EDITED BY JANIS JEFFERIES AND SARAH KEMBER

Whose Book is it Anyway?

A View from Elsewhere on Publishing,
Copyright and Creativity

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13. Show me the Copy! How Digital Media (Re)Assert Relational Creativity, Complicating Existing Intellectual Property and Publishing Paradigms¹

Joseph F. Turcotte

Introduction

It is important to recognize that emerging technological changes, especially communications media, are reciprocally engaged with changing social, economic, political, and cultural dynamics — even those that have a long history.² This relationship needs to be understood in order to address the myriad ways that long-standing social and economic practices in developed countries are being reoriented alongside the rise of digital and networked communication technologies. In particular,

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- 1 This chapter develops arguments made elsewhere (cf. Carys Craig and Joseph F. Turcotte with Rosemary J. Coombe, 'What's Feminist About Open Access? A Relational Approach to Copyright in the Academy', *feminists@law*, 1.1 (2011), 1–35) and presented on the panel 'Agency and Ethics: Media and Communications in the Digital Era' at the Canadian Communication Association Annual Meeting at Congress of the Humanities and Social Sciences, Wilfrid Laurier University and University of Waterloo, Waterloo, ON, 30 May 2012. The author would like to acknowledge and thank Professors Carys J. Craig and Rosemary J. Coombe for their formative work in these areas and the helpful comments of the anonymous reviewers.
 - 2 Cf. Harold A. Innis, *Political Economy in the Modern State* (Toronto: University of Toronto Press, 2018).

digital technologies are giving new life to socio-cultural practices based on the appropriation and recombination of already existing cultural resources, and extending creative practices developed with the earlier advent of electronic technologies. Prior to digitization, electronic media enabled recombinant forms of cultural production: from Canadian pianist Glenn Gould's use of electronic media to the outer boroughs of New York City where the pioneers of hip-hop music used turntables and vinyl records to create a new art form, electronic technologies facilitated emerging and innovative creative practices while simultaneously rekindling marginalized forms of social and cultural production.

The rise of digital technologies has similarly contributed to the birth of a so-called remix culture, wherein the appropriation and recombination of existing texts and cultural works is deployed in novel and potentially transformative ways.³ Such practices demonstrate the vitality of relational creativity⁴ and should not be viewed in isolation, as they and contribute to the re-emergence of socially embedded forms of knowledge production, dissemination, and collaboration. However, dominant economic and legal systems, such as intellectual property (IP) law, in general, and copyright law, in particular, potentially impede these types of creativity, as they remain grounded on normative foundations that privilege Romantic conceptions of individual genius and creativity rather than relational and appropriative forms of creation.⁵ The extension of IP law into international trade and transnational economic realms extends this disjuncture globally, shifting normative positions surrounding whether 'bad artists copy — good artists steal'⁶ to punitive concerns and affirmations that 'to copy is to steal'.⁷

3 Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008), <https://doi.org/10.5040/9781849662505>

4 Carys J. Craig, *Copyright, Communication, and Culture: Towards a Relational Theory of Copyright* (Cheltenham and Northampton, MA: Edward Elgar, 2011), <https://doi.org/10.4337/9780857933522>

5 Cf. Martha Woodmansee and Peter Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature*, 3rd ed. (Durham, N.C.: Duke University Press, 1994).

6 Debra L. Quentel, 'Bad Artists Copy-Good Artists Steal: The Ugly Conflict between Copyright Law and Appropriationism', *UCLA Entertainment Law Review*, 4 (1996), 39–80.

7 Graham Dutfield, 'To Copy is to Steal: TRIPS, (Un)free Trade Agreements and the New Intellectual Property Fundamentalism', *Journal of Information, Law & Technology*, 1 (2006), 1–13.

This chapter seeks to find a middle ground, arguing that existing IP law does not properly align with how human creativity increasingly occurs and fails to reflect the emerging conditions of knowledge production facilitated by digital technologies and the reassertion of relational creativity. The chapter begins by re-presenting earlier arguments on relational creativity⁸ to demonstrate how knowledge production and creativity are necessarily socio-cultural processes that depend upon already existing works. Using the writing and publication processes surrounding scholarly research as an exemplar, this chapter highlights how authors and collaborators work within and beyond relationships with other researchers and existing bodies of work to generate novel insights. Next, the chapter employs feminist legal critique to demonstrate how copyright law obscures this relational creativity by privileging authorial categories based on Romantic notions of individuated creative practice. It then demonstrates how digital technologies and attendant practices are reasserting relational creativity in academic scholarship through open access movements, which complicate existing IP and academic publishing paradigms. By way of conclusion, the chapter discusses recent copyright developments in Canada, including rulings by the Supreme Court of Canada (SCC) as well as changes to Canada's *Copyright Act*, which seemingly recognize and validate the necessity of relational creativity in academic contexts, in particular, in the form of users' rights. In light of the such affirmation of fair dealing and user rights, especially in academic and research contexts, more open forms of knowledge production and exchange need to be viewed as complex and dialectical resources, which can be simultaneously commodified as intellectual goods, through copyright and related law, while serving to threaten proprietary publishing paradigms in that they facilitate alternative social and economic relationships — including unauthorized and illicit means of distributing and sharing knowledge-based resources.

8 cf. Craig, *Copyright, Communication, and Culture*; Carys J. Craig, 'Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law', *Journal of Gender, Social Policy and the Law*, 15.2 (2007), 207–68; Craig, Turcotte with Coombe, 'What's Feminist About Open Access?'

Relational Creativity and Socio-Cultural Authorship

IP and copyright law depend upon authorial categories that are premised upon individuated forms of creation and creative expression.⁹ From such perspectives, individual creators work independently or in small groups and are necessarily entitled to gain from their creative works due to moral claims based on Lockean conceptions of just reward.¹⁰ Furthermore, state governments grant proprietary rights to these expressions and inventions through IP law as a means to incentive such creativity: by fusing ideals of individual entitlement with utilitarian views of economic rationality and self-interest,¹¹ legislators seek to benefit both the author(s) and the general public through the creation and dissemination of useful knowledge. Authors are regarded as individuated, rights-bearing legal and economic subjects under this calculus and they are afforded the right of exclusivity over the expressions of their creativity. This exclusivity rests, in part, on the belief that incentives are necessary to encourage authors to produce expressions of knowledge and information,¹² thus contributing to the public good. This incentive theory is combined with a belief that such creative expression occurs independently and originally — further necessitating the granting of the right(s) to exclude others and the public from appropriating creative works.¹³ However, as legal scholars

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- 9 Cf. Craig, *Copyright, Communication, and Culture*; Craig, Turcotte with Coombe, 'What's Feminist About Open Access?'; Woodmansee and Jaszi, *The Construction of Authorship*; C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962).
 - 10 Yacine Dottridge, 'Creative Exploitation: Intellectual Property as a Form of Neoliberal Cultural Policy', Master of Arts, Major Research Paper (Toronto: Ryerson University and York University, 2012), <https://digital.library.ryerson.ca/islandora/object/RULA:3210>; Lawrence Liang, 'The Man Who Mistook His Wife for a Book', in Gaëlle Krikorian and Amy Kapczynski (eds.), *Access to Knowledge in the Age of Intellectual Property* (New York: Zone Books, 2010), pp. 277–92, <https://mitpress.mit.edu/books/access-knowledge-age-intellectual-property>
 - 11 Edwin C. Hettinger, 'Justifying Intellectual Property Rights', *Philosophy and Public Affairs*, 18.1 (1989), 31–52 (p. 50); Christopher May, *The Global Political Economy of Intellectual Property Rights: The New Enclosures*, 2nd ed. (London and New York: Routledge, 2010), pp. 7–8, <https://doi.org/10.4324/9780203873816>
 - 12 David Vaver, *Intellectual Property Law*, 2nd ed. (Concord: Irwin Law, 2011), p. 22, https://digitalcommons.osgoode.yorku.ca/faculty_books/134
 - 13 Grantland S. Rice, *The Transformation of Authorship in America* (Chicago: University of Chicago Press, 1997), p. 76.

Martha Woodmansee and Peter Jaszi demonstrate, this liberal-economic construction of authorship is a distinctly Modern conception.

Despite its seemingly universal and natural position in contemporary society, the concept of the Modern author presupposed by IP law 'is a relatively recent formation — the result of a quite radical reconceptualization of the creative process that culminated less than 200 years ago in the heroic self-presentation of Romantic poets'.¹⁴ This shift altered the authoritative claims of literature and the production of knowledge away from imitation and relational forms of creation towards a 'valorization of originality'.¹⁵ Moral as well as political and economic claims from — or on behalf of — the individual became rooted in liberal-Romantic conceptions of the essence of human expression. Through this Romantic lens, 'worthwhile' productivity is viewed as acts that are 'authentic' and 'original' to the individual author; acts of imitation, therefore, are disparaged as of a lesser quality, not necessarily deserving of moral worth. Copying, appropriating, or imitating are consequently regarded 'as evidence of a lesser state of human civilization and development'.¹⁶ IP regimes based upon these premises, especially copyright, reinforce these assumptions, introducing them into industrial and economic relationships that privilege claims of 'possessive individualism'¹⁷ over other creative processes that based on dialogue and intrapersonal communication.

The dominant liberal, Modern, Romantic conception of authorship does not necessarily reflect how creation and innovation always occur. A return to acknowledging relational forms of creativity is found in literary philosopher Roland Barthes' declaration of the 'death of the author',¹⁸ which argues creativity remains inherently and necessarily imbued within external and social relationships that contribute to the development of ideas and creations. From this perspective, acts of creativity are not wholly original but necessitate many acts of adaptation, appropriation, and derivation of other texts that form a reserve-source of ideas and inventions that contribute directly to future innovations.

14 Supra note 5, p. 3.

15 Marilyn Randall, *Pragmatic Plagiarism: Authorship, Profit and Power* (Toronto: University of Toronto Press, 2001), p. 47, <https://doi.org/10.3138/9781442678736>

16 Craig, Turcotte with Coombe, 'What's Feminist About Open Access?', p. 6.

17 Macpherson, *The Political Theory of Possessive Individualism*, p. 3.

18 Roland Barthes, *Image, Music, Text* (London: Fontana Press, 1977), pp. 142–48.

As copyright scholar Jessica Litman describes, this includes ‘a process of adapting, transforming, and recombining what is already “out there” in some other form.’¹⁹ Creativity is, therefore, a relational activity that includes ‘a combination of absorption, astigmatism, and amnesia’.²⁰ Yet, through enduring beliefs in possessive individualism, external relationships are obscured or forgotten in favour of ideas about creative inspiration occurring within the originator — which are then backed through the force of copyright and IP law.

The processes behind the production of scholarly literature and research demonstrate the reductionist nature of possessive individualism — a perspective that overlooks the relational activity that underscores creative endeavours. As Barthes elaborates, ‘[t]he text is a tissue of quotations drawn from the innumerable centres of culture [...] [T]he writer can only imitate a gesture that is always anterior, never original. His (sic) only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them.’²¹ Researchers and scientists are implicated within these external relational activities, whether knowingly or not:

the production of information works in a circle. An existing horizon of knowledge [...] is the raw material to which human creativity or innovation is applied. The resulting product is then passed back into this horizon of knowledge as raw material for other acts of creativity, and the circle begins again. With each cycle, something new is created, but this new product always carries a trace of the earlier innovations on which it builds.²²

Creative production, or the generation of ‘new’ knowledge and information, is based on recombinant processes that appropriate existing knowledge-based resources to create new informational outputs.²³ Research and science depend on these interactions: existing hypotheses and methods are appropriated and deployed to test, confirm, or challenge existing findings and ways of thought. In this sense, ‘academics actively

19 Jessica Litman, ‘The Public Domain’, *Emory Law Journal*, 39 (1990), 965–1024 (p. 967).

20 *Ibid.*, p. 1011.

21 *Supra* note 18, p. 137.

22 Arun Kundnani, ‘Where Do You Want to Go Today? The Rise of Informational Capital’, *Race & Class*, 40.2–3 (1998/99), 49–71 (p. 56).

23 Marcus Boon, *In Praise of Copying* (Cambridge, MA: Harvard University Press, 2010), <http://www.hup.harvard.edu/features/in-praise-of-copying/>

engage in knowledge construction as members of professional groups [...] their discursual decisions are socially grounded, influenced by the broad inquiry patterns and knowledge structures of their disciplines'.²⁴ This form of relational creativity 'insists upon the practical impossibility of independent creation and declares that all texts are necessarily reproductions of [parts of] other texts: it is in the nature of expression and cultural development that the new builds upon the old'.²⁵

Relational creativity does not discount the individual's contribution to creativity. Instead, it works to destabilize Romantic authorial categories, foregrounding relational and constructivist positions. Feminist political and legal theory offers an instructive conception of the self that does not preclude these socially related impulses: 'relational feminism' offers a map for resolving the liberal privileging of authorship with a social constructivist position.²⁶ This position affords 'attention both to the individuality of human beings and to their essentially social nature',²⁷ highlighting that 'autonomy itself is understood in relational terms; if we take as a starting point the intrinsic sociality of human beings'.²⁸

From this perspective, individual texts or academic scholarship are not necessarily the product of individuated labour and inspiration. Instead, these acts are part of broader social, cultural, economic, and political relationships that infuse an individual's understanding with external influences. While an individual's *expression* of creativity may be articulated as an authorial concept based in originality, the expression is always already implicated within external networks of *ideas* that fundamentally contribute to the development of subsequent innovations and creations. The relational perspective of creativity and authorship recognizes the duality inherent in such actions. Rather than either obscuring the individual component of authorship — the ability to appropriate various sources for new ends — or the relational aspects of creativity — the imbedded and interconnected nature of human expression — the relational perspective offers a way of articulating the

24 Ken Hyland, 'Academic Attribution: Citation and the Construction of Disciplinary Knowledge', *Applied Linguistics*, 20.3 (1999), 341–67 (p. 362).

25 Craig, *Copyright, Communication, and Culture*, p. 16.

26 Craig, Turcotte with Coombe, 'What's Feminist About Open Access?', p. 3.

27 Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities', *Yale Journal of Law & Feminism*, 1 (1989), 7–36 (p. 27), <https://pdfs.semanticscholar.org/4fca/3904f6b21b83b5cb2030e569415390011491.pdf>

28 Craig, Turcotte with Coombe, 'What's Feminist About Open Access?', p. 11.

necessarily entangled and interrelated aspects that contribute to creative and innovative advances. As the next section will demonstrate, however, the relational nature of creativity and scholarly research is obscured by contemporary IP law based on the liberal, Modern, Romantic ideal of an individuated 'author' working apart from external, social relationships.

Authorship, Control and Intellectual Property

Throughout history, emerging communications, media, and transportation technologies have had the tendency to disrupt the social, cultural, and political relations and hierarchies of the societies to which they are introduced. Since Ancient Greek times, the ability of emerging technologies to facilitate changes in social relationships has been a point of discussion: for example, Plato depicts Socrates viewing the advent of writing as a potentially destabilizing influence with the potential to undermine the capacities of memory and learning.²⁹ Similarly, subsequent technological developments, including the printing press and electronic broadcasting, in the forms of radio and television, gave rise to optimism and concern over the impact of media devices.³⁰ From this perspective, the ongoing maturation of the Internet and associated digitally networked technologies contribute to shifting social, cultural, political, and economic dynamics.³¹ The potential for technologically facilitated disruption has caused existing hierarchies of power to find ways to mitigate these changes to maintain their advantages. Under the auspices of an emerging 'informational economy',³² established economic and political actors have become increasingly attuned to the ways that digitally networked technologies threaten business models and economic rationales based upon the creation, control, and

29 Plato, trans. by Alexander Nehamas and Paul Woodruff, 'Phaedrus', in John M. Cooper (ed.), *Plato: Complete Works* (Indianapolis, IN and Cambridge, MA: Hackett Publishing Company, 1997).

30 Cf. Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto: University of Toronto Press, 1962); Neil Postman, *Amusing Ourselves to Death* (New York: Viking, 1985).

31 Manuel Castells, *The Rise of Network Society*, 2nd ed. (Oxford: Blackwell, 2009), <https://doi.org/10.1002/9781444319514>

32 Manuel Castells and Peter Hall, 'Technopoles: Mines and Foundries of the Informational Economy', in Manuel Castells and Peter Hall (eds.), *Technopoles of the World: The Making of 21st Century Industrial Complexes* (New York: Routledge, 1994), pp. 1–11.

dissemination of content and informational goods and services. Debates about IP law have become key sites where the disruptive potential of emerging technologies is actively resisted.

In recent years, debates surrounding IP law have moved increasingly into popular forums and become topics of critical discussion.³³ This politicization of IP law is in line with historic developments, which are replete with theoretical and legal contestation.³⁴ Historically, the development of Modern, (neo)liberal IP regimes has had two parallel threads. The first is a debate over whether IP is best understood as an extension of an individual's moral rights or whether the rights granted through IP law are utilitarian privileges afforded to the rights holder in order to spur creativity, which will, ultimately, serve the public good.³⁵ This debate revolves around the questions of authorship discussed above; the former position presupposes the author as an individual creating apart from social and cultural influence, whereas the latter conceives of the author as an individual working within social and cultural practices to which she is indebted and to which she contributes.

The second strand that has shaped the development of IP regimes revolves around technology: more specifically, how emerging technologies enable the ability to copy, appropriate, and reproduce works in previously impossible ways. This technological component has been fundamental to the make-up of IP laws since their inception. From this perspective, the first examples of Modern IP, the Venetian patent statutes of 1474 and Britain's Statute of Anne (1710) covering copyright, emerge out of the desire to address emerging technological capabilities to copy, appropriate, and disseminate inventions and creative works in new ways. These Statutes also represent the beginning of an international IP regime. They construct the notion of IP — more specifically, patents and copyright — in terms of an individuated author who is provided with

33 Sebastian Haunss, *Conflicts in the Knowledge Society: The Contentious Politics of Intellectual Property* (Cambridge, UK: Cambridge University Press, 2013), <https://doi.org/10.1017/cbo9781139567633>

34 Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago: University of Chicago Press, 2010), <https://doi.org/10.7208/chicago/9780226401201.001.0001>; Susan K. Sell and Christopher May, 'Moments in Law: Contestation and Settlement in the History of Intellectual Property', *Review of International Political Economy*, 8.3 (2001), 467–500.

35 Cf. David Vaver, 'Intellectual Property: Is It Still A 'Bargain'?', *Intellectual Property Journal*, 24 (2012), 143–58.

the legal right to determine how his or her works are appropriated and reproduced. The adoption of the printing press in Europe facilitated the emergence of an industry devoted to the reproduction of ‘unauthorized’ texts, highlighting the interrelated nature of emerging technologies and IP. As English scholar Mark Rose argues:

The institution of copyright is the child of technology. Without printing technology — without the means of multiplying copies of a book more readily and easily than by hand copying of manuscripts — there would be no need for copyright. Anglo-American copyright has its roots in 16th- and 17th-century guild practices that served to preserve order in the book trade and to protect booksellers’ investments.³⁶

In the realm of copyright, the enactment of the Statute of Anne was in response to this technological advance. Tellingly, concerns over the ownership and reproduction of creative works are stated in the first section of the Statute:

Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families [...].³⁷

Thus, the interest of individual authors to own and transfer the rights over their works as well as to manage the appropriation and reproduction of texts became a central tenet of IP law.

This technological concern has remained a priority throughout subsequent developments of IP law: as technologies have developed and enabled the reproduction of creative works through various media forms, IP law has been adjusted accordingly. Subsequent technologies such as photography, recorded music, radio and video have resulted in changes to IP law in order to maintain the position of rights holders and the individuated author.³⁸ The moral rights of the individuated author

36 Mark Rose, ‘Technology and Copyright in 1735: The Engraver’s Act’, *The Information Society*, 21 (2005), 63–66 (p. 63).

37 *The Statute of Anne: 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*, 8 Anne, c. 19 (1710), The Avalon Project: Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/anne_1710.asp

38 Cf. Mark Rose, ‘Mothers and Authors: *Johnson v. Calvert* and the New Children of Our Imaginations’, *Critical Inquiry*, 22 (Summer) (1996), 613–33 (pp. 614–15).

were prioritized in order to ensure that the fruits of one's 'own' labour were legally protected, so that the rights holders were able to profit from their creative works.

However, there is another important theory that has undergirded the development of IP law: a balance between the private rights of individual owners and the benefit of the public good through access to knowledge and information.³⁹ This public-private balance foregrounds an awareness of the relational nature of creativity, by attempting to encourage individuated forms of creativity based upon access to socially disseminated cultural products. Specifically in the American context, IP law developed with a concern for balancing private and public rights. Arguments persisted between those who viewed IP as another form of private property and others who envisioned that access to information and knowledge was a social good. As literature scholar Lewis Hyde describes it:

One side argued that the history of the common law showed that authors and inventors had a natural right to their work, and that like other such rights it should exist in perpetuity; the other side replied that the common law contained no such record, that copyrights and patents 'were merely privileges, which excludes the idea of a right,' that such privileges come from statutes rather than nature and that they could and should be limited in term.⁴⁰

This debate was ultimately resolved and intellectual property laws sought to balance the two positions. Authors, inventors and rights holders were afforded a limited-term monopoly over the control of their works, after which these works would enter the public domain where subsequent creators could freely appropriate them.⁴¹

However, since at least the negotiations surrounding the World Trade Organization (WTO) and the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement,⁴² this balance has been disrupted, as these

39 Gaëlle Krikorian and Amy Kapczynski (eds.), *Access to Knowledge in the Age of Intellectual Property* (New York: Zone Books, 2010), <https://mitpress.mit.edu/books/access-knowledge-age-intellectual-property>; Sara Bannerman, *International Copyright and Access to Knowledge* (Cambridge, UK: Cambridge University Press, 2016), <https://doi.org/10.1017/CBO9781139149686>

40 Lewis Hyde, *Common as Air: Revolution, Art and Ownership* (New York: Farrar, Straus and Giroux, 2010), pp. 86–87.

41 Cf. Johns, *Piracy: The Intellectual Property Wars*.

42 Cf. Peter Drahos with John Braithwaite, *Information Feudalism* (London: Earthscan Publications, Ltd., 2002), <https://doi.org/10.4324/9781315092683>

limited-term monopolies have grown longer: 'The story of copyright law in the twentieth [and now early twenty-first] century has been the process of expanding, lengthening, and strengthening [...]'.⁴³ This expansion and deepening of the international IP regime, in terms of protectable subject matter and the duration of the terms of protection,⁴⁴ distorts the historical balances that informed the creation of these legal structures.⁴⁵

This history of IP reform reveals tension between private and public interests, and how these concerns intersect with conceptions of the author as an individuated being who does her work separate from, or at least with no obligation to, external cultural influences. Under this view, it is the right of authors — and subsequent rights holders — to determine how their works are appropriated and reproduced. Technological innovations have played a central role in these discussions as subsequent technologies have made replication easier, thus threatening the control that rights holders have over the works in question. In particular, digital uses of published content create antagonisms between authors, publishers, and users,⁴⁶ with each group seeking to access and control published content for their own benefit.

The debate between private and public interest conceptions of IP centres on the role and nature of the author or creator. The private property perspective, which is largely ingrained in contemporary IP law, presupposes an individuated form of authorship and creativity.⁴⁷ The subject and property become intimately intertwined and are inseparable unless transferred elsewhere, as the object 'must become the production of the subject in order for it to be protected by law'.⁴⁸ The object is only afforded the status and protection of property if it is created by, and can be attributed, to a nameable author. In this way, IP

43 James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008), p. 4, <http://thepublicdomain.org/thepublicdomain1.pdf>

44 Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, UK: Cambridge University Press, 2003), <https://doi.org/10.1017/cbo9780511491665>

45 Bannerman, *International Copyright and Access to Knowledge*.

46 Cf. Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Cheltenham and Northampton: Edward Elgar, 2010), p. 19, <https://doi.org/10.4337/9781849805209>

47 Cf. Woodmansee and Jaszi, *The Construction of Authorship*.

48 Bernard Edelman, *Ownership of the Image: Elements of a Marxist Theory of Law* (London: Routledge, 1979), p. 45.

law facilitates the mis- and over-appropriation of creative works and privileges the interests of the individuated author over relational and discursive forms of creativity.⁴⁹ As legal scholar Shelley Wright offers:

The existing definition of copyright [...] presupposes that individuals live in isolation from one another, that the individual is an autonomous unit who creates artistic works and sells them, or permits their sale by others, while ignoring the individual's relationship with others within her community, family, ethnic group, religion — the very social relations out of which and for the benefit of whom the individual's limited monopoly rights are supposed to exist.⁵⁰

However, the public good notion of intellectual activity points to a more collaborative form of creative action, described above. This perspective asserts that creativity is based upon social relationships and interactions. This collaborative interpretation of creativity demonstrates the interconnected nature of the human subject. Rather than being separated from social interactions, this view recognizes how human subjects, as authors, work within networks of associated beings and ideas. From this relational perspective, creation does not happen in spaces of isolated individual brilliance. Instead, creativity is the result of complex relationships between sources of inspiration. Therefore, the public, or community, plays an integral role in creative activity.

Historic debates over the public-private nature of IP law demonstrates the influence that relational forms of creativity have in articulating balanced means for protecting and incentivizing creative endeavours. Although this balanced approach undergirds the historic development of IP regimes, the entrenchment of IP into international trade via the TRIPS Agreement has coincided with a disruption of the public-private balance in favour of models of IP regulation based upon the interests of entrenched industries and the economic rationales of large, IP-trading states. As IP and law scholars Peter Drahos and John Braithwaite demonstrate, the negotiations surrounding an international IP regime governed through the WTO via TRIPS focused on perpetuating the business models of content providers.⁵¹ Leading

⁴⁹ Ibid., p. 70.

⁵⁰ Shelley Wright, 'A Feminist Exploration of the Legal Protection of Art,' *Canadian Journal of Women and the Law*, 7 (1994), 59–96 (pp. 73–74).

⁵¹ Supra note 42.

up to and following the negotiations, lobbyists from the entertainment industry — predominately in the US — worked to advance IP provisions that strengthened the positions of IP rights holders, often at the disservice of emerging creative and innovative industries.

Following the adoption of the TRIPS Agreement, lobbyists for IP rights holders have continued to work and promote the extension of these rights and provisions elsewhere, while simultaneously extending the scope and duration of these rights through so-called TRIPS-plus agreements, which are often conducted at the bilateral or regional level.⁵² International trade negotiations work to strengthen the rights afforded to content creators and distributors in order to safeguard their business models against future, technologically facilitated threats and disruptions. These efforts have gone so far that they are increasingly drawing criticism from a disparate group of governments of developing nations, as well as concerned civil society actors. The rationale behind these anti-IP movements lies in a belief that these agreements and their IP provisions represent an overreach based upon the desires of certain corporate industries, which do a disservice to emerging industries and the development of domestic, local, and community-based socio-economic alternatives.⁵³ Importantly, the proprietary norms expanded through the international IP regime rest upon the rationale of possessive individualism mentioned above.⁵⁴ In doing so, TRIPS-plus IP law further subverts and obscures the relational aspects of creativity in favour of individuated forms of economic growth.

Relational creativity, however, remains an integral component of existing practices and emerging social circumstances. The opposition to further IP expansion from developing and indigenous communities serves to demonstrate this. From the perspective of developing states, the current international IP regime is ill-suited for the needs of countries at disparate levels of socio-economic development.⁵⁵ IP expansion from

52 Supra note 44.

53 Amy Kapczynski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property,' *Yale Law Journal*, 117.5 (2008), 839–51; Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*.

54 Sharmishta Barwa and Shirin M. Rai, 'Knowledge and/as Power: A Feminist Critique of Trade Related Intellectual Property Rights', *Gender, Technology and Development*, 7.1 (2003), 91–113.

55 Boatema Boateng, *The Copyright thing doesn't Work here: Adinkra and Kente Cloth and Intellectual Property in Ghana* (Minneapolis, MN: University of Minnesota Press,

largely developed states and their international and corporate allies does little to address the needs of countries facing problems associated with health, food security, education, and environmental concerns.⁵⁶ Indigenous communities rooted in more collaborative histories of knowledge production similarly dispute advances in international IP regimes that are based upon liberal, Romantic, and Enlightenment ideals. For these communities, legal regimes based upon the private ownership of information-based goods do not cohere with traditional and historic relationships that valorise the community and an interconnection with external influences including the environment.⁵⁷ Adding to these oppositional forces is an increasingly assertive lobby group comprising businesses and civil society actors that base their claims upon emerging socio-technological realities facilitated by digital and information communication technologies.⁵⁸ In the same way that Indigenous communities oppose international IP expansion, in part, because it does not cohere with relational forms of knowledge maintenance and production, digital technologies are facilitating the rise of communities that privilege relational creative practices in academic contexts.

Digitization, Open Access and the (Re)Emergence of Relational Creativity

The ongoing development of the Internet and associated digital, networked technologies continues to recast our social, cultural, political, and economic landscape. At the same time, these technological

2011), <https://doi.org/10.5749/minnesota/9780816670024.001.0001>; Miranda Forsyth and Sue Farran, *Weaving Intellectual Property Policy in Small Island Developing States* (Cambridge, UK: Intersentia, 2015), <https://doi.org/10.1017/9781780685731>

56 Duncan Matthews, *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (Cheltenham: Edward Elgar, 2011), <https://doi.org/10.4337/9780857931245>; Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*; Tzen Wong and Graham Dutfield (eds.), *Intellectual Property and Development: Current Trends and Future Scenarios* (Cambridge, UK: Cambridge University Press, 2011), <https://doi.org/10.1017/cbo9780511761027>

57 Kathy Bowery and Jane Anderson, 'The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?', *Social and Legal Studies*, 18.4 (2009), 479–504; Madhavi Sunder, 'The Invention of Traditional Knowledge', *Law and Contemporary Problems*, 70.2 (2007), 97–124.

58 Jyh-An Lee, *Non-Profit Organizations and the Intellectual Commons* (Cheltenham: Edward Elgar, 2012), <https://doi.org/10.4337/9781781001585>

advances are reasserting creative methods that have been previously obscured by modern, liberal conceptions of the individuated author. Digital technologies foreground the recursive and relational nature of creativity, highlighting how previous ideas, texts, and forms are appropriated during the creation of derivative and innovative works. Legal scholar Lawrence Lessig describes how these technologies facilitate creative activities based on combining previous cultural texts in new ways.⁵⁹ While these acts appear unprecedented and rooted in the socio-technological circumstances of the time, Lessig argues that only the techniques of this relational 'read-write (RW)' are novel and that recombinant creativity harkens back to previous eras in which information was shared and passed along to new generations through primarily oral means.⁶⁰ Literary theorist Thomas Pfau reminds us that nineteenth-century authors and artists regularly used recombinant techniques and allusion to generate new writings and creative works.⁶¹ Emerging digital technologies reassert this relational past, demonstrating the recursive nature of human expression and creativity.

The historic development of the Internet revolved around a focus on open access and information sharing being fundamental for spurring new ideas and creative expressions. The open and collaborative nature of the early Internet was ingrained in the technical apparatuses and internal coding of the network's infrastructure. Interoperability and enhanced accessibility were privileged in order to facilitate information sharing and collaboration across varying distances. Aspirational rhetoric accompanied this, promoting a belief that increased communication and information sharing could facilitate '[a]n enduring peace, an unprecedented rise in prosperity, an era of comfort, convenience and ease and a political world without politics or politicians — these were the hopes that cultivated a wave of belief in the magically transforming power of technology'.⁶² Facilitating possibilities for interaction, collaboration, and information sharing

⁵⁹ Supra note 3.

⁶⁰ Ibid., p. 82.

⁶¹ Thomas Pfau, 'The Pragmatics of Genre: Moral Theory and Lyric Authorship in Hegel and Woodsworth', in Martha Woodmansee and Peter Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994), pp. 133–58.

⁶² James W. Carey, 'Historical Pragmatism and the Internet', *New Media & Society*, 7.4 (2005), 443–55 (p. 445), <https://doi.org/10.1177/1461444805054107>

were regarded as means for pursuing a techno-utopian ideal based upon vibrant intellectual activity and innovation. While subsequent changes to the Internet's architecture as well as IP law in the name of commercial progress have led to the Internet being remade and recoded to facilitate informational capitalist expansion by increasing security and dissuading supposedly illicit acts of information sharing,⁶³ digitally networked technologies continue to enable creative agents to appropriate, combine, and recast cultural texts and ideas.

As the Internet and world-wide web have matured, various technological fixes have been developed to re-introduce forms of artificial scarcity over digital goods. In particular, digital technological protection measures (TPM) techniques are often used to affix so-called digital locks to media files as a way of prescribing, via code, terms of use and access.⁶⁴ The blockchain, a distributed ledger for verifying and circulating digital assets such as Bitcoin, is also increasingly used by producers and distributors of digital goods and assets to maintain control over the use and circulation of digital files online, with the promise of providing fair remuneration to artists and creators.⁶⁵ These technologies themselves further exemplify the public-private tensions within IP law and the culture industries. TPM and blockchain-based technologies seek to maintain the commercial and financial aspects of cultural texts and works, whether as goods in and of themselves or as assets for creator and/or rights-holder. In particular, TPMs have been added to TRIPS-plus trade agreements requiring signatory countries to prohibit anti-circumvention even when done for legitimate purposes.⁶⁶ The viability of technological controls such as these remain to be seen, especially in environments outside of the closed systems they depend

63 Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

64 Stefan Bechtold, 'The Present and Future of Digital Rights Management — Musings on Emerging Legal Problems', in Eberhard Becker, Willms Buhse, Dirk Günnewig, and Niels Rump (eds.), *Digital Rights Management: Technological, Economic, Legal and Political Aspects* (Berlin: Springer Science & Business Media, 2003), pp. 597–654, https://doi.org/10.1007/10941270_36

65 Cf. Rachel O'Dwyer, 'Limited Edition: Producing Artificial Scarcity for Digital Art on the Blockchain and its Implications for the Cultural Industries', *Convergence: The International Journal of Research into New Media Technologies* (2018), 1–21, <https://doi.org/10.1177/1354856518795097>; Martin Zeillinger, 'Digital Art as "Monetised Graphics": Enforcing Intellectual Property on the Blockchain', *Philosophy & Technology*, 31.1 (2018), 15–41.

66 Christopher May, 'Digital rights management and the breakdown of social norms', *First Monday*, 8.11 (2003), <https://doi.org/10.5210/fm.v8i11.1097>

on. If, for example, this artificial scarcity is lost once a file is transferred into a non-TPM format or a file that can be circulated on the broader world-wide-web.

In response to the growing commercialization and prioritization of the Internet and digital content, a host of online activists are working to retain the accessible nature of the digital realm. Anthropologist Christopher Kelty describes the 'open source' software movement as an initiative committed to developing and disseminating digital code and technologies that retain the Internet's open ethos.⁶⁷ The open source movement is a reaction against perceived overreach of private ownership over IP, rooted in the belief that an open and accessible Internet benefits from the creative potential of increased collaboration and relational creativity. Others describe open source as 'an oasis of anarchist production'.⁶⁸ Rather than 'locking in' content and information via digital code, open source initiatives allow their creative works to be freely accessible so that subsequent programmers can fix problematic elements of the software and create new and improved uses as well as possibilities. Various quasi-legal elements, such as Creative Commons licenses and the GNU General Public License, employ basic IP concepts such as attribution while enabling rights holders to easily and identifiably share their works with like-minded users. While such licenses are based upon the individuated authorship paradigm ingrained in the IP regimes that they are based upon, these tools implicitly recognize the relational nature of creativity by facilitating greater accessibility to knowledge and the creation of derivative works.

The Open Society Institute, a social justice initiative founded by billionaire George Soros, describes the basic tenets of this open and accessible Internet:

By 'open access' [...] we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without

67 Christopher Kelty, 'Geeks, Social Imaginaries and Recursive Publics', *Cultural Anthropology*, 2.2 (2008), 185–214; Christopher Kelty, *Two Bits: The Cultural Significance of Free Software* (Durham, N.C.: Duke University Press, 2008), <https://doi.org/10.1215/9780822389002>

68 Yochai Benkler, 'Freedom in the Commons: Towards a Political Economy of Information', *Duke Law Journal*, 52 (2003), 1245–76 (p. 1246).

financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.⁶⁹

This approach seeks to mesh existing IP and authorial categories with (re)emerging relational creative practices: ‘Open access principles seek instead to maintain and contribute to a vibrant public sphere based upon public domain, accessible and/or re-useable materials, thereby leveraging the enormous possibilities for innovation and exchange that online, networked communication technologies afford’.⁷⁰ Technological advances are transforming ingrained hierarchies of knowledge production, protection, and promotion and (re)asserting interconnected conceptions of authorship and creativity.

Since at least the early 2000s, many librarians and academics have worked to advance a movement towards open access in scholarly publishing, which seeks to publish literary and scholarly works in ways free from proprietary IP regimes. For example, the 2003 Berlin Declaration on Open Access to Knowledge and Information in the Sciences and Humanities,⁷¹ have helped to advance the cause of access to knowledge in educational and scientific settings. The Berlin Declaration seeks to address concerns raised by practitioners in the library and archive communities over issues including restrictive user rights and prohibitively expensive licensing regimes.⁷² The Berlin Declaration⁷³ follows two other open access statements of principle — the Budapest Open Access Initiative (2002)⁷⁴ and the Bethesda Statement on Open Access Publishing (2003)⁷⁵ — and states:

69 Cited in Ann Bartow, ‘Open Access, Law, Knowledge, Copyrights, Dominance and Subordination’, *Lewis & Clark Law Review*, 10.4 (2006), 869–84 (pp. 873–74).

70 Craig, Turcotte with Coombe, ‘What’s Feminist About Open Access?’, p. 20.

71 Max Planck Society and Max Planck Institute for the History of Science, *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*, 22 October 2003, <http://openaccess.mpg.de/Berlin-Declaration>

72 Peggy E. Hoon, ‘Who Woke the Sleeping Giant?: Libraries, Copyrights, and the Digital Age’, *Change*, 35.6 (2003), 28–33.

73 Supra note 71.

74 Leslie Chan, et al., *Budapest Open Access Initiative*, 2002, <https://www.budapestopenaccessinitiative.org/read>

75 Patrick Brown, et al., *Bethesda Statement on Open Access Publishing*, 2003, <http://legacy.earlham.edu/~peters/fos/bethesda.htm>

Our mission of disseminating knowledge is only half complete if the information is not made widely and readily available to society. New possibilities of knowledge dissemination not only through the classical form but also and increasingly through the open access paradigm via the Internet have to be supported. We define open access as a comprehensive source of human knowledge and cultural heritage that has been approved by the scientific community.⁷⁶

The Berlin Declaration, the Budapest Open Access Initiative, and the Bethesda Statement have collectively helped to develop an increasing open access movement⁷⁷ within academia and beyond.

According to the Budapest Open Access Initiative, open access relates, in part, to scholarly literature that is difficult to easily or affordably access due to burdensome and prohibitively expensive proprietary licensing regimes. It recognizes that copyright and IP law enable profit-oriented academic publishers to sequester large segments of academic scholarship⁷⁸ behind so-called paywalls and other technological protection measures, which reduce the availability of scholarly literature — especially in developing or historically marginalized locales.⁷⁹ These proprietary practices disrupt the relational nature of academic scholarship by adding financial burdens to access critical research and scholarly texts, which may impair use by other academics and scholars as well as broader communities of interest.

From the dominant IP perspective, the tools and resources that individuals use to orient themselves and engage in creative activity are regarded as market goods that must be purchased and/or licensed accordingly. The public good is subverted in order to privilege private gain, resulting in ‘an exploitative situation in which academic authors and the institutions for which they work are paying the costs of publication but losing control over their published works’.⁸⁰ In

76 Supra note 71.

77 Charles W. Bailey Jr., *What Is Open Access?*, preprint (2006), <http://digital-scholarship.org/cwb/WhatIsOA.htm>

78 Vincent Larivière, Stefanie Haustein, and Philippe Mongeon, ‘The Oligopoly of Academic Publishers in the Digital Era’, *PloS one*, 10.6 (2015), 1–15.

79 Manon A. Ress, ‘Open-Access Publishing: From Principles to Practice’, in Gaëlle Krikorian and Amy Kapczynski (eds.), *Access to Knowledge in the Age of Intellectual Property* (New York: Zone Books, 2010), pp. 475–96, <https://mitpress.mit.edu/books/access-knowledge-age-intellectual-property>

80 Nicholas Bramble, ‘Preparing Academic Scholarship for an Open Access World’, *Harvard Journal of Law & Technology*, 20.1 (2006), 209–33 (p. 217).

response, open access initiatives have been created, which seek to return public interest concerns to the fore⁸¹ and reflect the relational creativity inherent in academic scholarship and publishing. Such initiatives include practices of self-archiving in open online archives as well as the use of freely accessible open access online journals.⁸² Other open access initiatives use online message boards, indexable and searchable hashtags, and so-called shadow libraries to allow users to request and share scholarly texts more easily.⁸³ For the most part, such open access communities attempt to work alongside — or at least not to openly contradict — existing copyright and IP law; however, a guerrilla open access movement has also developed, which openly confronts the restrictive nature of proprietary scholarly publishing practices by openly flouting copyright and IP law by providing shadow libraries of paywall-protected texts.⁸⁴ Regardless of the practices employed to facilitate access, such practices represent a reassertion of the norms of relational creativity necessary to participate in academic research, scholarship, and writing.

Consultant, writer, and entrepreneur Matt Mason has labelled such situations as ‘the Pirate’s Dilemma’.⁸⁵ Mason’s work charts the ways in which emerging cultural groups from reggae to disco to punk rock and through to hip-hop have destabilized existing cultural norms by appropriating existing knowledge and information in new ways. The sharing of digital works in explicitly legal or potentially illicit ways, then, is an example of subversive countercultural elements challenging existing norms in the hopes of generating new social alternatives. The challenge for governments and industry is to adapt to and capitalize upon these changing circumstances. The appropriation of countercultural elements to become commodified goods and marketing opportunities

81 Peter Suber, *Knowledge Unbound: Selected Writings on Open Access, 2002–2011* (Cambridge, MA: MIT Press, 2016), <https://mitpress.mit.edu/books/knowledge-unbound>

82 Craig, Turcotte with Coombe, ‘What’s Feminist About Open Access?’, p. 24.

83 Guillaume Cabanac, ‘Bibliogifts in LibGen? A Study of a Text-Sharing Platform Driven by Biblioleaks and Crowdsourcing’, *Science and Technology*, 67.4 (2016), 874–84.

84 Balázs Bodó, ‘Pirates in the Library — An Inquiry into the Guerilla Open Access Movement’, in 8th Annual Workshop of the International Society for the History and Theory of Intellectual Property, CREATE, University of Glasgow, 2016.

85 Matt Mason, *The Pirate’s Dilemma: How Youth Culture is Reinventing Capitalism* (New York: Free Press, 2008).

throughout all of the musical epochs mentioned above demonstrates the resilience of the capitalist system to incorporate potentially destabilizing elements. In terms of digital disruption, businesses that were slow to adapt to changing technological circumstances during the rise of Napster and other peer-to-peer (p2p) networks have turned to legal and legislative means to ingrain their vested interests and historic business practices. From a socio-legal perspective, the evolution of law to reflect changing circumstances is an expected development. However, by often privileging the interests and business models of existing industry over emerging alternatives as well as social rights based claims, ongoing IP expansion threatens to prevent innovative forms of creativity.

Conclusion: Canada's 'Copyright Pentalogy' and the Affirmation of Fair Dealing

Content-based industries, most noticeably those based in developing countries, are, in part, responding to the social and technological changes facilitated by digital media with increased lobbying campaigns devoted to extending and projecting individuated forms of IP protection globally via trade-based mechanisms.⁸⁶ This has caused a global 'ratcheting up' of IP law in terms of breadth and scope.⁸⁷ However, as has been explored elsewhere,⁸⁸ these primarily economically motivated lobbies overlook the significant social, cultural, and political implications of IP law. IP regimes do not exist in purely economic realms as they enable and constrain access to social and cultural goods that are fundamental for human expression as well as political and cultural life. What is more, subsequent invention and creativity require access to the knowledge produced previously so that it may be refined, reworked, and redeployed. The primacy of individuated authorial rights within copyright law and international

86 *Supra* note 42.

87 Susan K. Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play', *PIJIP Research Paper no. 15* (Washington: American University Washington College of Law, 2010), <http://digitalcommons.wcl.american.edu/research/15>

88 Rosemary J. Coombe and Joseph F. Turcotte, 'Cultural, Political, and Social Implications of Intellectual Property Law in an Informational Economy', in UNESCO-EOLSS Joint Committee (ed.), *Encyclopedia of Life Support Systems (EOLSS): Culture, Civilization and Human Society* (Oxford: EOLSS Publishers, 2012), pp. 1–33.

trade agreements has contributed to a chilling effect whereby academic institutions and scholars are wary of asserting their relational creativity by sharing scholarly texts out of the fear of costly litigation and damages from rights holders.⁸⁹ Such fears limit the potential of relational creativity and the maintenance of a robust reservoir of knowledge and information for subsequent discovery and creativity.

Legal reform is one potential avenue for embracing the reassertion of relational creativity. Changes to Canada's copyright regime in 2012 demonstrate this: through the SCC's 'copyright pentalogy' of rulings⁹⁰ and the changes to Canada's *Copyright Act* contained in the Copyright Modernization Act, Bill C-11 (*Copyright Act*), Canada's domestic copyright regime was altered to accommodate more collaborative and open forms of knowledge creation and distribution. Importantly, in rulings on five copyright-related cases, the SCC 'provided an unequivocal affirmation that copyright exceptions such as fair dealing should be treated as users' rights';⁹¹ and, in Bill C-11 Canada's fair dealing provisions were expanded to include education, parody, and satire. These developments help bring greater clarity to the legal situation in Canada, where the success of a fair dealing argument was relatively uncertain and 'rather than engaging in risky copying activities, authors, publishers, creators, and users chose to, or were advised to, err on the side of caution'.⁹²

In addition the SCC's rulings helped to affirm fair dealing as not merely exceptions to copyright law but integral components of it.⁹³ When fair

89 Samuel E. Trosow, 'Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing' in Michael Geist (ed.), *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010), pp. 541–68, https://www.irwinlaw.com/content_commons/from_radical_extremism_to_balanced_copyright

90 Michael Geist, 'Introduction', in Michael Geist (ed.), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), pp. ii–xii, https://doi.org/10.26530/oapen_515360

91 *Ibid.*, p. iii.

92 Rosemary J. Coombe, Darren Wershler, and Martin Zeilinger, 'Introducing Dynamic Fair Dealing: Creating Canadian Digital Culture', in Rosemary J. Coombe, Darren Wershler and Martin Zeilinger (eds.), *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University of Toronto Press, 2014), pp. 3–42 (p. 9), <https://doi.org/10.3138/9781442665613-001>; for an overview of fair dealing in Canada, see Ariel Katz, 'Fair Use 2.0: The Rebirth of Fair Dealing in Canada', in Michael Geist (ed.), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), pp. 93–156, https://doi.org/10.26530/oapen_515360

93 Cf. David Vaver, 'User Rights', *Intellectual Property Journal*, 25 (2013), 106–10.

dealing is conceived of as a user's right⁹⁴ the attendant permissibility of the appropriation of copyright-protected content helps restore the so-called balance between creators and users — or private and public rights — that IP historically considered. For example, in *CCH v. Law Society of Upper Canada*, the SCC asserted the importance of users' rights in fair-dealing contexts.⁹⁵ Recognizing the existence of rights and obligations for both copyright owners and users, the SCC stated that, 'In order to maintain the proper balance between the rights of a copyright owner and users' interests, [fair dealing] must not be interpreted restrictively' (at Para. 48). In addition, "'research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained' (at Para. 51).

Similarly, in *SOCAN v. Bell Canada*, the SCC reaffirmed the central role that fair dealing plays in Canadian copyright law:

One of the tools employed to achieve the proper balance between protection and access in the Act is the concept of fair dealing, which allows users to engage in some activities that might otherwise amount to copyright infringement. In order to maintain the proper balance between these interests, the fair dealing provision 'must not be interpreted restrictively'.⁹⁶

The SCC's reaffirmation of the importance of fair dealing as well as the changes to the *Copyright Act* provide greater legal clarity for academic institutions and researchers to employ relational creativity through fair dealing exceptions. The SCC's rulings also stand apart from the rulings of courts in other countries, which 'have typically referred to exceptions to copyright infringements as defences that cannot form the basis of a legal claim'.⁹⁷ These developments may also provide greater clarity for Canadian academic institutions and libraries when considering their copyright and acquisition policies: under Canadian copyright law, educational copying will pass the fair dealing 'first stage purposes test' and then will be judged according to the 'second stage six part test'

94 David Vaver, 'Copyright Defenses as User Rights', *Journal of the Copyright Society of the USA* 60.4 (2013), 661–72.

95 Giuseppina D'Agostino, 'The Arithmetic of Fair Dealing at the Supreme Court of Canada' in Michael Geist (ed.), *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), pp. 187–211 (p. 187), https://doi.org/10.26530/oopen_515360

96 Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36, [2012] 2 S.C.R. 326 at Para. 11 (*SOCAN v. Bell*), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9996/index.do>

97 Pascale Chapdelaine, 'Copyright User Rights and Remedies: An Access to Justice Perspective', *Laws*, 7.3 (2018), 24–50 (p. 25).

of the 1) purpose, 2) character, 3) amount, and 4) alternatives to the copying as well as the 5) nature of the work and 6) effect of the work being copied.⁹⁸ However, the reliance on the Six-Part Test may, itself, lead to unintended consequences.⁹⁹

For authors and scholars engaged in academic publishing, the affirmation of fair dealing as a user's right is welcome news. As legal scholar Samuel Trosow argues:

At least with respect to the use of copyrighted materials in the educational and library context, the combined message from these measures is unmistakable and clear: users' rights are now firmly entrenched as core principles in Canadian copyright law, and the central policy tool to realize this principle is fair dealing.¹⁰⁰

For open access advocates in Canada, the SCC and Bill-C11 have provided legal mechanisms through which they can develop and deploy their normative claims around increasing access to scholarly texts. The reaffirmation and expansion of fair dealing in Canada enables innovative cultural and creative practices to develop with reduced fear of litigation or damages from rights holders as long as their uses of copyright-protected works accord with fair dealing.

However, the breadth and strength of users' rights remain contested in domestic and international contexts. In particular, the treatment of fair dealing as a users' right in Canadian law is not matched by recourse for users who have these rights impeded, such as through TPMs.¹⁰¹ Internationally, the inclusion of anti-circumvention provisions that privilege TPMs in international trade agreements over legitimate uses such as fair dealing for education purposes undermines the balance affirmed by the SCC and seemingly reflected elsewhere in Bill-C11. While recent Canadian free trade agreements such as the Canada-European Union Comprehensive Economic and Trade Agreement¹⁰² contain

⁹⁸ Supra note 90.

⁹⁹ Cf. supra note 95.

¹⁰⁰ Samuel E. Trosow, 'Fair Dealing Practices in the Post-Secondary Education Sector After the Pentalogy', in Michael Geist (ed.), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), pp. 213–33 (p. 213), https://doi.org/10.26530/oapen_515360

¹⁰¹ Supra note 97, p. 30.

¹⁰² Canada-European Union Comprehensive Economic and Trade Agreement, 30 October 2016, 20.9, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>

flexibilities regarding legitimate circumvention of TPMs, Canadian law does not reflect this. The Government of Canada is currently reviewing Bill-C11 and Canada's copyright law as part of the legislation's mandated five-year review. Whether any new legislation will affirm fair dealing as an appropriate limitation of TPMs in educational and research situations, at the least, remains to be seen.

Relational creativity, digital technologies, and the open access movement demonstrate the necessity of accounting for the various interests of rights holder and users in scholarly publishing contexts. The SCC's 'pentology' of rulings, as well as the expansion of fair dealing exemptions in the *Copyright Act* work to reaffirm the fundamental importance of allowing for relational creativity alongside copyright protections. Rather than viewing appropriation and inspiration as negative aspects of creativity, the ability of users to build from previously published work — even if copyright protected — serves an integral role in the generation and dissemination of subsequent knowledge and information. Canada's copyright framework and fair dealing provisions are a small step towards recognizing a proper calibration of competing rights and obligations around the 'copy' inherent to both copyright law and digital technologies.

Works Cited

- Bailey Jr. Charles W. (2006) *What Is Open Access?*, preprint, <http://digital-scholarship.org/cwb/WhatIsOA.htm>
- Bannerman, Sara (2016) *International Copyright and Access to Knowledge* (Cambridge, UK: Cambridge University Press), <https://doi.org/10.1017/CBO9781139149686>
- Barthes, Roland (1977) *Image, Music, Text* (London: Fontana Press).
- Bartow, Ann (2006) 'Open Access, Law, Knowledge, Copyrights, Dominance and Subordination', *Lewis & Clark Law Review* 10.4, 869–84.
- Barwa, Sharmishta and Shirin M. Rai (2003) 'Knowledge and/as Power: A Feminist Critique of Trade Related Intellectual Property Rights', *Gender, Technology and Development* 7.1, 91–113.
- Benkler, Yochai (2003) 'Freedom in the Commons: Towards a Political Economy of Information', *Duke Law Journal* 52, 1245–76.
- Max Planck Society and Max Planck Institute for the History of Science (22 October 2003) *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*, <http://openaccess.mpg.de/Berlin-Declaration>
- Boateng, Boatema (2011) *The Copyright Thing Doesn't Work Here: Adinkra and Kente Cloth and Intellectual Property in Ghana* (Minneapolis, MN: University of Minnesota Press), <https://doi.org/10.5749/minnesota/9780816670024.001.0001>
- Bodó, Balázs (2016) 'Pirates in the Library — An Inquiry into the Guerilla Open Access Movement', in 8th Annual Workshop of the International Society for the History and Theory of Intellectual Property, CREATe, University of Glasgow.
- Boon, Marcus (2010) *In Praise of Copying* (Cambridge, MA: Harvard University Press), <http://www.hup.harvard.edu/features/in-praise-of-copying/>
- Bowery, Kathy and Jane Anderson (2009) 'The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?', *Social and Legal Studies* 18.4, 479–504.
- Boyle, James (2008) *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press), <http://thepublicdomain.org/thepublicdomain1.pdf>
- Cabanac, Guillaume (2016) 'Bibliogifts in LibGen? A Study of a Text-Sharing Platform Driven by Biblioleaks and Crowdsourcing', *Science and Technology* 67.4, 874–84.
- Carey, James W. (2005) 'Historical Pragmatism and the Internet', *New Media & Society* 7.4, 443–55, <https://doi.org/10.1177/1461444805054107>

- Castells, Manuel (2009) *The Rise of Network Society*, 2nd ed. (Oxford: Blackwell), <https://doi.org/10.1002/9781444319514>
- Castells, Manuel and Peter Hall (1994) 'Technopoles: Mines and Foundries of the Informational Economy', in Manuel Castells and Peter Hall (ed.), *Technopoles of the World: The Making of 21st Century Industrial Complexes* (New York: Routledge), pp. 1–11.
- Coombe Rosemary J., and Darren Wershler, Martin Zeilinger (2014) 'Introducing Dynamic Fair Dealing: Creating Canadian Digital Culture', in Rosemary J. Coombe, Darren Wershler and Martin Zeilinger (eds.), *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University of Toronto Press), pp. 3–42, <https://doi.org/10.3138/9781442665613-001>
- Coombe Rosemary J., and Joseph F. Turcotte (2012) 'Cultural, Political, and Social Implications of Intellectual Property Law in an Informational Economy', in UNESCO-EOLSS Joint Committee (ed.), *Encyclopedia of Life Support Systems (EOLSS): Culture, Civilization and Human Society* (Oxford: EOLSS Publishers), pp. 1–33.
- Craig, Carys J. (2011) *Copyright, Communication, and Culture: Towards a Relational Theory of Copyright* (Cheltenham and Northampton, MA: Edward Elgar), <https://doi.org/10.4337/9780857933522>
- (2007) 'Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law', *Journal of Gender, Social Policy and the Law* 15.2, 207–68.
- and Joseph F. Turcotte with Rosemary J. Coombe. (2011) 'What's Feminist About Open Access? A Relational Approach to Copyright in the Academy', *feminists@law* 1.1, 1–35.
- D'Agostino, Giuseppina (2010) *Copyright, Contracts, Creators: New Media, New Rules* (Cheltenham & Northampton: Edward Elgar), <https://doi.org/10.4337/9781849805209>
- (2013) 'The Arithmetic of Fair Dealing at the Supreme Court of Canada' in Michael Geist (ed.), *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press), pp. 187–211, https://doi.org/10.26530/oapen_515360
- Dottridge, Yacine (2012) 'Creative Exploitation: Intellectual Property as a Form of Neoliberal Cultural Policy', Master of Arts, Major Research Paper (Toronto: Ryerson University and York University), <https://digital.library.ryerson.ca/islandora/object/RULA:3210>
- Drahos, Peter with John Braithwaite (2002) *Information Feudalism* (London: Earthscan Publications, Ltd.), <https://doi.org/10.4324/9781315092683>
- Dutfield, Graham (2006) 'To Copy is to Steal: TRIPS, (Un)free Trade Agreements and the New Intellectual Property Fundamentalism', *Journal of Information, Law & Technology* 1, 1–13.

- Forsyth, Miranda and Sue Farran (2015) *Weaving Intellectual Property Policy in Small Island Developing States* (Cambridge, UK: Intersentia), <https://doi.org/10.1017/9781780685731>
- Foucault, Michel (1984) 'What Is an Author?', in Paul Rabinov (ed.), *The Foucault Reader* (New York: Pantheon Books), pp. 101–19.
- Geist, Michael (2013) 'Introduction', in Michael Geist (ed.), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press), pp. ii–xii, https://doi.org/10.26530/oapen_515360
- Haunss, Sebastian (2013) *Conflicts in the Knowledge Society: The Contentious Politics of Intellectual Property* (Cambridge, UK: Cambridge University Press), <https://doi.org/10.1017/cbo9781139567633>
- Hettinger, Edwin C. (1989) 'Justifying Intellectual Property Rights', *Philosophy and Public Affairs* 18.1, 31–52.
- Hoon, Peggy E. (2003) 'Who Woke the Sleeping Giant?: Libraries, Copyrights, and the Digital Age', *Change* 35.6, 28–33.
- Hyde, Lewis (2010) *Common as Air: Revolution, Art and Ownership* (New York: Farrar, Straus and Giroux).
- Hyland, Ken (1999) 'Academic Attribution: Citation and the Construction of Disciplinary Knowledge', *Applied Linguistics* 20.3, 341–67.
- Jaszi, Peter (1994) 'On the Author Effect: Contemporary Copyright and Collective Creativity', in Martha Woodmansee and Peter Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, N.C.: Duke University Press), pp. 29–56.
- Johns, Adrian (2010) *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago: University of Chicago Press), <https://doi.org/10.7208/chicago/9780226401201.001.0001>
- Kapczynski, Amy (2008) 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property,' *Yale Law Journal* 117.5, 839–51.
- Katz, Ariel (2013) 'Fair Use 2.0: e Rebirth of Fair Dealing in Canada', in Michael Geist (ed.), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press), pp. 93–156, https://doi.org/10.26530/oapen_515360
- Krikorian, Gaëlle and Amy Kapczynski (eds.) (2010) *Access to Knowledge in the Age of Intellectual Property* (New York: Zone Books), <https://mitpress.mit.edu/books/access-knowledge-age-intellectual-property>
- Kelty, Christopher (2008) 'Geeks, Social Imaginaries and Recursive Publics', *Cultural Anthropology* 2.2, 185–214.
- (2008) *Two Bits: The Cultural Significance of Free Software* (Durham, N.C.: Duke University Press), <https://doi.org/10.1215/9780822389002>

- Larivière, Vincent, Stefanie Haustein, and Philippe Mongeon (2015) 'The Oligopoly of Academic Publishers in the Digital Era', *PloS one* 10.6, 1–15.
- Lee, Jyh-An (2012) *Non-Profit Organizations and the Intellectual Commons* (Cheltenham: Edward Elgar), <https://doi.org/10.4337/9781781001585>
- Lessig, Lawrence (1999) *Code and Other Laws of Cyberspace* (New York: Basic Books).
- (2008) *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press), <https://doi.org/10.5040/9781849662505>
- (2010) 'The Man Who Mistook His Wife for a Book', in Gaëlle Krikorian and Amy Kapczynski (eds.), *Access to Knowledge in the Age of Intellectual Property* (New York: Zone Books), pp. 277–92, <https://mitpress.mit.edu/books/access-knowledge-age-intellectual-property>
- Litman, Jessica (1990) 'The Public Domain', *Emory Law Journal* 39, 965–1024.
- Macpherson, C. B. (1962) *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press).
- Mason, Matt (2008) *The Pirate's Dilemma: How Youth Culture is Reinventing Capitalism* (New York: Free Press).
- Matthews, Duncan (2011) *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (Cheltenham: Edward Elgar), <https://doi.org/10.4337/9780857931245>
- May, Christopher (2010) *The Global Political Economy of Intellectual Property Rights: The New Enclosures*, 2nd ed. (London and New York: Routledge), <https://doi.org/10.4324/9780203873816>
- McLuhan, Marshall (1962) *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto: University of Toronto Press).
- Nedelsky, Jennifer (1989) 'Reconceiving Autonomy: Sources, Thoughts and Possibilities', *Yale Journal of Law & Feminism* 1, 7–36, <https://pdfs.semanticscholar.org/4fca/3904f6b21b83b5cb2030e569415390011491.pdf>
- Pfau, Thomas (1994) 'The Pragmatics of Genre: Moral Theory and Lyric Authorship in Hegel and Woodsworth', in Martha Woodmansee and Peter Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, N.C.: Duke University Press), pp. 133–58.
- Plato, trans. by Alexander Nehamas and Paul Woodruff (1997) 'Phaedrus', in John M. Cooper (ed.), *Plato: Complete Works* (Indianapolis and Cambridge, MA: Hackett Publishing Company).
- Postman, Neil (1985) *Amusing Ourselves to Death* (New York: Viking).
- Randall, Marilyn (2001) *Pragmatic Plagiarism: Authorship, Profit and Power* (Toronto: University of Toronto Press), <https://doi.org/10.3138/9781442678736>

- Ress, Manon A. (2010) 'Open-Access Publishing: From Principles to Practice', in Gaëlle Krikorian and Amy Kapczynski (eds.), *Access to Knowledge in the Age of Intellectual Property* (New York: Zone Books), pp. 475–96, <https://mitpress.mit.edu/books/access-knowledge-age-intellectual-property>
- Rice, Grantland S. (1997) *The Transformation of Authorship in America* (Chicago: University of Chicago Press).
- Rose, Mark (1996) 'Mothers and Authors: *Johnson v. Calvert* and the New Children of Our Imaginations', *Critical Inquiry* 22 (Summer), 613–33.
- (2005) 'Technology and Copyright in 1735: The Engraver's Act', *The Information Society* 21, 63–66.
- Sell, Susan K. (2010) 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play', *PIJIP Research Paper no. 15* (Washington: American University Washington College of Law), <http://digitalcommons.wcl.american.edu/research/15>
- (2003) *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, UK: Cambridge University Press), <https://doi.org/10.1017/cbo9780511491665>
- and Christopher May (2001) 'Moments in Law: Contestation and Settlement in the History of Intellectual Property', *Review of International Political Economy* 8.3, 467–500.
- Statute of Anne, The: 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*, 8 Anne, c. 19 (1710), The Avalon Project: Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/anne_1710.asp
- Suber, Peter (2016) *Knowledge Unbound: Selected Writings on Open Access, 2002–2011* (Cambridge, MA: MIT Press), <https://mitpress.mit.edu/books/knowledge-unbound>
- Sunder, Madhavi (2007) 'The Invention of Traditional Knowledge', *Law and Contemporary Problems* 70.2, 97–124.
- Trosow, Samuel E. (2013) 'Fair Dealing Practices in the Post-Secondary Education Sector After the Pentalogy', in Michael Geist (ed.), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press), pp. 213–33, https://doi.org/10.26530/oapen_515360
- (2010) 'Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing' in Michael Geist (ed.), *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law), pp. 541–68, https://www.irwinlaw.com/content_commons/from_radical_extremism_to_balanced_copyright

- Quentel, Debra L. (1996) 'Bad Artists Copy-Good Artists Steal: The Ugly Conflict between Copyright Law and Appropriationism', *UCLA Entertainment Law Review* 4, 39–80.
- Vaver, David (2013) 'User Rights', *Intellectual Property Journal* 25, 106–10.
- (2013) 'Copyright Defenses as User Rights', *Journal of the Copyright Society of the USA* 60.4, 661–72.
- (2012) 'Intellectual Property: Is It Still A 'Bargain'?', *Intellectual Property Journal* 24, 143–58.
- (2011) *Intellectual Property Law*, 2nd ed. (Concord: Irwin Law), https://digitalcommons.osgoode.yorku.ca/faculty_books/134
- Wong, Tzen and Graham Dutfield (eds.) (2011) *Intellectual Property and Development: Current Trends and Future Scenarios* (Cambridge, UK: Cambridge University Press), <https://doi.org/10.1017/cbo9780511761027>
- Woodmansee, Martha and Peter Jaszi (eds.) (1994) *The Construction of Authorship: Textual Appropriation in Law and Literature*, 3rd ed. (Durham, N.C.: Duke University Press).
- Wright, Shelley (1994) 'A Feminist Exploration of the Legal Protection of Art,' *Canadian Journal of Women and the Law* 7, 59–96.