

**PART 3**

# Defending Our Rights

Eliminating dysfunction in Canada's intellectual property regime

Richard C. Owens



JUNE 2017



True North in  
Canadian public policy



True North in  
Canadian public policy



## Board of Directors

---

### CHAIR

#### **Rob Wildeboer**

Executive Chairman, Martinrea International Inc.

### VICE CHAIR

#### **Jacquelyn Thayer Scott**

Past President and Professor,  
Cape Breton University, Sydney

### MANAGING DIRECTOR

#### **Brian Lee Crowley**

### SECRETARY

#### **Lincoln Caylor**

Partner, Bennett Jones LLP, Toronto

### TREASURER

#### **Martin MacKinnon**

CFO, Black Bull Resources Inc., Halifax

### DIRECTORS

#### **Pierre Casgrain**

Director and Corporate Secretary of Casgrain  
& Company Limited

#### **Erin Chutter**

President and CEO of Global Cobalt Corporation

#### **Laura Jones**

Executive Vice-President of the Canadian Federation  
of Independent Business (CFIB).

#### **Vaughn MacLellan**

DLA Piper (Canada) LLP

## Advisory Council

---

#### **John Beck**

Chairman and CEO, Aecon Construction Ltd., Toronto

#### **Navjeet (Bob) Dhillon**

President and CEO, Mainstreet Equity Corp., Calgary

#### **Jim Dinning**

Former Treasurer of Alberta

#### **Hon. David Emerson**

Former federal cabinet minister, corporate director  
and public policy adviser

#### **Richard Fadden**

Former National Security Advisor to the Prime Minister  
and former Deputy Minister of National Defence

#### **Brian Flemming**

International lawyer, writer, and policy advisor

#### **Robert Fulford**

Former Editor of Saturday Night magazine, columnist with  
the National Post

#### **Wayne Gudbranson**

CEO, Branham Group Inc., Ottawa

#### **Stanley Hartt**

Counsel, Norton Rose LLP

#### **Calvin Helin**

International speaker, best-selling author, entrepreneur  
and lawyer.

#### **Peter John Nicholson**

Former President, Canadian Council of Academies, Ottawa

#### **Hon. Jim Peterson**

Former federal cabinet minister, Counsel at Fasken  
Martineau, Toronto

#### **Maurice B. Tobin**

the Tobin Foundation, Washington DC

## Research Advisory Board

---

#### **Janet Ajzenstat**

Professor Emeritus of Politics, McMaster University

#### **Brian Ferguson**

Professor, Health Care Economics, University of Guelph

#### **Jack Granatstein**

Historian and former head of the Canadian War Museum

#### **Patrick James**

Professor, University of Southern California

#### **Rainer Knopff**

Professor of Politics, University of Calgary

#### **Larry Martin**

Principal, Dr. Larry Martin and Associates and Partner,  
Agri-Food Management Excellence, Inc.

#### **Christopher Sands**

Senior Fellow, Hudson Institute, Washington DC

#### **William Watson**

Associate Professor of Economics, McGill University



## Table of Contents

Executive Summary.....	2
Sommaire .....	3
Introduction.....	6
Weaknesses in Canada’s Intellectual Property Regime.....	7
Continuing and Systemic Problems .....	19
Trans-Pacific Partnership.....	26
Canada-EU Comprehensive Economic and Trade Agreement .....	27
University Innovation.....	27
Optimal Intellectual Property System Design .....	29
Conclusions.....	30
Recommendations .....	31
About the Author.....	34
References .....	35
Endnotes .....	38

*The author of this document has worked independently and is solely responsible for the views presented here. The opinions are not necessarily those of the Macdonald-Laurier Institute, its directors or supporters.*

# Executive Summary

This paper is the culmination of a major research effort conducted for the Macdonald-Laurier Institute on the state of intellectual property rights in Canada. This effort could not be more timely, as the federal government seeks to develop an “intellectual property strategy” befitting an innovative 21st century economy.

In the first paper we documented the strong evidence that economic benefits and increased innovation are connected to stronger intellectual property protections. Even better, they don’t cost government anything.

In the second paper, we examined Canada’s history of IP law and participation in global agreements and found that an economy like Canada’s is particularly well-suited to an environment of strong IP rights. We found that alleged imbalances of trade in IP-protected goods are no basis for IP policy. We should resist trendy calls from some academics for a “made-in-Canada” strategy that attempts to manipulate IP policy as though Canada were essentially an IP-importing, less-developed country. We need an IP strategy that is made *for* Canada.

In this last paper we examine the most troublesome dysfunctions in Canada’s IP rights regime. Over the last 30 years a great deal of shoring up and improving has been done, largely in response to treaty developments. This ought to continue. But IPRs are a living system and problems develop. And so this paper presents a review of IPR dysfunction in Canada, and suggests improvements worthy of a true “intellectual property strategy.”

## Patent subject matter

The exclusion of higher life forms from patentability sets Canada apart from every other OECD nation, which all allowed the patent on the famous “Harvard mouse.” Moreover, the *Harvard College* case could be a precedent to permit a lower court to disallow a patent on any novel subject matter it finds objectionable – new abortion medicines? – which is troublesome. **Recommendation:** As recommended in paper number 1, Canada should legislate patent protection for higher life forms.

## Life sciences patents regime

We must recognize that Canada has significant R&D activity in life sciences and fix the unnecessary weaknesses in its IP regime for life sciences innovation. **Recommendation:** To that end Canada should:

- Adopt a term of patent restoration no less than the two-year minimum required by CETA and preferably, to be internationally competitive, five years.
- Address the judge-made utility requirements that are invalidating patents relating to clearly beneficial drugs and other life sciences inventions. If the Supreme Court does not reverse course with its upcoming decision on *AstraZeneca*, then a legislative fix is required.
- Promptly ensure an equal right of appeal for innovators of proceedings such as those currently brought under the Notice of Compliance regulations.
- Provide 10 years of data protection rather than the eight required by CETA.

## Notice and notice

Whether or not a copyright pirate is also a soccer mom, as proponents like to suggest, is no more relevant to whether she should suffer the consequences of her actions than if she steals soccer equipment.

**Recommendation:** Canada’s toothless “notice and notice” regime for dealing with infringers should be replaced by the stricter “notice and takedown” standard, with appropriate penalties too.

## Fair dealing

“Fair dealing” has become as messy and ill-considered as notice and notice. This exception in the *Copyright Act* allows copying of a substantial portion of a work and even, in certain circumstances, all of it, without the author’s permission. The struggles of the educational publishing industry are illustrative of the negative effects. **Recommendation:** Reverse by legislation the excesses of the Supreme Court in expanding fair dealing in copyright.

## User generated content

The “user generated content” provision of the *Copyright Act* essentially allows individuals to steal someone else’s work, mar it, and then distribute it through Youtube. While the section provides that this may be done only for non-commercial purposes, the way it is (very badly) worded makes it ineffective in preventing commercial use. **Recommendation:** This parochial deviation promoted by the “made-in-Canada” school of IP policy ought to be deleted from the *Copyright Act*.

## Copyright term extension

As discussed in the first paper, there is no reason copyright should be singled out from other types of property for expiry. **Recommendation:** Canada should be bold and end copyright terms altogether, or failing that, adopt the widely-used term of 70 years plus the life of the author for all works.

## IP in the courts

A number of the weaknesses in Canada’s IP regime, including the interpretation of fair dealing and the application of the promise doctrine, have been created by or exacerbated by the courts. IP is too important in the modern economy not to be well-served by the nation’s highest court. **Recommendation:** Ensure that solid intellectual property knowledge and skills are continuously represented on the SCC.

In addition to these recommendations above, the papers in this series have recommended **supporting small and medium sized enterprises** in attaining patents; fully **implementing recent trade agreements** (TPP and CETA); and **rejecting trade imbalances** in IP-protected goods and services as the basis for IP policy.

In all, this series makes 10 specific recommendations; each one intended to help position Canada as a leader in innovation, and together they could form the basis for an IP strategy that would serve Canada very well in the future.

## Sommaire

Le présent article est l’aboutissement d’un important effort de recherche mené pour l’Institut Macdonald-Laurier afin d’évaluer la situation des droits de propriété intellectuelle (DPI) au Canada. Cette recherche ne pourrait être plus opportune, puisque le gouvernement fédéral s’est engagé à élaborer une « stratégie de la propriété intellectuelle » qui sied à une économie innovatrice du XXI<sup>e</sup> siècle.

Le premier article démontrait clairement qu’une protection forte de la propriété intellectuelle (PI)

engendre des retombées économiques et accroît l'innovation. Mieux encore, le gouvernement n'a aucun coût à engager à ce titre.

Le deuxième article révélait, tout en présentant l'histoire des lois du Canada dans la foulée de sa participation aux accords commerciaux mondiaux, qu'une économie telle que la nôtre est particulièrement bien préparée à un contexte caractérisé par des DPI forts. Il révélait également qu'il n'est pas avisé de tenir compte des déficits commerciaux allégués en biens protégés par la PI pour élaborer des politiques dans le domaine. Il faut résister aux appels en vogue de quelques universitaires en faveur d'une stratégie typiquement « canadienne », mais qui est en réalité une tentative d'altérer la politique de la PI de façon insidieuse, comme si le Canada était essentiellement un pays en développement importateur de PI. Le pays a besoin d'une stratégie de la propriété intellectuelle qui soit conçue *pour* le Canada.

Dans ce dernier article, les défaillances les plus gênantes du régime canadien des DPI sont examinées. Au cours des 30 dernières années, on a procédé à de nombreux rajustements et renforcements, en grande partie en réaction aux traités conclus. Cette démarche doit se poursuivre. Mais le système des DPI est vivant, ce qui fait qu'avec le temps, des problèmes sont susceptibles d'apparaître. Dans cet article, on passe donc en revue les dysfonctionnements liés aux DPI au Canada et on propose des améliorations dignes d'une véritable « stratégie de la propriété intellectuelle ».

## Objet des brevets

En excluant les brevets portant sur les formes de vie supérieures, le Canada adopte une position nettement contraire à celle de tous les autres pays de l'OCDE, qui brevettent tous ce qu'on dénomme la célèbre « souris de Harvard ». En outre, l'affaire *Harvard College* pourrait avoir créé un précédent en ce qu'elle permet à un tribunal de première instance de rejeter un brevet sur tout domaine de nouveauté qu'il juge douteux – de nouveaux médicaments abortifs? – ce qui est inquiétant. **Recommandation** : Comme on le recommande dans le document no 1, le Canada doit légiférer en matière de protection des brevets relatifs aux formes de vie supérieures.

## Régime de brevet dans le domaine des sciences de la vie

Il faut reconnaître l'importante activité de R et D en sciences de la vie au Canada et régler les faiblesses inutiles de son régime de PI dans ce domaine. **Recommandation** : À ces fins, le Canada doit :

- Adopter une durée en matière de restauration des brevets qui ne soit pas inférieure aux deux ans requis par l'AECG, mais préférablement, qui soit d'au moins cinq ans, afin d'être compétitif à l'échelle internationale.
- Prendre des mesures en vue de composer avec les exigences en matière d'utilité qui découlent de la jurisprudence et sont propres à entraîner l'invalidité des brevets portant sur des médicaments clairement efficaces et d'autres inventions en sciences de la vie. Si la Cour suprême ne fait pas marche arrière dans la décision à venir dans l'affaire *AstraZeneca*, une solution législative sera nécessaire.
- Assurer rapidement un droit égal d'appel aux « innovateurs » dans le cadre des instances similaires à celles actuellement visées par la réglementation sur les avis de conformité.
- Garantir la protection des données pendant une période de dix ans plutôt que huit, tel que requis par l'AECG.

## Régime d'« avis et avis »

Que l'auteur d'un piratage puisse aussi être une mère de famille dévouée, comme certains aiment le prétendre, ne change rien au fait que cette maman doit subir les conséquences de ses actions

tout comme dans le cas où elle se mettrait à cambrioler pour ses enfants. **Recommandation** : Le régime d'« avis et avis » du Canada est impuissant lorsqu'il est question de traiter avec les contrefacteurs et devrait être remplacé par une norme plus stricte d'« avis et de retrait » avec les sanctions conséquentes..

## Notion d'« utilisation équitable »

La notion d'« utilisation équitable » prévue par la loi est devenue confuse et mal adaptée. La série d'exceptions qui en découle et qui figure dans la *Loi sur le droit d'auteur* permet la reproduction d'une partie importante d'une œuvre et même, dans certaines circonstances, d'une œuvre en entier, sans l'autorisation de l'auteur. Les difficultés de l'industrie de l'édition pédagogique illustrent bien ses effets négatifs. **Recommandation** : Corriger au moyen d'une loi les dérapages de la Cour suprême relativement à l'extension de la notion d'utilisation équitable dans le droit d'auteur.

## Contenu généré par les utilisateurs

Le « Contenu généré par les utilisateurs » se réfère à une disposition de la *Loi sur le droit d'auteur* qui permet essentiellement à toute personne de s'approprier d'un contenu, de le modifier, puis de le distribuer sur YouTube. Bien que l'article permette cette diffusion à des fins non commerciales seulement, son libellé est rédigé (très mal) de manière à ne pas empêcher une utilisation commerciale. **Recommandation** : Cette dérive à l'appui du repli sur soi promue par une école de pensée qui favorise une politique « made in Canada » en matière de PI doit être éliminée de la *Loi sur le droit d'auteur*.

## Extension de la durée du droit d'auteur

Comme on en a discuté dans le premier article, rien ne justifie qu'un statut différent des autres types de propriétés soit attribué au droit d'auteur sur le plan de la durée. **Recommandation** : Le Canada doit faire preuve de détermination et abolir la disposition qui limite la durée du droit d'auteur, ou à défaut, adopter la pratique largement répandue qui établit la durée de ce droit à 70 ans après la mort de l'auteur.

## PI devant les cours de justice

Certaines faiblesses dans le régime de la PI du Canada, notamment en ce qui a trait à l'interprétation de l'utilisation équitable et à l'application des règles en matière de promesse, découlent des décisions rendues par les tribunaux ou ont été exacerbées par ces derniers. La PI est trop importante au sein d'une économie moderne pour être mal servie par le plus haut tribunal du pays. **Recommandation** : Veiller à ce que de solides connaissances et compétences en matière de propriété intellectuelle soient toujours présentes au sein de la Cour suprême du Canada.

En plus des recommandations ci-dessus, les articles de cette série ont recommandé **de faciliter les prises de brevets par les petites et moyennes entreprises; de mettre en œuvre en entier les accords commerciaux conclus récemment** (PTP et AECG); et **d'exclure la prise en compte des déséquilibres commerciaux** en biens protégés par la PI lorsqu'il est question d'élaborer des politiques en matière de PI.

Cette série présente en tout dix recommandations précises; chacune vise à aider le Canada à devenir un chef de file en innovation. Ensemble, elles pourraient former la base d'une stratégie de la propriété intellectuelle qui pourrait très bien servir le Canada de demain.

# Introduction

In its March 2017 budget, the Government of Canada promised a renewed intellectual property rights (IPRs) strategy as part of its program to support economic development and innovation in Canada. The Macdonald-Laurier Institute (MLI) has devoted a series of papers to understanding the importance of intellectual property protection and seeking ways to improve the country's record on IP rights. This paper, the third and final one in the series, looks in particular at some of the quirks of the Canadian intellectual property (IP) policy environment – its politics, institutions, and current debates and issues.

As we have demonstrated in the previous papers, IPRs are a critical, non-fiscal underpinning of innovation policy. They don't cost the government anything and they can have a powerful economic impact. In fact, by enabling more traceable, taxable transactions, they probably enhance revenue.

Strong IPRs correlate highly with favourable national innovation outcomes. This seems to be true at any stage of economic development, but, as studies show, it is particularly so for an advanced and open economy like Canada's, and even more so for an economy as populated by small- and medium-sized enterprises (SMEs) as Canada's is. IP is critical for innovative SMEs to thrive in information and communications technology (ICT) and biotech environments dominated by large firms. Of course, too, the greater the extent to which firms can appropriate the value of their work through IPRs, the less Canada needs to subsidize innovation. The more IP transactions, the larger the tax base.

“The greater the extent to which firms can appropriate the value of their work through intellectual property rights, the less Canada needs to subsidize innovation.”

The first paper in this series (Owens with Robichaud 2017b) reviews how IPRs are strongly justified philosophically and morally. It also demonstrates that IPRs are essential for utilitarian reasons. They are incentives that further the creation, disclosure, and distribution of IP. They are important signals, reducing the cost of capital to SMEs. They facilitate firm formation and collaboration among firms. The first paper also examines the growing importance of copyright to the innovation economy and suggests a fresh approach to

understanding copyright, tossing out the ill-conceived notion of “balance” and extending the term of protection indefinitely. Critiques of IPRs were reviewed in the first paper and it was seen that none effectively supported a policy of weaker IPRs.

Also, the international politics of IP were shown to favour stronger IPRs in Canada. Multi-national comparative indices all show significant deficiencies in Canada's protection of IP. This author agrees, and we can anticipate that the forthcoming MLI IP index will demonstrate the same. Also there is the *Special 301 Report* issued by the US Trade Representative's (USTR) Office (2016), on which Canada has long resided as an IP delinquent.

The second paper (Owens with Robichaud 2017a) examined the impacts of trade and foreign investment on IP policy, and how research proves that the characteristics of the Canadian economy make it best suited to a policy of strong IPRs. It examined the innovation economy of Canada as a whole, but looked in particular at the pharmaceutical and ICT sectors. It also set out a brief, recent history of Canada's main IP laws, to demonstrate how they have evolved in response primarily to international treaties, and to demonstrate their (general, but not unvarying) strengthening over time.

We turn now to issues facing IP policy in Canada.

# Weaknesses in Canada's Intellectual Property Regime

As the description of the recent history of IPR development in Canada in the second paper (Owens with Robichaud 2017a) shows, a great deal of shoring up and improving of the IPR regime has been done, largely in response to treaty developments. This ought to continue. But IPRs are a living system and problems develop. The following section is a review of current IPR dysfunction in Canada.

## Patents

### Patent subject matter

The *Patent Act* (Canada) has several exclusions from what may constitute an “invention” within the meaning of the *Patent Act*. Methods of medical treatment are not permitted (*Tennessee Eastman Co. et al. v. Commissioner of Patents*), although this exclusion has been gradually limited. Computer software *per se* is excluded, considered an abstract scientific principle or theorem, these being expressly excluded in the *Patent Act* (s. 27(8)). That said, however, software is, practically, patentable as a computer-implemented invention if the patent is drafted properly and cites some physical result, such as process control (*Schlumberger Canada Ltd v. Canada (Commissioner of Patents)*). Business processes, which are usually instantiated in software, are patentable (*Amazon.com Inc. v. Canada (Commissioner of Patent)*).

But “higher” life forms, such as plants and animals, are not patentable, while so-called “lower” life forms, such as microorganisms, are. No one can say with any certainty where lower ends and higher begins, which is a source of unnecessary confusion and uncertainty for the life sciences industries. Moreover, the Supreme Court of Canada (SCC) ruled that only inventions anticipated by the legislature in enacting the *Patent Act* are patentable, an absurd result that has potentially deep repercussions for the ambit of future patentable subject matter (*Harvard College v. Canada (Commissioner of Patents)*). These results stem from the so-called Harvard mouse case, a case in which Harvard College sued to have a patent issued for its mouse, which had been genetically modified for susceptibility to cancer. Harvard lost after a very long fight that lasted for what would have been nearly the whole 20-year life of the contested patent.

The exclusion of higher life forms from patentability sets Canada apart from every other OECD nation, all of which allowed the patent on Harvard's mouse (and many creatures like it). Moreover, the availability of the Harvard mouse case as a precedent to permit a lower court to disallow any patent on a subject matter it finds objectionable – new abortion medicines? – is troublesome. It is necessary at least that the consequences of this badly-reasoned case be legislatively rejected. An amendment to the *Patent Act* should make it clear that “everything under the sun” made by man is patentable, subject only to the express exceptions and requirements contained in the *Patent Act*. New exceptions, if any, would be enacted by the legislature, not the courts, which is as it should be.

### Patent term restoration

Patent term restoration (PTR) is a legislated extension of a patent term, to a specified maximum, to make up for government-occasioned delays for approval of a pharmaceutical product that occur during the 20-year patent term. It is implemented in many countries. The reasoning behind it is that it is unfair for government to take away by the hand of bureaucratic delay the monopoly largesse it bestows with the hand granting the patent. Patent term restoration is the law in all G7 countries except Canada. Yet Canada is noteworthy for delay of marketing approval for pharmaceuticals as Mifegymiso recently shows. The approval of the Mifegymiso drug for abortion, commonly known as “the morning after pill,” was held up for years for no good reason, at great cost to the women who need it. Canada

should rightly offer PTR. The average time to market for an innovative pharmaceutical is 11–13 years – a very significant bite out of the patent term of 20 years (Lybecker 2017).

In the United States, the maximum extension of term is capped at 5 years of lost time, similar to the EU. Once implemented, the *Canada-EU Comprehensive Economic and Trade Agreement (CETA)*<sup>1</sup> requires Canada to provide a minimum two-year restoration of patent where the life of the patent is lost due to delays in regulatory approval (Government of Canada 2016). In addition, during that extended period, CETA would permit member countries to implement an exception to patent infringement allowing for the export of products using the patent, a novel provision in patent law worldwide: “Notwithstanding paragraphs 1 through 4 of this article, each party may also limit the scope of the protection by providing exceptions for making, using, offering for sale, selling or importing of products for the purpose of export during the period of protection.” In other words, persons other than the patent holder may manufacture provided it is solely for export – presumably to jurisdictions not affected by the existence of the patent.

The Trans-Pacific Partnership (TPP) would similarly require Canada to implement PTR; under the TPP, “unreasonable curtailment” or delay in obtaining regulatory approval would be compensated. There is no definition of what an “unreasonable” delay would be. This could be important for biotechnological inventions that may spend longer in prosecution at the patent office than others.

“ It is unfair for government to take away by the hand of bureaucratic delay the monopoly largesse it bestows with the hand granting the patent.”

The TPP would require, as an additional trade obligation that Canada is not already bound to, Canada to restore that portion of the patent term that is lost due to delays in the Canadian Intellectual Property Office (CIPO) during prosecution of a patent application, irrespective of the nature of the invented technology.

Canada should, moreover, stop its incremental resistance to effective IPR change and go straight to the widely-adopted five-year PTR limit, not the

two years CETA sets as a minimum. Presumably this resistance arises from the influence of a sort of governmental “trade Realpolitik” on IP improvement: do not give up now what you can trade in the future. Obviously, this is not without logic. Yet is it consistent with a forward-looking IP policy, when the withheld concession actually brings benefits to Canada, too?

Finally, CETA provides that signatory states shall provide a minimum 8 years of data protection for innovative drugs. Canada does now provide these 8 years, but they are short of a world-leading standard. The US and Europe both provide 10 years and Canada ought to follow those examples. The 8-year period dates back to 2006, when Canada amended the data protection provisions of the *Food and Drug Regulations* to grant 8 years of market exclusivity to manufacturers of “innovative drugs,” to satisfy the North American Free Trade Agreement (NAFTA) and Trade Related Aspects of Intellectual Property (TRIPS) obligations to protect undisclosed, proprietary data necessary to determine the safety and efficacy of a new pharmaceutical product containing a new chemical.

### Utility requirements

The most contentious patent issue in Canada is its law of “utility,” particularly as it is applied to pharmaceutical inventions. An invention must have utility to be patentable – it is one of the statutory requirements, like novelty and non-obviousness. In Canada, approximately 30 pharmaceutical patents have been invalidated in the past several years for rulings on utility by the courts, sapping billions of dollars from the Canadian market for pharmaceuticals that have been successfully patented and marketed in other countries. The Canadian courts’ interpretation of utility, known as the *promise*

*doctrine*, requires patentees, when patents are challenged as being invalid, to demonstrate that they met the criterion of utility at the time of filing of the patent application; this can be met by either showing the utility was actually demonstrated at the time, or by proving the “promise of the patent.”

Utility is a largely formal requirement; only a “mere scintilla” of usefulness is required to validly patent an invention. If the invention is a drug, it must, for instance, be said to effectively treat some condition, or improve on such treatment. So far so good. But the promise doctrine takes this much further. If a patent is challenged, post-issuance, the court will read it for “promises” of utility – inferring utility stated at the time of patenting that can be very broad, perhaps, for instance, for greater therapeutic effect in the case of a drug. If the patent is proven not to have lived up to this expanded promise, it is invalidated – even though proven utility may exceed, even greatly exceed, the “mere scintilla” level: it all has to be there. This arises from *Apotex Inc. v. Wellcome Foundation Ltd.*, a decision by the SCC – even though no such requirement is stated in the *Patent Act*.

The trend of the courts to invalidate patents for this expanded demand for utility led to Eli Lilly lodging a complaint in 2014 under the NAFTA dispute resolution processes, after patents on two of its top-selling products (the ADHD drug Atomoxetine (Strattera) and the anti-psychotic Olanzapine (Zyprexa)) were invalidated. In that dispute, Lilly claimed under the investor-state provisions for damages of C\$500 million, alleging that its rights had been violated under the expropriation and compensation provisions, minimum standards of treatment, and national treatment provisions of NAFTA.

Eli Lilly patented Strattera in 81 jurisdictions. Only in Canada was the patent invalidated for lacking “utility.” Most people would find this odd given that enough people find the drug useful that global sales are around US\$700 million.

A sympathetic NAFTA tribunal saved Canada the \$500 million plus costs. In its ruling (International Centre for Settlement of Investment Disputes 2017), the tribunal found that while the promise doctrine amounted to a change in Canadian patent law, the change was not big enough or sudden enough to qualify Eli Lilly for compensation under the investment protection provisions of NAFTA. Having decided this, the tribunal did not even get to Eli Lilly’s claim that the promise doctrine was not in keeping with Canada’s intellectual property obligations under NAFTA, which it may well not be.

The promise doctrine is judge-made law, but even in a common law jurisdiction like ours, the tribunal reasoned, courts were clearly an arm of government and their decisions could be open for review.

The promise doctrine is sure to come up in the impending NAFTA renegotiations. We had better have an answer, and the only reasonable one is an end to its excesses, perhaps by legislative intervention. Alternatively, the case of *AstraZeneca Canada Inc., et al. v. Apotex Inc., et al.* will soon be decided by the SCC. The case was heard in November 2016 but no decision has yet been issued. This case provides the Court an opportunity to clarify the promise doctrine, and it should take the opportunity to do so. The SCC can right wrongs that courts, including itself, have wrought.

Intellectual property law, as will have become clear to any reader of these papers, is a complex melding of statute and case law. No statute, no rights ... but until a court rules, there’s no telling what the

“ The promise doctrine is sure to come up in the impending NAFTA renegotiations. We had better have an answer, and the only reasonable one is an end to its excesses, perhaps by legislative intervention.”

rights are, exactly. So it is with the promise doctrine. The SCC can overrule itself. It has the power to do so as it is not effectively bound by its own precedent (as we saw when the recent *Carter* decision reversed an earlier decision about assisted dying). But it is the statute that, ultimately, governs. We can hope that the SCC soon corrects itself. If it does not, there is no other remedy for the promise doctrine than to legislate it out of existence. Such amending legislation need only be brief and to the effect that as long as some utility is proved the patent should be sustained.

### Deficient enforcement and resolution for pharmaceutical-related patents

Another element of Canada's IP system affecting pharmaceutical patents is the unequal availability of appeal for proceedings that are brought under the *Patented Medicines (Notice of Compliance) Regulations* (NOC Regulations). The purpose and operation of the NOC Regulations are a little complex.

Section 55.2(1) of the *Patent Act* allows a generic manufacturer to use a patented invention for the purpose of seeking regulatory approval of its product. The provision, therefore, provides an exception from infringement. The *Patented Medicines (Notice of Compliance) Regulations* [S.O.R./93-133 as amended] balance this right by ensuring that this exception to infringement does not allow a

generic to be actually sold before patent expiry. Thus the notice of compliance for the generic, (NOC), which is the licence to actually market a drug, is withheld until the generic manufacturer first addresses the patents for that drug. The generic manufacturer may either agree to wait for expiry of the patent before receiving its NOC, or challenge the patent by making an allegation justifying the issuance of the NOC. The allegation may be accepted by the innovator or upheld through a Federal Court decision.

““ The “notice and notice” provisions of the *Copyright Modernization Act* are among its most controversial.”

Under the NOC Regulations, if a patentee brings a “prohibition proceeding”, and an order issued by

the Federal Court against the Minister of Health prohibiting issuance of marketing approval (that is, a notice of compliance, or NOC) to a generic, the generic can appeal that decision to the Federal Court of Appeal. However, if a generic is successful, the innovator/patentee cannot appeal an adverse finding once the NOC has been issued (since it then becomes a moot issue, there being nothing to “prohibit”). This system is often referred to as a “linkage” between marketing approval and patent status.

While the NOC regulations are not an international treaty requirement, CETA provides that, where such linkage systems exist, there should be “equitable rights of appeal” for innovative medicine parties. Bill C-30, *An Act to Implement CETA*, requires that amendments be made as necessary to NOC regulations to implement an equitable right of appeal, and otherwise increase the scope and finality of such actions. How this would be implemented to deal with the lack of appeal for innovators under the NOC Regulations is unclear.

New regulations are expected to be issued soon.

## Copyright

### Notice and notice

The “notice and notice” provisions of the *Copyright Modernization Act* (CMA) are among its most controversial. They are a means to deal with copyright infringement on the Internet. Pursuant to this regime, an Internet Service Provider (ISP) who receives a notice that one of its users is infringing

copyright must forward that notice to the user. But there is no requirement for the ISP to delete the infringing content; nor does any cost or punishment for the infringer follow, even for repeat offences. Compared to the US “notice and take-down” regime, Canada’s notice and notice is perceived, quite rightly, as much less effective at preventing infringement.

The adoption of notice and notice was controversial – ISPs liked it, since its administrative burdens and impositions on customers were light, while content providers would have preferred something that actually had some effect, particularly on the most serious abusers whom, one suspects, are least deterred by the limp notice and notice response. A flavour of the controversy, and of the attempts to use poor and non-existent data to justify notice and notice, are caught in Barry Sookman’s (2011) contemporary blog post on it. For instance:

Canada’s ISPs had advocated for this “notice and notice” process claiming it was effective. However, they never produced any empirical evidence or studies to back up their claims.

On March 22, 2010 – before the federal election was called – TELUS, Bell and Rogers appeared before the Special Legislative Committee studying Bill C-32. The ISPs continued to endorse notice and notice asking that this process be formalized in C-32. Studies around the world have shown that notice and notice by itself – without any real threat of a sanction – is not the most effective way of reducing online peer-to-peer file sharing. TELUS, Bell and Rogers which have, to some extent, been voluntarily passing on notices from rights holders for about decade, were asked by the Parliamentary Committee whether notice and notice was effective. As it turns out, after a decade of experience, it became clear from their testimony that the ISPs could not show to what extent notice and notice (without any real threat of a sanction) deters online file sharing.

The MPs on the Committee were keenly aware that the ISPs had advocated for notice and notice and rejected any form of graduated response to provide further assistance in reducing online file sharing. So, the MPs on the Committee, led by Mr. Marc Garneau and Mr Pablo Rodriguez, asked the ISPs to provide evidence that notice and notice without the possibility of sanctions is effective. Mr. Garneau squarely challenged Canada’s leading ISPs to provide data to support their positions.

In Mr. Sookman’s view, the ISPs failed miserably in their attempts to demonstrate the efficacy of notice and notice; this author wholeheartedly agrees.

Notice and notice works like this, according to an Innovation, Science and Economic Development (2015) Canada (ISED) web page:

When a copyright owner thinks that an Internet user might be infringing their copyright, they can send a notice of alleged infringement to the user’s Internet service provider (ISP). Notice and Notice requires that the ISP forward (e.g. via email) the notice of alleged infringement to the user and then inform the copyright owner once this has been done.

For example, a copyright owner observes an Internet user with a Canadian Internet protocol (IP) address downloading a movie from a pirate site. Not knowing who the person is, the copyright owner can send a notice of alleged infringement to the ISP that owns the relevant IP address. The ISP must then forward the notice to its subscriber who was using that IP address at the time of the alleged infringement.

“ Compared to the US “notice and take-down” regime, Canada’s notice and notice is perceived, quite rightly, as much less effective at preventing infringement.”

Also according to ISED (2015), the purpose of notice and notice is consumer education and awareness. These may be worthy goals, but they could be served just as well by an effective “takedown” system. After all, an effective regime is no less likely to educate and to promote awareness. The reason those are notice and notice’s only stated goals is that notice and notice is limited to them since it is toothless; to effectively combat piracy is not in its mechanism.

The US notice and takedown system has the benefit of resulting in the takedown of the allegedly infringing material if the recipient of a notice does not formally protest it. Recall that the absence of a takedown requirement was fastened on by the Global Intellectual Property Center (GIPC) Index (2017) and by the *Special 301 Report* (USTR 2016) as a noteworthy deficiency of Canada’s IP regime. Data on the efficacy of notice and notice seem to be scarce but the scope of the piracy problem in Canada leaves its actual, as well as its theoretical, utility very much in doubt. Certainly it is up for review as a part of the *Copyright Act*’s scheduled five-year review due this year.

Also better is a system that actually attaches penalties, such as France’s HADOPI (*Haute Autorité pour la Diffusion des Œuvres et la Protection des droits d’auteur sur Internet*). This system originally threatened users with losing Internet access. After a French court declared Internet access to be a basic human right, this penalty was replaced in 2013 with a system of graduated fines. While it is an appropriate remedy to deprive Internet access from those who abuse it by theft, its impact on freedom of expression will likely limit its use here as well; effective fines may be the only answer. It is an interesting consequence of notice and notice that, since it is ineffective, it leaves the exacting of consequences for piracy to the content providers, who are likely to seek far more in terms of damages than an administrative penalty would.

““ Canada does have a severe problem with piracy. It is damaging trade relations and Canadian artists, and we need to look to new, more effective means to deal with it.”

In any event, the concern is less that any particular type of punishment be implemented, than that there be consequences for illegal downloading and failing to obey a notice where, of course, the notice is appropriately made. There is a strong case to be made for a publicly administered consequence for infringement. The loss to society from foregone artistic production and distribution owing to piracy is great, and enforcement by individual litigation is difficult and expensive. Content providers now often include payment demands with their notices, to the dismay of those who thought the ill-designed notice and notice a reprieve for pirates. Perhaps a payment demand accompanying notice makes it more effective but otherwise, it seems that even the best evidence of the efficacy of notice and notice – such as that quoted by Professor Geist – is pretty weak (Geist 2015b).

The US Copyright Office (n.d.) is reviewing its *Digital Millennium Copyright Act*’s (DMCA) notice and takedown regime. The public consultation process ended in May of last year and the report is now being prepared. No specific publication date is announced. The US concern about notice and takedown is that it is not good enough, not that it is too strict – in other words, Canada is still on a beta solution while the US is moving on to 2.0. We would do well to benefit from this process and research without, necessarily, following the US legislative lead. Canada does have a severe problem with piracy (IIPA 2017). It is damaging trade relations and Canadian artists, and we need to look to new, more effective means to deal with it. The US government and US companies are certainly also concerned about our notice and notice system (Burke 2017).

Ironically, by making enforcement so unnecessarily difficult and expensive, notice and notice creates the circumstances that feed expensive claim letters from rights-holders. Some Canadians are concerned about the effect of these demands on the poor ignorant saps who steal over the Internet – as

though such theft really ought to be without consequences. Those sending such letters are often called “copyright trolls,” which is deliberately prejudicial and unfair; they are in fact *bona fide* copyright holders defending their property against pirates. Whether or not the pirate is also a soccer mom is no more relevant to whether she should suffer the consequences of her actions than if she steals soccer equipment.

In the absence of any other remedy, and given the fact that pirated materials remain up even after notice is given, these pejoratively treated rights-holders have to take action themselves. And that action is expensive, requiring application to a court to get the names of pirates from relevant ISPs, and then sending take-down and demand letters to them. Thus notice and notice actually encourages higher penalties for pirates than notice and takedown would. While no one should interfere with the ability of rights holders to claim appropriate damages from thieves, it is in everyone’s interests to find an administrative means to mitigate the strain that notice and notice places on rights-holders’ self-help efforts. Perhaps this means a system of stiff penalties, the revenues from which go straight to rights-holders (after another expensive collective takes its share, of course).

In bringing these unintended consequences to light, Canada owes a debt to rights-holders who have taken action to protect their interests, particularly Voltage Pictures, and technologically-sophisticated “sniffing” systems like Canipre (2015) and others, who provide rights-holders with the information as to what IP addresses are responsible for illegal downloading. Indeed, in providing efficient notice and demands, companies like Canipre may be the best solution to the piracy problem – better than a collective; essentially, a privatized penalty system with an incentive to chase pirates. The market will find its level for settlement costs.

Voltage Pictures, creator of such critically acclaimed films as *The Hurt Locker* and *The Dallas Buyers Club*, has, in well-publicized and important cases in Canada, sought to discover the names and contact information of Canadian pirates; eventually, those IP addresses were uncovered by Canipre, to the credit of its Canadian ingenuity. To the credit of the courts, Voltage has succeeded in spite of inappropriate appeals to privacy. A recent case decision decided that ISPs do not yet, absent federal government regulation on the subject, have the authority to require reimbursement of costs from parties like Voltage seeking this information. And, they should not. A reasonable fee for court order compliance should be passed on to the pirate on her ISP bill – not to every subscriber, but to those subject to the order. This should be large enough to compensate the ISP both for compliance and billing the subscriber.

Moreover a simpler, regulatory process for release of pirate information by ISPs is needed. We do not need to tie up court time on this sort of thing. ISPs can include in their subscriber agreements the right to release such information as an exception to privacy obligations. Privacy obligations should not apply in circumstances of theft, anyway.

### Fair dealing

Fair dealing is an exception to the rights of the author set out in the *Copyright Act*, and it has become as messy and ill-considered as notice and notice. This exception allows copying of a substantial portion of a work and even, in certain circumstances, all of it,<sup>2</sup> for certain purposes, without the author’s permission. These purposes are criticism, review, news reporting, parody, private study, education, research, and satire. In Canadian law this “exception” has expanded dangerously to undermine the integrity of the *Copyright Act*.

“ ... it is in everyone’s interests to find an administrative means to mitigate the strain that notice and notice places on rights-holders’ self-help efforts.”

Educational publishing is now instructive of how an overemphasis on fair dealing by the courts and legislature has had a strongly negative impact on the production of copyright-protected works. To understand why, we need to examine the tortured path along which the SCC has marched the law of fair dealing. To do so not only demonstrates a particular flaw in Canadian IP laws, it demonstrates how difficult it can be to fix problems compounded by legislation and court decision.

Fair dealing was long understood to be what the *Copyright Act* says it is – a defence to copying a material part of a work. If a copy were made for certain purposes, and were otherwise fair, then a copier would not be liable for damages. Section 29 of the Act now reads:

29. Fair dealing for the purpose of research, private study, **education**, parody or satire does not infringe copyright. [Emphasis added; note that education, parody, and satire were additions to the Act made through the CMA. News reporting and criticism, subject to additional conditions, are covered in subsequent sections of the *Copyright Act*.]

In *CCH Canadian Ltd. v. Law Society of Upper Canada* (CCH), a pre-CMA case, fair dealing was reviewed and discussed at length. This case involved the Great Library of the Law Society of Upper Canada copying materials published by the publisher CCH and faxing them to lawyers. To the general surprise of practitioners, CCH determined that fair dealing was no mere defence but rather a “user right” – whatever that is. These so-called “user rights” are widely perceived to be good things, better than a mere

defence to infringement. But no coherent theory of what they may be or how they would apply in practice has emerged. Lurking behind the mere semantics, however, is a principle of interpretation strongly favouring users over creators, for reasons the Court does not satisfactorily articulate.

A further problem with CCH is its novel means of applying the fair dealing exception. The reasoning in CCH ran that, in a fair dealing analysis, the purpose of the user supplants the purpose of the copier, where both are involved (when, in other words, one person copies for another’s use). Recall that fair dealing must be for an allowable purpose. Under the court’s analysis, then, it was not the Law Society distributing material that mattered, but the private purposes of individual

““ Educational publishing is now instructive of how an overemphasis on fair dealing by the courts and legislature has had a strongly negative impact on the production of copyright-protected works.”

lawyers who received the material. Since the lawyers were found to be engaging in research and private study, an allowable purpose, this substitution of intentions carried the day.

This substitution of user for copier may make sense where the copier is merely the agent of the end user, a functionary of the copy process with no actual interest in the copy, such as a personal assistant. But the Great Library is very much an active player, an institution making available information it acquires at a cost with support from lawyers and government. It copies as an institutional player, not as an insubstantial agent. To abstract the Great Library from the process is a judicial sleight of hand. So is it to ignore the fact that lawyers are in a business which is perfectly capable of bearing the costs of its inputs.

Also in CCH the Court determined that fair dealing rights, in particular the purpose of “research and private study” should have a “large and liberal interpretation” (paragraph 56). This means that we can expect the boundaries of permitted purposes to be further stretched in the future.

Then came the 2012 case of *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* (*Alberta v. CCLA*), in which the SCC pursued a similar analysis to a still worse end. This case also preceded the CMA and the addition of education as a permitted purpose for fair dealing.

The majority, by a slim 5–4 margin, adopted the “end user” analysis of CCH to considerably expand the scope of the private copying exception, and thereby effected an enormous transfer of wealth from the struggling publishing industry to the well-established and largely publicly funded education industry.

The facts on appeal in *Alberta v. CCLA* were stated in the case headnote as follows:

Access Copyright represents authors and publishers of printed literary and artistic works. It filed a proposed tariff with the Copyright Board with respect to the reproduction of its repertoire for use in elementary and secondary schools in all the provinces and territories other than Quebec. The Copyright Board concluded that copies made at the teachers’ initiative with instructions to students that they read the material were made for the allowable purpose of “research or private study” under s. 29 of the Copyright Act. They did not, however, constitute fair dealing and were therefore subject to a royalty. On judicial review, the Federal Court of Appeal upheld the Copyright Board’s conclusion that the copies were not fair dealing.

The SCC not only decided that it was the students’ purposes that counted, but it found those purposes to be “research or private study,” even though the students played no role in initiating the copying, and they studied the work as a class, not individually. Surely that exception is meant to apply where the initiative to copy is the researcher’s, not a teacher’s. And it strains credulity that to make copies for a classroom full of students is “private.” The dissent enlarged on these points; both the Court of Appeal and the Copyright Board had found the purpose of the copying to be instruction, not private study. Again, the SCC erased the presence of the actual copier in a wholly unconvincing manner, so that the purpose of “instruction” became research and private study by the students.

“ ... schools are buying many fewer textbooks. One hears of schools buying one book from which copies may be made, instead of one for each student.”

On every point, the SCC majority got the wrong reasoning in *Alberta v. CCLA*. The court sought to justify and expand its heady reasoning in CCH, it seems, and to expand fair dealing, heedless of the altogether salutary and express limitations of it in the legislation. That the SCC could make such a ruling is somewhat astonishing, especially in the face of a cogent and doctrinally sensible dissent by Mr. Justice Rothstein in which Deschamps, Fish, and Cromwell, JJ, concurred.

The result of the decision in *Alberta v. CCLA* is a dramatic undermining of the educational publishing market. Universities and schools have dropped their licensing arrangements with Access Copyright, and schools are buying many fewer textbooks. One hears of schools buying one book from which copies may be made, instead of one for each student. Access Copyright is suing York University over its current stance to paying royalties for works (Shen 2016).

On top of this, the CMA introduced fair dealing for educational purposes. According to the preamble to the CMA, this is based on sound public policy:

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

If the rights of educational publishers could be so thoroughly trodden underfoot with the pre-existing private study exemption, just think what risk they run with the new education exception. The

dealing would still have to be “fair,” but if making copies for a whole class is fair for the “private study” exemption, as it was found to be in *Alberta v. CCLA*, what would not be fair for “education”?

In fact, so egregious is the SCC’s treatment of fair dealing that the resulting law would not meet Canada’s treaty obligations. The current situation is unlikely to meet the requirements of the *Berne Convention* on copyright, and other treaties to which Canada is bound. The Berne “three-step test,” set out in Article 9(2), has been re-stated in other treaties. These include TRIPS, in which the three-step test is set out as follows: “Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.”

On a plain reading, it would seem that the current combination of judicial and legislative exemp-

tions for educational use may be a special case – education – although “education” is so broad as to potentially exceed the application of the term “special”; these exemptions clearly conflict with a normal exploitation of the work; and they undoubtedly unreasonably prejudice the legitimate interests of the rights holder. As such, Canada’s education copyright regime is open to challenge in a trade dispute under the WTO.

““ So egregious is the Supreme Court of Canada’s treatment of fair dealing that the resulting law would not meet Canada’s treaty obligations.”

Even Heritage Canada, in the ministerial briefing book made available to the newly appointed Liberal Minister Mélanie Joly, notes “Educational institutions have dramatically changed the way they manage copyright clearance in a way that disrupts the former business models of many au-

thors and publishers, and their collective societies. These latter have initiated court proceedings in Ontario and Quebec on behalf of publishers.”

PWC was retained by Access Copyright to perform a detailed study of the educational publishing market in Canada. Its excellent study, *Economic Impacts of the Canadian Educational Sector’s Fair Dealing Guidelines*, was released in June 2015. The tale it tells is as unfortunate as it was predictable. In response to the greatly increased scope of the fair dealing exception, educational institutions and authorities in Canada adopted new fair dealing guidelines pursuant to which the payment of royalties to content producers was greatly attenuated. The study should be reviewed by anyone who questions the practical effects of strong copyright laws. It assesses the actual and expected market impacts of the implementation of the Fair Dealing Guidelines (“Guidelines”) adopted in 2012 by the Council of Ministers of Education, Canada (CMEC), Association of Universities and Colleges Canada (AUCC), and Colleges and Institutes Canada (CICan). The Guidelines apply to K-12 schools and post-secondary institutions in Canada, excluding the province of Quebec. Amongst the findings of its assessment are that:

- Since implementation of the Fair Dealing Guidelines, the educational publishing industry in Canada has been subject to a significant negative impact.
- Application of the Guidelines significantly compromises the ability of educational publishers to publish original materials and meet varied academic needs.
- The economic footprint of the educational publishing industry is shrinking.
- The Guidelines, and the resulting market impacts, impede the ability of content producers to seize digital opportunities and discourage innovation in the Canadian digital knowledge-based economy.

Oxford University Press, for instance, has closed its Canadian business. Access Copyright's revenues are much diminished, calling the future of the collective into question. Soon, perhaps, government will have to step in to fund the development of Canadian instructional materials, preserving some supply while costing scholarly independence, credibility, and efficiency.

It should be no surprise that to establish a regime in which people are expected to provide their products for free would lead to supply drying up. What makes the whole mess even more inexcusable is that we are dealing with *education*. Did not courts and legislators advert to the fact that education relies on published content, is in fact one of its most important markets, and that copyright incentives are essential to support that market?

It is up to legislators to turn this around. It must become a high priority for the 2017 review of the *Copyright Act*, if it is not dealt with before. Clearly the SCC will not have (or take) the opportunity to reverse itself on the issue any time soon. The *Access Copyright v. York University* case could create an opportunity; it is currently in Federal Court.

Worse still, Canada is participating in negotiations at the World Intellectual Property Organization (WIPO) on a new international treaty related to increased access to copyright-protected material for educational institutions and for libraries and archives, in an effort, one can only suppose, to throw gasoline on the bonfire of Canadian educational publishing; Canada should withdraw, unless by staying in it can mitigate the depredations of the national copyright predators in the group of negotiators.

### User-generated content

Another "issue" tackled in CMA is "mash-ups." Some, presumably in ISED, felt that it was important that Canadian fan-boys and fan-girls be able to mess up other people's work. Some even claim this to be a creative activity. Some artists care more than others about such unauthorized uses of their work. Prince, for instance, was notorious for caring deeply about control of his music. (See for instance the giddily nonsensical case, *Lenz v.*

*Universal Music Corp.*, 801 F.3d 1126 (2015), which grew, inadvertently, from Prince's caution.) On the other hand, distributors of Star Wars films may feel that they benefit from the attention in social media garnered by redistributed clips.

And so, further straying from sound IPRs, the CMA contained a decidedly odd, user-generated content (UGC) provision (s. 29.21). This bit of wackiness demonstrates, perhaps, that too many legislative efforts at copyright reform led to some punch-drunk minds involved in the *CMA* drafting. The UGC provision is intended to allow individuals to steal someone else's work, mar it, and then distribute it through Youtube – making mash-ups, in other words. While the section provides that this may be done only for non-commercial purposes, the way it is (very badly) worded makes it ineffective in preventing commercial use.

Moreover, the UGC provision is far too complex for its purpose. The *Copyright Act* should be preventing this sort of desecration, not abetting it. And because of its terrible drafting, the UGC provision is full of holes and unintended consequences. It contravenes the moral rights section of the *Copyright Act*, as well.

How much of an impact, if any, the UGC provision will have on creators' rights remains to be seen. Its terms are quite restrictive, making it of limited application, and it presents significant interpretative

““ The user-generated content provision of the *Copyright Modernization Act* is intended to allow individuals to steal someone else's work, mar it, and then distribute it through Youtube ...”

difficulties. The UGC provision supports free copying for the purposes of self-indulgent works that are highly derivative. Now, it may be that, given the international nature of the Internet, the impact of the UGC provision will be low. It would be silly to rely on a parochial Canadian exception to copyright when exposing one's plagiarism to the whole world on Youtube or Vimeo; therefore we may see little use, and less litigation, of this UGC provision.

So the best that may be said of the UGC provision is that it is ineffective, something which should have been plainly obvious from the beginning. Is it also harmless? For a couple of reasons, no. First, limited though it be in its applicability, it helps to spread the idea that copying and using someone else's work is okay. It is an unreasonable expansion of fair dealing rights. Second, it may lead innocent users into inadvertent liability outside Canada, should they assume that anyone anywhere else in the world with access to the posted UGC will care what the *Copyright Act* (Canada) says. And finally, it submits copyright protected works of both Canadians and others to the gross indignities of mutilation by the casual creator of pastiche or mash-ups.

In other words, it is a failed experiment, a parochial deviation courtesy of the "made-in-Canada" school of IP policy. It ought to simply be deleted from the *Copyright Act*.

### Copyright term extension

In 2015 the term of protection in Canada for audio recordings was extended to 70 years from the making of the recording. While this is a start, many jurisdictions, including Canada's major trading partners Europe and the United States, have adopted a term of 70 years from the date of the death of the author for other works, while the term for other works in Canada remains at 50 years from the date of the death of the author.

Moreover, there is the TPP, which requires Canada to extend its term to 70 years.

However, there is still another reason to extend our term, and that is that it will gain Canadian authors a reciprocal benefit in Europe and other jurisdictions. This is because these jurisdictions have implemented a 70-year term under the "rule of the shorter term," permitted under the *Berne Convention* and other copyright treaties. This rule provides that to extend the benefits of domestic copyright

““ If, as a consequence of the longer term, more copyrighted products will be sold than before, it would produce more economic activity.”

protection which exceeds the treaty minimum (50 years from the date of the death of the author) to foreign treaty nationals can be done on the basis that those nationals' nation extends the same. Absent the invocation of this rule, foreign copyright holders of treaty nations would otherwise be protected as domestic nationals and automatically subject to the full extent of the legal term. With this rule, discrimination is possible.

A study produced for Canada's federal government concluded that the impact of the term extension to be that "[u]ser costs may increase slightly," and that it would "likely contribute in a

small way to... [a net] outflow of royalties from Canada" (Hollander 2011). In other words, the effects would be immaterial if, perhaps, slightly negative. However, it should be noted that this conclusion was reached in the absence of the favourable balance of trade analysis, which appears to be new to the previous paper in this series.

Hollander's is a qualitative study that may not fully anticipate all the effects of introducing the longer period. If, as a consequence of the longer term, more copyrighted products will be sold than before, it would produce more economic activity. And even if some consumers will be out of pocket for the

difference between the price of a royalty-bearing good and a public domain good (some studies dispute the existence of a price differential in at least some circumstances (see PWC 2006 and Sookman 2015a)) a Canadian author's estate will be better off by as much, so it would often be a wash economically. And Canada would benefit from the reinvestment of those royalties in its creative economy (see for example EU Commission 2008 and Sookman 2015a).

All that said, as argued extensively in the first paper in this series, a limit of 70 years is no more appropriate or justified than any other longer one. Properly, there should be no term limits to copyright at all (Owens with Robichaud 2017b).

## Continuing and Systemic Problems

In addition to particular legislative flaws and initiatives, it is worthwhile considering the impacts of institutional capabilities and biases on the progress of IPRs in Canada.

### The politics of IP change in Canada

#### Patents

That the public eye is focused more on copyright law than patent law makes patent reform a bit the easier of the two, but patent law amendment too can be contentious. The US has seen a strong movement for patent "reform," which is spilling north over the border. This so-called reform is actually political pressure by large enterprises, primarily in the ICT sector, to make patents harder to enforce. It is an anti-innovator movement and the word "reform" is euphemistic and misleading. It is unlikely that the movement would be pushed hard in Canada, given how little litigation occurs here and the relatively small impact the diminishment of the Canadian market would mean. Nonetheless, calls for patent reform are heard and the Canadian government has recently considered related reforms (Geist 2014).

“Canada should avoid contamination by the financially-motivated movement against patent intermediaries from across the border.”

Jim Balsillie (Geist 2015a) and Michael Geist (2014) have called for reforms to reduce the impact of so-called "patent trolls." Who is a "patent troll" is in the eyes of the beholder; it is a pejorative term used to suggest they have less right to exercise their patents than others do. It is primarily directed at entities that own but do not practice patents. Presumably Mr. Balsillie's terrible experience at the hands of patent owners NTP led him on his crusade.<sup>3</sup> But one man's "troll" is another man's "patent intermediary," providing liquidity for small inventors or, indeed, depending on circumstances, maybe the small inventor herself.

Canada should avoid contamination by the financially-motivated movement against patent intermediaries from across the border. The fact that it is a project of large companies to avoid the rights of smaller ones is all we need to know; Canada's interests are aligned principally with SMEs, which benefit most from stronger IPRs.

Also fraught is the question of the increase of biopharmaceutical patent rights in Canada. Drug prices benefit – that is, increase – from stronger patent rights, and voters and governments pay for drugs. A lot. We could free ride on the willingness of others to pay the full cost of drug development – as we do now. That is simply opportunistic. But is that fair to our trading partners, or principled? No.

To accept the system of patents as a means to pay for drug development ought to mean buying into it all the way. While some complain about the decline in drug company R&D in Canada (see previous paper, Owens with Robichaud 2017a), it is not really surprising given Canada’s half-hearted approach to amending its patent regime for drug development.

It is time this country stepped up. To do so is also to acknowledge that to enhance incentives for drug development is very much in the interests of Canadians. It is also better than to allow the mixed incentives of health care provider and innovation policy-maker to defeat both purposes. Moreover, Canada’s controls on innovative drug prices seems to result in having amongst the world’s highest generic drug prices, a potentially more dangerous effect.

### Copyright

Future copyright reform is likely to be bedeviled by controversy just as it has been in the recent past.<sup>4</sup> The process of copyright reform has reflected its new politicization. The citizenry is more interested in copyright than patent; patent, after all, has little (but not nothing) to do with free consumption of cultural goods. The future of Canada’s copyright laws has even inspired a protest organized by the Pirate Party of Canada (Owens 2016). But policy-makers cater far, far too much to the pirate constituency, based on a sort of deluded nationalism (assuming we are freely consuming US goods without despoiling our own creators) and an entirely false narrative of the pirate as some essential-

ly innocent and ignorant Canadian soccer mom. We need to believe in copyrights, and that in no small part means not cringing when they are enforced against thieves.

“... policy-makers cater far, far too much to the pirate constituency, based on a sort of deluded nationalism ... and an entirely false narrative of the pirate as some essentially innocent and ignorant Canadian soccer mom.”

To help to ensure the passage of copyright reform, then Bill C-32, in 2008 the government engaged in extensive consultation with the public, both through meetings and written submissions. But the consultation process ended up providing no legitimacy for planned amendments. As discussed in a study of written responses to the call for comment on copyright reform, many of the responses came from foreign nationals, principally pirates and game “modders” encouraged by online links on websites frequented by such folk to submit form letters. These made up the bulk of the written responses (Owens 2010, April 23).

Still, artists of all media and their representative organizations also responded, and they made it very clear that they sought copyright legislation that would protect their rights in an increasingly hostile, digital-copying environment. Their interests should be the watchword for copyright reform.

Because copyright is a multi-faceted form of IP protection that embraces both industrial property (software) and cultural property (books, photographs, movies, music, and so on), responsibility for the Act is shared between Ministry of Canadian Heritage (Heritage) and ISED. According to the Heritage web site: “The Copyright Policy Branch of the Department of Canadian Heritage is responsible, through its policy-making activities, for ensuring that Canada’s copyright policy framework, a cornerstone of cultural policy, supports creativity, innovation and access to cultural works” (Government of Canada 2016b).

Industry has not always seen eye-to-eye with Heritage on all reforms. Industry Minister Tony Clement, when he was driving the consultation process, favoured less rigid copyright rules, including the notice and notice regime.

Heritage's website expresses a foundational belief in the importance of strong copyright protection: "Effective copyright protection is key to cultural expression, citizen engagement, and economic growth powered by the rapid expansion of the knowledge-based economy" (Government of Canada 2016c).

ISED's mandate to promote innovation, on the other hand, has put it in the same league as ISPs, broadcasters, consumers, businesses, investors, and "user industries," groups that have a vested interest in reducing the scope of copyright protection (Haggart 2014). This of course is a far from ineluctable alliance, and hopefully ISED will see the error of its ways and align itself with stronger IPRs, for all the reasons set out in these papers. That alignment will do far more to advance ISED's mandate.

### Little academic support for IPRs

An impediment to the effective evolution of Canadian IP laws is the extent to which the Canadian academy is anti-IP. One is hard-pressed to point to legal scholars in Canadian universities who support IPRs with any rigour or enthusiasm. How could this be for such well-established and important legal doctrine? The reasons, it turns out, are historical.

Many Canadian law schools have been negligently inattentive to IP until relatively recently. There has been a lack of enthusiasm for IP courses and personnel both. Perhaps IP is too commercial and practical, or perhaps it was just a blind spot. But the attitude still is certainly wrong and puzzling. IP has been referred to as the "metaphysics of the law," and it is rich in pedagogical opportunity. Yet schools were for such a long time behind in developing this area of the curriculum. IP was, moreover, not an area of real research interest – nor to a large extent of student interest – for a long time. But then it became important as society became increasingly technologically dependent, and business increasingly enhanced wealth through the deployment of intangible assets. This led to the creation of the Centre for Innovation Law and Policy in 1999, brainchild of Dean Ron Daniels of the University of Toronto Faculty of Law, and Ken Knox of the Innovation Foundation of the province of Ontario. Located at University of Toronto Faculty of Law, it nonetheless served all law schools in Ontario, providing grants for the development of library resources, research, conferences, colloquia, and travel, and the development of personnel through training and study support. Several of its past fellows and students have gone on to take up teaching positions in IP in Ontario universities. The author of this study was executive director of the Centre for approximately six years.

“ An impediment to the effective evolution of Canadian IP laws is the extent to which the Canadian academy is anti-IP.”

As law schools have very grudgingly awakened to the need for IP and technology curriculum, many Canadian law professors in the field have been appointed recently. They are young and tend towards IP trends and notions that are of more recent vintage and less rooted in doctrine. They have not generally had the benefit of mentorship by senior IP colleagues. Their standard-bearer is more Lawrence Lessig (tellingly, a constitutional scholar) than Robert Merges.

One must turn instead largely to Canadian legal practitioners and the civil service for a wider breadth of perspective and insight into IPRs. This is not to say that their necessary deferral to the interests of clients should be ignored. However, they have valuable and extensive experience – usually more up to date than academics, unsurprisingly – which must not be ignored. Nor should a presumption of bias vitiate all of their views, by any stretch.

As to the academy, given the historical importance of it in the development of legislative policy, this is an unfortunate state of affairs. Chairs have been endowed at law schools with the express government intent of bringing in senior IP and innovation faculty. Faculties have been found wanting in being able to fill those chairs. Moreover, in those chairs now sit not the envisioned senior faculty, but members of this new generation.

We should stress that this is not to say that Canadian IP academics are not intelligent people doing interesting work. But their work does not always reflect the empirically demonstrable effects of strong IPRs and their benefits to the innovation economy, nor an appreciation of the intense and elegant evolution of IPRs. Industry, copyright collectives, and rights-holders associations are all at loggerheads with Canadian legal academics, finding them ideologically predisposed against them. US

and European academies are more balanced, not having suffered the earlier dearth of personnel that Canadian schools have.

““ In Canadian law schools... there is support for consumers over innovators, an absence of concern for essential incentives for innovation.”

In Canadian law schools there is a bias toward the public domain. In other words, the biggest concern seems to be for the exceptions to IPRs – their truncation – not the IPRs themselves. There is support for consumers over innovators, an absence of concern for essential incentives for innovation. This bias seems ideological, and not empirically-based.

Indeed, the public domain that benefits from an absence of rights or abandoned rights is a bit elusive. Are those beneficiaries Internet copiers and mash-up artists? Plagiarists? If they are, there is no clear policy reason to abet their concerns. Another example often given is of documentary film-makers, some of whom face the process of clearing rights to use pre-existing materials. Is there any dearth of documentaries? No. Rights clearance is not beyond the capabilities of the makers of documentaries, nor of movies, sampled music, compilations, or other works. Older commentators will remember the brouhaha over rights clearance in respect of multi-media CDs back in the day, but they too flourished without the copyright reform their makers tried to promote. And of course, documentary film-makers and others ultimately benefit from the same rights that they are beholden to respect of others' works.

In this series of papers we have frequently cited the ideas of Prof. Michael Geist and Jim Balsillie. There are fellow travellers in varying degrees: Jeremy de Beer, David Fewer, Richard Gold, Carys Craig, and more. All in some degree adopt an anti-rights posture. To be sure, these are highly intelligent people who cannot easily be pigeon-holed. Their decency, intelligence, and dedication are not compromised by doctrinal fallibility. But we should denounce their doctrinal fallibility where we find it.

And it should be remembered that rebellion against the established order is a function not only of adherence to a particular philosophical school, but also is a matter of age and fashion, and that current exponents of a set of views now may moderate with time. Let us not allow fashion to have an undue impact on public policy that must survive and guide the country for generations.

Rather than pick again on Mr. Balsillie or Professor Geist, let's review a recent article by Prof. Richard Gold of McGill University to better illuminate this kind of problematic Canadian thinking about IP. Writing about the NAFTA tribunal defeat of Eli Lilly, described above, Gold (2017) writes in the *Globe and Mail*: "But the win is only the beginning: The decision strengthens our ability to develop a made-in-Canada innovation policy that places priority on Canadian firms, patients and consumers."

Here we are again, with this defeatist, parochial approach to IPRs. He went on:

Most of the patents of commercial importance in Canada are held by foreign firms. This is not bad in itself: We are a small country in a big world. It becomes a problem, however, when those foreign firms gain patents that stifle Canadian innovation. By gaining patents too easily and having the financial resources to assert them aggressively against smaller Canadian firms and universities, these foreign patent holders slow down or keep out Canadian innovators.

Of course most Canadian patents are held by foreigners – patents in every jurisdiction are mostly held by foreigners. The rest of the world is always bigger than any domestic market for ideas. It means nothing. Moreover we *want* others to bring their inventions to Canada. It is an unmitigated plus, both for consumers and for innovation.

And with regard to "foreign firms," as readers of this series know, it is property rights that allow smaller Canadian firms to keep predatory foreign firms at bay, not the other way around. Then, unable to criticize the whole patent system, Prof. Gold does a drive-by slander by alluding to some who are "gaining patents too easily." What patents are gained too easily? He doesn't say. Canada does not grant patents easily. Yes, anecdotes exist of patents that ought not to have been granted. Patents are regularly invalidated by courts. No system is error-free, and the patent system is actually, through its massively iterative process and co-option of so many good minds, very good at self-correction. Cherry-picked anecdotes, exceptions that prove the rule, are no basis for policy.

Gold goes on in the *Globe* to elaborate on his vision of a "made-in Canada innovation policy":

The ingredients for such a strategy exist. They include using tools such as public-private patent funds to keep Canadian developed knowledge (protected, for example, through U.S. patents) in the hands of Canadians; standard setting that puts Canadian technology at the heart of developments in fields as diverse as communications, aeronautics and health; new models of university-industry partnerships that focus on creating hard-to-move knowledge that attract firms to come to us rather than selling off our knowledge to others; direct support of firms in developing international intellectual property strategies; using university alumni networks to bring scale-up expertise to Canadian firms, and more. All this needs to be backed up by educating today's innovators and students on how to obtain, deploy and strategize about intellectual property at the global level. (Gold 2017)

“ ... we want others to bring their inventions to Canada. It is an unmitigated plus, both for consumers and for innovation.”

It is hard to know where to start critiquing these weak, uncompetitive, central-planning ideas. To his credit, Barry Sookman has more energy to clear this thicket of misinformation than I do.<sup>5</sup> But in Canada it takes a lot of effort. Weeds grow thick.

In his book *Justifying Intellectual Property*, Robert Merges (2011), with greater delicacy and flair than this author, expands on the sense of dislocation and disorientation an IP scholar feels in what

he calls the misguided “technocentrism” of much modern IP scholarship:

Intellectual Property (IP) law today is like one of those sprawling, chaotic megacities of the developing world – Mexico City, maybe, or Shanghai. Construction cranes are everywhere. The old city center – the ancient core of the field – is today surrounded by new buildings, new neighborhoods, knots of urban growth, budding in every direction, far off into the distance. As a longtime resident, an old-timer who for a good number of years now has walked the streets and taken in the scenes, I find myself with decidedly mixed feelings about all this. I marvel at the bold, new energy unleashed in the old burgh, and I am not a little pleased at the prosperity it has brought. But I also feel a distinct sense of unease. The helter-skelter of new growth, proliferating at times with no regard for the classic lines and feel of the old city, brings a slight case of vertigo – a feeling of being lost amid the familiar. It’s an exciting time, to be sure; but a confusing time too.

### Misguided nationalism

Like Richard Gold, Michael Geist and Jim Balsillie raise arguments about needing a “made-in-Canada” IP regime, presumably a regime tailored to the peculiarities of Canada’s IP innovation economy, trade, and markets. This probably has something to do with the desire of intellectual property professors and policy nabobs to have some impact on the polity beyond teaching and talking, and is clearly used as a cover for simply reducing IPRs.

In fact, IP is perhaps the most thoroughly internationalized area of law, one to which legions of scholars around the world have contributed. It is not, as it is often portrayed, the developed world’s grab for rights. The idea that an advanced OECD nation like Canada would need something special or different is wrong. There is great benefit, in attracting foreign direct investment (FDI) and in being able to use foreign jurisprudence, for instance, in cleaving to international norms.

Moreover, because of its treaty obligations Canada has very little room to experiment anyway. The policy levers on the scale of stronger vs. weaker IP rights are few and short. And it is clear that support for innovation lies in strong IPRs. As this series of papers has demonstrated time and again, what

Canada needs is strong, predictable, world-class IPRs. In the last paper we took to task academics like Terry Fisher of Harvard University for their desire to use IPRs to engineer society. Many Canadian academic ideas are little better.

“As this series of papers has demonstrated time and again, what Canada needs is strong, predictable, world-class IPRs.”

One could also argue that the international innovation economy would function better with common IP rules. In this regard we do well to acknowledge that most treaties leave to legislative discretion precisely how to implement them. This discretion is typically narrow. In the exercise of this discretion, however, we should not seek a “made-in-Canada” eccentricity. Rather, real gains

would be made by collaborating with our neighbours, and trading and research partners, to share a common governance. Imagine if a Canadian could use the same form for a take-down request for US and Canadian ISPs and others around the world. Imagine if patent examination were even more uniform than it is. Imagine if a similar trademark application could be filed internationally.<sup>6</sup> Common rules such as these could only help Canadian companies expand. We live in a globalized world! Parochial policy’s time is long past.

## Insufficient expertise on the Supreme Court of Canada

Canada is not without administrative and judicial expertise in IP. It has administrative tribunals, the Patent Appeal Board, Commissioner of Patents, the Copyright Board, the Canadian Intellectual Property Office, and, because IP is a federal responsibility under the *Constitution Act, 1982*, federal courts with jurisdiction over federal matters, including IP, that hear many IP cases. However, the SCC seems often to disagree with the expert opinions coming to it from courts below themselves, even when they display superior expertise or reasoning. Although *Alberta v. CCLA*, discussed at length above, and *Harvard College v. Canada (Commissioner of Patents)*, also referred to above, are two of the most egregious examples, it is not in those cases alone that the SCC has taken IP jurisprudence down a crooked path. So, too, in *CCH v. Law Society of Upper Canada*. And two recent copyright cases, *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* and *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, have resulted in law that says that to download a work is not to telecommunicate it to the public, but to stream it is, on rather obscure grounds.

Why is this area of law, so critical to Canadian innovation policy, ill-served by our top court?<sup>7</sup>

For many years after the enactment of the *Charter of Rights and Freedoms*, the SCC was busy interpreting and applying it, and dealing with the court's criminal law duties. Commercial and IP cases were turned aside. It is only in the last decade that the court has begun finally to turn to IP issues. But as chance would have it, this has been a decade in which Internet copying has greatly influenced public, and academic, views of copyright.

The result perhaps is twofold. First, the court's IP experience atrophied, and it came to lack both perspective and expertise. Second, it finally turned its mind to IP when new and bold theories about IP, less respectful towards rights-holders, were gaining popularity among the public and the academy. None the wiser, the Court picked up on modern trends instead of cleaving to more established principles. More IP-knowledgeable judges like Marshall Rothstein and Ian Binnie were not able to turn the court in spite of excellent dissenting judgments. Consider, for instance, the Harvard Mouse case and *Alberta v. CCLA*.

This situation, in a modern innovation economy, wants remedy. Look at all the damage to trade relations caused by the promise doctrine set out above. Look at the damage caused by *Alberta v. CCLA*. Just as the SCC needs to work in both official languages, it needs to learn to better think in IP. Accordingly it should have more training and perhaps resources in IP.

How might the acuity of the SCC on IP matters be improved? Already we are working with superb jurists, so it seems that making better resources available to them, providing continuity and depth on IP, would make sufficient difference. It would be terrific, and not disproportionate to the problem, to appoint one justice regularly from the IP bar, given how specialized and increasingly important an area this is for modern business and, indeed, civilization.

Simpler to implement and also effective would be a training of several days for each justice in IP. Admittedly they cannot be trained in every specialist area, but again, given the importance and uniqueness of IP, special treatment is merited. To recruit clerks with backgrounds in the area would be helpful. General background briefings (not related to any particular case, of course) from Heritage and/or ISED, on Canada's stance and progress in IP implementation, could be made available to the Court.

“ It would be terrific, and not disproportionate to the problem, to appoint to the Supreme Court of Canada one justice regularly from the IP bar.”

# Trans-Pacific Partnership

Implementation of the TPP would bring slightly stronger IP protection to Canada, and would considerably improve protection for Canadians' IP in Pacific Rim countries. At least from an IP and electronic commerce perspective, it is a terrific agreement (Owens 2015) that will now go ahead without one of the negotiating parties— the United States under Donald Trump having backed out of it.

The TPP IP provisions have been controversial in Canada. Dueling narratives have been spun by opponents and supporters of the deal. Leading opponents of the IP provisions in particular include Jim Balsillie, Dan Breznitz, and Michael Geist. Vocal supporters include this author (Owens 2015) and Barry Sookman.

The TPP, which links Canada to 10 other Pacific nations that combined represent a large percentage of global GDP, has been criticized as being unduly long (more than 6000 pages) and complex for a “free” trade agreement. However, in a world as regulated and complex as today's, trade agreements must not only mutually reduce tariff barriers but also harmonize laws and markets, and this makes for a lot of detail. The benefits of harmonization certainly apply to IP.

“Implementation of the TPP would bring slightly stronger IP protection to Canada, and would considerably improve protection for Canadians' IP in Pacific Rim countries.”

Like most treaties dealing with intellectual property, the TPP largely reinforces the status quo, at least for developed countries like the US, Japan, Canada, and Australia. This status quo is set out in treaties that antedate the TPP, some by more than 100 years, and that cover more of the world's geography than the TPP does. These treaties reflect longstanding efforts to harmonize IP laws among nations.

Canada is already a party to and has implemented these treaties, so the TPP will not change much here. The IP provisions of the TPP are not, therefore, particularly new or unique. They incorporate much of the IP law already widely harmonized and require nations that are behind in this harmonization endeavour to catch up over time.

IP treaties that Canada has already implemented include the *Berne Convention*, and the more recent *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT) – all copyright treaties – as well as existing trade treaties that also deal with IP, such as NAFTA and TRIPS. Canada's commitments in the TPP are similar to those made in CETA, although CETA's corresponding IP provisions are simpler overall because there was less disparity in IP protection amongst the signatory states than is the case across the Pacific Rim. The TPP provisions for phasing in IP measures in some member states (such as Peru, Brunei, Vietnam, Malaysia, Mexico, and others) indicate the scope of work ahead of them to bring their regimes into compliance (18.83 et seq.).

Canadian innovators would benefit from TPP requirements that Canada's Pacific Rim trading partners adopt standards of IP protection similar to Canada's and those of the other developed countries that are party to the TPP. Canada's laws already meet the TPP standards almost entirely except primarily for patent term restoration for time lost prosecuting patents in the patent office, and the longer term of copyright protection. Indeed, the TPP requires that parties accede to other, more recent treaties to which Canada is already a party, including the *Budapest Treaty* on deposit of microorganism samples for biotechnology patents; *UPOV 1991*, on protection of new varieties of plants; and the WCT and the WPPT (18.7).

# Canada-EU Comprehensive Economic and Trade Agreement

Like the TPP, CETA was concluded under the Harper government. Like the TPP, it is an ambitious and comprehensive trade agreement, including rules respecting IP harmonization. It will entail limited changes to Canada's IP laws. Implementation of CETA will, however, address pharmaceutical patents. It requires that there be effective rights of appeal in any country that has a system of patent linkage, and will require patent term restoration of at least two years. Patent linkage refers to the system or process by which a country links drug marketing approval to the status of the patent(s) corresponding to the originator's product. It also requires PTR of at least 2 years. Patent linkage and PTR are discussed at length above.

So the main advantage of the implementation of CETA from an IP perspective is to improve the patent situation for pharmaceuticals. Legislation implementing CETA, Bill C-30, has made its way through parliament, has received Royal Assent on May 16, 2017, and is to come into force in cooperation with European states.

## University Innovation

A preponderance of government-funded research takes place in Canada's universities. Commercialization of that research is continually encouraged by governments, but is in low supply. The Canadian university landscape is a hodgepodge of innovation rules. If Canada is meant to be a sort of intra-institutional competition or experiment in governance, that might explain the chaos reigning. It is clear no one is tracking results or applying best practices – even though universities are major levers of Canadian innovation policy.

In the United States, by comparison, industry and universities have a long history of collaboration. However, in that country, disagreements became frequent about ownership of the intellectual property that arose from federally funded research. Unless otherwise negotiated, the IPRs typically went to the federal government, and by 1980 it held 28,000 patents that came about as a product of the research it funded, of which only 5 percent were licensed to industry (Greenhalgh and Rogers 2010). The US federal government only offered these publicly-owned inventions through non-exclusive licenses. Firms were reluctant to invest and develop new products without exclusive rights – cogent evidence for the incentive effects of IPRs. It takes a significant investment of time, effort, and capital to commercialize knowledge, and thus spur innovation, and without the certainty associated with an exclusive licence, many companies were simply not willing to make this kind of commitment (Greenhalgh and Rogers 2010).

To put governments in the path of commercial IP licensing transactions is the sort of unproductive thing only governments would do. Similar efforts in Canada – to retain and commercialize IP including material developed on behalf of governments – have gone nowhere. This is not surprising. Commercialization is very difficult and is a long-odds game requiring great expertise. No government really has the expertise or resources. No university does either, really.

This situation in the US changed dramatically with the passing of the *Bayh-Dole Act* (BDA) in 1980. The BDA allowed universities and individual scientists to retain ownership of innovations arising from federally-funded research, provided they file for patent protection and commercialize by licensing. As

Putnam and Tepperman (2001) point out, both licensing and patenting of university research output has increased significantly since the passing of the BDA.

Although several countries have passed legislation modeled after the BDA, Canada has not, and continually yields only meager returns on the commercialization of university research. As Jim Balsillie (2015) points out:

The University of Toronto's commercialization office states that it is "in a class with the likes of MIT and Stanford." But Stanford has generated \$1.3-billion (U.S.) in royalties for itself and the Massachusetts Institute of Technology issued 288 U.S. patents last year alone; U of T generates annual licensed IP income of less than \$3-million (Canadian) and averages eight U.S. patents a year. Statistics Canada reports that in 2009, just \$10-million was netted by all Canadian universities for their licences and IP. Even when accounting for universities that have open IP policies, this is a trivial amount by global standards.

Without guiding legislation, universities are left to navigate a complex thicket of funding organizations, each with its own rules (Moisan and Painchaud 2015). Some public subsidy organizations retain rights to the fruits of the research they fund, while others allow the university to do so. In cases where the funder has not assigned rights, each university has its own, often ill-communicated, usually ignored, policy on whether the researcher, university, or both owns the IPR arising from subsidized research, and how royalty revenues are to be shared if the innovation is successfully commercialized (Galushko and Sagynbekov 2014). Most universities require researchers to commercialize their innovations by way of a technology transfer office (TTO), which acts as a kind of intermediary between

CIPO, industry, and the university. It is a rigid, usually unproductive policy that frustrates everyone involved.

“ Direct links between universities and businesses could be forged, allowing the market, rather than government funding organizations, to dictate which innovations should be commercialized.”

Galushko and Sagynbekov (2014) interviewed a number of Canadian university researchers and found that the perception among them was that government has been pushing commercialization and links between university and business by promoting needs-based and applied research, partially as a result of concerns about Canada's innovation performance. Two hindrances identified by interviewees in the study were the lack of a clearly defined reward system for individual researchers, and the rigidity of the TTO structure. Some argue that if Canada implemented a regime similar to that of the US, it could considerably simplify and streamline the process of commercializing university innovations.

erably simplify and streamline the process of commercializing university innovations.

Direct links between universities and businesses could be forged, allowing the market, rather than government funding organizations, to dictate which innovations should be commercialized. A detailed study on university commercialization carried out by Marianne Feldman and this author, and resulting in a report by a committee chaired by John Manley about the University of Toronto's Innovation foundation, only amplified these conclusions and concerns (Manley 2005) Is BDA emulation the solution for commercialization of the IP of Canadian universities? In some ways, yes. Investors have frequently cited confusion over ownership of IP in universities as a major barrier to investment. A uniform, consistent structure could go a long way to solving that problem.

# Optimal Intellectual Property System Design

Like the literature on the link between IP and economic outcomes, the literature on optimal patent systems tends to divide countries along a developed/developing continuum, and provides only limited insight into the situation facing a highly-developed economy.

Gene Grossman and Edwin Lai (2004) considered the optimal level of patent protection for countries operating in an open economy, where many of the benefits of patent protection accrue to foreigners. They concluded that the incentives to strengthen national IP laws are not as pronounced in technology importing countries. This very modest conclusion does not really add much to the discussion, particularly in light of the research indicating that the importance of IPRs to FDI, and of FDI to economic development. Allowing profits to foreign investors (and why not? How could their risk possibly not be rewarded?) is simply an unavoidable cost of development. And that conclusion really is no different for Canada than Congo – only the scale changes.

Additionally, Grossman and Lai argue, the marginal costs of strengthening IPRs vary with the elasticity of demand for technological goods. Because of these factors, it is often easier for smaller or developing countries to “free ride” off the innovative incentives provided by, in their view, jurisdictions of “first filing,” such as the US and EU. This conclusion seems premised on so many assumptions about the availability, copying, and dissemination of technologies as to be worth very little.

Applying Grossman and Lai’s model to the Canadian context, Canada is an open economy with, we assume, a relatively inelastic demand for technology goods. On top of this, our human capital stock is high. Although our small market size might partially explain Canada’s relatively lax IPR laws, it should be noted that countries like Switzerland and Israel – much smaller markets than Canada – not only protect IPRs more than Canada, but also undertake more R&D *per capita* and file for more patents per million citizens.

Chu, Cozzi, and Galli (2014) build on Grossman and Lai’s findings by demonstrating a stage dependency of their views of optimal IPR systems. At an earlier stage of development (development, or distance to the technological frontier, is measured here as the relative labour productivity of a given country) a country implements lax IP laws, but as it moves towards the world technology frontier, it is optimal for the country to shift its IPR laws away from the “free rider/imitation” model, and strengthen its IPR laws to foster domestic innovative firms and attract FDI. Quoting a NERA Economic Consulting report, Chu, Cozzi, and Galli’s paper describes the relationship between domestic innovation and IPR laws in the following terms:

A weak IPR regime may support technological growth and development through imitation in early stages of development. At subsequent stages of development, however, a weak IPR regime discourages domestic innovation. Innovation and technological development are drivers of economic growth. Economies that succeed in shifting into knowledge-based production are characterized by domestic innovation, typically supported with well-designed and adequately enforced IPR laws. (Sepetys and Cox 2009, 3)

““ Countries like Switzerland and Israel – much smaller markets than Canada – not only protect IPRs more than Canada, but also undertake more R&D *per capita* and file for more patents per million citizens.”

No commentator explains where the capacity to imitate effectively comes from without the technology transfers and FDI attendant on strong IPRs. Even at an early stage, then, the value of a weaker IPR strategy is highly questionable.

How exactly this relates to Canada – a country that has been strengthening its IPR laws for the last 30 years and is close to the world technology frontier – seems clear. As an open market country with high R&D capacity (as is evidenced by human capital stock), growing market size, growing entrepreneurial class, closeness to world technological frontier, and inelastic demand for technology goods, the optimal IPR configuration for Canada is one of robust protection.

## Conclusions

This paper has attempted to take a wide, and admittedly somewhat idiosyncratic, view of the IP landscape in Canada. It has reviewed the need for legislative changes to clarify the scope of permitted subject matter under the *Patent Act*, and to banish the promise doctrine setting a too-high barrier on utility for Canadian patents, particularly for pharmaceuticals. Also with respect to pharmaceuticals, patent term restoration needs to be instituted to a 5-year maximum, data protection to ten years, and there must be equitable rights of appeal for Notice of Compliance proceedings.

For copyright, we need to review and replace notice and notice, which is too weak a stance against piracy. Fair dealing must be circumscribed in a reasonable way; it cannot be allowed to continue

““ All signs and research point in the same direction: the stronger Canada’s IPRs, the better.”

to consume the rights granted elsewhere in the *Copyright Act*. Repeal the otiose User Generated Content provision, and abolish copyright term limits.

Patent “reform” is a tainted American movement to limit the rights of smaller inventors, and should be treated as anathema in Canada. The process of copyright reform will in the future require careful management because of its relatively higher level of politicization in Canada compared to patent.

Canadian law schools, alas, are breeding grounds of unwholesome notions undermining IP and need a better internalization of IP doctrine. Now they are more about rebellion than conservation, but the stage may pass with age and fashion. Nor is the SCC doing so well in its grand purview; we should expect more consistent judgements on IP matters from the SCC and provide it with the resources to ensure them.

The progress of Canada’s IP regime is very much about treaty implementation and we should continue to seek treaty adherence and implementation. This is particularly true of CETA and the TPP. It is not true of whatever WIPO may come up with on education; we should likely withdraw from negotiations on that.

Finally, all signs and research point in the same direction: the stronger Canada’s IPRs, the better.

# Recommendations

Readers will recall the following 5 recommendations from the first and second papers:

## Recommendation 1

The nature of copyright protection is such that there is no justification to limit the term of protection. Copyright protection does nothing to reduce the store of common property. Copyright does not even create a monopoly, and there is no reason it should be singled out from other types of property for expiry. Therefore, our recommendation is to:

**End term limits for copyright.** Using the rule of reciprocal treatment under *Berne*, let other citizens of other signatory nations enjoy copyright for the length of the terms, if any, of their own nation. This would be a bold move, consistent with Canada's treaty obligations and showing leadership in IP. In the more conservative but less desirable alternative, adopt the already widely-used term of 70 years plus the life of the author, gaining Canadian creators the like benefit in European markets.<sup>8</sup>

## Recommendation 2

Out of step with all OECD countries and despite the plain wording of Canada's *Patent Act*, the SCC ruled that so-called "higher life forms" could not be patented. The life form in question was the oncomouse, a mouse whose DNA had been edited by Harvard College researchers to enhance susceptibility to cancer. Such inventions are entirely worthy of protection. The decision was a blow to Canada's life sciences industry. Moreover, the reasoning of the decision – that patents over higher life forms were not contemplated by the 19th century legislature that adopted the *Patent Act* – brings into doubt all future, unknown classes of patent. Accordingly, it is our recommendation to:

**Legislate patent protection for higher life forms**, reversing the Harvard College decision of the SCC and bringing life sciences patenting in line with the rest of the OECD. In reversing the damage done by the Harvard College decision, there should also be a legislative adoption of interpretative principles for the *Patent Act* that make it clear that anything under the sun<sup>9</sup> (or indeed, elsewhere in the universe) made by man and that meets the standards of the *Patent Act*, is patentable, subject only to express, legislated exceptions.

## Recommendation 3

Small- and medium-sized businesses drive much of Canada's innovation economy. They tend to be insufficiently grounded in the possibilities of IP to help to grow their businesses. Accordingly, we recommend to:

**Facilitate patenting by SMEs**, perhaps by reducing or waiving fees for first patents, and further publicize the value of IP protection.

## Recommendation 4

Canada is lucky to have agreements to open trade in the Pacific Rim and to Europe, the TPP, and CETA respectively. Still, the IP requirements of these agreements will benefit Canada. Accordingly, it is our recommendation to:

**Quickly implement the TPP and complete the implementation of CETA**, subject to other signatory nations doing so, and continue to further support freer trade in IPR-protected goods.

## Recommendation 5

One of the worries that seems to animate opposition to stronger IP rules in Canada is the existence of trade deficits in IP protected goods. As demonstrated herein, such deficits are actually quite minor and, in any event, mean little. Accordingly, we recommend that:

**A trade deficit in IP-related goods is not a sound basis upon which to weaken IP protection. Indeed, it is a basis to strengthen IP protection.**

These recommendations are further sustained by the conclusions of this paper. To these we add, based on the research presented in the third paper:

## Recommendation 6

To strengthen IP rights benefits not only local innovation but also trade relations. This is certainly the case with the subjects of our second recommendation, deficiencies in Canada's regime protecting pharmaceuticals. These changes are straightforward and address specific deficiencies. They are also in large measure changes to which Canada has committed in trade treaties, but we would go further than these agreements require. Therefore, our recommendation is to:

**Recognize that Canada has significant R&D activity in life sciences and fix the unnecessary weaknesses in its IP regime for life sciences innovation.** To that end:

- Adopt a term of patent restoration no less than the two-year minimum required by CETA and preferably beyond that standard; to be internationally competitive, the term of restoration should be capped at five years.
- Address the judge-made utility requirements that are invalidating patents relating to clearly beneficial drugs and other life sciences inventions. If the Supreme Court does not reverse course with a decision on *AstraZeneca*, then a legislative fix is required.
- Promptly ensure an equal right of appeal of proceedings, such as those currently brought under the Notice of Compliance regulations.
- Provide 10 years of data protection rather than the eight required by CETA.

## Recommendation 7

As described at some length above, the extent of "fair dealing" in Canadian copyright law has become perilous, and it is adversely affecting, in particular, Canada's educational publishing industry. This has occurred because of the SCC's doctrinally unsound and bold conclusions, and also because of statutory amendment of the fair dealing provisions to include "education" as a permitted purpose for fair dealing. The threat posed to creativity in Canada by these excessive fair dealing rules has only begun to be realized and it is time to nip it in the opening blossom. Therefore, our recommendation is to:

**Reverse by legislation the excesses of the SCC in expanding fair dealing in copyright, specifically the private study exemption.** Guidelines for the better interpretation of this exemption are clearly set out in the minority decision in *Alberta v. CCLA*. Make it clear that fair dealing is a defence to infringement and not a "right" and that a critical criterion in evaluating the fairness of the dealing is economic impact. In this vein, it is also important to abandon or severely limit participation in WIPO discussions to increase educational access for copyright protected materials.

## Recommendation 8

The *Copyright Modernization Act* finally addressed in Canada the need for means to object to illegal and infringing material on the Internet. But, inexplicably, it provides only for notice to be sent to the

infringer. It does not set out means to cause the material to be taken down. It provides no means to punish the person infringing copyright. This toothless, half-baked provision needs amendment; therefore, it is our recommendation to:

**Provide a more effective remedy for Internet copying** by changing Canada's notice and notice system to a notice and takedown provision and by providing punishments for serial or serious copying.

## **Recommendation 9**

It is unfortunate that the development of IP law in Canada was long marked by inattention by the SCC, and then by its missteps. IP is too important in the modern economy not to be well served by the nation's highest court. Accordingly, it is our recommendation to:

**Ensure that solid intellectual property knowledge and skills are continuously represented on the SCC.**

## **Recommendation 10**

Amongst the most ill-considered provisions in the *Copyright Modernization Act* is the user-generated content (UGC) provision. It has perverse consequences, encouraging as it does copying and violations of moral rights; it is too complex and badly drafted to serve its intended purpose; it leaves copied works open to commercial exploitation by third parties: and it is useless, since it would apply only to Canada, and not the rest of the world the Internet reaches. Therefore, our recommendation is to:

**Delete the UGC provision from the *Copyright Act* entirely.**

## About the Author



### **Richard Owens**

Richard Owens is a Munk Senior Fellow with the Macdonald-Laurier Institute. He is a lawyer who has specialized in business and commercial law, regulation of financial institutions, intellectual property and technology. He has served financial services providers, technology companies, drug companies and others in Internet, technology, intellectual property strategy and patent law, M&A, outsourcing, strategic alliance and joint ventures, licensing and other areas. He has been repeatedly recognized as among Canada's best lawyers in technology law and attained the highest rating on Martindale Hubbell. He conducted his practice with three of Canada's leading law firms. Richard is past

chair of the board of directors of the University of Toronto Innovations Foundation, and member of the advisory committee to the Office of the Privacy Commissioner of Canada. He is a member of the board of the Center for Innovation Law and Policy at the University of Toronto Faculty of Law, and served as a director of the International Technology Law Association. He is on the boards or advisory boards of other companies and not-for-profit enterprises and chairs the board of an international woman's health organization. Richard is an adjunct professor, teaching courses on the law of information technology and electronic commerce, innovation law and policy, intellectual property, digital content and the creative economy, and the law and policy of biotechnology, all at the University of Toronto Faculty of Law, where he has taught for approximately 25 years and also served as the Executive Director of the Centre for Innovation Law and Policy. Richard has written and published widely on intellectual property law, the law of information technology, privacy, and the regulation of financial institutions.

*The author would like to acknowledge the contributions of Adrienne Blanchard and Barry Sookman who acted as advisers, reviewed drafts of these papers, and contributed some sections, and the research assistance of Michael Robichaud.*

# References

- Balsillie, Jim. 2015. "Canadians Can Innovate, But We're Not Equipped to Win." *Globe and Mail*, May 8. Available at <http://www.theglobeandmail.com/report-on-business/rob-commentary/balsillie-learns-canadian-innovators-not-equipped-for-global-competition/article24346408/>.
- Berger, Bernhard. 2001. "Why Resale Rights for Artists Are a Bad Idea." *Selected Problems in Art Law*. Available at [http://www.law.harvard.edu/faculty/martin/art\\_law/why\\_resale\\_rights\\_for\\_artists.htm](http://www.law.harvard.edu/faculty/martin/art_law/why_resale_rights_for_artists.htm).
- Burke, Brendan. 2017. "Ineffective Laws Fuelling Canada's Online Piracy Problems, U.S. Copyright Group Says." *CBC News*, February 19. Available at <http://www.cbc.ca/news/politics/copyright-online-piracy-canada-laws-infringement-rights-1.3986968>.
- Canipre. 2015. *Services*. Web page. *canipre.com*. Available at <http://canipre.com/?portfolio=project-2-5>.
- Chu, Angus C., Guido Cozzi, and Silvia Galli. 2014. "Stage-Dependent Intellectual Property Rights." *Journal of Development Economics* 106: 239–249. Available at <http://www.sciencedirect.com/science/article/pii/S030438781300148X>.
- EU Commission. 2008. *Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union*. Commission Staff Working Document. 23.04.2008, SEC (2008). Available at [http://ec.europa.eu/internal\\_market/copyright/docs/term/ia\\_term\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf).
- Galushko, Viktoriya, and Ken Sagynbekov. 2014. "Commercialization of University Research in Canada: What Can We Do Better?" *International Journal of Business Administration* 5 (5). Available at <http://www.sciedu.ca/journal/index.php/ijba/article/download/5393/3165>.
- Geist, Michael. 2014. *How Canadian Business Chilled Patent Troll Reforms*. Blog post. Michaelgeist.ca, October 20. Available at <http://www.michaelgeist.ca/2014/10/canadian-business-chilled-patent-troll-reforms/>.
- Geist, Michael. 2015a. *Balsillie's Call for Patent Troll Reform: RIM Co-founder Pushes for Made-in-Canada IP Policies*. Blog post. Michaelgeist.ca, May 15. Available at <http://www.michaelgeist.ca/2015/05/balsillies-call-for-patent-troll-reform-why-did-rim-co-founder-urge-caution-only-one-year-ago/>.
- Geist, Michael. 2015b. *Canadian Piracy Rates Plummet as Industry Points to Effectiveness of Copyright Notice-and-Notice System*. Blog post. Michaelgeist.ca, May 20. Available at <http://www.michaelgeist.ca/2015/05/canadian-piracy-rates-plummet-as-industry-points-to-effectiveness-of-copyright-notice-and-notice-system/>.
- Global Intellectual Property Center [GIPC]. 2017. *The Roots of Innovation: U.S. Chamber International IP Index, Fifth Edition*. Global Intellectual Property Center. Available at [http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC\\_IP\\_Index\\_2017\\_Report.pdf](http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC_IP_Index_2017_Report.pdf).
- Gold, Richard. 2017. "NAFTA Patent Ruling a Big Victory for Canadian Innovation." *Globe and Mail*, April 6. Available at <http://www.theglobeandmail.com/report-on-business/rob-commentary/nafta-patent-ruling-a-big-victory-for-canadian-innovation/article34617647/>.
- Government of Canada. 2016. *Canada-European Union Comprehensive Economic and Trade Agreement (CETA)*. Government of Canada. Available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.
- Greenhalgh, Christine, and Mark Rogers. 2010. *Innovation, Intellectual Property, and Economic Growth*. Princeton University Press. Available at <http://press.princeton.edu/titles/9221.html>.

- Grossman, Gene M., and Edwin L.C. Lai. 2004. "International Protection of Intellectual Property." *The American Economic Review* 94 (5): 1635–1653.
- Haggart, Blayne. 2014. *Copyfight: The Global Politics of Digital Copyright Reform*. University of Toronto Press. Available at <http://www.utppublishing.com/Copyfight-The-Global-Politics-of-Digital-Copyright-Reform.html>.
- Health Canada. 2016. Guidance Document: *Patented Medicines (Notice of Compliance) Regulations*. Health Canada. Available at <https://www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/applications-submissions/guidance-documents/patented-medicines/notice-compliance-regulations.html>.
- Hollander, Abraham. 2011. *Assessing Economic Impacts of Copyright Reform on Selected Users and Consumers*. Industry Canada.
- Innovation, Science and Economic Development Canada [ISED]. 2015. *Notice and Notice Regime*. Web page. Innovation, Science and Economic Development Canada, Office of Consumer Affairs. Available at <https://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02920.html>.
- International Centre for Settlement of Investment Disputes. 2017. *In an Arbitration Under Chapter Eleven of the NAFTA and the UNCITRAL Arbitration Rules, 1976, Between Eli Lilly and Company and Government of Canada*. Final Award. Case No. UNCT/14/2. March 16, 2017. Available at <https://www.italaw.com/sites/default/files/case-documents/italaw8546.pdf>.
- International Intellectual Property Alliance [IIPA]. 2017. *2017 Special 301 Report on Copyright Protection and Enforcement*. International Intellectual Property Alliance. Available at <http://www.iipawebsite.com/special301.html>.
- Lybecker, Kristina M. 2017. *Intellectual Property Rights Protection and the Biopharmaceutical Industry: How Canada Measures Up*. Fraser Institute, January. Available at <https://www.fraserinstitute.org/sites/default/files/intellectual-property-rights-protection-and-the%20biopharmaceutical-industry.pdf>.
- Merges, Robert P. 2011. *Justifying Intellectual Property*. Harvard University Press.
- Minister of Canadian Heritage. Undated. *Mandate Letter from Prime Minister Justin Trudeau to Mélanie Joly. Obtained by Access to Information request*.
- Moisan, Gabrielle, and Francois Painchaud. 2015. "Bayh-Dole 30 Years Old – Must the Government Remain the Owner of Patents Obtained as a Result of Its Subsidies?" *Robic News* 14 (4). Available at <http://newsletter.robic.ca/nouvelle.aspx?lg=EN&id=177>.
- Norman, John, and Justin Smith. 2015. *The TPP – New Rights for Pharmaceutical Patent Holders in Canada*. Web page. Gowling WLG, November 12. Available at <https://gowlingwlg.com/en/global/insights-resources/the-tpp-%E2%80%94-new-rights-for-pharmaceutical-patent-holders-in-canada>.
- Owens, Richard C. 2010. *Noises Heard: Canada's Recent Online Copyright Consultation Process. Teachings and Cautions*. Blog post, April 23. Richardowens.com. Available at <http://www.richardcowens.com/?p=4>.
- Owens, Richard C. 2015. *Debunking Alarmism Over the TPP and IP: Why the Trans-Pacific Partnership is a good deal for Canadian Innovators*. Commentary. Macdonald-Laurier Institute, December. Available at <http://www.macdonaldlaurier.ca/files/pdf/MLICommentaryOwens-12-15-final.pdf>.
- Owens, Richard C. 2016. *How to Really Support Canadian Culture: Heritage and the Copyright Brief*. Commentary. Macdonald-Laurier Institute, July. Available at [www.macdonaldlaurier.ca/files/pdf/MLICommentaryOwens\\_web.pdf](http://www.macdonaldlaurier.ca/files/pdf/MLICommentaryOwens_web.pdf).
- Owens, Richard, with Michael Robichaud. 2017a. *How We Got Here: The Evolution of Canadian IP Rights and their Economic Impact*. Defending Our Rights, Part 2. Macdonald-Laurier Institute. Available at [http://macdonaldlaurier.ca/files/pdf/MLI-IPPaper2\\_0617\\_webready.pdf](http://macdonaldlaurier.ca/files/pdf/MLI-IPPaper2_0617_webready.pdf).

- Owens, Richard, with Michael Robichaud. 2017b. *Why Intellectual Property Protection Matters to Canada*. Defending Our Rights, Part 1. Macdonald-Laurier Institute. Available at [http://macdonaldlaurier.ca/files/pdf/MLI\\_IPPaper0517\\_webready.pdf](http://macdonaldlaurier.ca/files/pdf/MLI_IPPaper0517_webready.pdf).
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*. 27 June 1989. World Intellectual Property Organization. Available at [http://www.wipo.int/wipolex/en/wipo\\_treaties/text.jsp?file\\_id=283484](http://www.wipo.int/wipolex/en/wipo_treaties/text.jsp?file_id=283484).
- Putnam, Jonathan D., and Andrew B. Tepperman. 2011. "Chapter 6: Intellectual Property Rights and Economic Progress: A Review." In Robert E. Litan (ed.). *Handbook on Law, Innovation and Growth*. Edward Elgar, 112–150. <http://www.e-elgar.com/shop/handbook-on-law-innovation-and-growth>.
- PWC. 2006. *Impact of Copyright Extension for Sound Recordings in the UK*. Private report commissioned by the British Phonographic Industry.
- PWC. 2015. *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines*. PWC, June. Available at [https://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](https://www.accesscopyright.ca/media/94983/access_copyright_report.pdf).
- Sepetys, Kristina, and Alan Cox. 2009. *Intellectual Property Rights Protection in China: Trends in Litigation and Economic Damages*. NERA Economic Consulting. Available at [http://www.ipeg.com/blog/wp-content/uploads/NERA-IP-Protection\\_China\\_2009.pdf](http://www.ipeg.com/blog/wp-content/uploads/NERA-IP-Protection_China_2009.pdf).
- Shen, Anqi. 2016. "Copyright Back in the Spotlight with Several Impending Decisions." *University Affairs*, September 21. Available at <http://www.universityaffairs.ca/news/news-article/copyright-back-spotlight/>.
- Sookman, Barry. 2011. *Rethinking Notice and Notice after C-32 (now C-11)*. Blog post. Barrysookman.com, April 4. Available at <http://www.barrysookman.com/2011/04/04/rethinking-notice-and-notice-after-c-32/>.
- Sookman, Barry. 2015a. *Canada to Extend Copyright Term for Artists and Record Producers*. Blog post. Barrysookman.com, April 21. Available at [http://www.barrysookman.com/2015/04/21/canada-to-extend-copyright-term-for-artists-and-record-producers/#\\_edn2](http://www.barrysookman.com/2015/04/21/canada-to-extend-copyright-term-for-artists-and-record-producers/#_edn2).
- Sookman, Barry. 2015b. *TPP, Copyright, e-Commerce and Digital Policy: A Reply to Michael Geist*. Blog post. Barrysookman.com, December 15. Available at <http://www.barrysookman.com/2015/12/15/tpp-copyright-e-commerce-and-digital-policy-a-reply-to-michael-geist/>.
- Tkachuk, David, and Joseph A. Day. 2016. *Copyright Board: A Rationale for Urgent Review*. Report of the Standing Senate Committee on Banking, Trade and Commerce. Senate of Canada. Available at [https://sencanada.ca/content/sen/committee/421/BANC/Reports/2016-11-25BANCFINALVERSIONCopyright\\_e.pdf](https://sencanada.ca/content/sen/committee/421/BANC/Reports/2016-11-25BANCFINALVERSIONCopyright_e.pdf).
- United States Trade Representative [USTR]. 2016. *2016 Special 301 Report*. Office of the United States Trade Representative. Available at <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>.
- United States Copyright Office. n.d. *Section 512 Study*. Web page. Copyright.gov. Available at <https://www.copyright.gov/policy/section512>.

## Legal citations

- Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 S.C.C. 37, [2012] 2 S.C.R. 345.
- Amazon.com Inc. v. Canada (Commissioner of Patent)* 2011 F.C.A. 328.
- Apotex Inc. v. Wellcome Foundation Ltd.*, [2002] 4 S.C.R. 153, 2002 S.C.C. 77.
- AstraZeneca Canada Inc., et al. v. Apotex Inc., et al.* (F.C.) (Civil).

*The Bayb-Dole Act of 1980* (Patent Rights in Inventions Made with Federal Assistance) 35 U.S.C. § 200-212; 37 C.F.R. Part 401.

*CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

*Copyright Act*, R.S.C 1985, c. C-42. Available at <http://laws-lois.justice.gc.ca/eng/acts/C-42/page-1.html#h-1>.

*Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

*Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 S.C.C. 34 (July 12, 2012).

*Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, 2002 S.C.C. 76.

*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 S.C.C. 35 (July 12, 2012).

*Schlumberger Canada Ltd v. Canada (Commissioner of Patents)* [1981] F.C. 845.

*Tele-direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 F.C. 22.

*Tennessee Eastman Co. et al. v. Commissioner of Patents*, [1974] S.C.R. 111.

*Patent Act* (R.S.C., 1985, c. P-4).

## Endnotes

- 1 Bill C-30 to implement CETA has passed the House and is in the Senate at the time of writing. Once passed it will come into force at a time to be fixed by order of the Governor in Council – presumably to be coordinated with European implementation.
- 2 It may be possible to deal fairly with a whole work. As David Vaver has pointed out, there might be no other way to criticize or review certain types of works such as photographs (*CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, para. 56).
- 3 In 2006, Blackberry paid US\$612.5 million to settle a lawsuit from patent-holding entity NTP, Inc. for Blackberry’s infringement of NTP’s patents. Blackberry fought the suit fiercely and rejected a first requested fee of \$40 million for a licence – a very costly mistake indeed.
- 4 For a full review of copyright issues facing Heritage Canada, see Richard Owens, 2016, *How to Really Support Canadian Culture: Heritage and the Copyright Brief*.
- 5 See for example his demolition of Professor Geist’s complaints about the TPP in Sookman, 2015b.
- 6 This will be the case with Canada’s anticipated compliance with the *Madrid Protocol*.
- 7 This is not to put all the blame on the SCC. Other courts err too. Consider the Federal Court decision in *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 FC 22, a decision that negated copyright’s historical protection of labour and effort, and left modern databases high and dry without IP protection and a very complex rule to apply to compilations.
- 8 The rule of reciprocal treatment and its application to Europe and other jurisdictions will be discussed in the next paper of this series.
- 9 This would be consistent with the US approach in which “anything under the sun made by man” is, subject to legislated exceptions, patentable (*Diamond v. Chakrabarty*).



True North in  
Canadian public policy

## Critically Acclaimed, Award-Winning Institute

**The Macdonald-Laurier Institute fills a gap in Canada's democratic infrastructure by focusing our work on the full range of issues that fall under Ottawa's jurisdiction.**

- One of the top three new think tanks in the world according to the University of Pennsylvania.
- Cited by five present and former Canadian Prime Ministers, as well as by David Cameron, the British Prime Minister.
- First book, *The Canadian Century: Moving out of America's Shadow*, won the Sir Antony Fisher International Memorial Award in 2011.
- *Hill Times* says Brian Lee Crowley is one of the 100 most influential people in Ottawa.
- The *Wall Street Journal*, the *Economist*, the *Globe and Mail*, the *National Post* and many other leading national and international publications have quoted the Institute's work.



"The study by Brian Lee Crowley and Ken Coates is a 'home run'. The analysis by Douglas Bland will make many uncomfortable but it is a wake up call that must be read."

FORMER CANADIAN PRIME MINISTER PAUL MARTIN ON MLI'S PROJECT ON ABORIGINAL PEOPLE AND THE NATURAL RESOURCE ECONOMY.

## Ideas Change the World

Independent and non-partisan, the Macdonald-Laurier Institute is increasingly recognized as the thought leader on national issues in Canada, prodding governments, opinion leaders and the general public to accept nothing but the very best public policy solutions for the challenges Canada faces.

## Where You've Seen Us



# About the Macdonald-Laurier Institute

## What Do We Do?

When you change how people think, you change what they want and how they act. That is why thought leadership is essential in every field. At MLI, we strip away the complexity that makes policy issues unintelligible and present them in a way that leads to action, to better quality policy decisions, to more effective government, and to a more focused pursuit of the national interest of all Canadians. MLI is the only non-partisan, independent national public policy think tank based in Ottawa that focuses on the full range of issues that fall under the jurisdiction of the federal government.

## What Is in a Name?

The Macdonald-Laurier Institute exists not merely to burnish the splendid legacy of two towering figures in Canadian history – Sir John A. Macdonald and Sir Wilfrid Laurier – but to renew that legacy. A Tory and a Grit, an English speaker and a French speaker – these two men represent the very best of Canada’s fine political tradition. As prime minister, each championed the values that led to Canada assuming her place as one of the world’s leading democracies. We will continue to vigorously uphold these values, the cornerstones of our nation.



## Working for a Better Canada

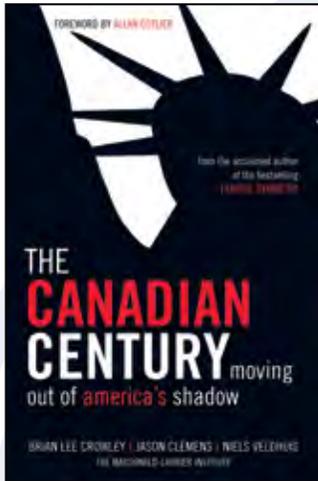
Good policy doesn’t just happen; it requires good ideas, hard work, and being in the right place at the right time. In other words, it requires MLI. We pride ourselves on independence, and accept no funding from the government for our research. If you value our work and if you believe in the possibility of a better Canada, consider making a tax-deductible donation. The Macdonald-Laurier Institute is a registered charity.

## Our Issues

**The Institute undertakes an impressive programme of thought leadership on public policy. Some of the issues we have tackled recently include:**

- Aboriginal people and the management of our natural resources;
- Getting the most out of our petroleum resources;
- Ensuring students have the skills employers need;
- Controlling government debt at all levels;
- The vulnerability of Canada’s critical infrastructure;
- Ottawa’s regulation of foreign investment; and
- How to fix Canadian health care.

# Macdonald-Laurier Institute Publications



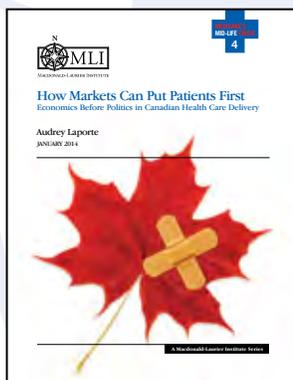
Winner of the Sir Antony Fisher International Memorial Award BEST THINK TANK BOOK IN 2011, as awarded by the Atlas Economic Research Foundation.

**The Canadian Century**  
By Brian Lee Crowley,  
Jason Clemens, and Niels Veldhuis

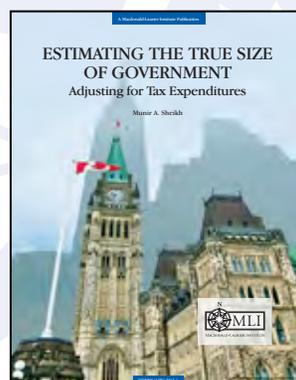
Do you want to be first to hear about new policy initiatives? Get the inside scoop on upcoming events?

Visit our website  
[www.MacdonaldLaurier.ca](http://www.MacdonaldLaurier.ca) and sign up for our newsletter.

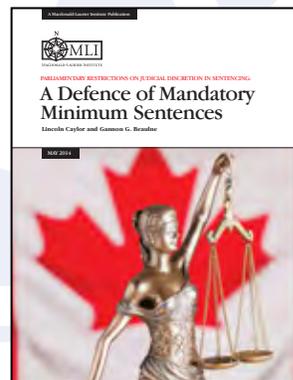
## RESEARCH PAPERS



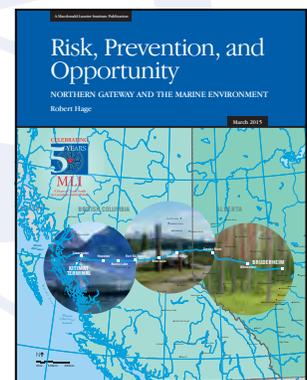
**How Markets Can Put Patients First**  
Audrey Laporte



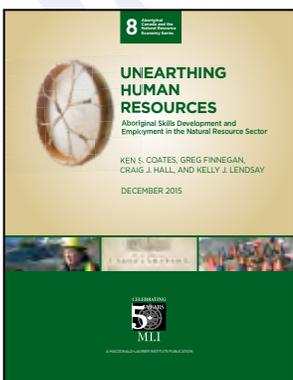
**Estimating the True Size of Government**  
Munir A. Sheikh



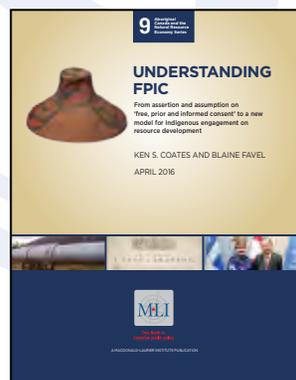
**A Defence of Mandatory Minimum Sentences**  
Lincoln Caylor and  
Gannon G. Beaulne



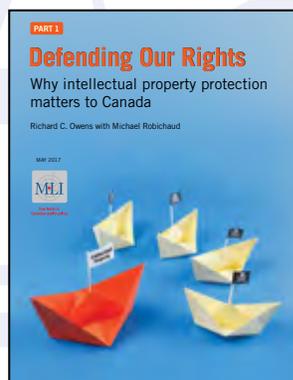
**Risk, Prevention and Opportunity**  
Robert Hage



**Unearthing Human Resources**  
Ken S. Coates,  
Greg Finnegan, Craig J. Hall,  
and Kelly J. Lendsay



**Understanding FPIC**  
Ken S. Coates and  
Blaine Favel



**Part 1: Defending Our Rights**  
Richard C. Owens and  
Michael Robichaud



**Part 2: Defending Our Rights**  
Richard C. Owens and  
Michael Robichaud



True North in  
Canadian public policy

---

**CONTACT US:** Macdonald-Laurier Institute  
8 York Street, Suite 200  
Ottawa, Ontario, Canada K1N 5S6

**TELEPHONE:** (613) 482-8327

**WEBSITE:** [www.MacdonaldLaurier.ca](http://www.MacdonaldLaurier.ca)

**CONNECT  
WITH US:**



@MLInstitute



[www.facebook.com/  
MacdonaldLaurierInstitute](http://www.facebook.com/MacdonaldLaurierInstitute)



[www.youtube.com/  
MLInstitute](http://www.youtube.com/MLInstitute)

---

## What people are saying about the Macdonald- Laurier Institute

---

*In five short years, the institute has established itself as a steady source of high-quality research and thoughtful policy analysis here in our nation's capital. Inspired by Canada's deep-rooted intellectual tradition of ordered liberty – as exemplified by Macdonald and Laurier – the institute is making unique contributions to federal public policy and discourse. Please accept my best wishes for a memorable anniversary celebration and continued success.*

THE RIGHT HONOURABLE STEPHEN HARPER

---

*The Macdonald-Laurier Institute is an important source of fact and opinion for so many, including me. Everything they tackle is accomplished in great depth and furthers the public policy debate in Canada. Happy Anniversary, this is but the beginning.*

THE RIGHT HONOURABLE PAUL MARTIN

---

*In its mere five years of existence, the Macdonald-Laurier Institute, under the erudite Brian Lee Crowley's vibrant leadership, has, through its various publications and public events, forged a reputation for brilliance and originality in areas of vital concern to Canadians: from all aspects of the economy to health care reform, aboriginal affairs, justice, and national security.*

BARBARA KAY, NATIONAL POST COLUMNIST

---

*Intelligent and informed debate contributes to a stronger, healthier and more competitive Canadian society. In five short years the Macdonald-Laurier Institute has emerged as a significant and respected voice in the shaping of public policy. On a wide range of issues important to our country's future, Brian Lee Crowley and his team are making a difference.*

JOHN MANLEY, CEO COUNCIL

---