DMCA remains in effect and any major copyright reform is at least several years away. Two developments, however, are worth mentioning. The most notable recent DMCA-related development occurred on July 26, 2010, when the Librarian of Congress, as mandated by the DMCA, concluded the fourth triennial “rule making” proceeding to determine if any new TPM-related exceptions should be added to the law, based on whether affected persons “are, or are likely to be ... adversely affected by the prohibition ... in their ability to make non-infringing uses ... of a particular class of copyrighted works” (DMCA s. 1201 (a)(C)). This most recent round of rule making continued a judicial trend to link TPM circumvention to copyright (Geist 2010) and more generally accepts the principle that TPMs should not inhibit a user’s fair-use rights, including in situations where a user has a good-faith belief that an act of circumvention is “in aid of an actual fair use” (Jazi 2010). Nonetheless, the formal prohibition of trafficking in the tools that can actually circumvent TPMs remains in place.

Changes in U.S. copyright law as a result of this rule making have led to a sharp divide between de facto U.S. law and the U.S. government’s international position on digital

copyright, which continues to advocate a prohibition on TPMs mirroring the original Lehman White Paper and draft Internet treaties. This divide suggests the extent to which domestic U.S. copyright policymaking lies apart from regional or international institutional processes.

More recently, there are signs that the copyright impasse between content-industry and user interests, which the author observed during his summer 2008 field work in Washington, D.C., may be about to change. The November 2010 mid-term elections witnessed the unexpected defeat of Democrat Rick Boucher, the most vocal and knowledgeable Congressional proponent of user rights (Sohn 2010). Although Boucher's loss upsets the balance between supporters and opponents of stronger copyright in Congress, it is, as of January 2011, too early to determine whether it will affect the overall balance among the various interests, given that other factors, such as their relative importance to the U.S. economy, remain unchanged.

## **II. The Anti-Counterfeiting Trade Agreement (ACTA)**

In a classic example of forum shifting, in 2006, U.S. officials began discussing the possibility of a plurilateral agreement on counterfeiting outside both the WIPO and the WTO, and above the fray of normal bilateral relations. The talks on what became known as the ACTA began in June 2008 and included among others the United States, Canada, Mexico, the EU and Japan (Foreign Affairs and International Trade Canada 2010) and concluded in early December 2010. Negotiated in secret, ACTA is mainly concerned with digital copyright and other non-counterfeiting issues, notwithstanding its name. Initially, ACTA was an obvious attempt to promote the adoption DMCA-like rules regarding the legal protection of TPMs and ISP liability. However, in July 2010 the United States backed down from this position in the face of opposition from the EU (the most important player other than the

U.S.), Japan, Mexico, Singapore, Morocco and Australia, all of which preferred language closer to that of the Internet treaties (Geist 2010a). The ACTA negotiations and results seem to have repeated the experience of the Internet treaties. As before, the United States, representing its content industries, proposed a maximalist copyright treaty, only to be rebuffed, resulting in a more balanced treaty that continues to allow countries a great deal of leeway in interpreting their treaty obligations.

U.S. government and content industries' efforts can be seen in ACTA Article 27. Unlike the Internet treaties, Article 27, Paragraph 6 explicitly defines "adequate legal protection and effective legal remedies," as they apply to the circumvention of TPMs. Like the DMCA, it prohibits the sale, manufacture and importation of circumvention devices. However, it is immediately undercut by Article 8, which explicitly allows that members "may adopt or maintain appropriate limitations or exceptions" to prohibitions on circumvention devices, and that related obligations "are without prejudice to the rights, limitations, exceptions, or defences to copyright or related rights infringement under a Party's law." This paragraph is important because it not only grandfathers current exceptions in copyright laws, but also allows for the adoption of new exceptions. As a result, ACTA's TPM provisions mirror those in the Internet treaties.

Similarly, for ISP liability, Article 27 requires the implementation of a process to allow for "effective action against an act of infringement of intellectual property rights which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements." While it also discusses notification regimes (such as notice-and-notice and notice-and-takedown), it

says only that a Party *may* set up a specific regime to require ISPs to provide rights holders with information that identifies accused infringers. Nothing more stringent is required.

Article 27 also requires that any measures not create “barriers to legislative activity, including electronic commerce, and, consistent with that Party’s law, preserves fundamental principles such as freedom of expression, fair process, and privacy.” Canada’s notice-and-notice approach to limiting ISP liability would fit comfortably within this framework. Ironically, the U.S. notice-and-takedown approach may be in violation of the requirement that ISP liability not interfere with the principles of fair process and freedom of expression, as notice-and-takedown requires that allegedly infringing materials be taken down *before* an accused can plead his or her case.

The experience with ACTA and the Internet treaties suggests real limits to the U.S. ability to influence international copyright laws. In the absence of a direct linkage between trade and IP, the United States’ resources, including the size of its market and the reach of its content industries, give it a high degree of influence that is not as decisive as it may have appeared in the mid-1990s’ after the TRIPS negotiations. Future research on international copyright and the U.S. influence on domestic laws will have to consider how copyright treaties and laws will develop in a world in which the United States cannot credibly link IP reform to market access.

## **PART VI: ANALYSIS**

This dissertation addresses the question of how the WIPO Internet treaties were implemented in North America. The U.S. response – the DMCA – emerged from the conflict and negotiations among domestic interests acting both within the U.S. policymaking process and on the international stage at the WIPO. From an historical-institutionalist perspective, the

story of the DMCA is largely a domestic one, marked by institutional consistency and path dependency, with outcomes driven by the biases of the U.S. political process.

### **I. United States: Master of its domain at home, first among equals abroad**

Due to their political and economic resources, the U.S. copyright industries, through their contacts within the U.S. government, were able to influence the formation of the WIPO Internet treaties so as to ensure the treaties would be useful as a normative tools to continue the push for American domestic copyright reform in their interests. The final DMCA, however, was the result of many small compromises (as is typical in American copyright history) and a grand compromise between the content industries and the telecommunications industry. The WIPO Internet treaties functioned more as a normative justification than as a strict limit on what the U.S. could and could not do.

#### **i. Institutional persistence**

The DMCA was the result of an historically contingent pluralist-style negotiation process that privileged certain interests over others. From a governance perspective, one of the most interesting things about the legislative battle that led to the DMCA was the extent to which its development was divorced from global – to say nothing of regional – politics. Despite Bruce Lehman's dramatic attempted end-run around the domestic policy process, the DMCA followed the same well-trodden path as all the copyright bills of the previous century. In the U.S. quasi-pluralist, interest-based copyright regime, in which affected interests are expected to negotiate among themselves, and in which powerful interests (such as the telecommunications industry) can make themselves heard in Congress, it is hard to imagine a political scenario that ends in something other than a limited-liability regime for ISPs and strong protection for TPMs with limited exceptions. No matter the outcome at

WIPO, any legislation affecting ISP liability would have had to be approved by a Congress in which the telecommunications industry was not lacking in influence. The eventual ISP-content industries deal—notice-and-takedown in exchange for the legal protection of TPMs—emerged wholly out of the unique dynamics of U.S. copyright policymaking. The same thing can be said for the (relatively less powerful) interests that opposed TPM protection. In the end, from a purely domestic U.S. perspective, the WIPO negotiations were little more than a sideshow.

The persistence of a pluralist-style domestic U.S. copyright negotiating process can be explained in part by the fact that while technological change over the years required periodic changes to the law, copyright itself remained a technical, apolitical issue. While public interest started to rise before and during the DMCA negotiations, it was only with the 1999 invention and subsequent shutdown of Napster that ordinary Americans began to pay attention to copyright. This politicization has the potential to complicate further the difficult process of making and passing copyright laws in the United States. It also suggests that the days of apolitical inter-industry bargaining to create copyright laws are numbered.

## **ii. Interests treated differently**

With respect to the various actors involved in the debate, some groups' views were clearly seen as more important than others. Most important were the motion picture industry, the music recording industry and software publishers on the content side, and the online and ISP industry, the telecommunications industry, television and radio broadcasters, computer, consumer-electronics manufacturers, and libraries on the dissemination side.

Digital technology acted as an external shock that led to the involvement of ISPs and “the public,” in large part through the Digital Future Coalition. The telecommunications

industry had a significant effect on the DMCA and the WIPO Internet treaties, wresting significant concessions that have led several observers to argue that they were the big winners under the DMCA. The effectiveness of public-interest groups was subtler. In the debate that led to the Internet treaties and the DMCA, public interest organizations, copyright lawyers such as Peter Jazi, and Internet civil liberties groups – groups that had previously been involved peripherally in copyright reform (excepting copyright lawyers) – weighed in on the subject. Jazi’s strategy with the DFC was to link the interests of less-powerful groups like university lawyers with those of lobbies to whom Congress would listen, such as the consumer-electronics industry (Litman 2006, 124); what influence they had on the debate came by finding like-minded allies to whom Congress would listen. However, they did not have a full “seat at the table.” At WIPO, while NGOs were present in Geneva during the negotiations, their “expressions of concern [finding] a receptive audience among many national delegations” (Samuelson 1997, 4),<sup>163</sup> accounts such as Ricketson and Ginsburg (2006) and Ficsor (2002) seem to accord them a relatively small effect on the actual outcome; member states and major industry were still the primary drivers of the treaties.

At the time of the DMCA, copyright was just starting to emerge as a political issue. Groups like Public Knowledge, which focuses on copyright and similar issues from an access perspective, were not yet around. Furthermore, “the public interest” was represented mainly by academics and experts who were sounding alarm bells for a public that was not yet fully aware of how their direct interests could be affected by copyright policy. As Kupferschmid’s early-blogging on the Internet treaties negotiations suggests, the Internet had only just arrived

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<sup>163</sup> Samuelson (1997, 3-4) also credits these groups with moderating the White House’s position at the negotiations.

as a means to help disparate interests coordinate in a way that would allow individuals to coordinate and organize effectively to counter more traditionally organized lobbies.

In 1996 and 1998, the politicization of copyright, traceable to the 1999 arrival of Napster and to the DMCA itself, was still in the future. Ten years of experience with the DMCA and the sue-everyone response of the U.S. music industry would create widespread protest groups in Canada, the U.S. and (to a lesser extent) in Mexico. Absent these concrete examples of the negative effects of copyright law on individuals' lives, narrow public opposition to the DMCA in the United States was unsurprising, even as the contours of the DMCA fight presaged what was to come.

### **iii. Ideas and regional politics: A U.S. template for implementation**

The U.S. debate over copyright reform occurred within the protection/dissemination parameters set by the Constitution's Copyright Clause. Since the 1980s, purposeful actors, namely the content industries, have engaged in substantive bricolage (linking calls for stronger copyright to U.S. trade law) and symbolic bricolage (emphasizing copyright's protection function over that of dissemination). While opponents attempted to re-emphasize copyright's dissemination function with some success, the DMCA's TPM rules demonstrate that, for the moment, the protection forces have the upper hand and have pushed U.S. copyright closer to being primarily a copyright owner's right, rather than a policy to balance different interests. Whether this represents an "evolutionary" change that demonstrates the path-dependent nature of copyright or a "revolutionary" change that puts copyright on a new "path" is, ultimately, in the eye of the beholder. What matters is that the concept of institutional persistence suggests that established policies securely embedded in a solid institutional structure are harder to change than new policies in weak institutional structures.

Given the enduring persistence of U.S. copyright institutions, DMCA rules on TPMs (and ISP liability, for that matter) would be very hard to reverse. Their presence will likely prove a solid base for the content industries' arguments for greater protection in the next round of copyright reforms, whenever that may be.

The DMCA is more than just a domestic U.S. policy. It "has acted as a template for other states, particularly through its impact on ensuing U.S. free-trade agreements" (Brown 2006, 245).<sup>164</sup> Proponents explicitly acknowledge the role it would play in setting copyright policies around the world. As Litman elaborates in her definitive account of the birth of the DMCA: "Representatives of the motion picture and recording industries backed up [Lehman's] arguments with prophesies of widespread international piracy unless Congress acted quickly. The world's eyes, they said, were on America" (Litman 2006, 134).

The outcome of this particular policymaking process, shaped by the country's particular conceptions of copyright, its specific institutional context and its unique constellation of actors, is thus of significant interest to Canada and Mexico, as well as the rest of the world.

Several points can be noted about the WIPO Internet treaties and the U.S. DMCA from a regional perspective. On issues like copyright that do not require cooperation with outside governments or interests, regional and international considerations are minimized. In other words, in a region characterized by a large power imbalance, one would expect the larger partner to be relatively less constrained by regional and international institutions and influences. To state the obvious, the DMCA was not influenced at all by regional politics. One could go further and say that it was hardly influenced by the Internet treaties themselves.

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<sup>164</sup> Brown also notes that the EU Copyright Directive, which addresses the European Union's WIPO obligations, "has changed the direction of copyright law in the European Economic Area's 30-plus member and aspiring member states, affecting another half a billion citizens."

Instead, the DMCA, the outcome of a pluralist-style negotiation process, became the preferred U.S. template for implementation of member countries' obligations under the Internet treaties. While the treaties give countries significant leeway to decide how (or even if) they will be implemented, the United States has a position on this issue, which it has been promoting actively, and this position was the outcome of a specific institutional structure. The particular institutional structure of the U.S. legislative process also influenced other countries' approach to digital-copyright reform in another way. The WIPO Internet treaties have come to define what is meant by digital-copyright reform. While they were relatively silent on ISP liability, it was the pragmatic linkage of ISP liability and the legal protection of TPMs in the legislative bargaining that led to the DMCA that made both TPMs and ISP liability part of the generally accepted template for countries such as Canada and Mexico considering how to reform their copyright laws.

The signing of these treaties marked the beginning, not the end, of the battle over digital copyright in North America and the rest of the world. The Internet treaties set the general parameters for digital-copyright reform on the U.S. design, but left the actual rule-making up to member countries. Making the Internet treaties concrete, however, would not be a simple matter of implementing domestic preferences. Just as it had shaped the draft treaties, the United States, and its content industries would try to influence how countries implemented the treaties. With the sideshow (from the U.S. domestic perspective) of the WIPO Internet treaties concluded, the domestic American debate over digital-copyright reform could continue. Its stakes would be much higher than simply defining the copyright regime of a single nation. The negotiations that led to the DMCA also set the U.S. position on what it would consider acceptable for other countries' attempts to implement the Internet

treaties. Given its relative economic and political importance, the United States' choices matter for all WIPO members, including Canada and Mexico.

The WIPO Internet treaties play different roles in the three North American countries. The United States was able to shape the treaties to allow it to fulfill its domestic and global objectives. In Clarkson's (2008) terminology, the WIPO Internet treaties increased the U.S. *capacity* to influence other countries without sacrificing its domestic autonomy to implement its own digital-copyright regime. While Mexico and Canada were present at the negotiations, their influence on its outcome was obviously much less than that of the United States.<sup>165</sup> Although they were smaller players, the treaties did not necessarily affect their autonomy. For these two countries (as well as for most other countries), the effect of the WIPO Internet treaties would depend upon the interaction of the fairly loose requirements of the treaties with domestic institutions and interests, and the context within which they interact with the United States. In the case of Canada and Mexico, this context is defined by their bilateral relationships with the United States and, regionally, the NAFTA and – to a much lesser extent – the Security and Prosperity Partnership of North America.

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<sup>165</sup> In his highly detailed treatise on the treaties' negotiations, Ficsor (2003) mentions Canada only a couple of times and Mexico hardly ever, if at all.

## **CHAPTER 4: CANADA AND THE INTERNET TREATIES: ABORTED IMPLEMENTATIONS**

### **INTRODUCTION**

Historical institutionalism, as applied to the study of a heterogeneous region like North America, is useful not only for its ability to consider ideas, institutions and interests at different levels. It also allows us to consider the differential regional effects on these parts. Such an analysis is particularly important for a region like North America in which policies like copyright are developed in separate national capitals under a common regional framework (i.e., the North American Free Trade Agreement, NAFTA). The Canadian response to the Internet treaties remains (as of January 2011) a work in progress.<sup>166</sup> The drawn-out nature of the Canadian implementation of the WIPO Internet treaties provides researchers with an unusually rigorous opportunity to evaluate the interplay of domestic, regional and international economic, political, institutional and cultural factors, allowing for a more subtle understanding of how Canadian copyright policy is made.

This chapter is presented in three parts. The first part elaborates on the historical-institutional framework – the ideas, institutions and interests – that has shaped Canadian copyright policymaking as it relates to efforts to implement the Internet treaties. The second part of the chapter examines how these factors interacted to produce the 2005 and 2007-08 copyright-reform bills, neither of which made it beyond first reading in the House of Commons. It also summarizes post-2008 events related to this dissertation. The third part offers some reflections on what this debate can tell us about domestic and regional copyright governance.

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<sup>166</sup> This chapter covers the period from the conclusion of the treaties to the introduction of Bill C-61 in June 2008. The epilogue addresses subsequent developments through the introduction of Bill C-32 in June 2010.

## **PART I: THE CANADIAN COPYRIGHT LANDSCAPE**

### **I. Ideas: Canada's copyright ambivalence**

In Canada, as in the United States and Mexico, copyright is officially a federal responsibility. Section 91 (23) of the *Constitution Act, 1867*, places copyright exclusively under federal jurisdiction, although provinces can pass laws that indirectly affect copyright, in areas such as publication, distribution, licensing and sales of literature (Handa 2002, 138). More recently, law regulating technological protection measures (TPMs), or “paracopyright,” may also fall under provincial jurisdiction, as TPMs touch on issues such as “contractual obligations, consumer protection, e-commerce, and the regulation of classic property” in ways that go beyond the regulation of copying that is the purpose of copyright law (de Beer 2006, 90). However, although the Constitution provides the federal government with responsibility for copyright, it lacks an explicit guiding principle in legislation or the Constitution of the type found in the U.S. “Copyright Clause” or Article 18 in the Mexican Constitution of 1917 (Handa 2002, 113). Instead, the orientation of Canadian copyright law must be teased from the legislative process, government reports, the legislation itself, practice and jurisprudence. Historically, Canada's copyright regime and discourse is firmly rooted in the utilitarian tradition of the United Kingdom and the United States: a pragmatic, technocratic, economics-focused law that balances the interests (note: not rights) of copyright owners and users of copyrighted works.

This instrumentalist approach has been acknowledged by the Supreme Court of Canada, which contends that “the economic purpose of copyright law is instrumentalist in nature, namely, to ensure the orderly production and distribution of, and access to, works of art and intellect” (cited in Gervais 2005, 315). In other words, the Court is implicitly arguing

that its main objective is the balancing of competing interests (again, not rights) in pursuit of an overall societal optimum, and is not the maximization of rights of copyright owners. This view is reflected in past touchstone studies of Canadian copyright, in particular the Economic Council of Canada's 1971 report into Canadian copyright reform and the 1957 Ilsley Commission report, whose work from 1954 to 1960 occurred under the Liberal government of Louis St. Laurent and the Progressive Conservative government of John Diefenbaker. More recently, it is echoed in the mission statement of Industry Canada, which has formal legislative responsibility for copyright.<sup>167</sup>

While Canadian copyright falls within the Anglo-American tradition, in some areas the *Copyright Act* pays obeisance to the Continental (i.e., French) view of copyright as an inalienable author's moral right. However, while Canadian copyright law shows traces of the Continental moral-rights approach, this approach is overshadowed by economic rights in copyright.<sup>168</sup> In 1931, the *Copyright Act* recognized moral rights for the first time, as a condition of signing the *Berne Convention*; however, they were not made enforceable until the passage of a 1987 bill, which also enacted a public lending right that compensates Canadian authors when their books are lent to the public by libraries (Handa 2002, 67-68). However, even though such "moral rights" are enforceable, they are not inalienable, as moral rights are in a true Continental regime.

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<sup>167</sup> This statement declares that government copyright policy is guided by the objectives of "ensuring net gains for Canadians; maintaining the responsiveness of the [*Copyright*] Act to technological innovation and new business models; clarifying the law where it will reduce the risk of unnecessary litigation; and ensuring a direction for reform that takes into account, and helps shape, international trends" (Industry Canada and Canadian Heritage 2002b, 41).

<sup>168</sup> While Anglo-American and Continental European traditions are represented in Canadian law, the *Copyright Act* does not acknowledge the traditions of Canada's First Nations, namely the aboriginal "concept of collective or communal intellectual property existing in perpetuity," with rights "often exercised by only one individual in each generation, sometimes through matrilineal descent" (Chartrand 2006, xiv).

### **i. Canadian cultural industry statistics**

Copyright's relatively low standing on the Canadian policy agenda results in part from the economic reality that Canadian domestic cultural production, which includes the production of books, music, motion pictures and software, while not insignificant, is a relatively minor part of the economy. Canada historically was, and remains, a net importer of copyrighted works. According to Statistics Canada, the "cultural sector"<sup>169</sup> of the Canadian economy accounted for an average of 3.8% (\$33.7 billion) of Canada's Gross Domestic Product (GDP), and an average of 3.9% of overall employment between 1996 and 2001, the latest year for which data are available (Singh 2008, 9). In contrast, Canada's financial sector accounted for just under 20% of Canadian GDP in 2008, while manufacturing accounted for 14.9%.<sup>170</sup> With respect to employment, the most significant categories in 2008 were trade (15.6%), manufacturing (11.9% of the labour force) and health care and social services (11.1%).<sup>171</sup>

These statistics do not include software, which is also covered by copyright. A study commissioned by the Department of Canadian Heritage finds that, including the software industries,<sup>172</sup> Canadian copyright industries accounted for 4.5% of Canadian GDP between 1997 and 2004. Employment in the "core" copyright industries was just over 655,000 in 2004, accounting for 4.1% of total Canadian employment; together with non-core

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<sup>169</sup> Statistics Canada defines "culture" as: "creative artistic activity and the goods and services produced by it, and the preservation of human heritage" (Singh 2008, 7). "Cultural activity" is divided into creation, production, manufacturing, distribution and support (e.g., "copyright collectives, agents, managers, promoters") (Singh 2008, 11).

<sup>170</sup> Statistics Canada, Table 1.3: Gross domestic product at basic prices, overview – Annual. Available at: <http://www.statcan.gc.ca/pub/15-001-x/2009012/t003-eng.htm>, accessed June 19, 2010.

<sup>171</sup> Statistics Canada. Employment by Industry. Available at: <http://www40.statcan.ca/l01/cst01/econ40-eng.htm>, accessed June 19, 2010. The Heritage Canada report's definition of the cultural sector means that some cultural production is covered by these categories, such as manufacturing.

<sup>172</sup> For "core" industry definition, see Connectus Consulting Inc (2006, 5-7). For some reason, the report does not define "non-core" industries.

employment (219,000 jobs), the copyright sector accounted for 5.6% of total Canadian employment. Growth in the copyright industries was led by the software and database industries and tended overall to outperform the rest of the economy.<sup>173</sup>

Over 60 years passed between the introduction of Canada's first proper *Copyright Act* in 1924 and the next major revision in 1987. The small size of the domestic industry and copyright's low profile as a vote-getting issue, combined with a net deficit position in copyrighted works, and the fact that stronger copyright would worsen this deficit position, has tended to temper governmental interest in reforming copyright. In 2004, Canada posted a \$3.2 billion deficit in royalties, primarily with the United States (software royalty payments and advertising mitigated this deficit somewhat with surpluses of \$317 million and \$242.4 million, respectively) (Connectus Consulting Inc. 2006, 9).<sup>174</sup>

## **ii. Changing balance in Canadian law**

The period from 1924 to 1987 was characterized by minor revisions in the *Copyright Act* and by occasional reports calling for a modernization of an increasingly outdated Act. From a policy perspective, this period was also marked by the low profile of IP generally: Doern and Sharaput (2000, 43) refer to the "leisurely low-priority nature of IP during this period." The three major studies of Canadian copyright over this period – the 1957 Ilsley Commission Report, the 1971 report of the Economic Council of Canada's 1971 report and the 1977 Keyes and Brunet Report – all demonstrated a consistent approach to the idea of copyright as a policy that should balance the protection of copyright owners and the

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<sup>173</sup> Interestingly, given the fact that the music industry has been the main driver of the debate over Canadian WIPO implementation as a necessary ingredient to ensuring the continued production of music, the study found that the sound-recording industry's contribution to Canadian GDP actually rose to \$387 million in 2004, from \$243 million in 1997. Overall declines in product sales, industry consolidation, reduced employment and the exit of inefficient firms from the industry allowed the industry as a whole to perform well, outperforming Canadian GDP between 1999 and 2004 (Connectus Consulting Inc 2006, 13).

<sup>174</sup> All figures are chained 1997 dollars.

promotion of the dissemination of creative works. They also see the two objectives as being in tension with each other: strengthen protection too much and dissemination and users of copyrighted works will suffer. The reports also took a skeptical view to copyright. The Keyes and Brunet Report, prepared for the Department of Consumer and Corporate Affairs,<sup>175</sup> argued that stronger protection for copyright owners was not necessarily in Canada's interest as a developing country (Bannerman 2009, 258).

The skeptical approach to copyright seen in these reports began to change in the mid-1980s, first with the publication of Consumer and Corporate Affairs Canada's joint 1984 White Paper with the Department of Communications, *From Gutenberg to Telidon: A White Paper on Copyright. Proposals for the Revision of the Canadian Copyright Act*.<sup>176</sup> The key change of Canadian perspective found in this report, as Bannerman (2009, 259) notes, is from skepticism about the benefits of stronger copyright to arguing for "the importance of stronger copyright protection to stimulate economic growth." The White Paper viewed copyright as a way "to provide new opportunities for growth in Canadian cultural, entertainment and information industries" (Consumer and Corporate Affairs Canada and the Department of Communications 1984, 87). Before the Paper could be acted upon, the reigning Liberal government was defeated in 1984 and replaced with the relatively more pro-American Progressive Conservative government of Brian Mulroney. Under Mulroney, in 1985 the House of Commons Standing Committee on Communications and Culture tabled the report *A Charter of Rights for Creators*.<sup>177</sup> Where *From Gutenberg to Telidon* framed its

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<sup>175</sup> The Department of Industry's predecessor department, responsible for copyright.

<sup>176</sup> That few people today know what Telidon is provides us with a reminder both of how quickly information technologies evolve and the problems and inefficiencies involved with reforming copyright laws to address specific technologies. These, however, are lessons that it seems few legislators and other interested parties have learned.

<sup>177</sup> This White Paper was adopted by the Committee as a discussion paper.

advocacy for stronger copyright protection with the desire to strike “an appropriate balance amongst the various interest groups involved to ensure that creators are properly compensated while the efficient dissemination of information and ideas is assured,” *A Charter of Rights for Creators* eschewed the language of creator-user balance in favour of an exclusive focus on maximizing the rights of copyright owners (or, in the language of the report, “creators”) (Bannerman 2009, 260). This shift can be explained in terms of changes in actors and ideas, not material conditions. Canada was still a net importer of copyrighted works. Stronger copyright would almost certainly not reverse this situation, especially given the small size of the country and English Canada’s penchant for consuming U.S. cultural products.

What had changed were prevailing opinions about how copyright *should* be viewed. *From Gutenberg to Telidon* and especially *A Charter of Rights for Creators* are notable for their lack of consideration of the balance of payments effects of stronger copyright (i.e., that stronger protection would lead to increased net outflows of royalty payments), which had been central to previous analyses (Handa 1997, 970). Key to this change was the linkage (substantive bricolage) between IP and international trade agreements. Handa (2002, 287) argues that the post-1987 period has been characterized by linkages between IP reform and international trade agreements “entered into by Canada that reflect largely U.S. motives, especially where new works are concerned.” The 1988 Canada-U.S. Free Trade Agreement (CUSFTA) required that Canada begin paying U.S. broadcasters to retransmit their television signals as part of a larger agreement to ensure access to the U.S. market.

However, the reorientation of Canadian thought on copyright seen in *A Charter of Rights for Creators* predates these agreements. The timing suggests that this new tendency to

see copyright in terms of maximizing a country's competitive position has its basis in ideological and personnel changes in government. On the ideological side, this new approach likely is an example of Campbell's concept of diffusion, related to the influence of similar arguments emanating from the United States at the same time (discussed in chapters 2 and 3). It also reflects the general championing of market forces that accompanied the crisis in the Keynesian welfare state and gave rise to Canadian pressures for free trade with the United States (Golob 2003). This view was solidified by the replacement of the Trudeau Liberal government with Progressive Conservative Mulroney's pro-business, pro-United States and (eventually) pro-free trade government.

Following this period, Canadian copyright reforms in 1988 and 1997 tended to privilege copyright owners over other groups. Flora MacDonald, the Progressive Conservative Minister of Communications and sponsor of the 1988 Bill C-60, *An Act to Amend the Copyright Act*, described the bill as "pro-creator" (cited in Doern and Sharaput 2000, 195).<sup>178</sup> The bill, the first major piece of copyright legislation in over 60 years, also marked the emergence of the content industries as the "primary stakeholders" in the copyright debate (Doyle 2006, 62-63).

Despite promises that "user" rights would be addressed in a second phase to follow immediately after the 1988 bill, user groups had to wait almost a decade for the sequel. Bill C-32, *An Act to Amend the Copyright Act*, was passed in 1997, this time by a Liberal government.<sup>179</sup> While this second bill was marketed to user groups as a complement to pro-

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<sup>178</sup> Among other things, it provided copyright protection for computer programs and abolished compulsory licenses for the reproduction of sound recordings. It also reformed the Copyright Appeal Board as the Copyright Board of Canada, which regulates the tariffs that Canada's collection societies can charge (Doern and Sharaput 2000, 105).

<sup>179</sup> Mexico actually provides an interesting parallel to the Canadian situation: its 1997 overhaul of the *Ley Federal del Derecho de Autor* was followed six years later by a bill of author-centric amendments.

owner 1988 legislation, the 1997 reforms resulted “in more rights under the Act for producers and copyright owners and fewer exceptions for users and consumers” (Doyle 2006, 78). In particular, for the first time in Canadian law Bill C-32 recognized neighbouring rights – rights in works that are not directly related to creation – for recording artists and the makers of sound recordings. This change allowed Canada to adhere to the 1961 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (the *Rome Convention*) (Doern and Sharaput 2000, 110-111). The WIPO *Performances and Phonograms Treaty* (WPPT) – one of the two Internet treaties – would also address these neighbouring rights from a digital perspective. Although Bill C-32 was passed soon after the conclusion of the 1996 Internet treaties negotiations, the Bill did not address the substance of the treaties.

Between 1988 and 1996, governments passed five other bills amending the *Copyright Act*, “largely because of the impetus of successive trade agreements,” notably those related to NAFTA and WTO (Doern and Sharaput 2000, 105).<sup>180</sup> The NAFTA changes, for example, introduced a commercial “rental right” for computer programs and sound recordings and enacted NAFTA Article 1701, which requires the “effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade (Hébert, cited in Doern and Sharaput 2000, 106). Since the 1997 changes, the government has passed minor amendments to the *Copyright Act*, in 2002, 2003 and 2007. Of particular interest to this dissertation are the 2007 changes, which, at the behest of the Canadian Motion Picture Distributors Association

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<sup>180</sup> These include three under the Progressive Conservatives, *The Canada-U.S. Free Trade Agreement Implementation Act* (1988) and two minor amendments in 1993. Acts implementing NAFTA and the WTO/TRIPS Agreement were passed by the Liberal government of Jean Chrétien. This division of labour further suggests the non-partisan nature of copyright in Canada at the time. Please see Appendix A for hyperlinks to the CUSFTA and NAFTA copyright-related Articles.

(the Canadian counterpart to the Motion Picture Association of America) and Hollywood-based interests (Tibbetts 2007), introduced provisions to deal with the (already-illegal) camcording of movies in theatres (Valiquet 2007).

Though the protection approach favouring copyright-owner interests has tended to drive and dominate Canadian copyright debates since the mid-1980s, recent court rulings suggest that the dissemination aspect of copyright remains important. A 2002 ruling by the Supreme Court of Canada<sup>181</sup> argued that a creator's right to a "just reward" is limited and must be balanced against other public-policy objectives, although the court does not tell Parliament how to balance these objectives (Scassa 2005, 45-47).<sup>182</sup> As the Canadian debate over the Internet treaties, discussed below, suggests, this perspective remains contentious.

This brief survey of the Canadian copyright scene from the mid-1980s to the late 2000s reveals that the underlying justifications for Canadian copyright have changed significantly since the 1924 *Copyright Act*. Before the mid-1980s, the objective of copyright was generally agreed to be to balanced protection for copyright owners against the requirements of creators, supported by the understanding that stronger copyright was not necessarily in Canada's interest. Since the mid-1980s, this rhetoric has been displaced largely by an emphasis on copyright as a way to increase the competitiveness of the cultural industry, the result of the diffusion of ideas from the United States and the linkage of trade to IP. More recently, however, the 2002 Supreme Court ruling reaffirming limitations on creators' and owners' rights in copyright has complicated, though not reversed, the tendency to view copyright as primarily an owner's right.

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<sup>181</sup> *Théberge v. Galerie d'Art du Petit Champlain*.

<sup>182</sup> See also Gervais (2005, 320-321). Although Sheffer (2006) argues that a 2006 Supreme Court ruling (*Robertson v. Thompson Corp.*, concerning unauthorized and unpaid digital reproduction of freelancers' articles) revealed an unwillingness for the court to reject an author-centric view of copyright in favour of a social-utility view.

Ideas about copyright are not static. As this chapter documents, Canadian attempts to implement the Internet treaties spurred a challenge to the dominant protection perspective from individuals, consumers and public-interests groups, many of whom became involved in copyright policymaking for the first time.

## **II. Institutions: Balance, with a twist**

### **i. International institutions**

Canadian copyright policy is embedded in a series of international and regional institutions that limit Canadian policy autonomy, often in exchange for other objectives, such as improved market access and protection of Canadian copyright owners abroad. Internationally, as discussed in chapters 1 and 2, in addition to the WIPO Internet treaties, Canada is a full member of the *Berne* (copyright) and *Rome Conventions* (neighbouring rights), as well as the TRIPS Agreement. Canada is also a member of the 1952 *Universal Copyright Convention*. Canada's adherence to the main copyright conventions has in the past been less than wholehearted. This sentiment is a reflection of the fact that the national treatment principle that underlies the *Berne Convention* and TRIPS – which stipulates that Canada must accord the same level of copyright protection to other countries' citizens as it does to its own nationals – does not provide net economic benefits to small-producer countries that are net importers of copyrighted works. Even during the NAFTA talks, the Canadian government fought successfully the U.S. insistence that cultural issues, including copyright, be included in the agreement through the inclusion of CUSFTA's "cultural exemption." Canada tried unsuccessfully to convince the Mexican government to support the Canadian anti-copyright-inclusion stance, but Mexico refused, as its language protected it from the cultural assimilation that formed the basis for the Canadian objection to including

copyright in the deal (cited in Sinclair 1996, 46). As noted earlier, while Canada's cultural industries are formally exempted from NAFTA's copyright provisions, Canada did implement several NAFTA-related copyright changes in its 1993 NAFTA enabling legislation. As well, Canada's long delay in implementing the Internet treaties suggests that the longstanding official Canadian ambivalence about international copyright is alive and well.<sup>183</sup>

Regionally, the importance of NAFTA's copyright rule-making effect on Canada was secondary to the way it limited the U.S. ability to link Canadian copyright reform to improved access to the U.S. market, its preferred strategy in its dealings with other countries. As noted in chapter 2, the NAFTA and WTO dispute-resolution mechanisms have further limited U.S. ability to retaliate against countries with what it perceives to be unfair copyright laws.

## **ii. Domestic institutions**

Within these international contours, Canadian copyright policy is shaped significantly by Canada's distinctive copyright institutional framework.<sup>184</sup> While this dissertation generally accepts Doern and Sharaput's (2000) path-breaking institutional analysis of Canadian intellectual property, it departs from their institutional taxonomy in two areas. First, it accords lesser importance to Foreign Affairs and International Trade Canada (DFAIT) in the setting of Canadian copyright policy. Doern and Sharaput argue that DFAIT has supplanted Department of Canadian Heritage and Industry Canada as the primary copyright policymaking department due to "the growing trade policy aspects of copyright and IP"

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<sup>183</sup> See, e.g., Doyle (2006); for an historical perspective see Bannerman (2009).

<sup>184</sup> The Department of Justice also has a role in vetting legislation to ensure that it is both constitutional and in line with Canada's treaty obligations. This is significant when considering arguments that either the Liberal or Conservative's very different bills to implement the Internet treaties do not fulfill Canada's obligations under the Internet Treaties.

(Doern and Sharaput 2000, 101). They correctly note that only after copyright and IP were linked to trade issues did copyright become a key governmental priority (Doern and Sharaput 2000, 107). However, it would be more correct to say that DFAIT only has a central copyright role during trade negotiations, particularly with a major trading partner with a strong interest in IP (that is, the United States, the European Union and Japan). In such situations, IP becomes one sector among many to be traded off against other objectives. In the absence of trade negotiations, Industry Canada and Canadian Heritage remain the main agencies; DFAIT plays a coordinating role, relaying information to and from Canada's foreign partners and making recommendations based on its perception of Canada's interests. In the negotiations that led to the WIPO Internet Treaties, for example, Industry Canada and Canadian Heritage led the Canadian delegation, while DFAIT played a coordinating role (Gratton, interview by author, February 7, 2008). In the case of the *implementation* of the Internet treaties, DFAIT plays a secondary role, primarily as one of the conduits for making Canada aware of the U.S. position and informing the United States of Canadian actions on copyright. Because DFAIT plays a relatively minor role in the negotiation and implementation of the Internet treaties, the following analysis does not focus on its role, except in passing.

In fact, and this is the second departure, Doern and Sharaput's emphasis on DFAIT somewhat obscures the significant role of the Prime Minister's Office and his secretariat, the Privy Council Office (PMO/PCO) in the copyright policymaking process. The PMO/PCO not only has the final say on the inevitable departmental conflicts, but the decision to initiate trade negotiations is a political one that cannot be made only by DFAIT. Outside trade negotiations, the PMO/PCO plays a pivotal political role, acquiescing to or resisting foreign

political pressure and placing political pressure on the departments to behave in a certain way. In an era of “court government” (Savoie 2008), the role of the PMO/PCO in influencing and making public policy cannot be excluded from or minimized in any institutional analysis of Canadian federal policymaking. As well, Parliament itself, particularly in the presence of minority parliaments, can have a decisive effect on the progress of copyright legislation.

### **1. Central institutions: Heritage and Industry**

In the United States, the debate between owners and users takes place within Congress, which requires that all recognized interested parties reach a consensus that Congress will then approve. In Canada, the rough equivalent of this process primarily occurs not in Parliament but within the bureaucracy, and the specific nature of this arena has significant effects on the outcomes of policy debates. Canada is unusual in that the responsibility for copyright is divided over two departments.<sup>185</sup> The *Copyright Act* gives formal responsibility for copyright to the Minister of Industry. In practice, however, Industry Canada and Canadian Heritage share the copyright file.<sup>186</sup> While Industry Canada is involved by statute, Canadian Heritage owes its involvement to its responsibility for Canadian Radio-television and Telecommunications Commission (CRTC), and aspects of the broadcasting industry, as well as its “broad heritage and cultural policy mandate that includes citizenship and Canadian identity, cultural development and heritage, and national politics” (Doern and Sharaput 2000, 24).<sup>187</sup>

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<sup>185</sup> While other institutions also share influence over Canadian copyright policy, this dissertation focuses only on those with a direct effect on the copyright lawmaking process.

<sup>186</sup> Prior to 1993, the predecessor to Industry Canada, the Department of Consumer and Corporate Affairs, handled the file. The Department of Canadian Heritage is treated as a joint, though somewhat subordinate; in practice, the two departments must negotiate in order to bring forth copyright legislation.

<sup>187</sup> The dual nature of this relationship could be seen even before the reorganization: the 1985 White Paper, *From Gutenberg to Telidon*, was published in the name of Consumer and Corporate Affairs and the Department of Communications, whose responsibility for culture would be given to Canadian Heritage in 1993 and whose technical responsibility for communications matters would be taken over by Industry Canada.

Although Canadian Heritage's responsibility is not enshrined in the *Copyright Act*, copyright has assumed a greater relative importance for Canadian Heritage than Industry Canada. Where Industry Canada is also responsible for patent-related issues (which are generally seen as more economically important than copyright issues), Canadian Heritage can focus solely on copyright on behalf of industries and groups such as the music and movie industries for which stronger copyright is their main priority. Doern and Sharaput (2000, 107) speculate that the 1993 re-assignment of the Department of Communications' responsibility for the technical aspects of telecommunications to Industry Canada "may have had the effect of requiring the Heritage Minister to search for her remaining areas of influence in the cultural sector. This included more prominence on the creators of copyrighted property." That copyright offered policymakers the opportunity to re-cast a seemingly market-based policy as cultural policy in an age of market liberalism made it even more attractive (Doern and Sharaput 2000, 183; Murray 2005, 27). Canadian Heritage's search for influence has yielded some results. A study of the rhetorical battle over copyright found that Canadian Heritage's articulation of its view of copyright "as a tool to protect Canada's creators and cultural industries from digital technologies has been much more insistently articulated in Ottawa than Industry's perspective of copyright as a part of the government's declared 'innovation strategy'" (Murray 2005, 18).

The departments' opposing mandates institutionalize copyright's user-creator, or protection-dissemination, dichotomy and complicate any efforts to pass copyright legislation.<sup>188</sup> Industry Canada's mandated focus on innovation is biased toward dissemination, ensuring that copyright law does not hinder access to knowledge and

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<sup>188</sup> As Michele Austin, chief of staff to former Conservative Industry Minister Maxime Bernier, told the author, were copyright policy to be made the purview of only one department, "life would be a thousand times easier" (Austin, interview by author, April 30, 2008).

information. Canadian Heritage's goal, meanwhile, is to maximize protection for creators for cultural reasons, although in practice this means maximizing copyright protection for copyright owners; that is, record companies and movie studios, which are usually not Canadian (Murray 2005, 18, 16 n. 2). Interest groups tend to gravitate toward one department or the other. Groups representing performers, writers, creators and the copyright industries coalesce around Canadian Heritage, while Industry Canada is seen as the representative of ISPs, consumers, businesses, investors and "user industries, such as the broadcasting sector," (Doern and Sharaput 2000, 131, 24; Doyle 2000, 97).

This distinction is not ironclad. Canadian Heritage officials, at least in 2005, expressed concern about DMCA-like protection of TPMs (Doyle 2006, 134, see also 109-111) even though their main clients, the Canadian Recording Industry Association and the Canadian Motion Picture Distributors Association were strongly in favour of them. As well, Industry Canada's general interest in balance may be tempered by the view of strong copyright as a means to strengthen innovation for certain industries, such as the computer and video game industries.

The vigour with which each bureaucracy defends its mandate often interferes with the timely pursuit of reform, even when their ministers are in agreement about what should be done (Austin, interview by author, April 30, 2008). These institutional divisions were key contributors to the long delays in implementing Canada's obligations under the WIPO Internet Treaties (see also Murray and Trosow 2007, 31). That these divisions have delayed Canadian implementation of the Internet treaties in the face of ever-rising U.S. desire for their implementation further suggests the extent to which Canada still retains political autonomy on the copyright file.

The past several years have also offered ample evidence of the importance of individual ministers in shaping their department's actions, and resulting legislation. While Industry Canada has traditionally held the lead on the copyright file, Liberal Heritage Minister Sheila Copps emerged as the central figure in Canadian copyright reform from the late-1990s to the mid-2000s, working (unsuccessfully, in the end) for the implementation of the WIPO Internet treaties along the lines of the U.S. DMCA (Doyle 2006). Similarly, Conservative Industry Minister Maxime Bernier's libertarian views were one of the reasons why he resisted strong protection for TPMs (Austin, interview by author, April 30, 2008).

## **2. The Prime Minister's Office and the Privy Council Office**

The relative neglect of the role of the PMO and his secretariat (the PCO) in Canadian policy analyses is particularly problematic at a time when political power has been centralized more than ever in the hands of the Prime Minister and his aides (Savoie 2008). In the Canadian political system, the PMO/PCO can and does arbitrate and facilitate inter-departmental disputes. This role is particularly important in a case like copyright, where responsibility for the file is split between two departments. In the 1997 debates over Bill C-32, the PMO had to arbitrate between Industry Canada and Canadian Heritage departments, whose polarization reflected that of their main constituents and even spilled over into the Liberal caucus. According to then-Canadian Heritage Minister Sheila Copps, the two departments were at such loggerheads that Prime Minister Jean Chrétien had to set part of the balance in the bill, eventually deciding "that, because Canadian universities had recently received substantial funding, they could make do with a limited copying exception (Doyle 2006, 73-74).

The PMO/PCO, however, can also serve as an originator of policy, which it then can task the responsible departments with carrying out. Its position can reflect an overall judgment on how a decision might affect electoral chances, whether a policy may favour one group too much over another, or it may reflect purely ideological considerations that have nothing to do with the policy itself and everything to do with political perceptions.

### **3. Parliament and copyright**

The direct relevance of Parliament, the legislative body that actually passes department-generated legislation, is primarily limited to minority-government situations. During periods of majority-government rule, governments can signal how they feel about copyright legislation in their choice of the reviewing committee. The House of Commons Standing Committee on Canadian Heritage is generally more favourable to the creative community and the content industries; the House Standing Committee on Industry being more favourable to user groups; and joint committees falling in between. In such a situation, Parliament's own role remains limited-to-nonexistent, since no matter which committee is assigned responsibility for the copyright file, the government controls the parliamentary committees. While majority governments face very little risk that any legislation it introduces might not pass, a minority government must convince one or more opposition parties to support its legislative agenda, and the survival of any bill depends on the government not being defeated in a confidence vote. Consequently, politicians must pay close attention to how copyright is playing politically.

Throughout most of the 20<sup>th</sup> century, copyright has been of minimal public interest in Canada. In the relatively tranquil period from the first *Copyright Act* in 1924 to the flurry of copyright-related activity in the mid-1980s, the Ilesley Commission was able to conduct its

work under Liberal and Progressive Conservative governments in the 1950s, keeping a low profile in the process. Even as copyright and intellectual property has moved to the centre of the global political economy, since the mid-1980s there has been little to distinguish between the two major parties on this file. Both the 1988 Progressive Conservative and 1997 Liberal copyright reform bills, described above, focused more on copyright owners and creators than on users and consumers. Since the beginning of the 2000s, however, copyright has become an increasingly contentious issue in Canada. This increased public interest, combined with a series of minority Parliaments since 2005, made it more difficult to pass any copyright bill.

Of the four major political parties, only the left-leaning New Democratic Party (NDP) is now consistently critical of a strong copyright policy, primarily as the result of the efforts of NDP MP Charlie Angus, a musician and author.<sup>189</sup> The Bloc Québécois views copyright in much the same way as does Mexico, as a cultural support for Québécois artists and as a creator's moral right. It is largely in favour of stronger copyright and is thus (ironically) aligned with the foreign entertainment industries that dominate the Canadian entertainment landscape. Neither the Liberal nor the Conservative parties currently have a discernibly coherent view on copyright. Each has proposed legislation to implement the Internet treaties, with the Liberals favouring an incremental approach to copyright reform and the Conservatives favouring the U.S. position on TPMs.

### **III. Interests: A changing balance**

As recently as the 1997 debate over Bill C-32, copyright lobby groups could be classified relatively easily. On the one side were those favouring increased protection for copyright owners and creators: the content industries, creators' copyright collectives, artists'

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<sup>189</sup> This analysis was conducted before the May 2011 federal election. As of May 2011, it is unclear whether the Liberals or Bloc Québécois can still be considered as "major political parties."

groups and the U.S. government. Of these groups, the U.S. government and the music recording and motion-picture industries have led the call for stronger copyright protection, with the Canadian Recording Industry Association (CRIA) as the most vocal and public advocate for the Canadian adoption of U.S.-style implementation of the Internet treaties (Doyle 2006).<sup>190</sup> While Canadian creator groups are also interested in stronger copyright reform, their focus is more on issues like increased performers' rights, with issues like ISP liability and the legal protection of TPMs as secondary issues. On the other side were those groups that emphasize the dissemination part of copyright law, namely large institutional groups like universities, libraries and television broadcasters.

The popularization of digital technology and the Internet, however, has upended the Canadian copyright debate in the 2000s to a greater extent than in the United States circa the debate over the 1998 DMCA. At the time of the DMCA, the Internet and activities like filesharing and downloading were not yet as ubiquitous as they are today. The U.S. DMCA debate witnessed the birth of groups not directly aligned with any of these large interests, but with a "public interest." Over the past 10 years in Canada, groups and individuals affected directly by the digital technologies and media covered by the Internet treaties have emerged as a potent political force. While the U.S.-based content industries continue to be the main proponents for stronger copyright protection, as they were in 1988 and 1997, these new "public interest" groups have challenged traditional approaches to copyright and complicated the passage of any Canadian copyright bill. As in the United States, the Canadian telecommunications industry has become increasingly involved in copyright politics, primarily with respect to the issue of ISP liability.

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<sup>190</sup> Despite its name CRIA historically has been dominated by foreign record companies. Since 2006, it has exclusively represented foreign companies.

### **i. The United States**

Before Confederation, Canada was ruled by a succession of Imperial copyright acts, placing it squarely in the Anglo-American tradition. These acts were, unsurprisingly, insensitive to the needs of a developing country with a miniscule publishing industry (Bannerman 2009). After Confederation, the United Kingdom continued to keep a tight leash on Canadian copyright laws. Early attempts to implement made-in-Canada legislation, in 1872 and 1890, were thwarted by the UK through its 1865 *Colonial Laws Validity Act* because the acts were deemed to be inconsistent with UK legislation (Robert 2001, 65). The 1890 bill would have replicated the U.S. manufacturing clause, providing copyright only to those books printed in Canada. It was stopped with “British power ... bluntly applied,” as were subsequent attempts to enact the bill in 1890, 1891 and 1895 (Murray and Trosow 2007, 30).

Internationally, Canada became a member of the 1886 *Berne Convention* after the United Kingdom decided that its quasi-independent colony would join the Convention. Canada attempted unsuccessfully to renounce the treaty in 1889. Bannerman notes: “Canada would have been the first country to withdraw from the Berne Union, and fears that such an action would destroy the nascent copyright union led the British government to use its Imperial control to prevent Canada’s withdrawal” (2009, especially 178-181). That Canada’s first wholly indigenous copyright legislation, the 1921 *Copyright Act* (passed in 1924) was designed to fulfill its obligations under the *Berne Convention* – a treaty it had tried to renounce – and was essentially the same as the UK *Imperial Act* of 1911 (Ilsley Commission 1957, 8-10), demonstrates the direct influence that the UK had over Canadian legislation.

Early Canadian copyright debates were couched largely in regional, not global, terms. Canadian law of the time reflected “the grip of British law and the weight of U.S. market forces on a cluster of small colonies” (Murray and Trosow 2007, 27), the United States being a source of cheap books that benefited readers while posing a threat to the nascent Canadian publishing industry and to British publishers. As an example of this push-and-pull, one can look to the 1842 *Imperial Copyright Act*, which prohibited the importation of reprints into the United Kingdom and its colonies and which was partly overturned with the 1847 *Foreign Reprints Act*, which permitted imports subject to a 12.5% duty “that was in practice seldom collected” (Murray and Trosow 2007, 28). Early copyright actors acknowledged this U.S. influence. In 1895, the Copyright Association of Canada remarked that “the geographical position of Canada, side by side with the United States ought not to be overlooked. This fact makes Canada’s position very different indeed from that of any other British colony” (cited in Scassa 2005, 79 n. 44).

Half a century later, in 1957, in its review of Canadian intellectual property laws, the Ilsley Commission acknowledged the continuing economic importance of the U.S. market for Canadian publishers in its recommendation that Canada ratify the 1952 *Universal Copyright Convention* (UCC), negotiated under the auspices of the United Nations Educational, Scientific and Cultural Organization. The UCC has been negotiated at the United Nations in part to deal with the U.S. refusal to join the *Berne Convention*, primarily because of its resistance to eliminating its manufacturing clause. In a report that was otherwise concerned about how international agreements such as the *Berne Convention* limited Canadian sovereignty, the Ilsley Commission recognized the economic interest of ratifying a treaty that

would provide protection in the lucrative U.S. market to Canadian authors who first publish in a place other than the United States (Ilsley Commission, 1957, 16).<sup>191</sup>

Today, the United States and its content industries loom large in Canadian copyright (and intellectual property) policy-making, as the main drivers for change, in particular favouring greater protection and less focus on dissemination in Canadian copyright law (Doern and Sharaput 2000, 8). The U.S. government has been pursuing, in Canada as elsewhere, the exportation of the DMCA, including strong legal protection for TPMs and a notice-and-takedown regime.

The U.S. government relies on a variety of other diplomatic tools in its attempt to influence the Canadian government, as NAFTA's copyright provisions can be modified only with great difficulty and because NAFTA effectively limits the ability of the three countries to trade issues against increased market access. For example, the United States used meetings under the Security and Prosperity Partnership of North America (SPP) to inquire about Canada's lack of WIPO implementation (Austin, interview by author, April 30, 2008). Despite its limited scope, the SPP is significant for the discussion of regional copyright because it was a forum in which copyright reform (a U.S. interest) could be linked credibly to movement on trade and border issues (Geist 2008).

Former U.S. Ambassador to Canada David Wilkins also met with Canadian officials on several occasions and was not shy about expressing the American pro-content-industry position. At an April 2008 Public Policy Forum conference on intellectual property, Wilkins remarked: "The USTR continues to have concern about Canada's failure to ratify and

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<sup>191</sup> The influence of the United States on Canadian copyright thinking can also be seen in the Ilsley Commission's remark that in the drafting of their report, they gave "full consideration" to U.S. "copyright legislation, its governing principles and its importance in relation to the Canadian economy" (Ilsley Commission 1957, 8).

implement two WIPO Internet treaties” (Wilkins 2008). Michael Shapiro, Attorney-Advisor from the Office of Intellectual Property Policy and Enforcement of the U.S. Patent and Trademark Office, elaborated on the U.S. position, arguing for Canadian DMCA-type legislation. He posited that the difficult nature of copyright policy “should not be a reason for further delay in ratifying and fully implementing the WIPO Internet treaties” (Shapiro 2008). The United States has also exerted pressure on other copyright-related issues. In 2007, California Governor and action movie superstar Arnold Schwarzenegger directly and successfully lobbied Conservative Prime Minister Stephen Harper for a bill to outlaw camcording of films in movie theatres, though such acts were already illegal (Geist 2007).

The United States has also placed Canada on its Special 301 Watch List<sup>192</sup> every year since 1988 save one (1993). Since 2004, Canada’s lack of movement on the Internet treaties has figured prominently in its placement on this list. While placement on this list can be a prelude to sanctions, in practice the United States would have to pursue any resulting sanctions through the dispute-settlement mechanisms of the WTO or NAFTA, which it has yet to do. Officially, Canada rejects the Special 301 Process, as being “deeply flawed and inappropriate. ... It’s reflective of industry views,” says Yannick Mondy, First Secretary at the Canadian Embassy in Washington (Mondy, interview by author, August 6, 2008). Statements in a 2007 parliamentary committee hearing by Nancy Segal, Deputy Director of DFAIT’s Intellectual Property, Information and Technology Trade Policy Division, further support this view: “Canada does not recognize the 301 Watch List process. It basically lacks reliable and objective analysis. It’s driven entirely by U.S. industry. If you aren’t on the Watch List in some way, shape, or form, you may not be of importance” (Segal 2007).

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<sup>192</sup> Discussed in chapter 2.

The U.S. Congress, for its part, has also made declarations highlighting Canada as a “pirate” nation, through its Congressional Anti-Piracy Caucus<sup>193</sup> and has raised the issue during inter-parliamentary meetings. More recently, the United States has attempted to influence Canadian law via the negotiation of the Anti-Counterfeiting Trade Agreement outside of existing institutions like WIPO or the WTO.<sup>194</sup>

In an historical-institutionalist analysis, institutions can also be actors. The previous chapter treated the U.S. government as a collection of institutions that shaped and maintained a specific copyright policy. In Canada and Mexico, the United States is an actor whose position on copyright, as well as its persistence in promoting internationally this position, is the outcome of the confluence of ideas, institutions and interests described in chapter 3. It has several resources at its command, notably Canadian (and Mexican) asymmetrical dependence on the U.S. market and its ability to work in tandem with its content industries, which have a strong presence in the Canadian and Mexican markets. Consequently, Canadian governments have demonstrated sensitivity to U.S. views on copyright (e.g., the 2007 anti-camcording bill). However, the extent to which sensitivity translates into Canadian enactment of preferred U.S. policies as opposed to an acceptance of the U.S. framing of an issue is dependent on other factors. U.S. ability to link copyright reform to an issue about which Canada cares about, such as access to the U.S. market, is one way in which the United States has been able to effect changes in Canadian laws. In other cases, such linkage is more difficult. Like other actors (albeit an important one), the United States must work through existing domestic institutional setups, as existing regional institutions, such as they are, cannot be used easily to modify Canadian (or U.S. or Mexican) copyright laws.

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<sup>193</sup> The Caucus has a website: <http://schiff.house.gov/antipiracycaucus/>, accessed July 6, 2009.

<sup>194</sup> This agreement and its implications for this dissertation’s arguments are discussed in the epilogue to chapter 3.

## **ii. Protection groups**

### **1. The copyright industries**

The content industries have always played an important role in the Canadian copyright debate: “throughout history the Canadian government increased the strength of its copyright laws in close consultation with the content industries” (Doyle 2006, 9). Dominated by multinational businesses with strong links to U.S.-based lobby groups and well resourced, the content industries enjoy relatively easy access to decision-makers and civil servants. They also are aligned with, or are part of, industry groups, such as the Canadian Chamber of Commerce, that have also lobbied for stronger copyright laws. Overall, these businesses tend to support a DMCA-like approach to TPMs and a notice-and-takedown regime for ISPs. As with their counterparts in the United States, copyright law is the foundation of their business models, and they spend significant resources on lobbying to influence government copyright decisions. Doyle (2006, 1) reports that the 2005 Bill C-60, Canada’s first attempt to implement the Internet treaties, was the most heavily lobbied bill in Canadian history.

The Canadian Recording Industry Association (CRIA) has been the most visible, vocal and important proponent of stronger Canadian copyright reform.<sup>195</sup> One of Canada’s foremost digital-copyright experts, University of Ottawa law professor and Canada Research Chair in Internet and E-commerce Law Michael Geist says that copyright is “their number one issue, by far” (Geist, interview by author, May 14, 2008). CRIA’s views largely parallel those of the other main industry associations, the Canadian Motion Picture Distributors Association (CMPDA), the Canadian Publishers’ Association, and Entertainment Software Association of Canada (ESAC).

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<sup>195</sup> See Doyle (2006) for an account of how CRIA lobbied the government in pursuit of its copyright objectives.

Like the CMPDA, CRIA represents foreign, primarily U.S.-based, companies (the four major international record companies), which control an overwhelming part of the Canadian market. CRIA-represented companies control about 95% of the Canadian music market (CRIA 2006). It also has close ties to its U.S. sister organization, the Recording Industry Association of America (RIAA), including an overlapping client roster. CRIA was founded in 1964 as the Canadian Record Manufacturer's Association, "to represent the interests of Canadian companies that create, manufacture and market sound recordings,"<sup>196</sup> although its main clients have always been the dominant multinational recording labels.<sup>197</sup> While they are primarily foreign-based interests that do not create works themselves, they traditionally have framed their policy interventions with references to their role in promoting Canadian culture and Canadian artists. In the motion-picture industry, the CMPDA represents the U.S. motion-picture studios that dominate the Canadian market (Canadian films accounted for only 2.9% of total box office receipts in 2009 (CBC 2009)). As with CRIA and the RIAA, the CMPDA's membership is the same as the MPAA and each group's members are represented in the International Intellectual Property Alliance (IIPA), the main umbrella U.S. intellectual property lobby group.

On the video game front, ESAC has emerged as a new voice in Canadian copyright with the potential to have a significant effect on the development of Canadian copyright law. ESAC was formed in 2003-04 from the Canadian branch of what was then the U.S. Interactive Digital Software Association (now the Entertainment Software Association

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<sup>196</sup> Canadian Recording Industry Association. "About CRIA." Accessed December 30, 2010. <http://www.cria.ca/about.php>.

<sup>197</sup> In 2006, several Canadian record labels left CRIA, arguing that the association was only representing the interests of the "Big Four" foreign record labels (CBC 2006).

(ESA)) and became significantly active in the run-up to 2008's Bill C-61.<sup>198</sup> Although ESAC's views differ from the ESA on some issues, they both support a complete prohibition on the trafficking of devices that can circumvent TPMs, arguing that it would damage their business model. Most interestingly, however, is the extent to which ESAC, unlike the CMPDA and CRIA, couches its defence of copyright in economic terms. Notes ESAC's Director of Policy and Legal Affairs Jason Kee: "We employ over 10,000 people in all provinces, and are basically responsible for quite a lot of job creation and contributions to the knowledge economy, which basically makes our industry increasingly of interest to policymakers" (Kee, interview by author, February 10, 2008).

## **2. Creators' groups**

Traditionally, actual creators have served two roles in the copyright debate. On the one hand, creators were used to legitimate industry demands for greater copyright protection to copyright owners, even though this protection does not necessarily translate into more revenues for artists. On the other, creator groups have actively lobbied for greater rights in their own work. Industry and creators groups have in the past formed temporary coalitions (Doern and Sharaput 2000, 130), such as the Copyright Coalition of Creators and Producers in the run-up to the 2005 copyright bill (Doyle 2006, 7). In Canada, creator groups tend to divide along linguistic and provincial lines, with Quebec-based creators and performers forming their own associations. Both traditional English- and French-Canadian creator groups, however, generally support WIPO implementation, particularly provisions extending protection to performers, but not necessarily those related to TPMs or ISP liability. While primarily domestically focused, creator groups also maintain loose affiliations with foreign

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<sup>198</sup> Its predecessor made a submission to the 2004 Bulte report, but was too new to have done anything else.

and international groups.<sup>199</sup> Overall, they are best characterized as “national” (in the sense of “Canadian”), not North American or international.

Since the early 2000s, however, Canadian artists have taken advantage of the reduced production and distribution costs afforded by digital technologies to loosen their dependence on traditional production and distribution channels. Some artists have also articulated a view on copyright separate from the maximalist approach expressed by traditional content industries and creator groups. To date, the Canadian Music Creators Coalition (CMCC) has been the most prominent example of a creators’ view of copyright distinct from an industry view. The CMCC was formed in April 2006 by several prominent Canadian artists (whose ranks now count Sarah McLachlan, Avril Lavigne and the Barenaked Ladies) “and some lawyers in Ottawa who want to remain anonymous” (Serry, interview by author, May 13, 2008). It was created in large part in response to the fear that record labels would start suing Canadian file sharers as has been done in the United States, a move these artists saw as being bad for business. The CMCC has also come out against DMCA-like TPM protection and advocates for a copyright policy that recognizes the need to satisfy consumers/users/individuals and their own need to be remunerated for their work.

Although a small, ad hoc organization, the CMCC has changed the way copyright is discussed in Canada, forcing industry groups increasingly to frame their advocacy more in terms of copyright’s effect on investment and jobs rather than on culture. However, its most significant effect will likely come when any copyright bill reaches the committee stage, and the CMCC can deploy some of Canada’s most popular artists to speak for artists and against

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<sup>199</sup> The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), for example, works internationally through the International Federation of Actors, and was deeply involved through the FIA in the negotiations that led to the WPPT (Neil, interview by author, May 19, 2008).

CRIA attempts to frame CRIA's advocacy as being artist-friendly (Geist, interview by author, May 14, 2008).

### **iii. Dissemination groups**

#### **1. Traditional user groups**

As in the U.S., large institutional users, such as the Association of Universities and Colleges of Canada (AUCC), the Canadian Library Association, the Canadian Association of University Teachers, and Council of Ministers of Education, Canada, have tended to represent "users" in the Canadian copyright debate (Wills, interview by author, February 10, 2009).<sup>200</sup> They, like industry groups, continue to be important in the copyright policymaking process. Generally, they are against strong protection of TPMs, as TPMs can interfere with the ease of use, lending and access of books and other materials for educators (Wills, interview by author, February 10, 2009). Like industry groups, they have relatively good access to decision-makers, although their interests, like user groups in the United States, are more defensive. They are not as well resourced as their industry counterparts. They also confront the same issues in advocating for "balance" that similar groups do in the United States: it is easier to call for stronger copyright than it is to describe how it should be balanced among various competing interests.

#### **2. Internet Service Providers<sup>201</sup>**

The Canadian ISP industry is dominated by three large "legacy" providers, including Bell Canada (phone), TELUS Corp. (phone) and Rogers Communications Inc. (cable). They are joined in turn by a number of much smaller ISPs who serve largely rural and niche

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<sup>200</sup> Wills further notes that the AUCC has always emphasized that it represents both creators and users of copyright materials and seeks a balanced approach to copyright reforms.

<sup>201</sup> While telecommunications companies are the main Canadian ISPs, universities also function as ISPs, giving the AUCC an interest in the issue; it supports a formalization of the notice-and-notice regime (Wills, interview by author, February 10, 2009).

markets that accounted for about 4% of the Canadian ISP market in 2010 (Copeland, interview by author, June 24, 2010). Until 2006, all ISPs were represented by the Canadian Association of Internet Providers (CAIP, founded in 1996); cable companies were further represented by the Canadian Cable Television Association (CCTA). The CCTA has since been disbanded, with the large telecommunications companies undertaking their lobbying directly.

CAIP continues to represent smaller ISPs, although according to CAIP Chair Tom Copeland, CAIP works with the larger companies on issues of mutual interest (Copeland, interview by author, June 24, 2010). These groups work to influence government individually and through coalitions, namely the Balanced Copyright Coalition in the run-up to 2005's Bill C-60, and the Business Coalition on Balanced Copyright (BCBC), a group started in February 2008 that counts CAIP, Rogers, Bell, TELUS, the Retail Council of Canada, the Canadian Association of Bankers and other politically and economically important business groups among its members. ISPs enjoy a longstanding, active relationship with governmental officials through Industry Canada, whose responsibility for issues like e-commerce and innovation makes it their natural representative in government (Copeland, interview by author, June 24, 2010).

ISPs are primarily concerned with limiting their liability for infringing actions committed by their subscribers and minimizing the cost of maintaining any regime that requires them to police the actions of their users. They have consistently advocated for a notice-and-notice regime. Unlike many other groups on the user side of the copyright debate, ISPs are financially and politically powerful, consisting as they do of some of Canada's most economically successful companies. Though focused "almost exclusively on the issue of ISP

liability,<sup>202</sup> the wider user lobby has been able to benefit from their economic strength via the attention they bring to general user issues (Doyle 2006, 85).

Since the passage of Bill C-32 in 1997, public interest in copyright has increased, primarily as a reaction to the way that copyright law has affected, or threatens to affect, directly individuals' lives and their control over what they consider(ed) to be their own property. While these individual/consumer/public-interest groups lack the resources and access to governmental officials needed to be on an equal footing with the content industries, they have changed the way copyright policy is made, as well as the tone and, to a lesser extent, the direction of the debate.

In the early part of the 2000s, individuals' interest in copyright was highly influenced by organizations and events in the United States with citizens receiving most of their copyright information from U.S. sources like the libertarian electronic-rights group Electronic Frontier Foundation (EFF) and slashdot.org, a computer-tech website. As a result, their submissions to initial public consultations on copyright reform in 2001-02 (discussed below) referred often to the DMCA and used U.S. terms like "fair use" instead of Canadian concepts like "fair dealing." Many who participated in these consultations did so via form letters provided by Electronic Frontier Canada, a Canadian branch of the EFF (Bannerman 2006; Doyle 2006).

The Canadian online community has now matured to the point where Canadian experts and groups can satisfy individuals' demand for information on copyright. To a large extent, this maturation is the result of the efforts of University of Ottawa Law Professor Michael Geist. In 2003, Geist started the Canadian Internet Policy and Public Interest Clinic

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<sup>202</sup> While this comment refers to the 2005 copyright bill, it also applies to the rest of the Canadian copyright debate.

(CIPPIC) with a grant from the U.S.-based Amazon.com's Cy Press fund (it continues to receive support from U.S. and Canadian sources).<sup>203</sup> CIPPIC has been instrumental in helping smaller organizations become involved in the copyright debate. Geist has focused on digital-copyright issues with a combination of education and advocacy for user rights through his blog and weekly column in the Toronto Star. A canny political operator with extensive governmental contacts and a sharp understanding of digital media, Geist's use of Facebook to spur grassroots opposition to the Conservative government's 2007 legislation (discussed below) represented the first effective political use of social-networking media in Canada.

#### **IV: Distinctive Canadian ideas, institutions and interests**

This historical-institutionalist picture of the ideas, institutions and interests that shape the Canadian copyright debate suggests the potential for either convergence or divergence on the U.S. model of implementation of the Internet treaties. The past ten years have been a time of upheaval. The United States and its allied content industries continue to have significant resources at their disposal when arguing for copyright reform. The ability of the United States to get a hearing on copyright issues (along with the U.S. motion picture industry, which dominates the Canadian market) was evidenced by the passage of the 1997 anti-camcording bill, despite the presence of relevant existing legislation and no strong evidence that it was actually needed. The exogenous technological shock of the arrival of the digital age has brought new groups and voices to the fore, such as the telecommunications industry and ISPs, individual creators, individuals and public interest groups. While the telecommunications industry possesses the largest amount of resources (in terms of economic

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<sup>203</sup> CIPPIC is now known as the Glushko-Samuelson Canadian Internet Policy and Public Interest Clinic, named after U.S. "technology innovator and entrepreneur Dr. Robert Glushko and his wife, [law] professor Pamela Samuelson," who made a "large donation" to the clinic in 2007. This funding is a rare example of U.S. material linkages to Canadian user-oriented advocacy groups.

and political clout), individual creators and users have also deployed their own resources. Their attempts to engage in symbolic bricolage, respectively emphasizing copyright's supposed role in promoting creation and dissemination, threatens to reframe the entire copyright debate.

Overall, enough uncertainty existed at the beginning of the Canadian debates over the Internet treaties to make it difficult to predict their outcome with any certainty. Based on past example and the divided institutional responsibility for copyright, one would expect a tendency to balance as in 1997, when the Prime Minister's Office arbitrated a law that attempted to reach a balance between user and owner interests. Predicting such an outcome for the Internet treaties, however, has been complicated by the emergence of individuals and public-interest groups in the copyright debate, and while it was not obvious in 1997, the power of a Prime Minister's Office with very few checks on its powers also had the potential to upset this rough balance.

## **PART II: IMPLEMENTATION OF THE INTERNET TREATIES: USERS FIND THEIR VOICE**

In the debates over the Internet treaties, the ideas, institutions and interests described in the previous part combined to produce one of the more surprisingly contentious issues in Canadian political history, transforming Canadian copyright from a sleepy backwater to an issue that has captured the attention of the Canadian political class. From a regional historical-institutionalist perspective, the Canadian debate over implementation of the treaties reveals a process influenced by the regional hegemon but whose domestic constellation of institutions and interests retains the potential for policy outcomes different from those in the United States.

## **I. 2001-02: Government consultations**

### **i. A Framework for Copyright Reform**

Given the rate of technological change, the drafters of Bill C-32 in 1997 included a provision requiring that the government review its copyright legislation within five years. In 2001, the government launched its “section 92” review, which consisted of a series of public consultations and three papers. *A Framework for Copyright Reform* (Industry Canada and Department of Canadian Heritage 2001) provided a high-level overview of the issue and set out possible options with respect to copyright reform; a *Consultation Paper on Digital Copyright Issues* (Industry Canada and Department of Canadian Heritage 2002); and a *Consultation Paper on the Application of the Copyright Act’s Compulsory Retransmission Licence to the Internet* (Industry Canada and Department of Canadian Heritage 2002a). The latter two were designed “to launch the online portion of ... public consultations.” More traditional consultations were held in Halifax, Vancouver, Montreal, Toronto, Ottawa and Edmonton, and attended by over 300 Canadians (Bannerman 2006).

At the WIPO negotiations, Canadian delegates were in favour of a “minimalist” approach to the legal protection of TPMs (making it a crime to break a digital lock only if it were done for the purposes of violating an underlying copyright); their views on ISP liability were unclear from the conference proceedings and documents. However, the papers themselves did not commit the government to any one position in any area, including legal protection for TPMs and ISP liability. Instead, they provided generic core principles: the framework rules must promote Canadian values: the framework rules should be clear and allow easy, transparent access and use; the proposals should promote a vibrant and competitive electronic commerce in Canada; the framework needs to be cast in a global

context; and it should be technologically neutral, to the extent possible (Industry Canada and Department of Canadian Heritage 2002, 13-15). The Liberal government's decision to undertake two years of consultation suggests an interest in delaying implementation of the Internet treaties (Doyle 2006, 36) and also suggests the government was not committed to one particular interpretation of the treaties.

### **1. Government position on TPMs and ISP liability**

These papers' perspective on TPMs was consistent with the Canadian government's position at the WIPO negotiations (discussed in the previous chapter), namely, a reluctance to create new rights that would go too far beyond existing rights. They explicitly noted that restricting the trade in circumvention devices could impair existing rights under the law while also expressing concern about issues such as privacy (Industry Canada and Department of Canadian Heritage 2002, 24). They concluded that more consultations were necessary.

The government's ISP-liability approach presented an interesting contrast to its non-position on TPMs. While the papers gently critiqued the U.S. approach to TPMs, they proposed a notice-and-takedown regime for ISPs in line with the U.S. approach. The papers also noted that, in addition to the U.S., the EU, Japan and Australia all use variations of "notice-and-takedown." The government's position, as will be seen, did not last long.

### **ii. Supporting Culture and Innovation**

In October 2002, the departments tabled their section 92 report, whose title mirrored their differing priorities: *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Industry Canada and Department of Canadian Heritage 2002b). The report proposed addressing digital issues and implementation of the WIPO

Treaties within one to two years (i.e., by 2004), with other issues to be dealt with in the medium (two-to-four years) and long (four-plus years) term.<sup>204</sup>

These papers set out a government vision of a digital agenda that accepts the Internet treaties as the legitimized means by which a country engages in digital-copyright reform. Indeed, digital-copyright reform in Canadian debates is largely synonymous with the Internet treaties. Gervais argues that this prioritization of WIPO implementation and digital copyright reflected political priorities (Gervais 2005, 339-340). Although the report committed the government to addressing those “digital issues for which consultations and preliminary policy analysis have taken place” (i.e., ISP liability, legal protection of TPMs and Rights Management Information, and a “making available right”), it did little more than canvass possible alternatives (Industry Canada and Canadian Heritage 2002b, 43-44, 22 (TPMs), 28 (ISP liability)).<sup>205</sup>

### **iii. Public consultations**

To officials’ surprise and consternation,<sup>206</sup> public interest in copyright reform remained high for the 2002 consultations. The government paper attracted comments from more than 700 individuals and organizations when it was posted on a government website.<sup>207</sup> Articles in the mainstream press on the potential implications for Canada of the implementation of the WIPO treaties complemented the work a small but active number of

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<sup>204</sup> The Department of Canadian Heritage’s internal estimates were more accurate: they calculated that, despite the fact that the treaties were a high priority for the content industries, it would take five-to-ten years to implement short-term reforms, and eight-to-twenty years to implement fully the WIPO Internet treaties (Doyle 2006, 100).

<sup>205</sup> Rights Management Information refers to the protection of the bibliographic or identifying data attached to a digital work, such as author and copyright owner. A making available right is the right to forbid others from making a copyrighted work available over the Internet or other means of telecommunications.

<sup>206</sup> The departments received 670 written submissions (of which 234 were closely modeled on a form letter produced by the EFF (Doyle 2006, 95; Geist 2005, 2). The diversity of opinions, and the lack of clarity in many submissions about who the individual represented – as well as the fact that the consultations were aimed at traditional copyright experts, not laypeople (Bannerman 2006) – made it difficult to summarize their input.

<sup>207</sup> See Bannerman (2006) for a discussion.

Canadian copyright bloggers. Most notable of these new bloggers was Geist, who was emerging as one of the most vocal proponent of users' rights. The consultations also gave activists, some of whom were becoming involved on copyright issues for the first time, the opportunity to begin networking (McOrmond, interview by author, January 18, 2008). These activists were relatively resource and contact poor compared with traditional content-industry lobby and institutional-user groups. The advocacy by these new activists and the traditional user-rights lobbies was complemented by the economic strength of the ISPs, including Bell Canada, TELUS and Rogers, although these companies focused "almost exclusively on the issue of ISP liability" (Doyle 2006, 85, 86, 94). For their part, ISPs formed the Balanced Copyright Coalition with the Public Interest Advocacy Centre (PIAC), the Retail Council of Canada, the Canadian Advanced Technology Alliance and several professors (Doyle 2006, 85), to counter calls for notice-and-takedown and strong legal protection for TPMs.

#### **iv. *Status Report*: ISP liability issue is settled**

On March 25, 2004, the government submitted a *Status Report on Copyright Reform* to the House Standing Committee on Canadian Heritage. The report committed the government to addressing the legal protection of TPMs, again without making specific recommendations (Industry Canada and Canadian Heritage 2004, 3). It also revealed an evolution of the government's position on ISP liability. In contrast to the government's initial position in favour of notice-and-takedown, the *Status Report* announced that the government was considering two variations on notice-and-notice. The document did not mention notice-and-takedown at all.

While various groups, including the U.S. government, continued to advocate for notice-and-takedown, it seems that the issue was settled in favour of notice-and-notice by the

courts and then by an informal agreement among ISPs and the content industries soon after the publication of the government's original 2001 consultation papers. In 2004, the Supreme Court upheld the ruling in *SOCAN v. CAIP*, that ISPs could not be held liable for copyright infringements committed by their subscribers since they only provided the means of communication.<sup>208</sup> Earlier, the Copyright Board of Canada had ruled in the "Tariff 22" case that ISPs were not required to collect tariffs for digital works shared by subscribers on their system. These findings, which severely limit ISPs' liability for subscribers' infringement, essentially took notice-and-takedown off the table, and led to the creation of an informal notice-and-notice regime among the members of CRIA, CAIP and the CCTA with which all concerned seem to be satisfied.<sup>209</sup>

While the government could have overruled this informal arrangement via legislation, the government's 2004 *Status Update* explicitly cast its support for a version of notice-and-notice. It followed this update with attempts to formalize notice-and-notice in the Liberal government's 2005 Bill C-60, and the Conservative government's Bills C-61 (2008) and C-32 (2010). The existence of an informal consensus between ISPs and rights holders in favour of notice-and-notice, combined with the political and economic power of ISPs (Doyle 2006, 117), heavily favoured notice-and-notice, despite the fact that it rejects the international consensus in favour of variations of notice-and-takedown.

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<sup>208</sup> As de Beer and Clemmer (2009, 379) note: "In its analysis in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, Canada's Supreme Court held that the *Copyright Act* specifies that only neutral intermediaries enjoy immunity from liability. This immunity is to be enjoyed "so long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, *i.e.*, whose participation is content neutral, but confines itself to providing 'a conduit' for information communicated by others." Justice Binnie reiterated this principle, reinforcing that "to the extent [that ISPs] act as innocent disseminators, they are protected by §2.4(1)(b) of the Act". He drew an analogy to a case that held the owners of telephone wires, who were "utterly ignorant of the nature of the message", were not responsible for the content of the transmissions" (citations omitted).

<sup>209</sup> "Under this arrangement, ... CRIA first notifies a CAIP- or CCTA-member ISP in writing when an alleged infringement of CRIA's copyrights by a customer of the ISP is taking place; the ISP then notifies its customer of the allegation, again in writing, and sends a written confirmation that it has done so back to CRIA" (CAIP 2001).

This outcome is significant for our understanding of Canadian copyright policy for three reasons. First, the telecommunications industry's ability to obtain a low-impact limited-liability regime, even given later content-industry attempts to reverse it, demonstrates that industry's relative strength in the Canadian copyright debate. Second, it further demonstrates that, under certain conditions, Canada possesses significant autonomy in forming copyright policy. In particular, it is more difficult to change an established, path-dependent process (that had been legitimized by the courts) than it is to create something new. In contrast, legal protection of TPMs is a new right and thus is more open to influence. Third, the timing of the court decision that affirmed the user-friendly notice-and-notice regime suggests that the Canadian judicial system's openness to the concept of copyright as something that must balance owner and user interests was not the result of the strong outpouring of individual-user interests that would occur nearer to the end of the decade. Rather, it was based in existing Canadian copyright traditions.

## **II. 2004-05: The politics of Bill C-60**

The time from 2004 to the introduction of the bill by a minority Liberal government in June 2005 was marked by lobbying and bureaucratic and parliamentary positioning. It also suggested the extent to which the Canadian copyright bureaucracy tended toward the status quo. In this period, the bureaucracy seems to have come to a consensus on the treatment of TPMs. Despite the traditional rivalry between Industry Canada and Canadian Heritage and between their client bases, in the run-up to Bill C-60 departmental officials supported a "balanced approach ... responding to copyright's role in the new digital environment" – that is a minimalist approach to TPM protection and a notice-and-notice ISP liability regime (Doyle 2006, 138). Even Canadian Heritage "did not view the protection of TPMs and the

outlaw of circumvention devices as the best solution to the problem,” claiming that a maximalist approach was “not smart public policy.” A 2005 internal and informal policy review favoured a “minimal approach” to treaty implementation (Doyle 2006, 107, 109) of the kind promoted by Canadian delegates to the WIPO negotiations and reflected in a plain-language reading of the Internet treaties.

In this case, the U.S. example served as a caution of what not to do (a form of reverse emulation). The departments’ observed the DMCA and its aftermath, and came to resist, “for public policy reasons ... the maximalist proposals of the content lobby and [came] to empathize with many of the basic concerns of the user lobby” (Doyle 2006, 87). For policy and political reasons (most public-consultation participants were opposed to the DMCA), a “maximalist interpretation of the treaties ... did not appeal to some Canadian policy makers, who viewed digital copyright reform with far more caution than haste” (Doyle 2006, 96).

In the period before the introduction of Bill C-60, the content industries enjoyed a significant advantage in access to departmental officials. In 2004 only two of 75 meetings between the Copyright Policy Branch at Canadian Heritage and stakeholders included groups representing the public: “one with the Electronic Frontier Foundation (EFF), and one joint meeting with ... CIPPIC and the Public Interest Advocacy Centre (PIAC)” (Doyle 2006, 140). Rights holders, led by CRIA but supported by other industry and creators’ groups, disagreed with the (eventual) departmental view. As part of the Copyright Coalition of Creators and Producers, a temporary formal coalition of industry groups and the major copyright collectives, photographers and artists’ organizations (Doyle 2006, 84), they proposed in 2002 a detailed, DMCA-like approach to circumvention. CRIA also expressed its support for notice-and-takedown (CRIA 2001).

CRIA, other industry groups and creators' groups found a useful ally in Heritage Minister Sheila Copps, who supported fully their position (Doyle 2006, 126). In 2002, Copps "cleverly shifted the pressure from herself to the bureaucracy, especially Industry Canada." This pressure forced Industry Canada (and its minister, David Emerson) "to compromise on the departments' plans for a short-term, incomplete WIPO package" (Doyle 2006, 127). CRIA, representing the rights lobby, bypassed the bureaucratic policy process and appealed directly to the minister, realizing "some of its key aims in the form of a bill by working from the top down." Throughout the process, their relationship with Copps, which dated to 1997, was their single most powerful lever (Doyle 2006, 121). The relationship was mutually beneficial: Copps "earned political capital and positive publicity" while supporting, as she saw it, Canada's "cultural community," and the content industry could count on an influential ally (Doyle 2006, 122-123).<sup>210</sup>

CRIA's strategy of emphasizing the political to bypass the bureaucracy's policy concerns in the run-up to the introduction of Bill C-60 met with mixed success, best exemplified by the events surrounding what became known as the "Bulte Report." In May 2004, the House Canadian Heritage Committee, chaired by Liberal MP Sarmite Bulte and heavily influenced by the rights-holder lobby and comprised of MPs who little understood the topic (Doyle 2006, 138), released its *Interim Report on Copyright Reform* (Committee on Canadian Heritage 2004). This report quickly became infamous among users groups and those concerned about the possible direction Canadian copyright reform would take. Bulte had extensive links to the content industries. Her committee's report read much like the 1985 *A Charter of Rights for Creators* (Doyle 2006, 125). It took an "extreme copyright-holder slant," arguing for maximalist legal protection for TPMs and a notice-and-takedown regime

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<sup>210</sup> Following Copps' departure in 2003, Heritage Minister Helene Scherrer took a similar approach.

for ISP liability (Murray 2005, 22). These recommendations were based in part on the false argument that without changes to the law, Canada would be “vulnerable to sanctions under international trade rules” and that exceptions and limitations to copyright were somehow illegitimate, rather than being an essential part of copyright (Tawfik 2005, 70-71).

The report had a counterproductive effect. Its extreme position created “a whipping-boy for public interest advocacy” (Murray 2005, 22). Within government, Bulte’s committee irritated “some public servants” and came to be seen as a rogue committee because its recommendations and analysis were so transparently biased toward one group. As a result, the government agreed that a joint Industry-Heritage Committee would study the resulting legislation, not the Heritage Committee as had happened in 1997, (Doyle 2006, 136-137). Given the relative friendliness of the Heritage Committee to copyright owners, this rebuke was a setback to their cause.

#### **i. Bill C-60 (June 2005)**

These studies and analyses culminated in the June 2005 tabling of Bill C-60, *An Act to Amend the Copyright Act*,<sup>211</sup> by the minority Liberal government of Paul Martin. Bill C-60 did not follow the DMCA on either the legal protection of TPMs or ISP liability. It addressed the legal protection of TPMs in one paragraph. Clause 27 would have made it illegal to break a TPM protecting any material form of the work for the purpose of infringing the underlying copyright or moral right. Rights holders would also have the right to sue someone who “knows or ought to know that the measure has been removed or rendered ineffective and, without the owner’s or holder’s consent.” Unlike the preferred U.S. approach, which prohibits the manufacture and sale of anti-TPM devices, it avoids creating any new right

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<sup>211</sup> See Banks and Kitching (2005) for a full summary of the bill.

related exclusively to the presence of a TPM by linking TPM infringement to infringement of the underlying copyright.

On ISP liability, Bill C-60 proposed a notice-and-notice regime, which would have formalized the system that had been operating for several years. ISPs would not have been liable for copyright infringement if they were only providing the network the alleged infringer had used (Clause 20). This clause was not wholly uncontroversial. Geist (2005b), for example, argues that under Bill C-60 that search engines would effectively have been subject to a “notice-and-takedown” regime. However, this part of the bill did not attract much criticism.

## **ii. Triumph of the bureaucracy?**

Although it could have been reformed at the committee stage had the government not fallen in September 2005, Bill C-60 represented a victory for the user lobby and the bureaucracy on TPMs, while the notice-and-notice regime represented a victory for ISPs. On these two issues, the Liberal government decided to ignore U.S. pressure to implement stronger protection for TPMs and a notice-and-takedown regime. The content industries did not lose completely: most notably, they received a making available right for which they and the U.S. government had lobbied hard. Doyle concludes that: “Perhaps what is most interesting about the political pressures surrounding copyright and the recording industry is not how the government responded with a making available right, but that, even in the face of such pressures, the government came forward with a minimalist bill” (Doyle 2006, 146-147).

Doyle argues that Bill C-60 was a triumph of the bureaucracy. Convinced by public opinion and the observed effects of the DMCA that a minimalist approach was best for Canada, and struggling to deal with unforeseen high levels of public interest, “the

bureaucracy adopted a slow, staged and deliberative copyright reform process” (Doyle 2006, 117). Meanwhile, the formalization of the notice-and-notice regime was also due in part to the economic and political clout of the Canadian telecommunications industry.<sup>212</sup> Both outcomes demonstrated Canada’s ability to implement policies different from those in (and favoured by) the United States.

However, despite his strong analysis, Doyle seems to have overestimated the power of the bureaucracy to resist political pressure, as well as failing to account for the ever-present (if sometimes only latent) power of the Prime Minister. He concludes that one cannot win a policy battle based on resources and access alone; if something, like the DMCA, is seen by policy experts within the bureaucracy to be bad policy, civil servants will resist the implementation of these bad policies (Doyle 2006, 156-158).

### **III. 2007-08: Bill C-61 and the triumph of the U.S. lobby**

Events have disproved Doyle’s prediction and his faith in the ability of good policy to trump bad policy.<sup>213</sup> Only three years after Bill C-60, a minority Conservative government, led by Stephen Harper, – with the same bureaucracy in the face of even greater public opposition than before – introduced a *maximalist* bill that mirrored the DMCA on TPMs – prohibiting the trafficking of tools that can break digital locks as well as the breaking of digital locks under most circumstances – even as it kept C-60’s notice-and-notice ISP regime.

The flaw in Doyle’s analysis is suggested by another observation he makes. Doyle remarks that copyright could become an issue in Canada-U.S. relations, possibly through the not-then-defunct Free Trade Area of the Americas negotiations. Before 2006, the influence of the PMO/PCO would have been easy to miss, because the Prime Ministers of the day, Jean

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<sup>212</sup> Also discussed in Doyle (2006, 116, 118-119).

<sup>213</sup> As Kingdon (2003, 57) notes, good policy must also be good politics in order to be implemented.

Chrétien and (in 2005) Paul Martin, seem to have given the lead on this issue to their departments (although Chrétien intervened to settle a specific inter-departmental dispute in 1997). However, as Savoie (2008) has argued persuasively, the increasing centralization of federal political power in the PMO and away from the departments makes it imperative that one always consider the effect of the PMO in federal policymaking, if only to note that the PMO has decided to let individual departments work without interference.

Two developments shaped the emergence of the Conservative government's Bill C-61 in June 2008. The first was the PMO/PCO's decision to place itself at the centre of the copyright policymaking process. In Conservative Prime Minister Stephen Harper, Canada had a prime minister who was very hands-on. The second, and certainly the most dramatic, was the full emergence of copyright as an issue capable of engaging thousands of ordinary Canadians, an emergence spurred by the innovative use of Facebook by a politically savvy law professor.

#### **i. Inter-departmental politics and the role of the PMO/PCO**

The historical-institutionalist approach posits that change can emerge from the manipulation of contradictory institutional logics. In Canada, Industry Canada and Canadian Heritage had opposing mandates, while the PMO could decide to rule in favour of either department. Following the election of a minority Conservative government in January 2006, copyright lobbying continued. During this period, the large copyright lobbies kept a low public profile but continued to lobby behind the scenes and be consulted by the two departments. The larger copyright-user lobbies also seem to have been consulted during this period. However, according to CIPPIC Director David Fewer, neither he nor any other public-interest groups met with government officials specifically about copyright reform

(Fewer, interview by author, February 7, 2008), although Industry Minister Maxime Bernier's Chief of Staff Michele Austin says she met with Geist repeatedly, and Bernier met with the Retail Council of Canada (a "user" group) (Austin, interview by author, April 30, 2008). User-rights groups called for a new round of public consultations, citing the rapid pace of technological changes, new stakeholders, and greater awareness of the significance of copyright on everyday life (Fewer, interview by author, February 7, 2008). However, government officials and industry representatives, in interviews with the author in the first half of 2008, argued against further consultations, claiming that the issue had already canvassed all interested parties.

The government proceeded slowly on what Heritage Minister Bev Oda and Industry Minister Bernier appreciated was a complex file complicated by the lack of a unified governmental approach. Each minister was working under opposing "mandate letters," the letters from the PMO that set out a department's objectives for the government's term.<sup>214</sup> According to Austin, the four main issues on copyright when Bernier came to Industry in 2006 were: WIPO implementation, ISP liability, TPMs, and fair use and fair dealing. Of these issues, TPMs provided the only large source of disagreement between the two departments. Industry Canada favoured a more permissive approach to breaking digital locks while respecting any underlying copyright and Canadian Heritage arguing for much stronger protection. TPMs were also a hard ideological issue for the libertarian Bernier: he supported the rights of individuals to break digital locks that impeded their rights, but as a Quebec-

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<sup>214</sup> "This is the mandate letter to Bernier," reads Austin: "It is important that you and [Canadian Heritage] Minister [Bev] Oda proceed with work ensuring that our intellectual property regime is modernized and among the best in the world. Any delays on this file may put Canada's international reputation at risk. In particular, I ask that you and your colleague [Minister Oda] focus on developing amendments to the copyright act that will bring the 1996 WIPO Internet treaties into force." Oda's letter read: "You should jointly lead with the minister of industry a review of bill C-60, an act to amend the copyright act' [and] ensure that any new act provides reasonable access to copyrighted work for learning for teachers while promoting educational policy goals" (Austin, interview by author, April 30, 2008).

based politician he was sensitive to the fact that Quebecers favour strong copyright protection (Austin, interview by author, April 30, 2008).

By May 2007, Bernier and Industry Canada had prepared a presentation to the PCO to outline Industry Canada's views on copyright – dealing mainly with TPMs, education, and private copying – and to receive permission to write a bill. Austin describes discussions with the PCO and PMO as “intense.” While Heritage's initial reaction to the Industry package was less than positive, by July 2007, Bernier and Oda reached an agreement, entitled ‘Moving Forward on Copyright Reform,’ on all WIPO-related issues except for TPMs, ISP liability and the treatment of publicly accessible material. However, the two bureaucracies were unable to come to an agreement on this issue (Austin, interview by author, April 30, 2008).

Faced with a fundamental inter-departmental disagreement, they unsuccessfully sought the intervention of the PCO to help negotiate a compromise. However, the PMO and PCO were unwilling to overrule “either department.” The PMO itself had specific, if vague, views on what should be done: “satisfy the United States” (Austin, interview by author, April 30, 2008).<sup>215</sup> During the 2005-06 election, Stephen Harper distinguished his Conservatives from the Liberal party by promising to improve relations with the United States that had been strained by U.S. intransigence over the Iraq war, Ballistic Missile Defence and that perennial thorn, the softwood-lumber dispute. Upon coming to power, the Harper government quickly settled the softwood-lumber dispute on terms that were exceedingly favourable to the United States (Kopala 2006).

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<sup>215</sup> Says Austin: “The Prime Minister's Office's position was: move quickly, satisfy the United States. And both of our positions were, politically speaking, ‘Listen, there have been mistakes made in the DMCA, there are a list of exceptions that have been created by court, can we not have DMCA lite?’ And they said, ‘We don't care what you do, as long as the U.S. is satisfied’” (Austin, interview by author, April 30, 2008).

This intransigence, says Austin, eventually led to Bernier being shuffled from Industry to DFAIT in August 2007. Part of the problem was Bernier's assessment that a U.S.-style implementation of the Internet treaties would be unwise for political and policy reasons, according to Austin. In addition to the policy reasons described above, Bernier and Austin argued that the bill would hurt the Conservatives with potential Conservative voters, such as young men who understood computers and mothers whose children could end up being sued.

Prime Minister Stephen Harper seems to have viewed the issue in terms of Canada-U.S. relations, rather than as a strictly Canadian issue:

It's not often that the Prime Minister is exposed to issues like that [copyright] in bilaterals [with the United States]. Usually, he will be in a room where he's in charge of the agenda, he's in charge of the discussion. But when you go and you see the Americans, when you're in a bilateral situation or an international situation, they say, 'Where's copyright [as an issue]?' And he would [say]: 'Yeah, that's a good question. Where's copyright?' [H]e would say, 'Well, we just want to make the Americans happy.' 'Well do you understand what that means, politically?' 'Just do it.' 'No, I positively won't just do it until you understand what this means' (Austin, interview by author, April 30, 2008).

Faced with a PMO that did not understand the issue and a PCO that refused to broker a deal, Bernier and Oda "proposed a fairly large package not exclusive to copyright," including "counterfeiting, ... time shifting, levies, fair use, ephemeral recordings. Austin characterizes the proposal as "a consumer-based package" and as "DMCA-lite."

U.S. pressure on Canada was evident at the August 2007 SPP Summit in Montebello, Quebec. Unlike the calcified NAFTA, the SPP provided a forum in which the three countries could discuss a wide range of issues. In a bilateral/trilateral relationship typically characterized by an absence of cross-issue linkage (Keohane and Nye 1989), the SPP provided the United States with a novel opportunity to link Canadian copyright reform to an issue of great importance to Canada: the border and trade. Under the SPP process, the U.S.

Secretary of Commerce could (and did) ask about Canadian WIPO implementation. Often, a “we’re working on it” was all that was required. However, according to government documents obtained by Geist, in the run-up to the August 2007 SPP summit at Montebello, Quebec, the United States linked American movement on border issues to Canadian movement on copyright (Geist 2008).

It is unclear how significant this attempted linkage was for a PMO/PCO already interested in satisfying the United States on copyright (and which continued to pursue DMCA-style policies long after the end of the summit). Bernier, partly because of his continued insistence that Canada could not follow the U.S. approach to copyright reform (Austin, interview by author, April 30, 2008), was shuffled to Foreign Affairs in August 2007 and replaced by then-Minister of Indian Affairs and Northern Development Jim Prentice.

## **ii. Facebook activism comes to Canada**

Following his arrival at Industry Canada, Prentice attempted to introduce a DMCA-style copyright bill and ended up fomenting widespread public protests that panicked the government, confounded Cabinet colleagues and led to a six-month delay in the bill’s introduction that rendered it collateral damage when the September 2008 election was called. This uprising vindicated Austin and Bernier’s intuition about the political dangers of copyright reform. In the end, the Conservative’s Bill C-61, like the Liberals’ Bill C-60, never got beyond first reading.

In the October 16, 2007, Speech from the Throne, the Conservative government pledged to “improve the protection of cultural and intellectual property rights in Canada, including copyright reform” (Canada 2007). When the government placed *An Act to Amend the Copyright Act* on the *Order Paper* on December 10, 2007, observers of Canadian

copyright expected that this new bill would be much closer to the DMCA than the Liberals' C-60 had been.<sup>216</sup>

What happened next caught everyone off guard. The first weekend in December, Geist set up a Facebook page, Fair Copyright for Canada (FCFC).<sup>217</sup> The site's initial objectives were relatively modest: to inform people and to get people involved in opposing the bill. Its main demand was that the government listen to the public. Eventually, this demand became more specific: that the government hold public consultations on any new bill. Geist and others critiqued the upcoming bill by referring to it as the "Canadian DMCA." This approach not only focused on a bad policy (i.e., DMCA-like law would be bad for Canada) but linked the issue to the always-latent sentiment of Canadian anti-Americanism. This symbolic bricolage, which played to a long-standing Canadian prejudice, was made more potent given the fact that the United States, and U.S.-based industries were the main groups lobbying for this bill. It was such a powerful linkage that it necessitated a direct rebuttal from the government, which insisted that the bill was indeed "Made in Canada" and his opponents were practicing base anti-Americanism.

With Geist's Facebook page, the public interest in copyright that had been building for almost a decade exploded into view. After only a month (in January 2008), the page had almost 40,000 members; as of June 2010 it had just under 88,000 members. FCFC proponents argued these numbers represented frustration with the "resistance on the part of our policymakers to grapple with what's really going on and to produce solutions that are right for us," in the words of Toronto-based technology lawyer and FCFC member Rob Hyndman (Interview by author, April 22, 2008). In contrast, the government saw the protests

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<sup>216</sup> Bill C-59, the bill that outlawed camcording at the request of the United States and its motion-picture industry, was an early indicator of the Conservative government's tendencies on this file.

<sup>217</sup> Available at: <http://www.facebook.com/group.php?gid=6315846683>, accessed June 19, 2010.

as representing only a passionate minority causing “a lot of miscommunication, a lot of misinformation,” according to Jean-Sébastien Rioux, Chief of Staff to then-Industry Minister Jim Prentice (Rioux, interview by author, February 26, 2009).

Individuals also used the FCFC page to organize quasi-independent lobbying efforts, local FCFC groups and grassroots-action campaigns (Geist, interview by author, May 14, 2008). One member, Kempton Lam, a Calgary blogger, software engineer, consultant and documentary maker, used FCFC to organize an impromptu meeting (covered by the mainstream media) with Prentice during a Christmas Open House in his riding office on December 8. Between 40 and 60 people showed up and were eventually able to talk with the minister.<sup>218</sup> This Facebook-based activism and the mainstream media press it attracted worried Conservative MPs, who had to deal with irate constituents on an unfamiliar issue, while cabinet ministers who understood the technology were also reluctant to move forward on this copyright bill (Austin, interview by author, April 30, 2008).

### **1. Bad timing for the government**

This unexpected (to the government) public outcry was effective primarily because it occurred during a minority Parliament, in which individual members’ electoral fates could mean the difference between a party achieving a majority or a minority government. Moreover, it came at a time of unusually high vulnerability for the Conservative government. In December 2007, the government was anticipating a contentious early-2008 vote on Canada’s participation in the Afghan war, and it was not yet clear how badly the Liberal party wanted to avoid an election. Even though the government could have passed any copyright bill with only the support of the Bloc Québécois, this unexpected crisis was too

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<sup>218</sup> His blog, which also contains details of his meet-up with the Industry minister, is available at: <http://kempton.wordpress.com/>, accessed June 19, 2010.

much for the government to handle, and the bill was not tabled for several months. This delay was a vindication for critics like Fewer, who attributes the government's clumsiness on the issue to a lack of consultation (Fewer, interview by author, February 7, 2008).

The delay meant that the eventual bill, discussed below, would become a victim of the September 2008 election call. In the winter and spring of 2008, however, the ultimate fate of the legislation was unknown. With the bill on hold, government and interest groups remained active. The United States kept Canada on its Special 301 Watch List in 2008 and U.S. Ambassador to Canada David Wilkins continued to pressure Canada publicly to implement the Internet treaties. The U.S. State Department arranged a meeting between the Parliamentary IP Caucus (an all-party group of MPs and Senators interested in IP issues) and the Entertainment Software Association, which was also attended by its Canadian cousin, the ESAC; the State Department also arranged for a brief cross-country tour for the ESA and ESAC to talk with interested groups (Kee, interview by author, February 10, 2008).

Industry groups, meanwhile, built alliances in an attempt to bring more resources to bear on the issue. In May, the Canadian Chamber of Commerce launched the Canadian Intellectual Property Council, "a coalition of Canadian businesses from a wide range of industry sectors," which called for a review of Canada's intellectual property regime, with an emphasis on protecting and enforcing intellectual property rights. Its first step was to fund a Conference Board report "regarding the lack of appropriate intellectual property protection in Canada," and its initial press release specifically mentions WIPO implementation (IP Council 2008).

On the user side, a number of companies, spurred by Ottawa lawyer Jay Kerr-Wilson, formed the Business Coalition for Balanced Copyright (BCBC), with representatives from

CAIP, Bell Canada, Google, Rogers, Telus and the Retail Council of Canada, among others. The BCBC released an agreed-upon set of principles, including support for notice-and-notice and C-60-like TPM rules (BCBC 2008). Each member would decide how much weight to give each issue (Glick, interview by author, April 21, 2008). Within government, the main lesson the Conservative government took away from the Facebook uprising was that the problems with the bill were not substantive, but with how the bill was communicated to Canadians and to the Conservative caucus (Rioux, interview by author, February 26, 2009). As a result, the government focused on messaging, not substance.

### **iii. Bill C-61 (June 2008)**

On June 12, 2008, Industry Minister Prentice and Heritage Minister Josée Verner finally introduced Bill C-61, *An Act to Amend the Copyright Act*, which had languished on the *Order Paper* for six months. According to Rioux, the legislation, “was 90-95 percent the same bill from December to June” (Rioux, interview by author, February 26, 2009). After its introduction, opponents quickly argued that the bill “was born in the U.S.A” (Geist 2008) by pointing to its treatment of TPMs. The government, meanwhile, claimed that Bill C-61 was a “made in Canada” response to domestic conditions that fulfilled Canada’s international obligations (Industry Canada 2008). In defence of the government’s position, Rioux argues that the bill was a good policy that also smoothed a rift with the U.S.:

Did the U.S. have this high up on their radar screen? Yes.... We have a bad rep internationally... we signed a treaty in 1997 [the WIPO Internet treaties] that we are not even close to being compliant with. You add all this stuff up and we have to update copyright law. And has the added benefit doing something to turn the temperature down with the U.S. – why not? (Rioux, interview by author, February 26, 2009).

Bill C-61 largely followed the Liberals’ Bill C-60 on the issue of ISP liability and rejected the U.S. approach, proposing a notice-and-notice regime. On TPMs, it rejected the

Liberals' 2005 approach in favour of the maximalist DMCA approach, making it a crime to break digital locks except under certain circumstances<sup>219</sup> and outlawing circumvention devices. At 50 pages, the bill was almost twice the length of Bill C-60 (32 pages), mainly because of its much more complex treatment of TPMs.

Bill C-61 would have been even stricter than the U.S. DMCA with respect to the system for determining future TPM exceptions. Instead of a triennial adjustment to account for new exceptions (described in chapter 3), Bill C-61's approach would have been more opaque than the U.S. system: changes would have been made via regulation, with no regular review process.

Under Bill C-60 it would not have been a crime to circumvent a TPM if the underlying work were in the public domain, if one were entitled under fair dealing to copy the underlying work or if the work were not otherwise protected by copyright. However, even the new "fair dealing" rights that were proposed by C-61 (an area ignored by C-60) would have effectively been trumped by the proposed rules in C-61 regarding TPMs. Bill C-61 "basically says that technology trumps whatever rights consumers or competitors might have otherwise had. So the law no longer matters. People only have whatever rights content owners choose for them" (de Beer 2008). Rather than the minimal changes of Bill C-60, Bill C-61 proposed a significant reorientation of Canadian copyright law toward the U.S.-desired position that the presence of digital locks should effectively trump user rights, adding a new layer to copyright that could potentially eliminate any user-owner balance in the law decidedly in favour of the owner.

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<sup>219</sup> The exemptions allowed for under Bill C-61 are for law enforcement or national security, encryption research; to make computers interoperable; for people with perceptual disabilities; in cases where the user is not informed that your personal information will be transmitted to a third party; and, for broadcasters (in certain cases) to "fix" an ephemeral reproduction of a work.

#### **iv. Reaction to Bill C-61**

Support and opposition for Bill C-61 were predictable. Industry associations and their lobbyists and lawyers, copyright owners and creators associations (with the significant exception of the Canadian Music Creators Coalition) generally supported the bill. Opponents of the bill included the CMCC, the Business Coalition for Balanced Copyright (though this group, which counts ISPs among its members, was satisfied with Bill C-61's notice-and-notice regime), CIPPIC, the Canadian Library Association, Canadian Privacy Commissioners, the Canadian Software Innovation Alliance (which represents Canadian open-source software developers), the Canadian Association of University Teachers, the Canadian Federation of Students, the Songwriters Association of Canada and Campus Bookstores, as well as the Film Studies Association of Canada, the Canadian Newspaper Association and the Hamilton Chamber of Commerce. Other groups expressed mixed opinions, including the Writers' Guild of Canada (screenwriters),<sup>220</sup> the Canadian Artists' Representation/Le Front des artistes canadiens Ontario (representing visual artists).<sup>221</sup>

#### **IV: Epilogue: 2008-10: The brief life and quick death of C-61 and the continuing saga of Canadian copyright reform**

The period following the introduction of Bill C-61 in June 2008 has been eventful in terms of the copyright debate. While copyright remains a lively political subject, little, if anything, has changed in terms of the tendencies and biases witnessed in the earlier copyright debate. The post-2008 introduction of C-61 confirmed the political importance of the public interest in copyright and led directly to its ultimate demise. Like the Liberal's Bill C-60, introduced three years earlier, Bill C-61 was a victim of an election call (on September 7,

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<sup>220</sup> It supported the principle of copyright reform, but disappointed by the Bill's lack of a levy on ISPs that would go to rights holders (Writers Guild 2008).

<sup>221</sup> It argued that C-61 was simply the "status quo" for visual and media artists (CARFAC Ontario 2008).

2008) and never made it beyond first reading in the House of Commons. Although it was sidelined by political circumstances unrelated to copyright, the bill's inauspicious death represented a clear victory of the individual and user interests that had congregated around Geist's Facebook activism. Had Bill C-61 been introduced as planned in December 2007, it would have had a much greater chance of making it through the legislative process before the Governor General dissolved Parliament in September 2008, although its passage in any form would not have been assured. As it is, public criticism managed to delay the bill long enough to ensure that it would not pass in the current Parliament, a clear victory for critics of strong legal protection of TPMs and evidence that Facebook and other social media can be used to influence the political process.

**i. Bill C-32 (October 2010): Conservative copyright reform redux**

If the death of Bill C-61 confirmed the importance of individuals and public-interest groups in the Canadian copyright debate, events following the re-election of Stephen Harper's minority Conservative government in Fall 2008 demonstrated that Facebook activism was better at blocking than effecting change. Following the 2008 election, Harper replaced Industry Minister Jim Prentice with the current (as of January 2011) minister, Tony Clement, and Minister of Canadian Heritage Minister Josée Verner (who replaced Bev Oda in the same August 2007 shuffle that claimed Industry Minister Maxime Bernier) with the current (as of January 2011) minister, James Moore. The relative weakness of these newly interested groups and individuals was not evident at first. Post-election, there were indications that the Conservative government would adopt a different policy on TPMs. Reversing itself, the government held public consultations on copyright reform from July 20,

2009, to September 13, 2002.<sup>222</sup> Canadians responded enthusiastically, attending 10 roundtables across the country. The government received over 2,800 separate submissions from individuals and groups, in addition to about 5,500 form letters, the vast majority of which originated from a balanced copyright (as opposed to pro-copyright-industry) site (Geist 2010b).<sup>223</sup> This remarkable (for government consultations) level of participation demonstrated Canadians' continued and rising interest in copyright: in 2001 officials were amazed by hundreds of submissions; now, submissions numbered in the thousands.

According to a tabulation of the 8,300 submissions by Geist (2010c), 6,138 were against “another Bill C-61,” while only 54 expressed support. As well, 6,641 submissions expressed an opinion “against anti-circumvention [rules] or in favour of limiting of DRM/Digital locks,”<sup>224</sup> and 6,027 expressed satisfaction with a notice-and-notice system of ISP liability. Of the issues raised, the legal protection of TPMs attracted the most attention.

While the public consultations put to rest the notion that the 2007-08 Facebook uprising reflected only the opinions of a disgruntled few, they did not fundamentally change the logic of a copyright-lawmaking process dominated by large interests and subject to the whims of the PMO. In 2008, the Conservative government, fearing an election, had played for time. Following the immediate crisis, however, it continued to treat Canadians' copyright concerns as a messaging problem and proceeded to introduce a PMO-mandated, TPM-maximalist bill. The attitude that TPM protection was an issue that could be spun while still adhering to a DMCA-style implementation was evident in the Conservatives' second attempt to implement the treaties, June 2010's Bill C-32, *The Copyright Modernization Act*. While

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<sup>222</sup> Submissions can be read at <http://www.ic.gc.ca/eic/site/008.nsf/eng/home>, accessed August 10, 2010.

<sup>223</sup> Calculations are by the author, from 2010 Copyright Consultations submissions database.

[http://www.ic.gc.ca/eic/site/008.nsf/eng/h\\_00001.html](http://www.ic.gc.ca/eic/site/008.nsf/eng/h_00001.html), accessed August 10, 2010.

<sup>224</sup> DRM, or Digital Rights Management, refers to electronic systems that manage access to content; many work by using TPMs.

(in addition to maintaining C-60 and C-61's notice-and-notice ISP-liability regime) C-32 introduced several novel user rights, it also imported wholesale Bill C-61's maximalist approach to TPMs. Furthermore, Bill C-32's proposed new rights would only be valid if the work in question were not protected by a TPM. As a result, it is difficult to conclude that these new rights are anything other than window dressing on a recycled Bill C-61.

## **V. Explaining Outcomes**

The different outcomes for TPMs and ISP liability illustrate nicely how distinct Canadian institutions and interests can lead to outcomes different from those in (and desired by) the United States. For TPMs, the decisive factor, in both 2005 and 2008, was the institutional power of the PMO, although it was most evident in 2008. In 2005, the PMO (passively) allowed the departments to maintain the status quo by not providing legal protection to TPMs in cases in which they were not applied to copyrighted content. This position was abetted by the fact that both bureaucracies were critical of the DMCA. In 2008, however, an ideologically motivated PMO overruled the departments in order to "make the Americans happy," in Austin's phrase. The PMO decided to accord the U.S. government's views on TPMs more importance than those of user groups and individual Canadians who have spoken out insistently against stronger legal protection on TPMs in a way that would override existing user rights in the *Copyright Act*.

This outcome reveals two things about the relative influence of interest groups in Canada. First, despite their dramatic large-scale entry into the copyright debate in December 2007, civil-society groups' ability to influence the course of the debate was limited in the 2007-08 debate. They were largely responsible for the delay that eventually sank the bill, but they were unable to change the government's mind on the issue. Once the initial crisis

passed, the government responded with cosmetic changes that could be overridden by TPMs. The ultimate Conservative government position favoured the United States and the traditional content industries. Second, and more importantly, a Liberal government decided against the views of the U.S. and content industries in 2005, suggesting that the Canadian government retains significant autonomy when making copyright law, and that the decision to follow the U.S. lead on TPM protection was almost completely contingent on the presence of Stephen Harper in the PMO. Another prime minister could have made (and did) a different decision.

Successive governments' actions on ISP liability reinforce the conclusion that effective control over Canadian copyright policy remains firmly rooted in domestic contexts, institutions and processes. Liberal and Conservative governments consistently supported the pre-existing voluntary notice-and-notice regime for ISP liability, which has operated without any significant controversy since the beginning of the decade and has withstood opposition from rights holders and the U.S. government.

The difference between Canadian consistency on ISP liability and the changing position on TPMs is the result of three factors related to institutions and actors. First, U.S. actors have prioritized TPM protection over ISP liability. Second, and more importantly, with respect to institutions, Canadian courts early on forced the content industry and ISPs to reach an agreement, with which all concerned were reasonably satisfied. In contrast, there remains no such legal position – formal or informal – on TPMs. The difference in the way TPMs and ISP liability were treated also reflects the relative influence and resources of the interest groups involved. Given the economic importance of ISPs, there was no reason for the government to upset a proven, workable balance and annoy politically and economically

powerful actors like Bell and Rogers. Faced with a pre-existing, truly made-in-Canada standard, it was easier for the government to ratify the status quo rather than adopt a controversial new regime whose benefits were open to debate. This conclusion accords with the findings of Banting, Hoberg and Simeon (1997, 15) that “one expects greater convergence between Canada and the United States in the newer areas of public policy ... .”

Even though they are rising in importance, Canadian user groups and creator groups like the CMCC are at a distinct resource disadvantage compared with copyright-industry groups and the large ISPs. The full effect of individual-user groups, however, will likely be felt in the longer run. The inclusion of any new user rights in Bill C-60 suggests that even a government hostile to this constituency realizes that they are now a legitimate part of the copyright debate. The Conservative government’s public consultations in 2009 further demonstrates that individual users be increasingly important in copyright debates. However, that the new user rights proposed by Bill C-32 can be overridden by a digital lock suggests that while the Conservative government has learned the importance of paying lip service to user groups, the traditional protection-oriented copyright interests continue to hold sway.

### **PART III: THE INSTITUTIONAL CONTEXT OF C-60 AND C-61**

#### **I. Copyright in Canada and the United States**

Although interconnected global, regional and domestic groups, institutions and ideas shape changes in Canadian copyright policy, Canadian copyright policymaking – as in the United States – remains a domestic story at heart. While the same general interests and ideas are at play in both copyright debates – content industries, user groups, consumers and so on – the composition of these groups, as well as their relative influence, differs between the two countries. However, considering the Canadian case from a regional historical-institutionalist

perspective reveals two major differences from and one important similarity to the U.S. policy debate examined in the previous chapter. The first difference, significant for our understanding of regionalism and historical institutionalism, is that regional institutions and actors have influenced outcomes in the Canadian government's decisions on how to implement the treaties, although not in a direction that promotes regional policy convergence.<sup>225</sup> In particular, NAFTA has constrained the U.S. ability to influence Canadian policy.

Second, where the U.S. debate has been driven primarily by internal domestic concerns, Canadian copyright reform, with minor exceptions, has largely been driven by the United States since the end of World War II, partly as a consequence of the close economic relationship between the two countries. To use Campbell's terminology, change in Canadian copyright policy has tended to occur through a form of "diffusion" – "the process whereby imported principles and practices are implemented locally" (Campbell 2004, 65) – of ideas that originate in the United States. At the same time, symbolic and substantive bricolage are also in evidence, particularly in the way that the United States linked copyright reform to market access, a trade issue (substantive bricolage), and how new creator and user groups have attempted to reframe the copyright debate to emphasize its dissemination side.

## **II. Ideas**

Ideationally, Canadian copyright policies are firmly entrenched within the Anglo-American tradition, largely as the result of historical and ongoing influence of, first, the United Kingdom and, currently, the United States. This particular path is reinforced by NAFTA and TRIPS. The United States continues to influence Canadian copyright policy through the Internet treaties and the example of the DMCA, particularly with respect to the

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<sup>225</sup> In terms of public policy, inaction and delay are also outcomes.

bundling of the issues of ISP liability and legal protection of TPMs. The United States, via its influence over the Internet treaties and its domestic process (which linked treaty implementation to ISP liability), largely set the overall agenda on digital-copyright reform for Canada (and the world). However, the outcome of the Canadian debate over implementation of the Internet treaties was shaped decisively by the regional and domestic institutional context, the specifically Canadian configuration and relative influence of domestic interests, and the traditional Canadian “go slow” approach to copyright reform.

### **III. Regional and domestic institutions**

The WIPO treaties’ implementation process in Canada reveals several important aspects of the nature of regional governance in copyright. First, as does the U.S. government, the Canadian government enjoys a great deal of leeway in deciding how to implement its international copyright commitments. The Canadian government put off even trying to implement the treaties for four years with the 2001-02 consultations, suggesting a high degree of control over the timing of the debate. On the issue of ISP liability, both the Liberal government (in 2005) and the Conservative government (in 2008 and 2010) rejected the U.S. notice-and-takedown approach in favour of a more moderate notice-and-notice regime. On the issue of legal protection for TPMs, the Liberal decision to adopt a minimalist approach was reversed by the Conservatives in its two subsequent bills. These outcomes reflect a situation in which the United States can influence, but not dictate, Canadian copyright laws.

Second, formal regional institutions do affect Canadian copyright policymaking. While NAFTA Chapter 17 reinforces the baseline for Canadian copyright and led to some changes in Canada’s copyright laws, NAFTA’s more important effect, from a regional governance perspective, is the way that NAFTA indirectly forces the U.S. government and its

industry allies to seek out other means of influencing Canadian copyright policy that do not require linking copyright to trade issues as it has in countries such as Australia and South Korea. These alternative means of influence include policy emulation (i.e., the example of the DMCA as a preferred model for implementing the Internet treaties) and penetration (i.e., lobbying by the U.S. government and the U.S. content industries). Consequently, while the United States has an effect on the Canadian debate, it is much lower than one would expect from a regional power that, only a decade earlier, had set rules in NAFTA that were seen by some to be a continuation of the harmonization of regional IP law.

Third, regional copyright governance is primarily binational in scope, with the United States at the centre. Mexico does not figure at all in the Canadian copyright debate. Canadian officials pay no attention to Mexican copyright policymaking,<sup>226</sup> and Canadian non-government actors have minimal-to-no contact with their Mexican counterparts on copyright. The only exceptions to this state of affairs are the copyright-industry associations, but these linkages are better characterized as global rather than regional. Instead, the international angle of Canadian copyright concerns the United States almost exclusively.<sup>227</sup> The short-lived SPP, which would have allowed for greater formal coordination among the three countries, offered a potential alternative to this double-bilateral model. Even under the SPP, however, copyright issues tended to be discussed on a double-bilateral basis. The SPP did provide a forum that allowed the United States to link more easily Canadian copyright reform to issues of greater interest to Canada, such as cross-border commerce. Overall, though, this analysis reconfirms that the North American region is a de facto “hub and spoke” regime:

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<sup>226</sup> For example, when the author contacted the Canadian embassy in Mexico in 2008 for their views on the Mexican copyright debate, they declined to participate, saying it was not an issue that the embassy followed.

<sup>227</sup> Although other countries can try to influence Canadian copyright law, as is happening in the ongoing (at the time of writing) Canada-EU free trade negotiations.

asymmetrical in nature and organized in a double-bilateral manner around a U.S. hegemonic power that itself is not all-powerful.

Rhetorically, the charge that Bill C-61 was “Born in the U.S.A.” proved damaging enough to require a response from the government that the bill was, indeed, “made in Canada.” The most significant “regional” actor in the Canadian copyright debate – as in the Mexican copyright debate – is the U.S. government, which operates more through moral suasion and domestic lobbying than through coercion and (largely nonexistent) regional institutions.

#### **IV. Interests**

Informally, one sees few regional linkages among those individuals and groups involved in Canadian copyright debates. Evidence for a harmonized regional position on copyright is strongest in copyright-industry groups. In fact, the industry groups that have driven the debate in Canada – particularly CRIA, CMPDA and, more recently, ESAC – are largely offshoots of their parent U.S. lobby groups. The members of these groups, however, are organized globally, not regionally. Furthermore, ISPs are primarily domestically based interests, several of which are politically and economically significant. The content industries – the strongest proponents of U.S.-style copyright reform – are largely seen as being foreign, thus hindering their ability to influence Canadian copyright law, despite their resources, which includes the backing of the regional hegemon. Creator groups, meanwhile, have contacts with U.S. groups and work with international partners (including in the run-up to the WIPO Internet treaties), but advocacy with respect to Canadian copyright-law reform is largely limited to domestically organized groups.

The greatest change over the past decade has occurred among individual-user groups and new creator groups. Reduced barriers to participating in the copyright debate, thanks to Facebook and other social-networking tools, have given individuals and their advocates a place in the debate. Furthermore, the past decade has witnessed a *reduction* in cross-border activity among such groups as a result of the efforts of particular individuals and groups. By 2008, copyright was being covered as a mainstream news topic and public involvement had become Canadianized, in large part due to the efforts of Geist and individuals involved in the FCFC network. New creator groups also benefited from increased capacity to participate in the copyright debate, in part due to the work of CIPPIC, itself partly funded from U.S. sources. This funding, while important, is as far as these regional ties go, and it represents a change from the early part of the decade, when user-group lobbies were directed largely from the United States.

#### **V. Constrained Autonomy**

Finally, from a regional-governance perspective, the difference of opinion on TPMs between the Conservative and Liberal governments, combined with the made-in-Canada ISP liability regime, indicate that Canada retains the ability to set its own copyright policy. Where kowtowing to the United States would upset previously existing programs and powerful stakeholders, the benefits of following the U.S. lead will be diminished. In the absence of any set policies, the Canadian government is more open to influence from all sides. In both cases, domestic factors – the structure of departmental decision-making, the relative power and influence of interest groups, and the identity of the Prime Minister – are paramount: the decision to follow the U.S., or any other country's, lead on copyright, is politically and domestically determined, and it is not set in stone.

## **CHAPTER 5: MEXICO AND THE INTERNET TREATIES: INTERNATIONAL PRESSURE, DOMESTIC POLITICS**

### **INTRODUCTION**

Mexican policy decisions regarding the implementation of the Internet treaties offers a fascinating counterpoint to the U.S. and Canadian studies. Many of the lessons of the Canadian case study apply to Mexico: regional institutions affect outcomes in Mexican policy debates, and outside NAFTA's copyright rules and its restraining effect on the United States, the North American region is primarily characterized by a "hub" (United States) and "spoke" (Canada, Mexico) relationship. As in Canada and the United States, findings of divergence or convergence on a U.S. or North American policy in Mexico can only be understood with reference to domestic ideas, institutions and interests. However, Mexico's path toward the Internet treaties demonstrates even more sharply the conditions under which the United States can and cannot influence Mexican copyright policy. Mexico completely overhauled its copyright law, the *Ley Federal del Derecho de Autor* (LFDA), in 1997 as a result of the North American Free Trade Agreement (NAFTA). This change brought it more in line with U.S. copyright law overall. Despite this convergence, Mexico has yet to fully implement the Internet treaties (especially with respect to technological protection measures (TPMs), as well as Internet Service Provider (ISP) liability), a situation that suggests the strength and limits of U.S. influence.

As noted in the introduction, Mexico's case has significance even beyond its contribution to our understanding of North American governance. Although much of the literature on developing-country copyright treats these countries as passive policy takers (see, e.g., Story 2003), in Mexico's case, powerful external interests are interpreted through domestic institutions and must contend with sometimes equally powerful domestic groups.

This case study serves as a partial corrective to the view of developing countries as simply policy takers.

This chapter is divided into four parts. The first part considers the significant changes in Mexican copyright ideas, institutions and interests since the implementation of NAFTA. The second part examines the interplay of these ideas, institutions and interests, in the context of the Internet treaties as the debate currently stands. As of January 2011, all indications are that within the next five years the Mexican government will undertake a broad-reaching reform of its federal copyright law, the LFDA, including full implementation of the WIPO Internet treaties (Tourné, interview by author, September 24 and 29). Based on the analyses in the previous two parts, the third part looks forward to what Mexican implementation of the treaties might look like. The chapter concludes with some thoughts about what Mexican copyright policymaking tells us about the North American region.

## **PART I: COPYRIGHT IN MEXICO**

### **I. Ideas: The persistence of history in Mexican copyright reform**

The 1994 NAFTA marked a watershed in Mexican copyright policy. It transformed a system primarily focused on the protection and promotion of the national culture and of authors' moral rights in the Continental-copyright tradition to a more Anglo-American regime that emphasizes the enforcement of copyright owners' economic rights. It also expanded the scope of copyright to focus on neighbouring rights<sup>228</sup> as much as on authors.<sup>229</sup>

It is tempting to interpret the NAFTA copyright provisions purely as being imposed by the United States on Mexico. The narrative of the developing country sacrificing intellectual property (IP) rules for market access is common (see, e.g., Drahos and

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<sup>228</sup> That is, rights related to, but not directly involved in, the creative process, such as broadcasters and record producers.

<sup>229</sup> See Robert (2001) for a detailed accounting of the specific nature of these changes.

Braithwaite 2002; Sell 2003). Undoubtedly, Mexico and other developing countries are at a disadvantage in trade talks with an IP component and will tend to trade IP rules for concessions they (correctly) deem to be more valuable, such as rules on agriculture or general market access. Such a narrative, while containing a grain of truth – the NAFTA copyright provisions were inserted by the United States and did target Mexico – ignores the tendency of existing institutions and ideas to persist and influence newly introduced concepts, ideas and policies. Taken too far, the view that developing countries are international “policy takers” can obscure developing countries’ agency. In the case of Mexico and NAFTA it can obscure the extent to which many existing Mexican copyright interests welcomed and benefited from NAFTA-related changes.

While NAFTA-related changes laid the groundwork for Mexico’s coming Internet treaty-related reforms, the context in which the commercialization of Mexican copyright law continues to be carried out is as influenced by Mexico’s past as by the external influences (the United States, the *Berne* and *Rome Conventions*, TRIPS, the Internet treaties and so on). Specifically, the historical interpretation of *derechos de autor* (literally, authors’ rights) as a constitutionally mandated means to protect and promote authors’ rights (and thereby the national culture) has created a narrative that tends to reinforce calls for a maximalist interpretation of the (commercial) WIPO Internet treaties, while playing down the importance of users’ rights.

#### **i. International influences on Mexican copyright law**

Like Canada, Mexico’s copyright tradition was bequeathed to it, first by its colonial master and then by its most important trading partner. Mexican regulation of literary and intellectual production historically is based in the Continental European tradition, which

emphasizes an author's inalienable moral rights related to issues such as attribution, as opposed to an owner's economic rights (i.e., to treat the copyright as an alienable right that can be bought and sold). It dates to Spain's *Real Orden* of 1764 (Carrillo 2002, 26).<sup>230</sup> While predecessors to the current law can be seen in the various 19<sup>th</sup>-century Constitutions and laws,<sup>231</sup> modern Mexican copyright law dates to, and draws its authority from, Article 28 of the 1917 Mexican Constitution. Article 28 prohibits monopolies except in certain cases, including "the privileges that, for a limited time, are recognized for authors and artists to produce their works ..." (translation by author).<sup>232</sup> Serrano Migallón (2008, 38), Mexico's foremost copyright authority, argues that the granting of these privileges represented the State's recognition of an author's inherent rights, specifically, an author's permanent inalienable moral rights and temporary and alienable economic rights in his/her work.<sup>233</sup>

Mexican *derecho de autor* laws historically have addressed two fundamental objectives: public order and the social interest, with social interest defined as all that benefits Mexico and its development. Specifically, copyright law must address the educational and cultural needs of the society on one side and on the other side must fulfill its international obligations to protect and enforce copyright in Mexican territory (Obón León 2003, 10-11). Mexican copyright policy, a federal responsibility, draws its legitimacy not from a balancing of interests or maximizing the production and dissemination of knowledge and the "useful arts," as in the United States.<sup>234</sup> Rather, it is intimately intertwined with Mexican culture and national identity (the "national spirit," as Serrano Migallón (2008, xvii, author's translation)

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<sup>230</sup> See discussion of moral rights in chapter 2.

<sup>231</sup> See Serrano Migallón (2008, 29-49) for a review of Mexican copyright law through to the 1997 law.

<sup>232</sup> The Article also exempts patents. Article 28 also establishes a monopoly over Mexico's energy sector. It was maintained under NAFTA and continues to be a source of irritation in the Mexico-U.S. relationship.

<sup>233</sup> For example, an author's right to attribution does not expire after a certain period, while an author's right to determine who can copy her work expires after a set time, currently life of the author plus 100 years in Mexico.

<sup>234</sup> And, recall, unlike Canadian law, which provides no guidance on the purpose of copyright.

puts it), whose defence is a central preoccupation and responsibility of the Mexican government. The main academic text on Mexican copyright law and history frames copyright as *the way* in which Mexican culture, and culture more generally, is safeguarded (Idirs 2008, xv). Writing after the 1997 transformation of Mexico's copyright regime, Serrano Migallón (2008, 4, author's translation) remarks:

In the past, as today, *derecho de autor* norms are not just economic or market norms; their end is not solely related to the trade in cultural goods and services. Its ultimate purpose has been always of a much more transcendent nature, its juridical norms destined to preserve the dignity of the labours of creators of these works of ingenuity and the spirit, in a way that allows, with respect to respect and remuneration, an apt environment for creation and its enjoyment.

The continued influence of this perspective in the post-NAFTA legislation demonstrates the historical-institutionalist notion of path dependence. This focus on the production and preservation of Mexican culture is restated in Article 1 of the 1997 LFDA.

According to Article 1, copyright's objective is:

to safeguard and promote the Nation's cultural heritage; to protect the rights of authors, performers, as well as publishers, producers and broadcasters, in connection to their literary or artistic works in all their forms, their publications, their phonograms or video recordings, and their broadcasts, as well as other intellectual-property rights (author's translation).

While previous LFDAs focused more on authors, the expressed motivating sentiment – the protection of rights in order to preserve and strengthen the national culture – has remained consistent since the 1963 revisions to Mexico's *derecho de autor* law (Malpica de Lamadrid 2002, 197). The (limited) Mexican academic literature on Mexican copyright<sup>235</sup>

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<sup>235</sup> The subject remains woefully understudied even by Mexican legal academics (Nivón 2009, 62; Arteaga, interview by author, February 3, 2010; López, interview by author, September 18, 2009). The truth of this observation – voiced unanimously by every interview subject with whom the issue was raised – came home to the author during a visit to the legal studies bookstore of UNAM, Mexico's largest university. There, texts on copyright took up all of one small section of one small shelf, vastly outnumbered by books on every other legal subject.

suggests that Mexican copyright law bases its international legitimacy to a large extent on Article 27 of the *Universal Declaration of Human Rights* (see, e.g., Obón León 1998, 118).

Mexican copyright officials have always been sensitive to the international context in which Mexican copyright policy is made (see, e.g., Serrano Migallón 2008; Obón León 2003). For over a century, Mexican officials have paid attention to international copyright. One of the Mexican government's main objectives in introducing its first proto-copyright law, the 1846 *Reglamento de la Libertad de Imprenta* (Freedom of the Press Regulations), was to insert Mexico into the community of more-advanced nations (Serrano Migallón 2008, 33, 36). Unlike Canada, which until the 1990s had been a reluctant joiner of international copyright treaties, and only joined the 1886 *Berne Convention* as a consequence of its quasi-colonial relationship with the United Kingdom, Mexico has been an enthusiastic joiner of international treaties. In 1947, Mexico ratified the *Interamerican Convention on Copyright and Literary Property*; in 1957, the *Universal Copyright Convention*<sup>236</sup>; in 1964, the *Rome Convention*; in 1967 the *Berne Convention*,<sup>237</sup> in 1995 the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs), discussed in chapter 2; and in 1996 the Internet treaties. In turn, the Conventions ratified in 1947, 1957 and 1964 directly influenced Mexican copyright reforms in 1947, 1956 and 1963, respectively (Malpica De Lamadrid 2002, 193-196).

More recent changes to the Mexican copyright law, which reoriented Mexican copyright toward an Anglo-American focus, were unquestionably related to U.S. influence and preparations for and the implementation of NAFTA (Economist 1996, 66; Appleton 1994; Robert 2001). This includes the 1997 law, which implemented Mexico's NAFTA

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<sup>236</sup> 1971 revisions ratified in 1975.

<sup>237</sup> The *Berne Convention* entered into force in Mexico in 1967; Mexico ratified the 1971 Paris revision to the *Berne Convention* in 1974.

copyright obligations, as well as relatively minor changes in 1991 that, among other things, extended copyright protection to phonogram producers, a move in which the U.S.-based Recording Industry Association of America was instrumental and which it was estimated would earn record companies around US\$75 million per year (Carrillo 2003, 27; Serrano Migallón 2008, 49; Billboard magazine, cited in Jones 1996, 338).<sup>238</sup>

As a smaller country, like Canada, Mexico's copyright has felt the influence of its international trading partners. Even here, however, one sees how the diffusion of a "foreign" approach to copyright has been interpreted in light of existing domestic approaches. The traditional Mexican idea of *derechos de autor* as a moral right has influenced its treatment of copyright as an economic right that encompasses both users and creators. Copyright lawyer Cesar Callejas remarks: "In Mexico there is still the myth that industrial property protects commerce and *derecho de autor* protects artistic ideas (moral rights)" (Interview by author, October 26, 2009). This myth holds despite the fact that post-1997 Mexican copyright law is focused primarily on the economic rights of owners. As copyright lawyer Manuel Morante remarks, "today the *derecho patrimonial* (economic right) takes precedence over moral rights" (Interview by author, December 3, 2009).

The result of the commingling of these two approaches is an economics-focused approach to copyright that favours the maximization of copyright *owners'* rights. In other words, NAFTA represents not only a "critical juncture" in the making of Mexican copyright policy, linking trade-access issues to Mexican copyright reform, but also a larger degree of path dependence than one might otherwise suspect given the large change that NAFTA wrought on Mexican copyright law. User rights come off badly in this situation, although

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<sup>238</sup> Changes in 1982 were also made to address international requirements (Carrillo 2003, 27).

currently some Mexican academics and activists are working to focus more attention on users' rights, notably the 2009 volume edited by López and Ramírez.

The institutions created for the protection and defense of copyright, according to their functions, ensure compliance with the exclusive rights provided by the law governing the subject (Arteaga, interview by author, October 19, 2009). Like all copyright laws, Mexico's contains several exceptions – primarily in articles 147-150 – that allow either for copying or licensing of works without the need to obtain the permission of the copyright owner. Many of these are familiar from other copyright laws: exemptions for purposes of criticism, educational and scientific research purposes. One of the more interesting allows for a one-time, one-copy reproduction of a work for personal, private, non-commercial use (Article 148(4)).

These limitations, argues Serrano Migallón (2008, 147), are both inherent in Mexican *derecho de autor*, and are needed to balance the needs of rightsholders with those of society and users. They are also consistent with Mexico's status as a civil-law jurisdiction, in which judges interpret statutes and do not make law through the principle of *stare decisis*.<sup>239</sup> Since they require that a list of specific conditions be met, these exceptions resemble the more close-ended Canadian fair-dealing limitations than they do the open-ended U.S. fair-use exceptions.

The 1997 reforms, discussed below, may have refocused Mexican copyright from (Mexican) creators' moral rights toward copyright as a commercial right available to foreigners as well as Mexicans, distributors and artists, but they did not fundamentally challenge the idea, inherent in previous laws, that the national interest is best served by maximizing artists' rights in their work. This maximalist approach to copyright protection

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<sup>239</sup> That is, they do not base their judgments on precedents, as in common-law jurisdictions.

suggests a fundamental symmetry between the objectives of Mexico's past and present copyright regimes. In short, Mexican copyright law has a traditional bias toward copyright owners' rights that was refocused, not created, by these reforms.

## **ii. Cultural superpower and/or developing country**

Economically, Mexican copyright policy is drawn in two opposite directions, by its not-unjustified self-image as a global-cultural heavyweight and its material status as a developing country. The former tugs the country toward a desire for stronger copyright laws, the latter toward their relaxation. The result is a paradox, common in much of Mexican policy, that while Mexican copyright laws are among the strongest in the world – unusual, as the Economist magazine (1996) notes, for a developing country – they are poorly enforced.<sup>240</sup>

As either the most or second-most (after Spain) dynamic producer of Spanish-language cultural products, Mexico has an objective interest – similar to that of the United States – in promoting strong international copyright protection for its artists and copyright owners. The country also has a subjective view that, in the words of Alfredo Tourné, Director of Protection with Mexico's main copyright agency, the *Instituto Nacional del Derecho de Autor* (National Copyright Institute, INDAUTOR), “we should be leaders in this topic in Latin America” (Tourné, interview by author, September 24 and 29). This self-image of Mexico as a cultural superpower tends to reinforce the idea, promoted most directly internationally by the United States, that copyright protection should be strengthened, and contributes to the path dependence and Mexican institutional bias in favour of copyright owners in the debate over copyright generally and the implementation of the Internet treaties in particular.

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<sup>240</sup> Schonwetter, de Beer, Kawooya and Prabhala (2010) note a similar paradox in African countries.

Mexico's economic position on copyright is actually somewhat unclear. By a generous measure of the cultural industries, Mexico has been a consistent net exporter of cultural-industry products – defined very broadly to include industries directly and indirectly in industries involved in copyright, with copyright-related industries accounting for 13.4% of total exports and 8.0% of total imports in 2000 (the last year for which these comprehensive numbers are available) (Piedras 2004, 150).<sup>241</sup> However, by some measures, Mexico is actually a net importer of copyrighted works. Using royalty payments and licensing fees<sup>242</sup> as an imperfect proxy for copyright royalty payments, Mexico received \$US70.4 million in royalties in 2005, compared with \$US 111.0 million in payments.<sup>243</sup> This conclusion is reinforced by the fact that US\$1.8 million in Mexican mechanical royalty payments accrued to foreigners, against US\$1.5 million to Mexicans (Piedras 2005, 85).<sup>244</sup> Nonetheless, the content industries are not unimportant to Mexico. For example, Mexico is the world's third-most important producer of phonograms, after the United States and United Kingdom (Tourné, interview by author, September 24 and 29). Overall, Mexicans “perceive themselves much less as net importers and they see themselves as having a more balanced set of interests on copyright-based [material]” (Simon, interview by author, August 1, 2008).

For example, the Mexican company Televisa, the largest media company in the Spanish-speaking world “has built itself into the world's largest exporter of Spanish-

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<sup>241</sup> For a list of included industries see Piedras (2004 46-51). While these numbers may be out of date, there is little reason to believe that the overall trend has changed much. This dissertation cites them not just as evidence of Mexico's actual economic situation, but because they are cited by *all* Mexican experts when discussing copyright policy.

<sup>242</sup> Defined as payments and receipts between residents and nonresidents for the authorized use of intangible, nonproduced, nonfinancial assets and proprietary rights (patents, copyrights, trademarks, industrial processes, and franchises) and for the use, through licensing agreements, of produced originals of prototypes (such as films and manuscripts).

<sup>243</sup> Figures are U.S. current dollars on a balance of payments basis, from World Bank 2011 <http://data.worldbank.org/indicator/BM.GSR.ROYL.CD/countries>, accessed February 9, 2011.

<sup>244</sup> Mechanical royalties refer to royalties from the sale of audio recordings.

language programs on the strength of its ‘domestic opportunity advantage,’ its more-or-less ‘unique access to the world’s largest domestic market’ in that language” (Sinclair 1996, 46). Televisa was able to build this advantage due to its status as a “virtual monopoly” (Lawson 2002, 29), the result of decades of collusion with the PRI (*Partido Revolucionario Mexicano*, or Institutional Revolutionary Party) government that which ruled Mexico until 2000. With roots in television stations allied with PRI President Miguel Alemán (1946-52), Televisa received decades of concessions from the PRI in return for acting as the “ruling party cheerleader” (Lawson 2002, 5). It enjoyed a virtual monopoly over broadcasting until the 1990s (Lawson 2002, 29). Its relationship with President Carlos Salinas (1988-94), who brought NAFTA to Mexico, was particularly tight. While its influence in Mexican politics has diminished somewhat since the Salinas and one-party rule, it remains a key player in Mexican telecommunications. As an example of its influence on copyright policy, Televisa was the only company that was part of five-member Mexican delegation to WIPO for the negotiation of the Internet treaties (WIPO 1996).

The importance of strong international and domestic copyright law to Mexican officials was evident during the NAFTA negotiations. In those talks, the Canadian government fought the U.S. insistence that copyright be included in the agreement; instead, it successfully imported the “cultural exemption” from the Canada-U.S. Free Trade Agreement. Canada tried to convince Mexico to support the Canadian anti-copyright-inclusion stance, but Mexico refused. “Protected by an ancient and vigorous cultural identity and a rich language of its own which had survived North American penetration,” Mexico did not regard national culture as being on the negotiating table (cited in Sinclair 1996, 46). Rather, Mexico, and particularly Televisa, were interested in the large and increasing Spanish-speaking market in

the United States, which would be prime targets for the export of Mexican *telenovelas*, music and books (García Moreno 1998, 106-107), as well as renewing copyright on Mexican films that had reverted to the public domain in the United States (Robert 2001, 50).

At the same time, Mexico is also a developing country facing resource constraints in which just under half of the population lived under the official poverty line in 2008.<sup>245</sup> As a result, the strength of Mexican copyright laws is matched by the lack of enforcement of the same. Fears of social unrest (Preston 1996, 1) because of the informal sector's contribution to GDP and employment, and the involvement, in some cases, of organized crime and corruption, mean that officials face little political or economic incentive to enforce copyright laws. This occurs despite continued efforts by government, *sociedades de gestión colectivas* and industry to improve enforcement. Jalife Daher (2006, xxix) calls the 1999 changes to the penal code and the *Ley de la Propiedad* (property law), which includes penalties of up to 10 years in prison, "our system's most extreme reaction against piracy" (see also Ángel 2005, 1-2). Copyright lawyer Callejas argues that the government is not interested in enforcement for several reasons, including a lack of clear data on the scope of the problem, since the only data on the losses from *pirateria* (piracy) come from companies that have refused to reveal their methodology and sources (Callejas, interview by author, October 26, 2009).

The production and consumption of bootlegged copyrighted works in Mexico is related to the state of the economy. As *The Economist* notes, 1996 witnessed an explosion in the sale and production of bootlegged CDs and DVDs, a fact it attributed to the severe economic downturn of the previous year as "many normally legitimate firms ... entered the black market (*Economist* 1996, 66). A study on Mexico City's informal economy links its

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<sup>245</sup> Available at:

[http://www.coneval.gob.mx/coneval2/htmls/medicion\\_pobreza/HomeMedicionPobreza.jsp?categorias=MED\\_POBREZA,MED\\_POBREZA-med\\_pob\\_ingre](http://www.coneval.gob.mx/coneval2/htmls/medicion_pobreza/HomeMedicionPobreza.jsp?categorias=MED_POBREZA,MED_POBREZA-med_pob_ingre), accessed January 23, 2010.

rise, including that of vendors of bootlegged goods, to Mexico's "lost decade" of the 1980s (González et al. 2008, 10).<sup>246</sup>

On the demand side, a large sector of the population is effectively priced out of the market for books, movies and films. According to Morante, a survey by the American Chamber of Commerce found that price was the main reason Mexicans bought bootlegged products (Morante, interview by author, December 3, 2009). Official CDs and DVDs cost the same in Mexico as they do in the United States and Canada, even though wages are much lower: the daily minimum wage in the *Distrito Federal* (Mexico City) in 2009 was 54 pesos (about \$4.40). Faced with low wages and a product that can be sold profitably for much less than the list price – bootlegged movies cost between \$1 and \$3 – with minimal fear of arrest or sanction – the widespread purchase of bootlegged works is understandable.

### **iii. NAFTA and the reorientation of Mexican copyright law**

The wholesale 1997 revision of the *Ley Federal del Derecho de Autor* (LFDA) represented the culmination of a reform process that began with changes to Mexico's overall intellectual property laws in 1991 in reaction to U.S.-based pressure and the run-up to NAFTA (Arteaga, interview by author, October 19, 2009). The reforms were part of the general Mexican reaction to the economic crises of the 1980s that rejected a more autonomous model of economic development for the outward focus of neoliberalism, and culminated in the implementation of NAFTA in 1994 (Golob 2003; Garcia 1992).

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<sup>246</sup> Such vendors are ubiquitous throughout Mexico, and are particularly visible in Mexico City. Outside subway stops, in the Alameda, one of Mexico City's main parks, across from the offices of the *Secretaría de Relaciones Extranjeras* (Foreign Affairs), outside UNAM, Mexico's largest university, to name only three places, one can purchase the latest Hollywood films for the equivalent of \$2 or \$3; some vendors even specialize in subgenres, such as art films. In the metro itself, hawkers move from car to car blasting out samples of the hit songs on the CDs they have for sale: For 10 pesos (about 80 cents), a commuter can buy 237 Beatles songs, or the latest hits by the Black Eyed Peas and Pitbull.

With that caveat, the most significant legacy of the 1997 revisions was its shifting of Mexican copyright law from a more “humanist” approach emphasizing creators’ moral rights to a focus on copyright as commercial law focused on contracts, and on (as called for by NAFTA) strengthening sanctions against copyright violators. The 1997 law expanded what had been “a completely authorial law in the strict sense that it dealt with the author and the protection of the author” to include a greater focus on the protection of neighbouring rights (Aguilar, interview by author, February 3, 2010), including performers, phonogram producers, audio-visual producers and editors, both Mexican and foreign (Obón-León 2003, 11-12). Some did better than others. Composers and musicians received greater protection, but audio-visual workers, especially cinematographers, saw their rights diminished: only films as a whole received a copyright, but with no special rights for the people who actually make the films (Obón-León 2003, 15).

NAFTA was the impetus to change a law that it was generally agreed in Mexico needed to be modernized (Arteaga, interview by author, October 19, 2009; Callejas, interview by author, October 26, 2009). Serrano Migallón (2008, xvii, xix, translation by the author) argues that the new law was the result of government lobbying by “the intellectual community, artists, authors and all those who participate in the creation of culture goods and services,”<sup>247</sup> and addressed both domestic and international concerns (Caballero Leal and Jalife Daher 1998, i, translation by the author). NAFTA’s copyright provisions were included at the insistence of the United States and targeted at reforming Mexican copyright, in particular mandating punishments for commercial violations of copyrights (Rangel Ortiz 1998, 381).

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<sup>247</sup> See Serrano Migallón (2008, especially pp. 51 and 255-256), for an account of the passage of the bill.

Mexico emerged from NAFTA having “lost” more of its demands of the United States than it “won” (Robert 2001).<sup>248</sup> That the United States may have come out the “winner” in the copyright part of NAFTA is not to say that Mexico adopted policies that entirely revamped its copyright regime. For example, Mexico negotiated fairly broad reservations in NAFTA with respect to its broadcast and film industries, requiring that a majority of time of each day’s live broadcast programs feature Mexican nationals, limiting non-national ownership in cable service providers to minority interests, and requiring that 30 percent of per theatre movie screen time be reserved for Mexican films (Abbott 1995, 93-94).<sup>249</sup> However, another view, articulated by García Moreno (1998, 115-116, translation by the author), holds that the 1997 LFDA, which implemented NAFTA’s copyright provisions:

is a law that, rather than addressing the authentic needs of Mexican society, is a product of the compromises made by Mexico at the international level, especially with respect to NAFTA . . . . Our country had to cede to American pressure to provide ‘adequate’ copyright and neighbouring rights protection, for owners who are nationals and residents of that country, for purely commercial purposes.

This view correctly emphasizes that the reorientation of Mexican copyright policy toward a U.S.-style regime was not a significant concern to the Mexican NAFTA negotiators, although Cameron and Tomlin (2000, 98) report that “there was contention over differences in legal frameworks – the Mexican system, for example, gave greater weight to the rights of authors than producers.” In any case, those critical of the new focus were not among the relevant interests that shape Mexican copyright policy.

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<sup>248</sup> Robert (2001) explains NAFTA outcomes for all three countries in terms of tactics used and resources available. While Robert focuses mainly on analyses of Canadian outcomes, she notes that Mexico was able to use resources such as its adherence to the *Rome Convention* to exempt itself from the national treatment of sound recordings. This exemption was useful to the United States in that it allowed the U.S. to ensure that NAFTA did not require the United States to implement Berne article *6bis* on moral rights (Robert 2001, 247). She also notes that Mexico, unlike Canada, was not concerned with negotiating on copyright, as it was not a source of cultural insecurity for the Spanish-speaking Mexicans as it was for the (primarily) English-speaking Canadians.

<sup>249</sup> Abbot also contends that NAFTA’s effect was more significant on Mexico’s patent regime, an issue beyond the scope of this study.

Of the changes required by NAFTA, two stand out in particular. First was the requirement that NAFTA partners (i.e., Mexico) enforce their domestic copyright laws. While treaties typically do not “constrain the criminal law of other countries,” NAFTA requires that partners set prison terms and/or fines “to provide a deterrent ‘consistent with the level of penalties applied for crimes of a corresponding gravity.’” Second, and less dramatically, was the extension of copyright to groups that had been previously been ignored (including the music recording and satellite TV industries) (Acheson and Maule 1996, 368-369; see also Appleton 1994, 124-128). Together, these changes provide an idea of the significance of NAFTA Chapter 17 as it relates to copyright, particularly for Mexico.

The 1997 changes were important for the future development of copyright policy in Mexico not because they sparked a trend toward stronger copyright protection: this tendency was already inherent in Mexican copyright. Rather, they rearranged the agenda of Mexican copyright policymakers. They brought to the fore economic and contractual issues and the concerns not just of Mexican creators, but also of groups like the record producers – foreign and domestic – who now had greater rights under NAFTA and the LFDA. Furthermore, while Mexico may have “lost” more than it “won” on copyright in the NAFTA negotiations, it is difficult to conclude that, overall, the domestic groups most involved in the making of copyright policies – “the intellectual community, artists, authors and all those who participate in the creation of culture goods and services” and so on – were either opposed to NAFTA’s outcome or have not come to see it in a favourable light. Certainly, there is little evidence of widespread discontent among these groups. Furthermore, copyright was a technical, apolitical commercial policy: both houses of Congress unanimously adopted the 1997 LFDA

(Serrano Migallón 2008, 51).<sup>250</sup> This is not to argue that the NAFTA deal was objectively positive from a public policy perspective or that certain groups did not or do not oppose it, only that it seems that the NAFTA copyright chapter had the broad support of those groups that were *listened* to in the process.

## **II. Institutions: Corporatism, (mostly) uninterrupted**

The structure and focus of institutions affects both what policies get advanced and which actors are listened to in the policymaking process. In Canada, a divided bureaucracy with departments advancing diametrically opposed views of copyright gives both “protection” and “dissemination” interests an institutional base from which to promote their points of view. This set-up tends toward compromise and stalemate but can be overridden by political power exercised by the Prime Minister. In the United States, the bureaucratic institutions with responsibility for copyright tend to favour copyright’s “protection” function over its “dissemination” function. The balance between the two, meanwhile, is set via inter-industry bargaining, with Congress tacitly agreeing to pass consensus copyright bills, so long as all relevant (in its view) interest groups are represented. The resulting copyright bills have reflected the relative power and influence of the involved groups.

Mexico’s institutional copyright regime resembles more closely that of the United States, in which bureaucratic institutions tend to emphasize copyright protection, and in which affected interests are involved in setting policy. However, unlike the United States’ institutional structure, Mexico’s emerged from a formal corporatist tradition. From 1910 through the 1990s, regulation of society and the economy was corporatist in nature: “The government has sought to act as the ultimate arbiter and to see to it that no one group

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<sup>250</sup> This lack of conflict over copyright would carry over from this undemocratic period: copyright reforms in 2003 were just as uncontroversial.

becomes predominant” (Camp 2007, 137). Mexican corporatism had been characterized by state-created organizations “requiring those persons meeting the criteria of a special interest to belong to it” (Camp 2007, 136). However, the election of Vicente Fox in 2000 led to the demise of one-party rule and this corporatist structure suffered a setback. While membership in accredited groups is no longer mandatory for those who wish standing in copyright discussions and Congress matters much more than it previously did (Camp 2007, 136-137), Mexican copyright policymaking continues to follow a loose corporatist model. Although “Mexico has witnessed a flowering of popular movements since 1989,” these are “the result of the action of elite economic and cultural groups” (Camp 2007, 162). Nonetheless, those groups one would expect would be most directly affected by changes in digital-copyright rules have only very recently started to take an interest in copyright policy. As a result, copyright policymaking appears to the author to remain largely untouched, likely because it is not politically sensitive.

In Mexico, a not-completely-neutral state coordinates negotiations among accepted groups representing capital (i.e., the copyright industries, both domestic and foreign) and labour (i.e., the *sociedades de gestión colectivas*, the creator-focused collection societies) from an oligopolistic sector (Callejas, interview by author, October 26, 2009). Overall, those institutions directly responsible for Mexican copyright policy are biased toward copyright protection, comfortable with the new economic emphasis of copyright law, and open to U.S. perspectives on copyright. In terms of the Internet treaties, this bias privileges the passage of DMCA-style protection of TPMs and ISP liability rules. However, parts of Congress and the Mexican bureaucracy involved with the telecommunications industry that were not

previously a significant part of the copyright debate have the potential to challenge this view of copyright.

### **i. Congress**

Over the past decade, and certainly since the election of Vicente Fox in 2000 ended 71 years of one-party rule, the Mexican policymaking process has changed dramatically. Where previously Congress was largely a rubber stamp for decisions made by the Executive, the Senate and House of Deputies are increasingly asserting their legislative independence. In copyright policy, this is no less true and has led to a situation in which Congress has demonstrated increasing power with respect to copyright policymaking. The 2003 changes to the LFDA (discussed below) emerged from Congress, not the Executive (de la Parra 2004, 1996). More routinely, individual members and senators also introduce copyright legislation: as with their U.S. counterparts (and somewhat similarly to the situation with Canadian Private Members' bills), few of these become law.

Where previously groups wanting changes to Mexican copyright law could only go through the Executive and its departments (*Secretarías*), they now also have the choice of lobbying legislators, in a process reminiscent of U.S. Congressional lobbying (they also continue to lobby the President as well (Aguilar, interview by author, February 3, 2010)).<sup>251</sup> Not surprisingly, lobbyists take advantage of this situation and focus their attention on individual legislators as well as those on key committees, the most prominent of which are the culture committees of the two houses of Congress.<sup>252</sup>

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<sup>251</sup> Camp notes that lobbyists have been paying attention to members of Congress since 1997 (Camp 2007, 186), although according to copyright lawyer Manuel Morante, Mexican politicians are still getting used to a system in which Congress has a fair share of power, comparing Congress' grasp of responsibility to "teenagers discovering life" (Morante, interview by author, December 3, 2009).

<sup>252</sup> While these committees are the main one for copyright matters, copyright issues can also come up in the context of other issues, in which case other committees and departments would be consulted.

Politicians from all parties continue to treat copyright as an apolitical issue. As in Canada before 1997 and in the United States before the debate over the DMCA in the 1990s, copyright in Mexico is still seen primarily as a technical issue. That reputation, combined with the popular perception of copyright, rooted in Mexico's Continental copyright tradition, as a policy to safeguard Mexican culture, does not provide politicians with many reasons to oppose its extension. For example, at the request of the *sociedades de gestión colectivas*, which represent authors, the government in 2003 increased the general term of protection to life of the author plus *one hundred* years, easily the longest term of protection on the planet, longer than Canada's life plus 50 years term, the U.S. term of life plus 75 years, and far beyond copyright's original 14-year term. This change benefited the *sociedades*, which stood to collect royalties on works that were about to fall into the public domain. However, it was so drastic that even INDAUTOR's Director of Protection, Alfredo Tourné, a proponent of strong copyright protection and copyright owners' rights, says the changes went too far (Tourné, interview by author, September 24 and 29). Nonetheless, this change gave rise to only cursory Congressional debate (Serrano Migallón 2008, 336). According to Morante, Mexican politicians have yet to grasp fully the nature of digital-copyright issues (Interview by author, December 3, 2009). However, while most interviewees agreed that copyright was largely a non-partisan, apolitical issue, Morante comments that the opposition centre-left *Partido de la Revolución Democrática* (the Democratic Revolution Party, PRD) was in general not supportive of too-strong crackdowns on copyright violations because of its links to social groups, who in turn are linked *mercados sobre ruedas* (literally, markets on wheels), which distribute bootlegged materials (Morante, interview by author, December 3, 2009).<sup>253</sup>

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<sup>253</sup> González *et al* (2008) remark that lax enforcement due to corruption is generally recognized to be one cause for widespread copyright violations in Mexico.

This position by the PRD, combined with recent comments by the Congressional committee responsible for telecommunications criticizing copyright extensions (discussed below), suggest that Congress may be on the verge of taking a more active interest in copyright issues.

## **ii. Executive-branch institutions**

### **1. INDAUTOR and the *Instituto Mexicano de la Propiedad Industrial* (IMPI)**

Despite the rise in power of Congress, the Executive (i.e., the Presidency and its agencies) continues to wield significant power. As Camp notes: “Groups in Mexican society who want some part in national policy decisions must make their concerns and interests known to the executive branch at the highest possible level” (Camp 2007, 180). One interviewee mentioned that lobby groups try to communicate with the Presidency, to make their concerns known (Aguilar, interview by author, February 3, 2010). Administratively, similar to the United States and in contrast with Canada, Mexican copyright policy is the main responsibility of one department, which historically has emphasized the “protection” role of copyright over that of “dissemination.” In Mexico, perhaps befitting the traditional view of *derechos de autor* as being about the promotion and protection of Mexican culture, copyright is the formal responsibility of the *Secretaría de Educación Pública* (Public Education Department, SEP). Within SEP, copyright policy rests primarily with INDAUTOR, a quasi-independent entity created in 1997 from what had been an SEP *Dirección General de Derecho de Autor* (General Directorate of Copyrights), with roots going back to Mexico’s 1947 copyright law (Viñamata 2005, 77). INDAUTOR’s director-general serves at the pleasure of the Executive and can be fired for cause by the secretary of the SEP. INDAUTOR is responsible for protecting *derechos de autor* in Mexico and

establishing *derecho de autor*-related policies (Serrano Migallón 2008, 164). Specifically, Article 209 of the LFDA gives INDAUTOR the responsibility to:

1. protect and promote *derecho de autor*;
2. promote the creation of literary and artistic works;
3. run the Public *Derecho de Autor* Registry (works are not required to be registered, but registration is offered as an option to copyright owners to better help assert their rights).
4. maintain its historical heritage; and
5. promote international cooperation and exchanges with institutions charged with the registration and protection of *derecho de autor* and neighbouring rights (translation of the legislation by the author).

The responsibilities of INDAUTOR, under LFDA article 210, include protecting authors' moral rights and setting tariffs (Viñamata 2005, 77). Interestingly, the *Instituto Mexicano de la Propiedad Industrial* (Mexican Institute of Industrial Property, IMPI), a much-better-funded and relatively more independent agency under the *Secretaría de Economía*, has been responsible for pursuing commercial copyright violations since 2001, which happen to be of greatest interest to foreign (and domestic) copyright holders. Nonetheless, INDAUTOR is the lead agency with respect to copyright policy and is the primary governmental contact point for copyright-related individuals and groups wishing to discuss or reform the LFDA. While it is open to all opinions, INDAUTOR sees its main clients as being the *sociedades de gestión colectivas*, which represents authors, artists and other creators (discussed below) and the groups representing Mexican-based copyright industries, such as the phonogram and motion picture industries (also discussed below) (Tourné, interview by author, September 24 and 29).

Internationally, INDAUTOR houses Mexico's recognized governmental copyright experts. For example, the Mexican delegation to the 1996 WIPO Internet treaties negotiations was led by Dr. Fernando Serrano Migallón, then-head of the entity replaced by INDAUTOR (and the author of the most authoritative book on Mexican copyright law).<sup>254</sup> While INDAUTOR's semi-independence has increased its authority on copyright issues, it remains subservient to the SEP and must work within that bureaucracy, which tends to view copyright as a secondary priority, in order to promote and propose changes. It does not make political decisions (Callejas, interview by author, October 26, 2009).

Like the rest of Mexican copyright, INDAUTOR's focus has gradually moved toward a greater focus on economic concerns and away from a more direct focus on the fostering of culture and creativity. The 1947 law, for example, required that the *Derecho de Autor* Department, then a directorate of the SEP, focus on promoting culture more directly. For example, its objectives were to:

- organize, control and maintain the literary and artistic property register;
- stimulate the development of theatre in the country and organize contests for authors, actors, and set designers, and, in general, promote the betterment of these fields;
- organize artistic expositions, fairs, pageants, contests, auditions, theatre festivals, and film exhibitions of cultural interest;
- coordinate the artistic, cultural, recreation and sporting activities of the federal public sector; and
- promote the film, radio, television production and the publishing industry (Viñamata 2005, 77, translation by the author).

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<sup>254</sup> Also on the committee were two representatives of the Mexican embassy in Geneva, a representative of the Mexican foreign ministry and – representing the private sector – a vice-president from Televisa.

As this mandate suggests, INDAUTOR is focused primarily – one is tempted to say almost exclusively – on authors’ rights, as opposed to user rights. Among these stakeholders, all those interviewed reported good relations with INDAUTOR. These include U.S. industry officials: even as the U.S. International Intellectual Property Alliance (IIPA) remains highly critical of Mexican copyright enforcement and other issues, its submissions to the USTR Special 301 process<sup>255</sup> continually refer to a good degree of cooperation and consultations between its members and Mexican authorities.

## **2. *Secretaría de Comunicaciones y Transportes (SCT)***

Given INDAUTOR’s role as maximizing author’s protection (subject to some limitations), one would expect that, all else being equal, digital copyright-related reforms could be expected to follow the maximalist U.S. model. However, despite its central role in copyright policymaking, shaping the implementation of the Internet treaties is beyond the total control of either INDAUTOR or its clients. Any reforms that touch on ISP liability and TPM issues will require the acquiescence of the relevant departments, which in this case would mean, at the very least, the *Secretaría de Comunicaciones y Transportes* (Communications and Transportation Department, SCT), which regulates the telecommunications industry, and the *Secretaría de Economía* (the Economy Department), which oversees economic policy. Each of these has their own industrial clients, whose membership does not overlap with those of INDAUTOR.

Of the two, the SCT’s interest in ISP liability would likely be the largest hurdle for proponents of DMCA-style copyright reform (TPM protection appears to be a secondary issue in Mexico). Currently, Mexico has no “safe harbour” rules for ISPs; while this suggests that ISPs could be potentially liable for infringement carried over their networks, the typical

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<sup>255</sup> Available under “Mexico” at <http://www.iipa.com/countryreports.html>, accessed August 6, 2010.

ISP contract with a client shifts all liability onto the consumer.<sup>256</sup> Easy agreement on ISP liability is likely to be elusive, mainly because the SCT and its client industries are pursuing goals that are potentially in conflict with the pursuit of maximalist copyright in general and ISP liability in particular. Furthermore, the telecommunications industry can be expected to fight any proposal that requires investments that could threaten their profitability.

The Mexican government has made increasing Internet access a key part of its developmental platform. The government's *Plan Nacional de Desarrollo 2007-2012* (National Development Plan)<sup>257</sup> sets the objective of increasing the number of Mexicans with online access from the 18 million online in 2006 to cover 60% of the population (currently around 111 million people), and improving the quality of services available to them. The *Plan Nacional* mentions intellectual property only generally (copyright is not mentioned at all) as it relates to the uncertainty of property rights, with no specific objectives attached. Furthermore, the section of the *Plan Nacional* devoted to culture and art<sup>258</sup> proposes the objective that "All Mexicans have access to participation and enjoyment of Mexico's artistic, historical and cultural heritage as part of their full development as human beings" (translation by the author). While the plan does call for support for various forms of culture, including on the Internet, its emphasis on access could be seen as an endorsement of users' rights.

According to Jorge Basurto of the *Comisión Federal de Telecomunicaciones* (Federal Telecommunications Commission, COFETEL), which regulates ISPs on behalf of SCT, it is unlikely that SCT would agree to anything that went against this objective. Furthermore, the

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<sup>256</sup> See, for example, Article 14 of Telmex's Terms and Conditions of Internet use (available at [http://www.telmex.com/mx/hogar/pdf/pt\\_descarga.jsp?a=Terminosycondiciones\\_Infinitem.pdf](http://www.telmex.com/mx/hogar/pdf/pt_descarga.jsp?a=Terminosycondiciones_Infinitem.pdf), accessed March 5, 2010, and on file with the author).

<sup>257</sup> Available (in Spanish) at <http://pnd.presidencia.gob.mx/>, accessed August 6, 2010.

<sup>258</sup> See <http://pnd.calderon.presidencia.gob.mx/igualdad-de-oportunidades/cultura-arte-deporte-y-recreacion.html>, accessed August 6, 2010.

SCT can counter the rhetoric of copyright as a means to protect Mexican culture with rhetoric trumpeting the need for economic development via an open Internet; it is not immediately clear which rhetoric will prove the more convincing to Congress (Basurto, interview by author, January 29, 2010).

The current institutional regime, with the exception of the SCT and its related Congressional commissions, shapes Mexican copyright policymaking in a specific direction. The administrative institutions – INDAUTOR and IMPI – favour the “protection” role of copyright, as do the *sociedades de gestión colectivas* and the copyright industries. While not formally closed to actors with strongly differing views, such interests are not easily reflected by these institutions’ official mandates.

The corporatist state of affairs, however, is open to challenge from intra-institutional conflict, of which one source – the SCT and its representation of ISPs and the telecommunications industry – has already been mentioned. Congress itself represents another challenge to the “protection” status quo that favours the implementation of the Internet treaties along the lines of the U.S. DMCA. As the following section on interests remarks, rising public interest in digital-copyright issues, related to increasing broadband Internet use, combined with an increasing academic and legal focus on digital-copyright issues, may also create public pressure for user and consumer rights.

### **III. Interests: Some challenges to traditional actors**

#### **i. Sociedades de Gestión Colectivas**

In Mexican copyright negotiations, the government recognizes the interests of authors as being represented by *sociedades de gestión colectivas* (Nivón, interview by author, October 9, 2009). These groups are non-profit organizations authorized by INDAUTOR

(Serrano Migallón 1998, 71) and mandated by article 192 of the LFDA to protect authors and neighbouring-rights holders' moral and patrimonial rights, both foreign and domestic. The LFDA gives *sociedades* the power to collect royalties on behalf of its members. It also requires that they be constituted for the purpose of mutual aid among its members, based on the principles of partnership, equality and equity (LFDA art. 192; see also Obón Leon 1991, 9-10). While the *sociedades* maintain linkages with collection societies in other countries (though not with a specific North American focus), they are primarily domestic groups.

The main roles of *sociedades de gestión colectivas* include representing their members' interests, exhibiting their members' works, and safeguarding Mexico's intellectual and artistic traditions (Serrano Migallón 2008, 153). As José Cárdeno, General Coordinator of Legal Affairs of the *Sociedad de Autores y Compositores de México* (Authors and Composers Society of Mexico, SACM), the most important of Mexico's *sociedades*, remarks: "We want to balance of course the rights of the community, but at the same time, we want to balance the rights of the copyright owners that were going into public domain" (Interview by author, 2009).

Their roots can be traced back to authors' guilds established to protect their member's rights (Serrano Migallón 2008, 154), the earliest being the *Sociedad Mexicana de Autores Líricos y Dramáticos* (Mexican Lyricists and Dramatic Authors Society), created in 1902. They had a distinctive corporatist role: the 1956 legislation formally designated the *Sociedad General Mexicana de Autores* (General Society of Mexican Authors), a confederation of *sociedades*, as the formal interlocutor with the government with respect to copyright (Serrano Migallón 2008, 47-48). Over time, more societies have been created until they reached the current number of 14 (Alba 2009; Viñamata 2005, 71-72; Cue Bolaños 1990, 72-73).

They also serve as creators' representatives in copyright negotiations, although following the 1997 changes to the LFDA (specifically section 195), creators are no longer limited to mandatory membership in one group, as a way to give individual artists bargaining power when dealing with publishers and distributors (Callejas, interview by author, October 26, 2009). The *sociedades* continue to dominate authorial representation in their dealings with the government; unlike in Canada and the United States, creators have not made their voice heard through alternative organizations, such as the Canadian Music Creators Coalition or the U.S. Future of Music Coalition. Creator groups seem somewhat more important in Mexico than in Canada or the United States due to their long history of involvement in the corporatist copyright-negotiation regime as the authoritative voice of Mexican creators. They were the main force behind the successful 2003 extension of the term of copyright to life of the author plus 100 years (Serrano Migallón 2008, 280; IIPA 2003), spurred by the fact that the “*Catálogo de Oro*” (Gold Catalogue) of classic Mexican music was about to pass into the public domain. De la Parra Trujillo (2004, 107) argues that the change will not benefit authors or the public, but rather SACM, the main lobbyist for the change, which stands to collect royalties for works that would have otherwise fallen into the public domain. Many of the authors who created these works are either long dead or stand to receive, on average, relatively little from this increased protection.

In contrast to new artists' groups in Canada and the United States, the *sociedades* have consistently advocated (and stand to benefit from) stronger rights, since they are in the business of collecting royalties, rather than creating. The extent to which these societies look out for interests separate from those of their members is suggested by a 2009 newspaper article on the SACM alleging poor conduct by its executive, citing millionaire heads of

SACM, chosen by the result of nepotism, and a system that gives high royalty earners a greater say in SACM's decisions (Alba 2009). With respect to the 2003 law, as Obón León suggests above, collection societies, not artists, are the main beneficiaries of extensions of copyright a full century after the creator is dead. Consequently, they can be expected to pursue a copyright regime stronger than might be preferred by individual artists. ISP liability is their primary digital concern; TPM protection is not a priority for these groups.

## ii. Copyright industries

Like the *sociedades*, the various associations representing copyright industries – most but not all of which represent foreign-based multinationals (as in Canada) – have *de facto* standing in the copyright policymaking process, including recognition by INDAUTOR, access to lawmakers and access to the Executive. NAFTA and the resulting 1997 law recognized and strengthened a host of neighbouring rights that have benefitted mainly, but not exclusively, foreign businesses. Televisa, the world's largest Spanish-language media company and a crucially important player in Mexican politics generally, is the most obvious exception. Televisa in particular has a strong incentive for Mexican copyright law to accommodate U.S. demands, as it is very interested in the growing U.S. Spanish-speaking market (Callejas, interview by author, October 26, 2009).

While the interests of these copyright industries – strong ISP liability, stronger copyright protection, strong legal protection for TPMs and especially better enforcement of existing copyright laws, to name a few – are similar to the interests of copyright industries worldwide, there are three things worth noting about the Mexican-based industries. First, they were arguably the main beneficiaries of the 1997 changes to the LFDA. As noted above, the 1997 law had the result of creating or strengthening economic rights in copyright,

particularly for industry. Mexico was able to protect some of its traditional limitations – for example, neighbouring rights applied only to producers or performers of sound recordings on primary use, not secondary use (in Mexico, performers’ secondary use rights are not protected; they are in the U.S.) (Appleton 1994, 126, 124). García Moreno (1998, 111) argues that the 1997 law was more concerned with the rights of intermediaries than actual creators and, in contrast to previous copyright laws, was more focused on protecting the businesses that profit from authors, not the authors themselves.

Second, while interview subjects from the content industries saw a need to implement fully the Internet treaties, ISP liability – generally supporting a notice-and-takedown, or “three-strikes” legislation<sup>259</sup> – was seen as the most pressing concern. For example, the *Asociación Mexicana de Productores de Fonogramas y Videogramas* (Mexican Association of Phonogram Producers, AMPROFON), which represents foreign music companies, favours TPM protection as it is required by the treaties; however, the association has no official position on how protection should be implemented and does not see it as a priority (Aguilar, interview by author, February 3, 2010). Those most interested in TPM protection appear to be video game producers (Morante, interview by author, December 3, 2009), which have little production in Mexico and tend to see the country mainly as a market (Mitchell, interview by author, July 8, 2008). On the other side of the issue, consumer-electronics producers – the group that in the United States opposed TPM protection – do not have a large production presence in Mexico (Tourné, interview by author, September 24 and 29).

### **iii. The United States**

The United States has exerted a strong influence on Mexican copyright law. In the pre-NAFTA period, the United States was able to threaten Mexico credibly with the removal

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<sup>259</sup> A “three-strikes” policy would restrict then remove a user’s Internet access for repeat copyright offences.

of its preferential access to the U.S. market under the Generalized System of Preferences in order to coerce changes. The 1997 law can be seen as the last successful use of this threat, since NAFTA, going forward, more or less guaranteed Mexican access to the U.S. market and took this critical bargaining chip off the table. In addition to the diplomatic tools discussed in the Canadian case study (Special 301 and U.S. trade policy, diplomatic representations of the U.S. position, working with and through industry associations), the United States has also been active in providing training to Mexican judges and other officials with respect to copyright-law enforcement through the IPR (Intellectual Property Rights) Training Coordination Group.<sup>260</sup> This government-industry group, which counts the Patent and Trademark Office, the Copyright Office and the IIPA among its members,<sup>261</sup> provides “IPR-related informational programs, training, and technical assistance to foreign officials and policy makers.”<sup>262</sup> In September 2009 and in April-May 2010, for example, the PTO and U.S. State Department held training sessions for Mexican officials on IP enforcement and the application of IP laws in copyright cases.<sup>263</sup>

#### **iv. Internet Service Providers**

ISPs themselves have interests that are potentially at odds with those of copyright owners. As in Canada and the United States, they would be very reluctant to implement any system that requires substantial resource investments on their behalf. They also would resist any requirements that reduced their integrity of their networks, which they promote to consumers based on their ability to download movies and music at rapid rates (Basurto,

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<sup>260</sup> Website: <http://www.training.ipr.gov/>, accessed August 4, 2010.

<sup>261</sup> For a full list of members, see <http://www.training.ipr.gov/index.cfm?fuseaction=content.about>, accessed August 4, 2010.

<sup>262</sup> See <http://www.training.ipr.gov/index.cfm?fuseaction=content.about>, accessed August 15, 2010.

<sup>263</sup> The program's database, at <http://www.training.ipr.gov/index.cfm?fuseaction=db.search>, accessed August 4, 2010, details U.S. involvement in IP, including copyright, training and discussions going back over a decade.

interview by author, January 29, 2010). SCT's recommendations on ISP liability are likely to be heeded since Telmex, which controls 95% of the ISP market, is owned by Carlos Slim, who was named the world's richest man in 2010 by Forbes magazine and whose words carry weight with the Mexican government, particularly given the pro-business slant of recent governments, including the current *Partido Acción Nacional* (National Action Party, PAN) government.

#### **v. The Public: Neither seen nor heard**

While copyright is sometimes covered by the media, it is rare to see any discussion of copyright from the perspective of users. Everyone interviewed agreed that public pressure (as opposed to pressure from specific interests) currently plays little, if any, role in copyright policymaking. Mike Margáin, of the American Chamber Mexico, which represents U.S. businesses in Mexico, remarks that outside of a few young “cyberonauts” there is little public interest in copyright (Interview by author, April 27, 2010). The lack of interest and effective input is partly the result of the fact that Mexicans have yet to experience their “Napster moment of awareness” that galvanized debate in the United States and Canada. In Mexico relatively few households have Internet access (13.7% in 2008), and fewer have broadband Internet access (8.41% in 2009) (see Tables 1 and 2 in Appendix A, Chapter 5). However, the lack of civil-society involvement in copyright issues in Mexico is also likely attributable to the newness and weakness of Mexican civil society in a nominally post-corporatist era. As Blacklock and Macdonald (1998, 146-147) remark, until the mid-1990s, civil society was a “highly restricted space”: “tightly controlled from above, creating a political culture characterized by verticalism and hierarchy, as well as the exclusion of large segments of the population not represented in the corporatist system.” Mexican civil society's relative

newness thus presents groups and individuals not already directly involved in the copyright debate with an additional challenge of gaining a toehold in the debate.

With respect to civil society, there is no evidence of any regional (or extra-Mexico) linkages emanating either from foreign groups interested in Mexico or (nonexistent) Mexican groups. In fact, although Mexican academics looking into digital-copyright issues have been influenced by U.S. academics such as Lawrence Lessig, the most direct civil-society influences on Mexican civil-society groups concerned with copyright have come from Spain, not the U.S. or Canada. In March 2010, the *Centro Cultural de España México* (Cultural Centre of Spain in Mexico), which is affiliated with the Spanish Embassy in Mexico, hosted a three-day workshop, “*Comunidades, cultura libre y propiedad intelectual*” (Communities, free culture and intellectual property) as part of the 2010 *Festival de México*, an annual arts and culture festival held in Mexico City. It also co-published the first Mexican book on digital copyright and free culture (López and Ramírez 2009). Mexican governmental copyright policy may be enmeshed in global treaties with a strong focus on the United States, and the Mexican copyright industries and *sociedades de gestión colectivas* may have global links with their counterparts in other countries. However, when it comes to civil society and copyright, North America definitely does not exist.

From the perspective of digital-copyright issues, the situation is little better in academic circles, the other sector of society that has, in Canada and the United States, taken the lead in public activism with respect to the Internet treaties. As in all civil-law jurisdictions, academics are important in Mexican politics, and politicians usually seek to form strong links with academics, in order to secure their endorsement and legitimacy for their policy proposals. The result is a closeness between power and academia that is not as

evident in Canada or the United States. Often, academics are asked to study issues before they are changed; while lobbying is important, these academic studies provide moral authority to back political change (Callejas, interview by author, October 26, 2009).

However, copyright law has to date attracted few legal scholars and practitioners<sup>264</sup> – though this is changing (Aguilar, interview by author, February 3, 2010; Callejas, interview by author, October 26, 2009) – and very little interest from other academic departments and faculties (López, interview by author, September 18, 2009). Nivón (2009, 62) remarks that journals that one might have thought would have taken an interest in the issue – the *Revista Internacional de Filosofía Política* (*The International Journal of Political Philosophy*) or *Derecho y Cultura* (*Law and Culture*) – have not published a single article on the subject of copyright and culture. The first Mexican-related book on copyright and the Internet from a cultural perspective, a volume of essays loosely comparing Mexican and Spanish situations regarding digital-copyright issues, was published only in July 2009 (López and Ramírez 2009).

#### **vi. Canadian influence**

Canadian governmental non-involvement in Mexican copyright policy further demonstrates the primarily double-bilateral nature of the formal North American region. On a governmental level, the NAFTA provisions on copyright primarily involved the United States and Mexico. Mexico refused Canada's requests to take culture off the table (Robert 89, 2001). The only other regional framework – the SPP – was primarily an information-sharing exercise with respect to copyright. Canada, in short, is a non-entity in the Mexican copyright debate, as everyone interviewed for this dissertation agreed. The Canadian Embassy in

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<sup>264</sup> Most academic salaries are low by Canadian standards. As for practical interest in the issue of copyright, Callejas remarks that many academics depend on royalties for part of their income (Interview by author, October 26, 2009).

Mexico turned down a request for an interview on the grounds that Mexican copyright was not an issue that concerned Canada.<sup>265</sup> While this may or may not be sound policy – a strong argument could be made that both countries could benefit from some degree of cooperation in the face of their common neighbour and main regional copyright *demandeur* – it nonetheless reflects the utter lack of bilateral Canada-Mexico engagement on copyright.

#### **IV. Summary**

This Mexican combination of ideas, institutions and interests described above reflects a copyright policymaking situation considerably more complex than would be suggested by a cursory glance at the relative economic power of the United States and Mexico. While it suggests a strong domestic bias toward implementation of the treaties along U.S.-preferred DMCA lines, this tendency is driven as much by domestic considerations as by regional, or U.S., pressure. The new focus on copyright as an owner's economic property right has interacted a continued perception of copyright as an *author's moral right* to support an approach of the economic view of copyright as an *owner's economic right* that should be maximized. The Mexican approach to the Internet treaties, and to international copyright negotiations in general, is also driven by its self-image, similar to that of the United States, as a cultural superpower that benefits from strong international copyright protection. Unlike the United States, however, Mexico's developing country status provides an incentive not to enforce these strong laws too enthusiastically.

With respect to institutions, as in the United States, Mexico's formal copyright institutions tend to favour copyright's protection dimension over its dissemination role. Officials at these agencies have enthusiastically embraced the view of copyright protection as

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<sup>265</sup> The author hastens to add that the personnel at the Canadian embassy were very helpful in other areas, for which he is thankful.

something to be maximized, and while exceptions and limitations exist in Mexican copyright law, they tend to be underemphasized. However, the Internet treaties have involved new governmental agencies concerned with telecommunications in the copyright debate, which serve stakeholders outside the copyright industries (i.e., telecommunications companies and ISPs) and which have priorities other than the maximization of copyright protection.

With respect to actors, the Mexican copyright debate remains dominated by nationally focused interests, the primary exceptions being the United States, the multinational content industries, and the lesser involvement of the Spanish Embassy. Currently, protection interests – the *sociedades de gestión colectivas*, the copyright industries and the United States – enjoy a relatively favourable position in the Mexican copyright negotiations process. In contrast, groups reflecting the “user” or “dissemination” position – the public and academics critical of Mexican copyright in particular – do not have as strong a standing in the process, nor do their concerns fit well with traditional Mexican copyright narratives. Their interests, however, are reflected to a certain degree in the lack of enforcement of Mexican copyright laws. The main exception to the lack of formal involvement in the making (rather than the enforcement) of copyright policy is the telecommunications industry, which has political influence and an institutional base in the SCT. Meanwhile, general user interests, traditionally neglected in Mexican copyright policymaking, have the potential to intrude on copyright negotiations, much as they have in Canada and the United States, although they have not yet done so.

## **PART II: MEXICO AND THE INTERNET TREATIES: A WORK IN PROGRESS**

The government of Mexico ratified the WIPO *Copyright Treaty* (WCT) on March 6, 2002, and the *Performances and Phonograms Treaty* (WPPT) on May 20, 2002. They are

considered to be “in force,” since under Mexico’s civil law, treaties are deemed implemented when they are ratified, and become part of the law. While their implementation does not require incorporation into the Mexican copyright law, groups within and without the country have continued to call for full implementation of the treaties via changes in Mexican copyright law.

According to the Mexican government, Mexico is mostly in compliance with its WIPO Internet treaty obligations (Diplomatic official, interview by author, August 13, 2008). The 1997 LFDA, which was being debated at the same time as the Internet treaties, includes several related amendments that were inserted “in anticipation of the final outcome of the WCT and WPPT” (Schmidt 2001). These include a “making available” right<sup>266</sup> and a “transmission right”<sup>267</sup> (WCT Article 8; WPPT Article 15); and a measure protecting TPMs placed on computer programs (WCT Article 11).<sup>268</sup>

With respect to TPMs, in language similar to that which would be drafted into the 1998 U.S. DMCA, Article 112 of the LFDA prohibits

the importation, manufacture, distribution and use of equipment or the services intended to eliminate the technical protection of computer programs, of transmissions across the spectrum of electromagnetic and telecommunications networks and programs’ electronic elements” (author’s translation).

Article 231(V) imposes criminal sanctions on the importation, sale, lease of any program or performance of any act that would have as its purpose the deactivation of the protective electronic controls of computer software. Violation of these articles is punishable by imprisonment of three to ten years and a fine of 2,000 to 20,000 times the minimum wage. Furthermore, while the LFDA does not define circumvention, a non-paper presented at

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<sup>266</sup> Article 27 II c) of the LFDA.

<sup>267</sup> Article 17 III of the LFDA.

<sup>268</sup> The law also protects temporary or ephemeral digital copies, anticipating – incorrectly, it turns out – that it would be required by the final text of the Internet treaties.

WIPO by INDAUTOR,<sup>269</sup> suggests that it is only an issue when the underlying copyright or author's rights have been infringed (INDAUTOR 2008).

While the 1997 reforms expanded the protection of creative works, it is generally argued that it requires more precision to address Internet-related issues regarding online content (Barrios Garrido 1998, 372).<sup>270</sup> It contains no provisions limiting ISP liability; neither does it address fully the legal protection of TPMs beyond that provided to TPMs applied to computer software. Although the LFDA was amended in 2003, these amendments did not extend to treaty-implementation issues. Although implementing legislation has yet to be tabled (as of January 2011), a full review of and subsequent amendments to the LFDA are likely within the next three-to-five years.

## **I. Explaining Partial Implementation**

The partial implementation of the treaties (to date) is the result of three factors: fluctuating U.S. ability to link copyright with trade issues; Mexico's low level of digital-infrastructure development; and the continued importance of domestic copyright actors, particularly the *sociedades de gestión colectivas*.

### **i. Trade Linkages**

At heart, the extension of protection to TPMs protecting computer software can be understood as the overall result of NAFTA-negotiating dynamics. In particular, it was the Mexican response to U.S. pressure at the time of the NAFTA negotiations. For the U.S., software protection was a, or, rather, the, pressing digital-copyright issue at the time

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<sup>269</sup> A "non-paper," in international relations, is a paper circulated without attribution for comment. It does not represent an organization's official position. This paper is on file with the author.

<sup>270</sup> The only Internet-specific laws Mexico has on its books are related to e-commerce (Hernandez Arzate 2006, 117).

(Schmidt 2009). The decision to protect TPMs reflects U.S. involvement in the Mexican copyright process:

Interaction between the U.S. and Mexican governments is evident during the legislative discussions of the Mexican Copyright Law and the rules on anti-circumvention evidence that fact. In keeping with this, the Federal Penal Code imposes criminal sanctions against manufacturers of devices or systems that deactivate the protective electronic controls of computer software (Schmidt 2009).

U.S. involvement in Mexican copyright policy post-NAFTA can be understood as part of the same process of IP-trade linkage that led to the reorientation of Mexican copyright law. However, in the post- NAFTA era, as has already been noted, the United States has been able to influence (through training) and lobby, but not coerce. After placing Mexico on its Special 301 Priority Watch List in 1989, the United States continued to criticize Mexican copyright laws and enforcement, placing it on its Watch List in 1998 and 1999, and from 2003 to the present (USTR 1989-2010). While the United States has seen some improvement in Mexico's enforcement of its copyright laws, the WIPO Internet treaties continue not to be implemented fully in Mexican law.

## **ii. Power of domestic groups**

That copyright reform in Mexico historically has been driven by international treaties does not mean that domestic groups are passive actors. The 2003 changes to the LFDA, more adjustment to the 1997 reforms than wholesale reform, reflected the power of the *sociedades de gestión colectivas*. They, rather than the United States or its content industries, were the driving force behind the bill (Serrano Migallón 2008, 280; IIPA 2003). Their main demands included extension of the term of copyright to a world-leading life of the author plus 100 years. While the changes were driven by the *sociedades*, IIPA members were able to remove the provisions it deemed most troublesome, notably a private copying levy, while supporting

the copyright term extension (IIPA 2005). Conspicuously absent from the uncontroversial legislation (Serrano Migallón 2008, 336), however, was any mention of the Internet treaties. Their absence, while suggestive of the fact that actors prioritized issues other than digital copyright (discussed in the next section), also suggests that the U.S. and its content industries, the main proponents for the treaties' implementation in Mexico and around the world, do not drive all copyright changes. Making the reasonable assumption that the United States would prefer the implementation of the treaties to their non-implementation, the 2003 reforms show that the United States lacks the ability to force the issue of copyright reform in Mexico.

In copyright, the United States can be thought of as one interest among many, and not normally powerful enough to dictate the copyright agenda post-NAFTA. In the absence of formal regional mechanisms through which the U.S. (or Canada, theoretically) can set Mexican copyright policy, and in the presence of a NAFTA that restrains U.S. ability to link copyright to other economic issues, the United States must work through lobbying and the building of sympathetic epistemic communities (i.e., through training of Mexican copyright officials). To the extent that it is able to move its neighbours' copyright policies closer to its own preferred outcomes (and thus to common "North American" standards), the United States must do so indirectly, through Mexico's (and Canada's) domestic policymaking processes. Even here, the ability of the United States to affect Mexican policy is limited by the Mexican state's resource constraints and domestic political and economic pressure not to enforce the law. As a developing country, copyright enforcement is only one among several competing priorities. U.S. aid, through training programs and other direct support of Mexican

copyright officials, discussed above, suggests that the United States implicitly recognizes this weakness in the Mexican state.

### **iii. The role of technology**

American and Mexican copyright experts interviewed for this dissertation were unanimous in emphasizing that problems related to enforcement and old-fashioned commercial piracy (bootlegged DVDs, CDs and books) – specifically, enforcement of existing laws – dwarfed (and at the moment continue to dwarf) the problem of unauthorized Internet downloading and uploading. For example, while Special 301 submissions by the U.S.-based IIPA throughout the 2000s called for the full implementation of the WIPO Internet treaties, the issue of “Internet piracy” in Mexico received its own section only in 2009 and 2010. Low levels of broadband penetration (see Table 1, Appendix B, chapter 5) are a significant contributor to industry and creators groups’ relative lack of interest (until now) in Internet-treaty ratification.

## **PART III: LOOKING FORWARD: IMPLEMENTATION OF THE INTERNET TREATIES**

In an historical institutionalist approach actors, are “embedded in institutional milieus” that influence their choice of strategies and choices, even as they reshape or sustain the institutions with their actions (Immergut 1996, cited in Katznelson 1997, 104). Institutions emerge from “concrete historical processes” that lead to a favouring of certain options, policies and groups over others (Pierson 2000). Ideas, meanwhile, can be function as background constraints on which policies are considered seriously and as resources to promote and legitimize policies (Campbell 2004, 384-385). In Mexico copyright policy is made within a quasi-corporatist framework in which user/individual rights are poorly represented. Ideationally, the traditional concept of *derecho de autor* has effectively been

married to the economic concept of copyright, both as something to be maximized for creators/owners. With respect to actors, the United States, on behalf of its industries, has worked, with some success since NAFTA, to reshape the Mexican copyright landscape. These factors suggest that when the treaties are implemented, their implementation along U.S. lines is quite possible.

Contrasting Mexico with Canada may prove useful in understanding this prediction. In both countries, the impetus for the treaty implementation has come from the U.S. However, the two countries differ in the strength of domestic support for this policy. In Mexico, one can see a more “natural” affinity for a U.S. approach in its institutional, ideational and political factors; some of these are the result of the U.S.-initiated NAFTA changes. Canada’s reluctance to discuss copyright during the NAFTA negotiations, compared with Mexican agreement to discuss it, provides a further example of the differences between the two countries.

As for the culture of copyright, the Canadian instrumentalist view of copyright as a balance among competing interests does not align with the Mexican view of copyright (*derecho de autor*) as an author’s right that must be defended to protect and promote the national culture. If more protection and national culture are better than less, then the Mexican view has, in practice, much in common with the U.S.-led economic imperative to maximize copyright *owners’* rights. Both impulses favour one side of the copyright equation – the author or owner – against the other – the user, however defined.

In Canada, the responsibility for copyright is split between two departments with conflicting mandates, while new groups such as individual users have forced their way into the debate through its politicization. In Mexico, INDAUTOR tends to see its role as

maximizing authors' and copyright owners' rights. Politically, copyright remains viewed as a technical issue settled by corporatist bargaining largely between two sides – authors and the copyright industries – whose interests are more similar than different. The public (and even many non-copyright-lawyers/academics) remains uninterested, despite the initial efforts of some Mexican academics to kick-start a public debate.

The countries are most similar when it comes to the telecommunications sector. Each has a powerful domestic telecoms/ISP sector able to deploy political and economic influence to make their voices heard in the policymaking process by working through their representative departments (in Canada, Industry Canada, and the SCT in Mexico). In Mexico, the telecommunications companies and the SCT are further aided by the ability to deploy a government-supported narrative about the need to increase broadband speed and penetration in the name of economic development, which has the potential to counter the narrative of copyright as protector of the national culture. While these strengths do not definitively demonstrate that notice-and-notice will prevail over notice-and-takedown or some stronger variant, it does mean that Mexican ISPs will have to be accommodated in the policymaking process.

They are most different in terms of the constituency for these changes. In Canada, as in Mexico, the United States is the main advocate for U.S.-style treaty implementation. However, while the United States' main Canadian allies, such as CRIA, are perceived as representing “foreign” interests in Canada, in Mexico, copyright is considered a domestic policy, supported by domestic Mexican groups like SACM, itself a powerful player in copyright policymaking.

## **I. Rising U.S. interest**

Treaty implementation has been a consistent, if secondary, demand by U.S. government and industry over the years since their signing and ratification by Mexico in 2003 (IIPA various years; United States various years). Since Mexico was placed on the Special 301 Watch List in 2003, for the first time since 1999, enforcement has been the perennial concern. In 2006, for example, the IIPA recommended 14 enforcement and training-related measures<sup>271</sup>, and only eight related to legislation, including full implementation of the Internet treaties; these numbers were similar in 2007, and the 2008 report contained 26 enforcement-related recommendations.<sup>272</sup> In contrast, recent Canadian IIPA and Special 301 reports have focused more consistently on policy objectives, in particular implementation of the Internet treaties.

Signs that digital-copyright issues are becoming relatively more pressing for U.S. industry can be seen in the IIPA's 2009 Special 301 submission, which was their first to discuss in-depth their concerns with "Internet piracy," recommending "(1) a notification procedure [i.e., notice-and-notice or notice-and-takedown]; (2) a stepped approach to subscriber termination [i.e., cutting off a person's Internet usage following more than one accused or actual copyright infringements; and (3) deterrent sanctions against serious or repeat offenders" (IIPA 2009).

## **II. Institutional changes**

Already predisposed toward strong support for authors' rights, INDAUTOR's disposition toward copyright as an economic right has become more pronounced. In 2007,

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<sup>271</sup> As already noted the U.S. government, particularly the PTO, have provided training to Mexican copyright officials over the past decade.

<sup>272</sup> Enforcement in the post-1997 law period was also the main issue, as the U.S. government claimed to be satisfied with Mexico's laws.

Manuel Guerra Zamarro,<sup>273</sup> a widely respected copyright lawyer (Morante, interview by author, December 3, 2009) and a former Mexican representative at WIPO, was appointed by PAN President Felipe Calderón (elected in 2006) as INDAUTOR's director general, a post that had never before been held by an industry lawyer.

While the precise reasons for his appointment are unclear – those interviewed on the subject alternately emphasized its continuity with and break from the past – Guerra's appointment can be seen as a turning point in Mexican copyright, for several reasons. He is widely credited for bringing a renewed energy, order and focus to INDAUTOR, including pushing the agency to adopt the idea that Mexico should implement fully the Internet treaties (Aguilar, interview by author, February 3, 2010; Morante, interview by author, December 3, 2009; Tourné, interview by author, September 24 and 29, 2009).<sup>274</sup> He has also staffed INDAUTOR with younger people from the private sector who are seen as being more interested in the copyright sectors for which they are responsible (Aguilar, interview by author, February 3, 2010), and as being sympathetic to the idea copyright as an economic right rather than simply a moral one. Perhaps tellingly, Guerra's appointment was received favourably by U.S. officials (Government official, interview by author, July 1, 2008), possibly signaling the government's intention to run a U.S.-friendly copyright policy.

These moves represent a generational shift in Mexican copyright policy and suggest a greater sympathy with the idea of implementing international treaties, a subject that Tourné

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<sup>273</sup> For a biography of Guerra Zamarro, see

<http://www.pgimg.com/home.php?seccion=socios&subSeccion=guerrazamarro>, accessed August 6, 2010.

<sup>274</sup> For example, he is apparently working to get the Internet treaties officially published. Although ratified in 2003, parts of the treaties (some agreed statements) were never published fully, a result of human error. Since treaties in Mexico are not formally part of the law of the land until they are published, this is a technical issue of some importance (Morante, interview by author, December 3, 2009; Margáin, interview by author, April 27, 2010), although it is unclear to the author how much effect it has on the actual conduct of copyright policy and the ongoing debate about what implementation of the Internet treaties should look like with respect to TPMs and ISP liability.

says was not a high priority for INDAUTOR's previous leadership (Tourné, interview by author, September 24 and 29). He expects that the government will undertake a comprehensive reform of Mexican copyright policy within the next two-to-three years (although this is dependent on the status of much more urgent government priorities, such as the current economic crisis and the ongoing drug war that has left thousands dead). He argued that it was important for the government to implement fully the WIPO Internet treaties before Internet penetration rates rose too high (Interview by author, September 24 and 29, 2009).

### **III. *Sociedades de Gestión Colectivas* and copyright industries: Joining forces**

As in Canada and the United States, various industry associations lobby the government – the Executive and legislators – on their members' behalf. However, two of the most important industry groups – the Motion Picture Association, representing Hollywood, and AMPROFON, which represents the Mexican branches of the main global record companies, as well as the U.S.-based Univision Music and Azteca Records – have, since 2008, formed the *Asociación Protectora de Cine y Música* to lobby jointly for stronger copyright laws. As well, the Institute for the Protection of Intellectual Property and Legitimate Commerce (IPIIC), an anti-piracy group, was founded in March 2006 by AMPROFON, the BSA (the Business Software Alliance), CNIV (*Cámara Nacional de la Industria del Vestido*, The National Chamber of the Garment Industry), and PRONAPHON (the National Producers of Phonograms). As the IIPA remarked, "This association essentially gave a legal status to the group that was meeting with PGR and other government agencies" (IIPA 2007).

In November 2009, 37 copyright-related groups came together to form the *Coalición por el Acceso Legal a la Cultura* (Coalition for the Legal Access to Culture) (El Universal 2009; Publimetro 2010). The coalition, which has the blessing of INDAUTOR and IMPI (which have observer status in the coalition), brings together artists' unions and *sociedades de gestión colectivas* with copyright-industry associations with the goal of reaching common positions on issues of mutual concern, according to SACM's Cárdeno (Interview by author, November 10, 2009) as well as Kenia López, the head of the *Comisión de Cultura de la Cámara de Diputados* (the main congressional committee responsible for copyright). According to those interviewed who are knowledgeable about the coalition, its creation represents a coming-together of previously antagonistic groups by emphasizing similarities, rather than differences (Tourné, interview by author, September 24 and 29, 2009; Aguilar, interview by author, February 3, 2010). Generally speaking, the *Coalición* favours stronger copyright laws and enforcement. Initially, the coalition will work toward forming common positions on the WIPO-related issue of ISP liability, as well as a copyright levy and *ex officio* authority for government officials. This last, a key goal for copyright groups, would give government officials the ability to enforce copyright laws without requiring a complaint to initiate proceedings, as is currently required (Cárdeno, interview by author, November 10, 2009).<sup>275</sup> While TPM protection was not mentioned, those in the industry say it remains an objective. Its absence, however, suggests its relatively low level of importance.

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<sup>275</sup> In early April 2010, the *Coalición*, whose members had been lobbying for this power for three years (Margáin, interview by author, April 27, 2010), were successful in their quest (El Universal 2010). Given Mexico's history of weak enforcement of strong copyright laws, and that greater enforcement will require increased revenues and human resources, the real-world effect of this change remains to be seen. Regardless, it represents a huge victory for the *Coalición*, whose members no longer have to instigate all copyright legal action.

The creation of this coalition suggests that these groups – the traditional players in Mexican copyright – are preparing for a showdown with ISPs over the future of digital copyright and Internet access in Mexico. This coalition allows these groups to present a unified front both to the government when proposing recommendations, and to the ISPs when negotiating a *modus vivendi*, an implicit, if not explicit, coalition objective (Aguilar, interview by author, February 3, 2010; Miranda, interview by author, November 25, 2009). By linking, in a sense, business and labour, the coalition will make it more difficult for users’ and citizens’ groups to argue their position, especially given the corporatist nature of Mexican copyright negotiations.

#### **IV. Internet service providers and the SCT**

Indirectly, this union of former opponents is also indicative of the power of ISPs in Mexico. Telmex (owned by Carlos Slim and controlling 95% of the Mexican ISP market) in particular, as COFETEL’s Basurto remarks, has “a lot of power” (Interview by author, January 29, 2010). Given the political power of Telmex and Televisa (whose interests are more divided, since they have interests on both the content and network sides), the road to a deal on ISP liability goes through these businesses. Government-mediated talks between copyright holders and ISPs were undertaken in 2008 and 2009 with no progress (IIPA 2010), suggesting strongly that there is little natural ground between the two groups, and that government intervention will be required to remedy the situation.<sup>276</sup>

#### **V. The public wild card**

As Tourné’s comments linking copyright reform with low levels of broadband penetration suggest, those wishing to implement stringent ISP requirements are in a race

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<sup>276</sup> While the two positions are not necessarily irreconcilable, neither will Telmex’s privileged position in the Mexican political economy necessarily trump that of the content industries. Televisa, also an important Mexican economic player, has both ISP and content interests, for example.

against time. Once a certain percentage of Mexicans have such access, it will become more difficult to reform the law, since they will likely protest if their service is disrupted or changed in a way not to their liking. In other words, familiarity will breed awareness and concern, much as it has in Canada and the United States. However, if reforms are implemented before this critical level is reached, it is likely that any public opposition would only occur after the fact. Basurto also sees some political gain, saying that the left-of-centre PRD “the Internet should be not regulated because everybody will need to go to the Internet; and everybody has the right to share and download whatever they want from the Internet because we are poor” (Basurto, interview by author, January 29, 2010).

Currently, there is no evidence that the Mexican public is concerned about digital-copyright issues, but this could change. Basurto suggests that opposition from customers could become a problem once specific copyright reforms are proposed even at current levels of Internet penetration (Interview by author, January 29, 2010). Those with broadband access are likely to be more affluent and more involved in and aware of politics, including digital-copyright politics.

## **VI. Copyright as cultural or economic issue?**

While copyright previously had been viewed in Mexico as a cultural issue, its continuing commercialization, as well as the benefits and challenges brought on by the digital age, suggest that the upcoming debate over copyright also has the potential to be framed in economic terms. In October 2008 the Senate *Comisión de Ciencia y Tecnología* (Science and Technology Committee) held a seminar on “copyright in the digital environment.” Although this seminar did not deal directly with the WIPO Internet treaties, it addressed copyright in cultural and economic terms, and touched on access issues (such as

the need for a national digital library). Committee president, Francisco Castellón Fonseca, argued to consider regulating copyright for its cultural and economic effects, since it has the potential to generate as much or more revenues than industrial property (i.e., patents) (Comisión 2008). The insertion of this committee into the debate has the potential to expand the debate over copyright from one primarily focused on maximizing authors' rights to one that examines its effect on the rest of the economy and society.

#### **PART IV: CONCLUSION**

Historical institutionalism's strength is its ability to consider all relevant ideas, institutions and interests no matter on what "level" they may be located. This approach, in turn, highlights several aspects of the Mexican policy debate over the implementation of the Internet treaties that would be an issue if it had been considered purely in terms of its domestic implementation. In doing so, it also allows us to understand better the nature of North America as a region.

##### **I. Ideas**

In line with the Canadian case study, this chapter finds a U.S. influence on Mexican copyright policy, both through the NAFTA copyright provisions (negotiated at the request of the United States) and subsequent U.S. lobbying efforts, themselves constrained by NAFTA's guarantee of access to the U.S. market. However, the historical-institutionalist approach links the domestic and the regional by noting the connection between the traditional Mexican approach to copyright and the post-NAFTA changes to copyright. Rather than being a completely exogenously imposed form of change, the move toward a more Anglo-American form of copyright was welcomed by at least some significant domestic copyright actors. This "new" form of copyright itself has been justified in part with reference to the

traditional view of copyright that preceded it, notably in the justification of the maximization of Anglo-American economic copyright in terms of the more Continental moral rights approach. In other words, the nature and effects of this exogenous change can only be understood with reference to pre-existing domestic ideas, just as North America itself can only be understood through an exploration of domestic, sub-regional polities, with an eye for the linkages among them, where they exist.

## **II. Institutions and interests**

The analysis in this chapter has reinforced the primacy in North America of domestic forces within a regional context. Mexico's decisions related to the implementation of the WIPO Internet treaties have been driven primarily by domestic politics, reshaped somewhat by NAFTA. Its non-implementation of key parts of these treaties can be explained through reference to domestic factors (level of technological development, relative influence of the relevant interest groups and institutional structure of copyright policymaking). As in Canada, NAFTA has influenced Mexican copyright by acting as a region-wide restraint on the ability of the United States (acting as a global hegemon) to coerce directly Mexican policymakers. NAFTA has led to a significant reorientation of the Mexican *derecho de autor* regime toward a greater emphasis on copyright as an economic, owner's right, rather than an author's moral right. In doing so, it has recast Mexican domestic politics and set the stage for an implementation of the Internet treaties in a way that favours policy convergence on a U.S.-style implementation of the treaties.

These observations are in keeping with observations of Mexican-American relations more generally. As Camp (2007, 295) remarks:

The United States continues to exercise considerable influence on Mexico's leadership, albeit usually implicit and indirect. In fact, if the United States were to

attempt to influence Mexican political affairs directly, the effort would surely backfire. Nevertheless, the influence is obvious and many actors are involved.

It is striking the extent to which traditional Mexican copyright elites have accommodated the sweeping reforms initiated by NAFTA. While small groups within these elites (such as cinematographers (Obón León 2003)) may have lost out on specific changes, overall they seem very comfortable with the maximization of rights and control that NAFTA delivers and that a U.S. interpretation of the WIPO Internet treaties proposes. This symmetry of interests has reinforced existing biases in the law, in favour of the copyright industries and the *sociedades de gestión colectivas*. Meanwhile, the process continues to shut out the interests of the individual users and unrepresented creators, those who are most affected by the potential changes to the law. Looking forward, direct political pressure as individuals become more affected by digital technologies, or academics fully engaging the issue of digital copyright in the upcoming legislative review, could give voice to the dissemination/user side of copyright. In both cases, they would have to confront entrenched interests who, as was seen in the Canadian case, will defend their positions vigorously.

### **III. Regional influences, domestic contexts**

The effect of NAFTA and the United States in this context is complex. The United States, through NAFTA and ongoing influence in training and lobbying, has changed the balance and direction of Mexican copyright policy. In doing so, however, it has not necessarily worked at odds with existing dominant Mexican copyright interests. Looking forward, in cases in which it has allies and little opposition (civil society being underdeveloped in the copyright arena), such as TPMs, U.S.-style law is likely. However, faced with powerful domestic opponents, as with ISP liability, policy victory even on a redesigned field is less likely. In both cases, however, outcomes are dependent on and

reflective of domestic institutions, ideas and interests. Beyond the United States, one sees little evidence of linkages to the rest of North America among Mexican civil society related to copyright, nor are ties between the *sociedades* and their Canadian and U.S. counterparts strong enough that one could consider them regional actors, or as anything other than primarily domestically focused.

Again, the Mexican digital-copyright story reveals a region characterized by double-bilateral relationships as Canada does not figure at all when it comes to Mexican copyright. It also reveals a region in which NAFTA restrains direct linkage and convergence. Change, when it does occur, functions through emulation, elite networking, harmonization through NAFTA, and penetration, but all occurring within the context of domestic institutions.

#### **IV. Conclusion: Takers on their own terms**

The outcome of the Mexican debate over the Internet treaties will have important consequences for the future development of Mexican copyright law and the terms on which its individuals and creators will be able to engage with digital technologies. It will reveal whether Mexican copyright law can adapt to serve users (which also includes creators) as well as the traditional copyright interest groups. User groups, which are traditionally underrepresented in the corporatist copyright-policymaking setup, have the most to lose from a maximalist-style copyright policy. However, as this chapter documents, civil-society groups of the kind that have taken up the defence of user-rights in Canada and the United States remain underdeveloped and are currently (as of 2009-10) small and disorganized, although this chapter presents evidence that suggests they will become more important in the future.

While Mexico may be somewhat unusual for a developing country in that it self-identifies as a cultural superpower, an examination of the making of Mexican digital-copyright law offers the possibility for greater understanding of the relationship of developing countries to international copyright treaties. Developing countries are usually seen as policy takers on copyright issues: they lack the resources to drive international negotiations and trade agreements and tend to value other issues, such as general market access, more highly. Mexico's policy decisions to date regarding the Internet treaties suggest that developing-country copyright-policy outcomes are as shaped by domestic policy processes and interest groups as those of any developed country. They may be policy takers in the sense of their ability to influence international copyright treaties, but decisions related to the implementation of these treaties are based on domestically oriented calculations; to the extent possible, they are takers on their own terms.

## CONCLUSION: THE POTENTIAL FOR VARIATION

### INTRODUCTION

This dissertation's historical-institutionalist approach to North America has painted a picture of a region in which all three countries continue to demonstrate significant degrees of policy autonomy in copyright policy, even though the implementation of the WIPO Internet treaties – the policy under investigation – occurred within an identifiable regional framework. The three national governments' responses to the WIPO Internet treaties have been shaped largely by domestic institutions, the particular constellation of interests that have grown up around them and the domestic approaches to copyright that have developed over time in response to ideological and material pressures.

Chapters 2 and 3 discussed how in the United States the content industries were able to link their self-interested desire for stronger copyright protection to growing U.S. concerns about declining economic dominance in the mid-1980s. Chapter 3 further detailed how the outcome of the *Digital Millennium Copyright Act* (DMCA) was shaped by pluralist-style inter-industry negotiations overseen by Congress, which privileged politically and economically important interests while relatively neglecting the interests of those groups that were underrepresented in the process or not invited to the table. The result has been a maximalist approach to the legal protection of technological protection measures (TPMs) and a notice-and-takedown regime to limit the liability of Internet Service Providers (ISPs) for the actions of their customers. Both outcomes were in keeping with the political and economic influence of the U.S.-based content industries and the telecommunications industries, respectively. They were also in keeping with the relative weakness of user and

individual interests, whose rights could be overridden by TPMs and whose interests are not well served by a presumed-guilty approach to ISP liability.<sup>277</sup>

Chapter 4 argued that the Canadian reluctance to implement the Internet treaties is rooted in the lack of a large domestic constituency for stronger copyright and Canada's status as a net importer of copyrighted works: stronger copyright always increases the country's trade deficit in royalties. Responsibility for copyright is divided between two departments with diametrically opposed mandates, thus further complicating implementation of the Internet treaties, while the supreme role of the Prime Minister's Office introduces a bureaucratic wild card into copyright-policy outcomes. The Prime Minister's preferences matter for what type of copyright policy gets passed. With respect to interests, increasing public interest in copyright has forced the government to acknowledge the concerns of individuals, even if proposed consumer-friendly provisions would be overruled by legal protections for digital locks that would favour the content industries. Nonetheless, Canadian public interest in copyright will likely grow stronger as people become ever-more exposed to digital works (such as e-books, downloaded movies and music) and thus to a copyright law that was not written with their best interests at heart. The resulting bills have reflected a made-in-Canada consensus on ISP liability around a notice-and-notice regime that reflects the political and economic importance of the telecommunications industry and the difficulty of changing an already-established institution (in this case, a court-approved informal process). On TPMs, the changing position of the Canadian government has been the result of the respective Prime Ministers' differing willingness to satisfy U.S. interests, even in the face of strong public opposition to U.S.-style TPM rules.

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<sup>277</sup> Recall that under a notice-and-takedown regime, material that has been alleged to infringe on a copyright must be taken down. Only then can the user file a counter-notice if he or she believes no copyright has been infringed.

Finally, chapter 5 noted that the traditional Mexican human-rights approach to copyright has had in helping to reinforce an economic-rights approach since NAFTA's implementation. This dissertation has argued that, far from being a passive policy taker on copyright, the Mexican government and those interests represented in the policymaking process are largely in favour of U.S.-style copyright reforms, a view that is partly reinforced by the view of Mexico as a cultural superpower. While public interest remains weak and academics only now beginning to study the issue, the most important user lobby is likely be the telecommunications industry, which has a solid institutional base within the government. Nonetheless, rising academic and public interest in digital-copyright issues has the potential to influence the Mexican debate in the future.

In the case of copyright, NAFTA and, to a lesser extent, the U.S.-identified content industries provide the regional factors that allow one to study copyright from a regional perspective. In particular, NAFTA's Chapter 17 copyright provisions reinforce the regional parameters for undertaking copyright law, institutionalizing an economic-focussed, pro-owner copyright path for the three countries. Their effect has been most obvious in Mexico, where they required a complete overhaul of the existing Mexican copyright law, whereas Chapter 17 simply reinforced the existing direction of Canadian and U.S. copyright laws.

If Chapter 17, by contributing to North American path dependence on copyright, represents a force for convergence on a single (likely U.S.) standard, the rest of NAFTA represents a potential force for divergence. By guaranteeing (more or less) access to the U.S. market, NAFTA makes it harder for the United States to link copyright reform in its

neighbours to improved access to its market. NAFTA thus places a constraint on U.S. actions.<sup>278</sup>

Canada, the United States and Mexico not only retain formal political autonomy, this autonomy may, in some cases, also be enhanced by the existence of a trade agreement. Furthermore, there is no evidence from this copyright case study that either governments or civil society are engaging in trilateral coordination and cooperation. More generally, the development of the North American market has not resulted in the creation of regional-level social institutions to counter any resulting negative externalities. In practice, the building of supranational institutions is only one way to bring citizens of all three countries under the protection of uniform social regulations. In the absence of the possibility (for historical and political reasons, barring some cataclysmic event) of building North American supranational institutions, civil society can work across borders through domestic political processes (as imperfect as they are) to produce the same type of change, should they wish to do so. Such work may be beyond the resources of most such groups, but a focus on this type of advocacy has the benefit of focusing on what can be done, rather than on ruing what can never be achieved due to history and circumstance. In the area of copyright policy, the problem seems to be a lack of interest in building linkages across borders in support of domestic political projects, not the inability to build supranational institutions. Formally, the Canadian and Mexican governments might benefit from increased information sharing on copyright. Both Canada and Mexico are targets of U.S. lobbying, while Mexico could look to Canada's digital experience for ideas on how to deal with copyright issues related to rising Internet access in Mexico. To date, however, Mexican-Canadian cooperation on this subject seems to

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<sup>278</sup> As noted in the introduction, guaranteed market access makes it harder for any one NAFTA country to convince the other to change its policies. As the largest economic power in the region, however, this effect is likely to be most pronounced when the United States is the one doing the offering.

be practically nonexistent. Similarly, civil-society groups in the three countries have overlapping interests. Canadian and Mexican groups and individuals in particular could benefit from stronger engagement in the U.S. domestic copyright debate, given the role U.S. policy outcomes play in framing domestic Canadian and Mexican debates.

## **PART I: UNDERSTANDING REGIONS, UNDERSTANDING NORTH AMERICA**

An HI approach to regionalism represents an advance over such purely comparative analyses, as well as over neofunctionalist-inspired and neoliberal functionalist approaches. Specifically, its focus on relevant ideas, institutions and interests no matter on what “level” they may be located allows the researcher to account for relevant influences that are either downplayed or ignored in these other approaches. This dissertation’s regional analysis of copyright in North America identifies five points in particular that emerge from a regional historical-institutionalist analysis.

### **I. NAFTA and path dependence**

NAFTA Chapter 17’s copyright provisions have served to constrain the future direction of change in the three countries in favour of an Anglo-American, economic approach to copyright. Its effect was least obvious in the United States, whose approach to copyright Chapter 17 essentially codified. Similarly, Canadian copyright law was already substantially similar to that of the United States and was embedded in the same tradition. Furthermore, while the cultural exemption embodied in Article 2005 of the Canada-U.S. Free Trade Agreement and carried over in NAFTA via Annex 2106 formally exempted Canada’s cultural industries from NAFTA’s copyright provisions, Canada still implemented NAFTA-related changes in its copyright law. In these two cases, Chapter 17 reinforced the path that Canadian and U.S. copyright policies were already on. For Mexico, however, Chapter 17

required a wholesale reorientation of its copyright law, from an author-centric moral-rights perspective to a copyright-owner, economic-rights one. As predicted by HI theory, once institutionalized, these policies tend to influence future policy options. To date, few, if any, interests in the three countries have called for a renegotiation of Chapter 17 or the implementation of any laws, including with respect to digital-copyright reform, that would contravene NAFTA. In other words, it is an accepted part of the regional landscape; copyright laws in all three countries are now on the same path. A purely comparative analysis of copyright reform that examined the three cases in isolation would have underplayed this systemic regional effect.

## **II. NAFTA's preservation of difference**

As discussed in chapter 1, neofunctionalist-style accounts generally assume that regional institutions such as NAFTA will tend to encourage harmonization among member states. An historical-institutionalist analysis suggests that this is not necessarily so. The way NAFTA constrains the ability of the three countries (the United States, in the case of copyright) to influence outcomes in their neighbours with respect to policies that do not have an explicit bilateral or trilateral angle represents NAFTA's second systemic regional effect.<sup>279</sup> The United States has enjoyed significant international successes in convincing other countries to reform their copyright laws in return for increased access to the U.S. market or the removal of economic sanctions (existing or threatened).

Making such linkages, however, is much more difficult when the targeted countries already enjoy relatively full access to the U.S. market and are largely protected from unilateral trade sanctions. NAFTA provides this protection (more or less). While formally it

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<sup>279</sup> For example, issues such as border security and transboundary pollution directly involve more than one state. The political dynamics of such issues are different from those surrounding issues that are primarily domestic in nature but in which other states may take an interest, such as copyright.

acts as a constraint on all three countries, NAFTA's constraining effect in the case of copyright is all the more telling given that it affects the country – the United States – upon which its neighbours are very dependent. As a result, U.S. efforts to change copyright laws in Canada and Mexico focus on diplomacy, entreaties (for example, through the Special 301 process), working with domestic stakeholders and the U.S.-identified content industries, and attempting to influence the institutions themselves (for example, through the provision of training to Mexican copyright officials). Although NAFTA's initial effect was to place Mexico on the same copyright path as Canada and the United States, its ongoing regional effect, in the case of copyright, has been to allow for autonomy in decision-making, albeit within the parameters of the agreement.

### **III. Accounting for the United States in the region**

Key to the regional historical-institutionalist approach is its focus on the *relevant* ideas, institutions and interests involved in a policy debate. For some issues, there will be *no* relevant factors at the regional level. In such cases, regional analyses are not warranted: they serve as a reminder that “regionness” is uneven (Clarkson 2008), varies from issue to issue, and will manifest itself differently depending on the issue or subject under investigation.

Where the presence of regional effects has been determined, as with copyright and NAFTA, a finding of no relevant regional factors in a case study provides significant insights into the nature of the region. One of the enduring questions about North America is whether it truly is a region, given the asymmetric relationship between the United States and its two neighbours. This dissertation answers with a resounding “Yes.” Its HI approach reveals that the United States, as a regional hegemonic power (following Keohane's (2005) use of the term) is both part of the region – formally subject to and constrained by NAFTA and

involved in its neighbours' copyright debates – but apart from the region in terms of its own domestic policy outcomes. U.S. implementation of the Internet treaties (and the way it influenced their content) occurred almost exclusively within the parameters of the domestic U.S. policymaking process. Neither NAFTA nor TRIPS were factors in setting its domestic law. The outcome of this U.S. debate, however, became the policy that the United States would try to persuade its neighbours and other countries to accept. As well, its ability to set the subject matter of the Internet treaties offers a classic example of how a hegemonic power can define an issue and set rules.

While its domestic policy may be determined apart from the region, its ability to export its policy options – to engage in diffusion – is limited by the NAFTA effect described above. As a result, it must act within these constraints in its attempts to influence outcomes; for example, through the U.S. use of the Special 301 process. It can also work to influence the institutions themselves, as with U.S. training of Mexican copyright officials. This regional HI approach is able therefore to account for the dual nature of the United States without treating it inaccurately as either a *sui generis* case or a superpower that dictates its neighbours' copyright laws.

#### **IV. Moving beyond formal supranational institutions**

An HI approach to regionalism takes institutions as it finds them and analyzes their effects on regional and domestic governance. Where formal regional institutions exist, HI can account for their effects, but it does not *a priori* assume that they must exist, either strongly or weakly, for a region to exist. It is also more comfortable than neofunctionalist theories in accounting for the persistent effects of domestic institutions in the absence of strong (or any) formal regional institutions. This dissertation's accounts of the effects of NAFTA and

persistent domestic institutions on copyright outcomes in North America demonstrates that a region can exist even in the absence of strong supranational institutions, although outcomes will differ in the two cases.

Neither do regional HI analyses necessarily need to focus on formal political institutions. Institutions, in the most general approach, are simply the rules of the game and need not be associated with parliaments or bureaucracies. Analyses of copyright policy necessarily concentrate on state institutions because the state is responsible for creating and maintaining copyright law. However, other regional issues may not involve the state to the same degree. In such cases, the effects of non-state institutions may be more important than those of state institutions.

#### **V. Respecting the persistence of domestic institutions**

Historical institutionalism (HI) is, in many ways, a conservative theory. Change in HI rarely comes easily and is always shaped by what preceded it. Change can be promoted via actions of domestic and/or foreign actors. It can occur through attempts to frame issues by linking concepts or emphasizing, for example, copyright's protection function over its dissemination function (symbolic bricolage). It can also occur by exploiting institutional inconsistencies and rules in one's favour, as when the Canadian Prime Minister intervened in a departmental stalemate in favour of the U.S. policy on TPMs (substantive bricolage). Similarly, the United States was able to effect change in Mexico by linking market access (i.e., NAFTA) to copyright reform.

HI's focus on all relevant institutions focusses the researcher's eye on the effects of the persistence of domestic political institutions. In copyright, their influence can be seen in the way that they shaped North American responses to the Internet treaties even though

NAFTA had placed all three countries on the same copyright path. These institutions, being human creations, are still open to change. However, they are so established that only a significant shock would cause the three countries to rethink their domestic sovereignty.

This state of affairs offers two academic lessons and one practical caution. First, the persistence of domestic institutions reminds one that such institutions can interact with regional factors and institutions so as to maintain differences. Second, and related to the first point, any theory of regionalism must account for this persistence of domestic institutions. That historical institutionalism is not burdened by preconceived notions about the relationship between domestic and regional institutions gives it an advantage in this area.

The conclusion that domestic political institutions are incredibly resilient and resistant to change also leads to a practical outcome that reveals a fatal flaw in neoliberal-functionalistic approaches to North American integration. As chapter 1 outlined, such approaches are usually contingent on the United States realizing that its material interests lie, for example, in an open border, and that a “thick” border that reflects only security concerns will ironically weaken the United States. Left understudied by these approaches is the significance that these material interests are filtered through existing institutions, notably Congress. This study suggests that so long as Congress retains sovereignty over U.S. lawmaking any “Big Idea” proposals that attempt to institutionalize deeper regional integration will always remain vulnerable to domestic politics and any resulting compromises will likely under-deliver in terms of stabilizing and institutionalizing the regional relationship. The existence of three domestic polities in the region, each reacting differently to various issues, suggests that dreams of deeper regional integration should be tempered with an ongoing attention to the domestic politics of each country’s neighbours.

## **PART II: COPYRIGHT POLICY AND THE POTENTIAL FOR VARIATION**

This dissertation has generated three snapshots of countries at different points in their experience with digital technology. In Mexico, digital technology has yet to affect meaningfully the making of copyright policy, which remains as corporatist and industry-focused as it was in Canada, pre-2001 and the United States, pre-1996. The United States in 1996 and 1998 was only beginning to experience the full effect of digital technology on copyright. The Canadian debate, which benefited from the U.S. example of the DMCA and almost a decade of experience with digital technologies and the Internet, provides a tantalizing picture of the future of copyright governance. It strongly suggests that copyright will continue to become an increasingly mainstream political issue, as digital technology brings more individuals directly into contact with copyright law.

While this politicization will tend to lead to more attention to individual-users' rights in all three countries, it will not necessarily lead to stronger users' rights, or to increased attention to dissemination at the expense of protection. Copyright law may be influenced by technological change, but it is also shaped by the particular institutional contexts in which copyright laws are made. In Canada, while the 2007-08 Facebook uprising forced a hostile government to acknowledge individuals' views through superficial user-friendly copyright reforms, Bills C-61 and C-32 demonstrated the limitations of their power and influence: absent the threat of an election, a Canadian government can pass almost any copyright law it desires. With time, individual users may come to be seen as equals with other accepted groups – and certainly the ever-rising interest in copyright (as measured by participation in the 2001-02 and 2008 public consultations) suggests that they will – but prudence cautions against assuming their involvement in the debate will necessarily be highly effective. The

entrenched copyright interests have shown no desire to accommodate any group that might threaten their existing financial returns from copyright law.

Much the same analysis can be applied to the United States, with the added complication that the content industries are far more entrenched on Capitol Hill than they are in Canada. Mexican civil society, meanwhile, faces the added struggle of organizing from an historically disadvantaged position referred to in chapter 5. While voters could turn issues like TPMs and ISP liability into an issue, a far-more likely avenue for the introduction of user rights is likely to be through the government-related academics, who, as was mentioned in the previous chapter, have only now begun to study the law in anticipation of a major reform. Their studies will almost certainly reference, and perhaps be influenced by free-culture advocates such as Lessig (2001) and authors in the first academic Mexican study of digital copyright and free culture, in addition to supporters of the status quo.

### **I. The future of copyright**

This analysis of the negotiation and implementation of the Internet treaties has confirmed that copyright is a path-dependent process, its continuation more dependent on its longevity and embeddedness in the international political economy than on whether or not it actually promotes creation and distribution. Faced with revolutionary technological changes that put mass copying and distribution in the hands of individuals for the first time in history, negotiators at WIPO crafted a treaty that sought to import traditional copyright concepts into the digital age. Domestically, all three countries covered by this study adopted the Internet treaties as their template for digital-copyright reform.

This path dependence, a function of ideational and institutional constraints, as well as the interests of those involved in negotiating the treaties and the subsequent legislative

projects, suggests the difficulty of the path for those desiring a more significant reform in copyright law. Chief among these are the individual users, creators and future artists who are disadvantaged by copyright law as it stands now. This dissertation detailed individual users' initial attempts to promote their interest in a copyright debate that previously had not acknowledged their (legitimate) point of view.

The North American experience with the Internet treaties suggests that copyright reform that takes these individuals' and groups' interests into account – a policy that promotes their ability to create and to benefit fully from the creations of others – can be achieved through two means. The most obvious way that pro-individual and pro-creator reform can be achieved is through direct engagement with the political process. The Canadian debate over Bill C-61 in 2007-08 suggests that copyright can indeed become a political issue and that, with organization, these new groups can make themselves heard at the copyright negotiation table. The ability of such groups to influence policy, as well as a more focused analysis of how they have affected the debate domestically and international represents a fruitful area for future research.

Real copyright reform also has the potential to come about through a change in the terms of the debate, by moving from debates over whether one is pro- or anti-copyright to a debate over what tools, of which copyright is only one, are best suited to promoting creation and distribution of creative works. Such a focus would move the debate away from foundational Western themes like “property” and “individuality” and toward a more empirical, pragmatic basis for debate. This shift would require greater attention to the real effects of copyright on creation and distribution, and the generation of more research on this subject than currently exists. It would also require coming to terms with the persistent lack of

evidence that copyright is actually necessary for the production and dissemination of creative works.

As desirable as this evidence-based turn might be, there currently exists little evidence that copyright's ideological hegemony will be challenged successfully in the near future. In all three case-study countries, support for copyright is the ticket for admission to the "serious" copyright-policy debate. Almost all opponents of stronger copyright tend to preface their critiques by affirming their support for copyright, if not in its present form, while defenders of stronger copyright accuse their critics of being completely anti-copyright.

The possibilities for success in either case are limited in particular by regional and international treaties, particularly TRIPS and Chapter 17 of the NAFTA, which commits signatories to a particular view of copyright. The likely difficulty of reforming these treaties suggests that the potential for a radical departure from the current copyright framework is negligible. Even within this framework, however, copyright can be made more responsive to the needs of individuals and creators, not least by the implementation of ISP liability rules such as notice-and-notice that do not assume that users are guilty until proven innocent, and by ensuring that TPM rules do not interfere with individuals' existing rights.

## **II. The potential for variation**

Copyright policies remain under the democratic control of domestic governments, within the constraints of rules of the NAFTA and TRIPS. NAFTA's restraining characteristics have increased the possibility for copyright-policy autonomy in Canada and Mexico. Copyright policymaking in the two countries does not reflect some democratic ideal; rather it reflects the advantages and defects of the two countries' political processes within the context of NAFTA and the Internet treaties. The extent to which citizens are not heeded

in the policymaking process (and the case studies strongly suggest this is the case in the three countries) suggests that copyright critics should focus on reforming domestic-democratic processes.

The emergence of a North American copyright regime (either formally or in the form of three identical domestic policies) remains highly dependent on domestic factors. To a significant extent, each North American government remains master of its own copyright policy. The governments of Canada and Mexico may choose to follow the U.S. lead, and they may do so in response to U.S. pressure (as in the Canadian Conservative government case) or in response to a mixture of U.S. influence and domestic interest-group preference (as in the case of Mexico). Neither case, however, takes away from the crucial point, from the perspective of those who value democratic decision-making. Policy convergence is a choice: it is not preordained.

## REFERENCES

### INTERVIEW SUBJECTS

#### I. United States

Band, Jonathan. Intellectual-property lawyer. Interview by author, digital recording. Washington, D.C., June 20, 2008.

Biette, David. Director, Canada Institute, Woodrow Wilson International Center for Scholars. Interview by author, digital recording. Washington, D.C., June 27, 2008.

Chaitovitz, Ann. Executive Director, Future of Music Coalition. Interview by author, digital recording. Washington, D.C., July 22, 2008.

Greenstein, Seth. Lawyer, Constantine Cannon LLP. Interview by author, digital recording. Washington, D.C., July 9, 2008.

Kupferschmid, Keith. Senior Vice President for Intellectual Property Policy & Enforcement, Software & Information Industry Association. Interview by author, digital recording. Washington, D.C., July 1, 2008.

Metalitz, Steven. Counsel, International Intellectual Property Alliance. Interview by author, digital recording. Washington, D.C., July 30, 2008.

Mitchell, Stevan. Vice President, Intellectual Property Policy, Entertainment Software Association. Interview by author, digital recording. Washington, D.C., July 8, 2008.

Mondy, Yannick. First Secretary, Trade Policy, Embassy of Canada in the United States. Interview by author, digital recording. Washington, D.C., August 6, 2008.

McCoy, Stan. Assistant U.S. Trade Representative for Intellectual Property and Innovation, Office of the United States Trade Representative. Interview by author, digital recording. Washington, D.C., August 8, 2008.

Papovich, Joseph. Senior Vice President, International, Recording Industry Association of America. Interview by author, digital recording. Washington, D.C., July 17, 2008.

Petricone, Michael. Senior Vice-President of Government Affairs, Consumer Electronics Association. Interview by author, digital recording. Washington, D.C., August 14, 2008.

Sands, Christopher. Senior Fellow, Hudson Institute. Interview by author, digital recording. Washington, D.C., June 17, 2008.

Schneider, Jennifer. Legislative Counsel, Rep. Rick Boucher (D-VA). Interview by author, digital recording. Washington, D.C., July 25, 2008.

Simon, Emery. Counselor, Business Software Association. Washington, D.C. August 1, 2008.

Sohn, Gigi. President and co-founder, Public Knowledge. Interview by author, digital recording. Washington, D.C., August 5, 2008.

Strong, Maria. Representative, International Intellectual Property Alliance. Interview by author, digital recording. Washington, D.C., July 30, 2008. (not cited this chapter).

Turkewitz, Neil. Executive Vice President, Recording Industry Association of America. Interview by author, digital recording. Washington, D.C., July 17, 2008.

Consumer-electronics lawyer. Interview by author, digital recording. Washington, D.C., July 2, 2008.

Government official. Interview by author, digital recording. Washington, D.C., July 1, 2008.

Diplomatic official, Interview by author, digital recording. Washington, D.C., August 13, 2008.

Motion-picture industry official. Interview by author, digital recording. Washington, D.C., July 18, 2008.

## **II. Canada**

Angus, Charlie, Member of Parliament, musician, former critic for the Department of Canadian Heritage, New Democratic Party. Interview by author, digital recording. Ottawa, ON. April 14, 2008.

Austin, Michele. Former Chief of Staff, Industry Minister Maxime Bernier. Interview by author, digital recording. Ottawa, ON. April 30, 2008.

Copeland, Tom. Chair, Canadian Association of Internet Providers. Via telephone. Interview by author, digital recording, via telephone. Ontario. June 24, 2010.

Fewer, David. Director, Canadian Internet Policy and Public Interest Clinic. Interview by author, digital recording. Ottawa, ON. February 7, 2008.

Geist, Michael. Professor of Law, University of Ottawa. Interview by author, digital recording. Ottawa, ON. May 14, 2008.

Glick, Jacob. Policy counsel, Google Canada. Interview by author, digital recording. Ottawa, ON. April 21, 2008.

Gratton, Denis. Former Manager, Copyright Policy, Department of Canadian Heritage. Interview by author, digital recording. Ottawa, ON. February 7, 2008.

Hume, Kim, Director, Public Policy and Communications, Alliance of Canadian Cinema, Television and Radio Artists. Interview by author, digital recording, via telephone. Toronto, ON. May 19, 2008.

Hyndman, Rob. Technology lawyer. Interview by author, digital recording, via telephone. Toronto, ON. April 22, 2008.

Jones, Paul. Professional Officer, Canadian Association of University Teachers. Interview by author, digital recording, via telephone. Ottawa, ON. February 5, 2009.

Kee, Jason, Director of Policy and Legal Affairs, Entertainment Software Association of Canada. Interview by author, digital recording. Ottawa, ON. February 10, 2008.

Lam, Kempton. Copyright blogger. Interview by author, digital recording, via telephone. Calgary, AB. April 16, 2008.

McOrmond, Russell. Independent Software producer. Interview by author, digital recording. Ottawa, ON. January 18, 2008.

Mirella, Loris, Senior Project Leader, Copyright Policy Branch, Department of Canadian Heritage. Interview by author, digital recording. Ottawa, ON. February 7, 2008.

Neil, Garry. Policy advisor, Alliance of Canadian Cinema, Television and Radio Artists. Interview by author, digital recording, via telephone. Toronto, ON. May 19, 2008.

Rioux, Jean Sébastien. Chief of Staff to former Industry Minister Jim Prentice. Interview by author, digital recording, via telephone. Calgary, AB. February 26, 2009.

Serry, Keith, Communications Director, Canadian Music Creators Coalition. Interview by author, digital recording. Montreal, QC. May 13, 2008

Wills, Steve. Manager, Legal Affairs, Association of University and Colleges of Canada. Interview by author, digital recording. Ottawa, ON. February 10, 2009.

### **III. Mexico**

Aguilar, Claraluz. Directora Jurídica, Asociación Mexicana de Productores de Fonogramas y Videogramas, A.C. Interview by author, digital recording. Mexico City. February 3, 2010.

Arteaga Alvarado, María del Carmen. Legal scholar; Former Legal Director, INDAUTOR (2000-2008). Interview by author, digital recording. Mexico City. October 19, 2009.

Basurto Hernández, Jorge. Comisión Federal de Telécomunicaciones, Director de Servicios de Valor Agregado. Interview by author, digital recording. Mexico City. January 29, 2010.

Cárdeno Shaadi, José Ramón. General Coordinator of Legal Affairs, SACM. Interview by author, digital recording. Mexico City. November 10, 2009.

Callejas, Cesar Benedicto. Director, Patents and Trademarks; National Autonomous University of Mexico (UNAM). Interview by author, digital recording. Mexico City. October 26, 2009.

López Cuenca, Alberto. Professor of Philosophy and Contemporary Art Theory and Coordinator of the Doctoral Program on Cultural Creation and Theories at the Universidad de las Américas (Puebla, Mexico). Interview by author, digital recording. Puebla, September 18, 2009.

Margáin, Mike. Vice-President, Mexican American Chamber intellectual Property Committee. Interview by author, digital recording. Mexico City. April 27, 2010.

Miranda, Jose. Gerente Legal, Sociedad Mexicana de Productores de Fonogramas. Interview by author, digital recording. Mexico City. November 25, 2009.

Morante Soria, Manuel. Copyright Lawyer, Arochi, Marroquín & Linder, S.C. Interview by author, digital recording. Mexico City. December 3, 2009.

Nivón Bólan, Eduardo Vicente. Professor of Anthropology, Universidad Autónoma Metropolitana. Interview by author, digital recording and written notes, Mexico City. October 9, 2009.

Tourné Guerrero, Alfredo. Director of Protection, INDAUTOR, Interview by author, digital recording. Mexico City. September 24 and 29, 2009.

## **BIBLIOGRAPHY**

“Rip. Mix. Burn.” *Economist*, July 2, 2005.

“A Fine Balance,” *Economist*, January 25, 2003.

“False Friends.” *Economist*, January 13, 1996. 66.

“Congress Brings Back Recently Removed 'IP Subcommittee' Now That Copyright Reformer Won't Lead It,” *Techdirt*, December 22, 2010. Accessed December 23, 2010.

“<http://www.techdirt.com/articles/20101220/23143712353/congress-brings-back-recently-removed-ip-subcommittee-now-that-copyright-reformer-wont-lead-it.shtml>.”

“Reconocen a Coalición por el Acceso Legal a la Cultura”, *Publimetro*, May 4, 2010. Accessed August 6, 2010. <http://www.publimetro.com.mx/entretener/reconocen-a-coalicion-por-el-acceso-legal-a-la-cultura/njed!o3v9wEhzv5jB9sEASORj3A/>.

Abbott, Frederick M. “NAFTA and the Legalization of World Politics: A Case Study.” *International Organization* 54 no. 3 (2000): 519-547.

Abbott, Frederick M. *Law and Policy of Regional Integration: The NAFTA and Western Hemispheric Integration in the World Trade Organization System*. Boston: Martinus Nijhoff Publishers, 1995.

Acheson, Keith, and Christopher J. Maule. “Copyright, Contract, the Cultural Industries, and NAFTA.” In *Mass Media and Free Trade: NAFTA and the Cultural Industries*, edited by Emile G. McAnany, and Kenton T. Wilkinson, 351-382. Austin: University of Texas Press, 1996.

Alba, Eric. “Mafias controlan el pago de derechos de autor a compositores en México.” *La Jornada Michoacán*, May 23, 2009. Accessed February 28, 2010. <http://www.lajornadamichoacan.com.mx/2009/05/23/index.php?section=cultura&article=016n1cul>.

Albini, Steve. “the problem with music.” *Maximumrocknroll* 133 (1994). Excerpted from *The Baffler* 5. Accessed June 4, 2009. <http://www.arancidamoeba.com/mrr/problemwithmusic.html>.

Amsden, Alice H. *The Rise of “The Rest”: Challenges to the West from Late-Industrializing Economies*. Oxford: Oxford University Press, 2000.

Amsden, Alice H. *Asia’s Next Giant: South Korea and Late Industrialization*. New York: Oxford University Press, 1989.

Appleton, Barry. *Navigating NAFTA: A Concise User’s Guide to the North American Free Trade Agreement*. Scarborough: Carswell, 1994.

Ángel Quintanilla, José (2005). “Algunos puntos sobre la piratería editorial en México.” *Pensar el Libro* 2 (2005). Accessed April 8, 2010. [http://www.cerlalc.org/Revista\\_Pirateria/pdf/n\\_art04.pdf](http://www.cerlalc.org/Revista_Pirateria/pdf/n_art04.pdf).

Archer, Margaret S. *Realist social theory: The morphogenetic approach*. Cambridge: Cambridge University Press, 1995.

Armstrong, Kenneth, and Simon Bulmer. *The governance of the Single European Market*. Manchester: Manchester University Press, 1998.

Arrow, Kenneth. “Economic Welfare and the Allocation of Resources for Invention.” In *The Rate and Direction of Inventive Activity: Economic and Social Factors*. Princeton: Princeton

University Press, 1962. Accessed December 30, 2010.  
<http://www.litigation.org/pubs/papers/2006/P1856.pdf>.

Atik, Jeffrey C. 2003. "Repenser NAFTA Chapter 11 – A Catalogue of Legitimacy Critiques." *Asper Review of International Business and Trade Law* 3 (2003): 215-234.

Ayres, Jeffrey and Laura Macdonald. "Deep Integration and Shallow Governance: The Limits of Civil Society Engagement across North America." *Policy and Society* 25 no. 3 (2006): 23-42.

Banks, Sam, and Andrew Kitching. *Bill C-60: an Act to Amend the Copyright Act, Legislative Summary*. LS-512-E. Ottawa: Library of Parliament, 2005.

Bannerman, Sara. *Canada and the Berne Convention, 1886-1971*. PhD Diss. Carleton University, 2009.

Bannerman, Sara. "Canadian Copyright Reform: Consulting with Copyright's Changing Public." *Intellectual Property Journal* 19 no. 2 (2006): 271-297.

Banting, Keith, George Hoberg, and Richard Simeon. "Introduction." In *Degrees of Freedom: Canada and the United States in a Changing World*, edited by Keith Banting, George Hoberg and Richard Simeon, 1-19. Montreal: McGill-Queen's University Press, 1997.

Barrios Garrido, Gabriela. "Internet y lo que falta en la nueva Ley Federal del Derecho de Autor." In *Estudios de Derecho Intelectual en Homenaje al Profesor David Rangel Medina*, edited by Manuel Becerra Ramírez. México: UNAM, 1998. Accessed March 1, 2010.  
<http://www.bibliojuridica.org/libros/1/164/21.pdf>.

Baumgartner, Frank R., and Bryan D. Jones. *Agendas and Instability in American Politics*. Chicago: University of Chicago Press, 1993.

Benkler, Yochai. "A Political Economy of the Public Domain: Markets in Information Goods Versus the Marketplace of Ideas." In *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, edited by Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman, and Harry First, 267-292. Oxford: Oxford University Press, 2001.

Bennett, Colin J. 1991. "What is Policy Convergence and What Causes It?" *British Journal of Political Science* 21 no. 2 (1991): 215-233.

Besen, Stanley M. "Intellectual Property." In *The New Palgrave Dictionary of Economics and the Law*, Vol. 2, edited by Peter Newman, 348-352. London: Macmillan, 1998.

Bettig, Ronald V. *Copyrighting Culture: The Political Economy of Intellectual Property*. Boulder, CO: Westview Press, 1996.

Bislev, Sven "Introduction." In *Economic Integration in NAFTA and the EU: Deficient Institutionalality*, edited by Kirsten A. de Appendini, and Sven Bislev, 1-16. Hampshire: Palgrave Macmillan, 1999.

Blacklock, Cathy, and Laura Macdonald. "Human Rights and Citizenship in Guatemala and Mexico: From 'Strategic' to 'New' Universalism?" *Social Politics* 5 no. 2 (1998): 132-157.

Blaikie, Norman. *Designing Social Research*. Cambridge: Polity Press, 2000.

Boggs, J.S.G. "Who Owns This?" *Chicago-Kent Law Review* 68 (1993): 889-910.

Boin, Arjen, and Sanneke Kuipers. "Institutional theory and the public policy field: a promising perspective for perennial problems." In *Debating Institutionalism*, edited by Jon Pierre, B. Guy Peters, and Gerry Stoker, 42-65. New York: Manchester University Press, 2008.

Boldrin, Michele, and David K. Levine. *Against Intellectual Monopoly*. Cambridge: Cambridge University Press, 2008.

Boldrin, Michele, and David K. Levine. "The Case Against Intellectual Property." *Research on Innovation* 2 (2002). Accessed May 28, 2009.  
[http://www.researchoninnovation.org/tiip/archive/issue2003\\_2.html](http://www.researchoninnovation.org/tiip/archive/issue2003_2.html).

Bow, Brian, and Patrick Lennox. "Introduction: The Question of Independence, Then and Now." In *An Independent Foreign Policy for Canada? Challenges and Choices for the Future*, edited by Brian Bow and Patrick Lennox, 3-24. Toronto: University of Toronto Press, 2008.

Boyle, James (2010). "Fantasy & Reality in Intellectual Property Policy." *Financial Times* (December 1, 2010). Accessed December 1, 2010.  
<http://www.thepublicdomain.org/2010/12/01/fantasy-reality-in-intellectual-property-policy/>.

Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. New Haven: Yale University Press, 2008.

Brennan, Timothy J. "Copyright, Property, and the Right to Deny." *Chicago-Kent Law Review* 68 (1993): 675-715.

Breyer, Stephen. "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs." *Harvard Law Review* 84 no. 2 (1970): 281-351.

Brown, Ian. "The Evolution of Anti-Circumvention Law." *International Review of Law and Computers* 20 no. 3 (2006): 239-260.

Business Coalition for Balanced Copyright (2008). "A balanced 'package' approach for a strong Canadian copyright regime," February 2008. Accessed June 19, 2010.

[http://static.googleusercontent.com/external\\_content/untrusted\\_dlcp/services.google.com/en//blog\\_resources/google\\_bcbc\\_position\\_paper.pdf](http://static.googleusercontent.com/external_content/untrusted_dlcp/services.google.com/en//blog_resources/google_bcbc_position_paper.pdf).

Caballero Leal, José Luis, and Mauricio Jalife Daher. "Comentarios a la Ley Federal de Derecho de Autor." En *Legislación de Derechos de Autor*. 2006 Edición, i-xxvii. México: Editorial Sista, 2006.

Calleya, Stephen C. *Navigating Regional Dynamics in the Post-Cold War World: Patterns of Relations in the Mediterranean Area*. Aldershot: Dartmouth Publishing Company Limited, 1997.

Cameron, Charles M., and Rebecca Morton. "Formal Theory Meets Data." In *Political Science: The State of the Discipline*, edited by Ira Katznelson, and Helen V. Milner, 784-804. New York: WW Norton & Company, 2002.

Cameron, Maxwell A., and Brian W. Tomlin. *The Making of NAFTA: How the Deal Was Done*. Ithaca: Cornell University Press, 2000.

Camp, Roderic Ai. *Politics in Mexico: The Democratic Consolidation*, 5<sup>th</sup> ed. New York: Oxford University Press, 2007.

Campbell, John L. *Institutional Change and Governance*. Princeton: Princeton University Press, 2004.

Canadian Association of Internet Providers (CAIP). "Submission from Canadian Association of Internet Providers," Copyright Reform Process, September 18, 2001. Accessed June 26, 2010. <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp00314.html>.

Canadian Council of Chief Executives (2004). *Building a 21st Century Canada-United States Partnership in North America*. 2004. Accessed November 12, 2006. [http://www.ceocouncil.ca/en/view/?document\\_id=365](http://www.ceocouncil.ca/en/view/?document_id=365).

Canadian Intellectual Property Council (IP Council). "Business coalition stresses need for better protection of intellectual property rights," 2008. Accessed June 19, 2010. [www.ipcouncil.ca/uploads/ReleaseIPCoalitionLaunch260508.pdf](http://www.ipcouncil.ca/uploads/ReleaseIPCoalitionLaunch260508.pdf).

Canadian Recording Industry Association (CRIA). "Canadian Creator and Music Industry Groups Applaud Introduction of Copyright Bill," June 12, 2008. Accessed June 19, 2010. [http://www.cria.ca/news/08-06-11\\_n.php](http://www.cria.ca/news/08-06-11_n.php).

Canadian Recording Industry Association (CRIA). "News," 2006. Accessed June 19, 2010. [http://www.cria.ca/news/020306a\\_n.php](http://www.cria.ca/news/020306a_n.php).

Canadian Recording Industry Association (CRIA). "Submission of the Canadian Recording Industry Association in Respect of Consultation Paper on Digital Copyright Issues," 2001. Accessed June 19, 2010. <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp00249.html>.

CARFAC Ontario. "Copyright Bill Represents Status Quo for Visual and Media Artists." News Release, June 26, 2008. Accessed June 19, 2010. [www.carfacontario.ca/images/C-61\\_Release.pdf](http://www.carfacontario.ca/images/C-61_Release.pdf).

Carrillo, Pedro. *El Derecho intelectual en México*. Mexicali: Universidad Autónoma de Baja California, 2002.

Carroll, Michael W. "The Struggle for Music Copyright." Villanova University School of Law Working Paper 31, 2005, 908-961.

CBC. "Canadian films continue to lose market share." [www.cbc.ca](http://www.cbc.ca), November 12, 2009. Accessed June 19, 2010. <http://www.cbc.ca/arts/film/story/2009/11/11/canadian-film.html>.

CBC. "Indie labels break with CRIA over commercial radio proposal," [www.cbc.ca](http://www.cbc.ca), April 13, 2006. Accessed December 30, 2010. <http://www.cbc.ca/arts/story/2006/04/13/cria-indie-crtc.html#ixzz19eilHs9pl>.

Chang, Ha-Joon. "Kicking Away the Ladder." *post-autistic economics review* 15 (2002). Accessed June 4, 2009. [http://www.btinternet.com/~pae\\_news/review/issue15.htm](http://www.btinternet.com/~pae_news/review/issue15.htm).

Chartrand, Harry Hillman. *The Compleat Canadian Copyright Act: Past, Present & Proposed Provisions 1921-2006*. Saskatoon: Compiler Press, 2006.

Choi, Young Jong and James A. Caporaso. "Comparative Regional Integration." In *Handbook of International Relations*. 3<sup>rd</sup> ed., edited by Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, 480-499. London: Sage, 2005.

Clarkson, Stephen. Presentation at Carleton University, March 19, 2008.

Clarkson, Stephen. *Does North America Exist? Governing the Continent after NAFTA and 9/11*. Toronto and Washington: University of Toronto Press and Woodrow Wilson Center Press, 2008.

Clarkson, Stephen. "Manoeuvring within the Continental Constitution: Autonomy and Capacity within the Security and Prosperity Partnership of North America," in *What Room for Manoeuvre? Canada Among Nations 2007*, edited by Jean Daudelin, and Daniel Schwanen, 248-267. Montreal: McGill-Queen's University Press, 2008a.

Clarkson, Stephen. "Lockstep in the Continental Ranks: Redrawing the American Perimeter After September 11." Ottawa: Canadian Centre for Policy Alternatives, 2002.

Clarkson, Stephen. *Uncle Sam and Us: Globalization, Neoconservatism, and the Canadian State*. Toronto: University of Toronto Press, 2002a.

Cohen, Stephen D., Robert A. Blecker, and Peter D. Whitney. *Fundamentals of U.S. Foreign Trade Policy: Economics Politics, Laws, and Issues*, 2<sup>nd</sup> ed. Boulder: Westview Press, 2003.

Computer and Communications Industry Association (CCIA). "Comments of the Computer & Communications Industry Association Before the United States Trade Representative re 2010 Special 301 Review," Docket No. USTR-2010-0003, 2010. Accessed June 19, 2010. <http://www.ccia.net.org/CCIA/files/ccLibraryFiles/Filename/000000000321/CCIA-2010-Spec301-cmts.pdf>.

Computer and Communications Industry Association. *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*. Washington, D.C.: Computer and Communications Industry Association, 2007.

Connectus Consulting Inc. *The Economic Impact of Canadian Copyright Industries – Sectoral Analysis*. Ottawa: Copyright Policy Branch, Department of Canadian Heritage, 2006.

Coombe, Rosemary J. *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*. Durham: Duke University Press, 1998.

Copyright Office. *The Digital Millennium Copyright Act of 1998*, Copyright Office Summary. Copyright Office: Washington, D.C., 1998. Accessed March 31, 2010. <http://www.copyright.gov/legislation/dmca.pdf>.

Corina, Giovanni Andrea. "Foreword." In *Globalism and the New Regionalism*, Volume I, edited by Bjorn Hettne, András Inotai, and Osvaldo Sunkely, xiii-xiv. Hampshire: Palgrave Macmillan. 1999.

Courchene, Thomas J. "Thinking North America: Pathways and Prospects" In *The Art of the State*, Vol. II, no. 1, edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen, 3-48. Montreal: Institute for Research on Public Policy, 2004.

Courchene, Thomas J. "FTA at 15, NAFTA at 10: A Canadian Perspective on North American Integration." In *The Art of the State*, Vol. II, no. 1, , edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen, 3-33. Montreal: Institute for Research on Public Policy, 2004.

Courchene, Thomas J., and Richard G. Harris. "From Fixing to Monetary Union: Options for North American Currency Integration," C.D. Howe Institute Commentary 127. Toronto: C. D. Howe Institute, 1999.

Cox, Robert W. *Power, Production and World Order: Social Forces in the Making of History*. New York: Columbia University Press, 1987.

Cue Bolaños, Angelina. "La Sociedad General de Escritores de México, SOGEM." *Revista Mexicana del Derecho de Autor* 1 no. 2 (1990): 21-29.

Cutler, A. Claire. "Gramsci, Law, and the Culture of Global Capitalism," *Critical Review of International Social and Political Philosophy* 8 no. 4 (2005): 527-542.

Dahl, Robert A. "Pluralism Revisited." *Comparative Politics* 10:2 (1978): 191-203.

Daniel, Johanne, and Lesley Ellen Harris. "Discussion Paper on the Implementation of the WIPO Copyright Treaty." Ottawa: Industry Canada, 1998. Accessed June 18, 2010. <http://www.ic.gc.ca/eic/site/ipdd-dppi.nsf/eng/ip00086.html>.

Daniel, Johanne, and Lesley Ellen Harris. Discussion Paper on the Implementation of the WIPO Performances and Phonograms Treaty. Ottawa: Industry Canada, 1998a. Accessed June 18, 2010. <http://www.ic.gc.ca/eic/site/ipdd-dppi.nsf/eng/ip01039.html>.

de Beer, Jeremy. "Copyright and Innovation in the Networked Information Economy." Conference Board of Canada Working Paper, 2009.

de Beer, Jeremy, and Christopher D. Clemmer. "Global Trends in Online Copyright Enforcement: The Role of Internet Intermediaries." *Jurimetrics* 49 no. 4 (2009). Accessed March 31, 2010. <http://ssrn.com/abstract=1529722>.

de Beer, Jeremy. "Jeremy de Beer on Canada's copyright bill: Win-win or spin-spin?" National Post. June 13, 2008. Accessed June 19, 2010. <http://network.nationalpost.com/np/blogs/fullcomment/archive/2008/06/13/174920.aspx>.

de Beer, Jeremy. "Constitutional Jurisdiction Over Paracopyright Laws." In *In the Public Interest: The Future of Canadian Copyright Law*, edited by Michael Geist, 89-124. Toronto: Irwin Law, 2005.

De la Parra Trujillo, Eduardo. "Comentarios a las reformas a la Ley Federal del Derecho de Autor." *Revista de Derecho Privado* III no. 8 (2004): 95-110.

Diez, Thomas, and Antje Wiener. "Introducing the Mosaic of Integration Theory. In *European Integration Theory*, edited by Antje Wiener, and Thomas Diez., 1-21. Oxford: Oxford University Press, 2004.

DiMaggio, Paul J., and Walter W. Powell.; Powell, Walter W. "Introduction." In *The New Institutionalism in Organizational Analysis*, edited by Walter W. Powell and Paul J. DiMaggio, 1-38. Chicago: University of Chicago Press, 1991.

Dinwoodie, Graeme. "The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?" *Case Western Reserve Law Review* 57 no. 4 (2007): 751-766. Accessed December 30, 2010. <http://ssrn.com/abstract=1601235>.

Djelic, Marie-Laure, and Sigrid Quack. "Overcoming path dependency: Path generation in open systems." *Theoretical Sociology* 36 (2007): 161-186.

Dobson, Wendy. *Shaping the Future of the North American Economic Space: A Framework for Action*. Toronto: C.D. Howe Institute, 2002.

Doern, G. Bruce, and Markus Sharaput. *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests*. Toronto: University of Toronto Press, 2000.

Doyle, Simon. *Prey to Thievery*. Ottawa: Simon Doyle, 2006

Drahos, Peter. *A Philosophy of Intellectual Property*. Aldershot: Dartmouth, 1996.

Drahos, Peter, with John Braithwaite. *Information Feudalism: Who Owns the Knowledge Economy?* London: Earthscan Publications Ltd., 2002.

Dutfield, Graham, and Uma Suthersanen. *Global Intellectual Property Law*. Cheltenham: Edward Elgar, 2008.

Easton, David. *A Systems Analysis of Political Life*. Chicago: University of Chicago Press, 1965.

Economic Council of Canada. *Report on Intellectual and Industrial Property*. Ottawa: Economic Council of Canada, 1971.

Electronic Frontier Foundation (EFF) (2010). "Unintended Consequences: Twelve Years under the DMCA," March 2010. Accessed March 31, 2010.  
<http://www.eff.org/wp/unintended-consequences-under-dmca>.

El Universal. "Diputados aprueban ley contra piratería." *El Universal*, April 6, 2010. Accessed August 15, 2010. <http://www.eluniversal.com.mx/notas/670994.html>.

El Universal. "Nace coalición en defensa del acceso legal a la cultura." *El Universal*, November 19, 2009. Accessed March 5, 2010.  
<http://www.eluniversal.com.mx/notas/641091.html>.

Escobar, Reynaldo Urriaga. "Los sistemas de derechos de autor y copyright hoy." *Revista Mexicana Del Derecho de Autor* Año II no. 6 (2002): 11-15.

Fernández-Kelly, Patricia; Massey, Douglas S. "Borders for Whom? The Role of NAFTA in Mexico-U.S. Migration." *The Annals of the American Academy of Political and Social Science* 2007 610 no. 1 (2007): 98-118.

Ficsor, Mihály. *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation*. Oxford: Oxford University Press, 2002.

Fink, Carsten and Keith E. Maskus. "Why We Study Intellectual Property Rights and What We Have Learned." In *Intellectual Property and Development*, edited by Carsten Fink and Keith E. Maskus, 1-15. Washington: World Bank, 2005.

Fiorina, Morris P. "Parties, Participation, and Representation in America: Old Theories Face New Realities." In *Political Science: The State of the Discipline*, 511-541.

Frith, Simon, and Lee Marshall. "Making Sense of Copyright." In *Music and Copyright*, 2<sup>nd</sup> ed., edited by Simon Frith and Lee Marshall, 1-20. Edinburgh: Edinburgh University Press, 2004.

Garcia, Gabriel. "Economic Development and the Course of Intellectual Property Protection in Mexico." *Texas International Law Journal* 27 (1992): 703-753

García Moreno, Victor Carlos. "El Capítulo XVII del TLCAN y su Influencia en la Nueva Ley Mexicana del Derecho de Autor." In *Estudios de Derecho Intelectual en Homenaje al Profesor David Rangel Medina*, 103-116.

Gattinger, Monica, and Geoffrey Hale. "Borders and Bridges: Canada's Policy Relations in North America." In *Borders and Bridges: Canada's Policy Relations in North America*, edited by Monica Gattinger, and Geoffrey Hale, 1-18. Toronto: Oxford University Press, 2010.

Geist, Michael. "The U.S. DMCA vs. Bill C-32: Comparing the Digital Lock Exceptions," [www.michaelgeist.ca](http://www.michaelgeist.ca), July 27, 2010. Accessed August 10, 2010.  
<http://www.michaelgeist.ca/content/view/5229/125/>.

Geist, Michael. "U.S. Caves on Anti-Circumvention Rules in ACTA." [www.michaelgeist.ca](http://www.michaelgeist.ca), July 19, 2010a. Accessed August 10, 2010.  
<http://www.michaelgeist.ca/content/view/5210/125/>.

Geist, Michael. "The 2009 Copyright Consultation: Setting the Record Straight," [www.michaelgeist.ca](http://www.michaelgeist.ca), April 20, 2010b. Accessed August 10, 2010.  
<http://www.michaelgeist.ca/content/view/4971/125/>.

Geist, Michael. "The Final Copyright Consultation Numbers: No Repeat of Bill C-61," [www.michaelgeist.ca](http://www.michaelgeist.ca), April 9, 2010c. Accessed August 10, 2010.  
<http://www.michaelgeist.ca/content/view/4946/125/>.

Geist, Michael. "How the U.S. Got its Canadian Copyright Bill." *Toronto Star*, June 16, 2008.

Geist, Michael. "Behind the Scenes of Canada's Movie Piracy Bill." [www.michaelgeist.ca](http://www.michaelgeist.ca), June 11, 2007. Accessed December 30, 2010.  
<http://www.michaelgeist.ca/content/view/2016/275/>.

Geist, Michael. "Anti-circumvention Legislation and Competition Policy: Defining a Canadian Way?" In *In the Public Interest: The Future of Canadian Copyright Law*, 211-250.

Geist, Michael. "Introduction" In *In the Public Interest: The Future of Canadian Copyright Law*, 1-12, 2005a.

Geist, Michael. "Bill C-60 User Guide: The ISPs and Search Engines." [www.michaelgeist.ca](http://www.michaelgeist.ca). June 2005b. Accessed June 19, 2010.  
<http://www.michaelgeist.ca/content/view/824/125/>.

Gervais, Daniel J. "The Purpose of Copyright Law in Canada." *University of Ottawa Law and Technology Journal* 2.2 (2005): 315-356.

Gillespie, Tarleton. *Wired Shut: Copyright and the Shape of Digital Culture*. Cambridge: MIT Press, 2007.

Gillespie, Tarleton. "Price Discrimination and the Shape of the Digital Commodity." In *Structures of Participation in Digital Culture*, edited by Joe Karaganis, 246-255. New York: Social Science Research Council, 2007a.

Ginsburg, Jane C. "Copyright and Control over New Technologies of Dissemination." *Columbia Law Review* 101 no. 7 (2001): 1612-1647.

Goldstein, Paul. *Copyright's Highway: From Gutenberg to the Celestial Jukebox*. Stanford: Stanford Law and Politics, 2003.

Golob, Stephanie R. "Beyond the Policy Frontier: Canada, Mexico and the Ideological Origins of NAFTA." *World Politics* 55 (2003): 361-398.

González, Marco; Javier Torres Medina, and Omar Jiménez. *La república informal: El ambulante en la ciudad de México*. Mexico City: Editions Porrúa, 2008.

Gordon, Wendy J. "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory." *Stanford Law Review* 41 (1989): 1343-1469.

Gordon, Wendy J., and Robert G. Bone, Robert G. "Copyright." In *Encyclopedia of Law and Economics*, Volume II, Chapter 1610, edited by in Boudewijn Bouckaert, and Gerrit De Geest, 189-215. Cheltenham: Edward Elgar, 2000.

Gotlieb, Allan. *Romanticism and Realism in Canadian Foreign Policy*. Toronto: C.D. Howe Institute, 2004.

Granatstein, J.L. "A Friendly Agreement in Advance: Canada-US Defense Relations Past, Present, and Future." *CD Howe Institute Commentary* 166 (2002).

Grinspun, Ricardo; Kreklewich, Robert (1999). "Institutions, Power Relations and Unequal Integration in the Americas: NAFTA as Deficient Institutionalality." In *Economic Integration in NAFTA and the EU: Deficient Institutionalality*. 17-33.

Haas, Ernest B. *The Uniting of Europe: Political, Social and Economic Forces 1950-1957*, 2<sup>nd</sup> ed. Stanford: Stanford University Press, 1968.

Haggart, Blayne. "Analysis of the Security and Prosperity Partnership of North America's Report to Leaders." Ottawa: Parliamentary Information and Research Service. Confidential document prepared for Mr. Peter Julian, MP, 2005. On file with the author. Released with permission.

Halbert, Debora J. *Resisting Intellectual Property*. New York: Routledge, 2005.

Hall, Peter A. and Rosemary C.R. Taylor. "Political Science and the Three New Institutionalisms." *Political Studies* XLIV (1996): 193-957.

Handa, Sunny. *Copyright Law in Canada*. Markham: Butterworths Canada Ltd., 2002.

Handa, Sunny. "A Review of Canada's International Copyright Obligations." *McGill Law Journal* 42 (1997): 961-990.

Hardin, Russell. "Valuing Intellectual Property." *Chicago-Kent Law Review* 68 (1993): 659-675.

Hart, Michael. "A New Accommodation with the United States: The Trade and Economic Dimension." In *The Art of the State*, Vol. II, no. 2., edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen. Montreal: Institute for Research on Public Policy, 2004.

Hart, Michael, and William Dymond. "Common Borders, Shared Destinies: Canada, the United States and Deepening Integration." Ottawa: Centre for Trade Policy and Law, 2001. Accessed November 12, 2006. <http://www.carleton.ca/ctpl/pdf/papers/cdaus.pdf>.

Hay, Colin. "Contemporary capitalism, globalization, regionalization and the persistence of national variation." *Review of International Studies* 26 (2000): 509-531.

Hay, Colin, and Ben Rosamond, "Globalisation, European Integration and the Discursive Construction of Economic Imperatives." *Journal of European Public Policy* 9 (2002): 147-167.

Hay, Colin and Wincott, Daniel. "Structure, Agency and Historical Institutionalism." *Political Studies* XLVI (1998): 951-957.

Haydu, Jeffrey. "Making Use of the Past: Time Periods as Cases to Compare and as Sequences of Problem Solving." *American Journal of Sociology* 104 no. 2 (1998): 339-371.

- Herman, Bill D., and Oscar H. Gandy, Jr. "Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings." *Cardozo Arts & Entertainment Law Journal* 24 (2006): 121-190.
- Hernández Arzate, Adriana. *Delimitación del contenido del derecho de autor en Internet*. Tesis, Licenciado en Derecho. Toluca: Universidad Autónoma del Estado de México, 2006.
- Hettinger, Edwin C. "Justifying Intellectual Property." *Philosophy & Public Affairs* 18 no. 1 (1989): 31-52.
- Hettne, Björn. "Beyond the 'New' Regionalism." *New Political Economy* 10 no. 4 (2005): 543-571.
- Hettne, Björn and Fredrik Söderbaum. "The future of regionalism: Old divides, new frontiers." In *Regionalisation and Global Governance: The taming of globalization?*, edited by Andrew F. Cooper, Christopher W. Hughes, and Philippe De Lombaerde, Philippe, 61-79. New York: Routledge, 2008.
- Heichel, Stephan, Jessica Pape, and Thomas Sommerer. "Is there convergence in convergence research? An overview of empirical studies on policy convergence." *Journal of European Public Policy* 12 no. 5 (2005): 817-840.
- Hoberg, Jr., George. "Review: Technology, Political Structure, and Social Regulation: A Cross-National Analysis." *Comparative Politics* 18 no. 3 (1986): 357-376.
- Hoffman, Stanley. "Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe." *Daedalus* 95 no. 3 (1966): 862-915.
- Holzinger, Katharina. "Methodological Pitfalls of Convergence Analysis." *European Union Politics* 7 no. 2 (2006): 271-287.
- Holzinger, Katharina and Christoph Knill. "Causes and conditions of cross-national policy convergence." *Journal of European Public Policy* 12 no. 5 (2005): 775-796.
- Hughes, Justin. "Notes on the Origin of 'Intellectual Property': Revised Conclusions and New Sources." Benjamin N. Cardozo School of Law, Jacob Burns Institute for Advanced Legal Studies Working Paper 265, 2009.
- Hughes, Justin. "Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson." *Southern California Law Review* 79 (2006): 993-1084.
- Hughes, Justin (1988). "The Philosophy of Intellectual Property." In *Intellectual Property: Moral, Legal, and International Dilemmas*, edited by Adam D. Moore, 107-177. Lanham: Rowman & Littlefield Publishers, Inc., 1997. Originally published in *Georgetown Law Journal* 287 (1988).

Huntington, Samuel P. "The Hispanic Challenge." *Foreign Policy* 141 (2004): 30-45.

Hurrell, Andrew. "Hegemony in a region that dares not speak its name." *International Journal* 61 no. 3 (2006): 545-566.

Hurrell, Andrew. "Regionalism in Theoretical Perspective." In *Regionalism in World Politics: Regional Organization and International Order*, edited by Louise Fawcett and Andrew Hurrell, 37-73. Oxford: Oxford University Press, 1995.

Hurt, Robert M., and Robert M. Schumann, Robert M. "The Economic Rationale of Copyright." *The American Economic Review* 56 no. 1-2 (1966): 421-432.

Hussain, Imtiaz. "Explaining Post-9/11 North American Regionalism: Of Clutter, Constraints, and Chaos." *Politics & Policy* 36 no. 1 (2008): 108-131.

Idirs, Kamil. "Preface." In Fernando Serrano Migallón, *Marco Jurídico del Derecho de Autor en México*, 2<sup>nd</sup> ed. Mexico City: Editorial Porrúa, 2008.

Immergut, Ellen M. "The Theoretical Core of the New Institutionalism," *Politics and Society* 26 no. 5 (1998): 5-34.

International Intellectual Property Association. "Special 301 Report: Mexico," 2005-2010. Accessed December 31, 2010. <http://www.iipa.com/countryreports.html>.

International Intellectual Property Association. "IIPA letter on copyright enforcement and pending legislative reform in Mexico," 2003. Accessed February 28, 2010. <http://www.iipa.com/countryreports.html>.

International Intellectual Property Association. "IIPA letter on copyright enforcement and pending legislative reform in Mexico," 2002. Accessed March 1, 2010. [http://www.iipa.com/pdf/2003\\_Apr2\\_Mexico\\_Ltr.pdf](http://www.iipa.com/pdf/2003_Apr2_Mexico_Ltr.pdf).

Jalife Daher, Mauricio. "El nuevo esquema antipiratería." En *Legislación de Derechos de Autor*, xxix- xxx.

Jazi, Peter. "Worth the Wait – installment #1." ©ollectanea blog, Center for Intellectual Property, July 30, 2010. Accessed August 10, 2010. [http://chaucer.umuc.edu/blogcip/collectanea/2010/07/worth\\_the\\_wait\\_-\\_installment\\_1.html](http://chaucer.umuc.edu/blogcip/collectanea/2010/07/worth_the_wait_-_installment_1.html).

Jenson, Jane. "Converging, Diverging or Shifting?" Social Architecture in an Era of Change." Prepared for the Canadian Political Science Association, Halifax, May 2003.

Johnson, Robert, and Rianne Mahon. "NAFTA, the Redesign, and Rescaling of Canada's Welfare State." *Studies in Political Economy* 76 (2005): 7-27.

Jones, Steve. "Mass Communication, Intellectual Property Rights, International Trade, and the Popular Music Industry." In *Mass Media and Free Trade: NAFTA and the Cultural Industries*, 331-350.

Jimenez, Jimena. *Canada, the United States and Mexico: Asymmetrical integration in North America*. PhD Diss., Carleton University, 2005.

Karaganis, Joe. "Disciplining Markets in the Digital Age." In *Structures of Participation in Digital Culture*, edited by Joe Karaganis, 222-245. New York: Social Science Research Council, 2007.

Katzenstein, Peter J. *A World of Regions: Asia and Europe in the American Imperium*. Ithaca: Cornell University Press, 2005.

Katzenstein, Peter J. "Regionalism in Comparative Perspective." *Cooperation and Conflict* 31 no. 2 (1996): 123-159. Accessed November 16, 2009.  
[http://www.arena.uio.no/publications/wp96\\_1.htm](http://www.arena.uio.no/publications/wp96_1.htm).

Katznelson, Ira. "Periodization and Preferences: Reflections on Purposive Action in Comparative historical Social Science." In *Comparative Historical Analysis in the Social Sciences*, edited by James Mahoney, and Dietrich Rueschemeyer, 270-301. Cambridge: Cambridge University Press, 2003.

Katznelson, Ira. "Review: The Doleful Dance of Politics and Policy: Can Historical Institutionalism Make a Difference?" *The American Political Science Review* 92 no. 1 (1998): 191-197.

Katznelson, Ira. "Structure and Configuration in Comparative Politics," In *Comparative Politics*, edited by Mark I. Lichbach and Alan S. Zuckerman, 81-112. Cambridge: Cambridge University Press, 1997.

Keohane, Robert O. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton: Princeton University Press, 2005.

Keohane, Robert O., and Joseph S. Nye. *Power and Interdependence*. 2<sup>nd</sup> ed. Glenview, IL: Scott, Foresman/Little Brown, 1989.

Kerr, Ian. "Technical Protection Measures: Part II – The Legal Protection of TPMs." Ottawa: Department of Canadian Heritage, 2004. Accessed August 14, 2010.  
[http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/tdm\\_e.cfm](http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/tdm_e.cfm).

Kerr, Ian R., Alana Maurushat, and Christian S. Tacit. "Technical Protection Measures: Tilting at Copyright's Windmill." *Ottawa Law Review* 34 no. 1 (2002-2003): 6-80.

Keyes, A.A., and C. Brunet. *Copyright in Canada: Proposals for a Revision of the Law*. Ottawa: Consumer and Corporate Affairs Canada, 1977.

Kingdon, John. *Agendas, Alternatives, and Public Policies*. 2<sup>nd</sup> ed. New York: Longman, 2003.

Kirton, John, and Jenilee Guebert. "Soft Law, Regulatory Coordination, and Convergence in North America." In *Borders and Bridges: Canada's Policy Relations in North America*, 59-76.

Kitschelt, Herbert, Peter Lange, Gary Marks, and John D. Stephens. "Convergence and Divergence in Advanced Capitalist Democracies." In *Continuity and Change in Contemporary Capitalism*, edited by Herbert Kitschelt, 427-460. London: Cambridge University Press, 1999.

Kopala, Margaret. "Softwood deal tears a hole in NAFTA." *Ottawa Citizen*. August 26, 2006. Accessed June 19, 2010. <http://www.canada.com/ottawacitizen/news/opinion/story.html?id=ce0dbe37-c91c-4305-ade6-58dbd68a5925>.

Knopf, Howard. "The Annual '301' Show – USTR Calls for Comment – 21 Reasons why Canadian Copyright Law is Already Stronger than USA's" *Excess Copyright* blog, February 17, 2010. Accessed March 31, 2010. <http://excesscopyright.blogspot.com/2010/02/annual-301-parade-ustr-calls-for.html>.

Krasner, Stephen D. "Sovereignty: An Institutional Perspective." *Comparative Political Studies* 21 no. 1 (1988): 66-94.

Kretschmer, Martin, and Friedmann Kawohl. "The History and Philosophy of Copyright." In *Music and Copyright*, 2<sup>nd</sup> ed., 21-53.

Ku, Raymond, Jiayang Sun, and Yiyang Fan. "Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty." *Vanderbilt Law Review* 63 (2009): 1669-1746.

Laing, Dave. "Copyright, Politics and the International Music Industry." In *Music and Copyright*, 2<sup>nd</sup> ed., 70-86.

Landes, William M., and Richard A. Posner. *The Economic Structure of Intellectual Property Law*. Cambridge: Harvard University Press, 2003.

Landes, William M., and Richard A. Posner. "An Economic Analysis of Copyright Law," *Journal of Legal Studies* XVIII no. 2 (1988.): 325-363.

Laursen, Finn. "Theoretical Perspectives on Comparative Regional Integration." In *Comparative Regional Integration: Theoretical Perspectives*, edited by Finn Laursen, 3-28. Hampshire: Ashgate, 2003.

Lawson, Chappell H. *Building the Fourth Estate: Democratization and the Rise of a Free Press in Mexico*. Berkeley: University of California Press, 2002.

Leslie, Peter. "The European Union Perspective." In *The Art of the State*, vol II, no. 1., edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen, 49-67. Montreal: Institute for Research on Public Policy, 2004.

Lessig, Lawrence. *The Future of Ideas: The Fate of the Commons in a Connected World*. New York: Random House, 2001.

Liebowitz, Stan. "MP3s and copyright collectives: a cure worse than the disease?" In *Developments in the Economics of Copyright: Research and Analysis*, edited by Lisa N. Takeyama, Wendy J. Gordon, and Ruth Towse, 37-59. Chentelham: Edward Elgar Publishing Limited, 2005.

Litman, Jessica. *Digital Copyright*. Amherst: Prometheus Books, 2006.

Litman, Jessica. "The Public Domain." *Emory Law Journal* 39 (1990): 965-1023. Accessed December 12, 2009. [http://www.law.duke.edu/pd/papers/Litman\\_background.pdf](http://www.law.duke.edu/pd/papers/Litman_background.pdf).

López Guzmán, Clara. "El derecho de autor y el desarrollo de colecciones digitales." *Biblioteca Universitaria Nueva Epoca* 6 no. 2 (2003): 103-108.

Macdonald, Laura. "The Politics of Regional Integration in Canada." Presented at "Responding to Globalisation in the Americas: The Political Economy of Hemispheric Integration," London, UK, 2006.

Macdonald, Laura. "Civil Society and North American Integration." *Policy Options* (June-July 2004): 54-57.

Mace, Gordon. "Introduction." In *Regionalism and the State: NAFTA and Foreign Policy Convergence*, edited by Gordon Mace, 1-11. Hampshire: Ashgate, 2008.

Mahon, Rianne, Caroline Andres, and Robert Johnson. "Policy Analysis in an Era of 'Globalization': Capturing Spatial Dimensions and Scalar Strategies." In *Critical Policy Studies*, edited by Michael Orsini and Miriam Smith, 41-64. Vancouver: UBC Press, 2007.

Mahoney, James. "Path Dependence in Historical Sociology." *Theory and Society* 29 no. 4 (2000): 507-548.

Malpica De Lamadrid, Luis. *La influencia del derecho internacional en el derecho mexicano: La Apertura de Modelo de Desarrollo de México*. México, D.F.: Editorial Limusa, 2002.

March, James G., and Johan P. Olsen. "The New Institutionalism: Organizational Factors in Political Life." *The American Political Science Review*: 78 no. 3 (1984): 734-749.

March, James G., and Johan P. Olsen. *Rediscovering Institutions: The Organizational Basis of Politics*. New York: The Free Press, 1989.

Maskus, Keith E. *Intellectual Property Rights in the Global Economy*, Washington: Institute for International Economics, 2000.

May, Christopher. *The World Intellectual Property Organization: Resurgence and the Development Agenda*. New York: Routledge, 2007.

May, Christopher. *Digital Rights Management: The Problem of Expanding Ownership Rights*. Oxford: Chandos Publishing, 2007a.

May, Christopher. *A Global Political Economy of Intellectual Property Rights*. New York: Routledge, 2000.

McDougall, John N. *Drifting Together: The Political Economy of Canada-U.S. Integration*, Peterborough: Broadview Press, 2006.

McLeod, Kembrew. *Owning Culture: Authorship, Ownership and Intellectual Property Law*. New York: Peter Lang, 2001.

Mitchell, Jr., Henry C. *The Intellectual Commons: Toward an Ecology of Intellectual Property*. Lanham, MD: Lexington Books, 2005.

Moore, Adam D. "Introduction." In *Intellectual Property: Moral, Legal, and International Dilemmas*, edited by Adam D. Moore, 1-14. Lanham: Rowman & Littlefield Publishers, Inc., 1997.

Morgenthau, Hans. *Politics among nations: The struggle for power and peace*, 6<sup>th</sup> ed. New York: Knopf, 1985.

Murray, Laura J. "Bill C-61: First Reactions." faircopyright.ca, June 12, 2008. Accessed June 19, 2010. <http://www.faircopyright.ca/.90.html>.

Murray, Laura J (2005). "Copyright Talk: Patterns and Pitfalls in Canadian Policy Discourses," In *In the Public Interest: The Future of Canadian Copyright Law*, 15-40.

Murray, Laura J., and Samuel E. Trosow. *Canadian Copyright: A Citizen's Guide*. Toronto: Between the Lines, 2007.

Nafzinger, James A.R. "NAFTA's regime for intellectual property: In the mainstream of public international law." *Huston Journal of International Law* 19 (Spring 1997). Accessed December 30, 2010. [http://findarticles.com/p/articles/mi\\_hb3094/is\\_n3\\_19/ai\\_n28689628/](http://findarticles.com/p/articles/mi_hb3094/is_n3_19/ai_n28689628/).

Netanel, Neil Weinstock. *Copyright's Paradox*. Oxford: Oxford University Press, 2008.

Nivón Bolán, Eduardo. "Propiedad intelectual y Política cultural: Una perspectiva desde la situación mexicana." In *Propiedad Intelectual, Nuevas Tecnologías y Libre Acceso a la Cultura*, edited by Alberto López Cuenca, and Eduardo Ramírez Pedrajo, 43-72. Puebla: Universidad de las Américas Puebla/Centro Cultural de España México, 2009. Accessed August 17, 2010. [http://www.ccemx.org/img\\_act\\_x\\_tipo/propiedadint.pdf](http://www.ccemx.org/img_act_x_tipo/propiedadint.pdf).

North Douglass C. *Institutions, institutional change, and economic performance*. Cambridge: Cambridge University Press, 1990.

Obón León, J. Ramón. "La Actualidad del Derecho de Autor en México." Presentation to WIPO Conference on "El Derecho de Autor: Un Valor Estratégico para el Futuro." Museo Nacional de Antropología e Historia, June 28, 2003. On file with the author.

Obón León, J. Ramón. "El Orden Público y el Interés social en la nueva ley federal del derecho de autor." In *Estudios de Derecho Intelectual en Homenaje al Profesor David Rangel Medina*, 117-133.

Olsen, Johan P. "Change and continuity: an institutional approach to institutions of democratic government." *European Political Science Review* 1 no. 1 (2009): 3-32.

Olson, Mancur. *The Logic of Collective Action*, Cambridge: Harvard University Press, 1971.

Orren, Karen, and Stephen Skowronek. *The Search for American Political Development*. Cambridge: Cambridge University Press, 2004.

Orsini, Michael, and Miriam Smith. "Critical Policy Studies." In *Critical Policy Studies*, 1-16.

Pastor, Robert. *Toward a North American Community: Lessons from the Old World for the New*. Washington, D.C.: Institute for International Economics, 2001.

Patry, William. *Moral Panics and the Copyright Wars*. Oxford: Oxford University Press, 2010.

Patry, William. "No One Likes a Bully: The IIPA and Canada." *The Patry Copyright Blog*, February 13, 2008. Accessed November 27, 2010. <http://williampatry.blogspot.com/2008/02/no-one-likes-bully-iipa-and-canada.html>.

Peters, B. Guy. "Institutional theory: Problems and Prospects." In *Debating Institutionalism*, 1-21.

Peters, B. Guy, Jon Pierre, and Desmond S. King. "The Politics of Path Dependency: Political Conflict in Historical Institutionalism." *The Journal of Politics* 67 no. 4 (2005): 1275-1300.

Piedras Feria, Ernesto. "Industrias Culturales en México: Una Actualización de los Cálculos al 2003." *Este País* 2007. Accessed March 1, 2010.

<http://www.gestioncultural.org/es/pdf/EPiedras-IndustriasCulturalesMexico.pdf>, accessed March 1, 2010.

Piedras Feria, Ernesto. *¿Cuánto vale la cultura? Contribución económica de las industrias protegidas por los derechos de autor en México*. México: CONACULTA/SACM/SOGEM, 2004.

Pierson, Paul. "Increasing Returns, Path Dependence, and the Study of Politics." *The American Political Science Review* 94 no. 2 (2000): 251-267.

Pierson, Paul. "The Limits of Design: Explaining Institutional Origin and Change." *Governance: An International Journal of Policy and Administration* 13 no. 4 (2000a): 475-499.

Pierson, Paul. "Not Just What, but *When*: Timing and Sequence in Political Processes." *Studies in American Political Development* 14 (2000b): 72-92.

Pierson, Paul. "The Path to European Integration: A Historical Institutional Analysis." *Comparative Political Studies* 29 no. 2 (1996): 123-163.

Pierson, Paul, and Theda Skocpol. "Historical Institutionalism in Contemporary Political Science." In *Political Science: The State of the Discipline*, 693-721.

Plant, Arnold. "The Economic Aspects of Copyright in Books." *Economica*, New Series 1 no. 2 (1934): 167-195.

Pollack, Mark A. "The New Institutionalisms and European Integration." In *European Integration Theory*. 137-156.

Pontusson, Jonas. "From Comparative Public Policy to Political Economy: Putting Political Institutions in Their Place and Taking Interests Seriously," *Comparative Political Studies* 28 no. 1 (1995): 117-147.

Pregeli, Vladimir. "The Jackson-Vanik Amendment: A Survey. CRS Report for Congress 98-545. Washington: Congressional Research Service. CRS. Accessed July 16, 2010. <http://www.fas.org/sgp/crs/row/98-545.pdf>.

Preston, Julia. "As Piracy Grows in Mexico, U.S. Companies Shout Foul." *New York Times*, April 20, 1996, 1.

Putnam, Robert D (1988). "Diplomacy and Domestic Politics: The Logic of Two-Level Games." *International Organization* 42 no. 3 (1988): 427-460.

Rangel Ortiz, Horacio. "La Usurpación de Derechos en la Nueva Ley Autoral Mexicana y su Reforma." In *Estudios de Derecho Intelectual en Homenaje al Profesor David Rangel Medina*. 377-395.

Raskind, Leo J. "Copyright." In *The New Palgrave Dictionary of Economics and the Law, Volume 1*, edited by Peter Newman, 478-483. London: Macmillan, 1998.

"Preface" (2006). In *The Oxford Handbook of Political Institutions*, edited by R.A.W. Rhodes, Sarah Binder, and Bert A. Rockman, Bert A., xii-xvii. Oxford: Oxford University Press. xii-xvii.

Richardson, Jeremy. "Government, Interest Groups and Policy Change." *Political Studies* 48 (2000): 1006-1025.

Ricketson, Sam, and Jane C. Ginsburg. *International Copyright And Neighbouring Rights: The Berne Convention and Beyond*, 2<sup>nd</sup> ed., Volumes I and II. Oxford: Oxford University Press, 2006.

Risse-Kappen, Thomas. "Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union." *Journal of Common Market Studies* 34 no. 1 (1996): 53-80.

Ritchie, Gordon. *Wrestling with the Elephant: The Inside Story of the Canada-U.S. Trade Wars*. Toronto: Macfarlane, Walter & Ross, 1997.

Robert, Maryse. *Negotiating NAFTA: Explaining the Outcome in Culture, Textiles, Autos, and Pharmaceuticals*. Toronto: University of Toronto Press, 2001.

Rosamond, Ben. "Rethinking classical integration theory." In *Regionalisation and Global Governance: The taming of globalization?*, 80-93.

Rosamond, Ben. "The uniting of Europe and the foundation of EU studies: Revisiting the neofunctionalism of Ernst B. Haas." *Journal of European Public Policy* 12 no. 2 (2005): 237-254.

Rose, Mark. *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard University Press, 1993.

Rotstein, Robert H. "Beyond Metaphor: Copyright Infringement and the Fiction of the Work." *Chicago-Kent Law Review* 68 (1993): 725-804.

Rushton, Michael. "Economic Impact of WIPO Ratification on Private Copying Regime." Ottawa: Department of Canadian Heritage, 2002.

Samuelson, Pamela (1997). "The U.S. Digital Agenda at the World Intellectual Property Organization." Monograph. Accessed February 15, 2008. [people.ischool.berkeley.edu/~pam/courses/cyberlaw97/docs/wipo.pdf](http://people.ischool.berkeley.edu/~pam/courses/cyberlaw97/docs/wipo.pdf).

Sapp, Heather A. "North American Anti-Circumvention: Implementation of the WIPO Internet Treaties in the United States, Mexico and Canada." *Computer Law Review and Technology Journal* 10 (2005): 1-39.

Savage, Luiza Ch. "Meet NAFTA 2.0." *Macleans* (September 13, 2006). Accessed November 12, 2006. [http://www.macleans.ca/topstories/canada/article.jsp?content=20060911\\_133202\\_133202](http://www.macleans.ca/topstories/canada/article.jsp?content=20060911_133202_133202).

Savoie, Donald J. *Court Government and the Collapse of Accountability in Canada and the United Kingdom*. Toronto: University of Toronto Press, 2008.

Scassa, Teresa (2005). "Interests in the Balance." In *In the Public Interest: The Future of Canadian Copyright Law*, 41-65.

Scherer, F.M. "The Innovation Lottery." In *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, 3-21.

Schmidt, Luis C. "Mexico's Fair Use Balancing Act." *Managing Intellectual Property – Supplement, Brand Management IP Focus 2009*, 2009. Accessed December 12, 2009. <http://www.managingip.com/Article.aspx?ArticleID=2192575>.

Schmidt, Luis. "The new digital agenda." *Copyright World*, February 23, 2009.

Schmidt, Luis. "Digital Millenium (*sic.*) 'a la Mexicaine': Internet and other digital technologies examined in light of the Mexican Copyright Law." *Copyright World Magazine*. January 1, 2001. Accessed January 26, 2010. <http://74.125.95.132/search?q=cache:ePbeMjjMeuIJ:www.olivares.com.mx/formatos/lsr/digital.pdf+Digital+Millenium+%27a+la+Mexicaine%27&cd=1&hl=en&ct=clnk>.

Schmitter, Philippe C. "Neo-Neofunctionalism." In *European Integration Theory*. 45-73.

Schonwetter, Tobias, Jeremy de Beer, Dick Kawooya, and Achal Prabhala. "Copyright and Education: Lessons on African Copyright and Access to Knowledge." *The African Journal of Information and Communication* 10 (2010): 37-52. Accessed August 6, 2010. <http://ifap-is-observatory.itk.hu/node/470>.

Schwanen, Daniel. "Deeper, Broader: A Roadmap for a Treaty of North America." In *The Art of the State*, Vol. II, no. 4, edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen, 33-50. Montreal: Institute for Research on Public Policy, 2004.

Schwanen, Daniel. "After Sept. 11: Interoperability with the U.S., Not Convergence." *Policy Options* (November 2001): 46-49.

Schwartz, Herman. "Down the Wrong Path: Path Dependence, Increasing Returns, and Historical Institutionalism." Unpublished manuscript, 2004. Accessed November 17, 2009. <http://people.virginia.edu/~hms2f/Path.pdf>.

Seeliger, Robert. "Conceptualizing and Researching Policy Convergence." *Policy Studies Journal* 24 no. 2 (1996): 287-306.

Segal, Nancy. *Testimony*. Edited by Standing Committee on Public Safety and National Security. Translated by House of Commons. No. 35, 1st Session, 39th Parliament ed. Ottawa: March 27, 2007.

Sell, Susan K. *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Cambridge: Cambridge University Press, 2003.

Serrano Migallón, Fernando. *Marco Jurídico del Derecho de Autor en México*, 2<sup>nd</sup> ed. Mexico City: Editorial Porrúa, 2008.

Serrano Migallón, Fernando. "Panorama General de la Nueva Ley Federal del Derecho de Autor." In *Estudios de Derecho Intelectual en Homenaje al Profesor David Rangel Medina*. 55-74.

Shapiro, Michael. *Speech to Public Policy Forum: Intellectual Property Reform: Innovation and the Economy*. Sound recording ed. Ottawa, April 28, 2008. On file with the author.

Sheffer, Warren. "Writers' Rights Upheld: The Robertson Decision." *Copyright & New Media Law Newsletter* 10 no. 4 (2006): 8-9.

Sinclair, John. "Culture and Trade: Some Theoretical and Practical Considerations." In *Mass Media and Free Trade: NAFTA and the Cultural Industries*, 30-60.

Singh, Vik. "Economic Contribution of Culture in Canada." 81-595-MIE – No. 023. Ottawa: Statistics Canada, 2008.

Siweck, Stephen E. *Copyright Industries in the U.S. Economy: The 2003-2007 Report*. Washington, D.C.: International Intellectual Property Alliance, 2009.

Slesinger, Reuben E., Robert W. Frase, and Armen A. Alchian. "Discussion." *The American Economic Review* 56 no. 1-2 (1966): 433-439.

Sohn, Gigi. "Boucher Defeat a Loss for the Tech Policy World." *Huffington Post*, November 2, 2010. Accessed December 19, 2010. [http://www.huffingtonpost.com/gigi-sohn/boucher-defeat-a-loss-for\\_b\\_778037.html](http://www.huffingtonpost.com/gigi-sohn/boucher-defeat-a-loss-for_b_778037.html).

Smiers, Joost. "The Abolition of Copyright: Better for Artists, the Third World, and the Public Domain." *International Communications Gazette* 62 no. 5 (2000): 379-406.

Spitz, Laura. "The Evolving Architecture of North American Integration, 80 *University of Colorado Law Review* 80 (2009): 101-157. Accessed August 13, 2010. <http://ssrn.com/abstract=1405397>.

Steger, Debra P. "The Search for North American Institutions." In *The Art of the State*, Vol. II, no. 1., edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen, 77-89. Montreal: Institute for Research on Public Policy, 2005.

Stinchcombe, Arthur L. *Constructing Social Theories*. New York: Harcourt, Brace & World, 1968.

Story, Alan. "Burn Berne: Why the Leading International Copyright Convention Must Be Repealed." *Houston Law Review* 40 no. 3 (2003): 763-801.

Streeck, Wolfgang, and Kathleen Thelen. "Introduction: Institutional Change in Advanced Political Economies." In *Beyond Continuity: Institutional Change in Advanced Political Economies*, edited by Wolfgang Streeck and Kathleen Thelen, 1-39. Oxford: Oxford University Press, 2005.

Strowel, Alain, and Séverine Dussolier. "Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT): Legal Protection of Technological Systems," WCT-WPPT/IMP/2. Geneva: WIPO, 1999. Accessed March 31, 2010. [http://www.wipo.int/edocs/mdocs/copyright/en/wct\\_wppt\\_imp/wct\\_wppt\\_imp\\_2.doc](http://www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_2.doc).

Studer, Isabel. "Obstacles to Integration: NAFTA's Institutional Weakness." In *Requiem or Revival: The Politics of North American Integration*, edited by Carol Wise and Isabel Studer, 1-23. Washington, D.C.: Brookings Institution Press, 2007. 53-75.

Tawfik, Myra J. "International Copyright Law: W[h]ither User Rights?" In *In the Public Interest: The Future of Canadian Copyright Law*, 66-85.

Tawfik, Myra J. "Intellectual Property Laws in Harmony with NAFTA: The Courts as Mediators Between the Global and the Local." *Canadian Journal of Law and Technology* 2 no. 3 (2003): 213-221.

Teufel, Brady. *Gauging the Influence of America's Legal Decisions Regarding Intellectual Property on the World Wide Web*, Master's Dissertation, University of Missouri-Columbia, 2004.

Thakur, Ramesh and Luk Van Langenhove. "Enhancing global governance through regional integration. In *Regionalisation and Global Governance: The taming of globalization?* 17-42.

Thelen, Kathleen. "Historical Institutionalism in Comparative Politics." *Annual Review of Political Science* 2 (1999): 369-404.

Thelen, Kathleen, and Sven Steinmo. "Historical institutionalism in comparative politics." In *Structuring Politics: Historical institutionalism in comparative analysis*, edited by Sven Steinmo, Kathleen Thelen and Frank Longstreth, 1-32. Cambridge: Cambridge University Press, 1992.

Thompson, William R. "The Regional Subsystem: A conceptual Explication and a Propositional Inventory." *International Studies Quarterly* 17 no. 1 (1973): 89-117.

Thumm, Nikolaus. *Intellectual Property Rights: National Systems and Harmonisation in Europe*, New York: Physica-Verlag, 2000.

Tibbetts, Janice. "Ottawa Tackles Movie Pirates." Saskatoon StarPhoenix, June 2, 2007. Accessed June 19, 2010.

<http://www.canada.com/saskatoonstarphoenix/news/national/story.html?id=83e4be8e-49ee-4ce1-b826-4850446ef4be>.

Towse, Ruth. "Copyright and Economic Incentives: An Application to Performers' Rights in the Music Industry." *Kyklos* 52 no. 3 (1999): 369-390.

Towse, Ruth and Rudi Holzhauer. "Introduction." In *The Economics of Intellectual Property, vol. 1*, edited by Ruth Towse, and Rudi Holzhauer, ix-xxxii. Cheltenham: Edward Elgar Publishing Ltd, 2002.

Truman, David. *The Governmental Process*. New York: Knopf, 1951.

Valiquet, Dominique (2007). "Bill C-59: An Act to amend the Criminal Code (unauthorized recording of a movie)" LS-559E. Ottawa: Library of Parliament, 2007. Accessed March 31, 2010.

[http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills\\_ls.asp?lang=E&ls=c59&source=library\\_prb&Parl=39&Ses=1](http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c59&source=library_prb&Parl=39&Ses=1).

Viñamata Paschkes, Carlos. *La Propiedad Intelectual*. 3<sup>rd</sup> ed. México: Trillas, 2005.

Vinje, Thomas C., and Jonathan Band. "The WIPO Copyright Treaty: A New International Intellectual Property Framework for the Digital Age," 1997. Accessed March 31, 2010. <http://www.policybandwidth.com/doc/JBand-NewWIPOCopyrightTreaty.pdf>.

Voss, T.R. "Institutions." In *International Encyclopedia of the Social & Behavioral Sciences*. Cambridge: Cambridge University Press, 2001.

Waldron, Jeremy. "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property." *Chicago-Kent Law Review* 68 (1993): 841-887.

Warleigh-Lack, Ales. "Studying regionalization comparatively: A conceptual framework." In *Regionalisation and Global Governance: The taming of globalization?* 43-60.

Welsh, Jennifer M. "North American Citizenship: Possibilities and Limits." In *The Art of the State* Vol. II, no. 7, edited by Thomas J. Courchene, Donald J. Savoie, and Daniel Schwanen, 33-50. Montreal: Institute for Research on Public Policy, 2004.

Wilkins, David. *Speech to Public Policy Forum: Intellectual Property Reform: Innovation and the Economy*. Sound recording. Ottawa: April 28, 2008. On file with the author.

Wise, Carol. "No Turning Back: Trade Integration and the New Development Mandate," *Requiem or Revival: The Politics of North American Integration*. 1-23.

World Bank. *World Development Indicators Database*. Accessed September 15, 2009.

Writers Guild of Canada. "Copyright Balance Can be Struck with Levies on Technologies and Distribution Platforms." News Release, June 12, 2008. Accessed June 19, 2010. <http://www.wgc.ca/files/WGC%20on%20Copyright%20June%2012.pdf>.

Writers Union of Canada (2008). "Writers' Union says Copyright Act 'Still Needs Work'." News Release, 2008. Accessed June 19, 2008. [http://www.writersunion.ca/av\\_pr061708.asp](http://www.writersunion.ca/av_pr061708.asp).

## **TREATIES**

World Intellectual Property Organization. WIPO Copyright Treaty, 1996. Accessed August 15, 2010. [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html)

World Intellectual Property Organization. WIPO Performances and Phonograms Treaty, 1996a. Accessed August 15, 2010. [http://www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html).

Anti-Counterfeiting Trade Agreement, 2010. Accessed December 29, 2010. [http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc\\_147079.pdf](http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf).

## **GOVERNMENT AND INTERNATIONAL ORGANIZATION DOCUMENTS**

### **I. International Organizations**

World Intellectual Property Organization (WIPO). "Core Tasks of WIPO." 2009a. Accessed April 14, 2009. [http://www.wipo.int/about-wipo/en/what/core\\_tasks.html](http://www.wipo.int/about-wipo/en/what/core_tasks.html).

World Intellectual Property Organization (WIPO) Diplomatic Conference on Certain Copyright and Neighboring Rights Questions "Memorandum Prepared by the Chairman of the Committee of Experts," CRNR/DC/4. Geneva: WIPO, 1996.

World Intellectual Property Organization. "List of Participants," (WIPO Internet treaties), 1996. Accessed February 28, 2010.

[http://www.wipo.int/meetings/en/html.jsp?file=/redocs/mdocs/mdocs/en/db\\_im/db\\_im\\_6-annex1.html](http://www.wipo.int/meetings/en/html.jsp?file=/redocs/mdocs/mdocs/en/db_im/db_im_6-annex1.html).

## II. United States

Department of Commerce. *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*. Washington, DC: Department of Commerce, 1995.

Office of the United States Trade Representative (USTR). “Special 301 Report.” Reports dating back to 1989. Accessed March 1, 2010. <http://www.keionline.org/ustr/special301>.

United States. “About US NORTHCOM.” Department of Defense. Accessed November 7, 2010. <http://www.northcom.mil/About/index.html>.

United States. Security and Prosperity Partnership of North America (SPP) Intellectual Property Rights Action Strategy, 2007. Accessed June 19, 2010. [http://www.spp.gov/pdf/spp\\_ip\\_strat\\_final.pdf](http://www.spp.gov/pdf/spp_ip_strat_final.pdf).

United States. “Most-favored-nation status – MFN.” U.S. Department of State Dispatch, September 17, 1990. Accessed July 16, 2010. [http://findarticles.com/p/articles/mi\\_m1584/is\\_n3\\_v1/ai\\_9079866/](http://findarticles.com/p/articles/mi_m1584/is_n3_v1/ai_9079866/).

## III. Canada

Canada. “2007 Speech from the Throne” October 17, 2007.

Consumer and Corporate Affairs Canada, and the Department of Communications. *From Gutenberg to Telidon: A White Paper on Copyright. Proposals for the Revision of the Canadian Copyright Act*. Ottawa: Supply and Services Canada, 1984.

Foreign Affairs and International Trade Canada (2010). “Anti-Counterfeiting Trade Agreement – Fact Sheet,” 2010. Accessed August 10, 2010. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/IP-factsheet-fiche.aspx?lang=en>.

House of Commons Standing Committee on Communications and Culture. *A Charter of Rights for Creators*. Ottawa: House of Commons, 1985.

House of Commons Standing Committee on Canadian Heritage. *Interim Report on Copyright Reform*. Ottawa: House of Commons, 2004.

Industry Canada. Government of Canada Proposes Update to Copyright Law: Balanced Approach to Truly Benefit Canadians. News release, June 12, 2008. Accessed June 19, 2010. <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04204.html>.

Industry Canada and Canadian Heritage. *A Framework for Copyright Reform*. Ottawa, 2001. Available at: <http://strategis.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01101.html>, accessed June 19, 2010.

Industry Canada and Canadian Heritage. *Consultation Paper on Digital Copyright Issues*. Ottawa, 2002. Accessed June 19, 2010. [http://strategis.gc.ca/eic/site/crp-prda.nsf/eng/h\\_rp01102.html](http://strategis.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01102.html).

Industry Canada and Canadian Heritage (2002a). *Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission Licence to the Internet*. Ottawa, 2002a. Accessed December 30, 2010. <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp00008.html>.

Industry Canada and Canadian Heritage. *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act, Copyright Reform Process, Canada, 2002b*. Accessed June 18, 2010. <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp00863.html>.

Ministers of Canadian Heritage and Industry. "Status Report on Copyright Reform." Submitted to the House of Commons Standing Committee on Canadian Heritage, 2005. Accessed June 19, 2010. <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01133.html>.

Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs (Ilsley Commission). *Report on Copyright*. Ottawa: Queen's Printer and Controller of Stationary, 1957. Accessed August 18, 2010. <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/ilsley1957a-eng/ilsley1957a-eng.htm>.

World Intellectual Property Organization (WIPO). "What is WIPO?" 2009. Accessed April 14, 2009. <http://www.wipo.int/about-wipo/en/what/>.

#### **IV. Mexico**

Comisión de Ciencia y Tecnología del Senado de México (Comisión). "B-0564 Seminario: 'Derecho de autor en el entorno digital'," 2008. Accessed February 28, 2010. [http://comunicacion.senado.gob.mx/index.php?option=com\\_content&task=view&id=7856&Itemid=163](http://comunicacion.senado.gob.mx/index.php?option=com_content&task=view&id=7856&Itemid=163).

INDAUTOR. "Internet & Technology Provisions: Questions for Discussion," Non-paper for discussion at WIPO. 2008. On file with the author.

INDAUTOR. "Internet & Technology Provisions: Questions for Discussion," 2008. On file with the author.

### **LEGISLATION**

#### **I. United States**

United States. Copyright Act (17 U.S.C.). Accessed August 18, 2010.  
[http://www.law.cornell.edu/uscode/html/uscode17/usc\\_sup\\_01\\_17.html](http://www.law.cornell.edu/uscode/html/uscode17/usc_sup_01_17.html).

United States. Trade Act of 1974 (19 U.S.C. Chapter 12). Accessed August 18, 2010.  
[http://www.law.cornell.edu/uscode/19/usc\\_sup\\_01\\_19\\_10\\_12.html](http://www.law.cornell.edu/uscode/19/usc_sup_01_19_10_12.html).

United States. “Digital Millennium Copyright Act 1998.” Accessed August 18, 2010.  
<http://www.copyright.gov/legislation/hr2281.pdf>.

United States. “Sonny Bono Copyright Term Extension Act,” 1998. Accessed August 18, 2010. [www.copyright.gov/legislation/s505.pdf](http://www.copyright.gov/legislation/s505.pdf).

United States, “NII Copyright Protection Act of 1995,” HR 2441. Accessed August 18, 2010.  
<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.2441>:

## II. Canada

Canada. Parliament. House of Commons. *The Copyright Modernization Act*. Bill C-32, 40<sup>th</sup> Parliament, 3<sup>rd</sup> Session, 2010-. Ottawa: Public Works and Government Services Canada. 1<sup>st</sup> Reading, June 2, 2010.

Canada. Parliament. House of Commons. “An Act to Amend the *Copyright Act*.” Bill C-61, 39<sup>th</sup> Parliament, 2<sup>nd</sup> Session, 2007-08. Ottawa: Public Works and Government Services Canada. 1<sup>st</sup> Reading, June 12, 2008.

Canada. Parliament. House of Commons. “An Act to amend the *Criminal Code* (unauthorized recording of a movie)” Bill C-59, 39<sup>th</sup> Parliament, 1<sup>st</sup> Session, 2006-07. Ottawa: Public Works and Government Services Canada. Assented to June 22, 2007.

Canada. Parliament. House of Commons. “An Act to Amend the *Copyright Act*.” Bill C-60, 38<sup>th</sup> Parliament, 1<sup>st</sup> Session, 2004-05. Ottawa: Public Works and Government Services Canada. 1<sup>st</sup> Reading, June 20, 2005.

Canada. Parliament. House of Commons. “An Act to Amend the *Copyright Act*.” Bill C-32, 35<sup>th</sup> Parliament, 2<sup>nd</sup> Session, 1996-97. Ottawa: Public Works and Government Services Canada. Assented to April 25, 1997.

Canada. *An Act Respecting Copyright*, (1985) R.S., 1985, c. C-42.

## III. Mexico

México. *Ley Federal del Derecho de Autor*, 1997. Accessed December 31, 2010.  
[http://www.sice.oas.org/int\\_prop/nat\\_leg/mexico/lcra.asp](http://www.sice.oas.org/int_prop/nat_leg/mexico/lcra.asp).

## APPENDIX A: TREATIES AND LEGISLATION

This appendix provides links to the texts of the main treaties and legislation discussed in this dissertation.

### TREATIES

*World Intellectual Property Organization Copyright Treaty*

[http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html), accessed February 25, 2011.

*World Intellectual Property Organization Performances and Phonograms Treaty*

[http://www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html), accessed February 25, 2011.

*North American Free Trade Agreement*

Chapter 17: Intellectual Property

<http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=149>, accessed February 25, 2011.

Chapter 20: Exceptions (Article 2106: Cultural Industries)

<http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=155#A2106>, accessed February 25, 2011.

*Canada-United States Free Trade Agreement (Articles 2004-2006)*

<http://www.worldtradelaw.net/nafta/CUSFTA.pdf>, accessed February 25, 2011.

*Anti-Counterfeiting Trade Agreement*

<http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf&pli=1>, accessed February 25, 2011.

### DOMESTIC LEGISLATION

#### UNITED STATES

*Digital Millennium Copyright Act*

Section 512 (ISP liability)

[http://www.law.cornell.edu/uscode/17/uscode\\_sec\\_17\\_00000512----000-.html](http://www.law.cornell.edu/uscode/17/uscode_sec_17_00000512----000-.html), accessed February 25, 2011.

Section 1201 (Technological Protection Measures)

[http://www.law.cornell.edu/uscode/17/uscode\\_sec\\_17\\_00001201----000-.html](http://www.law.cornell.edu/uscode/17/uscode_sec_17_00001201----000-.html), accessed February 25, 2011.

U.S.C. Title 19, Chapter 12, Subchapter III, Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices (Section 301 process)

[http://www.law.cornell.edu/uscode/html/uscode19/uscode\\_sup\\_01\\_19\\_10\\_12\\_20\\_III.html](http://www.law.cornell.edu/uscode/html/uscode19/uscode_sup_01_19_10_12_20_III.html), accessed February 25, 2011.

## CANADA

Bill C-60, *An Act to Amend the Copyright Act* (2005)

ISP liability (Clause 20)

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2334015&Language=e&Mode=1&File=45#7>, accessed February 25, 2011.

ISP liability (Clause 29)

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2334015&Language=e&Mode=1&File=54#10>, accessed February 25, 2011.

Technological Protection Measures (Clause 27)

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2334015&Language=e&Mode=1&File=45>, accessed February 25, 2011.

Bill C-61, *An Act to Amend the Copyright Act* (2008)

ISP liability (Clauses 21)

<http://www2.parl.gc.ca/housepublications/publication.aspx?docid=3570473&language=e&mode=1&File=51#9>, accessed February 25, 2011.

ISP liability (Clause 31)

<http://www2.parl.gc.ca/housepublications/publication.aspx?docid=3570473&language=e&mode=1&File=63#13>, accessed February 25, 2011.

Technological Protection Measures (Clause 32)

<http://www2.parl.gc.ca/housepublications/publication.aspx?docid=3570473&language=e&mode=1&File=57#11>, accessed February 25, 2011.

Bill C-32, *The Copyright Modernization Act* (2010-11)

ISP liability (Clause 32)

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-32&parl=&ses=&language=E&File=63#13>, accessed February 25, 2011.

ISP liability (Clause 35)

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-32&parl=&ses=&language=E&File=66#14>, accessed February 25, 2011.

ISP liability (Clause 47)

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-32&parl=&ses=&language=E&File=75>, accessed February 25, 2011.

Technological Protection Measures (Clause 47)

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-32&parl=&ses=&language=E&File=75>, accessed February 25, 2011.

## APPENDIX B: TABLES

## INTRODUCTION TABLES

**Table 1: Top Ten Canadian Export Markets, 1994-2008**

	1994		2004		2008	
	%	Rank	%	Rank	%	Rank
<b>United States</b>	<b>81.22</b>	<b>1</b>	<b>84.44</b>	<b>1</b>	<b>77.64</b>	<b>1</b>
United Kingdom	1.48	3	1.88	3	2.70	2
Japan	4.32	2	2.08	2	2.29	3
China	1.02	5	1.64	4	2.17	4
<b>Mexico</b>	<b>0.48</b>	<b>13</b>	<b>0.75</b>	<b>5</b>	<b>1.21</b>	<b>5</b>
Germany	1.03	4	0.65	6	0.93	6
Korea, South	0.99	6	0.55	7	0.79	7
Netherlands	0.56	9	0.47	10	0.77	8
Belgium	0.61	8	0.55	9	0.70	9
France (incl. Monaco, French Antilles)	0.62	7	0.58	8	0.67	10
<b>Sub-total</b>	<b>92.33</b>		<b>93.58</b>		<b>89.87</b>	
Others	7.67		6.42		10.13	
<b>Total (all countries)</b>	<b>100</b>		<b>100</b>		<b>100</b>	

Source: Industry Canada, Trade Data Online, Accessed November 16, 2009.

**Table 2: Top Ten Canadian Import Sources, 1994-2008**

	1994		2004		2008	
	%	Rank	%	Rank	%	Rank
<b>United States</b>	<b>67.8</b>	<b>1</b>	<b>58.7</b>	<b>1</b>	<b>52.4</b>	<b>1</b>
China	1.9	6	6.8	2	9.8	2
<b>Mexico</b>	<b>2.2</b>	<b>4</b>	<b>3.8</b>	<b>4</b>	<b>4.1</b>	<b>3</b>
Japan	5.6	2	3.8	3	3.5	4
Germany	2.2	5	2.7	6	2.9	5
United Kingdom	2.5	3	2.7	5	2.9	6
Algeria	0.1	37	0.9	12	1.8	7
Norway	0.8	12	1.4	9	1.4	8
South Korea	1.2	10	1.6	7	1.4	9
France (incl. Monaco, French Antilles)	1.2	10	1.5	8	1.4	10
<b>Sub-total</b>	<b>85.6</b>		<b>83.8</b>		<b>81.7</b>	
Others	14.5		16.2		16.2	
<b>Total (all countries)</b>	<b>100.0</b>		<b>100.0</b>		<b>100.0</b>	

Source: Industry Canada, Trade Data Online, Accessed November 16, 2009.

**Table 3: Top Ten U.S. Export Markets, 1994-2008**

	1994		2004		2008	
	%	Rank	%	Rank	%	Rank
<b>Canada</b>	<b>22.3</b>	<b>1</b>	<b>23.2</b>	<b>1</b>	<b>20.1</b>	<b>1</b>
<b>Mexico</b>	<b>9.9</b>	<b>3</b>	<b>13.5</b>	<b>2</b>	<b>11.7</b>	<b>2</b>
China	1.8	14	4.2	5	5.5	3
Japan	10.4	2	6.6	3	5.1	4
Germany	3.8	5	3.8	6	4.2	5
United Kingdom	5.3	4	4.4	4	4.1	6
Netherlands	2.7	9	3.0	8	3.1	7
Korea, South	3.5	6	3.2	7	2.7	8
Brazil	1.6	15	1.7	15	2.5	9
France	2.7	8	2.6	10	2.2	10
<b>Sub-total</b>	<b>63.9</b>		<b>66.3</b>		<b>61.2</b>	
Others	36.1		33.7		38.8	
<b>Total (all countries)</b>	<b>100.0</b>		<b>100.0</b>		<b>100.0</b>	

Source: Industry Canada, Trade Data Online, Accessed November 16, 2009.

**Table 4: Top Ten U.S. Import Sources, 1994-2008**

	1994		2004		2008	
	%	Rank	%	Rank	%	Rank
China	5.85	4	13.38	2	16.08	1
<b>Canada</b>	<b>19.36</b>	<b>1</b>	<b>17.44</b>	<b>1</b>	<b>15.98</b>	<b>2</b>
<b>Mexico</b>	<b>7.46</b>	<b>3</b>	<b>10.61</b>	<b>3</b>	<b>10.28</b>	<b>3</b>
Japan	17.97	2	8.83	4	6.63	4
Germany	4.79	5	5.26	5	4.65	5
United Kingdom	3.78	7	3.15	6	2.79	6
Saudi Arabia	1.16	17	1.43	15	2.61	7
Venezuela	1.26	16	1.7	13	2.45	8
Korea, South	2.96	8	3.14	7	2.29	9
France	2.52	9	2.15	9	2.09	10
<b>Sub-total</b>	<b>67.1</b>		<b>67.08</b>		<b>65.85</b>	
Others	32.9		32.92		34.15	
<b>Total (all countries)</b>	<b>100</b>		<b>100</b>		<b>100</b>	

Source: Industry Canada, Trade Data Online, Accessed November 16, 2009.

**Table 5: Top Ten Mexican Export Markets, 1994-2008**

	1994		2004		2008	
	%	Rank	%	Rank	%	Rank
<b>United States</b>	<b>84.9</b>	<b>1</b>	<b>87.5</b>	<b>1</b>	<b>80.2</b>	<b>1</b>
<b>Canada</b>	<b>2.4</b>	<b>2</b>	<b>1.8</b>	<b>2</b>	<b>2.4</b>	<b>2</b>
Germany	0.1	6	0.9	4	1.7	3
Spain	1.4	4	1.1	3	1.5	4
Brazil	0.6	7	0.5	7	1.2	5
Colombia	0.5	8	0.4	10	1.0	6
Venezuela	0.3	12	0.4	9	0.8	7
Netherlands	0.3	11	0.3	11	0.7	8
Japan	1.6	3	0.6	5	0.7	9
China	0.1	30	0.5	6	0.7	10
<b>Sub-total</b>	<b>92.2</b>		<b>94.0</b>		<b>90.9</b>	
Others	7.8		6.0		9.1	
<b>Total (all countries)</b>	<b>100.0</b>		<b>100.0</b>		<b>100.0</b>	

Source: *Secretaría de Economía, Subsecretaría de Negociaciones Comerciales Internacionales*, [http://www.economia-snci.gob.mx/sphp\\_pages/estadisticas/cuad\\_resumen/expmx\\_e.htm](http://www.economia-snci.gob.mx/sphp_pages/estadisticas/cuad_resumen/expmx_e.htm) accessed November 16, 2009.

**Table 6: Top Ten Mexican Import Sources, 1994-2010**

	1994		2004		2008	
	%	Rank	%	Rank	%	Rank
<b>United States</b>	<b>69.0</b>	<b>1</b>	<b>56.3</b>	<b>1</b>	<b>49.2</b>	<b>1</b>
China	0.6	12	7.3	2	11.2	2
Japan	6.0	2	5.4	3	5.3	3
South Korea	2.5	8	2.7	6	4.4	4
Germany	3.9	3	3.6	4	4.1	5
<b>Canada</b>	<b>2.0</b>	<b>4</b>	<b>2.7</b>	<b>5</b>	<b>3.0</b>	<b>6</b>
Taiwan	1.3	9	1.8	8	2.2	7
Italy	1.3	10	1.4	10	1.7	8
Brazil	1.5	7	2.2	7	1.7	9
Netherlands	0.3	20	0.4	21	1.3	10
<b>Sub-total</b>	<b>88.4</b>		<b>83.8</b>		<b>84.1</b>	
Others	11.6		16.2		15.9	
<b>Total (all countries)</b>	<b>100.0</b>		<b>100.0</b>		<b>100.0</b>	

Source: *Secretaría de Economía, Subsecretaría de Negociaciones Comerciales Internacionales*, [http://www.economia-snci.gob.mx/sphp\\_pages/estadisticas/cuad\\_resumen/impmx\\_e.htm](http://www.economia-snci.gob.mx/sphp_pages/estadisticas/cuad_resumen/impmx_e.htm), accessed November 16, 2009.

## CHAPTER 2 TABLES

**Table 1: Service exports, United States, Seasonally adjusted, 2006**

Sector	Exports	Imports	Balance	Share of service exports
				%
				\$ billion
Travel	85,789	72,104	13,685	19.7
Passenger Fares	22,036	27,501	-5,465	5.1
Other Transportation	46,225	65,318	-19,093	10.6
Royalties and License Fees	70,727	23,518	47,209	16.2
Other Private Services	186,028	125,478	60,550	42.7
Direct Defence Expenditures	23,913	31,032	-7,119	5.5
U.S. government Misc. services	1,155	4,021	-2,866	0.3
<b>Total</b>	<b>435,873</b>	<b>348,972</b>	<b>86,901</b>	<b>100.0</b>

Source: U.S. Census Bureau, FT-900, *U.S. International Trade in Goods and Services – Annual Revision for 2008*. June 10, 2008. [http://www.census.gov/foreign-trade/Press-Release/2008pr/final\\_revisions/](http://www.census.gov/foreign-trade/Press-Release/2008pr/final_revisions/), accessed August 1, 2009.

**Table 2: Royalties and License Fees, Top 15 exporting countries, 2006**

Rank	Exporters	Value	Share in 15 economies	Global share
		\$ billion	%	%
1	United States	62,378	41.8	32.3
2	European Union (27)	49,852	33.4	19.4
	Extra-EU (27) exports	29,643	19.9	12.9
3	Japan	20,096	13.5	5.2
4	Switzerland	7,681	5.1	1.9
5	Canada	3,245	2.2	1.3
6	Korea, Republic of	2,046	1.4	0.5
7	Singapore	730	0.5	0.4
8	Norway	674	0.5	0.4
9	Australia	621	0.4	0.4
10	Israel	593	0.4	0.2
11	Russian Federation	299	0.2	0.2
12	Hong Kong, China	259	0.2	0.1
13	Taipei, Chinese	244	0.2	0.1
14	Paraguay	236	0.2	0.1
15	China	205	0.1	96.1
	Top 15	149,160	100.0	40.0
	Remainder	6		3.9
	Total, world	155		100.0

Source: [http://www.wto.org/english/res\\_e/statis\\_e/its2008\\_e/its08\\_trade\\_category\\_e.htm](http://www.wto.org/english/res_e/statis_e/its2008_e/its08_trade_category_e.htm), Table III.31

**Table 3: Royalties and License Fees, by region, 2006**

	\$ billions	%
<b>Exports</b>		
<b>World</b>	<b>155</b>	<b>100.0</b>
<b>North America</b>	<b>66</b>	<b>42.9</b>
<b>United States</b>	<b>62</b>	<b>94</b>
<b>Canada</b>	<b>2</b>	<b>3</b>
<b>Mexico</b>	<b>1</b>	<b>2</b>
<b>South and Central America</b>	<b>1</b>	<b>0.5</b>
<b>Europe</b>	<b>58</b>	<b>38.1</b>
<b>European Union (27)</b>	<b>50</b>	<b>32.5</b>
<b>Commonwealth of Independent States (CIS)</b>	<b>0</b>	<b>0.2</b>
<b>Asia</b>	<b>25</b>	<b>16.2</b>

Source: [http://www.wto.org/english/res\\_e/statis\\_e/its2008\\_e/its08\\_trade\\_category\\_e.htm](http://www.wto.org/english/res_e/statis_e/its2008_e/its08_trade_category_e.htm), Table III.30, and author's calculations

**Table 4: Trade balance, United States, 2006**

	Exports	Imports	Balance
	\$ billion		
Goods	1,015,812	1,683,072	-847,260
Services	435,873	1,863,072	86,901
Total	1,451,685	2,212,044	-760,359

Balance of Payments Basis

Source: U.S. Census Bureau, Historical Trade Statistics, <http://www.census.gov/foreign-trade/statistics/historical/index.html> [accessed August 1, 2009]

## CHAPTER 5 TABLES

**Table 1: Households with broadband access, 2002-2009**

	2000	2001	2002	2003	2004	2005	2006	2007	2008
	%								
Mexico	..	0.3	0.4	..	1.9	2.2	4.2	6.1	9.8
Canada	..	21.6	29.3	35.5	44.1	50.1	57.9	64.2	..
United States	4.4	9.1	..	19.9	..	..	50.8	..	..

For Canada: Statistics for 2001 and every other year thereafter include the territories (Northwest Territories, Yukon Territory and Nunavut). For the even years, statistics include the 10 provinces only.

For Mexico: For 2001 and 2002, households with Internet access via cable. From 2004, households with Internet access via cable, ADSL or fixed wireless. Source: OECD Broadband portal, accessed February 5, 2010

For United States: Data not available in certain years.

Source: <http://www.oecd.org/dataoecd/20/59/39574039.xls>

Note: See the OECD broadband portal for data on sources and estimations

**Table 2: Households with access to the Internet, 2000-2008**

	2000	2001	2002	2003	2004	2005	2006	2007	2008
	%								
Mexico	..	6.1	7.6	..	8.9	8.8	10.4	11.9	13.7
Canada (2007)	42.6	49.9	54.5	56.9	59.8	64.3	68.1	72.7	..
United States (2007)	41.5	50.4	..	54.7	..	..	..	61.7	..

Internet access is via any device (desktop computer, portable computer, TV, mobile phone etc.).

For Canada: Statistics for 2001 and every other year thereafter include the territories (Northwest Territories, Yukon Territory and Nunavut). For the even years, statistics include the ten provinces only.

For United States: Data not available in certain years.

Source: OECD Key ICT indicators

<http://www.oecd.org/dataoecd/19/45/34083073.xls> accessed February 5, 2010