Excerpts from “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 favourable² 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.

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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

...

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

...

and to 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.

“Any 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.

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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.

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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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Notes

i 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, satire and education.