

Frame Analysis of Canadian Copyright Reform 2008-2012

From "Made-in-Canada" to a "Balanced Solution"

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Dedicated in memory of Aaron Swartz (1986-2013)

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Abstract

From 2008-2012, the Harper government engaged in an effort to reform Canada's copyright legislation. This thesis uses a frame analysis approach to identify two distinct frames advanced by the government during this reform. 2008's Bill C-61 was unsuccessfully framed as a "Made-in-Canada" approach in order to combat opposition claims that American pressure unduly influenced the policy process. Following the failure of this bill, the government embarked on a public consultation on copyright. Although the government did not substantively modify subsequent reform bills, it was able to leverage the consultation process and Supreme Court of Canada jurisprudence to lend legitimacy to its new frame of the reform as a "balanced approach", build a coalition of support, and mitigate opposition. The thesis' analysis supports key conclusions of existing framing literature and creates a space for the role of ideas in the study of copyright reform in Canada.

1.1. Introduction

On June 29th, 2012 the *Copyright Modernization Act* (Bill C-11) received royal assent, ending a fifteen-year process to reform Canada's copyright laws and bring them into compliance with international treaty standards. The reform package was a major priority for the Harper government and had been a sticking point in Canada-US relations for some time. Although many countries embarked on similar copyright reform processes, the Canadian experience was unusually prolonged, political, and acrimonious.

This thesis applies frame analysis to the case of copyright reform in Canada from 2008-2012 (a period including Bills C-61 (2008), C-32 (2010), and C-11 (2011), and a public consultation on copyright, which collectively represent the Harper government's copyright reform efforts). It specifically asks which frames the government used during the reform process and why different frames were met with different levels of success, building on the existing findings of public policy framing literature to show, among other conclusions, the importance of building frames which benefit from a perception of legitimacy. These questions are important because they help to explain a reform process that was central to the continued operation of a culturally and economically important institution in Canada--copyright.

The thesis shows that the government, facing significant opposition in advance of Bill C-61, framed the Bill as a "**Made-in-Canada**" solution to counter well-founded fears of outside influence on the policy process. This framing, however, failed to take

root and opposition to the bill remained strong. Forced to adopt a new approach, the government embarked on a public consultation, which it used strategically to deflect criticism. The government leveraged the consultation and Supreme Court jurisprudence for legitimacy in its efforts to frame the new bills as "**balanced**"-- a frame referring both to the content of the new bills and the process used to develop them. The new frame was ultimately successful, and opposition members were unable to stop the bill or force policy changes through debate or amendment processes. These results support past findings of public policy framing literature.

The thesis offers new contributions to the way in which framing can be used to strategic, normative ends; how governments borrow legitimacy from external sources and processes; how frames can distract attention from issues; and how copyright reform fits in the larger approach of the Harper government to issues.

Before continuing with a history of copyright and an explanation of key actors, it is useful to expand on the abstract offered above. In 2008, after several years of working on copyright reform behind the scenes, the Harper government was met with growing public unease and protest over the perceived involvement of United States trade representatives and US content industries in the bill's process. The Harper government presented Bill C-61 as a "Made in Canada" approach to copyright. As Chapter 3 will explore, this frame was designed to counteract the perception that American lobbying was instrumental in forcing the government to enact reforms. It also aimed to respond to opposition and public fears that the outcomes of copyright

reform would mirror the American experience with the DMCA (Digital Millennium Copyright Act), which led to draconian lawsuits against individual file-sharers and significant restrictions on researchers and other users of copyrighted works.¹ Although the government tried to emphasize the domestic policy innovations found in Bill C-61, ultimately public perception of the bill remained poor amidst criticism that the Bill was a "Christmas gift to the US".²

After Bill C-61 died on the order paper and the Harper Conservatives earned another minority government mandate, the government signaled plans to embark on an expansive public consultation to determine the future of copyright reform. Chapter 4 shows that the consultation was designed to respond to the poor reception of Bill C-61, and give Canadians the sense that their views were going to be incorporated into the process. Following a three-month long consultation consisting of town hall meetings in Montreal and Toronto, roundtable discussions with expert witnesses across Canada and an online submissions platform that received over 8,000 messages from citizens, the government introduced Bill C-32 (2010), along with its new framing: "balance".

¹ A more detailed treatment of user group opposition to the DMCA is available from the Electronic Frontier Foundation, for example: Electronic Frontier Foundation. "Unintended Consequences: Fifteen Years Under the DMCA". March 2013. Available online: <https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca>

² Knopf, Howard. "Canada's copyright law is stronger and better than U.S's" *Hill-Times* November 26, 2007.

Government MPs claimed that the legislation represented a balance between economic rights for artists and user rights for consumers. As this chapter will show, this frame borrows from emerging Supreme Court jurisprudence on copyright. What is more, they claimed that the consultation had been effective and taken into consideration in drafting the bill--in other words, that balance described both the content of the bill and the process by which it was arrived at. Shortly after unveiling the bill then-Minister James Moore declared that opponents of the bill were "radical extremists"³, and dismissed concerns that the bill gutted Canada's collective licensing system or imposed harsh rules to prevent circumvention of digital locks. After Bill C-32 died in committee following another dissolution of parliament, the new majority government reintroduced the bill exactly as-is, this time numbered Bill C-11. The bill passed without substantive amendment.

Although the bills did not change in any substantial way between iterations, the strategy of building legitimacy through the consultation and utilizing the balance frame helped government to quiet opposition, deflect attention from US lobbying efforts, and succeed in passing the bill with relatively little pushback.

This thesis will examine government communications, including parliamentary speeches, public statements, press releases, and private documents, in order to provide evidence to support the above narrative. It will explore how the opposition's framing efforts were at first successful, but through reframing the issue, the government was

³ Moore, James. "Speech at Toronto Board of Trade", June 25th, 2010. Available online: <https://www.youtube.com/watch?v=cP6v7DHkAcQ>

able to define the contours of the public debate and restrain the opposition's ability to respond effectively. As noted above, the thesis provides contributions to our understanding of frame analysis in a public policy context by providing empirical support for conclusions about how actors borrow legitimacy from external sources or processes, including the Supreme Court and the consultation process; use vague or misleading ideational claims to distract from issues; and use public consultations strategically to make the public feel as though their voices were heard, even if they were not incorporated. Further, the thesis contributes a detailed narrative of Canadian copyright reform to the study of copyright reform in general, and could be the basis for future comparison between the Canadian experience and that of jurisdictions abroad.

The remainder of the introduction will consist of a high level overview of copyright in Canada; identifying key actors and institutions in this debate; detailing the methodology of the case study; and providing a roadmap for the remaining thesis chapters.

1.2. Copyright: A Primer on The Issues

Copyright is a series of exclusive rights granted to the creators or owners of creative works as a limited legal monopoly so as to enable commercial exploitation of their works and incentivize further creation. Along with trademarks, which protect brand names and slogans, and patents, which govern ideas, copyright forms part of the broader field of intellectual property. Traditions of copyright vary around the world, but Canadian copyright descends primarily from English copyright, which can be traced

back to the Statute of Anne (1709-1710) and beyond. Despite this lineage, elements of the French *droit d'auteur*, which emphasizes the moral and intellectual rights of authors over their creations, have had some influence in debate surrounding copyright in Canada, particularly with respect to Quebecois artists.⁴ Closer examination is required to understand the historical context that led to today's debates.

The invention of the printing press had an almost incalculable effect on the dissemination of knowledge and creative works. Feeling that ignorance was bliss, the British crown enacted a policy censoring printed works. In order to do this, they delegated an exclusive crown patent on printing books to an organization known as the Stationer's Company in 1557. This restricted the use of printing and enabled government control of printed documents. The collapse of this system in the late 17th century when Parliament refused to renew the patent left the printers, unaccustomed to competition, to lobby the crown for economic protection. The result was the enactment of the Statute of Anne in 1710, which allowed publishers to hold a 21-year monopoly on publishing a given book.⁵ Early jurisprudence on the Statute focused largely on the right of publishers (to the exclusion of authors, even⁶) to publish translations, summaries, or commentaries on existing copyrighted works, but when the

⁴ Haggart, Blayne. *Copyright: The Global Politics of Digital Copyright Reform*. University of Toronto Press, 2014: pp. 151

⁵ Kaplan, Benjamin. *An Unhurried View of Copyright*. Columbia University Press, 1967: pp. 7.

⁶ Patterson, Lyman. *Copyright in Historical Perspective*. Vanderbilt University Press, 1968: pp. 151.

initial 21-year period expired, and the first batch of works began to enter the public domain, controversy ensued which resulted in the development of modern copyright.⁷

An English publisher named Robert Taylor published a poem called "The Seasons" by author James Thomson, and was promptly sued by the poem's previous publisher, Andrew Millar. The judge ruling on the case, Lord Mansfield, found that the Statute of Anne notwithstanding, publishers held a common-law ownership of creative works in perpetuity that could not be extinguished. Although *Millar v. Thomson* was later overturned by the House of Lords in *Donaldson v. Beckett*⁸, its impact was important: it coincided with a decline in the British patronage system, and thus the rise of a professional class of authors and creators who wanted economic protection.⁹ The *Millar* and *Donaldson* rulings began centuries of jurisprudence and legislation which steadily expanded the duration and purview of copyright to include a wide variety of activities including public performances, dramatizations, and home non-commercial copying, as well as addressing issues including the copyright status of orphaned works (works owned by defunct corporate entities or estateless creators). This process also saw a shift in the conception of copyright away from a right delegated to printers, and towards one held by authors themselves.

⁷ Kaplan, pp. 13.

⁸ Controversially, Deazley argues that the advisory judges in *Donaldson v. Beckett* actually advised the House of Lords to uphold the main tenants of unlimited copyright, but the House of Lords rejected the advisory opinions. See Deazley, Ronan. *Rethinking Copyright*. Edward Elgar Press, 2006: pp. 19

⁹ Kaplan, pp. 22.

With the expansion of copyright also came the development of *fair use* doctrines around the world.¹⁰ Fair use refers to actions an individual or company can undertake that would otherwise violate copyright law, but are permitted because of their specific goal or limited nature. In other words, fair use is an exemption or defence to copyright infringement. For example, while republishing an author's book and earning income from doing so is clearly a copyright violation in any jurisdiction, excerpting a page from an author's book in order to present it in context and critique it is permissible in all or nearly all places. Within Canada, these exceptions have historically been quite limited, specifically enumerated in statute, and referred to as *fair dealing*.¹¹ In contrast, the United States has an expansive and unenumerated fair use defence, allowing for significant expansion of fair use by courts as defendants present new examples of fair use behaviour. Fair dealing in Canada includes the use of material for some educational uses, commentary, and news reporting when done in limited ways without damaging the economic viability of the original work.

This stage of the debate also coincided with the beginnings of the internationalization of copyright law, chiefly through the development of the 1886 Berne Convention on Copyright, which forms the basis for copyright law in most jurisdictions today.

¹⁰ The earliest jurisprudence used the term *fairness abridgement* (*Gyles v. Wilcox*, 1740); from there various terms have been used in the common law of various jurisdictions. In most countries, fair use was not codified in statute until much later, in the 20th century.

¹¹ Fair dealing as a term was introduced in Copyright Act of Canada, 1921, a Canadian implementation of UK Copyright Act, 1911.

The development of player pianos and home recorded audio led to an important conceptual shift in the role of copyright: no longer was copyright a body of law designed solely to protect corporate entities from other corporate entities in a commercial context, it now impacted end-consumers. Cases and legislation that followed these issues focused increasingly on the act of copying or performance (i.e. playing a recorded song in a public place) by an individual for non-commercial reasons. This forms the basis of the debate surrounding copyright issues on the Internet today. As Daniel Gervais observes, in each case, courts and legislators grew "the sphere of protected rights... by analogy. On the Internet, individual end-users have become 'content providers' but they are not professionals. Still, because rightsholders analogized them to professional content providers, they had no hesitation to apply copyright... that is not what copyright was meant to do."¹²

Two phenomena are at work simultaneously in the Internet Age: the growth of the entertainment and cultural industries, chiefly run by major entertainment conglomerates, into goliaths worth hundreds of billions of dollars annually worldwide; and the invention of technologies that allow unlimited and lossless copying by people all over the world. These changes resulted in a consensus that existing copyright laws were increasingly archaic and ill suited to deal with modern challenges. In 1996, the World Intellectual Property Organization (an agency of the United Nations) adopted new treaties on copyright law to address this. Canada, along with most industrialized nations, signed the WIPO Copyright Treaty and the WIPO Performances and

¹² Gervais, Daniel. "The Purpose of Copyright Law in Canada". *University of Ottawa Law & Technology Journal* 2(2), 2005: pp. 327.

Phonograms Treaty. These two treaties represent perhaps the first major update to copyright treaty law since *Berne*. They required signatory nations to harmonize national law by accepting computer programs as copyrighted works, allowing authors the right to prohibit rentals of their copyrighted works, and enshrining protection for *TPMs*, technical protection measures, in law by disallowing circumvention of *TPMs*.

TPMs consist of technical measures designed to limit access to a given creative work through the use of technology. This technology is not too difficult to understand: for example, a DVD designed for the European market which cannot be decoded on a North American video player; an academic textbook that revokes digital access to its contents after a semester ends; or a video game which denies players access unless they consent to a particular terms of use contract. *TPMs* are controversial in part because they allow for a two-tier system of copyright, where physical and analogue objects pre-dating the digital age do not enjoy the same protections as digital content-- or from a consumer standpoint, where activities which might otherwise be permissible under fair use or fair dealing become technically impossible thanks to the *TPMs*.

Perhaps sensing that *TPM* as a term felt too clinical or robotic, legislative discussions of *TPMs* have typically used the more relatable metaphor "digital locks" to characterize and explain *TPMs*. This is a seriously flawed metaphor that deliberately invokes comparisons to physical property, breaking and entering, and theft despite the inapplicability of those ideas in a digital realm. Without being cheeky, it is fair to say that the term "digital locks" itself is an act of framing within the copyright reform

debate. Unfortunately, this thesis lacks the scope to more fully explore this line of argument at such a high level. Nevertheless, because the term was commonly used in the Canadian debate, this thesis will use the term in subsequent mentions of TPMs.

Digital locks are pervasive. Music CDs and later digital music stores like iTunes and Amazon have not employed digital locks, but virtually every other form of entertainment today is hidden behind a digital lock. Commercial DVDs employ a digital lock called Content Scramble System; Blu-Rays and digital videos bought on major providers are also locked using the Advanced Access Content System (AACs) digital lock; digital books bought from Amazon or Kobo or other vendors are locked; digital textbooks available online through uOttawa's e-book partners are locked with Adobe Digital Editions rights management technology; comic books purchased for reading on a tablet are locked; virtually every video game released in the last decade has been locked. Deazley observes that the pervasiveness of digital locks poses a grave threat to the public domain (the sphere of works not protected by copyright), as the locks themselves technically persist even when copyright protection for the work in question ends.¹³

Do digital locks work to deter piracy? No. An Industry Canada legal memo summarizes research on the effect of digital locks, concluding "there is no evidence that [digital locks] will restore the value of sales at present being lost to piracy and

¹³ Deazley, pp. 125.

downloading since there is no clear explanation for the fall in [sales]."¹⁴ Industry Canada's position here is realistic, in that it notes that the commercial declines ascribed to piracy are not only caused by piracy, and that regardless of legality, digital locks are routinely broken in order to enable piracy. Circumventing digital locks on Blu-Ray discs is trivial using the free software MakeMKV, while popular eBook program Calibre can be used to remove digital locks from Amazon Kindle books. Empirical research to confirm this is simple: despite digital locks on video games the hit video game Call of Duty: Modern Warfare 3 was pirated over three million times in 2011 and comparable figures are available many other major games, films, or television shows.¹⁵ To give an even more stark example, Polish game developer CD Projekt Red released their game, *The Witcher 2: Assassins of Kings*, in both digitally-locked and easy-to-copy versions. When pirated copies of the game appeared shortly thereafter, the source of the pirate release was the digitally locked version. So trivial was the process of disabling the digital lock that pirate groups had not even bothered to use the version free of locks as a basis for distribution.¹⁶

Along with digital locks and the other WIPO treaty issues, a few other key debates have emerged in copyright over the last few years:

¹⁴ Government of Canada. "Draft Industry Canada Memo on Technological Protection Measures". 2011: pp. 9. Obtained under Access to Information Act.

¹⁵ TorrentFreak. "The Most Pirated Games of 2011". December 30, 2011. Available online: <https://torrentfreak.com/top-10-most-pirated-games-of-2011-111230/>

¹⁶ Griffiths, Daniel Nye. "'The Truth Is, It Doesn't Work' - CD Projekt on DRM". *Forbes Online*. May 18, 2012. Available online: <http://www.forbes.com/sites/danielnye/griffiths/2012/05/18/the-truth-is-it-doesnt-work-cd-projekt-on-drm/>

First, are service providers (including search engines like Google, internet service providers like Rogers or Bell, and web hosting companies who physically provide servers for web sites) liable for copyright infringement that they enable by virtue of providing access to a site? Typically this has been dealt with legislatively by offering certain "safe-harbours" for content providers, provided they attempt to block access to pirated material and cooperate with rights owners. Providers who act in good faith are not considered liable. By contrast, providers who are directly involved with deliberately enabling piracy can be held liable.

Second, what level of liability should an individual committing an act of non-commercial copyright infringement incur? Is it merely the actual damages caused by a lost sale (some handful of dollars in most cases of non-commercial piracy), or is it some greater punishment, to deter others from acting and to reflect the fact that that one user might share his infringing file with countless others? The approach taken to resolve this problem differs highly by jurisdiction. Some jurisdictions have found that non-commercial infringement for personal use ought not be punished at all.¹⁷ The United Kingdom's decriminalization of non-commercial infringement begins in 2015.¹⁸ Other jurisdictions, including the United States have favoured near-unlimited liability.

¹⁷ This had essentially been Canada's position pre-reform since *BMG Canada v. John Doe*, 2004 FC 488, where Judge Konrad von Finckenstein held that non-commercial file sharing piracy that showed no active intent on the part of the user to distribute files could not be used as a basis to subpoena an Internet Service Provider to release customer information, a holding that in practice led to the decriminalization of file sharing in Canada.

¹⁸ Vincent, James. "UK pirates will get four warning letters a year." *The Independent* July 21, 2014. Available online: <http://www.independent.co.uk/life-style/gadgets-and-tech/uk-pirates-will-get-four-warning-letters-a-year-9618818.html>

Some countries, including France¹⁹, have adopted a "graduated response" system, which is designed to temporarily or permanently disconnect serial infringers from the Internet. Canada, among other countries, historically approved a levy on the sale of blank storage media, such as cassettes or hard drives; the proceeds from this levy went to a collective licensing organization, which disbursed the levy to individual artists. This was intended to compensate artists for unprosecuted copyright infringement while recognizing the futility of attempting to catch and prosecute offenders through the court system.

1.3. Impact and Significance of Copyright and Piracy

By now, it should be apparent to the reader just how significant the subject of copyright is. It may, however, be useful to reflect on the role copyright plays in Canada in order to establish the importance of this thesis. Copyright governs every work created by members of Canada's cultural industries (including but not limited to television, film, literary, visual arts, software, and video game industries)--market segments which, all told, accounted for 7% of Canada's GDP in 2008, or some \$86 billion dollars.²⁰ In terms of employment, almost 4% of Canada's workers are employed in one of these industries.²¹ Every musician, every writer, every academic, every actor, every director, every computer programmer, every poet, and every painter, among

¹⁹ For a detailed treatment of the evolution of this policy in France, see Derieux, Emmanuel. *Lutte contre le téléchargement illégal: Lois DADVSI et HADOPI*. Rueil-Malmaison, 2010.

²⁰ Conference Board of Canada *Valuing Culture: Measuring and Understanding Canada's Creative Economy*, 2008. pp. iii.

²¹ Singh, Vik. *Economic Contribution of Culture in Canada*. Statistics Canada, 2004. pp. 15.

many others, earn their livelihood as a direct result of cultural industries and thus copyright. Haggart observes that content industries have consistently outperformed the Canadian economy as a whole and are viewed as a growth sector in the years to come.²²

The importance of this issue to both citizens and politicians is also evident. Notwithstanding the tendency to dismiss Facebook activism as relatively low-burden and not representative of the true importance of an issue²³, it is worth observing that between 2008 and 2010 the "Fair Copyright for Canada" Facebook group, designed by Dr. Michael Geist to raise public awareness of the reform process during the Bill C-61 debate and beyond, attracted over 80,000 members.²⁴ As the minister responsible for the final Bill C-11, James Moore puts into context the legislative importance of this issue: "This bill will have had more consideration by Canadians at two stand-alone legislative committees and more time in the House than any bill Parliament has seen since the Liberals' Anti-terrorism Act back in 2001. That shows our commitment... when it comes to getting intellectual property right."²⁵

²² Haggart, pp. 152.

²³ Treatments of this issue are common in popular media, but perhaps the most discussed is Gladwell, Malcolm. "Small Change: Why the revolution will not be tweeted". *The New Yorker* October 4, 2010.

²⁴ Figure cited in Haggart, pp. 185 but cannot be independently confirmed; Facebook prohibits external archiving and has since changed the design of the group feature so as to remove explicit "membership" options.

²⁵ Moore, James. *Legislative Debates (Hansard)*. 41st Parliament, 1st Session. Feb 8, 2012: pp. 5025.

The scope of piracy, which is the major issue the 21st century copyright modernization process aimed to tackle, is impossible to estimate. An OECD study suggested that Canadians were more likely to engage in file sharing than any other country in the world's citizens.²⁶ Content companies typically repeat figures of billions of dollars in losses²⁷: The Motion Picture Association of Canada claims that in 2009-2010, piracy cost Canada 12,600 full-time equivalent jobs, \$1.8 billion dollars in sales, \$294 million in lost tax revenue.²⁸ The Entertainment Software Association of Canada estimates that video game piracy costs Canada and the United States \$3.5 billion annually.²⁹ The Ontario Chamber of Commerce "conservatively" estimates that the Canadian economy loses \$22.5 billion to piracy annually.³⁰

The reasoning employed in these kinds of industry figures is flawed in that it assumes that an act of piracy constitutes a lost sale, or alternatively, that a decrease in sector-wide sales over the last fifteen years is inherently a byproduct of piracy rather

²⁶ Organization for Economic Co-operation and Development. *Working Party on the Information Economy: Digital Broadband Content: Music*. Dec 13, 2005. pp. 75.

²⁷ It is impossible to conclude whether repeating these figures stems from the fact that individuals within companies truly believe losses of that magnitude exist, or if strategically inflating the magnitude of losses is an effective strategy to stress the importance of anti-piracy measures and cast companies as sympathetic victims.

²⁸ Numbers from an Ipsos Media *telephone survey* conducted February 2011, summary online: http://www.mpa-canada.org/wp-content/uploads/2014/05/CMPDA-Backgrounder_Ottawa-ON_February-17-2011_EN.pdf

²⁹ Entertainment Software Association of Canada. "Policy". Available online: <http://theesa.ca/policy/>

³⁰ This figure is derived from uncritically accepting US Chamber of Commerce figures for piracy in the United States and scaling the figure to Canada proportionate to GDP, an obvious statistical abuse. See Ontario Chamber of Commerce. *Protection of Intellectual Property: A Case for Ontario*. Dec 3, 2007. pp. 14.

than changes in demand.³¹ In reality, it is impossible to know how many dollars, if any, piracy costs industries. Some research has suggested that piracy has a net positive impact on creative industries.³² For the scope of this thesis, however, it is enough to say that industries *believe* that they are being denied billions of dollars of revenue through piracy, and that in their view, only legislative reforms that limit user behaviour and punish pirates can stem the bloodletting.

Further significance of intellectual property to US-Canadian relations will be discussed in the section to follow.

1.4. Key Actors and Institutions

Who are some of the key actors and institutions that shape this debate?

Although this thesis is primarily a work dealing with framing, and thus the ideational content of the debate, "there are no institutional vacuums."³³ As Fiona Ross explains, "[there is] an interactive relationship between the effective use of discourse and the broader partisan, cultural, and institutional context within which meanings are

³¹ For examples of this logic, see IFPI. *Recording Industry in Numbers 2010*. pp. 11

³² For just a few of the vast array of research claiming this, consider Aguiar, Luis and Martens, Bertin. "Digital Music Consumption on the Internet: Evidence from Clickstream Data" Institute for Prospective Technological Studies Digital Economy Working Paper 2013/2014; or for a closer to home look, Andersen, Brigitte and Frenz, Marion. "The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada", 2007.

³³ Rein, Martin and Schön, Donald. "Reframing Policy Discourse" in Fisher, Frank ed. *Reframing Public Policy: Discursive Politics and Deliberative Practices*. Oxford University Press, 2003, pp. 156.

embedded."³⁴ As a result, this list of actors and institutions should be understood as providing context to the frame analysis that follows in Chapters 3 and 4.

The Canadian Government: Prior to being elected, Prime Minister Harper identified copyright as a major domestic priority. The management of copyright as a portfolio within the Canadian government is primarily the responsibility of Industry Canada, which is concerned with strengthening copyright in order to advance the interests of Canadian businesses and encouraging Canadian innovation.³⁵ However, the file is jointly administered by Canadian Heritage, which is typically seen as holding a perspective on copyright reflective of its mandate to support Canadian artists and creators, as well as cultural dissemination. Of course the individual perspectives of departmental ministers modulate the department's priorities; Haggart notes that Minister Bernier resisted efforts to enshrine protection for digital locks on the basis of his personal libertarian views.³⁶ These two departments are further balanced against the input of DFAIT, who view copyright as a trade issue. Compliance with global copyright norms is seen as an important goal to increase trade, especially with the United States. This institutional arrangement within the government demonstrates that governments do not have unitary or monolithic preferences; rather, they are a multiplicity of voices that may clash against one another to generate public positions. Although this thesis is not able to explore the full extent of conflict and dissonance

³⁴ Ross, Fiona. "Framing Welfare Reform in Affluent Societies: Rendering Restructuring More Palatable?". *Journal of Public Policy*. 20(2), 2000, pp. 173.

³⁵ Doern, Bruce and Sharaput, Markus. *Canadian Intellectual Property: The Politics of Innovating Institutions and Interests*. University of Toronto Press, 2000. pp. 23.

³⁶ Haggart, pp. 160.

between departments owing to constraints on the research, where it is possible, these disputes will be noted.

The complexity of this portfolio thus requires intervention on the part of the PMO both to solve intra-cabinet disputes³⁷ and to establish clear mandate letters to the Ministers responsible for each department in order to ensure the timely development of legislation on the matter. Blayne Haggart was able to interview then-Industry Minister Maxime Bernier's chief of staff, who summarized the PMO's position during the period covered by this case study: "Move quickly, satisfy the United States."³⁸

The United States of America: The United States is not only Canada's biggest trade partner; they are also the actor typically seen as taking the lead globally on intellectual property issues. This is in large part due to the economic importance of intellectual property to the United States, not only because of copyright's role in protecting Los Angeles and New York City's creative industries, but also because of the role of patents and trademarks in protecting pharmaceutical industries, fashion labels, and even traditional manufacturing industries. The concern is of course not solely about macro-economic policy, but also because politicians themselves are direct beneficiaries of donations from content companies.³⁹

³⁷ Haggart, pp. 158.

³⁸ Quoted in Haggart, pp. 181.

³⁹ For one example, see Kendall, Todd. "An Empirical Analysis of Political Activity in Hollywood" *Journal of Cultural Economics* 33(1), 2009: pp. 19-47.

Every year the US Trade Representative solicits input from American firms about the state of intellectual property enforcement around the world, and along with their own positions, issues a report called the *Special 301 Report*. The purpose of this report is to name and shame countries viewed as being non-compliant with US copyright maximalism. US Ambassadors routinely cite intellectual property as among the most pressing bilateral issues they deal with.⁴⁰

The Special 301 process has been broadly successful at forcing reform abroad. Following their inclusion on Special 301 watch lists in the 1980s, the governments of Jamaica and the Dominican Republic openly worked with US officials to write new intellectual property laws for their countries.⁴¹ After threatening Singapore with trade sanctions totaling almost a billion dollars as part of the Special 301 process, Singapore underwent an IP enforcement reform that eliminated 98% of assessed piracy over a 4-year period.⁴² During the 1990s, the US government used Special 301 and other methods of imposing pressure on China to encourage adoption of more restrictive intellectual property laws and stronger enforcement.⁴³

⁴⁰ For example, even after the passage of US-friendly copyright reform in Bill C-11, intellectual property reform remains a major priority in the relationship; see coverage of incoming US Ambassador to Canada Bruce Heyman in Mes, Susana. "6 Canada-US issues set to dominate Ambassador Bruce Heyman's Agenda". *CBC News*. April 8, 2014. Available online: <http://www.cbc.ca/news/politics/6-canada-u-s-issues-set-to-dominate-ambassador-bruce-heyman-s-agenda-1.2598913>

⁴¹ Drahos, Peter. *Information Feudalism*. The New Press, 2002: pp. 87-89.

⁴² Jayakar, Krishna. "The United States-China copyright dispute" *Communication Law and Policy* 2(4): pp. 535.

⁴³ For a critical take on this issue, which has dominated Sino-American relations for the last 20 years, see Tian, Dexin. "The Hegemonic Role of the United States in US-China Copyright Disputes". *Journal of Intercultural Communication* 23 (2010).

Given the relative unimportance of copyright law in Canadian politics and the outsized importance of the issue in US politics, it should not be surprising that the United States has historically viewed Canada as an uncooperative laggard with respect to intellectual property issues. Relevant to this case, the United States identified Canada's failure to adopt laws that bring it into compliance with WIPO norms as a major trade issue. Canada was added to the Special 301 "Watch List" (a list reserved for serious copyright offenders) after the failure of the Martin government to adopt copyright reform, and elevated to the "Priority Watch List" (a list reserved for out-and-out hostile international actors, typically occupied by countries synonymous with large-scale commercial piracy like China and former CIS countries) during the period discussed in this thesis.

Despite the Canadian government's public protestations that US pressure did not impact the reform process, private documents reveal otherwise. Among the many US diplomatic cables leaked by Pvt. Chelsea Manning to Wikileaks were a cachet of documents discussing the extent to which the United States lobbied Canadian politicians, and more damningly the way in which the Special 301 process was deliberately manipulated by the Harper government in order to encourage public pressure for copyright reform.⁴⁴ A brief summary of those documents follows:

⁴⁴ The sourcing of Wikileaks diplomatic cables is contentious on the basis that the US Department of State considers their contents classified even after their public release. This thesis only cites cables that have been publicly cited by past academics and journalists and whose contents are widely known by individuals studying the field.

In early 2006, US Ambassador to Canada David Wilkins met with PM Stephen Harper and indicated that WIPO compliance was of paramount importance to US-Canada relations. The PM responded that Canadian Heritage and Industry had been asked to make copyright reform a priority. Then-Canadian Heritage Minister Bev Oda expressed her intentions to model Canadian legislation on the US DMCA (Digital Millennium Copyright Act), as opposed to the previous Liberal government's reform bill, Bill C-60, which had died on the order paper.⁴⁵

To reduce US-Canada tensions over US concerns that the Canadian copyright reform process had dragged on too long, in 2007, a staffer from the Privy Council Office released to US officials private mandate letters written by the Prime Minister to Canadian Heritage and Industry Canada. The staffer also reminded the US representatives that the public pressure they had been putting on Canada "ha[d] been helpful in moving the issue forward".⁴⁶ That same year, Industry Minister Maxime Bernier offered to share private drafts of the in-progress legislation with officials.⁴⁷ The significance here is that Canadian officials had subordinated the long-held assumption that domestic policy-making is a private and confidential affair in order to assuage US concerns. Moreover, American officials were privy to the process of the bill's

⁴⁵ *Wikileaks Cable 06OTTAWA1702: IPR: Prospects Brighten for Canadian Implementation*. Available online:

<https://wikileaks.org/cable/2006/06/06OTTAWA1702.html>

⁴⁶ *Wikileaks Cable 07OTTAWA1639: Government of Canada reportedly on track for new copyright laws in the fall*. Available online:

<https://wikileaks.org/cable/2007/08/07OTTAWA1639.html>

⁴⁷ *Wikileaks Cable 06OTTAWA3620: Canada Copyright Bill Months Away from Introduction in Parliament*. Available online:

<https://wikileaks.org/cable/2006/12/06OTTAWA3620.html>

development to a far greater extent than the Canadian public or opposition members were, which suggests that the government felt they owed accountability to a foreign actor rather than the public they nominally serve.

Finally, in 2009, Industry Minister Tony Clement's director of policy, Zoe Addington, told US officials that elevating Canada to the Special 301 Priority Watch List "would not hamper — and might even help — the (government of Canada's) ability to enact copyright legislation"⁴⁸ In effect, this was a reversal of the position held in the government's public statements on the matter, which was that they viewed Special 301 as illegitimate and irrelevant to their commitment to enact copyright reform. Through this public/private Janus-face arrangement, the government contributed to a manufactured crisis of US concern in order to manipulate domestic sentiment, portray copyright reform as urgent, and help deflect responsibility for the content of the final policy--a strategy which ultimately backfired when public opposition to the reform process centered around US influence.

Supreme Court of Canada: The Supreme Court of Canada has been a powerful actor on the issue of copyright reform. Three major rulings on copyright which provide background for the 2008-2012 debate were 2002's *Théberge* ruling, 2004's *CCH* ruling, and 2004's *SOCAN* ruling. These rulings, taken together, give the impression that the court views copyright as a question of balancing user rights and creator rights. As a

⁴⁸ *Wikileaks Cable 09OTTAWA309: Canada IP Update: GOC Official Reports No Progress on Copyright Bill.* Available online:
<https://wikileaks.org/cable/2009/04/09OTTAWA309.html>

result, the "balance frame" has a great deal of legitimacy and rises to something of a metacultural norm. In *Théberge*, a case dealing with a painter suing a print company over what he viewed as unauthorized use of his work, the court articulated its intellectual vision for the boundaries of copyright and fair dealing:

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... The proper balance... lies not only in recognizing the creator's rights but in giving due weight to their limited nature.⁴⁹

In *CCH*, a case where publishers sued the Law Society of Canada over their provision of photocopying services to members, the court gave a wide berth to fair dealing, holding that it "must be given a large and liberal [ed. *permissive*] interpretation in order to ensure that users' rights are not unduly constrained."⁵⁰ In *SOCAN*, a group representing Canadian musicians sued a trade group representing Canadian Internet service providers for their role in enabling copyright infringement. The court again drew a balance between user rights and authorial rights:

The capacity of the Internet to disseminate "works of the arts and intellect" is one of the great innovations of the information age. Its use should be facilitated

⁴⁹ *Théberge v. Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34.

⁵⁰ *CCH Canadian Limited v. Law Society of Upper Canada*, 2004 SCC 13.

rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.⁵¹

These three cases put together demonstrate that the court views copyright as not just a set of economic and moral rights for authors and creators, but also a set of "user rights" which limit the breadth of copyright and protect public interest. The court thus endorses the "balancing" frame, which sees copyright as a sort of tradeoff between rights for authors and broader rights for the public--the very same frame the Harper government later adopted in discussing Bills C-32 and C-11. Although the rulings themselves applied to relatively narrow cases, the power of the court's view to shape the ideational elements of future debates is quite substantial, and the court's institutional credibility guarantees that actors across the debate are sure to try to align their position with the court's expressed preference.

Creative and Content Groups: Creative groups consist of groups representing both creators themselves and content companies more generally. These actors typically favour not only copyright maximalism (in order to protect their economic success and avoid market competition, as well as in order to prosecute and punish acts of piracy or unauthorized copying), but also collective licensing measures and direct subsidies for creative works. Among industry representatives, the Canadian Recording Industry Association and the Entertainment Software Association of Canada (a trade group representing videogame developers and publishers in Canada) are among the most

⁵¹ *Society of Composers, Authors, and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45.

visible.⁵² One of the most significant groups who represented individual creators during this debate was the Canadian Music Creators Coalition, which represents a variety of prominent Canadian artists including Sarah McLachlan.⁵³

Provider Groups: Provider groups, including Internet Service Providers (Rogers, Bell, TekSavvy) who offer Internet access to individual consumers, peering and hosting companies (LayeredTech, Hostgator, Microsoft Azure) who provide the facilities and services on which web site data is stored, and search engine companies (Google, Microsoft Bing) that provide the primary means by which most citizens find web sites to begin with, are all involved in the copyright process. Typically they favour isolating themselves from liability, minimizing the cost of compliance with regulations, and protecting their users.

User Groups: An unusually broad coalition of interests and actors can be collectively referred to as user groups. These include everything from large organized groups of users (journalist associations, academic librarians, engineering researchers, and even some musicians and authors) down to individual users who interact with copyright law in their daily life (consider a student writing an MA thesis on copyright reform for the University of Ottawa, who is subject to digital lock limitations when attempting to read an academic book on copyright). The Association of Universities and

⁵² Haggart, pp. 167.

⁵³ Haggart, pp. 168.

Colleges of Canada has been especially vocal in speaking out against digital locks, on the basis that they interfere with academic use of materials.⁵⁴

These groups typically favour a high amount of leeway for fair dealing, including protection of rights to parody, satirize, remix, or research copyrighted work. They also favour lower terms of copyright protection, so that works enter the public domain more quickly.⁵⁵ They aim to avoid the criminalization of non-commercial copyright infringement. Finally, typically they support format-shifting and time-shifting, which refer to the right of a user to convert a copyrighted work into another format (for example, transferring a VHS to a digital file for archival purposes, or being able to play a 25-year-old Atari Pac-Man cartridge on a modern personal computer), or for later consumption.

Activists critical of copyright: Along with user groups, there exist actors who would be best described as activists critical of modern copyright. Typically these include authors or scholars who study copyright and critique it conceptually. Among these activists might be included Harvard Law Professor Lawrence Lessig, whose book *Free Culture* is an influential critique of modern copyright and something of a

⁵⁴ Haggart, pp. 169.

⁵⁵ There is a body of research, theoretical and economic, arguing for shorter copyright terms. For a theoretical argument, see "Copyright: A Radical Rethink" in *The Economist* 366, Jan 25, 2003. pp. 15. For empirical research, see Pollock, Rufus. "Optimal copyright over time: technological change and the stock of works". *Review of Economic Research on Copyright Issues*. 4(2), 2007. pp. 51-64.

touchstone for computer programmers and hackers weary of the extent of modern copyright.⁵⁶

In Canada, the two most prominent activists on the issue are science-fiction author Cory Doctorow and University of Ottawa Professor Michael Geist. Dr. Geist has been critical of US influence on Canadian digital policy, as well as copyright maximalism more generally. During the run-up to the introduction of Bill C-61, he created a popular Facebook group called Fair Copyright for Canada, whose unexpected success is credited for causing the government to delay and revise the bill. Dr. Geist's efforts are mentioned negatively in the aforementioned Wikileaks cables⁵⁷, his work has been referred to by name by all four parties in the House of Commons debates, and he was called as an expert witness to testify before the committees responsible for debating the reform bills.

A final note on actors and institutions; Canada's political parties have not historically been major actors in the debate on copyright. In the context of the 2008-2012 debates, the Bloc Quebecois (BQ) typically spoke in favour of collective licensing

⁵⁶ Although Lessig was not involved in the Canadian debate, *Free Culture* incidentally endorses the "balance" frame and attacks authors who lose sight of the need for balance: "When anyone begins to talk about "balance," the copyright warriors raise a different argument. "All this hand waving about balance and incentives," they say, "misses a fundamental point. Our content," the warriors insist, "is our property... And why should Congress deliberate at all about the merits of this theft? Do we ask whether the car thief had a good use for the car before we arrest him?" Lessig, Lawrence. *Free Culture*. Penguin Books, 2005. pp. 79.

⁵⁷ *Wikileaks Cable 05OTTAWA3244: Evolution of Industry Response to Canada's Draft Copyright Amendment Legislation*. Available online: <https://wikileaks.org/cable/2005/10/05OTTAWA3244.html>

agreements, perhaps a result of the importance of the arts sector to the Quebec economy. The New Democratic Party (NDP), represented largely by MP Charlie Angus, separately supported collective licensing agreements and opposed digital lock protections. It would be fair to characterize the NDP's position as being fairly consistently critical of stronger copyright.⁵⁸ The Liberal party, despite their role as a governing party during previous reform attempts and their successful oversight of a previous round of reforms in 1997, was not a notable actor in these debates. While Conservative MPs held the party line on the specific proposals tabled by their leadership, it would not be accurate to suggest the Conservative Party of Canada (CPC) had a significant interest in copyright historically beyond their higher-level positions on market economics, regulation, and trade more generally.

1.5. Theory and Method

Chapter 2 will provide an in-depth examination and literature review of framing theory--from its conceptual origins through to its modern use in public policy studies. For now, it suffices to say that this thesis will use frame analysis as articulated by Martin Rein and Donald Schön in order to observe how the Harper government framed copyright reform from 2008-2012, with specific emphasis on the shift in framing between the Bill C-61 and Bills C-32 and C-11. Frame analysis is a useful and important analytical approach through which to understand this case, because it provides the tools necessary to understand the disconnect between private and public statements by the government, shows why a shift in framing was necessary, and offers evidence as

⁵⁸ Haggart, pp. 162.

to why the particular forms the framing efforts took were effective to greater or lesser degrees. In turn, the case supports key observations in existing literature, and so provides a valuable empirical perspective on framing literature.

Methodologically, this is a qualitative case study. I aim to explore and qualitatively interpret the framing set out by government officials during this process. In order to do so, I constructed a corpus of potentially relevant documents. This began by using the House of Commons Hansard tool and OpenParliament.ca, an online tool that allows detailed searches of Hansard transcripts to search for all debates surrounding the three bills as well as mentions of copyright, intellectual property, and digital locks in other debates from 2008-2012. For the two bills that made it to the committee stage, committee hearings were examined. In Bill C-11's case, the Senate debates were also studied. Finally, Speeches from the Throne were also considered.

Outside of the parliamentary process, the thesis examined every formal press release issued by Industry Canada or Canadian Heritage on these subjects, including legislative backgrounders and questions, key speeches made by Ministers occupying both portfolios, interviews on CBC television, interviews on CBC and TVO radio programs, and editorials in most Canadian major newspapers. Some previously published private documents were considered, including interviews with civil servants⁵⁹, the Wikileaks cables surrounding Canada-US copyright relations, and talking points and internal analysis documents prepared for Ministers and MPs and

⁵⁹ These interviews were previously published by Haggart and did not require ethics approval for use in this thesis.

obtained by Dr. Michael Geist under Access to Information laws. In addition to the three bills, I also looked at documents and public remarks related to the 2009 public consultation.

The bulk of the analysis involved carefully reading the identified documents, identifying and discarding out-of-scope documents (which presented the views of actors that were not represented in the thesis, which were redundant or summarized other extant documents without further analysis, which concerned irrelevant matters of parliamentary process, etc.) The remaining in-scope documents were summarized and relevant quotations pulled to help assemble a narrative of what occurred. I did not formally code the documents as part of the process of identifying the frames used, in part because government message control was so strong and palpable that the frames used were consistent, homogeneous, and emerged quite convincingly from a plain reading of the documents.

It is my hope that the presentations of the case in Chapters 3 and 4 are able to convince readers that my narrative is compelling and constitutes an authentic, viable interpretation of what occurred.

1.6. Thesis Structure and Organization

The thesis is structured into five chapters. This chapter provided a high level overview of the thesis' question and conclusions; offered a historical background on copyright in a global and Canadian context; established the importance of copyright

and content industries and briefly discussed the significance of piracy as a problem; gave an overview of the key actors and institutions present for the copyright debate; and finally in this section, laid out the format of the remainder of the thesis.

Chapter 2 will provide an in-depth literature review of framing, beginning with Erving Goffman's definition of frames and tracing a current through public policy framing literature, which largely emerged from Rein and Schön's version of frame analysis. The chapter will identify the ways in which frame analysis has been applied, define and identify key terms and offer discussion of some of the findings and challenges in framing literature. After this, Chapter 2 will embark on a case study review providing a brief tour of some relevant frame analyses performed in the past. The cases reviewed were selected because they provide insight that proved useful in helping to understand the case studied in this thesis. Chapter 2 will conclude by reviewing the only published case study using frame analysis to examine a copyright reform effort, an analysis of framing in the debate surrounding anti-circumvention provisions of the American DMCA in the late 1990s.

Following the literature review, Chapters 3 and 4 will comprise the case study portion of the thesis. Each chapter will present one of the frames used by the government, using original source material to demonstrate how the government deployed the frame and tell a chronological narrative. Chapter 3 will examine the time period leading up to and including Bill C-61, assessing the government's "Made-in-Canada" frame. The chapter will discuss the forceful protests against the bill even

before it was tabled, the government's defensive posture, and their resulting failure to convince the public of the validity of their frame.

Chapter 4 will continue chronologically with the Public Consultation of 2009, Bill C-32 (2010), and Bill C-11 (2011), observing the government's frame shift towards a new "balance" frame. The chapter will combine description of the frame's use across the bill debates with analysis of why the frame was successful and how it derived its legitimacy and relevancy. The chapter will look at limited opposition efforts to contest the frame, both by making use of alternate frames and by attempting to contest the applicability of the government's frame to the bill using detailed, technical arguments about the bill's contents. Chapter 4 will conclude with a look back over the entire reform process, the transition between frames, and the government's ultimate success.

Chapter 5 will serve as a big-picture look forward. It will begin by summarizing developments in the copyright file since 2012, and hypothesize as to how future copyright reforms, including the legislatively mandated review of C-11 in 2017, might lead to new approaches and necessitate new frames. Next, it will show how this thesis' findings contribute to framing literature and literature on Canadian copyright reform. It will propose opportunities for new research in these fields. As part of discussing the thesis' contributions to the literature, it will also reflect on the limitations of the thesis and how subsequent work could improve and expand on the findings here. Finally, it will conclude by summarizing the entire thesis.

2.1. Framing: From Goffman to Rein and Schön

This thesis applies theories of frame analysis to offer insight about the copyright reform process from a public policy perspective. Before delving into the case study itself, it is valuable to take a chapter to explore the literature of frame analysis in public policy in order to provide a theoretical grounding for the thesis. This chapter will first provide a basic definition of frames and frame analysis, observe the state of the field, and then spend time examining past case studies of frame analysis in public policy.

Frame analysis refers to a multiplicity of analytical approaches used across several disciplines built around the *frame*, a conceptual tool originated by Erving Goffman, who wrote *Frame Analysis* in 1974. Goffman describes frames as "schematas of interpretation", or in other words cognitive structures that help individuals perceive and understand reality.⁶⁰ Goffman advances the frame as an important tool for how a subjective view of reality is constructed. Framing, viewed in this light, is a process that helps with cognitive understanding of the world, and serves as a process designed to "explicate the structures that give form to processes of social interaction and communication."⁶¹

Frame analysis is used in a wide variety of fields, including artificial intelligence and cognitive science⁶², political communication, public opinion, social movement

⁶⁰ Goffman, Erving. *Frame Analysis*. Harper & Row, 1974: pp. 21

⁶¹ Rein and Schön, pp. 146.

⁶² Minsky, Marvin. "A Framework for Representing Knowledge" in Winston, Pat ed. *The Psychology of Computer Vision*. McGraw Hill, 1975. pp. 211-277.

theory⁶³, media studies⁶⁴, and public policy. Frame analysis situates itself within broader analyses of discourse and the role of ideas in the policy process. Vivian Schmidt, for example, incorporates the use of frames and frame analysis within her discursive institutionalism framework, which extends sociological institutionalism by viewing frames and more broadly, ideas as part of an ongoing discursive process.⁶⁵

This thesis will make use of an existing tradition of frame analysis in the study of public policy, notably from Rein and Schön, who describe framing as "a way of selecting, organizing, interpreting, and making sense of a complex reality to provide guideposts for knowing, analyzing, persuading, and acting".⁶⁶ Here, frames are defined as packages that combine norms and values, facts, history, and metaphor in order to provide a given context to a listener that emphasizes the relative importance of certain aspects of a debate over others--what Entman terms "selection and salience".⁶⁷ Ergo, frames work by "determin[ing] whether most people notice and how they understand and remember a problem, as well as how they evaluate and choose to act upon it."⁶⁸ Framing is not just intended to shape reform, but also to impress upon the target the need for reform at all.

⁶³ Snow, David and Benford, Robert. "Ideology, Frame Resonance and Participant Mobilization" *International Social Movement Research* 1, 1988. pp. 464-481.

⁶⁴ Iyengar, Shanto. *Is Anyone Responsible?: How Television Frames Political Issues*. University of Chicago Press, 1991.

⁶⁵ Schmidt, Vivian. "Taking ideas and discourse seriously: explaining change through discursive institutionalism as the fourth 'new institutionalism'." *European Political Science Review*. 2(1), 2010: pp. 1-25.

⁶⁶ Rein and Schön 2003, pp. 146.

⁶⁷ Entman, pp. 52.

⁶⁸ Entman, pp. 54.

Rein and Schön introduce three types of frame with differing levels of specificity. Metacultural frames refer to very broad shared systems of belief, almost rising to the level of worldview. These help shape "institutional action" frames, or general, reusable approaches that an actor can use across policy areas. The final and most specific form of frame is a "policy" frame, which refers to the frame deployed in the context of a specific policy.⁶⁹ The frames used in this thesis span the approaches; they are policy frames derived from institutional action frames, which draw on metacultural frames. For example, allowing expanded user rights while also enshrining protection for digital locks is a particular policy frame, rooted in an institutional action frame of "balancing" consumer and commercial rights, which in turn is grounded in metacultural norms about copyright in specific (for instance, Supreme Court jurisprudence in *CCH* and other decisions) and more generally about the government's role as mediator of interests and the extent to which it should intervene in the market.

In order to find frames, one needs to know where to look. John Campbell was instructive here. He notes: "Frames appear typically in the public pronouncements of policy makers and their aides, such as sound bites, campaign speeches, press releases, and other very public statements designed to muster public support for policy proposals."⁷⁰ This rough guide formed the basis for the original document corpus on which the frame analysis was performed. This approach recognizes that framing, as a public act, may not necessarily be reflected in private statements or documents.

⁶⁹ Rein, Martin and Schön, Donald. *Frame Reflection: Toward the Resolution of Intractable Policy Controversies*. Basic Books, 1994: pp. 33-34

⁷⁰ Campbell, John. "Institutional analysis and the role of ideas in political economy" *Theory and Society* 27, 1998: pp. 395.

Key authors view framing as a contentious, political, and normative act. Smith writes that a given frame "lead[s] to particular solutions and... privilege[s] particular actors."⁷¹ In his review of the role of ideas in public policy, Campbell expresses a similar view that "political elites strategically craft frames and use them to legitimize their policies to the public and each other."⁷² Because framing empowers some actors, Campbell notes a tendency of policymakers to engage in deliberately cynical attempts to hijack successful frames and obscure their honest positions on a subject.⁷³ Rein and Schön call this "gaming" or "hitching on" to a dominant frame.⁷⁴ These assessments of framing see it as more of a normative tool, to convince people of how something ought to be thought of, than a cognitive tool that describes how they are thought of.

Luc Juillet's approach is more traditionally cognitive. He argues that framing serves not only as a strategic tool to advance the interests of a given actor, but also one that "lead[s] other actors to redefine their own interests in light of a new understanding of reality... it has transformative potential."⁷⁵ Political psychologists including Drew Westen have remarked on the subconscious ways in which "networks of association" between actors, words and metaphors (i.e. frames) have a profound

⁷¹ Smith, Miriam. "Framing Same-sex marriage in Canada and the United States". *Social Legal Studies* 16(1), 2007: pp. 9

⁷² Campbell, John. "Ideas, Politics, and Public Policy". *Annual Review of Sociology*, 2002. pp. 27

⁷³ Campbell 2002, pp. 28.

⁷⁴ Rein and Schön 2003, pp. 151.

⁷⁵ Juillet, Luc. "Framing Environmental Policy: Aboriginal Rights and the Conservation of Migratory Birds" in Orsini, Michael and Smith, Miriam eds. *Critical Policy Studies*. University of British Columbia Press, 2007. pp. 260.

impact on the structure of a person's thoughts.⁷⁶ Rein and Schön observe the way in which a frame can structure thought on an important level when they say that different frames "lead to different views of the world and creates multiple social realities... [which can create] *policy controversies*". Policy controversies are conflicts between frames that cannot be resolved with reference to evidence, facts, or social scientific analysis, because the frames themselves establish the meaning of and validity of evidence in context. As a result, these conflicts between frames are typically irreconcilable without one or more parties changing their frame.⁷⁷

Rein and Schön thus suggest a form of thinking called frame-reflexivity where actors caught in irresolvable policy disputes critically reflect on the parameters of their frames in order to reach consensus and move beyond argumentative impasses--in their words, when "actors involved in policy disputes not only act *from* their frames, but turn their thought back onto the frames themselves and engage in reciprocal inquiry aimed at unblocking [the debate]".⁷⁸ This, of course, is seen as a best practice, not something that necessarily occurs with great regularity in real-world policy debates.

Although the frame-reflexivity approach and the cognitive discussion in Juillet's article are intuitive and clearly present in a variety of real-world debates, it must unfortunately be noted that the best available evidence--including the schism between

⁷⁶ Westen, Drew. *The Political Brain: The Role of Emotion in Deciding the Fate of the Nation*. Public Affairs, 2007: pp. 80-93.

⁷⁷ Rein and Schön 2003, pp. 147-148

⁷⁸ Rein, Martin and Schön, Donald. "Frame-Critical Policy Analysis and Frame-Reflective Policy Practice". *Knowledge and Policy* 9(1), 1996: pp. 94.

private belief and public statements, the abrupt shift in framing with no public acknowledgement as to why, the strategic use of the public consultation, the government's hostility to directly engaging opposition arguments, and more--is that the use of framing in this case was quite strategic, normative, and frankly cynical. The empirical discussion in Chapters 3 and 4 will show how framing was an integral part of the government's messaging public message strategy, rather than a reflection of sincere privately held belief or worldview.

Conflicts need not necessarily be controversies across multiple frames; Rein and Schön also allow space for disagreements within a given frame. In fact, they view distinguishing between intra-frame disagreements and inter-frame controversies as a common challenge in frame analysis, in part because of a tendency for participants in a discourse to adopt the dominant frame when "hoping to purchase legitimacy."⁷⁹ Indeed, as this thesis' case studies will show, in many cases a frame is successful and widely adopted, but the attached policy reform is still highly contested by opposition actors.

Countless studies show that framing has a significant effect on the way individuals deal with issues.⁸⁰ Individuals clearly have some degree of agency in evaluating frames. If all frames simply worked because a member of the elite deployed them, then as Fiona Ross reflects, "charismatic and telegenic leaders could exert control

⁷⁹ Ibid, pp. 151.

⁸⁰ To name just one: Jacoby, William. "Issue Framing and Public Opinion on Government Spending" *American Journal of Political Science* 44(4), 2000:

over both the saliency and interpretation of *any* social issue."⁸¹ Clearly, then, measuring the success of a frame is to measure the extent to which an actor can impose its view of the problem on other actors, either by weakening the force or unity of opposition, building a new coalition of support, successfully convincing key individuals to change their position, shifting social norms, or other such achievements. Learning to identify why some frames are more successful than others is a key problem in the field. Rein and Schön argue that ascertaining "taken-for-granted assumptions that underlie people's apparently natural understandings" contributes to answering this question.⁸² At the time they anticipated that empirical study might be an appropriate tool to reveal how ordinary people evaluate frames, which are seen as more effective, and why.⁸³

It would be impossible to examine all such empirical studies looking at the efficacy of different types of frames and different framing efforts, but one study by James Druckman found that the perceived credibility of a source significantly impacted the value of a frame and the chance of its adoption by others.⁸⁴ This speaks to the ongoing interplay and discourse at work; framing issues can lead to a perception of credibility when the frames are successful, and that perceived credibility can enhance the likelihood that future framing efforts will succeed.

⁸¹ Ross, Fiona. "Framing Welfare Reform in Affluent Societies: Rendering Restructuring More Palatable?". *Journal of Public Policy*. 20(2), 2000: pp. 172.

⁸² Rein and Schön 2003, pp. 150.

⁸³ Rein and Schön 2003, pp. 149.

⁸⁴ Druckman, James. "On the Limits of Framing Effects: Who Can Frame?". *The Journal of Politics* 63(4), 2001: pp. 1041-1066

Researchers have also examined how the *content* of a frame is able to affect its chances of success. Campbell, for his part, observes that a deliberately vague frame can work to convince disparate interest groups that their interests were represented, regardless of the actual policy content.⁸⁵ An empirical study of Finnish social policy by Kangas, Niemela, and Varjonen similarly found that "abstract frames appealing to moral sentiments are more effective than frames relying on factual arguments."⁸⁶ Ross emphasizes the value of frames that target "broad sections of society."⁸⁷

It would also be remiss not to discuss ways in which framing is more or less likely to be effective without recognizing that most acts of framing are not framing at all, but rather *reframing*. Ross speaks to the value of extant frames from which to bootstrap new ones. She argues: "the framing process is more likely to be successful... where underlying ideas, frames, and policy structures are not wildly incongruous with new initiatives."⁸⁸ Ross believes frames that reflect existing metacultural norms are more successful. Surel discerns that "the emergence of a new frame... occurs through associations and new hierarchical elements that may already exist. Far from making a clean slate of the past, a new societal paradigm must in effect be composed of previous cognitive and normative structures."⁸⁹ Miriam Smith found that "engagement with constitutional law" is one such way to build on previous structures and strengthen a

⁸⁵ Campbell 2002, pp. 27.

⁸⁶ Kangas, Olli et al. "When and why do ideas matter? The influence of framing on opinion formation and policy change" *European Political Science Review*. 6(1), 2013: pp. 76.

⁸⁷ Ross, pp. 172.

⁸⁸ Ross, pp. 173.

⁸⁹ Surel, pp. 508.

frame, because constitutional law (including Supreme Court jurisprudence) both "provides important political opportunities for [legal mobilization]" and because such outside sources of legitimacy have discursive and ideational impact on the debate.⁹⁰

Understanding the effectiveness of frames is considered key to understanding how and why *frame shifts* occur over time, which of course connects in a significant way to the central holding of this thesis. It stands to reason that a government actor who observes that her framing of an issue is not leading to progress or consent will endeavor to find a new frame that is more likely to be successful or contest the currently successful frame. This thesis contends that after the widespread public backlash and protest preceding Bill C-61, the Harper government found a frame that would work better in subsequent debates; an action that would have been far more difficult if the government was cognitively committed to its frame, rather than using it for strategic purposes.

Pinning down a concrete and exact definition of a frame, or framing, or frame analysis is difficult. Robert Entman, who looked at framing's "scattered conceptualization", has remarked upon this difficulty.⁹¹ He claimed "despite [framing's] omnipresence across the social sciences... nowhere is there a general statement of framing theory that shows... how framing influences thinking."⁹² Other methodological challenges and problems have been noted as well: Surel mentions that many critics

⁹⁰ Smith, pp. 8

⁹¹ Entman, Robert. "Framing: Towards Clarification of a Fractured Paradigm" *Journal of Communication* 43(4), 1993: pp. 51-58.

⁹² Ibid.

have found the process of identifying a specific frame within a given text or debate to be methodologically problematic.⁹³ This speaks to the fact that the objective of a frame analysis is typically to construct a plausible reading of the situation, rather than to lay exclusive claim on the only such description. Isolating the impact of a frame alone also poses a challenge, rendering it difficult to refer to a given act of framing as "successful" in and of itself.

2.2. Frame Analysis Applied: Some Cases of Interest

Having offered a workable definition of frames and explored some of the general questions and conclusions of frame analysis, it is now time to look at the sorts of casework that has been done using frame analysis. This thesis uses a sort of "survey" approach, discussing cases to gain insight about framing which helps inform the case study presented in the subsequent chapters.

One of the most significant bodies of frame analysis case studies deals with the framing of the welfare state. Ross looks at the framing of welfare state reform in industrialized countries.⁹⁴ She makes use of Esping-Andersen's "three worlds" welfare state typology⁹⁵ and observes how actors in states reflecting each of the "three worlds" have made use of different frames to reform or retrench welfare; of particular interest

⁹³ Offered as a critique in Surel, Yves. *The role of cognitive and normative frames in policy-making*. *Journal of European Public Policy* 7(4), pp. 506

⁹⁴ Ross.

⁹⁵ Esping-Andersen, Gøsta. *The Three Worlds of Welfare Capitalism*. Princeton University Press, 1990.

is the way in which she is able to look at the role extant frames and institutional configurations combine with new frames to result in particular reform outcomes.

Olli Kangas and his co-authors present a study of Finnish social insurance. They assess frames used during policy debates during a past reform effort, and then use a survey approach to poll public opinion response to the frames. They find that the public typically supports social insurance schemes that are expressed in general or moral terms (i.e. framed as "social justice"), but support decreases when more specific frames, particularly those that reference or include costs or characterize social insurance as an expense.⁹⁶ This thesis' case study shows similar behaviour: the government responds to opposition frames by categorizing them as taxes and expenditures, while referring to their own framing in very general terms.

Michael Prince studies income security in Canada. He begins with a model of decision-making taken from R. Kent Weaver: decision-makers aim to "claim credit", "do good", and "avoid blame".⁹⁷ He shows how framing efforts deployed during the Bill C-36 income security reform package were designed to do all three. Notably, by framing losses imposed on low-income seniors as "enhancing equity", the government was able to avoid being blamed for the losses by the public at large.⁹⁸ Moreover, by obfuscating the specifics of the policy, the government was able to lower visibility of the issue as a

⁹⁶ Kangas et al., pp. 89

⁹⁷ Prince, Michael. "Avoiding blame, doing good, and claiming credit: Reforming Canadian income security". *Canadian Public Administration* 53(3): pp. 294.

⁹⁸ Ibid, pp. 315.

whole.⁹⁹ Daniel Béland's review of welfare state literature arrives at the same conclusion; Béland introduces the concept of the "strategic misconception" to show how ideas can be used to strategically mislead an audience in order to pre-empt criticism of the content of a given policy.¹⁰⁰ This analysis helps explain much of the behaviour visible in the framing efforts discussed in Chapter 4's case study.

Social movement theorists have also developed an extensive body of research using frame analysis. Rhiannon Morgan offers a history of Aboriginal rights claims at the United Nations, drawing on theoretical work by Snow and Benford to introduce the concept of "frame alignment", or strategies by which a social movement can attract attention and support by aligning existing frames with the interests of target actors.¹⁰¹ In other words, "where authorities value, or purport to value, certain principles and norms, social movements can wrap up their claims in ways that call on those values, thus forcing authorities to embrace those claims."¹⁰² While this thesis is hardly the study of a social movement, frame alignment can be used to speak to the strategic ways in which framing can be used to co-opt existing values or principles to build a broader coalition of support; this is relevant when considering the shift in framing visible between Chapters 3 and 4 of the case study presented here.

⁹⁹ Ibid, pp. 316.

¹⁰⁰ Béland, Daniel. "Ideas and Social Policy: An Institutional Perspective". *Social Policy and Administration* 39(1), 2005: pp. 11.

¹⁰¹ Snow, David, et al. "Frame Alignment Processes, Micromobilisation, and Movement Participation". *American Sociological Review* 51: pp. 464-481.

¹⁰² Morgan, Rhiannon. "Advancing Indigenous Rights at the United Nations: Strategic Framing and Its Impact on the Normative Development of International Law" *Social & Legal Studies* 13(4), 2004: pp. 497.

Although the bulk of the public policy literature on framing chooses cases related to social spending (be it health spending, income guarantees and retirement, or welfare and employment insurance), framing has broader applicability. The penultimate case study reviewed by this chapter will examine how framing has been used to examine an environmental controversy in Canada. Luc Juillet looks at a persistent dispute between Aboriginal hunters and federal regulators over their desire to hunt certain migratory birds. Juillet recounts that Aboriginal leaders applied a "justice" frame in opposition to the government's "rational, science-based policy" frame. The inter-frame controversy resulted in to a "dialogue of the deaf".¹⁰³ Ultimately, the stalemate was broken when the Supreme Court of Canada held in *R. v. Sparrow* that Aboriginal hunting rights were to be accorded some level of deference; "the question was no longer whether Aboriginal claims for justice ought to be accommodated... but rather how the accommodation could best be achieved."¹⁰⁴ This speaks to the power of court decisions to lend legitimacy to a frame. Later, this thesis will explore how both proponents and opponents of copyright reform explicitly invoked Supreme Court jurisprudence and the balance frame as part of their efforts to shape reform. More broadly, Juillet is suggesting that sources of outside legitimacy and authority frequently provide ready-made frames that are then adapted by political actors to resolve policy disputes and controversies.

Finally, this chapter will perform a more in-depth review of the one published academic work that could be considered to be a frame analysis of copyright reform. Bill

¹⁰³ Juillet, pp. 263.

¹⁰⁴ Juillet, pp. 271-272.

Herman and Oscar Gandy Jr. performed what they termed a "content analysis" of US legislative debates surrounding Section 1201 of the Digital Millennium Copyright Act, which covers anti-circumvention (digital lock) regulations. Although content analysis is itself a nebulous term and often used for more quantitative approaches (e.g. word clustering), their analysis is fairly holistic and not dissimilar to the approach this thesis uses. Section 1201 of the DMCA empowers the US Copyright Office to periodically create new exemptions to legal provisions protecting digital locks--a power which was used in 2008 to legally allow the "jailbreaking" of smart phones to run computer programs prohibited by the phone's manufacturer.¹⁰⁵

The authors were interested in studying the development of the anti-circumvention rules, the exemption process, and how the exemption process has been used. They find that a US Patent Commissioner engaged in "policy laundering" when he framed stringent anti-circumvention rules as necessary to ensure that other international countries would adopt measures to reduce piracy of American goods and cultural works.¹⁰⁶ By framing the decision as a question of international leadership, representatives were convinced of the need to act.

The authors also discover that the exemption process, far from its nominal intent to provide a measure of balance, was actually designed to take authority

¹⁰⁵ US Copyright Office, Library of Congress. "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies. Docket No. RM 20088", 2008.

¹⁰⁶ Herman, Bill and Gandy, Oscar. "Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings". *Cardozo Arts and Entertainment Law Journal* 24(1), 2005: pp. 121.

traditionally delegated to American courts (i.e. to rule on questions of fair use as a defence to erstwhile copyright infringement) and embedding them within an extension of Congress friendly to copyright holder concerns.¹⁰⁷ The authors also invoke the blame-avoidance measure mentioned in Prince's work: "Under cover of deferral to expertise, congressional actors can... launder their motivations and quietly cash in political capital with the copyright industries."¹⁰⁸ Their findings demonstrate Béland's "strategic misconception" in a nutshell.

Having detected the use of framing in the process of developing the DMCA, the authors turn their attention to the use of framing during subsequent exemption hearings. They find that witnesses during exemption hearings are typically either clearly in favour of expanded exemptions or clearly opposed to exemptions at all, with few witnesses appearing mixed. Witnesses in favour of exemptions overwhelmingly framed the issue as one of balance; that only by granting exemptions to digital lock rules can the traditional balance between copyright interests and fair use be preserved.¹⁰⁹ In direct contrast to the use of the balance frame by the Harper government, here the balance frame was being used to justify liberalization of copyright and digital lock rules.

Meanwhile, opponents of exemptions typically focused on framing the exemption process itself as illegitimate, variously claiming that it was a quirk of

¹⁰⁷ Ibid, pp. 149

¹⁰⁸ Ibid.

¹⁰⁹ Ibid, pp. 158.

legislation, that it was meant to be used only in emergency situations, that exemptions should need to meet extraordinary burdens of proof (there was no statutory basis for the argument and transcripts of earlier debate do not substantiate that legislative intent was to impose a high burden of proof), or that the exemption process did not possess jurisdiction to hear requests.¹¹⁰ Herman and Gandy found that the resulting exemption decisions typically endorsed both the logic and demands of the anti-exemption witnesses. Herman and Gandy show that arguments that impugn the policy process can work to achieve or undermine a particular policy outcome, which speaks in the Canadian case both to why opponents of Bill C-61 would complain about the process, and why the government emphasized the legitimacy of the process as part of their balance frame in the later two bills.

2.3. Synthesis and Conclusions

These cases are just some of the many applications of frame analysis to the study of public policy debates. They were selected in order to provide analytical insight, to understand how frames have impacted other reform processes in the past, and to grasp how frame analysis has been used to illuminate the policy process.

The application of frame analysis in the subsequent chapters will be based on a synthesis of the above perspectives. In this analysis, frames are packages of ideas, norms, metaphors, and stories used by actors for instrumental purposes to contest each other's positions and win public support, or at least to silence or deter opposition.

¹¹⁰ Ibid, pp. 162-168.

Techniques that help make a successful frame are well documented: using pre-existing frames and metacultural narratives; building a coalition of interests by using very broad, high-level frames; using strategic misconception to distract from analysis of the actual policy outcome; borrowing from externally legitimate sources like courts or externally legitimate processes like public consultations; using "frame alignment" or "hitching on" to adopt framing that carries more currency with the public; framing opposition arguments or frames as taxes or expenditures; avoiding blame for the impact of policy changes by portraying the government as technocratic, objective, or rational; and others examined in this chapter and the case study to come. Actors who find their framing of a situation is not serving their strategic goals will introduce a frame shift to correct that.

The subsequent two chapters will take the theory gleaned from the framing literature in this review, and apply it to a careful, chronological reading of the Canadian copyright reform process in order to discover how the Canadian government framed reform efforts, and the conditions under which they were forced to adjust their framing to succeed.

3.1. Developing Bill C-61

In 2006, the Conservative Party won election with a mandate to form a minority government. Shortly after forming the government, Prime Minister Harper asked the Ministers representing Industry Canada (Maxime Bernier) and Canadian Heritage (Bev Oda) to consider copyright reform their top priority. The two departments shared a belief that copyright reform, modernization, and particularly bringing Canada into synchronization with its WIPO commitments were necessary. However, the devil is in the details and finding a bill that would satisfy both departments proved to be an elusive challenge.

Haggart provides an excellent narrative of the early development process informed by personal interviews with staffers at Industry Canada. The issues debated were those mentioned in the introduction of this thesis: implementation of WIPO obligations, protection for digital locks, liability for service providers, and expansions to fair dealing. Haggart's interviews suggest that for Bernier, the Minister tasked with taking the lead on the project, digital locks were the most problematic of the issues. As a freshman MP in some ways representing the Conservative Party push to gain ground in Quebec, Bernier was torn between his own position that protection for digital locks represented undue interference with the operation of the market, and the recognition that protection for artists and content groups was especially popular in Quebec.

By July of 2007, Industry Canada and Canadian Heritage had reached an agreement on the content of a new bill, with only the issue of digital locks remaining in

dispute. The ministers reached out to the PMO and PCO hoping for guidance on how to resolve their differences. As noted above, the only response was "move quickly, satisfy the United States."¹¹¹ In the end, Oda and Bernier reached an agreement that would have offered a fairly moderate, consumer-oriented bill with limited protections for digital locks.

The progress made by the two departments was upended unexpectedly when routine bilateral trade negotiations between Canada and the United States ground to a halt on American insistence to link copyright reform (including stronger protection for digital locks and a stronger measure for service provider liability) to other trade issues.¹¹² Bernier's reluctance to pursue stronger copyright policies caused a dispute between Industry Canada and the PMO that eventually led to Bernier being replaced with Jim Prentice.

Prentice immediately signaled his intent to pursue a stronger bill than Bernier had. While Bernier and Oda's bill had been modeled off the prior Liberal government's Bill C-60, Prentice intended to start fresh. The new bill was mentioned in the 2007 Speech from the Throne¹¹³ and added to the parliamentary order paper in early December 2007. Before the government could table the final bill, controversy erupted.

¹¹¹ Haggart, pp. 181.

¹¹² Documented in a variety of sources, including: Geist, Michael. "How the U.S. got its Canadian copyright bill" *Toronto Star* June 16, 2008.

¹¹³ Government of Canada. "Strong Leadership. A Better Canada." Speech from the Throne, October 16, 2007.

Criticisms of strong copyright from user groups and users are nothing new. Protest and negative public reaction over heavy-handed file-sharing lawsuits, such as those that resulting in the bankruptcy of college students¹¹⁴ or other ordinary non-commercial infringers, is well documented. However concern reached a fever pitch when Dr. Michael Geist formed a Facebook group called "Fair Copyright for Canada", which explicitly tied the still-unseen Conservative copyright reform bill to the reviled US DMCA (Digital Millennium Copyright Act). Geist argued that harsh provisions for digital locks combined with toothless expansions of fair dealing would give large content companies a sweeping mandate to interfere with consumer activity. Copyright lawyer Howard Knopf described the bill as a "Christmas gift to the US", and placed the blame for the upcoming bill's content squarely on US Ambassador David Wilkins.¹¹⁵

The group served as a staging ground for organizing protests of the coming bill, including a 50-person protest that blockaded Minister Prentice's constituency office during a Christmas open house, forcing him on the defensive. Protestors asked for consultation and input on the bill. Prentice, for his part, responded that no one had seen the bill, and thus protest was pre-emptive and not constructive.¹¹⁶ He also maintained that the bill's content would be seen as uncontroversial and designed narrowly to bring Canada into accord with its WIPO obligations.

¹¹⁴ Vijayan, Jaikumar. "Q&A: Tenenbaum says he faces bankruptcy after \$675K piracy verdict". *Computerworld*. Available online: http://www.computerworld.com/s/article/9136350/Q_A_Tenenbaum_says_he_faces_bankruptcy_after_675K_piracy_verdict

¹¹⁵ Knopf, Howard. "Canada's copyright law is stronger and better than U.S's" *Hill-Times* November 26, 2007.

¹¹⁶ CTV (CFCN Calgary). Segment on Protests at Jim Prentice's Office. December 9, 2007. Video available online: <https://www.youtube.com/watch?v=GMGTGgnAHss>

Cory Doctorow, a popular science fiction writer and long-time copyright reform advocate who had helped promote the protest, noted that the Minister's office was caught off guard by the strength of the challenge to the bill and public reaction to the protest. Doctorow described the occasion as "Prentice's 'series of tubes' moment", a reference to US Senator Ted Stevens' widely-criticized misunderstanding of the Internet during a network neutrality debate and a harsh indictment of Prentice's understanding of his portfolio.¹¹⁷

As a result of the protests, the bill, which was intended to be tabled before the Christmas recess, was delayed, first to "early in the Winter session", then even further. In February of 2008, a routine lecture given by Minister Prentice at University of Calgary, ostensibly on the subject of policymaking, was derailed when the Question & Answer period was dominated by questions about the forthcoming bill by users who characterized the still-unseen bill as "dominated by American corporate interests" and lacking "a balance between copyright holders and copyright users."¹¹⁸ Prentice once again asserted that criticism of a bill that had not yet been tabled--although he did not comment on the bill's delay or revised schedule--was premature, and that the bill served only to fulfill Canada's requirements under WIPO. The protestors were not the only ones who kept up pressure during the period of the bill's delay. A variety of

¹¹⁷ Doctorow, Cory. "Tomorrow is your best chance to fight the Canadian DMCA". *BoingBoing* (Blog), December 7, 2007: <http://boingboing.net/2007/12/07/canadians-tomorrow-i.html>

¹¹⁸ Prentice, Jim. Question and Answer Period at Lecture at University of Calgary Faculty of Law, February 8th, 2008. Videos available online: <https://www.youtube.com/watch?v=fiHzTlbGyJ4>

Canadian and US IP lobby groups took the time to consult with and lobby the Canadian Parliamentary IP Caucus in hopes of marshaling parliamentary support for stronger protections.¹¹⁹

Haggart describes the anti-reform protests as effective at scaring the government because of both institutional and ideational reasons. Institutionally, this was a minority government with fairly tenuous support inside the House of Commons. Ideationally, Haggart argued that "[the protest's] approach not only focused on a bad policy... but linked the issue to the always-latent sentiment of Canadian anti-Americanism. This symbolic bricolage was made more potent given the fact that the United States... [was] the main [actor] lobbying for this bill."¹²⁰ Given that framing literature speaks to the fact that frames which build on extant frames and tap into metacultural currents of thought are more successful, it should not be a surprise that this frame in particular was easily understood and communicated.

An interview by Haggart with Prentice's chief-of-staff, J an-Sebastien Rioux, reveals that the government also agreed that the efficacy of the protest stemmed not from its content, but its presentation. Rioux, referring to how the government was caught off guard by the protest and push-back, says "within government, the main lesson... was that the problems with the bill were not substantive, but with how the bill was communicated to Canadians and to the Conservative caucus."¹²¹ Prentice publicly

¹¹⁹ Haggart, pp. 187.

¹²⁰ Haggart, pp. 184.

¹²¹ Rioux quoted in Haggart, pp. 187.

lamented media coverage of the bill in a later interview with CBC Search Engine¹²² and James Moore, then-Minister of Canadian Heritage, later described the bill's perceptual problems as a result of the fact that "a lot of conspiracy theories were cultivated around [the bill]".¹²³

3.2. Framing C-61: "Made in Canada"

Given that the government felt that the bill's substantive merits were solid as-is, it should come as no surprise that Bill C-61, tabled six months later, was near identical to the delayed bill¹²⁴. Accompanying the bill was shiny new "Made in Canada" frame¹²⁵ that emphasized the uniquely Canadian policy innovations found in the bill and downplayed the role, if any, American pressure played in development of the bill.

With respect to the content of the final reform bill, it expanded fair dealing in Canada with some new exemptions, instituted the notice-and-notice system for service provider liability, and enforced strong protections for digital locks. The notice-and-notice system is indeed uniquely Canadian, and can readily be contrasted to the stronger notice-and-takedown approach found in the United States. Under notice-and-notice, service providers are required to contact clients who are involved in the distribution of infringing material (for example, through file sharing), but are not

¹²² Brown, Jesse. *CBC Search Engine* June 20, 2008.

¹²³ Moore, James. Standing Committee on Canadian Heritage. *Legislative Debates (Hansard)*. February 9, 2009: 16:30

¹²⁴ Rioux in Haggart, pp. 187.

¹²⁵ It could plausibly be argued that this itself represented a reframing of the government's prior position, but this thesis views the introduction of C-61 as the "starting point" for the narrative.

required to take action against the clients or forward subscriber information to complainants. By contrast, notice-and-takedown requires that service providers take more active measures to stop distribution, even before the user or client is able to respond to the allegations.

However, the bill's position on digital locks represented a major departure from the Canadian norm, the position articulated in Liberal Bill C-60, and indeed even international obligations, resulting in stronger protections for digital locks than even US law contained. The digital lock provision is highly contentious, because the protections for digital locks functionally override other statutory guarantees--in other words, even if a user is exercising a user right (including those expanded by Bill C-61), if the content provider makes the decision to place the content behind a digital lock, then the user's act will be criminal. Thus in effect, anti-circumvention laws allow creators to unilaterally curb user rights should they choose to.

At the introduction of Bill C-61, Prentice deployed the government frame: "Today we are delivering by introducing this 'made-in-Canada' bill."¹²⁶ A follow-up email from Prentice to constituents described the bill, again, as a "made-in-Canada approach" and emphasized a list of "What this bill is not: "It is not a mirror image of U.S. copyright laws. Our bill is made-in-Canada with different exceptions for educators, consumers and others and brings us into line with more than 60 different countries

¹²⁶ Government of Canada. "Government of Canada Proposes Update to Copyright Law". June 12, 2008.

including Japan, France, Germany, and Australia."¹²⁷ Critics disagreed: Dr. Geist described the bill as "an awful lot like the much criticized U.S. Digital Millennium Copyright Act."¹²⁸ Geist also explicitly called the government to task for "delivering a stinging rebuke to the Supreme Court's copyright vision of public interest and balance."¹²⁹ Prentice responded to Geist directly in a published letter to the *Toronto Star*, beginning by noting the bill expands user rights and concluding by that notice-and-notice as a system for service provider liability was unique to Canada and a contrast to the American approach.¹³⁰

The bill's public introduction also highlighted the fact that the issue had been given a public consultation in 2002 (notably before the era of MP3 players, smartphones, and widespread video piracy) and had been debated over the years, and that much of the bill simply reflected international standards codified in WIPO. In other words, that copyright reform had reached a consensus on the issues years ago, and that this bill was straightforwardly about implementation.¹³¹ Household newsletters sent by Conservative Party MPs to constituents also repeated the same arguments, showing that government messaging was unusually active, tight, and controlled for a bill that might outwardly seem like a relatively low priority.¹³²

¹²⁷ Prentice, Jim. Email to Constituents on C-61, June 13, 2008.

¹²⁸ Geist, Michael. "Fine print makes for disturbing reading" *Ottawa Citizen*. June 13, 2008.

¹²⁹ Ibid.

¹³⁰ Prentice, Jim. "Canadian approach to copyright" *Toronto Star* June 17, 2008.

¹³¹ Prentice, Jim. "Amendments to the Copyright Act". Industry Canada Speaking Points. June 12, 2008.

¹³² For an example, see Yelich, Lynne. Householder to Constituents, June 12, 2008.

When the content of the bill was addressed in government arguments, MPs emphasized expansions to fair dealing. Along with noting the "made-in-Canada" nature of the bill, an editorial by Minister of Defence Peter MacKay drew attention to the bill's improvements to fair dealing as it relates to "access by students and research".¹³³ No government communications made mention of the digital locks provisions or Canada's place on the Special 301 list.

Although the bill only reached first reading in the House of Commons, and thus parliamentary debate was limited, a testy exchange in Question Period captures the opposition and government positions and framing of this issue:

Charlie Angus, NDP: ... The government's made in the U.S.A. copyright legislation actually represents a radical rewriting of Canadian copyright policy...

Jim Prentice: If [Angus] took the time to read the bill he would see that the educational exemptions, the format shifting exceptions, the time shifting exceptions, the private copying of music exemptions, and the provisions relating to statutory damages are all made in Canada. All of these provisions are uniquely Canadian... This government is protecting consumers.¹³⁴

Angus' statement here reflects the perspective of both the Liberal and NDP caucuses at the time; response emails from both parties to constituents argued for balance in copyright, accused the government of "full capitulation to the U.S. corporate lobby", and asked for a consultation of Canadian stakeholders before proceeding.¹³⁵ ¹³⁶

¹³³ MacKay, Peter. "Column: Improved access to pediatric health care" *Westmount Examiner* (syndicated in many Nova Scotian papers), July 3, 2008.

¹³⁴ Angus, Charlie and Prentice, Jim. *Legislative Debates (Hansard)*. 39th Parliament, 2nd Session. June 19, 2008: 14:50.

¹³⁵ Layton, Jack. Response Email to Bill C-61, June 18, 2008.

Public reaction to the bill was mixed. Angus Reid polled the Canadian public a week after the bill was introduced.¹³⁷ 45% of respondents opposed the bill, including majorities in British Columbia and pluralities in many provinces. Likely due to the important role cultural industries play in the province, Quebec was the only province to have majority support for the bill. Younger respondents and more educated respondents were more likely to oppose the bill. A plurality of respondents nationally wanted their local MP to vote against the bill. But the most significant finding of the poll relates directly to the frame being discussed: 76% of respondents viewed the bill as being precipitated by pressure from American and Canadian content firms, suggesting that attempting to frame the bill as a made-in-Canada approach had not worked out of the gate.¹³⁸

Editorial reviews and letters-to-the-Editor similarly panned the bill, describing it variously as "a glass of cold water to the face"¹³⁹ and "a fundamentally flawed piece of legislation"¹⁴⁰, filled with "unintended consequences"¹⁴¹, expressing worry that the bill

¹³⁶ Liberal Party of Canada. Response Email to Bill C-61, June 22, 2008.

¹³⁷ A note on methodology: the survey was conducted *online*, and so there is reason to believe that self-selection bias on the part of respondents may play a factor here, even after census-based weighting of the survey sample. Sample size 1,001 adult Canadians, stated margin of error +- 3.1%, 19 times out of 20.

¹³⁸ Angus Reid. "Canadians Evenly Split on Proposed Amendments to Copyright Act". June 19, 2008.

¹³⁹ Tossell, Ivor. "Copyright cock-up". *Globe and Mail*. June 19, 2008.

¹⁴⁰ Skoll, David. "Corcoran's No Capitalist. RE: A bill to save kill bill rights" *National Post* Letter to the Editor, June 21, 2008.

¹⁴¹ Ottawa Citizen Editorial Board. "Questions about copying". *Ottawa Citizen*. June 19, 2008.

would "turn millions into criminals"¹⁴² while simultaneously being ineffective and unenforceable.¹⁴³ ¹⁴⁴ Athabasca University Vice President of Research Rory McGreal noted "Mr. Prentice talks about having consulted with everyone, he's consulted with nobody... The only meetings they've had are with the Americans."¹⁴⁵ The Ottawa Citizen explicitly said that the Supreme Court of Canada held that copyright's goal was to balance the rights of artists and creators against private study, education, and dissemination (user rights).¹⁴⁶

Prentice was once again subject to a considerable level of highly personal protest. CBC's Search Engine radio show ran an interview with Prentice featuring reader questions. Readers asked Prentice about why breaking digital locks for individual otherwise non-infringing purposes was problematic, forcing him to admit that enforcement would be near impossible and that "there is no intent on the part of this government to send someone over to examine your iPod". When readers questioned parallels between the bill's provisions and the US Digital Millennium Copyright Act, Prentice argued that liability caps on damages over acts of piracy would avoid the situations where citizens are bankrupted by civil action on the part of major content firms, dodging the broader point about the similarities between C-61 and US

¹⁴² Ford, Catherine. "Copyright law would turn millions into criminals" *Calgary Herald* June 20, 2008.

¹⁴³ Paulson, Dave. "Copyright law heavy-handed". *The Prince George Citizen*. June 15, 2008.

¹⁴⁴ St. Catherine's Standard Editorial Board. "MP3 legislation makes too many criminals". *The St. Catherine's Standard*. June 14, 2008.

¹⁴⁵ McGreal, Rory in Harris, Scott. "Digital locks, lack of consultation fuel anger at copyright bill". *Vue Weekly* 661. June 19, 2008.

¹⁴⁶ Ottawa Citizen.

legislation. Exasperated, Prentice eventually hung up mid-interview.¹⁴⁷ His 2008 "stampede breakfast" riding event was also interrupted by dozens of protestors holding signs reading "Bill C-61 Makes Everyone Copyright Criminals", "\$20,000 crime to backup [*sic*] a DVD to your own iPod?!", and emphasizing the lack of public consultation on the bill.¹⁴⁸

After repeated confidence votes and extended periods of brinkmanship, parliament dissolved for election, killing all unresolved legislation on the order paper including Bill C-61. The delay between the election and the reintroduction of copyright reform would allow the Conservative party to retool the framing of their bill in order to find a winning strategy. The opposition's demands that the government "respec[t] the Supreme Court's emphasis on balance and the public interest"¹⁴⁹ and allow for public consultation would both be met, but as a part of a lip-service approach designed to rehabilitate government messaging, not a substantive commitment to changing the bill to address the issues raised.

Before continuing, it is worth noting that the "Made-in-Canada" *policy sovereignty* framing used in support of this bill is not an uncommon frame for the Harper government; the government campaigned on abandoning the Kyoto environmental accord in favour of a "made-in-Canada" plan, claiming that previous governments "sen[t] money to foreign governments for hot air credits, but can't seem

¹⁴⁷ Brown, Jesse. *CBC Search Engine* June 20, 2008.

¹⁴⁸ McIntosh, Mary-Catherine. Segment on C-61 Protest. *CBC News Calgary*. July 5, 2008.

¹⁴⁹ Geist, Michael. "Fine print makes for disturbing reading" *Ottawa Citizen*. June 13, 2008.

to get anything done to help people here at home."¹⁵⁰ In 2014, moreover, the Harper government has characterized its new prostitution legislation similarly as a made-in-Canada approach, in order to both squash attempts by sex-worker advocates to suggest a decriminalized approach similar to New Zealand or the Netherlands, and to avoid too-close comparisons to the Nordic model.¹⁵¹ As a final example, David Anderson, Parliamentary Secretary for Foreign Affairs, recently defended Canada's refusal to sign the UNESCO convention on intangible cultural heritage by arguing that the government's ad hoc, "made-in-Canada" solution "works best for us."¹⁵²

The focus on the sovereignty of a given policy and domestic innovations in responding to a policy problem plays on existing metacultural norms about Canadian exceptionalism and particularly resistance to US influence on Canadian culture and industry. "Made-in-Canada", thus, serves a reusable institutional action frame that fits many different policy problems and generates a variety of specific policy frames. For example, if a problem is conceived primarily as a global problem, reframing it as a national problem that requires a "Made-in-Canada" solution allows government to shirk a global mandate to act. If evidence from abroad challenges the government's desired policy, reframing the problem to devalue or exclude that evidence reduces the strength of opposition. Although the government's framing efforts did not successfully

¹⁵⁰ Conservative Party of Canada. *Stand Up For Canada: Conservative Party of Canada Federal Election Platform 2006*. pp. 37.

¹⁵¹ MacKay, Peter. "A made-in-Canada solution to prostitution". *National Post* June 14, 2014.

¹⁵² Anderson, David. *Legislative Debates (Hansard)*. June 10, 2014: 12:55

dispense with criticism of C-61, it seems likely that this sort of approach will be used again in the future.

3.3 Summarizing the Bill C-61 environment

The copyright reform debate during 2007-2008 was marked by strong protest by opposition parties, academics, user groups, and the public over fear of copyright overreach. The opposition position framed the issue as one of US interference, tying tough copyright policies to US media corporations and the US government. This frame challenged the government's ability to portray reform as a neutral and un-contentious modernization. As a result, government delayed the introduction of Bill C-61 and shifted to emphasize the bill as a "made-in-Canada" approach. Despite this attempt, government was not able to maintain control of the debate, convince the public, or break the opposition. Subsequent reforms would need a more credible approach at presenting the issue.

4.1. The Public Consultation and Beyond

Although the collapse of Parliament in 2008 was not in any meaningful way linked to the protests against Bill C-61, there is still evidence to suggest that there was dissatisfaction within the Conservative Party with the way the bill was developed, presented, and communicated. It is difficult to say whether the dissatisfaction stemmed from the unexpectedly strong pushback against the bill, or if they reflected ideological divisions within the party (similar to those between Industry Canadian and Canadian Heritage) that went unaddressed during the bill's development. During an all-candidates debate in Thunder Bay--Superior North, Conservative candidate Bev Sarafin, perhaps sensing that the issue was an inflammatory one, dodged a question on the bill by telling a constituent that "[if elected], she'd be willing to discuss which parts of the bill (she called it "Jim Prentice's bill") [she] found dissatisfactory."¹⁵³

Meanwhile, the Conservative Party election platform in 2008 offered a preview of the frame the Conservatives would soon deploy. Under the heading "Protecting Creators and Consumers of New Ideas and Products", it articulated a vision for a copyright bill that "strikes the appropriate *balance* among the rights of musicians, artists, programmers, and other creators... but also protects consumers who want to access copyright [*sic*] works for their personal use."¹⁵⁴

¹⁵³ Babcock, Ben. "My experience at a local debate". Personal blog. Available online: <http://tachyondecay.net/blog/2008/10/2356/>

¹⁵⁴ Emphasis mine. Conservative Party of Canada. "The True North Strong and Free: Stephen Harper's plan for Canadians", 2008: pp. 13.

The incoming Minister of Canadian Heritage, James Moore, identified Bill C-61's failure as one of communication, claiming that "a lot of conspiracy theories were cultivated around [C-61]" and claiming that the government was to blame for "not having legislation out there for people actually to discuss and talk about [the bill]", suggesting a recognition that delaying the bill under public protest only to unveil essentially the same bill was not a productive strategy.¹⁵⁵

On July 20th, 2009, James Moore and Industry Minister Tony Clement introduced a wide-ranging consultation on copyright reform designed to combat the communication problem. The consultation would take two forms: an online submissions form which would allow users and groups all over the country to offer input on the shape of the reform to come, and a series of meetings across the country with expert witnesses voicing their input. At the time, Clement declared, "your opinions and suggestions will help us draft new, flexible legislation." Haggart believes that the consultation emerged in direct response to the magnitude of public protest against C-61 and specifically the demand from user groups for consultation.¹⁵⁶ Zoe Addington, then-Director of Policy for Industry Canada, confirmed this view when she told American representatives that consultations were "intended to educate consumers and "sell" the Government view", and designed in response to unfair accusations of drafting

¹⁵⁵ Moore, James. Standing Committee on Canadian Heritage. *Legislative Debates (Hansard)*. 40th Parliament, 2nd Session. February 9, 2009: 16:30.

¹⁵⁶ Haggart, pp. 190.

C-61 without public consultation.¹⁵⁷ A questions section on the submissions website, designed to inform the public about the consultation, made the government's putative objective clear: "The government is taking this opportunity to listen to Canadians about what is important to them on copyright. At the end of these consultations, the government will take stock of the submissions that Canadians have made and the discussions that took place."¹⁵⁸ There can be no doubt, then, that the consultation constitutes an important reaction by the government to the failure of C-61. Clement moderated the consultation round-tables and town-halls, asking participants not to feel constrained by C-61 and instead help create a bill that "balance[s] the rights of consumers with the enablers who bring creators and consumers together... [and] protect[s] the Canadian interest."¹⁵⁹

The first sign that the government did not view the consultation as in any way binding on the *content* of the end bill came on August 28th, when Tony Clement entertained a press scrum outside one of the town-hall meetings. In full messaging mode, Clement kept the focus on the process itself and argued that the consultation would allow for "as much input as possible... people are going to have their say... We've talked about the idea of balance. We haven't decided what that balance is. We want to

¹⁵⁷ *Wikileaks Cable 09OTTAWA309: Canada IP Update: GOC Official Reports No Progress on Copyright Bill*. Available online:

<https://wikileaks.org/cable/2009/04/09OTTAWA309.html>

¹⁵⁸ Government of Canada. "Copyright Consultation: Frequently Asked Questions" August 10, 2009.

¹⁵⁹ Clement, Tony. "Remarks at Calgary Round Table on Copyright Reform" July 21, 2009.

hear from everybody."¹⁶⁰ When asked what metric the government would use to assess the results of the consultation in order to incorporate them into the bill (an effort by a journalist to help establish public expectations for the resulting bill), Clement remained evasive and refused to commit to having obligation to integrate the results of the consultation into any future bill.

At the end of the consultation, the results were clear. Over 8,000 submissions were received by the online submission reform, and each is available publicly for review online.¹⁶¹ Although it was obviously beyond the scope of this thesis to analyze 8,000 submissions for content, there are at least two published analyses of the results. Dr. Michael Geist found that of the 8,000 submissions, approximately 100 favoured digital lock rules, tougher penalties, or bill content similar to C-61. By contrast, 6,138 argued against a repeat of C-61, 6,641 argued against tough digital lock rules, and 6,242 argued for stronger fair dealing/fair use exceptions to copyright.¹⁶² Richard Owens, a copyright lawyer, took umbrage with Dr. Geist's analysis, noting that many of the submissions in favour of user rights were form letters or modified form letters, arguing that some submissions may have been duplicate, criticizing the use of non-full names

¹⁶⁰ Clement, Tony. Press Scrum, Toronto, August 27, 2009. Video available online: <https://www.youtube.com/watch?v=ooPTYhsfxv8>

¹⁶¹ A brief aside: This analysis ignores the contributions of speakers at the two town-hall meetings, or the country-wide round-tables. The round-table discussion format made use of pre-screened discussants that represented major industry groups; as a result, many of the same voices are represented later in the committee testimony of the subsequent bills. The online submissions better represent users and groups whose voices were not otherwise heard in the process.

¹⁶² Geist, Michael. "The Final Copyright Consultation Numbers: No Repeat of Bill C-61", April 9, 2010. Available online: <http://www.michaelgeist.ca/2010/04/copycon-final-numbers/>

("there were, for example, sixty-eight 'Chris' and seventy-two 'John' who made Submissions"¹⁶³).

This strikes at a difficult question in analyzing the results of public input: should a quantitative approach be taken, where the volume of submissions and positions be the operative purpose, or should a more holistic analysis of the argumentation used take priority? Although it is impossible to know how the government took into account the results of the consultation, an Industry Canada memo reflects government's basic awareness of Dr. Geist's point: "Users typically object to the use of TPMs [digital locks], which inhibit their ability to use legitimately-acquired content even for non-infringing purposes."¹⁶⁴

After the consultation, speeches from MPs emphasized the role of the consultation in "enabl[ing] us to bring forward a modernized copyright bill for [Canada]"¹⁶⁵ and "help[ing] us to deliver legislation that is forward-looking and reflects Canadian values"¹⁶⁶ An interview with Tony Clement in the Hill-Times reflected this optimistic but vague assessment:

¹⁶³ Owens, Richard. "Noises Heard: Canada's Recent Online Copyright Consultation Process." Comment for IP Osgoode, Osgoode Hall Law School. Available online: http://www.iposgoode.ca/wp-content/uploads/2010/04/RichardOwens_Online_Copyright_Consultation_19April2010.pdf

¹⁶⁴ Government of Canada. "Draft Industry Canada Memo on Technological Protection Measures". 2011: pp. 3. Obtained under Access to Information Act.

¹⁶⁵ Moore, James. Speech at the Calgary Chamber of Commerce, November 13, 2009.

¹⁶⁶ Gallant, Cheryl. *Legislative Debates (Hansard)*, 40th Parliament, 3rd Session. April 13, 2010: 18:55

It's too early to tell what the most important policy lesson is. What is clear is that the government is committed to consulting Canadians... Concerns were expressed around the introduction of Bill C-61 over a lack of opportunities for average Canadians to contribute to the dialogue on this important policy area... Listening to Canadians is a valuable part of the policy development process... It is too early to say what aspects of the law will be changed based on these consultations.¹⁶⁷

What emerges from these many statements is that the rhetorical emphasis on the value of the consultation and the incorporation of the consultation in the "balance" frame was not so much about describing the substance of the bill or how the consultation shaped it, but rather aiming to enhance citizen confidence in the *process* of policymaking. In the government's view, balance emerges from the fact that everyone, users included, was listened to, even if they were ignored. Building from the established literature about the role of credibility in terms of being able to effectively frame bills¹⁶⁸, the consultation process can thus be viewed as a credibility-building exercise. By connecting an analysis of the process to an analysis of the outcome, the government is able to avoid messy debates that center around facts and evidence. In other words, the consultation makes it more difficult for opposition members to contest the bill's balance (either by attacking the content of the bill or by again attempting to tie the bill to foreign interests), given that the government is easily able

¹⁶⁷ Clement, Tony. Interview in "Communications and Intellectual Property" Supplement, *Hill-Times* November 2, 2009, pp. 24-25.

¹⁶⁸ Druckman, James. "On the Limits of Framing Effects: Who Can Frame?". *The Journal of Politics* 63(4), 2001: pp. 1041-1066

to defend the bill by claiming it was written in collaboration with the interests of thousands of Canadians who participated in consultation.

It should be noted that the government had mentioned the balance frame in press releases and statements during the prior Bill C-61 debate, but two important shifts occurred. First, the government increased the emphasis of the frame during C-32 and C-11 (leaving the "made-in-Canada" argument by the wayside), and second, the consultation allowed the government to more easily claim that the bill plausibly represented a considered, reasonable balance, in addition to deflecting attention from the much-criticized American influence on the bill's content.

It did not take long for the government to begin using the consultation to defend its policy stances. On December 1st, 2009, the negotiating draft of ACTA (Anti-Counterfeit Trade Agreement, an international treaty which would update intellectual property protections) was leaked. NDP MP Charlie Angus, who objected both to the content of the draft and to the loss of sovereignty, angrily questioned Clement in the House of Commons:

Angus: "[The leak] has exposed the industry minister's so-called public consultations on copyright as a total sham, because ACTA will deep six Canada's ability to establish copyright policy... Will the minister table in the House the mandate letter that was given to the [ACTA negotiators]?"

Clement: "Despite the hon. member's fear-mongering... the ACTA negotiations are in fact subservient to any legislation that is put forward in the house. In good faith, I and [James Moore] talked to the people of Canada, talked to stakeholders

about a future copyright bill... We have gone further in terms of ensuring the public is aware of the issues involved in copyright renewal and reform than any other government and we are proud of that record."¹⁶⁹

While the government developed a new bill, Angus introduced a private member's bill to expand and continue Canada's private copying levy--a system where purchasers of blank storage media (cassettes, compact discs, hard drives, music players) would be charged a levy at purchase time which would be disbursed to artists to compensate them for sales lost due to piracy. Hearings and debates on the private member's bill typically served as a proxy venue to continue broader copyright debates. The collective licensing bill offered an opportunity for opposition members to contest the framing of the issue, characterizing the private copying levy as "a long-standing Canadian tradition", in contrast to "digital locks, predatory lawsuits, and zero tolerance on access."¹⁷⁰ Angus also evoked the balance frame that the Supreme Court of Canada had previously used and that the government was beginning to use--weighing user rights against artist rights. During debates on this bill, Conservative MP Dean del Mastro emphasized the government's commitment to a new copyright bill to the exclusion of private member's bills, and again echoed the role of the consultation in shaping the government's thinking.¹⁷¹

¹⁶⁹ Angus, Charlie and Clement, Tony. *Legislative Debates (Hansard)*. 40th Parliament, 2nd Session. December 1, 2009: Oral Questions, pp. 7452.

¹⁷⁰ Angus, Charlie. *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. March 16, 2010: 10:00.

¹⁷¹ Del Mastro, Dean in *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. March 26, 2010: 13:00.

4.2. C-32, A Balanced Approach

In May of 2010, Don Martin and Michael Geist separately reported that negotiations on the next copyright bill had stalled over an impasse between Tony Clement's desire to implement a consumer-friendly copyright bill and James Moore's aim to take a stronger copyright approach modeled after US legislation. The PMO reportedly intervened to endorse Moore's approach and direct the ministers to table a new bill within a month. Martin characterized the outcome as the government "ignor[ing] the extensive public consultations"¹⁷² while Geist held that the resulting bill would "represen[t] a stunning reversal... the consultation appears to have been little more than theatre, with the PMO and Moore choosing to dismiss public opinion."¹⁷³

On June 2, 2010, Clement and Moore introduced Bill C-32. C-32 maintained essentially the same approach to the key issues as C-61. The major changes to existing pre-reform copyright law included a slight expansion of fair use exceptions to include time-shifting (recording content in order to watch it later), format-shifting, and educational exceptions; a "notice-and-notice" system for service provider liability; caps on statutory damages for non-commercial copyright infringement; and most

¹⁷² Martin, Don. "Conservatives to unveil national securities watchdog: Sources". *National Post*, May 19, 2010.

¹⁷³ Geist, Michael. "PMO Issues the Order: Canadian DMCA Bill Within Six Weeks". May 5, 2010. Available online: <http://www.michaelgeist.ca/2010/05/pmo-demands-canadian-dmca/>

significantly, stronger protections for digital locks.¹⁷⁴ Among the minor substantive changes since C-61 was a specific exemption for a customer unlocking a telephone in order to change cellular providers, and some limited provisions that would allow circumvention of digital locks in cases of people with perceptual disabilities. The main change was the government's presentation of the bill. The day before announcing the bill, Clement and Moore jointly published an editorial in the *National Post*, which laid out the case for modernizing Canadian copyright law ("The last time our copyright laws were updated, Canadians turned to CD players, pagers and the Sega Genesis, not iPods, Black-Berries [*sic*] and PlayStations."¹⁷⁵) Notably missing in the editorial was any sort of engagement with the actual issues surrounding copyright reform. Instead, the ministers emphasized the necessity to update copyright law, citing that "simple common sense tells us that change - *balanced change* - is long overdue" and the government's commitment to a "solution that balances the ability of Canadians to access and enjoy new technologies, with the rights of Canadian creators, who are the bedrock of our culture and economy."¹⁷⁶

This strategy of appealing to balance would come to define the government's framing strategy for the bill. The bill's website was located at Balancedcopyright.gc.ca. The opening speech presenting the bill to the public referred to the bill as "a common-

¹⁷⁴ Stronger protections even when compared with C-61, including clarification of time-shifting and format-shifting rules to make it explicit that anti-circumvention requirements trump any expanded fair use rights, see for example changes in §29.23.

¹⁷⁵ Moore, James and Clement, Tony. "Time to transform our laws: The Copyright Act is outdated in the age of Google and iPods" *National Post* June 1, 2010: pp. A16.

¹⁷⁶ *Ibid.*

sense balance".¹⁷⁷ Moore's press conference to announce the bill tied the results of the consultation to the work done on C-32 and described the bill as "fair, balanced, and relevant in today's technological world."¹⁷⁸ Introducing the bill to the house, Moore claimed "this bill is balanced, and it serves the interest of consumers and creators"¹⁷⁹ and that the "bill is good for both groups".¹⁸⁰ Dean Del Mastro, then Moore's Parliamentary Secretary, seemed to master the government's framing efforts (and there can be no doubt what the frame expressed here is):

When we write a copyright bill, such as Bill C-32, it is about the appropriate balance. Bill C-32 is about balance. It is about balancing the rights of consumers and the rights of rights holders. That is why groups across the spectrum... have come forward and said that it is a balanced bill. Is it perfect? It is pretty tough to write a perfect copyright bill by its very nature. People are going to say they would really like to have just a little bit more rights one way or the other... it is about balancing the two. Writing a copyright bill is about balance.¹⁸¹

The immediate reaction of the public and opposition was divided. As with C-61, responses emphasized the bill's positive provisions, including the legal framework for dealing with piracy, "notice-and-notice" provisions for service providers, and expanded

¹⁷⁷ Government of Canada. "Government of Canada Introduces Proposals to Modernize Copyright Act", June 2, 2010

¹⁷⁸ Moore, James. Press Conference on the Introduction of Copyright Legislation. June 2, 2010.

¹⁷⁹ Moore, James. *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. June 10, 2010: 14:35.

¹⁸⁰ Moore, James. *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. June 14, 2010: 14:40.

¹⁸¹ Del Mastro, Dean. *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. June 16, 2010: 20:25.

fair use. Criticism consisted of relatively minor criticism for the scope of the educational exception to fair use (coming from content groups and artists) and substantial criticism focused on the digital lock provisions (coming from user groups and the public). In essence, the debate was as follows: the new bill allows consumers additional flexibility to interact with the content they have purchased, for example to convert a DVD film into a digital format in order to watch on their portable devices. However, because the new protection for digital locks supersedes the right to format-shifting, no one can take advantage of the new right. Moreover, existing fair dealing rights would not apply to digital content stuck behind digital locks. The outcome, thus, is that consumers have fewer rights when interacting with their content. Jean-Pierre Blais, the Assistant Deputy Minister for Canadian Heritage, later confirmed to parliament that this interpretation of the bill's provisions was correct but declined to comment on how the government reached this particular "balance", saying, "What I can tell you is that the government has decided to go forward to modernize the Copyright Act in Canada... It's really not easy for us... to explain or justify why a political choice was made. I can tell you what the choice was, but it's very difficult for me to say why or why not or what other choices [may have been considered]."¹⁸²

In response to criticism of the bill, James Moore went on the offensive. In a speech to the Toronto Board of Trade on June 22, 2010, Moore started by arguing that the legislation grew out of the views presented at the copyright consultations, and conveying the sense that the government "develop[ed] comprehensive legislation that

¹⁸² Blais, Jean-Pierre. Testimony to Canadian Heritage Committee. *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. November 4, 2010: 17:00

tries to find the right balance of the needs of the stakeholders and the long-term interests of Canadians."¹⁸³ However, during the speech, Moore grew unhinged:

The only people who are opposed to this legislation are really two groups of radical extremists. There are those that pretend to be for copyright reform, but they don't believe in copyright reform... they favour only weakening legislation, only in gutting tools that would allow those who are actually investing in jobs to have those jobs. I think we give them far too much voice. If you look at the balance, anyone who is truly objective, looks at this legislation [*sic*] will realize that everyone has a little water in their wine with this legislation because it requires that kind of balance. Don't let those... who pretend to be experts on copyright reform, who put up a smiley, shiny, cute face on what is actually a pretty disingenuous campaign to undermine the rights, the property rights of individual citizens.¹⁸⁴

By situating himself in a position of technocratic objectivity, framing the government's efforts as "balanced", emphasizing the need for compromise and consensus, and casting opponents as individuals bent on undermining the process and radical extremists who don't believe in copyright reform at all, Moore sought to frame the policy reforms in such a way that they were uncontroversial and to decrease the salience and significance of factual contestations of the bill's content. He leaned on the consultation process for legitimacy. Clement struck a more conciliatory tone, emphasizing on an interview with TVO's Search Engine radio show that the bill's approach came from a need to be WIPO-compliant, and admitting "I understand there

¹⁸³ Moore, James. "Speech at Toronto Board of Trade", June 25th, 2010. Available online: <https://www.youtube.com/watch?v=cP6v7DHkAcQ>

¹⁸⁴ Ibid.

is another side to this argument, and that's why we're going to go through a lengthy process for this bill. I'm not Moses coming down from the mount here... this was our attempt to have a proper balance."¹⁸⁵ Reactions from content companies sympathized with Moore. Entertainment Software Association of Canada executive director Danielle Parr suggested that critics were "promoting piracy under the guise of 'user rights'".¹⁸⁶ It seems unlikely that the members of the unanimous bench of the Supreme Court of Canada ruling on *CCH* were secretly computer pirates.

Over the summer, debate on the bill was fairly minimal, but government MPs developed form letter responses to inquiries about the bill. Moore's letter called the legislation "a fair, balanced, and common-sense approach."¹⁸⁷ A small protest in Calgary opposed the bill, but media coverage was limited in contrast to the earlier C-61 protests.¹⁸⁸ Debate resumed in the fall as the bill worked its way through the House of Commons process.

As debate moved into the fall, it is worth considering the success of NDP MP Charlie Angus' attempt to advance an artist-oriented counter-frame. Bloc Quebecois and NDP MPs articulated a view during the Bill C-32 debates that the demise of the private copying levy bill would lead to economic disaster for artists, and reflected the

¹⁸⁵ Brown, Jesse. "Digital Locks" *TVO Search Engine*. TVO, Ontario. June 14, 2010: 15:45-16:30

¹⁸⁶ Nowak, Peter. "Copyright bill would ban breaking digital locks". *CBC News*. June 2, 2010. Available online: <http://www.cbc.ca/news/technology/copyright-bill-would-ban-breaking-digital-locks-1.866381>

¹⁸⁷ Moore, James. "Letter to Constituents about C-32". August 25, 2010.

¹⁸⁸ CTV Calgary. "Rally opposing copyright infringement [*sic*]". June 27, 2010. Available online: <http://calgary.ctvnews.ca/rally-opposing-copyright-infringement-1.527103>

government's broader agenda to attack artists (for example, by cancelling the PromArt program in 2008). The government contested the artist-oriented frame, instead framing the private copying levy as a tax. Despite efforts by NDP and BQ MPs to explain that levies are not collected by the government and thus are not taxes, CPC MPs insisted that the levy was a tax. This side debate climaxed when Moore and Clement jointly sent a press release during the height of Christmas shopping season reminding Canadians that the Conservative Party would not support "the opposition's massive new iPod Tax on Canadian music lovers" and repeating that C-32 struck an appropriate balance.¹⁸⁹ It is hard not to take a cynical view on a pre-emptive declaration by government that they do not plan to do something no one thought they were going to do to begin with. The stunt was supported by an appearance in a crowded shopping mall in front of a music retailer. By emphasizing artists-as-businesses, the levy as a tax, and referencing the digital lock provisions as "free market" approach to empowering content companies, the government was able to keep the debate on terms friendly to their own frame.

The second-reading speeches on the bill by Moore and Clement kept a laser-like focus on the frame rather than the more substantive content of the bill, which other than minor tweaks was in keeping with Bill C-61. Clement argued that "a primary aim of any copyright reform must be balance", and that "fair, balanced, and technologically

¹⁸⁹ Clement, Tony and Moore, James. "Statement from the Honourable Tony Clement, Minister of Industry, and the Honourable James Moore, Minister of Canadian Heritage and Official Languages" Press Release, December 14, 2010.

neutral, this bill accomplishes all of these things."¹⁹⁰ Moore conceded that Bill C-61 had been criticized for not having any public consultation, and defended the bill as the result of the input received during consultation. He insisted that "[the government] tried to get the appropriate balance, and the truth is, if we move one element of this bill over... a little bit, we will have a whole new constituency of people who are upset with it."¹⁹¹ At least seven other speeches during the second reading debate surrounding the bill featured the Prime Minister, the Ministers of Canadian Heritage or Industry, or the Parliamentary Secretary to the Minister of Canadian Heritage repeating the government refrain about balance. Notably, on December 8th, Moore quoted former Liberal finance minister John Manley, acting in his then-capacity as CEO of the Canadian Council of Chief Executives, as describing the bill as having struck "an appropriate balance".¹⁹² Despite repeated reference to the court's balance frame, no MPs other than NDP MPs Charlie Angus and Glenn Thibeault attempted to actually consider whether the bill met the court's spirit of balance.¹⁹³ This repetition was not unique to the House of Commons. James Moore appeared on CBC's Power and Politics on November 17th, 2010, to echo both the importance of the consultation process and the balance of the bill.¹⁹⁴

¹⁹⁰ Clement, Tony. Second Reading Speech for Bill C-32. *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. November 2, 2010, 10:25.

¹⁹¹ Moore, James. Second Reading Speech for Bill C-32. *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. November 2, 2010: 10:45.

¹⁹² Moore, James. *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. December 8, 2010: 14:55.

¹⁹³ For example, Thibeault, Glenn. *Legislative Debates (Hansard)*, 40th Parliament, 3rd Session. November 3, 2010: 17:45.

¹⁹⁴ Moore, James. Interview on Power and Politics with Evan Solomon, November 17, 2010. 1:20:00

The bill was referred to a special ad-hoc legislative committee, reflecting the fact that multiple standing committees had an interest in the bill's results. Evidentiary hearings featuring testimony from academics, composers, businesses, artists, teachers, authors, software engineers, and others provided a wide array of perspectives on the bill. Response by content groups was typically positive, excepting the expansion of the educational exception to fair dealing. By contrast, user groups, academics, and librarians were furious over the digital lock provisions. Clement and Moore both testified in front of the committee. Again, the emphasis was on balance. Talking points prepared for the Ministers testimonies confirm that both were coached to describe the bill as "balanced" and "modernized"¹⁹⁵ and to refute any opposition claims that the digital lock approach is not balanced by stressing that, in fact, the approach is balanced.¹⁹⁶ Finally the coaching emphasized that any remaining criticism of the Bill as being written under pressure from the United States should emphasize the role of the consultation and policies like notice-and-notice, which differed from US, approaches.¹⁹⁷ At the testimony, Clement emphasized the consultation submissions, while Moore emphasized the bill's adherence to international standards.¹⁹⁸

In a testament to the shallowness of the debate, when challenged on the digital lock issue, Moore defended the bill as an issue of consumer choice by saying he

¹⁹⁵ Government of Canada. "Questions and Answers - Bill C-32: For Ministers' appearance before the Legislative Committee". 2011: pp. 3. Obtained under Access to Information Act.

¹⁹⁶ Ibid, pp. 10.

¹⁹⁷ Ibid, pp. 33.

¹⁹⁸ Moore, James, and Clement, Tony. Legislative Committee on Bill C-32. *Legislative Debates (Hansard)*. 40th Parliament, 3rd Session. November 25, 2010: 08:50

"personally choose[s] to buy products that don't have digital locks. It's my right as a consumer to be able to do that. As we're seeing increasingly with technology... the [industries] are creating products where people have the right to [format-shift]."¹⁹⁹ This is an argument that defies belief. No commercial films or television shows are released without digital locks.

Bill C-32 died on the order paper before third reading when the Parliament of Canada held the government in contempt of parliament over Bev Oda's refusal to provide cost estimates for her ministries' legislation.

4.3. C-11, "It's Been Debated"

The 2011 Conservative Party platform directly incorporated the framing into the party's election efforts. The platform pledged to reintroduce Bill C-32 verbatim, in order to bring "balanced, common-sense legislation... [that] respects both the rights of creators and the interests of consumers."²⁰⁰ A Cabinet shuffle following the election found Tony Clement shuffled to the Treasury Board and newcomer Christian Paradis installed as Minister of Industry.

When the new bill was tabled, the balance frame returned as well. This time, however, the frame was also coupled with a sense that the time to pass the bill had long-since come--in other words, the government leveraged the amount of time the debate had taken in order to portray the resulting bill as a product of consensus, ready

¹⁹⁹ Ibid.

²⁰⁰ Conservative Party of Canada. *Here for Canada*. 2011: pp. 15.

to be passed. The resulting Bill, C-11, contained no material changes from C-32 and the plan for the new bill's legislative committee was that previous witnesses would not be invited back. Moore told the Canadian Press "This is long overdue... we did so much consultation, so much preparation." Documents including the Balanced Copyright Questions and Answers document²⁰¹, the Copyright Backgrounder introduced by the government for C-11²⁰², and the Press Release introducing C-11²⁰³ all reflected the balance framing and the new component of the frame, which stressed the need to move quickly to pass the bill, given the extensive deliberation that had already occurred.

Perhaps the most public challenge to the government's bill on its merits came from Jesse Brown, host of TVO's Search Engine radio show. Brown welcomed James Moore for an exceedingly tough interview where Moore repeated the party line on balance and consultation. Brown challenged the degree to which the bill incorporated the results of the consultation, noting that the public had spoken out against digital locks. Moore demurred, saying "Maybe Batman¹⁸⁵ [*ed.* a skeptical reference to the use of pseudonyms by some consultation submitters] did... the consultation that we did

²⁰¹ Government of Canada. Balanced Copyright: Questions and Answers Web Page. October 2011. Archived online: http://www.balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html

²⁰² Government of Canada. "Copyright Backgrounder in Press Release Announcing Bill C-11". Archived online: http://www.balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01237.html

²⁰³ Government of Canada. Press Release Announcing Bill C-11. September 29, 2011. Archived Online: <http://tinyurl.com/c11pressrelease>

wasn't a referendum, it was a consultation... most people recognize that we got this right... this really is a balancing act... this is a genuine good-faith attempt."²⁰⁴

The defence in the House of Commons was similar. During the debates on Bill C-11, forty-one separate government speeches in the House and seven at the committee stage evoked the balance frame, variously noting that the bill had been arrived at after extensive deliberation²⁰⁵, that the consultation had been taken into consideration²⁰⁶, that it was impossible to make everyone happy but that a good balance had been achieved²⁰⁷, that enough debate had occurred²⁰⁸, and that the time to act was now. Key speakers included Moore, Christian Paradis, Dean Del Mastro, Paul Calandra, Gordon Brown, Mike Lake, and Harold Albrecht. Brown, for example, claimed that "there has been more public consultation on this bill than on any other topic that we have dealt with in this House."²⁰⁹ Moore further noted "this bill will have had more consideration by Canadians at two stand-alone legislative committees and more time in the House than any bill Parliament has seen since the Liberals' Anti-terrorism Act back in 2001."²¹⁰ Calandra spent his speeches primarily taunting opposition members who

²⁰⁴ Brown, Jesse. "James Moore on Copyright Reform". *TVO Search Engine*. TVO, Ontario. October 3, 2011: 20:55.

²⁰⁵ Paradis, Christian. Second Reading Speech for Bill C-11. *Legislative Debates (Hansard)*. 41st Parliament, 1st Session, October 18, 2011: 10:30.

²⁰⁶ Moore, James. Second Reading Speech for Bill C-11. *Legislative Debates (Hansard)*. 41st Parliament, 1st Session, October 18, 2011: 10:50.

²⁰⁷ Paradis, Christian. *Legislative Debates (Hansard)*. 41st Parliament, 1st Session, February 8, 2012: 15:45.

²⁰⁸ Brown, Gordon. *Legislative Debates (Hansard)*. 41st Parliament, 1st Session, February 8, 2012: 16:50.

²⁰⁹ *Ibid.*

²¹⁰ Moore, James. *Legislative Debates (Hansard)*. 41st Parliament, 1st Session, February 8, 2012: 15:45.

argued for more time to debate the issue by reminding them they had previously spoken on earlier incarnations of the bill.²¹¹ Del Mastro repeated the earlier "consumer choice" argument made by Moore, claiming that although he has "bought hundreds of DVDs", he chooses not to buy any that make use of digital locks--again, all commercial films on DVD use digital locks.²¹² By repeating a material falsehood about the impact of digital locks, the government knowingly deflected opposition and public attention away from the issue--an example, again, of Béland's notion of strategic misconception.

At committee, the NDP and Liberals MPs introduced over a dozen substantive amendments dealing with a variety of issues. Given that James Moore had previously bet members of parliament \$10,000 that the government would adopt substantive amendments to the bill opposition members had reason to expect some degree of flexibility at this juncture.²¹³ However, at committee, the Conservatives countered that such amendments constituted "policy changes" and that they would be more appropriate matters to be dealt with by private members bills.²¹⁴ It is worth remembering that when such a private member's bill had previously been introduced, the government had argued that the proper procedure to deal with the subject was through a government bill.

²¹¹ Calandra, Paul. *Legislative Debates (Hansard)*. 41st Parliament, 1st Session, December 12, 2011: 17:10.

²¹² Del Mastro, Dean. Legislative Committee on Bill C-11, *Legislative Debates (Hansard)*. 41st Parliament, 1st Session, March 13, 2012: 10:05.

²¹³ Cited by Regan, Geoff. Legislative Committee on Bill C-11, *Legislative Debates (Hansard)*. 41st Parliament, 1st Session, March 13, 2012: 10:20.

²¹⁴ Lake, Mike. Legislative Committee on Bill C-11, *Legislative Debates (Hansard)*. 41st Parliament, 1st Session, March 12, 2012: 15:40.

Among the amendments tabled and rejected were an amendment that would have restored the private copying levy, and an amendment designed to introduce flexibility into the digital lock rules. The latter, moved by Charlie Angus, would allow consumers to break digital locks on content they had legally purchased, provided they were otherwise not committing an offence. This approach would have been more similar to Bill C-60, the Martin government's attempt at copyright reform in 2005. User groups and critics across the country favoured the amendment. It failed on a party-line vote.

The bill was introduced in the Senate by Stephen Greene, who told his colleagues that "copyright is a complex subject matter with many diverse interests and considerations", before concluding that Bill C-11 was a balanced bill which respects the rights of both users and creators. Greene further emphasized the response to the national consultations.²¹⁵ Moore and Paradis testified in front of the Senate and made it clear that both the process and the outcome of the bill incorporated the views of Canadians and organizations across the country. It would be fair to characterize the Senate review as focusing as much on the process by which the government developed the bill as on the content of the bill. After several days of testimony from dozens of witnesses, many of whom had also appeared in front of the House committee, the bill was adopted as read and received Royal Assent on June 29th, 2012, the final act of the government before the summer recess.

²¹⁵ Greene, Stephen. *Senate Debates (Hansard)*. 41st Parliament, 1st Session. June 20, 2012: 16:25.

4.4 Lessons Learned

Dr. Geist provides probably the most succinct summary of the three-year period covered by this chapter. Responding to a question about the government's digital lock provisions in an interview with Jesse Brown, Dr. Geist said "What you find is there isn't a good answer from the government, other than 'we think it's the right balance'."²¹⁶

That the final bill passed is not a surprise. A majority parliament with strict party discipline and a recent electoral mandate to govern can pass any bill with ease. What is more surprising, based on the fact that the substantive policy changes raised by the bills did not change through the process, is the extent to which some of the most vocal forces which protested Bill C-61 became resigned during the time period covered by this chapter, and opposition efforts were not able to cause the issue to become more salient among voters as a whole.

The government was able to take the focus off the specifics of the bill by deploying a frame that spoke to broader principles: the balancing of user rights and creator rights. This frame, borrowed from critics of C-61 and the Supreme Court of Canada, had in-built legitimacy. The consultation process, even though it was largely ignored, provided the government additional shielding for its claim that everyone was represented by the bill, and prevented the opposition from being able to make headway claiming that American influence superseded the needs of Canadians.

²¹⁶ Brown, Jesse. "Digital Lockdown." *TVO Search Engine*. TVO, Ontario. October 26, 2011.

Opposition MPs also adopted the balance frame for their arguments, but were forced to make technical arguments about why the bill was not balanced. Opposition members who opposed the expansion of fair dealing or the demise of the private levy were attacked for being unwilling to stand up for Canadian consumers; opposition members who stood up for Canadian consumers against the onerous digital lock provisions were cast as extremist anti-copyright activists who were undermining the ability of Canadian businesses to protect themselves from privacy. There seems to have been little sincere effort on the part of the government to engage seriously with opposition ideas.

Like "Made-in-Canada", "Balance" is a frame used by the Harper government on a frequent basis. During the Prime Minister's tenure, EI reforms, environmental inaction, the "Victims Bill of Rights", Canadian foreign policy with respect to Israel, the budget bill, rail freight regulations, ballast water rules for the Great Lakes, failure to incorporate mental health and counselling therapy into the prison system, and free trade with Honduras, among other issues, have been categorized in the house as "balanced approaches".²¹⁷ Certainly all policy issues involve trade-offs in resource allocation and emphasis and clearly all changes to policy involve rectifying some perceived imbalance, but it seems an abuse of language to characterize every policy under the sun as "balanced" irrespective of whether or not the debate actually focused

²¹⁷ Naive search of Hansard records for CPC MP speakers from 2006-2014 using the words "balanced solution" or "balanced approach", followed by excluding results where the uses of the expression seemed in passive rather than an integral or driving part of the government's approach to the subject in question.

on balancing, soliciting the opinions of the public, or earnestly considering suggested amendments.

The framing literature shows patterns in terms of what works for framers; a credible, legitimate source with the appearance of impartiality and consensus, making a very high-level, general, argument, and using blame avoidance strategies to disclaim responsibility for any negative consequences of a bill makes for an effective framing effort. The government built itself up to be credible and legitimate by borrowing rhetorical conceptions from the Supreme Court and by leaning on the consultation process, regardless of results.

One challenge that the opposition faced is that the issue of digital locks was never explained very well. By using metaphorical comparisons to real-world locks, the reader might assume that a digital lock prevents "breaking and entering" against a content creator's property--or in other words, that digital locks prevent piracy. In fact, digital locks act more as restrictions on what legal owners can do with property they have legally purchased. Perhaps the opposition would have had more success if they framed the government bill as an effort to restrict what Canadians can do with property they have purchased. It is easy to imagine an advertisement claiming "Stephen Harper wants to let big business tell you what you can and can't watch on your iPad" resonating with the public and in turn forcing the government to defend their bill in light of their party's traditional focus on choice and liberty.

But the government's framing is persuasive in a way, because it creates a view of copyright as a zero-sum game. As a result, emphasizing consumer issues can easily be depicted as hurting artists. Knowing that the opposition parties who were most active on this issue derived the bulk of their political support from a province with a traditional view on copyright as *droit d'auteur* and a vibrant arts community (not to mention the only province where majority support existed for C-61), it is easy to imagine how opposition frames could have backfired and undermined their base of support.

Earlier opposition frames about Canadian sovereignty and the need to protect Canada against the intrusion of large American corporations ceased to resonate after the Canadian government undertook an extensive consultation on the issue. This demonstrates that in order to credibly seem as though a government puts national interests first, the important thing is not necessarily to change policy, but to change perception. Further research could integrate both framing and public consultation literature to assess the extent to which this holds true across other policy domains.

Chapter 5 will discuss some of the events since the passage of Bill C-11, which will be relevant for when legislatively mandated review of Canadian copyright law occurs in 2017, allowing opponents of strong copyright some metacultural support for developing new, alternative frames or to successfully claim that their approach reflects the dominant frame's values.

5.1 Developments Since C-11

Almost immediately after the passage of Bill C-11, a major event in Canadian copyright occurred when the Supreme Court of Canada issued five separate rulings on copyright cases in a single day. The rulings collectively constituted an "unequivocal affirmation that copyright exceptions such as fair dealing should be treated as user rights."²¹⁸ The court expanded fair dealing such that exemptions for academic research now covered non-academic personal research. Moreover, it embedded the principle of technological neutrality--the idea that copyright should act similarly regardless of the technology used to deliver content--into the constitutional jurisprudence on copyright, when a unanimous court held in *ESAC v. SOCAN* that "the traditional balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creators of those works should be preserved in the digital environment."²¹⁹ The 2012 judgments have left several scholars suggesting that as distinctly non-technologically neutral provisions, the digital lock rules would not pass muster at the Court. It is possible that the Court has enshrined the "user rights / dissemination" frame so fundamentally that any of the policy debates explored in this thesis are rendered moot, because digital locks prohibit the exercise of constitutionally guaranteed user rights. Dr. Geist observes that the court

²¹⁸ Geist, Michael. "Introduction" in *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. University of Ottawa Press, 2013. pp. iii.

²¹⁹ *Entertainment Software Association of Canada v. Society of Composers, Authors, and Music Publishers of Canada*. 2012 SCC 34, pp. 4.

"firmly reject[s] claims that 'users' rights' [are] only a metaphor... [user rights are] an essential component of Canadian copyright law."²²⁰

In November 2012, a Montreal firm disclosed that it had begun collecting evidence of copyright infringement by Canadian file sharers. This set the stage for an American content company to file a motion asking Canadian courts to turn over subscriber information for thousands of subscribers to the independent ISP TekSavvy. Preliminary court rulings have been highly skeptical towards the American sue-everyone approach, and have held that although internet service providers can be compelled to hand over subscriber information, Bill C-11's liability cap would be applied stringently and TekSavvy could fairly charge for the cost of handing over subscriber information and warning the content company in question that any abuse of the court process would result in judgment against the plaintiff. The result is that it is unlikely content companies could recoup their own costs associated with efforts to sue Canadian consumers.²²¹ Even in the absence of an affirmative Supreme Court ruling, it seems likely that lower courts will restore a sense of balance to Canadian copyright law.

In 2013, the government underwent a limited consultation to develop the regulatory guidelines of the "notice-and-notice" provider liability system found in C-11,

²²⁰ Geist, Michael. "How the Supreme Court of Canada Doubled Down on Users' Rights in Copyright". July 23, 2012. Available online:

<http://www.michaelgeist.ca/2012/07/scc-on-user-rights/>

²²¹ Geist, Michael. "Canadian court ruling in Teksavvy file sharing case a blow to copyright trolls: Geist" *Toronto Star* Feb 21, 2014.

which will be enforced starting in 2015. Early drafts of the consultation's guiding document showed deference to the equal importance of owner rights and user rights, but the final finished document puts the emphasis squarely on deterring infringement at any cost. Haggart concludes that the takeaway from this revision is that "while the Conservative government has learned the importance of paying lip service to user groups, the traditional protection-oriented copyright interests continue to hold sway."²²²

Meanwhile, Canada continues to negotiate the ACTA (Anti-Counterfeiting Trade Agreement) and TPP (Trans-Pacific Partnership) treaties. As with WIPO, the United States has taken a firm stand in favour of intellectual property rights maximalism. It is likely that the result of the ACTA process will require further reforms to Canadian copyright law, and probable that it will lead to stronger copyright.

Earlier this year, having successfully reformed Canadian copyright, the Harper government began the process of reforming trademarks in Canada. Perhaps desiring to avoid a bruising fight on the merits of their ideas, the reforms were tabled as part of an omnibus budget implementation bill.

5.2 Contributions and Further Research

Within the confines of a thesis, this work aims to offer an original contribution to two areas of scholarship: frame analysis in public policy, and the thematic area of

²²² Haggart, pp. 194.

Canadian copyright literature. This section of the thesis will contextualize the contribution of the thesis in each area and discuss opportunities for further research building on the work presented here:

Frame analysis in public policy: Frame analysis, as an ideational and discursive approach, offers explanations for how and why changes in policy can occur by considering the role of ideas and arguments. The policy frames offered here may be unique to the case in question, but they come from common institutional action frames that are used elsewhere. Future analysis can examine how other cases in other areas can also make use of frames like the "balance" frame, and how opposition groups can contest such a frame both from within and from without.

In particular this thesis uncovers a shift in frame from the contested early days of C-61, where the government was forced to defend itself against allegations of American influence, to the consultation process and the more successful balance frame of C-32 and C-11. It observes the use of Supreme Court jurisprudence and the strategic use of public consultation to bolster government framing and lend legitimacy to the process. It shows how government responded to Charlie Angus' artist-focused frame by characterizing collective licensing as taxes and expenses, highlighting a strategy displayed in Kangas' review of Finnish social insurance.

Canada is not the only country that has come into compliance with the WIPO Copyright Treaty over the last few years; all EU states acceded to the treaty in 2010,

and other developed nations like Israel and South Africa have signed but not yet ratified the treaty. As a result, comparative case studies between Canada and other countries could be fertile ground to cover. A recurring theme in framing literature is how framing and ideas interact with institutional and historical explanations. Looking at other governments that had similar institutional arrangements and similar histories (most similar systems approach) but different outcomes could allow for a more precise analysis of the role ideas can play in affecting the outcome and structure of the copyright debate. In particular, this kind of analysis could expose the ways in which various departmental arrangements of copyright responsibility contribute to differing outcomes, both in terms of the framing of copyright reform and the policies enacted.

Canadian copyright literature: Although Canadian copyright literature is hardly an enormous field, it is burgeoning. Legal scholarship arising from the emerging jurisprudence on copyright in this country seems especially rich, and provides an excellent theoretical background for subsequent policy arguments.

On the policy side, the only substantial work published in the field is Blayne Haggart's *Copyfight*, which is a historical institutionalist case study of copyright reform comparing the Canadian, American, and Mexican experiences of coming into compliance with WIPO. Haggart is able to explain how the PMO was influential in resolving conflict between Tony Clement and James Moore, and how US pressure worked on the digital lock issue but not on service provider liability issues, but what

goes unexamined is how the government faced so much opposition to C-61 and less to C-32 and C-11.

By examining framing and the role of ideas in the debate, it is my hope that this thesis expands in some modest way on Haggart's reading of what happened and offers insight on one way in which the government was able to control messaging and reduce the contentiousness of the issue and the bill in order to induce public consent or at least reduce resistance. Haggart's limited assessment of the role of ideas in the debate finds that, "copyright's traditional 'property' / 'protection' [emphasis] is being displaced by an emphasis on [user rights]. This ideational change portends future changes, or at least complications, in the direction of Canadian copyright law."²²³

Haggart is of course correct that more change is to come. Bill C-11 contained a provision mandating legislative review of its provisions within five years of enactment. Significant advances in technology, already underway during the previous reform process, and shifts in content consumption away from ownership-based models towards all-you-can-eat streaming or rental models²²⁴ may well change the issues that are considered salient. In a world where users never own books, films, or games to begin with, how will user rights apply and what will be the impact of digital locks?

²²³ Haggart, pp. 196.

²²⁴ This is a well-documented trend across mediums; for a few examples, see Enis, Matt. "Patron preferences shift towards streaming". *Library Journal*, September 1, 2012: pp. 18; Frankel, Daniel. "Forecast: Online Demand For Movies, TV Shows Will Top DVD Sales This Year". March 23, 2012. Available Online: <http://gigaom.com/2012/03/23/419-forecast-online-demand-for-movies-tv-shows-will-surpass-dvds-this-year/>

Understanding the framing efforts of the 2008-2012 debates may allow opposition parties and groups to come up with effective counter-frames or means to contest the dominant government frame in order to more effectively mobilize the public when legislative review arrives.

An obvious opportunity for further scholarship in the field of Canadian copyright would be to expand the area of inquiry from copyright to all digital issues. Comparing the public response and government actions in copyright reform to other digital issues, like digital privacy and lawful access (especially in light of the 2013 NSA disclosures), or the use of Usage-Based Billing for internet connectivity and resale, or the emerging issue of net neutrality, would properly situate copyright as not just as a part of intellectual property, but also as a part of a broader emphasis on how the government regulates and responds to the way users interact with technology. Whether using frame analysis or other analytical approaches, this will be a significant area of scholarship in the near future.

This thesis primarily interprets the public consultation process as a piece of "evidence" used to support the government's frames, but the case could also be an interesting starting point for a contribution to literature on the strategic use of public consultations and the ongoing debate surrounding models of consultation, deliberation, and participation.

Limitations of the thesis: It would be remiss to end this thesis without observing some of the limitations of this work.

As is typically the case with framing scholarship, constructing the narrative found in this thesis required interpreting public documents. Although I remain confident in the strength of the narrative, resources to file Access to Information Act requests and the ability to interview bureaucrats and MPs would have resulted in a better analysis of how the government saw their own framing efforts. The thesis benefits enormously from the interviews Blayne Haggart conducted in researching his work. The ability to conduct interviews of my own would have helped confirm inferences made about the conduct of actors based on what is currently publicly available.

In addition, more direct contact with the actors described in the thesis could have enriched my treatment of issues related to inter-departmental conflict. Like many frame analyses, here I treat the government as a monolith, which may be accurate in terms of voting behaviour in parliament and public-facing messaging, but not necessarily in the development of policy or framing strategies. Evidence of this exists throughout the process: Oda and Bernier's initial disagreements, the replacement of Bernier with Prentice, the replacement of Prentice with Clement, Clement's publicized struggle with Moore over the bill's content, and Clement's eventual replacement with Paradis. The government had only one public frame, but behind the scenes there were many voices. It seems likely that comparative analysis between countries would reveal

unique ways in which inter-departmental disputes over copyright contributed to the development of both policy and public messaging.

This thesis observes framing utilized by the Harper government during a particular reform period from 2008-2012, but in reality reform has been a much longer process dating back at least until 1997, when Canada signed the WIPO Copyright Treaty. Expanding the scope of the research to include Liberal Bill C-60 (2006), the results of earlier copyright reform consultations such as the 2002 consultation, and policymaker reactions to the 2002-2004 Supreme Court copyright rulings would have likely allowed for a better assessment of extant frames and metacultural factors to really build a convincing work that explains the role of ideas in copyright reform in Canada.

Methodologically, the analysis here is quite strictly interpretivist. Larger works on framing and the role of ideas in political debate, including in public policy, often use a mixed-methods approach. They rely on this sort of interpretative analysis, but also make use of content analysis of documents, more rigorous coding efforts (which may help to identify other frames employed by the actors), and often a public opinion component that involves survey or focus group research. Being able to observe how the public responded to government efforts and the degree to which framing shaped or silenced opposition on the part of ordinary citizens could enhance the analysis here. Such a project seems significantly beyond the scope of an MA Thesis and more appropriate for a book or longer research study, however it could enhance our

understanding of the debate and provide methodological checks against any bias on the part of the author in the interpretative component.

Finally, the thesis makes use of a near-exclusively strategic conception of framing. Beyond identifying the actors who stand to gain from the reform process, there is relatively little present in the thesis that approaches framing from a cognitive perspective. I believe the narrative presented supports this based on how crass the government's cynicism was, particularly with respect to the public consultation. Still, the work could be expanded with a cognitive component. If, as the research presented in the introduction suggests, digital locks have a limited impact if any in terms of preventing piracy, then wouldn't the government have compromised on the issue at some juncture? Although Bill C-61 seemed doomed from the start, even minor compromise on digital locks or collective licensing appears as though it would have swayed enough support to ensure prompt passage of Bill C-32. That the government held fast to these issues speaks to some private perception or cognitive frame, not expressed well or at all in the public debate, that privileged such an uncompromising approach. Is it possible that the government understood support for digital locks as compulsory to relieve US pressure or secure the support of Canadian content companies, even if they never attempted to articulate why? Richer, fuller research on this case would incorporate analysis that explores the cognitive side of framing, possibly with the benefit of extending more charity to the government position throughout the debate.

5.3. Conclusion

This thesis embarked on an exploration of the Canadian government's use of framing and ideas in order to sell copyright reform in Canada during 2008-2012. It demonstrated that the government's first copyright reform effort, Bill C-61, faced heavy scrutiny even before it was tabled, which forced the government to adjust its message and frame the bill as a "made-in-Canada" approach designed for Canadians. Groups opposed to the reform were successful in undermining the effort by characterizing the reform as driven by United States interests. The government reacted by embarking on a public consultation. This enabled them to borrow legitimacy and blunt the criticism that Canadians did not have input on the final bill. In addition to this process, they deployed the "balance" frame, which views copyright and copyright reform as about finding a balance between authors and users.

This frame has added legitimacy because it was previously articulated by the Supreme Court of Canada and indeed by opponents of copyright reform. While opponents were forced to engage in technical arguments that the bill as presented was not balanced, the government was able to maintain a public air of technocratic objectivity and rational policy-making. Further, opponents were unable to articulate opposition to the bill from a user perspective because the government's frame would view such opposition as opposition to Canadian artists, which constitute an important base of support for opposition parties during this period. As a result, the government was able to mitigate the level of protest against the bill, which along with favourable changes in the Conservative Party's electoral fortunes, contributed to the ultimate

success of Bill C-11. In spite of this, subsequent Supreme Court decisions and the passage of time are likely to challenge the government's framing efforts when legislation is reviewed in the future.

This narrative supports the conclusions from previous framing case studies that the government is more successful at framing when it is perceived as being a legitimate authority on the subject. By embarking on a public consultation, and by portraying the bill as "balanced", in keeping with Supreme Court jurisprudence, the government gained perceptual legitimacy. The broad nature of the frame incorporated a wider breadth of interests, which also had a positive impact on the success of the framing effort. It also touches on the conclusions in framing literature that more general, high-level arguments, and arguments that deflect blame for the negative impacts of policy changes away from the government, are more successful.

By examining a subject that previously was primarily examined from an historical institutionalist perspective, this thesis introduces an original contribution on the role of ideas and framing in the study of the case of Canadian copyright policy, and by applying frame analysis to a new and interesting case, offers a contribution to this literature as well.

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Appendix 1: Other Documents in the Corpus

In addition to the documents of the bibliography above, a significant number of parliamentary speeches were analyzed as part of the document corpus to help construct the narrative presented in Chapters 3 and 4. This appendix lists dates associated with those speeches in order to aid verification of the thesis. Some dates may not have had in-scope content relevant to the frame analysis; these contributed to a fuller understanding of the debates that occurred.

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Standing Committee on Canadian Heritage, March 25, 2010.

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House of Commons, November 3, 2010.
House of Commons, November 17, 2010.
House of Commons, November 19, 2010.
House of Commons, November 24, 2010.
House of Commons, November 26, 2010.
House of Commons, November 30, 2010.
House of Commons, December 1, 2010.
House of Commons, December 2, 2010.
House of Commons, December 7, 2010.
House of Commons, December 8, 2010.
House of Commons, December 9, 2010.
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House of Commons. October 21, 2011.
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House of Commons. March 15, 2012.
House of Commons. May 14, 2012.
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House of Commons. June 15, 2012.
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