

***From Fair Dealing To Fair Duty:  
The Necessary Margins Of Canadian Copyright Law***

by

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MA Communication (2004)

Dissertation submitted in partial fulfillment of the requirements for the  
degree of

Doctor of Philosophy

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## **Abstract**

Copyright law is one of our more explicit social institutions to regulate the flow of creative effort amongst individuals. Operating through a limited assignment of specific monopoly rights, copyright prescribes legitimacy upon communication. In this dissertation I examine the intricacies of this law via the intellectual contribution of Harold A. Innis (1894-1952). His expertise spanned communication, economics, and the law; the sphere touched by copyright. His passion for creating an atmosphere supportive of individual creativity has direct relevance to the goals of copyright. Copyright is deemed to encourage creative activity and protect creative individuals.

Much as Innis' work is (erroneously) subjected to charges of technological determinism, the trajectory of copyright law is often framed by the same inclination. Increases to the depth and breadth of copyright have followed in the wake of each advance in media technology. To some, this is evidence of a strict, and inescapable, causality. This sequence of events obscures other relevant cultural factors, namely the economic, social, geographic, and political dimensions of a society. And as a consequence, application of copyright relies less on legal rendition and more upon instilled perception.

My dissertation examines the manner in which this perception is cultivated, and argues that this is leading to a stifling of intellectual endeavor. The very law that provides for legitimate mining of intellectual property to the

advantage of the public domain is invoked in name to build protective walls around seeming private property, with licensed check points and tolls. Whereas through the exception of fair dealing, good faith productive uses of copyrighted work can sit with legitimacy.

Innis' theoretical perspective provides the backbone of this study; the contribution that regional entities, the margins if you will, can make to the goal of cultural florescence. Fair dealing, an exception on the margins of copyright, is critical to ensure creativity thrives. It draws heightened attention to the creative process and ensures that a measure of obligation to the system of creative exchange exists between current, past, and future creators. Fair dealing mandates *fair duty* for all parties concerned.

*for my darling Daphne*

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## Table of Contents

Approval .....	ii
Abstract.....	iii
Dedication .....	v
Acknowledgments .....	vi
Table of Contents .....	vii
I. Copyright, Fair Dealing, and Harold Innis.....	1
1.1 Introduction .....	1
1.2 The System of Copyright .....	6
1.3 Property in Ideas and Ideas of Property.....	19
1.4 <i>This Has Killed That</i> – Understanding Innis .....	29
1.5 Next Step: Innis and the Law .....	40
II. Harold Innis and the Law .....	44
2.1 Introduction .....	44
2.2 In Pursuit of Liberty .....	50
2.3 Orality and Oratory / Literacy and Liberty.....	59
2.4 Wisdom from the Margins.....	67
2.5 Conclusion: Communication Through the Medium of Law .....	78
III. Early Copyright Law in Canada – the Cultural Landscape .....	80
3.1 Introduction .....	80
3.2 A Patchwork of Regulation .....	86
3.3 Sir Charles Trevelyan and The Royal Copyright Commission of 1876- 1878.....	95
3.4 Denouncing Berne.....	101
3.5 Conclusion: Thompson to Innis .....	108
IV. Deconstructing the <i>Copyright Act of Canada</i> .....	111
4.1 Introduction .....	111
4.2 <i>The Copyright Act - Loi sur le droit d'auteur</i> .....	117
4.3 Conclusion .....	145
V. Fair Dealing – the Critical Exception.....	148
5.1 Introduction .....	148
5.2 Fair Dealing in Canadian Jurisprudence .....	153
5.3 Monopolies of Knowledge.....	173
5.4 Conclusion: Fair dealing at school / L'utilisation équitable à l'école ...	180
VI. Conclusion: from Fair Dealing to Fair Duty .....	189
6.1 Introduction .....	189
6.2 Worlds of Conflict.....	192
6.3 <i>The Copyright Act of Canada</i> – Structuring Relationships.....	201
6.4 Collaboration and Consciousness.....	209
VII. Epilogue .....	217
7.1 Looking Back at Innis – Looking Forward in Copyright .....	217



7.2 Where To Now?.....	221
Appendix A - Fair Dealing Policy Survey .....	229
A.1 - Introduction.....	229
A.2 - Canadian University Policies .....	231
Appendix B - Copyright Permission .....	256
Bibliography .....	257
Cases .....	257
Works Cited .....	258

# ***I. Copyright, Fair Dealing, and Harold Innis***

## **1.1 Introduction**

In this dissertation I critically examine social attempts to define and enforce private property rights in objects created through intellectual effort. Specifically, I pay particular attention to the current forces that wish to redefine the extent and limits of the *Copyright Act of Canada*, in what should be properly regarded as part of the constant evolution of the legal system in any society. That our society is becoming increasingly knowledge based is cliché, but nevertheless true. And as the value of knowledge increases over time, private interests are eager to stake their claims. Moreover, it appears that our legal system is evolving in such a way as to recognize these claims. The main justification for this appears to rest on two flawed premises: that intellectual property is in no substantive manner different from physical property, and, that all grants of property are absolute. The core of my work rests on the assertion that intellectual property is different from other forms of property and, in fact, exemplifies the necessity of limitations within all systems of rights.

The recent flurry of activity on the part of many copyright holders to assert greater rights over their intellectual property (relative to what is currently permissible by law) is detrimental to a greater social interest. Those advocating an expansion of copyright typically cast the argument that the current law is insufficient to facilitate the creation of new knowledge. They claim that greater

control via copyright is necessary for creativity to flourish. There is a theoretical justification for these claims, but only under a peculiar assumption that is largely violated in practice. The assumption being that any new act of creation is purely original and in no way draws on the body of knowledge that is represented by past acts of creation. This assumption ignores the collaborative underpinnings of all intellectual property; the effort expended by any individual creator necessarily draws heavily from past and current creative effort. If the logic to expand copyright is taken seriously then the increased returns copyright holders enjoy through intellectual property law should, as a matter of the same principle they advocate, be used to compensate past creators for their contribution. In this scenario, current copyright holders would only enjoy a personal return proportional to their incremental contribution to the overall stock of human knowledge. In reality, those advocating for a maximalist copyright regime continue to hold logic at arm's length.

But it remains that knowledge begets new knowledge and no act of creation is entirely original. If it is the goal of society to facilitate and protect intellectual creations, then the current inclination to adopt a greater sphere of copyright control is inappropriate as it fails to support the contribution of social knowledge to individual acts of creation, thereby retarding the ability of individuals to pursue creative endeavor. Fortunately, copyright offers much more than contemporary perceptions would have us believe. Embedded within its design of control are necessary measures of liberty; measures which facilitate

the use of the common stock of human knowledge. I examine the intricacies of copyright via the intellectual contribution of Harold A. Innis (1894-1952). His expertise with communication, economics, and the law addresses the very principles touched by copyright, and his passion for creating an atmosphere conducive to innovation and creativity has direct relevance to the goals of copyright: copyright is deemed to function as a means of encouragement for creativity activity and a measure of respect for individuality.

Examining copyright through the writings of Innis is both exciting and daunting. Each body of scholarship has its own canonical foundation, and each is complete with admirers and dissenters. To integrate both topics into one dissertation is risky as the end product may be something that pleases no-one. But this risk is worth taking; herein lies an opportunity to reinvigorate the discourse of copyright by moving the emphasis from the extremities of the current debate (creators versus users) to the middle ground of advancing creative effort. As I take my readers forward, it shall become evident that the writings of Harold Innis meld beautifully with the subject of copyright.

The late James Carey (1934-2006) said, “[Innis’] books ... are not merely things to read, but things to think with (Carey 1981, p.73).” Following in the spirit of Carey’s words, I argue that Innis’ ideas, particularly his belief that creativity is fostered through the interaction of mainstream thinking with conditions wrought by life in the periphery, show themselves in the construction and application of Canadian copyright law. Innis’ writings upon the

development of law illustrate his appreciation for the conjoining of principle and practice in early systems of the rule of law, to the benefit of individual freedom. In general, I use Innis' lifetime of intellectual effort to underscore that the law is as much a reflection of culture as are visual arts, literature, music *etc*, and just as capable of being used either in service of innovation, or, in service to monopoly.

In my exploration of the sphere of Canadian copyright law, I hope to make one further contribution to communication and Canadian studies: to draw greater attention to the work of Innis and remind any interested reader that Innis was about much more than staples or media. I rely extensively upon the work of Innis' definitive biographer, Alexander John Watson; borrowing from Innis himself, I have to say that my work should be read as a footnote to Watson.<sup>1</sup>

Innis' thoughts cannot be divorced from his stature as a Canadian intellectual positioned at the edge of the world stage; to better communicate the thrust of his theoretical position requires that I spend some time reviewing Innis' life together with past scholarship regarding his intellectual work. Likewise, a dissertation concerning contemporary copyright issues cannot avoid retreading well-worn ground; the challenges we struggle with today must be seen in light of their particular history. As a consequence, the journey of this dissertation is less linear than a reader might enjoy. Yet, this is but a reflection of the subject concerned; copyright does not function with a strict causality. Innis was acutely

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<sup>1</sup> In his essay *Bias of Communication* (1949), Innis describes his work as a footnote to that of Professor A.L. Kroeber, author of *Configurations of Cultural Growth* (Innis 2003a, p.33).

aware of the lack of fit that so often exists between theory and practice; his life's work sought to bring heightened attention to this ongoing disparity in all walks of academic endeavor. Papering over these disparities by an artificial imposition of linearity will not resolve the lack of fit. Instead, the lesson I bring from Innis is the necessity of heightened focus upon the incongruity of the functioning of copyright against its theoretical construction. If we are to find any resolution to current challenges, this incongruity must first be acknowledged.

And so, I invite my readers to embark with me on a journey of dual remembrance. When a particular remembrance gave rise to another fleeting thought, I took courage from Innis and allowed it to take root. But, with some compassion for my readers, I offer up a brief map of the journey ahead. The remainder of Chapter One seeks to establish an understanding of the system of copyright, together with a snapshot of Canada's current challenges within that system. In doing so, I bring the subjects of Innis and Canadian copyright law closer together. In Chapter Two I place my work amongst those who have commented on Innis' explorations of the rule of law, and, I consider how Innis' intellectual framework lends itself to the overlap between codified and practiced law. This leads me to propose that the language of copyright law is amenable to exploration as a medium of communication. Following what should rightly be known as Catherine Frost's Innis algorithm (see Chapter Two), I apply her three step examination to copyright law through Chapters Three, Four, and Five. That should mark the completion of this journey, yet life has an uncanny way of

continuing even beyond a student's delineation of scope. In Chapter Six I conclude by considering some of the more recent copyright-related events that are germane to my study of the system of copyright. Following which I indulge with a brief epilogue, and consider in what direction my future explorations will unfold.

## **1.2 The System of Copyright**

... given the present-day notions of intellectual property, exchange would be looked at askance. It is only very vigorous epochs that can give and take without wasting words. Now, a man must be very rich to allow others to take from him without protest, without 'claiming' his ideas as his own, without squabbling over priority. And then comes that intellectual pest of our time – originality (Innis 1946d, p.66).

One can only wonder what Innis might say were he to confront today's highly charged atmosphere of intellectual property. As the currency of our knowledge society, a currency which transcends national borders, intellectual property rights are both asserted and defended with proselytizing-like zeal. Within the gamut of intellectual property rights copyright has taken on added prominence, governing as it does the reproduction of virtually all fixed expressions of creative effort. Concurrent with the increased technological capability for diffusion of creative work on a world-wide scale are calls for greater control of that work through the mechanism of copyright. The intensity with which the expansion of copyright is mooted draws from a dual foundation: the sanctity of property rights and the preeminence of the unique title-holder to that property, the individual creator.

The *Copyright Act of Canada* [hereinafter the *Copyright Act*] grants to copyright holders a set of exclusive, time-limited rights to control reproduction of intellectual creations, based upon specific purposes, genres, and settings of reproduction. At this point, I must emphasize that copyright is not a grant of absolute, private, control over the diffusion of every type of effort culminating in a fixed expression. Copyright does not protect all and sundry; facts and ideas are never protected. The statutory grant of copyright protection applies only to the expression of an idea, with a requirement of some measure of originality. The textbook example of this distinction is, almost always, *Romeo and Juliet* and *West Side Story*. If both works had been created at the same time, copyright law as we know it would recognize each work as an original expression and worthy of protection. However, the protection is not permanent; in Canada the duration of protection, roughly speaking, is the lifetime of the creator plus fifty years. And finally, the protection given is not absolute, even during its term of protection. Copyright can only exclude use of a creative work when such use involves reproduction of a substantial aspect of the work. The term, substantial, is not defined either by the *Copyright Act* or by our courts. And, even during the term of protection, statutory exceptions allow use of all, or part, of creative work, when certain conditions are met.

In the common law tradition the model for copyright is often described as encouragement; to compensate authors, artists, musicians *etc.* for their effort in creating an intellectual object, alienable rights of reproduction allow creators to



exchange the control of that object for financial compensation. The justification for this model, equally as often, is claimed to be social benefit; creative effort supports society as a whole. Another model for copyright, that of civil law ancestry, prefaces the author as the natural beneficiary, with copyright necessary to protect the inherently personal nature of intellectual creation. Left unsaid in both traditions is the fact that all creators rely on past and contemporary copyrighted work; fulfilling a creator's own intellectual aspiration often requires reproducing other work. Instead, the Act is largely designed to facilitate distribution of creative work, paying little attention to either the activities which support the creation of that work or the creator itself. An exception to this structural bent does exist; within the Act there is one measure directly aimed at facilitating the creation of work. This measure is *fair dealing*.

Fair dealing provides individuals with the right to reproduce copyrighted material for specific purposes, including private study and research, *without authorization* from the copyright owner (*Copyright Act*, s.29,29-1,29-2). The right of fair dealing must coexist with copyright's dominant persona as a means of excluding others from reproducing a creative work. Taken together, fair dealing and copyright law do not appear to have a significant relationship to the distribution of staples, or the interplay of media (the seeming hallmarks of the intellectual undertakings of Innis.) While Innis makes various observations concerning the interaction between copyright and nineteenth century British and

American publishing practices,<sup>2</sup> he does not engage in a study of copyright law itself. This need not preclude extending Innis' ideas; implicated as copyright and fair dealing are to intellectual endeavor, the subject readily lends itself to examination through the writings of Innis.

It is often argued that copyright must balance the needs of society with the needs of creators. Given the diversity of need amongst both parties, balance becomes a contested term with little agreement as to what it actually is. Added to this, are varying approaches in how to find balance. Copyright is not the exclusive purview of the law; the disciplines of economics, history, literature, political economy, and communication have joined the fray. A blurred line of division exists in methodological approach; humanities scholars tend towards more qualitative examination and economists engage in more quantitative examination. For instance, economists Michele Boldrin and David Levine place the balance of allocation of intellectual property as that which permits competitive markets to function; they remind us that contemporary analyses of *markets of ideas*, are, in reality, situated upon the market of *copies of ideas* (Boldrin and Levine 2006). They challenge the notion that government monopoly is the best means by which the underlying competitive market of ideas will best thrive.

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<sup>2</sup> Innis makes reference to a key copyright decision *Donaldson v. Beckett* (1774) which entrenched copyright as a statutory right in England (Innis 2007, p.180; Innis 2003a, p.36-37). Copyright appears in a variety of Innis' essays, for instance: "American authors with lack of copyright protection turned to journalism... Publishers demand great names and great books if no copyright is involved (Innis 2003d, p.28-29);" "... the absence of copyright [meant] large scale piracy of English books in the United States, and a smaller-scale piracy of American ones in England (Innis 1946a, p.53);" "Emerson reported the remark of an Englishman: As long as you do not grant us copyright, we shall have the teaching of you (Innis 2003f, p.171)."

While aspects of their argument have much to contribute, it still reflects the prevailing tone of economics literature where analysis is grounded upon activity in a fiscal market<sup>3</sup> and disregards the vast array of cultural effort that is never intended for commercial exchange, but nonetheless is affected by copyright policies.

There are some ongoing attempts to overcome this gap. Richard Posner, an expert in the economics of intellectual property, argues that balance is struck through examining the benefits and costs associated with the scope of intellectual property rights. Then Posner says, “The problems are entirely empirical. They are problems of measurement (Posner 2006, p.165).” He acknowledges that the problem of gathering empirical data is daunting, as it requires being able to estimate the social costs surrounding intellectual property but finishes with a plea for more empirical evidence. While I agree with Posner, that we need a better understanding of the implications surrounding intellectual property, I am uneasy with the prospect of specifying a social cost to its repercussions. The very act of describing a social cost in empirical terms – either numerical or linguistic – makes that activity quantifiable, and thus alienable. This shifts the focus of thought; meeting the quantifiable loss is the seeming correction but the larger problem may still be unresolved or exacerbated. For instance, Sam Trosow argues that students are often required to pay additional licensing fees for

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<sup>3</sup> In the appropriately named, “Stocktake on the Literature (2008),” Towse et al provide a comprehensive analysis of contemporary economics literature concerning copyright.

copyrighted material that is freely available through fair dealing. His concern is met by the rejoinder that each fee is only the cost of "a cup of coffee."<sup>4</sup> This seeming resolution, the minimal cost, obscures the greater problem which is that individual rights as defined within the *Copyright Act* are denied. Innis' writings regarding the price system remind us that imposing a commercial system of exchange upon activities that circulate in *other* systems of exchange is not to be carried out lightly (Innis 1946c).

However, it remains that discussion of copyright is very much influenced by empirical analysis.<sup>5</sup> This is to the disadvantage of those who rely upon more abstract ideas to convey the risk of expanding the reach of copyright. Exceptions do occur; some economists have illustrated that file-sharing has not been the bane of the music industry as is commonly believed.<sup>6</sup> But again, these are explorations of an existing marketplace; they do not address the concern that expanding copyright to commodify that which has not yet been commodified may be undesirable. Instead, projections about the future of creativity are

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<sup>4</sup> *Copyright Issues in Post-secondary Education*, Seminar at Simon Fraser University Harbor Centre, 11 April 2008.

<sup>5</sup> Those lobbying for expansion routinely suggest that, but for lack of copyright, each pirated copy of a commodity represents a sale. The seeming scope of loss became a powerful argument in favour of the TRIPs agreement (Boyle 1996, p.3; Macmillan 2005, p.32). Those warning against copyright expansion need to address economic concerns. The 2002 challenge by Professor Lawrence Lessig questioning the constitutionality of extension to the term of copyright in United States was defeated at the United States' Supreme Court by a decision of 7-2. In his analysis of the loss Lessig indicates that his unwillingness to preface the economic impact of the copyright extension had bearing upon the decision (Lessig 2004, p.229-239).

<sup>6</sup> Industry Canada commissioned a study concerning file sharing and the Canadian music industry (Andersen and Frenz 2007). The landmark study of this vein stated that "Downloads have an effect on sales that is statistically indistinguishable from zero (Oberholzer and Strumpf 2004, p.1)". Economist Stan Liebowitz published a rebuttal (Liebowitz 2007).

extrapolated from detailed historical and philosophical arguments. It has been well documented that youthful nations have thrived by lax copyright rules and turned to stricter copyright regimes only when it served either their political or fiscal interests.<sup>7</sup> Despite this abundance of historical evidence, user rights have not found support within political discussion. In Canada, at the parliamentary level, arguments for limiting the expansion of copyright have resorted to appeals for generosity on the part of creators, or fairness from legislators; neither carries influence to parliamentarians caught up in the market system of thinking (Murray 2005; Nair 2006). On a global scale, the taking of indigenous knowledge without compensation to those societies is vehemently denounced, but again offers very little to persuade Western policy makers to change the intellectual property regime as a whole (Boyle 1996; Shiva 1997; Aoki 1998). Innis' intellectual approach, shaped by his explorations as a political economist and a communication scholar, helps to focus discussion upon the *creative process* and the individual freedom necessary to engage in this process. His examinations of staple commodities highlight the geopolitical influences that affect a nation's autonomy, and, his examinations of media illustrate how power is cultivated within a nation. The two together emphasize the risks of intertwining knowledge production with an exercise of power. Innis offers a fresh position amongst those projecting a negative outcome of an uninhibited copyright expansion; he

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<sup>7</sup> My MA thesis is equally guilty of this charge (Nair 2004); see also Hesse (2002), Boyle (2002), Litman (2001), McGill (2003), Sundara Rajan (2005), and Vaidhyathan (2001).

provides a more specific rationale that not only is it within the interests of nations to limit these exercises of power, but also sets the ground for my argument that fair dealing is the most appropriate means of doing so.

The presumption that the monopoly rights afforded by copyright are the best mechanism to support creative endeavor is by no means uncontested.<sup>8</sup> Yet, copyright is unlikely to be revoked as a whole. Therefore, beginning with the assumption that the mechanism of copyright is intended to support and protect creative individuals, the mechanism must address the needs of the individual creator before, during, and after the creative process. The challenge must shift from mediating between private fiscal returns and free reproduction for the public, an adversarial discussion in itself, to private reproduction in the immediate with private returns in the future. At this juncture, balance still lacks definition, but the absence of balance can be detected by the neglect of a time frame.

The form of copyright law itself mirrors Innis' axiom that intellectual activity and innovation thrive outside of a dominant paradigm of thought. In effect, the creative value of unauthorized reproduction provides a necessary complement to the prevailing view that emphasizes the fiscal merits of private control. And, as Innis was aware, structures, either material or legal, cannot

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<sup>8</sup> The extent of differing opinions was such that in 1876 the British Government embarked upon a Royal Commission to study the implementation of copyright (Saint-Amour 2003). Dispute continued into the twentieth century under no less a voice than Arnold Plant (Plant 1934). More recently, David Vaver reminds us of the lack of evidence between stronger copyright and intellectual innovation (Vaver 2006).

dictate a cultural outcome. Such outcomes are a consequence of a multitude of factors, including the manner by which prevailing interests utilize media or legal structures. These factors must not be neglected when comparing a set of outcomes to a prescribed objective. Applying Innis' mode of exploration and analytical thought to the contemporary environment of Canadian copyright law yields a cautionary note. This dissertation identifies that a significant threat to balance within our copyright regime stems, not from the principles or structure of copyright law, but from the persona attributed to copyright in our contemporary information age. Perception is becoming nine-tenths of the law.

Innis' work has been utilized in explorations of aesthetics, antiquity, economics, feminist studies, Marxism, media technology, modernism, postmodernism, political economy, public policy, and systems theory, but not law (either copyright or any other statute). I find this omission a curious one, given Watson's observations, both recent and past, "Innis viewed the rule of law as one of the highest achievements in Western civilization (Watson 2006, p.387; Watson 1981, p.563)." The entire body of Innis' intellectual work lays the foundation necessary to appreciate law as occupying a fundamental role in preserving human civilization: the law mediates between reason and emotion, knowledge and power, and, freedom and force. And it was in the process of developing his understanding of the law that Innis yielded his insights of institutions, bias, monopoly, and the price system that have come to be the hallmarks of Innisian discussion. These terms, and the concepts they embody,

provide a means by which the characteristics of copyright law can be articulated beyond the inert language of the statute and into the dynamic practices of creative activity.

Taking my cue from Innis I also examine the copyright practices imposed by some Canadian universities upon their graduate student bodies. Innis' acute sensitivity to the manner in which cultural mores are instilled, and perpetuated, dictates the importance of examining the impact of copyright upon nascent scholars. The perceptions of copyright prevalent within this generation will, without doubt, affect intellectual endeavor in future generations. My research suggests that the mere presence of fair dealing within the statute is insufficient; creative potential will only be realized when individuals exercise their right of fair dealing. Owner's rights are gaining strength without any alteration to the law; intellectual property is increasingly interpreted as individual property, and fair dealing is being framed as both cause and consequence of market failure (Loren 1997; Nair 2006).

My doctoral dissertation continues an exploration which began as a masters' thesis (Nair 2004). At that time I examined the philosophical and historical construction of the Anglo-American tradition of copyright, observing that the concept of an individual author was a convenient fiction that owed its genesis to the Romantic era, Lockean arguments claiming the fruit of one's labour, and, the struggles between rival publishers in eighteenth century England. Copyright came into modern existence through the Statute of Anne



(1710) which positioned this mechanism of monopoly as an Enlightenment ideal: *Act for the Encouragement of Learning*. This approach was shared by a fledgling United States whose founding fathers wrestled with their distaste for monopoly regimes against their desire to encourage creativity and innovation in their infant nation. Culminating in a constitutional protection for intellectual property rights, *To Promote the Progress of Science and the Useful Arts...*, copyright was often employed to limit owners' rights and aggressively assert public rights of access to copyrighted work. This pattern changed at the onset of the twentieth century and copyright in the United States became increasingly wedded to the principles of monopoly as greater private control gained political favour at the expense of public access. The lesson I learned from my masters' study was that the extent of copyright law is routinely set by media industries, even though copyright touches the lives of individuals. Most of the material covered by copyright is never intended for commercial exchange, and yet, as David Vaver writes, even a toddler's scribbles will qualify for protection (Vaver 2006, p.34). The debate we see today is only a new manifestation of the same concern that arose with the advent of each new media technology. Although, I will concede one slight modification with respect to this round of copyright debate. In the past, unauthorized reproduction was generally the purview of industries; today, individuals have greater capacity to reproduce and distribute copyrighted materials. Yet I would still argue that the debate is the same. The perennial

question continues: what are the privileges and duties incumbent upon all who are touched by the statutory grant of copyright?

As copyrighted holders become increasingly conscious of individual behaviour with copyrighted material, it is essential that individuals understand the breadth and depth of the law. Yet the complexity of the law (its conceptual basis of ideas versus expressions, the extensive and complicated allocation of rights, global concerns of international cooperation) deters individuals from engagement with the subject at a time when it is sorely needed. Seeking to refute this trend, I continue my studies expressly from a Canadian viewpoint.

Setting and interpreting copyright law in any country requires an ongoing balancing of interests. In these tasks, the principle intentions of the statute often guide parliamentarians and jurists alike, as might the tenor of the nation's legal tradition itself. Canadian copyright law presents a challenge; it has no stipulated intention, and our legal foundation draws from both the Anglo-American copyright tradition of social utility together with European traditions of creator's rights. It must be noted that the conceptual basis of intellectual property rights is itself a Western construct (Coombe 1998; Hesse 2002; Vaver 2000). Canada is fortunate in that the presence of First Nations peoples provides a close-at-hand reminder that the individualistic perspective on creativity is by no means universal.

Developments in copyright law are also affected by international agreement, a trend which began in the days of the *Berne Convention for the*

*Protection of Literary and Artistic Works* (1886). To the detriment of her own publishing sector, Canada was entangled within the *Berne Convention* at its outset (see Chapter Three); despite these less than auspicious beginnings, Canadian law has remained faithful to international cooperation. Yet, today, influential members of the World Intellectual Property Organization continue to claim the contrary and press for stringent adjustments to Canadian copyright law. Despite these pressures, or perhaps because of them, Canada has seen a unique development of the doctrine of fair dealing, culminating in 2004 with a unanimous Supreme Court declaration that fair dealing was a user's right. The imprecision of Canada's legal regime, the intertwining of cultural traditions, the autonomy with which Canadian jurisprudence operates all reinforce Innis' view that interpretation of the law must remain guided by principles and practices, and free from dogmatic strictures.

Unfortunately, this imprecision, diversity, and autonomy is at risk. Under the auspices of globalization, multinational concerns seek to imprint all domestic copyright law with the same model. Curiously, this comes as a purported need to "harmonize." Mira Sundara Rajan reminds us that, in music, "... harmony arises when individual notes are colored by the larger context defined by sequences of different notes (Sundara Rajan 2006, p.10-11)." Such a sentiment might have pleased Innis, adamant as he was that creative potential thrives through the protected interaction of differing paradigms of thought.

### 1.3 Property in Ideas and Ideas of Property

It is too often forgotten that intellectual property is property and that taking it without permission is theft... I do not feel my government should legalize theft (Margaret Atwood quoted in Rushton 2002, p.60).

Contemporary justification for property rights in intellectual objects is often based upon a metaphorical link to property rights in material objects (May 2002, p.165). With this metaphor in hand, the Western regime of intellectual property rights amalgamated three themes of justification: i) the right of reward for one's labour; ii) the element of personality imprinted upon one's creation; and iii) the necessity of creative activity to the well-being of a society. The first two themes share a philosophical origin of natural law with its focus upon the rights of the individual, while the third is of a more pragmatic basis stemming from utilitarian principles. Within discussion of intellectual property rights these arguments appear, to varying degrees, in academic literature, mainstream media, and by industry advocates.

The principles of natural law led to John Locke's famous exposition that a person has property in himself and, "The labour of his body and the work of his hands we may say are properly his (Locke 1966, p.22)." Using Locke's principles, intellectual property rights advocates can postulate that a person has a right of property to any intellectual creation arising through intellectual labour.<sup>9</sup> Locke's remarks came with a few provisos; in particular, the production of property from

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<sup>9</sup> Although as to whether Locke himself would have argued in support of intellectual property rights is a matter of dispute (Bettig 1996; Patterson 1968).

a common resource was only permissible to the extent that one person's property did not prevent the next person from the opportunity of producing a similar object of property. This poses some difficulties in the physical realm of finite resources, yet in the intellectual realm these challenges seem to disappear. Locke's work has iconic-like status; upon his foundation of labour, intellectual property rights appear close to indisputable (DeLong 2002, p.25; Fischer 1999). However, an important caveat arises, also through natural law principles. The uniqueness of the individual, as illustrated through his or her personality, leaves a mark upon their creative endeavors. The Enlightenment principles of individuality supported the Romantic conception of an author as a creative, isolated, genius. Edward Young's treatise on originality has led to a foundational principle for modern copyright. Courts have declared that the 'sweat of the brow' is insufficient to afford copyright protection, meaning that labour is not enough to earn copyright. Originality is the foundation of justification for the grant of copyright.<sup>10</sup>

Nonetheless, natural rights alone were insufficient to achieve a statutory protection of intellectual effort in the Anglo-American tradition. The codification of modern copyright law in both the United Kingdom and the United States relied on the final theme of justification, utilitarianism. The allocation of property rights by the state were framed as a measure of encouragement to creators. For

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<sup>10</sup> "[C]opyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work... (*Copyright Act*, Section 5.1)."

the benefit of society, by being assured of property rights in their creation, individuals will apply themselves to creative effort and add to the stock of human knowledge.<sup>11</sup>

Regardless of which rationale one utilizes to support a claim of property in an intellectual object, it remains that the fundamental premise, the metaphor to tangible property, is suspect. Intellectual objects differ significantly from material objects; for copyright to retain its legitimacy, these differences must be acknowledged and addressed within the overall system. Moreover, while the argument that property rights are the best way to promote human industriousness has bearing on the objective of promoting creativity and innovation, it would be prudent to remember that systems of rights are neither natural nor immutable. All rights are grants from, and supported by, the state.

A property right in an object takes as its foundation the right to exclude others from its use, together with the freedom to exchange the object in a voluntary transaction (Lametti 2003, p.335) . In practice, any given legal system typically prescribes limits on the extent to which property rights may be assigned and enforced over different objects. For instance, the right to derive property from one's labour is limited in many modern societies; individuals are not permitted to exchange their labour by becoming indentured servants. Similarly, a

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<sup>11</sup> The title of the Statute of Anne (1710) reads as: "An Act for the Encouragement of Learning, by Vesting the Copies of printed Books in the Authors, or Purchasers, of such Copies during the Times therein mentioned (Patterson 1968, 142)." Article 1, section 8, clause 8 of the United States Constitution states that Congress shall have the power, "to promote the Progress of Science and the Useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

modern state may demand involuntary labour through conscription; both Switzerland and Israel require military service from all adults. And property rights pertaining to landed estate are subject to usage and conservation laws. To whatever extent property rights are used as incentive, it is important to reinforce a broader conception of the notion of property:

... to be really effective, the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state, as much as the right to exclude, that is the essence of property (Morris Cohen quoted in Babe and Winn 1981, p.15).

The limitations on the reach of copyright are not an affront to individual rights but instead are reflective of the system of property as a whole. Although, the question still remains, how to utilize the system of property rights, complete with its limitations, to facilitate a marketplace exchange of creative endeavor? The appeal of the market is considered the incentive to create and sell a product, with the intention that the sales garnered will exceed the costs of production. The challenge for the marketplace of creative work is that intellectual effort culminates, not in private property, but in a public good.

In economics parlance a public good is characterized by two qualities, it is nonrivalrous and nonexcludable (Baker 2002, p.8). Nonrivalrous means that consumption of the good by one individual does not deplete the good itself. Once consumed a loaf of bread is no longer available to nourish another, whereas a single copy of a book can be read by many. Nonexcludable means the good has no mechanism limiting, or withholding, consumption of the good.

Exclusion mechanisms can be set by technology or public policy, or a combination of both. Automated toll gates are an early example of a technological solution whereas private clubs rely on a position of policy to exclude some participants. Intellectual property's nonrivalrousness and nonexcludability means the property is all too easily shared and the initial costs of production may not be recovered. In our digital world, excludability can be attempted through technological means, but copyright holders are making added efforts to utilize policy as a further means to exclude individuals from accessing copyrighted work.

Even with the continuing inclination of some industrialized nations to adopt more maximalist terms regarding the depth and breadth of copyright, particularly in terms of digital communication, Canada has not yet done so. Two general elections each resulted in a minority government; a recent third election resulted in the same outcome. This has contributed to a slower pace of change to the *Copyright Act*.<sup>12</sup> Canada is fortunate; the unintended delay has provided the necessary time for newer technologies to find significant application, and, allowed for better comprehension of the strengths and challenges of the digital world.

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<sup>12</sup> At the time of this writing (March 2009) Canadian copyright law is in flux. In June 2008 the Federal Government of Canada proposed changes to the Act *An Act to Amend the Copyright Act* (Bill C-61), Second Session, Thirty-ninth Parliament, 2007-2008. The recent Federal election delayed these plans; it is unclear at this time as to when copyright will resurface on the parliamentary agenda.



Not everyone is happy with Canada's delay. The United States routinely denounces Canadian law as antiquated and weak, and portrays Canada as a haven for piracy. Neither claim is correct; nevertheless Canada is being pressed to implement measures adopted by the United States in 1998, known as the *Digital Millennium Copyright Act* (McMurdy 2007). Key amongst external demands is legislation that would make circumvention of technological protection measures (TPMs) illegal, regardless of purpose, and a categorical criminalization of file sharing. These changes are touted as necessary to fulfill Canada's international obligations, even though Canada is under no such obligation. In 1997 Canada signed the World Intellectual Property Organization (WIPO) Copyright Treaties, thereby signaling support of the principles embodied in the treaties. This does not compel Canada to ratify those treaties. Furthermore, the absence of ratification does not mean Canada is sitting outside of international cooperation. Canadian law meets the standard of national treatment whereby foreign copyrights are respected and upheld to the same degree of privilege as a Canadian copyright. Indeed, an Industry Canada study itself suggests that Canada is already compliant with WIPO strictures (quoted in Murray and Trosow 2007, p.32-33). As and when Canada chooses to further engage with the WIPO treaties, the treaties offer more flexibility than most are aware (Murray and Trosow 2007; Geist 2006; Tawfik 2005b). There is latitude for a made-in-Canada law.

In December 2007 the sitting Federal Government made its first attempt to introduce a bill to amend the *Copyright Act*. As it became evident that the bill was designed in the model of the United States 1998 legislation, a wave of protest erupted. The fear of locks placed upon digital content (in contravention of existing exceptions for consumers), and the spectre of facilitating lawsuits by industry upon consumers (an element disdained by many Canadian artists themselves), together with a distaste for allowing American interests to set Canadian domestic policy hit a cumulative Canadian nerve. A subsequent attempt to introduce the legislation in early 2008 appears to have been set aside when prominent members of the Canadian business community openly questioned the direction taken by the Federal Government.<sup>13</sup> The legislation was finally unveiled in June 2008, just before Parliament recessed for the summer. The proposed amendments further strengthened copyright holders' rights; the legislation offered greater copyright protection than anything required by the WIPO Copyright Treaties, and further diluted the measure of fair dealing.<sup>14</sup> With the call of a general election in the Fall of 2008, the legislation died on the order paper.

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<sup>13</sup> Members included the Canadian Association of Broadcasters, the Canadian Association of Internet Providers, the Retail Council of Canada, Google, Yahoo! Canada, and others (Position Paper 2008).

<sup>14</sup> Bill C-61 suggests that fair dealing will bow to contract; "...If the individual has downloaded the work or other subject-matter from the Internet and is bound by a contract that governs the extent to which the individual may reproduce the work or other subject-matter, the contract prevails ... (Canada 2008, s.29.21)." Fair dealing allows for unfettered use of copyright material, provided all statutory conditions are met. Whereas a contract can set its own conditions of usage.

Then-Minister of Industry, Jim Prentice, alluded to the problem of copyright as one of "... balancing creators' rights with consumers' rights (CBC 2008a)." The Minister's choice of language was striking; historically copyright has been described as a means of balancing creators' rights with public interest. Consumer could mean either a paying customer, or, a consuming individual. I suspect the Minister was leaning to the former, but all creators consume the creative efforts of others and, in fact, operate within a system of exchange. One person's creative work draws from prior work, and will likely become fodder for other works; any effort to force *all* creative consumption into a fiscal model of exchange should be closely examined. The task should be to determine what system of exchange best facilitates the proliferation of creative work. Copyright may still provide the answer; what may be needed is simply a different perspective.

Paul Saint-Amour suggests that the narrative of copyright law presents the law as supportive of cultural endeavor. The public domain, the intellectual commons available to all and foundation of creativity, is enriched by new creation. Copyright as incentive to creation is a means by which the public domain grows, and as such copyright law is carefully crafted. Only objects meeting the requirement of original expression are protected. Facts and ideas remain available, at all times, to all people. The protection itself is limited in time, after which the entire expression enters the public domain for completely unfettered use. And, to provide adequate latitude for current and future creators,

copyrighted work remains accessible, through fair dealing [user rights] provisions, during its term of protection. These limitations posed by the law reflect both the social nature of creation as well as the element of restriction found in the system of property as whole. However, Saint-Amour also notes that while copyright law seems nothing but admirable, "In reality, copyright's constitutive balances are highly precarious and extremely susceptible to change through legislative reform, judicial practice and rights-holder lobbying (Saint-Amour 2003, p.4)." His work brings to mind Innis' frequent observations upon the influence of vested interests in setting the course of implementation of media.

Copyright law is often characterized with a causality similar to that which has been attributed to Innis' writings on media and staple commodities. It is claimed that Innis deemed the physical structure of commodities or media as the determinant of the nature of development of societies. Likewise, it appears that copyright law is routinely modified solely in response to developments within media technology. Just as Innis saw a more nuanced relationship among media, commodities, and the cultural atmosphere of a society, the development of copyright law is contingent upon much more than technology. Bringing together these two very distinct bodies of scholarship, copyright and Innis, is not without challenge; fortunately, Innis himself offers a link between his intellectual efforts and copyright law. A set of notes, titled *This Has Killed That*, contains the framework needed for this dissertation. Like all of Innis' work, these notes offer guidance rather than specific theory. Watson writes, "... the chronic ambiguity of

Innis work ... can be traced to his lifelong aversion to dealing with theory in a direct manner. ... [T]he substance of the communications works is to be found not so much in the reams of facts ... as in the manner in which these facts are presented (Watson 2006, p.320-321; Watson 1981, p.431-432)."

Ironically, the challenge of reading Innis is a consequence of his attempt to avoid facile causality. Watson shows us that the seeming jumble of historical snippets conceals an effort to develop three theories – a theory of imperialism, a theory of technological change, and a theory of consciousness – and show their inter-relations. For readers, flung into the onslaught of text without a guiding hand, it is never clearly apparent as to which level of Innis' trialectic analysis that we find ourselves in. In *This Has Killed That* Innis reveals, albeit in his guarded fashion, the intent of his intellectual ambitions and the means by which they can be fulfilled. Implicitly we see evidence of the thesis underlying his ambition; that the endurance of Western civilization rested upon renewal at those regions where thought escaped the confines of the doctrine of the centre.<sup>15</sup> Innis' thesis lends itself well to discussion about copyright.

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<sup>15</sup> Innis revealed his thesis in *Minerva's Owl*, a presidential address to the Royal Society of Canada in 1947. Later reprinted with a collection of essays, the pertinent sentence is, "In the regions to which Minerva's owls takes flight the success of organized force may permit a new enthusiasm and an intense flowering of culture incidental to the migration of scholars engaged in Herculean efforts in a declining civilization to a new area with possibilities of protection (Innis 2003d, p.5)." To those unschooled in the classics, and unaware of Innis' personal life, this remark carries little impact. Watson provides the necessary translation, "Western civilization can be renewed only by intellectual developments on a periphery that, in turn, became a new centre for cultural florescence (Watson 2006, p.7; Watson 1981, p.16)." I return to *Minerva's Owl* at the end of this dissertation.

#### **1.4 *This Has Killed That* — Understanding Innis**

Dated to sometime during World War II, these notes resemble the first draft of later addresses prepared by Innis. Brief as they are, we see evidence of the breadth and depth of Innis' thinking. Innis' intellectual undertakings are marked by concerns regarding Canada's political structure, the preservation of individual freedom, the realm and necessity of intellectual endeavor, all set within the international political strife of the times. This address also offers a glimpse of the objective behind Innis' methodological approach; how he looked for patterns in history and sought to uncover the inter-relationships of the pattern's constitutive elements. Innis' invocation of this famous episode from Victor Hugo's *Notre Dame de Paris* (1831) will resonate with all copyright enthusiasts, bringing to mind the continued lament of established media industries as they confront new media development. New media is usually accused of wreaking havoc upon society and, all too often, copyright is called upon to staunch the wounds seemingly inflicted by the new technology.

With respect to his choice of title, Innis writes, "It suggests questions which occupy at one time or another the minds of all of us and which are of particular concern to those of us immediately connected with universities – questions of freedom and power (Innis 1977, p.3)." Noting that this challenge existed from the time that universities appeared as distinct from monastic institutions, Innis suggests that universities are ultimately compelled to make peace with institutions of power, or escape their confines entirely:

Whether it has been church or state, the scholar has found himself compelled to consider the dangers of centralized power. His interests coincide with those of such instruments of centralized power so long as they are essential to the maintenance of order and the suppression of fanaticism and license. Freedom cannot exist without order ... With the outbreak of force during the present century it has become clear that we have been unable to find a solution to the problem of freedom and order. We have resorted to force rather than persuasion and to bullets rather than ballots (ibid.).

Innis did not write in the vein of abstract ideals; the horror of war was one that he had experienced first-hand. His service during World War I shaped his attachment to Canada, laying the ground for a lifetime project that was both personal and professional. Watson aptly notes that unless we understand the context of Innis' work, we will never understand the content. Watson's work, *Marginal Man: Harold Innis' Communications Works in Context*, was filed as a doctoral dissertation with the Department of Political Economy at the University of Toronto in 1981. Subsequently updated to address the Innisian scholarship that ensued in the following twenty-five years, he republished his dissertation in 2006 as *Marginal Man – The Dark Vision of Harold Innis*. To date, Watson's efforts remain the most authoritative source regarding Innis' work and life. There can be no substitute for reading *Marginal Man* in entirety, but for the needs of this dissertation I offer a brief summary of the environment in which Innis laboured, and the goals to which he aspired.

The Dominion of Canada had not yet fully emerged from its colonial beginnings; Innis was determined to bring Canada out from the shadows of imperialism. This goal of autonomy required a thorough overhaul of the

Canadian educational system of the day. Allied to Innis' ambition was the conviction that hinterland intellectuals were not only capable of achieving international repute, but the very means by which civilizations would endure. Enabling these individuals with individual and intellectual freedom was necessary for Canada to reach its potential. And key to this undertaking was the development of Canadian universities; institutions which were not to be mere imitations of metropole institutions, but instead, sites of uninhibited dialogue.

Innis believed that at the edges of an empire, thought could be untethered from the norms, allowing for greater latitude of investigation and debate, albeit under the protection of a political-economic force. Historically this force emanated from communities at the edges of empires – nomadic tribes or smaller courts – in the nineteenth and twentieth centuries force found its form in the nation-state. Yet Innis was careful to shield his ambition. His thesis, that uniquely Canadian universities could provide sustenance for Western civilization, did not meet with approval from ranks of administrators who had vowed to serve King and country, in that order. Innis' last few years of work are carefully constructed epistles of ambiguity, an ambiguity which has cost him dearly. The posthumous respect Innis deserves within the pantheon of Canadian intellectuals has been tentatively given. In 1994, during a celebration of the centenary of Innis' birth, Charles Acland and William Buxton drew attention to the renewed interest in Innis' writings regarding communication and culture, but ruefully admitted, "The demonstration of high regard for Innis' work sometimes



has the same enthusiasm as an obligation to visit a relative one doesn't really like (Acland and Buxton 1999, p.12)." Contradictory or condemning interpretations of Innis are a result of scholars' inability to examine Innis in the context of his entire project. In the years following Innis' death, scholars focused on one aspect or another, and neglected to consider its relative position, together with the geopolitical situation both in Canada and abroad.

My brief exposition of Watson's findings does not convey the depth and breadth of his meticulous research efforts. His work includes examining Innis' intellectual methods and illustrates that we gain much more from Innis if we pay close attention to his sources. Important as the array of content Innis assembles is, so too are the life histories and intellectual practices of those he cites. With respect to Innis' economics research, his first hand explorations provided a subtle, but important, contribution:

[Innis] traveled not only to obtain a firsthand view of the milieu and technique of staple production but also to plumb the oral tradition of those involved in the trade. He used this knowledge to offset the bias of the written documentation (Watson 2006, p.261; Watson 1981, p.398).

This mode of research was not available to Innis during his later studies. He lacked the capability necessary to decipher ancient languages, and did not have a comprehensive understanding of philosophy, religion, or classical studies. To offset these challenges, Innis amassed an extraordinary amount of material drawing from specialist scholars in those fields,<sup>16</sup> and found a new way to offset

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<sup>16</sup> An earlier essay by Watson, "Harold Innis and Classical Scholarship," published in a special issue of *Journal of Canadian Studies* (1977) identifies the support provided by the Classics

the bias of specialists. Watson examines what remains of Innis' bibliographies and reading notes, and points out the significance of unscholarly biographical studies for Innis:

The influence of such works in the published text of Innis' communications works is almost invisible, in the same way that direct reference to his travel experiences is absent from staple works. Nevertheless, ...these banal biographies, like his trip notes and conversations of earlier times, were essential ingredients of the material he was producing ... The biographies were the closest links Innis could come to direct conversations with ordinary people who had been engaged with media work but were long since dead. He felt obliged to read them to avoid being blinded by the great names of the specialist scholars working in these new fields (Watson 2006, p.268; Watson 1981, p.404-405).

If we keep Watson's analysis in mind, it is evident that Innis felt a connection to Victor Hugo. In other writings dated to the mid-1940s, Innis makes specific reference to Hugo and *Notre Dame de Paris*; for instance, "... 'architecture was the great handwriting of the human race...' (Innis 1946b, p.91);" ... "the book destroyed the 'ancient Gothic genius, that sun which sets behind the gigantic press of Mayence...' (Innis 2003d, p.24)." And, more significant than merely borrowing a title, Innis shared Hugo's vision of creativity and innovation thriving from beyond the reaches of dominant thought. Through his protagonist Archdeacon Claude Frollo Hugo vividly describes the role of architecture in articulating human thought, and the impact of printing upon human expression.

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department at the University of Toronto to Innis' labours. Unfortunately, this essay inadvertently lent credence to the popular belief that Innis' attachment to ancient Greek culture was a *consequence* of his colleagues' interests (Heyer 2003, p.41). Innis' interest in Greek culture is addressed in Chapter Two; just as Innis' work is rarely considered in light of his entire project; the same could be said for Watson's work.

Himself an architect of stirring prose, Hugo describes how, until the fifteenth century, all arts had been harnessed in the service of the cathedral.

In those days, he who was born a poet became an architect. All the genius scattered among the masses and crushed down on every side under feudalism ...finding no outlet but in architecture, escaped by way of that art, and its epics found voice in cathedrals. All other arts obeyed and put themselves at the service of the one. They were the artisans of the great work; the architect summed up in his own person, sculpture, which carved his façade; painting, which dyed his windows in glowing colours; music, which set his bells in motion and breathed in his organ pipes. Even poor Poetry – properly so called, who still persisted in eking out a meagre existence in manuscript – was obliged, if she was to be recognised at all, to enroll herself in the service of the edifice, either as hymn or prosody ... (Hugo 1917, p.186-187).

Then Hugo beautifully illustrates the potential of cultural florescence outside of the reach of monopoly as Archdeacon Claude Frollo reflects on the emancipatory potential of the printing press:

...from the moment that architecture is nothing more than an art like any other ... it is powerless to monopolize the services of others ... Each art gains by this divorce. Thus isolated, each waxes great. Stone-masonry becomes sculpture; pious illumination, painting; the restricted chant blooms out into concerted music (ibid., p.190).

Innis' (and Hugo's) intellectual vision that creative effort and innovation thrive in regions outside of dominant modes of thought offer an alternate perspective upon the relationship of fair dealing to copyright.

The enumerated activities that are now invested with the right of copyright control are expansive, but there still remains a space, outside of this dominant market operation of copyright, where individuals may freely engage with copyrighted material for good faith, productive purposes. This space comes into existence through the individual rights that provide legitimacy for

reproduction, transformation, combination and permutation of copyrighted work. Unfettered by the reach of copyright owners, uninhibited by the presumption of payment, individuals may undertake to fulfill their own creative aspirations. In doing so, they partake of, as well as contribute to, the public domain.

Credible scholars across many disciplines interpret the public domain as the body of works whose copyright term has expired,<sup>17</sup> but much greater scope is legitimately possible. The World Intellectual Property Organization (WIPO) defines the public domain as, "... the realm of works which can be exploited by everybody without any authorization... (WIPO 1981, p.207)." Therefore, the public domain includes work whose term of copyright protection has expired; it also includes currently copyrighted material accessed in accordance with the principles of fair dealing. As the sphere of copyright grows, the access provided by fair dealing becomes all the more critical if creativity and innovation are to thrive.

The extent to which Innis was aware of the intricacies of copyright must forever remain conjecture, but it can be pointed out that Hugo had a keen interest in copyright. He championed the establishment of an international copyright law; his efforts culminated in what eventually became the *Berne*

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<sup>17</sup> The public domain is routinely inferred to be composed of material whose copyright term has expired (Boldrin and Levine 2006 [2005], p.212; Murray and Trosow 2007, p.49; Ricketson 1987, p.319; Handa 2002, p.72; May 2006, p.279; Towse et al 2008, p.3). In recent years the Supreme Court of Canada have invoked the realm of the public domain as relevant to discussion of copyright but employed the term without definition (*CCH Canadian* [2004], *Théberge* [2002]).

*Convention*. But Hugo's advocacy included protection of the public domain; as the keynote speaker at the Paris World Exposition of 1878, he left no doubt as to his priorities:

Je déclare que s'il me fallait choisir entre le droit de l'écrivain et le droit du domaine public, je choisirais le droit du domaine public  
– If I have to choose between the rights of the author and the rights of the public domain, I will choose the rights of the public domain –  
(Hugo (1878) quoted in Wirtén 2004, p.184 n.11)

Hugo was acutely aware of the continuum of creativity where artistic endeavor perpetually renews itself in a myriad of forms. Key to maintaining the continuum is to ensure that the past, and current, remain as fodder for the future. Likewise, Innis had a marked appreciation for the importance of maintaining a conscious appreciation of the past, in order to safeguard future freedoms. A few of his colleagues recognized the importance that individual liberty held for Innis; in one very moving obituary we find, "Throughout his career he brought history to bear on the present, and his hope was that man would continue to do so, in the interest of liberty (Brebner 1953, p.730)." Innis' appreciation for human liberty, and plea to maintain such liberty, has all but vanished from discussion of his work. Innis' legacy appears bound to the arena of technology, while simultaneously tainted by the charge of technological determinism.

The intensity with which Innis' name is drawn into discussions of technology requires that clarification be offered. Technological determinism is the view that the cultural composition of a society is a result of its technological foundations – that the political, economic and creative aspects of daily life stem,

not from individual action, but from the practices conditioned by technological capability. To such thinking, our history is shaped by our technology, or lack thereof. The causality of this argument has brought forth skepticism from many quarters and Innis' association to this argument has proven detrimental to his reputation. Critics charge that he saw only a uni-directional causality from the technological structure of both commodities and media to social habits, leading to this summation, "A more general problem with [Innis'] theory [is] his lack of attention to the role of human agency in making and shaping the course of history (Acland and Buxton 1999, p.22)." Such criticism becomes all the more poignant given that not only did agency play a significant role in Innis' theory but that he hoped such agency would be the salvation of Western civilization.

The label of determinism has its roots in Innis' writings of staple commodities and regional development, and surfaces again in his explorations of media and of law. However, embedded in all three is the awareness that cultural factors as a whole play a part in the development of intellectual endeavor within hinterland regions. The political, the geographical, the technological, the economic, and the social, require examination. Watson observes that the orthodox interpretation of what has come to be known as Innis' economics staples theory has limited the understanding of Innis' work; "... when we examine these writings closely, we find that they [cannot] be reduced to a few neat rules of analysis (Watson 2006, p.145; Watson 1981, p.237)." Others have said the same with respect to Innis' later writings (Christian 1980; Frost 2003).

The inconclusiveness of the interaction among the non-material elements explains Innis' inability to set them into "neat rules of analysis." For many readers this lack of specificity has meant that Innis' underlying edict – change does not occur in a vacuum – is overshadowed by the detailed expositions of staples and production, or, media and distribution, or, legal code and imperialism. As a consequence readers are inclined to see only the seemingly deterministic conclusions surrounding the material elements. Without appreciating his underlying argument, Innis' penchant for detail is taken as evidence of a poor writer incapable of presenting a concise and logical argument.

James Curran identifies Innis as a technological determinist and a forerunner of a tradition where, "elliptical prose ... conveys the impression of profundity, and, the history of mass communication can be conveniently ticked off without the need to read a single, serious work of history (Curran 2002, p.53)." Other scholars see a more constructive use of Innis' work, but still present his work in the realm of technological structure and caution against relying on his theme of determinism (Briggs and Burke 2005, p.5-6; Murdoch p.46 and Scannel p.194-198 in Jensen 2002). Of course, international scholars coming of age in the last quarter century were less likely to benefit from Watson's earlier work, predating as it does the age of digital dissertations and world-wide access. An exception to these limited perceptions of Innis can be seen in the work of James Carey. Predating Watson, Carey's earliest work concerning Innis does describe Innis as a technological determinist, albeit "a rather soft determinist (Carey 1967,

p.7).” However, as Carey’s work progressed, his exploration of Innis yielded a more nuanced interpretation. Carey consistently brought heightened attention to the milieu of Innis’ intellectual development, in particular, the Chicago School, and writes of Innis’ contribution in expanding the scope of that school’s central paradigm (Carey 1999, p.81-104; Carey 1989, p.145). Through his work, Carey provides added clarity to our understanding of Innis’ existence as, and Innis’ thesis about, hinterland intellectuals. And, even without the benefit of Watson’s work, Carey identified the political thrust of Innis’ undertakings:

Innis had an admirable and indispensable moral gift expressed throughout his life but perhaps most ardently in his opposition to the cold war and the absorption of Canada into it and in his defense of the university tradition against those who would use it as merely another expression of state or market power (Carey 1989, p.142).

Innis’ lifetime of work was driven by his efforts to bring Canada to a position of autonomy whereupon the country would be able to withstand pressures exerted from all external empires (see Chapter Two.)

Returning to the question of determinism, a handful of Canadians continue to emphasize that Innis was not a technological determinist, although their defense is largely limited to what can be gleaned from Innis’ published work, as compared to his life experiences (Frost 2003; Robinson 2007; Buxton and Dickens 2006; Comor 2003; Heyer 2003).<sup>18</sup> Fortunately, Watson thoroughly examines Innis’ treatment of technology, civilization and agency, and dispels the charge of determinism with authority. Drawing from close examination of Innis’

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<sup>18</sup> See also Bonnett (2001) for a précis of latter twentieth century refutations of the charge of determinism.



archives, noting the feelings expressed by Innis, his friends and family, Watson traces Innis' attitudes to technology as connected to his experiences during World War I. The potential of technology was revealed in that inhuman combat; it was not limited to neutrality or benevolence, but reached diabolical proportions. The unmasking of technology, "...allowed Innis to focus his work on the underlying perspectives or myopias that technologies of communication imposed upon human consciousness (Watson 2006, p. 90; Watson 1981, p.130)." This may seem to support a charge of determinism. Or, as Innis saw it, recognition of that myopia meant uncovering its boundaries, where a critical consciousness necessary for innovation and diversity resided. While technologies of communication have the capability to induce a line of thought, it remains that these technologies are implemented by design, often at the will of the power structure of a society.

### **1.5 Next Step: Innis and the Law**

The classic dialectic of knowledge and power, rather than the relative permanence of media forms the basis of Innis' treatment of the human condition (Watson 2006, p.313; Watson 1981, p.383; Watson 1977, p.54).

While Innis may have intentionally devised his public addresses to be abstruse<sup>19</sup> in *This Has Killed That* he explains with some clarity that the capacity within technological development to function as an instrument of power is often exploited by *existing* centres of power. This interpretation finds further support

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<sup>19</sup> Innis' efforts to use his intellectual analyses as illustration of Canada's vulnerabilities – the ease with which the establishment in Canada (be they government, industry, religious, or, academic factions) exploited the Canadian people – did not sit well with elite of the day (Innis 1956, p.387).

in the work of William Buxton and Risa Dickens. Following in the vein of Watson's explorations, they examine an unpublished speech of Innis' and write:

Innis' enthusiasm for speaking to [members of the press] could be explained by the fact that he never treated the print media as a monolithic entity. This belies the notion that he was some sort of technological determinist who felt that print induced causal effects by virtue of its inherent properties; he was always at pains to emphasize that the print media were composed of various institutions, each with its own concerns and interests (Buxton and Dickens 2006, p.329).

This capacity to extend power by monopolizing technological means has been mirrored in the development of the laws of intellectual property. The rhetoric of copyright, that it seeks to enhance cultural endeavor for the betterment of society, cloaks the immense power wielded by the private sector through copyright. If priority had been placed upon the enhancement of cultural endeavor, appreciating its intrinsic value as an expression of human creativity within the larger social and political domain, copyright law would have evolved with greater emphasis upon creative communication. Instead, culture has been positioned as an article of trade with explicit fiscal value.

Shortly after Innis' death, his friend and colleague Tom Easterbrook made this observation:

Major changes over history in the technology of communications are themselves culturally conditioned, and Innis' writings on law, religion and politics attest to the absence of the technological determinism with which he is sometimes charged; he was too aware of the close interrelations of technology with institutions and physical environment to fall into this trap (Easterbrook 1953a, p.11).

The term "institution" had particular meaning to Innis, influenced as he was by institutional economist Thorstein Veblen. Many scholars have noticed Innis'

attachment to Veblen, although Veblen himself has received comparatively little attention.<sup>20</sup> Yet it is one of Innis' contemporaries that best articulates Veblen's legacy; Alexander Brady spoke of Veblen's awareness of the "human impulses and social forces that fashion the economy (Brady 1953, p.88)," and noted that this approach was greatly broadened in Innis' hands. An outcome later corroborated by another of Innis' contemporaries; shortly before her death Irene Spry wrote:

As [Innis] had shown in his own research, it was essential to go and see the actual setting of the problems that one was struggling to understand ... Innis believed that economists had to understand [in addition to geography], geology, biology, botany, human customs, culture, religions, and technology, as well as politics if they were to understand economic problems. His own various studies of Canadian industries show how effectively he lived up to this belief (Spry 1999, p.106).

Veblen defined institution very vaguely, "as a cluster of habits and customs, ways of doing things, and ways of thinking about things, both of them sanctioned by long practice and by the community's approval (Innis 1929, p.25; Veblen 1948, p.23)."<sup>21</sup> Intellectual property rights are one such institution, comprising a set of practices sanctioned by time and approval of civil society. Throughout this dissertation I consider how habits are instilled and cultivated with regards to the practice of copyright.

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<sup>20</sup> Innis' admiration of Veblen is well documented, both by himself and others (Heyer 2003, p.16; Innis 1929; Creighton 1957, p.59; Bonnett 2001, p.45-50; Easterbrook 1953b; Stamps 1995, p.57) to name but a few. Yet only Robert Babe and Alexander John Watson appear to have deeply explored Veblen's contribution to economics. Babe is particularly forceful regarding the importance of Veblen in general, stating that, "Veblen should be considered a founder of the discipline of Communication Studies." (Babe 1995, p.154, Watson, 2006 p.153-163; Watson 1981).

<sup>21</sup> My choice of Max Lerner's selection of Veblen's work, *the Portable Veblen*, is two-fold; Innis references another work of Lerner's, a compilation of writings from Oliver Wendell Holmes (Jr.), in *Roman Law and the British Empire*, and Robert Babe and Alexander John Watson both make reference to the *Portable Veblen*.

At this stage it might be prudent to recap my plan of page five. In Chapter Two I examine Innis' writings concerning the rule of law, how past scholarship has looked at these writing, all the while considering Innis' thoughts from his perspective as a peripheral intellectual. From that examination, I present my rationale that the copyright law is eminently well suited to adopt the persona of medium of communication and thus lends itself to an Innisian exploration.

Innis' style of investigation is much broader than a mere static assessment of technological structure. I am particularly indebted to Catherine Frost (2003) for her articulation of Innis' mode of exploration (see Chapter Two). Applying Frost's Innis algorithm occupies my attention through Chapters Three, Four, and Five. In the Conclusion (Chapter Six) I consider the outcome of my exploration, set against some of the more recent copyright-related events that arose after I set the scope of my study. And finally, in the Epilogue, I look back once more to Innis. What lessons can we still learn and apply to the ambit of copyright? Said another way, where might a margin arise for fair dealing itself?

## ***II. Harold Innis and the Law***

[Innis's] communications works, then, should not be seen as a radical new departure so much as a return to the "philosophical approach" of his early mentors, in particular James Ten Broeke. Innis's production of essays on law in the last few years of his life certainly represents the flowering of a personal interest in the subject following thirty confidence-building years in scholarship (Watson 2006, p.325-326; Watson 1981, p.440-441).

### **2.1 Introduction**

In this chapter I revisit the accepted paradigm of Innis' scholarly work, a set of coordinate axes known as time and space, and, orality and literacy, and consider that framework with the view of understanding the law, particularly as Innis might have seen the subject. It is imprudent to suggest that I have uncovered the essence of Innisian thought – the world will never know precisely what that thought was. However, by revisiting the framework, and using Watson's remarks as the starting point, I can show that there exists greater depth and applicability to Innis' thinking than is generally acknowledged. Despite Watson's early observation regarding Innis' interests in the law, only a few scholars have examined Innis from this perspective. Intriguingly so, William Christian, Richard Noble, and William Pencak each independently considered the overlap between Innis and the law, and are united in their assessment: For Innis, the rule of law, and its application, played a large part in Canada's potential as an autonomous nation and a site of innovation. The contributions of Christian, Noble, Pencak and Watson are discussed throughout this chapter. As

Canada continues to wrestle with the intricacies of copyright law, intertwined as that task is with domestic autonomy, returning to Innis can suggest a different position from where to reconcile the various dimensions of copyright's mandate.

Sparse as the inquiries concerning Innis and the law are, the conjoined terrain of Innis and copyright law is even more barren. Two explicit connections exist, but in terms of 'Innis the economist' or 'Innis the communications historian.' Harry Chartrand recognizes copyright as a staple of the knowledge economy and reminds us of Innis' work depicting staples as "[engendering] a particular pattern to the economy (Chartrand 2006, p.xv)." Ronald Bettig explores the history of copyright law "with the systems approach pioneered by [Innis] (Bettig 1996, p.3)." The overlap of copyright law with Innis' writings is much broader than these passing references would suggest; interestingly though, both Bettig and Chartrand open the door to greater possibilities. With respect to revised approaches of explorations centred upon communication technologies, Bettig writes, "these approaches do not entirely dispense with notions of determination ... but do disinherit the claim that determination operates only in one direction or in every instance. They resurrect dialectical analysis while recognizing the efficacy of ideology and culture (ibid., p.11)." This sits nicely with Chartrand's observation that, "Just as language structures human thought, law structures attitudes and behaviour contributing to the ethos or distinctiveness of a culture (Chartrand 2006, p.xii)." Taken together, law is a mode of communication that structures and is structured by the cultural

inclinations of the society in which it exists. Given Innis' close attention to the manner by which cultural inclinations arise, following his methods permits one to gauge how Canadian copyright law is evolving, and what the potential outcome of this evolution may be.

In a more theoretical turn, Robert Babe briefly introduced the work of Innis into cultural policy analysis in 1981 for the Department of Communications (Babe and Winn 1981, p.21). In this work pertaining to copyright and broadcasting, Babe begins by examining the very nature of cultural policy and describes a paradox articulated by Innis. Developments in modern communication, ostensibly capable of promoting cohesion and continuity within the nation, promote divisiveness because they are utilized in service of the individual and the momentary. In Innisian language this is the perennial tug-of-war between the cultural perspectives of time and space. Time manifests itself as a desire for maintaining a cultural heritage, with space holding stagnation at bay through an emphasis upon innovation. Time is inclined towards the community, and, space leans towards the individual. Babe describes the challenge for cultural policy in Canada; the desire to strengthen the sense of community takes form through the offering of individual property rights:

Government must use property in pursuing its goals because such is the nature and function of government. Government allocates and enforces property rights; it does not and cannot allocate and enforce empathy or cooperation (ibid., p.20).

And yet, copyright law with its component of fair dealing can do what Babe writes as being beyond the confines of government. The law, if properly observed, does mandate measures of empathy and cooperation upon both parties. Creators have a duty to share their work as necessary to foster other creators' efforts, and, these other creators (often referred to as users) have a duty to recognize past efforts, and not to abuse the right of access. Copyright law provides a living demonstration of the balance between the tendencies of space and time, and the means by which we can reach balance.

This claim necessarily relies upon multiple chapters of my dissertation; in this chapter I examine Innis' writings on law and illustrate that the subject of law lends itself to Innis' modes of analysis. But Innis does not make this easy. His lack of transparency requires that his readers have the patience and skill of an archaeologist. The dizzying arrays of brief historical glimpses, and even briefer citations, pave the way for understanding only if the reader delves deeper into the intellectual makeup of the sources Innis cites. The work of Richard Noble is a case in point, which I examine in Section 2.2. Furthermore, comprehension is greatly facilitated if one acquires some understanding of the ambition which underwrote Innis' lifetime of work, and the role played by the rule of law in support of that ambition.

It has been noted that Innis considered a career in law; the prevailing view seems to be that he set this area of study aside in favour of economics (Creighton 1957, p.41; Heyer 2004, p.168). Whereas Watson explains that Innis' detour



through economics was due in part<sup>1</sup> to Innis' sense of self-doubt regarding his own abilities, coupled with his realization that a grasp of basic subjects was necessary before pursuing more complex ones. "In other words, his change in focus from religion, culture, and philosophy to law and then to economics should be viewed as a conscious retrogression (not progression) that would be reversed once he felt he had established an adequate academic background (Watson 2006, p.102; Watson 1981, p.170)."

Innis himself comments on his career path. Recalling the teachings of a McMaster professor, W.M. Wallace, who said, "that the economic interpretation of history is not the only interpretation but is the deepest interpretation (Innis 2004b, p.S-25)," Innis believed facility with economics must be gained before addressing the law:

[I decided] to remedy to some extent my defective knowledge ... and ... remain in Chicago and complete my work for the PhD before starting my studies in law. The uneasy conscience, however, continued to worry me and I never felt completely equipped to go into the profession of law (ibid., p.S50-51).

Innis' appreciation of history was not purely for the task of historiography but to further a fundamental pursuit. Underlying his lifetime body of work was a central question, *how are civilizations to remain civil?* Catherine Frost writes of Innis' preoccupation with, "what constitutes a good civilization (Frost 2003, p.13)?" Set within his personal goals as described by Watson, it becomes clearer

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<sup>1</sup> Watson also points out that pursuing a PhD garnered Innis better financial aid from the Invalidated Soldiers' Commission, than that derived by reading law in a lawyer's office – the avenue by which a law career began in 1918 (Watson 2006, p.82; Watson 1981, p.149).

that Innis longed to instill and retain civility, where civility is a conscious respect for individual liberty. In doing so, not only would Canadian interests be better served, but Western civilization would extend its duration by respecting the diversity of its marginal cultures. Innis' concerns lay with the manner by which knowledge is reconciled with power, order with liberty, and reason with emotion. And the purpose for such civility can be found in the preamble of a little known *Preliminary Draft of a World Constitution*. Brought to light through the work of William Christian (Innis 1980, p.xvi),<sup>2</sup> this effort to draft a world constitution was undertaken by Innis and members of American academia. The preamble states:

The People of the earth having agreed  
That the advancement of man  
In spiritual excellence and physical welfare  
Is the common goal of mankind...(Hutchins et al. 1948, p.3)

Alexander Brady, a friend and colleague, made the following observation about Innis:

The violent years of the Second World War awakened in him, as in many thoughtful people, fundamental questions about the nature of contemporary civilization and the special factors which shaped it and were likely to determine its fate ... [Innis] had early come to cherish individuality, and was anxious above all that individuals should not be pushed around by public authorities, powerful corporations, or ecclesiastical sovereigns (Brady 1953, p.92-93).

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<sup>2</sup> Christian edited Innis' *Idea File* and included with the finished publication Innis' unpublished notes on law. These notes served as a basis for the only composition of Innis' that directly addressed the law, *Roman Law and the British Empire* (1950). Of the *Idea File* itself, Christian writes, "The reader of the ... 1500 notes will have an easier time once he realizes that concern for the dignity and the freedom of the individual lies at the heart of almost every note (Innis 1980, p.xvi)."

What Brady does not directly allude to was Innis' coupling of this concern for civilization with Canada's place in it. Innis' own experiences as a colonial soldier during World War I had left him not only with deep psychological scars, but an even deeper commitment to see Canada achieve a position of autonomy and regard upon the world stage. Innis' lifetime ambition was to balance freedom for all with freedom for each, allowing all individuals the best possible opportunity for self-development and creative expression.

## **2.2 In Pursuit of Liberty**

Here we see the shaping of Innis' view of Canada; a nation founded not upon the invocation of an enemy, but instead upon the shared experiences of a community of Canadians. Set amongst the most extraordinary margins of humanity, the trenches of France, the soldiers saw in themselves a movement from colony to nation.<sup>3</sup> This sense of identity came with a cost; "[Imagine] what the death of 240,000 and the wounding of 600,000 of the younger men ... would mean to our society today (Watson 2006, p.87)."<sup>4</sup> Canada was left without the numbers, or the will, to carry on the reconstruction necessary for Canada to stand as an independent nation. Innis was determined to concentrate on Canada, partly as a result of the identity he forged with other soldiers and their affection for Canada, and partly due to the influence of Prof. G.M. Wrong at the

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<sup>3</sup> The soldiers' resolve was motivated in part by the fact that their English superiors saw their contribution as coming to the aid of the Empire, not as an act of independent Canadian will (Innis 2004b, p.S-73).

<sup>4</sup> Watson makes a similar comparison in his 1981 publication, but the extrapolation of figures to Canada's population of the time results in different figures (Watson 1981, p.136).

University of Chicago (Innis 2004b, p.S-73). Wrong was clearly aware of the limitations of the Canadian Dominion; when the Americans included scholars in their delegation to the Paris Peace Conferences, Wrong's suggestion that Canada do the same was rejected. Instead, the Canadian delegation would be served by information from the British sources. Wrong responded simply, "Canada goes to the Peace Conference with no opinion of her own... she goes as a colony and not as a nation (Watson 2006, p.116; Watson 1981, p.192)."

Innis saw that Canadian identity had to be constructed in relief against both the English colonial view and the American jingoistic one. Canada's existence was not to serve the Empire, nor was it to be fashioned on military rhetoric of fighting a common enemy. Instead, if the nation could attain economic, cultural, and political autonomy across its realm, it would identify with, and as, its own. This project went far beyond an intellectual career plan; Innis committed himself to nothing less than building the Canadian nation:

It is no occasion for faintheartedness but in the name of those who have fallen in the defense of the liberties of the country and in obligation to those who have returned from that struggle, the Canadian people have before them the task of presenting to the world, a nation morally and materially great, a monument worthy of the men living and dead who have made this possible (Innis 1918, p.20).

Innis' writings on law, creativity, and liberty all have relevance to contemporary debate concerning the future of Canadian copyright law. The construction and application of law as a means of enhancing creative liberty, and the Canadian development of this law, reflect not only Innis' reverence for the rights of the individual, but also the contribution Canada can make to the

international regime of copyright law. Our contribution has value, not despite its uniquely Canadian stature, but because of it.

Chartrand writes, “[I]t is important to note that Canada is also bi-juridic operating with Anglosphere Common Law in English-speaking Canada and European Civil Code in the Province of Quebec. ... With the exception of the Republic of South Africa, Canada is the only English-speaking country to operate with both legal traditions (Chartrand 2006, p.xii).” The division between legal traditions is not confined to provincial boundaries; a prime example being the *Copyright Act*. Through its dual titles, *Copyright Act and Droit d’Auteur*, the common law development of copyright as a means of social utility mingles with the natural rights inclination of the civil law tradition. The distinction between the two traditions of law lies in the form of their development: common law begins from practice, civil law asserts legitimacy through principle. “As human artifacts, of course, both have strengths and weaknesses and both are less than ideal in practice (ibid.)” Left unsaid by Chartrand, but of critical importance to Innis, is that the weakness of one can be offset by the strengths of the other.

William Pencak places Innis’ calls to uphold the tradition of common law in Canada as a key component of his Canadian project (Pencak 2005, p.212). Common law allows for human activity to shape the development of law itself, and is a necessary complement to the more static workings of civil law. Innis’ repeated calls to preserve the tradition of common law in Canada were to ensure Canadian unity through respect for diversity. By taking into consideration local

custom, common law was a means of bringing cohesion to the Canadian nation comprised as it is by regions with disparate cultures. Pencak situates these perspectives within a familiar Innisan coordinate plane; common law emanates from the oral tradition (a temporal inclination), whereas civil (Roman) law emphasizes the written tradition (with spatial tendencies.) Recognizing the difficulty for students raised in the written tradition to appreciate the nature of orality specific to Ancient Greece, Innis uses Plato's (written) Dialogues as an illustration:

Plato attempted to adapt the new medium of prose to an elaboration of the conversation of Socrates by the dialogue with its question and answer, freedom of arrangement, and inclusiveness. A well planned conversation was aimed at discovering truth and awakening the interest and sympathy of the reader. ... The power of the oral tradition persisted in [Plato's] prose in the absence of a closely ordered system. ... The life and movement of dialectic opposed the establishment of a finished system of dogma (Innis 2007, p.79).

I return to Innis and the oral tradition later in this chapter; for now let it suffice to say Innis' distrust of dogma was allied to his desire for individual freedom.

Pencak identifies Innis' interest in multiple legal perspectives and draws the conclusion of their benefit to individual freedom. Which pairs well with the work of another scholar; Richard Noble begins with Innis' conception of freedom, and leads to Innis' calls to preserve the common law. "For Innis, Canada's continued existence as a democracy and a nation depended on its ability to preserve and foster freedom through its cultural and political institutions (Noble 1999, p.31)." Noble provides an illustration of how to read Innis; he specifically disclaims the idea that he reconstructed Innis' intellectual

context, instead his reading of Innis “illuminates Innis’ political thought (ibid., p.44 n.1).” Herein lies the crux of understanding Innis.

Noble traces Innis’ views on freedom to the eighteenth-century Whig tradition as espoused by David Hume, Adam Smith, and Edmund Burke. Individual liberty meant a realm of non-interference, guaranteed by the rule of law, but applicable to all. Therefore, liberty was not license to do as one pleases, but instead the assurance of protection from the arbitrary will of another. This element of the Whig tradition drew from John Locke but set the reconciliation of non-interference and social order with customs that had evolved gradually over time, which mitigated the likelihood of emotional considerations. Noble uncovers Innis’ appreciation for the circumscribing of emotion by reason<sup>5</sup> by paying close attention to Burke and Hume, beyond any references provided by Innis:

Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their appetites (Burke [1881] quoted in Noble 1999, p.32).

Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular. The rules of morality, therefore, are not the conclusions of our reason (Hume [1745] quoted in Noble 1999, p.33).

Moral restraint induces observation of the law, but the question remains, what is morality and who defines it? If the law is derived from customs and traditions which evolve over time, individuals are free from the tyranny of the immediacy where morality is invoked in the interests of the elite. In our hotly

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<sup>5</sup> The elements of reason and emotion keep appearing in Innis’ writings, *i.e.* *This has Killed That* (1977), *Political Economy in the Modern State* (1944), *A Plea for the University Tradition* (1944).

contested environment of copyright, the frequent calls to respect intellectual property rights come to mind. It is all too easy to frame an incursion into copyright as a violation of a property right; such behaviour is deemed evidence of a lack of morality. The outrage conveniently cloaks the reality that copyrighted work is legitimately accessible under the condition of fair dealing.<sup>6</sup>

A second characteristic of the Whig tradition lay in its parting of company with the social contract tradition as prescribed by Rousseau and Kant. For such thinkers, freedom was in the vein of universal rights, an intrinsic part of the human condition. Whereas for Hume, Burke *et al*, freedom was contingent on each nation's historical experiences. Experiences which invariably stood as situated amongst those of the broader empire, making freedom a relative concept. Perhaps nowhere is this more evident than in Innis' acute awareness of his role as a colonial intellectual. If Innis had pursued purely academic analyses of regional development, his expansive scholarly investigations might have won him accolades more easily. His efforts to use those analyses as illustrations of the necessity of developing Canadian autonomy brought rancour, and a curtailment of academic liberty, to his feet instead.<sup>7</sup>

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<sup>6</sup> For instance, David Basskin, legal counsel to the Canadian Music Publishers Association stridently opposes any effort to accommodate exceptions such as fair dealing, "Academics with tenure or a guaranteed salary tend to be the ones making rationale cases for what amounts to theft of creators' rights (quoted in Melnitzer 2008)."

<sup>7</sup> In a speech to the United Church in 1947 Innis said, with respect to his appointment as departmental chair of Political Economy at the University of Toronto, "I am unhappily too aware of the fact that I am the first Canadian to be appointed [to this position] ... My predecessors have been regarded as safe since as non-Canadians they could not make statements on Canadian affairs which would be taken seriously (Innis 1956, p.387)



The final hallmark of the Whig tradition, again drawing from Locke, is that power must be distributed with the government. By implementing a system of checks and balances between the executive, the legislative, and the judiciary, those who design the law remain subject to it. Which means the design of the law is more likely to be directed to the benefit of society instead of serving vested interests. It has not escaped the notice of thousands of Canadians that the most recent copyright negotiations are failing on precisely this point. Despite the expressed interest of artists, educators, nascent industries, and individuals, Bill C-61 was crafted behind closed doors under the control of vested interests, both domestic and multinational.<sup>8</sup>

Noble's uncovering of the philosophical underpinnings of an Innisian catchphrase suggests a further direction by which to understand Innis' theories: to what extent did Innis appreciate Hume *et al*? As has been observed, Innis' writings are strongly indebted to Adam Smith (Babe 2000, p.52; Bonnett 2001, p.149-202). Watson goes further and reminds us that Innis was aware of Smith's status as a periphery intellectual, a Scotsman who studied beyond the confines of the doctrinaire thinking exemplified by the university traditions of Oxford and

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<sup>8</sup> During the lead up to Bill C-61, CBC's program *Search Engine* brought in more questions and concerns from Canadians than the total number of submissions, by individuals, to the House of Commons during the 2004 copyright revisions process. Despite this interest, then-Industry Minister Jim Prentice declined to participate on the program (CBC 2008b). Launched in December 2007 the FaceBook Group, *Fair Copyright for Canadians*, gained a membership of nearly 90,000 Canadians by August 2008, but negotiations with the ministers involved was confined to industry groups (Geist 2008a; Geist 2008b).

the metropolitan power of London (Watson 2006, p.187; Watson 1981, p.296).

Innis is quite specific about the nonconformist nature of Smith:

When a University has been doing useless things for a long time, it appears at first degrading to them to be useful. A set of lectures upon Political Economy would be discouraged at Oxford, possibly despised, probably not permitted (Smith quoted in Innis 1946e, p.114).

Although union with England in 1707 brought Scotland into the English fold, Scotland's location at the fringes of England provided a more culturally diverse environment which, together with economic growth, permitted a diversity of thought culminating in the advancement of the principles of economic liberty.<sup>9</sup> That this should occur in the late eighteenth and early nineteenth century, when the struggle for civil and religious liberty was prosecuted in England, foreshadows Innis' writings about empires. It supports his rationale that empires endure for greater duration by cultivating stability through liberty at its fringes; Innis writes:

The universities of Scotland escaped the heavy hand of the state and while the church attempted to excommunicate Hume, it was possible for him and for Hutcheson and Adam Smith to strengthen the extension of civil liberties in the direction of economic freedom (ibid., p.113).

In the same vein, Edmund Burke was a periphery intellectual of liberal views in opposition to his mainstream peers. Although born into the Anglo-Irish gentry, during his political career he argued strenuously for less oppressive governance of Ireland. Innis' admiration for the Whig tradition was not only

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<sup>9</sup> Innis makes particular reference to the development of scholarly literature in Scotland, that Scottish writers had been directly supported by the universities; a consequence being the creation of the *Encyclopedia Britannica*, published in Edinburgh in 1771 (Innis 2007, p.180).

indicative of the principles espoused, but illustrates an aspect of Innis' thesis: innovative and creative thought are found in regions outside the reach of a dominant paradigm.

Canada's existence on the margins, this time with respect to the practices of law, offers an ideal setting in which to situate Innis' work. Theoretically, the means by which we recognize our two legal traditions suggests a mediation that should ultimately prove beneficial for the purposes of individual freedom and creative endeavor. With respect to copyright, a much quoted remark from *Compo Co. v. Blue Crest Music Inc.* [hereinafter *Compo*] instructs that matters of copyright dispute should not be resolved simply according to the principles of either common or civil law:

“[Copyright] neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute (*Compo* 1980, para.23).

This guidance has been interpreted as instructing courts to resolve disputes, without assuming a conclusion as dictated by common law or civil law principles (Vaver 2000, p.19). With my interpretation of Innis, I offer an amended interpretation; rather than distancing oneself from one conceptual basis or the other, matters of copyright are best resolved by considering the interaction between both conceptions. Innis writings upon common and civil law illustrate how these systems of law can co-exist, to the betterment of creative liberty for all concerned. If, as Noble writes, “... Innis associates liberty with cultural traditions

and historically evolved institutions for reasons other than epistemological skepticism or reverence for traditional wisdom (Noble 1999, p.34),” then placing the clarity of civil code within the context of historically derived custom, ensures a system of governance which remains flexible and checks inclination to stagnation and dogma. Innis captured the contextual strength of common law with one very simple phrase: “Law was found, not made...”

In France and particularly England the weakness of the written tradition favoured the position of custom and the common law. Law was found, not made, and the implications were evident in the jury system, the King’s Court, common law, and parliament (Innis 2003d, p.21).

That Innis should have felt fondly towards common law, with its antecedent oral tradition, should come as no surprise. But, as there is some confusion regarding Innis’ admiration of the oral practices of Ancient Greece and his perspective of written communication, a digression is in order. Innis’ self-stated preference for an oral tradition in the vein of Ancient Greek culture lay in its strength to support “the importance of life or the living tradition (Innis 2003b, p.190).” Nevertheless, Innis did not slavishly aspire to orality.

## **2.3 Orality and Oratory / Literacy and Liberty**

### **2.3.1 Orality and Oratory**

A criticism of Innis is that his examination of orality suffers by its exclusivity. “His work evidences no discussion of the phenomenon as evidenced in the prestate societies of sub-Saharan Africa, South Asia, and the New World (Heyer 2003, p.71).” This presupposes that Innis’ initial objective was to examine orality, which was not the case. Orality was not a region of academic study for

Innis; it was a very personal experience. William Buxton and Risa Dickens remind us that orality was endemic to Innis' intellectual practices, that his essays were composed as oral addresses to differing audiences. When scholars study his work as written text, they may not consider its original context. Each oral address is marked not only by a specific audience, but also a place in time (Buxton and Dickens 2006, p.326). However, Watson's earlier work probes the atmosphere of orality more deeply. He illustrates that the oral tradition was practiced as part of the cultural landscape in which Innis was raised, the semi-literate community of Otterville, and then took hold with Innis as oratory (Watson 2006, p.47-48; Watson 1981, p.72-73).

Oratory was prized by the traditions of Innis' day. It is telling that he chose to spend a portion of his first professional earnings (one term of teaching in 1911-1912) upon a subscription to the *Toronto Globe*, expressly to follow the debates in the House of Commons:

... the debates in the House of Commons were matters of great interest and spirit. The Rev. J.A. Macdonald, editor of the *Globe*, pursued with great effect the weaknesses of the government and exploited the contributions of Laurier and others in the opposition. I remember being forcibly struck in the reading of Laurier's speeches, which were reproduced in the *Globe*, with the amazing range of his vocabulary as contrasted with that of most English speakers. I met numerous words for which it was necessary for me to consult the dictionary and it was clear that a careful following of the *Globe* was in itself an education in English (Innis 2004b, p.S-22).

Debate took on an even more personal meaning for Innis during his time at McMaster University:

In the course of the year as president of McMaster University Debating Society, I took part in one inter-college debate held on December 3rd, 1915, on the subject "Resolved that Commercial Property is Necessarily a Cause of War." My debating mate was Mr. J.W. Davis and our opponents G.F. Kingston, who later became Primate of All Canada but died at far too early an age, and R.F. Palmer, both of Trinity College. The judges included Mr. J.A. Patterson, K.C., and the Hon. Justices Mr. F.R. Latchford and Mr. C.A. Masten. Their decision was not unanimous but was given in our favour (*ibid.*, p.5-31).

Contemporary political debate bears little resemblance to that of Innis' era; we must consciously remind ourselves of the manner by which debate was conducted then. The goal was to apply rationale thought to a position; to demonstrate the coherence of that position within an established system of principles. This structure, where two sides of an argument are presented equally without appeal to emotion or personal opinion, gave further impetus to Innis' respect for the processes embedded in common law.

Although he was skilled in oral argument, Innis' attachment to Ancient Greece was not solely due to its traditions of orality, but with the recognition that Greek culture was the cradle of both Western and Eastern civilization (Watson 2006, p.367; Watson 1981, p.527). With the Cold War looming, Innis saw that the cultural heritage of the United States and the Union of Soviet Socialist Republics originated from the Roman and Byzantium empires, respectively. Each being a variant of Greek heritage, Innis hoped for rapprochement between the two super-powers by renewing the cultural traditions of their former unity. His admiration of Greek culture stemmed neither from hostility to modern technology, nor a romantic inclination to pastoral times, but from the view that

Greek culture represented an inclination to justice and democracy. "The democracy of Athens was the first great instance which the world ever saw of the substitution of law for force (E.A. Freeman quoted in Innis, 2007, p.78)."

Reviewing Innis' exploration of the legal traditions of Ancient Greece, it appears that Innis saw the influence of Greek oral culture upon the utilization of written code within their rule of law. Watson explains the central distinction between Greek oral culture and the oral traditions of other Eastern empires; Greek oral tradition carried the cultural mindset of developing a consensus, and not of "legitimizing oppression (Watson 2006, p.371; Watson 1981, p.535)." The Greek practice drew strength from what Watson terms, "their intellectual backwardness [in the employment of script]," a handicap that ensured the adoption of writing began as subordinate to the oral tradition. Innis saw the advantage this brought to a system of law:

The flexibility of law ... was possible before a written tradition had become firmly entrenched. Written codes not only implied uniformity ... but also an element of inflexibility. ... When Athens became the centre of the federation ... the way was opened to greater flexibility in the law through the contributions of orators ... (Innis 2003d, p.21).

Allied to the development of flexible system of jurisprudence was the growth of liberty for the individual. Innis systematically shows that as the legal system evolved, those charged with administering the law remained under scrutiny as necessary to ensure the rights of the individual were maintained. For instance, paraphrasing from his detailed history reveals:

In the early aristocracy magistrates administered the unwritten customary law. Supervision over the laws was exercised by the hearing of

formal complaints against the judges. .... The example of written laws in the [Greek] colonies was probably followed by demands for written laws in the mother country, but here they became a compromise with a strong oral tradition. ... The severity of [written code of 621 BC] ... was checked by a constitutional change with guaranteed an individual the right to ... prosecute the magistrate who had wronged him (Innis 2007 [1950], p.89-90).

Emanating from the root that an act of injustice threatens common security, individual vengeance was replaced by social retribution. Individual responsibility emerged together with individual freedom. Freedom moved from principle to practice, by virtue of a constitution designed to resist concentrations of power. The power of the oral tradition was reflected by systems of governance that accommodated continuous adjustment through compromise and order.

Even with this benefit, Innis was still not blind to the risks of the oral tradition. Chief amongst these was an inclination to boredom and stagnation, the “inability to muster the intellectual resources of a people (Innis 2003c, p.133).” Added to which, an overt focus upon maintaining social organizations, comes with neglect of administration and oversight. Regions located upon the periphery were especially vulnerable to revolt from within, or invasion from beyond (Innis 2003a; Innis 2003e, p.75). Yet despite Innis’ broad assessment of orality, there has been a tendency to romanticize his attraction to the oral tradition. For instance, with respect to Innis’ examination of the influence of Greek culture to the Roman Empire, Paul Heyer writes:

[Innis] observes how a society that was primarily oral and based on forms of reciprocity linked to kinship gave way to one where written laws and contracts became the matrix of social relationships. *Ancient Law*, Henry



Sumner Maine's still revered classic, is one of Innis' major sources (Heyer 2003, p.50).

Such language carries a subtle message that the progression to written laws and contracts was detrimental in Innis' eyes, that written communication debases individual autonomy.

### 2.3.2 Literacy and Liberty

Innis' frequent reliance upon *Ancient Law* (1861) prompts a closer examination of that text together with its author Sir Henry Sumner Maine (1822-1888). Early, and later, twentieth century editors of Maine indicate that his contribution to legal theory represented a departure from the conventional thinking of the time (Morgan [1917] in Maine 1960; Rosen in Maine 1986). In opposition to the school of jurists represented by Jeremy Bentham and his follower John Austin, as well as the political philosophers of the day, Thomas Hobbes, John Locke and the like, Maine presented law as a product of historical development. Maine illustrated that the idea of law, in its earliest stages, was not driven by immutable precepts. "In the infancy of mankind ... law had scarcely reached the footing of custom; it is rather a habit (Maine 1960, p.5)." With the echo of Thorstein Veblen still resonating, together with Maine's reluctance to rely on dogma, this writing may have struck a chord with Innis. Ideas of the law began as isolated assessments of the facts without any clear order. It required the passage of time before custom became fixed by particular groups of elites, and then embodied in codes. Maine's investigations of ancient law, including Greek,

Roman, Indian and Chinese traditions culminated in his often quoted proposition, "... the movement of progressive societies has hitherto been a movement from Status to Contract (ibid., p.100)."

Maine's language needs deciphering; it is not immediately clear that he is lauding the growth of liberty for the individual. In contrast to the arguments of the Benthamite reformers, or the Rousseau romanticists, both of whom depicted society as composed of free individuals surrendering their liberty to give birth to society, Maine argues that the collective was the basic unit of primitive society. "Ancient Law ... is concerned... not with individuals but with Families, not with single human beings, but with groups (ibid., p.152)." Individuals existed within families, and families operated much like corporations where the allocation and transfer of resources was carried out irrespective of the activities of any one individual. Members of the family had no individual autonomy; their daily existence was a function of the *status* of the family. Through his examinations of behaviour surrounding wills, property, and contract, Maine observes that changes within the political, social, economic, and moral spheres induced a shift in the stature of the individual. They gained the capacity to arrange their resources on a personal, contractual basis. "The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of *individual obligation* in its place (emphasis mine, ibid., p.99)."

The conjoining of individual with obligation clarifies Maine's enthusiasm for contract, and Innis' attachment to Maine. In the context of ancient legal practices contract meant a mutually recognizable binding agreement, offering autonomy to the individual while continuing to foster relationships between individuals. A contract was not an impersonal promise; it moved an act of commitment from that of ritual, to an act of independent will. With this understanding, the relationship of contract between individuals may be every bit as reciprocal as under the oral tradition. Moreover, the use of written records in Roman law did not in and of themselves precipitate the rise of the contract; Maine argues that the benefits of the contract occurred despite a human inclination to leave written code in dogmatic terms. "It is indisputable that much of the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since ... their embodiment in some permanent record (*ibid.*, p.14)." Maine's regard for Roman law, and thus perhaps Innis', is in part attributable to that culture's desire to ameliorate a rigid system of law for the better: to introduce equity to social relations, to bureaucratize the monarchy, and to foster commercial innovation. These measures contributed to alleviating the risks inherent to oral cultures as noted by Innis. Innis saw merit in the written tradition as a necessary counterbalance to the more cumbersome and impersonal elements of the oral tradition.

Returning then to Innis' interest in common law as it evolved in England; the pattern of continuous adjustment repeated itself, with common and civil law

operating as a system of checks and balances between continuity and innovation. As told by Innis, the story of law is a story of experience, and of experiencing change. And, taking my cue from Noble and Watson, it is prudent to pay close attention to Innis' chosen interlocutors.

## **2.4 Wisdom from the Margins**

### **2.4.1 Francis Bacon**

Amongst Innis' published works there is only one essay that purports to address the law directly, *Roman Law and the British Empire* (1950). Readers looking for a systematic historical account of the law are bound for disappointment. Delivered as an address to the University of New Brunswick to mark its 150th anniversary, the essay appears largely to describe mundane legal practices, the rise of United States imperialism, and their combined effect upon Canada. Not only does Innis provide few details of the traditions of common law, but the sequence of historical and contemporary information provided is, at times, erratic in chronology. With careful study though, Innis' pointillist effort yields a broader perspective. He illustrates areas of intersection between Roman law and common law, the subsequent reshaping of the actors involved, and the consequent effect upon the world at large. Innis closes his address by saying, "... I should regard the 150th anniversary of the University of New Brunswick as an occasion which our faith in the traditions of common law, which were reflected

after the American Revolution in the founding of this university, could be reaffirmed (Innis 2004c, p.67).”

The tradition of common law in England rested upon a distinctly non-literate foundation. As Innis writes, “... it consisted of customs which existed in unwritten form ... it was necessary to discover these customs through the use of the jury system and the calling together of representatives of different communities in Parliament (ibid., p.68 n.2).” However, England of the 17<sup>th</sup> century practiced two streams of law. Set against the egalitarian ideal of common law was the more authoritative tradition of Roman (civil) law. This predominantly written model lent itself to the Tudor philosophy of the supremacy of the sovereign. During the reign of James I, the court of the King’s Bench, Common Pleas and Exchequer, and the House of Commons all stood irrevocably on the common law side, whereas the Chancery Courts, the Star Chamber, and the High Commission staunchly supported the Crown’s authority. Innis was clearly aware of the tension between practitioners of the two streams of law:

Sir Edward Coke defended the position of common law in the Bonham case, “When an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void (ibid., p.46).”

The Bonham case of 1610 was one of a handful of disputes where the legitimacy of the Crown to intervene in legal proceedings was called into question. These collisions between common and civil law were argued between

Sir Edward Coke, Chief Justice of Common Pleas, and Francis Bacon, Attorney General to James I. To Bacon, the English tradition of the King's justice had to continue; the Chancery Courts offered an avenue of appeal and equity for all men. In a country where noblemen were sometimes without scruples, "... a king's intervention and mercy were a poor man's hope (Bowen 1963, p.136)." Bacon and the Crown eventually prevailed, and the implications were lasting. Common law decisions are subject to review by appellate and Supreme Courts to this day. A point not lost on Innis:

In federal constitutions emphasizing the traditions of Roman law in common law countries supreme courts occupy a crucial position. Common law traditions assume the state is part of the law and the subject has greater difficulty in separating himself from the state. Change is consequently more gradual and less subject to revolution (Innis 2004c, p.67).

Just as other periphery intellectuals had intrigued Innis, so too did Sir Francis Bacon; "England on fringe could produce Bacon as continent dominated by monastic ideal (Innis 1980, p.96)." Innis was aware that Bacon supported the rise of science, at a time when reverence for the written Word impeded such undertakings:

Bacon attacked universities as centre of magisterial learning of continent and favoured new institution emphasizing science – reflected interest of London in practical affairs while universities distant from London remained centres of ecclesiastical tradition (ibid., p.129).

Catherine Bowen examines Bacon's study of Roman law, and concludes that it gave him a broader outlook on the English common law. "If Edward Coke saw common law as the perfection of reason, Bacon saw it as limited by medieval

technicalities and accretions, rigid and slow, urgently needing the relief of equity (Bowen 1963, p.49-50).” Bowen’s observation of Bacon is more than reminiscent of Innis’ assessment of cultures which tend too far to one cultural perspective (oral or literate, temporal or spatial) and required a corrective of the opposite inclination.

The faint but persistent theme throughout Innis’ essay is the benefit that common law brings to the goal of individual liberty. Again, paraphrasing from Innis’ swath of information, he writes:

Common law implied concern with local customs and facilitated the development of the British Commonwealth by peaceful means or by minor rebellions... In common law countries the state became part of the customs and traditions and the revolutionary tradition was weakened. ... The common law has consequently been responsive to the opinion of all classes of society including the illiterate. This contact has possibly been more effective than that of the church and religion since it is without the elaborate ceremonial and the written scriptures ... The common law gives great emphasis to character and to the study of character from an objective point of view. Its success is linked to individualism. The common law with its emphasis upon the oral tradition has perhaps a greater interest in the ascertainment of facts ... Facts are more important than principles (Innis 2004c, p.47-52)

Common law’s oral perspective made it a unifying cultural force by respecting individuals and local regions. That said, Innis was all too aware that conditions in Canada were affected by those of the Imperial masters. Which finally proved advantageous with respect to the United Kingdom but then less so from the United States. Innis’ dispirited remark that Canada moved from colony to nation to colony comes to mind (Innis 2004a, p.115). Britain absorbed the influence of Roman law, only to restore and strengthen common law. This

ultimately served to diminish the autocracy of the monarch and contribute to the development of the Commonwealth, with greater autonomy afforded to prior colonies. Whereas following the American Revolution, the efforts to protect the position of the law in the United States' ultimately supported imperialism. Innis explains, "Emergence of a federal government with a constitution ... involved protection to fundamental law but in a protest against the divine right of [the British] parliament, assumed the divine right of the United States ... (Innis 2004c, p.56)." This perspective had significant consequences for Canada<sup>10</sup> with continued risk to the role of common law. Extending Innis' remarks from earlier:

In federal constitutions emphasizing the traditions of Roman law in common law countries supreme courts occupy a crucial position. Common law traditions assume the state is part of the law and the subject has greater difficulty in separating himself from the state. Change is consequently more gradual and less subject to revolution. But Roman law tradition favoured by written constitutions in the United States and in members of the Commonwealth leans towards imperialism, and threatens the beneficial effects of common law in Western civilization ((Innis 2004c, p.67).

Bearing in mind Innis' distrust of written form because of the inclination to use it in service of dogma, a brief note in *Roman Law and the British Empire* provokes further examination. In describing appointments to the Supreme Court of Canada Innis writes:

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<sup>10</sup> "It has been said that the British empire was acquired in a fit of absent-mindedness, but the empire of the United States has grown up during periods imperial fanaticism marked by such slogans as "Manifest Destiny" and "54-40 or Fight." ... In Canada we have seen American imperialism at work in various ways ranging from fisheries disputes to protests against the construction of the Canadian Pacific Railway and the duress exercised by President Theodore Roosevelt on the arbitrators during the Alaska boundary dispute... (Innis 2004c, p.59)." As will be seen in Chapter Three, early copyright law in Canada was affected by similar duress applied from the United States, and acquiesced to by Britain.



Codes and statutes impose a heavy burden on language. ... Changes in language necessitate the constant attention of the courts. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in the colour and content according to the circumstances and times in which it may be used (Holmes)" (Innis 2004c, p.70 n.15).

#### 2.4.2 Oliver Wendell Holmes, Jr.

The reference to Oliver Wendell Holmes Jr. raises a question: how did Innis view Holmes' contribution to jurisprudence? A Civil War veteran wounded in battle, a philosopher at heart who pursued a career in law following the end of the war; the parallels to Innis' life are evident. Holmes' reputation as the Great Dissenter might also have intrigued Innis.<sup>11</sup> An enigmatic entry from Innis' *Ideas File* provides some answers. "Oliver Wendell Holmes – background of interest in common law – oral tradition – refusal to be bound by black letters – common law is experience (Innis 1980, p.22)."

Holmes penned more than a 1000 judicial opinions, speeches, articles, and reviews, but is renowned for his work, *The Common Law* (1881). Considered a founding document of sociological inquiry into jurisprudence, evidence is that Innis read, at least in part, *The Common Law*.<sup>12</sup> But, Innis' quotation from Holmes is cited as from Max Lerner's *The Mind and Faith of Justice Holmes* (first published in 1943), a work combining a brief personal history of Holmes together with a selection of his speeches, essays, letters, and judicial opinions. Lerner positions

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<sup>11</sup> Catherine Bowen calculates that Holmes participated in fewer dissents than the average United States' Justice (Bowen 1945, p.447) but the erudition and sincerity with which he wrote, coupled with deference he showed to the majority, gained him both the title and the respect of the nation. Like Holmes, Innis has been described as a dissenter (Babe 2000, p.54).

<sup>12</sup> A footnote in *Empire and Communication* (2007, p.218 n. 90) quotes a passage from *The Common Law*.

Holmes as a marginal member of the United States Supreme Court – marginal in the best Innisian sense of the word – Holmes opposed the dominant strain of thought:

It was not a brilliant Court, nor an enlightened one ... The main outlines of judicial strategy had already been laid down. ... [The] whole duty of a Supreme Court Justice lay in filling in the outlines of [due process and laissez-faire] decisions and in using constitutional law as a way of entrenching the system of economic power. Holmes refused to live up to the rules of the game so conceived. He had no intention of conscripting the legal Constitution as he saw it to the uses of the economic Constitution. Any more than he would conscript it to the uses of a political program (Lerner in Holmes 1954, p.xxxviii).

An early proponent of what later became identified as legal realism, Holmes' fundamental tenet was: "The life of the law has not been logic, it has been experience (Holmes 1881, p.1)." As such, the law must be interpreted not only against the events of the times, but in consideration of the future. New ideas often came to the court in shackles with the judiciary charged to decide the legality of the idea. As legal precedent, courts' decisions would have repercussions for generations to come. Throughout his legal career, which culminated in thirty years of service to the Supreme Court, Holmes insisted that decisions of law must be made outside of the strictures of any prevailing dogma, and outside the bounds of the letter of the law. Lerner describes Holmes' journey as one marked by frustration, with a Supreme Court majority showing hostility to Holmes' perspective upon the Constitution.

The Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or

novel and even shocking ought not to conclude our judgment [as to their legitimacy] (Holmes 1954, p.49).

The Constitution embodied principles, and it fell to the judicial elite to articulate and shape these principles for society. Holmes' treatment of written law brings to mind Innis' admiration of Plato's dialogues, for preserving the power of the spoken word on the written page. Innis did not deplore written communiqué on face value; it was the subjugation of words to render them powerless that he despaired of.

Holmes' unwillingness to yield interpretation of the law to dogma must have appealed to Innis. Added to which are Lerner's accounts of Holmes exploration of the law – his interest in the classics, his reading of both Anglo-American and Continental legal literature, the importance of legal history, and the relation of legal systems to the culture in which it is embedded – Innis' journey through law shows a remarkable similarity.

#### **2.4.3 from Innis to copyright**

Bowen makes another Innisian-like observation; she writes that Holmes studied common law together with Roman law, examined the formation and dissolution of states, and concluded that, "...when the pattern of a society changes, legislation meets the change or the state perishes (Bowen 1945, p.302)." Innis examined ancient empires and looked for the means by which empires endure. Patterns in society were evidence of the cultural inclinations to time or

space; the ability of society to mediate from one pattern to another was key to its continuity or collapse.

Innis' discussion of empire has been prone to inversion. Charges of determinism assume that Innis was beginning with structural characteristics of the media and correlated his findings to uncover an imbalance in the empire. Watson noted thirty years ago, and reiterated in 2006, that to the little extent Innis employed causality he began with the framework of empire and worked backward to expose the relationship between media (Watson 2006, p.316; Watson 1977, p.56). For Innis, the term empire lacked any connotation, either positive or negative; it was simply a recurring institution. His interest lay in balanced empires; they were necessarily pluralistic having productively resolved the challenge of endurance and stability across time and space (Innis 2003e, p.64). And stability was an indicator of the individual and intellectual freedom necessary to sustain society:

I have attempted ... [to use the concept of empire] as an indication of the efficiency of communication. It will reflect to an important extent the efficiency of particular media in communication and its possibilities in creating conditions favourable to creative thought (Innis 2007, p.29).

The instructive measure here lies in the plural form: *media of communication*. For each cultural perspective expressed through a means of communication, Innis desired the presence of a complementary perspective to mitigate the extremities of the other. The *Copyright Act* has such a foundation already; it is structured to

include the dual perspectives of time and space through an implicit and explicit mingling of civil and common law.

Through Holmes' influence, we see a glimpse of how common law and civil law can engage in a productive co-existence. The conjoining of the two results in heightened awareness of both practice and principle. As a consequence, emotion is held at bay. Holmes lauded liberty of all individuals, so much so that he refused to use the law in sympathy of an individual. The lesson to be learned is the necessity of depoliticizing the actors within a law. From a copyright perspective, this means resisting the temptation to contextualize copyright in ideological terms. Copyright in Canada is typically framed in terms of national identity, the sanctity of the creative people, or by purely fiscal concerns.<sup>13</sup> Even in abstract terms the current trend to describe copyright in terms of balance between users and creators may do more harm than good. It provokes an adversarial, emotional discussion and reframes questions of copyright as questions of access. As a consequence the purpose of copyright as an aid to the *creative process* is either distorted or left by the wayside entirely.

Advocates for lesser control via copyright argue that creativity will be undermined if the common stock of human knowledge is strictly controlled. The implication being that it is in society's best interests to ensure some measures

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<sup>13</sup> Perhaps best exemplified by remarks in 2005 of then-Heritage Minister Liza Frulla, "...Children are going to become researchers, authors, composers; ... they will have the right to be compensated for their intellectual property. This is what Canada is all about (CBC 2005)." The current government speaks of multiple priorities with some emphasis upon reward from creative effort, and, fostering innovation to attract investment and lucrative jobs ((Industry Canada 2008).

exist by which users can freely partake of copyrighted work. The converse argument states that without stronger copyright terms, creators will not have sufficient incentive to engage in creative activity, which is ultimately to the detriment of society. Setting apart any consideration of society's wellbeing, and focusing instead upon Innis' desire to afford liberty to all individuals, where does copyright assist or detract from his goal of ensuring sufficient liberty and order for individuals so that they may use their creative potential?

To meet its prescribed intentions of supporting social utility and creators' rights, copyright has been designed to function predominantly as a means of control over diffusion of creative work. Yet consider the creative process before the allocation of copyright, before the instantiation of the intellectual creation. The nascent creator begins as a purveyor of past and existing intellectual creations. The question of access to copyrighted material, *for that same individual*, has changed. The relationship between the creator before, with the same creator after, is predicated upon the creative process itself. Rather than considering copyright as a defined point between access and control, copyright law meets its intentions better by allowing for continuous adjustment on the part of a creator. Efforts to use the law as an instrument of stagnant regulation deter its potential to act as a medium of continuity between past, present, and future.

## **2.5 Conclusion: Communication Through the Medium of Law**

To position the law as a medium is likely to invite curiosity, or complaint, or perhaps both. The term itself, medium, can encompass a larger connotation than that of technology; Innis himself makes plain that his thinking was far broader than was later attributed to him, "The oral tradition facilitated and encouraged the introduction of a new medium such as mathematics (Innis 2007, p.88)." Catherine Frost sums up the challenge for would-be Innis interpreters, "Although Innis talked about the importance of new media and their impact on knowledge, it is not immediately clear what constituted a new medium in his view (Frost 2003, p.10)."

Reviewing Innis' details of characteristics of media she observes, "[for Innis] a new medium is that which employs a new material, tool, or process. Changes in these factors therefore imply important changes for communications, knowledge, and ultimately civilization." This may suggest that Innis was strictly a material man, that his attention was focused upon the physical nature of communication conduits, however, Frost opens the door to a much broader interpretation, "... in the end, Innis was most concerned with the potential for a new medium to effect changes at a broad civilizational level.... (ibid., p.11-12)."

Whether or not Innis viewed the law as a medium will remain unknown. One thing is evident, his writings of the law illustrate that he saw language as a tool of the law. I suggest that if a medium is that where changes therein imply changes for communications, knowledge, and civilization, then the language of

copyright law, a law intended in part to further knowledge by stipulating terms of communication, can assume the persona of a medium and is well-poised for examination through Innis' methodology. A methodology which Frost shows as being much more than a static assessment of structural characteristics:

First, [Innis] was attentive to the pre-existing geographic and cultural conditions in which a new medium arose and was adopted; second, he detailed the economic and technological features associated with the medium itself; and third, he was concerned with a medium's potential to influence content and to foster new social and economic monopolies down the line (ibid., p.11).

This dissertation continues by applying Frost's observations in a study of the *Copyright Act*. In Chapter Three I examine the pre-existing geographic and cultural conditions in which copyright law arose in Canada. Extrapolating from what the "economic and technological features [of a medium]" are, in Chapter Four I examine the manner in which language implements the tasks associated to copyright within the Act. To conclude application of Frost's Innis algorithm, in Chapter Five I illustrate how fair dealing can mitigate intellectual monopoly and where it falls prey to intellectual monopoly. Throughout it all, Innis makes repeated appearances; his conceptual toolkit of time and space, bias and consciousness, and, monopoly and the price system, appear tailor made for the subject of copyright.



### ***III. Early Copyright Law in Canada – the Cultural Landscape***

#### **3.1 Introduction**

Following the methodology of Harold Innis sets the necessary first step as an examination of the political, social, geographic, and economic conditions in which copyright law took hold in Canada. This presents me with a dilemma, as there was no distinct moment in time where copyright law sprang forth in Canada. Unlike both the United Kingdom and the United States, where copyright law was developed internally and then fixed into a uniform code that spanned each country, early copyright law in British North America was implemented colony by colony, and with consideration to the existing Imperial law. A patchwork atmosphere of copyright existed in British North America, before the Dominion of Canada came into existence. Even with Dominion status, revision of Canadian law could only occur with the consent of the United Kingdom. It was not until 1924 that Canada attained the right to implement changes to its own domestic copyright law (Murray and Trosow 2007, p.30).

One locus of exploration from where to examine the Canadian cultural landscape of early copyright law could be via the Canadian Copyright Act of 1875. It proved to have the longest duration of existence of early, post-Confederation, Canadian law; it remained unchanged until 1900 (Seville 2006, p.131). Yet, the development of the 1875 Act was less by Canadian design, and more by British sanction (see Section 3.2 for further details). For that reason, I

establish my examination from the perspective of the (failed) Canadian Copyright Act of 1889. This legislation marked a near-success in Canadian efforts to implement a made-in-Canada approach to copyright law.

From Confederation on, Canada had proposed an innovative approach to copyright, the inclusion of compulsory licensing (Bannerman 2009, p.95). This measure could have protected British authors, served Canadian readers, and encouraged industry in Canada. It is is addedly intriguing from an Innisian standpoint; it illustrates his axiom that innovation thrives in regions outside of centres of mainstream thought and power. As this chapter will show, Canada's desired development of the law was an adaptation of the regime of monopoly copyright by taking into consideration the conditions of life in the periphery. Yet, as this chapter also illustrates, Canadian efforts to modify its own copyright law were repeatedly rebuffed by the publishing sectors of both the United Kingdom and the United States.

Copyright law is a system whereby creativity, authorial rights, and social wellbeing all coexist to varying degrees. However, copyright is usually viewed as an instrument of protection; it is implied that this assures fiscal remuneration in support of creative people. With respect to the most recent effort to amend the *Copyright Act*, Industry Canada writes:

People who work hard and use their talents and abilities to create things should be remunerated for their efforts. The Copyright Act provides protection to creators and other rights holders in the form of rights over the communication, reproduction and other uses of their work. The creation of Canadian and other content, and the availability of diverse

choices for Canadians, depend on adequate copyright protection. Without such protection, the incentive to produce original work is greatly reduced (Industry Canada 2008).

Left unsaid, perhaps even unperceived, is that copyright can provide meaningful financial benefit only after the creation of an interested and accessible audience for that work. The pursuit of authorial success is entangled in elements of competition, geography, and readership.

In nineteenth century Canada, a self-supporting Canadian printing industry might have assuaged these particularly demanding elements; instead, the lack of such infrastructure became an added impediment for Canadian authors. In 1843 Susanna Moodie, a British émigré renowned for her writings about the colonial experience, had this to say:

It is almost impossible for any work published in Canada to remunerate the bookseller, while the United States can produce reprints of the works of the first writers in the world, at a quarter the expense. The same may be said of the different magazines which have been published in the Colony (quoted from *The Canadian Style* 1973, p.330).

During Canada's progression from colony to nation, few understood these hurdles; and fewer still strove to overcome them. One who did was Sir John Sparrow David Thompson (1845-1894). As Justice Minister in Sir John A. Macdonald's cabinet (1885-1891), a position Thompson continued to hold during his short period as Prime Minister (1892-1894), he spoke on behalf of Canadian authors and Canadian trade alike.

In 1889 Thompson sought to amend the Canadian copyright act of the day, demonstrating in the process the legitimacy of Canada's right to enact its

own copyright legislation. Tailored as the amendment was to address the complexities of Canada's geographic and political position, it encouraged the development of a national printing industry by ensuring the legitimate reprinting of works of foreign authors, with due recompense. This measure of compulsory licensing applied only if the copyright holder did not seek publication in Canada within one month of publication elsewhere. Canadian readers and all authors could both have benefited by this proposal. But the passage of the 1889 Act required disengagement from Imperial copyright law, as also from the blanket pronouncements of the *Berne Convention*. In his arguments Thompson argued, not for Canadian autonomy, but for recognition of the autonomy as it already existed in the *British North America Act* of 1867. Unfortunately, the political strength, if not the political legitimacy, of the British and American publishing industries ensured that such recognition was withheld; the *Copyright Act of 1889* never received Royal Assent.

In its infancy, colonial literature was insufficient to ensure success for local publishing houses. The colonial audience wanted to read from the established authors of the day – British, Irish, and Scottish – there was little demand for nascent, indigenous writing (Frye 1982, p.21; Peterman 2004, p.400). Even as Canadian talent developed to a point of recognition, the small domestic market continued to limit the development of the publishing industry; as a consequence Canadian authors remained without significant support (Mount 2005, p.6-14 and p.23-25). Nevertheless, the small population was large enough to be desired as a

market by foreign publishers. Canadian readers were a valuable bargaining chip; British copyright holders would openly sell the Canadian market exclusively to American publishers, while the promise of the Canadian market played a part in securing, and maintaining, a copyright treaty between the United States and Britain. These fiscal objectives were rarely acknowledged; representatives of the British Government and publishing sector would insist that Canada lacked the legislative authority necessary to chart an independent course in copyright. As a result, Canada was held to a dogmatic reading of a copyright law designed to protect outside interests.

The events of this period have been explored to varying degrees and from varying perspectives. Through reviewing the activities of Mark Twain, Gordon Roper illustrates some of the challenges felt by Canadian publishers (Roper 1966, p.30-89). James Barnes presents an engaging overview of the effects upon Canada within his history of the events leading to the recognition of British copyright by the United States (Barnes 1974, p.138-152). John Feather makes a brief mention of Canada as he explores Britain's copyright history (Feather 1994, p.170); Catherine Seville's study of Canada's copyright challenges is more comprehensive but she speaks from the position of the British Government (Seville 2006, p.22-29 and p.78-145). And throughout his studies of Canadian book publishing George Parker has made continued reference to this subject; in a recent study he focuses directly upon the issues of copyright in nineteenth century Canada, and provides a succinct overview of critical nineteenth century events which affected Canada's

copyright situation (Parker 2005, p.148-158). Concurrent to Parker's interpretation I offer another; keeping Innis' objective of Canadian autonomy in mind, the perspective of Thompson's rationale and vision of the Dominion of Canada warrants remembrance.

22 September 1889,  
Samuel E. Dawson:  
The Canadian Copyright Act of 1889 raised 'a profound political question ... It is nothing more or less than a Declaration of Independence' (quoted in Waite 1983, p. 38).

22 February 1890,  
Frederick R. Daldy Esq., British Copyright Association, letter to  
Lord Knutsford, Colonial Secretary:  
... Your Lordship will notice that I venture to recommend the Canadian Government *to drop the subject*, because in my opinion, no further legislation is required on their part (*italics in original*). (Daldy 1890b, p.9)

At the time, Thompson's stand against the Imperial and international copyright regime of the day was represented as antithetical to authors' interests and a stubborn effort of nationalism. This misconception has lingered (Mount 2005, p.27; Seville 2006, p.116-123; Parker 2005, p.155), despite the efforts of Thompson's biographer, Peter Waite. Waite unravels the complexity of Canada's position, and illustrates the patience and diplomacy that marked Thompson's efforts (Waite 1983). Examination of the correspondence between Canada and Britain presents further evidence that Thompson's efforts, far from being short-sighted or mulish, were an astute and measured response to Canada's peculiar situation. The Federal Government of Canada sought to bring Canada's copyright position closer to that of its nearest neighbor, with an important difference. The United States copyright law of that era has been described as an

endorsement of piracy (McGill 2003, p.81). Innis himself observes that prior to 1891 English books had no protection in America, and, that the American Copyright Act included, “an invitation to reprint the works of English authors (Innis 2004d, p.3).” Canada shunned such an approach, seeking instead to ensure that the balance of rights between authors and a greater social interest were reflective of the cultural makeup of the day.

### **3.2 A Patchwork of Regulation**

Canada’s troubles began with the passage of the *Imperial Copyright Act* in 1842.<sup>1</sup> Designed to protect British copyright holders, all foreign reprints of copyrighted material were prohibited from entering any Imperial region. Although continental sales of pirated English works were thwarted for nearly twenty years, by 1860 the rigid scrutiny of imported work by Customs officials had slackened beside the general principles of free trade (Barnes 1974, p.113). However, in the North American colonies, the prohibition and its effects were not so easily undone.

Prior to the enactment of the 1842 Act, inexpensive American reprints of British books and magazines served the colonists as well. Prohibition meant that colonial readers were legally bound to rely upon highly priced London editions. The North American legislatures appealed for relief, arguing that education, self-improvement, and even patriotism were at risk. The monopoly pricing enjoyed

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<sup>1</sup> *Imperial Copyright Act of 1842 (U.K.)* 5 and 6 Vict. c. 45.

by British publishers was an issue even in the mother country, but, residents there could offset the expense through circulating libraries, clubs, and reading societies. Such alternatives were not available in the colonies. A Despatch from the House of Assembly of Nova Scotia, dated to 13 March 1846, succinctly evaluated the situation:

... [the] practical effect [of the Copyright Act] is to... deprive the people [of the Colonies] of the blessings of literature, whose means rendered them unable to purchase the costly books issued by the English press; to diminish the revenue and to encourage smuggling; and while they entail these lamentable evils, their enforcement produce no corresponding benefit to the author (No. 7 1846, p.9).

The crux of the difficulty lay with the issue of colonial reprints. Locally produced, licensed reprints would have allowed for a less expensive product, as well as remove the added freight and insurance costs passed on to consumers. British publishers staunchly opposed such measures; colonies were not encouraged to develop industry, reserved as they were as the exclusive market of the mother country. The British publishers argued that colonial production would decrease employment among British printers and bookbinders. The loss of the colonial market would also have affected domestic costs; a smaller production run at home meant a higher cost for each book. Moreover, publishers remained fearful that cheaper books produced in the Colonies would find their way back into the English market, underselling books in the domestic market (Seville 2006, p.78-83).



However, the colonists found a sympathetic ear at the Board of Trade; Vice-President William E. Gladstone (later President) attempted to persuade the Colonial Office and the British publishers to provide the colonists with cheaper books, in return for the prohibition on reprints enjoyed through the Act of 1842. Some publishers made a modest effort to do so, notably John Murray (Barnes 1974, p.143; Dawson 1882, p.15). His efforts were largely confined to offering older books at semi-discounted prices. Continued prodding by the Lords of the Privy Council of Trade led to the following Despatch, dated to 5 November 1846, from the Colonial Secretary Earl Grey to the Colonial legislatures:

... her Majesty's Government propose[s] to leave to the local Legislatures the duty and responsibility of passing such enactment as they may deem proper for securing both the rights of the authors and the interests of the public (Grey 1846, p.13-14).

In 1890, Thompson would remind the Colonial Office that Earl Grey's promise to the North American colonies had remained unfulfilled for more than forty years, and time had "... strengthened tenfold every one of the reasons which induced it to be made (Thompson 1890, p.18)."

How far this promise of copyright autonomy would have functioned cannot be determined, but given Earl Grey's reputation as an advocate for colonial autonomy it is likely that Canada would have done well had he continued as Colonial Secretary. In any case, further examination of the correspondence suggests the Board of Trade recognized the volatility of the situation brewing in Canada, and were ready to look beyond the status quo

treatment of copyright. In a letter to the Colonial Office, dated to 19 October 1846, the Board agreed that decisions of equitable treatment for the authors and public were best handled by the colonies themselves:

For devising such an arrangement a knowledge of local feelings is required which [the Board of Trade] are conscious they do not possess in sufficient degree, ... were [the Board] to attempt to legislate ... they might create alarm or dissatisfaction here without accomplishing their purpose of benefiting the colonies (Britain 1846, p.12).

Such was the mood that lay behind Earl Grey's Despatch. With the support of the Colonial Office the Board of Trade proposed that the prohibition of foreign reprints cease (Barnes 1974, p.148). If that atmosphere of thought had continued unimpeded, there was opportunity for Canada to develop its own printing industry and legitimately produce foreign reprints of copyrighted material.

The *Foreign Reprints Act* passed in 1847<sup>2</sup> permitted the cessation of prohibition upon foreign reprints for any colony that made provision to adequately compensate the British copyright holder, if such provision met with the approval of the British Government. The Province of Canada<sup>3</sup> duly responded, offering copyright protection to British subjects who printed and published their works in that province. By then a shift in perspective had set in at the Board of Trade; Gladstone was no longer serving in the Government, and the Board was more inclined to favour the view of English authors and publishers.

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<sup>2</sup> *Foreign Reprints Act 1847 (U.K)* 10 & 11 Vict. c. 95.

<sup>3</sup> Other colonies also submit laws for consideration; I examine the Province of Canada because it held the largest centres of wealth and population, and thus had the most to lose or gain (Barnes 1974, p.138).

Consultation between the Colonial Office and the Board resulted in the refusal of the Colonial Office to issue the Order in Council to suspend the Act of 1842, a necessary step before Canadian law could take effect. Protracted negotiations followed, with the prohibition eventually lifted in 1851 (Barnes 1974, p.149-151; Feather 1994, p.170). Far from any prospects of autonomy and development of Canadian industry, the colonial legislatures were confined to negotiating the fees by which American-made foreign reprints could circulate in the colonies.

Foreign reprints were allowed to enter the Province of Canada, subject to a 27 ½ % combined duty and royalty.<sup>4</sup> This resolution pleased very few people. British copyright holders complained that the 12 ½ % fee which was their due was rarely collected. Canadian customs officials accused the British copyright holders of neglecting to provide timely notice of copyrighted publications, further exacerbating the problem posed by the vastness of the frontier with the United States which made collection almost impossible. And Canadian publishers remained barred from reprinting British copyrighted work. The 1847 *Foreign Reprints Act* effectively sanctioned cheap reprints, which were unauthorized in the United States and unauthorized in Canada, as authorized for entry into the Canadian market from the United States, upon the added payment of 12 ½ %. It seemed only fair then for the Canadian publishing sector to seek

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<sup>4</sup> The language surrounding the charges is not uniform. Writing to the Colonial Office, Frederick Daldy referred to a royalty of 12 ½ per cent, and customs duty of 15 per cent (Daldy 1890a, p.33). Waite describes the charges as, "... 12 ¼ % specific duty, and 15% as ad valorem as royalty (Waite 1983, p.39)." And, nineteenth century publisher, Samuel E. Dawson wrote that reprints could be imported from the United States, "... on payment of a duty of 12 ½ %, additional to the regular 15 % on all books (Dawson 1882, p.25)."

permission to publish reprints legitimately, subject to payment of the same 12 ½ % fee. The Canadian *Copyright Act of 1872*, permitting such a practice, was easily passed by the Canadian Parliament, but Royal Assent of this Act was withheld. A few Canadian printers set up shop on the American side of the border, printing English works with impunity, and dutifully importing them into Canada subject to the 12 ½ % fee. Innis notes that, despite the fee, the books produced by one such printer, J.W. Lovell, were still cheaper than those exported from Britain (Innis 2004d, p.4).

Eventually, the Colonial Office and the British Copyright Association came to concede that Canadian publishers could secure Canadian copyright on British work, on a case-by-case basis, determined by the copyright holder. This allowance came via the compromise *Canadian Copyright Act of 1875*, under the direction of Dalry (Seville 2006, p.107; Parker 1976, p.46). Canadian copyright was attainable, if the works were “printed or published or reprinted and republished in Canada,” and would be granted to “any person domiciled in Canada or in any part of the British Possessions, or being a citizen of any country having an international copyright treaty with the United Kingdom (Canada 1875, s.4).” The Act allowed authors and publishers a grace period; Canadian copyright could be deferred for up to one month from the date of publication elsewhere, but, while the 1875 Act specifically stated that, “... nothing in this Act shall be held to prohibit the importation from the United Kingdom of copies of such works legally printed there (ibid., s.15),” reciprocity was not forthcoming.

London publishers demanded that colonial editions of such work be barred from the United Kingdom;<sup>5</sup> Canadian publishers would not be permitted to compete in the home market.

The intention of the 1875 Act was to encourage British copyright holders to obtain Canadian copyright but not conflict with Imperial law (Roper 1966, p.40; Thompson 1890, p.24). In the process, American made reprints of British work could be excluded from Canada. If the British copyright holder fulfilled the requirements to obtain Canadian copyright – including local publication – those works could neither be reprinted nor imported without permission of the copyright holder (Canada 1875, s.11). It was hoped that if Canadian booksellers could not legitimately avail themselves of American reprints, booksellers would provide some support to the industry by taking their supply from Canadian reprinters instead. However, as the Canadian Act was held to be subject to the 1842 *Imperial Copyright Act* together with its modification in the 1847 *Foreign Reprints Act*, United Kingdom copyright holders already enjoyed copyright protection throughout the Empire regardless. Reprinting privileges could only be obtained with their consent. This issue was tested in the courts in *Smiles v. Bedford* (1876) with judgment found in favour of the British copyright holder (Shields 1980, p.639). Despite neglecting to establish Canadian copyright in his work *Thrift* (published in Britain and the United States in 1875), Samuel Smiles

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<sup>5</sup> The bill to give assent to the Canadian Copyright act of 1875, deemed it unlawful, “for any person [not authorized by the copyright owner] to import into the United Kingdom any copies of such book reprinted or republished in Canada.” See *A Bill, to give effect to an Act of the Parliament of Dominion of Canada respecting Copyright*, 38 & 39 Vict. (London: HMSO), Section Four.

restrained Belford Brothers from reprinting his work, successfully arguing that Canadian copyright law did not supersede Imperial law.

The conduct of Samuel Smiles was more the norm than the exception. English copyright holders had long since profited by dealing directly with American publishers (Thompson 1890, p.19). Although the United States enjoyed an absence of international copyright obligations, and was free to pirate English works with impunity, many U.S. publishers, anxious for contemporary literature, sought agreements with English publishers to enter into a contract for the latest in English work. A liberal gratuity would be offered under the condition that the English publisher did not allow any Canadian publishers the same privilege. This behaviour was not a recent development; the tactic had been noted by Canadian Finance Minister John Rose shortly after Confederation:

[T]he foreign publisher, having a larger market of his own, and knowing the advantages of access to the Canadian market, can hold out greater inducements to the author than the [Canadian] publisher, and can afford to indemnify the author for agreeing to ... abstain from printing in Canada (Rose 1869, p.36).

Furthermore, Imperial law allowed American authors to copyright their works in Canada, while Canadian authors were not protected in the United States. Empire-wide copyright protection was remarkably easy to obtain.<sup>6</sup> Only two conditions applied; temporary residence in British dominions, and first publication in the British Isles, where 'publication' merely required registration in London and an offering (of even a single copy) for sale (Roper 1966, p.39). As a

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<sup>6</sup> Yet that same Empire-wide protection was denied to Canadians who published first in Canada, a point even the British Government later acknowledged (Britain 1892, p.44).

consequence, American authors would cross the border for a brief visit to Canada, send a few copies to London, and then return to the United States, where their work would continue to be printed.

The 1875 Act sought to halt this practice, with the requirement that Canadian copyright required domicile in Canada. In a much publicized misinterpretation of Canadian law, Mark Twain's (Samuel Clements') efforts to limit Canadian piracy of *The Prince and the Pauper* by obtaining Canadian copyright, failed because he did not establish Canadian residency when his London publishers issued the British edition (ibid., p.65-70). Yet, on the heels of *Smiles v. Belford*, Twain's Canadian publisher Samuel Dawson emphasized a "[S]tartling anomaly – the Copyright which our Parliament refuses, the English Parliament grants, and the book which cannot be printed in Canada without the author's consent, can be imported from abroad (Dawson 1882, p.22)."

By merely being present on Canadian soil, a British dominion, while copies were offered for sale first in Britain, Twain obtained Imperial copyright for *The Prince and the Pauper*. The absence of Canadian copyright notwithstanding, this situation still carried considerable advantage to Twain. Works protected in the Empire, if then imported to Canada, were protected as foreign reprints of British copyrighted work. Canadian publishers Belford Bros. created an un-authorized print of *The Prince and the Pauper* at a printing plant operating in the United States. Importing the books for sale in Canada, they paid the nearly 30% in added fees; a cost passed on to the Canadian consumers

((Roper 1966, p.71). That the requisite duty/royalty was imposed, collected, and ultimately benefited an American copyright holder, made no difference.

The disadvantages of the 1875 Act notwithstanding, some Canadian publishers benefited by it (Parker 2005, p.152). This was confirmed by no less a body than a British Royal Commission. Conducted from 1876-1878, the Commission Report indicates that since the establishment of the 1875 Act, thirty-one works of British authors had been legally republished in Canada at prices less than the English editions sold in Canada, and less than the cost of the unauthorized American reprints. In many cases, the unauthorized American reprints were kept out of Canada (Report in Britain 1878, p.xxxii para.201). If operations in Canada had been left unimpeded (see Section 3.4) the Canadian publishing industry may have gained more from the 1875 Act. In any case, the state of copyright in Canada was such that it merited attention during the Crown inquiry into the subject of monopoly copyright.

### **3.3 Sir Charles Trevelyan and The Royal Copyright Commission of 1876-1878**

Spanning two years of investigation, the Commission's detailed investigation and report accurately describe the plight in Canada. The collusion between American publishers and British copyright holders was entered into evidence; on 13 March 1877, during questioning of T.H. Farrer, James Anthony Froude stated:



My own publishers in New York write to me on that point ... 'If you will protect us against the Canadian publisher, we are now ready to give you such and such a royalty on any book of yours that we publish,' which would amount to a very important sum (Minutes of the Evidence in Britain 1878, p.273 para.5112).

Froude's case being one of many, the Commissioners made particular note of the non-competition gentleman's agreements amongst the major American publishers, where the privilege of republication of British work fell to the publisher who first gained the consent of the British copyright holder:

[S]ecured from competition ... it is worth while for [American publishers] to rival each other abroad in their offers for early sheets of important works. We are assured that there are cases in which authors reap substantial results ... and instances are even known in which an English author's returns from the United States exceed the profits of his British sale .... (Report in Britain 1878, p.xxxvii para.242).

Daldy and Knutsford each served as Commissioners for the inquiry; and, the Commission's final recommendations not only supported the principle of compulsory licensing but also the position that colonies should devise their own legislation as necessary:

We recommend that the difficulty of securing a supply of English literature at cheap prices, for colonial readers be met in two ways: 1st by the introduction of a licensing system in the Colonies; and 2nd. By continuing, though with alterations, the provisions of the Foreign Reprints Act.

... In case the owner of a copyright work should not avail himself of the provisions of the copyright law (if any) in a Colony, and in case no adequate provision be made by re-publication in the Colony or otherwise, within a reasonable time after publication elsewhere ... a license may, upon application, be granted to re-publish the work in the Colony subject, to a royalty in favour of the copyright holder of not less than a specified sum percent. ...

We do not feel that we can be more definite in our recommendation than this, nor indeed do we think that the details of such law could be settled by the Imperial Legislature. We should prefer to leave the settlement of

such details to special legislation in each colony (*ibid.*, p.xxxiii para.206-208).

The testimony and submission of Sir Charles Trevelyan is worthy of examination. He was a respected figure within the British establishment, a distinguished civil servant, and an author in his own right. Trevelyan was also executor of Thomas Babington Macaulay's estate, and served as trustee of Macaulay's copyrights (Seville 2006, p.107). He reminded the Commission of past offers<sup>7</sup> by the Canadian government to secure a 12 ½ % royalty for British authors, through sanction of unauthorized reproductions of British copyrighted work. Included amongst Trevelyan's submissions was his letter to the editor of the *Atheneum*, dated to 6 May 1872:

... Three years ago the Canadians offered to pay a real 12 ½ per cent on the retail price of English copyright works, provided they were allowed the same privileges of reprinting them which was enjoyed by the people of the United States. ... Every party concerned would be benefited by these arrangements. Authors and their assignees instead of getting nothing at all, would obtain as high a rate of remuneration as the ... Transatlantic book market would allow; Canadian printers would find employment in their own country instead of being driven to the United States for occupation; and, notwithstanding the royalty, the Canadian public would get their books cheaper than if they had to import them from the States (Appendix I in Britain 1878, p.328).

Trevelyan stated that this system could be replicated across the globe, allowing for greater diffusion of English literature, with better returns to the author than the current state of distribution permitted. Early in his testimony, he bluntly drew his battle lines:

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<sup>7</sup> These past offers included the (failed) Canadian Copyright Act of 1872 – the first effort by Canada to enact compulsory licensing.

The difference between the position of authors and that of publishers underlies the whole subject, and it is better to have it out at once. It is for the interest of the author that his works should be sold anywhere and by anybody. It matters not to him who the publishers are, or whether there is one or a hundred; in fact for him the more the better: the greater the competition among publishers, the better for the author (Minutes in Britain 1878, p.2).

During questioning, Knutsford<sup>8</sup> argued that multiple publications of the same work would increase the overhead costs of publication, thereby reducing what profit could accrue to the author. In response, Trevelyan observed:

Different publishers would dish up the work in different forms suited to the public taste, and on the whole, more would be printed, and in forms better suited to the public demand and the result would be an increased sale and increased profit to the author. It is the difference between the monopoly of one person and the competition of the many. Competition in the long run always produces improvement both in quality and cheapness (ibid., p.8 para.78).

Upon Knutsford's continued questioning that such measures impede authors' rights to have control over their property, Trevelyan said:

An author's property in his work is already limited in point of time, and this would be another form of limitation...I consider that, in common with other kinds of property, [copyright] must be subject to the conditions required by public interest, and this kind of property more than all ... is the latest born and the most artificial of all... (ibid., para.81 and 88).

Staunchly opposed to the principle of monopoly copyright, Trevelyan singled out Canada as particularly unsuited for it. He submitted to the Commission a series of letters (Appendix I in Britain 1878, p.327) pertaining to the earlier Canadian proposal of compulsory licensing, written by himself to English publisher Thomas Longman. Fully appreciating the invitation to

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<sup>8</sup> In the Commission documents, Lord Knutsford is identified by another of his titles, Baron Holland (Waite 1983, p.44; Report in Britain 1878, p.iii).

smuggling that the lengthy open southern frontier of Canada posed, and the attendant difficulty for the Canadian government in collecting the foreign reprints fees upon imported books, in the first letter, dated to 8 February 1872, he wrote:

I strongly urge the plan advocated by the Government of Canada be adopted. ... We actually get nothing for our copyrights either from Canada or the United States, while, if this arrangement was made, we should be substantial gainers from the excise of 12 ½ per cent on the sales of the Canadian reprints...

Two days later, Trevelyan reiterated the same point, adding:  
... if the required permission were given, the Canadian printers and publishers would undersell the Americans, and we should, to a considerable extent, get the command of the book market of the United States, leading, possibly, hereafter to the adoption of a similar arrangement there.

And in a third letter, dated to 12 February 1872:

I cannot understand your difficulty about owners of English copyright works "exchanging and abandoning their full and undoubted rights for an excise sale of 12 ½ per cent on the sale." ... [I]n Canada these rights have hitherto been entirely worthless because ... the "exclusive right and liberty to multiply and sell" has been neutralized by the freedom of United States publishers to print and sell the same books on the other side of a long line of frontier.

While some of Trevelyan's colleagues concurred with the merits of the Canadian proposal, a counter-submission of George Routledge addressed an underlying angst. Routledge provided a letter from Lord Lytton to Earl Stanhope, Chairman of the (British) Copyright Association dated to 11 July 1872, whereupon Lytton objected to compulsory licensing in Canada. Beginning with the usual remonstrations of the loss of control by the author, Lytton then painted

a picture of an ineffectual Empire, culminating in further loss of influence upon, that most recalcitrant colony, the United States:

[W]hatever the details of the bill, I think it is *against the principle* that we should take our stand. Whatever principle we concede to Canada will be adopted in Australia, and other English-speaking Colonies, and may much influence any terms of copyright we may hereafter obtain in the United States (italics in original, Appendix XIII in Britain 1878, p.407).

The ambit of investigation for the Commission had been domestic, colonial, and international copyright. The body of the report addressing international copyright begins with the sub-heading, "The American Question." The absence of recognition of British copyright was a continued thorn in the side of British authors and publishers. And yet, the commissioners took care to phrase this difficulty with the utmost of humility:

When deciding upon the terms in which we should report upon this subject, we have felt the extreme delicacy of our position in expressing an opinion upon the policy and laws of a friendly nation.... The main difficulty undoubtedly arises from the fact that ... original works published in America are, as yet, less numerous than those published in Britain. This naturally affords a temptation to the Americans to take advantage of the works of the older country.... (Report in Britain 1878, p.xxxvi para.234-236)

The commission advocated that a copyright convention with the United States was desirable, and thus had endeavored during the inquiry to, "[A]scertain the feeling of Americans on the subject, and wherein, if at all, their interests would be prejudiced (ibid., para.243)." This concern would further handicap Canada with the advent of the *Berne Convention*.

### 3.4 Denouncing Berne

As noted in Section 3.2, the 1875 Act did procure some benefit for some Canadian publishers. These gains were threatened with the *Berne Convention for the Protection of Literary and Artistic Works* (1886). Adhered to by Britain in 1886,<sup>9</sup> and ratified in 1887, the convention decreed that inhabitants of any country party to the convention had full and complete copyright protection in all other countries party to the convention, without the necessity of producing the work in that country. As far as the needs of Canadian authors went, it is more than ironic that one inducement to the *Berne Convention* was its assurance of recognition of Canadian copyright through Imperial countries, recognition not provided through the existing Imperial law. Nevertheless, Canada agreed to participate within the Convention in accordance with Britain's hope that the United States would join.

Editorial reaction in Canada was swift; in a publication dated to 17 August 1888, the *Toronto Telegram* did not mince words regarding the implications for Canada:

The effect to bring Canada in under this [Berne] convention is really an effort of the English publishers to control the trade and kill the book, printing, and publishing business in Canada (Waite 1983, p.40).

An attempt to ratify the *Berne Convention* by the Canadian Parliament was met with heated protest, and the bill was set aside. The *Montreal Gazette*

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<sup>9</sup> *International Copyright Act 1886* (U.K.), 49 & 50 Vict., c.33.

highlighted the core principle of the *Berne Convention*, and the means by which it was being engaged to better suit the London publishers:

The Berne Convention requires that citizens of each concurring country shall have all the privileges of a native in every other concurring country; the Canadian law already grants that ... The Imperial Copyright act of 1842 is a relic of a bygone time ... An attempt to enforce that act under the cover of the Berne convention ... will lead to an intense irritation (23 October 1888).

The *Toronto Globe* voiced the frustration felt with Canada's continued colonial status in the eyes of the British Crown:

Manufacturers and traders in defending their personal interests seldom have the good fortune to be also defenders of the public interest. But this is the situation of the Canadian Copyright Association in opposing the Berne Bill. .... The British negotiators took the liberty of presuming Canada to be part of Great Britain in respect of copyright, and totally disregarded the interests of the Canadian people, their book manufacturers and booksellers. The matter is one to which the principle of Home Rule must be applied (5 November 1888).

A delegation from the Canadian Copyright Association appealed to the Canadian Cabinet on 22 January 1889, calling for a made-in-Canada condition to copyright.<sup>10</sup> Cabinet responded in that same session of Parliament; an amendment to the Copyright Act of 1875 was put forth under the guidance of John Thompson, minister of justice, and John Lowe, deputy minister of agriculture (the ministry responsible for patents and copyrights). Swiftly passed by the Canadian Parliament, the legislation of 1889 stipulated that if copyright owners failed to arrange for publication in Canada, within one month of publication elsewhere, the Minister of Agriculture could grant a license for

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<sup>10</sup> The delegation presented a petition, "... signed by 2000 people including 300 publishers, 300 booksellers, the printing unions and others (Seville 2006, p.115),"

Canadian reprints, subject to a royalty of 10 per cent (Canada 1889, s.3-4).

Royalties were to be collected by the Department of Inland Revenue and then be remitted to the United Kingdom copyright holder.

The route to independent copyright legislation required recognition of the Dominion's constitutional rights, as well as disengagement from the *Berne Convention*. The Convention provided for member countries to withdraw participation upon one year of notice. Under Thompson's guidance, in a letter dated to 16 August 1889 the Governor General of Canada, Lord Stanley of Preston, requested that the Colonial Office formally issue an Order-in-Council declaring that the *Berne Convention* did not apply to Canada, effective one year hence (Stanley 1889, p.2-3).

With respect to Canada's constitutional rights, Thompson took his position that the 1867 *British North America Act* had conferred upon Canada the right to legislate, even where it contradicted a British statute. Prior to Confederation, the colonies were bound by the 1865 *Colonial Laws Validity Act* which ensured that colonial legislation could not nullify rights already present in British legislation. Yet Section 91 of the *British North America Act* conferred upon the Federal Government of Canada the exclusive legislative authority over matters of copyright (Whyte and Lederman 1977, s.22-2). And while Section 129 of the *British North America Act* indicated that no Canadian Act could repeal an existing British Act, since Confederation, Canada had "repealed, sometimes by implication, sometimes directly, scores of Imperial enactments (Waite 1983,



p.42).” Thompson made it evident that to suggest that the powers afforded to the Dominion of Canada were curtailed was not only contrary to the expectation of the Canadian people, but also contrary to the views of the British Privy Council.

The legitimacy of Thompson’s argument was supported by three recent decisions – *Apollo Candle Co. vs. Powell*, *Davies vs. Harris*, *Riel vs. Regina* all argued in 1885 before the Privy Council – all supporting Colonial and Dominion rights to repeal Imperial laws (Thompson 1889). In particular, in *Riel vs. Regina*, the Privy Council decreed that the Dominion of Canada could establish criminal procedures departing from British law when circumstances required it. A situation not unlike that of copyright:

Parliament considered that the peculiar position in which Canada is placed on account of her proximity to the United States, and the copyright policy of the United States, demand peculiar treatment in legislation on this subject, and treatment different from both the Berne Convention and from the Imperial and Canadian Copyright Acts heretofore in force (*ibid.*, p.5).

In the face of British admonishment that Canada’s actions would impede negotiations with the United States, Thompson later wrote, “the present policy of making Canada a market for American reprints, and closing the Canadian press, for the benefit of the American press, in regard to British copyright works, has a direct tendency to induce the United States to refuse any international arrangement (Thompson 1890, p.27).”

Four years later, still petitioning for denunciation of the *Berne Convention*, Thompson noted that the cultural and geographic conditions which gave rise to

the *Berne Convention* were not the same as those prevailing in Canada. In yet another report, dated to 7 February 1894, Thompson detailed the critical differences: European populations were arranged in higher densities than the Canadian population; British and European readers were largely supplied by libraries, whereas Canadian readers were more often required to buy their books; and the reading class was a distinct fraction of the European populations, whereas the Canadian reading class encompassed nearly the entire population (Thompson 1894, p.70).

Characteristically, the British Crown never issued the one year notice despite repeated requests from Canada. In the same report Thompson had reminded the British Crown that when the Canadian government agreed to be included in the convention, "Canada's right to withdraw from the convention on a year's notice, was placed on the face of the treaty and she would not have consented to enter without that condition (ibid., p.73)." A point Thompson identified as previously acknowledged by the British Crown; upon discussing Canada's request, representatives from the Board of Trade, the Colonial Office and the Foreign Office had concluded that "If Canada presses for withdrawal from the *Berne Convention*, her request cannot well be refused (Britain 1892, p.54)."

While Thompson argued for the legitimacy of Canada's actions, the influence of the English publishing sector had already ensured that logic take a hiatus. Alarmed by the course of events, the publishers moved quickly to make

their views known. At Thompson's first request of denunciation Daldy was once again dispatched to oversee events in Canada. In a letter dated to 20 February 1890, Daldy wrote to Thompson, "... it [is] not necessary for you to legislate [upon copyright] on account of your having joined the *Berne Convention* (Enclosure in Daldy 1890b, p.11)." Instead, Daldy suggested improvements to the means by which Canadian Customs agents could better collect the duties currently imposed upon Foreign Reprints. The added expense to Canada Customs could be offset by increasing the duty, "If you shrink from the expense you can easily make the duty 15 per cent, and retain 2 ½ per cent for Customs expenses (ibid.)." Daldy added that with the higher cost of the duty production of English reprints in Canada would be encouraged by those publishers, "...who like to bring out Canadian editions of suitable works by arrangements with their authors (ibid.)." Despite his exposure to the findings of the Commission, Daldy again refused to acknowledge that such arrangements were more often fiction than reality.

At that same time, in a separate letter to Knutsford, a recurring grievance came forward from Daldy. Beginning with the usual plea for the principles of copyright - the justice due to an author - he raises the "American Question" again:

I do not know whether you consider that the Canadian Act might be interpreted by the United States as directed against her trade. It would undoubtedly so operate... and it may lead her to so remonstrate on account of it being unfair to those of her interest (Daldy 1890b, p.10).

Daldy also took pains to distance the Canadian proposal from the Royal Commission recommendations:

... I have not entered into the question of the particular "Royalty editions" which the Royal Commission suggested be allowed *under certain circumstances*, because those circumstances do not arise here. ... I think it was never contemplated that the law should be changed merely to confer a doubtful benefit on the Canadian printing trade at the expense of the author's interests (italics in original, *ibid.*, p.9).

Daldy's opinion of the doubtful benefit seemed sufficient to disregard the careful investigation and analysis of the Commission, and Knutsford duly responded with a rebuke to Canada, insisting that Canada did not have the legal authority to amend an Imperial copyright act as it related to Canada. Speaking of the "special objection" to two provisions within the Act, by "the proprietors of copyright in this country," Knutsford stated that the one-month time for publication in Canada was insufficient; moreover, the licensing system as a whole was opposed by "Mr. Daldy, who represents the Copyright Association (Knutsford 1890, p.12-13)."

To reiterate the absence of logic: events in Canada had been acknowledged by the British Government as the "... principal grounds for the appointment of the Copyright Commission of 1876 (Britain 1892, p.47);" Daldy and Knutsford had each served as Commissioners for that inquiry; and, the Commission's final recommendations pertaining to colonial copyright, supported in theory what the denied Canadian *Copyright Act of 1889* proposed in practice. The one aspect of the Commission report that remained was its

solicitous attitude towards the United States. The long desired Anglo-American copyright treaty came into being in 1891, a development contingent upon the official offering of the Canadian market to the United States. On 15 June 1891 Lord Salisbury confirmed that "... publication in any part of Her Majesty's dominions can obtain the benefit of English copyright ... residence in some part of Her Majesty's dominions is not a necessary condition (Britain 1892, p.35)." As had been the custom, publication did not require the type be set in any British dominion, but the work merely displayed for sale. Canada's publishing industry remained at a disadvantage.

### **3.5 Conclusion: Thompson to Innis**

Thompson continued to press Canada's autonomy in all matters, including copyright. He came very close to his objectives; during a visit to London in the winter of 1894, he gained greater support within the Colonial Office (Waite 1983, p.47) as well as from the London media.<sup>11</sup> Unfortunately, Thompson's advocacy came to an abrupt end. On 12 December 1894, just after a ceremony where he had been sworn in as a member of Her Majesty's Privy Council, Thompson suddenly died. Without his legislative and diplomatic skill, Canada could not succeed in its efforts to implement a domestic copyright law

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<sup>11</sup> A surprising editorial came from the *Times* of London on 11 December 1894: "Under the provisions of the Berne Convention Canada was prevented from producing the works ... of British copyright holders ... while her nearest neighbor, publishing in the same language for a reading public of which the requirements were practically identical was not a member of [the Convention] and ... was free to reproduce at will and flood the markets of the continents with cheap reprints against which the Canadian book trade could not contend."

that adhered in principle to international cooperation while respecting the uniqueness of Canada's cultural, political, and geographic existence. Canada's colonial days were not yet over and it was into this climate that Innis was born on 5 November 1894.

Reviewing these events comes with some risk; it is tempting to succumb to feelings of outrage. A dispassionate analysis serves better to illustrate the prescience of Innis' thought. I have already noted that compulsory licensing represented an innovation of the time, but an isolated reading of history does not fully divulge the merits of that idea. Imitation being the sincerest form of flattery, it is worth noting that the United States later included compulsory licensing as part of its own domestic copyright law, recognizing that it facilitated the development of a new industry.<sup>12</sup> The United Kingdom followed suit; in general, the autonomy of nations to implement compulsory licensing within their own shores was recognized within the *Berne Convention* itself (Ricketson 1987, p.513-515). And, eventually, special consideration for implementation of copyright within developing nations was also recognized (*ibid.*, p.590-664).

A further aspect of Innisian thinking that appears is the benefit that the United Kingdom could have enjoyed by encouraging the publishing industry in Canada. Sir Charles Trevelyan argued that the development of Canadian publishing could enable Britain to take control of the North American market as

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<sup>12</sup> See also my MA thesis for greater detail concerning the events leading to codification of compulsory licensing in the United States' *Copyright Act 1909* (Nair 2004).

a whole. As I wrote in Chapter Two, Innis saw that “empires endure for greater duration by cultivating stability through liberty at its fringes.” And, where analyzing copyright law via the writings of Innis offers the most intrigue, is that the notion of centre and periphery, or control and liberty, is present within the structure of the law itself. This will become evident as the Innisian exploration continues.

## ***IV. Deconstructing the Copyright Act of Canada***

### **4.1 Introduction**

In this chapter I embark upon the next step of Frost's Innis algorithm, which is to identify "the physical and economic characteristics associated with the medium itself." Which raises the question: what are the physical and economic characteristics of a written statute? I propose that the characteristics of copyright law are to be found through its structure and language. How is the law designed to ascribe intellectual property rights and what is the underlying intention of recognition of intellectual property rights? And, in the context of that intention, how is language utilized to shape relations between affected parties? Again, these technical details are circumscribed by the cultural ambience surrounding copyright. One clue to our ambience lies in the titles of our Act: *Loi sur le Droit D'Auteur* and *Copyright Act* illustrate two differing conceptions supporting the protection of creative effort. Canadian law draws both from the French civil law foundation of intellectual property as a natural right, and, the Anglo-American common law inclination towards a utilitarian justification for intellectual property rights. As described in Chapter Two, *Innis and the Law*, our dual legal traditions can operate to our benefit, and indeed are already poised to do so. During the last decade, Canadian legal discourse is showing a greater awareness of the French contribution (Tawfik 2003, p.60 n.5).



However, the conjoining of tradition is not easy, and the journey is not complete. The less than equitable translation between *the Copyright Act* and *Loi sur le Droit D'Auteur*, together with the absence of any stated context<sup>1</sup> to the monopoly right, has meant that for many years federal governments of both political leanings avoided examining a rationale for copyright. An uncanny remark came from the Keyes-Brunet report of 1977, "Concern with the underlying social philosophy of copyright law is unwarranted unless different theories lead to different conclusions (Keyes and Brunet 1977, p.5)." A quarter century later, this proved to be prophetic. In *Théberge v. Galerie du Petit Champlain* [hereinafter *Théberge*], with a Supreme Court copyright ruling settled by a 4-3 decision, Justice Binnie writing for the majority said:

[T]here are some continuing conceptual differences between the droit d'auteur of the continental civiliste tradition and the English copyright tradition, and these differences seem to lie at the root of [this] misunderstanding (*Théberge* 2002, para.6).

This illustration of the continued existence of Canada's two solitudes is to our betterment. The Supreme Court of Canada recognized the existence of our two legal traditions and drew attention to their differences. This is key to Canada's multicultural future; the recognition of union, without giving way to uniformity. Neither legal tradition can supplant the other; at best we hope to utilize the two

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<sup>1</sup> Canada's first autonomous copyright legislation, the Copyright Act of 1921, was modeled in the Anglo-American tradition. While the United Kingdom and the United States took care to define the purpose of copyright as in aid of society, Canadian law did not provide any such context (Canada 1921). Neither was context added in later revisions, nor in the *Canadian Charter of Rights and Freedoms* (1982). As noted in Chapter Three, the granting of copyright as an area of federal supervision came via the *British North America Act* (1867), where copyright was simply listed as one of twenty-nine federal responsibilities.

in complementary fashion. That said, at this time, the partnership remains uneven. I will return to this case in Section 4.2.5 (Moral Rights II) and again in Chapter Five. First, I take a closer look at the continental civiliste tradition and the English copyright tradition.

It is erroneous to believe either system operated with one party exclusively in mind. In their infancy, the two were not substantially divergent; in their maturity, they are again showing signs of similarity. Despite claims that French Revolutionary laws placed authors' rights upon a more elevated basis, the progress towards protecting authors' rights was tentative and uneven. Jane Ginsburg's work shows that, until the Napoleonic era, the driving principle behind French law was the preservation and development of the public domain, with authors' rights considered as a necessary exception. The speeches from Revolutionary Assemblies, the text of the laws, and the court decisions all reflect an instrumentalist undercurrent to French copyright law (Ginsburg 1994). Looking at early modifications of the law, in 1791 and 1793, neither placed authors securely at the core of a property right; she writes, "The 1791 text is preoccupied with the recognition and enlargement of the public domain ... the 1793 law emphasizes that the protection of the authors will not prove detrimental to society (Ginsburg 1994, p.144)." . It was not until 1957 that French law decisively cast the objective of their law as the protection of author's rights (Murray and Trosow 2007, p.27).

The American copyright tradition of social utility has not been immune to the author-centric dialogue either. Although the language of the Constitutional protection of intellectual property suggests the intention was public benefit, the rights of creators were not overlooked in those early days (Ginsburg 1994, p.138).<sup>2</sup> The authorial focus gained strength in *Bleistein v. Donaldson* (1903) when Supreme Court Justice Oliver Wendell Holmes Jr., writing for the majority, said judges should not be vested with the role of critic determining what is eligible as art and therefore worthy of protection. “Personality always contains something unique... and a very modest grade of art has in it something irreducible, which is one man’s alone (Holmes 1954, p.210).” As the twentieth century unfolded the private rights enacted within United States’ law steadily expanded at the expense of public interest, cloaked as they were in the name of the creative, original, author (Lessig 2002; Vaidhyathan 2001).

The early overlap of public interest within both systems, together with their later emphasis upon private rights, indicates that the practice and interpretation of copyright law is much more subjective than an ideological perspective alone would dictate. Moreover, there is a neglect of consideration of all affected parties. The phenomenon of intellectual property involves not two stakeholders, but three. Whether one supports the natural rights of the author, or

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<sup>2</sup> U.S. Const., art.I, sect. 8, cl.8 stipulates that Congress shall have the power “to promote the Progress of Science and the Useful Arts, by securing for limited times to Authors and Inventors the exclusive rights to their respective Writings and Discoveries.” Ginsburg studies the American atmosphere surrounding copyright through examination of the *Committee of Detail* and Madison’s writings in the *Federalist Papers*.

the wellbeing of society, if the conviction in either case is taken seriously then creativity itself must be protected. Natural rights must apply to all: past, present, and future authors. To do so, means *authorship* must be protected. Likewise, consideration of societal benefit must ensure that creative processes are not stifled by the system purporting to encourage creative effort. To this end, Innis' very simple, but enduring, framework of *time, space, balance, and creativity*, comes to mind.

I have attempted to show elsewhere that in Western civilization a stable society is dependent upon an appreciation of a proper balance between the concepts of space and time ...[In] attempting a balance between the demands of time and space we can develop conditions favourable to an interest in cultural activity (Innis 2003e, p.64 and p.90).

For Innis, creativity was the outcome of a stable society. The necessary condition of balance implied a productive coexistence between the cultural perspectives of time and space. As I wrote in Chapter Two, "Time manifests itself as a desire for maintaining a cultural heritage, with space holding stagnation at bay through an emphasis upon innovation. Time is inclined towards the community; space leans towards the individual." This means that the rights of the many must find harmony with the rights of the one. As one would expect with any rule of law, both the rights of individuals and individual rights are implicated in the construction of copyright law. The *Copyright Act* offers a particular challenge to parliamentarian and jurist alike in that creators' straddle both positions in the exercise of their creative endeavors. The fulcrum upon which time and space maintain a delicate balance is this creative process itself.

How does the protection of creative expression further creative activity, whether in celebration of individuality, or by necessity for community wellbeing?

The mechanism of copyright seeks to control, for limited time, some acts of reproduction of creative expressions fixed in tangible form.<sup>3</sup> Ideas may not be copyrighted; instead the expressive rendering of an idea is protected under modern copyright law. These rights have come to be known as having one of two forms: economic rights which are an allocation of rights to protect potential monetary returns for creative work, or, non-economic rights – moral rights – to protect the integrity of the creator and the creative work. In both cases, the duration of the rights exist for the lifetime of the creator plus fifty years.

Our Act is extensive; according to Wallace Maclean the text in 1921 spanned 9,343 words and now, after forty-one amendments, has grown to 31,223 words.<sup>4</sup> I do not provide a comprehensive description of our Act in its entirety, as other sources exist for this purpose (Vaver 2000; Murray and Trosow 2007; Handa 2002). Instead, I look for points of intersection among the Innis triumvirate – the individual, the community, and creativity itself – considered in the context of social practices and judicial oversight. These moments of interaction illustrate their relative prominence and suggest opportunities for achieving Innis’ longed-for goal of balance. Equally important to this task is to consider not only what is contained in the law, but what is missing?

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<sup>3</sup> This innocuous statement is deceptive; *tangible form* is not language found within our Act, but is a recognized concept derived from past practices.

<sup>4</sup> “In both cases, the preamble, marginal notes, and schedules are excluded from the word counts (Maclean 2007).”

## 4.2 The Copyright Act - Loi sur le droit d'auteur

### 4.2.1 Definitions

Our Act begins with definitions of terms used throughout the later text. While authors and the public are the two supposed stakeholders involved with copyright, there is no definition for either. Trivial as this observation may seem, it is an early indication that our Act is designed with respect to the object of creative effort, as compared to either the creative process, or the consumptive process, related to the effort. The author gains identity only through his or her copyright, "... the author of a work shall be the first owner of the copyright therein (*Copyright Act*, s.13(1))."<sup>5</sup> It has been left to the courts to provide a more tenable definition of an author; according to the British Columbia Supreme Court an author is a person who writes, draws, or composes a work, with the caveat that such a person must not merely be acting as a scribe (*Darryl Neudorf v. Nettwerk Productions Ltd*, para.16).<sup>6</sup>

The ambivalent treatment of authors began during events concerning the implementation and application of the first codified Western copyright law, the Statute of Anne (1710). The legislation arose after the printing privileges of the Stationer's Company had lapsed, a lapse which supposedly brought about disorder in the book trade. I examined this period in detail in my masters' thesis (Nair 2004); a few aspects bear repetition.

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<sup>5</sup> One exception to this rule is for work authored in the course of employment; in this case the employer is the first owner of the copyright (*Copyright Act*, s.13(3)).

<sup>6</sup> This judgement cites *University of London Press Ltd. v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601, a case which I examine again later in this chapter.

Following the advent of the printing press, printing activity in England was secured by privileges from the Crown. Usually granted to printers, such privilege could be assigned to an individual author. Yet authors did not develop as an economic force; the system of privilege was eventually concentrated within a printers' guild known as the Stationer's Company. The Company controlled who may reproduce manuscripts; their strength was greatly enhanced in 1557 when Queen Mary issued a charter granting the Stationer's Company a monopoly on printing. Only members of the Company could obtain a license to operate a printing press, with the number of eligible members strictly controlled. The favour for this privilege was met through an effective surveillance of the press (Patterson 1968, p.26; Rose 1993, p.12). While the objective of the charter was to suppress the production of heretical or seditious works, it also served to secure property for the members.

The Company kept a registry of all eligible publications where each entry was associated with a particular printer. Lyman Ray Patterson observes a subtle change in the form of the entries in the register. Earlier a printer would indicate that he had received a "license to prynte" a particular manuscript from an author, whereas later the word "copy" began replacing "print" (Patterson 1968, p.52-54). By the seventeenth century, the form of entry evolved away from one that emphasized the action of copying, and instead became one of possession. Entries in the register would refer to a "book or copy" as belonging to a

particular member. Once a member secured a work, his rights continued in perpetuity. Such rights were transferable, but only amongst members.

With such rigidity and control within the publishing sector authors were in an ineffectual position if they wished to bargain over the value of their creations. The British law protected the economic rights of the members, but made no provision for the rights of the authors. By the second half of the seventeenth century, authors began to receive payment for publication of their work, but, such payments were based on economic reasons as the investment necessary to maintain a book trade rather than legal or moral grounds (*ibid.*, p.64-77). Increases in the book trade did not precipitate further clout for authors, instead greater power was concentrated in the hands of the members:

The copy owners were men of the future. By 1640, they were firmly entrenched as the leaders of the trade ... long standing family businesses were beginning to develop; intermarriage between these families was not uncommon and over two or three generations dozens of valuable copies were being concentrated in a few firms (*Feather 1988, p.41*).

The monopoly enjoyed by this elite group came increasingly under attack and the charter privileges were eventually allowed to lapse in 1694. The Stationer's Company made repeated efforts to re-establish either copyright regulation or press licensing or both. Their efforts found success after they adopted the author as the principle beneficiary of their movement, arguing that securing property in books would facilitate better conditions for authors. The booksellers insisted that the author had an inherent right to his work, which



could then be assigned to a bookseller. Based on the common law trade practices of the time, the booksellers' rights of property would exist in perpetuity.

The legislators also seized on the importance of the figure of the author. By permitting authors to register their own titles, the long-standing monopoly enjoyed by the booksellers would be broken. In spite of this appeal, the draftsmen stopped short of making any type of statement implying authors had property rights in their writings. The preamble of an early draft contained reference to authors possessing property in their books and writings; this was removed in order to forestall the booksellers claim that the act supported authors' common law rights (Patterson 1968 p.142; Rose 1993 p. 45). In the spring of 1710, the Statute of Anne<sup>7</sup> was passed by the British Parliament identifying the author, giving such a person a fourteen-year renewable term of copyright. Despite the focus upon the interests of authors, the language of the law again served to operate as a means of regulating trade in the printing industry. A model which continues to be the basis of copyright law.

Returning to our Act, the individuals defined are only those that participate in legal or market processes affiliated with copyright. One seeming anomaly in this list is:

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<sup>7</sup> The Act also contains the first codified notion of the public domain – the Statute allowed publishers a twenty-one year copyright term to publish previously published works. Such works were considered outside the scope of the law, and regarded as belonging to the public at large.

"maker" means

(a) in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken, or

(b) in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of the sounds are undertaken;

(Copyright Act, s.2).

Given the technological possibilities of our current day, the definition of maker does present the opportunity to encompass an individual creator. But a clause added in 1997 suggests a particular intention to the term, the entity of the music publisher:

For greater certainty, the arrangements referred to in paragraph (b) of the definition "maker" ... include arrangements for entering into contracts with performers, financial arrangements and technical arrangements required for the first fixation of the sounds for a sound recording; (ibid., s.2.11).

The reference to performers merits closer attention. Performers could have been recognized as artisans of cultural work, and, by way of copyright in their performances, admitted to the realm of authorship. Instead, the treatment of performers differs greatly from that of authors (Sundara Rajan 2005a). Performers may only benefit from neighboring rights, those rights which are attached to the activities of disseminating an author's work. Even though authors only appear in the context of their work, they are identified as first titleholder of that work. Whereas performers are not afforded any identity at all, only their performance has a presence in our Act. This presence is set in terms by the *use* made of literary, dramatic, artistic, or musical works:

"performer's performance" means any of the following when done by a performer:

- (a) a performance of an artistic work, dramatic work or musical work, whether or not the work was previously fixed in any material form, and whether or not the work's term of copyright protection under this Act has expired,
- (b) a recitation or reading of a literary work, whether or not the work's term of copyright protection under this Act has expired, or
- (c) an improvisation of a dramatic work, musical work or literary work, whether or not the improvised work is based on a pre-existing work; (ibid., s.2).

Our Act takes care to define, in as broad terms as possible, work eligible for copyright. Definitions exist for *each* of "literary work," "dramatic work," "musical work," "artistic work," and "every original literary, dramatic, musical and artistic work."

"literary work" includes tables, computer programs<sup>8</sup>, and compilations of literary works

"dramatic work" includes

- (a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise,
- (b) any cinematographic work, and
- (c) any compilation of dramatic works;

"artistic work" includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works

"musical work" means any work of music or musical composition, with or without words, and includes any compilation thereof

"every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations,

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<sup>8</sup> The explicit inclusion of computer programs as literary work marks a curious development in copyright law. Arguably, the design of a computer program involves creative work, which is then fixed in form (*i.e.* software code) making it eligible for copyright protection. Yet the fixed form becomes compiled object code, with the creative aspects hidden from public view. Unlike patents which require a declaration of the details of the process to secure that intellectual property right, copyright does not require disclosure – the fact that individuals cannot decompile the object code and learn from the creative design would not negate a claim of copyright. Yet all other protected work offers the opportunity to learn from, and improve upon, the object of protection.

sketches and plastic works relative to geography, topography, architecture or science; (ibid., s.2).

What is striking about these definitions is their reliance upon the word *include*.

The language is open-ended, which conceivably allows for more forms of expression to be considered copyrightable, should that be desired.

#### 4.2.2 Originality and the Public Domain

A further element to pay close attention to is the word, *original*; this is the key element for admittance to the copyright circle; “[C]opyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work (*Copyright Act*, s.5.1).”<sup>9</sup> Again, this key term is not defined. Attempts to find a conceptual foundation for originality have resulted in a tension between the principles of “creative spark” and “sweat of the brow.” At a recent debate via *CCH Canadian Ltd. v. Law Society of Upper Canada* [hereinafter *CCH Canadian*], the Supreme Court of Canada unambiguously rejected both extremes and sought middle ground. The issue that prompted this statement was whether headnotes summarizing court cases were eligible for copyright. The trial court held that such notes lacked the necessary creative spark and imagination to qualify; eventually the Supreme Court rejected the position of the trial court.

Writing for the Supreme Court, Chief Justice Beverly McLaughlin said:

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<sup>9</sup> The only limitation of a grant of Canadian copyright for such work lies in the unusual event that a copyright holder’s nation does not participate in any of the Berne, UCC, or WTO treaties. Even then, the Minister in charge may choose to extend copyright if circumstances so warrant it.

I conclude that the correct position falls between these extremes. For a work to be "original" within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise (CCH Canadian 2004, para.16).

This elaboration of skill and judgment has received some attention (Gervais 2004, p.133-142; Scassa 2004, p.90-92); the next adjudication of originality will undoubtedly make for more commentary. That academic interest aside, my curiosity focuses elsewhere in the paragraph. The second and third sentences sever the mystic of creativity from the prosaic allocation of copyright, *For a work to be "original" within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique.* Even though the author as an isolated, creative genius has been thoroughly illustrated to be a convenient fiction (Boyle 1996; Rose 1993; Woodmansee 1994), the law still grounds its legitimacy in this fiction. The Chief Justice's explanation of original pierces through to the reality of intellectual endeavor and she is quite explicit as to where such endeavor arises from:

When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. ... By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the

author being overcompensated for his or her work. This helps ensure that there is room for the *public domain* to flourish as others are able to produce new works by building on the ideas and information contained in the works of others (emphasis mine, *CCH Canadian* 2004, para. 23).

The term *public domain* is also not defined in our Act. Connotation of the phrase ranges from the benign (that which is freely available to the public) to an aura of degradation (to *fall into* the public domain implies a loss of stature).

Common to both interpretations is the belief that material in the public domain is absent copyright, either through expiry or ineligibility. As I mentioned in the Chapter One, the World Intellectual Property Organization defines the public domain as, "... the realm of works which can be exploited by everybody *without any authorization.*" This includes work lacking copyright protection, however, it also includes currently copyrighted material accessed in accordance with exceptions detailed in our Act. As I have argued elsewhere (Nair 2006) and will expand upon in Chapter Five, fair dealing is the critical avenue towards accessing the public domain in its entirety.<sup>10</sup>

Returning then to the Chief Justice's remarks, the inference is that the public domain is important, but she refrains from directly describing its necessity to the system of copyright itself. Instead, she points the reader to Jessica Litman's work, *The Public Domain* (1990). Litman brilliantly articulates the collaborative essence of creativity, and explains that it is the public domain that prescribes legitimacy upon authorship within the system of copyright. Predicated as the

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<sup>10</sup> To reiterate, fair dealing allows for the unauthorized reproduction of copyrighted material for: private study, research, criticism, review, and news reporting, with some attendant requirements of citation (*Copyright Act*, s.29-29.2).

allocation of copyright is upon the romantic conception of individual, original creation, the rights of control are given to an identifiable author. To maintain this system of intellectual property rights, without the public domain, would mean that individual creators could only claim originality over the incremental addition they make to the stock of creative effort they draw from, *and*, must identify and share authorship with all those that preceded the work. To deny this obligation would negate any individual claim of originality in the entire creative work as a whole, thereby disallowing the intellectual property right. Litman best illustrates that it is by the grace of exploitation provided by the public domain, that an individual creator can claim originality, and copyright, in the entirety of the work.

The overlap, and disjuncture, between originality, creativity, and uniqueness, is crucial, and has been observed before. In 1916 the English court provided a valuable point of entry to this discussion, via *University of London Press v. University Tutorial Press* [hereinafter *University*]. Considered a classic case, it set the minimal requirement for originality as something more than a copy, but not necessarily novel. The case itself pertained to a dispute over a set of mathematics examination papers; asked to decide whether these papers were original works, the court wrote:

The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought... The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in

an original or novel form, but that the work must not be copied from another work -- that it should originate from the author (*University* 1916, p.608-609).

The circularity of the first sentence notwithstanding, or perhaps because of it, the last phrase set the bar of originality as separate from the question of uniqueness. Originality is not conditional upon the work's relationship to other work but, instead, identifies the nature of the relationship between the author and the work: the expression of thought must be new to the author.

The court was explicit that routine copying would impair a claim of originality, and, equally explicit that drawing from a common stock of knowledge would not impede a finding of originality. It emphasized that the expression of thought necessary for intellectual work to come to fruition is not conducted in isolation; if isolation was necessary to gain copyright, "only those historians who discovered fresh historical facts could acquire copyright for their works (*ibid.*, p.609)." Originality is the marker that distinguishes creativity from plagiarism; it does not refute the existence of a larger, creative world in which the author is situated, but instead recognizes that the author's effort comes to fruition *because* of engagement within this larger, creative world, namely the public domain. Which allows for an alternate conceptualization of the public domain; the public domain is not merely a static assemblage of material, but a set of collaborative relationships. In the public domain past, present, and future, creators mingle; as authors partake of other creations, they reciprocate in kind. To refrain from such reciprocity would stultify the creative process itself.



Thus in 1916 we were reminded that creators of copyrighted material are simultaneously users of copyrighted material and that creativity is a transformative process.<sup>11</sup> Unfortunately, contemporary policy focuses upon what offends copyright, instead of what is creative work. As a consequence, debate on copyright is increasingly preoccupied with the distribution of the copyrighted work, instead of the creation of that work. Creators and users are reduced to endpoints on a finite segment instead of existing as local points set upon a continuum. This preoccupation can be detected by the extensive bundle of rights which aim to control the reproduction of copyrighted work.

#### **4.2.3 The Bundle of Rights**

Part I of our Act, titled *Copyright and Moral Rights in Works*, enumerates the rights available to copyright holders. By its core function, copyright holders control acts of reproduction of a work, according to specific purposes, genres, and settings:

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<sup>11</sup> Curiously though, in the years that followed, the ruling of *University of London Press v. University Tutorial Press* has been interpreted along the lines of a 'sweat of the brow' standard of originality where justification of copyright arises through the industriousness on the part of the author (CCH Canadian 2004, para 15) thereby reducing the consideration of collaboration. This may have been the consequence of a frequently quoted remark in this case, that "anything work copying is worth protecting." As Vaver points out, "The aphorism conveniently begs all questions of initial eligibility, protectability, and even infringement (Vaver 2000, p.13 n.18)."

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

and to *authorize such acts* (emphasis mine *Copyright Act, s.3.1*).

This grant of monopoly begins with a caveat. Section 3.1, expressly stipulates that these sole rights operate only with respect to the whole work, or a *substantial part thereof*. At no point does our Act define what is deemed *substantial*, it leaves that determination to the particular details of each case.

A complaint of our Act is that it is unsuited to the digital age. Section 3.1 makes reference to *any material form*, suggesting that our Act itself can address the reproduction of work through the digital medium. It is true that our Act does not address specific circumstances of digital file movement, what is even more true is that judiciaries routinely have had to wrestle with questions pertaining to unanticipated usage of copyrighted material that arise with or without the advent of a new technology. For instance, consider the case brought forward by Harriet Beecher Stowe in 1853 regarding an unauthorized translation of *Uncle Tom's Cabin*, hardly a new technology (Vaidhyanathan 2001, p.48-50). Even so, copyright content holders have lobbied strenuously to adopt a stricter regime of copyright, calling for more control through greater precision in the language of our Act. As their calls have abounded from the increased capabilities of

individuals to access copyrighted material through global, digital networks, clause (f) provokes particular attention.

This right, to communicate to the public by telecommunication, is fraught with uncertainty. As I noted earlier, *public* is not defined; an attempt to clarify telecommunication to the public is less than helpful:

A person who communicates a work or other subject-matter to the public by telecommunication does not by that act alone perform it in public, nor by that act alone is deemed to authorize its performance in public (*Copyright Act*, s.2.3).

As further definitions have been added, we see a particular conception of *public* emerging; *public* is not necessarily society en masse but a particular audience which can be awarded to the copyright holder:

For the purposes of communication to the public by telecommunication, (a) persons who occupy apartments, hotel rooms or dwelling units situated in the same building are part of the public, and a communication intended to be received exclusively by such persons is a communication to the public (*ibid.*, s.2.4(1));

The language of section 2.4 in its entirety makes evident that the definitions were added in the context of broadcasting but this conception of the public as a delineated (commercial) audience has greater implications. David Vaver suggests that just as the right of public performance is increasingly construed as occurring when a commercial or profitable advantage would ensue, a telecommunication is likely deemed “to the public” if that setting could be financially advantageous to the copyright holder (Vaver 2000, p.134-139 n.18). In terms of contemporary communication methods, the posting of material to a

website could be construed as a public communication even though there is no deliberate distributing of content to individuals within the public body.

However, in these circumstances, a valuable right of access may have been afforded to the public. The last stick in the bundle of rights comprising copyright is the authorization right. A copyright holder can authorize others to partake of any one of the enumerated rights; the language of Section 3.1 does not specify any form to authorization. In fact, it does not even specify that such authorization must be explicit. Depending upon the circumstances, authorization can be inferred implicitly. Sunny Handa writes:

[The] copyright owner, having dealt with the work in a manner as to invite others to make use of the work in a certain way, can be said to have implicitly consented to such a use, even where no explicit license was given to any particular user (Handa 2002, p.293).

If we keep this discussion within our digital realm, we are increasingly seeing this type of authorization. A website carries a particular connotation, derived from the cultural practices of the Internet environment. Meaning to say, it is expected that others will access, browse, enjoy, and perhaps copy the material. The ubiquity of icons for *print* and *email*, together with functioning *copy* and *paste* commands, suggest to an Internet-user that the copyright owner has sanctioned these activities. If a copyright holder prefers that their website material not be utilized without payment or permission, it is incumbent upon them to declare this intention. They need not execute the latest in encryption technology, but there must be some indication of their wishes. A condition of possession is notice

to the world by a clear act (Rose 1994, p.12). Disabling the copy function, placing the site itself behind a commercial exchange account, or posting a statement identifying the copyright owner's wishes are to the discretion of each individual. Although, it must be remembered that the option of applying fair dealing is viable at all times, once a work has been published. Extensive as the bundle of rights allocated under the name of copyright is, copyright owners cannot choose to prohibit others from fair dealing (see Chapter Five).

With respect to the posting of intent, the rising usage of Creative Commons' (CC) licensing shows that more and more individuals are inclined to do just that. Founded in 2001 by Lawrence Lessig, Creative Commons facilitates the development of intellectual effort by providing a means for creators to share their work on their own terms. A series of simple licenses that can be applied to any intellectual creation, in a digital medium or other, enable individuals to avoid the extremities of the copyright bundle without requiring expensive legal assistance. And, even more important than the increased facility to share, Creative Commons has contributed to a social movement that recognizes the value of sharing creative effort, all the while respecting the paradigm of property. Of such movements Yochai Benkler writes, "They do not negate property-like rights in information, knowledge, and culture. Rather, they represent a self-conscious choice by their participants to use copyrights, patents, and similar rights to create a domain of resources that are free to all for common use (Benkler 2006, p.455-456)."

The movement itself is not without critics, but to-date Creative Commons' centres have been established in fifty countries, with more jurisdictions in the process of joining ( Creative Commons 2008a).<sup>12</sup> While it is very difficult to estimate the total number of intellectual objects that are licensed this way, in the digital realm several million web pages are identified as CC licensed. The enhancement of choice within the hands of individual creators is significant, marking as it does a departure in the tradition of copyright as a publisher's trade mechanism. Furthermore, a collective individuality is reflected in the system itself; the licenses themselves have evolved in accordance to the wishes of the creators. One core principle has become evident: individuals want to be recognized for their efforts.

At the onset, permissible licenses began from a set of four core principles, which could be combined according to an individual's wishes:

Attribution: You let others copy, distribute, display, and perform your copyrighted work - and derivative works based upon it - but only if they give credit the way you request.

Noncommercial: You let others copy, distribute, display, and perform your work - and derivative works based upon it - but for noncommercial purposes only.

No Derivative Works: You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.

Share Alike: You allow others to distribute derivative works only under a license identical to the license that governs your work (Creative Commons 2008b).

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<sup>12</sup> Creative Commons Canada was established in 2003 with the support of the University of Ottawa Law and Technology Program, and, Centre for Public Interest and Internet Clinic.

Of the sixteen possible combinations, five were invalid (the option of zero, or the mutually exclusive combination of No Derivative with Share Alike) and thus ineligible. Of the remaining eleven choices, the five combinations that lacked Attribution were phased out; overwhelmingly, individuals wanted the Attribution clause (Wikipedia 2008). In this regard, Creative Commons exemplifies a key element of the European civil law tradition, the moral right of attribution.

#### 4.2.4 Moral Rights

Moral rights are similar to fair dealing, with respect to their relative position within the Act. Fair dealing sits in the periphery of the Act as a whole; it is a set of rights pertaining to creation as compared to distribution. Moral rights sit in the periphery of distribution rights. Commonly described as a noneconomic right, moral rights address the relationship between an author and his or her creation, and seek to protect the integrity of both. Bearing in mind Innis' emphasis upon innovation outside of a dominant paradigm, moral rights and Canada's treatment thereof deserves closer attention.

A word first on language; the term *moral rights* is derived from the original phrase, *les droits moraux*, which is more closely translated as *personal* or *intellectual* rights (Vaver 2000, p.158). The loss in translation is to the detriment of comprehension; the underpinnings of morality influence our conception of the right, as ideologies are wont to do, without the necessary examination of what

morality means in this case. As I described in Chapter Two, Innis saw the virtue of establishing morality by way of reason and historical custom. This ensures that a particular view of morality is not imposed by appeals of the moment, engendered in the interests of an elite body.

Briefly, moral rights are an acknowledgment of the intensely personal nature of intellectual effort, that the culminating work embodies an aspect of the creator's soul. Personality can be injured through a careless use of a creative work; theoretically, moral rights protect the author by prohibiting certain uses of the creative work. Canadian handling of moral rights is intriguing, beginning as it did early on in Canada's independent copyright lifetime. Even though Canadian law did not include measures to address infringement of moral rights until 1988, observance of moral rights in Canada dates to 1931 (Handa 2002, p.372-376).<sup>13</sup> At that time, Canada addressed the stipulations of the 1928 Rome revisions of the *Berne Convention*, revisions which included, Article 6<sup>bis</sup>:

#### Moral Rights

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation (Ricketson and Ginsburg 2006, p.585-586).

Moral rights originated in France, and permeated European countries through civil law doctrine. Although, as Cyrill Rigamonti explains, not all civil

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<sup>13</sup> Prior to 1931 similar ends could be achieved through a 1915 Criminal Code amendment, "This made it an offense either to [without consent] change anything in a copyrighted work ... to be performed publicly for profit, or to suppress its title or authorship (Vaver 2000, p.159)."



law countries embraced moral rights, nor did all common law countries reject inclusion of moral rights. Switzerland did not have a moral rights provision within its legal code until 1992 and Canada serves as his example of a common law country which implemented moral rights in the 1930s (Rigamonti 2006, p.354 n.6).<sup>14</sup> Nevertheless, a canonical distinction between civil law and common law doctrine, with respect to protection of intellectual work, is the degree of attention to moral rights. The perception is that those who followed the civil law doctrine are more creator-friendly than those who did not; the actual implementation belies this interpretation. Like the eighteenth century treatment of copyright, the treatment of moral rights in the twentieth century suggests that the sanctity of the author is, yet again, more in name than substance. The fiction of the author being the focal point can be best elucidated with one further return to my masters' thesis. The distinction between an author and a publisher is blurred in copyright discourse, but their statutory existence had a distinct hierarchy.

Despite the enactment of the Statute of Anne, the bookseller's campaign to extend their rights to literary property continued. With the focus still upon the central figure of the author, a question arose, what was the nature of the relationship between an author and literature? A number of metaphors were proposed: a tiller of the soil, vessel of divine inspiration, a magician (Rose 1993, p.38). By far the most common metaphor was that of parent and child; the notion

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<sup>14</sup> Mira Sundara Rajan is even more specific, "Canada is unique, having had moral rights legislation since 1931, when it was the first common-law country to introduce them (2006, p.265 n.68)."

of likeness (as opposed to property) was consistent with a patriarchal society concerned with bloodlines and pedigree. Daniel Defoe, who had served time in pillory and prison for his work, *The Shortest Way with the Dissenters* (1702) also pressed for authorial rights along these lines. He wrote of literary theft as a form of child stealing, "But behold in this Christian Nation, there Children of our Heads are seiz'd, captivated, spirited away, and carry'd into Captivity, and there is none to redeem them (Defoe, 2 February 1710 –quoted in Rose, 1993, p.39)."

This analogy proved awkward; if piracy was akin to stealing a child, what can be said of a parent who dispenses with his own child for pecuniary benefit? An alternative metaphor emerged, literary work as landed estate (Rose 1993, p.56). Literature became property, and, ownership of literature became proprietary. As authorship became increasingly tied to notions of originality and personality, the comforting sense of tangibility offset the intangible nature of the discourse. A new discussion arose; what kind of right did an author have in their intellectual creation? Was it perpetual or statutory? The booksellers pressed for a common law, natural right of property. Such a right would establish copyright in perpetuity. Given that the trade practices of the day usually saw literature consigned to the hands of the booksellers, perpetual copyright was capable of producing vast wealth for some booksellers.

The judicial impact of one piece of literature was far reaching; James Thomson's poem, *The Seasons* made two appearances in court and touched both ends of the spectrum of debate. Andrew Millar, who had acquired the publishing

rights to Thomson's poem, brought action against Robert Taylor who reprinted the work following expiration of the copyright term. In *Millar v. Taylor* (1769) the judges decreed that authors had, by virtue of the common law, copyright in their work and that the Statute of Anne did not revoke this right. This decision fixed the conceptual basis of copyright as an author's right, and, supported the bookseller's argument that copyright was perpetual. Five years later, in proceedings concerning the same literary work, the court overturned that decision. In *Donaldson v. Beckett* (1774), the House of Lords determined that the Statute of Anne supplanted the common law copyright of authors, and, such copyright had never been perpetual under common law. The case was not settled easily, differences of opinion arose on various aspects under examination. One point that received near unanimity (ten justices in favour, one dissenting) was that at common law, an author had sole right of printing and publishing. At the end though, the Lord Chancellor Lord Camden stated that the depth of the common law right did not aspire to cast intellectual creation as private, perpetual, property, and did not trouble to mask his displeasure of the entire proceedings:

The arguments attempted to be maintained on the side of the Respondents, were founded on patents, privileges, Star Chamber decrees, and the bye laws of the Stationers' Company; all of them the effects of the grossest tyranny and usurpation; the very last places in which I should have dreamt of finding the least trace of the common law of this kingdom: and yet, by a variety of subtle reasoning and metaphysical refinements, have they endeavoured to squeeze out the spirit of the common law from premises, in which it could not possibly have existence (quoted in Talmo 2008).

Thomas Edward Scrutton, a legal commentator closer to that era, criticized Camden's analysis of the formation of common law, that "the by-laws, proclamations, entries and assignments which [Camden] put aside as unworthy and illegal (Scrutton 1883, p.104)," played a part in decisions of legitimacy. Stratton equally noted the clear implications of a contrary decision, "It is impossible to overlook the fact that the persons who would have mainly gained by the existence of a common law right in perpetuity were the booksellers and not the authors (ibid..)" This brings to mind Innis' observations of the benefit of common law, as well as his warnings as to its misuse. The strength of common law lies in its attention to custom, however, it remains that custom derived through exercises of power must be watched with vigilance.

The outcome of *Donaldson v. Beckett* was, to some degree, the thwarting of monopolies still enjoyed by former members of the Stationer's Company. Yet the indictment of the publishing sector did nothing to install authors at the centre of the regime of copyright. Authors continued to exist by way of reference to their work; the control offered by copyright remained a distinct act, divorced from the process of creation, and was typically transferred to the publisher. While the

allocation of moral rights as a non-transferable measure of control is offered to creators themselves, and suggests a prefacing of the author's right, the various means by which moral rights have been limited once again relegate the author to a lesser stature.

#### 4.2.5 Moral Rights II

Since moral rights were formally adopted into Canadian law, creators have not fared well on this issue.<sup>15</sup> It was with some surprise that, in 1982, moral rights were successfully upheld in the case of *Snow v. Eaton Centre Ltd.*

[hereinafter *Snow*] Michael Snow, an artist of international recognition, created and sold a sculpture *Flight Stop* to Eaton Centre (Toronto). The naturalistic composition of sixty fibre-glass geese arranged in flight was decorated, by the Centre, with red ribbons for a Christmas season. Snow argued that the additional ornamentation made ridicule of his work and was prejudicial to his reputation.

The presiding judge agreed and ordered that the ribbons be removed stating:

... the words 'prejudicial to his honour or reputation'... involve a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at... (*Snow* 1982, para.5).

On the issue of prejudice to honour or reputation, a markedly different interpretation arose twenty years later. Artist Claude Théberge's attempt to seize transformations of his work failed in part because:

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<sup>15</sup> In 1977 a court deemed that the wholesale destruction of public art work by a city did not violate the moral rights of the sculptor; in 1986, a choreographer was deemed inconsequential to a ballet he composed, that any competent director could ensure that the ballet was danced closely enough to the original choreography (Vaver 2000, 158-163).

A distortion, mutilation or modification of a work is only actionable if it is to 'the prejudice of the honour or reputation of the author'. The artist or writer should not become the judge in his own cause on such matters (*Théberge* 2002, para. 78).

The differences between *Snow* and *Théberge* are many, beginning with the fact that Claude Théberge did not pursue his case on the grounds of moral rights infringement. Even so, the element of moral rights arose and draws attention to the manner by which moral rights has been coded into Canadian law. Writing for the majority, Justice Binnie offers:

The important feature of moral rights in the present statute is that the integrity of the work is infringed only if the work is modified to the prejudice of the honour or reputation of the author (*Théberge* 2002, para. 17).

During the 1988 amendments of our Act, the definition of moral rights was modified, and the charge of infringement added:

The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, 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... (*Copyright Act*, s.14.1).

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.  
... (*ibid.*, s.28.2)

Section 14.1 addresses the *right to claim authorship* as mandated by the *Berne Convention*, but the right is qualified as *where reasonable in the circumstances*. This does suggest a measure of flexibility that is to the advantage of those wishing to utilize a creative work, with a commensurate disadvantage to the creator. This disadvantage is furthered by the premise of infringement; the necessary

condition of infringement is the degradation of a creator's honour or reputation. Such an outcome is difficult to illustrate even for established artists, let alone the up and coming. Mira Sundara Rajan, a foremost authority on moral rights, places this implementation as unnecessarily narrow. By conjoining modification to the charge of harming reputation, creators must prove their reputation is being harmed in order to prevent modification of their work. An alternative implementation could have placed the burden of proof upon those manipulating the creation (Sundara Rajan 2006, p.226). From an Innisian perspective, what strikes me is that as greater precision of language was introduced into moral rights, creators' rights decreased. The implications of morality suggest upholding the sanctity of the creator, but, the text of moral rights suggests that ideology was offset by political interests, a situation consistent with the drafting and implementation of copyright law since its infancy.

Had Théberge pressed his claim via moral rights, he might have been successful. Given that he had a reputation, there was at least some possibility of illustrating harm. While Théberge had previously agreed to other transformations of his work, it was his position that the dispute in this instance was not the commercialization of his work, but that these articles of sale were created without his consent and often omitted his name (*Théberge* 2002, para.20). Yet, as he opted to arrange for seizure of the transformed artwork, he consigned this case to copyright. The measure of seizure is only available in Canadian law as a response to copyright infringement.

The question that was eventually put to the Supreme Court of Canada was whether the transformation of the artwork resulted in reproduction. The transfer process was remarkable; the ink was literally lifted off of its paper backing and reapplied to canvas. In the eyes of the majority, the images were transferred from one medium to another and not reproduced, and this was not an instance of infringement. Whereas the minority opinion emphasized that another instance of fixation had occurred, and this implied reproduction. It has not escaped notice that the majority and minority opinions were divided along cultural lines, what is important is that these cultural differences continue. And disappointing as the outcome was from an artist's perspective, it remains that *Théberge* upholds a fundamental precept of the rule of law: all systems of rights are limited so that the rights articulated in the name of an individual can be applied to all individuals.

Moral rights act as a continuing restraint on what purchasers can do with a work once it passes from the author, but respect must be given to the limitations that are an essential part of the moral rights created by Parliament. Economic rights should not be read so broadly that they cover the same ground as the moral rights, making inoperative the limits Parliament has imposed on moral rights (*Théberge* 2002, para.22).

The economic rights bestowed upon copyright owners are limited in nature; this court emphasized that so too are moral rights in Canada. This marks a significant break with the French, *civiliste*, tradition. Under French law, moral rights are perpetual, whereas Canadian law sets the term of moral rights as equivalent to copyright which means lifetime of the creator plus fifty years. Canada permits a creator to waive their moral rights, whereas in France moral



rights are inalienable. These limitations suggest that Canada's moral rights implementation has an underlying utilitarian foundation (Handa 2002, p.377-387).<sup>16</sup> An alternate interpretation would be to emphasize that these limitations recognize not merely that a work may be fodder to future creation, but that the access provided by a current creator through limitations of his or her property right is a measure of respect owed to past creators. A respect founded upon the natural process of creativity; we recognize our intellectual indebtedness, and reciprocate accordingly. The limitations on copyright and moral rights are reflective of the relationships which exist within the creative continuum.

Improvement is still necessary; the treatment of moral rights is cumbersome for authors and it poses challenges for society as well. In mischievous hands, moral rights can interfere with creativity. Of course, the same can be said for copyright itself. This need not preclude one from examining the benefits provided through moral rights, bearing in mind that limitations are permissible and can be set in both directions. For instance, a special exemption for parody, as found in French legislation appears to mediate well between the integrity right and freedom of expression (Sundara Rajan 2006, p.231). A more broadly construed right of integrity could maintain not only individual works, but the cultural heritage in which they are situated. Herein lies the crux of moral rights; Sundara Rajan reminds us that moral rights make a larger contribution to

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<sup>16</sup> I would also point out that Canada's copyright regime, with its tightly worded exceptions shows evidence of a natural rights foundation; see Exceptions in Chapter Five.

culture as a whole by reflecting social attitudes concerning creativity and creative work. Moral rights emphasize the importance of the relationship between the author and his or her work, enhancing culture in the following ways:

[T]he generation of respect for creativity, which leads to the creation of culture and encourages the maintenance of cultural heritage; the preservation of the existing cultural patrimony; and respect for historical truth (Sundara Rajan 2006, p.225).

I find this element of historical truth particularly interesting. With language that returns us to Innis, Sundara Rajan writes "A cultural environment that is correctly attuned to historical fact will be more compatible with creativity and development (ibid.,p.226)."

### **4.3 Conclusion**

[This paper] is concerned with the change in attitudes towards time preceding the modern obsession with present-mindedness, which suggests the balance between time and space has been seriously disturbed with disastrous consequences for Western civilization. ... We must somehow escape on the one hand from our obsession with the moment and on the other hand from our obsession with history. [In ...] attempting a balance between the demands of time and space we can develop conditions favourable to an interest in cultural activity (Innis 2003e, p.76 and p.90).

Innis was deeply concerned that modern society placed little regard upon the past, and, none at all on the future. But his appreciation of history was not that of the archivist who collects cultural events and artifacts to ensure they are not forgotten as the world changes. Innis' appreciation was for those things that do not change: culture is a living, breathing, continual experience. An experience

conveyed through the shared creative expressions of past, present, and future creators.

Current events show little appreciation for maintaining the cultural perspective of time; Innis' angst is playing out in the Canadian political debate concerning the future of Canadian copyright law. The tendency towards framing copyright as a grant of absolute property, will be detrimental to future creativity:

The character of a medium of communication tends to create a bias in civilization favourable to an overemphasis upon the time concept or on the space concept and only at rare intervals are the biases offset by the influence of another medium and stability achieved (ibid., p.64).

Maintaining my position that law represents a medium of communication, the character of copyright law is increasingly assumed to lie within the distribution rights. These rights are oriented along spatial lines; their concern is with the immediate and the pecuniary. Distribution addresses the alienability of the work; once a work is created, the copyright owner can exchange the work in the marketplace. Relegated to the dim recesses of concern, if it is thought about at all, are development of the creative work before the point of creation, and, protection of the work after the point of sale. An overt focus upon distribution rights severs the cultural relationships necessary for these other aspects to endure.

Fortunately, the spatial bias of distribution rights can be offset from within the *Copyright Act*. A countervailing temporal character is present through moral rights. Worthy of repetition is Sundara Rajan's remark that moral rights reflect social attitudes concerning the creative process. However, moral rights

cannot sustain the creative process alone. As creativity is founded upon transformation, a measure of humility must be injected into the social relationships embodied through copyright law. And this (temporal) social attitude is directly reinforced through the necessary exception of fair dealing.

Fair dealing provides the legitimacy needed to access the public domain in its entirety, and simultaneously ensures that a measure of humility exists amongst creators. As each individual creator borrows from past creation, so too must their work contribute to future creativity. To do otherwise will wreak havoc upon the public domain. Fair dealing addresses Innis' third concern with a medium; its amenability, or not, towards the creation of knowledge monopolies. In Chapter Five I resume this exploration and detail how fair dealing is evolving and what the implications for monopoly are.

## ***V. Fair Dealing – the Critical Exception***

### **5.1 Introduction**

As I continue to deconstruct the *Copyright Act*, I look for overlap between the public, the author, and the creative process. In Parts I and II of the Act, the author receives limited attention, and the public and creativity are largely absent from consideration. Fortunately, in Part III, there is one measure that is of individual benefit and directly facilitates creativity: fair dealing.<sup>1</sup> By removing control over certain uses of copyrighted material, fair dealing ensures any individual may further their own creative aspirations. It is this aspect within the system of copyright that prevents copyright from functioning solely as an instrument of monopoly *during* a work's copyright term. In doing so fair dealing contributes to the creative process which is quite distinct from the acts of reproduction commonly associated with copyright. Fair dealing's statutory existence falls within a set of exceptions defined in Part III of our Act, *Infringement of Copyright and Moral Rights and Exceptions to Infringement*.

This structuring of "exceptions to infringement" indicates where emphasis lies in our implementation of protection of creative endeavor. Creative endeavor is protected, with exceptions granted for use of the protected material. An alternate implementation could have taken the position of allocating public

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<sup>1</sup> Again, fair dealing permits for the unauthorized use of copyrighted material for the purposes of private study, research, criticism, review, and news reporting, with some attendant requirements of citation (*Copyright Act*, s.29-29.2).

rights of access to the material, with exceptions granted by way of property rights to the author. As I noted in Chapter Four, the French civiliste tradition began with this perspective; my exploration in Chapter Three illustrates that even the more property-conscious United States made infringement a matter of context in the eighteenth century.<sup>2</sup>

For copyright and moral rights, infringement is allied to the lack of consent of the copyright owner, or author, respectively:

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; ...

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;

(*Copyright Act*, s.27 and s.28).

Exceptions to infringement remove the condition of consent, in so far as the use of the copyrighted material meets the conditions of the exception. The list of exceptions provided in Part III is extensive, suggesting a generous allocation of public access. For instance, specific allowances are made for i) educational institutions; ii) libraries, archives, and museums; iii) machines installed in educational institutions, libraries, archives, and museums; iv) libraries, archives, and museums in educational institutions; v) Library and Archives Canada; and vi) broadcasters through the ephemeral recording and transfer of medium exception. However, all exceptions are framed with strict limitations; there is

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<sup>2</sup> Section Five of the U.S. Copyright Act of 1790 stated, "... nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting, or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States ... (United States 1790, stat 124)."

very little that is offered that does not come with strings attached. One exception which caught my eye is Section 32, *Persons with Perceptual Difficulties*. The inclusion of this modest exception for the needs of individuals impaired in sight, hearing, or cognitive function is an interesting example.

Changes to our Act have routinely followed in the wake of new technological development. Here, the impetus for change was not the use of technology but the absence of such use. The limited availability of copyrighted material in alternative formats prompted an intervention by the Federal Government of Canada. Section 32 appears to permit transformation of a copyrighted work into a format more amenable to the needs of impaired individuals but closer examination of the limitations shows the uneasy entanglement of exceptions within the market sphere.

Transformation of sound recordings and cinematographic work require the consent of either the copyright holder or the representative collective society. Likewise transforming work into a large-print book requires consent. All other literary, dramatic, artistic, and musical work may be transformed (*i.e.* into Braille, sign language, digital text, or into a sound recording), provided a similar transformation is not *commercially available*. This phrase is far more encompassing than one would expect:

"commercially available" means, in relation to a work or other subject-matter,

(a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, ... or

(b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort (*Copyright Act*, s.2).

Clause (b) greatly extends the sphere of (a); the protection is not incumbent upon the commercial existence of a work; it is only necessary that the mechanism for licensing the diffusion of copyrighted material should exist.<sup>3</sup> Mercifully, the limitation on the exception for persons with perceptual difficulties is confined to sub-section (a) of commercial availability. Educational institutions are not so fortunate; their limited exceptions are blunted by the full ambit of commercially availability:

(1) It is not an infringement of copyright for an educational institution or a person acting under its authority

(a) to make a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for displaying handwritten material, or

(b) to make a copy of a work to be used to project an image of that copy using an overhead projector or similar device

for the purposes of education or training on the premises of an educational institution.

(2) It is not an infringement of copyright for an educational institution or a person acting under its authority to

(a) reproduce, translate or perform in public on the premises of the educational institution, or

(b) communicate by telecommunication to the public situated on the premises of the educational institution

a work or other subject-matter as required for a test or examination.

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<sup>3</sup> Canada has more than thirty copyright collectives representing authors and copyright holders for various media and various usage (Murray and Trosow 2007, p.71-73). These societies facilitate the setting and collecting of licensing fees for copyrighted material. By comparison, the United States has less than six such collectives (Knopf 2007).



(3) Except in the case of manual reproduction, the exemption from copyright infringement provided by paragraph (1)(b) and subsection (2) does not apply if the work or other subject-matter is commercially available in a medium that is appropriate for the purpose referred to in that paragraph or subsection, as the case may be (Copyright Act, s.29.4).

Meagre as the exceptions provided through the *Copyright Act* are, the manner by which exceptions are structured provokes increased hostility between creators and the public. The inference is that when a work is deemed a public need, copyright holders are denied control over, and compensation for, the work. Meanwhile, the public's measure of access to copyrighted work is inversely proportional to that work's commercial viability. It is hardly surprising that creators have been less than enthusiastic about exceptions to copyright, even less so that the public is strenuously opposed to expanding the commercial reach of copyright. What is striking about the exceptions is that, by and large, they follow the design of allocating rights in support of distribution, not creation. The only exception which directly supports creativity is fair dealing.

In Frost's Innis algorithm, the last step is to consider how a medium influences content, and fosters social or economic monopoly. Fair dealing is the necessary limitation which precludes copyright from functioning as purely an instrument of monopoly. Even though there are other limitations upon copyright's reach—the idea versus expression mandate; the uncopyrightable nature of facts or data; the limited term of copyright (in Canada term is generally the author's lifetime plus fifty years)—these measures do not facilitate the

*ongoing* use of copyrighted material in a productive fashion. That task falls solely under the purview of fair dealing, and occupies the remainder of this chapter.

## 5.2 Fair Dealing in Canadian Jurisprudence

Those advocating a more extensive sphere of control via copyright often invoke the concept of property rights to defend their claim of control. In practice a property right is rarely a grant of absolute control, whereas in the abstract realm of intellectual property absolute dominion is seen as the norm. As such, incursions into this realm of absolute dominion are viewed with suspicion. The word exception suggests that, but for these clauses, the allocation of property would be absolute. The perception of fair dealing is compromised at the outset. And, until recently, the Canadian judiciary discouraged any reflection upon the contribution fair dealing makes to the system of copyright as a whole.<sup>4</sup>

### 5.2.1 Early days...

Fair dealing made its first appearance into Canadian copyright law, with the Act of 1921. Styled after the British *Copyright Act of 1911*, "Any fair dealing with any work for the purposes of private study, research, criticism, review, or

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<sup>4</sup> The most recent Federal Liberal government also refrained from examining fair dealing closely (Nair 2006). Our current Conservative Government's delay in making any reference to report on fair dealing, written by Prof. D'Agostino of Osgoode Hall Law School, from the report's completion in June 2007 to its release in August 2008, suggests there is still discomfort with fair dealing in political circles. The report is available through <http://www.pch.gc.ca/pc-ch/org/sectr/ac-ca/pda-cpb/publctn/index-eng.cfm>. As this dissertation was coming to a close in December 2008, Prof. D'Agostino published an updated version of her paper. I share her thought that, "Canada should ... seek to build on the distinctive features of its fair dealing regime (D'Agostino 2008, p.309)."

newspaper summary (Canada 1921, p.16(1)(i)),” would not be an act of infringement. In this statute, like our current Act, *fair dealing* itself is undefined. In the eighty-plus years of subsequent legislative modification, copyright holders were afforded increasing rights of control but fair dealing saw its scope reduced.

From our current Act:

Fair dealing for the purpose of research or private study does not infringe copyright (*Copyright Act*, s.29).

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
- (*ibid.*, s.29.1).

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.
- (*ibid.*, s.29.2).

Even though newspaper summary was broadened to include news reporting, additional constraints were added through the requirements of attribution. An individual wishing to utilize fair dealing is bound by three conditions: i) the usage of copyrighted material must fall within one of these enumerated tasks, ii) if the task is criticism, review, or news reporting, the appropriate attribution must be made, and iii) left unsaid but still necessary, the

dealing itself must be fair. Like its predecessors, our Act does not provide any guidance as to what constitutes fair dealing; that determination has been left in the hands of the courts. In 1994 the United States Supreme Court famously characterized a similar exception, fair use, as guaranteeing the necessary breathing space for works to flourish within the system of copyright (*Campbell v. Acuff-Rose Music Inc*, para.579); Canadian courts have been unwilling to see fair dealing in this light.

Carys Craig writes, "The tendency amongst Canadian courts was to reject the fair dealing defense by invoking (and thus creating) a bright line mechanical rule ... (Craig 2005, p.443)." For instance, in 1983, fair dealing was denied because a court rejected the idea that an abridgment was a form of review, "fair dealing ...requires as a minimum some dealing with the work other than simply condensing it into an abridged version and reproducing it under the author's name (*R. v. James Lorimer*, p.269)." To state that condensing a work is insufficient intellectual effort ignores the roots of fair dealing itself, arising as it did from the provision of fair abridgement.<sup>5</sup> Another instance of association to a bright line mechanical rule lies in *Boudreau v. Lin* (1997). Some commentary upon this case is misplaced; attention has been focused upon the defendant's effort to shelter classroom distribution of copyrighted material under the aegis of fair dealing (Vaver 2000, p.190 n.91; Craig 2005, p.444). Given that the defendant had

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<sup>5</sup> In *Gyles v. Wilcox* (1740), the English courts decided, "...the second author, through a good faith productive use of the first author's work, had, in effect, created a new, original work that would itself promote the progress of science and thereby benefit the public (quoted in Loren 1997)."

plagiarized another work, and, published and sold the outcome under his own name, the rejection of fair dealing is more than fitting. Where this case illuminates a bright-line rule is in the remark that followed the court's description of fair dealing, "These exceptions are to be restrictively interpreted (*Boudreau v. Lin*, para.48)." This restrictive approach to fair dealing was articulated in the trial court decision of *CCH Canadian v. Law Society of Upper Canada* – see Section 5.2.5 *CCH Canadian* below – and yet again the following year when fair dealing towards the preparation of a biography was denied in part because:

The most significant factor in interpreting what is meant by 'research' in the Act is the fact that, unlike fair dealing for the purpose of criticism or review, or news reporting, there is no requirement that the source be identified. This indicates that the use contemplated by private study and research is not one in which the copied work is communicated to the public (*Hager v. ECW Press*; p.335).

While the statutory language of fair dealing is predicated upon the purpose of the dealing, the court redefined purpose in terms of distribution. The opinion that work which arises through private study and research is not communicated to the public is at odds with the well-established academic practice of publishing one's own research findings. The rejection of fair dealing in circumstances better described as plagiarism is entirely appropriate, but let that become the issue.

The tendency to subject fair dealing to bright-line mechanical rules appears to have begun with the first case of fair dealing in Canada in 1943, *Zamacois v. Douville* [hereinafter *Zamacois*]. Unfortunately, this legacy is miscast. The case is considered as the deciding event where reproducing an entire work

cannot be considered fair dealing (Handa 2002, p.294). In 1997, in *Allen v. Toronto Star Newspapers Ltd.* [hereinafter *Allen*], when the Court of Appeal permitted the use of an entire work for the purposes of news reporting they took pains to “respectfully disagree” with the 1943 decision.<sup>6</sup> Yet the ruling of 1943 was far more nuanced than legal citation alone can divulge; added to which, the presiding judge did not categorically stipulate that any individual reproduction of an entire work was impermissible as fair dealing. Justice Angers wrote, “... a critic cannot, without rendering himself liable for infringement, reproduce the entirety of the work criticized without the authorization of the author (*Zamacois*, para.107).” His remarks were specific to the role of criticism, and reached only after a detailed investigation of the circumstances surrounding the use of the copyrighted material.

At issue was a 1940 republication of an essay, with a separate commentary printed at the same time. Angers carefully examined a number of details: questions of the *Berne Convention* were involved, the nature of competition, and the prevailing practices within the newspaper industry. He went so far as to examine what literary criticism meant in the French cultural tradition as compared to the English tradition, given that the object in question was the work of a French scholar, reprinted in a Quebec newspaper. Fair dealing’s judicial

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<sup>6</sup> “To the extent that [*Zamacois*] is considered an authority for the proposition that reproduction of an entire newspaper article or, in this case, a photograph of a magazine cover, can never be considered a fair dealing with the article (or magazine cover) for purposes of news summary or reporting, we respectfully disagree (*Allen*, para.39).”

entry in Canada came with the recognition that each dealing must be judged in light of its circumstances. The annotation of *Zamacois* includes:

What amounts to 'fair dealing with any work for the purpose of private study, research, criticism or newspaper summary' within the meaning of ... the Copyright Act is a matter which must necessarily depend upon the fact of each case.

Despite this promising start, in the following years Canadian courts bound fair dealing "tightly to the strict statutory language and encumbered [it] with an apparent, if unarticulated, sense that use of another's work without permission was de facto unfair (Craig 2005, 443)." The insistence upon consent reached its zenith in *Michelin v. CAW Canada* [hereinafter *Michelin*]. A landmark event in Canadian fair dealing jurisprudence, this ruling exemplifies the extent to which fair dealing has been held as subordinate to copyright's measures of control.

### 5.2.2 *Michelin v. CAW*

In 1994 the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW) attempted to unionize the employees at Michelin Canada's three plants in Nova Scotia. The union's campaign materials included a reproduction of Bibendum (the Michelin Man) portraying the character as a figure of oppression. Michelin argued that its intellectual property rights had been violated; the CAW had not asked for, nor received, permission to utilize the character in their materials. CAW defended their actions, in part, upon the right of fair dealing.

In the argument of fair dealing the defendants' required that the Canadian court recognize parody as a form of criticism. A critical aspect of their argument rested on a recent, similar recognition by the United States' Supreme Court (*Campbell*, para. 597). Justice Teitelbaum rapidly rejected the analogy – the court should be prudent before applying American precedent in a Canadian context, the codification of fair use is quite different from fair dealing, and, with fair dealing's very specific and closed set of activities Canadian courts had previously cautioned against reading in implied exceptions (*Michelin*, para.65-70) – leaving the defendants with little ground to stand on. Finally, Teitelbaum indicated that even if parody was interpreted as criticism, the defendants had failed to meet the attribution requirements.

Required for fair dealing is mention of the source, and, if present in the source, the author, performer, sound-recording maker, or broadcaster. This rare appearance of the author, not the copyright holder, suggests fair dealing is attempting to bring moral rights closer to centre stage. If this is the case, it does not bear up to closer scrutiny. Canadian implementation of moral rights reduces the imperative of attribution to the author (or performer) by the qualification of “where reasonable under the circumstances,” and the language of fair dealing itself only requires mention of the author “if given in the source.” As a comparison, the United Kingdom implementation of fair dealing makes no such requirements for reporting current events by sound-recording, film, or telecommunication. And in the United States, attribution is not necessary for a



finding of fair use, merely a factor to consider. David Vaver raises the question of why Canada adopted a stricter threshold for fair dealing than its English forbears or American neighbors, and writes, "These citation requirements are no doubt supposed to reinforce the moral rights of authors and entrepreneurs, but their implementation is both awkward and irrational (Vaver 2000, p.197)."

The awkward implementation played against the interests of the defendants in *Michelin*. They argued that by its very nature, "parody to succeed as parody must implicitly conjure up the heart of the original work (*Michelin*, para.73)" and implicitly meets the requirements of *mention*. This line of reasoning had been supported at the United States' Supreme Court; the CAW was not so fortunate in Canada. Teitelbaum felt the reasoning was logically inconsistent with the letter of our law, "If parody does not require mention of the source because of its very nature as a parody, then parody cannot be included under the term 'criticism' which so obviously requires mention of the source (*ibid.*, para. 74)." Rather than consider what it is to criticize, the judge felt bound to look at what conditions, as defined within the *Copyright Act*, would imply criticism. Under these terms, Canadian parody will never find a home under criticism.

Perhaps most damaging of all, fair dealing's role in the system of copyright was eviscerated without any recourse to the technicalities of the law itself. The plaintiffs contended that the defendants did not treat the copyright work in a *fair* manner. Conceding that the Copyright Act did not define "fair dealing," Teitelbaum agreed with:

... the Plaintiff's submission that the overall use of the copyright must be "fair" or treat the copyright in a good faith manner. The Collins Dictionary defines "fair" as "free from discrimination, dishonesty, etc. just; impartial". ... even if parody were to be read in as criticism, the Defendants would have to adhere to the bundle of limitations that go with criticism, including the need to treat the copyright in a fair manner. The Defendants held the *Bibendum* up to ridicule (*ibid.*, para. 75).

Michael Rushton comments that with this interpretation, fair dealing "was reduced to an obligation to use the materials in a polite manner (Rushton 2002, p.58)." Instead of operating as a measure to support creative freedom, fair dealing becomes a further measure of control in the hands of copyright owners.

Although the late-twentieth century inclination was to subordinate fair dealing to copyright owners' interests, a moment of discontinuity occurred a year later. A dispute concerning a photograph, a magazine cover, and a newspaper report, brought forward a much needed reminder of the collaborative and transformative nature of creative effort, and emphasized that the very merit of fair dealing lies in its undefined structure.

### 5.2.3 *Allen v. Toronto Star Newspapers Ltd.*

During the Federal Liberal leadership campaign of 1990, the *Toronto Star* featured candidate Sheila Copps and examined her past career in politics against her then-current political aspirations. The newspaper reproduced a magazine cover, published in 1985 by *Saturday Night*, where a photograph of Copps figured prominently. The intentionally provocative cover, with Copps dressed in black motorcycle leathers and seated astride a Harley Davidson motorcycle, was placed near a more recent photograph. The original *Saturday Night* article

pertained to Copps' reputation as a member of the opposition "Rat Pack;" the *Toronto Star* utilized the cover to demonstrate her change of image as she had developed within the Canadian political establishment.

While *Saturday Night* did not object to the use of its cover, the photographer of the original pictures, Jim Allen, successfully claimed copyright infringement at the first trial. Then the decision was reversed on appeal; Justices O'Driscoll, Flinn, and Sedgewick accepted that, "...[the] reproduction of the 1985 magazine cover does not infringe any copyright interest in the photo or the cover because of the 'fair dealing' defence... (*Allen*, para.8)."

The heart of the dispute began from Allen's claim that he had copyright in his original photograph of Ms. Copps. To his thinking, this fact precluded the use of the cover, which included his photograph, in the story published by the newspaper. Allen's copyright in his photograph was not disputed by either court, or the *Toronto Star*. At appeal, the case turned on a new question: how might copyrighted material be legitimately utilized in the creation of a new work? Within the answer, is a reminder that a work deemed original and worthy of copyright in its own right, may have copyrighted material amongst its constituent parts. "Copyright may subsist separately in a compilation of elements which may themselves individually be the subject of copyright (*ibid.*, para.13)." The determination of copyright of the compilation is not incumbent upon the copyright status of the elements, but upon the originality of the compilation. The justices cited a prior ruling by then-Justice McLaughlin:

It is well established that compilations<sup>7</sup> of material produced by others may be protected by copyright, provided that the arrangement of the elements taken from other sources is the product of the plaintiff's thought, selection and work. It is not the several components that are the subject of the copyright, but the over-all arrangement of them .... The basis of copyright is the originality of the work in question. So long as work, taste and discretion have entered into the composition, that originality is established. In the case of a compilation, the originality requisite to copyright is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation ... (ibid., para.14).

Beginning with the premise that all intellectual effort culminates in a compilation, here is a different framework from where to make a determination of fair dealing. Is the outcome of the intellectual effort deserving of the allocation of copyright, by virtue of being more than just the sum of its parts? If so, the dealing becomes fair. Admittedly, this is not a trivial question to answer; returning to Justice Holmes' view that a judge should not be vested with the role of critic, the same can be said for third-party administrators. This situation can be avoided in my sphere of research – copyright practices surrounding dissertation research (Section 5.4) – a panel of experts adjudicates on the merits of the student's work.

The student's advisory committee will make the necessary determination of originality. Even with attribution, if the copying is only to the extent of mere repetition the student's claim of originality will be defeated. In which case, while

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<sup>7</sup> The definition of compilation lends itself to both a dynamic creative undertaking, as well as a mere static arrangement of individual elements: "compilation" means (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data (*Copyright Act*, s.2).

excessive copying might have been considered infringement, the committee would not pass such work and that dissertation will never see the light of day. Whereas, when it is evident that the copying is in aid of giving rise to an original expression, the dealing is fair.

For those who crave clarity with fair dealing, *Allen* offers an explicit template against which all determinations of fair dealing may be guided:



“The use by the Toronto Star on March 10, 1990 of a photographic reproduction of the November 1985 cover of Saturday Night was related to then current news, the leadership aspirations of Ms. Copps. The other photo used to illustrate the feature article on Ms. Copps portrayed her in a more traditional political appearance in 1990. It was apt for the newspaper to contrast the image she was willing to project in 1985. The change in her image was the thrust of the article.

The cover was not reproduced in colour as was the original. The cover was reproduced in reduced form. The news story and accompanying photos received no special prominence in the newspaper. They appeared on an inside page of an inside section. These factors are indications that the purpose of its reproduction of the cover was to aid in the presentation of a news story and not to gain an unfair commercial or competitive advantage over Allen or Saturday Night.

In our view, the test of fair dealing is essentially purposive. It is not simply a mechanical test of measurement of the extent of copying involved... (*Allen*, para.37-39).”

And to give full thrust to the import of the last sentence, the justices gave an instruction which would later be repeated by the Federal Court of Appeal and

Supreme Court of Canada in the *CCH Canadian* rulings. Drawing from *Hubbard v.*

*Vosper*, a United Kingdom case concerning literary criticism, the text reads as:

It is impossible to define what is "fair dealing". It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression (*ibid.*, para.40).

Although *Allen* brought increased clarity to the application of fair dealing, the necessity of fair dealing to intellectual endeavor did not enter discussion.

This dialogue took time to come to fruition, a journey that was aided in no small part by a Supreme Court decision in 2002, concerning the work of Claude Th  berge. While fair dealing was not the issue at hand, this case as a whole laid a foundation upon which a robust interpretation of fair dealing gained not only legitimacy, but also necessity. *Th  berge* marked a return to the standard first set by *Zamacois* where the offending activity was scrutinized within the system of intellectual property as a whole.

#### 5.2.4 *Th  berge v. Galerie d'Art du Petit Champlain Inc.*

In Chapter Four I drew attention to this case as an illustration that contemporary implementation of moral rights has limited usefulness for creators. That said, the case emphasized an important aspect of any system of rights, that

they are in fact limited. For completeness, I include here the chronology of events that lead to the Supreme Court ruling of 2002.

Claude Th  berge is a Canadian artist of international repute. In 1999 he objected to the practices of an art gallery which had purchased authorized reproductions of his work and then transferred the images to canvas. Th  berge argued that this was effectively copyright infringement, and to that end he was entitled to retrieve all infringing copies of his work. He obtained a writ of seizure before the questions of reproduction and infringement were brought to court. The gallery successfully appealed the seizure; the Quebec Superior court found that no infringement had occurred and thus there were no grounds for the seizure. Th  berge continued to press his claim and the Quebec Court of Appeal ruled in favour of the seizure.

In October 2001 this case reached the Supreme Court of Canada, with judgment delivered five months later in March 2002. In a split decision, the seizure was once again overturned. In the eyes of the majority, the images were not reproduced. They were transferred from one medium to another, and therefore this was not an instance of infringement.<sup>8</sup> In reaching their decision, the justices gave strong consideration to the role that copyright plays in society.

Writing for the majority, Justice Binnie said:

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<sup>8</sup> The minority opinion emphasized reproduction did not necessarily require an increase in the number of copies. Another instance of fixation had occurred and therefore, it was infringement (*Th  berge*, para.138-159)

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 ...

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 ...

(emphasis mine, *Théberge*, para.30-32).

The decision of the majority appears to favour a utilitarian perspective of intellectual property. However, this reference to the public domain suggests a broader vision at work. Even though not defined in the judgment, the public domain appears as a living entity. The majority opinion puts forward the risk posed by overt control of copyrighted material; specifically, that the ability of all individuals to utilize such material is impeded. With this departure from the focus of either the civiliste or copyright tradition, creativity itself appears in discussion:

It is in the nature of the subject that intellectual property concepts have to evolve to deal with new and unexpected developments in human creativity. The problem here is that the respondent's submission ignores the balance of rights and interests that lie at the basis of copyright law (ibid., para.75).

*Théberge* marks a tipping point in Canadian legal discourse; the door was opened to the idea that copyright is not necessarily an individual right, but part and parcel of a system. Although, the necessity of fair dealing to this system is still not apparent. In *Allen* the application of fair dealing was clarified, in *Théberge*



the function of creativity was brought forward; application and function melded together to illustrate necessity in *CCH Canadian*.

### 5.2.5 CCH Canadian

*CCH Canadian* is best known as the Supreme Court decision of 2004 where, with unanimity, fair dealing was held to be a user's right, and not to be interpreted restrictively. The importance of this pronouncement should not be minimized, but it must also be remembered that basis of this judgment was laid by the Court of Appeal in May 2002. Throughout its court appearances, the issues of originality and fair dealing were examined closely. Having addressed the contribution to originality within Chapter Four, here I focus upon the issue of fair dealing.

The story of *CCH Canadian* began in connection to a dispute between the Law Society of Upper Canada, and a number of legal publishers including *CCH Canadian Ltd.*, *Canada Law Book*, and *Thomson Canada*. The Law Society of Upper Canada maintains and operates the Great Library at Osgoode Hall in Toronto, which contains one of the largest collections of legal materials in Canada. At issue was a service offered by the Great Library where (upon request) published legal materials were copied and delivered (either in print or via facsimile) for a fee. The legal publishers claimed that the law society infringed upon their copyrights; the Law Society launched a counterclaim

seeking a declaration that the copying activity fell within the component of research in fair dealing.

At the initial trial, Justice Gibson dismissed the counterclaim entirely, stating that while the ultimate use of the requested material may fall within fair dealing, the copying of the material by the intermediary library staff was not. Reminiscent of the bright-line mechanical rules, he wrote, "...the fair dealing exception should be strictly construed (*CCH Canadian* 2000, para.61)." At the appeal Justice Linden opted for a more measured interpretation. While agreeing that courts should not imply exceptions, he argued that this does not support a narrow reading of the exceptions that do exist. With language that looks very similar to *Théberge*, he said, "An overly restrictive interpretation of the exemptions contained in the Act would be inconsistent with the mandate of copyright law to harmonize owners' rights with legitimate public interests (*CCH Canadian* 2002, para.126)." Justice Linden brought into Canadian juridical dialogue a critical reminder, one which the Supreme Court would later echo, "User rights are not just loopholes. Both owner rights and user rights should therefore be given [a] fair and balanced reading. Simply put, any act falling within the fair dealing exemptions is not an infringement of copyright (*ibid.*)."

Justice Linden paved the way for a more nuanced examination of fair dealing and proposed a framework of issues to be considered. Paraphrasing from the court text, a working model by which individuals can judge their usage of copyrighted material emerges:

- 1) *The Purpose of the Dealing*: Establishing the validity of purpose is quite straightforward. Canadian law is described as a closed set of purposes: private study, research, criticism, review, and news reporting.
- 2) *The Character of the Dealing*: How is the work dealt with? A single copy of a work, for an allowable purpose is likely to be fair, whereas if multiple copies are widely distributed, then closer examination is required.
- 3) *The Amount of the Dealing*: If the amount is considered to be less than substantial, no further analysis needs to be done.<sup>9</sup> Where the copying is beyond substantial, fair dealing is contingent upon the purpose. For instance, research and private study may well necessitate the copying of an entire academic article. Whereas for the purpose of criticism, it is unlikely that one needs to include a full copy of a literary work.
- 4) *Alternatives to the Dealing*: If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered. Or if the source of the copyrighted material enjoys a monopoly on such material, that will affect a decision as well.
- 5) *The Nature of the Work*: Is there a public interest to be gained in wider dissemination of the original work? Such a concern must also bear in mind that the public interest is also served by ensuring adequate returns to creators for their intellectual undertakings.

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<sup>9</sup> Copyright is defined as, "...the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever...(Copyright Act, s.3.1)." Bear in mind that *substantial* is not defined.

6) *The Effect of the Dealing on the Work*: This speaks to the likelihood of affecting the market of the original. Will utilization of the copyrighted material result in unfair competition?

(*ibid.*, para.145-160)

Linden aptly noted that other factors may apply, or that not all of these elements will be relevant to all cases of fair dealing. And, a library can stand in the shoes of its patrons; engaging with a copyrighted work in the same manner by which an individual might legitimately do so is not infringement (*CCH Canadian* 2002, para.143). At *CCH Canadian's* final appearance in 2004, the Supreme Court agreed with the necessity of contextual examination for fair dealing, and reiterated Linden's framework. Moreover, they clarified a critical element; that the availability of a license is not relevant to a question of fair dealing (*CCH Canadian* 2004, para.70). The significance of this element deserves elaboration, and I take it up again in the Conclusion.

The Supreme Court pronouncements regarding *CCH Canadian* are well documented (Murray and Trosow 2007; Geist 2006; Scassa 2004; Craig 2005) to name just a few. Perhaps the most encouraging words from *CCH Canadian's* 2004 court appearance were, "'Research' must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. ... [R]esearch is not limited to non-commercial or private contexts (*CCH Canadian* 2004, para.51)." Such a sentiment should have resonated well within post-secondary institutions; indeed, *CCH Canadian* has much to offer all educational

institutions. Yet fair dealing remains under-utilized, or openly distorted, in post-secondary institutions; see Section 5.4 below.

Federal court judge Roger Hughes describes court rulings as "... the art of the possible ... While Parliament sets the laws, the courts can illustrate the magnitude of the law, and the potential the law can support."<sup>10</sup> The unanimity of the *CCH Canadian* decision suggests that our Supreme Court Justices saw that Canadian copyright law has greater potential than has been previously offered; they illustrated the magnitude the law can support. The justices' position serves as an exemplar of Innis' theory that for creativity to flourish any cultural system must be supported by a countervailing cultural system. To offset the encroachment of distribution rights, the Supreme Court of Canada set fair dealing in a position as an urgently needed corrective to the prevailing tendency in the interpretation of copyright.

Bearing in mind my objective of an Innisian analysis of copyright law, what is striking about the justices' framework is precisely its imprecision. It avoids the inflexibility of uniform interpretation; instead the written code is examined by engagement with each situation. Such is the hallmark of oral tradition. Fair dealing is a subjective assessment, and invokes a dialogue – figuratively speaking – between creators of new, existing, and old work. In doing so, fair dealing provides a temporal component within the system of copyright. The combination of distribution rights and fair dealing provides a living

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<sup>10</sup> Roger Hughes spoke at *Ethics, Creativity & Copyright*, August 2006, Calgary.

demonstration of a blending of the tendencies of space and time, and the achievement of balance.

But this balance is precarious at best. The justices left Canadians with a warning, “It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of a dealing is fair (*CCH Canadian 2004*, para.55).” If Canadians presume that intellectual property is solely private property, this will shape our practices. At this time, the courts are prepared to recognize the contextual foundation of any application of fair dealing, but this by no means implies such consciousness on the part of individuals. If fair dealing remains bound by bright-line mechanical rules such practices will become the norm, and future court rulings will not be so hospitable to fair dealing. In this scenario, fair dealing will become simply another avenue by which copyright holders control creative development. Or, in Innis’ language, fair dealing will become nothing more than an instrument of the monopolization of knowledge.

### **5.3 Monopolies of Knowledge**

Arguably, Innis is responsible for the entrenchment of the phrase “monopoly of knowledge” within communications’ parlance. As is often the case with his writings, he did not define the phrase but left interpretation in the hands of the reader. In the early days of the Innisian revival, William Kuhns described the phrase as having three connotations, “the constriction to one medium, the

limitation of a certain form of knowledge, and fairly tight control by a small power hegemony (Kuhns 1971, p.155).” While the first two definitions unduly limit Innis’ concerns to terms of content and form, they are still applicable to a discussion of copyright. Images of creative artifacts enclosed by walls, metaphorical or real, come to mind. This imagery plays well with the position that a maximalist interpretation of copyright is leading to a second enclosure, the enclosure of the knowledge commons (Aoki 1998; Boyle 2002). The implication is that a monopoly of knowledge should be of concern; the predictable conclusion is that such monopoly deters creative liberty. If we cannot use creative material, we cannot capitalize upon our individual creative potential. However, with respect to my analysis of copyright, Innis’ phrase runs much deeper and is far more insidious than merely implying the limited manipulation of content. The conceptual basis of Innis’ language has broadened<sup>11</sup> but I return to Kuhns’ third observation. For my purposes, “control by a small power hegemony” remains the most useful rendering of Innis’ language. Such control is affecting the conceptual basis of intellectual property itself, the way we think about intellectual property is changing. The conjoined beliefs that copyright is a realm of absolute dominion, and creativity is an outcome of solely individual effort, are taking root, not by virtue of the truth of either of those statements but by outside efforts to construct a particular consciousness of creative effort. Continuing then

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<sup>11</sup> Menahem Bondheim provides an insightful summary of the various ways that individual scholars privilege aspects of this concept, “ [concerning] the economic and sociopolitical consequences, a more general political economy implication, and the epistemological consequences (Blondheim 2004, p.123).”

from Kuhns' observation, the next concern is to determine how control is exerted, how is this consciousness constructed?

Again I turn to Watson; he describes the inter-relation Innis saw between consciousness and the axes of time and space:

... 'monopolies of knowledge' ... refer[s] to the institutional formations within a polity that appropriate for themselves the right to construct how time and space are perceived by ordinary members of society ... what is 'monopolized' is the control over the structuring of space and time (Watson 2006, p.328; Watson 1981).

Watson is not alone in his observation; Robert Babe also notes the entanglement of monopoly and consciousness, via Innis' framework:

In his later writings Innis often emphasized that monopolies of knowledge (i.e., those large-scale truths, systems of truth, or myths that allow groups to exercise control over time or space), inevitably accompany control of particular media of communication (Babe 2000, p.62).

In Chapter Two I provided a brief introduction to the cultural inclinations of time and space; at this juncture a few more details are helpful.

Innis argues that each society, with its inclination to time or space, will have its own perception of both conditions. At their heart, time-bound societies do not see time as a linear, measurable, event. Time exists in events: seasons, religious festivals, and creative epochs. From this perspective, the emphasis is upon living in space, not appropriating or administering the space. And the nature of living is rooted in a demand for continuity (Innis 2003e). Paradoxically, while the demand for continuity may diminish individuality at the centre, the lack of attention to the marginal regions allows individual creativity to flourish



at those sites, which may ultimately be to the detriment of the centre. Reason being, that same lack of attention to boundaries is an invitation to invasion, either by innovation or force. In contrast, spatially oriented societies are inclined to view time as a set of discrete measures, and emphasize the importance of territorial holdings and the expansion thereof. Little concern is paid to questions of the past or future, life is in the immediate. Relations with the community are of lesser consequence than the supremacy of the individual. And, again paradoxically, despite the emphasis upon individuality the desire for ease of administration throughout the territory leads to a cultural homogenization by eroding local cultures within.

The inclination of the predominant medium in a society is one means by which the inclination of the society as a whole can be detected, “The relative emphasis upon time or space [of a medium] will imply a bias of significance to the culture in which it is imbedded (Innis 2003a, p.33).” With copyright law as my medium of exploration, its structure shows a distinctly spatial bias. The statute is predominantly devised as an instrument of distribution rights, where the implication is exchange for remuneration.

Fortunately, in true Innisian fashion, a countervailing temporal bias exists within the same statute; taken together the two strengthen individual creative potential. This temporal orientation is found in the maintenance of cultural heritage that stems from fair dealing and moral rights. The contribution of fair dealing is not merely the provision of access to creative work, instead it sustains

a conscious relationship. Fair dealing ought to be seen as the individual right that serves all individual creators throughout their creative efforts. All creators, consciously or not, rely upon fair dealing. Fair dealing preserves the fluidity of time which is necessary to creativity itself. *CCH Canadian* brought into contemporary discourse the concept and subtleties of users' rights. Unfortunately, the nuance of the Supreme Court ruling was quickly forgotten and *CCH Canadian* has been invoked to fuel the acrimony that already exists between creators and the public.<sup>12</sup> Time is being manipulated to sever the relationships that exist in the sphere of fair dealing. We see time as a series of disconnected intervals, one where a creative work comes to life, and then another where others partake of it.

As I approach the completion of application of Frost's Innis algorithm, which is to consider the amenability of a medium to foster social or economic monopoly, it would seem that fair dealing is well positioned to resist the monopolization of knowledge. The language of the law, together with the clarity expressed by our courts in 1997, 2002, and 2004, suggests that legitimate usage of fair dealing is on stronger ground than at any time in our past history. Yet Innis might suggest caution, he was acutely conscious that the merit of a medium can be blunted through its usage. For instance, Innis disapproved of the outcome of one of democracy's bedrock principles, freedom of the press. "The guarantee of

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<sup>12</sup> In the days following the Supreme Court *CCH Canadian* ruling, owners' rights representatives as well as Canadian bureaucrats actively sought to frame *CCH Canadian* as antithetical to creators (Murray 2004; Nair 2006).

freedom of the press under the Bill of Rights in the United States and its encouragement by postal regulations has meant an unrestricted operation of commercial forces and an impact of technology upon communication tempered only by commercialism itself (Innis 2004d, p.11)."

Innis' compact statement requires some elaboration; at the heart of all his lamentations was his concern for Canadian cultural development. The flood of American periodicals into Canada had consequences for the development of an indigenous Canadian literature. The pattern set in the nineteenth century, where American publications were priced more cheaply because of the larger market (which included Canada), continued into the twentieth century. In this distorted arena of publishing, Canadian publications were compelled to imitate their American counterparts, and Canadian writers were forced to adapt to American needs. Creative expression was valued more as a vehicle for advertisement; Innis wrote, "Our poets and painters are reduced to the status of sandwich men (ibid.)."<sup>13</sup>

Even though fair dealing supports creative expression, neither its language, nor the interpretation provided by the courts, can compel individuals or institutions to follow in its spirit. The reverse seems to be happening. Fair dealing is subjected to misinformation across Canada. In particular, universities across Canada do not educate graduate students appropriately regarding fair

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<sup>13</sup> The late James Carey pointed out another effacement of Canadian culture through American journalism, that American journalists reporting from Canada chose to ignore Canadian press law – deeming it a violation of their First Amendment (Carey 2004, p.xvi).

dealing, and instead are implementing “bright line mechanical rules,” which are serving to reinforce the mistaken belief that intellectual property is solely an individual creation.

Given the nature of fair dealing, it should come as no surprise that it is best utilized, and most needed, within educational institutions. I have examined a cross-section of Canadian post-secondary institutions to determine how fair dealing, and its relationship to copyright, are portrayed to graduate students. My rationale for choosing doctoral students stems from Innis’ influence; how are perceptions cultivated and carried across time? Impressions cast upon the next generation of Canadian researchers will have far-reaching consequences. I must emphasize that this was not an exhaustive study, but an effort to gain awareness of the atmosphere of fair dealing at Canadian post-secondary institutions.

Copyright is an insidious creature, its post-secondary presence occurs in varying degrees in a myriad of places. Some institutional libraries post information concerning copyright, some institutions deal at length with it through an institution-wide intellectual property policy, and some rely on outside information (either the federal government, or, educational bodies such as the Association of Universities and Colleges of Canada (AUCC) and the Council of Ministers of Education Canada (CMEC)).

In Canada, approximately thirty post-secondary institutions offer doctoral programs. As the culmination of a doctorate requires making an original contribution to one’s field, I examined the policies concerning the inclusion of

copyrighted material, as directed to doctoral students, at twenty-one institutions. The parameters by which I set the study, and the complete data gathered, can be found in Appendix A; a summary of the key findings is presented below.

#### **5.4 Conclusion: Fair dealing at school / L'utilisation équitable a l'école**

Across the twenty-one institutions only one institution provides a description of fair dealing that is equal to the law (Institution #15). One institution gives the spirit of fair dealing reasonably well (Institution #20). Fourteen institutions contribute to a misrepresentation of copyright and fair dealing.

Of the remaining five, three do not mention fair dealing, but do not impose undue copyright restrictions upon doctoral research (Institutions #10, #11, #16). And finally, two institutions do not address this topic at all (Institutions #13 and #18). This pleases me as it is better to avoid this subject entirely, rather than risk propagating a mistaken interpretation of copyright. I should temper my enthusiasm though; these samples might simply mean the policies are not easily evident to a third-party observer.

The correct description of fair dealing (l'utilisation équitable) came from a French medium institution.<sup>14</sup>

Institution #15:

L'utilisation équitable d'une oeuvre est une notion de la Loi sur le droit d'auteur qui permet l'utilisation d'une oeuvre pour des fins d'études privées, de recherche, de critique, de compte rendu ou de communication

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<sup>14</sup> I would like to express my appreciation to Laureano Ralon for his help with the translations of information found at French medium institutions.

de nouvelles et qui considère qu'une telle utilisation ne constitue pas une violation du droit d'auteur.

La citation ou la reproduction d'une partie peu importante, en quantité autant qu'en qualité, d'une oeuvre sont considérées comme une utilisation équitable. À condition d'indiquer la source et le nom du ou des auteurs, auteurs, une telle utilisation ne nécessite pas l'autorisation écrite de la ou du ou des titulaires des droits commerciaux et n'oblige pas au versement de redevances. ...

Les critères pour déterminer l'importance de la partie citée ou reproduite sont les suivants:

- son ampleur par rapport à l'ensemble de l'oeuvre originale;
- son importance dans l'oeuvre originale;
- son ampleur dans l'oeuvre dans laquelle elle est utilisée;
- le but de l'emprunt;
- la concurrence préjudiciable pouvant en résulter pour la ou le ou les titulaires des droits commerciaux.

The equitable use of a work is a measure of the Law [droit d'auteur] allowing the use of a work for the purposes of private studies, of research, of criticism and report or communication of news ... such a use does not constitute a violation of the royalty [copyright].

The ... reproduction of a section [of a work] of little importance, by either quantity or quality, is considered fair dealing. Provided that the source and the name of the author(s) are acknowledged. Such a use does not require the written consent of the copyright holder, and does not oblige the payment of copyright fees.

The criteria to determine the importance of the section ... are:

- its magnitude/scope in relation to the original work.
- its importance in the original work.
- its scope/ importance in the work in which it is embedded
- the objective of using the section
- the damage its inclusion could cause the copyright holder.

Although the criteria are heavily weighted in terms of the original work, this framework modestly resembles that suggested in *CCH Canadian*.

A second institution does not use the term *fair dealing* but its function is covered reasonably well.

Institution #20:

In conformity with the Copyright Act, the thesis may contain an extract (e.g., quotations, diagrams, tables) from other sources protected by the Copyright Act for the purposes of research, comment, or review, provided that the use of the material is fair and reasonable and the source is properly attributed. Otherwise, there must be no substantial amount of copied material in the thesis unless written permission has been granted by the holder of the copyright. What constitutes a 'substantial amount' depends on the circumstances but more weight is generally given to the quality of the amount copied rather than to the quantity. When in doubt, students are advised to seek permission to include the material from the holder of the copyright.

Here, the word "substantial" is predicated upon the circumstances of the usage.

This extract does not primarily emphasize that the inclusion of copyrighted material in a thesis or dissertation requires permission from the copyright holder; while the last sentence does open that door, the preceding information sets the emphasis upon using material in a "fair and reasonable" manner. And it was encouraging to see that an "extract" encompasses diagrams and tables.

The fourteen cases of misrepresentation convey the sense that inclusion of copyrighted material for research comes via permission. With such permission deemed necessary to the acceptance of the student's work by the institution. The following extract captures the tone of much of these institutions:

Institution # 7:

In some cases, students include images, photos, tables, etc., from copyrighted sources for their thesis/practicum. Written permission from the copyright holder(s) is required. ...

Images or more than a reasonable extract (according to the Copyright Act) of another person's work must be accompanied by written permission from the copyright holder(s). ...

The thesis/practicum cannot be accepted ... if permission has not been obtained.

Close examination of policies reveals some distinct strains of thought underlying this overall inclination. These are: (1) the tendency to subject fair dealing to a question of measure; (2) the belief that fair dealing does not apply to a whole work (illustrations being the most common example); (3) open misrepresentation of the language of fair dealing. And common to all institutions was the absence of any consideration of the student's work as an original contribution on its own merits.

#### 5.4.1 Measurement

By and large, Canadian universities run into trouble with the determination of substantial. Many institutions put forth the statement that copying beyond a substantial amount requires copyright permission, but give little effort to explain either the subjective nature of substantial, or, that fair dealing permits utilization beyond substantial. Where further information is provided, it comes in the form of setting of a measure upon the amount than can be copied, ranging from (slightly) generous to stringent:

Institution #8:

Does your thesis contain any quotations from pre-existing materials that extend for more than one page? [If yes] then you must obtain written authorisation to reproduce the material from the copyright owner (eg., journal publisher and/or co-authors).

Institution #1:

Students should definitely seek permission when their thesis contains ... quotations from a single source that are over 500 words in total, or that consist of more than 2% of the copyrighted work.

This position is allied to the view that one cannot deal fairly with a whole work.



#### 5.4.2 Whole works

Some institutions indicate that using a whole work (illustrations, maps, charts, poems) is inadmissible and requires permission from a copyright holder, as exemplified by:

Institution #2:

Copyright clearances or consents should be obtained by the candidate for the reproduction of the whole of any map, diagram, chart, drawing, survey, questionnaire, computer code, painting, photograph, or poem in any thesis or dissertation.

One institution is refreshingly candid about the implications for the student in pursuing these permission slips:

Institution #19:

Students who have reproduced or used a "substantial part" of a work or other proprietary material in the thesis must obtain permission from the rights-holder. Students must be aware that obtaining this permission may take some time and may require a fee.

These regulations are particularly troubling given that none of these institutions actually provide the language of fair dealing as it is found in our Act.

#### 5.4.3 Misrepresentation of fair dealing

The survey results show several instances of an altered explanation of fair dealing. For instance:

Institution #1:

Under Canadian law, you need permission to reproduce or adapt a work for use other than *private* research, private study and educational use. Canadian law considers theses to be published, and consequently outside of educational use (emphasis mine).

Institution #6:

Copying materials: the "fair dealing" clause in Canadian copyright legislation allows a researcher to make copies of an article or portion of a book for *private study or research* (emphasis mine).

Institution #9:

Under the Copyright Act, the "*fair use*" provision allows the quotation of a reasonable extract of someone else's work, if properly cited. For more extensive quotation, the candidate must obtain written permission from the copyright holder(s) and include this permission in the thesis (emphasis mine).

If the required letters of permission are not obtained, a dissertation may not be accepted, or must be altered before submission to the institution.

#### **5.4.4 Permission and publication**

Some universities have taken steps to ensure that a candidate can still submit their work, even without permission. What is necessary is to remove the copyrighted material from the final copy of the dissertation, as illustrated by:

Institution #17:

When letters of copyright permission cannot be obtained and, when the omission of this material, will not deter from the sense of the text, the copyrighted material should be removed and a page inserted in its place [only for the microfilming copy of the thesis/dissertation/report.] This page should explain that the material involved has been removed because of the unavailability of copyright permission; what information the material contained; and the original source of the material.

#### **5.4.5 Copyright and contract.**

A legitimate need of copyright permission arises when a student has already published his or her work and assigned their copyright exclusively. This is separate to the issue of including other copyrighted material in a dissertation.

Only one institution confines their remarks entirely to this aspect:

Institution #16:

If the thesis contains other previously copyrighted material, signed waivers have been obtained from co-authors and publishers, and have been included with the thesis.

That this institution is an English medium school, located in Quebec leads to another observation.

#### **5.4.6 Francophone influences**

The two institutions that did not address the inclusion of copyrighted material in doctoral research were both French medium institutions (Institution #13 and #18.) As I noted earlier, this could simply mean that the regulations are not present under the auspices of the institution's Faculté des Études Supérieures (Faculty of Graduate Studies.) But being curious, I reviewed the website beyond this faculty. My comprehension of the French language is limited; perhaps I missed something. Yet the added fact that the one clear description of l'utilisation équitable (fair dealing) came from a French-based institution (#15) together with the position of the English medium institution in Quebec mentioned above suggests that a very positive influence might be at hand from Francophone Canada. The droit d'auteur connotation notwithstanding, it appears that these regions may be more likely to see that l'utilisation équitable is indeed a creator's right.

#### **5.4.7 Cultivating Perceptions**

Returning to the overall goal I set for this survey, to determine the atmosphere of fair dealing at Canadian universities, the results do not bode well.

These policies are not merely tedious; they are likely to reinforce a mistaken interpretation of copyright law as it functions in its mandate to encourage and protect creative effort. In light of the recent jurisprudence which strongly supports the application of fair dealing, and ought to bring some measure of comfort to university administrators, the complete absence of any reference to *CCH Canadian* across all twenty-one institutions is perplexing to say the least.

Fair dealing is not an invitation to copy without restriction. It is a modest measure ensuring that the system purporting to encourage or protect creative effort does not thwart creativity itself. Yet the climate surrounding fair dealing is more akin to that voiced during the Michelin trial, that individuals are obligated to utilize copyrighted material in a fair manner, where the notion of fairness is set by the sensibilities of the copyright owner, instead of the position of the law.

The move within universities to reconceptualize, or set aside, the tenets of fair dealing already affects research activity. Left unchecked, this tendency will have a grave impact on Canada's innovative and creative capability in the years to come. If a generation of researchers is led to believe that legitimate research is driven by permission or payment, this is likely to become the practice. Again, as our high court has already warned, this will affect future adjudication of fair dealing.

In a special issue of the *Hill Times*, titled "Innovation," Dr. Chad Garfield, president of the Social Sciences and Humanities Research Council reminds us that:

[R]esearch in the humanities and social sciences is essential to innovation in Canada and around the world. From anthropology and literature to politics and law, the humanities and social sciences build knowledge about people: what we think, how we act, why we embrace one technology and reject another – indeed, the deep complexity of human ideas and behaviour (Garfield 2008, p.37).

Canada is a small nation, which makes knowledge production doubly important, and doubly difficult if our research institutions introduce intellectual property constraints beyond those required by law.

## **VI. Conclusion: from Fair Dealing to Fair Duty**

### **6.1 Introduction**

For valuable consideration received, I hereby irrevocably and unconditionally grant to LNS and the Partner perpetually and throughout the world the right to copyright and use, reuse, publish, republish and incorporate (alone or together with other materials) the Images, my name and my likeness without restriction through any and all media (including print, video, CD-ROM, internet and any other electronic medium presently in existence or invented in the future) for illustration, art, promotion, advertising, trade or any other purpose whatsoever, including its use and license to others as it sees fit in its discretion...

- *Image Use Agreement*, Condition #1.

Professionally speaking, a great deal has happened for me over the last year. Two refereed publications are coming to fruition, collegial engagement within the university community is thriving, and this dissertation has unfolded with what I now know was relatively little pain. However, the copyright activity which stands out most in my mind was something that affected my eleven-year-old daughter. In July 2008 she attended a fine arts program, sponsored in part by the 2010 Legacies Now Society. On Day Two she returned home with the *Image Use Agreement*, specifically identified as intended for minors, concerning photographs taken of the children the day before.

At the bottom of the agreement was a place for the participant to sign, with a witness, and then spaces for a parent/guardian and witness to sign. My daughter had dutifully followed the instructions, and enlisted the aid of another eleven-year-old to act as her witness. It is disturbing that a contract of this nature

was distributed to children who would neither be able to comprehend the language nor recognize the implications of making a permanent assignment of their personal rights. The condition of parental acknowledgement is a cold comfort as most parents would not be much wiser in this matter than their children. When I queried the program organizers about the *Image Use Agreement*, they indicated that several hundred children in British Columbia had been presented with the same agreement. I would have comfortably signed it, had it been a reasonable assignment of nonexclusive distribution rights intended to promote involvement in the arts for children, or to highlight the efforts of many dedicated teachers, or to fundraise for after-school activities. With the intentions so vague, and the terms so broad, I could not sign it.

We have come a long way from the inception of copyright as a means of managing the relationship between an author and the publisher who underwrites the cost of disseminating the author's work. Even in that scenario, a contract such as this would be reprehensible but one can hope that the author has enough legal knowledge and individual talent to strike a better bargain. Victor Hugo again comes to mind. Instead, this situation marked an opportunity to define and control intellectual property. The benefit of the control remains unknown. Perhaps it will provide positive fiscal returns in the future as a means of securing additional sponsors for the 2010 Olympics. Or, its value may be in the aversion of negative publicity. Images of happy children might act as a rebuttal to those critics who have vociferously denounced the staging of the games in

Vancouver. In any case, this episode is merely a different manifestation of the same atmosphere which is undermining fair dealing in Canada. Individuals or organizations are inclined to claim as much intellectual property as they can, with the belief that it *might* provide benefit some day.

At the outset of this dissertation I indicated that I would

...critically examine social attempts to define and enforce private property rights in objects created through intellectual effort. Specifically, I pay particular attention to the current forces that wish to redefine the extent and limits of the *Copyright Act of Canada*, in what should be properly regarded as part of the constant evolution of the legal system in any society. That our society is becoming increasingly knowledge based is cliché, but nevertheless true. And as the value of knowledge increases over time, private interests are eager to stake their claims.

It is now apparent that this last sentence is backwards and incomplete. Private interests stake their claims, thereby inducing an increase in the perception of value. As *value* has multiple shades of meaning, a remark of Robin Neil is instructive:

Within the world of each medium of communication, means determined ends and values of a relative sort were in large measure determined.... As Innis' analysis passed from one world of values to another, only one element with independent and ultimate significance remained constant – the creativity of the individual (Neill 1972, p.114).

As I review my application of Catherine Frost's three-step Innis algorithm, I am once again struck by the amenability of Innis' work to the realm of copyright. Regardless of doctrinal foundation – natural rights or utilitarianism – copyright serves the creative individual and operates by setting terms of communication between individuals. If its objectives are not met, the blame should not fall upon the law itself. The means, ends, and values determined



through implementation and application of copyright are caught up in a messy world where, as Innis writes, “ ... the law is apt to become anything ‘boldly asserted and plausibly maintained’ ... (Innis 2004c, p.52).”

## **6.2 Worlds of Conflict**

As I detailed in Chapter Three, copyright operated at cross-purposes in Canada’s early days. The dimensions of Canada’s struggle for parity in free trade, within the North American publishing industry were reduced to motivations of greed or misplaced nationalism. Then, and now, it is implied that the Foreign Reprints Act of 1847 was passed by Canada’s design, to satisfy Canadians’ desire for inexpensive reading material, at the expense of the British author (Seville 2006, p.25 and p.89; Longman 1872, p.77). Left unarticulated is that the measures which preceded it were expressly introduced by British copyright holders anxious to tighten their grip upon their home and colonial markets. And left unsaid is that this was not the resolution requested by Canada. The initial effort of the Province of Canada was to offer protection of foreign copyrights on Canadian soil, via publication of foreign copyrighted material on Canadian soil, an option then disallowed by the British Government. Untenable as the system of duty collection was, and being of little help to either British copyright holders or the Canadian printing industry, the Canadian Government laboured for years to set the duty system aside and adopt an

innovative approach to secure compensation to authors and provide access to literature for Canadians.

Thompson's correspondence illustrates that Canada wished for the copyright autonomy promised by Earl Grey in 1846, which would have allowed the nation to meet the objectives of "securing both the rights of the authors and the interests of the public" through development of its own printing industry:

... What the Canadian publisher and printer desire to do is to supply the cheap books which the Canadian reader desires. ... It must, therefore, be repeated that it is desired that the Canadian publisher be permitted to sell in his own market; a market, which under present conditions, is reserved for the benefit of persons outside of Canada (Thompson 1894, p.76).

Rather than readdress the duty system, British copyright holders would emphasize their grievance that the duties were never properly collected and that Canada had an obligation to serve authors according to the copyright model in place.

Paul Saint-Amour writes that self-legitimation is:

endemic to all canons ... in any "progressive" teleological model of history, once-viable alternatives are first stigmatized as dead ends or nearly avoided perils and subsequently buried by the dominant discourse. But in the case of copyright, I would hazard a guess, this retrospective bias is unusually strong (Saint-Amour 2003, p.55).

Saint-Amour's remarks are addressed to the general principle of monopoly copyright, but are uncannily accurate with regards to Canada's particular history. The legitimacy and logic of Canada's position in the nineteenth century were set aside even as they were proposed, stigmatized under the banners of disrespect and international obligation. The British publishing industry

preserved its market via an unwillingness to consider alternate developments of law, without consideration that the law should never be regarded as monolithic. Past copyright regimes will run their course; as cultural atmospheres change, so too should the written incarnation of the law. This does not require abandoning the principles of the law. As nations consider further adoption of international copyright regulations, under the much touted principles of *noblesse oblige*, Canada's nineteenth century failure may still provide benefit for future copyright consideration.

In 1997 Canada signed the World Intellectual Property Office (WIPO) Internet Treaties (composed of the WIPO *Copyright Treaty* (WCT) and the WIPO *Performances and Phonograms Treaty* (WPPT) but has not yet ratified either. In 1998 the United States passed the *Digital Millennium Copyright Act* (DMCA), which, in part, was intended to allow the United States to ratify the WIPO treaties. The primary group lobbying for the DMCA in the United States was the American music industry. Even though the DMCA exceeds some measures of the international treaties, it did not ultimately secure the assets of that industry. This state of affairs was confirmed by none other than Bruce Lehman, architect of the DMCA, and now a principal member of the International Intellectual Property Institute. At a conference titled *Musical Myopia, Digital Dystopia: New Media and Copyright Reform*, held at McGill University in March 2007, he remarked:

Canada has the benefit of the soon-to-be decade of experience of the U.S... in some areas our policies have not worked out too well...

Attempts at copyright control have not been successful; at least with regards to music.<sup>1</sup>

Given the continued influence of the music industry in setting Canada's copyright agenda, Lehman's remarks are doubly instructive. He placed the development of the DMCA as occurring during the pre-Internet era, and a consequence of Bill Clinton's campaign promise to capture the economic benefits of the Information Superhighway. The phenomenon that is the Internet has changed considerably over the last decade, and business models previously unimagined have taken root. Current Canadian policy makers show a lack of judgment in suggesting that Canadian law follow in the pattern of DMCA.

Lehman's presentation in its entirety was very engaging, particularly his thoughts on the past and future of music development, but for my purposes here I am intrigued by remarks he made after the formal presentations. Michael Geist, also a panelist at the conference, describes the conversation:

In a later afternoon discussion, Lehman went further, urging Canada to think outside the box on future copyright reform. While emphasizing the need to adhere to international copyright law (i.e. Berne), he suggested that Canada was well placed to experiment with new approaches (Geist 2008c).

Lehman's words meld nicely with what might be the last reference Innis made on the subject of copyright. In the essay, *The Strategy of Culture* (1952) Innis wrote:

By attempting constructive efforts to explore the cultural possibilities of various media of communication and to develop them along lines free from commercialism, Canadians might make a contribution to the cultural life of the United States ... which would in some way

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<sup>1</sup> Video coverage available, last accessed 1 October 2008 from: <http://www.cipp.mcgill.ca/en/events/past/>

compensate for the damage it did before the enactment of the American Copyright Act (Innis 2004d, p.14).”

Just as Canada’s nineteenth century innovation of compulsory licensing was later adopted by the United States and United Kingdom, our development of fair dealing as mode of communication free from commercialism could contribute to a better international perspective on the implementation of user rights. Before we engage with that possibility, taking Lehman’s words to heart, can the recent developments in fair dealing in Canada withstand the scrutiny of international principles?

Like copyright law as a whole, exceptions to copyright are governed through the *Berne Convention*, and overlaid with the TRIPS agreement. From its infancy on, the negotiation of the *Berne Convention* included the awareness that it was necessary to limit the grant of copyright. Member states were permitted some latitude as to how they implemented exceptions to copyright (Ricketson 1987, p.477). During the 1967 Stockholm negotiations it was proposed to formally introduce the allowance of exceptions into the language. After much discussion the following was accepted as article 9(2):

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author (ibid., p.481).

This has come to be known as the Berne three-step test: i) the exception must be for a specific circumstance; ii) it must not conflict within the realm of exchange

that is usually associated to the work; and iii) must not unreasonably detract from the author's wellbeing.

WTO members must also comply with stipulations coded into TRIPS, one of which is Article 13:

Members shall confine limitations or exceptions to the exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder (Ricketson and Ginsburg 2006, p.850).

There is a subtle change in language here; the rule addresses all the exclusive rights, not merely that of reproduction.

Returning to the question of whether Canada's treatment of fair dealing is legitimate under the TRIPS/Berne combination, a WTO panel examining the implications of Article 13 in 2000 offered this, "If these three conditions are met, a government may choose between different options for limiting the right in question, including use free of charge and without an authorization by the rights holder (quoted in Tawfik 2005a)." This means that individual governments can enjoy some flexibility with how exceptions are implemented. That said, the devil will always be in the details. Reviewing that same WTO panel investigation, Daniel Gervais makes reference to the practice of photocopying via licensing through copyright collectives, an established practice in Canada. He suggests that interfering with this process could be deemed a conflict with a normal exploitation (Gervais 2004, p.165-166). The lesson to be learned is that fair dealing's legitimacy on an international scale requires that fair dealing retain its

flavour as an accepted limitation upon the grant of copyright, that it not yield to a system of licensing. Canada is fortunate; this risk has been mitigated by the actions and language of our Supreme Court Justices. On page 171 I allude to a critical remark from the Supreme Court, “the availability of license is not relevant to deciding whether a dealing has been fair (*CCH Canadian* 2004, para.70).” To grasp the full impact of this statement requires a brief digression south of the border. The United States treatment of user rights (Fair Use) is instructive.

#### Section 107 Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A<sup>2</sup>, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The option of “multiple copies for classroom use” together with the open-ended list of potential application (by way of “for purposes such as”) makes American Fair Use a seeming panacea of user freedom. Such is not the case. Sam Trosow speaks frequently about this point, and emphasizes that how a court chooses to apply the four factors is key to the outcome. In the United States,

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<sup>2</sup> Sections 106 and 106A detail the exclusive rights in copyrighted works and the rights of certain authors to attribution and integrity, respectively.

courts have placed added emphasis upon the monetary implications of a fair use finding, making the protection of fair use less than reliable. Lydia Loren further explains:

If the use at issue is something for which the copyright owner desires to charge a fee and is able to show the court a simple and efficient means of paying the fee, the copyright owner can defeat an assertion of fair use. This results in a situation that permits the copyright owner to narrow the rights of fair use by providing a licensing scheme for the types of uses that should not require permission... (Loren 2000).

Given the manner by which Canadian law defines the condition of commercial availability (all that is required is that a licensing scheme exists), and the numerous copyright collectives that operate in Canada, adoption of the American approach to user rights should be considered carefully. A broader provision in law under Fair Use, or any other name may be meaningless, if the limited reach of copyright it is not recognized by practitioners and therefore not given due consideration in the courts.

The challenge for Canadian universities is to encourage students and faculty to take individual responsibility for their copying. Fair dealing is not a means of copying without restriction or thought. The analysis that goes into a decision of fair dealing ensures that all parties are cognizant of their rights and duties under the *Copyright Act*. To hide behind an institutional exemption, or blindly enter into a license agreement for copying, means nascent creators will continue to lose sight of the debt they owe to their predecessors. The perception of creativity will remain that of individual undertaking, and copyright will continue to be seen as a private largesse bestowed upon a single author. Even



though the legal construction of our Act shows (modestly so) that this is not the case at all.

The construction of our Act came into sharper focus during Chapter Four, where I applied the second step of Frost's Innis algorithm. It entailed examining the technological and economic features of copyright law. The technological underpinning of the law is the written expression itself. Copyright law offers the potential to disseminate creative thought, by setting terms of communication amongst individuals. It operates as a medium of communication, with all the benefits and risks that entails:

A medium of communication has an important influence on the dissemination of knowledge over space and over time and it becomes necessary to study its characteristics in order to appraise its influence in *its cultural setting* (emphasis mine, Innis 2003a, p.33).

Paul Heyer writes that when Innis used the phrase, medium of communication, he was referring to both the composition of the medium (*i.e.* stone, clay, paper etc.) and its manner of inscription (*i.e.* hieroglyphs, cuneiform, script, etc.) But Heyer's following remark, "It is therefore both the medium per se, coupled with the form of communication, that predisposes the society in question to frame its knowledge of the world in particular ways (Heyer 2003, p.63)," introduces a causality that Innis took care to avoid. Innis' qualifying clause—in its cultural setting—indicates that the influence of a medium of communication is circumscribed by the cultural inclination of those in whose hands it operates.

### **6.3 *The Copyright Act of Canada – Structuring Relationships***

With a brief look back at the origin of modern copyright law, centred as it was upon the activities of the English publishing industry, it should come as no surprise that copyright law operates primarily as a market-mechanism. The majority of our Act is preoccupied with those rights that facilitate the exchange of the work for fiscal remuneration. The assumption being that when a work comes into existence, the creator requires a mechanism for disposing of it as a market commodity. Yet we should not lose sight of the fact that most of the expressions governed by copyright never reach, nor are intended for, a commercial market. In this regard, it is gratifying that the one-size-fits-all approach in copyright is adapting to a wider conceptual basis. The rise of Creative Commons' licensing is one illustration of effort to utilize the principles of copyright, uphold the wishes of the author, and foster a direct relationship between author and reader. Even more important, and more subtle, is the fact that the Internet represents an environment with its own diverse set of cultural practices where the imprint of copyright exists, but does not bind the system as a whole. Economic exchange exists side by side with non-economic exchange; efforts to nullify the diversity of the system should be discouraged. If the system is left unfettered then individuals have greater opportunity of choice. Given his quest to empower the individual, Innis may well have been pleased with such developments.

As I said earlier, I find it intriguing that the construction of copyright law itself exemplifies the body of Innis' theory: creativity and innovation are fostered through the margins of an empire. In Innis' writings, margins are physical regions, peripheral to a centre of power. These regions develop as best serves the centre, where development rests upon the efficient exploitation of staple commodities via transportation and communication networks. However, Innis' writings also yield his belief that by virtue of being peripheral to the centre, these same regions enjoy some degree of autonomy and flexibility. Away from the homogenizing tendencies of the centre, marginal areas have an advantage to foster creativity, innovation, and knowledge. In my application of Innis' work, I suggest that *margin* need not be defined by physical boundaries. It represents that which supports a countervailing mode of thought; an independent consciousness if you will. The margin of copyright law is composed of those elements within the statute which are not deemed economic distribution rights. Moral rights are within this realm, as is fair dealing. Most apropos with respect to Innis' writings, fair dealing offers a realm of creative liberty set apart from the region of control, and is a site of intersection between civil and common law protection of creative effort.

Innis saw merit in the juxtaposition of our legal traditions. The early addition of moral rights to our Act was a clear signal of the bi-juridic foundation Canada enjoys. Through our dual legal heritage, natural rights mingle with social utility; if we take Innis seriously, herein lies an opportunity for betterment.

The heightened presence of the two points of view should be seen as a progressive movement in contemporary discussions of protecting and encouraging creative effort. A means of avoiding stagnancy in application of the law, and encouraging innovation in development of the law, is to maintain a provocative dialogue by those entrusted in the governance of the law. Such a dialogue began in the Supreme Court of Canada with the *Théberge* case of 2002, and has since continued. Through fruitful discussion of the two endpoint positions, creator-centric versus social utility, the middle stakeholder is gaining some presence in Canadian jurisprudence. That stakeholder is the principle of creativity itself. It is gratifying that our highest court is continuing this dialogue, as was evidenced in the 2006 ruling of *Robertson v. Thomson* [hereinafter *Robertson*].

In 1995 freelance writer Heather Robertson submit two articles to the Globe and Mail. Subsequent to their publication, the articles were included in two databases and a CD-ROM. In both databases as well as the CD-ROM, articles from the Globe and Mail were stored with material from other newspapers or periodicals. Robertson objected to the inclusion of her work in these forms, and brought suit against the publisher, Thomson Corporation. The ambit of the dispute is much broader than space permits here, closer reading is worthwhile. Like *Théberge*, this case was very narrowly decided. With a five to four decision, it was deemed that newspapers could not republish freelance articles in databases without obtaining consent from, and making compensation

to, the authors. By contrast, reproduction via the CD-ROM was permissible. And similar to *Théberge*, the division between the majority and the minority opinion fell along cultural lines. Reviewing the decision, Warren Sheffer writes:

Notably, the majority, which seems to have been ultimately determined by the swing vote of the Court's newest judge, Justice Rothstein, did not adopt a utilitarian perspective on Canadian copyright law that the Court had early expressed in its seminal 2002 decision [*Théberge*] .... Similar to the *Théberge* decision, in *Roberston*, the Quebec or New Brunswick based and Francophone judges supported an author's right perspective, while justices based in the rest of Canada supported a utilitarian view, with Justice Rothstein providing the casting vote (Sheffer 2006, p.2-3).

Interestingly enough, Sheffer did not comment that Justice Rothstein was born, educated, and practiced law in Manitoba, where there is a significant francophone community. As I read this case, it appears that, again, there was difference of opinion at the high court, structured along the division between European civiliste and Anglo-American copyright traditions. And, once again, between the majority and minority opinions there was both agreement and productive disagreement. In particular, the assessment of media neutrality gave rise to some critical points. From the majority came:

Media neutrality means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones. But it does not mean that once a work is converted into electronic data anything can then be done with it. The resulting work must still conform to the exigencies of the *Copyright Act*. Media neutrality is not a licence to override the rights of authors — it exists to protect the rights of authors and others as technology evolves (*Robertson* 2006, para.49).

And from the minority:

Under a media neutral *Copyright Act*, mere visual comparison of the work and the item said to be a reproduction of that work may be deceptive. The conversion of a work from one medium to another will necessarily involve changes in the work's visual appearance, but these visual

manifestations do not change the content of the right ... The *Copyright Act* was designed to keep pace with technological developments to foster intellectual, artistic and cultural creativity (ibid., paras.77-79).

Taken together, both opinions continue to provide healthy reminders as to the means by which copyright functions. First and foremost, works must conform to the exigencies of the *Copyright Act*, including the limitation upon the reach of copyright. This means that fair dealing cannot be forbidden out-of-hand. It is inconsistent within our law to affirm copyright in a work, and simultaneously reject the possibility of fair dealing *in that same work*. Repeating myself *ad nauseum*, fair dealing gains its legitimacy from its context of use. Second, with respect to our Justices' remark that a differing visual manifestation does not change the content of the (reproduction) right, the same can be said about the right of fair dealing. The fact that works are now digitally accessible does not affect their candidacy for application of fair dealing.

In an important step, both opinions refined the notion of the duality of copyright's objective. I find the last sentence of paragraph forty-nine to be a welcome change; the reference to "rights of authors and others," is a less adversarial choice of language than we have seen so far where authorial rights were placed in opposition to public rights. And even though the minority opinion did invoke the language of public interest, they came closer to identifying how the public interest actually occurs:

The public interest is particularly significant in the context of archived newspapers. These materials are a primary resource for teachers, students, writers, reporters, and researchers. It is this interest that hangs

in the balance between the competing rights of the two groups of creators in this case, the authors and the publishers (*ibid.*, para 70).

Where the minority opinion stopped short was in identifying that teachers, students, writers, reporters, and researchers are creators in their own right, and that the public benefit spoken of is the process of creativity itself. This decision is further acknowledgement that copyright is part and parcel of a system designed to encourage and respect creative individuals. Most importantly, as a sum total, this discussion of copyright moved further away from the abstractions usually applied to copyright and injected a dose of realism into discussion. Again, as Innis emphasized, interpretation of the law must not succumb to dogma. This is best achieved by acknowledgment of principle, and, accommodation of practice.

This was also clearly evident in the culmination of the *CCH Canadian* case, where our Supreme Court Justices instructed Canadians to pay close attention to the circumstances of copying (the purpose, the character, the amount *etc.*) and situated those circumstances in the realm of peers. In our case this means the academic community. Innis' remarks about the common law, how it "consisted of customs which existed in unwritten form,... it was necessary to discover these customs through the use of the jury system and the calling together of representatives of different communities in Parliament," are eerily prophetic, but entirely appropriate given the collaborative underpinnings of creative effort.

If we believe that copyright is a means to encourage creative effort, and uphold respect for creative talent, then confining interpretation of copyright purely to its distribution capabilities is insufficient. Within our Act, fair dealing is the only measure which directly addresses the creative process. This is the critical exception which ensures that our system, which theoretically encourages and protects creative effort, will not stifle creative effort. Fair dealing can ensure that the system of copyright does not degenerate into a monopolization of knowledge under the guise of absolute property rights.

This task is not without considerable challenge, given the deep-seated conception of property as absolute dominion. Considered the founding father of property law commentary, Sir William Blackstone famously wrote that property is, "... that sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe (quoted in Rose 1986, p.711 n.2)." Even as Sir William was aware, the rights of a property owner could be mitigated by consideration of prevailing customs, *i.e.* the practice of common grazing rights. Nevertheless, it remains that the image of "despotic dominion" continues to pervade discussions of property.

The classical conception of property had, and continues to have, its share of detractors. The legacy of dissent began with Wesley Newcomb Hohfeld (1879-1918). While not a prolific writer, two influential law review articles established his reputation and a conception of property as a set of relationships (Singer 2000, p.133). For Hohfeld, property reflected a correlative system. Each right enjoyed



by an individual gives rise to a duty upon another, the duty to observe that right. Hohfeld, together with Oliver Wendell Holmes Jr. and others, shared a doctrinal approach to law known as legal realism. Considered a response to the inadequacies of a mechanical application of formal law, its general principles included a belief that the law is a man-made creation, and thus subject to man's frailties. Legal realism espoused the view that the law should function for a social purpose; and, given the indeterminacy of the law, an interdisciplinary approach benefits exploration of judicial dispute.<sup>3</sup> Property became not a single right, but a bundle of rights, where each must be examined in its own realm of applicability. Such an investigation facilitates the recognition that a resource may in fact have legitimate multiple owners whose rights are intertwined. By examining disputes from this perspective, closer attention is paid to social contexts and guiding principles. Property can be reconceptualized as a set of human relationships, rather than a connection between individuals and resources.

Throughout the twentieth century, and continuing into the twenty-first, the perspective of property as a locus of social relations elicits considerable discussion.<sup>4</sup> And yet, despite this continued study, the classical conception of

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<sup>3</sup> Although Innis does not appear to use the term "legal realism," given the period in which these jurists practiced, it is plausible that Innis shared affinity with their approach to interpretation of law. Also, the manner by which this philosophy arose supports Innis' appreciation that for every dominant paradigm of thought, a differing paradigm of thought adds to the overall value of debate.

<sup>4</sup> See David Lametti (2003) for a comprehensive review of this literature.

property remains the more powerful force in any discussion of property. Joseph Singer explains:

[the legal realists' model] ... fails to recognize the cultural endurance of property for both citizens and judges. The ownership idea – for good or for ill – is extremely powerful and affects the way legal and social problems are analyzed. Demonstrating the ownership can be deconstructed does not deprive it of its force as an organizing category ... (Singer 2000, p.83).

In both *Théberge* and *CCH Canadian*, Canadian Supreme Court Justices made pointed references to the role of the public domain, deconstructing the ownership of creative effort as it were, and yet their interpretation of the law continues to be blunted by the aura of the individual author. That creative work is collaborative has degenerated into the status of aphorism, seemingly profound, yet easily set aside as a quaint anachronism.

#### **6.4 Collaboration and Consciousness**

Innis consistently argues that a stable society was the best means to promote individual freedom and individual creativity. Stability ensues when the cultural perspectives of time and space were reconciled productively. The economic rights embedded in copyright have a distinctly spatial dimension; the emphasis of the language is to facilitate exchange for individual remuneration. To complement this perspective, the exception of fair dealing emphasizes temporal continuity by facilitating creative exchange. This exchange is not directed between identifiable participants, but spread amongst all contributors to the general stock of human endeavor. Economic rights address the needs of the

creator following creation of a work, while fair dealing addresses creators' needs before creation of the work. Fair dealing is essential to balance in copyright law; it fulfills its mandate by allowing modest access to the public domain in its entirety for a good faith productive use of the material concerned.

Twice already I have identified the broader latitude of the World Intellectual Property Organization's position with regards to the public domain; at this third repetition, I provide the definition as a whole:

Public domain: Also referred to as "domaine public," 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 or the lack of an international instrument ensuring protection in the case of foreign works (emphasis mine, World Intellectual Property Organization 1981, p.207).

The inclusion of "mostly" indicates that WIPO is aware that there are other measures within the law which remove the requirement of authorization. The language contained in fair dealing stipulates that legitimate usage is not an infringement, therefore use without authorization is permissible. As I emphasized in Chapter Four, it is this broader view of the public domain that legitimizes the system of copyright itself. That said, fair dealing's most important contribution is the consciousness it raises as to the importance of unfettered development of past work.

It is insufficient merely to allow for access of copyrighted material. Such access may only yield derivative work of the same nature; past creation must "stimulate [but] not stifle (Hume quoted in Innis 2003d, p.6)." Access is near-meaningless if the voice is silenced. Critical analysis, whether it comes via social

parody, reverse engineering, archival documents *etc.*, will lose all strength if the material cannot be republished. It appears that Canadian universities are inclined to endow a copyright holder with absolute control, even though the law itself does not bestow such a grant. Students are routinely requested to seek permission for the inclusion of copyrighted material deemed of importance to the copyright holder, without consideration of how the law treats such inclusion. Some copyright administrators insist that the regulations do not forbid students from utilizing such material, merely that it must be withdrawn from the final publication in the institutions' library or online repository.<sup>5</sup> In place of the offending material students can indicate what the content was. This is the seeming correction to concerns that a dissertation might be the site of infringement; it is the "cup of coffee solution."<sup>6</sup> Yet, if the student had chosen to include the material to exemplify a particular point, removing the original expression blunts the impact of the student's work. Effective criticism or analysis may well require reproducing the original expression. In our media-saturated world, this could become more the norm than the exception.

Rather than deny or distort fair dealing, Canadian universities would do better to ensure that fair dealing is correctly utilized. Measures which ensure legitimacy are already part and parcel of educational practices. An exercise of fair dealing which culminates in a work copyrightable on its own merits, by

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<sup>5</sup> Private conversations with participants at Canadian University Faculty Association workshops, *Copyright and Fair dealing* – October and November 2008.

<sup>6</sup> See my remarks in the Introduction, page 11.

virtue of its originality and what that entails in both the academic and judicial traditions, will not be guilty of copyright infringement. Through my deconstruction of the *Copyright Act*, an outline of a proof emerged in Chapters Four and Five; here I offer it more precisely.

Every new creative expression is a consequence of collaborative effort, explicitly and implicitly drawing from previous work. Thus any new expression would, strictly speaking, be ineligible for copyright because copyright is allocated only to identifiable authors for original expressions. This conundrum is solved by the acceptance that original does not mean unique, and, by the public domain which offers a legitimate unauthorized utilization of material when employed in a manner consistent with existing exceptions to the mandate of copyright. In Canada, fair dealing is the means by which we can gain this legitimate unauthorized utilization. Thus, if a new expression is deemed original and worthy of copyright, then the inclusion of other material, without authorization, must be legitimate. Disallowance of the inclusion, meaning the rejection of fair dealing with that material, implies that the new expression is not original and not copyrightable. This contradiction allows one to conclude that an original work implies a legitimate application of fair dealing.

If I had only offered this train of argument, my claim would have remained a theoretical proposition, logically consistent but untried in practice. Fortunately, our courts have already added a material embodiment to the theory,

by explicitly addressing the matter of inclusion of copyrighted material within a copyrighted expression in *Allen v. Toronto Star Newspapers Ltd.* (1997).

My argument can be extended to a range of work, from individual research papers and projects, through to peer-reviewed publication. In the former case, the teacher verifies the originality of the work; in the latter, a panel of reviewers will consider the question of originality. The opposite to originality is plagiarism, and the post-secondary environment as a whole has its own set of checks and balances to address this problem. In the process, fair dealing can rest with legitimacy, and, as is often the case, anonymity.

Throughout this dissertation I have refrained from making suppositions as to what comment Harold Innis might have given concerning present-day Canadian copyright law. As I approach the end, I will indulge in speculation. I think Innis would have approved of the language of fair dealing. It exemplifies the tempering of black-letter law, combining practice all the while upholding principle. As an institution, the Canadian system of law reflects the nature of the creative process. No parliamentary or educational body can predict what combination of reproduction of copyrighted material will inspire and enable individuals to create the next *Life of Pi*, or the next *Linux* operating system. Fair dealing, often decried for its lack of precision, reflects the indeterminacy of creativity itself.

Without fair dealing, copyright holders set the terms of what is permissible intellectual discussion. This unlimited exercise of power will be to

the detriment of creative effort. Fair dealing is the best means to limit excess power; it maintains the grant of copyright all the while allowing, on a case by case basis, the opportunity to further creative effort. *What we need, we take, but we take only what we need.* This is the ethos that governs the relationship between copyright and fair dealing; it serves to minimize the risk of monopoly within systems of knowledge. The intensity with which Innis portrays the dangers of monopolies of knowledge illustrates, in relief, the necessity of permeability and engagement within any system of knowledge creation.

Mechanization has emphasized complexity and confusion; it has been responsible for monopolies of knowledge in the field of knowledge; and it becomes extremely important to any civilization, if it is not to succumb to the influence of this monopoly of knowledge, to make some critical survey and report. The conditions of freedom of thought are in danger of being destroyed by science, technology, and the mechanization of knowledge, and with them, Western civilization ... *we should try to understand something of the importance of life or of the living tradition, which is peculiar to the oral as against the mechanized tradition* (emphasis mine, Innis 2003b, p.190).

The crux of the intersection between copyright law and Innis' work lies in the importance of the living tradition. The living tradition is sustained in two dimensions. First, intellectual thought is cultivated as part and parcel of individual freedom. Second, while individual thought is necessary, in fact prized, freedom of thought must not divorce itself from its community. In this case, community means all creators. A conscious relationship must continue between current and future creators. Fair dealing simultaneously addresses both dimensions. It allows individuals to enjoy the fodder necessary bring creative thought to fruition, and, it reconciles the mutual duties amongst all creators.

Creators have a duty to share their work as necessary to foster future creators' efforts, and, creators have a duty to recognize past creators' efforts, and, not to abuse the right of access. More succinctly, fair dealing mandates *fair duty* for all parties concerned.

Copyright is often proclaimed to be a creator's right. Cloaked via the language of respect, a perception of copyright is inculcated such that it appears as a measure of absolute control over the diffusion of copyrighted material. While inside my explored sphere of post-secondary nascent research, supposed copyright-infringement is frowned upon; outside this sphere infringement would seem to be a daily occurrence. Mira Sundara Rajan writes:

Without an appropriate moral justification that can achieve public support, fostering a psychology of respect for copyright norms, copyright protection will no longer be meaningful. .... It has become a truism that digital technology and the Internet pose fundamental challenges to the viability of copyright law, by making it extremely difficult to enforce copyright restrictions as in the past (2006, p.29; p.32).

How then are we to achieve a sufficient moral justification to ensure that copyright remains a meaningful right, and supportive of creative individuals? I propose that the conceptual basis of fair duty has greater prospects for achieving public support than entreaties of respect which translate to prohibition on legitimate uses of copyrighted material. The failure of copyright to achieve moral justification speaks to the unwillingness of people to yield to the dominant persona of copyright, namely its distribution rights. Entreaties such as that of then-Minister Liza Frulla, arguing that copyright serves the future needs of



Canadians, fall on deaf ears.<sup>7</sup> Copyright is losing its relevance to those Canadians who are deprived of the stature of creator and subjected to maximalist renditions of copyright that deter creative sensibilities. Perhaps if Canadians were cognizant of the multiple dimensions of the system of copyright, that the grant of control comes with a requisite duty to share, the resentment might abate. The combination of copyright and fair duty articulate the privileges and obligations necessary for the system of copyright to achieve its mandate of protecting and encouraging creative individuals.

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<sup>7</sup> See note 13, page 76.

## **VII. Epilogue**

### **7.1 Looking Back at Innis – Looking Forward in Copyright**

The current trend within Canada's educational environment is to distance education from fair dealing.<sup>8</sup> To ignore fair dealing is to engage in a purely mechanistic reading of copyright law and such a move is at our own peril. The modest balance present in the law is distorted and creative effort will suffer. Others are likely to raise objection to my position. Intellectual property rights are deemed as supportive of creative effort, more rights ought to equal more creativity. Which raises the perennial question, what are the consequences of extending copyright's depth and breadth? Innis offers us further insight into the risks inherent to denoting all and sundry as property. His essay, *The Penetrative Powers of the Price System* (1938), has been described as torturous; the cryptic prose seems even more impenetrable than usual. Through patient reading, and a little guidance, the essay gives some evidence of the continuity between Innis' writings concerning staple commodities and his later communications' essays. Babe writes, "Innis understood money, or the price system, to be a space-biased mode of communication *par excellence*, and the further the price system

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<sup>8</sup> It would be inappropriate to imply that it is only universities in Canada who misrepresent the role played by copyright law in the overlap between educational activities and copyrighted material. The Canadian educational community as a whole adopts an extreme position of risk-aversion. The Council of Ministers of Education, Canada, insist that utilizing publicly available material from the Internet in educational institutions is a violation of Canadian copyright law and requires an educational exemption; the Association of Universities and Colleges Canada takes a similar view (AUCC 2008; CMEC 2008).

penetrates a culture, the more space-bound it becomes (emphasis in original, Babe 2000, p.76)."<sup>9</sup>

Innis does not define the price system, for that I turn to an economist of the same period, and of some renown. Ronald Coase makes reference to the price system as a coordinating instrument which facilitates the allocation of resources (Coase 1937, p.388). Theoretically, the allocation should be reflective of the patterns of supply and demand. Coase's contribution to economic theory was to explore the discrepancy between theory and practice; in reality, allocations of resources occur for reasons beyond the supply and demand.<sup>10</sup>

Innis illustrated the effects of the price system through examining patterns of trade for older colonial empires and post-colonial Canada. Through the price system Adam Smith and his followers devised a means of diminishing the role of vested interests that characterized mercantilism. Sown within that same model was the capacity to support vested interests in capitalism. What might be of particular interest to communication scholars is the attention Innis gives to the effects of the shift in fiscal exchange that occurred as the oral nature of the barter system gave way to the more efficient trade by way of specie (currency) (Innis 1946c, p.150). Babe comments that Innis viewed money and prices as the means

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<sup>9</sup> It may not appear seamless that money can be equated with the system which operates with money as the unit of measure. In other writings Babe reminds us that economists define money as a medium of exchange, and as Innis saw it, replete with its own biases. And, money is also a measure of value; it communicates information about the circulation of value through certain economic situations (Babe 1995, p.10; Babe 2003, p.4-5).

<sup>10</sup> Coase received the Nobel Prize in Economics in 1991, based on the development of the ideas he first posed in 1937. [http://nobelprize.org/nobel\\_prizes/economics/laureates/1991/press.html](http://nobelprize.org/nobel_prizes/economics/laureates/1991/press.html); last accessed 11 November 2008.

by which local cultures are “[annexed] to an increasingly larger trading, financial, cultural, and political system. In the process, local relations based on hierarchy, kinship, tradition ... get wiped out and replaced by relations premised on money value and commodity exchange (Babe 2000, p.60).”<sup>11</sup>

But, again, it is prudent to avoid overt generalization from Innis’ writings. Innis also articulates the merits of the price system: it served to remove the monopolization of markets which occurred through the colonial system. It is in these scraps of contradiction that we see the continued thrust of Innis’ view that each medium of communication carries with it a potentially stabilizing tendency that can be applied to situations of imbalance. That the new application may yield an imbalance of its own necessitates application of another medium of different cultural inclination.

The price system stimulated free trade, making it increasingly untenable for European nations to maintain the mercantile commercial system on the North American continent. A situation not unlike that of copyright; the monopoly of the Stationer’s Company was seen as detrimental to the free flow of books with the Statute of Anne devised as a necessary corrective. In his essay, Innis documents some of the ensuing troubles emanating as the price system had to coexist with monetary interventions implemented under the impetus of

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<sup>11</sup> Innis describes the effect of commercial trade upon the North American indigenous people. He quotes Sir George Simpson (a governor of the Hudson’s Bay Company), “I believe it would be highly beneficial [for the native people] to imbibe our manners and customs and imitate us in Dress; our Supplies would thus become necessary to them which would increase the consumption of European produce ... and benefit our trade... (Innis 1946c, p.151).”

nationalistic endeavors, or for appeasement of vested interests, all the while attempting to cope with the changing face of industrialism. Again, there are parallels to the development of copyright law. At its best, the price system supported the rise of capitalism, stimulated the growth of invention, and the “trend in the movement of goods from light and valuable raw materials to heavy and cheap raw materials, and to light and valuable finished products (Innis 1946c, p.165).” Watson notes that this kind of observation did not carry Innis far in his concerns of long term trends via exploration of commercial trade goods, but was fruitful in tracing the effects of media technologies (Watson 2006, p.218; Watson 1981, p.314).

This appears to place my argument in jeopardy, suggesting as it does that we are enjoying the proliferation of “light and valuable raw materials” through the further expansion of the market into copyright’s ambit. Innis removes the seeming contradiction by his oblique reminders that wholesale penetration of the price system comes with a cost, the loss of temporal continuity. And, with a later reprinting of the essay, Innis is direct in his assessment:

[The price system’s] advantages have been so important that little question has been raised as to its limitations ... It appears to be the most effective system for introducing freedom and efficiency into hierarchical systems. ... But effectiveness of the price system will depend on a realization of its limitations (Innis 1946f, p.ix).

The twentieth century proliferation of knowledge effort came despite the lesser qualities of the price system, not solely because of it. The commodification of that which has not previously been commodified – the free flow of creative materials

as it supports individual creative development through a good faith productive use of the material – will ultimately thwart any objective of maximizing individual creative potential. Innis might have summed up the current behaviour as an exercise in present-mindedness; contemporary society is unable to consider questions of duration. Through the insistence that copyright and fair dealing have separate beneficiaries, creators and the public, the temporal component of the creative process is swept out of consideration. Even though all creators are beholden to all creators, and this debt is paid through the continued cycle of fair dealing. Through fair dealing intellectual material already circulates in a system of creative exchange, necessarily outside of the reach of the price system.

## 7.2 Where To Now?

...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.  
- *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34.

In the words of Hume, "As force is always on the side of the governed, the governors have nothing to support them but opinion." ... An interest in learning assumes a stable society in which organized force is sufficiently powerful to provide sustained protection.  
- Harold Innis, *Minerva's Owl* (1947).

My objective of an Innisian analysis of Canadian copyright practices stemmed from Innis' quotation from Hume, *the governors have nothing to support them but opinion*. It is the shaping of opinion, and the incongruity of opinion with the law, that piqued my attention and provoked my concern. The property rights provided by copyright law denote a porous boundary around intellectual

creation. Depending upon use, the creation may be subject to exclusive control, or openly accessed. The degree of enclosure legitimately enjoyed by creators and public alike is proportional to their awareness of the foundation of intellectual property. The juxtaposition of intellectual with property is more than a clever turn-of-phrase; it represents the habitually collaborative nature of intellectual endeavor. But the degree of enclosure can be subverted through misinterpretation, even without the formality of a change to the law. To withstand this misinterpretation, requires a stable society in which organized force is sufficiently powerful to provide sustained protection. Which raises the question, where can such force emanate with respect to copyright law?

Innis' essay, *Minerva's Owl*, is something of an anomaly. Like his other writings, the essay is guilty of detail at the sacrifice of theory. Where it differs is in the use of a metaphor. Stylistically, this was not a device that Innis relied upon. Minerva, also known as Pallas Athena, was the patron saint for Athens. The persona of the goddess was comprised of a couplet: wisdom and the warrior. Precisely the two attributes Innis found within empires where cultural activity flourished. The owl, the familiar of Minerva, represents one aspect of her persona – the search for knowledge – and continually returns to the safety of his patron. Hence the necessity of force:

With a weakening of protection of organized force, scholars put forth greater efforts and in a sense the flowering of the culture comes before its collapse. Minerva's owl begins its flight in the gathering dusk not only from classical Greece, but in turn from Alexandria, from Rome, from Constantinople, from the republican cities of Italy, from France, from

Holland, from Germany. It has been said of the Byzantine Empire that "on the eve of her definite ruin, all Hellas was reassembling her intellectual energy to throw a last splendid glow." "...the perishing Empire of the fourteenth and fifteenth centuries, especially the city of Constantinople, was a centre of ardent culture, both intellectual and artistic" (Innis 2003d, p.5).

Innis relies on the metaphor of the owl in flight to illustrate that cultural activity is at its height, just before the collapse of an empire. Innis did not despair over the migration of the owl; the collapse of one empire and the birth of another offer the potential for cultural renewal. Such renewal sustains Western civilization as a whole. Innis was not naively suggesting that the cultural effort of one empire would be duplicated in another, more hospitable, region. Instead, cultural traditions intermingle, creating a synergy capable of producing new avenues of thought and forms of expression. Continuing from the passage above, Innis writes:

In the regions to which Minerva's owl takes flight the success of organized force may permit a new enthusiasm and intense flowering of culture incidental to the migration of scholars engaged in Herculean efforts in a declining civilization to a new area with possibilities for protection. The success of organized force is dependent upon an effective combination of the oral tradition and the vernacular in public opinion with technology and science (ibid.).

What remained critical for the continued flight of the owl was the existence of sites of protection. Thinking back to my earlier reference to *This Has Killed That*, and other writings of that period which related to the university, it is clearer as to where Innis' despair emanated from. In his eyes, as the world entered yet another war, universities were stepping further away from their role as a mediator between the forces of freedom and power. Innis saw the tradition



of scholarship, that of learning and teaching without fear of persecution and with the intention of exploring beyond accepted mantra, as the very means by which Western civilization would endure. *Minerva's Owl* finishes with a plea to revive vital discussion within the university.

In today's setting, Innis' passion for the university may read as quaint at best, and naive at worst. It is disservice to Innis if I leave my readers with this impression. Innis writings have to be understood in the context of his times, and thus his beliefs. While the treachery and devastation wrought by World War I brought about an acute disillusionment with Innis' religious ideals, his intellectual perspective continued to show the influence of his Baptist upbringing, particular as it was practiced at McMaster University (Watson 2006, 62-67; 1981, 98-112). Once again, there is no substitute for reading Watson's work in entirety, but I offer a brief summation.

Watson writes, "The very strength of the Baptists' faith seems to have allowed for a militantly secular approach to the ideas that were present in the McMaster classrooms.<sup>12</sup> Their faith demanded that agnostic and heretical modes

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<sup>12</sup> Prior to Innis' arrival, McMaster had been the site of struggle between some more progressive teachers, and Baptists traditionalists. An attempt to bring the church into modern times, emanating from the University of Chicago, emphasized rigorous scrutiny of the Scriptures with the aim of constructing a philosophical basis for Baptist faith. The scientific, historical, and literary analyses, coupled with comparative studies of other religions, drew the ire of traditionalists who felt the spiritual basis of the faith was compromised by this line of questioning. The progressive approach was a representation of present-mindedness where the achievements of the past were discounted to allow for a more comfortable fit with the present. While the height of controversy had subsided before Innis' arrival, he was likely aware of the discord. From what we now know of Innis' disapproval of present-mindedness and monopolies of knowledge, we can simultaneously detect the influence of the traditionalists as well as the fear of limiting academic freedom..

of thought be examined, though, to be sure, for the purposes of refutation (Watson 2006, p.64; Watson 1981, p.105).” As such, students were exposed to a wide range of intellectual paradigms, across multiple disciplines, where none could take on the hallmark of a single, guiding, principle. For instance, Innis, entering McMaster in 1913, was exposed to the theory of evolution, the works of Sigmund Freud, and a very progressive approach to political economy. Innis’ time at McMaster instilled in him a desire to develop a philosophical understanding of civilization, sharpened his appreciation for inter-disciplinary studies, and, honed his awareness of dialectical inquiry. The hallmark of Innis’ scholarly endeavors is an inability to pursue any doctrine for the sake of doctrine. At the height of his academic career, Innis said, “The Marxist solution, the Keynesian solution, or any solution, cannot be accepted as final if universities are to continue and civilization is to survive (Innis 1946e, p.141).” Innis saw the university as that site from where power can be harnessed with responsibility, holding its excesses in check through an appeal to reason with due consideration to both the future and the past:

But always the university must attempt to foster the search for truth and, in its search, must always question the pretensions of organized power whether in the hands of the church or the state. It will always favour the existence of a number of centralized powers in the hope that no one of them will predominate and exert its will and that individual freedom will have a great chance to survive. It will always insist that any group which pretends to have found truth is a fraud against civilization and that it is the search for truth and not truth which keeps civilization alive (Innis 1977, p.5).

At this stage then, it is a little disappointing to see that the protection Innis sought through Canadian universities is contributing, perhaps inadvertently, to the monopolization of knowledge via a reconceptualization of copyright law. Yet, Minerva's owl may still find a safe haven within the Canadian university community. The issue of copyright law has a far greater profile than in past and there remain untapped avenues of exploration for further advancement of the subject. Both avenues are beckoning which suggests that I have reached not an end, but a new beginning.

With respect to the first issue, greater engagement—combining the oral tradition with the vernacular in public opinion—these last four years have seen an unprecedented rise of copyright awareness amongst the professoriate. Michael Geist comes to mind, but he is only one of many. Laura Murray, Myra Tawfik, and Sam Trosow, to name just a few, advocate for a more nuanced interpretation of copyright law as a whole including a better understanding of fair dealing. Coming to the field of communication in Canada is a publication of a book, *Dynamic Fair Dealing*, dedicated solely to the topic of fair dealing. Editors Rosemary Coombe and Darren Wershler-Henry write:

The dynamic practice of dealing and negotiations around its fairness shapes the forms that culture can and will take in Canada for the near future. In the context of the immediate process of changes to Canadian copyright law, this project takes on a particular degree of relevance and urgency.

In the more immediate, it is gratifying that the British Columbia chapter of the Canadian University Faculty Association took it upon themselves to sponsor

a series of workshops concerning copyright and fair dealing; it has been my great pleasure to be a part of that undertaking. And, I look forward to further research. The continued lesson I take from Innis is the value of interdisciplinary scholarship. To that end, a broader investigation of copyright is calling.

In Chapter One I allude to the fact that copyright is now the purview of many disciplines. Bearing in mind that some overlap does occur, existing literature concerning copyright typically falls into one of three subject areas: i) legal analyses; ii) historical reviews; iii) economics studies. I have already touched upon some of the limitations inherent to all three categories: legal analyses do not always convey the subtleties of a ruling as was evident in the *Zamacois v. Douville* (1943); historical analysis carries little weight in contemporary policy discussions; and economics studies tend to be confined to examining existing marketplaces. Throughout my graduate studies I have explored copyright via the realms of law and historical study, what remains is to integrate and expand the economics dimension. With that aim, continued focus on the university environment will prove fruitful.

Copyright's mandate to balance opposing forces encompasses a variety of perspectives: incentive v. access, private v. public, cost v. benefit, present v. future. The widest range of analysis lies within economics literature, but economists too grapple with the problem of modeling a dynamic phenomenon. Nevertheless, the strength of economic analysis lies in its specific explorations of efficiency in intellectual production; I wish to continue my research with the goal

of illustrating fair dealing as the means to efficiency in intellectual collaboration. An implicit benefit of continued exploration of the academic environment is that it mimics those arenas of non-fiscal creative activity. Activity which struggles to thrive in a world of heightened intellectual property consciousness where acceptance of the non-fiscal collaborative exchange of creative effort is steadily eroding. As we attempt to move forward through this conflict, there is much to be learned from examining a sphere where a good-faith, productive use of copyrighted material is demonstrably legitimate.

In the academic environment fiscal remuneration for published work is of lesser or no consequence; careers rely upon “an economy of citations.”<sup>13</sup> Granted, economists will argue that there is always a market, explicit or implicit, and that well defined property rights are essential for efficient functioning of this market. I concur, there is an activity of exchange happening at all times, a creative exchange that takes place across and within generations of creators. Fair dealing is the means by which this creative exchange is sustained. Well-defined property rights are critical to this activity, which implies greater recognition of the limited nature of these rights. Only then can we benefit from the margins that lie beyond.

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<sup>13</sup> Private conversation with Laura Murray.

## **Appendix A – Fair Dealing Policy Survey**

### **A.1 – Introduction**

In order to identify the tenor of policies concerning the inclusion of copyrighted material in research, I examined policies targeted at graduate students. To ensure uniformity across the survey, I examined only those policies listed at each institution's Graduate Studies website.

The range of detail in the policy statements varies from an absence of reference to copyrighted material, to open distortion of the *Copyright Act of Canada*. The summation of the study is included in Chapter Five; here I include – unedited – the text of the relevant policy statements as I found them. Information I found to be significant has been bolded. Each institutions' founding year, and graduate student enrollment (for the year 2007) was taken from the Directory of Canadian Universities (42<sup>nd</sup> Edition) 2008. Ottawa: AUCC Publications.

Using the search tool provided by the Association of University and Colleges in Canada, I determined that there were, roughly speaking, thirty institutions in Canada that offer a broad selection of doctoral degrees. Omitted from this number were the purely theological schools, as well as institutions that had limited doctoral offerings. (For instance, Athabasca University only offers an EdD, Brock University has only five doctoral programs, St. Mary's university only has three doctoral programs.)

While I informally reviewed most of the thirty institutions, I confined my documented list of policies by the following considerations:

- 1) Age. Concern with the inclusion of intellectual property by students' is a recent phenomena; examining the practices of institutions who would not have established such practices at their infancy speaks to the intensity of the environment of intellectual property. My preliminary investigation began in 2007, where I set the generational marker to 40 years prior. Institutions must have a history dating to 1977 or earlier.
- 2) As the requirement for completion of a doctorate is to make an original contribution to one's field, and given my argument that originality is the sign of legitimacy with fair dealing, I looked at institutions with a broad range of doctoral programs.
- 3) For provinces with smaller populations, I attempted to survey at least two institutions per province (if it had sufficient institutions which met (1) and (2)) – addressing differing geographic and cultural conditions.
- 4) To (modestly) reflect the larger populations of Central Canada, I selected 5 institutions from Ontario, and 4 institutions from Quebec.

In total, my published survey spans twenty-one institutions.

While this study began by virtue of the personal experiences of a few students; I refrained from making student experiences the means of examination. My reasons were twofold:

- 1) If research data is incumbent upon an individual choice of participation, a researcher risks hearing only of cases that play to either end of the spectrum of inquiry; as such the results are likely be distorted.
- 2) The objective of the study was not to highlight individual experiences, but to gain a better understanding of how students are educated as to the nature of intellectual property and copyright.

The issue of copyright and student work also arises in terms of the non-exclusive license that all institutions request from a student for distribution of the work through that institution's library or electronic repository. I have declined from commenting upon this aspect as the overlap with fair dealing is much more subtle (albeit still of importance) than the direct concerns of preparing the dissertation or thesis. However, I can say that the tone of the language used for these purposes tended to emphasize the creator's rights aspect of copyright. The student grants a license to the institution allowing it to distribute the material, often described as for "scholarly purposes." Left unsaid is that this is precisely what fair dealing allows for, and that any individual can utilize the student's work through a legitimate practice of fair dealing. No license itself is required.

Finally, this study should be read as a preliminary first step towards a more comprehensive examination of the climate of intellectual property as perpetuated within Canadian universities. By confining my examination to posted policy, my study is limited to those policies that *appear* to be transparent. Moreover, these regulations may be related to the policies of the Library and Archives Canada; further licensing is deemed necessary for depositing the work with this national institution and reproduction through University Microfilms International (UMI). However, this treatment is uneven throughout the surveyed institutions. And the policies of these two entities are not reflective of copyright law as it is written. Yet, when these policies are presented to students, it is represented as component of law, rather than a policy or contract choice.

My preference throughout all of this is that universities refrain from discussing copyright with students, unless the institutions are prepared to provide a complete and balanced set of instructions.

## A.2 – Canadian University Policies

*Sequentially numbered, and organized by province*

### **British Columbia**

#### 1) **University of British Columbia (Vancouver)**

Established in 1908.

Number of graduate students in 2007:

Full-time: 6,760

Part-time: 1,060

From the Faculty of Graduate Studies: *Avoiding Copyright Violations* (undated)

Please read the following information carefully if you are including copyrighted material in your thesis in order to avoid problems with your final submission.

Copyright protection applies regardless of whether the work in question is published (such as a book or an annual report) or not (such as an internal company memo), and whether someone has put it out in the **public domain** (such as on a web site) or not. This protection expires 50 years after the death of the originator, regardless of who holds copyright at that time.

For a work to be in the **public domain**, the originator must have specifically waived copyright to the work, or copyright must have legally expired. ...

Note: It is good academic practice to cite sources, but such citing does not necessarily remove the obligation to obtain formal permission to use the material.

...

#### **Students Should Definitely Seek Permission When Their Thesis Contains:**

quotations from a single source that are over 500 words in total, or that consist of more than 2% of the copyrighted work

short quotations that are a virtual trademark of the copyrighted work. For example: use of a single famous sentence triggered a lawsuit that was won by the copyright holder of "Gone with the Wind"

any tables, figures, and all forms of images including photos, maps, graphs, drawings, logos etc. that have been obtained from any copyrighted source, including web sites, newspapers, journals, books, brochures, professors' lecture notes, etc.

articles written by the thesis author which have been previously published in a journal to which the author has assigned copyright

any material co-authored with others who share copyright

scripts and recordings of any performance

translations of copyrighted work

Important: If your use of copyrighted material is not described above, that does not mean that you do not need permission. ...



Under Canadian law, you need permission to reproduce or adapt a work for use other than **private research, private study** and educational use. Canadian law considers theses to be published, and consequently outside of educational use. ...

When letters of copyright permission cannot be obtained, you must remove the copyrighted material and leave a blank space.

This space must contain the following:

- A statement that the material has been removed because of copyright restrictions.
- A description of the material and the information it contained.
- A full citation of the original source of the material [e.g. Figure 3 has been removed due to copyright restrictions. The information removed is... (describe the figure information and source)].

URL:

<http://www.grad.ubc.ca/students/thesis/index.asp?menu=001,003,000,000>

last accessed: September 16, 2008

Notes:

- Fair dealing's structure is dramatically altered by the remark of "private research, private study."
- Also, the aspect of publication seems to eliminate consideration of fair dealing.
- Without permission, material must be removed.

- 2) **University of Victoria (Victoria)**  
Established 1963. Formerly Victoria College (1903-1963).  
Number of graduate students in 2007:  
    Full-time: 2,090  
    Part-time: 300

From the Faculty of Graduate Studies: *Guidelines for Preparation of Masters' Theses and Doctoral Dissertations* (May 2007)

### **Inclusion of Copyrighted Material in Theses or Dissertations**

The Library and Archives Canada through its agent, ProQuest/UMI, microfilms all University of Victoria theses/dissertations. In so doing, ProQuest/UMI must ensure that it is not infringing copyright law by microfilming copyrighted material. ProQuest/UMI will reject a thesis or dissertation which includes copyrighted material if the owner's consent for its use has not been obtained. However, the present Canadian copyright act does provide an exception, under a provision for "**fair dealing**", which protects the authors of theses/dissertations from the full effects of the infringement provisions. This includes actions which "do not constitute an infringement of copyright", "any **fair dealing** with any work for the **purpose of research**". However, this clause applies only when the material used does not comprise either "the whole" or "a substantial part" of the copyrighted original.

...

Copyright is breached when any person other than the owner of the copyright (or in the case of moral rights, other than the author) does anything that violates the rights of the owner (or author). Most candidates in the Faculty of Graduate Studies will be primarily concerned with the owner's right to control reproduction of the whole work or a substantial part of the work. The reference to "substantial" has both quantitative and qualitative features. Usually the qualitative feature is the most significant feature because it contains a key, crucial or attractive portion of the work. **Indeed, the fact that someone wishes to reproduce it suggests that it is of some qualitative value.** Beyond this there is little guidance as to what constitutes substantiality in qualitative terms. Similarly there is little guidance as to what quantitatively is a substantial amount. In an attempt to give a practical guideline, the Faculty of Graduate Studies recommends that:

- 1) At a minimum, when more than one full page or 10% of a work is reproduced in a thesis or dissertation by quotation or otherwise, the candidate should attempt to obtain a copyright clearance or consent from the owner of that work. This is not to say that a violation of copyright cannot occur within these limits.
- 2) Copyright clearances or consents should be obtained by the candidate for the **reproduction of the whole of any map, diagram, chart, drawing, survey, questionnaire, computer code, painting, photograph, or poem in any thesis or dissertation.** Care must be given that attribution is to the actual creator of the work.
- 3) No work of any nature should be reproduced in any thesis or dissertation in any distorted or modified format without both a copyright clearance from the owner and a waiver of moral rights from the author.

...

Where it is necessary to include "the whole" or "a substantial part" of a copyrighted item, the student is advised to apply to the owner of the copyright for permission. This action may involve considerable time and should be done well in advance of the submission of

the thesis/dissertation. Additional information can be obtained through ProQuest/UMI Dissertation Author relations... A letter of permission must recognize your right as the author of the thesis/dissertation to have it reproduced through the Library and Archives Canada and its agents.

When permission to quote is not available, the copyrighted material should not be included in the body of the thesis/dissertation, but should be added as an appendix which can be withheld from binding and microfilming. Such material should be correctly referred to within the thesis/dissertation. A letter from your supervisor acknowledging the removal of the appendix from binding and microfilming is required with your final thesis/dissertation copy (ies).

URL: <http://registrar.uvic.ca/grad/documents/ThesisGuidelines.pdf>

last accessed: 16 September 2008

Notes:

- Circular definition of fair dealing; no complete works (poems, maps, photographs etc...) research only...
- The bolded sentence opens the door to a U.S. style of interpretation, because it's copied, it had value, and therefore negatively impacts the author.
- Without letters, material withheld.

## **Alberta**

### 3) **University of Alberta** (Edmonton).

Established 1906.

Number of graduate students in 2007:

Full-time: 4,860

Part-time: 1,200

From the Faculty of Graduate Studies and Research: *Thesis Format Specifications*  
(dated to 16 May 2008)

The student, as author, retains the copyright to the thesis.

- In conformity with the Copyright Act, there must be no substantial amount of copyrighted material in the thesis. Please read the following information carefully if you are including material that is previously copyrighted.
- Under the Copyright Act, a reasonable extract of another person's work can be included in a student's thesis, provided that the source is documented. Students using a substantial amount of copyrighted material in their theses must include, with the thesis, letters of permission from the person(s) or publishing company holding the copyright. Acquiring letters of copyright permission takes a considerable amount of time; students requesting such letters should do this well in advance of the submission of the thesis, as these letters must accompany the thesis when the final copies are presented to the Faculty of Graduate Studies and Research.
- When letters of copyright permission cannot be obtained, the copyright material must be removed and a page inserted in its place, in the microfilming copy of the thesis only. This page should explain: that the material involved has been removed because of copyright restrictions; what information the material contained; and the original source of the material [eg, page 12 has been removed due to copyright restrictions. The information removed was Figure 23 (describe the figure information and source)].

URL:

<http://www.gradstudies.ualberta.ca/degreesuperv/thesis/thesispecs.pdf>

Last accessed: 15 August 2008.

Notes:

- No mention of fair dealing, even though the text makes reference is to the Act.
- Without letters, material must be removed

4) **University of Calgary** (Calgary).

Established 1966. Formerly University of Alberta at Calgary (1945-1966)

Number of graduate students in 2007:

Full-time: 4,110

Part-time: 1,230

From the Faculty of Graduate Studies and Research: *Thesis Guidelines* (dated to June 2006)

You must ensure that there is no substantial amount of copyrighted material in your thesis. Under the Copyright Act, a reasonable extract of another person's work can be included in your thesis. If you quote more than this extract, you must obtain written permission from the copyright holder(s) and you must include the permission in your thesis.

URL:

[http://www.grad.ucalgary.ca/GetFile.aspx?aliaspath=%2FDownloads%2Fpdf%2FThesis+Preparation%2Ft\\_thesis\\_guidelines\\_pdf](http://www.grad.ucalgary.ca/GetFile.aspx?aliaspath=%2FDownloads%2Fpdf%2FThesis+Preparation%2Ft_thesis_guidelines_pdf).

last accessed: 17 September 2008.

Note:

- No mention of fair dealing even though reference is to the Act.
- Permission required beyond substantial.

## **Saskatchewan**

### 5) **University of Regina, (Regina).**

Established 1974

Formerly Regina College (1911), University of Saskatchewan (1925);  
University of Saskatchewan, Regina Campus (1959); University of Regina  
(1974).

Number of graduate students in 2007:

Full-time: 660

Part-time: 820

From the Faculty of Graduate Studies and Research: *A Guide for the Preparation of Graduate Theses* (dated to March 2007)

Copyright or patented material or equipment:

Any material (literature, tests, surveys, questionnaires, figures, etc.) covered by copyright that was used in the thesis must have the proper reference or permission for its use.

Patented equipment must be referred to by name. Where copyrighted material has been used in the thesis, letters of permission from the person/s or publishing company holding the copyright must be included.

URL: <http://www.uregina.ca/gradstudies/publications/Thesis%20Guide.pdf>

last accessed: 17 September 2008

Notes:

- No mention of fair dealing;
- peculiar correlation; permission **or** reference???

6) **University of Saskatchewan, (Saskatoon)**

Established 1907

Number of graduate students in 2007:

Full-time: 1,930

Part-time: 260

College of Graduate Studies and Research: *Policy and Procedures Manual, Appendix C: Intellectual Property Rights of Graduate Students* (dated to January 2008)

### 3.0 Copyright

3.1 Copyright is an exclusive property right to publish, produce, reproduce, translate, broadcast, adapt or perform a work, as defined by the *Copyright Act* (R.S.C.1985, c. C-42, as amended.)

Copyright gives rights to creators while providing access to Intellectual Property by users. Canadian copyright law, which is intended to strike a balance between these two interest groups, applies to all original literary, scholarly, dramatic, musical, and artistic works and recordings and software. For creators, the law is intended to ensure that they have control over the use of their creations. For users, the law sets out the conditions and terms under which an original work may be legally copied, in whole or in part, or used for instruction, research, translation, broadcast, performance, adaptation or display.

In particular, copyright gives the creator the right to control certain uses of his/her work in both economic and moral terms in the areas of reproduction and public performance. Economic rights allow creators to draw income from these uses of their works. Copyright also provides the moral right to claim the authorship of a work and to preserve its integrity.

### 3.2 Graduate Students as Creators

#### 3.2.1 Copyright Holders

The copyright of works produced by graduate students rests with those individuals, unless the author has been employed to create a work, in which case the copyright rests with the employer. It rests with a graduate student if he/she works independently of collaborators, including the research supervisor(s) and the financial sponsor(s) of research programs; that is when the work is not part of a graduate student's assigned duties as part of a research grant or contract under the supervision of faculty members, or as part of the assigned duties related to Graduate Teaching or Graduate Research Fellowships from the University. The graduate student is then the sole copyright holder of the following:

- material and **ideas** submitted in course work or presented in seminars and thesis developed as part of the academic program of the student;
- lectures developed and delivered by the graduate student;
- printed works (books, articles and similar materials) written by the graduate student;
- artistic works (paintings, sculptures, musical compositions and the like) created by the graduate student;
- computer programs developed by the graduate student;
- recorded works (films, video tapes, audio recordings, etc.) created by the graduate student.

Copyright exists as soon as a copyrightable work is created. Ownership of copyright should be indicated on the title page by placing a copyright symbol in front of the owner's name, followed by the year. Copyright generally lasts for the life of the author plus 50 years. ...

### 3.3 Graduate Students as Users of Copyrighted Works

Graduate students use Intellectual Property in their own research and in their roles as instructors and demonstrators in University classrooms. At the University of Saskatchewan graduate students should be knowledgeable of the information contained in *A Guide to Copying at the University of Saskatchewan* (1995).

Copying materials: the "**fair dealing**" clause in Canadian copyright legislation allows a researcher to make copies of an article or portion of a book for **private study or research**. If a person is reproducing materials for teaching purposes, the regulations of the University must be followed.

Copying excerpts for term papers, thesis or article: excerpts from unpublished and published works to be included in a thesis or article need to be acknowledged and in some cases the permission of the holder of copyright must be obtained.

"Fairness" is determined by the nature of the work being carried out, as well as quantitatively by the amount of copyright material being reproduced. Whether a portion of a work will be considered substantial depends on several factors. These are contained in *A Guide to Copying at the University of Saskatchewan* and in the *CGSR Guide for the Preparation of a Thesis*. The latter states:

Use notes and bibliographic references. When use is made of a substantial part of a source work, it is necessary to obtain prior permission from the author. **Definition of a "substantial part of a work" depends on several factors, principally the quantity and quality of the portion taken and the economic impact of the ability of the copyright owner to profit from the exploitation of the work. In some instances, copying even a short excerpt may be sufficient to constitute infringement. (e.g., in some cases, copying a single table, chart, or poem may not be considered fair dealing.)**

URL: <http://www.usask.ca/cgsr/pnp.php>

last accessed: 17 September 2008

Notes:

- limited representation of fair dealing.
- undue reference to the economic impact to creators in the determination of fair dealing.
- emphasis in the policy document is that of graduate students as creators, without obligations...
- mistakenly offers copyright in ideas.



## **Manitoba**

### 7) **University of Manitoba (Winnipeg)**

Established 1877

Number of graduate students in 2007:

Full-time: 2,430

Part-time: 730

Faculty of Graduate Studies: *Thesis Guidelines* (undated, but website as whole dates to 2005)

List of Copyrighted Material for which Permission was Obtained

**In some cases, students include images, photos, tables, etc., from copyrighted sources for their thesis/practicum. Written permission from the copyright holder(s) is required. ...**

Use of Copyrighted Material

If the thesis or practicum includes copyrighted material, permission must be obtained from the copyright holder. FGS has developed [a] form that can be utilized when requesting the use of copyrighted material. In some cases, copyright holders prefer to use their own permission forms and/or will provide their permission electronically. Both of these are acceptable by FGS

Images or more than a reasonable extract (according to the Copyright Act) of another person's work must be accompanied by written permission from the copyright holder(s). Obtaining the permission may take a considerable amount of time, therefore this must be taken into consideration when meeting a thesis submission deadline. A reference to written permission having been obtained must be included under the image or text. The reference should also include the date the permission was granted, and the name/title of the copyright holder(s). The original form(s) signed by the copyright holders should be retained by the student with a copy provided to FGS at the completion of the thesis/practicum.

The thesis/practicum cannot be accepted by FGS if permission has not been obtained. It is important that the student and their Advisor ensure that the permission has been granted. In some cases the copyright holder cannot be located or the cost is prohibitive to using the text or image. In these situations the text or image may have to be omitted from the thesis/practicum.

Subsequently, information on where the reader can locate the image or text should be included, such as the URL, title of book/journal, volume and issue number, page number, publisher, and date of publication. A description of the purpose or significance of the text or image should be provided.

URL:

[http://www.umanitoba.ca/faculties/graduate\\_studies/thesis/guidelines.html](http://www.umanitoba.ca/faculties/graduate_studies/thesis/guidelines.html)

last accessed: 17 September 2008

Notes:

- no mention of fair dealing,
- permission needed for images,
- material without permissions may have to be omitted from the thesis.

There was no eligible institution for a second representative from Manitoba  
Brandon, University of Winnipeg, and Collège universitaire de Saint-Boniface  
did not have doctoral programs of study.

## Ontario

### 8) University of Toronto (Toronto)

Established 1827. Formerly King's College at York (1827-1849)

Number of graduate students in 2007:

Full-time: 12,100

Part-time: 2,000

School of Graduate Studies: *Guidelines for Preparation of Theses* (undated)

Theses that do not conform to these guidelines will not be accepted by the School or by the National Library for microfilming ...

#### Previously Copyrighted Material

This includes questionnaires and surveys appearing in the appendices and chapters that may (i) be multiauthored with the student as the primary author and/or (ii) have been previously published. A written authorization to produce copyrighted material beyond a brief excerpt must be obtained from the copyright owner (e.g., journal publisher) and co-author(s) and submitted with all copies of the thesis. Such permission letters should not only allow inclusion of the material in the thesis but should specify the use made of the thesis by National Library (i.e., to reproduce, loan, distribute, or sell copies of the thesis by any means and in any form or format). Within the thesis, a statement of the authorization can either be included in the author's acknowledgements or at the beginning of the section in which the material is used (e.g., on the first page of a section/document which is more than one page in length). For more information consult the Copyright Checklist [below].

URL: <http://www.sgs.utoronto.ca/current/thesis/index.asp>

Last accessed: September 17, 2008

#### Copyright Checklist

"Congratulations! As the author of your thesis, you own its intellectual property, according to the Copyright Policy of the University of Toronto at <http://www.utoronto.ca/govcncl/pap/policies/copyright.html>

As an author, you are thus subject to the Canada Copyright Act and should familiarize yourself with the act at: <http://laws.justice.gc.ca/en/C-42/index.html>.

The best way to address "fair use" of material in your thesis is by evaluating the following four factors.

( ) Does your thesis contain published articles in a journal or published chapters in a book with you as a sole author or an author among others?

**( ) Does your thesis (appendices and chapters) contain questionnaires, maps tests, surveys, graphs, illustrations or pictures in the form in which they were originally published elsewhere?**

( ) Does your thesis contain any quotations from pre-existing materials that extend for more than one page?

( ) Does your thesis contain reproductions of complete poems or off-prints of journals articles, even if the work is short?

If you have answered yes to any of the above, then you must obtain written authorisation to reproduce the material from the copyright owner (eg, journal publisher and/or co-authors).

URL:

<http://www.sgs.utoronto.ca/current/studentforms/Copyright%20Checklist.pdf>

last accessed: 17 September 2008

Note:

- mistaken reference to Fair Use; even that is not applied properly.

9) **University of Western Ontario** (London).

Established 1878, as the Western University of London.

Number of graduate students in 2007:

Full-time: 4,100

Part-time: 500

School of Graduate and Postdoctoral Studies: Thesis Regulation Guide

Copyrighted Material and Permission

"The candidate must ensure that the thesis does not contain a substantial amount of copyrighted material. Under the Copyright Act, the "**fair use**" provision allows the quotation of a reasonable extract of someone else's work, if properly cited. For more extensive quotation, the candidate must obtain written permission from the copyright holder(s) and include this permission in the thesis."

URL: [http://grad.uwo.ca/documentation/thesis\\_regulation\\_guide.pdf](http://grad.uwo.ca/documentation/thesis_regulation_guide.pdf)

Last accessed 18 September 2008

Notes:

- mistaken reference to Fair Use
- permission required beyond substantial...

10) **McMaster University** (Hamilton)

Established 1887 in Toronto, moved to Hamilton in 1930.

Number of graduate students in 2007:

Full-time: 2,700

Part-time: 430

School of Graduate Studies: Guide for the Preparation of Theses (dated to March 2003)

The National Library has a guideline relating to the deposit of theses with the Library and with University Microfilms International. Permission must be obtained for the use of extensive quotation from other copyrighted works prior to deposit.

URL: <http://www.mcmaster.ca/graduate/thesesguide.pdf>

Last accessed: 18 September 2008

Notes:

- No mention of fair dealing, but no misinformation either.
- policy appears to be tied strictly to the requirements of the National Library and UMI; McMaster itself has not opted for stricter guidelines. Innis might be pleased!

11) **Waterloo** (Waterloo).

Established in 1957 as Waterloo College Associate Faculties

Number of graduate students in 2007:

Full-time: 3,000

Part-time: 660

Graduate Studies: Undated webpage

**Use of Copyrighted Material**

According to The Library and Archives Canada, the following are requirements regarding copyrighted material in theses:

"Please ensure that you have not included copyrighted material from other sources unless you have received written permission from the copyright holder(s).

This may take quite some time especially if some of the copyrighted material is older, if the copyrighted source(s) you need to contact is out of the country and/or you need to contact multiple sources. It is strongly recommended that the copyrighted source(s) are contacted early in your thesis preparation.

You may have already published a portion of your thesis, for example as a journal article or part of a book. If you have assigned the copyright to your publisher you need to obtain written permission to include it in your thesis. Your publisher must be informed about the Theses Non-Exclusive License you have signed with Library Archives Canada.

If your thesis includes material (e.g. a chapter, an article) that has been co-written with another author(s), you need permission from the author(s) before submission to Library and Archives Canada (via your university) for publication. The co-author(s) must be informed that you have signed a Theses Non-Exclusive License that authorizes Library and Archives Canada to reproduce, communicate to the public on the Internet, loan, distribute or sell copies of your thesis, among other things.

**In all cases**, written permission must accompany the thesis.

The letters of copyright permission should be located just prior to the works cited in the thesis. The universal copyright notice © must appear on the title page of your thesis.

URL: [http://www.grad.uwaterloo.ca/Thesis\\_Regs/tg2copy.asp](http://www.grad.uwaterloo.ca/Thesis_Regs/tg2copy.asp); retrieved 20 September 2008

Notes:

- Here the regulations are tied specifically to Library and Archives Canada, and previously published/co-authored work.
- Waterloo is known for research and innovation; this might explain the minimal interference into research.

12) **Windsor** (Windsor)

Established 1857 as Assumption College; acquired present status in 1963.

Number of graduate students in 2007

Full-time: 1,484

Part-time: 160

Faculty of Graduate Studies: Guidelines for Major Papers, Theses and  
Dissertations (appears dated to March 2008)

**Copyright regulations**

Students are affected by copyright legislation in two regards: they must copyright their own work, and they must take care not to violate other authors' or publishers' copyrights. This regulation does not apply to major papers.

...

Students wishing to include **substantial** amounts of material in their theses or dissertations which has already been copyrighted must receive written permission from the copyright holder. (For guidance on what constitutes substantial amounts, consult the Administrative Officer in the Office of Graduate Studies.) Failure to provide written proof of having received such permission will prevent the inclusion of this material in the thesis, and it must be removed before the thesis can be deposited.

Letters of permission must be presented at the time of deposit. The regulation applies whether the material appears in the body of the thesis or in an appendix. ... If you intend to use copyrighted material, please consult the Administrative Officer in the Office of Graduate Studies regarding the wording of required letters of permission

URL:

<http://web4.uwindsor.ca/units/gradstudies/gradstudies2.nsf/inToc/BB87D6317624801F85256EFD0067FF44>

Last accessed October 2, 2008

Notes:

- No mention of fair dealing,
- Material might be removed prior to deposit,
- (Aside, the problem with "substantial" is deemed to be a copyright problem, rather than a challenge with the dissertation - is the student not utilizing the substantial material in a manner consistent with the aim of the dissertation?)

## Québec

My sincere appreciation goes to Laureano Ralon for his assistance with translating information from the French medium institutions.

### 13) Université Laval (Québec)

Established 1663 as Séminaire de Québec; became l'Université Laval in 1852

Number of graduate students in 2007:

Temps complet (cycles supérieurs) full-time : 5,670

Temps partiel (cycles supérieurs) part-time: 4,830

Very interesting: there do not appear to be any regulations concerning the inclusion of copyrighted material through their Faculté des études supérieures (graduate studies). The regulations listed pertain to the inclusion of previously published work by the student (or student and co-authors). A handbook for graduate students only touched on copyright to the extent of describing that individuals carrying on work outside of university-employment have copyright in their work.

### 14) Université de Montréal (Montréal)

Established 1878; Formerly Université Laval à Montréal (1878 - 1920)

Number of graduate students in 2007:

Temps complet (cycles supérieurs) full-time : 7,950

Temps partiel (cycles supérieurs) part-time: 2,090

Faculté des Études Supérieures: *Guide de présentation et d'évaluation des mémoires de maîtrise et des thèses de doctorat* (Mars 2001)

#### **Les droits d'auteur.**

Si l'étudiant envisage d'inclure dans son mémoire ou sa thèse des extraits importants de livres ou d'articles, il doit obtenir la permission écrite de reproduire ces extraits et en faire état de façon appropriée dans son manuscrit.

If the student foresees the inclusion in his/her thesis or dissertation of important passages from books or articles, he or she must obtain written permission for the reproduction of these extracts and appropriately include them in his/her manuscript.

URL: [http://www.fesp.umontreal.ca/etudiants\\_actuels/memoire\\_these.html](http://www.fesp.umontreal.ca/etudiants_actuels/memoire_these.html)  
last accessed September 18, 2008

Notes:

- in the guide, searching for "Utilisation équitable" came up nil.
- this predates CCH Canadian



15) **Sherbrooke** (Québec)

Established 1954.

Number of graduate students in 2007:

Temps complet (cycles supérieurs) full-time : 3,430

Temps partiel (cycles supérieurs) part-time: 2,580

Études supérieures: Guide des études supérieures (août 2006)

7.2 La Rédaction - Le droit d'auteur

L'utilisation équitable d'une oeuvre est une notion de la Loi sur le droit d'auteur qui permet l'utilisation d'une oeuvre pour des fins d'études privées, de recherche, de critique, de compte rendu ou de communication de nouvelles et qui considère qu'une telle utilisation ne constitue pas une violation du droit d'auteur.

La citation ou la reproduction d'une partie peu importante, en quantité autant qu'en qualité, d'une oeuvre sont considérées comme une utilisation équitable. À condition d'indiquer la source et le nom du ou des auteurs, auteurs, une telle utilisation ne nécessite pas l'autorisation écrite de la ou du ou des titulaires des droits commerciaux et n'oblige pas au versement de redevances.

Dans le cas où la partie citée ou reproduite est importante, en quantité ou en qualité, il devient obligatoire d'obtenir l'autorisation écrite de la ou du ou des titulaires des droits commerciaux et de mentionner, dans le texte, la source et le nom de la ou du ou des auteurs ou auteurs de l'oeuvre.

Les critères pour déterminer l'importance de la partie citée ou reproduite sont les suivants:

- son ampleur par rapport à l'ensemble de l'oeuvre originale;
- son importance dans l'oeuvre originale;
- son ampleur dans l'oeuvre dans laquelle elle est utilisée;
- le but de l'emprunt;
- la concurrence préjudiciable pouvant en résulter pour la ou le ou les titulaires des droits commerciaux.

The equitable use of a work is a measure of the Law [of copyright] allowing the use of a work for the purposes of private studies, of research, of criticism and report or communication of news ... such a use does not constitute a violation of the [right].

The ... reproduction of a section [of a work] of little importance, by either quantity or quality, is considered fair dealing. Provided that the source and the name of the author(s) are acknowledged. Such a use does not require the written consent of the copyright holder, and does not oblige the payment of copyright fees.

If the section ... reproduced is important, in quantity or quality, it is mandatory to obtain written authorization from the copyright holder and reference, in the text, the source and name of the authors.

The criteria to determine the importance of the section ... are:

- its magnitude/scope in relation to the original work.
- its importance in the original work.
- its scope/importance in the work in which it is embedded
- the objective of using the section
- the damage its inclusion could cause the copyright holder.

URL: <http://www.usherbrooke.ca/etudes-superieures/menu-de-gauche/guide-des-etudes-superieures/>

Last accessed August 4, 2008

Notes:

- this is the first institution I have found which describes fair dealing (l'utilisation équitable) as it exists in the law.
- Although the criteria is weighted in terms of the original work, the framework for determining the necessity of permission resembles that of the CCH Canadian case.

#### 16) McGill (Montreal)

Established in 1821 (Formerly University of McGill College 1821-1885)

Number of graduate students in 2007

Full-time: 5,820

Part-time: 1,900

Graduate and Postdoctoral Studies website: *Thesis Preparation and Submission Guidelines* (dated to November 2007)

#### **Copyright Checklist (2007):**

If the thesis contains other previously copyrighted material, signed waivers have been obtained from co-authors and publishers, and have been included with the thesis.

URL: <http://www.mcgill.ca/gps/current/programs/thesis/guidelines/>  
<http://www.mcgill.ca/files/gps/thesischecklist.pdf>  
Last accessed 20 September 2008.

Notes:

- No restriction on component inclusion; Inference seems to be only for previously published works. Hurray!

## **New Brunswick**

### **17) University of New Brunswick (Fredericton)**

Established in 1785.

Former names of the institution: College of New Brunswick (1800-1828);

King's College (1828-1859).

Number of graduate students in 2007

Full-time (graduates): 860

Part-time (graduates): 330

School of Graduate Studies: *Regulations and Guidelines for the Preparation and Submission of Graduate Theses, PhD Dissertations and Reports* (dated to 2006)

#### **2. Copyright**

If you intend to use previously copyrighted material in your thesis/dissertation/report, you must include, with your thesis/dissertation/report letters of permission from the person(s) or publishing company holding the copyright. This usually involves a considerable amount of time and should be well done in advance of the submission of the thesis/dissertation/report as these letters must accompany the thesis/dissertation/report when the final copies are presented to the Graduate School.

When letters of copyright permission cannot be obtained and, when the omission of this material will not deter from the sense of the text, the copyrighted material should be removed and a page inserted in its place (only for the microfilming copy of the thesis/dissertation/report). This page should explain that the material involved has been removed because of the unavailability of copyright permission; what information the material contained; and the original source of the material.

URL:

<http://www.unb.ca/gradschl/guidelines/documents/GuidelinesforthePreparationofDissertationThesisorReport.pdf>;

last accessed 20 September 2008

Notes:

- No mention of fair dealing, but fortunately, removal of copyrighted material is qualified "where it will not deter from the sense of the text."
- But it still has to come out of the microforming (national deposit) copy.

### **18) Université dé Moncton (Moncton)**

Established in 1963.

Number of graduate students in 2007:

Temps complet (cycles supérieurs) full-time: 450

Temps partiel (cycles supérieurs) part-time: 340

Again, very interesting. No explicit policy concerning the inclusion of copyrighted material in theses or dissertations. All that I could find was the

usual permission granted to the university to distribute the dissertation through the library.

Faculté des études supérieures et de la recherche: règlements universitaires des deuxième et troisième cycles (undated)

En s'inscrivant à l'Université, l'étudiante ou l'étudiant autorise l'utilisation de sa thèse à des fins de recherche, permet la consultation et le prêt de sa thèse en conformité avec la procédure établie par la bibliothèque générale, autorise l'Université à reproduire sa thèse par photographie ou photocopie pour des fins de diffusion sans buts lucratifs, mais conserve néanmoins les droits d'auteur de sa thèse.

By registering with the university, a student authorizes the use of his or her thesis for the purposes of research, allows the consultation of his or her thesis through the procedures established by the library, authorizes the University to reproduce the thesis by photography or photocopy for noncommercial purposes, but preserves their right of copyright.

URL:

[http://www2.umoncton.ca/cfdocs/repertoire/etudes\\_sup/reglements\\_universitaires.htm](http://www2.umoncton.ca/cfdocs/repertoire/etudes_sup/reglements_universitaires.htm)

Last accessed 21 September 2008.

## **Prince Edward Island**

### **19) University of Prince Edward Island (Charlottetown)**

Established in 1804.

Number of graduate students in 2007:

Full-time (graduates): 150

Part-time (graduates): 80

*A Guide for the Writing of Graduate Thesis, Master of Science Program, Doctor of Philosophy Program (June 2006):*

#### **5.3.6 Permission to Reproduce**

Students who have reproduced or used a "substantial part" of a work or other proprietary material in the thesis must obtain permission from the rights-holder. Students must be aware that obtaining this permission may take some time and may require a fee.

#### **5.12.0 Copyright and Subsequent Use of the Thesis**

...Students are reminded that they are required to respect standards of academic honesty and intellectual property in the case of all material used in the thesis. In order to do this, it is usually sufficient to use notes and bibliographical references. When use is made of a substantial part of a source work, it is necessary to obtain prior permission from the author.

URL: <http://www.upei.ca/avc/files/avc/guidetowritingthesis.pdf>

Last accessed 18 September 2008

Notes:

- copyright without fair dealing... the usual.

There were no eligible candidates for the second institution, PEI has only one university.

## **Nova Scotia**

### 20) **Dalhousie** (Halifax)

Established in 1818.

Number of graduate students in 2007:

Full-time (graduates): 2,790

Part-time (graduates): 750

Faculty of Graduate Studies: Thesis Format Guidelines (June 2006)

#### 4.0 Copyright

In conformity with the Copyright Act, the thesis may contain an extract (e.g., quotations, diagrams, tables) from other sources protected by the Copyright Act for the purposes of research, comment, or review, provided that the use of the material is fair and reasonable and the source is properly attributed. Otherwise, there must be no substantial amount of copied material in the thesis unless written permission has been granted by the holder of the copyright. What constitutes a "substantial amount" depends on the circumstances but more weight is generally given to the quality of the amount copied rather than to the quantity. When in doubt, students are advised to seek permission to include the material from the holder of the copyright.

[http://www.dalgrad.dal.ca/forms/docs/thesis\\_regs.pdf](http://www.dalgrad.dal.ca/forms/docs/thesis_regs.pdf)

last accessed: 17 September 2008

Notes:

- overall gives the spirit of fair dealing and describes extracts inclusive of diagrams and tables.
- includes "comment and review" as part of the allowed measures through the Copyright Act.
- determination of substantial leans towards quality.
- fly in the ointment: "students are to seek permission" if in doubt.

There were no eligible candidates for the second institution.

## ***Newfoundland and Labrador***

### 21) **Memorial University of Newfoundland** (St. John's).

Established in 1925 as Memorial University College.

Number of graduate students in 2007:

Full-time: 1,550

Part-time: 850

School of Graduate Studies: *Guidelines for Theses and Reports* (dated to 16 September 2008)

#### 2.8 Intellectual Property and Copyright

Canada's Copyright Act permits "**fair dealing**" of someone else's work. There is reasonable flexibility in the interpretation of what constitutes "fair dealing" and you are allowed to quote a reasonable extract provided it is properly cited. Extensive quotation requires written permission of the copyright holder (usually the publisher) which must be noted in the thesis. Students opting to submit a thesis in manuscript format should note that incorporation of published material will require written permission from the copyright holder. Copies of the Canadian Copyright Act can be consulted in the Reserve Section of the Queen Elizabeth II Library and the Health Sciences Library. A useful statement of the Canadian Copyright Act relevant to Educational Institutions in Newfoundland can be found at: <http://www.cmec.ca/copyright/copyright.htm>. At the time of submission of a thesis, students are requested to complete and sign a "Request to Include Copyright Material" form (Appendix 4).

URL: [http://www.mun.ca/sgs/go/guid\\_policies/guidelines\\_intro.php](http://www.mun.ca/sgs/go/guid_policies/guidelines_intro.php)

last accessed: 17 September 2008

Notes:

- mentions fair dealing, but without full explanation. Still, this better than most....
- distinguishes the previously published work requires permission from the copyright holder...
- reference to CMEC is a little ominous.

There were no eligible candidates for the second institution, Newfoundland and Labrador has only one university.



## **Appendix B – Copyright Permission**

This dissertation includes a variety of copyrighted material, including academic writings, an image, and policy statements. I have not sought permission for any of my usage, believing that I have engaged with the material in accordance with the tenets of fair dealing.

I have copied literature as it was necessary to achieve my objectives of exploring Canadian copyright law, through the experiences of Harold Innis. With regards to my reproduction of a portion of the Toronto Star's publication of 10 March 1990 (see page 164) I felt the illustration was germane to the task of bringing home *how* to utilize copyrighted material as part of a larger, original work. Some say a picture is worth a thousand words; I would go further and say that a picture can achieve what words cannot. With respect to the policy statements collected in Appendix A; I reproduced only the text of statements concerning the object of my study, which was to identify how copyright and fair dealing are portrayed to students.

My third chapter formed the basis of a publication "The Copyright Act of 1889 – A Canadian Declaration of Independence," *Canadian Historical Review*, Vol. 90, Issue 1 (March 2009). As per my own contract with University of Toronto Press, I need **not** request permission to reproduce the work within a larger body of my own authorship or editorship. I agreed to cite the publication in a manner appropriate to UTP wishes, and have verified that this has been done so. I would like to thank the editors and reviewers, and, the staff at University of Toronto Press for their interest and attention to my work.

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