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Spectre: Canadian Copyright and the Mandatory Tariff - Part II

Ariel Katz

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Canadian copyright collectives and the Copyright Board have in recent years advanced the theory that when the Board certifies collectives' tariffs (or fixes the royalties in individual cases), those tariffs become mandatory on users. Users have no choice whether to deal with the collective; they must pay the specified royalties as long as they make a single unauthorized use of a work from the collective's repertoire. Many users, for some strange reason, have also subscribed to this view, despite its extraordinary consequences.

This is a second article in a series of two. The previous article showed that the "mandatory tariff" theory cannot, as a matter of statutory interpretation and in light of the case law, withstand scrutiny. This article shows that in addition, construing the Act in accordance with the "mandatory tariff" theory gives rise to numerous practical challenges, conceptual puzzles, procedural nightmares, and constitutional headaches, each of which should weigh the scales against it. In contrast, the "voluntary licence" theory avoids all these quandaries, and, in addition to being consistent with earlier case law, appears clear, simple, and coherent.

Ces dernières années, des sociétés canadiennes de gestion du droit d'auteur et la Commission du droit d'auteur ont proposé la théorie

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selon laquelle les tarifs des sociétés de gestion qui sont homologués par la Commission (et les redevances qu'elle détermine dans des cas individuels) lient les utilisateurs. Ces derniers n'ont pas le choix de faire affaire avec les sociétés de gestion et doivent payer les redevances applicables s'ils désirent faire un usage unique non autorisé d'une œuvre faisant partie du répertoire d'une société de gestion. Pour quelque raison étrange, plusieurs utilisateurs ont également partagé cette opinion, malgré ses conséquences extraordinaires.

Cet article est le second d'une série de deux. Le précédent article démontrait que la théorie des «tarifs obligatoires » ne pouvait pas, dans la mesure où elle se rapporte à l'interprétation des lois et compte tenu de la jurisprudence, résister à l'analyse. Dans ce nouvel article, l'auteur démontre qu'en plus, interpréter la loi en tenant compte de la théorie des «tarifs obligatoires» ouvre la porte à de nombreuses contestations d'ordre pratique, des casse-tête conceptuels, des cauchemars en matière de procédure et des maux de tête constitutionnels qui devraient tous faire l'objet de critiques. En revanche, la théorie dite de la «licence volontaire» n'est pas sujette à conjectures et, en plus de correspondre à la jurisprudence antérieure, apparaît comme étant claire, simple et cohérente.

1. INTRODUCTION

This is a second in a series of two articles discussing the spectre of the "mandatory tariff." In *Spectre I*,[1] I argued that the notion of a "mandatory tariff", namely, the view, promoted by Canadian copyright collectives and the Copyright Board, that when the Board certifies collectives' tariffs (or fixes the royalties in individual cases), those tariffs become mandatory on users, is false. Under the "mandatory tariff" theory, users have no choice whether to deal with the collective; they must pay the specified royalties as long as they make a single unauthorized use of a work from the collective's repertoire. In *Spectre I*, I showed that the spectre of a "mandatory tariff" lacks any basis in law. Established case law debunks it, standard principles of statutory interpretation contradict it and the legislative history discredits it. An approved tariff creates a compulsory licence that interested users can avail themselves of, if they wish to obtain a licence, but it does not force users to

1 Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff - Part I" (2015) 27 I.P.J. 151 at 207-210 [Katz, "Spectre I"].

become licensees. Copyright collectives can recover unpaid royalties only from users who offered to pay them and later default on their payment. I described this as the "voluntary licence" theory.

In this article, I assume for a moment that notwithstanding the analysis in *Spectre I*, the words of the *Copyright Act* still leave considerable ambiguity so that the "mandatory tariff" theory still remains plausible, at least linguistically. Following the court's recent decision in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*,[2] the assumption that such ambiguity exists has become purely theoretical. Still, as this article shows, construing the Act in accordance with the "mandatory tariff" theory gives rise to numerous practical challenges, conceptual puzzles, procedural nightmares and constitutional headaches, each of which should weigh the scales against it. In contrast, the "voluntary licence" theory avoids all these quandaries, and, in addition to being consistent with earlier case law, appears clear, simple and coherent.

2. UNINTENDED CONSEQUENCES

(a) Example: Opt Out University

To illustrate the various challenges that the mandatory tariff theory raises, consider a hypothetical Canadian university, which, like most Canadian universities used to obtain a licence from Access Copyright (or Copiebec, in Quebec), but has decided not to renew it. Let us call it OptOut U.

Now, OptOut U is not a rogue university. It is an established university with 50,000 students and 5,000 full-time faculty members. It decided to operate without a licence from a CMO, not out of ignorance or disregard of the law but after careful consideration. Like many Canadian universities (including the University of British Columbia and the University of Toronto), it concluded that after "the passage of the *Copyright Modernization Act*, the Supreme Court of Canada's 2012 copyright rulings, technological change, changes in the scholarly publishing world, and the broadening reach of open access initiatives (among other

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2 2015 SCC 57, paras 101-13.

developments),"[3] obtaining an additional licence from Access Copyright and paying its requested fees makes little sense.

Prior to reaching this conclusion, OptOut U found that the vast majority of materials that its instructors, researchers, students and staff use have already been fully licensed and dearly paid for, under licensing agreements that it has entered into with most academic and other publishers, either directly or through various intermediaries. It also concluded that in many cases (albeit not all) the copying that takes place involves reproducing an insubstantial part of the work in question (hence, non infringing) and that, in many other cases, even if the reproduction is of a substantial part, it would nonetheless be considered fair dealing, and it has implemented a new copyright policy and new fair dealing guidelines.[4] OptOut U acknowledges it cannot guarantee that every reproduction made on campus would be non-infringing, but it has been comforted by the Supreme Court's holding that if it were sued for copyright infringement and would like to rely on fair dealing, it would not have to show that each copy was fair, but "need only prove that [its] own dealings with copyrighted works were for the purpose of research or private study and were fair. [It] may do this either by showing that [its] own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair."[5]

OptOut U realizes the ambiguity that surrounds the concepts of "substantial part," or "fair dealing," and that a court's determination of these questions might be different than its own. It also understands that some individual staff, faculty and students might not always follow its policies, and that a court might find it liable for having "authorized" these reproductions, however unlikely.[6] In other words, OptOut U cannot rule out that: (a) among the tens of thousands students, staff and faculty, most of which reproduce works almost on a daily basis, at least one (and

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3 Cheryl Misak, Letter from Cheryl Misak, Vice President and Provost, University of Toronto, to Roanie Levy, Access Copyright (6 June 2013), online: <http://arielkatz.org/wp-content/uploads/2013/06/Access-Copyright-U-of-T-Misak-to-Levy-June-7-20132.pdf>.

4 See *e.g.*, Scholarly Communications & Copyright Office, University of Toronto Libraries, online: <http://onesearch.library.utoronto.ca/copyright/home>.

5 *CCH Canadian Ltd.v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at para. 63 (S.C.C.).

6 *Ibid*. at paras. 39-46.

possibly more than one) infringing copy will be made; and (b) that it might be held liable for making or authorizing this infringement.

Nevertheless, OptOut U still believes that obtaining a licence from Access Copyright makes little sense. First, it has always suspected that Access Copyright's repertoire is not as extensive as Access Copyright claims it is — a suspicion that the Copyright Board has confirmed recently.[7] This means that it cannot avoid all liability by paying licence fees to Access Copyright: a licence from Access Copyright applies only to works the owners of which have authorized Access Copyright to act on their behalf, but not to others. Second, Access Copyright's licence does not cover all uses made with the works in its repertoire. For example, it permits copying of up to 10 per cent of a work, meaning that copying beyond this limitation is not covered by the licence, and hence potentially infringing.[8] Finally, it has been advised that in the unlikely event that it would be held liable for copyright infringement, as of 2012, the non-commercial nature of most of its activities cap its exposure to statutory damages at $5,000. Under those circumstances, OptOut U reckoned that not only a licence from Access Copyright provides it with very little benefit, it would also require it to comply with onerous reporting, monitoring and incur additional compliance costs. It believes there are better purposes in furtherance of its public mandate for which its limited resources could and should be used for.

Let us assume now that the Board certified Access Copyright's Proposed Tariff and set the royalties as $35 per FTE student annually. This means that if the "mandatory tariff" theory holds true, even a single act of reproduction for which OptOut U could be held liable would trigger liability for paying the royalties under the

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7 Copyright Board of Canada, Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire [Provincial and Territorial Governments — 2005-2014] (22 May 2015), at paras. 138-140, online: <http://www.cb-cda.gc.ca/decisions/2015/DEC-2015-03-22.pdf>.

8 Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013, (12 June 2010) Can. Gaz. I (Supplement). See also Access Copyright, Provincial and Territorial Governments — 2005-2014, *supra* note 7 at para. 171. It does not mean that copying beyond 10 per cent is infringing: the copied part might still be insubstantial, or constitute fair dealing. However, if under the logic of the licence copying even less than 10 per cent requires a licence, then any licensee who buys into this logic would assume that *a fortiori* it would be an infringement to copy more than 10 per cent.

approved tariff.[9] Notwithstanding its good faith efforts to ensure compliance with the law, irrespective of the millions of dollars it pays for licences from publishers (and which Access Copyright claims constitute part of its repertoire), and regardless of the rulings of the Supreme Court and amendments by Parliament, a single unauthorized reproduction would oblige OptOut U to pay Access Copyright's annual fee of $1.75 million. Paradoxically, OptOut U would be in a worse position than Rogue U, who simply ignored the law. Under the "mandatory tariff" theory, both OptOut U and Rogue U would be equally liable under the tariff, except OptOut U would already have paid out significant licence fees directly to publishers.

OptOut U believes this is an absurd result that Parliament could not have intended. It is right.

(b) Double Dipping

In *CBC v. SODRAC*, the FCA recognized that when CBC broadcasts programs (and makes ephemeral copies) that incorporate works of SODRAC members who granted a *through-to-the-viewer* license, paying royalties to SODRAC under a blanket licence would result in double payment. The FCA agreed that CBC should not pay twice, but concluded that the solution lies in an appropriate "discount formula . . . designed to give the Broadcasters credit when they broadcast a program in which the producer has in fact obtained a through to the viewer licence . . .."[10]

A similar problem arises when a user is compelled to pay a fee for a blanket licence even though many of its uses are not infringing and do not require any licence (*e.g.*, they constitute fair dealing). In theory, a modified "mandatory tariff" theory could call for a similar discount formula that would give the user credit for uses that fall under fair dealing or another exception.

However, a discount formula only offers a charade of a solution. First, it compels the user to deal with the CMO even when the user can comply with the Act without a licence from the CMO. Second, one of the advantages of dealing with a CMO is the ease and convenience of the CMO's blanket licence, compared to

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9 Statement of Claim: *Access Copyright v. York University*, (Court File T-578-13) (8 April 2013) at para. 19, online: <http://www.scribd.com/doc/134926954/AC-v-York-Statment-of-Claim-T-578-13-Doc1>.

10 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2014 FCA 84 at para. 70.

the transaction costs that dealing with the copyright owners themselves entail. Thus, when a licence from a CMO is available, a user will prefer negotiating directly with the copyright owner and forgo the ease of dealing with a single CMO only if it can achieve significant cost savings (for example, because the user only needs a small subset of the CMO's repertoire, or the CMO's licence, while convenient, is too expensive, or it comes with too onerous conditions). But if a tariff is mandatory and paying royalties for a blanket licence from a CMO is the starting point, the user may not achieve any cost savings even if it can get credit for licence fees that it paid directly to the copyright owners. In some cases, the user might even end up paying more.

Suppose that a CMO administers 10 works and the fee for a blanket licence is $1,000. The user, knowing it would only use five works, negotiates separate licences with four copyright owners for $100 each. The fifth copyright owner assigned her copyright to the CMO, or would only grant a licence through it. If the user wants to use the fifth work, the CMO would still demand $1,000, from which it would give a discount with respect to works that had been licensed separately ($400 in this example). To benefit from the discount formula, the user would have to demonstrate that it secured licences to the other four works, and would probably have to disclose to the CMO the copyright owners with whom it had negotiated with and how much it agreed paying them. Even with a perfect discount formula and a perfectly regulated CMO, the user's $400 credit on the $1,000 blanket licence still adds up to $1,000, leaving the user with no cost savings.[11] Adding the cost the user incurred in negotiating the separate licences, applying to get credit, negotiating, *etc.* the user ends up paying more. The user might as well pay for the blanket licence.

This demonstrates a larger issue: even though there is no market failure preventing owners and users from entering into licence agreements in a competitive setting, the CMO and its blanket licence discourage a competitive marketplace.[12] The user would pay $1,000 for licences, the market value of which is probably $500.

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[11] Another way to put it, in this example, the CMO's blanket licence effectively set the price of the fifth work at $600, compared to the market price of $100. The higher price does not represent a premium paid for the superior quality of the fifth work, but the CMO's monopolistic rent.

[12] Ariel Katz, "Copyright Collectives: Good Solution But for Which Problem?", in Harry First, Rochelle C. Dreyfuss & Diane L. Zimmerman, eds., *Working*

As I have shown elsewhere, at least in some cases, copyright owners have deliberately avoided through-to-the-audience (or source licensing) agreements with producers, not because of prohibitive transaction costs, but to collect monopolistic rents through CMOs, on top of the licence fees they have negotiated in a competitive market place.[13] This was one of the problems the Parker Report in 1935, and the Supreme Court in 2012, sought to rectify.[14] Solving it may require more than just voluntary licences — it may require a Copyright Board that has not been captured by the CMOs it is supposed to regulate, and a Competition Bureau willing to pay more attention to such issues. Nevertheless, the "mandatory tariff" theory only exacerbates the problem because, if a tariff can be imposed on users, their incentive to seek more competitive licensing alternatives, and the incentive of more entrepreneurial copyright owners to develop them, diminishes.

(c) Instruments of Oppression and Extortion (and offers that users can't refuse)

Preventing CMOs from charging excessive prices and otherwise abusing their monopolistic position is the raison d'être of the regulatory scheme.[15] In theory, the problem of supra-competitive licence fees would not exist because the Copyright Board has the power to ensure their reasonableness. However, regulatory oversight of CMOs is an imperfect solution. Even if the Board could set the "correct" reasonable price, users might still need to spend considerable resources on participation in the Board proceedings, which, in turn, would practically allow CMOs to charge a higher-than-reasonable price. Here's why.

Suppose that playing music generates a radio station profit of $10 million, and suppose that a CMO's repertoire includes all the music in which the station might be interested. The CMO presents

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Within the Boundaries of Intellectual Property: Innovation Policy For The Knowledge Society (New York: Oxford University Press, 2009) 395 at 425 [Katz, "Copyright Collectives"].

13 *Ibid*. at 408-15.

14 Katz, "Spectre I", *supra* note 1 at 207-210. See also Jeremy De Beer, "Copyright Royalty Stacking", in Michael Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa, Ont.: Ottawa University Press, 2013) 335.

15 *See* Katz, "Spectre I", *supra* note 1 at 171.

the radio station with a binary choice: either it obtains a licence from the CMO, plays music, and earns $10 million, or it cannot play any music and earns nothing or significantly less. This means that an unregulated CMO would offer the station a licence for slightly less than $10 million and siphon all of the station's profit.

Enter the Copyright Board, whose mandate is to set a reasonable fee for the licence. Now, suppose that the radio station and the CMO each estimate that the Board will ultimately find that the reasonable fee is only $3 million, but the Board proceedings would cost the parties $2 million each. In this case, the station and the CMO would be happy to settle for a fee of $5 million — not as high as $10 million, but still considerably higher than $3 million.

The "mandatory tariff" theory exacerbates this problem. If the fees that the Board approves can be imposed on the radio station (and potentially imposed retroactively after years of lengthy proceedings), the CMO would rationally propose a tariff requiring the station to pay substantially more than $10 million — say $15 million. Since any approved tariff exceeding $10 million, if imposed on the station, would devastate it (or even drive it to bankruptcy), the station, even if it estimates that it would be able to convince the Board to set the fee at the "reasonable" $3 million level, would be willing to spend up to $7 million to prevent the risk of being required to pay more than $10 million. Under such conditions, the station might as well agree to settle and pay slightly less than $10 million, the same licence fee that an unregulated CMO would charge. Thus, the "mandatory tariff" theory allows CMOs to hijack the regulatory scheme and turn it into an instrument of "oppression and extortion," and to place users at its "unrestrained mercies," contrary to Parliament's intent.[16]

Apparently, Access Copyright seems to have adopted such a strategy. It is pursuing two proposed tariff proceedings for higher education before the Board, despite the fact that it entered into Model Licences with the Association of Universities and Colleges of Canada (AUCC) and Association of Canadian Community Colleges (ACCC)[17] that allow any interested institution to obtain a

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16 *Canadian Performing Right Society Ltd. v. Vigneux*, [1943] S.C.R. 348 at 356 [*Vigneux*].

17 Since 2014 the organization had been known as Colleges and Institutes Canada (CICan).

licence at lower rates than those it asks the Board to approve. Apparently, it maintains the tariff proceedings to keep the threat of retroactive mandatory fees, hoping that universities and colleges that otherwise would have opted out, will sign the licence agreement.[18]

(d) Mandatory Tariffs Encourage Artificial and Opportunistic Licensing Schemes

Section 3 of the Act grants copyright owners a bundle of three distinct and exclusive rights, each covering different modes of exploitation. Subsection 13(4) makes it clear that an owner can license or assign each right to different persons, and may further divide or subdivide those rights and permissions. This malleability can allow owners to structure business models and customize their licences in a way that increases total welfare by maximizing not only their private gain, but also the benefits for their users. But the divisibility of the copyright may also be exploited for double dipping: to increase the copyright owners' gain through anti-competitive schemes that artificially introduce, and then exploit, inefficiencies.

Market competition between copyright owners constraints their ability to develop double-dipping schemes. For example, if a film producer wants to incorporate a song in a movie and then distribute copies of the movie globally and allow theatre owners to perform it publicly, the producer would need to obtain a licence that covers all the necessary rights from the copyright bundle. As long as the songwriter retains those rights, the price that he will be able to charge for the bundle will depend on the work's relative value compared to other competing works, not on whether the songwriter agrees to grant one licence covering all the separate rights, or separate licences for each of the rights. If the user needs a full bundle and the owner will not give it (either in an attempt to charge a higher price or because he assigned parts of the bundle to another person) this would only make her work less attractive, and encourage the producer to choose another work.[19] This way, competition between copyright owners discourages inefficient unbundling of the separate exclusive rights.

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18 Ariel Katz, "The Best Possible Outcome for Universities, Really?" online: <http://arielkatz.org/archives/1673>.

19 Katz, "Copyright Collectives", *supra* note 12.

However, CMOs allow copyright owners to unbundle their copyright and implement inefficient and opportunistic double-dipping schemes, while avoiding the discipline of market competition. If the owner transfers parts of the bundle to CMOs, a user who needs permission to use the entire bundle would have to obtain one licence from the owner (priced at the competitive level) and another from the CMO (priced at a monopoly level). In theory, such a structure could allow the owners, collectively, to charge from users the same amount that they would charge if they were allowed to collude and fix their prices outright. This is exactly what happened in the movie business during the 1930s, until a U.S. court declared that "[a]lmost every part of the Ascap structure, almost all of Ascap's activities in licensing motion picture theatres, involve a violation of the anti-trust laws."[20] ASCAP was enjoined from administering the performing rights of works synchronized in movies, and its members were forced to grant those rights directly to producers. This requirement for "source licensing" was subsequently incorporated into the antitrust consent decree between ASCAP and the U.S. Department of Justice, which have established the regulatory oversight of ASCAP in the U.S.[21]

Those, or similar, concerns also troubled the 1935 Royal Commission in Canada. The Parker Report noted that "at least some music publishers have a source of revenue arising out of copyright other than that provided by the fees collected by the Performing Rights Society; . . . A strong impression is left that some persons have divided copyright into many parts — distinct in themselves — so that the right hand does not or cannot know what the left hand is doing. The manifold ramifications of the music taxes and fees by which the organized music industry has exacted millions of dollars from exhibitors and motion picture producers may become the subject of broad federal regulation in the United States of America"[22] (and they did). Its major recommendation, the

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20 *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp 888 at 893 (S.D. N.Y., 1948).

21 Katz, "Copyright Collectives", *supra* note 12; Glynn Lunney, "Copyright Collectives and Collection Societies: The United States Experience" in Daniel Gervais, ed., *Collective Management of Copyright and Related Rights* (Frederick, MD: Kluwer Law International, 2006) 311 at 350-51.

22 J. Parker, *Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, Limited, and Similar Societies* (Ottawa, ON: JO Patenaude, 1935) at 26 [Parker Report]. See also at 30, where among the complaints against CPRS, the Report mentions that CPRS was

creation of the Copyright Appeal Board, was aimed at addressing this mischief in addition to the setting of tariffs.[23]

As the court noted in *ESA*, when a single economic activity implicates more than one rights, devising licensing schemes that require users to deal with the owner as well as with a CMO, or with more than one CMO, undermines the rationale for allowing collective administration in the first place.[24] Similar concerns have convinced the Supreme Court of Israel in a recent case to limit the ability of owners to partially withdraw from the collective scheme, and they also lie at the heart of pending litigation between the online music service Pandora and ASCAP in the U.S. Likewise, the terms of a settlement of an antitrust class action filed by radio stations against SESAC (the small and hitherto unregulated CMO) include measures to prevent similar "double dipping" practices.[25]

These abuses are troubling enough even where tariffs are unquestionably not mandatory (*e.g.*, in the U.S., or Israel), but mandatory tariffs compound the abuse. If CMO can ask the Board to approve their licensing scheme and then impose them on users, it only encourages them to make artificial distinction between rights or uses and then convince the Board that those extra usage rights justify the payment of additional fees.

(e) Reducing Content Diversity, Hurting Authors and Small Publishers

CMOs frequently argue that they serve the interests of small and local creators, and thereby promote content diversity. Many local creators believe that, and some of them are happy to serve at the front of lobbying efforts to give CMOs more powers. Because

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receiving revenue from score charges and that performing rights were in reality a double charge.

23 *Ibid.* at 49.

24 *ACUM - Association of Composers and Music Publishers in Israel v. The Director-General of the Antitrust Authority*, 2012 CA 5365/11 at para. 11, decided Sept. 3, 2013, English translation available at: <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/ACUM%20v.%20EMI.pdf> citing Ariel Katz, "Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?" in Marcel Boyer, Michael Trebilcock & David Vaver, eds., *Competition Policy and Intellectual Property* (Toronto: Irwin Law, 2009) 449 at 461-463 [*ESA*].

25 *Radio Music License Committee, Inc. v. SESAC, Inc.*, 29 F.Supp.3d 487 (E.D. Pa., 2014).

CMOs can earn supra-competitive rents, they allow their members to earn money that they would not earn in a competitive market. Even if such an outcome is deemed desirable — by no means a trivial or obvious conclusion[26]— it is far from clear, however, that CMOs benefit all creators, or benefit them equally. Canada, with a relatively small population, is a net importer of cultural products, and the main beneficiaries of collective administration are large foreign producers, not small local creators.[27] If Canada wishes to support local creators, then grants, subsidies, tax credits and programs such as the public lending program, or legislation such as the *Status of the Artists Act*,[28] may be more targeted and effective.

Moreover, as Ivan Reidel has shown, CMOs may actually impoverish content diversity, reduce audience welfare and jeopardize the livelihood of less popular artists.[29] I have also explained why CMOs might encourage creation of more mediocre works,[30] and documented how historically, on more than one occasion, CMOs have abused their monopolistic position vis-à-vis authors and played a role in marginalizing minority groups.[31] Band and Butler have documented numerous other episodes.[32] The concerns of the Parker Report about the marginalization of Canadian creators provide another historical example.[33]

This marginalizing effect arises from a combination of at least two factors. First, CMOs do not necessarily want to be as inclusive as possible because inclusiveness means they have to share their monopolistic rents with a larger number of members. While adding

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[26] Ariel Katz, "Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?" in Marcel Boyer, Michael Trebilcock & David Vaver, eds., *Competition Policy and Intellectual Property* (Toronto, Ont.: Irwin Law, 2009) at 459-462 [Katz, "Commentary"].

[27] *E.g.*, Michael Geist, "Who Gets a Large Share of Access Copyright Education Licensing Revenues?: US Publishers Say They Do" online: <http://www.michaelgeist.ca/2014/02/ac-licensing-share/>.

[28] *Infra* Part 3.(d).

[29] Ivan Reidel, "The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses" (2010) 7 N.Y.U. J. L. & Bus. 731.

[30] Katz, "Commentary", *supra* note 25 at 460-61.

[31] Ariel Katz, "Monopoly and Competition in the Collective Administration of Public Performance Rights" (2006) 2:2 Haifa Law Review 551.

[32] Jonathan Band & Brandon Butler, *Some Cautionary Tales About Collective Licensing* (Rochester, N.Y.: 2013).

[33] Katz, "Spectre I", *supra* note 1 at 207-210.

more members increases the size of the CMO's repertoire and makes it more valuable, the marginal revenue from adding an additional work diminishes. Beyond a certain point, more members could mean less money for the current members.[34] Second, a blanket licence discourages development of alternative business models that could benefit some creators, especially those who produce less mainstream works. With a blanket licence from a large CMO, the user may pay a supra-competitive price, but it gets all-you-can-eat permission to use most mainstream works. With less money to spend, the user's incentive to pay additional fees for less mainstream work is diminished, which increases the barriers to entry that producers of those works face, or may force them to become dependent on the CMO.[35] This problem exists even when the CMO's licence is voluntary, but it becomes even more severe if a user can be compelled to deal with the CMO. Why would a user consider alternative licensing options if using a single work from the CMO's repertoire would require it to pay the same amount that it would pay if it used only works from the CMO's repertoire?

In sum, mandatory tariff requires users to pay for uses that do not require a copyright owner's permission and for works that may not be in the CMO's repertoire. It also encourages artificial and inefficient fragmentation of various rights, it enhances CMOs' monopolistic power, rather than controlling it and it may not only hurt users, but also some creators, thereby reducing cultural diversity. In the absence of clear indication, there is no reason to assume that Parliament intended to bring about such outcomes — it should be presumed not to.

3. CONCEPTUAL PUZZLES

The consequences of mandatory tariffs should be sufficient to prefer statutory construction that avoids them. But to be persuasive, the mandatory tariff theory also needs to overcome a few conceptual puzzles. I outline these puzzles below.

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34 Stanley M. Besen, Sheila N. Kirby &and Steven C. Salop, "An Economic Analysis of Copyright Collectives" (1992) 78 Va. L. Rev. 383 at 392-95.

35 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 at 25 (1979), Stevens J., dissenting.

(a) Infringement Action in Disguise and Double Recovery

Under the mandatory tariff theory, subsection 68.2(1) provides a remedy against users who used any work from the CMO's repertoire even though they never wished to obtain a licence. But, such users might be infringers, and as I note in *Spectre I*, the courts emphasized that the statutory remedy, now in subsection 68.2(1), applies to licensees who have failed to pay, not against infringers, and that infringers and licensees are the opposite of each other.[36] Therefore, the mandatory tariff theory stands for the strange proposition that the same provision applies simultaneously in contradictory situations.

But, more importantly, a user who has paid or offered to pay the royalties specified in an approved tariff cannot be sued for infringement. This is clear from the Act and the case law.[37] It is also clear the protection from charges of infringement does not and cannot apply to users who have not offered to pay the specified royalties. Does that mean a user who has not offered to pay can be sued twice: once for infringing the copyrights of the CMO or its member, and once for not paying the royalties specified in the approved tariff? This is puzzling, not only in light of Thorson J.'s emphasis in *Sandholm* that "a defendant cannot be the plaintiff's licensee to perform its copyright musical works and at the same time infringe its copyright in them,"[38] but also because in some cases (when copyright owners do not assign their copyright to the CMO), the user may be sued by two different entities and in separate proceedings: once by the CMO, as well as by the copyright owner itself. If this were possible, it would run against well-established principles in copyright law regarding who has standing to bring action. Only the owner of a copyright, or any person deriving a property interest in the copyright (*e.g.*, an exclusive licensee) can sue for infringement.[39] When the plaintiff is not the owner, the owner has to be made party to the proceedings[40] and the court is required to apportion any monetary award between the

36 Katz, "Spectre I", *supra* note 1 at 182 and 185.

37 See subsection 68.2(2) and section 70.17 and Katz, "Spectre I", *supra* note 1 at 206-7.

38 *C.A.P.A.C. v. Sandholm Holdings Ltd.* (1955), 24 C.P.R. 58 at para. 22 (Can. Ex. Ct.).

39 *Copyright Act*, R.S.C. 1985, c. C-42 at s. 41.23(1) [*Copyright Act*].

40 *Ibid.* at s. 41.23(2).

owner and the other person.[41] These are not technicalities. Rather, as the House of Lords held, these are safeguards protecting the defendant from being sued twice and held liable twice.[42]

Under the "mandatory tariff" theory, however, CMOs who might not have any proprietary interest in the copyright (such as Access Copyright) and could not bring any action for infringement could still sue infringers and seek a monetary award. This is puzzling not only because they could do that without joining the owner, and not only because it would be sufficient for them to prove one instance of infringement and become entitled to a monetary award that might exceed any award its members could get individually, but also because without joining the owners, the defendant remains exposed to additional lawsuits from the owners themselves.[43]

Moreover, the "mandatory tariff" theory necessitates a finding of at least one infringement of the copyright in one work from the CMO's repertoire, but the Act defines "infringement . . . in terms of the absence of consent and, consequently, proof of infringement requires proof of lack of consent. . . [This] can only mean that the plaintiff bears the burden of persuasion with respect to the lack of consent."[44] When the CMO is not the owner of the copyright, it can only prove that it, the CMO, had not given consent, but it cannot prove that the owner's consent had not been given in other ways. Similarly, if the user claims her dealing was fair, to defeat the claim, the plaintiff would have to show that the dealing harmed the market for the work.[45] These may be problems for CMOs, but on a more fundamental level, it is also a problem for users, because users' rights under the Act are not only substantive, they are also procedural. Just as users cannot be held liable for acts that are not exclusive to the owners, they also have the right not to be sued by persons who lack standing to sue, and they should not be required to defend themselves and answer allegations of infringement unless a proper plaintiff has proven all the elements of infringement. The

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41 *Ibid.* at s. 41.23(4).

42 *Performing Rights Society Ltd. v. London Theatre of Varieties Ltd.* (1923), [1924] A.C. 1 at pp. 31-32 (H.L.).

43 *Ibid.*

44 *Harmony Consulting Ltd. v. G. A. Foss Transport Ltd.*, 2012 FCA 226 at para. 31 (F.C.A.).

45 *CCH Canadian Ltd. v. Law Society of Upper Canada*, *supra* note 5 at para. 72.

"mandatory tariff" theory effectively deprives users of their procedural rights. It exposes them to lawsuits by persons who would not have standing to sue for infringement, and on the basis of proof of one infringement, be liable to pay amounts that were determined in other proceedings before the Board, and which might be grossly disproportionate to any wrong doing on their behalf or any actual damage that they might have caused.

None of these problems arise if the remedy of suing to collect the unpaid royalties under subsection 68.2(1) applies only against users who offered to pay the royalties that the Board has certified but default on their payment. The user in those cases is not an infringer, but a statutory licensee, and the basis for this statutory remedy isn't infringement of copyright, but failure to pay royalties that the user has undertaken to pay. Since the user cannot be sued for infringement (it is a licensee) it is not exposed to additional lawsuits from the copyright owners, and to the risk of double recovery.

(b) A Novel Form of Class Action in Disguise

CMOs might argue that Parliament intended to provide them the remedy of imposing a tariff on infringers precisely because it may be difficult for individual copyright owners to sue for infringement. Such an argument is flawed. First, it relies on one of the rationales for permitting collective administration (a practice that otherwise violates competition law), but ignores the whole scheme that Parliament actually created. Parliament has allowed copyright owners administer copyrights collectively by offering (regulated) licences, but it did not create a scheme that displaces copyright law and the rules of civil procedure and dispenses with the requirements of actions for infringement. If Parliament wanted to do that, it would have chosen language to that effect.[46]

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[46] See *Performing Rights Society Ltd. v. London Theatre of Varieties Ltd.*, *supra* note 42 (where the House of Lords did not consider the difficulties that PRS would face if it had to comply with the requirements for bringing action as sufficient grounds for ignoring those requirements); See also *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 (F.C.A.) (noting that "[i]n our legal system rights holders must normally take some action to vindicate their rights. When Parliament intends to make exceptions to the 'opt in' principle generally applicable to the collective administration of rights under the Act, as it has done for retransmission and private copying, it has expressly so provided." at para. 115).

Second, the "mandatory tariff" theory does not envisage a legislative scheme aimed to facilitate efficient licensing, but instead one designed to ensure that users pay the royalties specified by the Board no matter what — whether they are interested in obtaining a licence from the CMO or not. This view envisages a novel two-stage enforcement mechanism, essentially comprising an action by a class of copyright owners (who authorized the CMO to act on their behalf) against a class of defendants (the class of users as defined in each tariff). The first and most important stage in this strange form of class action takes place before the Board, in the form of tariff proceedings, during which the Board hears the case, and determines prospectively the type and the number of uses by members of the users' class that mandate payment, as well as what that total payment should be. In the second stage, equipped with this order (the approved tariff), the CMO can enforce it summarily in a court of competent jurisdiction against every member of the defendant class.

Moreover, not only does the first and most important stage in this mechanism take place before the Board, which is not bound by procedural and evidentiary safeguards that normally apply in court, it also requires the Board to determine liability in advance, not with respect to acts that have been committed but with respect to those that might be made in the future.

There is no reason to think that Parliament intended to create such a novel form of class action. If copyright owners face difficulties enforcing copyrights individually, they may bring class proceedings in the courts of all provinces and territories[47] as well as in the Federal Court.[48] True, recent case law reveals some difficulties in adjudicating copyright questions on a class basis.[49] However, these challenges for class plaintiffs in copyright cases

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[47] Jon J. Foreman & Genevieve Meisenheimer, "The Evolution of the Class Action Trial in Ontario" (2014) 4 W. J. Legal Stud. 1 at 2.

[48] *Federal Courts Rules*, SOR/98-106 at pt 5.1, online: <http://www.canlii.org/en/ca/laws/regu/sor-98-106/latest/sor-98-106.html#PART_5_1_CLASS_PROCEEDINGS_313374>.

[49] For example, in *Waldman v. Thomson Reuters Corp.*, 2012 ONSC 1138 (Ont. S.C.J.), leave to appeal refused 2012 ONSC 3436 (Ont. Div. Ct.), the court was willing to certify class proceedings to determine whether the defendant has a general defense, such as fair dealing, that can render the whole case moot, but held that establishing liability, and determining an appropriate monetary relief may not be suitable for determination on a class basis, and may require

reflect the imperatives of due process, and actually emphasize how strange it would be if the legal system that insists on those procedural safeguards in class proceedings would forgo them to benefit copyright owners. Moreover, it would seem even stranger if a statutory scheme adopted to constrain the power of "super-monopolies"[50] and prevent them from becoming "instrument[s] of coercion and oppression"[51] would somehow endow the same entities with super powers and free them from the constraints that the legal system imposes on ordinary mortals.

(c) Statutory Damages in Disguise

On several occasions, the Board approved an interim tariff (or interim licence in arbitration proceedings) under the peculiar theory that issuing an interim tariff is justified "to prevent a legal vacuum." According to the Board, "[a] vacuum or void exists when someone uses a repertoire without authorization or when copyright owners and users disagree on the need for a licence."[52] The Board interpreted its mandate as "[e]nsuring that what may be in breach of copyright definitely not be so, thereby avoiding that a collective be compelled to resort to lengthy and costly legal proceedings, [and this goal] may in itself justify issuing an interim decision."[53]

The Board's reference to a legal void is odd. The Supreme Court has referred mainly to legal voids or legal vacuums in constitutional cases, for example, when it suspends a declaration that an act of Parliament or a provincial legislature is invalid to allow the legislature to enact valid legislation.[54] Nothing of this magnitude exists when the Board does not approve a tariff. No legal void exists whatsoever when someone uses a work without authorization, or when copyright owners and users disagree on the need for a licence. If the copyright owner believes her copyright has been infringed,

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determination on an individual basis; See also *Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132 (2d Cir., 2013).

50 Parker Report, *supra* note 22 at 19.

51 *Vigneux*, *supra* note 16 at 354.

52 Copyright Board of Canada, Interim Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in Its Repertoire: Decision of the Board (23 December 2010) at para. 14, online: <http://www.cb-cda.gc.ca/decisions/2010/decision_of_the_board.pdf>.

53 *Ibid.*

54 *Hislop v. Canada (Attorney General)*, [2007] 1 S.C.R. 429 at para. 90 (S.C.C.).

she can sue the user. If the owner and user disagree on whether the user's activities infringe copyright, the owner may apply for a declaration of infringement, and the user may apply for a declaration of non-infringement.[55] There is no legal void when the Act works exactly as intended.

Apparently, the Board believes it should issue tariffs, even on an interim basis, to allow CMOs to impose them and avoid the need to bring infringement proceedings (which entail greater substantive and procedural requirements). This is reminiscent of the rationale for statutory damages, which Parliament introduced in 1997,[56] but with notable differences. According to the Board, copyright owners who choose to administer their copyrights collectively are not only spared the need to prove damages, they do not even need to prove that their particular copyrights have been infringed: they only need to prove that the copyright in one single work in the repertoire has been infringed. Under this theory, the user has to pay the amounts the Board has set, regardless of how many non-infringing or fully-paid-for copies were made.

The fact that Parliament introduced statutory damages in 1997, when it also expanded the scope of collective administration, makes this theory even more puzzling. Why would Parliament create two avenues for statutory damages: one under an act of Parliament and the other pursuant to decisions of an administrative tribunal? In the former, Parliament in section 38.1, set out the range of statutory damages, provided some guidance on how to implement them but left their determination in individual cases to the court's discretion, to ensure some proportionality between the statutory damages and actual damages.[57] In the latter, under subsection 68.2(1), the amounts are predetermined by the Board, and then imposed without regard to the actual circumstances of the case and without any proportionality to either the user's behaviour or copyright owners' actual damage.

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55 *Research in Motion Ltd. v. Atari Inc.*, 2007 CarswellOnt 5261 (Ont. S.C.J.), online: <http://canlii.ca/t/1slnp> retrieved on 2015-07-15>.

56 *Telewizja Polsat S. A. v. Radiopol Inc.* (2006), [2007] 1 F.C.R. 444 at para. 40 (F.C.); João Velloso & Mistrale Goudreau, "Punishment, Private Style: Statutory Damages in Canadian Copyright Law", in *Intellectual property for the 21st Century: Interdisciplinary Approaches* (Toronto: Irwin Law, 2014) 268 at 269.

57 Velloso & Goudreau, *ibid*. 268 at 274.

The puzzle only deepens when one considers the history of statutory damages for copyright infringement. Statutory damages existed in the British legislation until the late 19th century, when, in response to the abusive scheme employed by the infamous Mr. Thomas Wall — the first reported "copyright troll"[58] — the U.K. Parliament decided to remove the automatic statutory damages and leave their determination to the court's discretion.[59] In 1911, the U.K. Parliament removed statutory damages altogether. When Canada enacted its own *Copyright Act* in 1921, based on the 1911 U.K. Act, it did not include statutory damages. It took Parliament 76 years to (re)enact them, but within an additional 15 years, Parliament recognized the potential for abuse inherent in statutory damages, and began retracting by capping the total statutory damages that a non-commercial user may be ordered to pay for all infringements at $5,000.[60] Courts, too, have recently begun recognizing the potential for abuse.[61] It would be absurd to impute to Parliament intent to prevent abuse and allow it at the same time.

Subsection 38.1(4), however, deserves additional treatment. This provision, which applies only to Performing Rights Organizations (PROs), may have resulted in some unintended consequences. It provides that:

> Where the defendant has not paid applicable royalties, a collective society referred to in section 67 may only make an election under this section to recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just.

The drafters of subsection 38.1(4) designed it as a *limitation* on the amount of statutory damages that a PRO could recover. It provides that a section 67 CMO "may only make an election under this section to recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages" ranging between three and ten times the applicable royalties. This

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58 Brad A. Greenberg, "Copyright Trolls and Presumptively Fair Uses" (2014) 85 U. Colo. L. Rev. 53 at 68.

59 *Ibid.* note 49.

60 *Copyright Act*, R.S.C. 1985, c. C-42, s. 38.1(1)(b).

61 *Voltage Pictures LLC v. John Doe*, 2014 FC 161.

provision was not discussed during parliamentary debates, though some participants in the committee hearings made brief comments on it. These comments confirm they, too, considered it as a limitation on the amount of statutory damages that CMOs could recover.

For example, Marian Hebb, representing CANCOPY (now Access Copyright), lamented that as non-owner of the copyrights it administers, CANCOPY could not sue to recover statutory damages, and requested that section 38.1 be amended so CANCOPY could take advantage of it. She also asked to amend the ceiling of damages, explaining that "since CANCOPY sets its royalties in terms of pennies [per page], ten times is not really a very effective remedy. We ask that you at least give the court discretion to increase a damage award in appropriate circumstances."[62] Parliament paid no heed to the request. This, however, has not deterred Access Copyright from arguing, several years later, that subsection 68.2(1) gives it an ersatz remedy.

Mr. David Basskin, Executive Director of the Canadian Music Publishers Association, requested that Parliament remove subsection 38.1(4) altogether. He argued that the "proposed subsection 38.1(4) would impose an unjustified limitation on the availability of statutory damages where [CMOs are] involved."[63] This has not deterred CMOs from using this "unjustified limitation" as a very effective tool of dragooning users into paying unnecessary licence fees.

In a "Fact Sheet on Copyright Remedies," Industry Canada explains that subsection 38.1(4), in addition to encouraging users to obtain the appropriate licences beforehand,

> maintains proportionality between the value of a royalties [*sic*] (i.e. the loss incurred by the copyright owners) and the damages awarded. For instance: A licence to play taped music at a wedding might cost $60. The damages to be paid under subsection 38.1(4) would therefore range between $180 (3 x

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62 House of Commons, Standing Committee on Canadian Heritage, Evidence: Meeting No 38 (November 19, 1996) at 1115, online: <http://www.parl.gc.ca/content/hoc/archives/committee/352/heri/evidence/38_96-11-19/heri38_blk-e.html>.

63 House of Commons, Standing Committee on Canadian Heritage, Evidence: Meeting No 37 (November 7, 1996) at 1120, online: <http://www.parl.gc.ca/content/hoc/archives/committee/352/heri/evidence/37_96-11-07/heri37_blk-e.html>.

> $60) and $600 (10 x $60). The judge would determine the appropriate award within these two values based on the following factors: the good or bad faith of the defendant; the parties' conduct before and during the court proceedings; and the need to prevent other infringements of the copyright in question.[64]

In reality, SOCAN and Re:Sound have successfully turned subsection 38.1(4) into a draconian royalty-collection tool. They rely on the ambiguity of the phrase "applicable royalties" to force users into submitting to the "mandatory tariff" theory.

Subsection 38.1(4) can be interpreted in different ways:

1. It provides statutory damages to performing rights societies as a remedy for *copyright* **infringement**. The word "applicable" in "applicable royalties" refers to the royalties that **apply to the specific works** that a defendant publicly performs in an infringing manner. The unpaid approved royalties provide a measure of the copyright owners' loss, and the multiplier might be justified for deterrence. This interpretation consistent with the location of section 38.1 (in Part IV of the Act, under the heading "Infringement of Copyright and Moral Right"), and with the fact that section 38.1 itself opens with a reference to a copyright owner who may elect to recover statutory damages from infringers.

   The proportionality that the Industry Canada Fact Sheet mentions and the example that it provides echo this interpretation. However, note that the example impliedly assumes that all music that the user played would be included in the PRO's repertoire, and that playing it without a licence from the PRO constitutes infringement. This is only sometimes true. If, for example, the user was planning to play only or predominantly public domain music, or music composed by non-SOCAN members, or in circumstances that might be considered fair dealing, then SOCAN has not lost $60. Awarding even that amount, let alone multiplying it by a factor of three to ten results in a disproportionate penalty. To avoid that, the court could interpret the provision as requiring the PRO to demonstrate which of the works that the defendant has played infringed its copyrights, then prorate royalties under the tariff before multiplying them.

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[64] Industry Canada, *Archived—? Fact Sheet on copyright Remedies*, online: Industry Canada <http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/ip00090.html>.

Also note that if subsection 38.1(4) provides only a remedy against infringers of *copyright*, it may not apply to royalties collected by Re:Sound, because the section 19 *equitable remuneration* right is not a *copyright*, and therefore cannot be "infringed."[65]

2. Alternatively, subsection 38.1(4) might be interpreted as entitling PROs to recover multiplied statutory damages as a remedy against users who obtained a licence but failed to fully comply with its terms,[66] or even when the PRO and the user disagree on how the royalties under the tariff should be calculated.

3. Under a third interpretation, subsection 38.1(4) emboldens the mandatory tariff theory. The phrase "applicable royalties" refers to royalties that users are obligated to pay in accordance with the "mandatory tariff" theory. Those who fail to do so can be required to pay between three to ten times that amount. This interpretation ignores the location of this provision, its reference to "damages" and the elementary distinction between an infringer and a licensee.

4. Last, subsection 38.1(4) could be interpreted as applying to all of the above: as a remedy against infringers, as a remedy against shirking licensees and as a deterrent against users contemplating not to obtain a licence from a PRO.

PROs have thus far been successful in advancing the fourth interpretation.[67] They have also taken the view that even if the user

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[65] *Astral Media Radio Inc. v. Society of Composers, Authors & Music Publishers of Canada*, 2010 FCA 16 at para. 20 ("The performers and makers of sound recordings, the owners of "neighbouring rights", have no copyright in the recordings that they can protect from infringement by an action for breach of copyright. However, the Copyright Act confers on them a right to "equitable remuneration" as determined by the Copyright Board ... .").

[66] This is how Prof. Vaver, for example, appears to have understood this provision in 1997 when he wrote: "Collective societies also have a new made-in-Canada debt collection remedy: they can — with a few exceptions — recover 3 to 10 times the amount of any royalty a licensee has omitted to pay. Bad bookkeeping may mean a treble penalty; bad manners may mean a tenfold one," David Vaver, "The Copyright Amendments of 1997: An Overview" (1997) 12 I.P.J. 53.

[67] *Society of Composers, Authors & Music Publishers of Canada v. Kicks Roadhouse Inc.*, 2005 FC 528 (F.C.).

obtained a licence but the parties disagree on how the royalties under the tariff should be calculated, a user who decides unilaterally to remit lower royalties could be liable to pay the multiplied statutory damages.[68]

One could expect it would be easy to find jurisprudence analyzing a provision that the Federal Court described as a "rather extraordinary remedy,"[69] and the FCA called "a significant penalty."[70] It may appear surprising that this provision has only been mentioned but never discussed, and there is only one reported case where statutory damages under subsection 38.1(4) were actually awarded, and even then they were granted in a default judgment, pursuant to *ex parte* proceedings, after the defendant failed to defend.[71] Upon reflection, however, this is not surprising at all. In most cases, the threat of being liable to pay between three to ten times the tariff royalties convinces users that they are better off complying with the PRO's demands than litigating the point, losing, paying costs and between three to tenfold the requested amount. Talk about "instruments of oppression and extortion."

(d) Status of the Artist Legislation in Disguise

Defenders of collective administration sometimes compare copyright owners that form collectives to workers who join unions to bargain collectively with their employers. CMOs, the argument goes, allow authors to "use the power of collective bargaining to obtain more for the use of their work and negotiate on a less unbalanced basis with large multinational user groups."[72] The analogy can be misleading in several respects. For example, it breaks down completely when, as is usually the case, CMOs' repertoires comprise works owned by large multinational publishers or producers.[73] But even when the analogy may hold

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68 *Astral Media Radio Inc. v. Society of Composers, Authors & Music Publishers of Canada* (2008), [2009] 3 F.C.R. 415 at para. 48 (F.C.), rev'd in part *Neighbouring Rights Collective of Canada v. Astral Media Radio Inc.*, *supra* note 65.

69 *Ibid.* at 14.

70 *Ibid.* at 13.

71 *Society of Composers, Authors & Music Publishers of Canada v. IIC Enterprises Ltd.*, 2012 FCA 179 (F.C.A.).

72 Daniel J. Gervais, "The Changing Role of Copyright Collectives", in Daniel J. Gervais, ed., *supra* note 21, 3 at 18.

73 Katz, "Copyright Collectives", *supra* note 12 at 421-22.

greater force, it is particularly inapt in Canada, because federal and provincial legislation in Canada have established *sui generis* schemes that apply labour law collective bargaining models to the relationships between authors and producers.

Quebec has adopted the most comprehensive scheme, which provides for collective bargaining between recognized creators' associations and producers.[74] The federal *Status of the Artist Act* (*SAA*) has adopted a similar model, but on the "employer" side it applies only to federal institutions and federally regulated broadcasters.[75] Importantly for the current discussion, those schemes explicitly provide for the ability to impose minimum terms and conditions for the provision of artists' services and other related matters, which include the terms under which existing works could be used and what minimum fee should be paid for those works.[76] Producers and certified artists' associations are *required* to bargain in good faith.[77] In enacting the *SAA*, Parliament recognized "that artists should 'be compensated for the use of their works . . .',"[78] and adopted a scheme designed to impose minimum terms on certain users. In contrast, in enacting the collective administration provisions of the *Copyright Act*, Parliament intended to preserve the advantages that collective administration might offer, while protecting users from CMOs' abuse of their market power. The *SAA* focuses on *individual artists* and on allowing them to negotiate collectively with producers. The raison d'être of this labour law model is the perceived imbalance of power between the weak worker/artist and the employer/producer, an imbalance that may require some element of compulsion to

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74 *An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*, C.Q.L.R. c. S-321, online: <http://www.canlii.org/en/qc/laws/stat/cqlr-c-s-32.1/latest/cqlr-c-s-32.1.html>; *An Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters*, C.Q.L.R. c. S-3201, online: <http://www.canlii.org/en/qc/laws/stat/cqlr-c-s-32.01/latest/cqlr-c-s-32.01.html>.

75 *Status of the Artist Act*, S.C. 1992, c. 33, s. 6, online: <http://www.canlii.org/en/ca/laws/stat/sc-1992-c-33/latest/sc-1992-c-33.html#sec6subsec2_smooth>.

76 *Canadian Artists' Representation / Le Front des artistes canadiens v. National Gallery of Canada*, 2014 SCC 42 (S.C.C.).

77 *Ibid*. at para. 8.

78 *Ibid*. at para. 18.

rectify. The regulation of CMOs focuses on *copyright owners* (not individual authors) who form "super monopolies" and on setting *maximum* fees and terms to protect users. Compelling users to deal with those CMOs turns the scheme that Parliament created on its head, and confuses it with a scheme which clearly it is not.

(e) Procedural Nightmares

If the "mandatory tariff" theory is correct, avoiding the inevitable collision with well-established legal principles would require courts to endure some procedural nightmares. Even proponents of the "mandatory tariff" theory concede that users cannot be compelled to pay the royalties under a tariff if (a) they do not use works from the CMO's repertoire; (b) they use works from the CMO's repertoire, but obtained permission elsewhere; or (c) they use works from the CMO's repertoire, but their uses are exempted under the Act.[79] Therefore, unless the Board can structure a tariff in a way that the royalties be calculated to apply only (a) to the works in the CMO's repertoire; (b) that are not separately licensed; and (c) that their use without a licence would constitute an infringement, a mandatory tariff would necessarily result in an obligation to pay the CMO royalties for uses (a) of works that it was not authorized to administer; (b) that do not require any additional licence; or (c) for acts that require no licence at all.

However, the Board cannot have jurisdiction to approve a tariff with this effect, and no court would have jurisdiction to enforce it. Preventing such an outcome requires the Board either to set royalties with surgical precision (if the Board certifies a fixed amount of royalties), or at least to establish a precise adjustable formula that would make allowance for all the uses that do not require the CMO's permission. The first option entails a procedural nightmare before the Board, while the latter shifts the nightmare to the parties who would have to implement the tariff and to the courts that may be called to resolve the inevitable disputes.

Access Copyright's educational tariffs, and comparison to the lessons from class proceedings in copyright cases, illustrate the point. Beginning in 1991, Access Copyright reached licence agreements with all provinces and territories (excluding Quebec)

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[79] *Access Copyright Reply and Defence to Counterclaim*, File No. T-578-13, Federal Court, Oct. 4, 2013.

with respect to reproduction of its repertoire for use in K-12 schools. Royalties were calculated on the basis of an annual flat fee for FTE students. Initially, the fee was $1 per FTE student, which gradually increased to $2.30. When the last of those agreements was about to expire in 2004, Access Copyright wanted royalties calculated on the basis of volume of copies, but the parties were unable to reach agreement on how to determine such volume, and how to distinguish between copies that would require licence from those that would not. Failing to reach an agreement, Access Copyright filed a proposed tariff with the Copyright Board.[80] During the proceedings, the parties agreed to the terms and methodology of a volume study. The study was based on a sample of 894 schools, representing 9 per cent of all schools, 31 school boards and 17 offices of Ministries of Education. It was conducted for 10 consecutive days in each sampled school, spread throughout the 2005-2006 school year.[81] Observers recorded information on stickers attached to sample photocopies, indicating the number of photocopied pages, the number of copies made, the number of pages reproduced from the original, the person for whom the copy was made (staff member, student, *etc*.), the person who initiated the copying, and the purposes for which the copies are intended (*e.g*., criticism or review, entertainment, inclusion in an exam, projection in class).[82]

Extrapolating from the sample, the study estimated that schools photocopied 10.3 billion pages during the study year. Of this, 7.2 billion were photocopies of unpublished or unknown documents (not part of Access Copyright's repertoire, and which may include teachers' and schools' own materials). Of the remaining 3.1 billion copies,[83] 2.8 billion were photocopies of consumables and reproducibles (which would not be covered by the tariff). From the remaining 300 million copies, the Board deducted additional copies (for example, works identified as public domain or those

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80 *Reprographic Reproduction 2005-2009, Re*, 2009 CarswellNat 1931 at paras. 14-19 (Copyright Bd.).

81 *Ibid*. at para. 30-31.

82 *Ibid*. at para. 10.

83 The Board accepted Access Copyright's assertion that 99 per cent of the works that schools copied were from its repertoire, even though the point was contested and the Board noted that Access Copyright did not provide any supporting evidence, *ibid*. at para. 179.

which the Board found were fair dealing), and calculated a total of 246 million copies that would require permission.[84] The main issue on appeal was whether the 16.9 million copies out of this total qualified as fair dealing.[85] The educators conceded that the tariff should apply to the remaining 229 million copies,[86] yet it is clear, in light of the Supreme Court's more recent decisions, that even this number understates the extent of fair dealing.[87]

Obviously, it would be impossible for the Board to determine royalties on the basis of whether each reproduction of each work requires permission. Not only because of the vast amount of reproductions that were made, but also because the prospective nature of the Board's proceedings, and the fact that, in the case of tariffs, they may apply not to a single user but to a class of users, which may vary in their actual uses. This means that the Board cannot possibly gather evidence with respect to all prospective users' activities during the period of the tariff, and, even if this evidence were theoretically available, collecting and analyzing it would be prohibitively costly. Clearly, the Board would have to resort to assumptions and approximations. But it is clear that any such determination would lead to false positives (identifying acts as requiring permissions when they do not) and false negatives (exempting acts that ought not be exempted).

When parties agree to enter a licence agreement, such approximations present no problem. Parties may hold radically opposing views about whether copyright subsists in the work, who owns the copyright, what would amount to "substantial part" of a work, or uses constitute fair dealing, but they may still find it mutually advantageous to settle their dispute, sign a licence agreement and avoid the need to determine these questions

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84 *Ibid.* Appendix, Table 2.

85 *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency*, 2012 SCC 37 at paras. 6-8.

86 In a subsequent submission from 2007, the educators noted that the methodology for the study was negotiated in the summer of 2004, immediately following the Supreme Court's landmark decision in *CCH*, and without taking into account the implication of that decision, Copyright Board of Canada, Reprographic Reproduction 2005-2009 Educational Institutions, Legal Argument of the Objectors (9 October 2007) at 2-3 (on file with the author).

87 Michael Geist, "Why the End of Access Copyright K-12 Licensing for Is Not The End of Payment for Educational Copying," online: <http://www.michaelgeist.ca/2012/08/access-copyright-payment/>.

through litigation. At times, to reach such a settlement, they might seek the assistance of a mediator or an arbitrator. In an ideal world, no user will pay and no owner will accept unnecessary licence fees, but parties cannot be expected to litigate every time boundaries of copyright are not clear. They are generally free to agree on licence fees and on the method of calculating them, however imprecise (and in any event the rate of the licence fees will likely reflect the probabilistic strength of the parties' respective viewpoints).

If they choose to litigate, however, this is a different matter. Unlike parties who choose to settle their disputes privately, the court, by the essence of its adjudicative role, cannot approximate a finding of liability. It must determine whether the defendant infringed the owner's copyright, and only then may it use some approximation techniques to calculate the damages or the user's profit. But the court cannot issue a probabilistic judgment; it cannot issue a ruling such as "[i]f the plaintiff could prove that he owned the copyright, and that it was infringed by the defendant, which caused it to suffer damages in the amount of $1000, I would have ordered the defendant to pay that amount, but since I am convinced that the probability that the plaintiff is the owner is not larger than 50%, and the probability that his copyright was infringed is 50%, and that there is only 25% chance that he suffered damages of $1000, I order the defendant to pay the plaintiff $62.50 (1000 X 0.5 X 0.5 X 0.25)."

Moreover, a party cannot be held liable prospectively, and assumptions and approximations based on past events cannot substitute for actual evidence: a copyright owner can go to a court and seek a monetary award as a remedy for past or ongoing infringement, but it cannot seek a pecuniary remedy for future events, based on evidence of past events. Yet, the Board routinely relies on evidence with respect to past events to determine future royalties.

Therefore, if the "mandatory tariff" theory holds, and paying the royalties that the Board has approved becomes mandatory on users, then issuing a legally valid tariff would require the Board to approve only tariffs that be imposed without any false positives, because any false positive would result in a duty to pay that lacks any legal basis — an outcome that runs afoul of the rule of law.[88]

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[88] Note that false negatives, which may result in lower payments to the CMO and

Therefore, the mandatory tariff theory presents the Board and the parties appearing before it with a herculean task, which they cannot possibly accomplish and would be ill-advised to attempt. There is no method that would enable the Board to accomplish such task, let alone one that employs procedural and evidentiary safeguards to ensure due process.

In contrast, under the voluntary licence theory, those imperfections, inherent in the Board proceedings, present a much smaller problem. As long as the Board implements a reasonable methodology for approximation and calculating fair and reasonable royalties, and as long as the user can choose whether to avail herself of the licence, allowing the CMO to recover the royalties from a user who offered to pay them but defaults would normally raise little conceptual issues. If a user is free to choose whether it seeks a licence pursuant to the terms that the Board had approved, then the fact that Board has used an imprecise methodology for determining which acts require permission and what the fee for such permission might be presents little problem. It is not different from any user's own decision to enter a licence voluntarily, even if the user believes that its acts do not require a licence or that the fees are too high.

It might be tempting to think the Board could avoid the problem by certifying a sophisticated royalty-calculating formula, based on some algorithm for calculating the royalties payable by each user using the user's relevant data. But even if such a formula could be developed, this would not solve the problem; it would only shift it from the Board to the parties and courts that would have to resolve the inevitable disputes. It would create the same problems of the reverse class action in disguise. Note that even mandatory tariff terms that require the user to make and retain records that could be used in applying the formula creates an obligation that

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its members, do not create any legal problem as long as arrived at reasonably. There is no symmetry between the false positive and the false negatives because collective administration under the section 67 regime and the general regime is voluntary. Copyright owners who do not wish to be limited in their ability to charge whatever the market will bear do not have to administer their copyrights collectively.

lacks any legal basis, because copyright owners' exclusive rights do not include any obligation on any user to make and maintain records of her uses.[89]

Unlike the "mandatory tariff" theory, the voluntary licence theory avoids these problems. The voluntary tariff theory fits the Board's jurisdiction, and its procedural and institutional capabilities, and as the next Part explains in greater details, comports with the rule of law, whereas the mandatory tariff theory offends it.

4. CONSTITUTIONAL HEADACHES

(a) The Rule of Law

The previous section has already mentioned how the possibility that the practical inability to ensure that a tariff, if mandatory, would permit CMOs to impose on users payments for which no liability to pay exists might offend the rule of law. This Part begins by highlighting deeper rule of law problems associated with the mandatory tariff theory, and proceeds to discuss some related and some additional constitutional problems, all of which should stir courts away from construing subsection 68.2(1) in line with the mandatory tariff theory.

That the rule of law is a central tenet of any liberal democracy is almost axiomatic.[90] It was recognized as an unwritten constitutional principle, which lies "at the root of our system of government,"[91] and thus capable of limiting government action.[92]

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89 Compare to para. 82(1)(b), which requires manufacturers and importers of blank audio recording media to keep certain records, and subsection 88(3), which provides that the collecting body may apply to a court for an order directing compliance with any obligation under this Part that has not been complied with.

90 *E.g.*, Preamble to the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, online: <http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html?autocompleteStr=charter&autocompletePos=1>; Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law 37* (Princeton Univ. Press, 2012).

91 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 70 [Secession Reference].

92 *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para. 54.

Of course, the rule of law is a complex and contested concept, and widespread agreement on what this term actually means is hard to come by.[93] For some it is nothing but rhetoric that means nothing, while for others it means almost everything.[94] Fortunately, this article can proceed with one common meaning of the rule of law, namely the notion that, in A.V. Dicey's words,

> no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[95]

The mandatory tariff theory runs afoul of this principle on two grounds. First, because it contemplates a situation where a finding of one instance of infringement would result in an order compelling the user to "suffer in goods" and pay amounts that bear no proportion to the infringement that do not relate to any distinct breach of copyright and are not calculated in the ordinary legal manner before the ordinary courts of the land, but, in advance, in proceedings before an administrative tribunal and using methodologies and evidence that are inherently imprecise. Second, because this would happen without a clear legal foundation.

Another relevant and oft-cited formulation of the rule of law, is that of Wilde C.J., who stated in *Gosling v. Veley* that

> The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called,

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93 See *e.g.*, Thomas B. Nachbar, "Defining the Rule of Law Problem" (2009) 6 The Green Bag 303, 304; Peter W. Hogg & Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U.T.L.J. 715, 717; Richard H. Fallon, Jr., "The Rule of Law as a Concept in Constitutional Discourse" (1997) 97 Colum. L. Rev. 1; Margaret Jane Radin, "Reconsidering the Rule of Law" (1989) 69 B.U.L. Rev. 781.

94 Peter Hogg & Cara Zwibel, "The Rule of Law in the Supreme Court of Canada" (2002) 55:3 U.T.L.J. 715 at 717.

95 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London, UK: Macmillan & Co, 1915) at 184 [Dicey, *Constitution*]. Dicey's definition of the rule of law included two additional components: that no man is above the law and that officials are bound by the same laws as ordinary subjects, *id.* at 189, and the recognition and protection of individual rights and other constitutional principles through the operation of the common law courts rather than formal constitutional documents, *id.* at 191.

> whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those who seek to impose the burthen [sic], has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to support it.[96]

Gosling v. Veley concerned the ability of a parish to impose a Church Rate on individuals and compel them to contribute to the maintenance of the church. Wilde C.J. wrote a dissenting opinion in the Exchequer Court, which the House of Lords later endorsed, and his statement that this meaning of the rule of law requires no authority became the oft-quoted authority for that proposition.[97]

The House of Lords in that case drew a clear distinction between the between the legal duty of any individual to contribute to the repair of the parish church and the ability of the parish to impose a Church Rate on individuals.[98] The House of Lords held that breach of the duty to contribute (which existed at the time, but was later abolished by Parliament),[99] may be punishable by the Ecclesiastical Court, but a rate could only be levied if a majority of the parish voted in its favour in a meeting convened for that purpose. Even though members of the parish who refused to vote in favour of the Rate might be breaching their legal duty to contribute, their breach does not allow the minority to impose the rate. Lord Baron Martin also emphasized that the duty to contribute could be complied with in different ways, not only by paying the Church Rate.[100]

By analogy, every user has a legal obligation to comply with the *Copyright Act*, but there are different ways to comply with this duty: by obtaining a licence from a CMO or from other sources, by using only what the law permits without the owner's consent, or not using the works. Breach of the duty may be actionable before the courts in an action for infringement, but could only be imposed if the CMO can show a clear legal basis for the imposition. As I explain in *Spectre I*, subsection 68.2(1) provides a statutory basis

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96 *Gosling v. Veley* (1850), 116 E.R. 891 at 921 [*Gosling*].

97 See *e.g.*, *A.G. v. Wilts* (1921), 37 T.L.R. 884 [*Wilts*]; *O.E.C.T.A. v. Ontario (Attorney General)*, 2001 SCC 15 at para. 77; *Total Network SL v. Revenue & Customs*, [2008] 1 A.C. 1174 (H.L.) at para. 22.

98 *Gosling v. Veley* (1853), 10 E.R. 627 at 642 [*Gosling* HoL].

99 *Compulsory Church Rate Abolition Act 1868*, 31 & 32 Vict., c. 109.

100 *Gosling* HoL, *supra* note 98 at 647.

for collecting the royalties from users who undertook to pay them, but then defaulted, but the "mandatory tariff" theory contemplates their imposition on users who never offered to pay them. Therefore, in the absence of such voluntary undertaking, a tariff can only be imposed if there is clear statutory mandate to do so.

The same considerations informed the court in *A.G. v. Wilts United* where it was held that before any person can be compelled to pay any amount of money, the person demanding such payment "must show, in clear terms, that Parliament has authorized the particular charge."[101] While Lord Atkin recognized that in theory such grant of statutory authority to impose a payment could be implied, "the circumstances would be remarkable indeed which would induce the Court to believe that the Legislature had sacrificed all the well-known checks and precautions, and, not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject."[102]

The question in that case was whether regulations that required a licence from the Food Controller allowed the Food Controller under the *Defence of the Realm Act* to impose a charge as a condition of the grant of a licence.[103] The Court of Appeal held that the Controller did not have the power to impose the charge. In reaching the conclusion that the grant of such power cannot be easily implied, Atkin L.J. relied in part on the *Bill of Rights* from 1689, which prohibited the levying of money without grant of Parliament or beyond the scope of such grant.[104]

> in view of the historic struggle of the Legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, the circumstances would be remarkable indeed which would induce the Court to believe that the Legislature had sacrificed all the well-known checks and precautions, and entrusted a Minister of the Crown with defined and unlimited powers of imposing charges upon the subject for purposes connected with his department.

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[101] *Wilts*, *supra* note 97 at 886, Atkin L.J.

[102] *Ibid.*

[103] *Ibid.*

[104] *Bill of Rights, 1689* (U.K.), 1 Wm. & Mar., c. 2.

> I am clearly of opinion that no such powers, and indeed no powers at all, of imposing any such charge are given to the Minister of Food by the statutory provisions on which he relies.[105]

Atkin L.J. added that there are no express words granting such powers, "and all the powers given appear capable of performance without any power to levy money."[106] This is equally true with respect to Board-approved tariffs. Even though, unlike in *Wilts*, Parliament clearly authorized CMOs to collect money from those who seek a licence, and empowered the Board to set the amounts, there are no express words conferring powers to impose any charge on those who do not seek a licence, and all the powers are capable of performance without any power to levy money. Indeed, the words are capable of more coherent performance without such powers.

These cases are also significant because as British cases, decided within the constitutional paradigm of Parliamentary sovereignty, they do not rely on a written entrenched Constitution, and therefore show how the rule of law, as a constitutional principle, imposes a very heavy burden on those who claim to have the power to impose involuntary payments on others.

Indeed, in his discussion of the sovereignty of Parliament, Dicey emphasized the difference between laws enacted by Parliaments and laws enacted by other subordinate bodies possessing law-making powers. The rules promulgated by each are "laws," in the sense that the courts may be called upon to enforce them, but unlike Parliament, the subordinate law-making bodies are not sovereign, because the courts have the power, and indeed the obligation, to pronounce on the validity of their rules.[107]

To illustrate that point, Dicey provided the example of a group of cases involving railway by-laws, which involved issues analogous to the question of mandatory tariffs.[108] These cases dealt with the

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[105] *Wilts*, *supra* note 97 at 886.

[106] *Ibid.*

[107] Dicey, *Constitution*, *supra* note 95 at 91-92.

[108] Another set of more contemporary cases, dealing with penalties imposed by private parking corporations, which limits on both time and length do not permit me to discuss in detail in this article, are also analogous to issues surrounding mandatory tariffs. This detour into real property and traffic serves to showcase how the owner of a copyright or the owner of real property may have recourse against those who infringe or trespass, but those who infringe or

validity of certain by-laws promulgated by railway companies pursuant to powers given to them under an Act of Parliament.[109]

In *Watson*,[110] for example, the defendant challenged the validity of a by-law providing that any passenger traveling without a ticket or refusing to show a ticket would be charged the fare from wherever the train began its trip, regardless of where they actually got on the train. The Divisional Court found that the way the plaintiffs were applying the by-law would be "repugnant to the Act of Parliament"[111] and also that the by-law was unreasonable, given that "a man who has travelled five miles or fifty may be mulcted in the same sum, without any reference to the benefit he has derived . . . or the injury he has inflicted."[112]

In a concise affirming judgment in the Court of Appeal, Bramwell L.J. found that:

> [I]t was argued for the plaintiffs that it was a fare and not a penalty, and thereupon recoverable not before justices as a penalty, but as a debt in the county court. I am of opinion that it is not a debt, that the plaintiffs have no power to create such a debt. The statute, see s. 109, gives power to enforce by-laws only by a penalty against the offender. We have no doubt that a railway company may demand and insist on payment before taking a passenger, and that if they give him credit for his fare they may insist on any sum they think fit, and if he agrees to it that would be a valid debt, and recoverable as such. But if the passenger does not agree to it he may indeed be a trespasser in getting into the carriage, and liable to damages as such, or they may waive the tort and recover the fare on the quantum meruit scale; but they cannot fix and insist on a fare at their pleasure.

Essentially, the railway company's argument was the same as the "mandatory tariff" theory, namely, that any passenger who travels without paying the appropriate fare owes it payment for the

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trespass do not automatically owe the owner any money. A tariff can bind only users who accepted, in a clear and unequivocal way, a duty to pay the specified royalties. See *Imperial Parking Canada Corp. v. Toronto (City)*, 2007 ONCA 649; *Imperial Parking Ltd. v. R.*,[2000] F.C.J. No. 1011.

109 *Railway Clauses Consolidation Act, 1845* (U.K.), 8 Vict., c. 20 [Railway Act].

110 *London and Brighton Railway Company v. Watson*, [1879] 4 C.P.D. 118 (C.A.) [Watson].

111 *London and Brighton Railway Company v. Watson*, [1878] 3 C.P.D. 429 at 435 (Div. Ct.).

112 *Ibid*.

longest trip, and that it is entitled to sue the passenger and recover the debt. The court, however, disagreed. The company does not have the power to impose payments on passengers, and even if it had the power to impose payments, it would be unreasonable to impose a payment that bears no relation to how much the passenger actually travelled or the damage that the company had suffered. The company can sue to recover an unpaid debt only if the passenger agreed to pay the amount, but without such an agreement it can only sue for trespass. Likewise, the Board has the power to approve the fees that a CMO can charge from those who seek a licence, and when a user offers to pay the royalties specified by the Board but fails to pay them, the CMO can sue to recover them. But, if the user never agreed to pay those amounts, the copyright owners can only bring an action for copyright infringement. The CMO, even when the Board approves its tariffs, does not have the power to impose them on users who never agreed to pay them, and, even if an approved tariff could be imposed, a tariff that imposes payment that is unrelated to the user's actual use, or to the copyright owners' actual injury, would be unreasonable and invalid as such.

(b) Taxes, Imposts, and Monopolies

A closely related question is whether a mandatory tariff effectively imposes "any Tax or Impost." If it does, then it is governed by section 53 of the *Constitution Act, 1867* providing that "Bills . . . for imposing any Tax or Impost, shall originate in the House of Commons."[113] A tariff is a form of an enactment, promulgated by the Board, pursuant to its mandate under the *Copyright Act*.[114] However, the tariff itself does not originate in the House of Commons. Rather, it is proposed by a CMO, and approved by the Board. Therefore, if a tariff is mandatory and it is also a tax or an impost, then its constitutional validity depends on whether Parliament can delegate its power to impose any payment to a subordinate body.

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113 The *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 53, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*].

114 *Interpretation Act*, R.S.C. 1985, c. I-21 (28 December 2014), s. 2, online: <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-21/latest/rsc-1985-c-i-21.html>.

Section 53 codifies the Constitutional principle of "no taxation without representation."[115] Its historical evolution is tightly connected to another rule of law principle, requiring that the grant of monopolies, inasmuch as they confer upon some persons powers to control the activities of others, also requires clear statutory mandate. I address these two principles below.

(i) Is a mandatory tariff "tax or impost"?

Some may object to the argument that a mandatory tariff is a tax or impost on the grounds that it is not really imposed on anyone, because even under the mandatory tariff theory, a user does not have to pay anything if it does not use any work from the CMO's repertoire. Accordingly, it is only imposed if the user elects to use a work from the CMO's repertoire, and everyone can avoid the imposition of the tariff by refraining to use such works. A similar argument was rejected in *Wilts*, where Atkin L.J. held that since the Food Controller had no statutory authority to collect money, it made no difference that the obligation to pay was expressed in the form of an agreement.[116] Therefore, the fee did not cease to be a tax, imposed without statutory authority, because those who sought a licence agreed to pay it. Moreover, the argument should be rejected because it could apply to almost any type of tax. For example, anyone can avoid paying income tax, or a particular rate, if she does not earn income above a certain threshold, but this does not make the income tax less of a tax.

Another objection might be based on the distinction between taxes, fees and regulatory charges. In *CPCC v. Canadian Storage Media Alliance*,[117] a case involving the blank media levy, the retailers argued that the levy was a tax, and was unconstitutional because it had not been enacted pursuant to the procedure set out in section 54 of the *Constitution Act, 1867*. The FCA dismissed the challenge, finding that the levy was not a tax, but a regulatory charge. The decision is not free from doubts.[118]

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115 *Ontario English Catholic Teachers' Assn v. Ontario (Attorney General)*, *supra* note 97 at para. 71.

116 *Wilts*, *supra* note 97 at 887.

117 *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 (F.C.A.).

118 Jeremy F. de Beer, "Copyrights, Federalism, and the Constitutionality of Canada's Private Copying Levy" (2005) 51 McGill L.J. 735 at 761.

The FCA might have been reluctant to find that the levy was a tax on the assumption that, if it were, it would have been unconstitutional for failure to comply with the procedural requirements laid out in section 54. But the assumption that if the levy was a tax within the meaning of section 53 it was unconstitutional by virtue of section 54 is incorrect, and the case seems to have been decided on the wrong theory. Section 54 applies only to bills *for* the Appropriation *of* any Part *of* the Public Revenue, or *of* any Tax or Impost," it "concerns the appropriation of taxes, and not the imposition of taxes."[119] The imposition of taxes requires only that the bill originate in the House of Commons,[120] which it did. Therefore, the constitutional validity of the levy did not hinge on section 54, but on a separate question, namely, on whether Parliament could delegate the power to impose a tax.

The question arises because while the Act provides for the imposition of the levy, the Act does not establish the rate of the levy, and Parliament has delegated this role to the Board. But such delegation should not necessarily be fatal too, because "[t]he delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation. . . . [I]f the legislature expressly and clearly authorizes the imposition of a tax by a delegated body or individual, then the requirements of the principle of 'no taxation without representation' will be met."[121] Valid delegation would still require "a detailed statutory framework, setting out the structure of the tax, the tax base, and the principles for its imposition."[122] In the case of the blank media levy, Parliament used language that clearly and expressly authorizes the imposition of a levy and clearly identifies those on whom it may be imposed.[123] Moreover, the Act reserves to the government the power to prescribe by regulation any kind of media that would be excluded.[124] Whether these features provide sufficient accountability to satisfy the democratic principle of no taxation

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119 *Constitution Act, 1867*, *supra* note 113, s. 54.

120 *Ontario English Catholic Teachers' Assn v. Ontario (Attorney General)*, *supra* note 97 at para. 70.

121 *Ibid.* at para. 74.

122 *Ibid.* at para. 75.

123 *Copyright Act*, *supra* note 39, s. 82.

124 *Ibid.*

without representation is beyond the scope of this article. It is clear, however, that no similar features exist with respect to tariffs. Therefore, even if Part VIII of the Act establishes a sufficiently detailed framework to render the delegation valid, its absence from the tariffs that concern this article means that mandatory tariff would fail to pass constitutional muster. If those tariffs are mandatory, they might be unconstitutional.

(ii) Monopolies

Another objection for viewing mandatory tariffs as taxes or imposts stems from their private nature. Unlike taxes, typically imposed and collected by the state and used for public purposes, a mandatory tariff entails collection of money by a private body, a CMO, for the private benefit of its members. Indeed, in the *CPCC* case,[125] the Board relied on those private features of the blank media levy in its conclusion that the levy was not a tax but a regulatory charge.[126] While the FCA agreed that the levy was not a tax but a regulatory charge, it disagreed with the Board's characterization of the levy as private. It correctly stated that the levy is levied by a public body, namely the Board, even though the CMO initiates it,[127] but its holding that the levy is imposed for public, rather than private, purposes, is, in my view, unconvincing. The FCA reasoned that because the levy constitutes part of copyright law's balance between the public interest and those of creators, it is collected for public purposes.[128] However, this conclusion renders meaningless the distinction between private and public interests, purposes and means. Almost any private entitlement has some public aspect, and its legal recognition can be seen as reflecting or promoting a higher-order public interest. Even in the realm of "pure" private law, the law protects one's property, makes contractual promises generally binding and enforceable and provides redress to those who were wronged, not only out of concern to the private benefit of the relevant individuals but also because it is in the interest of the public in large that such entitlements were legally protected.

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[125] *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 [*CPCC*].

[126] *Ibid*. at paras. 26, 50.

[127] *Ibid*. at para. 52.

[128] *Ibid*. at para. 51.

Apparently, the private nature of the levy confused both the Board and the FCA because both assumed that a statute imposing a compulsory charge could only be either a tax or a regulatory charge, and that if it were a tax, then it would be unconstitutional because its enactment did not comply with section 54 of the *Constitution Act, 1876*. They failed to notice a third option — that a grant to a private entity of power to impose obligations or control the ability of another belongs to another legal category. It is a species of a broader family of legal institutions called "monopolies," within the meaning of section 1 of the *Statute of Monopolies, 1623*,[129] which, among other things, affirmed the principle that monopolies are void unless granted pursuant to an act of Parliament.

Dating back at least to the first half of the 16th century, the term "monopoly" has described the grant of various commercial and industrial privileges to individuals or companies.[130] Monopolies were granted both as a form of compensation and as a method of regulation.

Often, such privileges included the power to exclude others from enjoying similar privileges, to license them, or to collect fees from third parties engaged in some prescribed activities. Some monopolies would exempt an individual from penal laws or from existing regulatory schemes, or confer upon the individual power to exempt others.[131] Formal documents granting such monopolies were sometimes called "patents." In many cases, patents conferring regulatory authority were not used to stop and punish an undesired activity but simply to extract fees from those engaging in the activity.[132] Monopolies took various forms, but all of them would have conferred upon patentees a legal power to claim the economic rents generated by a particular trade, industry or article of commerce.[133]

The constitutional principle that the imposition of any pecuniary burden requires clear statutory mandate, and the

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[129] 21 Jac. I, c. 3, s. 1.

[130] Oren Bracha, "Monopolies", in Stanley N. Katz, ed., *The Oxford International Encyclopedia of Legal History*, vol. 4 (Oxford University Press, 2009) 186.

[131] Thomas B. Nachbar, "Monopoly, Mercantilism, and the Politics of Regulation" (2005) 91 Va. L. Rev. 1313 at 1324-25.

[132] *Ibid.* at 1325.

[133] *Ibid.* at 1326.

principle that the grant of monopolies requires clear statutory mandate resemble not only in their operation, but in fact they also represent two sides of the same constitutional coin. Both rules were forged during the constitutional struggles of the 17th century, and their codifications represent important milestones in limiting Royal prerogative and establishing Parliamentary supremacy.

The *Bill of Rights, 1669* was not the first statutory instrument requiring Parliamentary approval to the imposition of taxes. It was preceded by the *Petition of Right* from 1627, which provided that "no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament,"[134] which, in turn, was a high point in the struggle to limit the Royal power of taxation, dating back at least to the Magna Carta.[135] The *Statute of Monopolies* sprang from the same struggles. Prior to the passage of the Statute, monarchs, relying on Royal prerogative, routinely granted monopolies to raise revenue and finance expenditure without depending on Parliament's approval. As a condition for the grant of a monopoly, grantees would often need to share half their income with the Crown. The Crown could raise revenue by imposing indirect "taxes," and could increase its expenditure without relying on Parliament's approval or oversight of either. The principle that taxation requires Parliamentary approval would be meaningless if monopolies could be granted without Parliament's sanction. Even though monopolies were objected to for several reasons, including that they went against the "general ordinance of God,"[136] typically resulted in economic evils and "will take from men against their wills, their living and trades,"[137] the *Statute of Monopolies* did not prohibit the grant of monopolies altogether. With some exceptions, it only prohibited their grant by the Crown without Parliamentary approval. As a constitutional matter, only Royal monopolies were objectionable, because their grant by virtue of Royal prerogative interfered with individual rights, and because they provided the Crown a source of income without recourse to Parliament.[138]

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[134] *Petition of Right, 1627* (U.K.), 3 Car. 1, c. 1, s. 10.

[135] *Magna Carta of Edward 1* (1297), 25 Edw. 1.

[136] *Darcy*, *infra* note 147 at 1137.

[137] *Darcy*, *infra* note 147 at 1138.

[138] Nachbar, "Monopoly, Mercantilism, and the Politics of Regulation", *supra* note 131 at 1344.

Therefore, both Acts represent important milestones in the development of the rule of law, and in the entrenchment of the principle that imposing any pecuniary burden, and, more broadly, imposing any limitation on any person's liberty, requires valid legislative action.

In the U.K., the correct classification of a mandatory tariff, whether it is a tax, a regulatory charge or a monopoly, likely bears less significance than in Canada, because the validity of such imposition depends solely on the question of whether an Act of Parliament has authorized the imposition. Thus, if a "clear and distinct legal authority" exists, then a "pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll."[139] For example, when the House of Lords affirmed the Court of Appeal's holding in *A.G. v. Wilts*, it characterized the imposition of the licence fee as a tax because "[h]owever the character of the transaction might be defined, in the end it remained that people were called upon to pay money to the Controller for the exercise of certain privileges. That imposition could only be properly described as a tax, which could not be levied except by direct statutory means."[140]

In Canada, a charge like the one imposed in *Wilts* might be characterized as a regulatory charge, but the distinction would not change the fact that its imposition requires statutory authority. Without such authority, it would be invalid regardless of how it would be characterized. However, if statutory authority to impose a licence fee existed, then the distinction between a tax and a regulatory charge may become significant for constitutional purposes for two reasons: first, because under section 53 of the *Constitution Act, 1867*, if a charge is a tax, it can only be imposed by Parliament but not by delegated authority, whereas if it is a regulatory charge, it can be imposed by the relevant government agency if the legislature has authorized it to do so.[141] Second, the distinction is relevant for determining which level of government, provincial or federal, can impose the charge.[142]

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[139] *Gosling*, *supra* note 96 at 921.

[140] *Attorney General v. Wilts United Dairies, Ltd.* (1922), 38 T.L.R. 781 at 782 (H.L.).

[141] *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131 at paras. 4-6.

[142] *Ibid.* at para. 18.

With the exception of the *CPCC* case, the Canadian jurisprudence on the distinction between taxes and regulatory charges deals with charges imposed and collected by the government or other state organs. But if a statute that provides for the imposition and collection of charges by private entities should be seen as the grant of a monopoly, then such a grant raises different questions.

In 1997, Parliament, in the context of copyright, reaffirmed and heightened the same principle that the *Statute of Monopolies* first established. Parliament amended section 89, and provided that "no person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament . . .." Previously, the same provision (section 63 in 1985) read "[n]o person is entitled to copyright or any similar right in any literary, dramatic, musical or artistic work otherwise than under and in accordance with this Act, or of any other statutory enactment for the time being in force . . .." The previous version might have allowed the grant of copyright-like rights by subordinate legislation promulgated by a regulatory body, such as the Board. The current Act prohibits that. Only Parliament can grant copyrights or add additional powers to their holders. The Copyright Board cannot.

The difference between the blank media levy and other tariffs illustrate the point. The blank media levy, properly called a *levy*, is unquestionably mandatory, because section 82 imposes on manufacturers and importers of blank media a legal obligation to pay a levy to the collecting body. By enacting the provisions of Part VIII, Parliament has created a new type of monopoly in the sense that it has granted eligible right holders a new right of remuneration and imposed on certain persons legally enforceable duties to pay this remuneration. Since this new monopoly is a creature of an Act of Parliament, its grant is consistent both with the constitutional principal codified in the *Statute of Monopolies*, and with section 89 of the Act.

In contrast, the mandatory tariff theory does not rely on any such clear statutory mandate, but it would still entail that individual copyright owners, who do not have the power to force a licence upon a user, could nonetheless gain such an extraordinary power by filing tariffs with the Board. This would mean that the Board possesses legislative powers, contrary to the Supreme Court's holding in the 2012 *CRTC Reference* case, where it was held that the power to allocate rights between owners and users falls within the exclusive domain of Parliament, and cannot be delegated to a subordinate body.

The mandatory tariff theory relies on a strained interpretation of subsection 68.2(1), but the recognition that this interpretation entails the grant of a new type of monopoly held by a CMO (or an expansion of the monopoly held by its member copyright owners) should stir the courts away from such construction because, in addition to running afoul of section 89, such interpretation violates an established principle of statutory interpretation under which "legislation that interferes with the rights of subjects is strictly construed . . . [and] it is presumed that the legislature does not intend to interfere with individual rights."[143] Keeping with this position, the Supreme Court held that "explicit statutory language is required to divest persons of rights they otherwise enjoy at law."[144] This principle has been followed in Canada as well as other common law countries.[145] In the United States, courts apply a rule of strict construction to statutory grants, under which powers may not "be presumed or inferred [and] only such powers and rights may be exercised under the grant as appear affirmatively, specifically, explicitly, or expressly, or, in general, only such powers and rights as are clearly comprehended within the words of the act. Statutory grants are not to be enlarged by construction."[146]

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143 Ruth Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007) at 225 [Sullivan].

144 *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 at para. 43. See also Sullivan, *supra* note 143 at 226.

145 In the United States, see for example *Pine River Irrigation Dist. v. U.S.*, 656 F.Supp.2d 1298 (D. Colo., 2009) ("statutory provisions such as these 'granting privileges or relinquishing rights of the public are to be strictly construed.'"). In the United Kingdon, see for example *The Pharmaceutical Society v. The London and Provincial Supply Association Ltd.* (1880), 5 App. Cas. 857 at 867 ("the liberty of the subject ought not to be held to be abridged any farther than the words of the statute, considered with a proper regard to its objects, may require." *Looker v. Halcomb and Others* (1827), 4 Bing. 183, *per* Best C.J. at 740 ("an act of parliament which . . . abridges the liberty of the subject, ought to receive the strictest construction; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the act.") and also *Raynard v. Chase* (1756), 97 E.R. 155 at 157, *per* Mansfield C.J. (noting that the statute in question should be read restrictively because, among other reasons, it was in "restraint of natural right" and "contrary to the general right given by the common law of this kingdom").

The defining feature of any legal monopoly is that it restricts persons from pursuing activities that but for the grant of monopoly they would be legally entitled to pursue.[147] Monopolies, by their nature, interfere with the right of "every man at common law [to] use what trade he would without restraint."[148] Sir Coke, in his report of *Darcy v. Allen* famously stated that "the common law, in this point, agrees with the equity of the law of God, as appears in Deut. cap. xxiv. ver. 6. . . .you shall not take in pledge the nether and upper millstone, for that is his life; by which it appears, that every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life."[149] Therefore, the principle requiring explicit statutory mandate for interfering with individual rights has also been applied to the interpretation of the copyright[150] and patent statutes.[151]

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146 Am. Jur. Statutes §199 (footnotes omitted).

147 *Bauer & Cie v. O'Donnell*, 229 U.S. 1 at 10 (1913) (explaining that "[t]he right to make, use, and sell an invented article is not derived from the patent law. This right existed before and without the passage of the law, and was always the right of an inventor." The significance of a patent is that its grant secures "to the inventor the exclusive right to make, use, and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee."). See also *Darcy v. Allen* (1599), 74 E.R. 1131 [*Darcy v. Allen*].

148 *Mayor of Winton v. Wilks* (1705), 92 E.R. 247 at 248.

149 *Darcy v. Allen*, *supra* note 147 at 1263. See also HCJ 1/49 *Bezerano v. Minister of Police* (1949), 2 P.D. 80 (Supreme Court of Israel) at 82-83 ("It is a fundamental rule, that every person is endowed with a natural right to pursue whatever vocation or trade he chooses, as long as this vocation or trade is not prohibited by law. . . It is an unwritten right, but it springs from every person natural right to seek and earn a living.").

150 *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) at pp. 350-351 (holding that the exclusive right to vend copies does not extend beyond the first authorized sale of copies because such an interpretation "embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.").

151 *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502 at 511 (1917) ("These rules of law make it very clear that the scope of the grant which may be

Monopolies are also an exception to the general rules of commerce and might engage the interpretative principle that "departures from the general rule should be strictly construed."[152] While the shift in Canadian jurisprudence towards purposive interpretation of statutes might reject a blind application of any rule compelling strict construction, the principle is still one which the courts may rely on, as the Supreme Court did in *Barette v. Crabtree Estate* where they adopted a narrow interpretation of section 114 of the *Canada Business Corporations Act* because it "constitutes a major exception to the fundamental principles of company law . . . [and] overrides the more general principles."[153]

The mandatory tariff theory entails a much greater interference with the rights of users than ordinary copyright does. It contemplates an imposition on users of an obligation to pay money to a CMO, where no such power is given to the individual copyright owner.[154] It deprives users of various procedural rights, and effectively nullifies substantive fair dealing rights.[155] In addition, "a tariff entails onerous obligations such as auditing, accounting and reporting"[156] which is yet another imposition on individuals. Consider the case of OptOut U discussed earlier in this article. Under the mandatory tariff theory, the school would effectively be forced into accepting the various monitoring requirements necessary to ensure compliance with the tariff, regardless of whether they believed that an alternative licensing approach was preferable. This is a significant interference with their ability to act without supervision and also a potential infringement on their privacy rights.

Along with more extreme actions like expropriation, taxation is considered a significant interference with the rights of individuals because it also appropriates from the population and so the courts have traditionally narrowly interpreted fiscal legislation. Dogmatic

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made to an inventor in a patent, pursuant to the statute, must be limited to the invention described in the claims of his patent . . .; and to determine what grant may lawfully be so made we must hold fast to the language of the act of Congress providing for it, which is found in [the *Patent Act*]").

[152] Sullivan, *supra* note 143 at 227.

[153] *Crabtree (Succession de) v. Barrette*, [1993] 1 S.C.R. 1027 at 1044.

[154] Katz, "Spectre I", *supra* note 1 at 203.

[155] See Part 3(e), above.

[156] *Public Performance of Musical Works, Re*, 2010 FCA 139 at para. 36.

adherence to this principle has been pushed aside by purposive interpretation, but the principle has not lost its relevance.[157] When a court needs to choose between construction that abridges individual rights or established legal rules and one that does not, the presumptions calling upon the court not to infer such legislative intent reflect established legal norms that form part of the legislative context.[158] As such, when applied mindfully, such canons of constructions, while not determinative, are consistent with purposive interpretation.

Whether a mandatory tariff constitutes fiscal legislation depends on how that phrase is defined, but even if it is not, an interpretation of the *Copyright Act* that results in the mandatory imposition of tariffs is, at the very least, closely analogous to such legislation. Why should it matter if a compulsory charge is imposed for the benefit of the state or to benefit a private actor? If courts should hesitate before they interpret statutes that impose, without clear authority, an obligation to pay money to the government — where the funds will be collected and used for public purposes and an infrastructure to ensure accountability is already in place — they should be even more circumspect before they impose a compulsory charge by and for the benefit of private entities. However, we can also move beyond mere analogy when we consider that, as I have noted, the rules regarding the imposition of taxes and imposts require clear statutory mandate and the rule that the grant of monopolies requires clear statutory mandate are different sides of the same constitutional coin.[159]

If the Crown axiomatically cannot impose a pecuniary burden on its subjects absent clear and distinct legal authority, *a fortiori* such clear and distinct legal authority is required before a private entity can impose such a burden on another person. Subsection 68.2(1) fails to do so.

(c) Division of Powers

The ‘‘mandatory tariff’’ theory faces additional constitutional hurdles concerning whether it is in Parliament’s power to enact legislation that provides for a mandatory tariff. Full analysis of this

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[157] See *Québec (Communauté urbaine) v. Notre-Dame de Bonsecours*, [1994] 3 S.C.R. 3.

[158] Sullivan, *supra* note 143 at 223.

[159] See 4.(b), above, for more on this idea.

question may require an additional article, so I will only sketch the types of concerns that arise. Subsections 91(22) and 91(23) of the *Constitution Act, 1867* give Parliament exclusive legislative power to enact laws in relation to "patents of invention and discovery" and "copyrights."

Determining whether a law is in pith and substance related to "copyrights" requires defining what copyright is. Fortunately, for constitutional purposes, it may be easier to identify what copyright is not than to define what it is. The *Constitution Act, 1867* provides some hints. "Copyrights" and "patents of invention and discovery" are two exclusive rights that Parliament can grant. As noted above, they are a species of a broader family of legal institutions called "monopolies," within the meaning of section 1 of the *Statute of Monopolies, 1623*.[160]

Therefore, while Parliament has the power to grant these two types of monopolies, it does not possess an unlimited power to grant monopolies off all kinds. Patents and monopolies that are not for "invention and discovery" or that cannot be properly called "copyrights" are beyond the scope of Parliament's legislative power unless the power to enact them can be found under another head of federal legislative power. For example, Parliament might grant a monopoly in banking (federal jurisdiction), but it may not for insurance (provincial jurisdiction). Unfortunately, the courts in copyright cases have barely touched upon the scope of those legislative powers, and, when they have, their insights were not highly illuminating.[161]

SOCAN v. Landmark Cinema appears to be the most relevant case to the issue at hand. SOCAN sued Landmark Cinema for infringing its public performance rights. Presumably (the decision does not provide full details), SOCAN sought an order requiring the defendant to pay the royalties specified in the approved tariff. The defendant, among other defences, challenged the constitutional validity of the Copyright Board's power to determine the royalties payable to SOCAN. It argued that the power "to pass laws respecting property and civil rights and the setting, fixing, and determination of the amount to be paid pursuant to the licence is not a proper exercising of the powers of the Parliament of Canada to pass laws respecting copyright" but legislative power with respect

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160 *Statute of Monopolies*, 1623, 21 Jac. I, c. 3, s. 1.

161 de Beer, "Copyrights, Federalism", *supra* note 118.

to property and civil rights, which falls under exclusive provincial jurisdiction.[162] The court dismissed the argument, reasoning that the argument "moves directly against long-established jurisprudence which has held that the Copyright Board's power to fix licence fees is not a matter of contract, but of statutory fixation which is ancillary to, if not an essential component of, Parliament's jurisdiction with respect to copyright under subsection 91(23) of the *Constitution Act, 1867*."

If the defendant's argument challenged the notion that the tariff could be imposed on it (unclear from the decision), then the court dismissed it too quickly, and unpersuasively. The "long-established jurisprudence" it referred to comprise three cases: *CAPAC v. Elmwood Hotel*,[163] *Sandholm*, and *Maple Leaf*. None of these cases dealt with whether Parliament's power to enact laws in relation to copyright gives it power to empower the Board to approve tariffs that could be imposed on users. In *Elmwood*, the defendant was a licensee who defaulted on its payments. It did not challenge CAPAC's power to sue for the recovery of unpaid licence fees, but contested the jurisdiction of the Exchequer Court to hear such claim. It argued that CAPAC's "right to recover was a civil right and [its] recourse was before the provincial Courts."[164] The constitutional question in *Elmwood* was whether the Exchequer Court had constitutionally valid jurisdiction to hear and determine claims for the recovery of unpaid fees owed in respect to the grant of licence by CAPAC.[165] The court held that Parliament had constitutionally conferred upon it jurisdiction to hear the case. Relying on *Maple Leaf* and *Sandholm*, the court explained that since Parliament "had the legislative authority to enact laws regulating the licensing of performing rights by associations such as the plaintiff and fixing the amount of fees, charges or royalties and the terms of the licenses . . .," Parliament could also give CMOs power to sue "sue for or collect in respect of the issue or grant by it of licenses, ..."[166] The question in all three cases was the power to

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[162] *Society of Composers, Authors & Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.* (1992), 45 C.P.R. (3d) 346 at para. 6 (F.C.T.D.).

[163] *Composers, Authors & Publishers Assn. of Canada Ltd. v. Elmwood Hotel Ltd.* (1955), 24 C.P.R. 77.

[164] *Ibid.* at para. 9.

[165] *Ibid.* at para. 7.

[166] *Ibid.* at paras. 13-14.

collect from defendants who sought licences but failed to pay, not from those who never wished to obtain them.

In *Landmark*, however, the defendant seems to have raised a different challenge. It appears that he had never taken a licence from SOCAN, and refused to take one, believing he had already been licensed by the producers and distributors of the motion pictures that he performed. The constitutional challenge targeted SOCAN's claim to sue for the recovery of royalties that the defendant believed it never owed.[167] Regrettably, the defendant's framing of its argument and the court's reasons in dismissing it failed to observe a subtle yet crucial distinction between Parliament's power to regulate CMOs and limit the amount of royalties that they may request for the grant of licences on the one hand, and Parliament's ability to confer upon CMOs the power to exact payments from users who did not wish to become licensees and never undertook to pay any royalties. The answer to the former seems to be an easy "yes," while serious doubts surround the latter.

In the *CPCC* case, the FCA disposed of the argument that Part VIII of the *Copyright Act*, imposing the blank media levy, was not in pith and substance copyright legislation fairly quickly, noting that "[t]he essential element of the federal legislative competence over copyright, which is enumerated at class 23 of section 91 of the *Constitution Act, 1867*, involves the establishment of a legal framework allowing rightsholders to be rewarded for the reproduction of recorded music by third parties. That is precisely what Part VIII achieves."[168] However, the pith and substance question is more complicated than that, because even though Parliament has set up, in Part VII, a scheme for rewarding copyright owners, it has chosen to do so by imposing a levy on manufacturers and importers of blank media. The problem is that the acts of manufacturing or importing a blank audio recording medium do not engage any of the exclusive right of copyright owners. Effectively, Parliament has granted a CMO a monopoly over the blank media industry — not in the sense of an exclusive right to manufacture or import blank media, but in the sense of a right to collect money from those who manufacture or import it. It is far from clear that Parliament competence over copyright, which

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[167] *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.*, *supra* note 162 at para. 6.

[168] *CPCC*, *supra* note 125 at para. 32.

is generally understood as competence to grant to authors exclusive rights in their works, extends to competence to regulate specific industries.

The case law on subsection 91(2), granting Parliament legislative power with respect to trade and commerce, provides a useful analogy. Parliament's legislative power with respect to the regulation of trade and commerce has been interpreted as applying to the regulation of interprovincial and international trade and commerce, and to general regulation of trade affecting Canada as a whole, but it does not include the power to regulate particular industries or trades.[169]

We can begin with two elementary propositions. First, when Parliament grants authors certain exclusive rights, defines what constitutes infringement, and provides remedies for infringement, it creates a law of general application, the subject matter of which is copyright. Such law would likely be valid under subsection 91(23) of the *Constitution Act, 1867*, notwithstanding the fact that such exclusive rights imply corresponding duties on non-owners, and may incidentally affect non-owners' property and civil rights.[170] Second, when Parliament grants authors certain exclusive rights, it can, and indeed must, confine them in order to comply with basic principles of legality. Parliament can circumscribe their scope generally (*e.g.*, when it determines copyrightable subject matter, conditions for copyrightability, *etc.*), and it can create exceptions and limitations that qualify those exclusive rights under certain conditions (*e.g.*, what constitutes fair dealing, conditions under which users may obtain a compulsory licence, *etc.*).

Enter the Copyright Board, and its power to certify tariffs. A tariff, if it is intended to have a binding effect, is a "regulation" and is a form of "enactment."[171] As explained, when CMOs file proposed tariffs and the Board approves them, the tariff is binding on the CMO and its members; their exclusive rights are qualified for the duration of the tariff. They can no longer withhold the grant of licences.[172] In this sense, a tariff is "law in relation to copyright" because it creates a statutory limitation on the scope of copyright

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169 *Reference re Securities Act (Canada)*, 2011 SCC 66 at para. 75.

170 de Beer, "Copyrights, Federalism", *supra* note 118 at 747.

171 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2, online: <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-21/latest/rsc-1985-c-i-21.html>.

172 Katz, "Spectre I", *supra* note 1 at 177.

owners' statutory exclusive rights. Correlatively, it expands users' freedom, in that it allows them, if they offer to pay the royalties specified in an approved tariff, to do acts that otherwise would require each owner's permission. A tariff with such an effect raises no different constitutional issue than standard copyright. If Parliament can grant authors exclusive rights and create exceptions and limitations thereto, it can qualify the scope of those rights that are administered collectively.

A tariff that is mandatory on users is an entirely different constitutional creature. It may not be law in relation to copyright at all. Rather, every such tariff will be an enactment that targets a specific person (in the case of section 70.2 proceedings) or that targets a class of users, that is a particular trade or industry. It would not be a licence to do something that otherwise only the copyright owner has the sole right to do, but an enactment that regulates a specific person, trade or industry, and imposes upon them obligations that did not exist before.

If the Copyright Board is correct that "a tariff is a prospective norm of general application"[173] that binds any user which it "targets," then each tariff is an enactment that targets a specific trade or industry. Every such tariff is a regulation that determines the amount of compulsory payments that those operating in that trade or industry are liable to pay to a CMO, imposes on them obligations to keep records, allows CMOs to examine their records and their premises, may determine how they can use works, *etc*. In fact, any such mandatory tariff regulates users as much as, and possibly more, than it regulates the CMO that proposed it.

It is not clear at all that a tariff, which creates new and additional obligations on users, beyond those created by Parliament, is law in relation to copyright. It may be, in pith and substance, law in relation to every specific sector to which it applies, and its constitutional validity may depend on each sector. For example, tariffs that apply to broadcasters may be "broadcasting law" and fall within federal jurisdiction. Tariffs that apply to educational institutions, an area of major contention between CMOs and educators, may not only intrude upon the provinces' exclusive jurisdiction over property and civil rights, but may

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173 *Society for Reproduction Rights of Authors, Composers & Publishers in Canada v. Canadian Broadcasting Corp*., 2012 CarswellNat 4255 (Copyright Bd.).

intrude into education, which falls under exclusive provincial jurisdiction.

This conclusion may find additional support in the differences between the federal and provincial *Status of the Artist* legislation, discussed above. As mentioned, the federal *SAA* applies, on the "employer" side only to federal producers, whereas its Quebec counterpart applies to all types of producers. The difference likely reflects the constitutional division of powers. Even though the legislation has the taste of copyright, inasmuch as it concerns artists and includes provisions dealing with the use of their copyrighted works, the drafters of those acts might have concluded that legislation that establishes compulsory mechanisms on producers does not come within the purview of copyright legislation. That is why Quebec can apply its Act to a wide range of producers within the province (as a matter of property and civil rights), whereas the federal *SAA* can apply only to federal producers. If this were not so, the Quebec legislation might have been *ultra vires* under the federal paramountcy doctrine, and the federal *SAA* would not have to be confined to federal producers.

(d) Usurping the Jurisdiction of the Courts

Another concern with the "mandatory tariff theory" is that its application might offend the rule of law by hallowing out the rule of the role of the so-called "s. 96 courts."[174] Section 96 of the *Constitution Act, 1867* gives the federal government the power to appoint judges to the superior, district and county courts in the provinces. In *Trial Lawyers Association of B.C.*,[175] McLachlin C.J.C. noted that:

> [a]lthough the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but '[t]he jurisdiction which forms this core cannot be removed from the

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[174] *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at para. 52 (S.C.C.) [MacMillan].

[175] *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (S.C.C.) [Trial Lawyers Association of B.C.].

> superior courts by either level of government, without amending the Constitution.' In this way, the Canadian Constitution 'confers a special and inalienable status on what have come to be called the 'section 96 courts'.[176]

The court confirmed the interconnectivity of section 96 and the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*[177] where they affirmed the statement by the BCCA that ". . .access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. . .Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court . . . interference from whatever source falls into the same category."[178] The purpose of section 96 is "the maintenance of the rule of law through the protection of the judicial role"[179] and this purpose would clearly be undermined in the provinces or the federal government could simply enact legislation "creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts."[180] Simply put, "neither level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction."[181]

As noted above, the mandatory tariff theory entails a strange reality in which the role of the courts is limiting to enforcing what are, in effect, monetary awards pre-determined by the Board. If this theory holds, then it effectively deprives the courts of their core or inherent jurisdiction. While it may be hard to define what constitutes a court's core or inherent jurisdiction may be difficult to define, "[t]he core jurisdiction of the [the] superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law."[182] Removing any part of this core "emasculates the court, making it something other than a superior court."[183] If tariffs are mandatory, and copyright collectives are able to impose them not on users who sought a

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176 *Ibid.* at para. 29 [citations omitted].

177 (*sub nom. B.C.G.E.U., Re*), [1988] 2 S.C.R. 214 (S.C.C.).

178 *Ibid.* at 230 citing *B.C.G.E.U., Re* (1985), 20 D.L.R. (4th) 399 (B.C. C.A.).

179 *R. v. Campbell*, [1997] 3 S.C.R. 3 at 66.

180 *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 at 728.

181 *Trial Lawyers Association of B.C.*, *supra* note 175 at para. 30.

182 *MacMillan*, *supra* note 174 at paras. 30 & 38.

183 *Ibid.*

licence and then defaulted on paying the royalties, but on users who made one or more infringing copy of a work from a CMO's repertoire, then courts are left without a very little role other than rubber-stamping the Board's decisions — clearly leaving them "emasculated."

(e) Charter Issues

Others have already suggested that excessive monetary awards may run afoul of some constitutional protections. In the U.S., it has been suggested that gross and disproportional statutory damages, or those that require a defendant to pay someone other than who she actually injured, may violate the due process requirements under the U.S. Constitution.[184] Similar concern was noted with respect to statutory damages that are aggregated in class action suits.[185] Likewise, in Canada, and under some circumstances, such excessive awards might violate the requirement that deprivations of liberty and security should accord with principles of fundamental justice under section 7 of the *Charter of Rights and Freedoms*,[186] or the requirement in the *Canadian Bill of Rights* that any Act of Parliament shall not be construed as abrogating one's right not to be deprived of her property without due process of law, unless that Act expressly allows that.[187]

The application of section 7 of the *Charter* is less obvious than many of the other hurdles the "mandatory tariff theory" faces, but is nevertheless important. While the court held that section 7 of the *Charter* does not apply to corporations, this is mitigated by the fact that "the courts have allowed corporations to defend themselves in penal and even civil proceedings by arguing that a law violates the s 7 rights of natural persons and is therefore invalid."[188] Moreover, even though, to my knowledge, no CMO has proposed a tariff that

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[184] Pamela Samuelson, Phil Hill & Tara Wheatland, "Statutory Damages: A Rarity in Copyright Laws Internationally, But For How Long?" (2013) 60 J. Copyright Soc'y USA 529 at 547-48, online: <http://journal.csusa.org/archive/v60-04-SamuelsonFinalCPY405.pdf>.

[185] *Ibid.* at 563, note 148.

[186] David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks*, 2nd ed. (Toronto: Irwin Law, 2011) at 641.

[187] *Canadian Bill of Rights*, S.C. 1960, c. 44, ss. 1-2, online: <http://www.canlii.org/en/ca/laws/stat/sc-1960-c-44/latest/sc-1960-c-44.html>.

[188] Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) at 223.

would apply directly to individuals, some tariffs do apply to individuals (for example, a tariff that applies to restaurants is not limited to restaurants that are run by incorporated corporations and thus, if mandatory, may be imposed on the individual who operates it). Moreover, there is nothing in the Act precluding CMOs from proposing tariffs that target individuals, and any interpretation of subsection 68.2(1) should take this into account.

Another objection to the relevance of section 7 of the *Charter* stems from that fact that, "to date, the courts, for the most part, have been unsympathetic to those seeking to vindicate pure economic rights through the *Charter*"[189] under the view that ". . . the economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee."[190] While this may appear to rule out any potential claims rooted in this section of the *Charter*, it is important to make note of the language adopted by the courts in these cases. Words like "generally"[191] and "pure"[192] have been used to qualify a refusal to apply section 7 in cases of economic rights. In addition, the court in *Irwin Toy* made clear that it was not saying that "no right with an economic component can fall within 'security of the person.' Lower courts have found that the rubric of 'economic rights' embraces a broad spectrum of interests."[193] While undoubtedly an extreme example, the American case of *Sony BMG Music Entertainment v. Joel Tenenbaum*[194] in which a Boston College student was found liable for $675,000 of damages for sharing 31 songs via peer to peer file-sharing program Kazaa, might be relevant.[195] Damages of this nature might in fact move away from being entirely economic in nature, as they could fundamentally

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189 *Ibid.* at 254.

190 *Irwin Toy Ltd. v. Québec (Procureur général)*, [1989] 1 S.C.R. 927 at 1003 [*Irwin Toy*].

191 *Ibid.*

192 See, for example, *Siemens v. Manitoba (Attorney General)* (2002), 2003 SCC 3 at para. 45 ("The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests").

193 *Irwin Toy*, *supra* note 190 at 1003.

194 719 F.3d 67 (1st Cir. 2013).

195 See Wendy J. Gordon, "The Lost Logic Of Deterrence: When 'Sending A Message' To The Masses Outstrips Fairness" (11 July 2013), online: Cognoscenti *Cognosenti*, <https://cognoscenti.wbur.org/2013/07/11/joel-tenenbaum-wendy-gordon>.

influence the ability of a defendant to carry on their life under such extreme levels of indebtedness. Canadian courts have yet to be faced with a Constitutional challenge stemming from damages of this magnitude, but it is possible that this type of situation might engage the previously unused powers of section 7 to protect economic rights. If the appropriate set of facts ever presents itself, a court confronted with an individual burdened by a life devastating pecuniary imposition might be willing to recall Lord Coke's words reminding that a person ought not to be dispossessed of his livelihood more than he be deprived of his life.[196]

While the Act allows any prospective user to object to a proposed tariff, the "mandatory tariff" theory practically requires users to file objections and spend years and precious dollars litigating a case, and complying with an intrusive interrogatory process, without even being charged with infringing anyone's right, only to minimize the risk that a tariff would be imposed on them in the future, should they infringe the copyright in a single work. This seems to offend the principles of fundamental justice. The "mandatory tariff" theory (or statutory damages under subsection 38.1(4)) can lead directly to such excessive awards and unjust results, and therefore a dark constitutional shadow casts over it.

The notion of a mandatory tariff, especially if combined with various mandatory reporting, monitoring and auditing requirements, may also raise questions regarding its compatibility of the constitutional right under the *Charter* to be secure against unreasonable search or seizure, and in the case of educational institutions, may further implicate their and their members' academic freedom, which is inextricably connected to their *Charter*-protected freedom of expression.[197] Under the "voluntary licence theory" most, if not all, of these constitutional questions disappear.

5. CONCLUSION

The spectre of the mandatory tariff has been haunting users of copyright material in Canada in recent years. Many have subscribed to the view that once the Copyright Board approves a

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[196] *Darcy v. Allen*, *supra* note 147.

[197] *Pridgen v. University of Calgary*, 2012 ABCA 139 at para. 115 (Alta. C.A.).

tariff, it may be imposed on any person falling within the class of users covered by the tariff if the person makes even a single unauthorized use of any work from the repertoire of the CMO that proposed the tariff.

The mandatory tariff clearly benefits CMOs, because it discourages users from seeking alternative and more competitive licensing options, and from taking advantage of the opportunities for uses that require neither permission nor payment. It also allows CMOs to use an approved tariff as a threat to exact higher licence fees in negotiated licence agreements. Whether the spectre benefits authors is another question. It certainly benefits some copyright owners who can skim the monopolistic rents that CMOs may offer them, but it may hurt others who could do better if they could cut the monopolistic middleman and deal directly with their users. The spectre also compels users to participate in lengthy and expensive Copyright Board proceedings. Users would need to participate and object to expensive proposed tariffs not only when they need licences from CMOs (and want to ensure their reasonableness), but also when they do not, but feel they need to protect themselves from the risk of tariffs that might be imposed on them retroactively. These unnecessary proceedings, and the judicial reviews that follow, may benefit a cottage industry of lawyers and consultants whose practice centres around proceedings before the Copyright Board (and yes, they also provide research topics for a handful of academics), but otherwise, very little benefit arises from such proceedings.

Ultimately, my argument is simple. Copyright gives owners exclusive rights to do certain acts with a work, with a corresponding duty on non-owners to refrain from doing those acts without the owner's permission. Owners have a *right to exclude*, not a power to collect fees; non-owners have a duty to refrain, not a duty to pay. Owners and users can enter licence agreements which may include a binding obligation to pay royalties in exchange for a licence, and owners may bring an action against those who do those acts without a licence. But a user does not have to pay the owner anything unless it agreed to pay, or until the court finds it infringed the copyright and orders a monetary award. Individual copyright owners cannot impose a duty to pay when they administer rights individually, and they cannot when they administer their copyrights collectively.

Parliament may, subject to constitutional constraints, choose to enact another scheme, such as the one it enacted with the blank media levy. But until that day, with respect to copyrights under sections 3, 15, 18 and 21, we only need to deal with the scheme that Parliament has set up. Under this scheme, tariffs with respect to copyright are not mandatory. Spectre dismissed.