The nature and justification of the consumer's ownership rights in the copy of a copyrighted work

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1. Introduction

The nature and justification of the property rights in the lawfully acquired copy of a copyrighted work is an afterthought in our current legal system. It has been so far defined negatively and by default, through the application of copyright law. The great difficulty is that Canada's *Copyright Act* (the *CCA*)[1] just as other copyright laws throughout the world, focuses almost exclusively on defining the exclusive rights and remedies of copyright holders, with fragmented references to certain uses of copyrighted works that are stated not to infringe copyright (i.e. exceptions or limitations). Somewhat unexpectedly, the Supreme Court of Canada has recently characterized such exceptions as "users' rights".[2] The ramifications of this characterization have yet to be fully appreciated, but it invites to a profound reflection, among others, on the exact nature and scope of the ownership rights in the copy of a copyrighted work.

In the last thirty years, copyright legislation reform around the world has seen an unprecedented expansion of copyright holders' exclusive rights, often, to the detriment of consumers of copyrighted materials. This paper looks at how property theory can fill the gap to better define and justify the property rights of the consumer in the copy of a copyrighted work. This choice is perfectly justifiable while it is at the same time peculiar. First, when a consumer buys a book, a music CD or a film DVD, she is the rightful owner of this chattel. Thus, there is nothing extraordinary in approaching that right from the perspective of property theory. However, even the less informed consumer knows that this chattel is not like any other one. She knows or ought to know, that by buying a book, a CD or a DVD, she does not become the owner of the expressive work that it contains. The dichotomy between the chattel and the copyrighted work is often presented as the distinction between the "tangible" and the "intangible", the former being

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[1] The Canadian *Copyright Act R.S.C. 1985, c. C-42*.

[2] *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339, 2004 SCC 13, at paragraph 48 (hereafter *"CCH"*).

owned by the purchaser of the copy of the copyrighted work, and the latter remaining within the exclusive domain of the copyright holder. This creates a context by which the physical aspect is trivialised as being insignificant in comparison to the expressive work – the intangible and predominant object within the chattel - that it supports.

Second, the choice of property theory to better understand the nature of the rights in the copy of a copyrighted work can be perceived to be peculiar as we are moving towards an era where the property rights in the copy of the copyrighted work are being progressively eliminated altogether. With the advent of online licensing of copyrighted works, the physical tangible medium is eliminated, and with this, any transfer of property in the chattel supporting the copyrighted work.

What promises then, is property theory left with to offer? Why not focus on cultural and other social policy or turn to the body of copyright law itself to elucidate the nature of the rights in the copy of a copyrighted work (or what they should be)? As I argue throughout this paper, the property institution has strong imprints on the manner by which legislators and the Judiciary make decisions on the allocation of access to resources, and resolve conflicts arising there from. This is particularly true in the field of intellectual property. As much as policy makers, courts, and scholars "officially" distance copyright from the concept of property, copyright is frequently assimilated to a property interest of some sort.[3] Similarly, the property institution is profoundly incrusted in how copyright holders and consumers comprehend and articulate what they grant or receive access to.[4] From this perspective, the ubiquity and perenniality of the property institution, as well as its heterogeneity and adaptability,[5] offer an anchor of analysis of choice that can help clarify the rights in the copy of a copyrighted work, even as we are moving deeper and deeper into the world of intangibles. To that effect, this paper looks at the entitlements that are attributed to the property in the physical copy of a copyrighted work (such as a music CD or film DVD) independently of any express contract terms that may alter them.

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[3] See the discussion on the nature of copyright in section 3 below.

[4] As noted by Blackstone: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property": 2 William Blackstone, Commentaries *2.

[5] J. W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 4.

Although the focus of my paper is to look at the ownership rights in the physical copy of a copyrighted work, property theory provides important insights into the nature of the rights in the intangible copy of a copyrighted work obtained through on line licensing. In fact, it is in the light of an increasingly "physical free" access to copyrighted works that there is a pressing need to clarify the nature and scope of consumers' rights in the copy of a copyrighted work, more than there ever was before.

2. Laying the framework: the property institution, the consumer of copyrighted works and copyright

2.1 The property institution's main characteristics

The essence of property is the twin manifestation of trespassory rules[6] and the existence of a heterogeneous ownership spectrum that spans from "mere property" to "full-blooded ownership". These ownership interests all share in common (i) a juridical relation between a person and a resource (ii) privileges and powers that are open ended, and (iii) which authorize self-seekingness to the owner.[7] Self-seekingness refers to this intimate relationship between the owner and the resource as to how she chooses to dispose of the resource, with *prima facie* no duty to account to any one on the merit or rationality of that preference.[8] While "full blooded ownership"[9] is the strongest illustration of all three characteristics, mere property for its part embraces "some open–ended set of use-privileges and some open-ended set of powers of control over uses made by others".[10]

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[6] which refers to all rules which, by reference to a resource, impose obligations (negative or positive) upon an open ended range of persons, with the exception of some privileged individual, group, or agency (i.e. the owner(s)). They are open ended, and give rise to various civil or criminal remedies such as damages, possessory recovery, injunction or restitution: J. W. Harris, supra note 5, at 25 and 86.

[7] J.W. Harris, supra note 5, at 5.
[8] *Ibid,* at 65.
[9] J.W. Harris, supra note 5, at 30, defines "Full-blooded ownership" as "the relationship between a person (or persons) and a thing such that he (or they) have *prima facie* unlimited privileges of use or abuse over the thing and *prima facie* unlimited powers of control and transmission, so far as such use or exercise of power does not infringe some property independent prohibition". I refer to "property independent prohibitions" in section 2.2 below.

[10] J.W. Harris, supra note 5, at 29.

For instance, full powers of transmission may not be present in the case of mere property, while it is *prima facie* the case of full-blooded ownership.[11] Hence, property is by no means a homogeneous concept. It has evolved since the beginning of times and will likely continue to do so. Arguably, intellectual property is one relatively recent example of that evolution. The variances on the ownership spectrum are theoretically open-ended and infinite.[12] Yet, the three traits mentioned above are distinctive enough to refer to property as one institution.

Two elements must be present for a property institution to be in place. First, there must be a scarcity. We often describe copyright laws as the creation by the state of an "artificial scarcity" to prohibit the unauthorized copying that could otherwise prevail with respect to a work of authorship.[13] Second, the owner must be distanced from it in that she can apply control over the resource, and similarly, that others can be accused of taking the resource.[14]

Distilled to its bare essence and relevant to the present discussion, property is distinct from other legal institutions by the open ended (*a priori* unlimited) nature of the privileges and powers that it incarnates, as well as by the opposability of these privileges and powers to all (*in rem).*[15] However and with no surprise, the open-ended texture of property does not preclude the existence of limitations.[16]

2.2. The Theoretical Justifications of Property

Property, and particularly private property, is a controversial institution. As Jim Harris explains, "a property institution at least confers some private domain over some scarce things, so that the separateness of persons is made evident in the face of collective decision-making. But that domain necessarily confers some power over others and hence

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[11] *Ibid.*
[12] J.W. Harris, supra note 5, at 275.
[13] *Ibid*, at 342; M. A. Lemley, "Property, IP and Free Riding" (2005) Texas L. Rev. 1031, at 1055.
[14] J.W. Harris, supra note 5, at 332, where the author discusses how certain matter cannot be the object of trespassory powers because of their high level of abstractedness : joy, happiness, friendship, etc….

[15] Unlike a contract, that binds the contracting parties only.
[16] See discussion in section 2.3 below.

is distributionally problematic".[17] In the realm of copyright particularly, any reference to property, either in an attempt to define the nature of the right, or by reference to property theories to justify its existence, is the subject of ongoing debate and controversy. It seems however that the debate is obscured by at least two misconceptions. First, the nature of the property institution is often confused with one of its potential justifications, i.e. the existence of a natural right over some resource. Second, there may be an erroneous perception that property is a narrow, fixed in time phenomenon,[18] as opposed to a flexible and somewhat heteroclite organizing idea, that can accommodate a wide array of interests, and that the peculiarities of copyright would be in good company within the property institution. [19]

One corollary of the controversial nature of property is that there is no apparent consensus on its theoretical justification. To complicate matters further (and this alone can be a source of contention) arriving at a cogent theory of property may necessitate the co-existence of different underlying justifications. This is attributable in part to the heterogeneous nature of property, and to the complementary role that apparently conflicting theories can play in justifying the "phenomenon" of property.[20]

In section 4.3, I review and apply the ramifications of selected property justification theories with respect to the consumer's property rights in the copy of a copyrighted work, and with respect to the copyright holder interests in the same copy.[21] I look at how each theoretical justification can potentially impact on the scope of both rights. Not only is this exercise critical for a better understanding of the scope of each right, it also provides important guidance in understanding and justifying the application of the limitations to those rights.

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[17] J.W. Harris, supra note 5, at 165.
[18] Perhaps strictly viewed as "full-blooded ownership".
[19] R. Epstein, "The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituray" (2010) 62 Stan. L. Re. 455, argues that the evolution of property, including through its fragmentation and recombination is in fact a demonstration of its robustness. The author also argues that intellectual property can also be treated as property.
[20] See the discussion in section 4.3.1 below.
[21] See section 4.3 below.

2.3 The limitations to property and their significance

The limitations to property, their *raison d'être* and mode of operation, are central to the understanding of the nature of consumers' property rights in copyrighted works, arguably even more so than with respect to other chattels that are not subjected to copyright. For Jim Harris, any form of property should not extend beyond the mix of "property –specific justice reasons" that support them.[22] Moreover, property limitations can be justified on the basis of practical and conceptual limits.[23]

Broadly speaking, there are four main categories of property limitations. The first one refers to "property-independent prohibitions".[24] While they effectively limit the open-ended use privileges of an owned resource, that is so regardless of the status of ownership. They vary in time and in space. Some environmental regulation could fall in that category, as well as criminal law prohibitions. For example, the fact that you own a music CD does not entitle you, or anyone having it in her possession, to force it down someone's throat (besides the fact that it would be physically impossible). Property-independent prohibitions signal that certain uses prohibited to all are not *prima facie* part of the rights of even fool-blooded ownership.[25]

The second one refers to "property-limitation rules", i.e. when the *prima facie* open-ended privileges of ownership are overridden.[26] Examples of property-limitation rules include the common law tort of nuisance and limitations on the freedom to bequeath.[27] As for property-independent prohibitions, they may vary in time and in place. The normative exercise to assess their merit involves a balancing act between the values taken to be inherent in ownership, the

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[22] J.W. Harris, supra note 5, at 335.
[23] *Ibid.*
[24] J.W. Harris, supra note 5, at 32-33.

[25] *Ibid.*
[26] J.W. Harris, supra note 5, at 34.

[27] *Ibid.*

freedom to act self-seekingly, in relation to that which is one's own, and other values, individual or social. [28]

The third one refers to the most extreme form of property limitation, namely when property can be confiscated from the owner, i.e. "expropriation rules".[29]

Last but not least, practical and conceptual considerations impose limits to the scope of rights that property entails. An interest that lacks a distance between the owner and the object of property is a conceptual limit to property.[30] Also, there are property externalities, which for practical reasons, cannot fall under the purview of property. For example, it would be impractical to ban people from watching the beautiful garden of a private property, or to prohibit them from taking a picture from a distance, unless they pay a fee to the property owner. As I discuss further in this paper, the *CCA* (similarly to other jurisdictions) is filled with examples of the application of exclusive rights of copyright holders, which are impractical and not so far from the photograph of the lawn example.[31] There are however limits to the practicality argument, especially if there are strong justice reasons for supporting a property interest.[32] And yet, the practicality argument may point to deeper considerations of important normative value, that elucidate the proper scope of a property right, and the degree of desirable state intervention and individual liberty.

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[28] J.W. Harris, supra note 5, at 90.

[29] The confiscation of products of crime under criminal law, the powers of the trustee in bankruptcy in bankruptcy law, as well as division of patrimony under family law are various examples of expropriation rules. See J.W. Harris, supra note 5, at 37-38. "Appropriation rules" reflect the other side of the coin of expropriation and even beyond. For instance, in case where the owner cannot be located, which does not necessarily entail an instance of expropriation. *Ibid,* at 38-39.

[30] J.W. Harris, supra note 5, at 332-333.

[31] See discussion in section 3. below on the nature of copyright and particularly on the over-propertization of copyright. To illustrate that point, see sections 29 to 32.5 of the *CCA* supra note 1, which contain very detailed enumerations of what are not considered infringements of copyright. As one example: the fact that it is permitted to take a picture of an architectural building, which under copyright laws is protected as a work of authorship see s. 32.2 (1) b of the *CCA*. The inference is that were they not listed, all those acts could be considered as part of the exclusive rights of the copyright holder.

[32] J.W. Harris, supra note 5, at 334.

Property limitation rules provide a valuable analytical framework to characterize the interaction between the property rights in the copy of a copyrighted work and its interaction with the rights of the copyright holder. One common trait of the various categories of property limitations is that they are predominantly imposed for the benefit of the public interest (e.g. criminal law, bankruptcy law, environmental law, municipal law) except perhaps in the case of some property-limitation rules, or practical limits to property which are also intended to benefit the private interests of an individual or other private property owners. [33] Arguably, the exclusive rights of the copyright holder and the property rights of the consumer in the copy of a copyrighted work both benefit their respective private interests, while serving at the same time greater public policy goals.[34]

As I argue in this paper, in the case of the property rights in the copy of a copyrighted work, the property rights of the copyright holder act as a limitation on those property rights.[35] What is less clear, and has yet to be more fully investigated, is the extent to which the consumer property rights in the copy of a copyrighted work, also acts as a limitation on the copyright holders property rights. In each case, there is a two-way juridical relation. Moreover, each set of limitations (e.g. the ones of the copyright holder on the consumer and the ones of the consumer on the copyright holder) operates distinctly, separately, in parallel to the other. Finally, there is a remarkable asymmetry between the breadth of the limitations imposed on the consumer's property rights in the copy of the copyrighted work on the one hand, and the limitations that are imposed by the same consumer property rights on the property rights of the copyright holders on the other.[36]

3. The Nature of Copyright

[33] As it is the case with respect to the application of the tort of nuisance.
[34] See discussion in section 4.2 and 5.1 below.
[35] See discussion in section 4.2 below.
[36] See discussion in section 4.1 below on the various privileges that property in the copy of a copyrighted work confers as opposed to the limitations that the copyright holder exclusive rights impose.

The *CCA* defines copyright, in relation to a work,[37] as the sole right to produce or reproduce a work, to perform it in public, to telecommunicate it to the public, and other non-exhaustive exclusive rights, including the sole right to authorize any such acts.[38] Copyright also includes specific exclusive rights with respect to a performer's performance, sound recordings and communication signals.[39] The ownership rights of the consumer to the commercial copy of a copyrighted work are confronted with exclusive rights of the copyright holder after the first publication of the copyrighted work has occurred. Hence, other aspects of copyright, such as the sole right to authorize first publication, raise distinct questions as to the nature of copyright and its theoretical justification, that are beyond the scope of this paper.[40]

Copyright has been described as a monopoly,[41] as a regulatory right,[42] as a government subsidy,[43] as a construction of statute[44] and as property.[45] The persistence with which

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[37] i.e. an original work that falls under one or more of four categories: literary, dramatic, musical or artistic work: s. 2 of the *CCA*, supra note 1.

[38] S. 3 of the *CCA, supra,* note 1.

[39] S. 2 of the *CCA*, supra note 1.

[40] See S. Handa, *Copyright Law in Canada* (Markham, Ontario: Butterworth Canada, 2002), at 125-126 where the author suggests approaching copyright in two phases to apply coherent theoretical justirifications. The first right to publish would be justified on the basis of privacy, while the exploitation right after publication has occurred would be justified by a social utility model.

[41] R.J. Roberts, "Canadian Copyright: Natural Property or Mere Monopoly" (1979) 40 Can. Patent Reporter (2d) 33; and P.E.Moyse, "La nature du droit d'auteur: droit de propriété ou monopole?" (1998) 43 McGill L.J. 507.

[42] R. Patterson, "Free Speech, Copyright and Fair Use" (1987), 40 Vand. L. Rev. 1 at 8.

[43] M. A. Lemley, supra note 13, at 1069 and fol.: the author, after making an analogy to real property, tort, government subsidy and government regulation, concludes that no analogy is fully adequate but the closest one is probably a government subsidy as it underlies the trade-off at play better than talking about it as a real property right.

[44] Compo Co. v. Blue Crest Music Inc. [1980] 1 S.C.R. 357, at paragraph 23.

[45] *Millar v. Taylor* (1769), 4 Burr. 2303, 98 E.R. 201, *per* Willes J., at 218; *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, paragraphs 27-39; D.Vaver, "Canada's Intellectual Property Framework: A Comparative Overview", (2004) 17 I.P.J. 125, at 135; R. Epstein, supra note 19; for a historical perspective on the debate around the nature of copyright, i.e. either as a monopoly, property or creation of statute, see *H.G. Fox, Canadian law of Copyright (Toronto: University of Toronto Press, 1944) at 7-11, whereby* after reviewing the three characterizations of copyright, the author concludes that copyright is incorporeal property: *ibid*, at 10-11.

some commentators insist that it is not property, serves at times the overt purpose of distancing copyright from a natural right or common law property.[46] The underlying purpose of distancing the nature of copyright from property, may be to avoid any expansionist tendencies associated with property rights, by confining copyright to the letter of the statute that creates it. These motives it seems, confuse the nature of the right, for instance property, with its justification, i.e. a natural right, which is not a *sine qua none* condition for the existence of property.[47] Also, although the open-ended texture of property may in theory lead to expansionism, the declared self-standing statutory nature of copyright has not stopped it from expanding, whether we call this creature property or not.[48]

In Canada, copyright is probably more properly described as a distinct private property interest conferred by statute. The Supreme Court has repeatedly confirmed the "self-standing" statutory nature of copyright law,[49] independent from property law or tort law. The same court and lower courts also refer to copyright as a property interest.[50] Copyright confers a broad list of exclusive rights with correlative trespassory powers which are opposable to all (i.e. *in rem).*[51] It can be assigned, in whole or in part,[52] it can be the object of contract[53] and it can be bequeathed. It is an object of commoditization.[54]

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[46] R.J. Roberts, supra note 41, at 34, R. Patterson, supra note 42, at 8.

[47] The existence of a natural right to property has been the object of an ongoing controversy: see the discussion in section 4.3 below.

[48] From a U.S. perspective, J. Litman, "Lawful Personal Use" (2007) 85 Tex. L. Rev. 1871 at 1872, cites various recent legislative changes that have lead to progressively expanding copyrightholders exclusive rights and restraining lawful personal uses of copyrighted material.

[49] Society of Composers, Authors and Music Publishers of Canada *v.* Canadian Assn. of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45, at paragraph 82.

[50] *Millar v. Taylo,r* supra note 45; *Euro-Excellence Inc. v. Kraft Canada Inc.*, supra note 45, at paragraphs 27-39; *Ritchie v. Sawmill Creek Golf & Country Club Ltd.* (Ont. S.C.) (2004), 35 C.P.R. (4th) 163, at paragraph 20.

[51] The *CCA,* supra note 1, at section 3, 15, 18, 21 and 26 sets the exclusive rights of copyright holders that are opposable to all, including a copyright user who has no contractual relationship with the copyright holder. It also lists the remedies in Part IV of the *CCA*.

[52] Section 13(4) of the *CCA*, supra, note 1.

[53] The most frequent form being licence agreements.

Thus, in spite of its complex uniqueness,[55] one would be hard pressed to deny copyright any commonality with property,[56] other than for ideological reasons.

Among the most notable peculiarities, the non rivalrous nature of copyright strikes as the most obvious incompatibility with the property institution. Unlike most resources subject to property, the use of one copy of the work does not take away the use and enjoyment by others, including the copyright holder.[57] Thus, copyright law creates an "artificial scarcity."[58] From that perspective, the statutory nature of copyright is not in contradiction with the property institution *per se*, on the contrary, it is constitutive of its stature as such.

Another peculiarity is the duration of copyright, which, unlike other property interests, is limited to the life of the author plus 50 years.[59] Aside from the fact that relatively speaking, this may very well be eternity,[60] the limited duration of a right is no stranger to the property institution.[61]

Of the three ownership interests that are common to all property institutions,[62] namely (i) a juridical relation between a person and a resource (ii) privileges and powers that are open ended, and (iii) which authorize self-seekingness on the owner, copyright meets the

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[54] On the commoditization of copyright, see F. MacMillan, "The Cruel C: Copyright and Film" (2002) 24 E.I.P.R. 483, in particular, at 484.

[55] These are traits that the property institution, by its heterogeneity, can very well accommodate: see J.W. Harris, supra note 5, at 3-6.

[56] From a U.S. perspective, see R. Epstein, supra note 19, who argues that intellectual property, including copyright, is property.

[57] Except in some case with respect to the economic rights of the copyright holder in being compensated for the sale of the copies of her copyrighted work.

[58] J.W. Harris, supra note 5, at 342; M. A. Lemley, supra note 13, at 1055 notes that the purpose of the artificially created scarcity is " a conscious decision to create scarcity in a type of good in which it is ordinarily absent in order to artificially boost the economic returns to innovation."

[59] Section 6 of the *CCA,* supra note 1.

[60] In a day and age of instantaneous dissemination of unprecedented amounts of information, works are quickly relegated to the ranks of "dépassé". Also, the quick pace at which technology is updated, particularly in the area of computer programs (protected by copyright as literary works) make this term likely much longer than its actual "utile life" can sustain.

[61] For example, in civil law, emphyteusis and usufruct are real rights (i.e. a dismemberment of the right of ownership) that have a limited duration of up to 100 years: art. 1119, 1123 and 1197 of the *Québec Civil Code.*

[62] That is, from mere property interest to full blooded ownership, see section 2.1 above.

first one,[63] and the second and third ones to a large extent. If not unlimited, there is an open-ended texture to copyright, in that the list of exclusive powers it confers is not exhaustive.[64] As to the self-seekingness nature of copyright, it is a central feature to the operation of copyright, that the copyright holder may decide how and when she wants to dispose of copyright,[65] with no duty to account to any one on the merit or rationality of that choice.[66] As the Supreme Court noted in *Robertson*, on the issue of whether freelance authors had impliedly or not licensed the right to the Globe and Mail newspaper to republish their articles in electronic databases: "parties are, have been, and will continue to be, free to alter by contract the rights established by the *Copyright Act.*" [67] Thus, on the property institution spectrum of ownership rights, copyright may very well sit closer to full-blooded ownership than it appears at first sight.

More than that, in respect of the trespassory powers and economic benefits that are presumed to be within the domain of the copyright holder, copyright has been described as conferring inflated ownership rights to the copyright holder. Applying economic theory, Marc A. Lemley argues that copyright law allows the copyright holder to benefit from all externalities of her ownership right to a degree that is not observed for other types of property[68]: "…society in general doesn't prohibit free riding. Internalization of

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[63] i.e. rights on the artificially scarce intangible resource that can be distanced from the copyright owner, that confer trespassory powers.

[64] Section 3 of the *CCA* , supra note 1, states: ""copyright", in relation to a work, means the sole right to produce or reproduce the work…..and <u>includes</u> the sole right…." [emphasis added].

[65] Section 13(4) of the *CCA*, supra note 1, provides: "The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other right by licence, …."

[66] The *CCA*, supra note 1, also supports the self-seekingness aspect of copyright through moral rights, i.e. the right to the integrity of the work and the right to be associated with the work, which can be invoked by authors (i.e. physical persons): see section 14.1(1) of the CCA, *ibid*. However, moral rights are inalienable (they can be waived): section 14.1(2) of the *CCA, ibid* . In that sense, they would probably not qualify as property interests.

[67] Robertson *v*. Thomson Corp., [2006] 2 S.C.R. 363, 2006 SCC 43, at paragraph 58.

[68] M.A. Lemley, supra note 13, at 1033: "Courts and commentators adopt--explicitly or implicitly--the economic logic of real property in the context of intellectual property cases. They then make a subconscious move, one that the economic theory of property does not justify: they jump from the idea that

positive externalities is not necessary at all unless efficient use of the property requires a significant investment that cannot be recouped another way. And even then, economic theory properly requires not the complete internalization of positive externalities but only the capture of returns sufficient to recoup the investment. Only where there is a tragedy of the commons do we insist on complete or relatively complete internalization of externalities."[69] This, is the result, according to Lemley, of a focus by the courts on the benefit of those externalities, i.e. "free riding", and on the assumption that such benefits are necessarily unjust. [70] Indeed, if copyright holders benefit from even more externalities than other property institutions, then logically, the reason for that expansion must be sought elsewhere than because it is often assimilated by law makers, the judiciary and commentators to property.

From this perspective, the lens of property theory is useful to apprehend copyright. Even more so, it is arguably necessary, given the absence of an articulation by the *CCA* of the property rights of the consumer in the copy of a copyrighted work. Viewed from the perspective of two competing property rights in the same resource, and how one right operates as a limitation on the other and *vice versa*, property theory provides a strong normative framework both for the consumer and the copyright holder's dual rights in the same copyrighted work.

4. The consumer's rights in the copy of a copyrighted work

4.1 The nature and scope of the property right: copyright leftovers?

The exact nature and scope of the consumer's property right in the copy of a copyrighted work has been overlooked in comparison to the nature of copyright. Her right is sometimes contrasted with the copyright holder's right through the tangible *versus* intangible dichotomy. A distinction is then made between the exclusive rights of the copyright holder in the copyright which are her sole domain (the "intangible") and the

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intellectual property is property to the idea that the IP owner is entitled to capture the full social value of her right."

[69] M.A. Lemley, supra note 13, at 1050.
[70] *Ibid,* at 1044.

property rights of the consumer in the physical copy (such as a music CD, a film DVD or a book) of the copyrighted work (the "tangible").[71] What is assumed by this dichotomy is that the consumer has no property right whatsoever in the copyright (the "intangible") but only in the tangible. In other words, all exclusive rights of production, reproduction, performance in public, communication to the public by telecommunication, adaptation, conversion and so on are *a priori* within the domain of the copyright holder, unless she gives her authorization through a licence, or unless the consumer falls under one of the limited exceptions to copyright infringement. Putting aside the fact that the exclusive rights of the copyright holder are not devoid of any ambiguity, the line seems relatively clear. However, for reasons I explain below, the distinction between intangible and tangible is highly problematic and misleading. More than that, it may be the source of one of the greatest misunderstandings on the scope of copyright.

Applying Jim Harris's theory of the three essential characteristics of the various ownership spectrum of property, namely: (i) a juridical relation between a person and a resource (ii) privileges and powers that are open ended and (iii) the fact that they authorize self-seekingness on the part of the owner,[72] the first one is present, while the second and third characteristics are at first sight more problematic. The consumer of a lawfully purchased music CD or film DVD is the owner of the CD or DVD copy, and has a property right on the copies. As such, she can dispose of the CD or the DVD through transfer by donation or second hand sale. She has trespassory powers that give rise to legal remedies, including revesting of the property in case of theft.[73] She can listen to the CD or DVD for as much as she wants, can play it as part of a performance or skit in the privacy of her home, can mark the copy with her name, can lend it to a friend, and so on.

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[71] § 202 of the U.S. Copyright Act, Copyright Law of the U. S. (Title 17 of the *United States Code)* provides that: "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object." The *CCA*, supra note 1, does not contain a similar provision.

[72] See section 2.1 above.

[73] For example see: the British-Columbia *Sale Of Goods Act* [RSBC 1996] CHAPTER 410. Under Québec' civil law, the nature and scope of her remedies depend on the good faith of the person in possession and on the application of prescription rules: articles 928-933 of *Québec Civil Code.*

Under the *CCA, s*he cannot make copies of the DVD, but she can make a copy of the music CD on a blank CD[74] for her private use only.[75] She may be able to make a copy of the CD or DVD under the fair dealing provisions if it is for one of the specified purposes (i.e. research or private study and criticism or review) and if the dealing is fair.[76] She cannot play the CD in public, including at a neighbourhood fair,[77] at a wedding, during a public performance in a park, at the corner store where she works part-time, without obtaining the authorization of the copyright holder or paying royalties to the relevant copyright collective body.[78] She cannot telecommunicate to the public any substantial portion of the CD or DVD, including posting it on face book, incorporating it in a clip she posted on "You tube" or on her personal website, without the prior consent of the copyright holder, and the list goes on an on. These prohibitions act without a doubt as limitations to her property rights in the CD and DVD.[79]

What I want to illustrate by this somewhat fastidious list of open-ended limitations[80] is two fold. First, the list of limitations is likely to be overwhelmingly greater than the list of powers and privileges of the consumer in the CD or DVD. Second, those limitations are not trivial. They go to the heart of the uses that the consumer increasingly wants to make of a CD, a DVD, a book or other copyrighted works. They directly and materially impede on the *a priori* self-seekingness that ownership in the copy of a copyrighted work should entail.[81] In fact, the situation is here reversed: she is *a priori* banned to a great extent from the self-seekingness aspect of her property rights in the CD or DVD she owns.

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[74] Or any other "audio recording medium" as per section 79 and fol. of the *CCA,* supra note 1.
[75] Under the private copying regime in the *CCA, supra* note 1 , it is very limited. It only applies to audio recording and does not permit for example making a copy of a musical recording on an MP3 player such as IPOD as they do note constitute an audio recording medium.
[76] Section 29 to 29.2 and of the *CCA*, supra note 1.
[77] Unless the use would fall under one of the limited exceptions to copyright infringement for Educational institutions: s. 29.4 to 30 of the *CCA, supra* note 1.
[78] Either directly or through the relevant collective agency that is administered by the Copyright Board under the *CCA,* supra note 1.
[79] See discussion on the nature of those limitations in section 4.2 below.
[80] I refer to the list of limitations of what a consumer can do with a CD and DVD as being "open-ended", simply as a corollary of the fact that the list of exclusive rights of copyright holders with respect to their copyrighted works are often drafted in open-ended terms: for instance, see s. 3 of the *CCA,* supra note 1. below. The fact that the limitations applying to property are open-ended is not unusual per se and is the case for other types of property limitations.
[81] J.P. Liu, "Copyright Law's Theory of the Consumer" (2003) 44 Boston College Law Review, 397, at 412, refers to copyrighted works as not only being individual consumer goods but as also being social

Two recent judgments by the Supreme Court of Canada shed some light on the nature and scope of the rights to the copy of a copyrighted work. In *Théberge v. Galerie d'Art du Petit Champlain inc* ("*Théberge*")[82] Binnie J. for the majority, draws the line between the rights of the owner in the physical copy of a copyrighted work and the rights of the copyright holder. Having decided that the transposition of lawfully purchased posters of artist Claude Théberge's paintings on a canvas was not a "reproduction" of the copyrighted work as per the exclusive rights conferred to Théberge under section 3 of the *CCA*, the court's majority decided that such transposition did not fall within the economic rights of the artist (while it may have fallen under his moral rights). Commenting on the proper balance that needs to be struck among the creator's rights and other public policy objectives, Binnie J. stated that this exercise "lies not only in recognizing the creator's rights but in giving due weight to their limited nature.",[83] so that "Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it."[84]

In *CCH Canadian Ltd. v. Law Society of Upper Canada* [85] (*"CCH"*), having to interpret the scope of the fair dealing provisions in the *CCA,* the Supreme Court characterized the exceptions to copyright infringement as "users' rights" and not just mere loop holes in the *CCA.*[86] This statement and the remarks in *Théberge* offer a new perspective on the place

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goods: "… to make sense of and interpret many copyrighted works meaningfully, it is sometimes necessary to communicate with others about the works; to share viewpoints, to debate, and to argue. Although some works can certainly be consumed alone, by an individual consumer, many works are suited to social consumption. The ability to communicate about copyrighted works enriches our understanding of those works and enables us to get much more out of them."

[82] *Théberge v. Gallerie d'art du petit Champlain Inc.* [2002] 2 S.C.R. 336 ("Théberge").
[83] *Ibid,* at paragraph 31.
[84] *Ibid,* at paragraph 32.

[85] *CCH, supra* note 2.

[86] *Ibid,* at paragraph 48.

of users of copyrighted works under the *CCA*. They shake the preconception of the *CCA* as being almost exclusively concerned with the exclusive rights of copyright holders.[87]

However, the *CCA* is silent on the nature and scope of the property rights in the copy of a copyrighted work. As promising as *Théberge* and *CCH* may be in ascertaining clearer and perhaps broader rights in and to consumers' copy of a copyrighted work, there are obvious constraints to how far the judiciary can go in filling that gap, if courts are to rely solely on the framework set out by the *CCA*.[88] In that light, resort to property law and theory to better understand the scope of consumers' rights in the copy of a copyrighted work provides a much needed complementary legal and normative framework of analysis.

How then is this property right in the copy of a copyrighted work best characterized on the spectrum of ownership rights, and does it matter? Based on the definitions of "mere property" and "full blooded ownership" at the two ends of the ownership spectrum of property,[89] one is hard pressed to characterize the property right of the consumer as full-blooded ownership, although in theory it should. The proper characterization is a matter of degree. The tangible *versus* intangible dichotomy to define the rights of copyright holders against the ones of the property owner in the copy of the copyrighted work is harmful as it dismisses that the property right in the copy of the copyrighted work and the self-seekingness that is inherent to a property right, gives her privileges and entitlements

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[87] Abraham Drassinower refers to the balance of *Théberge*, supra note 80, as a reflection of the *CCA* standing as a juridical order which "underlines and therefore advances the internalization of limitations of authorial entitlement", as opposed to merely establishing the exclusive rights of copyright holders : A. Drassinower, "Exceptions properly so-called" in Y.Gendreau & A. Drassinower, eds., *Langues et droit d'auteur/Language and Copyright* (Carswell; Bruylant, 2009) 205, at 209-210.

[88] As we have been frequently reminded by the Supreme Court : "In Canada, copyright is a creature of statute, and the rights and remedies provided by the *Copyright Act* are exhaustive": Society of Composers, Authors and Music Publishers of Canada *v.* Canadian Assn. of Internet Providers, supra note 49, at 82, whereby the Court refers to previous judgment by the same court having made the same statement.

[89] See discussion in section 2.1 above.

that are commonly understood to be within the realm of the intangible exclusive rights of copyright.

This *décalage* between property theory and what the consumer actually owns, may explain to a large extent the incredulity or disbelief that even the well informed person has with respect to what she is entitled and not entitled to do with the copy of her music CD or film DVD. Full-blooded ownership in a chattel or real property, is a hard wired concept that goes back to immemorial times.[90] Property limitations, although widely spread, need to be properly justified, even more so when they go to the heart of what are deemed to be *prima facie* use privileges entitlements, as it is the case with what some of the copyright limitations forbid.[91] Progressively over the years, copyright has expanded and has (in)advertently encroached on the full-blooded ownership of the lawful purchaser of the copy of a copyrighted work, such as a CD or DVD.[92] To “restore” it to its presumed state of full-blooded ownership, more attention needs to be devoted to the open-ended self-seekingness that it should entail, in the context of copyright. A better understanding of the operation of copyright as a property limitation on the consumer’s ownership rights in the music CD and film DVD is the next step towards that goal.

4.2 Copyright and moral rights as property-limitation rules

The bundle of exclusive rights conferred to the copyright holder by copyright law, effectively imposes limits on the property entitlements of the consumer of the lawfully purchased copy of a copyrighted work, such as a music CD or film DVD.[93] Moral

[90] J.W. Harris, supra note 5, at 4.
[91] As Jeremy Waldron puts it: “The fact is however , that whether or not we speak of a burden of proof, an institution like intellectual property is not self-justifying; we owe a justification to anyone who finds that he can move less freely than he would in the absence of the institution”, J. Waldron, "From Authors to Copiers: Individual Rights & Social Values in Intellectual Property" (1993) 69 Chicago-Kent Law Review, 841, in D. Vaver, ed., *Intellectual Property Rights, Critical Concepts in Law* (London: Routledge, 2006) Vol.I, 114 at 146.

[92] For a U.S. perspective, see J. Litman, supra note 48, at 1872.
[93] See the list of copyright limitations in section 4.1 above.

rights[94] operate in the same way but are beyond the scope of this paper. Characterizing copyright as a limitation on the individual private rights of the consumer is not trivial. As Jeremy Waldron notes: "It sounds a lot less pleasant if, instead of saying we are rewarding authors, we turn the matter around and say we are imposing duties, restricting freedom, and inflicting burdens on certain individuals for the sake of the greater social good."[95]

We can quickly dismiss the most extreme form of property limitation, namely expropriation rules. It would be far fetched to qualify as such the effect of copyright on the ownership rights of a consumer on the lawfully purchased copy of a copyrighted work[96] except perhaps in some very specific cases.[97]

Copyright is opposable to all (*in rem*) and as such it imposes limitations to anyone in possession of or accessing a copy of the copyrighted work, independently of whether the person is the owner or not. On that basis, copyright could be characterized as a property-independent prohibition.[98] However, this type of limitation is not only disinterested in the juridical relation between the person and the chattel, it also often disregards the nature of the chattel or other property resource altogether. For its part, copyright applies specifically to those chattels or other resources that contain or embed a work protected by copyright law. This signals a property-limitation rule that also extends to a lawful possessor of a copyrighted work vested with open-ended use privileges.[99] Also, the fact that copyright is a property limitation that is imposed predominantly (at least during its term) for the benefit of the copyright holders' private interests, brings it closer to a

[94] See *infra*, note 142.
[95] J. Waldron, supra note 91, at 129.
[96] For expropriation to occur, the rightful owner would normally need to have had benefits conferred that where taken away from her. In the case of copyright, it operates as a limit on the owners' rights from the beginning.

[97] For example, through the application of technological protection measures or digital rights management, some usages could be restrained *a posteriori.* The expropriation or confiscation analogy could be plausible.

[98] See discussion in section 2.3 above.
[99] J.W. Harris, supra note 5, at 34.

property-limitation rule.[100] By contrast, most property- independent prohibitions stem from public law, i.e. they are justified on the basis of the public interest and public policy.

The distinctions are important. In the case of property- independent prohibitions, the effect of the limitation is that the forbidden use or excluded privilege was not *a priori* considered to be part of the ownership rights in the copy of the copyrighted work. In the case of property-limitation rules, those uses or privileges are considered to be *a priori* part of the property domain but for some public interest or other property-justice reason, have been taken out of that domain for the benefit of another party (in the present case the copyright holder) or of the collectivity. Accordingly, the rationale as well as the scope of the limitation need to be clearly set out to the party who's property rights are being limited. Here is a further illustration that copyright is more adequately characterized as a property-limitation rule on the property rights of the consumer in the copy of the copyrighted work than as a property-independent prohibition: once the relevant copyright expires, the consumer becomes entitled to perform all acts that were previously in the exclusive domain of the copyright holder. Another important consideration is that while property-independent prohibitions are external to the property institution, property-limitation rules often operate as internal limitations. As in the case of a consumer and a copyright holder, we are witnessing two equal but competing property claims that pertain

[100] Although a more nuanced view of copyright is that it also serves public interests through the encouragement of the production and dissemination of works. On the one hand, the limitation copyright imposes on the property rights of the copy of a copyrighted work is for the immediate benefit of the private interests of the copyright holder. On the other hand, such benefits arguably act as a "temporary proxy"(on a related idea of copyright holders' holding the balance between authors and users, see in D. McGowan, "Some Copyright Consumer Conundrums" in *Consumer Protection in the Age of the "Information Economy"* (Aldershot: Ashgate Publishing Ltd., 2006) at 155) to a greater public interest, as they encourage the dissemination of copyrighted works that will eventually fall in the public domain. This is more the case in theory than in practice. In spite of the public policy aspect supposedly embedded within copyright law, individual moral entitlements favouring the private interests of copyright holders have made their way in policy design: J. Waldron, supra note 91 at 120. One of the side effects is the increasingly generous duration of the exclusive right granted by law to copyright holders (for example in the U.S. and in Europe) and their increasing *de jure* powers to control that right. In that light, public interest considerations play a secondary role during the term of a copyrighted work.

to the same object, it is plausible that the mediation of any conflict between the two lies within the property institution itself and not at its periphery. [101]

4.3 Theoretical justifications for the property right in the copy of a copyrighted work

Property theory reveals that the ownership rights of the consumer in the copy of a copyrighted work are anaemic when measured against the three attributes[102] that are common to the various interests on the ownership spectrum.[103] This deficiency is happening quite independently from any theoretical justification one may give to the ownership rights in the copy of a copyrighted work. This is attributable in great part to the fact that those ownership rights have been so far passively defined (if at all) by default, as a resultant of the scope of the exclusive rights of the copyright holder in the copyrighted work.

Why and how should we reinvigorate the consumer's ownership rights? How apt is the property institution to "mediate" between the breadth of the property right of the consumer in the copy of a copyrighted work and the property right of the copyright holder in the same work? An active articulation of the ownership rights in the copy of a copyrighted work through property theory inevitably necessitates an investigation into its theoretical justifications. This is imperative in light of the huge controversy that currently prevails around the proper scope of copyright exclusive rights and its impact on consumers accessing copyrighted works. [104] On that terrain, seemingly contradictory

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[101] Abraham Drassinower develops a similar idea of internal versus external limitations and how they apply to authors and copyright users, by mainly focussing on copyright law as a juridical order: A. Drassinower, supra note 87.

[102] Namely: a juridical relation between a person and a resource (ii) privileges and powers that are open ended, and (iii) which authorize self-seekingness to the owner. See discussion in section 2.1 above.

[103] They are even further away from their presumed stature as full-blooded ownership and as a result, somewhat estranged from the property institution altogether. See the discussion on the theoretical nature of the ownership right in the copy of a copyrighted work and how it contrasts with the reality of the limitations that copyright effectively imposes on such ownership rights in section 4.1 above.

[104] Looking at copyright from the perspective of users and copiers, Jeremy Waldron notes: "We cannot unravel conundrums of moral justification unless we are willing to approach the issue even handedly from both sides.": J. Waldron, supra note 91, at 114.

justificatory theories are playing a central role in how the courts, lawmakers, scholars and interest groups characterize the exclusive rights conferred to copyright holders. [105]

What are the justifications behind property rights and how do they shape the property institution's own "internal" solution? Indeed, if property is a natural right, as opposed to the result of an instrumental design, the limitations that can be imposed on that right would require a stronger justification and engender different consequences.[106] This is particularly important in the case of two (equal) property rights opposing each other, as it is the case between the consumer and the copyright holder.

The justification of the ownership rights in the copy of a copyrighted work is under theorized, just as for its nature.[107] By contrast, literature abounds on the theoretical justifications of copyright.[108] I propose to briefly review those property theory justifications which are more likely to shed some light on the *raison d'être* of the ownership right in the copy of a copyrighted work.[109] It is beyond the scope and purpose

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[105] W. Fisher, "Theories of Intellectual Property" in S.R. Munzer (ed) *New Essays in the legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 168.

[106] J. Waldron, supra note 91, at 119, J.W. Harris, supra note 5, at 183.

[107] See discussion above in section 4.1.

[108]To list only a few, see: E. Hettinger, "Justifying Intellectual Property" (1989) 18 Philosophy & Public Affairs, 31, in D. Vaver, ed., *Intellectual Property Rights, Critical Concepts in Law* (London: Routledge, 2006) Vol.I, 97; J. Waldron, supra note 91, W. Fisher, supra note 105; P.Drahos, *A Philosophy of Intellectual Property* (Aldeshot: Ashgate, 1996); S. Handa, supra note 40, at 59-134; C. Craig, "Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law" (2002) 28 Queen's L.J. 1; S.E. Trosow, "The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital" (2003) 16 Can. J.L. & Juris. 217; B. Fitzgerald, "Theoretical Underpinning of Intellectual Property: I am a Pragmatist But Theory is my Rhetoric" (2003) 16 Can. J.L. & Juris. 179; Bronaugh, R., Barton, P. & Drassinower, A. "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law (2003) 16 Can. J.L. & Juris. 3; W. M. Landes, R.A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, Mass:Bellnap Press 2003); R.A. Posner, "The Law and Economics of Intellectual Property" (2002) Daedalus 5; R. Polk Wagner, "Information Wants to be Free, Intellectual Property and the Mythologies of Control", (2003) 103 Columbia Law Review, 995M.A. Lemley, supra note 13; G. D'Agostino, *Towards a Balanced Copyright Treatment of Freelance Authors in the Digital Era,* (D.Phil. Thesis, Faculty of Law, University of Oxford 2004) chapter X[publication is pending in *Copyright, Contracts, Creators: New Media, New Rules* (Edward Elgar 2010)]; K.M. O'Regan, "Downloading Personhood: A Hegelian Theory of Copyright Law" (2009) 7 Can. J. L. & Tech. 1.

[109] It is beyond the scope of this paper to review all property theories. Among the several theories that are not discussed is the first occupancy theory, personhood constituting theory, for example as developed in the

of this paper to provide a detailed review of the body of academic work on the theoretical justifications of copyright. I refer to the latter only in so far as it contextualizes or responds to the application of various justificatory theories on the ownership rights in the copy of a copyrighted work. Moreover, the scope of study of copyright is more limited in the case of music CD and film DVDs, as we are concerned with the proper justifications of copyright after the copyrighted work is commercialized.[110] We are also dealing with multiple copies of a commoditized copyrighted work as opposed to instances where there exists only one original of the copyrighted work.[111]

4.3.1 Natural property rights in the fruits of one's labour

Property theories justifying natural rights in the fruits of one's labour are of little relevance to ascertain the proper scope of ownership rights in the copy of a copyrighted work. By essence, the consumer of our study does not necessarily or effectively create anything ideational or corporeal.[112] Without necessarily being a passive act, she essentially consumes or "absorbs" the copyrighted work through the copy that she owns. Nevertheless, natural rights' theories of property should be mentioned briefly for the profound resonance they bear on the justification of copyright,[113] which in turn is a significant property limitation to the consumers' ownership rights.[114]

Simply put, the question of whether a person can claim a natural right to property, is whether she has a moral claim to a resource, independent of social convention or positive

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work of Margaret Jane Radin: M.J. Radin, Property and Personhood (1982) 34 Stan. LR 957, and sovereignty theories.

[110] Indeed, when the consumer accesses the copyrighted work, the exclusive right to authorize first publication that is part of the bundle of copyright exclusive rights and give rise to distinct theoretical justifications has already taken place. See S. Handa, supra note 40.

[111] Such as would be the case with a painting, a statue or an architectural work. In such cases, the interaction between the property rights of the owner of the physical copy and the author is arguably higher, and may involve greater moral rights issue than when dealing with copies of films of musical recordings.

[112] For a discussion on the various types of consumers of copyrighted works, from passive to active authors, and on the type of consumer that law makers should focus on, see J. Liu, supra note 81; N. Elkin-Koren, "Making Room for Consumers Under the DMCA" (2007) 22 Berkley Technology Law Journal, 1119.

[113] E. Hettinger, supra note 108, at 100, refers the entitlement to the fruits of one's labour as perhaps the "most powerful intuition supporting property rights" including with respect to products of the mind.

[114] See discussion in section 4.2 above.

legal provisions, so that others must concede ownership use-privileges and control – powers over that resource with the correlative trespassory rules established by the state.[115] Frequently invoked as a justification of copyright, it has been the object of important criticism including, its questionable applicability to intangible property,[116] the difficulty in applying proportionality between the labour contribution and the exclusive rights conferred by copyright,[117] that exclusive property rights do not "naturally" flow as the sole reward or recognition for one's labour[118] and that the right to use and possess one's labour and the right to profit from it by selling it in the market place derive from distinct justifications.[119]

Arguments that copyright derives from a natural right to the fruits of one's labour are "officially" put to rest in Canada[120] and also in the U.S.[121] Yet, regardless of the existence or not of a natural right to the fruits of one's labour from which property rights derive, fundamental aspects of copyright law, such as the low threshold of originality required for a work to be protected by copyright, seem to fit more nicely with the fruits of one's labour theory[122] than with a utilitarian justification for copyright.[123] Moreover, case law

[115] J.W. Harris, supra note 5, at 182.
[116] W. Fisher, supra note 105, at 184-189.
[117] E. Hettinger, supra note 108, at 101 and 104.
[118] One of the mistakes is to conflate the issue of deserving a reward with what the reward should be: E. Hettinger, supra note 108, at 103. The type of reward is in fact dictated by social convention and is not as such a natural right: J.W. Harris, supra note 5, at 207.
[119] For instance, Edward Hettinger, supra note 108, at 100-103 argues that while there may be a natural right in possessing and using one's labour, there is no natural right in selling it and making a profit from it in the market place, which is largely a socially created phenomenon.

[120] In Compo Co. v. Blue Crest Music Inc., supra note 44, at paragraph 23, (subsequently applied in numerous Supreme Court Judgements: see Society of Composers, Authors and Music Publishers of Canada *v.* Canadian Assn. of Internet Providers, supra note 49, at paragraph 82) the Supreme Court of Canada declaration: "copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute." considerably weakens the strength of any argument that copyright derives from natural law.

[121] The Constitution of the United States of America, Article I, Section 8, supra note 105, stipulates that Congress's power in the area of Copyright (and patents) is to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.
[122] In *CCH,* supra note 2 at paragraph 15, the Supreme Court of Canada refers to how the various existing legal traditions on the applicable threshold of originality in copyright law derives from natural law concepts based on the fruits of one's labour.

abounds with labour-desert derived analyses for rewarding copyright holders for the uses of their work, or for expanding the scope of copyright property rights.[124]

There is a "natural" appeal to apply the labour-desert theory to copyright, one of which is its disconcerting facility of conceptualization and of application: everything an author creates she owns. Copyright law is then justified to provide the trespassory powers that concretize the said ownership. In fact, this is a much simpler proposition than trying to establish the extent of the scope of copyright insofar as it incents creations and dissemination of works, i.e. under the "official" utilitarian justification of copyright, which as a result, has its own share of conceptual difficulties.[125]

The application of the fruits of one's labour theory to copyright is harmful to the assertion of clearer property rights in the copy of a copyrighted work in at least two respects. First, under that theory, the competing claims are unequivocally framed as labourer (i.e. of the copyright holder) v. idler and free rider (i.e. the consumer).[126] The latter cannot reap where she has not sown is the premise.[127] The labourer is deemed to be *a priori* meritorious (even if copyright law does not impose any requirement of artistic quality or novelty for a work to be protected). This places her on a pedestal,[128] and any claim of unauthorized use of the labourer's work is from that stand point, *a priori* suspicious. Second (and as a corollary to the first observation) the labour-desert theory, if not properly qualified, for instance by Locke's famous provisos,[129] can effectively lead

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[123] Under which there should arguably be a selection in the types of works that society wants to incent to create and disseminate and hence a higher threshold in the types of works that deserve copyright protection. See discussion on instrumentalism in section 4.3.3 below.
[124] From a Canadian perspective, see C. Craig, supra note 108. From a U.S. perspective, W. Fisher, supra note 105, at 174, cites examples from law reform debates, U.S. Supreme Court decisions as well as lower court decisions.
[125] See the discussion in section 4.3.3 below.
[126] On the emphasis that is placed by policy and law makers on the concept of "free riding" and its harmful effects, see M.A. Lemley, supra note 13.
[127] Even in instances where the copyright holder can stop the user where arguably, the copyright holder has not sown either, for example by holding the exclusive right to authorize the translation of a literary work or other conversions of a work from one expressive form to another: s. 3 of the *CCA*, supra note 1.
[128] C. Craig, supra note 108, at 58, develops a similar argument on how the application of labour-desert derived analysis to copyright law begins the reasoning from the copyright holder standpoint, and how this directly impacts on the outcome.
[129] W. Fisher, supra note 105, at 170-171 summarizes Locke's provisos, namely "the proposition that a person may legitimately acquire property rights by mixing his labor with resources held "in common" only if, after the acquisition, "there is enough and as good left in common for others"[citing John Locke, *Two*

to an "over propertization" of copyright, which in turn acts as an ever expanding limitation on the ownership rights in the copy of the copyright, to the point that the property right in the copy of the copyrighted work is being hollowed out of any meaningful substance.

4.3.2 Property, freedom, autonomy and privacy

4.3.2.1 Property, freedom and autonomy

To invoke freedom as a moral justification for maintaining a property institution, one needs to ask "whether inherent property freedoms are a necessary feature of the just society."[130] The proposition is that quite apart from instrumental reasons, "property institutions by their very nature confer freedoms (ranges for autonomous choice) which would not exist without them; and for this reason no citizen is treated justly by his community unless it institutes or maintains a property institution."[131] Hence, open-ended uses and privileges nurture freedoms which contribute to autonomous choice and *prima facie* justify property institutions.[132] By contrast, at an instrumental level, a property institution delegates "use-channelling and use-policing functions" to individual owners and takes the burden off the community for such functions.[133] Conversely, a society that does not support property institutions would offer access to resources in a communal, controlled, monitored and policed use environment.[134]

Although some authors as Jim Harris argue that there is an independent property specific justice reason based on autonomy and freedom that is distinct from utilitarian

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Treatises of Government (P.Laslett, ed.m Cambridge: Cambridge University Press, 1970), Second Treatise, sec. 27] and their application in the case of intellectual property, [citing Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 178-82].

[130] J.W. Harris, supra note 5, at 231

[131] J.W. Harris, supra note 5, at 230.

[132] J.W. Harris, supra note 5 at 231

[133] J.W. Harris, supra note 5, at 242.

[134] *Ibid.*

justifications, it seems difficult to make an argument on the basis of those fundamental values to justify the ownership rights in the copy of a copyrighted work. As I intend to demonstrate in this section, when courts and scholars invoke freedom and autonomy to justify consumers' rights in the copy of copyrighted works, they often do so as part of a utilitarian argument. Some balance needs to take place in the assertion of the ownership rights of the consumer as against those of the copyright holder so that we can promote autonomy and freedom, not because at a fundamental level, autonomy and freedom command that we do.

One example of freedom and autonomy being intertwined in a utilitarian argument is *Théberge*. In that case, Binnie J. for the majority, draws the line between the rights of the owner in the physical copy of a copyrighted work and the rights of the copyright holder. Having decided that the transposition of lawfully purchased posters of artist Claude Théberge's paintings on a canvas was not a "reproduction" of the copyrighted work as per the exclusive rights conferred to Théberge under section 3 of the *CCA*, the court decided that such transposition did not fall within the economic rights of the artist (while it may have fallen under his moral rights). One of the reasons given by the majority is:

> "The proper balance among these [i.e. the creator's rights] and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to under compensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."[135]

The peculiarity of the facts in this case invite us to some caution on the extent to which it asserts greater property rights in the copy of a copyrighted work. The fact that this is a four to three decision also illustrates the ambiguity that prevails around the breadth that we are willing to give to copyright holders rights, even beyond the exclusive rights

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[135] Théberge, supra note 82, at paragraphs 31 and 32.

expressly conferred to them by the *CCA*. And yet, the above cited reasons in *Théberge* strongly echo the freedoms that are intrinsic to the property rights in the copy of Claude Théberge's painting, as well as the instrumental efficiency that results from those freedoms. On that basis, the significance of *Théberge* as a precedent on the interaction between the rights in the copy of a copyrighted work and the rights of the copyright holder in the work should not be underestimated. At the same time, *Théberge* does not go as far as supporting an autonomy and freedom argument to justify the property rights in the copy of the copyrighted work independently of utilitarian considerations.

Autonomy, in the context of the copy of a copyrighted work, includes the ability to choose how and when and with whom a consumer will enjoy the copyrighted work. In that sense, it allows communication and self-expression in respect of the copyrighted work.[136] How much value do we place on individual freedom and how much autonomy is a modern society expected to nurture through, among others its property institution? In the alternative, how can we justify the allocation of resources imposed on society to control, monitor and police every use by the consumer in the name of the rights of the copyright holder? If this is the route we are taking, and there are many indications that point in that direction,[137] the cost of use channelling and use policing functions is not to be borne by private copyright holders alone, it also becomes the burden of society, through other private intermediaries,[138] the court system and police authority involvement to enforce the copyright holder trespassory rights.

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[136] J. Liu, supra note 81, at 406-420.; N. Elkin-Koren, supra note 112, at 1143, refers to a "breathing space" which may include "the freedom to choose the work one wishes to consume or any part of it (and, likewise, the freedom to ignore or refuse other parts); the freedom to choose where to experience the work and how; the freedom to experience the work in privacy without the fear of surveillance; and the freedom to make one's own reading of the work, to experiment with it, and to share that reading."

[137] I refer here to new technologies that allow copyright holders to monitor every use that is made by consumers of their copyrighted work and even to retrieve it from their computer or disable it , as well as to successful legal action that has been taken by the music industry to claim substantial damages from individual users on the basis of copyright infringement. In Canada, music industry has not been able to do this on the basis of procedural issues and privacy concerns: *BMG Canada Inc.* v. *John Doe,* [2005] F.C.J. No. 858, 2005 FCA 193.

[138] Such as the resources that need to be deployed by internet service providers, as one example.

When it comes to freedom, history, as well as the disparity by which it is experienced in different parts of the world, are reminders of its great fragility. Copyright scholars looking at consumers' rights with respect to copyrighted work often invoke freedom and autonomy as essential values to justify a greater assertion of those rights.[139] Niva Elkin-Koren argues that the consumption of copyrighted works may require even greater protection than other consumptive goods to preserve essential autonomy and freedoms: "Cultural artifacts are not simply useful commodities. While they often have an entertainment value that could be quantified, they also possess a communicative value and a symbolic significance. They engage our minds in a more direct and intimate way than do mundane commodities and, therefore, expose consumers to a higher risk of deeper and more intrusive restrictions of freedom. This particular vulnerability of information consumers is often overlooked."[140] Once again, although Neva Elkin-Korin places a lot of emphasis on autonomy and freedom, she does so as values that we need to promote, more than as justifications to delineate the scope of the consumer's property rights in the copy of a copyrighted work. In that sense, her reference to autonomy and freedom seems to fit within a larger instrumental design.

If we maintain the current passive approach to the definition of the property rights in the copy of a copyrighted work and leave it to copyright as currently framed and interpreted, and to the will of the copyright holder through her exclusive authorization rights, we are effectively weakening our expectations with respect to the participation that consumers' ought to play in a modern, cultural, innovative society, and in turn, shaping their own perception of the same.[141] In that sense, the underlying values of autonomy and freedom as justifications to property take a different meaning when it pertains to the copy of a copyrighted work, and needs to be given even greater weight. Once again, protecting the vulnerability of consumers' autonomy and freedom fits better in an instrumental design argument than it confirms that there is a separate justification of the property rights in the copy of a copyrighted work that is based on autonomy and freedom.

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[139] J.P. Liu, supra note 81, at 406-411; N. Elkin-Koren, supra note 112, at 1143; J. Litman, supra note 48, at 1879.
[140] N. Elkin-Koren, supra note 112, at 1136-1137.
[141] N. Elkin-Koren, supra note 112, at 1143.

Turning to the justification of copyright, personality-based theories are sometimes invoked to justify the establishment of private property rights for the benefit of copyright holders.[142] They also include notions of freedom and autonomy. While personality-based theories have a strong resonance to justify the existence of moral rights,[143] as well as the exclusive right of the individual author to authorize the first publication of her work, once the work is published, personhood arguments to justify copyright exclusive rights are less than certain.[144] The personhood justification for copyright is even less convincing when the copyright is owned by an institutional copyright holder such as a music label company or a Hollywood film producer. Thus, given the commercialization phase of, and institutional interests in most copyrighted works under the present case of study, personhood, freedom and autonomy justifications for the copyright holder's property right do not provide a convincing normative framework of study.[145] As it is difficult to invoke freedom and autonomy as a justification for copyright in the present case of study, the same freedom and autonomy cannot act as the normative base to "reserve" a scope of exclusive rights that is above and beyond the property–specific justice reason for copyright, which ought to be found elsewhere.[146]

[142] For a survey of theoretical justifications of intellectual property, in particular personality based theories see W. Fisher, supra note 105, at 171-172, 174 and 189-192.

[143] In Canada, moral rights refer to the right to the integrity of the work and the right to be associated with the work, which can be invoked by authors only, i.e. physical persons, and not copyright holders: section 14.1(1) of the *CCA*, supra note 1. Moreover their inalienability, gives strength to the argument that they are founded on personality-based theories: section 14.1(2) of the *CCA*, supra, note 1. For a contrary view, i.e. that the justification of moral rights in Canada is utilitarian, see S. Handa, supra note 40, at 128-130.

[144] For example, see J. Waldron , supra note 91, at 137, where the author concludes that it is a mistake to generalize beyond the first right to publish that a copier's actions compromise the liberty of the author whose work she is using. The author also responds to arguments made by Wendy Gordon on author's liberties to make a profit as not being the proper question. Rather, a distinction needs to be made between undermining the ability to make profit and liberty to make profit, *ibid* at 136. See also W. Fisher, supra note 105, at 190-191.

[145] Yet, this is not to say that freedom and flexibility of choice do not play a role on how copyright holders exercise their property rights. Copyright law operates on the basis that copyright holders are granted a lot of freedom and flexibility in how and when they can dispose of their property rightsSection 13(4) of the *CCA,* supra note 1. See also the discussion on the self-seeking aspects of copyright in section 3 above.

[146] See the discussion in section 4.3.3 below on the application of instrumentalists theories to justify copyright.

Thus, with respect to the consumers' ownership right (and also the ones of the copyright holder in the commercial phase of her copyrighted work), the case for a justification of those rights based on freedom and autonomy, independent of an instrumental design based on utilitarianism or other social planning theory, has yet to be made, but it should not be excluded altogether.

4.3.2.2 Property and Privacy

The right to privacy can play an important role, either directly or indirectly, on the scope of ownership rights in the copy of a copyrighted work. The extent to which it may act as a justification for those ownership rights is less certain[147] and the reasons therefore are beyond the scope of this paper. [148] At the very least, the right to privacy can act as an important property-independent prohibition to limit the enforcement rights of the copyright holder, as we have recently witnessed in *BMG Canada Inc.* v. *John Doe*.[149]

4.3.3 Property and instrumentalism

Copyright in Canada, as a creation of statute[150] is justified by a utilitarian[151] balancing act between three components: the promotion of the public interest in encouraging the creation, and in encouraging the dissemination of copyrighted works and, obtaining a just reward for the creator.[152] At a broader level and as acknowledged by the Supreme Court,

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[147] To the same extent that it is in the case of freedom and autonomy, see discussion in section 4.3.2.1.

[148] See the discussion in J.W. Harris, supra note 5, at 224-228, on the moral justification of privacy in ascertaining the existence of property rights with respect to specific resources. For example, the author's right to authorize (or not) the first publication of her artistic or literary work has strong foundations in her right to privacy. On an author's right to authorize first publication and the privacy justification, see S. Handa, supra, note 39, at 107 and fol.

[149] *BMG Canada Inc.* v. *John Doe,* supra note 137.

[150] Compo Co. v. Blue Crest Music Inc., supra note 44, at paragraph 23. See also discussion on nature of copyright in section 3 above.

[151] Utilitarianism is the most frequently invoked theoretical justification for western copyright law: S. Handa, supra note 40, at 75. To be more precise, one may add western common-law countries.

[152] Théberge, supra note 82, at paragrapgh 30; for a review of recent Supreme Court of Canada copyright cases confirming a utilitarian approach to copyright law, see D. Gervais, "The Purpose of Copyright Law in Canada" (2005) 2 U. Ottawa L. & Tech. J. 315.

the incentive for the creation of works is not only to benefit creators, but obviously, the readers, listeners and viewers of such works. In the U.S., The Constitution is silent on the need to reward authors. Congress's power with respect to copyright (and patents) is "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[153]

Hence the stated justifications of the *CCA* contain an overt public policy component that may assist in justifying the proper scope of property rights in the copy of a copyrighted work. But as Jeremy Waldron observes, if broad public policy arguments are the only counter balance to the private property of the copyright holder, we may be leaving out of the picture those who are directly and immediately affected by the enforcement of the property rule, "those to whom, above all, a justification of property is owed."[154]

The biggest flaw in the utilitarian justification of copyright to incent creators and the dissemination of works resides in its inconsistency[155] and difficulty of application.[156] Perhaps the greatest deception of all with the utilitarian foundation of copyright, is its failure to live up to the promise it beholds of creating private property interests, but only as is necessary to serve the public interest and as such, of paying as much regard to the effect of such private property on the recipients or "intended beneficiaries" of copyrighted works, as it does to the rights of copyright holders. One of the most overtly utilitarian copyright systems, i.e. U.S. copyright law, has progressively gone through an unprecedented expansion of the rights of copyright holders. Its law, just as copyright laws

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[153] The Constitution of the United States of America, supra note 121, Article I, Section 8.

[154] J. Waldron, supra note 91, at 117.

[155] D.Vaver, "Canada's Intellectual Property Framework: A Comparative Overview", (2004) 17 I.P.J. 125, at 127. notes how in spite of the theoretical utilitarian justification of copyright in Canada and in the U.S., in both countries, in practice, natural law Lockean approaches permeate throughout copyright law making; see also discussion in section 4.3.1 above.

[156] For a review and critique of utilitarian theories as they relate to intellectual property, see E.C. Hettinger, supra, note 108, at 107-110; W. Fisher, supra note 105, at 169, 173-174 and 177-184.

in other jurisdictions, has a limited and fragmented articulation of the rights of the intended beneficiaries of the copyrighted works, if they can be called rights at all.

Setting aside difficulties in the application of utilitarian theories to copyright, the assumption is that the progress of science and the promotion of creation are to serve solely as a justification for the property rights of copyright holders. This assumption alone, may explain in great part the failed public interest promise of utilitarianism. What needs to be further explored, is the extent to which the incentive to create also justifies the existence and scope of the property rights in the copy of a copyrighted work.[157]

Modern societies generally encourage innovation and creativity.[158] Among others, this has led to an explosion of communication networks, an unprecedented dissemination of copyrighted works and a broad array of technological information access and reproduction tools. By using these technological tools, consumers have the potential of experiencing copyrighted works in ways that were, not so long ago, unthinkable, and in volumes that are unprecedented. If the instrumental reason for the copyright system is to provide incentives to create, then the copyright system should be equally concerned with the extent to which creative works can be accessed and experienced by consumers, as it is with ensuring proper incentives to the copyright holder through the establishment of exclusive rights. Why stimulate creations if it is not for the benefit of those who will access them?[159] As Neva Elkin-Koren argues, in a U.S. context:

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[157] Neva Elkin-Koren explores this idea. For her, "What we call "consumption" of informational works is never a passive behavior--it is a conversation, or a social activity of interaction. When a reader engages with an artistic expression, she contributes to its meaning. Thus, consumption of informational works, even for one's sole benefit, promotes copyright goals….This reality of exchange and interaction suggests that in order to promote creativity it is insufficient to simply provide incentives to authors to produce. It is also necessary to expand access to creative works. Access, in this sense, becomes a central means for promoting production, creation, and progress.": N. Elkin-Koren, supra note 112, at 1141.

[158] As this is reflected among others in an utilitarian approach to copyright. For Sunny Handa, the reason why utilitarian theories have been more prevalent than creator natural rights based theories in anglo-american traditions of copyright is consistent with emphasis on knowledge and progress in the said copyright traditions: S. Handa, supra note 40, at 118.

[159] J. Litman, supra note 48, at 1879 refers to "copyright liberties": i.e. the fact that "copyright law was designed to maximize the opportunities for non exploitative enjoyment of copyrighted works in order to encourage reading, listening, watching, and their cousins". Author argues that they are "both deeply embedded in copyright's design and crucial to its promotion of the "Progress of Science.""

> "…to promote creativity it is insufficient to provide incentives to authors by empowering them to exclude second-comers. It is also inappropriate to exempt only transformative uses of copyrighted materials. Promoting creativity requires expanding access to creative works. Copyright law must therefore expand the balance it strikes between authors and users to cover not only subsequent authors but also simply consumers of cultural goods who might become authors in the future."[160]

For Elkin-Koren, consumers are no less means of production than authors.[161] In this information age, failure to give more consideration to the existence and proper scope of property rights in the copy of a copyrighted work as part of the property design of copyright, is taking copyright out of its instrumental justification orbit. The assumption that the incentive to create is a one stream justification intended for copyright holders only, needs to be seriously reconsidered.

In addition to regarding the incentive to create and the dissemination of works as objectives that are equally applicable to consumers and not only aimed at copyright holders, the need to promote and preserve an appropriate level of freedom and autonomy of consumers owning the copy of a copyrighted work is present in the reasons of the Supreme Court in *Théberge,* and is being raised in scholarly work.[162] A justification for the property rights in the copy of a copyrighted work that will help delineate its boundaries is emerging from these two utilitarian objectives. It offers a compelling counterweight to the justification of copyright based on the incentive to create and the dissemination of works.

To sum up, property theories based on the fruits of one's labour are ill suited to justify and clarify the nature and scope of the property rights in the copy of a copyrighted work. Second, the independent justification of the ownership rights in the copy of a copyrighted work, based on freedom and autonomy, needs more elaboration to root the property rights of the consumer in the copy of a copyrighted work. When autonomy and freedom are

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[160] N. Elkin-Koren, supra note 112, at 1141.
[161] *Ibid.,* see also J. Litman, supra note 48, at 1880.
[162] See discussion of freedom and autonomy in section 4.3.2 above.

advanced in the name of the consumer of copyrighted works, they are often intertwined with instrumental arguments. With respect to the justification of copyright in particular, utilitarianism constitutes the prevailing theory to justify copyright in Anglo-American legal traditions, especially in respect of the specific scope of study of this paper, i.e. copies of commoditized musical and film copyrighted works. As a result, asserting greater and clearer ownership rights in the copy of a copyrighted work on the basis of utilitarian justifications offers a common ground of study to both the rights of the consumer and of the copyright holder in the same copyrighted work

5. Standing on its own feet: developing a theoretical framework to assert the consumer rights in the copy of a copyrighted work

5.1 Consumer ownership rights as property-limitation rules of copyright

Having looked at the peculiar nature and scope of the ownership rights in the copy of a copyrighted work, and at the theoretical property justifications that better anchor these rights, what is the interaction between the property rights of the consumer and the exclusive rights of the copyright holder in the copyrighted work? How does property theory inform us on this interplay?

To the same extent that copyright acts as a property-limitation rule to the property in the copy of a copyrighted work, the latter property rights should also act as a limitation on the exclusive rights of the copyright holder. However, the little attention devoted to and poor articulation of the property rights in the copy of a copyrighted work,[163] inevitably engender a lack of clarity around the extent to which they effectively limit the exclusive rights of the copyright holder. This is the gap that the theoretical framework developed in this paper attempts to fill.

[163] Certainly in comparison with the attention devoted to defining the exclusive rights of the copyright holder.

In property theory terms, the property rights in the copy of a copyrighted work are adequately described as a property-limitation rule on the exclusive rights of the copyright holder's rights. The limitation goes to the heart of the property right of the copyright holder in defining its scope (as opposed to applying independently of the existence or not of copyright exclusive rights in the work). The limitation is intended to benefit competing private interests of the consumer owning the copy of the copyrighted work[164], which is more characteristic of property – limitation rules.[165] As such, the uses or privileges of the copyright holder may (or may not) be considered to be *a priori* part of her property domain but for some public interest or other property- justice reason, have been taken out of that domain for the benefit of another party (in the present case the consumer of copyrighted works) or of the collectivity.[166]

Both *Théberge*[167] and *CCH* [168] would support the proposition that the competing property right of the consumer in the copy of the copyrighted work operates as a property-limitation rule to the copyright holder's property right in the copyright.[169] Thus, in spite of the declared statutory constraining nature of copyright,[170] the essence of the property institution and its underlying theory provide an essential legal framework to position how the property rights in the copy of a copyrighted work (should) impact on the exclusive rights of the copyright holders' exclusive rights. The characterization of the property

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[164] Although by doing so, one may argue that such limitation on copyright is necessary to further broader public policy objectives concerning how copyrighted works are being made accessible.
[165] See discussion in section 2.3 above.
[166] This analysis fits well with what occurs in the case of fair dealing: the a priori exclusive domain of the copyright holder is punctually limited by the consumer's rights to make otherwise unauthorized uses of the copyrighted work if the consumer falls under one of the specific listed purpose of fair dealing and if the dealing is fair.
[167] Théberge , supra note 82, at paragraphs 31-32.
[168] CCH, supra note 2.

[169] See discussion on Théberge and *CCH* in section 4.1 above. See also the discussion on "property-limitation" rules in section 2.3 above. In contrast to the effects of the consumers' property rights in the copy of a copyrighted work, independent-property prohibitions to copyright would include restrictions resulting from public laws, including defamation law or anti-hatred speech laws, e.g., the copyright holder is subject to respecting those laws to the same extent as any other citizen, independently of her status as copyright holder. In that sense those limitations were never *a priori* part of her broadly defined exclusive rights.
[170] i.e. the Supreme Court of Canada in Compo Co. v. Blue Crest Music Inc , supra note 44, frequently followed by the Supreme Court thereafter that, supra note 86.

rights in the copy of a copyrighted work as a “property-limitation rule” effectively levels the field with the property rights of the copyright holder.

5.2 Consumer ownership rights should not extend beyond their property-specific justice reasons and beyond what the property institution can bear

The open–ended privileges and uses that we are asserting on behalf of the consumer as lawful owner of the copy of a copyrighted work, need to take into account those uses and privileges that are inherent, in the information age, to copyrighted works, in addition to the traditional privileges such as the right to unlimited listening or viewing of the music CD or film DVD or the right to transfer the copy of the work.[171] Current uses that are inherent to the nature of copyrighted works include: making copies for convenience of use in time and in space, sharing copies of the work with family and friends, posting the work in a personal collage, adapting the copyrighted work as a self-expressive and creative act for private purposes, and so on.

The consumer-owner’s open-ended uses and privileges should not extend beyond its underlying justifications, such as the ones identified in this paper, i.e. the instrumental promotion of creative and innovative citizens benefiting from their access, communication and network environment, as well as the need to preserve and protect their autonomy and freedom in how they experience copyrighted works. Any use that is not supported by at least one of these underlying justifications would not fall *a priori* within her open-ended privileges and uses as owner of the copy of a copyrighted work. To the extent that certain uses or privileges are justified by their underlying property-specific justice reason, then such uses or privileges would give rise to trespassory rules.[172] Also, as the consumer use shifts from the private, personal sphere to the commercial sphere, the underlying property-specific justice reason to her ownership right

[171] Either through a sale or a gift.
[172]For instance, this could apply to a technological protection measure that impeaches the consumer to make copies of a music CD (assuming such use is asserted as being within the open-ended uses supported by the ownership rights in the CD). The corollary is that the consumer would benefit from a legal remedy with respect to this technological protection measure, such as damages.

in the copy of the copyrighted work is altered.[173] The shift of property-specific justice reasons, when moving from personal to commercial uses that would directly compete with the copyright holder economic rights, could provide valuable insights into when and why the open-ended uses and privileges in the copy of a copyrighted work may no longer be justified and should be limited. It also resonates with the internal limits of a utilitarian view of copyright as a tool to incent creation and the dissemination of works, although the current legal framework does not specifically allows for that distinction.[174] The shift from personal to commercial uses also brings different property-limitation rules and independent-property prohibitions.[175] Finally, any uses or privileges that the property institution cannot support either at a conceptual or practical level should not fall within the property domain of the lawful owner of the copy of a copyrighted work. It is harder to think of such limitations here than it is in the case of the copyright holder's property rights.[176]

5.3 Copyright should not extend beyond its property-specific justice reasons and beyond what the property institution can bear

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[173]One of the reasons being that the commercial sphere involves different distributive consequences: see J.W. Harris, supra note 5, at 275, where the author [citing John Christman, *The Myth of Property* (OUP, 1994), pt. 3] refers to two distinct concepts within ownership, i.e. "control ownership" and "income ownership": "the first would encompass use-privileges and all unilateral exercises of powers (including gifts) and the latter all exercises of power made for consideration (hire, rent, sale, or exchange)" the reason being "that the former can be justified by autonomy considerations whereas the latter has distributional consequences."

[174] J. Litman, supra note 48, at 1911-1911, in a U.S. context, proposes a model of four categories of personal uses that should be considered in establishing personal use rights of copyrighted works, whereby the personal uses are measured against their likely effect on "copyright liberties" and on the incentive to create of the copyright holder.

[175]For example, the property of a land mower supports certain open-ended personal uses and privileges (although one is hard pressed to find an endless list in this case) that change once the use of the land mower becomes commercial. Other independent property limitation rules start to apply, such as fair commercial practices, competition law, safety in the workplace rules, and so on. The same can be said of the copy of a copyrighted work. Once the use shifts from a private, non commercial use to a public or commercial use, different property-limitation and property independent rules would apply, including those limitations that are based on the copyright holder exclusive rights, as reframed by the limitations imposed by the consumers' property rights in the copy of the copyrighted work.

[176] See discussion in section 5.3 below.

Copyright operates as an important property-limitation rule for the consumer-owner of the copy of a copyrighted work.[177] It currently dictates to a large extent the scope of her property rights.[178] As a property institution, it should not extend beyond its underlying justification.[179] As pointed out earlier in this paper, this is much easier said then done. Even the presumably most flexible justification of copyright of all to address the interests of copyright holders and copyright consumers, i.e. utilitarianism,[180] has given rise to an unprecedented expansion of copyright holders' exclusive rights at the expense of copyright users.[181]

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

6. Conclusion

In copyright theory, there is a controversy around the qualification of copyright as property. At the same time, there is general support for the idea that the copy of a copyrighted work is property. Property theory teaches us that this controversy is ill founded and that in fact, it is the qualification as property of the copy in the copyrighted work that it is more problematic. With respect to the nature of copyright, the controversy

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[177] See discussion above section 4.2.
[178] *Ibid.*
[179] *Théberge,* supra note 82, paragraph 31-32.
[180] J.W. Harris, supra note 5, at 298.
[181] From a U.S. perspective, J. Litman, supra note 48 at 1872, cites various recent legislative changes that have lead to restrain lawful personal uses of copyrighted material even further.

is ill founded because it takes a narrow view of what the property institution is and because -for ideological or other reasons- it often confuses the nature of property with its justifications. The trust in the ownership rights in the copy of a copyrighted work is misplaced because the consumer does not really own the copy of a copyrighted work, at least not in the sense that traditional property theory informs us. Two of the three features that are common to all forms of ownership interests on the spectrum of the property institution are highly deficient. That is: the open-ended privileges and powers, and the self-seekingness that they authorize to the owner. As copyright holders are gaining more and more control over the dissemination of their works, the ownership interest in the copy of a copyrighted work is more and more becoming an illusion. Not only are copyright holders able to remotely monitor, control and block certain uses of the physical copy of a copyrighted work, but the tangible aspect is disappearing altogether with the advent of online distribution of copyrighted works.

The fundamental values that underlie the property institution and that are profoundly engrained in most societies since immemorial times offer an anchor to a long overdue invigoration of the ownership rights in the copy of a copyrighted work. Arguably, property theory will also allow to critically refute the wide spread assumption that consumers own nothing if no physical copy of a copyrighted work is transferred to them in the on line licensing world. It provides a legal and normative framework to limit what copyright holders can do by licence agreements.[182]

A stronger affirmation of the ownership rights in the copy of the copyrighted work engenders a more robust property-limitation rule on the ownership rights of the copyright holder. The two conflicting property interests in the same object need to be mediated. Property law and theory offer a strong “internal” analytical framework to equilibrate the interaction and the demands of the rights of the copyright holder and of the consumer.

This paper did not explore the property theory structural framework under which contract law, consumer protection law and human rights law (to name a few) become property-

[182] It is beyond the scope of this article to discuss how ownership rights can be asserted in the copy of a copyrighted work that is supplied with no transfer of ownership in a physical support, such as is the case with online licensing. Among others, the perpetual nature of such licenses provides an interesting base to argue in favour of rights similar to ownership regardless of a physical transfer.

independent prohibitions on the rights of the copyright holder and also of the consumer. They set further limitations that are external to those rights. In that respect, the concept of proportionality[183] offers a promising avenue to set the proper boundaries on those rights, that are reflective of the values and justifications that lie beneath seemingly conflicting interests and legal regimes.

[183] For example, see A. Drassinower, supra note 87, where the author discusses the concept of proportionality in mediating between copyright law and human rights law.