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Copyright and Control

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Copyright and Control

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CLA Copyright Committee Peer-Reviewed *Feliciter* columns (fully footnoted; I am General Editor) – accessible from http://www.cla.ca/AM/Template.cfm?Section=Copyright_Information:

2. Rob Tiessen, “The Definition of ‘Commercially Available,’” 59(6) December 2013 at 14
4. Sam Cheng & Christina Winter, “Copyright Skills in Academic Libraries,” 60(2) April 2014 at 8
5. Margaret Ann Wilkinson, “Copyright Users’ Rights in International Law,” 60(3) June 2014 at 7
8. Carolyn Soltau & Adam Farrell, “Copyright and the Canadian For-Profit Library,” 60(6) December 2014 at 8
10. John Tooth, Becky Smith, Jeannie Bail, “Unravelling the Complexity of Music Copyright,” 61(2) April 2015 forthcoming

Look forward to further columns on the Public Lending Right, on the rights of Interviewees & Oral Histories, on Photographs, etc.
Control and Balance

Legislative control in Canada over copyright was given in 1867 exclusively to the Federal government: Constitution Act s 91 (23)

– Note that the concept of “copyright” is neither defined nor elaborated upon (differs from US).

“In Canada, copyright is a creature of statute, and the rights and remedies provided by the Copyright Act are exhaustive.”

Binnie, “Tariff 22”, para 81 (see also s 89 of the Act)
But, the Copyright Act must align with the Charter:

- Freedom of expression (and “media of communication”) is guaranteed in Charter (s 2(b))
  - Since copyright involves a limited term monopoly over dissemination of expressions, it is evident that a balance must be achieved between ...

Federal government control over copyright AND
Freedom of expression and media of communication
International evidence of the necessity for balancing control:

**Universal Declaration of Human Rights (1948) Art 27**

(1) 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.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.


(1) The States Parties to this present Covenant recognize the right of everyone:
   - To take part in cultural life;
   - To enjoy the benefits of scientific progress and its applications;
   - To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
“Balance” in Canadian Copyright

“Under the Copyright Act, the rights of the copyright holder and the limitations on those rights should be read together to give ‘the fair and balanced reading that befits remedial legislation’”.

Justice Binnie (as he then was), for SCC majority (at para 89), with Justice LeBel (as he then was) concurring, in the 2004 “Tariff 22” decision (emphasis added), quoting from para 48, 2004 CCH v LSUC unanimous decision written by the Chief Justice

“balance between promoting the public interest in the encouragement and dissemination of works… and…[preventing] someone other than the creator from appropriating whatever benefits may be generated.”

Binnie, for the majority in 2002 Théberge (para 30), quoted with approval by Chief Justice in CCH v LSUC (para 10)
## What balance?

<table>
<thead>
<tr>
<th>Decision</th>
<th>1st stated</th>
<th>2nd stated</th>
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<tbody>
<tr>
<td>CCH v LSUC; “Tariff 22”</td>
<td>“rights of the copyright holder”</td>
<td>“limitation on ... rights [of copyright holder]”</td>
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<tr>
<td>Théberge</td>
<td>“promoting the public interest in ... work”</td>
<td>“preventing someone other than the creator from appropriating benefits”</td>
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Balancing what?

Rights of the **copyright holder**
(CCH v LSUC; “Tariff 22”)

≠

Limitations on … rights [of copyright holder]
(CCH v LSUC; “Tariff 22”)

=  

Preventing someone other than the **creator** from appropriating benefits …
(Théberge)

Promoting the public interest in … works
(Théberge)
Does “Balance” have to be Binary?

Historically, YES:

KEY FEATURE of copyright interest – transferability ("assignees or assigns" identified specifically in the legislation)
Statute of Anne, 1709

The Congress shall have power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their respective Writings ....
US Constitution Art 1 §8 cl 8 (1787)

The “classic balance”: encouragement for dissemination of ideas in return for contractually transferable limited term monopolies over expressions of those ideas
Copyright created as mechanism to provide incentives to *individuals* to spur them to creativity -- in turn producing public benefits through dissemination of information.

STAKEHOLDERS REPRESENTED IN THE CREATION OF COPYRIGHT

- **Individuals**
  - As consumers
  - AND
  - as businesses

- **Society**
  - National economic interest
  - AND
  - public interest

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But is more than a binary balance evidenced in the current Copyright Act? **YES**

1. Original economic rights – works – s.3 -- “other subject matter” – ss 15, 18, 21 CORPORATE


3. Users’ Rights – ss 29 to 32.3 LIMITATIONS ON THE RIGHTS OF ECONOMIC RIGHTSHOLDERS (NO EFFECT ON MORAL RIGHTS)

[4. TPM and MRI – ss 41 to 41.27 -- whether or not it can be argued TPM and MRI are not copyright — but CORPORATE]
What is the CATALYST for the CHANGE in copyright from “classic” past to multi-faceted present?

TECHNOLOGY?

NO...
KEY BUSINESS ENVIRONMENT CHANGE:

17th - 18th C.  ➤  Mid-19th C.  ➤  Late 19th C. to Present

Patent

Copyright

Trademark

Separation of company from its individual owners

• e.g. Joint Stock Companies Act, UK 1844

The corporation as a person in its own right.

• e.g. Santa Clara Cty v Southern Pacific RR Co. 1886 US
• e.g. Salomon v A Salomon & Co Ltd 1897 HL
Mid 19th C Rise of Corporation changes landscape

Individual Interests

Corporate Interests
Not explicitly recognized in Copyright Law, at least in theory, OR
So recognized that they obliterate Individual Interests

Societal Interests
In classic IP (including copyright), societal growth through access to information
INHERENT © RESPONSE TO CORPORATE SEPARATION FROM INDIVIDUALS:

17th - 18th C. Copyright

Mid-19th C.

Late 19th C. to Present

MOVE TO INTRODUCE “Moral Rights” – non-transferable

Separation of company from its individual owners

• e.g. Joint Stock Companies Act, UK1844

The corporation as a person in its own right.

• e.g. Santa Clara Cty v Southern Pacific RR Co. 1886 US
• e.g. Salomon v A Salomon & Co Ltd 1897 HL
20th C, as Moral Rights gain acceptance:

- **Individual Interests**
  - Moral Rights - not transferable
  - Paternity
  - Integrity
    - (Divulgation)
    - (Withdrawal)

- **Corporate Interests**
  - Copyright - transferable
    - (Economic Rights)

- **Societal Interests**
  - (Dissemination, economic development)
As Technology Advances, Tensions and Divisions Created by Separation of Individuals from Companies (after Creation of Original IP) intensifies:

- **Individual Interests**: [Privacy]
- **Societal Interests**: [Personal Data Protection]
- **Moral Rights**
- **Corporate Interests**: [Confidential Information], [Data Protection], [TPM & DRM]
- **Copyright (Economic Rights)**, [Patent], [Trademarks]
Information Needs and the Copyright Regime

Users need (1) access to information and (2) indications of the authority of accessed information (both of work and author) in order to make decisions about using information:

• Economic rights in copyright act to enhance the user’s ability to access information;

• Moral rights act to provide indicators of the reliability (integrity rights) and authority (paternity rights) of information
  – The functions of the moral rights are increasingly important as the “old” indicators of authority (eg, the reputations of established publishers) become vastly diminished as self-publication and “free” republication become norms.
Traditional Academic Publishing Cycle –
Typical Economic Allocation of Literary Output

Ownership within the academic community and institutions

Ownership by private sector publishers

The point of assignment

Learning, Research, & Writing

Writing, Peer Review, & Publication

Publication, Distribution, & Dissemination

$
At the **end of the 20th Century**, when Academic Publishers, assigned rights by authors, joined Collectives to assert *their* assigned rights: Academic Institutions ended up Paying 3 Times for Written Product!

**Traditionally**, professors wrote and submitted articles to prestigious peer reviewed journals.

**Journals** assumed the copyright in return for publication.

**Institutions** paid AccessCopyright (formerly CANCOPY).

**Publication Revenue Cycle** – end of 20th C

**Journals** were purchased by academic libraries for use by students and professors.
When Original Copyright Owners Make Economic Copyright Decisions, they are Key Intellectual Property Policy Makers

Assert economic copyright rights?
1. Assign to traditional publishers?
   » Control shifts to publishers, whether foreign or domestic.
2. Assign to alternative publishers (those who do not insist on full transfer of rights)?
   » Some control shifts to publishers, whether foreign or domestic, some rights remain with original copyright holder.
3. Grant certain permissions
4. Exercise rights collectively?
   » Individually authors have little control over collective enforcement (though Access Copyright only requires non-exclusive assignment and therefore individual infringement action still possible) – but there is possible remuneration according to collective’s policies and possible control through governance of the collective…

OR

Renounce economic copyright rights?
If rights are renounced, the original owner ceases to be important as a policy-maker:

**Consequences of renunciation of economic rights:**

- No control of the work or other subject matter by the original copyright holder;
- No further potential for original copyright holder to exploit future economic value of that work or other subject matter;
- Works and “other subject matter” can exploited (throughout the period of copyright protection) by other persons (individual or corporate)...
When Original Copyright Owners Make Copyright & Moral Rights Decisions, they are Key Intellectual Property Policy Makers

Assert copyright economic rights?
1. Assign to traditional publishers?
   » Control with publishers, whether foreign or domestic.
2. Assign to alternative publishers (those who do not insist on full transfer of rights)?
   » Some control with publishers, whether foreign or domestic, some rights remaining with copyright holder.
3. Grant certain permissions
4. Exercise rights collectively?
   » Individually little control over collective enforcement (though Access Copyright only requires non-exclusive assignment and therefore individual infringement action still possible) – but possible remuneration according to collective’s policies and possible control through governance of collective?

Retain moral rights – or waive them as part of agreements focused on economic rights?
Effect of moral rights waiver in Canada:

• Waiver of moral rights is a uniquely Canadian legislative concept (introduced in 1988)

• Once a waiver is given to someone, unless otherwise indicated, any subsequent users authorized by the person (individual or corporate) receiving the waiver can also rely on the waiver (ss 14.1 and 17.1)

• In the United States, moral rights have only been legislated in a very narrow sphere – one not affecting this discussion – so it is possible American academic publishers will not seek moral rights waivers from their creators; in this case, in Canada, these creators, publishing with Americans, will be able to exercise their full moral rights in Canada (because they have never waived them) whereas those publishing with Canadian publishers will have waived their rights and thus will typically not be able to assert their moral rights in Canada.
The effect of the “open access” movement:

Reasons for adopting (from Glushko & Shoyama (2015))

• Enlightened self-interest
• Enlightened group interest
• Neo-Marxist rationale
• Taxpayer rationale
• Social justice rationale

“What happens when a grass-roots movement becomes mandated?

• Tri-Agency Open Access Policy on Publications (effective from May 1, 2015)

“Grant recipients are required to ensure that any peer-reviewed journal publications arising from Agency-supported research are freely accessible within 12 months of publication … [through] Online Repositories [or] Journals.”

“while one can support open access for some or all of these reasons, these rationales do not always operate in concert, and supporting … certain … forms may advance … some… without advancing the objectives of other”
Model of Typical “classic” contract:

Authors: Assignment of all economic rights

Canada: moral rights waiver, post 1988

Publication

Sometimes $$

Publishers
Not Contract but Permission Model:

Since no contractual exchange between author and publisher, neither can control economic uses once published – but nor can users be certain moral rights will not be claimed since legal status of waiver would not be certain (is general waiver for all public contemplated under s 14.1(2) given s 14.1(4) provision that others can claim through owner or licensee and here no licensee?)
Contract for Open Access in “hybrid” publication:

**AUTHORS**
- Assignment of economic rights
- Canada: moral rights waiver, post 1988
- $$$ Article Processing Charges [APC] -- often obtained from institution or government (grants)
  
**PUBLISHERS**
- Publication in “open access” form
Under the Tri-Council-influenced model 2015, authors may PAY publishers to publish their works as dictated by Tri-Council influenced institutions and the Tri-Council itself: Academic institutions can end up Paying 4 Times for works and other subject matter!

(3) Hybrid journals are purchased by academic libraries (with both open access and non-open content), in order to preserve full publications for use by students and professors.

(4) Universities pay Access Copyright for reproduction rights where not open access.

(1) Academic institutions support and encourage professors to write.

(2) Authors pay Article Processing Charges [APC] to publishers, using “public” funds, to release articles with “open access” permissions.

(2) Professors write and submit articles to prestigious peer-reviewed journals or venues.

Publication Revenue Cycle

$ $ $ $
Open Access Movement may frustrate Legislation Against Circumvention of TPMs & MRI

• Open access may detract from the over-balance toward corporate power created by the recent imposition of legal protection of TPMs & MRI – because open access necessarily means TPMs will not be installed;

• Open access can enhance the power of authors who have NOT waived their moral rights because avoiding TPMs leaves authors able to see their own works and ensure their moral rights are respected
  – No legislated exception for moral rights holders to circumvent TPMs to ensure respect for moral rights

• Can more be done to enhance moral rights in order to preserve indications of reliability & authority of sources for users?
Once moral rights are waived, creators cease to be important as policy-makers contributing to the authority of information sources ...

Consequences of renunciation of economic and moral rights:

– No control of the work or other subject matter by the original copyright holder;

– No further potential for original copyright holder to exploit future economic value of that work or other subject matter;

– Works and “other subject matter” may be available to be exploited (throughout the period of copyright protection) by other persons (individual or corporate);

– The author or performer cannot control connecting her or his name or pseudonym to the work or performance or cannot enforce his or her choice of anonymity – and cannot stop the connection of another person (individual or corporate) being connected with the work as author or performer

– The author or performer cannot ensure that the work or performance remains as it was originally conceived and executed by the author or performer

– The public loses legal protection of the “authority” of the work or performer’s performance (neither the authenticity of the work or performance nor the real identity of its creator are guaranteed)
Contractual power of Colleges & Universities

• In recent years colleges and universities have had **significant impact** on copyright policy in Canada by **negotiating** licenses for online materials that mirror the Canadian **“fair dealing”** legislative provisions (rather signing contracts that contain the American **“fair use”** provisions, other users’ rights provisions or no users’ rights provisions)

• Can this success be replicated in respect of supporting authors’ moral rights?
I would urge you to consider **a policy change in 3 steps** that will empower creators, better address users’ needs, preserve a multi-faceted balance in copyright and, thus, serve the public interest:

1. Use the influence of your position to **educate and encourage** authors and creators (including performers) to resist attempts to have them waive their moral rights as part of agreements involving their economic rights (open access or otherwise);

2. Use the influence of your position to **negotiate, as part of** licenses or purchases, for wording such that, even if vendors have asked creators to waive their moral rights, that the vendor will respect the rights legislated for authors and creators in ss 14.1, 17.1, 28.2 (referring the sections or setting out identical wording in the license (whether open access is involved or not);

3. Use your **influence in any relevant venue** to try to ensure that any type of “open access” that is supported leaves the moral rights of creators intact and in place.
Taking these three steps to re-invigorate authors’ control over their works and performances in key public interest policy-making by

- Ensuring creators are given ongoing controls over their works and performances;
- Redressing the imbalance in copyright in the 19th century which occurred when corporations became businesses apart from individuals and copyright ceased to be a matter of binary balancing (requiring, instead, balancing amongst multiple stakeholders);
- Meeting key users’ needs in the online, digital environment of distributed dissemination by preserving indications of the authority of available information (the integrity of the work and identification of authors as authors intend).
THANK YOU – for further background see:


