

## fair dealing: protector of the public domain

Meera Nair, Ph.D. Author of *Fair Duty* (<https://fairduty.wordpress.com/>) and Copyright Officer for Northern Alberta Institute of Technology (NAIT).

This past week marked Fair Dealing / Fair Use Week 2015. It was pleasing to see many Canadians within the educational community taking interest in our system of copyright. But, I confess to some disappointment that this interest should have blossomed only belatedly – after 2012. True, in that year the Copyright Act was revised with increased scope given to exceptional uses of copyrighted material. Also true, in 2012 the Supreme Court handed down two more decisions emphasizing the merits of fair dealing. But we cannot lose sight of the fact those decisions were based upon our previous Act which did not include any provision for “education.” Nor can we forget our Court began speaking to the importance of fair dealing a full decade earlier, emphasizing that fair dealing is our mode of entry into the public domain.



Claude Théberge (1934-2008)

Untitled, courtesy of Claude Théberge Official Website (<http://www.claudetheberge.com/index-en.html>)

It started via the work of the late Claude Théberge. Concerned over secondary uses of his work, Théberge pressed forward with legal action that culminated in *Théberge v. Galerie d'Art du Petit Champlain inc* (2002 SCC 34). The language of that decision set the stage for *CCH Canadian* which followed two years later.

Claude Théberge began his action when works which were licensed for print reproduction were recast in a different format. The ink was quite literally lifted off the paper and applied to canvas. Wishing to stop distribution of the canvases, Théberge sought the remedy of seizure—an option only available in the name of copyright infringement. With opinion divided among lower courts as to whether infringement had occurred or not, the matter reached the Supreme Court of Canada in October 2001. Writing for the majority, Justice Binnie concluded that the reproduction right of copyright had not been breached and thus no infringement had occurred:

When Raphaël’s *Madonna di Foligno* was lifted for preservation purposes from its original canvas in 1799 under the direction of the chemist Berthollet and fixed to a new canvas, the resulting work was considered to be no less an original Raphaël. Similarly, when the frescoes of Pompeii were restored by replacement of the underlying plaster, the result was not classified as a “reproduction”, even though the old plaster was a constituent physical element of the original frescoes.

If a comparable copyright situation arose, I do not think the artist would (or should) have a veto over a purchaser's attempt to preserve the asset. These examples may be more spectacular than the humble swap of substrates of a paper poster, but the principle is the same and applies equally to authorized copies as well as to the original artistic work. In neither case is there reproduction within the meaning of the Act (para 38).

The minority opinion focused upon fixation as a condition of infringement; but given the majority's views, the matter could have ended with a modest discussion. Instead, Canadians were provided an opportunity to reflect upon how the system of copyright serves our society.

In any court decision, it is expected that reference to the relevant statute and its purpose will be invoked; in this regard, Justice Binnie followed the format. But, he gave prominence to the public as a stakeholder in the operations of copyright:

The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator ... The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it (paras. 30-31).

That could have sufficed but Justice Binnie went a vital step further:

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology, such as limited computer program reproduction and "ephemeral recordings" in connection with live performances (emphasis mine, para. 32).

For a case that had nothing to do with exceptions, it was startling to see the reference to fair dealing, particularly in the role of "traditional" protection for the public domain. That passage puzzled me; my thanks to Howard Knopf for sharing a critical page of a WIPO glossary:

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 public domain then does not come into existence only by virtue of time, it is in existence when statutory exceptions provide unauthorized use of copyrighted works. To put it another way, all copyrighted material is public domain material, when accessed in accordance via fair dealing or any other exception found within the law.

This awareness of the fullest extent of the public domain has prominent spokespeople. In her landmark article, *The Public Domain* (1990), Jessica Litman 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." The Center for the Public Domain at Duke University states: "The public domain is 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." And in *The Copywrights—Intellectual Property and the Literary Imagination* (2003), Paul Saint-Amour writes: "When the copyright in a work expires, the work joins the public domain. More precisely, the end of copyright releases the protected aspects of the work into the public domain, as some unprotected, communal property aspects have resided there since publication."

Fair dealing is much more than a means to manage some educational uses of copyrighted work. In a world of excessively lengthy copyright terms, fair dealing and other exceptions for unauthorized use ensure that the public domain remains accessible and continues to grow.

Returning to *Théberge v. Galerie d'Art du Petit Champlain inc*, the case made clear that a prominent element of Théberge's concern was the abuse of his moral rights—that his name was not present on the canvas creations. But as seizure is not a remedy available through moral rights infringement, he chose to pursue his complaint through copyright. No doubt the outcome was distressing to him. To his memory then we can show gratitude for his artistry and remember that his action enabled the Supreme Court of Canada to reinvigorate fair dealing to the benefit of all Canadians.