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Donald C. Brace Memorial Lecture 2021

User Rights: Fair Use and Beyond

David Vaver*

First, my sincere thanks to the Donald C. Brace Lecture Committee and your Society's President and Vice-President for honouring me with their invitation to give this year's lecture.

I am indeed thrice honoured - first, by being in the company of the very distinguished speakers who have preceded me; second, as the first non-American to give this lecture; and third — and by no means least — by giving a lecture named for Donald C. Brace.

My late father-in-law Jack McClenaghan was a journalist and writer in New Zealand, and it was Harcourt Brace & World — the firm co-founded by Donald C. Brace — which published Jack's first novel "Moving Target" in the US in 1966. The cover calls the book "A novel of survival" and it's about a hunt for an army deserter in the mountain wilds of New Zealand during the Second World War. Jack retained the copyright, which he later parlayed into an option on the movie rights. Sad to say, no movie resulted — Dustin Hoffman was otherwise occupied — but the proceeds from the rights Jack retained made a big difference to his family's life. It also helped Jack keep writing. Were he here today, Jack would have toasted Donald Brace — as I do now, in their absence.

It was suggested that I speak on a development in copyright law in Canada that was thought to be of possible interest to Society members: User Rights — the rights people have to use a copyrighted work without interference from the copyright owner. The development of this concept is also a tale of survival — the survival of an idea that has existed since the dawn of copyright but got deserted in the 20th century — only to return as a survivor in the 21st.

My title "User Rights: Fair Use and Beyond" is meant to suggest four related phenomena:

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First, that user rights may extend beyond fair dealing — Canada’s version of fair use — and that they may encompass any statutory or other defence.

Second, that they may extend beyond defences and have substantive effect.

Third, that the concept may extend beyond copyright and be applied to other IP rights.

Fourth, that such user rights may extend beyond Canada geographically.

Some preliminary points: I refer at various points to both fair use and fair dealing but my talk will be mainly of the developments in fair dealing in Canada. Many aspects of fair dealing are equally relevant to American concepts of fair use. When I speak of copyright owners, I also intend to include authors, although of course they are often not one and the same.

The term “fair dealing” — *utilisation équitable* in Canada’s other official language — comes from UK law. It has been employed over the last century in many countries of British heritage. Three main points of similarity and difference between fair use and fair dealing should be noted.

First, whether a dealing or use is fair and thus outside the copyright owner’s control depends on factors that are much the same in both Canada and the US. In the US the factors appear in legislation.¹ In Canada they are laid down by judges, much as happened in the US before its Act of 1976. The Canadian factors are listed non-exhaustively: (1) the purpose of the dealing; (2) its character; (3) its amount; (4) what alternatives to it exist; (5) the nature of the work; and (6) the effect of the dealing on the work.² The weight given to each factor may differ, case to case; and how such criteria are applied in either country may also differ.

¹ 17 USC § 107.

² *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at [50] [*Law Society*].

Second, the purposes for which copyrighted material may be fairly used are also much the same in both countries. The main difference is that the US list of purposes is not exhaustive, whereas Canada's list of 8 purposes is. They are research, private study, education, parody, satire, criticism, review, news reporting — and nothing else.³ Three of these purposes — research, criticism, and news reporting — appear on the US list but any other purpose is also acceptable there.

Finally, acknowledgement of sources is mandatory in Canada for criticism, review, and news reporting,⁴ whereas it is not even mentioned among the US fair use criteria and its presence or absence rarely matters.

So let me now turn to “User Rights” as they have developed in Canada. First, what are they? That's easy to state: they are the rights anyone has to use a copyrighted work without interference from the copyright owner. The word “right” is used in its common meaning of “entitlement”, like the right to vote.

User rights extend beyond fair dealing to include common activities such as the right of non-profit libraries and archives to serve their patrons; of schools and universities to educate their students; of charities to further their benevolent purposes; of access rights for people who cannot see or hear well, or at all; and so on.

How these activities should be described is itself somewhat of a moving target. During much of the 20th century they were commonly called — and often still are called — “exceptions” or “limitations.” (I'll abbreviate that from now on to just “exceptions”.) The alternative term “user rights” has arisen partly as a reaction to the baggage that accompanies the language of exceptions, partly because “user rights” better describes the activities referred to, both historically and teleologically.

³ *Copyright Act*, RSC 1985, ch C-30, ss 29, 29.1, 29.2.

⁴ *Ibid*, ss. 29.1 & 29.2.

The term “user rights” is of course not unknown in the US. For example, there is the well-known book co-authored by the late Professor Ray Patterson and Stanley Lindberg in 1991: *The Nature of Copyright: A Law of Users’ Rights*. The term was also promoted some years ago by a former Brace lecturer, Judge Birch of the 11th Circuit US Court of Appeals.⁵ Its use was also not unknown in the UK. Writing in 1915, the editor of the leading British treatise on Copyright, *Copinger*, referred to a pre-existing “right of fair user” and deprecated what he saw as the unnecessary introduction of a provision on fair dealing in the newly enacted 1911 law.⁶

So what’s wrong with calling whatever anybody can do without infringing a copyright an “exception” to copyright? The problem is the implication drawn from this usage: that copyright’s natural order is one where all uses are or should be within the copyright holder’s control. Any departure from that position is then indeed exceptional: an abnormality or aberration. This thought is often accompanied by a reference to the language of property: copyright is property and so its owners should be able to stop anyone else from doing anything with or to it. Allowing users to do such things looks like a “taking” of property — something that, if not positively unconstitutional, is again at least exceptional: to be closely cabined, and interpreted as narrowly and grudgingly as possible.

I won’t bore you with the well-known objections to all that, except to say this: copyright legislation itself rarely reads like this, and the natural order of things can be viewed quite differently. Before copyright came along, people could do whatever they wished with published work: copyright became a fetter on those rights. What was the exception, what the rule? Could not copyright itself plausibly be the exception, and freedom the rule? Did not the rights of copyright owners stop at the point that users’ rights started? Can copyright not be viewed as an island in a sea of user rights: the land stops where the sea begins? The area between high and low tide may be up for discussion but otherwise each expanse should be treated equally.

⁵ Stanley F Birch, “Copyright Fair Use: A Constitutional Imperative” 54 Jo Copyright Soc’y USA 139, 148, n 22 (2007).

⁶ J.M. Easton, ed., *Copinger on Copyright* (5th ed. 1915), 144.

Such indeed was copyright's history up to the early 20th century. Users had plenty of rights because copyright owners had so few. Recall the unauthorized translation into German of *Uncle Tom's Cabin* in the mid 19th century. Harriet Beecher Stowe and her publisher went to court to stop the translations being offered to German-speaking Pennsylvanians. The suit failed, even though the unauthorized works competed with Stowe's own authorized translation. The copyright statute then forbade the printing only of a "copy" and, as any fool could see even from the title, *Onkel Toms Hütte* was no "copy" of *Uncle Tom's Cabin*.⁷

Of course things have moved on since the 19th century. Largely under the *Berne Convention's* globalizing influence, translations and many other activities were brought under the copyright owner's control in the 20th century, but many were not. Copyright's island grew and the sea of user rights shrank; yet no reason existed why sea and island should switch character.

Yet switch they did for much of the 20th century in Canada, the UK, and elsewhere: copyright became the sea and user rights the island enclosed by it.⁸ A shift towards expanding the island and treating fair dealing generously nevertheless started in Britain around the final quarter of the century, especially in appellate cases involving free speech or criticism. Thus a former Scientologist was allowed to reproduce great chunks of unpublished Scientology material in a book criticizing the creed.⁹ A television documentary was allowed to use quite a few clips from the *The Clockwork Orange* movie to criticize its withdrawal from British cinemas.¹⁰ (It was re-released later.) Yet another documentary could use clips from a television program to

⁷ *Stowe v Thomas*, 23 F Cas 201 (1853) (E.D. Penn).

⁸ E.g., *Hawkes & Son (London) Ltd v. Paramount Film Service Ltd* [1934] Ch 593, 608 (C.A.) (fair dealing construed "strictly").

⁹ *Hubbard v Vosper* [1972] 2 QB 84, 94-5 & 98-9 (CA).

¹⁰ *Time Warner Entertainment Co v Channel Four TV Corp plc* [1994] EMLR 1 (CA).

criticize the growing scourge of checkbook journalism.¹¹ These decisions seemed to share a common factor typified by Judge Birch's comment in his Brace lecture that "copyright law is intended to protect the public domain for the user as well as the proprietary domain of the copyright owner."¹²

The Canadian user rights story is one of false starts, followed by a half century hiatus, a rethinking of basic principles, followed by an embrace of user rights and their elaboration over time.

The story starts, like *Moving Target*, during the Second World War. While Canadian armed forces were fighting the conflict in Europe, Canadian businesses were fighting a different conflict at home. You may ask, what was their aim? What were they striving for with toil, tears, sweat — and lawyers? For the right to play juke boxes for free.¹³ For, in a piece of poorly thought out legislation, the Canadian Parliament had laid down that royalties or other fees for playing jukeboxes in public places could not be collected from their owners or users, only from jukebox makers. The problem with this shift of liability was there was no-one in Canada to collect from. All the jukeboxes came from the Wurlitzer factory in North Tonawanda, New York State, and it was uninterested in paying royalties for the use of its equipment in Canada. So the Canadian performing rights society representing composers and music publishers went to court to get injunctions against the local supplier of Wurlitzers and a restaurant it was renting one to.

¹¹ *Pro Sieben v Carlton Television Ltd* [1999] 1 WLR 605, 614 (CA) ("criticism or review" and "reporting current events" are "expressions of wide and indefinite scope ... which should be interpreted liberally").

¹² Birch, above note at 148, fn 22.

¹³ Compare the 1847 case which Le Café Morel lost in Paris to Ernest Bourget for refusing to supply him with an *eau sucré* while they nevertheless played his compositions for free (Tribunal de Commerce de la Seine, 1847), recounted in S. Albinsson, "A Costly Glass of Water: The Bourget v. Morel case in Parisian courts 1847-1849" (2014) 96:2 Swedish Jo Music Research 59, 63-4.

The society's case was simple. The legislation said the society couldn't collect royalties from owners or users; it didn't take away any other remedy. The provision cut into the copyright owner's property right; it should be interpreted narrowly; and so the right to get an injunction remained. And two Canadian courts agreed.¹⁴ Two of the five judges in the Supreme Court of Canada had reservations with this reasoning. They said copyright laws should not become "instruments of oppression and extortion";¹⁵ yet even they could not bring themselves to refuse the injunctions requested.

Canada's highest court at this time was still the Judicial Committee of the Privy Council sitting in London, and it disagreed with all this. Legislation eliminating monetary liability for an activity must intend to legalize it; otherwise, copyright owners could get indirectly by injunction what they could not get directly through charging.¹⁶ And so the jukeboxes could keep playing for free until Parliament sorted out its policy error, which of course in due course it did.

But, as one American judge famously put it, some decisions are "like a restricted railroad ticket, good for this day and train only."¹⁷ Rejection of a narrow approach to exceptions did not sit well with the trio of Supreme Court judges who had decided the *Wurlitzer* case this way. A few years later, they had a case on a provision that said an agricultural fair did not infringe copyright for music played "without motive of gain." The trio said with straight faces that, on a "fair reading", the fair lost.¹⁸ It had paid the band that played at the grounds, so the performance was for "motive of gain", even if there were no admission charge and the fair was not trying to make money. This approach was no different from what the triumvirate had

¹⁴ *Vigneux v. Canadian Performing Right Society Ltd* [1943] SCR 348, 365, aff'ing [1942] Ex CR 129.

¹⁵ *Ibid*, 353-4.

¹⁶ *Vigneux v. Canadian Performing Right Society Ltd* [1945] AC 108, 122 & 124 (PC).

¹⁷ *Smith v Allwright*, 321 US 649, 665 (1944), by Roberts J dissenting, although the dictum could have been better deployed in a case where the dissenter was not in favour of denying equal voting rights.

¹⁸ *CAPAC v. Western Fair Assn.* [1951] S.C.R. 596, 601.

done in the *Wurlitzer* case: the ticket got a new name — “fairness” — but the track and the destination — narrow construction — remained the same.

Meanwhile, that same year, 1951, a first instance Canadian judge did recognize what the Privy Council had meant: that fairness was a two-way street. Sounding much like Judge Birch, the judge said:

The [copyright] statute was designed as much for the protection of the public as for the protection of copyright-owners, and calls for a fair construction — fair not only from the standpoint of copyright-owners but also from the standpoint of the public.¹⁹

Unfortunately the judge’s statement of principle was somewhat sullied by his conclusion: that a Muzak system that piped music through to multiple buildings was like a Wurlitzer and so could claim the shelter of the *Wurlitzer* case. Unsurprisingly that conclusion did not survive appeal and the Muzak corporation had to pay royalties.²⁰

The idea of balanced fairness was destined to lie dormant for the next half century, even though the idea was plainly right: copyright law has always sought to balance owners’ and users’ interests. Without users, copyright laws are pointless. Users therefore deserve the same treatment as owners — and that means balancing right against right, not right against exception. Right against exception starts the balance off with a heavy boot on one side of the scales.

The genesis of this approach was a pair of Supreme Court of Canada cases decided within two years of each other. The first in 2002, *Théberge v. Galerie d’Art du Petit Champlain Inc.*,²¹ had nothing to do with exceptions. The question was how wide a reading should be given to a

¹⁹ *CAPAC Ltd v Associated Broadcasting Co Ltd* [1951] Ont Reps 101, 120 (SC).

²⁰ *CAPAC Ltd v Associated Broadcasting Co Ltd* [1952] Ont Reps 322 (CA), affd [1954] 1 WLR 1484, [1955] 2 DLR 452 (PC).

²¹ *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336.

particular owner's right — the right of reproduction or copying. A firm had bought some posters made by a well-known Quebec artist and had transferred the image by lifting the ink from the poster to a canvas. Did this “reproduce” the image and so need the copyright owner's consent? The point proved as controversial in Canada as it has done in the US, and the Supreme Court of Canada split 4:3 on it. The majority said that reproduction implies production of an additional copy and the transfer process did not do that: after the process, the poster was just blank while the canvas now carried the image. The majority prefaced its reasoning with some basic principles that have been repeatedly cited in virtually every major copyright case in Canada since:

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 (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated). ... The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them...

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.²²

This was all pretty heady stuff, for just over a decade earlier, in 1990, the Supreme Court had been asked to say that a licence to broadcast work necessarily implied a right to make prior ephemeral records to enable the broadcast to occur. Canada's legislation then did not include an express ephemeral recording right, as it now does, and the Supreme Court unanimously refused to create one. One may search the judgment high and low to find the word “balance”,

²² *Ibid* at 355-6, by Binnie J for the majority.

but it isn't there. Instead the Court said that copyright had a "single object": "the benefit of authors of all kinds."²³ The decision was penned by a new judge on the Court, Justice Beverley McLachlin. By the time of *Théberge*, she had become Chief Justice McLachlin, and she now joined the majority opinion. The two judges from the earlier decision joined the *Théberge* dissenters.

So what happened?

The *Théberge* dissenters hadn't changed their minds but the Chief Justice had. She had thought more about IP theory since 1990, as might be expected of someone with a master's degree in philosophy. That became clear from a speech she gave in 1992 to a conference of IP lawyers. There Justice McLachlin spoke of her unease with the idea of IP as property, although she admitted that "given the property-oriented basis of our society and legal system, [intellectual property] will inevitably continue to be stuffed into that mould." But she ended her speech with a prescient passage:

The notion of the idea as property, always an awkward fit, is becoming, in our modern world, a notion which is impossible to sustain in some contexts. People can and will copy and borrow, with or without permission, and there is little from a practical point of view that can be done to stop it. Or little, for that matter that we *want* to do to stop it.²⁴
[Emphasis in text]

In context, "we" clearly means not just lawyers, legislators, or judges: it means the general public. She went on:

The tenuous moral opprobrium of using others' ideas is far outweighed by countervailing considerations of utility to users when it comes to the photocopy

²³ *Bishop v Stevens* [1990] 2 S.C.R. 467, 478-9.

²⁴ Beverley McLachlin, "Intellectual Property — What's It All About?" In Gordon F. Henderson (ed.) *Trade-mark Law in Canada* (Carswell 1993), ch 15, p 396.

machine and the video-recorder. ... The challenge ... is to work out, case by case, law by law, a framework which recognizes the benefits to be obtained from regarding ideas as property, while delineating the limits on those property rights, which a society increasingly dependent on the free flow of ideas must permit, as a matter of practicality and morality.²⁵

And then comes a final passage that reads very much like the language in *Théberge*.

Justice McLachlin also said in her speech that “we will in future decades see more and more limitations placed on the nature” of IP — prophetically, as it turned out. For around the time of her speech, proceedings in another copyright infringement case had just been filed, and the case meandered its way into the Supreme Court of Canada a decade later. Law book publishers wanted royalties for the photocopying of books bought for law firm libraries. The lawyers said “no”, so the publishers, supported by a copying collective, sued the lawyers’ bar association, the Law Society of Ontario — then rather more grandly called the Law Society of Upper Canada.

The Society has a comprehensive research library in Toronto and the publishers said that anytime anyone on the premises photocopied a case from one of the library’s law reports, or a case summary from a digest, or a passage from a treatise, they were guilty of infringing the publishers’ copyrights. So too was any librarian who copied for a book-less lawyer in rural Ontario who could not afford to drive the few hundred miles needed to Toronto every time they had to nail down a point of law. The Law Society was said to be equally at fault for letting its patrons photocopy and its librarians transmit photocopies by fax, even though the Society’s guidelines restricted copying to research or other statutory purposes, and notices by its photocopy machines warned against infringement.

The Society said the activities were all fair dealing for purposes of research; that any copying by librarians fell within a statutory provision allowing library photocopying; and that, if any

²⁵ *Ibid*, 396-7.

patrons had infringed, the Society was not liable since it had not authorized infringement — “authorization” being Canada’s rough equivalent to contributory infringement.

None of this went down well with the trial judge. Saying “The fair dealing exception should be strictly construed,”²⁶ he found for the publishers. Now while the Federal Court of Appeal was mulling its decision, the *Théberge* judgment came down and the Court of Appeal recognized the need to balance rights. It also said fair dealing was a “user right” and that the judge had wrongly given it a narrow construction.²⁷ But still the Society lost: the court said the Society’s dealing, while certainly for research, was unfair.

On further appeal, the Supreme Court in a unanimous judgment delivered in 2004 by Chief Justice McLachlin dismissed the case against the Law Society. The court found fair dealing established and would have also applied the provision allowing library photocopying, if needed. The Society had its copyright practices endorsed and was found not to have authorized any infringements that may have occurred on its premises.

On user rights and fair dealing, the court had this to say:

Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively. ... “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”²⁸

²⁶ *CCH Canadian Ltd v Law Society of Upper Canada* [1999] FCJ No 1647 at [175].

²⁷ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187 at [126].

²⁸ *Law Society*, above note at [48].

On how the statutory purposes were to be interpreted, it said:

“Research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted ... that “[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research.” Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.²⁹

I interpolate to say that, as often happens, technology nonetheless gave the copyright owners the last laugh. The publishers put their legal material online and so acquired a new income stream that more than compensated for any lost photocopying royalties. And yesterday’s owners can easily become today’s users; so that when the publishers were sued by the lawyers for putting pleadings and written briefs online without getting their consent, what defence finally caused the case to settle? Fair dealing for purposes of legal research, of course.³⁰

Some hoped the Law Society Case would be a one-off, but that did not happen. The Court has built on its foundations in three later cases, two decided in 2012 and one decided in 2021. In the first two, the Court was urged to retreat from its approach in the *Law Society* case. Not only did it firmly refuse to do so, but it made a broad view of user rights central to its analysis.

The torch-bearer in all three cases was Justice Rosalie Abella. In the first case, SOCAN, Canada’s performing right society, wanted online providers such as iTunes to pay for the snippets of music they streamed for users browsing online for recordings they might buy. Justice Abella said for a unanimous Court, affirming the lower tribunals, that users were doing

²⁹ *Ibid* at [51].

³⁰ *Waldman v. Thomson Reuters Canada Ltd*, 2014 ONSC 1288 at [92], although the refusal to approve the class action settlement was reversed on appeal, 2016 ONSC 2622 at [28] (Div Ct).

“research” and that iTunes’ facilitation of it was a fair dealing.³¹ The result was hardly surprising. Users were just using new technology to do what they used to do in pre-iTunes days when they went to a physical record store and were given earphones and a listening booth. No-one then thought the store should pay royalties,³² nor should their digital equivalent now.

The companion case to *iTunes* was more contentious. Access Copyright, the Canadian copying collective, wanted schools to pay for photocopying short excerpts from books for the use of their students. The collective got the Copyright Board to decide the copying was not fair dealing and to set a royalty rate. The Supreme Court produced a split decision.³³ The point of disagreement was the standard of review. Courts usually give expert tribunals like the Board plenty of leeway in their decision-making. They reverse them only if the decision has been unreasonable or tainted by a material error of law affecting the result. Justice Abella for the court majority said that was the case, and the Board should reconsider. It did, saying the Court had effectively endorsed the schools’ practice.³⁴

These cases foregrounded user rights in two ways. First, in the liberal approach to how the purpose of a use should be interpreted. In the *iTunes Case* this meant extending “research” beyond what lawyers or scholars do to include research by ordinary members of the public doing what some might call “shopping”. Transforming the work into something else was not required.

The *Schools* case was decided before “education” was added to the allowable statutory purposes but the amendment would have made no difference. The Court thought the

³¹ *SOCAN v. Bell Canada*, 2012 SCC 36.

³² *Performing Right Society Ltd. v. Harlequin* [1979] 1 W.L.R. 851 (Ch.).

³³ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

³⁴ Copyright Board of Canada, *Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire* (Jan. 18, 2013), at para. 5.

photocopying was done for the purpose of the student's research or private study. That was so whoever did the copying – student or teacher – or whether the research or study occurred in the classroom or the student's dorm.

Second, since fair dealing was a user right, the fairness of any dealing should be looked at not just from the copyright owner's perspective, but as much, if not more, from the perspective of the user. In the *iTunes* case, the excerpt was 30 seconds long and of deliberately low quality: so fair enough for the purpose. Apple merely facilitated the purpose; its intent to make money did not matter. Nor did it matter that the user might listen to the excerpt more than once; the snippet did not substitute for the whole record or compete with it.

In the *Schools* case, the excerpt each student got was fair when compared with the source work. The total amount of copying done by the institution was relevant only when one asked how the dealing affected the work. The evidence did not show any loss of sales: the excerpts came from a variety of works; they supplemented the assigned textbooks; and nobody suggested each student should buy a whole textbook for just the page or two the teacher wanted read. So publishers lost no sales.

Some lower courts got the message. Some did not. That was why a third case flowing from the *Schools* case was decided by the Supreme Court of Canada this year. It nominally involved the university where I teach in Toronto, York University, but in fact the entire Canadian university and education sector was affected.³⁵ The question was whether the university's guidelines for producing coursepacks and other student material complied as fair dealing for the purposes of education. The guidelines were much like those specified in other countries, allowing the copying of short extracts for coursepacks, class handouts, or internal electronic classrooms. This meant allowing copying of up to 10% of a work; a single chapter; a single article from a journal; a single artistic work from a collection; an entire newspaper article or page; a poem or music score from a compilation; or an entire dictionary or encyclopaedia

³⁵ I should add that the University respected my academic independence and at no time approached me.

entry. Instructor discretion was required: only what was required for the purpose could be taken.

The Copyright Board was unimpressed. It said the guidelines were too generous and set a per-student royalty rate. The university refused to pay, so Access Copyright went to court to enforce the rate. The lower courts agreed the dealing was unfair but were told by a unanimous Supreme Court they got it wrong. The court did not, however, make a definitive decision because the copyright owners were not parties to the case. The court was however emphatic in saying the lower courts had virtually ignored the students' perspective as users, contrary to what the Supreme Court had laid down in the *Schools* case.³⁶ It restated the general principles it was applying:

This Court's modern fair dealing doctrine reflects its more general "move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace" ... Fair dealing is "[o]ne of the tools employed to achieve the proper balance between protection and access in the Act" ... [I]ncreasing public access to and dissemination of artistic and intellectual works, which enrich society and often provide users with the tools and inspiration to generate works of their own, is a primary goal of copyright.³⁷

Why has Canada gone this route — apart from its inherent rightness? Two reasons probably contribute. Both have to do with the particular interests and experience of Justices McLachlin and Abella. They are of course only two of nine judges on the court and others have similar interests and experience, but the influence of these two judges in these copyright cases on the opinion of the others stands out.

³⁶ *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 at [103] & [105].

³⁷ *Ibid* at [90] & [92].

First, in 1982 Canada got its first constitutionally entrenched Bill of Rights, the *Canadian Charter of Rights and Freedoms*. Among the guaranteed rights was of course freedom of expression. By the time of *Théberge* and the *Law Society* case, the Supreme Court of Canada had had two decades of experience balancing free speech against apparently contradictory legislation and *Charter* rights, and saying which right won out. Justice McLachlin had led many of these cases. She clearly saw copyright as a law that dealt with the sensitive area of expression of not just authors but everyone. From there, it was a short step to treat fair dealing itself as an aspect of the right to free speech — a right the Court had, by the time of the *Law Society* case, already called a “vital concept” to be restricted only “in the clearest of circumstances.”³⁸

Second, Justice Abella’s reference to the need to achieve the “proper balance between protection and access” echoes her strong interest in human rights and the way protection and access is reflected in the *Universal Declaration of Human Rights* of 1948. That treaty gives everyone “the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits” (article 27(1)). Its next subsection (article 27(2)) then provides for the author’s right to “the protection of the moral and material interests resulting from [their] scientific, literary or artistic production”. This ordering is significant. Access to culture is the rule and copyright the exception. The protection of authors in the *Declaration* in fact appears as one of the last items on a long list of rights – unsurprisingly behind rights to work, equality, social security, health, and education. One can call these rights “timeless expressions of the fundamental entitlements of the human person.”³⁹ It would be hard to say that of copyright — a right that is tradeable, time-limited, often corporate, and merely statutory, and so capable of being here today and gone tomorrow.

I should say just a few words about the “Beyond” part of “Fair Use and Beyond”.

³⁸ *Edmonton Journal v. Alberta (A.-G.)*, [1989] 2 S.C.R. 1326.

³⁹ Peter Yu, “IP and Human Rights in the Nonmultilateral Era” 64 Fla. L.Rev. 1045, 1052-53 (2012).

I suggested earlier that user rights may extend beyond defences and have a substantive effect. A Supreme Court of Canada case in 2012 is in point. The *Copyright Act* gives broadcasters a copyright on their signals but simultaneously lets cable television suppliers carry local broadcasting for free. The Canadian Radio & Telecommunications Commission — Canada’s version of the FCC — tabled an order requiring cable companies either to pay local broadcasters or else blank their signal. The Court said the order was void because, among other reasons, it sought to override the rights the *Copyright Act* gave suppliers. It called their rights “user rights” and said that no order of an administrative tribunal could erase them.⁴⁰

If that is so, one wonders how user rights may be overridden by private agreement. Legislation barring overriding need not be express; the bar may there by implication from the policy underlying a provision.⁴¹ May that not be the case with user rights? Can the click of a mouse really dispense with rights the Supreme Court has called an “essential part of copyright protection”⁴² and “an essential part of furthering [copyright’s] public interest objectives.”⁴³ If “[c]reator rights and users’ rights are mutually supportive of copyright’s ends”,⁴⁴ how can one remove one leg of the support without toppling the edifice?

I also suggested earlier that the concept of user rights may extend beyond copyright and be applied to other IP rights. Why should the idea of balance and equal rights stop with copyright? Can not defences to trademark and patent infringement be viewed that way too?

⁴⁰ *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489

⁴¹ On unwaivability in other contexts, see eg *Johnson v Moreton*, [1980] AC 37 (HL) (tenancy security); *Royal Trust v Potash* [1986] 2 SCR 351 (mortgage repayment); *Private Career Training Institutions Agency v Prana Yoga Teacher College Inc* 2013 BCSC 17 at [35]-[8] (consumer protection); *Davies v Davies* (1919) 26 CLR 348 (Aust) (alimony); *Evans v Amicus Healthcare Ltd* [2003] EWHC 2161 at [286] & [295] (Fam) (artificial insemination consent).

⁴² *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37 at [79] (fair dealing).

⁴³ *SOCAN v Bell Canada*, above note , at [11].

⁴⁴ *York University*, above note at [94].

For example, the right of anyone to do follow-on research may reasonably be considered an essential element of the patent's system ultimate goal to progress the useful arts. Why then should that right not be given a liberal interpretation instead of its being whittled down almost to nothingness by the US Federal Circuit Court of Appeals?⁴⁵

I have also suggested that user rights may extend beyond Canada geographically. They have indeed, to Europe. European academics have taken up the user rights idea and their advocacy has borne fruit. In 2019 the European Court of Justice had to decide whether a newspaper could say it was copying “in connection with the report of current events” when it published secret German government documents on its website. The court said it could, even though the provision appeared in the EU *Copyright Directive* of 2001 under the heading of Exceptions and Limitations.⁴⁶ The court said that the “exceptions or limitations do themselves confer rights on the users of works [and are] specifically intended ... to ensure a fair balance between, on the one hand, the rights and interests of rightholders... and, on the other hand, the rights and interests of users of works”. True, copyrights had to be “given a broad interpretation” but they were not “inviolable” or “absolute” and might have to give way to fundamental rights such as free expression. That right underpinned the right to report current events and so deserved equal weight.⁴⁷ Later decisions of the Court of Justice repeat this refrain.⁴⁸

Conclusion

⁴⁵ Compare *Madey v Duke University*, 307 F 3d 1531 (Fed Cir 2002) with the liberal interpretation of the comparable right in *Merck & Co Inc v Apotex Inc* 2006 FCA 323 at [101]-[2].

⁴⁶ *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, article 5(3)(c).

⁴⁷ *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] EUECJ C-469/17 at [70]-[2].

⁴⁸ C. Geiger & E. Izyumenko, “The Constitutionalization of Intellectual Property Law in the EU and the *Funke Medien*, *Pelham* and *Spiegel* Online Decisions of the CJEU: Progress, But Still Some Way to Go!” at 20-3 (Centre for Int’l IP Studies, Oct. 21, 2019), Research Paper No. 2019-09, <https://ssrn.com/abstract=3472852>

I wrote on user rights for the Society’s Journal a few years ago to commemorate the 50th anniversary of the publication of *Nimmer & Nimmer on Copyright*. I was then unsure how the idea of user rights would be received elsewhere. I did not expect universal enthusiasm because at the end of the day “authors and copyright holders want money, not balance or user equality.”⁴⁹

Melville Nimmer was of course the first Donald C. Brace lecturer 51 years ago. It is therefore particularly apt to repeat the quote from *Nimmer & Nimmer* on which I ended my paper: that copyright’s primary purpose is “not to reward the author but ... rather to secure the general benefits derived by the public from the labors of authors.”⁵⁰

User rights do not set their sights on the author as a moving target. They instead aim to ensure that both authors and users benefit from the culture to which both contribute. The touchstone of fair use and fair dealing should be a fair deal — and that means a fair deal for all.

⁴⁹ David Vaver, “Copyright Defenses as User Rights” 60 *Jo Copyright Soc’y* 661, 672 (2013).

⁵⁰ 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, §1.03[A] (2013) (footnotes and internal quotes removed).