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DRM Roll Please: Is Digital Rights Management Legislation Unconstitutional in Canada?

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Abstract:

The authors argue that the Digital Rights Management (DRM) provisions of Bill C-61– Canada’s latest attempt at implementing its obligations under the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, *inter alia* – is *ultra vires* of Parliament’s enumerated powers, and unconstitutionally intrudes into the Provincial legislative sphere. The DRM provisions of Bill C-61 represent a poorly veiled attempt by the Government to strengthen the contractual rights available to copyright owners, in the guise of copyright reform and the implementation of Canada’s international obligations. Future iterations of Bill C-61 that do not take the fair dealing provisions of the *Copyright Act* (and the overall scheme of the Act) into account would also likely fail constitutional scrutiny.

Keywords: Constitutional; constitutionality; DRM; digital rights management; copyright; Canada.

1. Introduction

Copyright law has become increasingly meaningful to the lives of ordinary citizens. It has also become an intensely heated political affair as Canada implements the WIPO *Copyright Treaty*¹ (‘WCT’) and the WIPO *Performances and Phonograms Treaty*² (‘WPPT’). There have been two failed attempts at ratifying these conventions. The first attempt was Bill C-60³, introduced by Paul Martin’s Liberal Government in 2005, which died on the order paper when a motion of non confidence was passed, and an election was called. Three years later, Stephen Harper’s Conservative Government made a similar attempt in Bill C-61⁴, only to see it die on the order paper a few months later when the Governor General prorogued Parliament.

Indeed, the personal is the political; and a controversial aspect of both Bills were the provisions relating to Digital Rights Management (‘DRM’) technologies (a full description of which is provided for in section 2 of this article). Section 34.02(1) of Bill C-60 purported to grant a civil cause of action to a rights holder against anyone who circumvented a technological measure that protected a work (if the purpose of that circumvention was for the purpose of copyright infringement⁵).⁶ Section 34.02(2) of Bill C-60 also created a civil cause of action against persons who provided a service to circumvent, remove or render ineffective a technological measure where they knew (or ought to have known) that such means would have resulted in copyright infringement.⁷

Section 41.1 of Bill C-61 contained a more detailed provision.⁸ It would have prohibited the descrambling of a scrambled work, decryption of an encrypted work or otherwise the avoidance, bypassing, removal, or deactivation of a technological measure, for any purpose except in very limited situations (like national security, computer interoperability, computer security, encryption research and persons with perceptual disabilities).

The introduction of Bill C-61 drew widespread protests (Nowak, 2008) from consumers and academics alike who decried the Bill as a Canadian version of the U.S. *Digital Millennium Copyright Act* ('DMCA')⁹. Bill C-61 died on the order paper when an election was called when the Governor General prorogued Parliament a few months after its introduction. After the election, Harper's (second) Conservative government expressed a desire to reintroduce the former Bill C-61, perhaps with some improvements.¹⁰ Given the DRM provisions of Bill C-60 and Bill C-61, and Canada's international obligations under the WCT and WPPT, we can safely assume that DRM protections (and remedies for breaches thereof) will feature prominently in any future Bill.

The policy implications of DRM have been extensively discussed in the literature (Bechtold, 2003, pp. 597-654; de Beer, 2005; Cameron and Tomkowickz, 2007; Kerr, 2002; Armstrong, 2006). However, less attention has been paid to the constitutional dimensions of DRM legislation. Jeremy de Beer (2005) examined the constitutionality of Bill C-60's DRM provisions, concluding that it was doubtful that Parliament had the constitutional authority to legislate in that regard. This paper will build upon de Beer's (2005) analysis by comparing Bill C-61's provisions with Bill C-60's. The authors argue that the broad language of Bill C-61 squarely places the DRM provisions outside of Parliament's enumerated powers and into the Provinces' Property and Civil Rights jurisdiction. Future incarnations of Bill C-61 that do not take the fair dealing provisions of the *Copyright Act* (and the overall scheme of the Act) into account, ought to be rendered *ultra vires* for intruding into the Provincial legislative sphere. The authors argue that the DRM provisions of Bill C-61 represent a poorly veiled attempt by the Government to strengthen the contractual rights available to copyright owners, in the guise of copyright reform and the implementation of Canada's international obligations.

2. Technological Protection Measures and Digital Rights Management

Technological protection measures ('TPMs'), as the name implies, are technological means of protecting (copyrighted) works. TPMs are the core of DRM, and depending on the user behaviour which the copyright owner seeks to control or monitor, can be divided into three (3) broad categories:

General access controls;

Use or copy controls; and

Anti-device measures (Kerr, 2002)

The first category refers to digital locks that require a password, or a decryption code to access the work (Kerr, 2002, para. 8). The contents of a work could be digitally sealed, bound to a specific device, limited to viewing on a trusted player or class of device, or continuously decrypted by

reception of internet communications (Kerr, 2002, paras. 9-10). Some works use multiple TPMs to restrict general access.

The second category encompasses a TPM that prevents certain uses of digital works. Use or copy controls typically hamper copying or transmission of digital signals by employing encryption programs such as Digital Transmission Content Protection or watermarking movies for easier traceability (Kerr, 2002, para. 15).

The last category includes TPMs designed to bind a digital work to a certain device. An example is the Content Scramble System ('CSS') which allows only licensed DVDs to play on a certain DVD player (Kerr, 2002, para. 11). Regional encoding of DVDs and DVD players is another example of an anti-device measure.

All three types of TPMs may be found in one digital work. In recent years, rights holders have been keen to bundle TPMs and contractual terms of use to form a comprehensive DRM strategy (Cameron, 2004, p. 3).

Put simply, a DRM system can be viewed as:

'The use of a technical measure (most often cryptography) applied to two things: a digital lock on content, such as music, where that content can only be accessed with authorized tools containing the right decryption keys, and digital locks applied to access tools to disallow their owners/operators from controlling the tool. A tool can be software or a hardware/software bundle.' (McOrmond, 2007, p. 29)

Instead of resorting to impractical litigation, rights holders could simply substitute (or bolster) copyright law with their own licensing agreements, and automatically penalize violations (or even attempted violations) of the agreement by locking out or destroying the user's electronic works if permitted to do so by the agreement (McOrmond, 2007, p. 29). Implicit to the DRM scheme, is the desire of rights holders to track the nature, frequency and legitimacy of users' access to their works (McOrmond, 2007, p. 29).

Indeed, the use of DRM is varied between industries and may change over time. Music tracks tend to be offered DRM free, except Apple's iTunes service (Rosenblatt, 2008b). Whereas the film industry is increasingly utilizing fingerprinting and watermarking technologies to track works (Rosenblatt, 2008b). Consider also, the notorious SpiralFrog, an ad-supported music service that offered free music tracks to users in return for reciprocal exposure to multiple advertisements. Shortly after the company shut down its operations on March 19, 2009, it was revealed that SpiralFrog's DRM-protected music tracks lock-up indefinitely and cease playing after sixty (60) days from March 19, 2009 (Sandoval, 2009).

DRM becomes particularly important as entertainment and media industries move away from the purchase-to-ownership business model towards a fee-for-service or time limited rental distribution

business model. Even non-media industries such as software manufacturers are moving in the fee-for-service direction. Adobe, for example, has come out with a DRM system for Flash videos that will enable it to support user tied time-limited content licensing (Rosenblatt, 2008a).

Nevertheless, no matter how sophisticated any TPM (or DRM system) might be, they can all be circumvented. Basic circumvention methods include compromised passwords and keys, resurrecting deleted unencrypted files, using malicious computer programs like spyware or Trojan horses, or even a physical security breach (Network Associates, 1999, pp. 56-60). More advanced circumvention involves intercepting decrypted content, brute-force decryption (crypto-analysis), key stealing, hacking closed systems or using a pirated plug-in (also known as a 'crack') (Kerr, 2002, pp. 55-59).

Against this understanding, the authors now examine whether the DRM provisions found in Bill C-61 (and the subsequent legislation likely to follow) runs afoul of Canada's constitutional division of powers.

3. Constitutional Analysis

The authors will examine and compare the constitutionality of the various DRM provisions of Bill C-60 and Bill C-61. By subjecting the Bills to pith and substance inquiry, and a constitutional powers enumeration exercise one is led to the conclusion that DRM legislation is primarily concerned with the regulation of personal property through contract(s) and therefore *ultra vires* of Parliament's legislative competence.

3.1 The Pith and Substance of DRM Legislation

3.1.1 Purpose

Bill C-60 contained no preamble. Yet its purpose was fairly clear. It was Canada's first attempt to satisfy its international obligations under the WCT and WPPT.

Bill C-61 however left no ambiguity as to its stated purpose. It included a lengthy preamble that characterizes the current *Copyright Act* as unreflective of international norms.¹¹ The preamble was explicit in its recognition that copyright protection in the 'digital era' is enhanced when countries adopt a coordinated approach based norms set out in the WCT and WPPT.¹²

Although, a memorandum commissioned by Industry Canada concluded that the WCT and WPPT treaties do not require contracting Parties to grant authors a right to control access to their works; rather, the treaties only require that parties provide effective legal protection (and remedies) to authors by preventing circumvention (Hayes, 2000, p. 17). Indeed, the WCT and WPPT treaties do not mandate that protection of technological measures must be legislated into the domestic legislation of its signatories. However, the preamble to Bill C-61 declares that 'Canada is committed to enhancing the protection of copyright works or other subject-matter, including

through the recognition of technological measures, in a manner that promotes culture and innovation, competition and investment in the Canadian economy'¹³. Therefore the Bill is intended to go beyond satisfying the minimum obligations under the WCT and WPPT.

The Preamble gives insight into Bill C-61's three overlapping objectives:

- Enhancing the protection of 'copyright works' (sic) or other subject-matter by amending the *Copyright Act*;
- Protecting 'copyright works' (sic) or other subject matter by enhancing the recognition of technological measures; and
- Enhancing such 'copyright works' (sic) or other subject matter that promotes underlying policy goals (like culture, innovation, competition and investment in the Canadian economy).

Notice that Bill C-61 is intended to amend the *Copyright Act*, yet the Bill speaks about 'other subject-matter' which is not protected by copyright. Aside from moral rights, which are arguably not a type of 'subject-matter', it is difficult to see what else in the *Copyright Act* could be amended.

However, short of the rhetoric during question period that Bill C-61 was a Canadian version of the United States' DMCA legislation, there were no official debates on Bill C-61¹⁴. Therefore, aside from the Preamble, the objective and purpose of the Bill must be supplemented from unofficial sources (like statements on the Government's website, or comments to the media by Government officials). The Minister of Industry at the time, Jim Prentice, stated to CBC news that:

'the intent of the bill is to achieve an appropriate balance between the rights of creators on the one hand and the rights of consumers on the other...in a way that promotes/fosters innovation and also recognizes international standards.'¹⁵

The Canadian Government also outlined its four guiding principles in drafting the Bill:

1. The rights of those who hold copyright must be balanced with the needs of users to access copyright works (sic).
2. The *Copyright Act* must provide clear, predictable and fair rules to allow Canadians to derive benefits from their creations.
3. The *Copyright Act* should foster innovation in an effort to attract investment and high-paying jobs to Canada.
4. Canada must ensure that its copyright framework for the Internet is in line with international standards. (Industry Canada, 2008)

While these unofficial sources are useful in supplementing our understanding of the purpose of the legislation, one can also distil the intended purpose by looking at the mischief it seeks to remedy.¹⁶ The mischief here is said to be internet piracy, peer-to-peer file sharing, and unauthorized accessing of content in general (Industry Canada, 2008). If DRM helps remedy the said mischief, then circumvention of DRM permits the mischief to continue. Bill C-61, and its DRM provisions, provides rights and remedies for copyright holders to remedy this mischief (while easily satisfying Canada's international obligations under the WCT and WPPT). And by fostering innovation and investment in the Canadian economy, DRM legislation provides the necessary incentives for copyright holders to make content available in digital form (Cameron and Tomkowickz, 2007, paras. 32-33).

3.1.2 Effects

In assessing the effects of legislation, one must examine what the legislation does (or purports to do), and also what it does not do.¹⁷ DRM uses technological measures to lock or regulate access to content and/or prevent the ability of the user to control access (Kerr, 2002).

Bill C-60 defines a technological measure as:

‘any technology, device or component that, in the ordinary course of its operation, restricts the doing — in respect of a material form of a work, a performer’s performance fixed in a sound recording or a sound recording — of any act that is mentioned in section 3, 15 or 18¹⁸ or that could constitute an infringement of any applicable moral rights...’¹⁹

Bill C-61 defines a technological measure more expansively as:

‘Any *effective* technology, device or component that, in the ordinary course of its operation,

- a) *controls access* to a work, to a performer’s performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or
- b) restricts the doing — with respect to a work, to a performer’s performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.’²⁰

While both definitions refer to a technological measure as a mechanism for restricting copyright infringement, Bill C-61 adds the qualifier that such technologies be ‘effective’. The intentional inclusion of this qualifier is strange. It gives rise to the bizarre issue of someone who ‘easily’ circumvents a technological measure thereby rendering that technological measure outside of the Bill, since it was not truly ‘effective’. In other words, a technological measure is only a technological measure when it works. If it is otherwise ineffective, then it falls outside of the definition provided for in Bill C-61.

Bill C-61 also granularises the earlier definition from Bill C-60 by referring to technological measures which not only restrict certain acts, but which also control access. This inclusion is easier to understand, since there is a difference between restricting someone acting in a certain way (like copying the audio track of a movie to MP3 format), and controlling someone's access to something (like the time-limited viewing of a movie online), although, there are undoubtedly some areas of conceivable overlap.

Indeed, this granularisation grants protection to any technological measure that 'effectively' controls access to a work. Can this provision be said to have created a new right to control access?²¹

Landau (2002) argues that a right to control access exists in the U.S. under the DMCA as a natural evolution of US copyright law. The critical link in this evolution is the increasing use of technological measures and DRM to completely govern the uses of works by either explicit written licensing agreements or implicit technological fiat (or both). Landau (2002) analogises the right to control access to a museum's right to charge admission or a cable provider's right to scramble their signal to prevent non-subscribers from viewing premium channels they have not been billed for. Distilled to its most basic element, the authors argue that this 'new' right to control access under Bill C-61 clearly derives its theoretical underpinnings from contract law. DRM legislation merely provides a new remedy for breach of contract, in the guise of copyright reform. Apart from the constitutional problems, it seems to run afoul of the Supreme Court of Canada's clear statement that copyright law 'neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.'²²

Importing DRM legislation (which is theoretically informed by principles from contract law), into copyright legislation tips the 'balance' too far in favour of copyright owners. Consider the quagmire of educators in the U.S. who reformat and re-purpose DVD's for the purpose of creating educational clips, the object of which would clearly fall under fair use²³ or an educational exception, but for which there is no defence against a charge of circumvention (Fisher and McGeeveran, 2006, p. 25). Under Bill C-61, fair dealing would not be a defence to a charge of circumvention; nor would the Courts 'read it into' the section, especially given the clear guidance of the Supreme Court of Canada in *Euro-Excellence Inc. v Kraft Canada Inc.*²⁴ that:

'... judges [should not] substitute their policy preferences for those of Parliament. This Court has consistently held that "copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive": see *CCH*, at para. 9; *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, at para. 5; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at pp. 372-73...'²⁵

DRM has the very real potential to block innovation and stifle competition. The *Competition Act*²⁶ itself may have to be amended to accommodate Parliament's will, if DRM legislation is ultimately enacted (Cameron and Tomkowickz, 2007, para. 97). DRM legislation will also affect users' privacy, by binding them to a contract or a technological scheme that would otherwise have violated privacy laws. Indeed, Greg Hagen (2005) argues that the earlier Bill C-60 could have legitimised the Sony BMG Root kit that surreptitiously installed spyware on users computers, had it been enacted into law.

3.2 Interpretation of the enumerated heads of power

Once the pith and substance of the impugned legislation has been determined, one must examine one of the 'classes of subjects' specified in the Constitution. This is a determination of what head of power the particular statute is in relation to (Monahan, 2006, p. 115). The impugned legislation is then evaluated against the particular heads of power that it may fit under. The legislation can then be determined to be *ultra vires* or *intra vires* of Parliament's legislative competence, depending on what heading the legislation is fit under.

3.2.1 Copyright

Section 91 (23) of the *Constitution Act, 1867*²⁷ confers upon Parliament the exclusive jurisdiction to legislate in relation to copyrights. Parliament's legislative competence to enact the existing *Copyright Act*²⁸ is therefore not in question.

Copyright is said to be a regulatory, state-formulated system (Craig, 2006, p. 14). It is a 'creature of statute and the rights and remedies it provides are exhaustive'.²⁹ Canadian copyright law has also evolved to recognize the careful balancing of rights, responsibilities and freedoms that the *Copyright Act* is intended to provide. Justice Binnie, writing for the majority of the Supreme Court of Canada in *Théberge v. Galerie d'Art du Petit Champlain inc.* described it well:

'30 The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)...

31 The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.

32 Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation

in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology, such as limited computer program reproduction and “ephemeral recordings” in connection with live performances.’³⁰

In classifying Bill C-60, de Beer argued that s. 91 (23) of the Constitution granted Parliament the power to enact legislation with the aim and effect of promoting authors’ cultural expression (de Beer, 2005, p. 113). All other rights that were subsequently inserted after each statutory revision are peripheral, and some lie more to the edge of the copyright clause such as moral rights (de Beer, 2005, p. 113). Indeed, if moral rights are said to be at the fringe of Parliament’s copyright power, it is particularly difficult to conceptualise Bill C-61’s DRM provisions as neatly fitting under that power as well.

The overall remoteness of the new rights created in Bill C-61 from the copyright framework is striking, if one accepts de Beer’s argument that a balance between creators and users is a constitutional, as opposed to a statutory principle (de Beer, 2005, p 114). Balance in copyright can be said to be a constitutional principle because an over extension of copyright rights could destabilise the ‘appropriate balance between the federal and provincial heads of power.’³¹ The DRM provisions in Bill C-61 clearly lacked this balance. They failed to contain fair dealing limitations or exceptions, or otherwise adequately address Justice Binnie’s clear guidance from paragraphs 31 and 32 of *Théberge*.

Unlike the European Union Copyright Directive³², Bill C-61 failed to provide for the possibility that some sort of an administrative body could ensure balance in copyright, particularly adequate user access (Cook and Brazell, 2004). The purpose of DRM legislation is detached, in both spirit and application, from the purpose of Canadian copyright laws.

Most importantly, Bill C-61’s DRM provisions are less about copyright, and more about strengthening the contractual protection(s) of a property interest. This ‘pro-DRM’ view has its roots in the pro-capitalist DMCA legislation of the US, and posits that it is within the content provider’s rights to define what uses they consider ‘fair’ and make technical/contractual provisions that allow those uses without requiring payment. Strong proponents of DRM argue that fair use (or, its rough equivalent, ‘fair dealing’ in Canada and the UK) is too difficult to define with certainty, and Government should avoid disturbing DRM arrangements that clearly set out their contractual and technical limitations. Since DRM relies on the licensing of tangible property (rather than outright ownership), users that license DRM content have effectively opted out of copyright law and into the realm of contract law. The philosophical justification for this under the DMCA is that the US Congress has favoured strengthening the freedom of contract for digital content versus the need to find balance in copyright law.

Perhaps the US Congress has the legislative authority to balance (as a whole) the freedom of contract and copyright law; but it is the authors' contention that Canada's Federal Parliament may lack this ability. Indeed, Canadian Parliament is clearly within its copyright power to collaterally regulate the proprietary interests in copyright through search, seizure and injunction orders, but Parliament's right to regulate property or conduct that is not infringing copyright (as with DRM measures) is not constitutionally clear.

Parliament should not be permitted to provide statutory remedies for contractual breaches by colouring them as amendments to the *Copyright Act*. DRM provisions cannot be fit under the copyright heading because it has no concern with copyright law; rather it aims to strengthen general contract law for the benefit of copyright owners, with little (or no) *quid pro quo* for the public/users.

3.2.2 Property and Civil Rights in the Province

Section 92 (13) of the *Constitution Act, 1867* grants the power to legislate with respect to Property and Civil Rights in the Province exclusively to the provincial legislatures. Determining whether the law or the subject matter of the proceeding can be brought within a federal power, or if it wholly subsumed within property and civil rights in the province is the basic inquiry. How far do DRM provisions encroach upon the property and civil rights head of power? Is the encroachment into provincial jurisdiction so serious that the legislation must be looked at as a 'colourable'³³ attempt to expand copyright law beyond its parameters and into property and civil rights?

In *MacDonald v. Vapor Canada*³⁴ the Supreme Court of Canada invalidated a provision (subsection 7 (e)) in the Federal *Trade-marks Act* that sought to extend civil liability against anyone who 'adopt[ed] any other business practice contrary to honest industrial and commercial usage.'³⁵ The section 7 provisions of the *Trade-marks Act* (as a whole) are commonly referred to as the 'unfair competition' provisions (Gill and Jolliffe, 2002, pp. 2-20). Section 7 provides that:

'No person shall

- (a) make a false or misleading statement tending to discredit the business, wares or services of a competitor;
- (b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;
- (c) pass off other wares or services as and for those ordered or requested;
- (d) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to

- (i) the character, quality, quantity or composition,
- (ii) the geographical origin, or
- (iii) the mode of the manufacture, production or performance of such wares or services; or
- (e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.³⁶

The Supreme Court held that this provision (sub-section 7 (e)) attempted to extend tortious liability by formulating (in different words) the tort of conversion, ‘writ large’, and in a business context.³⁷ The imposition of a civil remedy in this case was *ultra vires* of Parliament’s legislative competence because the impugned provision was detached from the rest of the *Trade-marks Act*, and was not part of a regulatory scheme.³⁸ The court was not convinced that the impugned provision was related to the trade and commerce power of Parliament because the thrust of the provision was directed towards ‘the ethical conduct of persons engaged in trade or in businesses.’³⁹ Even if there was a close enough connection with trade, the court found that the provision’s private enforcement through civil action demonstrated a local, provincial flavour.⁴⁰ Chief Justice Laskin was even of the opinion that all of section 7 might fail constitutional scrutiny, unless ‘read down’, and tied to a regulatory scheme:

‘Neither s. 7 as a whole, nor section 7(e), if either stood alone... would be valid federal legislation in relation to the regulation of trade and commerce or in relation to any other head of federal legislative authority. There would, in such a situation, be a clear invasion of provincial legislative power. Section 7 is, however, nourished for federal legislative purposes in so far as it may be said to round out regulatory schemes prescribed by Parliament in the exercise of its legislative power in relation to patents, copyrights, trademarks and trade names. The subparagraphs of s. 7, if limited in this way, would be sustainable, and, certainly, if s. 7(e) whose validity is alone in question here, could be so limited, I would be prepared to uphold it to that extent. I am of opinion, however... that there is no subject matter left for s. 7(e) in relation to patents, copyright, trademarks and trade names when once these heads of legislative power are given an effect under the preceding subparagraphs of s. 7. In any event, in the present case the facts do not bring into issue any question of patent, copyright or trade mark infringement or any tortious dealing with such matters or with trade names. There is here merely an alleged breach of contract by a former employee, a breach of confidence and a misappropriation of confidential information. It is outside of federal competence to make this the subject of a statutory cause of action.’⁴¹ (See also, Gill and Jolliffe, 2002, pp. 2-21).

The DRM provisions of Bill C-61 bear considerable similarity to the impugned provision in *Vapor Canada*. The detachment of the Bill C-61’s section 41 provisions (on technological measures and rights management information) from the rest of the *Copyright Act*’s regulatory scheme by omitting the fair dealing defences skews the intended balance of the Act disproportionately in favour of the economic interests of copyright holders. One could also argue

that the existing moral rights provisions of the *Copyright Act* is also divorced from the fair dealing scheme – however, moral rights are dependent upon the existence of copyrighted works. Without an underlying copyrighted work, there are no moral rights. However, DRM does not necessarily require an underlying copyright work; as DRM can be placed on mundane items that lack the necessary originality to attract copyright protection.

Apart from abandoning the *Copyright Act's* fair dealing scheme, Bill C-61 would indirectly amend the long standing ‘first sale doctrine’⁴² by declaring certain uses of a work (such as circumventing a digital lock or viewing a document more than once) to be breaches of contract (this is the effect of similar anti-circumvention legislation in the U.S., see Heller, 2001, pp. 146-147). DRM legislation entrenches a new legal order where users are no longer owners of works subject to copyright but are rather mere licensees of content providers.

The paramountcy of copyright law, as it currently stands, provides users with a defence of fair dealing despite any breach of contract. Whereas, the proposed Bill C-61 would place the law of contract above copyright thereby avoiding the paramountcy ‘problem’. It creates (or fosters) a contractual cause of action that is immune from federal laws like the fair dealing provisions of the *Copyright Act*, and perhaps even the *Competition Act* (since Acts of Parliament are presumed to be congruous and complementary to one another any enactment of DRM provisions into the *Copyright Act* ‘cannot’ be anti-competitive).

3.3 Ancillary Doctrine

In *General Motors v. City National Leasing*⁴³, Chief Justice Dickson added a third criterion to the federalism analysis. He held that:

‘If, on the other hand, the legislation is not in pith and substance within the constitutional powers of the enacting legislature, then the court must ask if the impugned provision is nonetheless a part of a valid legislative scheme. If it is, at the third stage the impugned provision should be upheld if it is sufficiently integrated into the valid legislative scheme.’⁴⁴

Assuming that the *Copyright Act* is a valid regulatory scheme, the main inquiry will inevitably centre on the ‘fit’ of any proposed DRM provisions within the *Copyright Act* (Monahan, 2006, pp. 118-119). To be part of a regulatory scheme, the impugned provision(s) must be ‘sufficiently integrated into the Act to sustain its constitutionality’.⁴⁵ To determine integration or ‘fit’, the impugned legislation must *minimally* intrude upon provincial jurisdiction.⁴⁶ Incidental effects upon an area outside of the competence of the legislator will not doom the impugned legislation.⁴⁷

More specifically, in *General Motors*, the following three factors were emphasized as reasons for finding the impugned provision (sec. 31.1 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23) *intra vires* of Parliament’s legislative competence:

1. the provision was remedial and was not in itself a substantive part of the Act; the provision did not create a general cause of action;
2. its application was limited by the provisions of the Act; and
3. Parliament was not constitutionally precluded from creating rights of civil action where such measures are shown to be warranted.⁴⁸

Recently, in *Kirkbi AG v. Ritvik Holdings Inc.*⁴⁹ the Supreme Court of Canada held that subsection 7 (b) of the current *Trade-marks Act*, R.S.C. 1985, c. T-13 (which essentially codified the common law tort of passing off) was *intra vires* of Parliament's legislative competence. Subsection 7 (b) states that no person shall 'direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another'⁵⁰. The impugned provision:

'... only minimally intrudes into provincial jurisdiction over property and civil rights. It is a remedial provision limited to trade-marks as defined in the Act... s. 7(b) "rounds out" the federal trade-marks scheme. In this regard s. 7(b) is, in its pith and substance, directly connected to the enforcement of trade-marks and trade-names in Canada because it is directed to avoiding confusion through use of trade-marks...

Unlike breach of confidence and appropriation of confidential information (s. 7(e)) [considered in *Vapor Canada*], the passing-off action [in the present case] plays a clear role in the federal scheme. Without this provision there would be a gap in the legislative protection of trade-marks. This would create inconsistencies in the protection of registered and unregistered trade-marks and lead to uncertainty. Section 7(b) is sufficiently integrated into the federal scheme and, in this respect, is significantly different from s. 7(e). I conclude that s. 7(b) lies within the federal government's legislative competence.'⁵¹

The court found that the creation of civil causes of action was generally a provincial, property or civil rights matter, but the intrusion into the provincial sphere was minimal due to the section's remedial nature and the fact that it was limited in its application by the provisions of the *Trade-mark Act*.⁵²

DRM legislation will likely not pass the 'fit' test. The *sui generis* status of a right to protect DRM from circumvention sets this legislation apart from the traditional remedies and rights found in the *Copyright Act*. Cameron and Tomkowickz (2007) argue that copyright law has traditionally been understood as a statutorily defined bundle of time limited exclusive rights. They argue that anti-circumvention legislation would not fit this bundle because it is difficult to conceptualize copyright holders as having the exclusive right to circumvent TPMs that apply to their works, or having the exclusive right to distribute circumvention devices (Cameron and Tomkowickz, 2007, pp. 312-313). The conceptual difficulty is enhanced when one considers that DRM legislation is

principally triggered by contractual breaches, express or implied. Alternatively, if DRM legislation does not operate based on contract, it is clear that it is occupied with far more than copying. DRM legislation is concerned with the regulation of personal property to prevent or achieve certain aims, some of which may correspond with the *Copyright Act's* objectives, while others may not.

Unlike *General Motors* or *Kirkbi*, the DRM provisions are not limited by the rest of the *Copyright Act*. It is essential that fair dealing provisions apply to DRM provisions. Anything less ignores the clear guidance of the Chief Justice of the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada* at paragraph 48:

‘... the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver... has explained, at p. 171 [in *Copyright Law*. Toronto: Irwin Law, 2000]: “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation”⁵³

Although Bill C-61's DRM provisions contain a few narrowly defined exceptions (like national security, computer interoperability, computer security, encryption research and persons with perceptual disabilities) none are as all-encompassing, flexible, or have as rich of a jurisprudential history as the fair dealing provisions of the *Copyright Act*. Fair dealing provisions are part of a legislative scheme that protects the rights of users, and ensures that the public interest is fairly served through the grant of copyrights. In the words of the Chief Justice at paragraphs 48 and 49 in *CCH*, the fair dealing provisions are an integral part of the *Copyright Act* – therefore, the DRM provisions (by definition) are not sufficiently ‘integrated’ into the *Copyright Act* if the fair dealing provisions do not apply to them. Again, it could be said that the fair dealing provisions of the *Copyright Act* do not apply to the moral rights provisions (Mohammed, 2009, p. 4). However, unlike DRM provisions, all moral rights rely upon a copyrighted work to derive their existence. There is no moral right that exists *completely* independently of a copyrighted work. Whereas there are many aspects of DRM that apply and exist independently of the copyrightability of any given work.

4. Conclusion

Given the history and evolution of Bill C-60 and Bill C-61, it is almost certain that future DRM legislation will be comparably drafted. Given the analysis outlined in this paper regarding Bill C-61, and de Beer's (2005) earlier analysis of Bill C-60, there is undoubtedly a constitutional challenge that can be mounted against DRM legislation. DRM legislation is nothing more than the

statutory codification of contractual rights and remedies, in the guise of copyright law. A scheme which simply does not work in Canada due to the division of powers between Federal and Provincial Governments unless the fair dealing provisions of the *Copyright Act* (and the overall scheme of the Act) are taken into account by the drafters of future legislation.

Given Canada's constitutional division of powers and the balance that Canada's *Copyright Act* is intended to provide for owners and users (uniformly emphasized in a trilogy of recent Supreme Court of Canada decisions⁵⁴); it is quite unlikely that a Canadian Court would adopt the reasoning of the US District Court in *Universal v. Reimerdes*⁵⁵ (affirmed on appeal⁵⁶) where it was held that the United States Congress was able to fundamentally alter the landscape of copyright, including eliminating the application of the defence of fair use to the anti-circumvention provisions of the DMCA.

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Notes

¹ *World Intellectual Property Organization Copyright Treaty*, 20 December 1996, 36 I.L.M. 65, available at: <www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html>. See 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.’

And Article 12 (Obligations concerning Rights Management Information):

‘(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means 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, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.’ (footnoting omitted)

² *World Intellectual Property Organization Performances and Phonograms Treaty*, 20 December 1996, 36 I.L.M. 76, available at: <www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html>. See Article 18 (Obligations concerning Technological Measures) and Article 19 (Obligations concerning Rights Management Information) which mirror the obligations under the WCT except for the references to performances or phonograms (which, after all, is the preoccupation of the WPPT).

³ Bill C-60, *An Act to amend the Copyright Act*, 1st sess. 38th Parl., 2005 [‘Bill C-60’].

⁴ Bill C-61, *An Act to Amend the Copyright Act*, 2nd Sess., 39th Parl., 2008 [‘Bill C-61’].

⁵ The provision is not designed to be tautological. It was drafted to exclude persons who circumvent technological measures for legitimate purposes like research and redundancy / back-up.

⁶ ‘An owner of copyright in a work, a performer’s performance fixed in a sound recording or a sound recording and a holder of moral rights in respect of a work or such a performer’s performance are, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who, without the consent of the copyright owner or moral rights holder, circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work, the performer’s performance or the sound recording for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).’

⁷ ‘An owner of copyright or a holder of moral rights referred to in subsection (1) has the same remedies against a person who offers or provides a service to circumvent, remove or render ineffective a technological measure protecting a material form of the work, the performer’s performance or the sound recording and knows or ought to know that providing the service will result in an infringement of the copyright or moral rights.’

⁸ No person shall

- (a) circumvent a technological measure within the meaning of paragraph (a) of the definition ‘technological measure’ in section 41;
- (b) offer services to the public or provide services if
 - (i) the services are offered or provided primarily for the purposes of circumventing a technological measure,

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- (ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a technological measure, or
- (iii) the person markets those services as being for the purposes of circumventing a technological measure or acts in concert with another person in order to market those services as being for those purposes; or
- (c) manufacture, import, provide — including by selling or renting — offer for sale or rental or distribute any technology, device or component if
- (i) the technology, device or component is designed or produced primarily for the purposes of circumventing a technological measure,
- (ii) the uses or purposes of the technology, device or component are not commercially significant other than when it is used for the purposes of circumventing a technological measure, or
- (iii) the person markets the technology, device or component as being for the purposes of circumventing a technological measure or acts in concert with another person in order to market the technology, device or component as being for those purposes.’

⁹ 17 U.S.C § 1201 (1998).

¹⁰ Government of Canada, *Speech from the Throne*, November 19 2008, available online at <<http://www.sft-ddt.gc.ca/eng/media.asp?id=1364>>.

¹¹ The full text of the Preamble is set out below:

‘Whereas the Copyright Act is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy;

Whereas advancements in and convergence of the information and communications technologies that link communities around the world present opportunities and challenges that are global in scope for the creation and use of copyright works or other subject-matter;

Whereas in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms;

Whereas such norms are reflected in the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, adopted in Geneva in 1996;

Whereas such norms are not wholly reflected in the *Copyright Act*;

Whereas the exclusive rights in the *Copyright Act* provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on these rights exist to further enhance users’ access to copyright works or other subject-matter;

Whereas the Government of Canada is committed to enhancing the protection of copyright works or other subject-matter, including through the recognition of technological measures, in a manner that promotes culture and innovation, competition and investment in the Canadian economy;

And whereas Canada’s ability to participate in a knowledge economy driven by innovation and network connectivity is fostered by encouraging the use of digital technologies for research and education’.

¹² *Supra*. at fns.1 and 2.

¹³ Preamble to Bill C-61 (emphasis added).

¹⁴ In the *Reference re Firearms Act (Can.)*, 2000 SCC 31 [‘*Firearms Reference*’], the Supreme Court of Canada reviewed the Minister of Justice’s second-reading speech in the House of Commons, as an aid to determining the object of the impugned firearms legislation.

¹⁵ Interview of Jim Prentice (12 June 2008) on CBC news world, Ottawa, CBC News World, online: <<http://www.youtube.com/watch?v=nbqRLV7tGg&feature=related>>.

¹⁶ *Firearms Reference* at para. 21.

¹⁷ *Firearms Reference* at para. 24.

¹⁸ Which enumerate the traditional rights of copyright holders.

¹⁹ Bill C-60, s. 34.02.

²⁰ Bill C-61, s. 41 (emphasis added).

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- ²¹ de Beer (2005) refers to this right as a ‘right of access’ to works (at p. 107).
- ²² *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 at pp. 372 – 373.
- ²³ Fair use is the (rough) American equivalent of fair dealing in Canada and the UK.
- ²⁴ 2007 SCC 37, [2007] 3 S.C.R. 20.
- ²⁵ *Ibid.* at para. 3.
- ²⁶ R.S.C. 1985, c. C-34.
- ²⁷ (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
- ²⁸ R.S.C. 1985, c. C-42.
- ²⁹ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002 SCC 34](#), [\[2002\] 2 S.C.R. 336](#) at para. 5 citing *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at p. 373; *R. v. Stewart*, [1988] 1 S.C.R. 963; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477.
- ³⁰ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336 [“*Théberge*”] at paras. 30 – 32 (emphasis and underlining added).
- ³¹ *Firearms Reference*, at para. 48.
- ³² European Commission, Directive 2001/29/EC of 22 May 2001 “On the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society”.
- ³³ *Switzman v. Elbling and A.G. of Quebec*, [1957] S.C.R. 285 at 303.
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- ³⁷ *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, at p. 149.
- ³⁸ *Ibid.* at p. 165.
- ³⁹ *Ibid.*
- ⁴⁰ *Ibid.*
- ⁴¹ *Ibid.* at p. 172 (emphasis and underlining added). Monahan (2006, at p. 293) questions the need for a regulatory scheme (especially since Chief Justice Laskin offered no explanation why its presence, or absence, was central to the determination of a federal legislation’s validity under the trade and commerce power).
- ⁴² Under the first use doctrine a user who first purchases a work gains many rights in the tangible property, allowing him to give away the work, destroy it, modify it, etc.
- ⁴³ [1989] 1 S.C.R. 641, [1989] S.C.J. No. 28 [“*General Motors*”].
- ⁴⁴ *Ibid.*, at para. 42.
- ⁴⁵ *General Motors*, at para. 46.
- ⁴⁶ *Kirkbi* (discussed *infra*).
- ⁴⁷ *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23 (cited with approval in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146 at para. 54.
- ⁴⁸ *General Motors*, at para. 48.
- ⁴⁹ 2005 SCC 65 [“*Kirkbi*”].
- ⁵⁰ *Trade-marks Act*, R.S.C. 1985, c. T-13.
- ⁵¹ *Kirkbi* at paras. 33 and 36.
- ⁵² *Kirkbi* at paras. 29-36.
- ⁵³ [2004] 1 S.C.R. 339 [“*CCH*”] at para. 48 (emphasis and underlining added).
- ⁵⁴ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339; 2004 SCC 13, and *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] S.C.J. No. 44.
- ⁵⁵ 111 F.Supp.2d 294 (S.D.N.Y. 2000).
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