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The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes

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The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes

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A. INTRODUCTION

The relationship between international and domestic intellectual property norms is growing in both scope and depth. In scope, first: the number of areas that are regulated by international norms has grown rapidly in the recent past. Since 1995, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[1] a part of the Uruguay Round package administered by the World Trade Organization (WTO), imposes minimum standards concerning almost all intellectual property rights, including copyrights, patents, trademarks, confidential information, and designs.[2] In depth: TRIPS language is generally much more precise than that of previous treaties. For example, while article 9 of the Paris Convention[3]—a World Intellectual Property Organization (WIPO)-administered instrument—only includes a "wish" that member countries provide for seizure of infring-

1 *Agreement Establishing the World Trade Organization, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 U.N.T.S. 299, 33 I.L.M. 81 (being Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, 1867 U.N.T.S. 3; 33 I.L.M. 1125). [TRIPS Agreement].

2 This incorporation of intellectual property rules, which had traditionally been developed and administered by the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, into the trade realm may set a precedent for other norm-making activity at the WTO in areas such as labour or environmental standards. See Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2004) at 182–85.

3 *Paris Convention for the Protection of Industrial Property*, 20 March 1883, 828 U.N.T.S. 305, most recently revised 14 July 1967 [Paris Convention].

ing goods at the point of importation, articles 51 to 59 of TRIPS provide an extremely detailed procedure that must be made available to rights-holders, including strict maximum time periods, to obtain a similar remedy.

As well, and perhaps because of these changes, and the fact that WTO agreements are "enforceable" between WTO members, courts (in particular the Canadian Supreme Court) and litigants are taking a closer look at TRIPS and other intellectual property instruments.[4] The impact of international norms has now moved beyond classic doctrines of ensuring compatibility between national and international law wherever possible. Recent decisions are informed by policy analyses of the need for uniformity of trade rules and their impact on Canadian innovation and business.

This short chapter, after a statement of the classical doctrine of reliance on international treaties as a subsidiary source of law, will look at the most salient recent cases and provide an analysis of the ongoing changes in the use and importance of international intellectual property norms in Canadian jurisprudence. The purpose of the chapter is thus twofold. First, it will attempt to demonstrate that the way in which international norms are now being used by Canadian courts at the appellate level has changed and is increasingly "trade-related" and policy-based. Put differently, the main use of international norms is not (or not only) to interpret statutes in light of international norms, but rather to apply Canadian norms in ways that mirror international developments and are conducive to a better trade environment. Second, it will draw the practitioner's attention to the importance of relying on international norms before Canadian courts, and on the consequences of increasing reliance on those norms, in particular by the Supreme Court. The last part of the chapter will also offer some thoughts on the potential influence that Canadian courts could play in the interpretation of international norms.

B. THE CLASSIC PRINCIPLE

The classical exposition of how international treaties are to be applied by courts when interpreting national laws was stated very adroitly by my colleague Professor Ruth Sullivan:

4 Under the WTO dispute-settlement system. See *Agreement Establishing the World Trade Organization: Annex 2* 15 April 1994, 1869 U.N.T.S. 40:33 I.L.M. 1226. See also online: www.wto.org/english/tratop_e/dispu_e/dispu_e.htm and Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2d ed. (London: Sweet & Maxwell, 2003) at 3 and 337–45.

> the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, an interpretation that reflects these values and principles is preferred.[5]

Customary and conventional international law norms should, in principle, be used as part of the legal context in such a way as to maximize the degree of compatibility between the (domestic) statutory norm and the international one, unless the language of the statute is unambiguously incompatible.[6] The relevant international norms are those by which Canada is bound, either because they are contained in a treaty to which Canada is party or by a rule of customary law. In the former case, the *Vienna Convention on the Law of Treaties*[7] is, of course, a useful reference. In the latter, article 38(1) of the *Statute of the International Court of Justice*[8] offers a starting point.[9]

5 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 422.

6 The subsidiary nature of international norms was emphasized, for example, in *Daniels v. White*, [1968] S.C.R. 517, where the Court stated (at para. 65):

> [P]arliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. It is a rule that is not often applied, because if a statute is unambiguous its provisions must be followed, even if they are contrary to international law. ... [T]he plain words of a statute could not be disregarded in order to observe the comity of nations and the established rules of international law. However, the principle of construction was recognized as applicable in a proper case.

7 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331. See in particular arts. 11–15.

8 *Statute of the International Court of Justice*, 26 June 1945, 59 Stat. 1055, 1060, T.S. No. 993, art. 38, para. 1(b). See also *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86.

9 The sources are:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of article 59, judicial decisions, and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is no need to belabour this well-documented point here.

There are a number of decisions by the Supreme Court of Canada that explicate how the principle should be applied. Among them of course is *Pushpanathan v. Canada (Minister of Employment & Immigration)*.[10] The question in that case was whether a determination of exclusion, under article 1F(C) of the *Convention Relating to the Status of Refugees*[11] by the United Nations High Commissioner for Refugees, affected how Canada should decide a claim for refugee status. Bastarache J. explained the linkage as follows:

> Since the purpose of the Act incorporating Article 1F(C) is to implement the underlying Convention, the Court must adopt an interpretation consistent with Canada's obligations under the Convention. The wording of the Convention and the rules of treaty interpretation will therefore be applied to determine the meaning of Article 1F(C) in domestic law.[12]

Referring to its decision in *Canada (Attorney General) v. Ward*[13] and the Vienna Convention, the Court then noted that in the Court of Appeal:

> In deciding on the relative weight to be accorded the various interpretative sources made available under the Vienna Convention, Strayer J.A. found that the terms "purposes and principles of the United Nations" were relatively clear. He was also of the opinion that the *travaux préparatoires* were confused, ambiguous, or unrepresentative, and therefore, "completely unhelpful". The UNHCR Handbook, which was accepted as a valid source under Article 31(3)(b) of the Vienna Convention, was considered "far from emphatic" as to the meaning of Article 1F(c). Finally, the categorization of the purpose of the Convention as a "'human rights' instrument" did not favour the applicant."[14]

The Supreme Court overturned the Court of Appeal, finding it had erred in dismissing the objects and purposes of the treaty and in according virtually no weight to the indications provided in the *travaux préparatoires*. It also noted that the "starting point of the interpretative exercise is, first, to define the purpose of the Convention as a whole, and, second, the purpose and place of Article 1(C) within that scheme."[15]

10 [1998] 1 S.C.R. 982 [*Pushpanathan*].
11 *Convention Relating to the Status of Refugees, 28 July 1951*, 189 U.N.T.S. 150.
12 *Pushpanathan, ibid.* at para. 51.
13 [1993] 2 S.C.R. 689.
14 *Pushpanathan*, above note 10 at para. 55.
15 *Ibid.* at para. 56.

Three years later, in *R. v. Sharpe*,[16] the Court applied the United Nations' *Convention on the Rights of the Child*.[17] Bastarache J.[18] noted that the "protection of children from harm is a universally accepted goal. While this Court has recognized that, generally, international norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically; ... In *Slaight Communications*,[19] this Court explained that a balancing of competing interests must be informed by Canada's international obligations."

Let us turn now to how this principle has surfaced in recent intellectual property decisions.

C. APPLICATION OF INTERNATIONAL NORMS IN INTELLECTUAL PROPERTY CASES

1) Supreme Court of Canada

Since 1875[20] and until 2000, there had been relatively few intellectual property cases heard by the Supreme Court. In recent years, however, leave to appeal was granted in several cases, which will be the focus of the following pages. In almost every one of those recent decisions the Supreme Court relied on international intellectual property norms.

The first case that should be mentioned in this context is *Harvard College v. Canada (Commissioner of Patents)*,[21] where, in a 5–4 decision, the Court found that higher life forms, such as plants or animals, could not be patented in Canada. To be patentable in Canada, an invention must be a "new and useful art, process, machine, manufacture or composition of matter."[22] Because plants and animals are neither processes nor machines, and because it is difficult to consider them as "manufactures," the central question before the Court was whether life forms are "compositions of matter." Life, the majority stated, could not be defined "only" as a composition of matter, because life transcends matter. The Court concluded that

16 [2001] 1 S.C.R. 45 [*Sharpe*].
17 *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3.
18 *Sharpe*, above note 16 at paras. 175 & 176. Bastarache J. wrote an opinion on behalf of L'Heureux-Dubé, Gonthier JJ., and himself that concurred in the result with the majority, but on different grounds.
19 *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1056–57.
20 The year the Court was established.
21 [2002] 4 S.C.R. 45 [*Harvard College*].
22 *Patent Act*, R.S.C. 1985, c. P-4, s. 2.

higher life forms did not fit the statutory definition of patentable material contained in the Act.[23] However, the Court allowed the patent on the process used to produce the modified gene.[24]

The majority decision relied on international norms according to the classic principle discussed above. Bastarache J., writing the majority opinion, said:

> [T]he respondent refers to the World Trade Organization's *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS), and the *North American Free Trade Agreement* (NAFTA), which both contain an article whereby members may "exclude from patentability" certain subject matter, including plants and animals other than micro-organisms. The respondent argues that it is apparent from this provision that plants and animals are considered patentable, unless specifically excluded from patentability. I see little merit to this argument since the *status quo* position in Canada is that higher life forms are not a patentable subject matter, regardless of the fact that there is no explicit exclusion in the *Patent Act*. In my view, the fact that there is a specific exception in TRIPS and NAFTA for plants and animals does however demonstrate that the distinction between higher and lower life forms is widely accepted as valid.[25]

The minority decision went much further and used both international norms and the policy context to support an expansion of patentability of biotechnological inventions. Binnie J. noted:

> Intellectual property has global mobility, and states have worked diligently to harmonize their patent, copyright and trademark regimes. In this context, the Commissioner's approach to this case sounds a highly discordant note. Intellectual property was the subject matter of such influential agreements as the *International Convention for the Protection of Industrial Property* (*Paris Convention*) as early as 1883. International rules governing patents were strengthened by the *European Patent Convention* in 1973, and, more recently, the World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) in 1994. Copyright was the subject of the *Berne Convention for the Protection of Literary and Artistic Works*[26] in 1886, revised by the *Berlin Convention of 1908* and the *Rome Convention* of 1928. ... The mobility of capital and technology makes it desirable that comparable jurisdictions with comparable intellectual property legislation arrive (to the extent permitted by the specifics of their own laws) at similar legal results.[27]

23 *Ibid.*

24 Known as an "oncogene" because it promoted cancer in mice bearing the modified gene.

25 *Harvard College*, above note 21 at para. 205.

Arguably, the minority is relying on international norms to make "policy statements." To state that "the mobility of capital and technology makes it desirable that comparable jurisdictions with comparable intellectual property legislation arrive (to the extent permitted by the specifics of their own laws) at similar legal results" certainly appears to go beyond the classic principle of compatibility of domestic statutes with "black-letter" international norms and in fact calls for the uniformity of (trade) rules in response to globalization. From a trade perspective, the minority opinion also logically adopts an instrumentalist/utilitarian view of intellectual property: intellectual property is neither a human right[28] nor a property right, but an instrument designed to maximize creativity and innovation (or the commercial development thereof) without imposing unduly high welfare costs. This view would be confirmed two years later in a copyright case,[29] the same year as *Monsanto Canada Inc. v. Schmeiser*,[30] a patent case in which the Court "clarified" *Harvard* by stating: first, that while a plant (a higher life form) per se could not be patented, biotechnologically engi-

26 *Berne Convention for the Protection of Literary and Artistic Works*, 1886, 828 U.N.T.S. 221. As revised until 1971. [*Berne Convention*] [footnote inserted by the author].

27 *Harvard College*, above note 21 at paras. 12–13.

28 See, for example, art. 27(2) of the *Universal Declaration of Human Rights*: "(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

29 Such a view was expressed even more clearly in 2000 in *Théberge v. Galeries d'art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336 at paras. 30–31 [*Théberge*]:

> The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).... The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.

The case is discussed below.

30 [2004] 1 S.C.R. 902.

neered cells of the plant could be; and second, that growing a plant containing the modified genetic sequence would infringe the patent. In practical terms, though formally unpatentable, higher life forms can thus be protected by patent by applying a broad infringement doctrine to patents protecting individual cells. The trend to use international treaty norms is apparent also in *Monsanto*, but more along the lines of the classic principle. In her dissent, Arbour J. actually used TRIPS to *limit* patent protection:

> In *Harvard College, supra*, both the majority and the minority called for Parliament's intervention on the issue of patenting higher life forms. As things stand, my conclusion on the scope of Monsanto's patent claims that is determinative of both validity and infringing use is not contrary to art. 27(1) of *TRIPS* whereby Canada has agreed to make patents available for any invention without discrimination as to the field of technology. My conclusion does not violate, and indeed is supported by art. 27(3)(b) of *TRIPS* ... Allowing gene and cell claims to extend patent protection to plants would render this provision of *TRIPS* meaningless. To find that possession of plants, as the embodiment of a gene or cell claim, constitute a "use" of that claim would have the same effect as patenting the plant. Therefore, my conclusion on both the scope of the claims and the scope of use is consistent with Canada's international obligations under *TRIPS*.[31]

International treaty norms were also mentioned in a number of copyright cases. The first recent Supreme Court case to rely substantially on such norms was *Théberge v. Galeries d'art du Petit Champlain Inc.*[32] The Court had to decide whether transferring the ink from a poster onto a canvas (a process known as "canvas-backing") constituted an infringement of Quebec painter Claude Théberge's copyright in the underlying artistic work (a painting). Writing for the majority this time,[33] Binnie J. opens with a clear reference to international intellectual property norms and the desirability of uniformity of rules among Canada's trading partners:

> Canada has adhered to the *Berne Convention for the Protection of Literary and Artistic Works* (1886) and subsequent revisions and additions, and other international treaties on the subject including the *Universal Copyright Convention* (1952). In light of the globalization of the so-called "cultural industries," it is desirable, within the limits permitted by our own

31 *Ibid.* at paras. 164 and 166–67.
32 See *Théberge*, above note 29.
33 As noted above, in *Harvard College* he wrote the dissenting opinion.

> legislation, to harmonize our interpretation of copyright protection with other like-minded jurisdictions.

In *Théberge*, the Court uses international treaty norms for two reasons, namely: 1) to interpret the statute in a way that is in conformity with applicable treaties (the classic approach); and 2) to ensure uniformity, basically because globalization of economic and trade relations makes uniformity desirable. In other words, there are two different reasons to rely on the TRIPS Agreement and other intellectual property instruments. First, there is a normative argument of keeping Canada as much as possible from infringing its multilateral commitments. Second, there's a desire to increase economic "predictability," thereby making it easier for Canadian companies to compete internationally.

This was confirmed by *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*.[34] The case dealt with the liability of Internet Service Providers (ISPs) for music transmitted over the Internet by their subscribers. ISPs usually have no control over such content and the Court indeed found that they were the wrong target for music authors who wanted to get paid for music transmissions. The analytical framework adopted by the Court includes a detailed comparative analysis and is testimony to the fact that recourse to international treaties is not motivated only by normative concerns. Nor was the Court trying to rely on customary law by admixing international and foreign (domestic) norms. Its purpose was to identify "global policy trends." In the words of Binnie J.:

> In the United States, unlike Canada, detailed legislation has now been enacted to deal specifically with the liability of Internet intermediaries ... Australia has enacted its *Copyright Amendment (Digital Agenda) Act 2000* ... The European Commission has issued a number of directives, as will be discussed. Parliament's response to the *World Intellectual Property Organization's (WIPO) Copyright Treaty*, 1996, ("WCT") and the *Performances and Phonograms Treaty*, 1996,[35] remains to be seen. In the meantime, the courts must struggle to transpose a *Copyright Act* designed to implement the *Berne Convention for the Protection of Literary and Artistic Works* of 1886,[36] as revised in Berlin in 1908, and subsequent piecemeal amend-

34 [2004] 2 S.C.R. 427 [*SOCAN v. CAIP*].
35 1996, 36 I.L.M. 76 [WPPT].
36 See *Berne Convention*, above note 26.

ments, to the information age, and to technologies undreamt of by those early legislators.[37]

In trying to interpret provisions of the Canadian Act, the Court (both the majority opinion by Binnie J. and LeBel J.'s partial dissent) refers to the *WIPO Copyright Treaty* (WCT), a treaty that Canada had signed but not ratified and that was not in force at the time of the facts under consideration:[38]

> Canada is a signatory but not yet a party to the WIPO Copyright Treaty. This treaty responded to the development of the Internet and other on-demand telecommunications technology. Article 8 provides that:
>
> > ... authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.
> >
> > ...
>
> The "making available" right is generally exercised at the point of transmission. This does not deny the interest of the country of reception but avoids, as a matter of policy, a "layering" of royalty obligations in different countries that are parties to the WCT.[39]

The Court also considered European and other foreign legislation. The majority's reliance on the WCT was clearly not strictly normative (the treaty was not ratified in Canada). Together with the laws of our major foreign partners, it was seen as a sign of "things to come." The partial dissent by LeBel J. also uses the WCT and WPPT, apparently in keeping with the classical recourse to international treaty norms. However, because the two treaties were neither in force at the time[40] nor ratified by Canada,[41] this required some additional justification. In discussing whether Canadian copyright law should apply to music transmissions outside Canada,[42] LeBel J. stated:

> Article 5 of the Berne Convention calls for the territorial treatment of copyright; however, the Berne Convention does not specifically address the communication of works over the Internet.[43] Canada is a signatory to the WCT, but it is not yet party to the treaty; it has yet to ratify it. The Board refused to interpret the Act in light of the WCT because the WCT is "not binding in Canada since it has been signed but not ratified by the Canadian Government" (at p. 448). I disagree. Although Canada has not ratified the treaty, this does not mean that it should not be considered as an aid in interpreting the Act.
>
> ... As McLachlin C.J. recently held, even though international norms are generally not binding without domestic implementation, they are relevant in interpreting domestic legislation: see R. v. Sharpe ..., at para. 175. Parliament is presumed not to legislate in breach of a treaty, the comity of nations and the principles of international law. This rule of construction is well established: see Daniels v. White .... Although the Copyright Act has not yet been amended to reflect the signing of the WCT, I believe this cannon of interpretation is equally applicable to the case at bar.[44]

The rule of construction referred to by LeBel J. is well established. It was usually applied, however, to treaties both in force and ratified or acceded to by Canada, which was not the case with the WCT. LeBel J.'s reliance on *Sharpe* is also debatable.[45] In that case, when the Court stated that "generally, international treaty norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically," it was not referring to norms not yet in force.[46]

37 *SOCAN v. CAIP*, at para. 43.

38 1996, 36 I.L.M. 65 [WCT]. Clearly, the government does not consider itself bound by the WCT at this stage. In a statement issued jointly by the ministers of heritage and industry in March 2005 (*Government Statement on Proposals for Copyright Reform*, online at: www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm), the government notes that it intends to table a bill precisely to implement the WCT and a sister treaty, the WPPT.

39 *SOCAN v. CAIP*, above note 34 at paras. 65–66.

40 The WCT came into force on 6 March 2002 and the WPPT on 20 May 2002. The tariff filed by SOCAN that was the object of the *SOCAN v. CAIP* litigation covered the years 1996, 1997, and 1998.

41 Which is still the case as of this writing.

42 That is, whether an Internet communication occurs in Canada. See *SOCAN v. CAIP*, above note 34 at para. 134.

43 Indeed. The Convention was last revised in 1971.

44 *SOCAN v. CAIP*, above note 34 at paras. 148–50.

45 See above note 16 and accompanying text.

46 Though of course Canada has signed the WCT, which may produce effects under international law.

A final Supreme Court case that deserves to be mentioned here is *CCH Canadian Ltd. v. Law Society of Upper Canada*.[47] The Court had to decide *inter alia* whether reported judicial decisions were protected by copyright and whether photocopying of those decisions and other materials by patrons of the Law Society's Great Library, or by the staff of library on behalf of LSUC members not physically present in the library, constituted an infringement of that copyright. On the first question, there is little doubt that the text of a judicial decision itself is "original"[48] enough to be protected by copyright. However, the rights belong to the Crown.[49] Private legal publishers of judicial decision were arguing that they held a *separate* copyright stemming from their original formatting of the text, the addition of keywords, headnotes, etc. To succeed, the publishers had to convince the Court that those additions and changes were themselves "original." Because the notion of originality is not defined in the *Copyright Act*,[50] the Court relied on international treaties. Interestingly, those treaties do not explicitly define the notion, but the *travaux préparatoires* offer a significant degree of guidance.[51] In the words of the chief justice:

> The idea of "intellectual creation" was implicit in the notion of literary or artistic work under the *Berne Convention for the Protection of Literary and Artistic Works* (1886), to which Canada adhered in 1923, and which served as the precursor to Canada's first *Copyright Act*, adopted in 1924. ... Professor Ricketson has indicated that in adopting a sweat of the brow or industriousness approach to deciding what is original, common law countries such as England have "depart[ed] from the spirit, if not the letter, of the [Berne] Convention" since works that have taken time, labour or money to produce but are not truly artistic or literary intellectual creations are accorded copyright protection.[52]

47 [2004] 1 S.C.R. 339 [*CCH*].

48 Originality is the fundamental condition for a work to be protected by copyright, both in Canada and internationally. See generally, Daniel Gervais, *La notion d'œuvre dans la Convention de Berne et en droit comparé* (Genève: Librairie Droz, 1998). The second fundamental condition is that the work must either belong to the category of literary or artistic works or be a compilation.

49 *Copyright Act.*, R.S.C. 1985, c- C-42, s. 12.

50 *Ibid.* See Daniel Gervais, "Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law" (2002–3) 49 J. Copyright Soc'y USA 949.

51 See Sam Ricketson, "The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties" (1999) I.P.Q. 56; Daniel Gervais, "The Compatibility of 'Skill & Labour' with the Berne Convention and the TRIPS Agreement" (2004) 2 Eur. I.P. Rev. 75; and, Gervais, *La notion d'œuvre*, above note 48.

Applying the Berne Convention principles, the Court concluded that publishers could get copyright protection for certain aspects of the headnotes, but not for mechanical or intellectually trivial exercises such as formatting.

TRIPS incorporated, by reference, the normative content of the Berne Convention.[53] TRIPS added new norms to the Berne Convention (and hence was known as a "Berne-plus" agreement), but not a definition of originality. As rightly noted by the chief justice, however, there is a definition implicit in Berne, and Canada is bound by this implicit definition.

It may be useful to compare the approach chosen by the Supreme Court in *CCH* with the approach taken by two WTO dispute-settlement panels. In a 2000 decision in a dispute between the United States and the European Union, a WTO panel[54] considered whether an exception contained in section 110(5) of the US *Copyright Act*[55] was compatible with the TRIPS Agreement and, because of its incorporation into TRIPS, also with the Berne Convention. The exception in question, a victory for the powerful lobby of bars, hotels, and restaurants, exempted from the payment of music royalties[56] almost all hotels, bars, restaurants, and smaller food stores in the United States. To be justifiable under Berne and TRIPS, the United States had to show that the exemption was covered by an exception contained in those instruments. However, because there was no specific exception that applied, the United States could only rely on a provision of Berne (and now TRIPS) known as the "three-step test." That test[57] is a "filter" for small exceptions not otherwise provided for in Berne. One of the questions that the WTO panel had to decide in interpreting the three-step test was whether the Berne *travaux préparatoires*, including a reference to "understandings"

52 *CCH*, above note 47 at para. 19.

53 Namely, arts. 1 to 21—except arts. 6*bis* and 10(3), which deal with moral rights. TRIPS Article 9(1). See also Daniel Gervais, *TRIPS Agreement*, above note 4 at 123–32.

54 United States – Section 110(5) of the US Copyright Act: Report of the Panel, WTO document WT/DS160/R of 15 June 2000.

55 17 U.S.C.

56 In this case the right to perform music "in public," that is, within the establishments, which often use loudspeakers to play radio or recorded music. In Canada, those uses would typically be licensed by SOCAN, which represents authors of music and lyrics.

57 Contained in *Berne Convention*, above note 26, art. 9(2), and TRIPS Agreement, above note 1, art. 13.

about the meaning of certain provisions, were binding also in a TRIPS context. The panel concluded that the entire *"acquis"* of Berne, including the *travaux*, had been made part of TRIPS, not just the text of the Convention itself.[58] The panel also found that a statement contained in the general report of a conference at which the Berne Convention had been revised could constitute an "agreement" as defined by article 31(2)(a) of the *Vienna Convention*.[59]

Another WTO panel, in a dispute concerning the Canadian *Patent Act*, was called upon to interpret article 30 of TRIPS, which applies the language of the Berne three-step test to patents.[60] That panel also referred to the history of the test in the Berne Convention. It thus seems that the Supreme Court's reference to the Berne *acquis* (though somewhat indirectly) and its conclusions on the notion of originality are both compatible with that *acquis*[61] and with WTO practice.

2) Federal Court of Canada

International intellectual property treaties were mentioned in most of the appellate decisions that led to the Supreme Court decisions discussed in the previous section. We will leave those aside for the purposes of this chapter. There are, however, a number of other Federal Court decisions that relied directly on international treaty norms and that are worth mentioning here. In two cases, the court relied fairly heavily on international norms. In two other cases, it was very reluctant to do so.

58 WTO document WT/DS160/R of 15 June 2000 at paras. 6.62–6.63.

59 *Ibid.* at para. 6.53.

60 The case is *Canada—Patent Protection of Pharmaceutical Products*, 17 March 2000, WTO document WT/DS114/R [*Canada—Patent Protection*]. Canada amended its *Patent Act* twice in response to decisions by the WTO Dispute-Settlement Body (DSB) that found the Act incompatible with the Agreement. Apart from the *Canada—Patent Protection* decision, which dealt with the so-called stockpiling exception that allowed generic drug manufacturers to begin manufacturing a patented molecule up to six months prior to the expiry of the patent (ss. 55.2(2) and (3) of the *Patent Act* were repealed by 2001, c. 10, s. 2(1)), another decision, *Canada—Term of Patent Protection*, doc. WT/DS170/AB/R of 12 October 2000, dealt with the term of protection of patents at the time of entry into force of TRIPS. S. 45, which was found to be in violation of TRIPS, was repealed and substituted by 2001, c. 10, s.1.

61 See Daniel Gervais, "Canadian Copyright Law Post CCH" (2004) 18 I.P.J. 131.

In *Tele-Direct (Publications) Inc. v. American Business Information Inc.*,[62] the Federal Court had to decide whether a telephone directory was a "compilation" for the purposes of the *Copyright Act*. Décary, J.A., explained his decision as follows:

> The definition of "compilation" must be interpreted in relation to the context in which it was introduced. Simply put, it was introduced as a result of the signature of the North American Free Trade Agreement[63] and with the specific purpose of implementing it. It is therefore but natural when attempting to interpret the new definition to seek guidance in the very words of the relevant provision of NAFTA which the amendment intends to implement.
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> ...
>
> I do not wish to be interpreted as saying that Canadian courts, when interpreting these provisions, should move away from following the Anglo-Canadian trend. I am only suggesting that where feasible without departing from fundamental principles, Canadian courts should not hesitate to adopt an interpretation that satisfies both the Anglo-Canadian standards and the American standards where, as here, it appears that the wording of Article 1705 of NAFTA and, by extension, of the added definition of "compilation" in the Canadian Copyright Act, tracks to a certain extent the wording of the definition of "compilation" found in the United States Copyrights Act.[64]

The court was thus using international norms both to find the meaning of statutory terms and to ensure a certain degree of harmony with United States law and practice in the wake of NAFTA, though not as explicitly as the Supreme Court in *Théberge* or in the *Harvard* dissent. Interestingly, the court also found that Canada's acceptance of NAFTA should inform the intended meaning of certain provisions of the *Copyright Act*[65] even where the Act was not amended by the implementing legislation.

62 [1998] 2 F.C. 22 (C.A.), leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 660 (21 May 1998) [*Tele-Direct*].

63 *North American Free Trade Agreement Between the Government of Canada, The Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, Can. T.S. 1994 No. 2 [NAFTA].

64 *Tele-Direct*, above note 62 at paras. 14–18 (footnotes omitted).

65 See *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, 53(2).

Another example worth mentioning in this context is *Baker Petrolite Corp. v. Canwell Enviro-Industries Ltd.*[66] The Federal Court of Appeal had to interpret whether the notion of novelty in patent law[67] had changed since the 1993 amendments[68] that defined a novelty-defeating disclosure as one that renders the subject matter of the invention "accessible to the public." While the application of this criterion is fairly straightforward in the case of, for example, a scientific or trade publication clearly describing the invention, it is less clear whether a disclosure takes place when the invention (or a product embodying or resulting from the use of the invention) is sold or simply "used in public." In *Baker Petrolite* the court concluded that if a sale or use in public allows a "person skilled in the art" to understand all the essential elements of the invention without adding his or her own ingenuity, then that sale or use defeats the novelty and thus makes it impossible to obtain the patent—unless the disclosure takes place within the "grace period" of twelve months provided for in section 28.2 of the *Patent Act*. Litigants in the case based a considerable part of their argument on international and foreign norms and this is reflected in the decision. In trying to discern Parliament's intention, the court used both an international treaty and comparative tools, referring to the *European Patent Convention* of 1973 and the *North American Free Trade Agreement, 1992*.[69]

In two cases involving an international pharmaceutical company, the Federal Court had to decide whether and, if so, to what extent it could directly rely on international intellectual property treaties. First, in *Pfizer Inc. v. R.*,[70] the well-known pharmaceutical company was seeking relief by relying directly on article 33 of the TRIPS Agreement. The basis for the relief claimed was a minimum term of protection for all patents of not less than twenty years from the filing date of the patent application. Prior to TRIPS, Canada granted patents a term of seventeen years from the date of issue of the patent. In its initial implementation of TRIPS, Canada only applied the twenty-year term to patents filed on or after 1989. Because TRIPS entered

66 2002 FCA 158.

67 According to s.2 of the *Patent Act* (see above note 22 and accompanying text), to be patented in Canada an invention must be new. In most cases, this means that the invention must not have been disclosed "more than one year before the filing date by the applicant, or by a person who obtained knowledge, directly or indirectly, from the applicant" (*Patent Act*, s. 28.2(1)(a)).

68 S. C. 1993, c. 15, s. 33. The amendments entered into force in 1996.

69 Above note 63.

70 [1999] 4 F.C. 441 (T.D.)

into force on 1 January 1995, there were still many patents in force then granted prior to 1989 and to which the shorter term applied. In the case at bar, Pfizer's patent had been granted in October 1980.

The conclusion reached in the case is of little practical importance because Canada amended the *Patent Act* after it was found to be in violation of article 33 by the WTO.[71] However, the decision is interesting to the extent that the court refused to "reinterpret" the Act in a way that was compatible with TRIPS article 33. In fact, not only did the court not follow the broad policy approach adopted in a number of Supreme Court decisions, but the decision also seems conservative even when analyzed against the backdrop of the classic principle of statutory interpretation.

Relying on the *WTO Implementation Act*,[72] the government claimed that "the aggregate effect of [the Act] is to bar any person from commencing any type of legal action under either the Act itself or the underlying WTO Agreement without the consent of the Attorney General."[73] It asked the court to conclude that the plaintiffs' action was barred because the attorney general's consent had not been given in the case. The court examined the detailed implementation of WTO rules and TRIPS in particular. It then concluded that TRIPS per se did not form part of Canadian law:

> The central issue in this case is whether Parliament, in enacting the *WTO Implementation Act*, gave legal effect or translated into federal law that Agreement as a whole and, in particular, its annexed *TRIPS Agreement* or section 33 thereof.... In my view, much guidance to answer the central question considered here is derived from the recent Supreme Court of Canada judgment in *Re British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway*.[74] ... I have come to the conclusion it is plain and obvious that Parliament did not legislate into federal domestic law the *WTO Agreement* and, in particular, section 33 of the *TRIPS Agreement*, which is essential to the success of Pfizer's declaration. Parliament, in my view, manifestly indicated its intention as to how it was implementing the *WTO Agreement* and its annexed *TRIPS Agreement* or any part thereof.[75]

71 See above note 60.

72 *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47.

73 *Pfizer Inc. v. R*, above note 70, at para. 11.

74 [1994] 2 S.C.R. 41.

75 *Pfizer Inc. v. R.*, above note 70 at paras. 36–45.

Then in *Pfizer Canada Inc. v. Canada (Attorney General)*,[76] the Canadian subsidiary of the same multinational company was trying to get the Federal Court to interpret the notion of "filing date" for patent application, in light of applicable international treaties. Strayer J.A. was not convinced:

> I am of the view that there is no need to resort to these instruments in this case. I base this conclusion on the long-established jurisprudence that while Parliament is presumed not to intend to legislate contrary to international treaties or general principles of international law, this is only a presumption: where the legislation is clear one need not and should not look to international law.... The appellants nevertheless say this principle has been modified by the Supreme Court in *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*.[77] They take that case to mean that "international treaties are always a proper aid to be used to interpret domestic legislation." But in that case Gonthier J. put it thus:
>
> > If the convention may be used on the correct principle that the statute is intended to implement the convention then, it follows, the latter becomes a proper aid to interpretation, and, more especially, may reveal a latent ambiguity in the text of the statute even if this was 'clear in itself' [at 1371–72].
> >
> > ...
>
> The other important international obligation invoked by the appellants is found in article 4.B of the Paris Convention.... [T]he Paris Convention does not, as I understand it, confer immediate enforceability in Canada of a patent applied for or obtained in another member country.[78]

Here again we see that the Court is strikingly less enthusiastic about the application of international norms.

3) Analysis

The Federal Court of Appeal has been more reluctant to use international treaties to interpret and, *a fortiori*, reinterpret, existing intellectual property statutes than the Supreme Court, looking instead at the intention expressed by Parliament in the implementing legislation (if any). However, the type of action launched by Pfizer is likely the first of many. The two

76 2003 FCA 138, leave to appeal to S.C.C. refused (2003), 27 C.P.R. (4th) vi.
77 [1990] 2 S.C.R. 1324.
78 *Pfizer Canada Inc. v. Canada (Attorney General)*, above note 76 at paras. 20–24.

Pfizer cases dealt with patent law, but similar conclusions can be drawn with respect to copyright, trademarks, and any other intellectual property rights governed by international treaties and, in particular, TRIPS.[79] As the area of intellectual property is regulated ever more deeply and broadly by international norms,[80] and the policy flexibility left for individual nations is proportionally reduced, the number of cases in which a provision of a domestic intellectual property statute or other legal rule[81] can be tested against an international norm will increase. The boundaries of the classical doctrine (interpreting the statute with a view to ensuring maximum compatibility with applicable international norms[82]) may be redefined to encompass broader policy issues, including an analysis of the economic and trade-related considerations that undergird the instrumentalist view of intellectual property[83] adopted by the Supreme Court, one which seems

79 These would include, in addition to those already mentioned, industrial designs, layout of computer chips, geographical indications, and confidential information, in particular clinical test information submitted to obtain marketing approval (see art. 39 of the TRIPS Agreement).
80 See Daniel Gervais, "The Internationalization of Intellectual Property: Challenges from the Very Old and the Very New" (2002) 12 Fordham I.P. Media & Ent. L.J. 929.
81 Because "intellectual property" as defined in TRIPS includes confidential information (see *ibid.*), one could also apply this reasoning to common law (or civil law) doctrines protecting trade secrets and other forms of secret commercial information from misappropriation and/or unfair competition.
82 See above notes 5-7 and accompanying text.
83 The concept of utilitarianism deals with the maximisation of the good to society. It is linked to the writings of Jeremy Bentham and John Stuart Mill. Instrumentalism assesses actions in relation to their objective. Thus, actions are tools to achieve certain goals. The instrumentalist utilitarianism view is to see law as an instrument to achieve the greatest good for society. Thus, intellectual property is useful because it encourages creativity and encourages people to share their creations with others thus benefiting society as a whole. The utilitarian rationale for intellectual property rights has been described as follows:

> The utilitarian argument is that intellectual property rights provide incentives to produce new intellectual objects. By assigning property rights to creators, an incentive is in place for people to undertake the expense and time to invent new products or develop new ideas. If intellectual property protection is removed, the argument goes, then there will be no incentive to produce intellectual objects because people will be free to copy the object without compensating the creator. The utilitarian argument weighs the long-term development of the society against the short-term drawback of assigning exclusive production rights to a creator [footnote omitted].

Robert L. Ostergard, Jr., "Intellectual Property: A Universal Human Right?" (1999) 21 *Hum. Rts. Q.* 156 at 162. See also Stephen R. Munzer, *A Theory of Property* (New York: Cambridge University Press, 1990).

fully consistent with the TRIPS approach.[84] In parallel, private litigants can be expected to use international norms to convince national courts to reinterpret intellectual property norms and standards. Indeed, it now behoves Canadian practitioners to use international norms wherever possible to convince courts of the interpretation of the statute or legal doctrine favourable to their clients' interests.[85] The policy direction indicated by Parliament, and adopted by the Supreme Court, of minimizing differences between Canada and its main trading partners in areas that may negatively affect trade in informational goods and services or goods whose value is essentially derived from their ideational content is certain to take on greater prominence in the coming years. This approach is arguably supported by

84 Graeme Dinwoodie & Rochelle Dreyfuss, "International Intellectual Property Law and the Public Domain of Science" (2004) 7 J. Int'l Econ. L. 431 at 447–48:

> The [TRIPS] Agreement, as an instrument of intellectual property law, must strike a balance between sufficient levels of protection to stimulate the desired social and commercial activity undertaken by first-comers, and sufficient limits on those rights to ensure the maximum socially useful exploitation of that activity. It partly achieves this balance substantively by allocating rights as between private and public interests, that is, between producers and users of intellectual property. But TRIPS, like any international agreement, must also deal with issues such as sovereignty, diversity, and legitimacy that pervade international relations. It must accordingly allocate power between supranational and national institutions, between national and international laws. In the TRIPS context, that allocation has the additional effect of giving member states an important role in striking the producer/user balance of intellectual property law.

This debate goes beyond intellectual property proper. It is related to the question of the public funding of scientific research. Proponents of greater public funding argue that it would increase access to scientific research (and that would increase the pace of innovation) while allowing research efforts to be devoted to orphan or tropical diseases, areas where the profit motive may not be sufficient to warrant efforts by private laboratories.

Empirical data is still being developed and the validity of the thesis has not (yet) been conclusively demonstrated. For a survey of arguments, see John C. Low, "Finding the Right Tool for the Job: Adequate Protection for Research Tool Patents in a Global Market?" (2005) 27 Hous. J. Int'l L. 345. For a more theoretical analysis, see Keith E. Maskus & Jerome H. Reichman, "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods" (2004) 7 J. Int'l Econ. L. 279.

85 See Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002)16 Sup. Ct. L.Rev (2d) 23; Stéphane Beaulac, "On the Saying That 'International Law Binds Canadian Courts'" (2003) 29:3 Canadian Council on International Law Bulletin 1; and Gib van Ert, "International law does bind Canadian courts: a reply" (2004) 30:1 Canadian Council International Law Bulletin 1.

the assumption that rational, public-minded government will seek to minimize the transaction costs of international cooperation.[86]

Although the approach taken by the Federal Court of Appeal is not uniform, it seems that the road ahead, as mapped by the Supreme Court, is clear. Beyond the need for uniform trade and trade-related rules, one could discern an attempt to apply intellectual property statutes so as to maximize the innovation potential of Canadians and Canadian enterprises. That is particularly true of the strong *Harvard College* dissent and of the opinions penned by the chief justice in *Monsanto* and *CCH*. These considerations led the Supreme Court to a different set of conclusions in the two other copyright decisions, namely *Théberge* and *SOCAN v. CAIP*, where the statute was interpreted more narrowly and where the interest of Canadians was perceived to be to allow use of copyright content without authorization and/or limiting the reach of the author's exclusive rights in favour of "balance."

In the five Supreme Court decisions since 2002 examined earlier in the chapter, a constant has been the reference to international intellectual property instruments not only, as in traditional jurisprudence, to interpret the relevant statute(s), but also to determine the underlying policy objectives. Those decisions show that intellectual property is not an end in itself. Copyright is not there to "protect" authors (or other owners of copyright), but to maximize the creation, production, and dissemination of knowledge and access thereto. Patents are there as part of a broader social contract to "incentivize" and promote access to innovation. To put it differently, protection of intellectual property rights is not an end but a means to achieving that end. This implies that the level of protection must be properly calibrated.

That conclusion seems consonant with the displacement of intellectual property negotiations. Those rules were initially developed in a "pure" circle of intellectual property, epitomized by the Paris and Berne Conventions, both housed in the World Intellectual Property Organization (WIPO).[87] At the international level, norm-setting activity moved in 1986 to the GATT, and the set of norms that emerged at the end of that process was incorporated into a new instrument, the TRIPS Agreement, at the inception of the WTO on 1 January 1995.[88] The pragmatic, instrumentalist approach of

86 See John K. Setear, "An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law" (1996) 37 Harv. Int'l L.J. 139 at 174.

87 See online: www.wipo.int.

88 TRIPS Agreement, above note 1 at para. 3.

trade law, the principal objective of which is not there to "protect" property or traders but to maximize legitimate trade (which includes a degree of protection for goods and persons, but only to the extent necessary), has infused intellectual property with a new approach, and one that the Supreme Court seems to have embraced fully.[89]

Practitioners of intellectual property would be well advised to take account of the approach chosen by the Supreme Court, one that reflects the transfer of jurisdiction in intellectual property to the domain of trade rules. Claiming a right as ordinary "property" that "deserves" on Lockean grounds, or as a human right, might fall on deaf ears. The path laid down by the Supreme Court emphasizes the need to show the social welfare impacts of protection—and the related search for "balance." If that is not the way Parliament intended intellectual property statutes to be interpreted and applied, it would have to say so in upcoming legislative amendments.

A few thoughts, before concluding, on whether the appropriation of international treaty norms by Canadian courts, and in particular the Supreme Court, might be a two-way street. Increasingly, courts in various countries are called upon to interpret TRIPS or other international instruments. In two cases dealing with the "three-step test,"[90] the WTO adopted dispute-settlement reports that interpreted certain TRIPS provisions[91] as including the *travaux préparatoires* of another instrument, the Berne Convention, which was incorporated into TRIPS. Yet, since 1995, out of nearly three hundred cases filed under the *WTO Dispute-Settlement Understanding (DSU)*,[92] only seven TRIPS cases led to a decision by a panel and two by the appellate body. This leaves large parts of TRIPS, including dozens

89 There would be much more to say on the property-based vs. instrumentalist theories of intellectual property of course. For our purposes, it seems fair to say that the lobbies that pushed for moving of international intellectual property norms in the trade arena could be expected to live with the pragmatism of trade rules, rather than defend pre-trade views based on property, theft, and piracy.

90 The test, borrowed by TRIPS drafters from art. 9(2) of the Berne Convention, limits exceptions to exclusive rights to cases that serve a special policy purpose, do not interfere with normal commercial exploitation, and do not unreasonably prejudice the legitimate interests of rights-holders. TRIPS Agreement, above note 1, arts. 13, 26(2) and 30, respectively.

91 World Trade Organization, *United-States-Section 110(5) of the US Copyright Act*, Report of the Panel, 15 June 2000, WTO Document WT/DS160/R; *Canada—Patent Protection*, above note 60.

92 Above note 4.

of provisions of other conventions incorporated in TRIPS by reference,[93] to be interpreted.

As national courts are increasingly called upon to provide interpretations of those norms to determine the compatibility of their own legislation, a national layer of jurisprudence of international intellectual property rules may emerge. As Professor Dinwoodie noted in that respect:

> In the classical system, national courts had very little role to play in the construction of international intellectual property law. Litigation involved national rights.... National courts are, however, beginning to tackle multinational cases and thus contribute to the creation of international norms.[94]

D. CONCLUSION

Canadian courts are occasionally called upon to interpret statutes in light of relevant international norms. According to the classical doctrine of statutory interpretation, courts should try to ensure compatibility between domestic statutes and (binding) international norms wherever possible. This was true also of cases involving intellectual property rights.

In recent years, however, under the impulsion of the Supreme Court, international norms have taken on a different hue. Beyond a simple compatibility analysis, the Supreme Court and, in a few cases, lower courts as well have signalled the desirability of ensuring compatibility and uniformity of rules governing trade with our main trading partners. Since 1995, that includes intellectual property norms contained in the WTO TRIPS Agreement. The analysis is informed by a perceived need to maintain and enhance Canada's competitiveness and innovation, while not hampering the free flow of information and knowledge. Those are seen as competing objectives in maximizing general welfare. The view may be characterized as instrumentalist.

93 Arts. 1–21 (minus 6*bis* and 10(3)) of the Berne Convention (Paris Act, 1971) and its Appendix (minus art. IV(3)); arts. 1-12 and 19 of the Paris Convention; arts. 2–7 (minus 6(3)), 12 and 16(3) of the *Treaty on Intellectual Property in Respect of Integrated Circuits* (known as the "Washington Treaty"). See arts. 2(1), 9(1), and 35 of the TRIPS Agreement, above note 1.

94 Graeme Dinwoodie, "The International Property Law System: New Actors, New Institutions, New Sources" in *Proceedings of the 98th Annual Meeting of the American Society of International Law* (2004) at 216. A symposium on that theme was held at the Chicago-Kent Program in Intellectual Property Law in October 2001. Papers were published in (2002) 77 Chi.-Kent L. Rev.

In parallel, litigants have begun to use international norms to buttress arguments in favour of one interpretation or another of Canadian intellectual property statutes. In certain cases, litigants asked courts, unsuccessfully, to impose obligations on the federal government that had not been expressly implemented in domestic legislation. In a number of cases already decided, and in many more to come, international norms constitute a strong support for interpreting or reinterpreting extant rules. Given the increasing internationalization of rules and globalization of economic relations, that trend is likely to increase rapidly in the coming years.