“The System of Copyright” – by Meera Nair, Ph.D.


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This chapter was written during a time of flux in Canadian copyright. The *Copyright Act* was due for amendment (through Bill C-32 and its later reappearance as Bill C-11) and the Supreme Court of Canada was set to review five cases concerning copyright. The amendments received royal assent on 29 June 2012 and the Supreme Court released its decisions on 12 July 2012. With much-appreciated latitude from the editor and publishing team, the chapter was updated at the eleventh hour of the production schedule to reflect the broadening of perspective regarding copyright in the new millennium. (Although, some aspects of Canadian policy making remain the same.)

I offer my thanks to Leslie Regan Shade for inviting me to contribute to *MediaScapes*, and to the staff at Nelson Education for their assistance. Any errors are entirely my own.

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Five Stories

1. It was predicted in the late 1990s that file-sharing would be the death of the music industry.\(^1\) The industry has changed, but it is alive and well, with online digital sales thriving. In December 2011 music industry associations made arguments to the Supreme Court of Canada that the use of 30-second music previews – as provided to encourage digital music sales – should be subject to payment.

2. In 2006 a Canadian student created the *International Music Score Library Project* – a legitimate online repository of public domain music. Yet the project has been repeatedly targeted for lawsuit by European music publishers. Those publishers felt it was the student’s responsibility to abide by European copyright law, replete as it is with a longer term of copyright.

3. An art student came to me with a question. She had concerns about posting pictures of her work into Facebook; she did not care for the requirement that she grant Facebook a license to use her work as it saw fit. Knowing that copyright is imperfect, she still wanted to share her work with family and friends, and, promote herself in the art world. But she felt ill-equipped to go it alone with the *Copyright Act*.

4. A YouTube work I enjoyed watching was a video created in tribute to skater Michelle Kwan. With the hope that Kwan would participate in the 2010 Vancouver Winter Olympics, the author prepared a promotional video for her. Composed of excerpts taken from televised sports coverage, set to popular music and interspersed with elegant captions, the effort exemplified how prior work can be incorporated to create something original in its own right. But the video was removed from YouTube on the charge of copyright infringement.

5. A revised edition of Mark Twain’s work *Huckleberry Finn* appeared on the market in 2011. Twain’s original prose was altered – the word *nigger* was replaced with *slave* (Bosman, 2011). Public reaction was not universally favourable\(^\text{ii}\) but actions of the editor and publisher are entirely legitimate – as the term of copyright has long since passed, anyone may redact, edit, and republish Twain’s work.

Copyright is neither the rogue nor hero of creativity in the digital age. Copyright is only a policy instrument, first enacted to regulate commercial print activity but now also capable of regulating individual behavior. This chapter is not a comprehensive description of the entire realm of copyright; it can only acquaint readers, in broad brushstrokes, with some of the aspects of copyright that touch us in the pursuits of learning, creativity and sharing.
I. The system of copyright

The word, *copyright*, seems intuitively obvious in meaning. Quite simply, copyright is the right to copy. But this literal translation masks an intriguing system of limited rights offered to both copyright holders and copyright users. The rationale for the system is often described as encouragement – that copyright assists in fostering creativity to the benefit of society at large by allowing individual creators to control their work. That claim has both defenders and detractors. Without control, authors, artists and musicians will not be able to support themselves. The rebuttal is that developments in literature, art and music could not occur but for the tradition of borrowing from, or building upon, past works. The ideal atmosphere for creativity likely resides between these two endpoints.

Copyright falls within the phenomenon known as intellectual property. Broadly speaking, intellectual property represents the means by which the rights to intellectual creations are controlled. But the language of “property” is misleading. Those who wish to expand the rights of control argue that since physical property rights grant absolute control, so too should intellectual property rights. Yet an intellectual creation is intrinsically different from a physical entity. And, even if one is willing to overlook the flawed analogy, it remains that physical property rights are limited. The most revered physical property right – land ownership – does not provide complete control to the titleholder. Building codes, zoning requirements, and environmental laws set public wellbeing ahead of the independence of the land-owner.

A structural design element of the notion of “rights” is that of limitation. Said another way, all rights are accompanied by a requirement not to abuse the right to the detriment of society. To determine where to draw the line between rights and limits requires an understanding of what the purpose of the right actually is. This causes some confusion for copyright in Canada – the Copyright Act was never given a purpose. This lies in stark contrast to the United States, which has a constitutionally enshrined purpose for intellectual property rights: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings.” But drawing from the influences of both our English and French forbears, we can informally superimpose an objective upon Canadian copyright:

To further the process of creativity to the benefit of creators and society alike.

Yet the contemporary political focus in copyright is about controlling the flow of digital works on the Internet; such focus only distorts discussion. Some industry associations have successfully convinced law makers in many jurisdictions that piracy is running rampant, artists are starving, and the only means to address these failings is an ever-increasing scope of copyright.

Fortunately, public engagement with the subject of copyright is growing. In 2012, American lawmakers were preparing to adopt legislation known as, *Stop Online Piracy Act* (SOPA). Opposition grew steadily as people became aware that the new law could undermine freedom of expression and legitimate business operations. On 18 January

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2012 websites around the world went dark to show support for curbing excessive expansion of copyright.

Canadians too are showing a steady growth in engagement with the subject of copyright. A public consultation on copyright in 2001 netted less than 700 letters, including form letters (Canada, 2002); a public consultation in 2009 brought in thousands of independent submissions. Many Canadians are aware of the importance of copyright in the digital age; as our ability to engage with creative effort expands with the reach of the Internet, so too does the implication of copyright upon our personal lives.

II. What does copyright do?

Copyright protects the expression of an idea. Ideas themselves cannot be copyrighted, and neither can instrumental building blocks such as facts or data. But for original expressions of literary, dramatic, artistic or musical nature, copyright is a set of rights that control the diffusion of those expressions (also known as works). Copyright law also addresses elements beyond these works – broadcast signals, performers’ performances, and sound recordings all have special stature under the Copyright Act. But the discussion in this chapter pertains only to creative effort that can be written, drawn, composed or shaped.

Literary works have a wide range, including books and pamphlets, poems and computer programs. Dramatic works can range from a Stratford Festival production to a radio commercial to an amateur video posted on YouTube. Artist works run the gamut from drawings and paintings to maps and building plans. Finally, musical work includes compositions of music, with or without accompanying lyrics. For all instances of copyright, the protection is immediate – no formal registration or application is required.

The rights embodied in copyright are first granted to the author(s) of eligible works but may be transferred to other parties. The rights are limited in time; when the term of copyright expires, the work is open for any purpose, by any person. The rights are also limited in space – even when a work is protected, there are exceptions that permit some uses of the work under certain circumstances. Said another way, exceptions to the rights of copyright owners are rights in the hands of copyright users.
Copyright in works

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right:

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other nondramatic work

(\textit{f}) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

\ldots

and to \textit{authorize} any such acts.

Conditions for subsistence of copyright

5.1 Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met ... 

Term of copyright

6. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.

Where copyright belongs to Her Majesty

12. Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty ...

Ownership of copyright

13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

Infringement generally

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

“Copyright does not arise when copying insubstantial amounts of a work. “Substantial” is not defined.

“All material form” indicates that the Act applies to any media – the language is technological neutral.

In total, ten clauses are stipulated in Section 3.1.

“communicate … to the public by telecommunication” was amended in 2012 to ensure that decisions to make content available online are clearly included in the scope of the exclusive rights of copyright holders.

Authorization need not always be explicit; depending on the situation at hand, authorization could be implicit.

“Original” is not defined.

While Canada enjoys a term of life-plus-fifty, other jurisdictions have moved to life-plus-seventy.

Crown copyright is an artifact from copyright’s precursor of 16th century censorship. Not all countries held onto this form of state control; from infancy on the United States resisted Crown copyright.

Copyright was forged ostensibly to protect authors, yet the figure of the author has little prominence in the Act. The author is only a referential point: the first person to own the copyright of a work.

The corollary is that copyright owners’ scope of control is confined to only those rights defined by law. While Section 3.1 is extensive, it does not include the right to negate existing limitations.
III. The Public Domain

Copyright cannot be explained purely by reference to the language of its law. Copyright takes form only when set against the backdrop of the public domain. But no other phrase in the copyright lexicon is more prone to misunderstanding. Credible scholars across many disciplines portray the public domain as composed only of material whose copyright term has expired. This is unnecessarily restrictive. At the other end of the spectrum, the public domain is seen as any material that can be accessed publicly. Whether that access is paid for, or free, is deemed irrelevant. This interpretation is far too generous.

Jessica Litman (1990) writes: “… The most important part of the public domain is a part we usually speak of only obliquely: the realm comprising aspects of copyrighted works that copyright does not protect” (p.976). This means, among other things, that a copyrighted work accessed in accordance with legitimate exceptions is public domain material. The bulk of the public domain comes into existence, not by virtue of time, but by the use made of a work.

Think about it. Every book, every image, every film, every strand of music – every creative expression is potentially public domain material.

This conceptual view of the public domain is not confined to Litman’s interpretation. For instance, The Center for Study of the Public Domain at Duke University – a highly reputable centre in the world of law – describes the public domain as: “…the realm of material—ideas, images, sounds, discoveries, facts, texts—that is unprotected by intellectual property rights and free for all to use or build upon” (Duke University, n.d.). But for those who wish for more forceful institutional support, consider this:

Public domain: … it means from a copyright aspect the realm of all works which can be exploited by everybody without any authorization, mostly because of the expiration of the term of protection (emphasis mine, WIPO Glossary 1980, p.207).

The inclusion of “mostly” indicates that the World Intellectual Property Organization is aware that there are measures within the law which remove the requirement of authorization. These are known as exceptions.

On January 1 of each year, works whose author passed away in the fiftieth preceding year become unencumbered by copyright in Canada. The website publicdomain routinely lists the gains. Europeans and Americans are not so fortunate; with copyright terms of life plus seventy, coupled with past policy decisions to avoid copyright expiry, fewer works are available in those regions. On 31 December 2011, the avant garde archive, Ubu-Web, celebrated the arrival of James Joyce’s work into the EU with a very colourful Tweet to Stephen Joyce, reminding the heir of James Joyce that the work of his grandfather could now be enjoyed by all of Ireland (O’Connell, 2012).

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IV. Exceptions

The rights embodied through copyright are intended to control distribution of both the original form of a work and any recreation of that work in a different expressional form (i.e., through translation, from dramatic work to novel, from literary creation to sound recording, etc.). But with the control of distribution rights, the system of copyright offers exceptions to distribution rights. Some allowances of reproduction of copyrighted work are permitted; some allowances are also permitted for reproduction in different formats. Generally speaking, these exceptions are designed to serve institutional distribution, where institutions are entities such as schools or telecommunications’ providers. Exceptions to distribution are very precisely worded and must be handled with care.

However, there is a very important flexible exception that is designed, not to facilitate distribution, but to facilitate creativity. This exception is known as Fair Dealing.

Fair Dealing

Fair dealing permits some unauthorized uses of copyrighted material, under certain conditions. It is not an invitation to copy without restriction. For most of Canada’s formal copyright history, fair dealing only applied to the activities of research, private study, criticism, review, and news reporting. Conditions are attached to fair dealing. For instance, citation is important. So too is careful consideration of the amount copied. Decisions of fair dealing require a two-step process of analysis. First, does the use of the work fall within the accepted list of purposes? Second, was the dealing fair? That second question can only be answered by a comprehensive exploration of each situation. This framework of inquiry was promoted by the Supreme Court of Canada in 2004, via a case often referred to as CCH Canadian.

CCH Canadian addressed a number of issues but is best known for its handling of fair dealing. Writing for a unanimous court, Chief Justice Beverley McLachlin stated: “In order to maintain the proper balance between the rights of a copyright owner and users’ interests, [fair dealing] must not be interpreted restrictively. … As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available” (CCH 2004, para. 48-49).

In CCH Canadian the copying under scrutiny was very modest. Upon request, the Great Library of the Law Society of Upper Canada would reproduce single copies of material related to legal research and convey the material to the patron via print or facsimile. A number of legal publishers claimed this behaviour as infringement, but the Supreme Court found that the library’s practices were in accordance with fair dealing. Their decision in part rested on the fact that the Great Library had developed a set of internal guidelines whereby patron requests were reviewed against a consideration of fairness.
The legacy of *CCH Canadian* is twofold:

i) The encouragement offered by the Supreme Court of Canada to make good use of the exception of fair dealing (that it is vital to a well-functioning system of copyright).

ii) The guidance offered by the Supreme Court of Canada towards a widespread understanding of how to use fair dealing.

The Justices emphasized that each examination of fair dealing must be judged by a comprehensive examination; decisions of fair dealing should include inquiry as to the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives for the dealing, the nature of the work, and the effect of the dealing on the copyrighted work. They also made it clear that not every question will be relevant in all situations and, in some situations other questions may arise. In short – each situation is unique and must be examined on its own merits.

Turning again to the Copyright Act, consider the language of fair dealing.

Research, private study etc.,

29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

Criticism or review

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(a) the source; and
(b) if given in the source, the name of the
   (i) author, in the case of a work,
   (ii) performer, in the case of a performer’s performance,
   (iii) maker, in the case of a sound recording, or
   (iv) broadcaster, in the case of a communication signal.

News reporting

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(a) the source; and
(b) if given in the source, the name of the
   (i) author, in the case of a work,
   (ii) performer, in the case of a performer’s performance,
   (iii) maker, in the case of a sound recording, or
   (iv) broadcaster, in the case of a communication signal.

Fair dealing is often decried for its imprecision. People would prefer the comfort of being told precisely what can, or cannot, be done. Yet as no legislator, creator, consumer, or user can precisely define the creative process, it is reasonable that an exception intended to support the creative process should lack precision too. The best the law can do is maintain some degree of flexibility when considering an unauthorized use that may serve the objective of fostering creativity.

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Fair Dealing is not Fair Use

Canada’s close relationships with American cultural industries occasionally lead to some confusion in understanding copyright law. While the two countries share the predominantly Anglo-American structure of copyright, there are important differences.

Fair use is the American parallel to fair dealing; both exceptions allow for some unauthorized reproduction of copyrighted material. The critical difference between the two is the elasticity of the American language. Fair use is coded as allowing unauthorized reproduction of copyrighted material “for purposes such as…” followed by an illustrative set of purposes (i.e. criticism, comment, scholarship etc.). The merit of the American structure is that it permits all uses an opportunity to be evaluated on fairness. As the Supreme Court of Canada continues to promote a liberal interpretation of fair dealing, Canadian fair dealing may reach the flexibility of fair use.

Also encoded within American law are four factors that should be considered when determining fair use (17 USC 107):
   (i) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
   (ii) the nature of the copyrighted work;
   (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
   (iv) the effect of the use upon the potential market for or value of the copyrighted work.

These factors are very similar to the framework advocated by the Supreme Court of Canada in CCH Canadian. However, what sets Canada apart from the United States is that our Justices emphasized that the framework for consideration may change depending on the situation, and, the potential market-impact was not the dominant concern (CCH 2004). The prior rigidity of application of the fair use factors in the United States led to some challenges there (Nair 2010); with the foresight of our Supreme Court, Canada is well-positioned to avoid those challenges.
More exceptions

A welcome measure within the Copyright Act expressly facilitates documentary work, whether by photograph or film. This allowance relieves Canadian documentarians of some of the excessive clearance-demands made of their American counterparts.

Incidental use

30.7 It is not an infringement of copyright to incidentally and not deliberately

(a) include a work or other subject-matter in another work or other subject-matter; or

(b) do any act in relation to a work or other subject-matter that is incidentally and not deliberately included in another work or other subject-matter

This eliminates the need to clear rights in, for example, logos and trade-marks, music (including mobile phone ring tones), and billboards that might appear in a street scene (Documentary Organization of Canada 2010, p.6).

The Documentary Organization of Canada (DOC) has worked steadily to educate its members about copyright and exceptions, and good practices that facilitate the ability to obtain Errors and Omissions Insurance. DOC began this work in 2005, with a survey of its members and sought to investigate how fair dealing might apply to copyright. In 2006 DOC commissioned a White Paper from attorney Howard Knopf that led to collaboration with University of Ottawa’s Canadian Internet Policy and Public Interest Clinic (CIPPIC). DOC published Copyright and Fair Dealing: Guidelines for Documentary Filmmakers in May 2010.

DOC astutely recognized that guidelines alone cannot achieve understanding and so in 2011 undertook a Fair Dealing Roadshow across the country. A complete report is available from the DOC website.

And a useful, but little known, exception allows the reproduction of publicly situated art or architecture.

Miscellaneous

32.2 (1b) It is not an infringement of copyright for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work

(i) an architectural work, provided the copy is not in the nature of an architectural drawing or plan, or

(ii) a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building

Controversy ensued when a Vancouver businessman sold photographs of Ken Lum’s work Monument for Vancouver. Lum’s inspiration came from a crossword arrangement that has long circulated in Vancouver. Yet as the circulation included use by the Hells Angels, a former associate of the group protested the sale of the photographs and cited copyright registration with the Canadian Intellectual Property Office (Bolan, 2011).

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User-Generated Content (UGC)

In 2012 the Federal Government added an exception to the Copyright Act. Known as the YouTube exception, this measure appears designed to bolster legitimacy for the individual creativity that is possible through consumer digital technology. The exception permits individuals to incorporate copyrighted material into new works, when those new works are intended for non-commercial purposes. However, Canadians should remember that this provision would not apply to YouTube as our Copyright Act has no standing outside of Canada.

Non-commercial User-generated Content

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if:

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

The usefulness of the YouTube exception was questioned from its unveiling. The emphasis that the input components are not a consequence of copyright infringement is likely to be violated by the amateur creators for whom the exception is intended – suggests the exception is an empty gesture. Moreover, the absence of any support to professional creators cannot be ignored. Martha Rans, Director of the Artists’ Legal Outreach Centre, said:

Josh Hite, a Vancouver media artist, made a video “chug chug chug” based on clips he found on Youtube. The exception, as drafted, makes it no easier for him to show the video at a festival. We are, however, seeing best practices emerge that respect the original creators and do not penalize users. It seems to me worthwhile to avoid unnecessary legislative intervention that could slow that process. In the US, Getty Images, one of the most significant owners of copyrights in visual work, is currently hosting a Mishmash competition. It invites and enables people to upload images from

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its digital archive and remix them. This suggests to me that copyright holders like Getty have adapted to the new digital landscape.

We need a copyright regime that enables artists to create transformative works. At the Vancouver Art Gallery right now you will find First Nations artists such as Sonny Assu and Jackson two Bears whose work borrow liberally from everything around us to make their work and speak to their people and their relationship to the world. That is the foundation of much art making. I was recently asked by an internationally respected Canadian painter whether a work of his that transforms images of an 80's pop icon could be exhibited in the public library. The contract required him to represent that there was no potential copyright infringements. He could not sign it and the work was not displayed (Rans, 2012).

Only time will tell if this provision for user-generated content will facilitate or impede creativity. All that can be said now is it offers the potential for emphasizing the collaborative nature of the creative process and acknowledges the growth of such production through digital technology and world-wide networks. For most of copyright’s 300+ year history, battles were fought between rival publishers. But the individual became implicated in the digital age. In the absence of modifying fair dealing to accommodate “for purposes such as”, the UGC exemption is promising action by the Federal Government to ensure that Canadians who practice creativity are not immediately deemed in violation of copyright. Much will depend on the practices that come forth, and the willingness (or lack thereof) of copyright holders to support creativity among nascent creators.

Also added in 2012 were exceptions for reasonable uses of legitimately acquired content. Consumers are permitted time shifting of television programs, in order that the programs can be enjoyed at times of the consumer’s choosing. Similarly, legitimately acquired content could be copied to use on a different device. A general provision to permit creating backup copies of content to guard against damage or loss was also introduced in 2012. But a key theme underwrote the 2012 amendments; infringement was extended to cover the act of circumventing a technological protection measure. This means that content can be locked to a particular media and device, and, unlocking the device is considered infringement. It will be to the discretion of copyright holders to determine if Canadians can actually enjoy the exceptions granted by law.
V. International Pressures

The introduction of protection for digital locks remains a divisive issue in Canada. A public consultation preceded the 2012 amendments; thousands of Canadians expressed opposition on this matter. Protecting a lock distorts any meaningful claim to balance in the Copyright Act; exceptions that can only exist on paper are hardly worth the paper they are written on. Eventually, the Federal Government admitted that such protections do impede legitimate exceptions but justified the protection alternately by reference to Canada’s international obligations and the option of consumers to avoid such encumbered products.\(^\text{vii}\)

A principal motive for amending Canadian law was to enable Canada to ratify two international treaties: the Copyright Treaty and the Performances and Phonograms Treaty. These treaties were negotiated through the World Intellectual Property Organization (WIPO) in 1996. Canada was under no obligation to ratify the treaties; although there was some political imperative vis-à-vis the United States.

The treaty language surrounding the digital locks was an outcome of intense debate among many countries (Geist, 2010). The treaties themselves allow some measure of individuality in implementation – many countries have limited protection for locks only to actual infringement. However, the Federal Government sought instead to follow the model provided by the United States in 1998, known as the Digital Millennium Copyright Act (DMCA). And although the United States has since repeatedly softened its stance on digital locks, Canada’s copyright law does not reflect the broader understanding within the United States today.\(^\text{viii}\)

The WIPO Treaties must be seen in the context of the atmosphere of the late 1990’s. File-sharing had emerged and the music industry reacted strongly. This, despite the fact that historically all media developments have brought fear and fortune (in that order) to the entertainment sector (Bettig 1996; Litman 2001). Despite the evident growth of the music industry, particularly the growing sales of online music, global policy making efforts to strengthen copyright continues. But where such negotiation previously occurred in an open form such as WIPO, contemporary negotiations are closed-door affairs. At the time of writing, the Anti-Counterfeiting Trade Agreement (ACTA) and the Trans-Pacific Partnership (TPP) are under discussion.

Lost in the perennial global effort to expand copyright is discussion of moral rights. Many people are aware of the mechanism of copyright, but are unaware of another set of rights offered to creators of intellectual works: moral rights. The topic does not easily invite interest – “moral rights” sounds distinctly pious. The English translation does not fully capture the meaning of the rights. The term came from France, as droit moreaux – which is better translated as personal or intellectual rights (Vaver 2000, p.158).
VI. Moral Rights and Creative Commons

Moral Rights
Moral rights arose out of the European civil law approach concerning the protection of intellectual effort and the creators of that effort. Moral rights are rooted in the belief that any kind of intellectual creation carries with it an extension of the creator’s soul. When we write, or draw, or compose music, we are giving something of ourselves in that process. Thus an assault on the creation is as reprehensible as an assault on the physical being of the creator. Moral rights were conceived as a means to protect that emotional connection between art and artist.

Moral rights
14.1 (1) The author of a work has subject to Section 28.2 the right to the integrity of the work and ... where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

No assignment of moral rights
(2) Moral rights may not be assigned but may be waived in whole or in part.

No waiver by assignment
(3) An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.

Term
14.2 (1) Moral rights in respect of a work subsist for the same term as the copyright in the work.

Infringement generally
28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

Nature of right of integrity
28.2 (1) The author’s right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution.
(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.
(3) For the purposes of this section,
(a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or
(b) steps taken in good faith to restore or preserve the work shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

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An often used illustration of moral rights is *Flight Stop* by Michael Snow. The work, composed of sixty fiberglass geese, is installed in Toronto Eaton Centre. When the Centre decorated the geese in connection to their 1982 Christmas season, Snow sought redress through the courts. Although the language of the law then was less supportive of artists than our current *Copyright Act*, Snow was successful and the Centre removed the decorative ribbons added around the geese’s necks. The win was surprising; artists had not enjoyed a high success rate with regard to protecting moral rights (Vaver, 2000, p.162).

Not every country observes Moral Rights; notably the United States does not. Instead, in 1990, the Visual Artists Rights Act added limited moral rights protection in American copyright law. The protection only applies to certain classes of arts; *i.e.*, a photographic image that exists in single copy only or limited edition prints and sculptures. The United States has openly resisted inclusion of moral rights; such control by the artist could interfere with the full gamut of market potential (Murray & Trosow 2007, p.65).

Yet, even without widespread formal recognition in law, a development known as Creative Commons (CC) has, perhaps inadvertently, brought one aspect of moral rights closer to universal acceptance.

**Creative Commons**

Creative Commons (CC) offers individuals an alternative to the contemporary grant of copyright. A CC license operates under the principal of “Some rights reserved” with individuals free to distribute their work under conditions of their own choosing (*i.e.*, Is commercial reproduction permitted? Is attribution necessary? Is derivative work permitted? And should these conditions be fostered through the derivative work?) As the operation gained followers, it became evident that attribution was a prominent concern. As a consequence, all CC licenses require attribution (unless the author declares otherwise).

Creative Commons suffers from the same challenge as copyright – that the license can be abused. However, courts have demonstrated that the licenses are enforceable and individuals may opt for legal redress. (That the courts are inaccessible to the broader population is a separate issue). The movement continues to grow, spanning 70 countries. With participation emanating from the White House, the World Bank, countless academic repositories, and commercial players, the story is worthy of a book unto itself.
VII. Concluding Thoughts

“Responsible Communication” Journalists and Bloggers

In a 2009 decision concerning defamation, the Supreme Court of Canada emphasized the importance of “responsible communication on matters of public interest”, gave a broad foundation to “public interest”, and offered the defense to journalists and non-journalists alike. The Court did not focus solely on the truth or falsity of information but also upon the conduct of the writer to uncover the truth. In a manner reminiscent of *CCH Canadian*, Chief Justice Beverley McLachlin prescribed a multi-facetted inquiry to assess how such stories are produced (*Grant v. Torstar*).

Far beyond the concern of defamation, this bodes well for all Canadians. The essence of fair dealing lies in responsible conduct. That our high court places emphasis upon public interest further supports fair dealing in an exercise of journalism, whether by professional journalist, or citizen blogger. News reporting already being a category in fair dealing, what must be followed are attribution and a thoughtful assessment of the included material. Fortunately, Canadian case history offers an illustration of fair dealing, both literally and figuratively speaking.

Prior to *CCH Canadian*, a surprising win for fair dealing concerned the reproduction of an image in a contemporary news story. In *Allen v. Toronto Star* (1997), photographer Jim Allen objected to the reproduction of a cover from *Saturday Night Magazine* that included his photograph of then-MP Sheila Copps. The 1985 cover showed Copps attired in black motor cycle leathers and seated astride a Harley Davidson; the *Toronto Star* story used the cover as a contrast with Copps’ more sedate image in 1990. Although Allen won at trial, the *Toronto Star* won on appeal. The higher court indicated that the reproduction of the entire cover was fair dealing as it was germane to the purpose of the article and offered no competitive advantage to the Star over the original photograph and publication.

Copyright and the Student/Researcher

Fair dealing is eminently suited to learning activities. Four categories of fair dealing – research, private study, criticism and review – are likely present in all student endeavors. And as citation is a foundational practice for academic endeavor, students usually meet the attribution requirement without any thought. In terms of the fairness of the dealing with the copyrighted work, application of the *CCH Canadian* framework in the learning environment favours fairness.

It is likely that the inclusion is to serve the purpose of criticism or review, as part of the larger expression of the student’s own ideas. Whether it is a grade ten homework assignment posted to a class website or a doctoral dissertation filed in an institutional repository, when the student has chosen an input element appropriate to his or her message and integrated that element in a new creation, such copying is likely to be fair.

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In our increasingly visual world, quotation may well encompass visual elements. That does not change the legitimacy of fair dealing, provided that reproducing the element is necessary for the larger purpose of the student’s expression.

Teachers play a part in helping students choose the amount and type of material needed. In *CCH Canadian*, the justices expressly stated that incumbent practices were germane to a decision of fair dealing. Thus institutions need not worry about setting boundaries on how much material their students can incorporate into projects – that is a decision shaped by teacher and student according to the long-standing practice called teaching.

**Copyright and Fair Dealing: Supporting Creativity, Education and Innovation**

Copyright is usually presented as a means to protect artists and enhance their creative output. It is taken as gospel that by expanding copyright, creative people will do better. But the mechanism of copyright does not guarantee income to any creator. A work has to be desired before it might be transacted. And the outcome of a transaction is not always evenly distributed between creator and publisher, or between domestic industries and international conglomerates, or the homegrown superstar as compared to the homegrown neophyte. Those distinctions have less to do with copyright and more to do with education, training, exposure, bargaining power, sheer luck, and the imprecision of creativity itself. However, the system of copyright can contribute to the underlying processes of creativity and innovation, to the benefit of all individuals and industries. Copyright, together with its limits, allows for better chances of prosperity.

On July 12, 2012, the Supreme Court of Canada released five copyright decisions; the outcomes and timing together signaling that copyright’s limits are to be taken seriously. These decisions warrant a chapter; for a succinct distillation I turn to Michael Geist:

  First, the cases provide an unequivocal affirmation that copyright exceptions such as fair dealing should be treated as users’ rights. …

Second, … the court has effectively embedded a technology-neutral principle into the law that will extend far beyond these particular cases, as future litigants will undoubtedly argue that existing exceptions can be applied to new uses of copyright works to ensure technological neutrality.

Third, the court continued its expansion of fair dealing by interpreting it in a broad and liberal manner … When combined with the government's recently enacted Bill C-11 that adds new consumer exceptions and limits damages, Canadian copyright law has undergone an extensive overhaul over the past few weeks with implications that will take years to sort through (Geist, 2012).

Canada’s copyright landscape will continue to change. Individuals, industries and institutions will leave their mark in one form or another. What is noteworthy about Canada’s development of the system of copyright in the new millennium is the
discernible trend to better understand the nuances of the rights available to all parties. Copyright’s first three hundred years of life was entirely about control and expansion; this need not be so for the next three hundred years.

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Notes

Unfortunately, this inaccurate view still holds today. The story is more complex; the late 1990s saw upheaval in the music industry for many reasons: (1) CD sales were artificially high in their infancy as consumers purchased repertoire they already owned in vinyl album format. (2) The retailing structure of the industry changed itself; dedicated music stores could not compete with the rise of large broad-based consumer outlets. Paradoxically, this meant a narrowing of repertoire available to consumers. (3) There was more competition for entertainment dollars; DVD technology became a consumer item and the phenomenon of gaming was on the rise. (4) Finally, with the new millennium came economic upheaval via the bursting of the dotcom bubble. Generally speaking, consumer spending declined as people had less money in their pockets.

ii The publisher, New South Books, offers a sample of the range of comments (Seidman, 2011)

iii History enthusiasts may be interested to know that the language of “property” came via Thomas Jefferson during the antebellum years. Jefferson was acutely conscious of the abuse of consumers that occurred when the Crown awarded monopoly privileges as per European and English custom. “… saying there will be no monopolies lessens the incitement to ingenuity … but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression,”(cited in Bell 2002, 5). As the fledgling United States established systems to encourage creativity, Jefferson steered away from the language of monopoly and the English connotations that went with it. Instead, he opted to refer to the exclusive right of a patent as a property (Walterscheid, 1994).

iv “Where social utility meets with natural rights is in the belief that creativity itself is valued. Otherwise, the underlying purpose of copyright in either tradition becomes meaningless, raising the question of why have such laws at all?” (Nair, 2009, p.30).

v “Such works do not include only ‘literary works’ in the sense of literature: they also include written works in the pure and applied sciences, humanities, biography and autobiography, as well as musical and artistic works. They include works by presidents and peasants, heroes and villains, from every corner, in every language and medium” (publicdomain, 2012).

vi Canada’s first copyright law, Copyright Act (1921), came into effect in 1924 with a fair dealing clause that allowed, “any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary.” In the late twentieth century, the provision for criticism, review, and news reporting were encumbered with more formal requirements of citation. In 2012, the categories themselves were expanded to include parody and satire.

vii Michael Geist, Canada Research Chair for Internet and E-Commerce Law at the e University of Ottawa has written extensively on these matters; see michaelgeist.ca. Through Access to Information, he obtained some key background material prepared for the Ministers involved (Geist 2011, September 21 and 27).

viii For instance, in 2010, the U.S. Librarian of Congress recently relaxed some of the prohibitions upon circumventing technological protection measures. Included was a measure that directly benefits educational uses of copyrighted materials, the extraction of clips from movies encrypted on DVDs, for the purposes of criticism and review, circumscribed by a requirement of good faith. This expands a previous allowance offered only to film and media studies professors; now all college and university professors, together with film and media studies’ students, have permission. Creation of documentary films and noncommercial videos is also sheltered (Billington, 2010).