

THE PROPERTY ATTRIBUTES OF COPYRIGHT

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I. INTRODUCTION

Copyright, as it is constructed under international conventions and copyright laws worldwide, has continuously expanded in duration, scope, and subject matter.¹ The expansionist trend of copyright has

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¹ Since its adoption in 1886, the *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter *Berne Convention*] has gone through many revisions to augment the protection of the exclusive rights of copyright holders. Revisions were made in 1908 (in Berlin), in 1928 (Rome), in 1948 (Brussels), in 1967 (Stockholm), and in 1971 (Paris). Other amendments were made in 1979. See *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, 828 U.N.T.S. 221 (amended on Sept. 28, 1979), online: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. See also 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS, THE BERNE CONVENTION AND BEYOND* ch. 3 (2d ed. 2006). Any subsequent

intensified in recent years, in response to the disruptive threats posed by the digital environment to its subsistence.² Manifest in all corners, including international organizations, legislative reform committees, policy papers, copyright scholar commentaries, interest groups and civil society movements, the heated debate persists on the merits and justifications for such an expansion.³ More particularly, the effects of

international agreements adopted under the Berne Convention, such as the WIPO Copyright Treaty, Dec. 20, 1996, WO033EN, online: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html [hereinafter WCT] and WIPO Performances and Phonograms Treaty, Dec. 20, 1996, WO034EN, online: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [hereinafter WPPT], must secure greater protection for copyright holders. See Berne Convention, art. 20. Parts II and III of the Agreement on the Trade Related Aspects of Intellectual Property Law, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 29 [hereinafter TRIPS], create minimum standard obligations for the protection and enforcement of intellectual property rights, including copyright.

² *Id.* The latest manifestations of the increased protection of intellectual property (in particular copyright) at the international and national levels impact more specifically online service providers and online users of copyright works by providing additional enforcement powers to copyright holders in the digital environment. The French law of 2009, Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet [ACT No. 2009-669 of June 12, 2009 Promoting the Distribution and Protection of Creation on the Internet] [hereinafter HADOPI], the UK Digital Economy Act of 2010, Digital Economy Act, 2010, c. 24 (U.K.), and the signature of the Anti-Counterfeiting Trade Agreement in 2011, Anti-Counterfeiting Trade Agreement, opened for signature May 1, 2011, available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf [hereinafter ACTA], illustrate a new wave of regulation toward strengthening the means by which copyright holders can enforce their exclusive rights and deter copyright infringement. For a discussion on the procedural adoption and substantive issues around ACTA, see Peter K. Yu, *Six Secret (and now open) Fears of Acta*, 64 SMU L. REV. 975 (2011). In Canada, Bill C-8, an Act to amend the Copyright Act and the Trade-marks Act and to make consequential amendments to other Acts, 2d Session, 41st Parl., 2013 (Third Reading, October 2, 2014), if adopted, will further amend Canada Copyright Act, R.S.C. 1985, c. C-42, by strengthening the civil and criminal remedies for copyright infringement.

³ Attempts in the United States to introduce similar laws have met fierce resistance from intermediaries and from members of the public, one culminating point being the complete blackout of Wikipedia for one day in January 2012. Amy Goodman, *The SOPA blackout protest makes history*, THE GUARDIAN, Jan. 18, 2012, <http://www.guardian.co.uk/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest-makes-history>. In the United States, the Bill introduced in the House of Representatives, the Stop Online Piracy Act [hereinafter SOPA], Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011), and the Bill introduced in the Senate, Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act [hereinafter PIPA], Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011), were subsequently abandoned. See Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, <http://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest>; Stephanie Condon, *PIPA, SOPA put on hold in wake of protests*, CBS NEWS, Jan. 20, 2012, <http://www.cbsnews.com/news/pipa-sopa-put-on-hold-in-wake-of-protests/>. At the international level, the future of ACTA is uncertain. In July 2012, in

copyright expansion on the desirable balance that needs to be struck between the rights and interests of copyright holders, users, intermediaries and the public are questioned and scrutinized.⁴

Whether copyright is property continues to ignite passionate debate, more than 300 years after the entry into force of the Statute of Anne.⁵ At the heart of the controversy lie various conceptions of property, as well as the causal effect between characterizing copyright as property and its rapid expansion. For some, the expansion of copyright is attributable to the *propertization* of copyright.⁶ For others, the root causes for the expansion of copyright must be sought

an unprecedented move, the European Parliament formally rejected the ratification of ACTA by the EU. See Charles Arthur, *Acta down, but not out, as Europe votes against controversial treaty*, THE GUARDIAN, July 4, 2012, <http://www.guardian.co.uk/technology/2012/jul/04/acta-european-parliament-votes-against>. The eventual ratification of ACTA by the EU and its Member States had given rise to broad opposition across Europe, the main fear being its limitations on Internet freedom. *Id.* The proposed terms of and clout of secrecy under which the negotiations for the Trans-Pacific Partnership (TPP) Free Trade Agreement have been conducted have also given rise to serious criticism. See, e.g., Letter from Joseph Stiglitz to TPP negotiators (December 6, 2013).

⁴ Discussions on the need to balance competing interests in copyright law have been central in legislative reform, public policy, and scholarly debates. For example in Canada, for a great part of the lengthy copyright legislative reform that has eventually led to the entry into force of the Copyright Modernization Act, S.C. 2012, c. 20; more specifically, Bill C-32, an Act to amend the Copyright Act, B. C-32, 3d Sess., 40th Parl., 2010 (1st reading June 2, 2010) and Bill C-11, an Act to amend the Copyright Act, B. C-11, 1st Sess., 41st Parl., 2011 (which became the Copyright Modernization Act), the Government of Canada labeled the initiative “Balanced Copyright,” and the Government website address where it communicated recent developments on copyright law around the entry into force of the Copyright Modernization Act was labelled “balancedcopyright.gc.ca.” Amongst scholarly work, see, e.g., THOMAS DREIER, *BALANCING PROPRIETARY AND PUBLIC DOMAIN INTERESTS: INSIDE OR OUTSIDE OF PROPRIETARY RIGHTS?*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 295 (Rochelle Cooper Dreyfuss et al. eds., 2001); *FROM RADICAL EXTREMISM TO BALANCED COPYRIGHT: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA* (Michael Geist ed. 2010); *OVERVIEW OF NATIONAL REPORTS ABOUT ‘BALANCING COPYRIGHT’* (Reto Hilty et al. eds., 2012), <http://ssrn.com/abstract=2040607>, reprinted in *BALANCING COPYRIGHT - A SURVEY OF NATIONAL APPROACHES (MPI STUDIES ON INTELLECTUAL PROPERTY AND COMPETITION LAW)* 1-78 (Reto Hilty et al. eds., 2012). The report surveys reports submitted by scholars with respect to 40 countries worldwide (including Canada, the United States, the United Kingdom, and France) about how each jurisdiction approaches the concept of balancing competing interests in copyright law.

⁵ See The Statute of Anne, 8 Anne c. 19 (1710) (An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned); see *CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW* (Helena Howe et al. eds., 2013) (focusing, in several chapters, on the property attributes of copyright); see also discussion *infra* Part II and Part III.

⁶ See discussion *infra* Part II.

elsewhere, or the so-called expansionist effects of qualifying copyright as property are attributable to a misconception of property.⁷

The primary goal of this article is to look at the property attributes of copyright to inform a more nuanced understanding of the nature of copyright that emphasizes its distinct character. I resort primarily to James W. Harris' theory in *Property and Justice*,⁸ and in particular, on the insights that his characterization of property as the twin manifestation of trespassory rules and of an ownership spectrum, bring to the understanding of copyright.⁹ While copyright holders' right to exclude has been a focal point in copyright theory,¹⁰ looking at copyright through trespassory rules and the ownership spectrum allows me to discern two distinct yet interrelated property interests that bring a more refined understanding of the property attributes of copyright.

The first interest relates to copyright as a whole when considered as the *thing* that is the object of commercial exploitation, which satisfies all requirements of a proprietary ownership interest.¹¹ The second interest focuses on the nature of copyright holders' relationship to the physical embodiment of their works (e.g. the commercial copies owned by consumers or other users): it emerges as a limited, remote, non-ownership proprietary interest.¹² Viewing copyright through the combination of the bundle of rights as an object of commodification and the more limited rights that copyright holders have with respect to disseminated copies of their works puts greater emphasis on the property attributes of copyright while underscoring their limited scope. For instance, viewing copyright through two distinct proprietary interests confirms that copyright holders cannot *own* their works once they are commercialized. This illustrates how a property lens may in fact narrow the scope of copyright, and challenge the perception that associating copyright to property inevitably leads to its expansion.¹³ As copyright holders' legal and technical powers of control increase, as much as users' power of uses of copyright works multiply, the temptations of drifting one way or the other on the debate regarding the property attributes of copyright are high. I argue that

⁷ *Id.*

⁸ JAMES W. HARRIS, *PROPERTY AND JUSTICE* (1996).

⁹ *Id.* at 5. The ownership spectrum spans from "mere property" to "full-blooded ownership." See discussion *infra* Part III.

¹⁰ See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: the Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1365-78 (1989); HUGH BREAKEY, *Properties of Copyright*, in CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW, *supra* note 5, at 137; discussion *infra* Part III.

¹¹ See discussion *infra* Part III.A.

¹² See discussion *infra* Part III.B.

¹³ See discussion *infra* Part III. B.