

## **Recalibrating Some Copyright Conceptions: Toward a Shared and Balanced Approach to Educational Copying**

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### ***Abstract***

Most of Canada's publicly-funded educational institutions have operated since the 1990s under blanket reprographic licences. But recent Copyright Act amendments and Supreme Court decisions in several copyright cases have added legislative and judicial weight to the idea that copyright encompasses both private owners' rights and public users' rights in the form of infringement exceptions such as fair dealing. Many educational institutions have responded to these changes by moving toward greater reliance on statutory users' rights and direct licensing with copyright owners, and by moving away from blanket collective licensing. Not unexpectedly, copyright owners and the societies and collectives that represent them see the changes in copyright law in a different light. Copyright owners' and educators' variant conceptions of the kinds of educational copying that are compensable pose a challenging policy problem in need of a principled solution that upholds the legislative underpinnings of copyright law and is perceived to be fair. This article attempts to frame a balanced understanding of underlying issues by considering the nature and purpose of copyright, the purpose of copyright collectives, what is meant by fair dealing, and, ultimately, how we should think about copyright. It suggests that meaningful change may not be achievable without concerted attention paid to the language we use to think and talk about copyright in order to construct a combat-free shared space in which learning, inquiry, and the production of creative works are fostered and, when appropriate, rewarded fairly.

### ***Keywords***

copyright; Canada. Copyright Act; fair dealing; educational institutions; copyright collectives

### ***Introduction***

A blanket licensing arrangement existed somewhat uneasily for about two decades between Canada's publicly-funded educational institutions and Access Copyright, a collective society representing copyright owners of textual works across Canada outside of Quebec. Established in 1988 and known as

CANCOPY until 2002, Access Copyright negotiated its first educational blanket licence with the province of Ontario in 1991 for reprography of book and journal excerpts in K-12 schools, after which most of Canada's other public K-12 and postsecondary institutions acquired a similar licence over the next several years (Copyright Board of Canada, *Statement* 14). But almost from the start, disquiet hovered around an issue on which the parties have generally agreed to disagree: the meaning and scope of the infringement exception called fair dealing in section 29 of the Copyright Act.

Unease intensified over the past decade after infringement exceptions were recast as users' rights by the Supreme Court of Canada in a unanimous 2004 decision (CCH; par. 12). In its landmark CCH ruling, the Court confirmed the Copyright Act's dual public and private objectives, which were described by the Court two years earlier in its *Théberge* decision 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" (par. 30). The *Théberge* and CCH rulings together signal a need to recalibrate our conceptions of the interests served by copyright.

This article considers the policy conundrum of how to approach that recalibration task with regard to educational copying, which is unfolding as a complex and, at times, divisive issue. Widely divergent interpretations of the Copyright Act and relevant case law have created an ideological chasm separating two groups: authors, publishers and other owners of copyright in original intellectual works on one side, and, on the other, members of the educational community who copy selections from those works for student use as part of the broad endeavour to cultivate an informed citizenry. The crux of the conundrum is disagreement on the bounds of compensable educational copying.

If we assume that a thriving creative culture and a well-rounded educational system are both highly valuable and vitally important to the continued flourishing of our society, how might we effectively address competing interests of copyright owners who maintain that educational institutions need blanket licences to cover classroom copying, and educators who believe blanket licensing is unnecessary because the majority of their copying is covered by fair dealing and licence agreements negotiated directly with publishers? Four issues appear to be embroiled in this discord: What is copyright? What is the purpose of copyright? What is the purpose of copyright collectives? How is fair dealing understood?

The answers explored here may inform policy development and refinement, but they also raise a further question: How should we think about copyright? This article proposes that resolution of our current quandary calls for shared commitment to converting the copyright "battlefield" into an enlivened, inclusive space conducive to a meeting of minds on fair and effective ways to encourage the pursuit of learning, inquiry, and the creative arts, and to ensure appropriate, fair rewards for creators.

## ***What is Copyright?***

A key point of divergence across variant viewpoints on compensable educational copying is the issue of what copyright is believed to be. Factually, copyright is a type of statute-enabled intellectual property that subsists immediately upon the creation of anything deemed to be its proper subject matter existing in a fixed or perceptible form, and lasts for a limited term. During that term, which in Canada is normally the life of the creator plus 50 years, a set of sole rights to control reproduction and other specified acts is granted to the copyright owner who, in most cases, is initially the creator. Sections 3, 15, 18, and 21 of the Copyright Act delineate the subject matter of copyright in Canada: entire, or any substantial part of, works (literary, dramatic, musical, and artistic), performers' performances, sound recordings, and communication signals, respectively.<sup>1</sup> The latter three categories comprise "other subject-matter" under the Act that are elsewhere sometimes referred to as "neighbouring rights."<sup>2</sup>

While the plain definition of copyright may stir little controversy, sticking points surface quickly if we instead ask "What is the nature of the property possessed by a copyright owner?" For some, "property" and "owner" in this context are imprecise terms for complex, contested constructs, but for others there is negligible meaningful difference between owning copyright in a work and owning a physical object such as a book, music CD, or car. The difficulty is that while the term "property" easily brings to mind possession and control of immediately-perceived things, material property and intellectual property are distinct kinds of entities. Because the former is tangible but the latter is not, material and intellectual property are necessarily associated with qualitatively different owner rights as they are not controllable in the same ways.

A work of the intellect may be an original expression of ideas, but the ideas themselves are never the subject of copyright. Thomas Jefferson insightfully compared ideas to exclusive physical property such as land and machines—both commonly conceived of as things that can belong to individuals—and concluded that property rights to ideas do not exist in nature:

Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession

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<sup>1</sup> Copyright in a performer's performance in WTO member countries is delineated in section 26 of the Act.

<sup>2</sup> In addition to the economic rights called copyright, the Copyright Act grants moral rights which this article does not address. Moral rights for authors of works and for performers' live and recorded performances are covered in sections 14.1 and 17.1 of the Act, respectively.

of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me . . . . Inventions, then cannot, in nature be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement . . . to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society. (333-34)

Copyright thus subsists in original creations of the mind that differ from physical property in two important respects. First, since ideas, like air, are freely available to all and cannot be “locked up,” the proposition that particular expressions or arrangements of ideas are the subject of an individual’s natural rights and should be treated like exclusive property seems untenable. Second, the way in which such creations are used is nonrivalrous. Stories, songs, sculptures, and stage productions are enjoyable simultaneously and repeatedly by many individuals (copyright owners included) without being exhausted. Copyright-protected works of the intellect are, therefore, most usefully conceived of as property only in a metaphorical sense—analogous to, but also distinct from, material property—given their basis in ideas, which are inexhaustible and inherently “incapable of confinement or exclusive appropriation” (Jefferson 334).

The intangible nature of copyright as intellectual property usually implies a need for its subject matter to be fixed in a material form to enable use and protection, although this is not explicitly stated in the Canadian Copyright Act. The Act refers to “fixed” works in its definitions of computer program, dramatic work, and performer’s performance (s. 2), but leaves unaddressed other issues relating to fixation such as a work’s rightful author when its creator and initial fixer are not the same person. In contrast, U.S. copyright law includes a definition of “fixed” that connects fixation to authorization by the author:

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission. (17 USC. Sec. 101)

Examination of the meaning of “substantial part” in sections 3, 15, 18, and 21 of the Canadian statute raises further complications in defining copyright. The Supreme Court provided some elucidation in a 2013 decision:

A substantial part of a work is a flexible notion. It is a matter of fact and degree . . . determined in relation to the originality of the work that warrants . . . protection . . . As a general proposition, a substantial part of a

work is a part of the work that represents a substantial portion of the author's skill and judgment expressed therein. (Cinar; par. 26)

Citing with approval a 1964 U.K. ruling that quality, not quantity, should determine whether a part is substantial, the Court noted the importance in such determinations of seeking an appropriate balance between "giving protection to the skill and judgment exercised by authors in the expression of their ideas . . . and leaving ideas and elements from the public domain free for all to draw upon" (Cinar; par. 28). The aspect of the "public domain" referenced here is not the familiar territory inhabited by works created prior to enactment of copyright law—works whose copyright terms have expired and works designated as being unprotected by copyright. Instead, it points to the less recognized but "most important part of the public domain . . . comprising aspects of copyrighted works that copyright does not protect" (Litman 976).

Another thorny concept enmeshed in copyright's fabric is originality. Section 5 of the Copyright Act states copyright subsists in every "original" work subject to specified conditions. The meaning of "original" under the Act was one of the issues before the Supreme Court in CCH. The Court acknowledged two interpretive approaches known as "sweat of the brow" (requiring an original work simply to originate from an author and be more than a copy) and "creativity" (requiring a creative element in addition to authorial origination of more than a mere copy) but determined that the proper approach regards the expression of an idea to be original if it results from an exercise of skill and judgment (pars. 15-16). In this moderate standard of originality, intellectual effort is required that goes beyond a trivial mechanical exercise, but the result need not be novel or unique. In Cinar the Court upheld the trial judge's finding that the children's television show in question was an original work, noting "[t]he development of a group of characters that have specific personality traits and whose interactions hinge on those personalities can require an exercise of skill and judgment sufficient to satisfy the *Copyright Act's* originality criterion" (par. 46).

On the surface, then, the concept of copyright is intuitively understandable when encountered in the guise of common terms signifying directly perceived material objects. But a closer look reveals copyright to be a slippery, artificial construct riddled with metaphoric conceits and the opaque requirements that its subject matter be fixed, a substantial part, and original. The aspect of an intellectual work that copyright protects is its intangible original expression of ideas, but a work is ordinarily perceived, at least initially, only in a tangible or fixed form. Variant perspectives on what copyright is are thus often indicative of different positions taken on the overlapping issues of whether copyright is thought to be conceptually equivalent or only partially analogous to tangible exclusive property; a natural or an artificial, societally created right; and applicable to every particle of all works by a creator or only to works evidencing originality or substantial parts of such works.

## ***What is the Purpose of Copyright?***

Copyright's purpose is another contentious matter. Copyright is often presumed to serve the singular purpose of protecting authors' and owners' interests. Arguably, that is how Canadian copyright law reads as the majority of the Copyright Act's 92 sections deal with owners' rights, infringement remedies, and copyright administration. Comparatively less attention is paid to users' rights (infringement exceptions), which are confined to four sections (ss. 29 to 32.2). As recently as 1990, the Supreme Court of Canada affirmed an author-centred view of copyright's purpose, citing with approval an earlier U.K. decision that unequivocally declared the "single object" of the Copyright Act to be "the benefit of authors of all kinds" (Bishop, pars. 478-79).

Ascertaining the purpose of a law can also be informed by considering contextual matters such as underlying legislative intents. The rationale articulated by Jefferson for society's grant of a limited monopoly to inventors, "encouragement . . . to pursue ideas which may produce utility" (334), has echoes of the ends that motivated enactment of the world's first copyright law, the 1710 U.K. Statute of Anne, whose formal title proclaims it to be "An Act for the Encouragement of Learning." The purpose of copyright is laid out in the U.S. Constitution as the power vested in Congress "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 and Discoveries" (Art. 1, Sec. 8).

Canada's current Copyright Act has lacked an explicit purpose statement from its enactment in 1921 as a close copy of the U.K. copyright law of 1911 (Vaver, *Intellectual* 55). But Canada's Constitution Act, 1867 states a desire for the founding provinces "to be federally united into One Dominion . . . with a Constitution similar in Principle to that of the United Kingdom," from which we can infer general alignment between Canada's laws and the U.K.'s legislative foundations, which include the Statute of Anne. The intertwined roots of British, American and Canadian copyright law are thus grounded in a common desire to advance societally beneficial (public) ends through grant of time-limited exclusive (private) rights to creators.

More recently, by reasserting the objective of the Copyright Act in *Théberge* and *CCH* to promote a balance of both private and public interests, the Supreme Court significantly clarified the purpose of copyright in Canada. *Théberge* provides an explicit articulation of why balance is an important purpose of the Act:

Excessive control by holders of copyrights . . . 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. (par 32)

Furthermore, the preamble to the 2012 Copyright Modernization Act describes Canada's Copyright Act as "an important marketplace framework law and cultural policy instrument that . . . supports creativity and innovation" and also "provide[s] . . . some limitations on rights . . . to further enhance users' access to copyright works or other subject-matter." Undoubtedly, the purpose of copyright law in Canada today is equally to promote and protect the interests of both copyright owners and members of the public who wish to use copyright-protected material.

On the whole, the historical purpose of copyright was to encourage the creation of societally useful works through a time-limited grant of a set of exclusive owners' rights. Although owners' rights, remedies, and rights administration dominate the text of copyright law, the Supreme Court has recently clarified the existence of two objectives of Canada's copyright law that must be kept in balance: the promotion of public access to works of the intellect, and the provision of economic rewards for creators. The tension inherent in these competing purposes has been characterized as an "interminable challenge . . . to construct a system that uses exclusivity to stimulate the creation and dissemination of works for the benefit of the public *without* unduly harming the public interest by restricting the ability to access and use the works that are thus created" (Craig, "Digital Locks" 507-08).

### ***What is the Purpose of Copyright Collectives?***

Concentrated efforts to modernize the 1921 Copyright Act did not come to fruition until 1988 when an initial set of reforms was passed that included "measures to improve the collective administration of copyright" (Canada. Canadian Heritage). Prior to the 1988 reforms, the two major active collectives were in the music industry (Wilkinson 333), and in Quebec the Union des écrivains québécois had performed some functions of a reprographic collective ("Copyright Collectives and Libraries"). Today, about thirty-four collectives act on behalf of Canadian rights holders across a range of creative communities that include musicians, recording producers, writers, performers, film directors, artists, and broadcasters (Copyright Board of Canada, "Copyright").

The Copyright Act defines "collective society" as

a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration. (s. 2)

Copyright owners and licensees can entrust collectives with management of their economic rights under the Act, which may involve handling inquiries from parties wishing to use copyrighted works in ways that require permission. Collectives are free to carry out their duties in a variety of ways that include blanket licensing of their entire repertoire of works and providing transactional licences for use of

specific works on an as-needed basis (Knopf 120). Under section 70.12 of the Act, a collective can stipulate the royalties, usage terms, and conditions in a licence in two ways: file a proposed tariff with the Copyright Board, or negotiate agreements with users.

The Copyright Board of Canada is a federal government-appointed economic tribunal established in 1989 as a successor to the Copyright Appeal Board (*Annual Report*). Section 66.7(1) of the Copyright Act provides that “[t]he Board has, with respect to . . . matters necessary or proper for the due exercise of its jurisdiction, all powers, rights and privileges as are vested in a superior court.” The Board’s jurisdiction includes certification of tariffs and determination of royalties to be charged by collectives. A critical issue dividing copyright owners and educators that the Copyright Board to date has not deemed necessary to address is whether a tariff for educational institutions, once certified, becomes mandatory when a user makes any copyright-protected use of the repertoire covered by the tariff (Copyright Board of Canada, *File: Access*).

Copyright collectives essentially serve to promote and manage owners’ economic rights under the Copyright Act. Their activities, which include issuing licences, filing tariffs for compensable uses, and distributing royalties, are performed under the general supervision of the Copyright Board. The primarily economic nature of their functions notwithstanding, since collectives and the Board are created and governed by the Act, it is reasonable to presume that the conduct of their activities should be consonant with both of the Act’s purposes, and not merely the one concerned with rewards for creators.

### ***How is Fair Dealing Understood?***

Embedded in the shift in judicial articulations of copyright’s purpose over the past two decades—from the singular objective of benefits for authors to the dual objectives, properly balanced, of promoting public access to intellectual and creative works and justly rewarding creators—is an evolving understanding of the meaning and scope of fair dealing. Under Part III of the Copyright Act, fair dealing is one of several infringement exceptions—infringement being any act permissible to a copyright owner that is instead performed by a person without the copyright owner’s consent or a defence (s. 27(1)). Prior to the CCH decision in 2004, infringement exceptions were generally treated as possible defences to allegations of infringement, not rights in themselves.

In CCH, the Supreme Court reaffirmed the objective identified in *Théberge* of balancing the Copyright Act’s dual public and private goals. But the Court went much further by stating that the Act “sets out the rights and obligations of both copyright owners and users” (par. 11), by observing exceptions to be “perhaps more properly understood as users’ rights” (par. 12), and by explaining that “the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. . . . In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not

be interpreted restrictively” (par. 48). Importantly, CCH’s reframing of fair dealing as a users’ *right*, rather than a mere infringement defence or privilege, suggests a corresponding *obligation* on the part of copyright owners to facilitate users’ exercise of that right (Craig, "Digital Locks" 511; Chapdelaine 28-29).

Given that the Copyright Act does not define “fair” and that fairness “depends on the facts of each case” (CCH; par. 52), how do we identify dealings that are fair? In the context of evaluating fairness of a dealing with a work, “fair” can be reasonably understood to mean “free from bias, fraud, or injustice; equitable; legitimate, valid, sound” (“Fair” def. 2)—in other words, balanced. The Supreme Court’s CCH ruling presents a flexible analytical framework of six factors (the purpose, character, amount and effect of a dealing; the nature of the work; and alternatives to the dealing) that could be helpful in assessing whether a dealing is fair. However, the factors relevant to a particular case are neither restricted to, nor are required to include, the six identified by the Court (par. 60).

A further matter is whether fair dealing can be curtailed by copyright owners’ statutory right to license uses of their works, the administration of which is often delegated to copyright collectives. Here, too, the Supreme Court shed light in CCH on an issue contested by copyright owners and educators. The Court stated that fair dealing with a work is possible even when licensed access to the work is available for purchase:

The availability of a licence is not relevant to deciding whether a dealing has been fair. . . . If a copyright owner were allowed to license people to use its work and then point to a person’s decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner’s monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act’s* balance between owner’s rights and user’s interests. (par. 30)

Any thoughts that the Supreme Court’s views in CCH on fair dealing and users’ rights might be overlooked as “stray language” (Vaver, "User Rights" 106) should have been dispelled by the Court’s decisions in Alberta (Education) and SOCAN, which reiterated and reapplied the Court’s approach to fair dealing in CCH. How, then, do authors and educational users now articulate their positions on collective licensing and fair dealing in light of the 2012 Copyright Act amendments, most of which came into force on November 7, 2012, and the Supreme Court’s 2012 decisions involving fair dealing? An open exchange of letters in 2013 between The Writers’ Union of Canada (TWUC) and the University of British Columbia (UBC) reveals some answers (Heffron; Toope).

In a letter to the President of UBC, TWUC chair Dorris Heffron expresses “great disappointment and frustration” at UBC’s announced course pack cost savings achieved through reliance on fair dealing. Her letter states the view that UBC’s fair dealing guidelines “are not supported by established law in Canada, nor are they likely ever to be.” She claims that “partners in education” such as UBC are

damaging a laboriously-established “collective licensing architecture” of fair compensation to authors by achieving cost savings “on the backs of Canada’s writers.” The “grossly unfair” result is viewed as “expropriation of the property of some of Canada’s lowest paid professionals by some of Canada’s highest paid professionals.”

TWUC’s position appears to be that UBC’s interpretation of the scope of fair dealing is incorrect and upsets an existing appropriate and fair collective licensing regime for compensating authors. Authors’ writings are portrayed as material possessions wrongfully taken from economically disadvantaged private owners by the economically advantaged for public use under UBC’s fair dealing guidelines. Even though Heffron’s letter focuses on perceived economic harms caused by the interpretation of fair dealing in the guidelines, it also refers to universities and writers as “partners in education,” which may indicate the existence of some common ground.

UBC President Stephen Toope’s response to the TWUC letter notes that UBC uses fair dealing to make “learning materials available to students on the most cost-effective basis possible.” His reply aims to “help [TWUC] to better understand” measures taken to “ensure that [UBC] is responding correctly to the balance that the Parliament and the Supreme Court of Canada have struck in relation to the rights of both authors and users.” His letter outlines how UBC pays \$25 million annually to publishers and authors and includes course pack sales as a portion of UBC’s total spending on learning materials. “[T]rained staff” are said to use a “rigorous process” to clear permissions for course pack materials and to acquire needed licences. That “some publishers and authors have decided not to grant any transactional clearances” is noted.

UBC’s position commits to operating within a balanced fair dealing framework created by legislators and the courts. The proportion of UBC’s learning materials expenditures represented by course pack sales is shown to be very small, and UBC’s careful approach to permissions clearance is explained. Toope’s stated desire to aid understanding suggests an interest in achieving common ground with TWUC members, although the noted inability to acquire some transactional licences perhaps hints at concerns about good faith dealings.

In a 2013 statement expressing perspectives on fair dealing and collectives similar to those of TWUC, the Canadian Copyright Institute (CCI), an association of copyright owners and collectives, makes two notable assertions. The CCI begins by professing to be “open to reviewing and revising aspects of the licensing agreements, and negotiating new principles around fair dealing,” but later declares that “Canada’s copyright owners will support whatever action is needed to reinstate collective licensing in schools, colleges and universities” (Canadian Copyright Institute 2, 8). The dissonance between these two messages in effect puts the CCI’s true openness to collaborative review, revision, and negotiation into question. Aspects of the CCI statement that seem inconsistent with current copyright law and appear to disregard relevant facts

about works commonly used by educational institutions are discussed in an article by four members of the Canadian Library Association's Copyright Committee (Glusko et al.). Their article also reveals the CCI's Board to have very strong ties to Access Copyright.

That Canadian copyright law underwent significant intentional changes in 2012 is incontrovertible. A pivotal matter of evident dissent between copyright owners and the educational community, however, is whether the "fair dealing consensus" (Geist) reflected in guidelines now in place across many educational institutions (e.g., Noel and Snel; Association of Universities and Colleges of Canada) represents an accurate interpretation of fair dealing's ambit under the Copyright Act. But this bone of contention is not new: from the very first model licence negotiated in 1994, the view held by the Association of Universities and Colleges of Canada that "single copies of the whole of a periodical article for private study . . . represent 'fair dealing'" has never been shared by Access Copyright ("Agreement Eases Copyright Woes").

### ***How Should We Think About Copyright?***

A porous conceptual basis and an "author-centric view" (SOCAN; par. 9) of copyright's purpose provided tenuous grounds for the educational copying regime, founded in the 1990s on blanket licensing, that precariously encircled profound disagreement on the scope of fair dealing. The above sampling of current positions of copyright owners and educational community members bespeaks lingering, if not further entrenched, differences. At the same time, repeated Supreme Court interpretations of fair dealing as an essential users' right and statutory inclusion of education as a fair dealing purpose create a window of opportunity for recalibrating conceptualizations of educational copying and related policy.

Such an undertaking, however, raises the question of what principles should guide the process. William Fisher suggests that understanding the theoretical underpinnings of intellectual property is important because of the rapidly increasing prominence of intellectual property in cultural and business matters around the world. In his survey of philosophical, economic, political, and legal rationales for intellectual property, Fisher identifies four leading perspectives within the literature of intellectual property theory: utilitarianism, labour theory, personality theory, and social planning theory. This section briefly considers the potential of each of these perspectives, the first two of which have been touched on implicitly thus far, to provide guiding principles for how we should think about copyright.

### **Utilitarian Approaches**

Utilitarian approaches are guided by the principle of maximizing net benefits to society. This was the goal of the legislators who passed the 2012 Copyright Act amendments as a means of achieving "balanced copyright" (Canada. Industry

Canada and Canada. Canadian Heritage). While the stated dual purposes of fostering creativity and promoting access to works are laudable, determinations of societal benefits are often carried out as economic or marketplace-based assessments that tend to tilt the scales toward private owners' rights, as they are the easiest to measure. Assigning measures to culture or to an educated citizenry is a more challenging task, and doing so risks reducing them to monetized or quantified commodities, producing an outcome of questionable benefit to society's progress.

Further, in a utilitarian model, the two purposes of copyright can appear to be in competition with each other (what provides the greatest net benefits to society—commercial success or a cultured citizenry?), which raises the question of whether balance is a true intent or merely convenient political rhetoric. A “greatest societal benefits” lens for rethinking copyright therefore seems inappropriate as it is the current approach taken by legislators with results that are apparently unsatisfactory, given current levels of discord between copyright owners and users regarding the nature and bounds of their respective rights and obligations.

### **Labour Approaches**

Labour theory ascribes a natural property right to creators on the basis that works they expend effort to create from ideas freely available to all result in no harm to others or to society because the supply of ideas is not depleted. As noted above, however, intellectual property and ownership are metaphoric concepts that have become concretized and, for some, almost indistinguishable from their material world cousins. Given the force of Jefferson's observation that property, intellectual or otherwise, does not exist in nature but is instead “the gift of social law” (333), adopting a lens for recalibrating thinking about copyright that deliberately keeps this inconvenient fact out of focus seems ill-advised.

Since an author of an original work is automatically its copyright owner, what if, as a practical tactic, we simply agreed to treat copyright as more or less equivalent to material property? This approach is questionable, as it would be tantamount to erasing the realm of ideas as a public good perpetually held in common and enjoyable by all, and would implicitly encourage overreach of owners' control over their works to the detriment of public access to those works. Such an outcome could reduce copyright owners' economic rewards and would almost certainly hinder rather than enhance society's progress.

### **Personality Approaches**

Personality theory is a third theoretical perspective identified by Fisher in the intellectual property literature (189). It is based on the premise that intellectual property rights fulfill creators' need for protection of their personhood captured in their works. This approach would likely be viewed favourably by authors and other creators as it accords strong weight to policies aimed at meeting their

needs for marketplace success or for environments conducive to creative productivity.

Abundant creativity and economic competitiveness are certainly part of Canada's "balanced copyright" agenda, but how personality theory approaches might address the other purpose of copyright—encouraging learning through public access to creative works—is unclear. Personality theory as a theoretical lens seems insufficient for our recalibration task as it yields principles for policy creation that address only one of copyright's two purposes for which we seek a workable balance.

### **Social Planning Approaches**

Social planning theory is Fisher's label for theoretical approaches that regard intellectual property rights as components of a desirable, fair society (192). These approaches typically combine different theories and principles to craft policies aimed at cultivating such a society. In Fisher's view, social planning theory has the greatest limitations of the four approaches. The chief reason is the seemingly insuperable challenge of envisioning a fair society involving intellectual property rights that are acceptable to most citizens, given that ideas on what is fair or just have long fueled intellectual debate with no resolution in sight. Nevertheless, social planning theory perhaps holds the most promise as a useful lens for rethinking copyright with an eye to evaluating the "collective licensing or fair dealing" dichotomy associated with educational copying.

Advantages of social planning approaches include the freedom to select principles and theories to frame issue-specific policies (e.g., one for maximizing creativity and innovation, another for enlarging public access to creative works) and flexibility in making adjustments over time to policies that may call for different theoretical constructs or principles. Disadvantages include Fisher's above-noted concern regarding the feasibility of defining and achieving consensus on what a desirable society looks like, as well as potential incoherence of the overall endeavour if too many disparate theories and principles are employed.

### **Policies for a Desirable Society**

With the potential downsides of a social planning approach borne in mind, some desirable society-oriented ideas for bridging the chasm between creators and educators on the issue of compensable educational copying are sketched here. These ideas are premised on the assumption that the riches of a desirable society include vibrant creator communities and educational systems that stimulate the progress of human society through creativity, learning, and scholarship, and that individuals are typically both creators and users of copyrighted works.

How should a balance be struck between fair dealing and blanket licensing in the educational sphere? The necessary starting point is the law. As “balance” is not referenced in the Copyright Act, however, the balancing instruments provided in the Act can be considered in lieu, the most important of which are probably the exceptions to infringement. The Supreme Court’s observation in *Théberge* (par. 31) that “[t]he proper balance among . . . public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature” casts new light on limits to creators’ rights that allows us to view the function of the exceptions under the Act not only as limitations to infringement but also as limitations to copyright. Or, put differently, “the boundaries and limitations of the copyright interest are not external to copyright policy; they are a central part of how the system works” (Craig, “Digital Locks” 508).

Fair dealing is likely the most important statutory exception relating to educational copying. In *CCH*, the Supreme Court elaborated on its holding in *Théberge* that the Copyright Act is a balance between private and public interests by stating that fair dealing purposes such as “[r]esearch must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained” (par. 70). Through these decisions, the Court enriched but also complicated the concept of fair dealing by invigorating it with a new central role in copyright’s balancing act. Furthermore, in *Alberta (Education)* (par. 21), the Court’s application of the *CCH*-mandated large and liberal interpretation yielded the important determination that in a classroom setting, fairness of the purpose of copying is properly assessed from the perspective of the end-user rather than the copier.

The Copyright Act’s dual purposes must be given equal weight, otherwise fairness to creators and users, or balance, is not achieved. The provisions of the Act, combined with the Supreme Court’s interpretations of the Act in *Théberge*, *CCH*, and *Alberta (Education)*, form a principled foundation on which to build policy that aims to balance legitimate interests of creators and educational users. Institutions like UBC have recently realigned their approach to educational copying with the statutory framework created by Parliament and interpreted by the courts. While fair dealing guidelines of such institutions may require adjustments, they result from a reasoned approach that strives for balance by respecting copyright owners’ rights, exercising users’ rights under the Act, and applying case law teachings.

If fair dealing is an appropriate instrument of policy recalibration for educational copying, what is the role of collective licensing? In this author’s view, it can be a useful instrument as well. A prerequisite, though, is copyright owners’ acceptance of the *Alberta (Education)* decision as an indication that the 1990s-initiated licensing regime rested on an overly narrow view of fair dealing that cannot support the Copyright Act’s dual private and public purposes. Creators and users alike will be well-served if copyright owners, collectives, and educational institutions can collaboratively establish new licensing services of value to the institutions. A collective whose services may serve as a guide is the U.S.-based

Copyright Clearance Center (CCC). That Canadian educational institutions operating without a blanket licence can sometimes secure a CCC licence to copy amounts of a Canadian publication beyond fair dealing when such a licence is not available to them from Access Copyright is no small irony.

And what about the effects on authors of the recently-updated fair dealing guidelines now followed by many educational institutions? Although publishers, rather than authors, are often the copyright owners of published works (e.g., Gasaway; Ewing), this is nonetheless a concern worth addressing, given that a desirable, fair society includes both authors and students. A first step could be to conduct an objective, nonpartisan analysis of the aspects of copyright owners' and educational institutions' rights, needs, and concerns that are implicated in the purposes and provisions of the Copyright Act, and those that are not. One such probable intersection between the rights, needs, and concerns of educators and copyright owners under the Act involves the compensable parts of educational copying that lie beyond properly-assessed fair dealing and outside of direct publisher licensing. Here exists an obvious potential role for collectives.

The case may be, however, that some, if not most, of the concerns stemming from authors' reduced royalties represent issues outside of the provisions and properly-heeded dual purposes of the Copyright Act. As Jessica Litman notes, many important societal concerns and goals are beyond what copyright law can possibly address:

Copyright law has a narrow focus. It has never paid attention to a whole host of important interests that have traditionally informed our information policy, and copyright analysis turns out to have very little room in it to do so. In addition to free speech concerns, information policy takes account of issues related to equity, competition, ensuring a diversity of viewpoints, securing ready and affordable access to important sources of information privacy—all issues that are at best tangential to copyright law and in some cases wholly alien. (qtd. in Craig, "Digital Locks" 513)

If much of the copying by educational institutions under former blanket licences is now properly assessed as fair dealing under the Act, then the place to address authors' concerns about the corresponding reduction in royalties may lie outside of the Act. That is, while "[t]aking the public interest seriously means acknowledging that there will be occasions when protecting the socially useful results of an individual's efforts does not serve the interests of the public, and that on such occasions copyright protection should be denied" (Craig, *Copyright* 121), denying copyright protection in such cases does not necessarily mean the concerns of affected authors should be ignored.

A second step to examine authors' concerns could broaden the evidence base by investigating whether there is a public interest in establishing a new program unconnected with copyright to compensate authors for societally beneficial uses of their works. If such a step is taken, rigorous, openly-shared research could be

conducted to develop balanced, principled grounds for determining suitable compensation levels that perhaps differentiate, among other things, between authors for whom publishing is a requirement of their academic or research positions and other authors for whom royalties represent a primary source of income.

## **Conclusion**

Education as a new statutory fair dealing purpose, the Supreme Court's insistence that fair dealing is essential for promotion of the public interest in the Canadian copyright scheme, and the Court's ruling that fair dealing can cover copying of short excerpts for classroom use together signal that we have turned a new corner in the arena of educational copying and within the ever-evolving copyright terrain in general. We now need policy approaches that not only embrace the changes in statutory and case law that recognize users' rights as an integral part of copyright's balance but also give fair hearing to concerns about imbalances caused by those changes and commit to finding workable solutions where warranted. Failure to do both will belie the claim that our ultimate goal is to establish policies that promote a desirable, inclusive society.

Successful recalibration of how we think about copyright is as dependent on mindfully-chosen language as it is on sound policy aimed at planning and sustaining a better society. Today's debates about copyright are rife with adversarial, doom-ridden metaphors involving battles, fights, wars, and piracy.<sup>3</sup> We might excuse such metaphors as merely reflecting passionately-held positions on inherently controversial issues, but George Lakoff and Mark Johnson propose that metaphors are not only pervasive features of language, they also structure how we think and act. Using as an example the conceptual metaphor "argument is war," they point out:

[W]e don't just *talk* about arguments in terms of war. We can actually win or lose arguments. We see the person we are arguing with as an opponent. We attack his positions and we defend our own. We gain and lose ground. . . . Though there is no physical battle, there is a verbal battle, and the structure of an argument—attack, defense, counterattack, etc.—reflects this. It is in this sense that the Argument is War metaphor is one that we live by in this culture. (Lakoff and Johnson 5)

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<sup>3</sup> Consider, for example, the titles of these books on copyright published within the past several years: William R. Bobbitt, *Universities, Faculty, and the Battle over Intellectual Property: Who Owns What's inside the Professor's Head?* Lewiston, NY: Edwin Mellen Press, 2006; Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates*, Chicago, IL: University of Chicago Press, 2009; William F. Patry, *Moral Panics and the Copyright Wars*, New York: Oxford University Press, 2009; Robert Levine, *Free Ride: How Digital Parasites Are Destroying the Culture Business, and How the Culture Business Can Fight Back*, New York: Doubleday, 2011; and Blayne Haggart, *Copyfight: The Global Politics of Digital Copyright Reform*, Toronto, ON: University of Toronto Press, 2014.

Rethinking our copyright conceptions calls for new metaphors aligned with the desirable, fair, and inclusive society we aspire to cultivate through balanced policy. Lakoff and Johnson invite us to “[i]magine a culture where an argument is viewed as a dance, the participants are seen as performers, and the goal is to perform in a balanced and aesthetically pleasing way” (6). We need a new conceptual space for copyright that is conducive to a true meeting of willing minds where fresh starts and new partnerships can emerge. Taking Lakoff and Johnson’s lead, maybe we can work toward converting the current copyright battlefield into a ballroom, in which case the first question to be asked is, “Shall we dance?”

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