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### Moving Past *Michelin*: Towards Judicial Reconsideration of the Intersection of Copyright and the Charter Right to Freedom of Expression

Graham Reynolds

Allard School of Law at the University of British Columbia, [reynolds@allard.ubc.ca](mailto:reynolds@allard.ubc.ca)

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## **Moving Past *Michelin*: Towards Judicial Reconsideration of the Intersection of Copyright and the *Charter* Right to Freedom of Expression**

Graham Reynolds\*

*On a regular basis over the past two decades, Canadian courts considering the intersection of the Charter right to freedom of expression and copyright have cited to Michelin v. CAW-Canada as authority. In this article, I argue that it is no longer acceptable for them to do so. As I will establish, the approaches to the intersection of freedom of expression and copyright employed in Michelin rely upon and have been shaped by conceptions of copyright and freedom of expression that, although once endorsed by the Supreme Court of Canada, are no longer valid, namely the author-centric view of copyright as well as an approach to freedom of expression under which it is accepted that property rights are insulated from Charter scrutiny. As such, the Michelin approaches to the intersection of the Charter right to freedom of expression and copyright are no longer good law, and should be explicitly rejected.*

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*Au cours des deux dernières décennies, les tribunaux canadiens ont fréquemment fait référence à la décision rendue dans l'affaire Michelin c. CAW-Canada comme faisant autorité pour trancher des litiges soulevant à la fois des questions relatives au droit constitutionnel à la liberté d'expression et au droit d'auteur. Dans cet article, l'auteur prétend que cette manière de faire n'est plus acceptable. L'auteur entend ainsi établir que les approches adoptées dans l'arrêt Michelin pour trancher un litige soulevant à la fois des questions relatives à la liberté d'expression et au droit d'auteur ont été élaborées à partir de conceptions du droit d'auteur et de la liberté d'expression qui, bien qu'ayant été un temps avalisées par la Cour*

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\* B.A. (Man.), LL.B (Dal.), B.C.L., M.Phil., D.Phil (Oxon.). Assistant Professor, Peter A. Allard School of Law at the University of British Columbia. The author is grateful to Justine Pila and Meghan Murtha for their valuable comments on versions of this article, and to Cody Rei-Anderson for his excellent research assistance. Any errors or omissions are solely the responsibility of the author.

*suprême du Canada, ne sont désormais plus valides. Ces conceptions reposaient sur une vision au centre de laquelle se trouvait le titulaire du droit d'auteur ainsi que sur une approche de la liberté d'expression en vertu de laquelle il était admis que les droits de propriété ne devaient pas être pris en considération dans le cadre d'une analyse effectuée en vertu de la Charte. Or, les approches adoptées dans l'arrêt Michelin pour trancher des litiges soulevant à la fois des questions relatives au droit constitutionnel à la liberté d'expression et au droit d'auteur ne s'appliquent plus et devraient être rejetées du revers de la main.*

## 1. INTRODUCTION

In 1994, in the context of a unionization drive, representatives of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW) created and distributed leaflets that featured a modified version of Compagnie Générale des Établissements Michelin — Michelin & Cie's (CGEM Michelin) copyrighted corporate logo, the Michelin Tire Man (or Bibendum).<sup>1</sup> In the CAW's leaflet, Bibendum, "a beaming marshmallow-like rotund figure composed of tires,"<sup>2</sup> was depicted as "broadly smiling . . . arms crossed, with his foot raised, seemingly ready to crush underfoot an unsuspecting Michelin worker."<sup>3</sup>

CGEM Michelin, objecting both to this depiction of Bibendum as well as to the CAW's unauthorized use of the word "Michelin", brought an action in the Federal Court (Trial Division) against CAW, Larry Wark (a local CAW representative) and Basil Hargrove (President of the CAW) (CAW *et al.*) for both copyright and trademark infringement.<sup>4</sup> As part of their defence, CAW *et al.* argued that, should the court determine that their use of Bibendum constitutes copyright infringement, then it should also determine that certain core sections of the *Copyright Act*

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<sup>1</sup> *Compagnie Générale des Établissements Michelin — Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 1996 CarswellNat 2297, [1997] 2 F.C. 306 at [2] (F.C.T.D.).

<sup>2</sup> *Ibid.* at [2].

<sup>3</sup> *Ibid.* at [2] and [8].

<sup>4</sup> *Ibid.* at [2].

unjustifiably infringe the s. 2(b) right to freedom of expression, as protected under the Canadian *Charter of Rights and Freedoms* (*Charter*).<sup>5</sup>

In his judgment, Teitelbaum J., having determined that the defendants had infringed CGEM Michelin's copyright, reached what he referred to as the "seemingly straightforward" conclusion that "[t]he *Charter* does not confer the right to use private property — the plaintiff's copyright — in the service of freedom of expression."<sup>6</sup> He also held, in the alternative, that even if he were to have determined that the impugned provisions of the *Copyright Act* infringed the *Charter* right to freedom of expression, that the infringement would be justified under a section 1 analysis.<sup>7</sup>

Over 20 years have passed since Teitelbaum J.'s judgment in *Compagnie Générale des Établissements Michelin — Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Michelin)* was handed down. Despite this passage of time, however, as well as its status as a trial level decision, *Michelin* continues to loom large over the intersection of the *Charter* right to freedom of expression and copyright in Canada. Since *Michelin* was handed down in 1996, eight decisions by Canadian courts have referenced the intersection of the *Charter* right to freedom of expression and copyright.<sup>8</sup> In five

<sup>5</sup> *Ibid.* at [3]; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>6</sup> *Michelin* at [79].

<sup>7</sup> *Ibid.* at [109].

<sup>8</sup> *Productions Avandi Ciné Vidéo Inc. c. Favreau*, 1999 CarswellQue 2742, 177 D.L.R. (4th) 568, 1 C.P.R. (4th) 129, [1999] R.J.Q. 1939 (Cour d'appel du Québec); *Fraser Health Authority v. Hospital Employees' Union*, 2003 BCSC 807, 2003 CarswellBC 1251, 226 D.L.R. (4th) 563, 25 C.P.R. (4th) 172 (B.C. S.C.); *Corporation Sun Média c. Syndicat canadien de la fonction publique*, 2007 QCCS 2943, 2007 CarswellQue 5486 (Cour supérieure du Québec); *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.*, 2008 BCSC 1609, 2008 CarswellBC 2512; *Canwest Mediaworks Publications Inc. v. Horizon Publications Ltd.*, 2009 BCSC 391; *Drolet v. Stiftung Gralsbotschaft (F.C.)*, 2009 FC 17, [2010] 1 F.C.R. 492, [2010] 1 R.C.F. 492, 2009 CarswellNat 1563 (Federal Court); *Robinson c. Films Cinar inc.*, 2009 QCCS 3793, 2009 CarswellQue 8380, 83 C.P.R. (4th) 1 (Cour supérieure du Québec); *Dish Network L.L.C. v. Rex*, 2011 BCSC 1105, 2011 CarswellBC 2124 (B.C. S.C.). The order granted in *Robinson c. Films Cinar inc.* was appealed, and the case was ultimately decided by the SCC as *Cinar Corporation v. Robinson*, 2013 SCC 73 (S.C.C.). Although the SCC decision did discuss other rights protected under

of these decisions (handed down in 2003, 2008, 2009, 2009 and 2011, respectively), courts have cited to *Michelin* as authority for the proposition that provisions of the *Copyright Act* are either consistent with,<sup>9</sup> or do not unjustifiably infringe,<sup>10</sup> the *Charter*-protected right to freedom of expression; or that “a *Charter* right to freedom of expression cannot be used to compel private property to be used as a forum for expression.”<sup>11</sup>

In this article, I argue that, with respect to its treatment of the intersection of the *Charter* right to freedom of expression and copyright, *Michelin* is no longer good law, and that, as a result, it is inappropriate for Canadian courts considering the intersection of the *Charter* right to freedom of expression and copyright to continue to rely on *Michelin* as authority.<sup>12</sup> As I will establish, the approaches to the intersection of the *Charter* right to freedom of expression and copyright employed by Teitelbaum J. in *Michelin* rely upon and have been shaped by conceptions of copyright and freedom of expression that, although once endorsed by the Supreme Court of Canada (SCC), are no longer valid. As a result, the *Michelin* approaches to the intersection of the *Charter* right to freedom of expression and copyright — to the extent to which they employ these now-abandoned conceptions of both copyright and of freedom of expression — should themselves be rejected.

This article proceeds as follows. In Part 2, I introduce the intersection of copyright and the *Charter* right to freedom of

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the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, namely the rights to inviolability, dignity, and peaceful enjoyment and free disposition of property, none of the proceedings related to *Robinson c. Films Cinar inc.*, including the SCC decision, reference the intersection of the *Charter* right to freedom of expression and copyright.

<sup>9</sup> *Fraser Health Authority v. Hospital Employees' Union* at [49]; *Canwest 2008* at [13]; *Drolet v. Stiftung Gralsbotschaft (F.C.)* at [187]; *Robinson c. Films Cinar inc.* at [1098].

<sup>10</sup> *Canwest 2008* at [13]; *Drolet v. Stiftung Gralsbotschaft (F.C.)* at [187].

<sup>11</sup> *Dish Network 2011* at [183].

<sup>12</sup> Paul LeBel writes that the question of whether a decision is “‘good law’ . . . is primarily an inquiry about whether the decision is currently valid, in the sense of being capable of exerting some binding or persuasive effect on the decision of future cases.” Paul A. LeBel, “An Interested Response to a ‘Wholly Disinterested Assessment’: LeBel on Summers on LeBel on Summers on . . . Er . . . Um . . . Oh, Yeah . . . Fuller” (1987) 85:8 *Mich. L. Rev.* 1914 at 1915.

expression. In Part 3, I describe how Canadian courts' views of the correct conceptions of both copyright and of freedom of expression have shifted over time, from an author-centric view of copyright to one that balances between copyright owners' rights, users' rights and the public interest; and from a conception of freedom of expression under which it is accepted that property rights are insulated from the operation of the *Charter*, to a conception of freedom of expression under which expression taking place on private property is only excluded from the operation of the *Charter* in the absence of government action.<sup>13</sup> In Part 4, I introduce the two approaches to the intersection of the *Charter* right to freedom of expression and copyright employed by Teitelbaum J. in *Michelin*. I argue that both of these approaches rely on or have been shaped by the now-rejected conceptions of copyright and of freedom of expression described above, and that, as a result, the *Michelin* approaches to the intersection of the *Charter* right to freedom of expression and copyright should themselves be rejected. Part 5 concludes the article.

## 2. THE INTERSECTION OF THE *CHARTER* RIGHT TO FREEDOM OF EXPRESSION AND COPYRIGHT: CASES, CONTEXT, AND COMMENTARY

Canada's copyright laws support and encourage expression in a number of ways, including by providing authors with exclusive, transferable and enforceable economic rights in works that they create, from which they can derive income;<sup>14</sup> by granting authors both attribution rights as well as the right to enjoin certain uses of their works (thus providing protection both for authors' economic as well as their moral interests);<sup>15</sup> and by creating an economic incentive for publishers as well as other intermediaries to disseminate works of expression.<sup>16</sup>

At the same time, however, Canada's copyright laws restrict expression. For instance, absent the successful invocation of a defence to copyright infringement, non-copyright owning parties

<sup>13</sup> *Montreal (Ville) v. 2952-1366 Québec inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62 at [62].

<sup>14</sup> *Copyright Act*, R.S.C. 1985, c. C-42 at ss. 3, 5.

<sup>15</sup> *Ibid.* at ss. 14.1, 14.2, 27, 28.1, 28.2.

<sup>16</sup> *Ibid.* at ss. 13(4), 13(7).

are not legally permitted to express themselves by reproducing a copyrighted work in whole or substantial part; performing it in public; or making it available online, among other acts.<sup>17</sup>

Given the different ways in which copyright both supports and restricts expression, the question of whether provisions of Canada's *Copyright Act* are consistent with the *Charter* right to freedom of expression is one that is important for courts to consider. *Michelin*, however, remains the only Canadian judicial decision to have engaged with the intersection of freedom of expression and copyright in any significant depth.<sup>18</sup>

The lack of attention paid by Canadian courts to this intersection is problematic. In many jurisdictions, including Canada, copyright has been invoked to silence criticism of

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<sup>17</sup> *Ibid.* at ss. 3, 27.

<sup>18</sup> This is not to say that *Michelin* was the first Canadian judicial decision to consider the intersection of the *Charter* right to freedom of expression and copyright. The first case to consider this intersection was *Queen v. James Lorimer & Co.*, [1982] F.C.J. No. 229 (F.C.T.D.). Prior to *Michelin*, this intersection was also considered in *Queen v. James Lorimer & Co.* (1983), [1984] 1 F.C. 1065; *Canadian Tire Corp. v. Retail Clerks Union, Local 1518* (1985), 7 C.P.R. (3d) 415, 1985 CarswellNat 800 (F.C.T.D.); *Rôtisseries St.-Hubert Ltée v. Le Syndicat des Travailleurs(euses) de la Rôtisserie St.-Hubert de Drummondville (C.S.N.)* (1986), 17 C.P.R. (3d) 461; and *R. v. Ghnaim* (1988), 92 A.R. 27. As well, despite having discussed copyright and *Charter* values in the context of a decision focusing on the correct interpretation to be given to a provision of the *Radiocommunication Act*, R.S.C. 1985, c. R-2 (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42); copyright and the rights to inviolability, dignity, peaceful enjoyment and free disposition of property, as protected under the Québec *Charter (Cinar)*; and publication and freedom of expression in the context of a case involving defamation and hyperlinks (an issue that can be seen as connected to copyright) (*Crookes v. Newton*, [2011] 3 S.C.R. 269); and despite having referenced *Michelin* (for other purposes) in *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, the SCC has yet to explicitly consider the intersection of the *Charter* right to freedom of expression and copyright. In Graham Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright" (2016) 41 *Queen's L.J.* 455, I offer several explanations to account for why the SCC has not yet explicitly considered this intersection.

governments,<sup>19</sup> corporations,<sup>20</sup> institutions,<sup>21</sup> and individuals;<sup>22</sup> to suppress the release of documents;<sup>23</sup> and to chill creative expression that incorporates copyrighted expression.<sup>24</sup>

<sup>19</sup> Craig highlights “copyright’s historical beginnings as a tool of censorship, a means of suppressing religious and political dissent” (Carys J. Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” (2006) 56 U.T.L.J. 75 at 87). See also Stephanie Ip, “Abbotsford shamed by WordPress for trying to remove parody city logo” *Vancouver Sun* (May 27, 2017), online: <<http://vancouver.sun.com/news/local-news/abbotsford-shamed-by-wordpress-for-trying-to-remove-parody-city-logo>>; Maira Sutton, “Copyright Law as a Tool for State Censorship of the Internet” *Electronic Frontier Foundation* (December 3, 2014), online: <<https://www.eff.org/deeplinks/2014/12/copyright-law-tool-state-internet-censorship>>; Katitza Rodriguez, “Leaked Documents Confirm Ecuador’s Internet Censorship Machine” *Electronic Frontier Foundation* (April 14, 2016), online: <<https://www.eff.org/deeplinks/2016/04/leaked-documents-confirm-ecuadors-internet-censorship-machine>> .

<sup>20</sup> Scassa writes that “[c]opyright law has emerged as the corporate weapon of choice in labour disputes and against other critics” (Teresa Scassa, “Intellectual Property on the Cyber-Picket Line: A Comment on *British Columbia Automobile Assn v Office and Professional Employees’ International Union, Local 378*” (2002) 39 Alta. L. Rev. 934 at 962). See also Wendy Seltzer, “Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment” (2010) 24 Harv. J.L. & Tech. 171; Mike Masnick, “Brazilian Media Giant Realizes It Can Use the DMCA to Censor Criticism of Its Coverage” *Techdirt*, online: <<https://www.techdirt.com/articles/20160426/12235534281/brazilian-media-giant-realizes-it-can-use-dmca-to-censor-criticism-coverage.shtml>> .

<sup>21</sup> See, for instance, Seltzer at 215; Lydia Pallas Loren, “Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously” (2011) 46 Wake Forest L. Rev. 745 at 747.

<sup>22</sup> See, for instance, David Fewer, “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada” (1997) 55 U.T. Fac. L. Rev. 175 at 197; Mike Masnick, “Copyright as Censorship: How Howard Hughes Used Copyright to Try to Block Biography He Didn’t Like” *Techdirt* (May 13, 2011), online: <<https://www.techdirt.com/articles/20110325/01002913621/copyright-as-censorship-how-howard-hughes-used-copyright-to-try-to-block-biography-he-didnt-like.shtml>> .

<sup>23</sup> See, for instance, *Fraser Health Authority v. Hospital Employees’ Union; Commonwealth v. John Fairfax & Sons Ltd.*; Seltzer at 214-15 and 222-24; Loren at 747.

<sup>24</sup> Bailey writes that “often over-reaching claims of infringement threaten to circumscribe the raw material available to often less advantaged artists, authors and other would-be creators” (Jane Bailey, “Deflating the Michelin Man” in Michael Geist, ed., *In the Public Interest* (Irwin Law, 2005) at 153). See, for

The question of copyright's constitutionality is particularly important for Canadian courts to consider given three related factors: recent amendments to Canada's *Copyright Act* that, in different ways, both expand and limit the rights of copyright owners and users;<sup>25</sup> the development and dissemination of technologies that both facilitate and guard against the unauthorized use of copyrighted expression, and which therefore impact the relationship between rights-holders and other parties;<sup>26</sup> and the ongoing evolution of Canadian copyright jurisprudence and freedom of expression jurisprudence.<sup>27</sup> These developments should cause courts to question whether conclusions reached more than 20 years ago with respect to the intersection of the *Charter* right to freedom of expression and copyright are still valid today.

For many years, the lack of judicial engagement with the intersection of the *Charter* right to freedom of expression and copyright was mirrored by a lack of academic commentary addressing this topic. The first paper to explore the intersection of the *Charter* right to freedom of expression and copyright was published in 1990, a full 20 years after seminal works on the intersection of copyright and the First Amendment were published in the United States of America.<sup>28</sup>

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instance, "Gone with the Wind Done Gone: 'Re-writing and Fair Use'" (2002) 115 Harv. L. Rev. 1193; John Tehranian, "The New (c)ensorship" (2015) 101 Iowa L. Rev. 245; Graham Reynolds, "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" in Michael Geist, ed., *From "Radical Extremism" to "Balanced Copyright"* (Irwin Law, 2010).

<sup>25</sup> See, for instance, the *Copyright Modernization Act*, S.C. 2012, c. 20; *Economic Action Plan 2015 Act, No. 1*, S.C. 2015, c. 36, s. 82; *An Act to Amend the Copyright Act (Access to Copyrighted Works or Other Subject-Matter for Persons With Perceptual Disabilities)*, S.C. 2016, c. 4.

<sup>26</sup> See, for instance, Jacob Kastrenakes & James Vincent, "A Brief History of Popcorn Time, the Piracy Service Everyone's Watching" *The Verge* (October 23, 2015), online: < [www.theverge.com/2015/10/23/9600576/popcorn-time-history-timeline](http://www.theverge.com/2015/10/23/9600576/popcorn-time-history-timeline) >; Google, "How Content ID Works", online: < [support.google.com/youtube/answer/2797370](http://support.google.com/youtube/answer/2797370) >; Taylor Bartholomew, "The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID" (2014) 13 *Duke L. & Tech. Rev.* 66.

<sup>27</sup> See Part 3 of this article.

<sup>28</sup> Joe Conforti, "Copyright and Freedom of Expression: A Privilege for New[s] Reports" (1990) 5 *I.P.J.* 130.

Beginning in the late 1990s, however, a number of academics including David Fewer,<sup>29</sup> Ysolde Gendreau,<sup>30</sup> Sunny Handa,<sup>31</sup> Carys Craig,<sup>32</sup> Jane Bailey,<sup>33</sup> Abraham Drassinower,<sup>34</sup> Teresa Scassa,<sup>35</sup> Bitá Amani,<sup>36</sup> Sarah Sklar-Heyn,<sup>37</sup> David Vaver,<sup>38</sup> and myself<sup>39</sup> began to pay increasing attention to the intersection of the *Charter* right to freedom of expression and copyright.

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<sup>29</sup> Fewer.

<sup>30</sup> Ysolde Gendreau, “Canadian Copyright Law and its Charters” in Jonathan Griffiths & Uma Suthersanen, eds., *Copyright and Free Speech* (Oxford University Press, 2005); Ysolde Gendreau, “Copyright and Freedom of Expression in Canada” in Paul Torremans, ed., *Copyright and Human Rights* (Kluwer Law International, 2004).

<sup>31</sup> Sunny Handa, *Copyright Law in Canada* (Markham, Ont.: Butterworths, 2002) at 95.

<sup>32</sup> Craig; Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar Publishing, 2011).

<sup>33</sup> Bailey.

<sup>34</sup> Abraham Drassinower, “Copyright Infringement as Compelled Speech” in Annabelle Lever, ed., *New Frontiers in the Philosophy of Intellectual Property* (Cambridge, 2012) at 203; Abraham Drassinower, *What’s Wrong with Copying?* (Harvard University Press, 2015).

<sup>35</sup> Scassa.

<sup>36</sup> Bitá Amani, “Copyright and Freedom of Expression: Fair Dealing Between Work and Play” in Rosemary J. Coombe, Darren Wershler & Martin Zellinger, eds., *Dynamic Fair Dealing: Creating Canadian Culture Online* (University of Toronto Press, 2013).

<sup>37</sup> Sarah Sklar-Heyn, “Battling Clearance Culture Shock: Comparing US Fair Use and Canadian Fair Dealing in Advancing Freedom of Expression in Non-Fiction Film” (2011) 20 *Cardozo J. Int’l. & Comp. L.* 233.

<sup>38</sup> David Vaver, “User Rights” (2013) 25 *I.P.J.* 105; David Vaver, “Copyright Defences as User Rights” (2013) 60 *J. Copyright Soc’y USA* 661.

<sup>39</sup> In Graham Reynolds, “Reconsidering Copyright’s Constitutionality” (2016) 53 *O.H.L.J.* 898, relying on the hypothetical case of copyright term extension, I argue that “based on current copyright and *Charter* jurisprudence, a Canadian court could determine that provisions of Canada’s *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression” (900); In Reynolds, “The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright”, I argue that “[d]espite the positive outcomes for the expression interests of non-copyright owning parties that have thus far resulted from the SCC’s post-2002 copyright jurisprudence, . . . the SCC should, where appropriate, explicitly engage with the *Charter* right to freedom of expression in the context of copyright” (458).

Several of the works written by these authors are critical of Teitelbaum J.'s judgment in *Michelin*. Some critiques focus on Teitelbaum J.'s approach to copyright. For instance, Scassa critiques the way in which Teitelbaum J. "conflated" *Michelin's* "corporate logo . . . with the works of more traditional creative artists."<sup>40</sup> As well, both Scassa and Craig are critical of the way in which Teitelbaum J. "treat[ed] copyright as simply another species of private property."<sup>41</sup> Craig and Bailey are also critical of the way in which Teitelbaum J., in his judgment, failed to "distinguish between intellectual and real property rights."<sup>42</sup>

A number of criticisms have also been levelled at Teitelbaum J.'s approach to freedom of expression. Scassa, for instance, is critical of the way in which Teitelbaum J. "privileg[ed] . . . private rights over freedom of expression."<sup>43</sup> As well, Bailey is critical of the way in which Teitelbaum J.'s decision "presupposes an existing property right in copyright material against which incursions for purposes of exercising freedom of expression must be justified," arguing both that there are "solid reasons to be cautious about *Michelin's* conclusion that the [Copyright] Act is consistent with section 2(b)," and that "subsequent legal and technological developments raise new questions about any continuing precedential value in the Court's section 1 analysis."<sup>44</sup> Craig critiques Teitelbaum J.'s "reli[ance] upon the distinction drawn in the *Irwin Toy* decision

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<sup>40</sup> Scassa at 959.

<sup>41</sup> Craig, "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright" at 95. Scassa writes that "[t]o equate copyrights with private property rights short circuits the much more contextual analysis required by copyright law" (at 959).

<sup>42</sup> Bailey at 141; Craig, "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright" at 92-94. Several other authors have also questioned the ongoing precedential value of *Michelin* in light of subsequent SCC copyright jurisprudence (Jeremy de Beer, "Legal Strategies to Profit from Peer Production" (2008) 46 Can. Bus. L.J. 269-278; Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use" (2009) 53 McGill L.J. 309 at 329-30, 359).

<sup>43</sup> Scassa at 959.

<sup>44</sup> Bailey at 143-44.

between the ‘form’ and the ‘content’ of expression,” arguing that “there is an argument to be made that the form/content divide . . . is inapposite in the realm of copyright.”<sup>45</sup>

This article builds upon these works in a number of ways. Like Scassa, Bailey and Craig, I critique the approach to copyright adopted by Teitelbaum J. However, I take a different approach than is taken in the above-mentioned works. Rather than arguing that Teitelbaum J. “radically misconstrued the nature and purpose of copyright law,”<sup>46</sup> as did Craig, for instance, I am arguing instead that Teitelbaum J., in his decision in *Michelin*, applied an approach to copyright that at the time that *Michelin* was handed down had been endorsed by the SCC as the correct view of copyright in Canada, but that has since been rejected (namely the author-centric view of copyright).

As well, like Scassa, Bailey and Craig, I critique the approach adopted by Teitelbaum J. to the *Charter* analysis (both ss. 2(b) and 1). However, as above, I take a different approach than is taken in the above-mentioned works. Rather than arguing that Teitelbaum J. misapplied the *Charter* analysis, for instance, I am instead arguing that Teitelbaum J., in his decision in *Michelin*, adopted approaches to the *Charter* right to freedom of expression as well as to the s. 1 analysis that at the time that *Michelin* was handed down were available to him to adopt, but that have now been foreclosed due both to subsequent SCC freedom of expression jurisprudence as well as to the SCC’s rejection of the author-centric approach to copyright.

In short, I am arguing that the *Michelin* approaches to the intersection of the *Charter* right to freedom of expression and copyright are no longer good law, and on this basis should be rejected by contemporary courts considering the intersection of the *Charter* right to freedom of expression and copyright.

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<sup>45</sup> Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” at 98.

<sup>46</sup> *Ibid.* at 111.

### 3. CANADIAN COURTS' VIEWS OF THE CORRECT CONCEPTIONS OF BOTH COPYRIGHT AND OF FREEDOM OF EXPRESSION HAVE SHIFTED OVER TIME

#### (a) Copyright in Canada: From an Author-centric Conception to a Balancing of Interests

In Canada, neither the *Constitution* nor the *Copyright Act* sets out the purpose or objective of copyright.<sup>47</sup> Furthermore, as Daniel Gervais and Scassa note, neither legislative history<sup>48</sup> nor “the history of copyright reform in Canada”<sup>49</sup> provides a clear articulation of copyright’s purpose. It has thus fallen to the courts to articulate the purpose of copyright in Canada.

Canadian courts’ views of the correct conception of copyright have shifted over time. During the period in which Teitelbaum J. delivered his judgment in *Michelin*, the conception of copyright endorsed by the SCC as the correct approach was one referred to by Abella J. in *SOCAN v. Bell* as “author-centric”.<sup>50</sup> Under this view of copyright, the singular purpose of copyright is to protect authors. Abella J. cited to *Bishop v. Stevens*, a 1990 decision of the SCC, as an example of a case in which the author-centric view of copyright was applied.<sup>51</sup> In this decision, McLachlin J. (as she then was) presented copyright as a set of laws the purpose of which is to protect authors, writing that the “copyright holder” is the party “whose interests the [*Copyright Act*] is designed to protect.”<sup>52</sup>

McLachlin J. rooted her view of the purpose of copyright in Canada’s copyright history, stating that:

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<sup>47</sup> *Cf.*, U.S. Const., art. 1, sec. 8, cl. 8, which sets out the objective of copyright in the United States.

<sup>48</sup> Daniel J. Gervais, “The Purpose of Copyright Law in Canada” (2005) 2 U.O.L.T.J. 315 at 318.

<sup>49</sup> Teresa Scassa, “Originality and Utilitarian Works: The Uneasy Relationship between Copyright Law and Unfair Competition” (2003-04) 1 U.O.L.T.J. 51 at 58.

<sup>50</sup> *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 at [9].

<sup>51</sup> *Ibid.* at [9].

<sup>52</sup> *Bishop v. Stevens*, [1990] 2 S.C.R. 467 at 483.

The [Copyright] Act was based on, and designed to implement, the Berne Convention of 1886 as revised in Berlin in 1908, which set forth an international code and created a union of states “for the protection of the rights of authors over their literary and artistic works”.<sup>53</sup>

McLachlin J. also remarked that the Canadian *Copyright Act* was based on the *Copyright Act, 1911* (U.K.), stating that:

As noted by Maugham J., in *Performing Right Society, Ltd. v. Hammond’s Bradford Brewery Co.*, [1934] 1 Ch. 121, at p. 127, “the Copyright Act, 1911, was passed with a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical”.<sup>54</sup>

Abella J., in *SOCAN v. Bell*, described the author-centric approach as “focus[ing] on the exclusive right of authors and copyright owners to control how their works were used in the marketplace.”<sup>55</sup> The importance, to copyright owners, of preserving control over copyrighted works is central to McLachlin J.’s judgment in *Bishop*. As McLachlin J. noted:

[F]rom a composer’s point of view, the right to *control* the circumstances under which the first recording is made is crucial. Once the composer has made or authorized a recording of his work, he has irrevocably given up much of his *control* over its presentation to the public (emphasis added).<sup>56</sup>

Also emphasized in this decision is the need for copyright holders to have “security”, or protection against the loss of control over copyrighted works.<sup>57</sup>

Citing to Craig, Abella J., in *SOCAN v. Bell*, wrote that under the author-centric approach to copyright, “any benefit the public might derive from the copyright system was only ‘a fortunate by-product of private entitlement.’”<sup>58</sup> This view — that the sole purpose of copyright is to advance the interests of authors and their assigns, but that in benefiting authors the public *may* benefit as well

<sup>53</sup> *Ibid.* at 473.

<sup>54</sup> *Ibid.* at 478-79.

<sup>55</sup> *SOCAN v. Bell* at [9].

<sup>56</sup> *Bishop* at 479.

<sup>57</sup> *Ibid.* at 481, 482 and 483.

<sup>58</sup> *SOCAN v. Bell* at [9], citing to Carys J. 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 at 14-15.

— is echoed in Gibson J.’s judgment in the trial decision in *CCH* (a decision handed down three years after Teitelbaum J.’s decision in *Michelin*). As Gibson J. stated:

The object and purpose of the Copyright Act is to benefit authors, albeit that in benefiting authors, it is capable of having a substantially broader-based public benefit through the encouragement of disclosure of works for the advancement of learning or, as in this case, the wider dissemination of law.<sup>59</sup>

The word “might” used by Abella J. in the above paragraph carries significant weight in this context, as does the word “capable” employed by Gibson J. The use of these terms assists in constructing an image of an approach to copyright focused squarely on the author or their assigns, under which the public may benefit, although there is no guarantee that it will and no consequence or significance if it does not.

The author-centric view of copyright has now been firmly rejected by the SCC. In its place, the SCC has outlined a conception of copyright that accepts both that authors’ rights are limited and that they must be balanced against the public interest.<sup>60</sup> As noted by Abella J. in *SOCAN v. Bell*, the SCC’s shift away from the author-centric view of copyright towards a more balanced approach began with Binnie J.’s majority judgment in *Théberge*.<sup>61</sup> In this decision, Binnie J. held that rather than being motivated by a single goal — namely to protect and benefit authors — copyright in Canada attempts to balance multiple goals. As he wrote:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).<sup>62</sup>

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<sup>59</sup> *CCH Canadian et al. v. Law Society of Upper Canada* (1999), 179 D.L.R. (4th) 609 at [116] (F.C.T.D.).

<sup>60</sup> *Théberge* at [30].

<sup>61</sup> See *SOCAN v. Bell* at [9], citing to *Théberge*. See also Chief Justice Beverley McLachlin, “Intellectual Property - what is it all about? (Address to the National Judicial Institute course ‘Intellectual Property: Trademark Law,’ 19, 20 November 1992)” in Gordon F. Henderson, ed., *Trade-marks Law of Canada* (Carswell, 1993).

<sup>62</sup> *Théberge* at [30].

In order for copyright to be effective in encouraging the creation of certain types of works of the arts and intellect, copyright owners must be given a fair reward. However, as noted by Binnie J., care must be taken to ensure that copyright owners are not overcompensated.<sup>63</sup> To provide an excessive reward to copyright owners would be to unnecessarily restrict the use of copyrighted works, which, as noted by Binnie J., might “unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole.”<sup>64</sup>

Rights granted to copyright owners, under the SCC’s balanced approach to copyright, are limited by public interest considerations. As noted by Binnie J. in *Théberge*, “[t]he proper balance” in copyright “lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.”<sup>65</sup> The primary limiting mechanisms internal to the *Copyright Act* are defences to copyright infringement such as fair dealing.<sup>66</sup> Under the SCC’s balanced approach to copyright, defences to copyright infringement are interpreted broadly, are seen as an “integral part of the *Copyright Act*,”<sup>67</sup> are described as “user’s right[s],”<sup>68</sup> and have been referred to by the SCC as “[o]ne of the tools employed to achieve the proper balance between protection and access in the *Act*.”<sup>69</sup>

**(b) The *Charter* Right to Freedom of Expression in Canada: From a Narrower Conception to a Broader Conception**

In the previous section, I described how the SCC’s view of the purpose of copyright has shifted over time, from an approach focused squarely on the author and their assigns to one in which copyright is conceived of as balancing between copyright owners’ rights, users’ rights and the public interest. In a similar manner, Canadian courts’ views of the correct approach to be taken to the *Charter* right to freedom of expression have also shifted over time.

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<sup>63</sup> *Ibid.* at [31].

<sup>64</sup> *Ibid.* at [32].

<sup>65</sup> *Ibid.* at [31].

<sup>66</sup> *Copyright Act*, ss. 29-29.2.

<sup>67</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at [48].

<sup>68</sup> *Ibid.* at [48].

<sup>69</sup> *SOCAN v. Bell* at [11].

In the years following the enactment of the *Canadian Charter of Rights and Freedoms*, courts struggled with a number of questions, one of which was how narrowly or broadly should the *Charter* right to freedom of expression be defined.<sup>70</sup> Initially, some courts took the view that the scope of the *Charter* right to freedom of expression was no different than the scope of the right to freedom of speech under the *Canadian Bill of Rights* (which was itself interpreted to be no broader than the scope of freedom of speech or expression under the common law).<sup>71</sup> Under this approach, the *Charter* was seen as having “entrench[ed] as constitutional rights the right existing at common law associated with the words themselves.”<sup>72</sup>

Over time, it began to be accepted by some courts that the scope of the s. 2(b) right to freedom of expression should not be interpreted in such a narrow manner.<sup>73</sup> However, certain courts continued to interpret the *Charter* right to freedom of expression more narrowly than did others. For instance, in *Cromer*, the Court of Appeal for British Columbia held that the scope of protectable expression could be limited or constrained by private rights, without needing to subject these limits to a section 1 analysis.<sup>74</sup> Other courts adopting more narrow approaches to the scope of the paragraph 2(b) right to freedom of expression accepted that the value of the expressive act should be considered in defining the scope of protectable expression.<sup>75</sup> Similarly, a number of courts

<sup>70</sup> For papers that discuss the development of s. 2(b) jurisprudence, see, for instance, Robert J. Sharpe, “Commercial Expression and the Charter” (1987) 37 U.T.L.J. 229 at 252-55; Jamie Cameron, “The Past, Present, and Future of Expressive Freedom under the Charter” (1997) 35 Osgoode Hall L.J. 1.

<sup>71</sup> See, for instance, *R. v. Squires* (1986), 25 C.C.C. (3d) 44 (Ont. Prov. Ct. (Crim. Div.)) and *Cromer v. British Columbia Teachers’ Federation* (1986), 29 D.L.R. (4th) 641 (B.C. C.A.). In *Cromer* at [54], Lambert J.A. wrote that “[t]he Charter does not purport to confer new freedoms. . . . [t]he freedom of expression itself remains the same freedom as existed before the adoption of the Charter” (*ibid.* at [54]).

<sup>72</sup> *R. v. Squires* at [59].

<sup>73</sup> See, for instance, *Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 41 O.R. (2d) 583 (Ont. Div. Ct.); *Rocket and Rocket College of Dental Surgeons of Ontario* (1998), 64 O.R. (2d) 353 (Ont. C.A.); *Ford v. Quebec*, [1988] 2 S.C.R. 712.

<sup>74</sup> *Cromer* at [39].

<sup>75</sup> Courts applying this approach were critical of (and ultimately rejected) arguments that the scope of protectable expression under the *Charter*-protected

accepted that freedom of expression could not be used to derogate from property rights.<sup>76</sup>

Under this latter approach, as described by Scott Prov. Ct. J., in *R. v. Layton*, “the ‘freedom of expression’ guaranteed by s. 2(b) is *in itself* limited so as to fully protect both private and public property from the impact of its operation” (emphasis in original). Scott Prov. Ct. J. wrote that “[t]his argument . . . is founded on the contention that the *Charter* does not diminish or modify any common law rights concerning the enjoyment of property.”<sup>77</sup>

In 1989, the SCC, in *Irwin Toy*, adopted an approach to freedom of expression under which the starting position for the s. 2(b) analysis is that all attempts to convey meaning are *prima facie* protectable expression.<sup>78</sup> The *Irwin Toy* approach — albeit slightly modified — remains the governing approach to freedom of expression in Canada.<sup>79</sup>

However, although the starting position under *Irwin Toy* is that all attempts to convey meaning are *prima facie* protectable expression, not all attempts to convey meaning will be protected under s. 2(b) of the *Charter*. Dickson C.J., Lamer J. and Wilson J., in their majority judgment in *Irwin Toy*, clarified that not all forms

right to freedom of expression should include types of expression such as nude burlesque dancing, spreading false news, and communication for the purposes of prostitution, in part on the basis that in their view, these types of expression did not possess sufficient “social or moral value” to warrant protection under s. 2(b). See, for instance, *R. v. Zundel* (1987), 58 O.R. (2d) 129 (Ont. C.A.) at [57]. See, also, *Re Koumoudorous and Metro Toronto*, 1984 CarswellOnt 1171, 6 D.L.R. (4th) 523 (Ont. Div. Ct.) and *R. v. Smith* (1988), 44 C.C.C. (3d) 385 (Ont. H.C.). Jamie Cameron refers to this conception of the *Charter* right to freedom of expression as a “definitional conception” (Jamie Cameron, “The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy Ltd v Attorney-General of Quebec*” (1989) 35 McGill L.J. 253 at 260).

<sup>76</sup> See, for instance, *New Brunswick Broadcasting Co., Limited v. Canadian Radio-television and Telecommunications Commission*, [1984] 2 F.C. 410 (F.C.A.); *Canadian Newspapers Co. Ltd. c. Montréal (Ville)*, [1988] R.J.Q. 482 (Cour supérieure du Québec); *Edmonton (City) v. Forget* (1989), 99 A.R. 122 (Alta. Prov. Ct.).

<sup>77</sup> *R. v. Layton*, 1986 CarswellOnt 792, 38 C.C.C. (3d) 550 (Ont. Prov. Ct.), Judicial District of York, Ontario. This argument was not accepted by Scott Prov. Ct. J.

<sup>78</sup> *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at 969.

<sup>79</sup> *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at [156]; *Société Radio-Canada c. Québec (Procureur général)*, 2011 SCC 2 at [33]-[36].

of expression are protected under s. 2(b) of the *Charter*. As they wrote:

The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts. While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen.<sup>80</sup>

Courts, both pre- and post-*Irwin Toy*, have also accepted that the location of expression could justify its exclusion from protection under s. 2(b) of the *Charter*.<sup>81</sup>

In recent years, the SCC has clarified the limited circumstances in which expression can be excluded from s. 2(b). In *Montréal (City)* (a 2005 decision of the SCC), McLachlin C.J. and Deschamps J. stated that “[e]xpressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee.”<sup>82</sup> As well, in this same decision, McLachlin C.J. and Deschamps J. wrote that, “[p]rivate property . . . will fall outside the protected sphere of s. 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*.”<sup>83</sup> As is discussed later in this article, this clarification is of particular significance to the intersection of copyright and the *Charter* right to freedom of expression.

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<sup>80</sup> *Irwin Toy* at 969-70.

<sup>81</sup> See, for instance, *NB Broadcasting; Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385.

<sup>82</sup> *Montreal (Ville) v. 2952-1366 Québec inc.*, [2005] 3 S.C.R. 141 at [72], 2005 CarswellQue 9633 (S.C.C.).

<sup>83</sup> *Ibid.* at [62].

#### 4. THE *MICHELIN* APPROACHES TO THE INTERSECTION OF THE CHARTER RIGHT TO FREEDOM OF EXPRESSION AND COPYRIGHT RELY ON NOW-ABANDONED CONCEPTIONS OF BOTH COPYRIGHT AND OF FREEDOM OF EXPRESSION

Two approaches to the intersection of the *Charter* right to freedom of expression and copyright can be identified in Teitelbaum J.'s decision in *Michelin*. First, Teitelbaum J. presented the relationship between the *Charter* right to freedom of expression and copyright as one in which there is no conflict between these rights. As Teitelbaum J. wrote, “[t]he *Charter* does not confer the right to use private property — the Plaintiff’s copyright — in the service of freedom of expression.”<sup>84</sup> Second, Teitelbaum J. wrote that even if he were to determine that the provisions of the *Copyright Act* infringe the *Charter* right to freedom of expression, that “according to the wording of Section 1, that Sections 3 and 27 of the *Copyright Act* are ‘reasonable limits prescribed by law . . . demonstrably justified in a free and democratic society.’”<sup>85</sup>

In the following section, I argue that both *Michelin* approaches to the intersection of the *Charter* right to freedom of expression and copyright rely on and have been shaped by now-abandoned conceptions of both copyright and of freedom of expression. As such, these approaches to the intersection of the *Charter* right to freedom of expression and copyright are no longer good law, and should not be relied upon by contemporary courts considering the intersection of these rights.

##### (a) **First *Michelin* Approach: Unauthorized Use of Copyrighted Expression is Prohibited Expression**

Under the first *Michelin* approach to the intersection of the *Charter* right to freedom of expression and copyright, Teitelbaum J. rejected the idea of conflict between these two rights, concluding that “[t]he *Charter* does not confer the right to use private property — the Plaintiff’s copyright — in the service of freedom of expression.”<sup>86</sup> In the absence of case law directly on point,

<sup>84</sup> *Michelin* at [85].

<sup>85</sup> *Ibid.* at [115].

<sup>86</sup> *Ibid.* at [85].

Teitelbaum J. justified this conclusion on the basis of the following analysis.

Having characterized copyright as private property, Teitelbaum J. made reference to a number of cases, both pre-*Charter* and post-*Charter*, in which courts concluded or in which it was remarked that freedom of expression does not grant the right to express oneself on private property. Teitelbaum J. then determined that “it is reasonable to equate doing something on private property as a forum of expression with using the property — the copyright — to convey expression.”<sup>87</sup> He also concluded that “[i]f form is defined as ‘how the meaning is conveyed’. . . ‘use’ of property could constitute a form of expression.”<sup>88</sup>

Through the course of his decision, Teitelbaum J. also engaged, in significant depth, with *Committee for the Commonwealth of Canada v. Canada*, a post-*Irwin Toy* decision of the SCC in which, as described by Teitelbaum J. “the Supreme Court suggested that choosing a public forum of expression can possibly limit the scope of protection under paragraph 2(b).”<sup>89</sup> Teitelbaum J. reasoned, by analogy to this case, that “use of private property to convey expression can also warrant removing the expression from the protection of paragraph 2(b).”<sup>90</sup>

These determinations, informed by Dickson C.J., Lamer J. and Wilson J.’s conclusion, in *Irwin Toy*, that certain “form[s] of expression chosen to convey a meaning fall[] outside the sphere of the guarantee,”<sup>91</sup> led Teitelbaum J. to his ultimate conclusion that “the defendants’ expression is a prohibited form or is subject to . . . a ‘special limitation’ and is not protected under the umbrella of paragraph 2(b).”<sup>92</sup>

As I will argue, each step of Teitelbaum J.’s analysis, as set out above, relies on or has been shaped by conceptions of both copyright and the *Charter* right to freedom of expression that have now been rejected, namely the author-centric view of copyright as well as a conception of freedom of expression under which it is

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<sup>87</sup> *Ibid.* at [101].

<sup>88</sup> *Ibid.* at [87].

<sup>89</sup> *Ibid.* at [88].

<sup>90</sup> *Ibid.* at [88].

<sup>91</sup> *Irwin Toy* at 970.

<sup>92</sup> *Michelin* at [87].

accepted that property rights are insulated from operation of the *Charter*.

(i) *Copyright is Private Property*

Teitelbaum J.'s characterization of copyright as private property was critical to his articulation of the first *Michelin* approach to the intersection of the *Charter* right to freedom of expression and copyright, in that it allowed Teitelbaum J. to link his analysis of whether the use of copyrighted expression constitutes prohibited expression under s. 2(b), to a line of cases, both pre-*Charter* and post-*Charter*, in which courts including the SCC either concluded or remarked that freedom of expression does not grant the right to express oneself on private property. These cases, along with *Commonwealth* (discussed in further depth in Part 4.(a)(v), below), serve as the jurisprudential foundation for Teitelbaum J.'s ultimate determination that the *Charter* right to freedom of expression does not protect the unauthorized use of copyrighted expression.

Teitelbaum J.'s characterization of copyright as a private property right flows from his adoption of the author-centric approach to copyright. Despite Estey J.'s statement, in *Compo Co. Ltd. v. Blue Crest Music et al.*, that “copyright is neither tort law nor property law in classification, but is statutory law,”<sup>93</sup> a number of Canadian courts, including the SCC, have referred to copyright as a property right.<sup>94</sup> Two recent SCC decisions in which this term was employed, for instance, are *Cinar Corporation*, in which McLachlin C.J., writing for the court, characterized the infringement of copyright in that case as “a breach of Robinson’s property rights”;<sup>95</sup> and *Canadian Artists’ Representation v. National Gallery of Canada*, in which Rothstein J., writing for the court, referred to “licensing or assigning the copyright in an existing work” as “simply a transfer of property.”<sup>96</sup>

<sup>93</sup> *Compo Co. Ltd. v. Blue Crest Music* (1979), [1980] 1 S.C.R. 357 at 372 (S.C.C.).

<sup>94</sup> In addition to the references below, see *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37 at [27]-[29]; *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363, 2006 SCC 43 at [56].

<sup>95</sup> *Cinar* at [102].

<sup>96</sup> *Canadian Artists’ Representation v. National Gallery of Canada*, 2014 SCC 42 at [9].

Very few Canadian cases, however, have referred to copyright as *private* property. Despite Teitelbaum J.'s statement that his characterization of copyright as a private property right is the "usual characterization of copyright,"<sup>97</sup> a search of both proprietary and publicly-available case law databases suggests that in only four Canadian decisions is copyright referred to in such a manner.<sup>98</sup> Of these decisions, three can be linked directly to *Michelin*: one of these decisions is *Michelin*, and two are decisions in which the reference to copyright as private property is contained within a quote from *Michelin*.<sup>99</sup>

While the question of whether copyright is a property right continues to "ignite passionate debate," as noted by Pascale Chapdelaine,<sup>100</sup> the mere characterization of copyright as a property right does not in and of itself point to any specific conclusion regarding the nature or scope of copyright.<sup>101</sup> The nominalist school of property law scholarship, for instance, takes the view that property is a "purely conventional concept with no fixed meaning — an empty vessel that can be filled by each legal

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<sup>97</sup> *Michelin* at [96].

<sup>98</sup> On May 9, 2017, I conducted a search of both a proprietary research database (Quicklaw) and a freely available research database (CanLII). No search limitations other than the terms "copyright /20 'private property'" were used. The search on Quicklaw (within the All Canadian Court Cases database) returned four results: *ibid.* (*Michelin*); *Canwest 2008*; *Fraser Health Authority v. Hospital Employees' Union*; and *Warner Bros.-Seven Arts Ltd. v. CESM-TV Ltd.*, [1971] Ex. C.J. No. 6. The search on CanLII returned three results: *Michelin*; *Canwest 2008*; and *Fraser Health Authority v. Hospital Employees' Union*.

<sup>99</sup> *Michelin*; *Fraser Health Authority v. Hospital Employees' Union*; *Canwest 2008*. The fourth decision, *Warner*, is a decision of the Exchequer Court of Canada, handed down in 1971.

<sup>100</sup> Pascale Chapdelaine, "The Property Attributes of Copyright" (2014) 10 Buff. Intell. Prop. L.J. 34 at 36. See, for instance, David Vaver, "General Introduction" in David Vaver, ed., *Intellectual Property Rights: Critical Concepts in Law Vol. 1* (Routledge, 2006) at 1-19; William F. Patry, *Moral Panics and the Copyright Wars* (Oxford University Press, 2009) at 103; Julie Cohen, "Copyright as Property in the Post-Industrial Economy" (2011) 2011 Wis. L. Rev. 141; Adam Mossoff, "Is Copyright Property?" (2005) 42 San Diego L. Rev. 29; Lior Zemer, "What Copyright Is: Time to Remember the Basics" (2006) 4 Buff. Intell. Prop. L.J. 54.

<sup>101</sup> *Cf.*, L. Ray Patterson, "Free Speech, Copyright, and Fair Use" (1987) 40 Vand. L. Rev. 1 at 9, cited in Craig, "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright" at 97.

system in according with [*sic*] its particular values and beliefs.”<sup>102</sup> Under this approach, to state that copyright is a property right is just the beginning, and not the end, of any discussion as to the nature or scope of copyright. Thus, the SCC’s use of the term property rights in its more recent copyright jurisprudence is not necessarily inconsistent with a balanced approach to copyright, and need not be seen as a movement away from such an approach.

The same cannot be said of the explicit characterization of copyright as *private* property. Craig writes that conceptualizing copyright as a private property right “recast[s copyright] . . . as a system for the protection of private individuals’ rights against the world, its primary purpose being the protection of copyright owners’ property.”<sup>103</sup> Similarly, William Patry writes that “[b]y describing copyright as a private property right, proponents of the description hope to get policy makers and courts to believe that only private, and not public rights are implicated.”<sup>104</sup>

In focusing attention squarely on the author and their assigns, the conception of copyright as private property is inconsistent with the balanced approach currently endorsed by the SCC as the correct conception of copyright, under which copyright owners’ rights are limited by users’ rights as well as public interest considerations. In the absence of additional qualifying language acknowledging the range of interests engaged by copyright laws, it would be inappropriate, under the balanced approach to copyright, for courts to refer to copyright as private property.

However, as noted above, the approach to copyright endorsed by the SCC during the period in which *Michelin* was handed down was not the balanced approach, but the author-centric approach. The characterization of copyright as private property, while inconsistent with the balanced approach to copyright, is consistent with and flows from Teitelbaum J.’s adoption of the author-centric approach to copyright, under which copyright *is* solely a matter of private interest.

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<sup>102</sup> Thomas R. Merrill, “Property and the Right to Exclude” (1998) 77 Neb. L. Rev. 730 at 737.

<sup>103</sup> Craig, *supra* note 101 at 94. Craig also writes that “[b]y characterizing copyright as private property pure and simple, the court obscures the nature of copyright as speech regulation” (*ibid.* at 97).

<sup>104</sup> Patry at 107.

(ii) *Freedom of Expression Does Not Confer the Right to Express Oneself on Private Property*

Having characterized copyright as private property, Teitelbaum J., in answering the question of whether core provisions of the *Copyright Act* unjustifiably infringe section 2(b) of the *Charter*, drew support from a number of cases, both pre-*Charter* and post-*Charter*, in which courts concluded or in which it was remarked that freedom of expression does not confer the right to express oneself on private property, namely: *Committee for the Commonwealth of Canada v. Canada (Commonwealth)*; *New Brunswick Broadcasting Co., Limited v. Canadian Radio-television and Telecommunication Commission (New Brunswick)*; and *Harrison v. Carswell (Harrison)*.<sup>105</sup>

Passages drawn by Teitelbaum J. from these cases reflect an approach to freedom of expression under which private property, the protection of which is characterized as a fundamental freedom, is insulated from the operation of the *Charter*. For instance, Teitelbaum J. referenced a passage from Dickson J.'s majority judgment in *Harrison* — a pre-*Charter* decision — in which Dickson J. noted that “Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law.”<sup>106</sup> This statement presents the right to enjoy property as a “fundamental freedom”; one that if it is to be limited, must be done explicitly by legislatures (that is to say, not by courts through judicial interpretation).<sup>107</sup> Philip Girard and Jim Phillips describe *Harrison* as representing the view that “[p]roperty rights are a powerful trope, and invariably win the day over other societal values, even though property remains formally outside the *Charter*.”<sup>108</sup>

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<sup>105</sup> *Commonwealth; New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Harrison v. Carswell* (1975), [1976] 2 S.C.R. 200.

<sup>106</sup> *Harrison* at 219.

<sup>107</sup> *Ibid.* at 219.

<sup>108</sup> Philip Girard & Jim Phillips, “A Certain Malaise: *Harrison v. Carswell*, Shopping Centre Picketing, and the Limits of the Postwar Settlement” in J. Fudge & E. Tucker, ed., *Canadian Labour Law Stories* (Irwin Law and Osgoode Society for Canadian Legal History, 2010).

Teitelbaum J. also referenced a passage from Thurlow C.J.’s judgment in *New Brunswick* (a decision handed down by the Federal Court of Appeal after the *Charter* had come into force but prior to the SCC’s decision in *Irwin Toy*) that, quoted in full, suggests that property rights are insulated from *Charter* scrutiny:

The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else’s property to do so. It gives no right to anyone to use someone else’s land or platform to make a speech, or someone else’s printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes . . . the freedom guaranteed by paragraph 2(b) does not include a right for anyone to use the property of another or public property, the use of which was subject to and governed by the provisions of a statute.<sup>109</sup>

This passage evokes the majority decision in *Harrison*, in which the protection of property is presented as a fundamental freedom.<sup>110</sup>

Last, with respect to *Commonwealth*, Teitelbaum J. referenced McLachlin J.’s statement, in *obiter*, that:

Freedom of expression . . . has not historically conferred a right to use another’s private property as a forum for expression. A proprietor has had the right to determine who uses his or her property and for what purpose. Moreover, the *Charter* does not extend to private actions. It is therefore clear that s. 2(b) confers no right to use private property as a forum for expression.<sup>111</sup>

While one reason given by McLachlin J. for the exclusion of expression taking place on private property from the scope of freedom of expression is the fact that “the *Charter* does not extend to private actions,” this justification for the exclusion of expression taking place on private property from the scope of freedom of expression, by virtue of its placement as the second justification in the paragraph, as well as the use of the conjunctive adverb “moreover” to link these two justifications, can be seen at most to

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<sup>109</sup> *N.B. Broadcasting*. The quote used by Teitelbaum J. ends after the phrase “public building for such purposes”.

<sup>110</sup> *Michelin* at [91]; *Harrison*.

<sup>111</sup> *Commonwealth* at 228.

be of equal weight to the first justification, namely the historical exclusion or insulation of private property from freedom of expression scrutiny.<sup>112</sup>

Teitelbaum J. also referenced L'Heureux-Dubé J.'s statement, in *Commonwealth*, that:

If the government had complete discretion to treat its property as would a private citizen, it could differentiate on the basis of content, or choose between particular viewpoints and grant access to sidewalks, streets, parks, the courthouse lawn, and even Parliament Hill only to those whose message accorded with the government's preferences.<sup>113</sup>

In a manner similar to Dickson J.'s statement from *Harrison* set out above, L'Heureux-Dubé J.'s remarks suggest that private property owners have "sole and despotic dominion"<sup>114</sup> over their property, and, armed with this complete and limitless freedom, can grant or deny access as they wish, regardless of the impact on other individuals' freedom of expression rights.

These references, taken together, present a view of private property as being insulated from *Charter* scrutiny. Consistent with this, they suggest that private property owners should be able to control who expresses themselves on their property (or with their property), and for what purposes, regardless of the impact that silencing or expelling any non-owning party may have on the expression interests either of the party engaged in the expressive act or the public more generally.

During the period in which *Michelin* was handed down, it was unclear whether and the extent to which expression taking place on (or using) private property is protected under section 2(b) of the *Charter*. As such, it was open to Teitelbaum J. to draw connections between the facts before him and the cases described above, and to rely on these cases as support for his conclusion that the unauthorized use of copyrighted expression can be excluded from the scope of protection under section 2(b) of the *Charter*.

Since *Michelin* was handed down, however, the SCC has provided additional guidance with respect to the question of whether and the extent to which expression taking place on private

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<sup>112</sup> *Ibid.* at 228.

<sup>113</sup> *Ibid.* at 192.

<sup>114</sup> William Blackstone, *Commentaries on the Laws of England*, Book II, ch. 1: Of Property in General.

property is protected under section 2(b). As noted above, in *Montréal (City)*, McLachlin C.J. and Deschamps J. clarified that while expression taking place on private property is generally excluded from *Charter* scrutiny, the reason for this exclusion is the absence of government action.<sup>115</sup> In situations where there is government action, the *Charter* is engaged, regardless of whether private property rights are involved.<sup>116</sup>

Copyright, as a set of rights created by legislation, constitutes government action.<sup>117</sup> Thus, contrary to the view conveyed by the passages described above, even if copyright is considered to be a private property right, due to the nature of copyright as a “creature of statute,”<sup>118</sup> the provisions of the *Copyright Act* remain subject to *Charter* scrutiny.<sup>119</sup> As such, a contemporary court considering the intersection of the *Charter* right to freedom of expression and copyright would not be able to rely on the cases described above as authority for the view that acts involving the unauthorized use of copyrighted expression should be excluded from the scope of protectable expression under section 2(b).

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<sup>115</sup> *Montréal* at [62]. See also *Canadian Broadcasting Corp. v. Canada (Attorney General)*, in which Deschamps J. wrote that “for . . . the location of the conveyance of a message to be excluded from *Charter* protection, the court must find that it conflicts with the values protected by s. 2(b), namely self-fulfillment, democratic discourse, and truth finding” (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19 at [37]).

<sup>116</sup> *Montréal* at [62].

<sup>117</sup> For the principle that legislation constitutes government action, see *Retail, Wholesale and Department Store Union, Local 580 (RWDSU) v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at [26]-[41].

<sup>118</sup> *Compo Co.* at 373.

<sup>119</sup> Bailey writes that “since copyright exists in Canada only as a result of its statutory creation in the Act, the existence of any such property right is dependent upon the constitutional validity of the legislation purporting to grant it” (Bailey at 141). See also Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” at 95. In Reynolds, “Reconsidering Copyright’s Constitutionality”, I argue that in light of subsequent copyright and freedom of expression jurisprudence, “[c]ontrary to the conclusion reached by Justice Teitelbaum in *Michelin*, the formal conception of copyright as a private property right should not result in the exclusion of expression that makes use of the copyrighted works of others from the scope of section 2(b) of the *Charter* on the basis of the location of expression” (913).

(iii) *The Use of Private Property as a Forum for Expression can be Equated to the Use of Copyright to Convey Expression*

Another element critical to the first *Michelin* approach to the intersection of the *Charter* right to freedom of expression and copyright is Teitelbaum J.'s conclusion that "it is reasonable to equate doing something on private property as a forum for expression with using the property — the copyright — to convey expression."<sup>120</sup> This conclusion helps justify Teitelbaum J.'s reliance, as authority, on the cases described in Part 4.(a)(ii), in which courts remarked or concluded that freedom of expression does not convey the right to express oneself on private property.

As I will argue, however, Teitelbaum J.'s conclusion that the use of copyrighted works to convey expression can be equated to the use of private property as a forum for expression was shaped by his adoption of the author-centric view of copyright, and as such should not be adopted by contemporary courts considering the intersection of the *Charter* right to freedom of expression and copyright.

In his judgment, Teitelbaum J. acknowledged that copyright is an intangible property right. However, he chose not to focus on the differences between intangible property and tangible property that might lead a court to conclude that the use of private property as a forum for expression cannot be equated to the use of copyrighted works to convey expression.<sup>121</sup>

In a manner that evokes the author-centric approach to copyright with its focus on copyright owner control, Teitelbaum J. instead presented the status of copyright as intangible property as a challenge that copyright owners must overcome in seeking to protect their private property rights, writing that because copyright is intangible property, "[t]he owner therefore has a more

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<sup>120</sup> *Michelin* at [101].

<sup>121</sup> For instance, as Craig notes, intellectual works are non-rivalrous goods, meaning that they can be enjoyed by multiple people simultaneously without impeding the ability of other individuals to use and enjoy the work (Craig, "Locke" at 23, cited in Bailey at 143). In contrast, real or personal property can be used or enjoyed by only a limited number of individuals simultaneously. As such, as Bailey writes, "while there may be a principled basis to justify limiting your use of my real property since this rivalrous use physically precludes me from expressing myself, no such justification arises in relation to copyright material" (*ibid.* at 143).

challenging task in asserting his or her control over the use of the property.”<sup>122</sup>

Teitelbaum J. also wrote that “just because [copyright] is intangible, it should not be any less worthy of protection as a full property right.”<sup>123</sup> In support of this latter statement, Teitelbaum J. referenced *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, a 1964 decision from the U.K. House of Lords.<sup>124</sup> After referencing *Ladbroke*, Teitelbaum J. went on to note that:

It may be easier to focus on the nature of the plaintiff’s property right in the copyright if we imagine the case of an infringer dealing with a painting, a piece of tangible private property that like the copyright is already imbued with meaning. No infringer could credibly allege that freedom of expression gives him or her the right to subvert the content or message of the painting by physically drawing a moustache on the painting. However, what if the infringer asserted the right to copy or substantially reproduce the painting with a moustache? Our instincts might not be so certain about the scope of the infringer’s freedom of expression because our perceptions are coloured by the intangible nature of the copyholder’s right. We should guard against our instincts in this instance since they might lead us to undervalue the nature of the plaintiff’s copyright and overestimate the breadth of the defendants’ freedom of expression.<sup>125</sup>

This paragraph echoes a passage in Lord Devlin’s judgment in *Ladbroke*, not directly quoted in *Michelin*, in which Lord Devlin noted that:

If a wine merchant, it was argued, selected a dozen different wines as having in combination a special appeal, and arranged the bottles together in a shop window, there was nothing to prevent a rival trader copying the arrangement. Ought it to make any difference if, instead of a shop window arrangement, the merchant makes a list? My lords, I think with respect that this argument is based on a fundamental misapprehension of the law of copyright. The law does not impinge on freedom of trade; it protects property. It is no more an interference with trade than is the law against larceny. Free trade does not require that one man should be allowed to appropriate without payment the

<sup>122</sup> *Michelin* at [103].

<sup>123</sup> *Ibid.* at [103].

<sup>124</sup> *Ibid.* at [103]; *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 W.L.R. 273 (U.K. H.L.).

<sup>125</sup> *Michelin* at [103].

fruits of another's labour, whether they are tangible or intangible. The law has not found it possible to give full protection to the intangible. But it can protect the intangible in certain states, and one of them is when it is expressed in words and print. The fact that that protection is of necessity limited is no argument for diminishing it further; and it is nothing to the point to say that either side of the protective limits a man can obtain gratis whatever his ideas of honesty permit him to pick up.<sup>126</sup>

The passage quoted above from Teitelbaum J.'s judgment suggests that — like Lord Devlin in the context of freedom of trade — Teitelbaum J. viewed the defendants' arguments that freedom of expression should act to limit the protection otherwise provided by copyright as “based on a fundamental misapprehension of the law of copyright.”<sup>127</sup> To Teitelbaum J., applying an author-centric view of copyright, copyright is a system of laws that was enacted for a single purpose: to protect and reward authors. The protection granted to authors is, in practical terms, limited by the intangible nature of copyright, one consequence of which is that non-copyright owning parties can, in many contexts and with relative ease, make unauthorized copies or reproductions of works (for instance the *Bibendum* leaflets).

Given the ease of making reproductions of copyrighted expression, one might assume that this or related acts are encompassed within the section 2(b) right to freedom of expression. Teitelbaum J. urged the reader to “guard against our instincts in this instance.”<sup>128</sup> Rather, in Teitelbaum J.'s view, in order to provide effective protection for authors, as is required under the *Copyright Act* as interpreted through the lens of the author-centric view, it is necessary to look past copyright's intangible nature and to treat it as one would treat “a full property right”;<sup>129</sup> that is to say, to treat copyright in a similar manner to other types of property rights by granting broad rights of control to copyright owners over the unauthorized use of copyrighted expression.

However, although it may have been open to Teitelbaum J., applying an author-centric approach to copyright, to equate

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<sup>126</sup> *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* at 290-91.

<sup>127</sup> *Ibid.* at 291.

<sup>128</sup> *Michelin* at [103].

<sup>129</sup> *Ibid.* at [103].

copyright to privately-owned real and to personal property rights, it is not appropriate for contemporary courts to take this step. Given the extent to which this aspect of Teitelbaum J.'s decision relies both on the characterization of copyright as a private property right as well as on a view of copyright as focusing on copyright owner control, to adopt this aspect of Teitelbaum J.'s decision would be to “[over]value the nature of the plaintiff’s copyright and [under]estimate the breadth of the defendants’ freedom of expression” (the opposite error to that warned of by Teitelbaum J.).<sup>130</sup>

(iv) *The Use of Copyright Constitutes a Form of Expression*

As noted above, Dickson C.J., Lamer J. and Wilson J., in their majority judgment in *Irwin Toy*, held that “[w]hile the guarantee of free expression protects all content of expression,” certain “form[s] of expression chosen to convey a meaning fall[] outside the sphere of the guarantee.”<sup>131</sup> Building upon this passage, Teitelbaum J. concluded that “[i]f form is defined as ‘how the meaning is conveyed’, it seems as if ‘use’ of property could constitute a form of expression.”<sup>132</sup> This conclusion, which was open to Teitelbaum J. to reach given the uncertainty following *Irwin Toy* regarding the circumstances in which expression could be excluded from the scope of section 2(b) on the basis of the form of expression, provided further support for his ultimate determination that the unauthorized use of copyrighted expression is not protected under the section 2(b) right to freedom of expression.

However, as is the case with the other key elements of the first *Michelin* approach, Teitelbaum J.'s conclusion that “‘use’ of property could constitute a form of expression,”<sup>133</sup> as well as his application of this conclusion in the context of copyright, relies on and was shaped by his adoption of the now-abandoned author-centric view of copyright. As such, it should not be relied on by contemporary courts considering the intersection of the *Charter* right to freedom of expression and copyright.

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<sup>130</sup> *Ibid.* at [103].

<sup>131</sup> *Irwin Toy* at 970.

<sup>132</sup> *Michelin* at [87].

<sup>133</sup> *Ibid.* at [87].

In *Michelin*, Teitelbaum J. referred to Bibendum as a “vehicle for the defendants’ message.”<sup>134</sup> Conceiving of a work such as Bibendum as a vehicle for conveying a message, as opposed to an element of the message itself, helps to justify continued copyright owner control over the copyrighted work (a key element of the author-centric approach). If the copyrighted work is only a vehicle used to convey a message, then it is unnecessary for parties to use the copyrighted work in order to successfully communicate their message. They can simply convey their message in an alternative way (one that does not infringe upon the copyright owner’s exclusive rights). Under this approach, the use of copyrighted expression to convey a message is only form, and not content.

However, the key assumption that animates Teitelbaum J.’s approach to the form/content divide is that it is possible, in the context of copyright, to separate form from content. This assumption can be challenged. As Craig writes:

Simply on the basis of [a] superficial overview of copyright doctrines, it is easy to see on what grounds one could criticize the form/content distinction in its application to copyright. Whether an expression assumes a copyrightable form, and whether a particular use constitutes an infringement of copyrighted material, are both questions whose answers must be determined with reference to the expression’s content.<sup>135</sup>

As well, in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (a 1990 decision of the SCC), for instance, Lamer J. wrote that:

[F]orm and content are often connected. In some instances they are inextricably linked. One such example is language. . . . Art may be yet another example of where form and content intersect. Is it really possible to conceive, for instance, of the content of a piece of music, a painting, a dance, a play or a film without reference to the manner or form in which it is presented? It seems to me that just as language colours the content of writing or speech, artistic forms colour and indeed help to define the product of artistic expression. . . . I am of the

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<sup>134</sup> *Ibid.* at [87].

<sup>135</sup> Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” at 101-102.

view, therefore, that art and language are two examples where content and form are inextricably linked, and as a result both merit protection under s. 2 (b) of the *Charter*.<sup>136</sup>

Applying Lamer J.'s approach to the form/content divide, in light of Craig's critique, it can be argued that a contemporary court applying a balanced approach to copyright might conclude, contrary to *Michelin*, that all copyrighted works "merit protection under s. 2(b) of the *Charter*" on the basis that their "content and form are inextricably linked."<sup>137</sup>

(v) *The Commonwealth Tests: Lamer C.J. and McLachlin J.*

In considering whether the defendants' use of *Bibendum* should be protected under section 2(b) of the *Charter*, Teitelbaum J. engaged, to a significant degree, with the SCC's decision in *Commonwealth*. During the period in which *Michelin* was handed down, *Commonwealth* was the leading SCC decision to consider the issue of whether and the extent to which expression on public property is protected under section 2(b).<sup>138</sup>

Teitelbaum J.'s engagement with *Commonwealth*, however, should not be seen as his acceptance of the idea that copyright is public property, or that copyright is a set of rights one goal of which is to protect or advance the public interest. As Teitelbaum J. wrote, "I can find no merit in the defendants' characterization of the plaintiff's copyright as a piece of quasi-public property."<sup>139</sup>

Rather, Teitelbaum J.'s engagement with *Commonwealth* provided further support for his conclusion that the use of copyrighted expression, as private property, constitutes prohibited expression. As he noted:

Chief Justice Lamer in *Commonwealth*, supra, stated that the necessary balancing of the parties' interests in cases of a party asserting the right to use public property occurs before the

<sup>136</sup> *Reference re ss 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1182.

<sup>137</sup> *Ibid.* at 1182. Scassa writes that "to deny employees the right to parody the most powerful and evocative symbols which the public associates with the employer is to place a substantial limitation on their right to disseminate information about their labour dispute." (Scassa, "Intellectual Property on the Cyber-Picket Line: A Comment on *British Columbia Automobile Assn v. Office and Professional Employees' International Union, Local 378*" at 960).

<sup>138</sup> *Montréal (City)* is now the dominant SCC authority in this area.

<sup>139</sup> *Michelin* at [96].

section 1 analysis. I have expanded this principle to conclude that a similar but stricter balancing of interests is to occur if the party, like the defendants in the case at bar, asserts the right to use private property.<sup>140</sup>

Seven judges of the SCC heard arguments in *Commonwealth*. Six judgments were handed down. Three of these judgments — those of Lamer C.J., McLachlin J. (as she then was), and L’Heureux-Dubé J. — set out distinct approaches to the question of whether and the extent to which section 2(b) of the *Charter* protects expression on public property. Teitelbaum J. focused his analysis on the approach outlined by Lamer C.J. on the basis of his view that Lamer C.J.’s approach had been applied most often in subsequent decisions.<sup>141</sup> Teitelbaum J. also applied the approach set out in McLachlin J.’s judgment, noting that both McLachlin J.’s approach and Lamer C.J.’s approach had the support of three SCC judges in *Commonwealth*.<sup>142</sup> Ultimately, Teitelbaum J. concluded — on the basis of both Lamer C.J.’s and McLachlin J.’s approaches — that the defendants’ expression is not protected under section 2(b) of the *Charter*.<sup>143</sup>

As I will argue in this part, the manner in which Teitelbaum J. applied both Lamer C.J. and McLachlin J.’s approaches from *Commonwealth* flows from and is consistent with both the author-centric approach to copyright as well as by the approach to freedom of expression under which it is accepted that property rights are insulated from the operation of the *Charter*. As such, Teitelbaum J.’s application of *Commonwealth* should not be followed by contemporary courts considering the intersection of the *Charter* right to freedom of expression and copyright.

### **(b) Lamer C.J.’s approach in *Commonwealth*, Applied**

Teitelbaum J. summarized Lamer C.J.’s approach in *Commonwealth* as follows:

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<sup>140</sup> *Ibid.* at [106].

<sup>141</sup> *Ibid.* at [97].

<sup>142</sup> *Ibid.* at [97]. Of the other four sets of reasons in *Commonwealth*, Teitelbaum J. mentioned LaForest J., Cory J. and Gonthier J.’s reasons only in passing. As well, he rejected the applicability of L’Heureux-Dubé J.’s approach on the basis that application of this approach would require him to accept the characterization of copyright as “quasi-public property” (a characterization that he rejected) (*ibid.* [96]).

<sup>143</sup> *Ibid.* at [87].

the Court, in determining the scope of the individual's right to free expression on government property under paragraph 2(b), should first balance the government's interest in public property with the individual's right to free expression on that property. Only if the expression is compatible with the primary function of the property is the expression within the protected sphere of paragraph 2(b).<sup>144</sup>

Applying this approach in the context of the defendants' unauthorized use of copyrighted expression, Teitelbaum J. wrote that:

If freedom of expression in a public forum is limited by such factors as the function of the place, the conditions and restrictions for using private property should be even stronger. By analogy to Chief Justice Lamer's reasoning on the use of public property, I hold that a person using the private property of another like a copyright, must demonstrate that his or her use of the property is compatible with the function of the property before the Court can deem the use a protected form of expression under the Charter.<sup>145</sup>

Teitelbaum J.'s description of the function of copyright as well as his characterization of the defendants' use of the specific copyrighted expression (Bibendum) were both shaped by his application of the author-centric approach to copyright. Teitelbaum J. described the function of copyright as to "present the original author's intent of a favourable corporate image or provide an incentive for compensating artists for the integrity of their vision."<sup>146</sup> This description is consistent with the author-centric approach to copyright, in that it both portrays copyright as being singularly focused on the rights of copyright owners, as well as emphasizing copyright owner control over the work's message. It is inconsistent, however, with the balanced approach to copyright, under which users have the right to engage in certain unauthorized uses of works,<sup>147</sup> some of which may disrupt, unsettle, or conflict with the intended message of the original author.

Teitelbaum J.'s discussion of the defendants' use of Bibendum also flows from his application of the author-centric approach to copyright. Throughout the course of his decision, Teitelbaum J.

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<sup>144</sup> *Ibid.* at [93].

<sup>145</sup> *Ibid.* at [105].

<sup>146</sup> *Ibid.* at [105].

<sup>147</sup> Including, as of 2012, the right to create fair parodies or satires.

portrayed the *CAW et al.*'s actions in a negative light, at one point analogizing their actions to an "infringer [who] asserted the right to copy or substantially reproduce [a] painting with a moustache."<sup>148</sup> Under a balanced approach to copyright, this characterization of the alleged infringer — as nothing more than a juvenile mischief-maker or vandal — would be inappropriate. As Paul Goldstein has written in relation to the intersection of the First Amendment and copyright in the United States:

Satisfaction of the public interest in access [to a diverse range of intellectual expression] requires adherence to what might appear to be a drastic perspective: that copyright infringement serves a healthy function and deserves to be encouraged. The infringer is, in any case, the sole proponent of the generalized interest in access; for courts to prejudice his position with assumptions of infringement's intrinsic badness would significantly impede vindication of the public interest.<sup>149</sup>

In Canada, the balanced approach to copyright should require courts to refrain from making "assumptions of infringement's intrinsic badness" in order to avoid "imped[ing] vindication of the public interest."<sup>150</sup> Under the author-centric view, however, as noted above, the public interest is not a relevant consideration. Under this view of copyright, the infringer represents not "the sole proponent of the generalized interest in access" but rather an individual whose actions threaten the interests of authors and their assigns — the parties whose interests the *Copyright Act* was designed to protect.<sup>151</sup>

Furthermore, Teitelbaum J. also presented the defendants' use as an appropriation of the plaintiff's copyright interest, writing that the defendants' actions "deprived the plaintiff of its property."<sup>152</sup> This statement suggests that copyright owners, as owners of private property, are entitled to control all uses of their copyrighted works save those explicitly provided for in copyright legislation (the

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<sup>148</sup> *Michelin* at [103].

<sup>149</sup> Paul Goldstein, "Copyright and the First Amendment" (1970) 70 *Colum. L. Rev.* 983 at 1055-56.

<sup>150</sup> *Ibid.* at 1056.

<sup>151</sup> *Ibid.* at 1056.

<sup>152</sup> *Michelin* at [98].

specific provisions of which are to be interpreted narrowly so as to not unfairly derogate from owners' private property rights).<sup>153</sup>

Although consistent with the author-centric approach to copyright, this statement is inconsistent with the balanced approach to copyright, under which many unauthorized uses of copyrighted expression are seen not as deprivations of a property interest but as acts that both advance the public interest and that are considered users' rights. As such, this aspect of Teitelbaum J.'s decision should also be rejected by contemporary courts considering the intersection of the *Charter* right to freedom of expression and copyright.

**(c) McLachlin J.'s Approach in *Commonwealth*, Applied**

Teitelbaum J. summarized McLachlin J.'s approach in *Commonwealth* as follows:

Justice McLachlin held at page 229 [of *Commonwealth*] that the right of free expression on government property is not a given and must meet certain conditions. At pages 238-239, Justice McLachlin specified that the individual asserting such a right of access has to prove that the expression furthers one of the purposes of free expression first defined in *Irwin Toy*, supra, at page 976 as: (i) seeking truth; (ii) fostering participation in the organs and means of social and political decision-making; and (iii) enhancing the diversity of the means of individual self-fulfilment.<sup>154</sup>

Although stating that “this test from *Commonwealth* is not directly applicable to the case at bar since it concerns the use of public property as a forum for expression,” Teitelbaum J. proceeded with his application of McLachlin J.'s approach on the basis that “it elaborates a helpful principle for distinguishing the nature of the parties' interests in this case” (namely the question of whether the defendants' use is consistent with the values underlying freedom of expression).<sup>155</sup> In so doing, the impact of the author-centric approach on Teitelbaum J.'s articulation of the intersection of the *Charter* right to freedom of expression and copyright is again made clear.

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<sup>153</sup> *Bishop* at 479.

<sup>154</sup> *Michelin* at [92].

<sup>155</sup> *Ibid.* at [98].

While acknowledging that “there was certainly a link between the defendants’ leaflets and brochures that *did not* depict the ‘Bibendum’ and the value of expression enhancing participation in social and political decision-making” (emphasis added), Teitelbaum J. rejected the idea that the CAW *et al.*’s use of Bibendum furthered the purposes underlying freedom of expression.<sup>156</sup> In particular, Teitelbaum J. focused on the third purpose of freedom of expression identified in *Irwin Toy*, stating that:

The defendants had no need to adopt a form of expression, the use of copyrighted material, that deprived the plaintiff of its property and actually subverted the third value of promoting the diversity of ideas. In other words, if copyright is not respected and protected, the creative energies of authors and artists in furthering the diversity of ideas will not be adequately compensated or recognized.<sup>157</sup>

This conclusion flows from Teitelbaum J.’s application of the author-centric approach to copyright. Under a system where the singular goal of copyright is to protect and reward authors, and where the primary mechanism of doing so is by granting authors broad rights of control over copyrighted works and over the authors’ message contained therein, then maintaining copyright owner control over copyrighted works — for instance by enjoining unauthorized uses of works such as the CAW *et al.*’s modified version of Bibendum — is critical to ensuring both creativity and diversity of ideas.

Teitelbaum J.’s characterization of CAW *et al.*’s use of Bibendum as an attack or an act of vandalism is consistent with such an approach to copyright. It is inconsistent, however, with the balanced approach to copyright, under which it is accepted that non-copyright owning parties have broad rights to engage in unauthorized uses of copyrighted works, and that creativity is fueled not only by providing robust protection for copyright owners’ rights (see *Cinar Corp.*,<sup>158</sup> for instance) but also by providing robust protection for users’ rights.

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<sup>156</sup> *Ibid.* at [98].

<sup>157</sup> *Ibid.* at [98].

<sup>158</sup> *Cinar*.

**(d) Second *Michelin* Approach: Any Infringement is Justified Under a Section 1 Analysis**

In the previous section, I argued that the first *Michelin* approach to the intersection of the *Charter* right to freedom of expression and copyright, as articulated by Teitelbaum J., relies upon and was shaped — in a number of ways — by Teitelbaum J.’s application of the now-abandoned author-centric view of copyright in concert with an approach to freedom of expression, now foreclosed, under which it is accepted that property rights are insulated from operation of the *Charter*.

In a similar manner, Teitelbaum J.’s application of the second *Michelin* approach, under which any conflict that may exist between copyright and the section 2(b) right to freedom of expression is defused by mechanisms internal to copyright, at least to the point of satisfying a section 1 analysis,<sup>159</sup> has also been shaped by these now-rejected conceptions of both copyright and of freedom of expression. As such, as is the case with the first *Michelin* approach, Teitelbaum J.’s analysis, which led him to the conclusion that “sections 3 and 27 of the Copyright Act are ‘reasonable limits prescribed by law . . . demonstrably justified in a free and democratic society’,” should also be rejected by contemporary Canadian courts considering this intersection.<sup>160</sup>

As described above, under the *Irwin Toy* test, once it is determined that a government action infringes section 2(b) in purpose or effect, and that there is no reason to exclude the expression from the scope of protection under the *Charter*, the onus shifts to the government to justify the infringement under section 1 of the *Charter*. Teitelbaum J. summarized the section 1 test as follows:

There are three prongs to what Chief Justice Dickson in *Oakes*, at page 139, called the proportionality test: (i) rational connection of the law’s objectives to the means; (ii) minimal impairment of the infringed *Charter* right; and (iii) proportion in the effects of the means and the objectives.<sup>161</sup>

As I will describe in further detail below, Teitelbaum J.’s application of each of these three prongs was shaped by his

<sup>159</sup> *Michelin* at [109]-[111].

<sup>160</sup> *Ibid.* at [109].

<sup>161</sup> *Ibid.* at [110].

adoption of now-abandoned approaches to both copyright and to freedom of expression.<sup>162</sup>

(i) *There is a Rational Connection Between the Law's Objectives and the Means Chosen to Achieve those Objectives*

In *Michelin*, Teitelbaum J. accepted that “the objectives of the *Copyright Act* are rationally connected to an action for copyright infringement” on the basis that a link exists “between the goal of protecting the interests of authors and copyright holders” and the means of achieving this goal, namely “by granting [authors and copyright holders] a monopoly on the right to use and reproduce their works and the ability to enforce those interests in an action for copyright infringement.”<sup>163</sup>

Teitelbaum J.’s application of the rational connection part of the proportionality test was shaped in two ways by his adoption of the author-centric approach to copyright. First, Teitelbaum J.’s statement that the objectives of the *Copyright Act* are to “protect[] the interests of authors and copyright holders” is consistent with the author-centric view of copyright, under which the sole purpose of copyright is to protect and reward authors and their assigns.<sup>164</sup> Conversely, this statement is inconsistent with the conception of copyright currently endorsed by the SCC as the correct approach (the balanced approach), under which the reward granted to copyright owners must be balanced with both users’ rights and the public interest.<sup>165</sup>

Second, Teitelbaum J.’s description of the means of achieving these objectives, namely by granting authors and copyright holders “a monopoly on the right to use and reproduce their works” — is also consistent with an author-centric approach to copyright.<sup>166</sup> Specifically, Teitelbaum J.’s use of the term “monopoly”,

<sup>162</sup> This statement is given support by Craig, who writes that “the court’s treatment of the s. 1 analysis was . . . distorted by its proprietary characterization of copyright and its singular concern with the rights of the copyright owner” (Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” at 91).

<sup>163</sup> *Michelin* at [111].

<sup>164</sup> *Ibid.* at [111].

<sup>165</sup> Bailey writes that “the SCC’s decisions in *Théberge* and *CCH* demonstrate that the [Copyright] Act’s purposes relate to more than just compensating authors” (Bailey at 146).

<sup>166</sup> *Michelin* at [111].

particularly in the absence of any language confirming the rights of non-copyright owning parties to make certain unauthorized uses of copyrighted works, or acknowledging that copyright owners' rights are limited (language which might be expected should the balanced approach be applied), is rooted in an approach to copyright that is focused solely on the private rights of copyright owners.<sup>167</sup> As well, the use of the term monopoly without any qualifiers such as limited or statutory, for instance, suggests an expansive approach to copyright owners' rights that, although consistent with the author-centric approach to copyright, is inconsistent with the balanced approach.

(ii) *The Impugned Provisions are Minimally Impairing of the Defendants' Rights*

With respect to the second prong of the section 1 analysis, Teitelbaum J. determined that the impugned provisions of the *Copyright Act*, if they are held to infringe the defendants' *Charter* right to freedom of expression, are minimally impairing of the defendants' rights. He reached this conclusion on the basis that the *Copyright Act* permits "attacks on the authors of works or their ideas," that "infringers" may reproduce parts of works that are not substantial without attracting liability, and that the *Copyright Act* contains exceptions to copyright infringement set out in subsections 27(2) and (3).<sup>168</sup>

Like his application of the rational connection test, Teitelbaum J.'s application of the minimal impairment part of the proportionality test was also shaped by his adoption of the author-centric approach to copyright. For instance, Teitelbaum

<sup>167</sup> For instance, Teitelbaum J.'s statement can be contrasted with the SCC's judgment in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 (S.C.C.) [*Reference re Broadcasting Act*, S.C. 1991 (Canada)] at [36], in which Rothstein J., in his majority judgment, wrote that "[t]he *Copyright Act* is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions."

<sup>168</sup> *Michelin* at [111].

J.'s statement that the *Copyright Act* permits "attacks on the authors of works or their ideas,"<sup>169</sup> a statement made in support of his conclusion that the *Copyright Act* minimally impairs the rights of non-copyright owning parties, suggests that he viewed the CAW *et al.*'s unauthorized use of the copyrighted Bibendum design as an attack — an aggressive, anti-social and violent act that should be given social sanction — as opposed to a legitimate attempt to convey a critical message. This view of the CAW *et al.*'s use of Bibendum is consistent with an approach to copyright focused squarely on the rights of authors and their assigns, and under which unauthorized use is portrayed as both an unjustified trespass and as an act that does lasting damage to the plaintiff's copyright.<sup>170</sup> It is inconsistent with the balanced approach to copyright, under which users are seen as having the right to engage in certain unauthorized uses of copyrighted works.<sup>171</sup>

As well, Teitelbaum J.'s statement that "[c]opyright . . . minimally impairs the defendants' right of free expression by the very well-tailored structure of the *Copyright Act* with its list of exceptions in subsections 27(2) and (3)" is also consistent with an author-centric approach to copyright.<sup>172</sup> Nowhere in his decision does Teitelbaum J. discuss how the exceptions in subsections 27(2) and (3) contribute to or support the expression interests of non-copyright owning parties, or which aspects of these exceptions are particularly important (or essential) in this regard.<sup>173</sup> Based on Teitelbaum J.'s comments, it appears as if it is the mere presence of exceptions to copyright infringement, rather than any particular aspect of them (or any particular exception) — alongside a need to

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<sup>169</sup> *Ibid.* at [111].

<sup>170</sup> See, for instance, Teitelbaum J.'s statement that "if the plaintiff loses its right to control the use of its copyright, there is little left to the plaintiff's right of private property" (*ibid.* at [106]).

<sup>171</sup> *SOCAN v. Bell* at [11].

<sup>172</sup> *Michelin* at [111].

<sup>173</sup> For instance, this part of *Michelin* can be contrasted with the SCC's decision in *SOCAN v. Bell*, in which Abella J. discussed, in detail, the important role played by defences in "furthering the public interest objectives of the *Copyright Act*" (*SOCAN v. Bell* at [11]).

give Parliament a “‘margin of appreciation’ in evaluating whether the impugned act minimally impairs the Charter right in question” — that is sufficient to persuade Teitelbaum J. that this aspect of the proportionality test is satisfied.<sup>174</sup>

This aspect of Teitelbaum J.’s decision is consistent with the author-centric approach to copyright, an approach to copyright focused squarely on the copyright owner, and under which exceptions to copyright infringement are seen as derogations from copyright owners’ rights. It is inconsistent, however, with the balanced approach to copyright, under which defences to copyright infringement are seen as users’ rights, or as elements essential to the proper functioning of the *Copyright Act*.<sup>175</sup>

(iii) *The Benefits of the Impugned Provisions of the Copyright Act Outweigh their Deleterious Effects*

Last, Teitelbaum J. held that the benefits of the impugned provisions of the *Copyright Act* outweigh their deleterious effects. In his judgment, Teitelbaum J. described the benefits of the impugned provisions as providing protection for authors and helping to “compensate[] [and] recognize[]” the “creative energies of authors and artists in furthering the diversity of ideas.”<sup>176</sup> This articulation of copyright’s benefits, which focuses solely on the ways through which copyright protects authors and rewards their creativity, flows from and is consistent with an author-centric view of copyright. No mention is made, for instance, of the benefits of the impugned provisions for a vibrant public domain, or the public interest more generally, as would be expected under a balanced approach.<sup>177</sup>

<sup>174</sup> *Michelin* at [111]. Bailey suggests that “the SCC’s subsequent decision in *Dunmore* casts doubt on *Michelin*’s conclusion that courts should defer to Parliament in analysing the constitutionality of the Act” (Bailey at 151).

<sup>175</sup> Bailey writes that “[t]he simple assertion that the limitations on copyright included in the Act necessarily demonstrate minimal impairment would, since *Théberge*, arguably demand greater scrutiny” (Bailey at 151). She also suggests that “[a]pplication of subsequent decisions of the SCC suggest that future analysis of this element of the section 1 test will not necessarily yield results so favourable to Parliament” (*ibid.* at 150). Relying in particular on *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (S.C.C.), I make a similar argument in Reynolds, “Reconsidering Copyright’s Constitutionality.”

<sup>176</sup> *Michelin* at [98].

<sup>177</sup> In *Théberge*, for instance, Binnie J. wrote that “[e]xcessive control by holders of

In describing the deleterious effects of the impugned provisions, Teitelbaum J. wrote that:

The plaintiff offered into evidence a wealth of union anti-Michelin pamphlets and brochures that did not use the plaintiff's property in violation of the Copyright Act. (Exhibit P-26). A prohibition on using the plaintiff's 'Bibendum' copyright does not therefore create undue hardship for the defendants in conveying their message to the Michelin workers.<sup>178</sup>

In implying that undue hardship might only be found where there is no other way through which a party could convey a message except through the unauthorized use of copyrighted expression, this passage is consistent with the author-centric view of copyright: one focused solely on the interests of authors and their assigns, and under which users' rights or the public interest are not relevant considerations.

It is inconsistent, however, with the balanced approach to copyright, under which non-copyright owning parties have rights to engage in certain unauthorized uses of works, and under which the "proper balance between protection and access" is a core copyright consideration.<sup>179</sup>

## 5. CONCLUSION

*Michelin* is a case firmly rooted in the era in which it was heard and handed down. Presented with arguments that core provisions of the *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression, and in the absence of governing authority directly on point, Teitelbaum J. adopted a conception of copyright that at the time arguments in *Michelin* were being heard had been endorsed by the SCC as the correct approach to copyright (the author-centric view). Teitelbaum J. also relied on and sought

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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" (*Théberge* at [32]).

<sup>178</sup> *Michelin* at [98].

<sup>179</sup> *SOCAN v. Bell* at [11]. Bailey argues that "particularly in light of the dual legislative objectives articulated by the SCC in *Théberge*", Teitelbaum J.'s judgment in *Michelin* "may both underestimate the deleterious impacts of the Act on free expression and overestimate its efficacy in achieving its objectives" (Bailey at 155).

assistance from decisions handed down by leading Canadian courts that had considered the question of whether and the extent to which the section 2(b) right to freedom of expression protects expression on private and public property, and that can be read as suggesting that private property is insulated from *Charter* scrutiny. Teitelbaum J.'s adoption of these conceptions of both copyright and freedom of expression played a critical role in shaping both *Michelin* approaches to the intersection of the *Charter* right to freedom of expression and copyright.

In the years since *Michelin* was handed down, a number of developments have occurred with respect to Canadian copyright jurisprudence. Beginning in 2002, for instance, the SCC began to move away from the author-centric view of copyright in favour of a balanced approach under which the rights of copyright owners are acknowledged to be limited, and must be balanced with the public's interest in accessing and using expression.<sup>180</sup> In 2012, the author-centric view was referred to by the SCC as the “former framework” for copyright.<sup>181</sup>

As well, in the years since *Michelin* was handed down, the SCC has provided further clarity with respect to specific aspects of the section 2(b) analysis, including the question of whether and the extent to which expression may be excluded from the scope of section 2(b) on the basis of its location, as well as the basis on which this determination is to be made. It is now clear that the reason why private property rights are generally excluded from *Charter* scrutiny is because of the absence of government action, and not because of any special characteristic of property that insulates it from *Charter* scrutiny.<sup>182</sup>

Despite these judicial developments, however, Canadian courts have continued to cite, on a regular basis over the past two decades, to the conclusions reached in *Michelin* with respect to the relationship between the *Charter* right to freedom of expression and copyright; conclusions which rely on and have been shaped by conceptions of both copyright and of the *Charter* right to freedom of expression that although once valid, have now been rejected.

In this article, I have argued that it is no longer acceptable for Canadian courts, when faced with arguments that specific

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<sup>180</sup> *SOCAN v. Bell* at [9].

<sup>181</sup> *Ibid.* at [9].

<sup>182</sup> *Montréal* at [62].

provisions of Canada's *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression, to dismiss these arguments on the basis that they have been addressed, and settled, in *Michelin*. Shaped as they have been by now-abandoned conceptions of both copyright and of freedom of expression, the *Michelin* approaches to the intersection of the *Charter* right to freedom of expression and copyright are no longer good law.

If not the *Michelin* approaches, then what? How should the relationship between the *Charter* right to freedom of expression and copyright be structured? A fulsome explanation of the different ways through which the relationship between the *Charter* right to freedom of expression and copyright could be structured using contemporary articulations of both freedom of expression and copyright is beyond the scope of this article.<sup>183</sup> Rather, the goal of this article has been to create a space within which such reconsideration can occur by demonstrating the extent to which the *Michelin* approaches to the intersection of the *Charter* right to freedom of expression and copyright have been shaped by now-abandoned conceptions of both copyright and of freedom of expression; and, as a result, to highlight the inappropriateness of courts' continued reliance on *Michelin* as authority in this area.

Too much is at stake, with respect to the intersection of the *Charter* right to freedom of expression and copyright, to assume that with the passage of time, *Michelin* will fall out of favour. While copyright supports, encourages and incentivizes the creation and dissemination of expression, it has also been used by governments, corporations, institutions and individuals, to stifle expression.<sup>184</sup> To the extent to which *Michelin* prevents *Charter* challenges from moving forward, in the context of copyright, due to now-abandoned approaches to both copyright and to the *Charter* right to freedom of expression, it must be explicitly rejected.

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<sup>183</sup> Several alternatives to the *Michelin* approaches to the intersection of freedom of expression and copyright have already been proposed. See, for instance, Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright" at 492; Fewer at 184; Craig, "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright" at 76; Amani at 44-45.

<sup>184</sup> See Part 2, above.

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