

COPYRIGHT IN ITS GLOBAL CONTEXT: CANADA'S APPROACH TO BILL C-32: INDIA'S LESSON IN 'WHAT NOT TO DO'.

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ABSTRACT

Every once in a while, one has the luxury to benefit from the experience of another. When those experiences originate from a comparable state of affairs, one would be unwise not to learn from them. Such an opportunity presents itself before India as both Copyright Modernization Act, 2010 of Canada and the Copyright (Amendment) Bill, 2010 of India are tabled before their respective legislative houses. Through this note the author seeks to reflect upon Canada's Bill C-32 vis-à-vis the other proposed or prevailing copyright laws of countries, in order to expediently inform the Indian position on Copyright law. The author attempts to discern the underlying legislative policies which drive both India and Canada in their evident attempt to harmonise municipal laws with their respective international obligations. While the provisions of Bill C-32 and the Copyright Amendment Bill, 2010 are contrasted, the author also seeks to understand both India and Canada's international obligations as per the prevailing international intellectual property regime and their respective proposals for domestic execution of the same, under the ubiquitous eye of the United States. The author does this in addition to critically reflecting upon the efficacy of provisions dealing with Technology Protection Measures which have thus far stirred the most controversy. In doing so the author is able to juxtapose the existing legal regime in the United States and the one proposed in Canada in order to suggest a viable way forward for India to attain a judicious copyright balance between international compliance and municipal efficacy.

INTRODUCTION

As both the Copyright Modernization Act, 2010 of Canada (better and more often referred to as the Bill C-32) and the Copyright (Amendment) Bill, 2010 of India are tabled before their respective legislative houses, one can't help but look at the debate centred on the Bills with incredulity. There exist a myriad of voices in support and dissention. However, the apparent lack of knowledge as regards the factors that influenced the bills into their current shape, along with uncertainty in relation to what exactly are Canada and India's international legal obligations, have led observers to view the debate as uninformed.

It is imperative to appreciate that even the few vociferously advocated benefits of enhanced copyright protection are inevitably overshadowed if achieved through

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a system, which in popular perception is viewed as ‘not beneficial’ or even ‘illegitimate’.¹ Bill C-32 is fast becoming inundated by the same stigma and hence one endeavours to examine how India’s Copyright Amendment Bill, 2010 can steer clear of the same fate. It is appropriate then to look into the inadequacy of Canada’s Bill C-32, in order to elucidate India’s lesson in ‘what not to do’ in light of a country’s binding obligations under the WIPO Internet Treaties.² The lesson is further strengthened by a narrative on Canada’s previous attempts at copyright modernization which depict a more balanced approach. Those attempts seem more in congruence with the wishes of the world community as observed in the negotiations leading up to the WIPO Copyright Treaty which render the myth of its inflexibility futile. After looking upon the provisions of India’s Copyright Amendment Bill, 2010 in detail it becomes imperative to juxtapose its stipulations with those of Bill C-32, as well as with the copyright regime in the United States after the Digital Millennium Copyright Act, 2000³ to enable a more efficient functioning of the inept, though now inevitable and institutionalized tradition of sightless reproduction of western legislations on similar subject matters.

This note is divided into three parts. Part I deals with the controversial provisions of Canada’s Bill C-32 in relation to Technology Protection Measures⁴, while looking at the prior attempts on Canada’s behalf to update its Copyright laws. It then provides a brief history of India’s road to Copyright modernization and contrasts certain provisions of the Copyright Amendment Bill, 2010 with that of Bill C-32. Part II looks at India and Canada’s international obligations as per the prevailing international intellectual property regime and analyses their respective proposals for domestic implementation of the same. Part III seeks to draw inferences from the existing legal regime in the United States and the one proposed in Canada in order to suggest a viable way forward for India to attain perfect copyright balance between achieving international compliance and maintaining ‘user friendliness’.

I. C-32 AND THE COPYRIGHT AMENDMENT BILL, 2010: A SURVEY

A. Bill C-32

Canada participated in the 1996 Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions that led to the creation of the “WIPO Internet Treaties” which came into force in 2002. Though Canada signed the treaties in 1997,

1. Debora Halbert, *Globalized Resistance to Intellectual Property*, available at <http://globalization.icaap.org/content/v5.2/halbert.html> (last visited on 6 Nov. 2010).

2. The WIPO Copyright Treaty and The WIPO and Phonograms Treaty are together referred to as the WIPO Internet Treaties.

3. Hereinafter DMCA.

4. Hereinafter TPMs.

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it has, as of yet, not ratified them. In a Speech from the Throne, opening the 1st Session of the 40th Canadian Parliament in November 2008, the Canadian government reiterated its commitment to copyright reform, by stating that “[t]he Canadian Government will proceed with legislation to modernize Canada’s copyright laws and ensure stronger protection for intellectual property”⁵; Bill C-32 was introduced in the House of Commons on 2 June 2010 as a result thereof.

It is imperative to look upon the preamble of the proposed Bill in order to garner a better understanding of the proposed amendment’s declared objectives. A cursory glance of the preamble of Bill C-32⁶ draws out certain conflicting messages which render its intentions ambiguous. One is unsure whether the Bill envisages enhanced copyright protection through norms similar to those of other nations (regardless of whether they are greater than what international obligations require) in order to achieve a *coordinated approach* or is it the intention of Bill C-32, to provide for protection solely through *international compliance*.⁷ The two are very different concepts as shall be examined later on in the discussion on Canada’s obligations under the WIPO Copyright Treaty⁸ and the United State’s influences through the DMCA.⁹

Although the preamble of Bill C-32 spells out its intention to bring the Canadian Copyright Act into compliance with the WIPO Internet Treaties¹⁰, it hopes to do so through the recognition of TPMs *in a manner* that promotes *culture, innovation, competition* and *investment* in the Canadian economy.¹¹ One however wonders whether TPMs and their impact on *Access to Knowledge* fall contrary to the objectives of culture and innovation.¹² This is because if Bill C-32 were to be law, Section 41.1 of the amended Act would make the circumvention of digital locks that control access to a work illegal, even if the work subject to the TPM is legally acquired. Section 41.1 further prohibits the manufacture and distribution of

5 PARLIAMENT OF CANADA, *Speech from the Throne delivered by Her Excellency the Right Honourable Michaëlle Jean, Governor General of Canada, to open the 3rd Session of the 40th Parliament*, available at <http://www.speech.gc.ca/eng/media.asp?id=1364> (last visited on 3 March 2010).

6 An Act to amend the Canadian Copyright Act, available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=4580265&file=4> (last visited on 1 Nov. 2010).

7 Preamble to Bill C-32 states in paragraph 3 that “copyright protection is enhanced when countries adopt a coordinated approach based on internationally recognized norms.”

8 Hereinafter WCT.

9 Digital Millennium Copyright Act, 2000.

10 See Statement of Objectives for Bill C-32, available at <http://prsindia.org/uploads/media/Copyright%20Act/The%20Copyright%20Bill%202010.pdf>. (last visited on 5 June 2011).

11 Bill C-32, pmbl., ¶ 7.

12 Sam Trosow, *Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing*, in FROM “RADICAL EXTREMISM” TO “BALANCED COPYRIGHT”: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 546-47 (Geist ed., 2010).

devices that can be used for the circumvention of TPMs, without there being an underlying distinction between access and copy controls. Therefore the mere circumvention of TPMs would bestow upon the owner every remedy as would be available to him in case of copyright infringement.¹³ Furthermore, Section 41.22 after the amendment would prohibit the removal or alteration of rights management information, if the person doing so knows that such removal or alteration would facilitate or conceal any infringement of copyright, or adversely affect a copyright owner's right to remuneration.¹⁴

It would be wise at this juncture to look at the various efforts instituted by the Canadian government in the last five years to reform Canadian copyright law leading up to Bill C-32. It is felt that in the past Canada maintained *policy flexibility* and adhered to international treaties on a minimalistic basis (also referred to by Bannerman as the "*Made in Canada approach*").¹⁵ There has however been a dereliction from this approach in favour of the American Maximalist approach with regards to Bill C-32.¹⁶ Ratification of WCT merely requires among other things, state parties to provide copyright holders with: a) *Legal remedies for the Circumvention of TPM's*; b) *exclusive right to make their work available on certain platforms for example the internet*; and c) *legal remedies against the removal and alteration of rights management information and against the distribution of such works*.¹⁷ Canada's previous attempt at Copyright Reform (Bill C-60) was seen to be more along the lines of the minimalistic approach, wherein there existed no limitations on the manufacture and sale of circumvention devices and infringement occurred only when circumvention was carried out for the sole purpose of copyright violation.¹⁸

Next on the scene was Bill C-61 in 2008 which followed the American Maximalist approach and was thus termed as the "*Canadian DMCA*" by its detractors.¹⁹ It banned circumvention devices and made circumvention illegal

13 PARLIAMENT OF CANADA, *Legislative Summary of Bill C-32: An Act to amend the Copyright Act*, available at: http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c32&source=library_prb&Parl=40&Ses=3#a23 (last visited on 3 Nov. 2010).

14 *Id.*

15 Sara Bannerman, *Copyright: Characteristics of Canadian Reform*, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 33-34 (Geist ed., 2010).

16 *Id.* at 18.

17 WIPO Copyright Treaty, available at <http://www.wipo.int/treaties/en/ip/wct/index.html> (last visited on 2 Nov. 2010).

18 Michael Geist, *Anti-Circumvention Legislation and Competition Policy: Defining a Canadian Way?*, in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW -50 (Michael Geist ed., 2005).

19 Cory Doctorow, *Canadian DMCA is worse than the American one*, available at: <http://boingboing.net/2008/06/12/canadian-dmca-is-wor.html> (last visited on 3 Nov. 2010).

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regardless of whether it was for infringing purposes or not.²⁰ Bill C-32 retains these controversial provisions; however it also includes certain “*Made in Canada*” provisions in order to attempt a more balanced copyright.²¹ Therefore Bill C-32 has been described as an attempt to meet domestic Canadian requirements while at the same time meeting the technical requirements of international treaties.²² Some of the “*Made in Canada*” provisions are as follows: Fair Dealing has been expanded to include education, satire, and parody; consumer exceptions now include time shifting, format shifting, backup copies, and lastly an exception for user generated content (also known as the YouTube exceptions in popular reference) in order to bolster creativity.²³ Protection of “*Internet Intermediaries*” from actions of their users, distinguishing between commercial and non-commercial infringement for the purpose of statutory damages, and exceptions for people with print disabilities²⁴ are just some of the provisions that have made Bill C-32 more acceptable. Nevertheless all these rights are subject to the digital lock provision and hence cease to exist when a rights holder locks his content down.²⁵ Hence the question required to be answered is — If Canada (or India for that matter) were to ratify the WIPO Internet Treaties to what extent would change in the present copyright law be absolutely necessary?

B. The Copyright Amendment Bill, 2010

India's Copyright Act of 1957 has been amended on no less than five prior occasions to complement national and international requirements.²⁶ The amendments in 1994 were significantly more comprehensive than those in 1999 which sought to comply with the obligations under the Trade Related Aspects of Intellectual Property Rights²⁷ agreement.²⁸ The most significant contributions of the 1994 amendments

20 Bill C-61, available at: <http://www2.parl.gc.ca/housepublications/publication.aspx?docid=3570473&language=e&mode=1> (last visited on 3 Nov. 2010).

21 GOVERNMENT OF CANADA, *Frequently Asked Questions on Balanced Copyright*, available at http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html#amend (last visited on 2 Nov. 2010).

22 Blayne Haggart, *North American Digital Copyright, Regional Governance and the Persistence of Variation*, 59 Paper presented at the Annual Conference of the Canadian Political Science Association, Montreal, available at www.cpsa-acsp.ca/papers-2010/Haggart.pdf (last visited on 3 June 2010) [hereinafter Haggart, *North American Digital Copyright*].

23 § 22, Bill C-32.

24 § 36, Bill C-32.

25 Though TPMs as a concept exist to lock digital content presumably to impede the infringement of copyright, the effect of these locks is the inability for users to make use of this content in non infringing ways. See Craig, *Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32*, in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW -95 (Michael Geist ed., 2005) [hereinafter Craig, *Locking Out Lawful Users*]; Michael Geist, *Anti-Circumvention Legislation and Competition Policy: Defining a Canadian Way?*, in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW -95 (Michael Geist ed., 2005).

26 The Act has been amended five times, since 1957, once each in the years 1983, 1984, 1992, 1994 and 1999.

27 Hereinafter TRIPS.

were in relation to the infringement of software copyright and the remedies thereof, which involved fines as well as criminal prosecution.²⁹ India's cautious stand as regards compliance with TRIPS was caused in no small measure by the predominant perception of developing countries that TRIPS was in fact a Faustian bargain, whose acceptance was attributed to underlying power imbalances between the global North and South.³⁰ The disputes between the global North and South that plagued the TRIPS agreement at the time of its conception had only multiplied with time, with the TRIPS being seen as the 'central problem' by forces in resistance to neo liberal globalization.³¹ It comes as a surprise then that, although India was quick to exercise restraint with regards to TRIPS (an agreement it is a signatory to), it refuses to do the same for the WIPO Internet Treaties, and is premature in effecting compliance, particularly when it isn't even a signatory.

The Copyright Amendment Bill, 2010 hence embodies India's sixth excursion in pursuit of international compliance, with the stated objective of addressing certain newer issues that have emerged in the context of digital technologies and the Internet, apart from bringing the 1957 Act into conformity with the WIPO Internet Treaties to the 'extent considered necessary and desirable'.³²

The qualifying words of 'to the extent necessary and desirable', have tempered the Copyright Amendment Bill, 2010 causing it to differ from Bill C-32 in five significant aspects. First, Section 65A(1) of the Copyright Amendment Bill, 2010³³ to be inserted in the principal Act after the amendment has ensured that the ambit of protection offered by the TPMs is analogous to that of the copyright law itself.³⁴ India has hence limited anti-circumvention measures only to *copy controls* and not *access controls*. TPMs can thus be used, not to restrict *access to work*, but to restrict activities already prohibited by the existing copyright law such as copying,

28 PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, *Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010*, available at <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf> (last visited on 3 Nov. 2010).

29 According to § 16 of this Act, it is illegal to make or distribute copies of copyrighted software without proper or specific authorisation. Section 63 B stipulates a minimum jail term of 7 days which can be extended up to 3 years. The Act further stipulates a fine ranging from Rs. 50,000 to 2,00,000.

30 L.R.Helfer, *Regime Shifting: The TRIPS Agreement and Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT. LAW 1 (2004).

31 Debora Halbert, *Globalized Resistance to Intellectual Property*, available at <http://globalization.icaap.org/content/v5.2/halbert.html> (last visited on 4 Nov. 2010).

32 See Statement of objectives for the Copyright (Amendment) Bill, 2010, available at <http://www.prsindia.org/uploads/media/Copyright%20Act/The%20Copyright%20Bill%202010.pdf> (last visited on 2 Nov. 2010).

33 The Copyright Amendment Bill, 2010, available at: <http://prsindia.org/uploads/media/Copyright%20Act/The%20Copyright%20Bill%202010.pdf> (last visited on 3 Nov. 2010).

34 § 65A(1) aligns the protection offered by TPM's to that offered by the copyright law itself. It states that these protections have to be "applied for the purpose of protecting any of the rights conferred by this (Principal) Act."

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communication to the public etc. Such a stance nullifies the allegation that TPM's exceed the scope of protection provided by the copyright law by circuitously blocking even legitimate activities which users are otherwise permitted to do under the Act.

Secondly, by virtue of Sections 65A(1) and 65A(2), immunity from penalties attracted while circumventing TPMs have been made parallel to the exceptions granted under the copyright law.³⁵ To correspond with this provision there has been a conscious expansion of fair dealing exceptions to include the use of films and sound recordings, in addition to the use of a literary, dramatic, musical or artistic works for personal use, research, criticism, or reporting of current events.³⁶ In line with international practice, transient and incidental storage of any work through the process of 'caching' have been provided immunity as well.³⁷ The Bill also permits copying and distribution of copyrighted works in formats designed specially for use by persons with disability (e.g. Braille) and registered organisations who work with such persons can apply to the Board for a licence to publish any work in a general format (e.g. audio books) for use by disabled persons.³⁸

Thirdly, by virtue of Section 65A(1), the provisions dealing with TPM's have been watered down in so far as they require the existence of an 'intention' while partaking in the act of circumvention for a penalty to be attracted.³⁹ A fourth significant difference emerges in the lack of a corresponding penalty for the acts of manufacture and propagation of *circumvention devices*.⁴⁰ And lastly, by way of abundant caution, Section 65A(2)(a) reiterates that all circumventing for "*a purpose not expressly prohibited by this Act*" will not be viewed as infringement under the act.⁴¹

Looking at the above differences, one appreciates that India's attempt at copyright modernization is significantly more restrained as compared to Bill C-32. At the same time one wonders whether such accommodating stance would be

35 § 65A(1) states that: "Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act." § 65A(2) states that: "Nothing in subsection (1) shall prevent any person from doing anything referred to therein for a purpose not expressly prohibited by this Act."

36 § 31, Copyright (Amendment) Bill, 2010 amending § 52 of the Principal Act.

37 § 31(ii)(b), Copyright (Amendment) Bill, 2010.

38 § 17, Copyright (Amendment) Bill, 2010.

39 § 65A(1) lays down the prerequisite of intention with the use of the words "with the intention of infringing such rights." See also Shamnad Basheer, *Submissions to the Standing Committee on HRD re: The Copyright Amendment Bill*, available at <http://www.spicyip.com/docs/SubmissionstoParliament.pdf> (last visited on 4 Nov. 2010).

40 §§ 65A and 65B, Copyright (Amendment) Bill, 2010 are silent as regards any penalty in relation to the acts of manufacture and propagation of circumvention devices.

41 § 65A(2)(a), Copyright (Amendment) Bill, 2010.

permitted to a country actually bound by the WIPO Internet Treaties. Hence there exists a need to consider Canada and India's international obligations as regards the international intellectual property (IP) regime.

II. INTERNATIONAL OBLIGATIONS-DOMESTIC IMPLICATIONS

A. Canada and India's International Obligations

The preamble to Bill C-32 stresses that it seeks to “*fulfil Canada's Obligations under the WIPO Internet Treaties.*”⁴² There exists, therefore, a need to look at Canada's obligations with respect to the WIPO Copyright Treaty⁴³ and the WIPO Performances and Phonograms Treaty⁴⁴ and the extent of change absolutely warranted by Canada having only signed and not ratified them.⁴⁵ India, having not even signed the WIPO Internet Treaties, needn't concern itself as regards their ratification. In fact the introduction of a Bill to enforce their provisions has been understood to be an act that is both precipitous and untimely.⁴⁶ Nevertheless, one must first clarify the position of law as regards the signing of a treaty and the obligations such an act entails. It is important to note that Canada like India is a dualist country.⁴⁷ The theory of dualism as propounded by positivists such as Triepel and Strupp contemplates that municipal and international law exist separately and the two cannot have an effect on or overrule each other.⁴⁸ As a consequence of this, international agreements are rendered operative in municipal law only by the device of “ratification” or “approval” and hence any rule of international law must be “transformed” or specifically adopted to be valid within the internal legal order.⁴⁹

India too follows a dualist approach and is of the firm belief that ‘legislations’ would defend against the excesses of executive authority and ensure adherence to necessary parliamentary procedures.⁵⁰ This position is refined through constitutional

42 Bill C-32, pmbll., ¶ 4 states that: “Whereas those norms are reflected in the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, adopted in Geneva in 1996.”

43 Hereinafter WCT.

44 Hereinafter WPPT.

45 WORLD INTELLECTUAL PROPERTY ORGANIZATION, *List of contracting parties to the WIPO Internet Treaties*, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited on 3 Nov. 2010).

46 Pranesh Prakash, *Analysis of the Copyright (Amendment) Bill, 2010*, available at <http://www.cis-india.org/advocacy/ipr/blog/copyright-bill-analysis> (last visited on 4 Nov. 2010).

47 HUGH M. KINDRED & PHILLIP M. SAUNDERS, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA* 183 (2006) [hereinafter KINDRED & SAUNDERS, *INTERNATIONAL LAW*].

48 MALCOLM N. SHAW, *INTERNATIONAL LAW* 122 (2008).

49 *Id.*, at 129.

50 *Parlement Belge*, (1879) 4 PD 129; *Walker v. Baird*, [1892] AC 491; *The Republic of Italy v. Hambros Bank Ltd.*, [1950] Ch. 314; *Mc Witter v. Att.-Gen.*, [1972] CMLR 882.

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conventions laid down by way of Article 253⁵¹ and Entry 14⁵² of the Union List of the Constitution of India which provide for the legislative supremacy in implementing a treaty, agreement or convention concluded at the international level. Therefore, a treaty will not be binding only by the way of signing it at an international meeting or conference. Although recent judicial dicta diverges slightly from this position in so far as it affirms India's international law obligations even in absence of corresponding legislation, it does so only when India is at least a party to an international instrument by way of signature as is not the case in this instance.⁵³ If the international instrument is signed but not ratified countries are merely obligated to not act in contravention to the specific object and purpose of the treaty.⁵⁴

The *raison d'être* for ratification was for the sentiments of the populace to be heard, and if such sentiment was one of disapproval the state was not to ratify the treaty at all.⁵⁵ Thereby Canada and India are under no express obligation to implement the WCT, and there exist no upshots for not doing so regardless of external international intimidation.⁵⁶ This is because with secure market access being already in place through NAFTA there isn't much the U.S. can do in order to influence a country's IP policy apart from diplomatic pressure through embassies and through the 301 process. However, the danger from the 301 process has been significantly reduced with the WTO outlawing any kind of direct action or retaliation.⁵⁷ Thereby Canada and India (if it were a signatory) needn't bare any apprehension as regards the "*consequences*" of non-ratification.

51 Constitution of India, art. 253 states that: "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

52 Entry 14 of the Union List in the Seventh Schedule of the Constitution of India stipulates for: "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

53 *Vishaka and others v. State of Rajasthan*, AIR 1997 SC 3011 ("[T]he international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them...to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee").

54 VCLT, art. 10(b) ("The text of a treaty is established as authentic and definitive by the signature, signature ad referendum or initialing by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text").

55 KINDRED & SAUNDERS, INTERNATIONAL LAW, *supra* note 47, at 819.

56 WIPO, INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE 416 (1997) ("The effect of signature is not, of course, to bind the signatory State but simply represents an acknowledgment of its intention to enact a law based on the Convention and, in due course, to ratify the Convention. It is only the ratification of the Convention by an existing member State which has signed the Convention, or accession to the Convention by a new member State, which creates an international legal obligation").

57 Haggart, *North American Digital Copyright*, *supra* 22, at 59.

As per article 31 of the Vienna Convention, treaties “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁸ Therefore if the WCT were to be ratified, Canada and India’s legal obligation would extend to a mere provision of “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”⁵⁹ Since neither the words “adequate” nor “effective” have been defined in the treaty, and because no interpretation of what an “effective technological measure” exists, one can presume that, in fact, no global threshold for protection requires conformance. This apparent ambiguity and broad drafting will be revealed to be a conscious feature and not a defect of the WCT when its legislative history is looked into.⁶⁰ A minimalist construal of these provisions would outlaw only the act of circumventing digital locks, for the purpose of or which has an effect similar to, infringement of an underlying copyright. Therefore, it can be safely assumed that the treaties provide member states with substantial breathing space in determining how strong the protection must be. Such was the desire and the consequential outcome of the negotiations leading up to the treaty, wherein no consensus could be reached.⁶¹ In order to settle this debate the author will examine the *travaux préparatoires* of the WIPO Internet Treaties to earn a better appreciation of the WCT, its common intention and the flexibilities inherent therein.

B. Travaux préparatoires of the WIPO Internet Treaties and Prevailing International Standards

Talks for the inclusion of measures relating to technology protection surfaced for the first time in the 4th Session of the committee of experts constituted under the aegis of the WIPO in 1994 just two years prior to establishment of the WCT.⁶² At this point there existed only a general discussion and no specific language seemed to have been tabled.⁶³ The Chair recognized the lack of consensus and even at that early stage recommended the adoption of a general provision and leaving it to individual countries to carry out suitable implementation.

58 VCLT, art. 31.

59 WCT, art. 11.

60 Michael Geist, *The case for Flexibility in Implementing the WIPO Internet Treaties: The Video*, available at <http://www.michaelgeist.ca/content/view/5395/125/> (last visited on 3 Nov. 2010).

61 WIPO, INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE 6 (1997).

62 WIPO, *Report of the Fourth Session of the Committee of Experts on a Possible Protocol to the Berne Convention*, note 31, ¶ 13, available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=3010 (last visited on 7 Nov. 2010).

63 *Id.*, at ¶ 92.

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At the 5th meeting in September 1995 the US stressed on the urgency of anti circumvention provisions and immediately thereafter opposition from other countries began to surface. It was not until the 6th meeting in 1996, just months away from the diplomatic conference that specific language began to emerge. Brazil, for example, put forward a proposal for anti circumvention protection for merely copy controls and not access controls.⁶⁴ The final preparatory meeting eventually took place in May of 1996 wherein the EU added its own proposal, which though close to the US proposal, required a higher threshold of “knowledge” while circumventing. The delegation summarily rejected the proposal, with countries such as China expressing doubt as to whether these provisions fit within Copyright at all and whether they belong in a Copyright Act to begin with.⁶⁵ Hence even after the final preparatory meeting there existed no consensus and no specific language, as was noted by the chair. Left with no other option, the US tabled a basic proposal in the Geneva diplomatic conference in December 1996. Even so, the delegation responded negatively with calls for the complete abandonment of the proposal. The result therefore was the general language we see in the WCT today. “Adequate” and “effective” legal remedies in all practicality mean what one wants them to mean, as this was the only way the delegation was able to achieve consensus.⁶⁶

Professor Samuelson best describes what followed, given the rising opposition to the basic proposal, she says:

Facing the prospect of little support for the Chairman's watered-down version of the US White Paper proposal, the US delegation was in the uncomfortable position of trying to find a national delegation willing to introduce a compromise provision brokered by US industry groups that would simply require states to have adequate and effective legal protection against circumvention technologies and services. In the end, such a delegation was found, and the final treaty embodied this sort of provision in article 11.⁶⁷

A look at the state practice of implementation across the globe, of the WIPO Internet Treaties by Michael Geist bares testimony to the flexibility intrinsic to them.⁶⁸ In the European Union, provisions vary from country to country. Countries allow for exceptions such as private copying, and anti circumvention measures apply

64 Michael Geist, *The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-circumvention Requirements*, in FROM “RADICAL EXTREMISM” TO “BALANCED COPYRIGHT”: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 214-5 (Geist ed., 2010) [hereinafter Geist, *The Case for Flexibility*].

65 *Id.*, at 215.

66 *Id.*

67 Pamela Samuelson, *The US Digital Agenda at WIPO*, 37 VA. J. INT'L L. 414 (1997).

68 Geist, *The Case for Flexibility*, *supra* note 64, at 211-21.

only to copy controls and not access controls. Some cases countries even allow the user to obtain a decree ordering a rights holder to unlock the material because they have a legal right to access it.⁶⁹ In Switzerland, there exists an exception for circumvention for legal purposes much like Bill C-60, as well as a monitoring agency to prevent the misuse of TPM's.⁷⁰ New Zealand also allows for circumvention for legal purposes. In addition Brazil creates mirror penalties for those who block access to work, just the same as those who try to circumvent.⁷¹

Bannerman in an attempt to explain the strict Canadian reforms in light of the obvious flexibility of the WCT suggests that Canadian copyright reforms have always been preceded by international or domestic pressure.⁷² The impetus for the present reforms too has resulted from US demands and the regular placement of Canada on the United States Trade Representative's Special 301 Priority watch list.⁷³ The Testimonies of US administrative officials before the US congress prior to the passage of the US DMCA reveals express acknowledgement of the fact that the DMCA goes beyond the WCT and that it was designed to provide a higher model for other countries to adopt.⁷⁴ Knowing that appeasement of the US government receives priority over reforms that are actually necessitated, there exists a need to look at the US counterpart to Bill C-32 and understand whether the Canadian government has included provisions that are more restrictive than the DMCA with regards to Digital Locks and Fair Dealing.⁷⁵

C. Domestic Implementation in Canada

Tony Clement desired for Canada's copyright laws to be forward-looking and responsive to a fast-paced digital world, however the Anti Circumvention exceptions embodied in Bill C-32 are already obsolete, making the Bill C-32 more onerous as compared to the US DMCA.⁷⁶ The DMCA anti-circumvention rule making process runs every three years and allows for new exceptions to be included, the most recent ones being burning DVD's for non-commercial purposes and an

69 *Id.*, at 232.

70 *Id.*, at 233.

71 *Id.*, at 236.

72 Haggart, *North American Digital Copyright*, *supra* note 22, at 50-2.

73 OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *2010 Special 301 Report*, 30 April 2010, available at www.ustr.gov/webfm_send/1906 (last visited on 3 Nov. 2010).

74 Geist, *The Case for Flexibility*, *supra* note 64, at 225.

75 Haggart, *North American Digital Copyright*, *supra* note 22, at 50-2.

76 UNITED STATES COPYRIGHT OFFICE, *Recommendations of the Register of Copyrights*, available at <http://www.copyright.gov/1201/2010/initialled-registers-recommendation-june-11-2010.pdf> (last visited on 4 Nov. 2010).

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exception for the jail breaking of cell phones⁷⁷ — a feature which Bill C-32 does not bare. The Digital Locks provision in Bill C-32 displaces all these exceptions.⁷⁸ In addition to these, Geist argues (under fire from critics) that the controversial decision of the US Court of Appeals for the 5th Circuit interpreting Section 1201(a) of the DMCA *MGE UPS Inc v. GE Consumer and Industrial, Inc.*⁷⁹ pushes US jurisprudence in the direction of legalizing circumvention of non infringing purposes.⁸⁰ As per Geist the language of the court conveys a message very similar to what many groups have been arguing for in the context of Canadian legal reform.⁸¹ One therefore realizes that though Bill C-32 mimics the DMCA in a bid for appeasement, it still has a lot to learn from it in terms of incorporating flexibility.

A study of Bill C-32 would prove imprudent if doesn't force a review of the actions proposed here at home. Hence, after establishing that Canada's attempt at copyright modernization reveals a pressured intensification of protection measures, despite the flexibility available as regards its international obligations, we take a closer look at India's Copyright (Amendment) Act of 2010.

D. The Case of India

To say that India itself is not impressionist in its attempt to upgrade its own copyright law would be a falsehood.⁸² When in the absence of overwhelming public demand, and despite not being a signatory to the WIPO Internet treaties⁸³, provisions pertaining to Digital Rights Management (DRM) were proposed to be introduced via The Copyright (Amendment) Bill, 2010, the populace figured India too would go the Canada way.⁸⁴ The insightful observed yet again the subtle coercion of the USTR "Special 301" reports, in order to explain their sudden emergence.⁸⁵ Like

77 *Id.* See also Michael Geist, *DMCA v. Bill C-32: Comparing the Digital Lock Exceptions*, available at: <http://www.michaelgeist.ca/content/view/5229/125/> (last visited on 4 Nov. 2010) [hereinafter Geist, *DMCA v. Bill C-32*].

78 *Id.*

79 2010 WL 2820006 (5th Cir.2010).

80 Barry Sookman, *Are the TPM provisions in C-32 more restrictive than those in the DMCA?*, available at <http://www.barrysookman.com/2010/09/30/are-the-tpm-provisions-in-c-32-more-restrictive-than-those-in-the-dmca/> (last visited on 28 March 2011).

81 Geist, *DMCA v. Bill C-32*, *supra* note 77.

82 PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, *Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010*, available at <http://164.100.47.5/newcommittee/reports/English/Committees/Committee%20on%20HRD/227.pdf> (last visited on 3 Nov. 2010).

83 WCT in particular requires that technological protection measures must be safeguarded by law.

84 The Copyright (Amendment) Bill, 2010 is, however, poised to change this: it includes three sections (viz. Sections 2(xa), 65A and 65B) which deal with Digital Rights Management.

85 Special 301 Reports of the Office of the United States Trade Representative pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994) allow for "reviews of the global state of intellectual property

most ‘industry oriented’ provisions, the ones dealing with TPM’s too were charged with being soporific, predisposed to rights holders and harbouring aspirations for DMCA standards.⁸⁶ Dispelling such fears India providentially has differed in five significant respects from Bill C-32 and hence inevitably the U.S. DMCA as regards the proposed implementation of TPM’s.⁸⁷

Though India is not a signatory to the WCT or the WPPT or perhaps precisely for that reason, the Bill qualifies its attempt to renovate the existing copyright law in sync with the WIPO internet treaties, by doing so only to the *extent considered necessary and desirable*.⁸⁸ This objective in addition to the differences mentioned above, has put to flight suspicions that India too was pressured into a pursuit of the DMCA ideal under international compulsion, rather than purely following its international obligation as is necessary. We see therefore that the Copyright (Amendment) Bill, 2010 has aptly made use of the ‘wiggle room’⁸⁹ inherent in the WIPO Internet Treaties and has created an avenue for consensus building at the international level towards a more unreserved recognition of the interest of users.⁹⁰ In this regard, the Canadian legislature can take away an important lesson from its Indian counterpart. It comes as no surprise then that the present Indian Copyright Act has been ranked first in terms of consumer friendliness.⁹¹

The Bill does, however, still leave a lot to be desired in its attempt to accomplish perfect copyright balance. The resultant effect of DRM technology is that while right holder’s are provided with unrestrained entitlements to restrict access to content via inventive TPM’s, the Bill harbors an underlying presumption that all users have access to anti circumvention technology and no onus is placed upon rights holders to assist in their right to legitimate circumvention.⁹² The fallacy of such a

rights (IPR) protection and enforcement.” It is further significant to note that the Special 301 Reports rely upon inputs from the obviously inequitable International Intellectual Property Alliance (IIPA).

86 Nandita Saikia, *DRM and other Implications of the Copyright (Amendment) Bill*, available at <http://copyright.lawmatters.in/2010/06/drm-and-other-implications-of-copyright.html> (last visited on 4 Nov. 2010).

87 *See supra* Part I (B).

88 *See* Statement of Objectives for Bill C-32, available at <http://prindia.org/uploads/media/Copyright%20Act/The%20Copyright%20Bill%202010.pdf> (last visited on 3 Nov. 2010).

89 This flexibility is popularly referred to as ‘Wiggle Room’. The phrase is borrowed from Myra J. Tawfik, *Is the WTO/TRIPS User Friendly*, available at http://www.cla.ca/AM/Template.cfm?Section=International_Trade_Treaties_Working_Group&Template=/CM/ContentDisplay.cfm&ContentID=2553 (last visited on 3 Nov. 2010) [hereinafter Tawfik, *Is the WTO/TRIPS User Friendly*].

90 *Id.*

91 CONSUMERS INTERNATIONAL, *Consumers International IP Watchlist Report 2010*, available at <http://a2knetwork.org/watchlist> (last visited on 3 Nov. 2010).

92 Pranesh Prakash, *Technological Protection Measures in the Copyright (Amendment) Bill, 2010*, available at <http://www.cis-india.org/advocacy/ipr/blog/tpm-copyright-amendment> (last visited on 2 Nov. 2010) [hereinafter Prakash, *Technological Protection*].

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presumption is revealed by jurisdictions such as Spain which expressly requires that copyright holders facilitate access to works protected by TPM to beneficiaries of limitations of copyright.⁹³ Paragraph 2 of Section 65A(2)(a) requires the facilitators of circumvention not specifically prohibited by the Act to maintain a record of such circumvention.⁹⁴ Such a provision generates ambiguity and remains silent vis-à-vis the implications of non maintenance of such records. It is uncertain as to what is the sufficient “degree of remoteness or closeness” within the facilitating relationship until where a person will have to maintain records.⁹⁵ The requirement for record maintenance isn't practically feasible in a decentralized distribution model such as that of most open source software, and hence if such a provision is strictly enforced it could harm rightful circumvention.⁹⁶

III. 'WHAT NOT TO DO': LESSONS FROM ABROAD

Though ‘fair dealing’ has been expanded, a lot can conversely be imbibed from Canada's Bill C-32. Unlike Bill C-32, no express provisions allowing for ‘transformative uses’ (time shifting, format shifting, backup copies), that do not conflict with a normal exploitation of the work or prejudice the legitimate interests of the rights holder have been provided for. Moreover, no exceptions have been provided for ‘user generated content’ or ‘satires and parodies’ unlike the “*Made in Canada*” provisions of Bill C-32 and certain other jurisdictions. Though private or personal use falls within the ambit of fair dealing, many common law jurisdictions similar to India⁹⁷ have held that the copying of work in its entirety even for personal use cannot constitute fair dealing. It is therefore felt that in the interest of research, in a country where education is a fundamental right⁹⁸ a general provision similar to that of Netherlands, permitting the making of private personal copies of any work in its entirety (both physical and electronic) must be expressly provided for.⁹⁹ In

93 In Article 161 of their law requires rights holders to inform users as to how they can be contacted if the user wishes to circumvent the TPM for a legitimate purpose and upon being contacted, aid in making use of their rights / the exceptions and limitations in copyright law.

94 § 65A(2)(a), Copyright (Amendment) Bill, 2010 states that: “Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person.”

95 Prakash, *Technological Protection*, *supra* note 92.

96 *Id.*

97 See Shamnad Basheer, *Submissions to the Standing Committee on HRD re: The Copyright Amendment Bill 5*, available at <http://www.spicyip.com/docs/SubmissionstoParliament.pdf> (last visited on 4 Nov. 2010).

98 The newly enacted Article 21A makes the ‘right to education’ a fundamental right. Even before the inclusion of this provision the Supreme Court had already interpreted Article 21 to hold the Right to Life to include the Right to Read and to an Adequate Education. See Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors., AIR 1981 SC 746. See also Lawrence Liang, *Exceptions & Limitations in Indian Copyright Law for Education: An Assessment*, 3(2) L. DEV. REV. 17 (2010).

99 The Dutch Copyright Act provides in Article 16 (B) for such personal copies (both physical and electronic).

addition, India might as well absorb the few positive aspects of the DMCA, such as the anti-circumvention rule making process which runs every three years and allows for new exceptions to be included, hence increasing flexibility.

In America's provisions for "fair use" the purposes listed aren't "exhaustive"¹⁰⁰, whereas Canada's fair dealing provisions aren't open ended and can be applied as a defence only when undertaken for one of listed purposes.¹⁰¹ Therefore, a provision closer to the US fair use model is desired in order to account for changes in common practices that are inevitable. As is highlighted by Prof. Trosow – "*the addition of mere categories cannot be expected to deal with the myriad of fair uses that exist, having the parliament to constantly deal with the need to update.*"¹⁰² The inclusion of the words "such as"¹⁰³ before activities specified to constitute fair dealing will most definitely push the Indian IP regime away from the Canadian line, towards a more flexible US school of fair use, suggesting an absence of an exhaustive roll of activities believed to be exceptions.¹⁰⁴ The economic contributions of industries benefitting from flexible fair use have been estimated to be 281 billion¹⁰⁵ and India would be keen to further promote its innovation sector through such flexible copyright law.

If the Copyright Amendment Bill, 2010, like Bill C-32, is to be justified as a means of innovation and creativity in order to benefit society as a whole then the legislatures of both countries must realize that suitable "fair dealing" provisions are an essential part of that justification.¹⁰⁶ India must continue to walk the tightrope of copyright balance, and continue to put into practice the decision of the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*¹⁰⁷ which reinforces the concept of balance between "Owner's Rights" and "User's interest".¹⁰⁸

100 § 107, U.S. Copyright Act, 1976 ("fair use of a copyright work...for purposes such as criticism, comment, news reporting, teaching...scholarship, or research, is not an infringement of copyright").

101 LINDEN J. explained the significance of the closed list of purposes as regards the Act when he stated that: "If the purpose of the dealing is not one that is expressly mentioned in the Act, this Court is powerless to apply the fair dealing exemptions." *See Canadian Ltd. v. Society of Upper Canada*, [2004] 1 S.C.R. 339.

102 LAURA J. MURRAY & SAMUEL E. TROSHOW, CANADIAN COPYRIGHT LAW: A CITIZEN'S GUIDE 204 (2007).

103 A feature witnessed in § 107, U.S. Copyright Act of 1976.

104 Melissa De Zwart, *Fair Use? Fair Dealing?*, 24 COPYRIGHT REPORTER 20-37 (2006).

105 Figures as per a CCLIA commissioned study found that companies in fact benefitted from limitations on copyright-holders' exclusive rights, through "fair use" and generated a revenue of \$4.7 trillion in 2007 – a 36 percent increase over the 2002 revenue of \$3.4 trillion. *See* COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATES, *CCLIA 2010 Study Calculating the Value of Fair Use*, available at <http://www.cclia.net/org/CCLIA/files/ccLibraryFiles/Filename/000000000354/fair-use-study-final.pdf> (last visited on 4 Nov. 2010).

106 Craig, *Locking Out Lawful Users*, *supra* note 25, at 178-9.

107 [2004] 1 S.C.R. 339. This Treaty reaffirmed the decision in *éberge Carys . Galerie D'Art du Petit Champlain Inc.*, 2002 SCC 34.

108 Tawfik, *Is the WTO/TRIPS User Friendly*, *supra* note 89, at 35.

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Legal remedies against circumvention should continue to be restricted to circumvention “for the purpose of an act that is an infringement of copyright.”¹⁰⁹ In this regard Canada’s Bill C-60 serves as a suitable point of reference for both Bill C-32 and the Copyright Amendment Bill, 2010 wherein TPM’s are understood to inhibit infringing acts and not grant owners sole control over access to copyrighted works.¹¹⁰ Similar provisions have been seen New Zealand.¹¹¹ It is further desired that service and device prohibitions continue to be excluded from the purview of the Copyright Amendment Bill, 2010 as such a measure is tantamount to “outlawing the knife and not the consequences of its wrongful use.” Such technology must be available to those who wish to use it a manner not constituting infringement. The Copyright Amendment Bill, 2010 must facilitate the practical application of fair dealing by ensuring that right holders facilitate fair dealing and make available the means by which fair dealing with respect to TPM protected work can be carried out.¹¹² This requirement is similar to that found in German Law.¹¹³ Lastly India does well by including a provision that says that nothing in its anti-circumvention provision “shall prevent any person from doing anything referred to therein for a purpose not expressly prohibited by this Act.”¹¹⁴ Such a provision is indispensable to the maintenance of copyright balance in favour of users and hence must necessarily be retained by India, in addition to being imbibed by other jurisdictions.

Though these changes might be objected to, one must realize that most of these objections are grounds for what Prof. Geist calls Copyright Myths.¹¹⁵ Innovation and creativity are not dependent on copyright measures and some of the greatest advancements have come at a time when Copyright Law wasn’t up to the so called “DMCA standard”.¹¹⁶ The biggest criticism obviously comes from the music industry wherein it is believed that the government’s reform legislation through Bill C-32, will provide essential legal protection against breaking “digital locks.” It is believed that without these protections innovative digital content would

109 Carys Craig, *Digital Locks and the Fate of Fair Dealing: In Pursuit of Prescriptive Parallelism*, 13 J. WORLD INTEL. PROP. 503 (2010), available at www3.interscience.wiley.com/journal/117991912/home (last visited on 4 Nov. 2010).

110 § 34.02, Bill C-60, available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2334015&Language=e&Mode=1> (last visited on 4 Nov. 2010).

111 § 226, New Zealand’s Act, 1994.

112 Ian R. Kerr, Alana Maurushat and Christian Tacit, *Technical Protection Measures: Tilting at Copyright’s Windmill* 34(1) OTTAWA L. REV. 7, 20 (2002–2003).

113 Wencke Baesler, *Technological Protection Measures in the United States, the European Union and Germany — How Much Fair Use Do We Need in the “Digital World”?*, 8 VIRGINIA J. L. TECH. 13, 20-22 (2003), available at www.vjolt.net/vol8/issue3/v8i3_a13-Baesler.pdf (last visited on 4 Nov. 2010).

114 § 65A(2)(a), Indian Copyright (Amendment) Bill, 2010.

115 Michael Geist, *The Copyright Myths*, available at <http://www.michaelgeist.ca/content/view/2886/125/> (last visited on 3 Nov. 2010).

116 *Id.*

disappear.¹¹⁷ To counter these fears one need only to look at the fact that the Canadian Digital Music Market has grown faster than the United States' (where it is supposed that stricter copyright laws exist) for the fourth consecutive year.¹¹⁸ Canada's Digital Music Market is now positioned at number seven in the world.¹¹⁹ Hence, one realizes that the extraordinarily rigid stand taken by Canada's Bill C-32 must necessarily be avoided, if India intends to maintain its emerging knowledge economy.¹²⁰

CONCLUSION

It is an accepted fact that multilateral treaties hoping to establish a uniform intellectual property regime across the globe have always provided member countries with a certain bit of flexibility in terms of how they interpret their obligations. This 'wobble room' creates avenues for consensus building at the international level towards a more unreserved recognition of the interest of users. Though constant external international pressure is a reality every nation must content with, it is desired that such 'wobble room' be made use of by nations in order to effect a more adjusted and neutral IP regime in their respective jurisdictions.

The supporters of Bill C-32 needn't look farther than the preamble of the bill which recognises the need to foster innovation and creativity. In the present form, Bill C-32 fails to achieve that goal with its restrictive "fair dealing" provisions and its rigid anti-circumvention laws. Though it provides a first rate lesson in 'what not to do' in the face of international pressure, outside observers' can't help but desire that the Canadian government take the next step forward and address the legitimate concerns of the critics of Bill C-32 in order to achieve perfect harmony in its copyright laws both internally and externally. The Copyright Amendment Bill, 2010 on the other hand, is a close example of that very harmony and has dealt fairly satisfactorily with the problems that are fundamental to TPMs. Nevertheless, it leaves a lot to be desired in terms of affecting a practical IP regime within the country, one that isn't

117 Jeff Rogers, *Modernized Copyright Law Crucial to Artist's Success*, available at <http://balancedcopyrightforcanada.ca/2010/10/modernized-copyright-law-crucial-to-artists-success-edmonton-journal> (last visited on 4 Nov. 2010).

118 Digital album sales jumped 42.3% to 4.78 million units, from 3.36 million units in 2008. Digital track sales were up 38.3% to 56.3 million units. Digital track sales were at 40.7 million units in 2008. See THE NIELSEN COMPANY, *The Nielsen Company and Billboard's 2009 Canadian Industry Report*, available at http://en-ca.nielsen.com/content/nielsen/en_ca/news/news_releases/2010The_Nielsen_Company_and_Billboard_s_2009_Canadian_Industry_Report.html (last visited on 5 Nov. 2010).

119 Michale Geist, *How Does Canada's Digital Music Market Really Stack Up?*, available at <http://www.michaelgeist.ca/content/view/4321/125/> (last visited on 7 Nov. 2010).

120 Pradip N. Thomas, *Copyright and Emerging Knowledge Economy in India*, 36 *ECO. POL. WEEKLY* 24, 2147-2156 (2001).

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'industry' but rather 'consumer' oriented. Till such law, which would hopefully serve as a model for other nations, isn't contemplated by the Indian legislature, its safest move forward would be to keep a look out for 'what not to do'.