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Pascale Chapdelaine
University of Windsor

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Living in the Shadow of the Intangible: the Nature of the Copy of a Copyrighted Work Part Two

Pascale Chapdelaine*

Abstract

Copyright laws throughout the world are copyright holder centric and present a very fragmented source to comprehend the rights of users, and in particular of consumers owning copies of copyrighted works. Although in recent years, a growing number of commentators have worked towards defining the place of users in copyright law, little attention has been devoted to the nature and justifications of copy ownership of copyrighted works. This paper applies property and copyright theory to define and justify the existence of copy ownership of copyrighted works. It seeks to carve out in clearer terms the place of copy ownership legally and normatively, to offer a counterbalance to a predominant copyright holder centric approach to copyright law. Part One of this paper laid out the theoretical framework of property and copyright theory. Part Two applies the theoretical framework to define the nature of the copy of a copyrighted work, as well as its justifications. It explores the ramifications of copyright acting as a property-limitation rule to copy ownership, and how copy ownership can also act as a property-limitation rule of copyright. As copy ownership of copyrighted works is progressively vanishing through online digital distribution of copyrighted works, it affirms the significance of copy ownership within copyright and property law. It finds the justifications of copy ownership on the a priori normative value of open-ended ownership freedoms, as well as within the instrumental justifications of copyright, to incent the creation and dissemination of copyrighted works. The adaptability of the property institution allows the concept of copy ownership to evolve, taking into account the available control and access technologies at any given time. It

* BCL, LL.B. (McGill), LL.M. (K.U. Leuven) Ph.D (candidate) Osgoode Hall Law School, Adjunct Professor, Faculty of Law University of Toronto. A shorter and earlier version of this paper won a Canada's IP Writing Challenge award in October 2010. I thank Osgoode Hall Law School and the Social Sciences and Humanities Research Council of Canada for making this research project possible. I also thank Giuseppina D'Agostino, Lisa Austin, Abraham Drassinower, Colin Grey and Hiram Melendez-Juarbe, as well as the participants of the ATLAS Agora doctoral seminar held in June 2010 at New York University School of Law, for insightful discussions or comments on earlier drafts of this paper. All errors remain mine.

provides important tools that may help resolve the ongoing controversy opposing the rights of consumers to the rights of copyright holders. The possible eradication of ownership of digital copies is not likely to resolve this conflict, unless it takes into account the underlying interests of consumers who lawfully access copyrighted works. The a priori normative force of ownership freedoms, the role of copy ownership in pursuing the instrumental goals of copyright, as well as the intrinsic transaction efficiency that results from it, incarnate a strong vehicle as well as a safeguard to consumers' rights to copies of copyrighted works.

Partout dans le monde, les lois sur le droit d'auteur reposent sur le titulaire du droit d'auteur et présentent donc une façon très fragmentée de concevoir les droits des utilisateurs, plus particulièrement des consommateurs qui possèdent des exemplaires des œuvres protégées par droit d'auteur. Même si depuis les dernières années, un nombre croissant de commentateurs se sont efforcés de trouver la place des utilisateurs dans les lois sur le droit d'auteur, peu a été dit quant à la nature du droit de propriété sur l'exemplaire des œuvres protégées et à ses raisons d'être. Le présent article traite de la théorie du droit de propriété et du droit d'auteur dans le but de définir et de justifier l'existence du droit de propriété sur l'exemplaire d'œuvres protégées par droit d'auteur. Il vise à établir en termes plus clairs la place qu'occupe le droit de propriété sur l'exemplaire d'un point de vue juridique et normatif et à faire contrepoids à l'approche fondée sur le titulaire du droit d'auteur qui prévaut en matière de droit d'auteur. La première partie de l'article présentait le cadre théorique du droit d'auteur et du droit de propriété. Cette deuxième partie porte sur l'application de ce cadre afin de déterminer la nature de l'exemplaire d'œuvres protégées par droit d'auteur, de même que les justifications s'y rattachant. Elle traite de la ramification du droit d'auteur en tant que règle restrictive du droit de propriété sur un exemplaire et de la façon dont ce droit de propriété pourrait également servir de règle restrictive pour le droit d'auteur. Dans le contexte de la disparition progressive du droit de propriété dans les exemplaires d'œuvres protégées, par l'avènement de la distribution numérique en ligne de ces œuvres, cet article renforce l'importance du droit de propriété sur l'exemplaire en droit d'auteur et en droit des biens. Les motifs justifiant le droit de propriété sur un exemplaire se fondent sur la valeur normative des libertés de propriété non restrictives a priori, de même que sur les fondements instrumentalistes du droit d'auteur, soit encourager la création et la diffusion des œuvres protégées. La flexibilité inhérente au droit de propriété permet à la notion du droit de propriété sur l'exemplaire d'évoluer en tenant compte des technologies d'accès et de contrôle offertes sur le marché en tout temps. Elle offre des outils essentiels qui peuvent aider à résoudre la controverse qui oppose

sans cesse les droits des consommateurs à ceux des titulaires du droit d'auteur. La possible éradication des droits de propriété d'exemplaires numériques n'est pas près de résoudre ce conflit, à moins qu'on ne tienne compte des intérêts sous-jacents des consommateurs qui obtiennent légalement accès aux exemplaires des œuvres protégées. La force normative des libertés associées au droit de propriété a priori, le rôle du droit de propriété sur l'exemplaire dans l'atteinte des objectifs fondamentaux du droit d'auteur, de même que l'efficacité transactionnelle intrinsèque qui en découle, offrent un véhicule de choix pour assurer la sauvegarde des droits des consommateurs sur les exemplaires d'œuvres protégées.

1. INTRODUCTORY NOTE

In the first part of this paper, I reviewed the property law and theory framework of analysis that is being applied to copy ownership of copyrighted works. In particular, I introduced the concept of property and ownership to copyright and the copy of copyrighted works, as well as various forms of limitations and their central role within property law. I described the controversy that subsists on the nature of copyright as a form of property and its relevance to a better understanding of the nature of the copy of a copyrighted work. In this second part of the paper, I look at the consumers' rights in the copy of a copyrighted work by describing their nature through existing legal sources (Part IV). I also look at justificatory theories around the ownership in the copy of a copyrighted work and their possible effects, e.g., the *prima facie* normative status of ownership freedoms, instrumental justifications of (intellectual) property and natural property rights in the fruits of one's labour justifications. The significance of maintaining copy ownership and ascertaining its proper scope is justified by the normative status of ownership freedoms and on the instrumental justifications of copyright and ownership of personal property. I also describe how copyright acts as a "property-limitation" rule on the ownership of the copy of a copyrighted work. In Part V, I apply the framework developed in this paper to clarify the scope of ownership rights in the copy of a copyrighted work, both from a prescriptive and normative perspective. I conclude by affirming the place of copy ownership in property and copyright institutional designs and by pointing to the need to account for it more adequately. Should the distribution of digital copyrighted works completely eradicate copy ownership over time, the fundamental interests of copyright consumers discussed in this paper remain highly relevant and will still need to be addressed. To overlook those interests is to be done at the peril of an efficacious and credible copyright system.

2. PART IV — THE CONSUMER'S RIGHTS IN THE COPY OF A COPYRIGHTED WORK

(a) The Nature and Scope of the Ownership Rights: Copyright Leftovers

The exact nature and scope of the consumer's property rights in the copy of a

copyrighted work has been overlooked¹ in comparison to the nature of copyright.² Her right is sometimes contrasted with the copyright holder's right through the tangible *versus* intangible dichotomy. A distinction is sometimes made between the exclusive rights of the copyright holder in the copyright which are her sole domain (the intangible) and the ownership rights of the consumer in the physical copy (such as a music CD, a film DVD or a book, or an online version) of the copyrighted work (the tangible).³ What is assumed by this dichotomy is that the consumer has no ownership right whatsoever in the copyright (the intangible) but only in the tangible. In other words, all exclusive rights of production, reproduction, performance in public, communication to the public by telecommunication, adaptation, conversion and so on are *a priori* within the domain of the copyright holder, unless she gives her authorization through a licence, or unless the consumer falls under one of the limited exceptions to copyright infringement (such as fair dealing). At first sight, the line between tangible and intangible may seem to provide a relatively clear and workable framework. However, the scope of the ownership rights of copyright holders is often unclear.⁴ The exclusive rights granted by Parliament leave room for interpretation⁵ and their interplay with copyright exceptions gives

¹ With one notable exception in the U.S. context: J.P. Liu, "Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership" (2001) 42 William and Mary Law Review, 1245.

² See the discussion on the nature of copyright in P. Chapdelaine, "Living in the Shadow of the Intangible: the Nature of The Copy of a Copyrighted Work Part One" (2010) 23 I.P.J. 83 at 96-103.

³ §202 of the U.S. *Copyright Act*, Copyright Law of the U.S. (Title 17 of the *United States Code*) provides that: "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object." The *Canadian Copyright Act* R.S.C. 1985, c. C-42 (the "CCA") does not contain a similar provision.

⁴ This is one of P. Menell's arguments to illustrate the important distinctions to be made between copyright as one form of intangible property with other forms of tangible property. Because of greater uncertainty around the scope of copyright property rights, this, among others, gives rise to much higher transaction costs than with respect to tangible property: P.S. Menell, "The Property Rights Movement's Embrace Of Intellectual Property: True Love Or Doomed Relationship?" (2007) 34 Ecology L.Q. 713 at 744-745.

⁵ While section 3 of the CCA, *supra* note 3 states "copyright means the sole right to produce or reproduce the work. . . , to perform the work, . . ." the list of manifestations of these rights in the same section is not exhaustive. This leaves more room for interpretation of the right to "produce", "reproduce", perform the work. The exclusive rights conferred by the CCA, *supra* note 3, only pertain to the whole work or a "substantial part" which leaves any unsubstantial part outside the domain of the exclusive rights of the copyright holder. This adds another level of uncertainty. Courts have tended to interpret what constitutes a non substantial part restrictively: *Hawkes and son (london) limited v. Paramount film service, limited* [1934] 1 Ch. 593 (C.A.); *Cie*

rise to a lot of grey areas. The distinction between intangible and tangible is increasingly problematic and misleading, as we are moving towards the online distribution of copyrighted works with no “hand to hand” exchange of a physical supporting medium of the copyrighted work.⁶

Applying Jim Harris’s theory of the three essential characteristics of property on the ownership spectrum, namely: (i) a juridical relation between a person and a resource (ii) privileges and powers that are open ended and (iii) the fact that they authorize self-seekingness on the part of the owner,⁷ the first one is present, while the second and third characteristics are more problematic. The consumer of a lawfully purchased music CD, or film DVD has an ownership right in the copy of the CD or DVD. Given the current state of the law and terms of conditions attached to online distribution of copyrighted works, this is less clear in the case of digital copies purchased online. As such, she can dispose of the CD or the DVD through transfer by donation or second hand sale. She has trespassory powers that give rise to legal remedies, including reversion of the property in case of theft.⁸ She can listen to the CD or DVD for as much as she wants, can play it as part of a performance or skit in the privacy of her home, can mark the copy with her name, can lend it to a friend, and so on. Under the CCA, she cannot make copies of the DVD, but she can make a copy of the music CD on a blank CD⁹ for her private use only.¹⁰ She may be able to make a copy of the CD or DVD under the fair dealing provisions if it is for one of the specified purposes (i.e., research or private study and criticism or review) and if the dealing is fair.¹¹ She cannot play the CD in public, including at a neighbourhood fair,¹² at a wedding, during a public performance in a park, at the corner store where she works part-time, without obtaining the authorization of the copyright holder or paying royalties to the relevant copyright collective body.¹³ She cannot telecommunicate to the public any substantial portion of

Générale des Etablissements Michelin-Michelin & Cie v. C.A. W.- Canada (1996), 71 C.P.R. (3d) 348 (Fed.T.D.) at 373.

⁶ See a more elaborate discussion on the tangible-intangible dichotomy further below in this section.

⁷ See P. Chapdelaine, *supra* note 2 at 89-90.

⁸ For example see: the British Columbia *Sale of Goods Act*, R.S.B.C. 1996, c. 410. Under Québec’s civil law, the nature and scope of her remedies depend on the good faith of the person in possession and on the application of prescription rules: articles 928–933 of *Québec Civil Code*.

⁹ Or any other “audio recording medium” as per section 79 and fol. of the CCA, *supra* note 3.

¹⁰ Under the private copying regime i.e., as set in s. 80 to 88 of the CCA, *supra* note 3, it is very limited. It only applies to audio recording and does not permit for example making a copy of a musical recording on an MP3 player such as iPod as they do not constitute an audio recording medium.

¹¹ Sections 29 to 29.2 and of the CCA, *supra* note 3.

¹² Unless the use would fall under one of the limited exceptions to copyright infringement for Educational institutions: s. 29.4 to 30 of the CCA, *supra* note 3.

¹³ Either directly or through the relevant collective agency that is administered by the Copyright Board under the CCA, *supra* note 3.

the CD or DVD, including posting it on Facebook, incorporating it in a clip she posted on “You Tube” or on her personal website, without the prior consent of the copyright holder, and the list goes on and on. These prohibitions act without a doubt as limitations to her *a priori* open-ended privileges and powers in the music CD and film DVD.¹⁴

What this somewhat fastidious list of open-ended limitations illustrates as to how she can use the music CD or film DVD¹⁵ is two fold. First, the list of limitations is likely to be overwhelmingly greater than the list of powers and privileges of the consumer in the CD or DVD. This is particularly striking given that we are dealing with a chattel, whereby property limitation rules are typically less prevailing than for other forms of tangible property.¹⁶ Second, those limitations are not trivial. They go to the heart of the uses that the consumer increasingly wants to make of a CD, a DVD, a book or other copyrighted works. They directly and materially impede on the *a priori* self-seekingness that ownership in the copy of a copyrighted work should entail.¹⁷ In fact, the situation is here reversed: she is *a priori* banned to a great extent from the self-seekingness aspect of her property rights in the CD or DVD she owns. Unlike other forms of ownership, whereby the exclusionary powers associated with ownership mean that the owner has the power to set the agenda,¹⁸ with respect to the ownership in the copy of a copyrighted work, we have come to accept that this agenda is to be almost exclusively set by the copyright holder.

How is the property of the copy of a copyrighted work best characterized on the spectrum of ownership rights, and does it matter? Based on the increasing list of limitations imposed on copy ownership, compared to the list of *a priori* open-ended privileges, one is hard pressed to characterize the property right of the consumer as

¹⁴ See discussion on the nature of those limitations in Part IV (c) below.

¹⁵ I refer to the list of limitations of what a consumer can do with a CD and DVD as being “open-ended”, simply as a corollary of the fact that the list of exclusive rights of copyright holders with respect to their copyrighted works are often drafted in open-ended terms: for instance, see s. 3 of the *CCA*, *supra* note 3. The fact that the limitations applying to property are open-ended is not unusual *per se* and is the case for other types of property limitations.

¹⁶ For example land: see J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 90.

¹⁷ J.P. Liu, “Copyright Law’s Theory of the Consumer” (2003) 44 *Boston College Law Review*, 397 at 412, refers to copyrighted works as not only being individual consumer goods but as also being social goods: “. . . to make sense of and interpret many copyrighted works meaningfully, it is sometimes necessary to communicate with others about the works; to share viewpoints, to debate, and to argue. Although some works can certainly be consumed alone, by an individual consumer, many works are suited to social consumption. The ability to communicate about copyrighted works enriches our understanding of those works and enables us to get much more out of them.”

¹⁸ L. Katz, “Exclusion and Exclusivity in Property Law” (2008) 58 *U of Toronto Law Journal* 275 at 277-278 whereby the author presents a narrower view of the power to exclude resulting from ownership, i.e., “What it means for ownership to be exclusive is just that owners are in a special position to set the agenda for a resource.”

full-blooded ownership,¹⁹ although a common assumption is that one is the full owner of her books, CDs and film DVDs to the same extent as she owns other chattels. The proper characterization is a matter of degree. The evolution of networks and reproduction technologies that are available to consumers, combined with the progressive expansion of copyright holders exclusive rights, are leading towards a greater encroachment on the open-ended powers, privileges and self-seekingness that the full-blooded ownership in the copy of a copyrighted work entails *a priori*.²⁰ More importantly, ownership itself is under threat with online distribution of copyrighted works, whereby the transfer in the ownership of the copies is being eliminated altogether and substituted with a licence of indefinite duration. Full-blooded ownership in a chattel or real property, is a hard wired concept that goes back to immemorial times.²¹ This *décalage* between property law and theory and what the consumer actually owns, may explain to a large extent the growing incredulity or disbelief that even the well-informed person has with respect to what she is entitled and not entitled to do with the copy of her music CD or film DVD. The meaning of ownership — as opposed to none — and the degree of privileges that it entails are even more critical questions with respect to digital copies of copyrighted works than they ever were before. For the purposes of our discussion, the questions need to be reframed as follows: with respect to the phenomenon of the eradication of copy ownership: are there freedoms (ranges of autonomous choices) which would not exist without the property in the copy? Without these freedoms, would the copyright system treat consumers fairly, and would it still be coherent with its instrumental justifications? In instances where the ownership in the copy subsists: what is the proper scope of ownership and how can it be legitimately limited by the exclusive rights of the copyright holder? The impact of various justificatory theories of private property on the copy of a copyrighted work, as well as the operation of copyright as a limitation on the consumer's ownership rights in the music CD or film DVD are considered next in an attempt to answer to these pressing questions.

(b) Justificatory Theories of (Intellectual) Property and the Copy of a Copyrighted Work

The justification of the ownership rights in the copy of a copyrighted work is under theorized, just as is the case for its nature.²² By contrast, literature abounds

¹⁹ The spectrum of ownership rights as described by Jim Harris spans from “mere property” to “full-blooded ownership”: see discussion in P.Chapdelaine, *supra* note 2 at 89-90.

²⁰ For a U.S. perspective, see J. Litman, “Lawful Personal Use” (2007) 85 Tex. L. Rev. 1871 at 1872.

²¹ J.W. Harris, *supra* note 16, at 4; in the context of the significance of our understanding of conventional property to justify the ownership of digital copies of copyrighted works, J.P. Liu, *supra* note 1 at 1300 states: “as a purely descriptive matter, the incidents of copy ownership can be explained as having arisen from conventional and deeply embedded understandings about what it means to own or to possess physical personal property.”

²² See discussion above in Part IV (a)

on the theoretical justifications of copyright.²³ As Jeremy Waldron noted when looking at copyright from the perspective of users and copiers: “We cannot unravel conundrums of moral justification unless we are willing to approach the issue even handedly from both sides.”²⁴ It is beyond the scope and purpose of this paper to provide a detailed review of the body of academic work on the theoretical justifications of property and more particularly of copyright.²⁵ Starting with the normative

²³ To list only a few, see: E. Hettinger, “Justifying Intellectual Property” (1989) 18 *Philosophy & Public Affairs*, 31, in D. Vaver, ed., *Intellectual Property Rights, Critical Concepts in Law* (London: Routledge, 2006) Vol. I, 97; J. Waldron, “From Authors to Copiers: Individual Rights & Social Values in Intellectual Property” (1993) 69 *Chicago-Kent Law Review*, 841, in D. Vaver, ed., *Intellectual Property Rights, Critical Concepts in Law* (London: Routledge, 2006) Vol. I, 114; W. Fisher, “Theories of Intellectual Property” in S.R. Munzer (ed) *New Essays in the legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 168; P. Drahos, *A Philosophy of Intellectual Property* (Aldeshot: Ashgate, 1996); S. Handa, *Copyright Law in Canada*, (Markham, Ontario: Butterworth Canada, 2002) at 59–134; C. Craig, “Locke, Labour and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright Law” (2002) 28 *Queen’s L.J.* 1; S.E. Trosow, “The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital” (2003) 16 *Can. J.L. & Juris.* 217; B. Fitzgerald, “Theoretical Underpinning of Intellectual Property: I am a Pragmatist But Theory is my Rhetoric” (2003) 16 *Can. J.L. & Juris.* 179; R. Bronaugh, P. Barton & A. Drassinower, “A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law” (2003) 16 *Can. J.L. & Juris.* 3; W. M. Landes, R.A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, Mass: Bellnap Press 2003); R.A. Posner, “The Law and Economics of Intellectual Property” (2002) *Daedalus* 5; R. Polk Wagner, “Information Wants to be Free, Intellectual Property and the Mythologies of Control” (2003) 103 *Columbia Law Review*, 995; M. A. Lemley, “Property, IP and Free Riding” (2005) *Texas L. Rev.* 1031; K.M. O’Regan, “Downloading Personhood: A Hegelian Theory of Copyright Law” (2009) 7 *Can. J. L. & Tech.* 1; G. D’Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Cheltenham:Edward Elgar, 2010) at 201-259.

²⁴ J. Waldron, *supra* note 23 at 114.

²⁵ Among the several justificatory theories of property that are not discussed here is the first occupancy theory, personhood constituting theory, for example as developed in the work of Margaret Jane Radin: M.J. Radin, “Property and Personhood” (1982) 34 *Stan. LR* 957, and sovereignty theories. With respect to copyright in particular, personality-based theories are frequently invoked to justify the creation of private property rights through copyright. (For a survey of theoretical justifications of intellectual property, in particular personality based theories see W. Fisher, *supra* note 23 at 171-172, 174 and 189–192.) They also include notions of freedom and autonomy. Personality-based theories have a strong resonance to justify the existence of moral rights. Their inalienability, gives strength to the argument that they are founded on personality-based theories: section 14.1(2) of the *CCA*, *supra* note 3 (for a contrary view, i.e., that the justification of moral rights in Canada is utilitarian, see S. Handa, *supra* note 23 at 128-130.) Personality-based theories can also be invoked to justify the exclusive right of the individual author to authorize the first publication of her work. Once the work is published, personhood arguments to justify copyright exclusive rights are less than certain (for example, see J. Waldron, *supra* note 23 at 137, where the author concludes that it is a mistake to generalize beyond the first right to publish that a copier’s actions

status of *a priori* open-ended freedoms reflected in the concept of ownership, and its ramifications to justify the scope of the ownership rights in copies of a copyrighted work, I will then look at two other prevailing underlying theories of property and copyright. First, a review of instrumental theories as they relate to copyright and the copy of a copyrighted work imposes itself on the basis that it is the most influential and prevailing justification for the existence of private property in general,²⁶ and copyright in particular.²⁷ Looking at the underlying instrumental theories to justify copyright provides a reference to assess the application of property rules to the ownership rights in the copy of a copyrighted work, to support or criticize the current scope of copyright, and to highlight important departures from its presumed prevailing theoretical justification. Second, a brief look at the fruits of one's labour theory — another influential natural law theoretical justification of copyright — and how it affects our conceptions of ownership in the copy of a copyrighted work, is also warranted. It points to the lack of a coherent and uniformly applied justification for the existence of copyright. On that terrain, seemingly contradictory justificatory theories are playing a central role in how the courts, lawmakers, scholars and interest groups characterize the exclusive rights conferred

compromise the liberty of the author whose work she is using. The author also responds to arguments made by Wendy Gordon on author's liberties to make a profit as not being the proper question. Rather, a distinction needs to be made between undermining the ability to make profit and liberty to make profit, *ibid.* at 136. See also W. Fisher, *supra* note 23 at 190-191.) The personhood justification for copyright is even less convincing when the copyright is owned by an institutional copyright holder such as a music label company or a Hollywood film producer. Thus, given the commercialization phase of, and institutional interests in most copyrighted works under the present case of study, personhood, freedom and autonomy justifications for the copyright holder's property right do not provide a convincing normative framework of study. Yet, this is not to say that freedom and flexibility of choice do not play a role on how copyright holders exercise their property rights. Copyright law operates on the basis that copyright holders are granted a lot of freedom and flexibility in how and when they can dispose of their property rights: section 13(4) of the *CCA*, *supra* note 3. See also the discussion on the self-seeking aspects of copyright in P. Chapdelaine, *supra* note 2 at 96-103. As it is difficult to invoke freedom and autonomy as a justification for copyright in the present case of study, the same freedom and autonomy cannot act as the normative base to "reserve" a scope of exclusive rights that is above and beyond the property — specific justice reason for copyright, which ought to be found elsewhere (See the discussion in section Part IV (b) (ii) below on the application of instrumentalists theories to justify copyright).

²⁶ J. Waldron, *The right to private property* (Clarendon Press: Oxford, 1988) at 3.

²⁷ Namely in the U.S., under the Constitution, Congress's power with respect to copyright (and patents) is "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries: The Constitution of the United States of America, Article I, Section 8; see also W. Fisher, *supra* note 23 at 169, 173. In other common law jurisdictions: S. Handa, *supra* note 23 at 75. See also J.W. Harris *supra* note 16 at 296 who sees the instrumental justification of creator- incentive as the only plausible justification for intellectual property.

to copyright holders.²⁸ The deliberate selection of these theoretical justifications of (intellectual) property is warranted by the scope of this paper.²⁹

(i) *The prima facie normative status of all ownership freedoms*

Central to Harris's theory of property as the incarnation of freedom and autonomous choice, is the ubiquitous manifestation in society of a wide spectrum of ownership interests. Ownership is an "organizing idea" under which all of these interests share, at various degrees, open-ended privileges, powers and self-seekingness.³⁰ To invoke freedom as a moral justification for maintaining a property institution, one needs to ask "whether inherent property freedoms are a necessary feature of the just society."³¹ The proposition is that quite apart from instrumental reasons, "property institutions by their very nature confer freedoms (ranges for autonomous choice) which would not exist without them; and for this reason no citizen is treated justly by his community unless it institutes or maintains a property institution."³² Hence, open-ended uses and privileges nurture freedoms which con-

²⁸ In *Théberge v. Galerie d'art du petit Champlain Inc.* [2002] 2 S.C.R. 336 (*Théberge*) at paragraph 30, the judgement for the majority seems to find the justifications of copyright on a combination instrumental and natural property rights in the fruits of one's labour theory grounds: "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)". In *BMG Canada v. John Doe*, [2005] F.C.J. No. 858, 2005 FCA 193, at paragraph 40 the Federal Court of Appeal adopts a utilitarian approach to copyright while resorting to Lockean fruits of one's labour theory language. For a U.S. perspective, see an analysis of the justificatory theories used in American copyright and intellectual property case law by W. Fisher, *supra* note 23, at 168; A. Mossoff, "Is copyright property?" (2005) 42 *San Diego Law Review*, 29, at 36 reviews how copyright law in the U.S. has been historically influenced mainly by utilitarianism and natural law theory, more specifically John Lockes' labor theory. The author points to earlier state copyright laws that were founded upon lockean justifications of property.

²⁹ In the case of music CDs and film DVDs, we are concerned with the proper justifications of copyright after the copyrighted work is commercialized. Indeed, when the consumer accesses the copyrighted work, the exclusive right to authorize first publication that is part of the bundle of copyright exclusive rights and give rise to distinct theoretical justifications, has already taken place. We are also dealing with multiple copies of a commoditized copyrighted work as opposed to instances where there exists only one original of the copyrighted work. This would be the case of a unique painting, a statue or an architectural work. In such cases, the interaction between the property rights of the owner of the physical copy and the author is likely to be greater than in the case of commercial copies of a music CD or a film DVD and raises distinct issues that are beyond the scope of this paper.

³⁰ J.W. Harris, *supra* note 16 at 63 and fol.

³¹ *Ibid.* at 231.

³² *Ibid.* at 230. J.O. Grunebaum, *Private Ownership* (London, New York: Routledge & Kegan Paul, 1987) bases the moral justification of ownership in autonomy and develops a theory of "autonomous ownership". Within that framework, he acknowledges how use controls of consumer goods violate autonomy: "Community control over con-

tribute to autonomous choice and *prima facie* justify property institutions.³³ Harris arrives at this conclusion by finding no convincing argument that any of the powers and privileges that the spectrum of ownership interests confers should be *a priori* excluded from the concept of ownership:³⁴ “the spectrum has evolved in human history and is available within property institutions as a means of conferring ranges of autonomous choice on individuals or groups.”³⁵ *A contrario*, if there were no property-specific justice reasons to support those freedoms, “countless day-to-day unquestioned assumptions about people being free to do what they like with their own things and their own money would turn out to be morally suspect.”³⁶ However, from the premise that there is no natural right to full-blooded ownership, none of these freedoms is sacrosanct, they may be overridden by justifiable property-limitation and expropriation rules, which are also widely observed and accepted in modern societies.³⁷ Although Harris’s theory of a right to property based on freedoms (and derived from Hegel’s theory of property)³⁸ unequivocally rejects a natural right to full-blooded ownership, it may rejoin what Waldron would call a “general right-based argument” to property (as opposed to a “special right-based argument”).³⁹

The *a priori* normative status of ownership freedoms is central to the justification of ownership in the copy of a copyrighted work in at least two cases: with respect to the threat to eradicate copy ownership altogether, and where copy ownership subsists, as a baseline to analyse what the proper scope of copy ownership freedoms should be. On the threat to eradicate ownership in digital copies, the questions to ask are: how can the property institution of copyright justify to *a priori* exclude the powers and privileges that relate to the ownership in the copy of a copyrighted work? Is it just to allow a shift to take place from day-to-day unquestioned freedoms (*albeit* limited) by consumers as copy owners of a copyrighted work, to countless suspicion, monitoring and control by the copyright holder over the fate of their copyrighted work? Given the ubiquity and centrality of ownership

sumer goods, either in the form of what goods are produced or control in the form of what uses consumer products may be put to, would violate autonomy”, *ibid.* at 183.

³³ *Ibid.* at 231.

³⁴ *Ibid.* at 275.

³⁵ *Ibid.*

³⁶ *Ibid.* at 65.

³⁷ *Ibid.* at 275.

³⁸ Harris develops his property right based argument on freedom mainly from the analysis of Hegel’s theory: J.W. Harris, *supra* note 16 at 230 and fol.

³⁹ Waldron defines the two concepts as follows: “A special-right-based argument . . . is an argument which takes an interest to have this importance not in itself but on account of the occurrence of some contingent event or transaction. A general-right-based argument . . . is one which does not take the importance of such an interest to depend on the occurrence of some contingent event or transaction, but attributes that importance to the interest itself, in virtue of its qualitative character.”: J. Waldron, *supra* note 26 at 116. Waldron’s theory, based on Hegel, supports a general-right-based argument to property. He uses as an example of a special-right-based argument, John Locke’s natural right theory of property that is based on labour-desert type of arguments.

as a vehicle to infinite and repetitive minuscule exercises of freedom in all spheres of consumption and modern life, allowing such a shift to take place through copyright holders' change of business practices, without any intervention from the authority from which the property right was created in the first place (i.e., the state, through copyright statutes) is at best suspicious. Copyright holders justify their increased control on the need to combat piracy, which is a legitimate concern. However, how much burden can copyright holders reasonably ask consumers to bear and how far can they impede on their legitimate freedom on that basis? More fundamentally, are these not too fundamental questions to be left to the will of copyright holders alone? The institution of intellectual property, as created by various statutes, is not self-justifying.⁴⁰ *A fortiori*, any further material limitations on consumers' and other users' freedoms should not be left to the will of the private interests of copyright holders alone, without the democratic process taking its course. However, given the current void in the copyright system on the status of the copy of a copyrighted work and the general legal uncertainty that results therefrom, copyright holders are able to create these material changes and to effectively broaden the scope of their exclusive rights. In parallel to copyright holders exhorting more power and control over their copyrighted works, in cases where ownership in the copy of the copyrighted work subsists, what is the normative force of these increasingly open-ended freedoms of consumers, as new technologies empower them more than ever before in how they access and experience copyrighted works? The *a priori* normative status of ownership freedoms brings a substantive argument to support and understand ownership in the copy of a copyrighted work, both for its scope and its subsistence, and to situate it vis-à-vis the private property regime that is created by copyright.⁴¹ It predates the existence of copyright and as such, it is one of the underlying assumptions, although not explicit, upon which copyright laws were created.⁴²

Related to the normative value of freedom is privacy, also relevant in the debate revolving around copyright holders' controls over the copies of their copy-

⁴⁰ As Waldron puts it: "The fact is however, that whether or not we speak of a burden of proof, an institution like intellectual property is not self-justifying; we owe a justification to anyone who finds that he can move less freely than he would in the absence of the institution", J. Waldron, *supra* note 23 at 146.

⁴¹ J.P. Liu, *supra* note 17 at 406-411 invokes autonomy as one of the aspirations of consumers of copyrighted works, e.g., "freedom in choosing when, how, and under what circumstances to consume a copyrighted work". The Author acknowledges that the U.S. copyright law already recognizes a fair degree of autonomy of the consumer among others through the application of the fair use doctrine. For Liu, "the sale of a copy represents a fixed bundle of entitlements giving the purchaser the ability to exercise a good deal of autonomy in consumption." *Ibid.*, at 408. More generally, on the fact that autonomy requires a wide range of rights of title over consumer goods, See, J.O. Grunenbaum, *supra* note 32 at 183.

⁴² J.P. Liu, *supra* note 1 at 1301 reflects on the place of the incidents of copy ownership within the copyright regime as follows: "Copyright law, then, does not so much expressly build in such incidents of copy ownership, as it accepts and assumes such incidents as given. That is, under this view, understandings about physical copy ownership antedate the relatively more recent development of copyright law."

righted works. Waldron (who also develops a general right to property derived from Hegel's theory of freedom and property)⁴³ arrives at a similar conclusion as Harris's *a priori* normative force of all ownership freedoms on the basis of the right to privacy.⁴⁴ For Waldron, if every resource was publicly controlled, every use on that resource by an individual would be an "other-regarding" action; we would be accountable to all and this would be untenable.⁴⁵ This makes him conclude that: "there must be a realm of private freedom somewhere for each individual — an area where he can make decisions about what to do and how to do it, justifying these decisions if at all only to himself."⁴⁶ Perhaps that it is so, precisely because privacy derives from the values of autonomy and freedom. It is a specific expectation, in certain circumstances, of a sacred space where these values can optimally flourish. Yet, for Harris, privacy has a distinct meaning from freedom as it specifically relates to justifying private property. For Harris, privacy can be the "shell" of a natural right to private property⁴⁷ in very limited circumstances, when the intimate relationship that arises between a person and a thing is such that a just treatment would entail recognition of an ownership right in the resource.⁴⁸ One example of such natural right would be the exclusive powers of an author on the right to authorize the first publication of her work on the basis of privacy.⁴⁹

Privacy considerations (just like freedom and autonomous choice) have applications that go above and beyond justifying the existence of private property rights in a resource. It is one thing to say that on the basis on privacy, the state will not enter the home of a consumer or install cameras in public spaces to monitor her uses of copyrighted materials.⁵⁰ This is a separate consideration from the constitutive and justificatory nature of the scope of exclusive rights and powers that she has in the copy of a copyrighted work that she owns. Although privacy is relevant to this consumer to preserve her right to non intrusion in a general context, it is not necessarily so to support the scope of her ownership rights in the copy of the copyrighted work. If this were to be the case, she ought to be granted privileges and powers on the copy of the copyrighted work through ownership because not to do

⁴³ J. Waldron, *supra* note 26 at 343 and fol.

⁴⁴ J. Waldron, *supra* note 26 at 295.

⁴⁵ J. Waldron, *supra* note 26 at 295 [citing J.S. Mill; Mill, *On Liberty*, Ch. 1].

⁴⁶ *Ibid.*

⁴⁷ By "shell", Harris means that the extent of the natural right cannot be determined until "the problematic balance between the requirement of a range of specially protected autonomous choice and necessary intervention by the community to prevent abuse" has been exercised: J.W. Harris, *supra* note 16 at 227-228.

⁴⁸ *Ibid.* at 224.

⁴⁹ *Millard v. Taylor*, (1769), 4 Burr. 2303, at 2379; J.W. Harris, *supra* note 16 at 225; S. Handa, *supra* note 23.

⁵⁰ For instance, privacy is invoked as one of the justifications for the private copying regime that exists in many European jurisdictions, which allows consumers to make a limited number of copies of defined copyrighted works without infringing copyright, and which provides a levy system to compensate authors: N. Helberger & P.B. Hugenholtz, "No place like home for making a copy, private copying in European copyright law and consumer law" (2007) 22 Berkeley Tech. L.J. 1061, at 1068-1072.

so would violate the intimate relationship that she has with the copyrighted work.⁵¹ Given that the commercial copy of the copyrighted work is not a creation of the consumer, and is often by nature, although not necessarily, a work that is communicated and shared with others, it seems that privacy, as a specific subset of freedoms and autonomous choice is not the relevant justification for the existence of ownership in the copy of a copyrighted work. However, privacy could be a justification for ownership in the “mini” derivative works or compilations of works that the consumer may create from a commercial copy of a copyrighted work, certainly with respect to the right to authorize its disclosure through the exclusive right to authorize first publication. Other than in specific acts of creation, a better characterization of the relation between privacy and ownership in the copy of a copyrighted work could be that the right of privacy can act in certain circumstances as an “independent property-prohibition rule” that would set limits to the exclusionary powers (and related enforcement rights) of the copyright holder on the consumer.⁵² One illustration of the application of privacy rights to limit the exclusionary powers conferred by copyright is *BMG Canada Inc. v. John Doe*.⁵³ In that case, the plaintiffs, various music providers in Canada, sought an order to compel various Internet service providers to disclose the names of the customers who used specific IP addresses at times that were material to the proceedings.⁵⁴ The Federal Court dismissed the order on the basis that the plaintiffs did not meet the “equitable bill of discovery requirements”. On appeal, the resolution of the issue revolved around the proper test to balance the personal property rights of the plaintiff as copyright holders and the privacy of Internet service providers’ consumers, which the Federal Court of Appeal described as follows: “Thus, in my view, in cases where plaintiffs show that they have a *bona fide* claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action. However, caution must be exercised by the courts in ordering such disclosure, to make sure that privacy rights are invaded in the most minimal way.”⁵⁵ The Federal Court of Appeal dismissed the appeal, but without prejudice to the plaintiffs’ right to commence a further application for disclosure of the identity of the “users”, taking into account the reasons given by the Federal Court of Appeal.⁵⁶ The plaintiffs later decided not to pursue their claims.

The *a priori* normative status of ownership freedoms, and incidentally and in specific cases of consumer creations, the right to privacy, are justifications that are distinct of other instrumental justifications for copy ownership and copyright, which I explore further below.

⁵¹ Drawing from the analysis of Harris on the relationship between privacy and moral justifications for private property: J.W. Harris, *supra* note 16 at 224.

⁵² See the discussion of independent property prohibition rules in P. Chapdelaine, *supra* note 2 at 90-93.

⁵³ *BMG Canada Inc. v. John Doe*, 2004 CF 488, 2004 FC 488, [2004] 3 F.C.R. 241 (F.C.); on appeal: *BMG Canada Inc. v. John Doe*, *supra* note 28.

⁵⁴ *BMG Canada Inc. v. John Doe* (F.C.), *supra* note 53 at paragraph 9.

⁵⁵ *BMG Canada Inc. v. John Doe* (F.C.A.) *supra* note 28 at paragraph 42.

⁵⁶ *Ibid.*, at paragraph 55.

(ii) Instrumental justifications of (intellectual) property

Instrumental justifications of property and copyright can complement and support the justification of copy ownership that is based on the *a priori* normative status of ownership freedoms, as previously discussed. Two instrumental justifications are particularly relevant to the discussion around copy ownership of copyrighted works. The first one is the incentive to create and to disseminate works i.e., the extent to which this prevailing justification for the existence of copyright also justifies copy ownership in copyrighted works. Concepts of freedom and autonomy are also being explored within the context of this creator-incentive justification, but from an instrumental perspective, i.e., certain behaviours that ought to be promoted within the framework of copyright laws. The second one is an economic efficiency argument that is generally invoked to support ownership in chattels; that is applied here more specifically to copies of copyrighted works.

Copyright in Canada, as a creation of statute⁵⁷ is justified by instrumental justifications i.e., balancing the promotion of the public interest in encouraging the creation and the dissemination of copyrighted works and, obtaining a just reward for the creator.⁵⁸ At a broader level and as acknowledged by the Supreme Court, the incentive for the creation of works is not only to benefit creators, but obviously, the readers, listeners and viewers of such works. However, without a greater articulation at the individual level, the overt public policy component that justifies the existence of copyright may be of remote assistance only to clarify the proper scope of ownership rights in the copy of a copyrighted work.⁵⁹ In the U.S., the Constitution is silent on the need to reward authors. Congress's power with respect to copyright (and patents) is "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."⁶⁰ For Harris, the creator-incentives instrument is the sole

⁵⁷ *Compo Co. v. Blue Crest Music Inc.* [1980] 1 S.C.R. 357, at paragraph 23. See also discussion on nature of copyright in P.Chapdelaine, *supra* note 2 at 96-103.

⁵⁸ *Théberge*, *supra* note 28 at paragraph 30. Arguably, the reference by the Supreme Court to a need to reward authors who lean towards natural property rights in the fruits of one's labour justificatory arguments (fruits of one's labour theories are discussed briefly below in the present section); In *BMG Canada v. John Doe*, *supra* note 28 at paragraph 40, the Federal Court of Appeal described the *raison d'être* of Canadian copyright law in instrumental terms: "Copyright law provides incentives for innovators — artists, musicians, inventors, writers, performers and marketers — to create. It is designed to ensure that ideas are expressed and developed instead of remaining dormant. Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished." Instrumentalism, (in particular, utilitarianism) is the most frequently invoked theoretical justification for western copyright law: S. Handa, *supra* note 23 at 75. For a review of recent Supreme Court of Canada copyright cases confirming an instrumentalist approach to copyright law, see D. Gervais, "The Purpose of Copyright Law in Canada" (2005) 2 U. Ottawa L. & Tech. J. 315.

⁵⁹ J. Waldron, *supra* note 23 at 117.

⁶⁰ The Constitution of the United States of America, Article I, Section 8.

plausible justification for creating private property through copyright.⁶¹

The biggest flaw in the instrumental justification of copyright to incent creators and the dissemination of works resides in its inconsistency,⁶² lack of persuasiveness and difficulty of application.⁶³ How much property rights must be conferred on copyright holders for them to be incented to create? Is property the *sine qua none* condition of creation or are there not other ways to incent creations?⁶⁴ Is there not sufficient evidence of innovation and creativity taking place without a motive or gain or where no intellectual property rights are being conferred? What type of creativity and innovation should be promoted to maximize net social welfare and is copyright law preoccupied at all by this question?⁶⁵ Perhaps the greatest deception of all with the instrumental balancing act between the incentive to create and disseminate works and a fair reward to the creator, to justify copyright, is its failure to create the right level of incentive by paying as much regard to the effect of such private property on the recipients or “intended beneficiaries” of copyrighted works, as it does to the scope of the rights of copyright holders. The U.S. and to a lesser extent Canada and other jurisdictions throughout the world, have in recent years, progressively gone through an unprecedented expansion of the rights of copyright holders.⁶⁶ At the same time, these laws continue to offer a limited and frag-

⁶¹ J.W. Harris, *supra* note 16 at 296 and fol.

⁶² C. Craig, *supra* note 23, D. Vaver, “Canada’s Intellectual Property Framework: A Comparative Overview”, (2004) 17 I.P.J. 125, at 127, notes how in spite of the instrumental justification of copyright in the U.S. Constitution, in practice, in the U.S. and also in Canada, natural law Lockean approaches permeate throughout copyright law making; see also discussion further below in the present section.

⁶³ For a review and critique of utilitarian theories as they relate to intellectual property, see E.C. Hettinger, *supra* note 23 at 107–110; W. Fisher, *supra* note 23 at 169, 173–174 and 177–184.

⁶⁴ See E.C. Hettinger, *supra* note 23 at 109.

⁶⁵ Copyright protects “original” works in the sense of artistic, dramatic, literary or musical works “originating” from its creator and is not concerned with the artistic quality or novelty or contribution of the work to society. The threshold for a work to receive copyright protection is fairly low as it was recently confirmed by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339, 2004 SCC 13, at paragraphs 14–16.

⁶⁶ This is illustrated both by an expansion of the nature of subject matter being protected by copyright, through the addition of communication signals, computer programs, performers’ performances and sound recordings. This is also illustrated by an expansion in the scope of exclusive rights, for instance, through the addition of rental rights for computer programs and cinematographic works through the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (TRIPS), Article 11 (TRIPS has 153 contracting parties, including Canada, as per membership to the World Trade Organization: the WTO official website: www.wto.org last visited in May 2011) and the introduction of technological protection measures, which aim at strengthening the exclusive rights of copyright holders on digital works: Article 11 of the WIPO Copyright Treaty (WCT), opened for signature Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) and Article 18 of WIPO Performances and Phonograms Treaty (WPPT), opened for signa-

mented articulation of the rights of the intended beneficiaries of the copyrighted works.

Setting aside the difficulties in the application of instrumental justifications to copyright, the assumption is that the progress of science and the promotion of creation are to serve solely as a justification for the property rights of copyright holders. This assumption alone, may explain in great part the expansion of copyright to a point where it can become counter productive to its initial stated goals of inciting creations and the dissemination of works.⁶⁷ What needs to be further explored, is the extent to which the incentive to create also justifies the existence and scope of the property rights in the copy of a copyrighted work.⁶⁸ Modern societies generally encourage innovation and creativity.⁶⁹ Among others, this has led to an explosion of communication networks, an unprecedented dissemination of copyrighted works and a broad array of technological information access and reproduction tools. By using these technological tools, consumers have the potential of experiencing copyrighted works in ways that were, not so long ago, unthinkable, and in volumes that are unprecedented. If the instrumental justification for the creation of private pro-

ture Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997). The WCT has 89 contracting parties and the WPPT has 88 contracting parties (the WIPO official website: www.wipo.org, last visited in May 2011. Canada has signed but has not yet ratified the WCT and the WPPT). From a U.S. perspective, J. Litman, *supra* note 20 at 1872, cites various recent legislative changes that have lead to progressively expanding copyright holders exclusive rights and restraining lawful personal uses of copyrighted material. See also the discussion of copyright expansionism in this section further below.

⁶⁷ Michael Heller refers to over protection of intellectual property leading to the “tragedy of the anti-commons”, see M. Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, (New York: Basic Books, 2008); P.S. Menell, *supra* note 4 at 744, whereby the author makes the argument that treating intellectual property too much like tangible real property, can lead to an underutilisation of intellectual property, while exclusionary powers associated with tangible real property are meant to avoid an over utilization of the resources (i.e., the “tragedy of the commons”).

⁶⁸ J.P. Liu looks at the balance between incentive to create and access as a justification to copy ownership of copyrighted work: J.P. Liu, *supra* note 1 at 1309 and fol. Neva Elkin-Koren also explores this idea. For her, “What we call “consumption” of informational works is never a passive behavior — it is a conversation, or a social activity of interaction. When a reader engages with an artistic expression, she contributes to its meaning. Thus, consumption of informational works, even for one’s sole benefit, promotes copyright goals. . . . This reality of exchange and interaction suggests that in order to promote creativity it is insufficient to simply provide incentives to authors to produce. It is also necessary to expand access to creative works. Access, in this sense, becomes a central means for promoting production, creation, and progress.”: N.Elkin-Koren, “Making Room for Consumers Under the DMCA” (2007) 22 Berkley Technology Law Journal, 1119 at 1141.

⁶⁹ As this is reflected among others in a utilitarian approach to copyright. For Sunny Handa, the reason why utilitarian theories have been more prevalent than creator natural rights based theories in Anglo-American traditions of copyright is consistent with emphasis on knowledge and progress in the said copyright traditions: S. Handa, *supra* note 23 at 118.

erty rights through copyright is to provide incentives to create, then the copyright system needs to be equally concerned with the extent to which creative works can be accessed and experienced by consumers, as it is with ensuring proper incentives to the copyright holder through the establishment of exclusive rights. Why stimulate creations if it is not for the benefit of those who will access them?⁷⁰ As Neva Elkin-Koren argues, in a U.S. context: “. . .to promote creativity it is insufficient to provide incentives to authors by empowering them to exclude second-comers. It is also inappropriate to exempt only transformative uses of copyrighted materials. Promoting creativity requires expanding access to creative works. Copyright law must therefore expand the balance it strikes between authors and users to cover not only subsequent authors but also simply consumers of cultural goods who might become authors in the future.”⁷¹ For Elkin-Koren, consumers are no less means of production than authors.⁷² Thus, from that perspective, the justification of copyright based on the incentive to create and to disseminate works also needs to weigh in the optimal access to consumers and users that can further support that goal at a broader level and on a longer term basis. In that light, the information age offers an unprecedented opportunity to reconsider the role of competing property rights in the copy of a copyrighted work, as part of the overall property design of copyright. Balancing the public interest incentive to create and disseminate works, while fairly rewarding the creator also means balancing those interests on an immediate term — i.e., the property rights of the creator — and on a longer term basis — i.e., incentivizing consumers to be culturally engaged and innovative. Otherwise, it runs the risk of taking copyright out of its instrumental justification orbit.

One mean to incent consumers to be culturally engaged and promote innovation with respect to copies of copyrighted works that they access is to protect a certain level of freedom and autonomy in how they experience them.⁷³ Ownership is one important vehicle for the exercise of freedom and autonomy, which includes for instance the ability to choose how and when and with whom a consumer will enjoy the copyrighted work. In that sense, it allows communication and self-expression in respect of the copyrighted work.⁷⁴ Here, freedom and autonomy are promoted to perfect the overarching goals of copyright as instruments rather than substantive values. Elkin-Koren argues that the consumption of copyrighted works

⁷⁰ J. Litman, *supra* note 20 at 1879 refers to “copyright liberties”: i.e., the fact that “copyright law was designed to maximize the opportunities for non exploitative enjoyment of copyrighted works in order to encourage reading, listening, watching, and their cousins”. The author argues that they are “both deeply embedded in copyright’s design and crucial to its promotion of the “Progress of Science.””

⁷¹ N. Elkin-Koren, *supra* note 68 at 1141.

⁷² *Ibid.*, see also J. Litman, *supra* note 20 at 1880.

⁷³ J.P. Liu, *supra* note 17 at 406–420.; N. Elkin-Koren, *supra* note 68 at 1143, refers to a “breathing space” which may include “the freedom to choose the work one wishes to consume or any part of it (and, likewise, the freedom to ignore or refuse other parts); the freedom to choose where to experience the work and how; the freedom to experience the work in privacy without the fear of surveillance; and the freedom to make one’s own reading of the work, to experiment with it, and to share that reading.”

⁷⁴ J.P. Liu, *supra* note 17 at 406–411; N. Elkin-Koren, *supra* note 68 at 1143; J. Litman, *supra* note 20 at 1879.

may require even greater protection than other consumptive goods to preserve essential autonomy and freedoms: “Cultural artifacts are not simply useful commodities. While they often have an entertainment value that could be quantified, they also possess a communicative value and a symbolic significance. They engage our minds in a more direct and intimate way than do mundane commodities and, therefore, expose consumers to a higher risk of deeper and more intrusive restrictions of freedom. This particular vulnerability of information consumers is often overlooked.”⁷⁵ If we maintain the current passive approach to the definition of the property rights in the copy of a copyrighted work and leave it to copyright as currently framed and interpreted, and to the will of the copyright holder through her exclusive authorization rights, we are effectively weakening expectations with respect to the participation that consumers ought to play in a modern, cultural and innovative society, and in turn, shaping their own perception of the same.⁷⁶ Thus, from that perspective, a creator — work dissemination — incentive instrumental justification of copyright, that takes into account consumer and other users’ interests, also leads to the need to preserve a certain level of freedom and autonomy of copy owners.

In parallel to the incentive to create and to disseminate copyrighted works as a justification for the ownership in the copy of a copyrighted work, there is also a wide-spread economic efficiency argument that generally supports maintaining a property institution with respect to chattels and other real property. The argument is that by doing so, the state delegates “use-channelling and use-policing functions” to individual owners and takes the burden off the community for such functions.⁷⁷ Conversely, a society that does not support property institutions would offer access to resources in a communal, controlled, monitored and policed use environment.⁷⁸ Efficiency is not an objective of copyright design or justification for the existence or limitation of copy ownership that exists in isolation of other substantive values or instrumental goals. Nevertheless, it is often an important indicator that can lend support to substantive values or point to important difficulties in their promotion and implementation. In the context of copyright and copy ownership, it can signal the proper scope of property rights that should be maintained to incent creations on the one hand, and to *a priori* value and allow open-ended freedom powers and privileges of copy ownership on the other.⁷⁹ In the “hand to hand” exchange of the physical copy of a copyrighted work such as a music CD or film DVD, the consumer is generally aware of her privileges and powers as owner of the copy of the copyrighted work and looks after her own interests to put her ownership rights to

⁷⁵ N. Elkin-Koren, *supra* note 68 at 1136-1137.

⁷⁶ N. Elkin-Koren, *supra* note 68 at 1143.

⁷⁷ J.W. Harris, *supra* note 16 at 242.

⁷⁸ *Ibid.*

⁷⁹ In several European jurisdictions, the economic argument, or the realization of a market failure is invoked to justify the private copying regime, together with other justifications such as privacy, freedom of expression of consumers, justice to authors through the automatic levy remuneration system. Under the private copying regime, consumers are allowed to make a limited number of copies of defined copyrighted works without infringing copyright. The private copying regime provides for a levy system to compensate authors: N. Helberger & P.B. Hugenholtz, *supra* note 50 at 1068-1072.

the most efficient and productive use (e.g., unlimited reading, listening, viewing, sharing, lending, donating, second hand sale, etc.). Here, the economic efficiency argument supports the *a priori* normative status of ownership freedoms previously discussed. It is the wide spread and well established concept of ownership that creates the efficiency: copyright holders and consumers know what consumers can do with their copies because they are owners, without the need to resort to elaborate lists of terms and conditions of use.⁸⁰ In an online distribution environment, at least two factors affect the applicability of the economic efficiency argument. First, the potential freedoms of use by consumers are growing exponentially by new network access, copying and sharing capabilities,⁸¹ with the result that consumers have a new understanding about ownership in the copy of a copyrighted work. Their understanding does not necessarily corroborate what copyright law (and the contractual terms dictated by copyright holders) allow them to do which means important information costs for consumers.⁸² In that context, the traditional effect of property as one that brings reasonable certainty and efficiency is shaken at best.⁸³ Second, the traditional economic efficiency justification for maintaining ownership in chattels, can be invoked to counter the growing commercial practice of copyright holders to eradicate copy ownership altogether. By maintaining traditional ownership in the copy of copyrighted works, copyright holders lower their production and marketing costs (i.e., drafting, implementing and maintaining convoluted terms and conditions) as well as their enforcement costs. In fact, by eradicating copy ownership, copyright holders are creating an environment whereby every act is subject to potential scrutiny and varies according to the terms and conditions that the copyright holder dictates, as opposed to the common understanding of ownership. This seems to run counter to basic understandings about transaction efficiency. Over time, it is possible, although speculative, that efficiency would be increased — and even brought to a similar level as traditional common understandings of copy ownership — by consumers becoming accustomed to new access rights to copies and to the fact that they no longer own it. This would require *inter alia* that all copyright holders' terms and conditions would become substantially similar. In the meantime, and generally, the implementation and enforcement costs of this environment tend to be underestimated.⁸⁴ Moreover, the cost of use channelling and use policing

⁸⁰ M. Seringhaus, "E-Book Transactions: Amazon "Kindles" The Copy Ownership Debate" (2009) 12 Yale J. L. & Tech. 147 at 171, argues that copy ownership of copyrighted materials need to be maintained on that basis.

⁸¹ This includes all capabilities made available through the digitization of works and the accessibility that the Internet provides: MP3 devices, Facebook™ Youtube™ are examples of widespread capabilities.

⁸² M. Seringhaus, *supra* note 80; E.M. Penalver & S.K. Katyal, *Property Outlaws* (New Haven and London: Yale University Press, 2010) at 40 refer generally to intellectual property's "unpredictability", engendering huge information costs for consumers, and pointing generally to inefficiency and counter productivity of intellectual property's private property regime.

⁸³ I refer here to a general understanding and expectations of open-ended powers and privilege that surround ownership, that does not need to rely upon a list of terms and conditions of use, transfer, etc.

⁸⁴ J.P. Liu, *supra* note 1 at 1321.

functions is not to be borne by private copyright holders alone, it also becomes the burden of society, through other private intermediaries,⁸⁵ the court system and police authority involvement to enforce the copyright holder trespassory rights. This said, the efficiency argument to support the subsistence of copy ownership only has value to the extent that we can address the first issue adequately, namely the modified understanding that consumers have about owning digital copies of copyrighted works. Until we are willing to accept the significance of the profound shift that is taking place in the basic understanding of copy ownership in a digital environment,⁸⁶ rather than resisting it, and make the proper adjustments, the confusion that prevails over the meaning of copy ownership remains an important obstacle to transaction efficiency.

(iii) Natural property rights in the fruits of one's labour

Property theories justifying natural rights in the fruits of one's labour are of little relevance to ascertain the proper scope of ownership rights in the copy of a copyrighted work.⁸⁷ These theories focus on the entitlements to creations while the consumption of copyrighted works does not necessarily or effectively entail the immediate creation of anything ideational or corporeal.⁸⁸ Without necessarily being a passive act, the consumer of our study essentially consumes or "absorbs" the copyrighted work through the copy that she owns. Nevertheless, natural rights' theories of property should be mentioned briefly for the profound resonance they bear on the justification of copyright,⁸⁹ which, as argued in this paper, is a significant property limitation to the consumers' ownership rights.⁹⁰

The question of whether a person can claim a natural right to property, is whether she has a moral claim to a resource, independent of social convention or positive legal provisions, so that others must confer or be subject to ownership use-privileges and control — powers over that resource.⁹¹ Frequently invoked as a justification of copyright, it has been the object of important criticism. Among them,

⁸⁵ Such as the resources that need to be deployed by Internet service providers, as one example.

⁸⁶ On the idea of paying attention to certain manifestations of "property outlaws", the main thesis of E.M. Penalver & S.K. Katyal, *supra* note 82, is to look at the effect that property disobedience has had in recent history on the evolution of the concept of property. Such movements are an essential component to property's dynamism, evolution and longevity.

⁸⁷ J.P. Liu, *supra* note 1 at 1326 comes at the same conclusion by looking at various justificatory theories that can support the ownership in the copy of a copyrighted work.

⁸⁸ For a discussion on the various types of consumers of copyrighted works, from passive to active authors, and on the type of consumer that law makers should focus on, see J.P. Liu, *supra* note 17; N. Elkin-Koren, *supra* note 68.

⁸⁹ E. Hettinger, *supra* note 23 at 100, refers the entitlement to the fruits of one's labour as perhaps the "most powerful intuition supporting property rights" including with respect to products of the mind.

⁹⁰ See particular in Part IV (c)

⁹¹ J.W. Harris, *supra* note 16 at 182.

its applicability to intangible property has been questioned,⁹² as well as the difficulty in applying proportionality between the labour contribution and the exclusive rights conferred by copyright.⁹³ Other criticisms include the argument that exclusive property rights do not “naturally” flow as the sole reward or recognition for one’s labour⁹⁴ and that the right to use and possess one’s labour and the right to profit from it by selling it in the market place derive from distinct justifications.⁹⁵

Arguments that copyright derives from a natural right to the fruits of one’s labour are “officially” put to rest in Canada⁹⁶ and also in the U.S.⁹⁷ Yet, regardless of the existence or not of a natural right to the fruits of one’s labour from which property rights derive, fundamental aspects of copyright law, such as the low threshold of originality required for a work to be protected by copyright, seem to fit more nicely with the fruits of one’s labour theory⁹⁸ than with instrumental justifications for copyright.⁹⁹ Moreover, case law abounds with natural property rights in the fruits of one’s labour derived analyses for rewarding copyright holders for the uses of their work, or for expanding the scope of copyright property rights.¹⁰⁰

There is a “natural” appeal to apply the fruits of ones’ labour natural law the-

⁹² W. Fisher, *supra* note 23 at 184–189.

⁹³ E. Hettinger, *supra* note 23 at 101, 104.

⁹⁴ One of the mistakes is to conflate the issue of deserving a reward with what the reward should be: E. Hettinger, *supra* note 23 at 103. The type of reward is in fact dictated by social convention and is not as such a natural right: J.W. Harris, *supra* note 16 at 207.

⁹⁵ For instance, Edward Hettinger, *supra* note 23 at 100–103 argues that while there may be a natural right in possessing and using one’s labour, there is no natural right in selling it and making a profit from it in the market place, which is largely a socially created phenomenon.

⁹⁶ The Supreme Court of Canada declaration in *Compo Co. v. Blue Crest Music Inc.*, *supra* note 57 at paragraph 23, considerably weakens the strength of any argument that copyright derives from natural law: “copyright law is neither tort law nor property law in classification, but is statutory law. It 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.” (subsequently applied in numerous Supreme Court Judgments: see *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 at paragraph 82).

⁹⁷ The Constitution of the United States of America, Article I, Section 8, stipulates that Congress’s power in the area of Copyright (and patents) is to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

⁹⁸ In *CCH*, *supra* note 65 at paragraph 15, the Supreme Court of Canada referred to how the various existing legal traditions on the applicable threshold of originality in copyright law derive from natural law concepts based on the fruits of one’s labour.

⁹⁹ Under which there should arguably be a selection in the types of works that society wants to incent to create and disseminate, and hence a higher threshold in the types of works that deserve copyright protection.

¹⁰⁰ From a Canadian perspective, see C. Craig, *supra* note 23. From a U.S. perspective, W. Fisher, *supra* note 23 at 174, where the author cites examples from law reform debates, U.S. Supreme Court decisions as well as lower court decisions. In *Théberge*, *supra*

ory to copyright, one of which is its disconcerting facility of conceptualization and of application: everything an author creates she owns. Copyright law is then justified to provide the trespassory powers that concretize that ownership. In fact, this is a much simpler proposition than trying to establish the extent of the scope of copyright insofar as it incents creations and dissemination of works, i.e., under the instrumental justification of copyright, which as a result, has its own share of conceptual difficulties.¹⁰¹

The way in which the fruits of one's labour theory has been applied to copyright is harmful to the assertion of clearer property rights in the copy of a copyrighted work in at least two respects. First, under that theory, the competing claims are unequivocally framed as labourer (i.e., of the copyright holder) versus idler and free rider (i.e., the consumer).¹⁰² The latter cannot reap where she has not sown is the premise.¹⁰³ The labourer is deemed to be *a priori* meritorious (even if copyright law does not impose any requirement of artistic quality or novelty for a work to be protected). This places her on a pedestal,¹⁰⁴ and any claim of unauthorized use of the labourer's work is from that stand point, *a priori* suspicious. Second, the fruits of one's labour natural law theory, if not properly applied and qualified, for instance by Locke's famous proviso,¹⁰⁵ can effectively lead to an "over propertization" of copyright, which in turn acts as an ever expanding limitation on the ownership rights in the copy of the copyright, to the point that the property right in the copy of the copyrighted work is being hollowed out of any meaningful substance.¹⁰⁶

To sum up on the justificatory theories of (intellectual) property and their impact on ascertaining the existence and proper scope of copy ownership, the

note 28, the Supreme Court of Canada also seems to invoke the fruits of one's labour theory as a justification for copyright, as I discuss further below in this section.

¹⁰¹ As discussed in Part IV (b) (ii) of this paper.

¹⁰² On the emphasis that is placed by policy and law makers on the concept of "free riding" and its harmful effects, see M.A. Lemley, *supra* note 23.

¹⁰³ Even in instances where the copyright holder can stop the user where arguably, the copyright holder has not sown either, for example by holding the exclusive right to authorize the translation of a literary work or other conversions of a work from one expressive form to another: s. 3 of the *CCA*, *supra* note 3.

¹⁰⁴ C. Craig, *supra* note 23 at 58, develops a similar argument on how the application of labour-desert derived analysis to copyright law begins the reasoning from the copyright holder standpoint, and how this directly impacts on the outcome.

¹⁰⁵ W. Fisher, *supra* note 23 at 170-171 summarizes Locke's proviso, namely "the proposition that a person may legitimately acquire property rights by mixing his labor with resources held "in common" only if, after the acquisition, "there is enough and as good left in common for others"[citing John Locke, *Two Treatises of Government* (P. Laslett, ed., Cambridge: Cambridge University Press, 1970), Second Treatise, sec. 27] and their application in the case of intellectual property, [citing Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 178-182].

¹⁰⁶ A more nuanced application of Locke's natural law justification of property to intellectual property that fully accounts for Locke's proviso may not lead to such expansionist tendencies. On the application of Locke's natural law theory to copyright freelancers and publishers, see G. D'Agostino, *supra* note 23 at 205-219.

Théberge case refers to each of the justificatory theories discussed above i.e., the underlying normative value of copy ownership, the need to incent creations and disseminations of works (with long-term interests in mind so that there are no undue hindrances to incorporation and embellishment of future creative works, or that it does not create “practical obstacles to proper utilization”), efficiency, and arguably some labor-desert justification of copyright, (i.e., the need give a just reward to the author). In that case, Binnie J. for the majority, drew the line between the rights of the owner in the physical copy of a copyrighted work and the rights of the copyright holder. Having decided that the transposition of lawfully purchased posters of artist Claude Théberge’s paintings on a canvas was not a “reproduction” of the copyrighted work as per the exclusive rights conferred to Théberge under section 3 of the *CCA*, the court’s majority decided that such transposition did not fall within the economic rights of the artist (while it may have fallen under his moral rights). One of the reasons given by the majority was:

The proper balance among these [i.e., the creator’s rights] 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 under compensate 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. 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.¹⁰⁷

The peculiarity of the facts in this case invite us to some caution on the extent to which it asserts greater property rights in the copy of a copyrighted work. The fact that this is a four to three decision also illustrates the ambiguity that prevails around the breadth that courts are willing to give to copyright holders’ rights, even beyond the exclusive rights expressly conferred to them by the *CCA*. And yet, the above cited reasons in *Théberge* strongly echo the freedoms that are intrinsic to the property rights in the copy of Claude Théberge’s painting, the need to set limits to copyright holders’ ownership rights to encourage future creations, as well as the instrumental efficiency that results from such freedoms and proper limitations. On that basis, the significance of *Théberge* on the limits that copy ownership can set on the ownership rights of the copyright holder, cannot not be underestimated.

(c) Copyright Limitative Effects on Copy Ownership

The bundle of exclusive rights conferred by the *CCA* to the copyright holder, effectively sets limits on the property entitlements of the consumer to the lawfully purchased copy of a copyrighted work, such as a music CD or film DVD.¹⁰⁸ Moral

¹⁰⁷ *Théberge*, *supra* note 28 at paragraphs 31-32.

¹⁰⁸ See the discussion on copyright limitations in Part IV (a) and (c) above.

rights¹⁰⁹ operate in the same way.¹¹⁰ Characterizing copyright as a limitation on the individual private property rights of the consumer is not trivial. As Waldron notes: “It sounds a lot less pleasant if, instead of saying we are rewarding authors, we turn the matter around and say we are imposing duties, restricting freedom, and inflicting burdens on certain individuals for the sake of the greater social good.”¹¹¹ What is the exact nature of copyright limitations under property law and theory and what insights can we gain there from?

We can quickly dismiss the most extreme form of property limitation, namely expropriation rules. It would be far fetched to qualify as such the effect of copyright on the ownership rights of a consumer on the lawfully purchased copy of a copyrighted work¹¹² except perhaps in some very specific cases.¹¹³ The use privileges are already taken out from her ownership rights when she purchases the copy of the copyrighted work, as opposed to a taking occurring after she becomes owner of the copy of the copyrighted work.

Copyright is opposable to all (*in rem*) and as such it imposes limitations to anyone in possession of or accessing a copy of the copyrighted work, independently of whether the person owns that copy or not. On that basis, copyright could be characterized as a property-independent prohibition.¹¹⁴ What would follow is that the use privilege and power limitations imposed by copyright on the owner of the copy of a copyrighted work are not even being *prima facie* part of her ownership entitlements. Her ownership rights would be to no avail for her recriminations against limited usage rights to the copy of the music CD or film DVD. She would need to find solace on other moral or legal grounds. This characterization needs to be rejected for the following reasons. First, the fact that copyright is opposable to all is a confirmation of the property right that Parliament created in favour of private (and sometimes public) parties.¹¹⁵ Second, the restrictions imposed by copy-

¹⁰⁹ In Canada, moral rights refer to the right to the integrity of the work and the right to be associated with the work, which can be invoked by authors only, i.e., physical persons, and not copyright holders who are not the authors: section 14.1(1) of the *CCA*, *supra* note 3.

¹¹⁰ How the moral rights of authors (as opposed to copyright holders) act as limitations to the ownership rights in the copy of a copyrighted work is not the focus of this paper, as we are dealing with copyrighted works usually held by copyright holders (such as film production or music label entities) who in Canada do not have entitlements to moral rights, in a consumer market, after the first publication of the copyrighted work has occurred. In that context, moral rights issues would more likely occur between the author and the copyright holder to whom the copyright was transferred or licensed.

¹¹¹ J. Waldron, *supra* note 23 at 129.

¹¹² For expropriation to occur, the rightful owner would normally need to have had benefits conferred that were taken away from her. In the case of copyright, it operates as a limit on the owners' rights from the beginning.

¹¹³ For example, through the application of technological measures or digital rights management, some usages could be restrained *a posteriori*. In such cases, the expropriation or confiscation analogy could be plausible.

¹¹⁴ See discussion in P. Chapdelaine, *supra* note 2 at 90-93.

¹¹⁵ The attributes of copyright that link it to property are discussed in P. Chapdelaine, *supra* note 2 at 96-103.

right on the ownership rights in the copy of a copyrighted work go to the heart of the open-ended privileges and powers of the owner of the copy. Two examples illustrate that point. Compare a music CD protected by copyright with another chattel, such as a laptop, not protected by any relevant intellectual property right for our discussion purpose.¹¹⁶ As owner of the laptop, she can photograph it, use it in a film, lend it or sell it to a friend, use it for or incorporate it in an art work, bring it to her family business and use it in a profit driven activity. She can even start a new line of business by making identical laptops.¹¹⁷ For all these activities, she does not need to ask permission to the store that sold the laptop, nor is it written in any contract that she is allowed to do these things. As owner of the laptop, she has the power and privilege to perform all these acts, as well as an impressive open-ended list of other uses. In the second example, compare a music CD protected by copyright with a music CD for which all copyrights have expired after the copy was purchased. In the latter case, she can make as many copies as she wishes for time or space shifting purposes, give it to friends, upload it on the Internet, she can incorporate it in a film, she can make a satire of its songs, mix it, play it at a wedding, or use it as part of a commercial venture. Once again, the list of powers and privileges is open-ended and she does not need to ask permission to the distributor of the music CD or to the copyright holder, nor is there any contract that tells her that she can perform all of these acts. She simply can, as owner of the copy of the music CD. What these two examples illustrate is that the limitations imposed by copyright are *a priori* part of her open-ended privileges and powers as owner of the copy of a copyrighted work (such as a music CD).. This signals a property-limitation rule rather than a property-independent prohibition. Also, the fact that copyright is opposable to all, including non owners who become in possession of a copyrighted work, does not exclude that it operates as a property-limitation rule. Such rules extend to lawful possessors of the copy of a copyrighted work vested with open-ended use privileges, not just to owners.¹¹⁸ Finally, this property-limitation rule is primarily intended to benefit the private interests of the copyright-holder, although from an instrumental perspective, copyright is also intended to benefit consumers and the public, as it presumably encourages the creation and dissemination of copyrighted works.¹¹⁹

¹¹⁶ The laptop would most likely bear a trade-mark. It may or may not be protected by patent.

¹¹⁷ Except for the trade-mark under which the laptop is sold, and subject to subsisting industrial design or patent rights. This last example takes us outside the realm of our discussion centered on the consumer.

¹¹⁸ J.W. Harris, *supra* note 16 at 34.

¹¹⁹ On the one hand, the limitation copyright imposes on the property rights of the copy of a copyrighted work is for the immediate benefit of the private interests of the copyright holder. On the other hand, such benefits arguably act as a “temporary proxy” (on a related idea of copyright holders’ holding the balance between authors and users, see in D. McGowan, “Some Copyright Consumer Conundrums” in *Consumer Protection in the Age of the “Information Economy”* (Aldershot: Ashgate Publishing Ltd., 2006) at 155) to a greater public interest, as they encourage the creation and dissemination of copyrighted works that will moreover eventually fall in the public domain. Still during the life of the exclusive rights conferred by copyright, individual moral entitlements

The characterization of copyright as a property-limitation rule provides critical insights into its nature and the one of the copy of the copyrighted work, as well as on the interaction between the two. First, it brings the normative force of ownership freedoms in the copy of the copyrighted work forward, and takes them out of the shadow of copyright to which they have been traditionally relegated, as an afterthought and by default of the application of copyright law. Second, copyright becomes an expansive and invasive bundle of limitations on the *a priori* open-ended privileges and powers of the ownership rights in the copy of the copyrighted work. To have overlooked this rather obvious legal characterization before may, as I argued above, explain in great part the scepticism, disbelief and rebellion that we witness with copyright consumers on the scope of their users' rights and actual end goals of copyright laws.¹²⁰ This prevailing contention is likely to increase as the potential for the list of *a priori* open-ended privileges and powers of consumer uses is expanding with multiple network and reproduction technologies' capabilities. Third, well established property rules — in particular property-limitation rules — abound and provide a cogent framework on how to mediate between two competing property claims (which in this case, are pertaining to the same copyrighted work). To use the example of the tort of nuisance, for the plaintiff to be successful in a property tort of nuisance case, not only does she need to show that she has suffered a harm from the defendant property owner, she must also establish that the defendant has caused it by going above and beyond what is necessary for him to have the natural use of his own property.¹²¹ The property positive and negative externalities are assessed on equal terms for both the plaintiff and defendant property owners and measured against the other. From a normative standpoint, giving due weight to the *a priori* ownership freedoms in the copy of a copyrighted work requires such a balancing exercise. Copyright as a limitation to the ownership rights in the copy of a copyrighted work would be justified only in so far as the contested use of the copy is an unreasonable exercise of her ownership that caused harm to the copyright holder.

One property nuisance case that illustrates the breadth of exclusionary powers inherent in property and how courts need to mediate between two seemingly competing exercises of ownership rights is the judgment by the High Court of Australia in the *Victoria Park* case.¹²² The plaintiff, owner of the Victoria Park racecourse, sought an injunction against defendant Taylor, who owned adjacent property and

favouring the private interests of copyright holders have made their way in policy design: J. Waldron, *supra* note 23 at 120. One of the side effects is the increasingly generous duration of the exclusive right granted by law to copyright holders (for example in the U.S. and in Europe) and their increasing *de jure* powers to control that right. In that light, public interest considerations play a secondary role during the term of a copyrighted work.

¹²⁰ J.P. Liu, *supra* note 1 at 1365 argues that to make every act with respect to a digital copy an infringing act of copyright will increase the disrespect of the public for copyright law.

¹²¹ J.W. Harris, *supra* note 16 at 34, citing: *West Cumberland Iron and Steel Company v. Kenyon*, [1879]. 11 Ch. D 782 at 787.

¹²² *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor*(1937), 58 C.L.R. 479 (Australia H.C.) (“Victoria Park”).

who had installed wooden platform to see the race course and the notice boards with information about the races (and against Angles who stood on the platform and commented about the race over the telephone, and a broadcasting company who broadcasted the comments of Angles). Such alleged nuisance was caused by the “unnatural” use of the adjacent land by Taylor and others. The Australia High Court dismissed the plaintiff’s appeal from the Supreme Court of New South Wales in a three to two decision. Although there was uncontested evidence that the plaintiff lost revenues as a result of the defendants’ use of the adjacent land, the court found no interference with the use and enjoyment of the plaintiff’s land. Qualifying the defendants’ actions as providing a competitive entertainment, Lantham J. continued: “The facts are that the racecourse is as suitable as ever it was for use as a racecourse. What the defendants do does not interfere with the races, nor does it interfere with the comfort or enjoyment of any person who is on the racecourse . . . I am unable to see that any right of the plaintiff has been violated or any wrong done to him. Any person is entitled to look over the plaintiff’s fences and to see what goes on in the plaintiff’s land. Further, if the plaintiff desires to prevent its notice boards being seen by people from outside the enclosure, it can place them in such a position that they are not visible to such people . . .”¹²³ The outcome of this case does not necessarily lead to one party limiting the open-ended *a priori* ownership rights of the other *per se* on the ground that the court found no loss of enjoyment by the plaintiff of his property. In other words, the activities and even profits made by Taylor and others, leading to a loss of profit by the plaintiff, were not within the realm of the property rights of the plaintiff. From a property-limitation rule perspective, this case can also illustrate how *a priori* open-ended privileges and powers, including the power to derive profits from one’s property, can be limited by other competing *a priori* open-ended privileges and powers, e.g., here, of Defendant Taylor and others, the adjacent property owner. It also illustrates how co-existing exercises of ownership rights can benefit or have negative effects on one and the other, without one party being liable to the other for the benefits she obtained from the other owners’ property (in this case, Defendants’ profits resulting from commenting on the races that took place on the plaintiff’s adjacent property, even though it was demonstrated that the plaintiff lost profits from defendant’s activities) provided that each party acted within the normal exercise of her ownership rights.¹²⁴ The *Victoria Park* case provides an important property law perspective on the expansion of copyright within the property institution. There is a prevailing assumption under which any benefits and enjoyments that are derived from the copyrighted work ought to be considered within the exclusive domain of the copyright holder.¹²⁵ The property law case of *Victoria Park* and many others, in-

¹²³ *Ibid.*, reasons delivered by Lantham J.

¹²⁴ For a detailed analysis of the *Victoria Park* case and its significance in property law and theory, particularly on the limits of the power to exclude, see: K. Gray, “Property in Thin Air” (1991) 50 Cambridge L.J. 252 at 264 and fol.

¹²⁵ This is illustrated *inter alia* by the broad interpretation that courts have typically given to copyright infringement occurring upon the production, reproduction or performance in public of a “substantial part” of the work: see *supra* note 5. M.A. Lemley, *supra* note 23, at 1044 observes that courts tend to qualify any benefit derived from the positive

form us that this assumption with respect to other tangible private property is wrong.

Under the *CCA*, the copyright holder can invoke one of her exclusive rights, such as the exclusive right to reproduce or to telecommunicate to the public the copyrighted work to limit the ownership rights in the copy of the copyrighted work. Only in instances where the alleged act is not within the list of exclusive exclusionary rights conferred to the copyright holder, such as was the case in the *Théberge* case, or if we reframe copyright law by giving more weight to the ownership rights in the copy of the copyrighted work¹²⁶ does the meditation of conflicting ownership rights as illustrated in the *Victoria Park* case bear some relevancy.

Property theory provides other insights into the limits of copyright, which have ramifications above and beyond the fate of ownership rights to the copy of a copyrighted work. For instance, as a property institution, copyright should not extend beyond its underlying property-specific justice reasons.¹²⁷ Under the prevailing view that copyright is justified predominantly by instrumental reasons to incent creations and dissemination of works, and given the specific scope of this paper,¹²⁸ this subjects copyright to constant revisions and attacks, e.g., to the extent that incentives are no longer necessary, or that the breadth of its rights would undermine its underlying public policy considerations.¹²⁹ Indeed, unlike other forms of traditional tangible private property, which are not intended to benefit the public *a priori*¹³⁰ the specific goals behind the creation of copyright as private property include the incentive to create and disseminate works *for* the benefit of the public. Thus, while the self-seekingness aspect in copyright is present as a resultant of its private property nature, it needs to be interpreted within and is constrained by this important constitutive public interest parameter.¹³¹

externalities of copyright as “free riding” leading to copyright infringement, on the underlying assumption that such benefits are necessarily unjust. See more generally, the discussion in P. Chapdelaine, *supra* note 2 at 96-103.

¹²⁶ See the discussion in Part V below.

¹²⁷ *Théberge*, *supra* note 28 at paragraphs 30-32. See the discussion on the relevant underlying theoretical justifications of copyright in Part IV (b) whereby I refer to instrumentalism as being the prevailing theory invoked to justify copyright and whereby I argue that instrumentalism justifications of copyright include the promotion of innovation and creativity of copyright consumers, not solely the copyright creators.

¹²⁸ Namely because we are dealing with the mass market commercialisation of copyrighted works after the first publication has occurred.

¹²⁹ J.W. Harris, *supra* note 16 at 298; P.S. Menell, *supra* note 4 at 752 refers more generally to intellectual property design needing some “breathing space” if it is to serve its function to incent creation and innovation properly.

¹³⁰ While they may need to accommodate community interests in specific circumstances such as compliance with heritage municipal by-laws. See G.S. Alexander, “The Social-Obligation Norm in American Property law” (2008-2009) 94 *Cornell L. Rev.* 745, more specifically at 795-796.

¹³¹ P.S. Menell, *supra* note 4 at 752-753 refers to intellectual property’s interdependence with public information and with other pre-existing works to allow for the creation of new intellectual property rights. An optimal system for the protection of intellectual property as the motor to creativity and innovation needs to be open to societal and

Finally, the property rights of copyright should not extend beyond what the property institution can or should conceptually and practically support. In addition to a consumer being rightfully entitled to certain open-ended uses and privileges over the copy of a copyrighted work, and to the copyright holder being rightfully limited in having any claim on those uses (or trespassory rights) it would be impractical as much as it would be inefficient to go after every instance of personal use of copyrighted works that is made on the Internet and elsewhere with network and copying device capabilities. Without constituting an argument in itself, the practicality argument helps corroborate the above normative analysis to the consumer and copyright holder's rights. It also signals instances where property owners (i.e., copyright holders) may be seeking powers and privileges that go beyond what their property rights can justify.

3. PART V — COPY OWNERSHIP AS A PROPERTY-LIMITATION RULE OF COPYRIGHT

The poor articulation of the ownership rights in the copy of a copyrighted work¹³² leads to a lack of clarity around the extent to which they should effectively limit the ownership rights of the copyright holder. To the same extent that copyright acts as a property-limitation rule to the ownership rights in the copy of a copyrighted work,¹³³ how can copy ownership also operate as a limitation on the ownership rights of the copyright holder? This is the void that the following analysis intends to fill, at least in part. An investigation into how copy ownership of the copy acts as a "property-limitation rule" is both prescriptive and normative. It is prescriptive in that it provides a legal analytical tool to mediate between the ownership rights in the copy of the copyrighted work and the exclusive rights of the copyright holder, when the rights of the latter are not clearly defined, and to clarify the rights of the former within the current scheme of the *CCA*. It is normative by its application of property-limitation rules theory to justify broader open-ended freedoms and powers, as they relate to copy ownership, than is currently permitted by the present scope of copyright holders' exclusive rights as they are defined by the *CCA*.

The *Théberge* case is a good illustration of a prescriptive application of property-limitation rule theory to copy ownership and to copyright. In that case, the issue was whether or not the transposition of lawful copies of paintings onto canvasses was an unauthorized production or reproduction of the paintings of Claude Théberge, and whether or not it was an infringement of his copyright. The lawful ownership rights of the copies of the paintings were asserted by the appellants (various art galleries) against the exclusive rights of respondent Claude Théberge in the paintings. The appellants purchased copies of the paintings in the open market

technological changes. The sharing culture that is more and more prevalent within intellectual property is unlikely to support traditional tight ownership and control powers.

¹³² As I discuss in Part IV (a), in contrast with the attention devoted to defining the exclusive rights of the copyright holder: see P. Chapdelaine, *supra* note 2 at 96-103.

¹³³ As per the discussion in Part IV (c).

from a publishing firm who was the licensee¹³⁴ of artist Claude Th  berge, and not a party to this action.¹³⁵ Thus, there was no explicit contractual licence between Claude Th  berge and the appellants (or between the latter and the publishing company). Binnie J. for the majority held that the appellants did not infringe the copyright of Claude Th  berge in his paintings. Commenting on the dissenting opinion's interpretation of the exclusive rights of the copyright holder (as including the act of transposing the copy of the paintings from a cardboard to a canvass) Binnie J. stated: "In my view, with respect, this expansive reading of the s. 3(1) economic rights tilts the balance too far in favour of the copyright holder and insufficiently recognizes the proprietary rights of the appellants in the physical posters which they purchased."¹³⁶ This is one example of upholding the *a priori* open-ended privileges and powers as owner in the copies of the paintings against the *a priori* open-ended privileges and powers of artist Claude Th  berge.¹³⁷ In property theory terms, the copy ownership rights of the appellants were assessed and brought to the fore. They enlightened the court into the scope of the *a priori* open-ended privileges and powers of copyright ownership. The ownership rights of the appellants in reproductions of Claude Th  berge's paintings acted as a property-limitation rule on the copyright of artist Claude Th  berge. The exercise involved a balancing act between the values taken to be inherent in ownership freedoms in relation to the owned copies of the paintings on the one hand, and copyright in the paintings on the other.¹³⁸ The valid exercise of ownership freedoms by the appellants effectively set a limit on the undefined or open-ended contours of artist Claude Th  berge's exclusive ownership rights in the paintings.

Two other examples illustrate how copy ownership privileges and powers act as property-limitation rules and prescribe the limits of copyright holders' exclusive rights under the current scheme of the CCA. The first example is the alienation powers to the copy of the copyrighted work by its owner. Restrictions on alienation have always been treated with suspicion in property law, especially in the case of chattels.¹³⁹ The fact that copyright holders cannot restrict the owner of the copy of a copyrighted work from selling or otherwise parting with her ownership in the copy has been recognized for a long time in the U.S. under the first sale doc-

¹³⁴ The licence did not explicitly authorize or forbid the acts performed by the appellants purchasers of the copies from the licensee. This is relevant only in so far as it could have provided some evidence of Claude Th  berge having relinquished his rights to the publishing company.

¹³⁵ The printing license between Claude Th  berge and EGI Dutil did not preclude the subtraction act which is alleged to infringe the copyright of Claude Th  berge: *supra* note 28 at paragraph 13.

¹³⁶ *Th  berge*, *supra* note 29 at paragraph 28.

¹³⁷ See the discussion on the nature of copyright in P. Chapdelaine, *supra* note 2 at 96-103.

¹³⁸ J.W. Harris, *supra* note 16 at 90.

¹³⁹ For a discussion on the law of servitudes and how it has been applied on chattels, and its relevancy to interpret current restrictive terms of copyright, see: M. Shaffer Van Houweling, "The New Servitudes", (2008) 96 Geo. L.J. 885 at 906 and fol.

trine,¹⁴⁰ and provides a good example of an ownership freedom of copy ownership that acts as a property-limitation rule of copyright. The second example is the unlimited viewing, reading and listening of a copyrighted work, conferred by the ownership freedoms (or lawful possession) of the copy of a copyrighted work. Although it is not specifically enunciated in the *CCA*, none of the exclusive rights of the copyright holder (i.e., the exclusive right to produce, reproduce, perform in public and authorize first publication) limit those freedoms of use, at least with respect to tangible copies transferred from “hand to hand”, with no remote technological control. The unlimited viewing, reading and listening of a copyrighted work results from the ownership freedoms of the owner of the copy of the copyrighted work.¹⁴¹ The increasing online distribution of copyrighted work is a threat to these two ownership freedoms in the copy of a copyrighted work. First, digital copies can be accessed with no sale of a physical medium taking place (instead, there is a licence to the copyright and to the copy of the copyrighted work). This allows copyright holders to avoid the application of the first sale doctrine, no sale having occurred. Second, because this unlimited freedom to listen to, view or read a copyrighted work is one that has been so far possible “by implication” and not through an explicit right in the *CCA*, new copyright holder technology controls and commercial terms dictating how copyrighted work are made accessible and how they can be used puts these freedoms under siege.¹⁴² Given this new copyright distribution conjecture, qualifying these two instances of the exercise of the ownership freedoms in the copy of a copyrighted work as “property-limitation rules” of copyright takes a whole new significance. It provides a legal tool that positively anchors copy owners’ rights in basic property law, with its inherent mediating balancing act.¹⁴³ The claim that copy owners should have the unlimited right to view, listen and read the copyrighted work, and a (limited) right of transfer is controversial.¹⁴⁴

¹⁴⁰ § 109 (a) of the U.S. Copyright Act, *supra* note 3 provides that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” See also J.P. Liu, *supra* note 1 at 1289-1290. There is no equivalent provision in the *CCA*, *supra* note 3.

¹⁴¹ J.P. Liu, *supra* note 1 at 1287.

¹⁴² J. Litman, *Digital Copyright* (Amherst: Prometheus Books, 2001) at 29 and following; J.P. Liu, *supra* note 1 at 1288-1289.

¹⁴³ As Joseph Liu observes, transposing these copy owner freedoms into the digital age is tricky because it directly interferes with the copyright holder’s right to control reproduction of her copyrighted works: J.P. Liu, *supra* note 1 at 1286, whereby Liu argues in favor of an unlimited access right to digital copies as well as a limited right to transfer digital copies; J.C. Ginsburg, “Essay: From having copies to Experiencing works: The development of an access right In U.S. copyright law” (2003) 50 *J. Copyright Soc’y U.S.A.* 113, in particular at 117-118, 120-121: the main thesis of the author is that the right of copyright holders to control access to their works (i.e., every instance of usage) is critical in a digital environment.

¹⁴⁴ J. Litman, *supra* note 144; J. Litman, *supra* note 20; J.P. Liu, *supra* note 1, in particular at 1237 and fol. argue in favour of such unlimited rights. As Liu observes, transposing these copy owner freedoms into the digital age is a delicate exercise because it directly interferes with the copyright holder’s right to control reproduction of her copyrighted

It relies in part on the fact that these ownership freedoms are already accepted as reasonable exercises of copy ownership “rights” in copies exchanged from hand to hand, and are justified within the framework of copyright law.

Pushing the analysis one step further, the assertion that the ownership in the copy of a copyrighted work can act as a property-limitation rule on the ownership rights of the copyright holder also has powerful normative value. It forces to rethink the legal merit of the traditional scope of exclusive rights of copyright holders. As I pointed out earlier in this paper, most of the *a priori* open-ended privileges and powers of the owner of the copy of a copyrighted work are countered by explicit ownership rights of the copyright holder that unequivocally limit the scope of the ownership rights in these copies. Thus, this exercise is valuable in any effort to redesign copyright as a private property right, in keeping with its underlying objectives of incenting creativity, innovation and the dissemination of copyrighted works. It is also critical in the environment of digital copies.¹⁴⁵ At an instrumental level, affirming broader ownership rights in the copy of a copyrighted work may also create an additional incentive towards lawful copy ownership and lessen the appeal of pirated copies. This would engender a more robust and efficient copyright system.

To posit copy ownership as a potential property-limitation rule of copyright provides a valuable framework to adequately qualify and address the increased capabilities of consumers’ use of copyrighted works. For instance, by the conjecture of new technologies, the *prima facie* open-ended privileges, powers and self-seekingness inherent to owning the copy of a copyrighted work are effectively expanding, both physically and in the minds of consumers. This is one of many illustrations of the adaptability of the property institution, in the present case, as it pertains to copyright and to chattels (whether they are physically exchangeable from hand to hand or not). Property law and theory provide a normative force that cannot be ignored and that can solve the consumer-copyright holder conundrum. It can succeed where the CCA, by its current structure and design, no longer can.

The purpose of the property-limitation rule analysis applied here is not to list all instances of copy ownership uses that need to be recognized to be within the ownership rights of the copy owner of a copyrighted work. Rather, it offers a normative analytical framework based on the principles of property law and theory discussed so far to substantiate when and how copy ownership should limit the exclusive rights of copyright owners. Two parameters need to be considered in asserting the ownership rights in the copy of the copyrighted work. The first is to affirmatively recognize the normative value of *a priori* open-ended freedoms and

works: J.P. Liu, *supra* note 1 at 1286, whereby Liu argues in favor of an unlimited access right to digital copies as a well as a limited right to transfer digital copies. For a contrary view, see: J.C. Ginsburg, “Essay: From having copies to Experiencing works: The development of an access right In U.S. copyright law” (2003) 50 J. Copyright Soc’y U.S.A. 113, in particular at 117-118 and at 120-121. The main thesis of the author is that the right of copyright holders to control access to their works (i.e., every instance of usage) is critical in a digital environment.

¹⁴⁵ Indeed, most uses of digital works involve a reproduction at some point which is an exclusive ownership right of the copyright holder and an infringement of copyright unless it falls under one of the exceptions to copyright infringement.

self-seekingness that are inherent in the ownership of the copy of a copyrighted work, supported by the instrumental justifications to incent creation and the dissemination of works. The second one is that such ownership freedoms cannot extend so far as to harm the ownership rights of the copyright holder. The fact that the harmful exercise to the copyright holder comes second is significant in that, just as in traditional property law and theory, the qualification of harm depends in part on the recognition of the competing property freedoms, as this was well illustrated in *Victoria Park*.¹⁴⁶ The application of these two parameters engenders a mediation between two competing ownership rights. This balancing act brings copyright closer to other traditional tangible property and counters a decried expansive view of copyright exclusionary powers as encapsulating more positive externalities that derive from the copyrighted work than it should.¹⁴⁷

With respect to the first parameter, the consumer-owners' open-ended uses and privileges should not extend beyond their underlying justifications, i.e., the instrumental promotion of creative and innovative citizens benefiting from their access, communication and network environment, as well as the need to preserve and protect their autonomy and freedom in how they experience copyrighted works. Any use that is not supported by at least one of these underlying justifications would not fall *a priori* within her open-ended privileges and uses as owner of the copy of a copyrighted work.

To the extent that certain uses or privileges are justified by their underlying property-specific justice reason, then such uses or privileges would give rise to trespassory rules.¹⁴⁸ As the consumers' uses shift from the private, personal sphere to the commercial sphere, the underlying property-specific justice reason to their ownership rights in the copy of the copyrighted work is altered.¹⁴⁹ The shift of property-specific justice reasons, when moving from personal to commercial uses that would directly compete with the copyright holders' economic rights, could provide valuable insights into when and why the open-ended uses and privileges in the copy of a copyrighted work may no longer be justified and should be limited or

¹⁴⁶ *Supra* note 122. In particular, the fact that the reasonable exercise of the ownership rights of the defendant (adjacent owner of the plaintiff race track owner) included taking advantage of positive externalities of the plaintiff race track property, so long as the plaintiff did not lose the enjoyment of his property. To say the contrary would have deprived the defendant of the reasonable enjoyment of his own property.

¹⁴⁷ M.A. Lemley, *supra* note 23, at 1033 and 1044.

¹⁴⁸ For instance, this could apply to a protection measure that impeaches the consumer to make copies of a music CD (assuming such use is asserted as being within the open-ended uses supported by the ownership rights in the CD). The corollary is that the consumer would be entitled to legal remedies against this technological measure.

¹⁴⁹ One of the reasons being that the commercial sphere involves different distributive consequences: see J.W. Harris, *supra* note 16 at 275, where the author [citing John Christman, *The Myth of Property* (OUP, 1994), pt. 3] refers to two distinct concepts within ownership, i.e., "control ownership" and "income ownership": "the first would encompass use-privileges and all unilateral exercises of powers (including gifts) and the latter all exercises of power made for consideration (hire, rent, sale, or exchange)" the reason being "that the former can be justified by autonomy considerations whereas the latter has distributional consequences."

altered.¹⁵⁰ It also resonates with the internal limits of an instrumental view of copyright as a tool to incent creation and the dissemination of works, although the current copyright legal framework does not explicitly make the distinction between commercial and non-commercial uses for the purpose of copyright infringement.¹⁵¹ The shift from personal to commercial uses also brings different property-limitation rules and independent-property prohibitions.¹⁵² Finally, any uses or privileges that the property institution cannot support either at a conceptual or practical level should not fall within the property domain of the lawful owner of the copy of a copyrighted work.

With respect to the second parameter, any exercise of the *a priori* open-ended freedoms associated with the ownership rights in the copy of the copyrighted work that would harm the ownership rights of the copyright holder would not be authorized, as it would be unjust that ownership rights be exercised in a way that harms the ownership rights of others including the copyright holder.¹⁵³ In such case, the consumer owning the copy of the copyrighted work would act outside the property-specific justice reasons that support her ownership rights. Under the current wording of the *CCA*, any act of reproduction and any performance in public that the consumer makes of or with the copy of the copyrighted work is an infringement of

¹⁵⁰ For instance, the use of a copyrighted work as part of a commercial activity could give rise to either property remedies, such as injunctive relief and damages or a liability rule, such as a compulsory license.

¹⁵¹ Under the *CCA*, *supra* note 3, the distinction between commercial and non-commercial uses is relevant with respect to the private copying regime at ss. 80 to 88. It can also be relevant to assess whether the dealing of a copyrighted work was fair under sections 29- 29.2; see *CCH*, *supra* note 65 at paragraphs 48 to 60. Bill C-32, An Act to amend the Copyright Act, 3rd Session, 40th Parl., 2010 (1st reading June 2, 2010), which died on March 25, 2011 due to a non-confidence vote, would have introduced in clause 22 the distinction between commercial and non commercial uses, creating exceptions to copyright infringement for specific personal uses (such as “non-commercial user-generated content”, “reproduction for private purposes” and “fixing Signals and recording programs for later listening or viewing.” J. Litman, *supra* note 20 at 1911-1911, in a U.S. context, proposes a model of four categories of personal uses that should be considered in establishing personal use rights of copyrighted works, whereby the personal uses are measured against their likely effect on “copyright liberties” and on the incentive to create of the copyright holder.

¹⁵² For example, the property of a laser printer supports certain open-ended personal uses and privileges that change once the use of the laser printer is made for commercial purposes. Other independent property-limitation rules may start to apply, such as safety in the workplace rules, quality standard rules for consumer usage and so on. The same can be said of the copy of a copyrighted work. Once the use shifts from a private, non commercial use to a public or commercial use, different property-limitation and property independent rules would apply, including those limitations that are based on the copyright holder’s exclusive rights, as reframed by the limitations imposed by the consumers’ property rights in the copy of the copyrighted work.

¹⁵³ Through the application of Harris’s theory around “property-limitation rules” the exercise of *a priori* open-ended privileges and powers are limited when such exercise is harmful to others, Harris *supra* note 16 at 35. See also the discussion on the application of property-limitation rules in P.Chapdelaine, *supra* note 2 at 94.

copyright unless it falls under one of the specific stated exceptions, or unless it has been specifically authorized by the copyright holder. However, such acts do not necessarily cause harm to the copyright holder's exclusive rights¹⁵⁴ while they may still give rise to statutory damages under the *CCA*.¹⁵⁵ Reframing copyright infringement (i.e., copyright holders' exclusionary powers) around the notion of economic harm inflicted on the ownership rights of the copyright holder as opposed to acts of production, reproduction and performances in public is one of the many other valuable approaches that have been suggested.¹⁵⁶ True to the property-specific justice reason of copyright at the phase of commercialization of copyrighted works, harm to the copyright holder needs to aim more specifically at dealings of the copyrighted work that undermine the incentive for the creation and dissemination of copyrighted works.

To frame the ownership in the copy of a copyrighted work positively as a property-limitation rule of copyright is to refuse the *status quo* (and to passively accept one of the starting premises of this paper) i.e., that the ownership rights in the copy of a copyrighted work have been and continue to be defined consequentially and by default to the ownership rights of the copyright holder in the copyrighted work. From a property theory perspective, maintaining the *status quo* is the equivalent of automatically making the ownership rights in property A subject to how the ownership rights in property B are and will be defined in the future, therefore discriminating owner A against owner B by preferring the latter over the former. It fails to recognize the reality of two different but equally meritorious, in their own right, competing property claims that need to be mediated one against the other. Depending on the issue to be resolved, emphasis will be placed on the limiting effects of copyright or on the limiting effects of the ownership rights in the copy of the copyrighted work.

The ownership in the copy of a copyrighted work is one among many other property-limitation rules to copyright. The use of a copyrighted work (other than as owner of a copy), under one of the stated purposes of fair dealing, under the public policy exception, under the visual disability rules, or even under competition law, are other distinct manifestations of property-limitation rules to copyright. However, when a consumer buys a copy of a copyrighted work, she acquires property rights in it that distinguish her from other relationships between a user and a copyright holder. From the copyright holder perspective, this transaction with the consumer-

¹⁵⁴ J.P. Liu, *supra* note 1 at 1282.

¹⁵⁵ Under section 38.1(1) of the *CCA*, *supra* note 3 it is possible for a copyright holder to claim a fixed dollar amount per instance of copyright infringement without having to prove actual damages.

¹⁵⁶ J. Litman, *supra* note 142 at Chapter 12, whereby the author recommends to reframe the exclusive rights conferred by copyright as an exclusive dissemination right for commercial exploitation; D. Gervais, "Towards a new core international copyright norm: the reverse three-step test" (2005) 9 *Marq. Intell. Prop. L. Rev.* 1. The author proposes a restructuring of copyright holders' exclusive rights by combining the fair use doctrine with the three-step test found in TRIPS to become the definition of copyright holders' rights and not the exceptions. In other words, everything that is not permitted by fair use and the Three-Step test should be within the exclusive rights of copyright holders.

purchaser, alters the *a priori* open-ended privileges and powers as private owner of the copyrighted work *with this* particular consumer, to make way to her new status as owner of the copy of a copyrighted work.

4. PART VI — CONCLUSION

In copyright theory, there is a controversy around the qualification of copyright as property. At the same time, the copy of a copyrighted work has generally been assimilated to property, with its contours remaining imprecise. A closer look informs us that the controversy is misplaced. It is the qualification of the copy in the copyrighted work as property that is becoming increasingly problematic. With respect to the nature of copyright, the controversy is ill founded because it takes a narrow view of what the property institution is and because — perhaps for ideological or other reasons — it often confuses the nature of property with its underlying justifications. With respect to the copy of a copyrighted work, increasingly, the consumer does not really own digital copies of copyrighted works, at least not in the sense that traditional property law and theory informs us.

We cannot afford to overlook the significance of consumers' interests in copies of copyrighted works, without undermining the viability and credibility of copyright laws. This paper presented the justifications and benefits for maintaining ownership of digital copies of copyrighted works, because of the *a priori* normative force of ownership freedoms, the specific role that copy ownership plays in the instrumental design of copyright, as well as greater transaction efficiency for both copyright holders and consumers.¹⁵⁷ When a consumer lawfully acquires the copy of a copyrighted work, two property interests have always been competing. Permuting “lawful acquisition” by “lawful access through licence” may even amplify this tension rather than alleviate it. It leaves behind the justice and efficiency benefits of well established and flexible concepts of personal property. Should copyright digital distribution evolve towards a complete eradication of copy ownership in digital copyrighted works, the fundamental interests of copyright consumers discussed in this paper remain highly relevant and applicable, and will still need to be addressed. Depending on how they are incorporated into copyright design, they may still act as property-limitation rules on copyright. If one relies on the historical focus of copyright laws on copyright holders, abandoning the concept of copy ownership is likely to weaken the place of the consumer rather than to strengthen it. In all cases, to overlook consumers' interests is to be done at the peril of an efficacious and credible copyright system.

This potential “property conflict” or “lawful access conflict” between consumers and copyright holders is a specific, yet very wide spread manifestation within the broader copyright access spectrum and public domain debate. As I demonstrated throughout this paper, property and copyright law and theory help to explain the nature of this specific legal relationship at play more precisely than simply opposing broad public policy considerations against the ownership rights of copyright

¹⁵⁷ For a discussion on the normative and legal implications of copy ownership and copy licensing of copyrighted works see: P. Chapdelaine, “What is Mine is not Yours and What is Yours is in Fact Mine, Copyright, Consumers and First Sale” The IPIGRAM, November 30, 2010, available online at: www.iposgoode.ca.

holders. As Waldron observed, if broad public policy arguments are the only counter balance to the private property of the copyright holder, we may be leaving out of the picture those who are directly and immediately affected by the enforcement of the property rule, “those to whom, above all, a justification of property is owed.”¹⁵⁸

This paper did not explore further applications of the property theory framework under which, among others, contract law, consumer protection law and human rights interact with the ownership rights of copyright holders and copy owners. Hopefully, this paper will open the path to future legal scholarship, as well as provide a useful framework of analysis to policy and law makers, as they address the rights of consumers and other users who lawfully access copyrighted works.

¹⁵⁸ J. Waldron, *supra* note 23 at 117.