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## Copyright Defenses as User Rights

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## COPYRIGHT DEFENSES AS USER RIGHTS

by DAVID VAVER\*

This article discusses two related topics: first, how treatises such as *Nimmer & Nimmer* influence copyright law beyond the United States, and particularly how U.S. copyright law influences Canadian law; and second, how Canadian law now treats statutory copyright defenses such as fair dealing as user rights, and the possible implications of that treatment.

## I

It is a striking coincidence that the leading treatises on copyright law in the United States and the United Kingdom are each works where a son succeeded father as author. The American work's line of succession is the more simple and direct: in 1985 on his father's death, David Nimmer assumed authorship of the treatise that Melville B. Nimmer first published in 1963. The British work, *Copinger on Copyright*, was first published in 1870, and its authorship descended first from W.A. Copinger to his son-in-law J.M. Easton in 1904, and then from Easton's successor F.E. Skone James to his son E.P. Skone James in 1965 on F.E.'s death.

The contrasts are equally striking. The current two-volume edition of what is now *Copinger & Skone James on Copyright* is updated by three barristers, with two more assisting. David Nimmer remains as sole author of *Nimmer & Nimmer on Copyright's* ten volumes. Hercules needs no help. Nor did Melville Nimmer before him. His book was his own. That, as we shall see below, is only relatively true of *Copinger's* first edition.<sup>1</sup>

While lineal authorial succession is no guarantee of success, in these two instances it has been, in ways the original author may not fully have envisaged. The expectations of Copinger and Nimmer *père* that their treatises would become pre-eminent in their respective jurisdictions have been fully realized, but the influence of both books has been much greater. Like copyright itself, their sway is now global, *Nimmer's* today probably more so than *Copinger's*. *Nimmer* is consulted frequently outside the

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<sup>1</sup> See text below, accompanying 42-44.

United States, on local law as much as U.S. law. American case law, when sifted, synthesized, refined, and interpreted, represents a rich lode of learning, and where better to go first for the result of that process than *Nimmer*?<sup>2</sup>

Like all American treatises, *Nimmer* must naturally be used with care on questions of non-American law. Common law jurisdictions often find it useful and even necessary to look to other common law jurisdictions or beyond for inspiration and guidance on local law, whether it be copyright or anything else. One finds help wherever one can when dealing with a new problem, and for copyright the United States, with its raft of copyright-based industries and relatively easy access to legal material, is an obvious source. American lawyers too have easy access to foreign law sources, courtesy of another work initiated by Melville B. Nimmer and carried on to date by Paul Edward Geller.<sup>3</sup>

To consult does not mean to accept, and the persuasiveness of American law varies not only according to the diligence of individual counsel but also according to fashion, time, place, and local legal tradition. For example, whereas nineteenth century British and American courts and treatise writers frequently referred to one another's legislation and caselaw, that phenomenon is much rarer today. British courts now show little interest in U.S. law, even where American judicial experience exceeds the British. Thus in 1994, at a time when indigenous case law on the point was scarce, a British judge refused to consider U.S. case law on copyright infringe-

<sup>2</sup> The evidence from Canada is persuasive. See the authoritative treatment of *Nimmer* in *Euro-Excellence, Inc. v. Kraft Canada, Inc.*, [2007] 3 S.C.R. 20, paras. 43–44 (exclusive licensee); *Soc'y of Composers, Authors and Music Publishers of Canada v. Canadian Ass'n of Internet Providers*, [2004] 2 S.C.R. 427, para. 117 (Internet service provider liability); *Apple Computer, Inc. v. Mackintosh Computers, Ltd.*, [1987] 1 F.C. 173, [1986] F.C.J. No. 278, para 68, *aff'd*, [1988] 1 F.C. 673 (C.A.), *aff'd*, [1990] 2 S.C.R. 209 (noting *Nimmer*'s criticism of *Baker v. Selden*, 101 U.S. 99 (1879)); *FWS Joint Sports Claimants v. Canada (Copyright Bd.)*, [1992] 1 F.C. 487 (C.A.) (football game not "dramatic work"); *Eros-Équipe de Recherche Opérationnelle en Santé Inc. v. Conseillers en Gestion et Informatique C.G.I., Inc.*, 2004 FC 178 at [121] (computer program infringement); *Neudorf v. Netzwerk Prods, Ltd.* (1999), 3 Can. Pat. Rep. (4th) 129, [1999] B.C.J. No. 2831, paras. 35, 74 (B.C.S.C.) (joint authorship); *Dolmage v. Erskine* (2003), 23 Can. Pat. Rep.(4th) 495 (Ont. S.C.) (academic copyright: *Nimmer* "highly regarded"); *Hutton v. Canadian Broad. Corp.* (1989), 29 Can. Pat. Rep.(3d) 398, 1989 CanLII 3311 at [265] (Alta. Q.B.) (damages), *aff'd* (1992), 41 Can. Pat. Rep. (3d) 45 (Alta. C.A.); *Pelchat v. Zone 3, Inc.*, 2013 QCCS 78, para. 78 (Que. S.C.) (no monopoly in ideas).

<sup>3</sup> See *INTERNATIONAL COPYRIGHT LAW & PRACTICE* (Paul Edward Geller & Melville B. Nimmer eds., 1988) (updated annually), which Melville B. Nimmer initiated and Paul E. Geller took over on Mel's death. David Nimmer, appropriately enough, authors the chapter on United States law.

ment of computer programs because it would add “complications” and likely “lead to overcitation of U.S. authority on a statute different from ours.”<sup>4</sup> Today British lawyers find U.S. copyright law even more peripheral to their concerns as U.K. law drifts into a Continental European mindset molded by directives and regulations emanating from Brussels and court decrees promulgated from Luxembourg.<sup>5</sup> Unsurprisingly, foreign judicial interest in contemporary modern British caselaw is correspondingly dwindling beyond Europe.<sup>6</sup>

## II

By contrast, Canada has historically taken a more lively interest in American copyright developments, even though Canadian law is rooted more in British than U.S. copyright law, with the occasional domesticated graft (e.g., statutory damages) from the latter.<sup>7</sup> Cross-border traffic in copyrighted material is enormous and Americans are often involved one way or another in Canadian disputes. Canadians do not share the British sentiments on the use of U.S. law, quoted in the previous paragraph. In a case also involving allegations of infringement of a computer program’s copyright, a Canadian appeal court mentioned the British attitude only to emphasize that divergent U.S. and U.K. views on infringement methodology in computer cases did not “necessarily” involve a “hard-edged ques-

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<sup>4</sup> *IBCOS Computers, Ltd. v. Barclays Mercantile Highland Fin., Ltd.*, [1994] F.S.R. 275, 302 (Ch.) (“the leading case” in the U.K. on copyright and computer programs, according to *SAS Inst., Inc. v. World Programming, Ltd.*, [2011] RPC 1, [2010] EWHC 1829, para. 86 (Ch.)). British courts have found U.S. law more helpful on copyright and private international law matters. See *Lucasfilm, Ltd. v. Ainsworth*, [2012] 1 A.C. 208, [2011] UKSC 39, where the U.K. Supreme court referred as much to American as to European trends in holding that British courts had jurisdiction to adjudicate U.S. copyright actions against British residents for internet sales made from Britain into the United States.

<sup>5</sup> European legal autonomy over the scope of copyright for computer programs is now substantially complete. See *SAS Inst., Inc. v. World Programming, Ltd.*, [2013] EWHC 69 (Ch.), applying *SAS Inst., Inc. v. World Programming, Ltd.*, Case C-406/10, [2012] Eur. Copr. & Design Reps. 22 (C.J.E.U.).

<sup>6</sup> See, e.g., in Canada, *Alberta (Educ.) v. Canadian Copyright Licensing Agency*, 2012 SCC 37 (finding U.K. law on fair dealing not “particularly helpful” for taking “a more restrictive approach” than Canadian law) (citing Guiseppina D’Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and Fair Use*, 53 MCGILL L.J. 309 (2008)), even though Canadian fair dealing law derives directly from the Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, s. 2(1)(i) (U.K.).

<sup>7</sup> William L. Hayhurst, *Intellectual Property Laws in Canada: the British Tradition, the American Influence and the French Factor*, 10 INTELL. PROP. J. 265 (1996); David Vaver, *Canada’s Intellectual Property Framework: A Comparative Overview*, 17 INTELL. PROP. J. 125, 126, 135ff. (2003).

tion of law.”<sup>8</sup> Affirming the suit’s dismissal, the appeal court found nothing wrong in how the trial court had fully discussed U.K. and U.S. case law but had ultimately relied on expert evidence to find no substantial reproduction in fact of the program involved.<sup>9</sup>

Canadian courts are therefore more receptive than British courts to the citation of U.S. law in copyright cases, perhaps partly motivated by NAFTA’s idea of a common level legal playing field among NAFTA members. U.S. law is treated as being anything from “very helpful” to “unhelpful but interesting anyway as contrast.” Judges especially at the appellate level do not hesitate to ask counsel whether or not U.S. law can shed any light on the case in front of them.

Three decisions of the Supreme Court of Canada spanning the last quarter century are representative. *Compo Co., Ltd. v. Blue Crest Music, Inc.*<sup>10</sup> concerned a firm which pressed sound recordings of a musical work to a record company’s order and was sued for infringing the music copyright owner’s right to “make” sound recordings.<sup>11</sup> The presser’s argument, that not it but the record company “made” the records, was rejected. In an oft-cited passage, the Court laid down both the rule and exception for relying on American copyright precedents:

The United States Copyright Act, both in its present (i.e., 1976) and earlier forms, has, of course, many similarities to the Canadian Act, as well as to the pre-existing Imperial Copyright Act. However, United States court decisions, even where the factual situations are similar, must be scrutinized very carefully because of some fundamental differences in copyright concepts which have been adopted in the legislation of that country. . . . That is not to say that we may not find some assistance in examining the experience in the United States and for that purpose I turn briefly to some of the decisions of the United States Federal Courts.<sup>12</sup>

The Court reviewed U.S. case law particularly on § 101(e) of the Copyright Act of 1909 preventing unauthorized “manufacture” of sound recordings, as well as more directly relevant U.K. precedents. It decided that the U.S. concept of “manufacture” was similar enough to the Canadian concept of “mak[ing]” for record pressers, like their American and British counterparts, to be liable for infringement if they lacked the copyright owner’s consent. The fact the record company might be liable too was irrelevant.

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<sup>8</sup> *Delrina Corp. v. Triolet Sys., Inc.*, (2002) 17 Can. Pat. Rep. (4th) 289, 2002 CanLII 11389, paras. 46–47 (Ont. C.A.).

<sup>9</sup> *Id.* paras. 80–81.

<sup>10</sup> [1980] 1 S.C.R. 357.

<sup>11</sup> Copyright Act, R.S.C. 1985, c. C-42, s. 3(1)(d).

<sup>12</sup> *Compo Co., Ltd.*, [1980] 1 S.C.R. at 367-68.

The second case, *CCH Canadian, Ltd. v. Law Society of Upper Canada*,<sup>13</sup> concerned legal publishers who claimed that the Law Society library's provision of a photocopy and faxing service for lawyers who wanted access to court opinions infringed the publishers' copyrights. In dismissing the claim, the Court considered, among other points, whether or not (1) the headnotes, case summaries, and indexes added to the case reports were "original" enough to warrant copyright, and (2) the Law Society's conduct constituted "fair dealing for the purpose of research."<sup>14</sup>

On originality, the Court saw two contrasting trends in U.K. and U.S. law, which had both found favor with Canadian courts at various times. One in U.K. law required the work merely to originate from an author and not be copied. The other, symbolized by O'Connor J.'s judgment in *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>15</sup> demanded some creativity beyond mere "sweat of the brow." Citing *Compo*, the Court indicated that that "U.S. copyright cases may not be easily transferable to Canada" but added:

This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas. As such, O'Connor J.'s concerns [in *Feist*] about the "sweat of the brow" doctrine's improper extension of copyright over facts also resonate in Canada.<sup>16</sup>

The Court concluded that the Canadian test of originality lay somewhere between the British and the American one. It required an intellectual effort that involved the exercise of skill and judgment beyond the mechanical or trivial.<sup>17</sup> Headnotes, case summaries, and indexes qualified; minor editing and additions to the case reports did not.

On fair dealing, the Court held the way the Law Society handled photocopying by and for lawyers did in fact constitute fair dealing for the purpose of legal research. Unlike the U.S. law on fair use, Canada's list of allowable fair dealing purposes is closed and the *Act* contains no fairness criteria. Nonetheless, the Federal Court of Appeal, encouraged by the *Compo* case to "find some assistance in examining the experience in the United States,"<sup>18</sup> compiled a list of non-exhaustive factors drawn from U.K. caselaw and § 107 of the Copyright Act of 1976.<sup>19</sup> The Supreme Court of Canada summarized these as "(1) the purpose of the dealing; (2)

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<sup>13</sup> [2004] 1 S.C.R. 339, 2004 SCC 13.

<sup>14</sup> Copyright Act, *supra* note 11, ss. 5(1) ("original"), 29 ("fair dealing").

<sup>15</sup> 499 U.S. 340 (1991).

<sup>16</sup> See *CCH Canadian, Ltd.*, 2004 SCC para. 22.

<sup>17</sup> *Id.* para. 16.

<sup>18</sup> See citation in text accompanying *supra* note 12, *ad finem*.

<sup>19</sup> *CCH Canadian, Ltd. v. Law Soc'y of Upper Canada*, [2002] 4 F.C. 213, 2002 FCA 187, paras. 147–150 (also drawing on DAVID VAVER, COPYRIGHT LAW 191 (2000)).

the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work,” and approved them generally as “a useful analytical framework to govern determinations of fairness in future cases.”<sup>20</sup>

The third case, *SOCAN v. Bell Canada*,<sup>21</sup> involved a claim by Canada’s counterpart of ASCAP against online music providers such as iTunes, for making available streamed thirty-second clips of musical works on their website for users to listen to and decide whether or not to buy the full recording. The Supreme Court of Canada said that fair dealing involved a two-step test: (1) the activity must fall within an allowable purpose (here “research”), a relatively low threshold to cross since the purposes were all interpreted liberally; and (2) the activity must then satisfy *CCH*’s fairness criteria, where most of the “analytical heavy-hitting” would occur.<sup>22</sup> The Court held that providing resources to facilitate research by customers constituted fair dealing by the providers for the purpose of research, and dismissed SOCAN’s claim.

The Court found the U.S. fair use law issues raised in this case interesting more as contrast than precedent. Specifically, it rejected SOCAN’s argument, based on U.S. case law, that only transformative uses could be fair. Saying it thought U.S. case law was not that categoric, the Court nevertheless added:

But even if [transformative use] were a requirement under American law, this Court has previously cautioned against the automatic portability of American copyright concepts into the Canadian arena, given the “fundamental differences” in the respective legislative schemes [citing *Compo*]. This caution has resonance in the fair dealing context.<sup>23</sup>

One may therefore conclude that Canadian lawyers and courts will profit from regularly consulting treatises like *Nimmer*, especially when new points arise and the statutory provisions are comparable. At worst, the exercise may highlight differences and sharpen understanding; at best, it may provide persuasive precedents or at least interesting arguments. American and other lawyers may well find similar interest in Canadian treatises and court decisions.

### III

Copyright defenses such as fair use or its Canadian counterpart, fair dealing, may be a case in point. One may wonder what more could be said about them that has not been said already, and often. As it happens, quite a lot — as is evidenced by two of the Supreme Court cases already men-

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<sup>20</sup> See *CCH Canadian, Ltd.*, 2004 SCC, para. 53.

<sup>21</sup> 2012 SCC 36.

<sup>22</sup> *Id.* para. 27.

<sup>23</sup> *Id.* para. 25.

tioned, *CCH v. Law Society* and *SOCAN v. Bell Canada*,<sup>24</sup> and two other judgments of the Court delivered in 2012:<sup>25</sup> the idea that the statutory defenses to copyright infringement, such as fair dealing, should be conceived of not as mere exceptions or limitations to copyright but as user rights.

The idea is not entirely unfamiliar to American lawyers. In 1991 Patterson and Lindberg published a monograph on user rights that conceptualized American copyright law and its interrelation with First Amendment principles as a balance between authors, publishers, and users.<sup>26</sup> Patterson and Lindberg were concerned more with the neglected subject of user rights, particularly fair use and personal use, but their argument logically covers other copyright defenses too.

The conceptualization of fair use as a user right has, however, been little judicially recognized in the United States. Its main champion was Judge Birch in the Eleventh Circuit who, with Patterson and Lindberg specifically in mind, wrote in *Bateman v. Mnemonics, Inc.*:<sup>27</sup>

Although the traditional approach is to view “fair use” as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused — this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right.

Judge Birch later repeated this view, adding that the U.S. Supreme Court’s requirement that fair use must be “procedurally asserted as an affirmative defense does not detract from its constitutional significance as a guarantor to access and use for First Amendment purposes.”<sup>28</sup>

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<sup>24</sup> See *supra*, notes 13, 21, respectively.

<sup>25</sup> *Alberta (Educ.) v. Canadian Copyright Licensing Agency*, 2012 SCC 37 (delivered simultaneously with the *SOCAN* decision); Reference re Broad. Regulatory Policy CRTC 2010-167 & Broad. Order CRTC 2010-168, 2012 SCC 68, para. 36, noting Copyright Act’s provision of “user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions.”

<sup>26</sup> L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* (1991).

<sup>27</sup> 79 F.3d 1532, 1542, n.22 (11th Cir. 1996). Patterson and Lindberg’s book with its discussion of user rights is cited later in the opinion. *Id.* note 32. Birch was a student at Emory Law School during the time Patterson taught copyright law there and later practised law in Macon and Atlanta, Georgia, before becoming a judge.

<sup>28</sup> *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 n.3 (11th Cir. 2001).



In both judgments, Birch's opinion was expressed in a footnote and *Nimmer* duly recorded the idea of user rights and the second quotation in full — in a footnote.<sup>29</sup> One may infer that the treatise author preferred to stay officially agnostic on a point that, by its placement, he recognized was a minority view in U.S. law.

The Supreme Court of Canada seemed unaware of these developments when it spoke about user rights in the *CCH* case, its first encounter with fair dealing. Yet it had laid the groundwork for *CCH* two years earlier in a shift away from a mechanistic treatment of copyright issues towards one that more realistically balanced owner, author and user interests:

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.<sup>30</sup>

These sentiments were plainly lost on the legal publishers in the *CCH* case, who repeated before the Supreme Court the argument they had lost before the Court of Appeal that “the Act's exemptions, such as the fair dealing provisions, ought to be narrowly construed.”<sup>31</sup> The Supreme Court rejected the argument in terms that apply to all statutory defenses to infringement:

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'

<sup>29</sup> 4 DAVID NIMMER & MELVILLE B. NIMMER, *Nimmer on Copyright* § 13.05, n.4 (2001).

<sup>30</sup> *Théberge v. Galerie d'Art du Petit Champlain, Inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, paras. 30–32 (holding that the ink transfer of an image did not infringe the right to “reproduce,” noting (*id.* para. 72) that it was reaching a similar result to *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997)).

<sup>31</sup> *CCH Canadian, Ltd. v. Law Soc'y of Upper Canada*, [2002] 4 F.C. 213, 2002 FCA 187, para. 126.

interests, it must not be interpreted restrictively. As Professor Vaver has explained:<sup>[32]</sup> “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.”<sup>33</sup>

In the two fair dealing cases it decided in 2012,<sup>34</sup> the Supreme Court of Canada emphatically reaffirmed the *CCH* case. User rights analysis in copyright law was here to stay: the rights were to be interpreted liberally, and more from a user and public than owner perspective. In a third case decided later that year, the rights of cable television suppliers under the Copyright Act to carry local broadcasting for free were called “user rights” by the Court, which prevented the rights from being undermined by a regulatory order that required the supplier to either pay the broadcaster or blank the signal.<sup>35</sup> These decisions all represent a “move away from an earlier author-centric view” to one that emphasizes user rights as an important tool to balance “protection and access” sensitively, so as to further the public interest in making culture widely available.<sup>36</sup>

The idea that users have rights just as owners do and that users are equals whose rights deserve the same respect as owners’ rights is of course anathema to copyright holders and those who act for them. To them, whatever a user can do with copyrighted material is an exception or indulgence, done by grace of the copyright owner, which may be withheld at whim: a case of *auteur*, or more realistically *propriétaire, obligé*.

There is however nothing inherently wrong in treating copyright defenses as user rights. They may not be entitlements that may be transferred or that have correlative duties in the way Hohfeld conceived of rights, but they are entitlements nonetheless: activities that by law are not infringements and so are “beyond the owner’s control.”<sup>37</sup>

The rhetoric of rights fits well with the Supreme Court of Canada’s view that copyright law is about balance: for to balance rights is to balance similar entities, while balancing a right against an exception is either nonsensical or starts off with a linguistic bias against the exception.<sup>38</sup> It is

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<sup>32</sup> VAVER, *supra* note 19, at 171.

<sup>33</sup> See *CCH Canadian, Ltd. v. Law Soc’y of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13.

<sup>34</sup> *SOCAN v. Bell Canada SOCAN*, 2012 SCC 36; *Alberta (Educ.) v. Canadian Copyright Licensing Agency*, 2012 SCC 37.

<sup>35</sup> Reference re Broad. Regulatory Policy CRTC 2010-167 & Broad. Order CRTC 2010-168, 2012 SCC 68, paras. 36, 58.

<sup>36</sup> *SOCAN*, 2012 SCC 36, paras. 9–11.

<sup>37</sup> Reference re Broad. Regulatory Policy, 2012 SCC, para. 58.

<sup>38</sup> See also TRIPS art. 7, which requires intellectual property protection and enforcement to contribute to innovation and dissemination “to the mutual advantage of producers and users of technological knowledge and *in a manner conducive to social and economic welfare, and to a balance of rights and obligations*” [emphasis added].

probably no coincidence that the Court's new perspective on copyright law came after two decades of decisions on the freedom of expression guarantee under the Canadian Charter of Rights and Freedoms of 1982. For copyright law is par excellence an area that deals with the sensitive area of expression of not just authors but everyone — and expression is, as the Supreme Court of Canada has emphasized in its post-Charter cases, a “vital concept” to be restricted only “in the clearest of circumstances.”<sup>39</sup> On this theory, cultural access would be treated as the rule, and copyright restriction as the exception.

The rhetoric of rights also has history on its side. Up to the early twentieth century, copyright law, like other intellectual property laws, neither had nor needed many specific user rights because owners had comparatively few rights. The main one was to prevent copying, and copying was taken literally: people could generally freely translate, make sound recordings and three-dimensional reproductions, and fairly adapt and abridge copyrighted works, because none of those acts constituted copying. Put a piano roll of a Stephen Foster song next to its sheet music, and anyone could tell they were not the same, and so clearly not copies.<sup>40</sup> Users thus had rights to do what owners had no right to stop them from doing; user rights began where owner rights stopped.

Even literal copies would not infringe if they did not unfairly appropriate or use the prior author's work.<sup>41</sup> Which brings us back to *Copinger on Copyright*. When W.A. Copinger first published his treatise in 1870, he copied quite a bit from George Curtis's earlier American treatise,<sup>42</sup> including the definition of copyright infringement almost verbatim. There is no record of Curtis's complaining, and there would have been no point. Both Curtis and Copinger said in their books, this time in different words, that infringement required the copier's work to substitute for or otherwise injure the earlier work; if not, the copier's use was fair and not an infringement on either side of the Atlantic.<sup>43</sup>

<sup>39</sup> *Edmonton Journal v. Alberta (A.-G.)*, [1989] 2 S.C.R. 1326.

<sup>40</sup> *Boosey v. Whight*, [1900] 1 Ch. 122 (C.A.); *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

<sup>41</sup> Judge Birch's earlier statement (*see* text accompanying *supra* note 27) that the judicial doctrine of fair use merely excuses infringement may need qualification if it means accurately to state the pre-1911 English (and pre-1921 Canadian) law of fair use. It was for the plaintiff to prove the defendant had unfairly taken the plaintiff's work, not for the defendant to disprove it. The defendant may however have had an evidentiary burden to disprove a plaintiff's *prima facie* showing of unfairness.

<sup>42</sup> GEORGE T. CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT* (Little & Brown 1847).

<sup>43</sup> For a fuller discussion, see David Vaver, *Harmless Copying*, 25 *INTELL. PROP. J.* 19, 24-26 (2012).

What Copinger did in the nineteenth century was often called the exercise of “a right of fair use.” That is how *Copinger’s* editor Easton described it in the edition that was published straight after the passage of the Copyright Act, 1911 (U.K.), the same Act which the 1921 Canadian Copyright Act substantially copied, and which remains the backbone of current Canadian legislation. The original U.K. Copyright Bill preceding the 1911 *Act* lacked a fair dealing provision. Fair dealing came in as an amendment during debates in Parliament, and Easton could not understand why it was introduced at all. Fair dealing for any purpose had always been acceptable, he said, and surely the new Act did not mean to take away “the rights of fair user [sic] previously enjoyed under the old law.”<sup>44</sup>

So in talking of user rights in the twenty-first century, the Supreme Court of Canada has resurrected, perhaps unwittingly, a usage and tradition stretching back into the nineteenth century that had become obscured for most of the twentieth century, until Patterson and Lindberg drew attention to it in their 1991 work.

The usage is however now freighted with the concerns of the twenty-first century rather than the nineteenth. When the Supreme Court speaks of copyright law’s need to achieve a “proper balance between protection and access,” the language echoes the customary international law of human rights treaties such as the Universal Declaration of Human Rights of 1948. Article 27(1) of the Declaration provides that everyone has “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.” The Article goes on in subsection (2) to provide for the author’s right to “the protection of the moral and material interests resulting from [his] scientific, literary or artistic production.” Significantly, this ordering tracks the Supreme Court of Canada’s treatment of freedom of expression noted earlier, where access is the rule and protection the exception.<sup>45</sup> Article 15(1) of the International Covenant on Economic, Social and Cultural Rights of 1966 maintains the same order of priority, and its official Commentary also makes clear that intellectual property is a lesser right than the rights to participate in cultural life and enjoy the benefits of scientific progress. In fact, intellectual property is, as in the Universal Declaration, the last on the long list of rights set out — unsurprisingly trumped by such rights as the right to work, equality, social security, health, and education. Being tradable, time-limited, often corporate, and merely statutory, intellectual property can be here today and gone tomorrow while, according to the

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<sup>44</sup> COPINGER ON COPYRIGHT 144 (James M Easton ed., 5th ed. 1915).

<sup>45</sup> See *supra* note 39 and accompanying text.

Commentary, “human rights are timeless expressions of the fundamental entitlements of the human person.”<sup>46</sup>

Whether or how far a user right may be restricted or contracted out of is an intriguing question. Equating user rights with human rights would certainly help transform user rights beyond mere defenses and give them substantive content. One might, for example, use human rights concepts to challenge the use of digital locks that deny access to an intending fair dealer; might such a denial unreasonably interfere with the fair dealer’s Charter freedom of expression? Are the 2012 amendments to the Copyright Act that support such a denial<sup>47</sup> a valid exercise of Parliament’s constitutional power over “copyrights,” when a fundamental purpose of copyright, to facilitate access, is thwarted?<sup>48</sup>

#### IV

The concept of user rights adopted by the Canadian courts may not be universally well-received initially, partly because its full implications have not yet fully been worked out. Author-centric and owner-centric jurisdictions will instinctively react negatively.<sup>49</sup> After all, authors and copyright holders want money, not balance or user equality. By contrast, jurisdictions that view copyright’s primary purpose as — to quote *Nimmer*<sup>50</sup> — “not to reward the author but rather to secure the general benefits derived by the public from the labors of authors” may find user rights a concept worth considering for their copyright law. And, while one is at it, why not for all intellectual property laws?

<sup>46</sup> See Peter Yu, *IP and Human Rights in the Nonmultilateral Era*, 64 FLA. L. REV. 1045, 1052-53 (2012).

<sup>47</sup> Copyright Act, *supra* note 11, secs. 41–41.22.

<sup>48</sup> For such a suggestion for Australian law, see *Stevens v. KK Sony Computer Entm’t*, [2005] HCA 58, para. 218; see also DAVID VAVER, *INTELLECTUAL PROPERTY: COPYRIGHT, PATENTS, TRADE-MARKS* 44-45 (2d ed. 2011).

<sup>49</sup> See RETO HILTY & SYLVIE NÉRISSEON, *BALANCING COPYRIGHT – A SURVEY OF NATIONAL APPROACHES* 19-23 (2012).

<sup>50</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.03[A] (2013) (footnotes and internal quotes removed).