

can anti-circumvention rules be made
consistent with privileged uses?

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bill c-60



bill c-60

- failed bill of previous government (died on order page)
- prohibits **circumvention for infringing purposes**
 - most 'privileged uses' (eg, fair dealing) are not infringement
- **no ban** on circumvention devices
- **notice and notice** system for ISPs

bill c-60's anti-circumvention rule

34.02(1) An owner of copyright in a work ... and a holder of moral rights in respect of a work ... are ... entitled to all remedies by way of injunction ... for the infringement of a right against a person who, without the consent of the copyright owner or moral rights holder, circumvents, removes or in any way renders ineffective a technological measure protecting any material form of the work ... **for the purpose of an act that is an infringement of the copyright in it** or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).



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translation, eh? 



'privileged uses' ?

hohfeldian analytics

privilege // right

(liberty)

(claim)

correlatives

if [user] has a privilege → [owner/state] has no right

if [user] has a right → [owner/state] owes a duty



canada's trilogy

- **théberge** v. galerie d'art du petit champlain
- **cch** v. law society of upper canada
- **socan** v. canadian assn. of internet providers

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. once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.

per binnie j, **théberge**



...the fair dealing exception is perhaps more properly understood as an **integral part** of the copyright act **than simply a defence**. any act falling within the fair dealing exception will not be an infringement of copyright.

per mclachlin cjc, **cch**




... the fair dealing exception, like other exceptions in the copyright act, is **a user's right**. in order to maintain the **proper balance** between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.

per mclachlin cjc, **cch**



to put it otherwise ... fair dealing, which specifies **permissible uses** of copyrighted works even in the absence of the copyright owner's consent, is to be understood and deployed not negatively, as a mere exception, but rather **positively, as a user right** integral to copyright law.

abraham **drassinower**

© exceptions = user rights 

[user] right → [owner/state] lacks privilege

user rights → © duties

© duties \approx circumvention rights

circumvention rights **are claims**

... a situation may arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.

scc, haig v canada

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balance

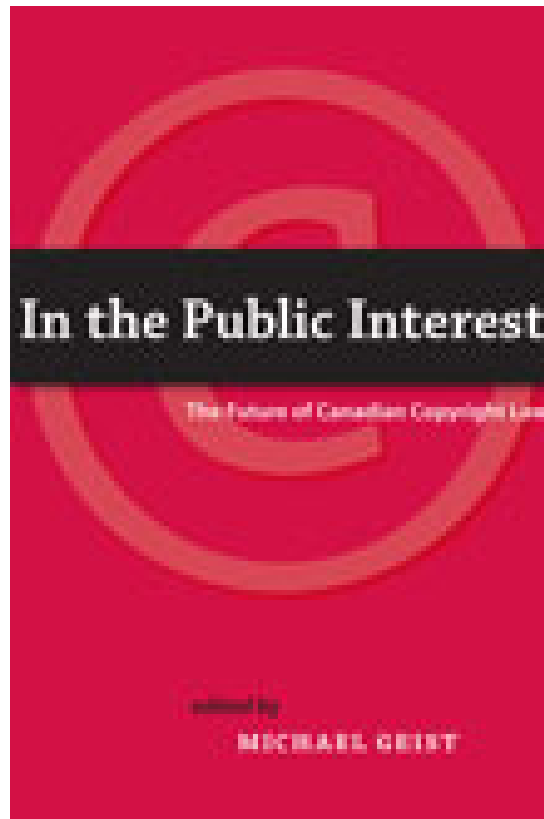
legislative balance sheet

ANTI-CIRCUMVENTION RULES

- DMCA
- DAA
- JCL
- CD
- etc
- etc

CIRCUMVENTION RIGHTS

- Geist's 30 Days of Drm
 - Investigation of concealed code
 - Statutory Obligations
 - Time Shifting
 - Educational Institutions
 - Libraries
 - Public Domain
 - Back-Ups of Digital Consumer Products
 - Broken or Obsolete Technologies
 - Systems Repair
 - Artistic Access
 - Private Copying
 - Criticism, Review and News Reporting
 - Research and Private Study
 - Involuntary Installation of software
 - Security Research
 - Reverse Engineering
 - Privacy



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