

Punishment, Private Style: Statutory Damages in Canadian Copyright Law

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ABSTRACT (EN): Copyright infringement is a widespread contemporary behaviour of commercial enterprises and private individuals. To restrain such infringements, legislators and courts have used punitive and statutory damages to sanction infringing activities and, in doing so, have incorporated the punitive aspects of criminal law into the private sphere without the procedural guarantees generally associated with criminal law. This chapter provides a detailed analysis of the courts' decisions on statutory damages in the Canadian copyright context. The authors argue that such a punitive path is fundamentally based on utilitarian and behaviourist approaches. Based on social sciences scholarship, the authors question the effectiveness of such approaches to reduce copyright violations (deterrence). The authors also situate this process of private style punishment in a more general trend of asymmetric incorporation of criminal justice norms (Legomsky, 2007) and discuss the systemic incoherencies created by such practices.

RÉSUMÉ (FR): La violation du droit d'auteur est un comportement contemporain très répandu chez les entreprises commerciales et les individus. Afin de mettre fin aux violations, les législateurs et les tribunaux ont recouru à des dommages punitifs et préétablis pour sanctionner les actes de contrefaçon et, ce faisant, ont incorporé les aspects punitifs du droit criminel dans la sphère privée sans les garanties procédurales généralement associées au droit criminel. Ce chapitre procède à une analyse détaillée des décisions ayant accordé des dommages préétablis dans le contexte du droit d'auteur

canadien. Les auteurs soutiennent qu'une telle voie punitive se base fondamentalement sur des approches utilitaristes et comportementales. Se basant sur les enseignements des sciences sociales, ils questionnent l'efficacité de telles approches pour freiner les violations du droit d'auteur (théorie de la dissuasion). Les auteurs discutent de ce procédé, style de peine privée, dans une tendance plus générale à l'incorporation asymétrique des normes de justice criminelle (Legomsky, 2007) et montrent les incohérences systémiques créées par une telle pratique.

A. INTRODUCTION

In 1997, a statutory damages regime was introduced in the *Copyright Act*,¹ as part of the second major phase of copyright reform in Canada.² Under this regime, plaintiffs in copyright cases have the ability to elect to receive an award of statutory damages in lieu of actual damages and profits.³ The copyright holder may make such election at any time before final judgment.⁴

The government has clearly stated the underlying reasons for the adoption of the regime:

A copyright owner who commences proceedings for infringement must prove not only the infringement, but also the losses suffered as a result. However, it is often difficult, sometimes impossible, to prove such losses because evidence as to the extent of infringement is usually difficult and/or expensive to find. Statutory damages alleviate this difficulty by guaranteeing a minimum award of damages once infringement is established. They also ease the evidentiary burden on the plaintiff in proceedings for

1 RSC 1985, c C-42 [*Copyright Act*].

2 Phase I took place in 1988 [*An Act to Amend the Copyright Act and to Amend Other Acts in Consequence Thereof*, RSC 1985, c 10 (4th Supp)] and Phase II in 1997 [*An Act to Amend the Copyright Act*, SC 1997, c 24] [*An Act to Amend the Copyright Act (1997)*]. After that, the government announced that it was embarking on a permanent process of copyright reform and introduced a series of bills, some of which resulted in legislative modifications, while others died on the order paper after the dissolution of Parliament: see Industry Canada, *A Framework for Copyright Reform* (Ottawa: Industry Canada, 2002), online: Industry Canada www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01101.html. The last Bill C-11, which modifies the statutory damages regime, received royal assent on 29 June 2012 and became the *Copyright Modernization Act*, SC 2012, c 12.

3 *An Act to Amend the Copyright Act (1997)*, above note 2, introducing s 38.1.

4 *Ibid.*

infringement, deter future infringements, reduce the cost of litigation and encourage the parties to settle matters out of court.⁵

The Canadian legislature, in enacting section 38.1, clearly had in mind the presumed deterrent purpose of statutory damages. The statute itself includes “the need to deter other infringements of the copyright in question” among the relevant factors that the court should take into consideration when setting the award.⁶ The alleged deterrent effect of statutory damages is also one of the reasons why the United States *Copyright Act* allows for such remedy.⁷ In this paper, we will first provide an overview of the Canadian legislative scheme and the courts’ implementation of the regime. In the second part, we will use a socio-legal studies approach to question the basis of deterrence theory and to show how inadequate it is to use such discourses in a copyright regime. We conclude that the Canadian statutory damages regime is fairly outbalanced and insufficient to compensate for commercial violations and for excessively punishing non-commercial infringements.

5 Industry Canada, *Fact Sheet on Copyright Remedies* (Ottawa: Industry Canada, 2011), online: Industry Canada www.ic.gc.ca/eic/site/ippp-dppi.nsf/eng/ip00090.html.

6 See *Copyright Act*, above note 1, s 38.1(5); the other factors are the good faith or bad faith of the defendant and the conduct of the parties before and during the proceedings.

7 It has been said that the Canadian regime was modelled on the US provisions: Malcolm E McLeod, “Recent Copyright Developments: the Canadian Perspective” (1998) 15 CIPR 39 at 49. The US *Copyright Act of 1909*, Pub L No 60-349, 35 Stat 1075 provided that statutory damages “shall not be regarded as a penalty” at 101(b). However, this provision was repealed in 1976 and now courts stress the deterrent purpose of statutory damages; see *FW Woolworth Company v Contemporary Arts Inc*, 344 US 228 (1952): “Moreover, a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury, but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright, the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy” at 233; see also *St Luke’s Cataract & Laser Inst, PA v Sanderson*, 573 F 3d 1186 at 1206 (11th Cir 2009); *E & J Gallo Winery v Spider Webs Ltd*, 286 F 3d 270 at 278 (5th Cir 2002); *FEL Publications, Ltd v Catholic Bishop of Chicago*, 754 F 2d 216 at 219 (7th Cir 1985). For a deeper analysis, see Pamela Samuelson & Tara Wheatland, “Boundaries of Intellectual Property Symposium: The Boundaries of Copyright and Trademark/Consumer Protection Law: Statutory Damages in Copyright Law: a Remedy in Need of Reform” (2009) 51:2 Wm & Mary L Rev 439 at 461.

B. THE CANADIAN STATUTORY DAMAGES REGIME

Certainly the amounts of statutory damages set in the legislation are meant to discourage future infringers. The court may award an amount between \$500 and \$20,000 in respect of each work or subject matter infringed by the defendant. The award covers each separate infringement with respect to each work. Subsection 38.1(2) of the *Copyright Act* allows for a smaller award when the defendant had acted in good faith: the award may be reduced to between \$200 and \$500 if the defendant “was not aware and had no reasonable grounds to believe that [he or she] had infringed copyright.” The courts will not often consider that a person had no reasonable ground to believe a work was not protected since “no person is entitled to assume, without inquiry, that a work published anonymously is not the subject of copyright.”⁸ It has been said that “it may be relatively difficult for a defendant to take advantage of this subsection”⁹

There is a possibility for further reductions if more than one work or subject matter is involved.¹⁰ Furthermore, the 2012 legislative modifications, adding paragraphs 38.1(1)(a) and (b) to the Act, make the amount of statutory damages contingent upon the commercial or non-commercial purpose of the infringement. For non-commercial infringers, the damages range between \$100 and \$5,000 for all infringements in a single proceeding for all works.

There could be situations where even the minimum award would be grossly disproportionate to the infringement. For example, the regime reserved to statutory damages claimed by collective societies shows that the goal is not compensatory; they can ask for an amount not less than three times, nor more than ten times the amount of applicable royalties.¹¹

The regime is also very severe for a one-time infringer. In 2012, iTunes charged \$1.29 CAD for the downloading of a single Justin Bieber song¹² and his CDs were on sale at HMV for \$12.99 CAD.¹³ Assuming that a song is a single work, the minimum award, even taking into account the good faith

8 See *Slumber-Magic Adjustable Bed Co v Sleep-King Adjustable Bed Co* (1984), 3 CPR (3d) 81 at 118 (BCSC) referring to *Gribble v Manitoba Free Press Co*, 40 Man R 42, [1931] 3 WWR 570 at 575, [1932] 1 DLR 169 (Man CA) at paras 28–30.

9 John S McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 3d ed (Scarborough: Carswell, 2000) at 661; for a rejection of this defence in the context of s 38.1(2), see *Nicholas v Environmental Systems (International) Ltd*, 2010 FC 741 at para 104 [Nicholas].

10 *Copyright Act*, above note 1, s 38.1(3).

11 *Ibid*, s 38.1(4).

12 Apple iTunes, online: <http://itunes.apple.com/us/album/boyfriend-single/id513122978>.

13 HMV, online: www.hmv.ca/Products/Detail/665016.aspx.

of a non-commercial infringer and the range set in the 2012 legislative modifications, would be \$100 per proceeding, so seventy-seven times the actual damages. In practice, even the criminal regime can be more lenient for the offender. Let us take the example of a first-time shoplifter of a CD. It is true that a “theft under \$5,000” (shoplifting) conviction can lead to fines and possibly jail time (up to two years if an indictable offence or up to six months if charged as a summary offence),¹⁴ but many judges will not inflict any sanctions to a first-time shoplifter and, usually, the charges will be withdrawn if the offender successfully completes a diversion program. In this regard, Crown attorneys may conditionally drop the charges or choose to use other extrajudicial measures such as imposing community service, donation to a local charity, or attendance at a lecture dissuading people from shoplifting.¹⁵

In other words, in some cases, the statutory damages regime may (and more likely will) impose a harsher sanction than the criminal law regime. It is to be noted that the maximum set by the legislation may also be insufficient to cover all the unauthorized profits made by the defendant and the actual damages suffered by the plaintiff.¹⁶ However, as the Act reserves the plaintiff’s right to also ask for exemplary or punitive damages,¹⁷ the courts have not pre-set maximum limits for the awards.

So what was the impact of the regime? How did the courts exercise this new discretion granted to compensate copyright holders?

To properly understand the impact of the legislative provision, one must first know that courts, when faced with the problem of an unproven scale of damages, did and still do resort to making rough quantification. In *Louis Vuitton Malletier SA v Singa Enterprises (Canada)*,¹⁸ the Federal Court explained

14 See *Criminal Code*, RSC 1985, c C-46, ss 334(b) and 787(1).

15 On those diversion programs, see Public Safety Canada, *Adult Offender Diversion Programs*, No 3:1 (Ottawa: Public Safety, January 1998), online: www.publicsafety.gc.ca/res/cor/sum/cprs199801-eng.aspx.

16 *Copyright Act*, above note 1, s 35 allows the plaintiff to claim both an account of profits and damages. In *Microsoft Corporation v 9038-3746 Québec Inc*, 2006 FC 1509 [9038-3746 Québec Inc], the court doubted that the maximum of “\$500,000 cover[ed] a full accounting of the profits the defendants have derived from infringing [the plaintiff’s] rights” at para 115.

17 See *Copyright Act*, above note 1, s 38.1(7); McKeown, above note 9, questions the wisdom of the rule: “to the extent that deterrence has been considered by the court in exercising its discretion under section 38.1 punitive or exemplary damages should not be awarded” at 662.

18 2011 FC 776.

the strategy developed by the judiciary. For instance, when infringing sales had been proven after an execution of an Anton Piller order, the courts would evaluate the damages “in the amount of \$3,000 where the defendants were operating from temporary premises such as flea markets, \$6,000 where the defendants were operating from conventional retail premises, and \$24,000 where the defendants were manufacturers and distributors of counterfeit goods.”¹⁹ Courts have also made some allowance for the effects of inflation²⁰ and have increased the amounts when the defendant was “engaged in continuous and blatantly recidivist activities over a period of time.”²¹ It was also accepted that courts could award punitive damages in cases of copyright infringement,²² with amounts varying from \$5,000 to \$250,000.²³

The principles underlying the regime of statutory damages, therefore, were not foreign to Canadian judges. Courts had granted lump sum awards in cases where the actual damages were hard to prove, and punitive damages in order to punish infringers and deter future violations. However the range of damages allotted by the *Copyright Act* and the integration of the regime in civil proceedings are, in our view, problematic.

1) The Problematic Range of Damages

From 1997 to 2011, there had been about twenty-two reported cases where statutory damages were awarded.²⁴ Some of them caught the legal commun-

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- 19 *Ibid* at para 129, referring to *Nike Canada Ltd v Holdstart Desigh Ltd et al*, T-1951085 FC (unreported).
 - 20 *Ibid* at para 130, referring to *Louis Vuitton Malletier SA v Yang*, 2007 FC 1179 at para 43 [Yang]; and *Louis Vuitton Malletier SA et al v 486353 BC Ltd et al*, 2008 BCSC 799 at paras 59–60 [486353 BC Ltd].
 - 21 For example, by relying on the frequency of inventory turnover, *ibid* at paras 131–33 referring to *Yang*, above note 20 at paras 43–44; see also *486353 BC Ltd*, above note 20 at paras 67–72.
 - 22 See, for instance, those early cases: *Durand et Cie v La Patrie Publishing Co*, [1960] SCR 649; *Hay & Hay Construction Co Ltd v Sloan et al* (1957), 12 DLR (2d) 397; *Pro-Arts Inc v Campus Crafts Holdings Ltd et al* (1980), 110 DLR (3d) 366 (Ont HC); *Schauenburg Industries Ltd v Borowski* (1979), 25 OR (2d) 737 (Ont HC); *Orbitron Software Design Corp v MICR Systems Ltd* (1990), 48 BLR 147 (BCSC).
 - 23 See *France Animation SA c Robinson*, 2011 QCCA 1361 at para 249 and the decisions referred to. The Superior Court had awarded punitive damages at \$1 million, the Court of Appeal reduced the amount to \$250,000. Leave to the Supreme Court has been granted.
 - 24 *Wing v Velthuizen* (2000), 9 CPR (4th) 449, 197 FTR 126 (TD); *Ritchie v Sawmill Creek Golf & Country Club Ltd* (2003), 27 CPR (4th) 220, 2003 CanLII 24511 (ON SC); *LS Entertainment Group Inc v Formosa Video (Canada) Ltd*, 2005 FC 1347; *9038-3746 Québec Inc*, above note 16; *Film City Entertainment Ltd v Chen*, 2006 FC 1150; *Film City Entertainment Ltd v Golden*

ity's attention because of the amount of damages involved.²⁵ For instance, the amount of statutory damages was set at about \$300,000 in *Telewizja Polsat SA v Radiopol Inc*;²⁶ and in *Microsoft Corporation v 9038-3746 Québec Inc*, the award was \$500,000 (that is, the maximum of \$20,000 per work for twenty-five works), joint with an award of punitive damages of \$200,000²⁷ and a lump sum representing solicitor/client costs and disbursements close to \$1,600,000.00.²⁸ The maximum of \$20,000 per work was also awarded in two cases, *Louis Vuitton Malletier SA v 486353 BC Ltd*²⁹ and *Louis Vuitton Malletier SA v Yang*.³⁰ Statutory damages in excess of \$100,000 were granted in two more cases.³¹

In some decisions, the judges raised the issue of proportionality. In *Telewizja Polsat SA v Radiopol Inc*,³² the defendants had decoded the signals of a television producer and had made them available to the public via the Internet. The evidence showed that 2,009 programs had been illegally decoded but that the plaintiff has suffered little damages. Justice Lemieux of the Federal Court stressed that there “should be some correlation between actual damages and statutory damages even though section 38.1 does not speak of actual damages”³³ and lowered the award to \$150 per work, arguing

Formosa Entertainment Ltd, 2006 FC 1149; *Telewizja Polsat SA v Radiopol Inc*, 2006 FC 584 [Telewizja Polsat]; *Video Box Enterprises Inc v Lam*, 2006 FC 546; *Duclow v Atlantic Business Consultants Ltd*, 2006 NSSM 26; *Lari v Canadian Copyright Licensing Agency*, 2007 FCA 127 [Lari]; *Yang*, above note 20; *Don Hammond Photography Ltd v The Consignment Studio Inc*, 2008 ABPC 9 [Don Hammond]; *486353 BC Ltd*, above note 20; *Microsoft Corporation v PC Village Co Ltd*, 2009 FC 401; *Microsoft Corporation v 1276916 Ontario Ltd*, 2009 FC 849; *Nicholas*, above note 9; *Entral Group International Inc v MCUE Enterprises Corp*, 2010 FC 606 [Entral Group]; *Sixty Spa v 3127885 Canada inc*, 2010 QCCS 2754 [Sixty Spa]; *Louis Vuitton Malletier SA v Singa Enterprises (Canada) Inc*, 2011 FC 247; *Society of Composers, Authors, and Music Publishers of Canada v IIC Enterprises Ltd*, 2011 FC 1088; *Century 21 Canada Limited Partnership v Rogers Communications Inc*, 2011 BCSC 1196 [Century 21]; *Setanta Sports Canada Ltd v 840341 Alberta Ltd*, 2011 FC 709.

25 John Cotter & Tara James, “Microsoft Wins Maximum Award in Counterfeit Software Dispute” *The Lawyers Weekly* (9 March 2007), online: The Lawyers Weekly www.lawyer-sweekly.ca/index.php?section=article&articleid=439.

26 *Telewizja Polsat*, above note 24.

27 *9038-3746 Québec Inc*, above note 16.

28 *Microsoft Corporation v 9038-3746 Québec Inc*, 2007 FC 659.

29 *Yang*, above note 20.

30 *Ibid.*

31 See *Lari*, above note 24 (statutory damages \$500,000, punitive damages \$100,000, solicitor-client costs \$100,000); see also *Entral Group*, above note 24 (statutory damages \$105,000, punitive damages \$100,000, solicitor-client costs \$70,000).

32 *Telewizja Polsat*, above note 24.

33 The court was quoting McKeown, above note 9 at 660.

that subsection 38.1 (3) allowed him to reduce the per work statutory minimum. In other cases as well, the courts have been concerned that the minimum statutory damages appeared disproportionate to the actual damages and used their discretion accordingly.³⁴ These rulings show that the courts are concerned when the actual damages suffered by the plaintiffs are much lower than the statutory damages, which they can claim under the *Copyright Act*. In such cases, statutory damages are used much more as harsh sanctions than as civil compensation, which is fairly problematic.

2) The Punishment — Private Style of the Legislative Scheme

The available damages are problematic not only because of their range, but also because they are a form of punishment operating in a “private style” (paraphrasing Marc Galanter³⁵). Statutory damages are primarily remedies in civil settings, but they are also aimed at punishing the defendant and deterring future infringements. In so doing, these damages are usurping the traditional primary goals of criminal law and the discourse of criminal law-based theories of punishment (deterrence, retribution, and denunciation). However, it has been established in criminal law that criminal punishment should be imposed only on those deserving the stigma of a criminal conviction.³⁶ Because of its punitive aspects, the stigma associated with a criminal conviction, and the potential abuses of the sovereign state, criminal law has historically developed a set of rights and safeguards for the defendant (*due process*), limiting consequently the range and strength of executive action in most democratic societies. For instance, the accused has a right against self-incrimination,³⁷ he or she is presumed innocent and, therefore, the state must prove the elements of the infraction beyond reasonable doubt, specific standards of fault (*mens rea*) are constitutionally required with respect of certain offences,³⁸ the accused is protected from

34 *Don Hammond*, above note 24; *Sixty Spa*, above note 24; *Century 21*, above note 24.

35 Marc Galanter, “Punishment, Civil Style: Punishment Outside the Criminal Law in the Contemporary United States” (1991) 25 *Isr LR* 759.

36 See, for a recent reaffirmation, *R v Roy*, 2012 SCC 26.

37 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 11(c) [*Charter*].

38 See, for example, *R v Beatty*, 2008 SCC 5, where the Court decided that, in the offence of dangerous operation of a motor vehicle causing death, “the requisite *mens rea* may only be found when there is a ‘marked departure’ from the standard of care expected of a reasonable person in the circumstances of the accused” at para 33.

cruel and unusual punishment,³⁹ and harsher penalties imply additional procedural guarantees.⁴⁰

In civil law cases, those privileges or rights are diminished or inexistent. In civil proceedings, a defendant may be forced to testify⁴¹ and the facts need only to be proven on a balance of probabilities. The defendant's intent is not relevant in principle and the defendant who in good faith believes he or she was authorized to use the copyrighted work will still be held liable for statutory damages. Of course, as mentioned in paragraph 38.1 (5)(a), the courts will take into account the good or bad faith of the defendant in setting the award of statutory damages, but the infringer still has to face the minimum rate. As it is sometimes three times what the normal royalties would have been, even the user acting in good faith may still be punished and in a relatively severe way.

Accordingly, the uses of statutory damages result in an *overpenalization* of non-commercial users acting in good faith, since the statutory damages imposed are disproportionately higher than the actual damages, which is even more problematic because of the lower standards of legal guarantees in civil proceedings. Paradoxically, this statutory approach is not enough to repair the injustice resulting from the commercial infringements (*underpenalization*). For instance, in *Microsoft Corporation v 9038-3746 Quebec Inc*,⁴² the court doubted that the maximum of \$500,000 was equivalent to the profits the defendants derived from infringing the plaintiff's rights.⁴³ So the maximum imposable statutory damages may also be significantly lower than the actual damages and plaintiffs often will also seek compensation via punitive damages.

When granting punitive damages, the courts have been very careful in identifying the function of those awards. The Supreme Court of Canada

39 *Charter*, above note 37, s 12.

40 *Ibid*, s 11(f) (right to trial by jury).

41 See, for example, *Code of Civil Procedure*, RSQ, c C-25, ss 302 and 309; see also Léo Ducharme & Charles-Maxime Panaccio, *Administration de la preuve*, 4e ed (Montréal: Wilson & Lafleur, 2010) at 240. In the context of *ex parte* Anton Piller orders related to copyright cases, the arguments based on the protection against self-incrimination were dismissed: see McKeown, above note 9 at 633–34. In some of the cases awarding statutory damages, the defendant had failed to produce documents and appropriate records: see *9038-3746 Québec Inc*, above note 16; *486353 BC Ltd*, above note 20. The courts felt that it was a factor, which weighed in favour of an award of statutory damages at the highest end of the scale.

42 *9038-3746 Québec Inc*, above note 16.

43 *Ibid* at para 115.

stated that “there has been ‘a substantial consensus . . . that the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation.”⁴⁴ Punishment, deterrence, and denunciation should be reserved for those cases where, borrowing Cory J’s words, “the jury or judge expresses its outrage at the egregious conduct of the defendant.”⁴⁵ Similar comments may be made concerning the statutory damages regime. However, by assuming those functions without integrating the due process safeguards of the criminal law and by imposing minimum awards, the regime may not be achieving the intended results. As criminologists and legal scholars have demonstrated, harsher punishment does not necessarily have an effect on crime rates.⁴⁶ In fact, severity and indiscriminate punishment may lead to more and worse deviant behaviour, as we will demonstrate later in this chapter.

This private style of punishment raises some issues, especially regarding the use of statutory damages to administer copyright conflicts. As discussed above, statutory damages overpenalize non-commercial infringements and are not enough to compensate the harm caused by commercial violations. Moreover, this penalization occurs administratively and not as a traditional criminalization process, or to use Stephen Legomsky’s words: it is an “asymmetric incorporation of criminal justice norms,”⁴⁷ a technique that borrows punitive discourses, enforcement structures, and resources from criminal justice without the corresponding guarantees of criminal trials. The use of statutory damages is a problematic innovation in the penal field in this sense and the efficacy of their goal of deterring other infringements (as expressed in paragraph 38.1(5)(c)) is questionable.

44 *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 68, as quoted in *de Montigny v Brossard (Succession)*, 2010 SCC 51 at para 51.

45 *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196.

46 See, for instance, the *Archambault Report* (Canadian Sentencing Commission, *Report — Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, 1987)), a key Canadian reference on the topic that reviewed more than 900 studies on deterrence and concluded that none of them could prove or provide consistent evidence that deterrence theory achieved its goals of deterring crime. See also, in the same sense and more contemporary, Anthony Doob & Cheryl Webster, “Sentence Severity and Crime: Accepting the Null Hypotheses” (2003) 30 *Crime & Justice* 143.

47 Stephen H Legomsky, “The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms” (2007) 64:2 *Wash & Lee L Rev* 469.

C. A SOCIO-LEGAL CRITIQUE OF THE STATUTORY DAMAGES SCHEME

We will criticize the regime in two parts: first, by questioning the basis of deterrence theory itself; and second, by setting out how counterproductive it may be to punish severely and indiscriminately all kinds of non-commercial infringements.

1) Beyond Rational Choice and Deterrence

Deterrence theory is based on utilitarian assumptions about human beings that are fairly anchored in an eighteenth and nineteenth-century humanist context. Philosophical ideas do not necessarily become obsolete over time and the Greek classics are a good reminder of this. However, the behaviour theory that is behind deterrence theory is very dated and quite simplistic. Utilitarianism basically argues that human beings are rationally and hedonistically driven, seeking to maximize pleasure and minimize pain. It is based on this assumption that Jeremy Bentham and many others after him (including contemporary judges) have argued that punishment deters certain behaviour because individuals rationally make utilitarian choices to minimize pain. Two hundred years later, utilitarian behaviour theory does not make a lot of sense, especially when you consider the rise of psychology and sociology as scientific discourses aiming, among other things, to explain human action from individual and societal points of view. Even the contemporary approaches that focus on individual and rational aspects of human behaviour (e.g., *behaviourism* and *routine active theory*) add other variables and learning elements to classical rational choice theory.⁴⁸

Our critique of deterrence theory suggests that its assumptions about human behaviour (and human nature) are not supported by contemporary understandings of approaches of human agency (individual capacity to

48 Exception made to some economic models that are essentially theoretical and fairly qualitatively disconnected from reality, for example, Milton Friedman and the neo-utilitarianism of the Chicago School. For grounded critiques of rational choice approaches in economy see among others: Louis Dumont, *From Mandeville to Marx: the Genesis and Triumph of Economic Ideology* (Chicago: University of Chicago Press, 1977); Maurice Godelier, *Rationality and Irrationality in Economics* (New York: New Left Books, 1972); Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1971); Marshall D Sahlins, *Stone Age Economics* (Chicago: Aldine-Atherton, 1972); Marshall D Sahlins, *Culture and Practical Reason* (Chicago: University of Chicago Press, 1976).

act independently, to make one's own choices). Literature reviews on deterrence studies overwhelmingly indicate that there is no evidence to support it.⁴⁹ Deterrence does not work because it is based on a bad behaviour theory, which assumes that it is part of human nature to maximize pleasure and minimize pain, universalizing a particular set of behaviours as if they were applicable to all human beings in all cultural contexts. Multiple contributing factors influence how individuals behave in society and a utilitarian-hedonistic calculus is not often among them. There are many other variables playing an important role in human agency, which reduce considerably the real capacity of agents to act freely (free will). There is a consensus among twentieth century social theorists⁵⁰ that agency is somehow related to social structures and individuals will make their choices in a fairly limited universe of possibilities.

Pierre Bourdieu, for instance, suggests that human beings rely on different (symbolic) capitals (economic, cultural, political, relational, etc.) that will substantially affect individual choices.⁵¹ Moreover, he demonstrates that even what we usually take as our most intimate choices (e.g., taste) are not the result of strictly individual choices, but of determinations at different levels.⁵² He argues that actors who occupy a given social space will share, more or less, the same habitus, tastes, political opinions, etc., and that choices are often embodied (his notion of *habitus* borrowed from Norbert Elias) and not the result of rational calculations. In short, individuals learn how to behave and most of the time they will simply act without thinking of how they should interact in everyday life. While Anthony Giddens takes a more theoretical approach in his *structuration theory*,⁵³ his theory recog-

49 Above notes 46–48.

50 Just to list the most important scholars in the agency/structure debate: Norbert Elias, Talcott Parsons, Peter Berger and Thomas Luckmann, Pierre Bourdieu, Anthony Giddens, and Michel Foucault. The ways they conceptualize human agency are not exactly the same, but they share the idea that the distinction between free will and determinism is a false dichotomy, pointing to notions of agency that relate to both individual choices and determinations (conditions, limitations of choices).

51 Pierre Bourdieu, *Outline of a Theory of Practice*, translated by Richard Nice (Cambridge: Cambridge University Press, 1977); Pierre Bourdieu, *Practical Reason: On the Theory of Action*, translated by Randal Johnson et al (Stanford: Stanford University Press, 1998).

52 Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, translated by Richard Nice (Cambridge: Harvard University Press, 1984).

53 Anthony Giddens, *New Rules of Sociological Method: A Positive Critique of Interpretative Sociologies* (Stanford: Stanford University Press, 1976); Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (Los Angeles: University of California Press, 1979) [Giddens, *Central Problems*]; Anthony Giddens, *The*

nizes the practical aspects of the reflexivity of the actors (and the limited capacity of monitoring reflexively their actions) and also that structures are “both medium and outcome of the reproduction of practices”⁵⁴ (*duality of structure*). In short, human action is essentially action in structures and the reflexivity of agents is not exclusively rational calculation driven by hedonism as assumed by classic utilitarianism.

Giddens, Bourdieu, and other pillars of twentieth century social theory argue similarly: behaviour and human action happen through structures, through sets of norms and values that are already present in society before we are born and many of them continue to exist without major changes after we die. Individuals learn to behave through socialization and normalization processes (family, school, work, prison, etc.). Contemporary social scientists fairly agree on the existence of a process of introjection and/or incorporation of social norms and values into the body/self (individual subjectivity). However, they have obviously different positions on how such processes occur. Their positions on how human beings are socialized vary mainly from school of thought or research area to another as each will put more emphasis on his or her own approach. For instance, the way a sociologist will conceptualize it will not be the same as an anthropologist or a psychologist, but even in the same disciplinary context they will vary marginally (e.g., constructivists and interactionists in sociology or behaviourists and cognitivists in psychology). In other words, social scientists will agree that there is somehow a socialization (to use George H Mead’s term)⁵⁵ or normalization process (to use Norbert Elias’s and Michel Foucault’s concepts),⁵⁶ but they disagree on how this happens. That hedonism is part of human nature and that individuals intrinsically make utilitarian calculi aiming to maximize pleasure and minimize pain is simply an assumption that is not backed by most contemporary behavioural theories. Certainly utilitarian reasoning is popular in Western cultures and fairly common in the legal

Constitution of Society: Outline of the Theory of Structuration (Cambridge: Polity Press, 1984).

54 Giddens, *Central Problems*, above note 53 at 5.

55 George H Mead, *Mind, Self, & Society from the Standpoint of a Social Behaviourist* (Chicago: University of Chicago Press, 1962).

56 Norbert Elias, “On Transformations of Aggressiveness” (1978) 5:2 *Theory & Society* 229; Norbert Elias, *The Civilizing Process* (Oxford: Blackwell, 2000); Michel Foucault, “Truth and Juridical Forms” in *Power: Essential Works of Foucault, 1954–1984* (New York: New Press, 1974); Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995).

and economic fields. But this reasoning cannot be applied indiscriminately to all. Opposing utilitarianism rationality, we can argue that most people refrain from engaging in deviant activities because they adhere to social norms (e.g., “killing is not good”) and not because of the potential sanctions involved. These socialization processes are so powerful that, for instance, when someone enters the army he or she will have to learn, will have to normalize, the killing of other people.⁵⁷

Deterrence theory will generally disregard socio-anthropological scholarship on this topic. Deviance is a normal human behaviour present in every society as Emile Durkheim, one of the founding fathers of sociology, pointed at the end of the nineteenth century in *The Rules of Sociological Method*.⁵⁸ Actually, he goes even further and argues that deviance reinforces social norms and supports the progress and development of society (i.e., the role of individual genius). Fifty years later, Claude Lévi-Strauss argued analogously in the anthropological field,⁵⁹ pointing to the importance of the other, taboos, and interdictions to reaffirm the identity of a group (or of individuals). Social-constructivists and symbolic-interactionists in the 1960s and 1970s (labelling theory)⁶⁰ added that society creates deviancy since what is normal and deviant is ultimately a social construct and the result of different (institutional) processes that classify and reclassify a given act as acceptable or not. Back to the “killing is not good” example, labelling approaches taught us that the meaning of the act of killing is socially constructed depending on the social context, and is not derived only from the act itself. For instance, killing may be labelled as deviant (murder) or, in the other extreme, as a desirable behaviour (war hero). More contemporary critics like Jack Katz⁶¹ examine how emotions and other non-utilitarian rationalities play a determinant role in deviance. Katz has shown that it is

57 Stanley Kubrick's *Full Metal Jacket* (1987) is a good cinematographic representation of this.

58 Émile Durkheim, *Les règles de la méthode sociologique*, 23d ed (Paris: Flammarion, 1987); the original edition was published in 1894.

59 See, especially, Claude Lévi-Strauss, *The Elementary Structures of Kinship* (Boston: Beacon Press, 1969) and Claude Lévi-Strauss, *Structural Anthropology* (New York: Basic Books, 1963).

60 See, for example, Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (London: Free Press of Glencoe, 1963); Erving Goffman, *The Presentation of Self in Everyday Life* (London: Allen Lane, 1969); Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs: Prentice-Hall, 1963); David Matza, *Becoming Deviant* (Englewood Cliffs: Prentice-Hall, 1969).

61 Jack Katz, *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* (New York: Basic Books, 1988).

cool to deviate, to do evil, especially when you are young,⁶² and in that sense the poor and the rich alike are emotionally driven and can commit crimes when they are seduced in a given context.⁶³

The bottom line is that no one has the *Criminal Code* as a pillow book, not even criminal law professors or practitioners. Supposedly, even if a potential offender knew the *Criminal Code* by heart, it would certainly not mean that she or he would rationalize the process of committing (or not) any criminalizable acts in function of the eventual sanctions that may be imposed. Thus, assuming that non-commercial users will stop to think about statutory damages before copyright infringement is simply naïve, and yet, it is a fiction or myth shared in the legal field.⁶⁴ Even if one can make a statistical relation between harsher statutory damages and conforming to IP and copyright regulations, there are so many other variables at play that it is virtually impossible to establish a causality link between these two variables.

We argue that users are adhering to a way of experiencing art and intellectual work that is shaped and driven by mass consumption since the beginning of the twentieth century. As Walter Benjamin argued in his famous essay, “The Work of Art in the Age of Mechanical Reproduction,” “mechanical reproduction of art changes the reaction of the masses toward art.”⁶⁵ It makes a lot of sense that users educated by a cultural industry favouring copies will end up copying as well.⁶⁶ We were socialized to consume copies as originals and today, in an age of electronic reproduction, consumers have

62 Men account for 80 percent of adults charged, and most accusations occur when people are aged sixteen to twenty-five, peaking around eighteen: see Shannon Brennan, *Police-Reported Crime Statistics in Canada, 2011* (Ottawa: Statistics Canada, 2012) at 20–21, online: Statistics Canada www.statcan.gc.ca/pub/85-002-x/2012001/article/11692-eng.pdf. These numbers are fairly stable when considering previous reports and they should not be interpreted essentially as deviant behaviour because young males are fairly over-policed and profiled, resulting in more charges to this population group.

63 Katz, above note 61.

64 For the uses of rational choice theories in criminal law and critiques to how such discourses are used by actors in the criminal justice system, see, for instance, Bernard E Harcourt, *Illusions of Order: The False Promise of Broken Windows Policing* (Cambridge: Harvard University Press, 2001); Bernard E Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007); André Jodouin & Marie-Eve Sylvestre, “Changer les lois, les idées, les pratiques: Réflexions sur l’échec de la réforme de la détermination de la peine” (2009) 50:3-4 C de D 519; Marie-Eve Sylvestre, “Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice” (2010) 55:4 McGill LJ 771.

65 Walter Benjamin, *Illuminations* (New York: Schocken, 1968) at 234.

66 Professor Lawrence Lessig of Harvard Law School uses the term “Remix Culture” to describe the modern society where the creation through copying is not only permitted,

more than ever the means to copy on their own. Non-commercial users adhere to these norms, but they are not in accordance with the legal norms that regulate copyrights, making these users deviants. Users copy because they learn to copy and they see it as a normal, acceptable behaviour.⁶⁷ This being said, punishment is probably the least effective strategy to changing behaviour and educational strategies would be more effective to prevent infringements.⁶⁸ Finally, even if deterrence theory worked, its asymmetric incorporation in the copyright regime is highly problematic as we are going to explain in the next subsection.

2) The Mismeasure of Punishment: Limits and Effects of Unusual Punishment

Deterrence theory is related to criminal law, in that both examine how we can justify punishment and under what circumstances the state may inflict pain on its citizens. However, mandatory minimum damages for copyright infringement, as discussed in the first part of the chapter, are applied outside of a normative system with the same guarantees that were historically earned in criminal law. Moreover, it is always good to remember that deterrence theory emerged anchored in Humanistic/Enlightenment values, aiming to reduce or at least setting limits to the sovereign and in reaction to the doctrine of maximum severity.⁶⁹ The doctrine of maximum severity

but encouraged: Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008).

- 67 John Palfrey et al, "Youth, Creativity, and Copyright in the Digital Age" (2009) 1:2 *International Journal of Learning & Media* 79 at 86–89.
- 68 For instance, in the United States in 2003, the Recording Industry Association of America (RIAA) started a vast litigation campaign against some 3,500 individual peer-to-peer users. It was said that the campaign was quite effective in increasing awareness of the illegality of file sharing but that its deterrence effect was debatable. The campaign was quite unpopular among the public and RIAA did put an end to it in 2008. See Will Moseley, "A New (Old) Solution for Online Copyright Enforcement After Thomas and Tenenbaum" (2010) 25:1 *Berkeley Tech LJ* 311 at 331–34; Ben Depoorter, Sven Vanneste, & Alain Van Hiel, "Copyright Backlash" (2011) 84:6 *S Cal L Rev* 1251 at 1255; Ernesto, "Filesharing Report Shows Explosive Growth for uTorrent" (26 April 2008), online: [TorrentFreak http://torrentfreak.com/p2p-statistics-080426/](http://torrentfreak.com/p2p-statistics-080426/).
- 69 The concept of doctrine of maximum severity was coined by Leon Radzinowicz to describe the indiscriminate use of severe punishment and the proliferation of capital sentences in the eighteenth and early nineteenth century in Britain. See Leon Radzinowicz, *History of English Criminal Law and its Administration from 1750*, vol 1 (London: Stevens and Sons, 1948); see also Alvaro Pires, "La doctrine de la sévérité maximale au

states that the only way to control deviance is through severity and strict enforcement (to punish more and more and to punish all offenders).

Radzinowicz suggested that a good historical example of this reasoning is found in the set of norms known as the “The Bloody Code” in England. At the beginning, there were merely fifty offences punishable by death. Yet, it was not enough to deter deviance, and “crime” rates were increasing. The answer was to punish more and more and punish all offenders. A century later, 200 offences were punishable by death. As a result, not only was there more crime, but the crimes committed were also more serious. The classic politically incorrect joke usually told in criminology classes goes as follow: if almost every deviant act was punished by death and people followed the rational-choice frame of mind, the offender would not only steal a horse, but also kill the owner, burn the farm, and get rid of all the witnesses. Obviously, it does not make any sense, and today the doctrine of maximum severity is used much more as an example of how severe punishment simply does not work and has no deterrent effect beyond neutralizing the offender him/herself.

In response, deterrence theory interestingly suggested that what deters crime is a just measure of pain through proportional and prompt punishment.⁷⁰ By that we mean, proportional and prompt in criminal law terms: proportional to the responsibility of the offender and the nature of the offence, and assuming that individuals are punished in a timely fashion while having the right to a minimum set of legal guarantees before being punished. It is important to note that Bentham himself argued that unnecessary laws and excessive punishment could lead to more dangerous evils and that the utilitarian calculus should be made in societal terms.⁷¹ This is not the case in copyright law, especially regarding the use of statutory damages. The range of damages is not proportional to the fault; individuals accused of infringements have less guarantees than they would have in criminal

siècle des lumières” in Christian Debuyst, ed, *Histoire des savoirs sur le crime & la peine*, vol 2 (Bruxelles: Larcier, 1998).

70 See Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Oxford: The Clarendon Press, 1876) [Bentham, *Introduction*]; Jeremy Bentham, *Theory of Legislation* (London: Trubner, 1876); Cesare M di Beccaria, *An Essay on Crimes and Punishments* (London: F Newbery, 1769); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (New York: Pantheon Books, 1978); Nils Christie, *Limits to Pain* (Oxford: Martin Robertson, 1982).

71 See Bentham, *Introduction*, above note 70: the calculus should address if a given law and/or punishment is causing more pleasure or more pain for the collectivity.

law, and one can really question to what extent punishment of non-commercial minor copyright violations is bringing more pleasure or more pain for society. When analyzed cautiously, the overpenalization through statutory damages looks much more like the *doctrine of maximum severity* than *deterrence theory* and this excessive (non-proportional) and arbitrary (less legal guarantees) punishment may simply lead to an escalation of deviance (e.g., from illegal downloading to file sharing), either because individuals are hedonistic and rationally driven (utilitarianism) or because they are not adhering to copyright norms taken as illegitimate and/or not reasonable (contemporary behaviour theories).⁷²

D. CONCLUSION

The Canadian statutory damages regime, while helping copyright owners to obtain compensation for their losses, also purports to deter future infringements. In reality, the effectiveness of the regime to deter copyright violations is questionable. Deterrence theory is based on outdated utilitarian assumptions of human behaviour and it has consistently been proved ineffective by empirical studies. The *Copyright Act* sets the minimum and maximum awards of statutory damages, which can result in overpenalization or underpenalization of defendants, punishing not proportionally either excessively or not enough to compensate copyright violations. Because the regime operates in civil settings, it ignores most of the safeguards and protective rights elaborated in the criminal proceedings. When dealing with non-commercial minor infringement, it operates more along the premises of the doctrine of maximum severity and could actually lead to an escalation of deviance and copyright violations. A more productive avenue could be to study how individuals internalize social norms and why this normalization of copyright compliance is not occurring in our electronic cultural age.

72 Two empirical studies conducted in the United States seem to confirm that stringent sanctions tend to increase the rate and frequency of infringing activities; Depoorter, above note 68 at 1267–72 and 1287–90.