
1. Walking the copyright tightrope

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The sight of a tightrope walker in action usually elicits feelings of awe and wonder. When she stands on one side, poised and concentrated, with a daring smile on her face, the audience also sizes up, just as she must, the vast expanse of emptiness in front of (and below!) her. Carefully, she steps on the rope and starts her trek with few, if any, props to help her maintain her balance as the call of the emptiness challenges her determination to get to the other end. A collective sigh of relief always mixes with the applause when she reaches her goal. The show can go on.

Fifteen years ago, the Supreme Court of Canada started a balancing act of another kind, albeit one that is not as life-threatening: the definition of the purpose of copyright law. Unlike US copyright law, which flows from a constitutional mandate,¹ or even British copyright law, which can claim a philosophical ancestry in the Statute of Anne of 1709,² no similar justification exists for Canadian copyright law. It is therefore no surprise that the comments made by the highest court of the country, comments that are meant to guide the interpretation of the Copyright Act,³ were met with so much enthusiasm by members of the Canadian academic copyright community:⁴

The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately,

¹ ‘The Congress shall have the power ... (8) to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’, United States Constitution, art. I, § 8, c. 8.

² An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books to the Authors or Purchasers of such Copies, during the Times therein mentioned, 1710, 8 Anne, c. 19.

³ RSC 1985, c. C-42 (hereinafter Copyright Act).

⁴ As an example, see T. Scassa, ‘Interests in the Balance’ in M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005), 41.

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to prevent someone other than the creator from appropriating whatever benefits may be generated) ...

The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.⁵

The balancing exercise with which judges must imbue their decisions does not always pit the same copyright elements against each other. In the *Théberge* decision, where a painter was seeking to prevent the sale of canvases onto which the colours from posters and correspondence cards reproducing his works had been transferred, the author's copyright was being challenged by the property right of the owner of the posters and correspondence cards.⁶ The concept of balance was further developed by the Court in its landmark decision opposing the Law Society of Upper Canada to a major legal publisher over the photocopies of their publications by and for the members of the society in its library. In its determination of the relationship between the copyright owner's rights and the users' reliance on the exception of fair dealing for the purpose of research,⁷ the Court relied on its earlier iteration of the balancing act in copyright law to extend it to two other circumstances: the interpretation of the notion of originality and the relationship between copyright economic rights and exceptions. Originality must be defined so as to embody a balance between copyright owners' interests and those of the public:

As mentioned, in *Théberge*, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. ... By way of contrast, when an author must exercise skill and judgment to ground

⁵ *Théberge v. Galerie d'art du Petit Champlain*, 2002 SCC 34, at ¶¶30–31.

⁶ Compare the result in *Théberge* with that in the CJEU decision on a similar fact pattern in a referral by the Dutch Supreme Court: *Art & Allposters International BV v. Stichting Pictoright*, case C-419/13, 22 January 2015.

⁷ Copyright Act, s. 29.

originality in a work, there is a safeguard against the author being over-compensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.⁸

As for exceptions, it is not enough to understand that the copyright status as a protected work is itself the result of the balancing act as set out above. If an exception to copyright can come into play when a work is used, another balancing act must be achieved between the copyright owner's right and the eventual user's exception. This is where the Court expands its concept of the balance and dubs exceptions 'rights':

Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver has explained, ... 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation'.⁹

Since this first application of the balancing exercise in the field of exceptions, the Court has persisted in relying on this approach in later cases that it heard where copyright exceptions were at stake.¹⁰

Another context in which the Supreme Court of Canada expanded on the need for balance in copyright law is that of the interpretation of economic rights, particularly the relationship between related prerogatives. In *Entertainment Software Association v. SOCAN*,¹¹ where the crux of the matter lay in the relationship between the public performance right in the opening paragraph of section 3 (1) and the right to communicate to the public by telecommunication in the ensuing enumeration of various prerogatives, the Court again invoked the need to preserve the 'traditional balance between authors and users'¹² that requires recognizing the

⁸ *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 23, at ¶23.

⁹ *Ibid.*, at ¶48.

¹⁰ *SOCAN v. Bell Canada*, 2012 SCC 36; *Alberta (Education) v. Access Copyright*, 2012 SCC 37; *CBC v. SODRAC 2003 Inc.*, 2015 SCC 57.

¹¹ 2012 SCC 34.

¹² *Ibid.*, at ¶8.

'limited nature of creators' rights'¹³ to conclude that the right to communicate to the public by telecommunication can include streaming activities, but not downloading technology.¹⁴ In so doing, it introduced a new requirement for the interpretation of copyright prerogatives, which seems to flow from the need to maintain balance: technological neutrality.¹⁵ This began a chain reaction that continued in another case, whose decision was rendered on the same day, that also depended on the relationship between these two prerogatives.¹⁶

The culmination (so far ...) of the reliance on technological neutrality to interpret the notion of balance in copyright law has come in *CBC v. SODRAC*.¹⁷ Now, both concepts have become 'central to Canadian copyright law',¹⁸ and the efficiency gains obtained through new technology 'have nothing to do with the copyright holder's legitimate interests, or with the balance struck between the copyright holder and the user'.¹⁹ Paradoxically, however, this extension of the comprehension of the balance in copyright law comes at a time when the Court seems to be backtracking from its initial terminology: throughout its decision, it refers to the copyright holders' and users' 'interests' rather than to their 'rights'.

Whether they be called rights or interests, it is increasingly clear that the Canadian Copyright Act has become a battleground of opposing claims. The adversarial nature of judicial proceedings, of course, lends itself to such an approach; but, as the Court gives an indication each time, the opposition between right holders and users is also played out in the statute itself. Multiple strains of various natures actually coexist in the Copyright Act: some are easy to identify, while others are more hidden. Both types of tensions influence one's understanding of the law, and each will be examined below.

VISIBLE TENSIONS

An informed perusal of any copyright law should make it fairly obvious that the text often results from compromises that are reached by various

¹³ *Ibid.*, at ¶7.

¹⁴ *Ibid.*, at ¶32–44.

¹⁵ *Ibid.*, at ¶5.

¹⁶ *SOCAN v. Bell Canada*, 2012 SCC 36.

¹⁷ *Supra*, note 10.

¹⁸ *Ibid.*, at ¶51.

¹⁹ *Ibid.*, at ¶182.

stakeholders. The Canadian Copyright Act, in this respect, is no different from any other national legislative scheme in this area; but it also has its idiosyncrasies that highlight particularly well the tensions that are at play in this environment. These tensions exist among the rights themselves and between the rights and the exceptions that limit them. In order to breathe life into these dynamics, the Act relies, in some circumstances, upon institutions that are designed to facilitate the participation of authors and copyright owners in this process: collective societies. Again, collective societies exist in other jurisdictions as well, but the Canadian context in which they operate gives rise to situations that create some tensions of their own.

Tensions Among the Rights

Authors and copyright owners exercise rights that can conflict with each other. The very statement of the rights can lead to a puzzling assessment of the overall scope of the economic rights that are granted to them. Similarly, the clear alignment of Canadian copyright policy with the 1961 Rome Convention,²⁰ coupled with preoccupations with national constitutional issues, makes for a particular relationship between the protection of original works and what is known in many countries as ‘neighbouring’ or ‘related’ rights. Lastly, of course, one should not forget the well-known tensions between economic rights and moral rights.

Copyright v. copyright

Part I of the Canadian Copyright Act comes after several provisions of the Act that deal with the short title of the statute²¹ and a number of definitions that may be relevant throughout it.²² Entitled ‘Copyright and Moral Rights in Works’, it starts with section 3, which is drafted as a definition of copyright itself,²³ a definition that is essentially comprised of a list of various economic prerogatives that the copyright owner enjoys.²⁴ This is where, for instance, the right of reproduction and the

²⁰ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome, 26 October 1961.

²¹ Copyright Act, s. 1.

²² Copyright Act, ss. 2-2.7.

²³ See, *infra*, note 24.

²⁴ ‘For the purposes of this Act, *copyright*, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in

right to communicate to the public by telecommunication are found. The uninitiated reader could reasonably assume that it provides the definitive word on the extent of the control that the copyright owner can exert in relation to his protected works.

However, the situation is actually more complex. While it is true that section 3 of the Act appears to give a fairly exhaustive definition of the copyright owner's monopoly, other provisions in the Act also enable the copyright owner to take action when his monopoly is threatened.

Part III of the Act, entitled 'Infringement of Copyright and Moral Rights and Exceptions to Copyright', bears testimony to the old adage that 'where there is a right there is a remedy' or, more exactly in this case, to the reverse: 'where there is a remedy there is a right'. While its first provision states that '[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything

public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

- (a) to produce, reproduce, perform or publish any translation of the work,
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
- (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
- (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
- (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
- (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
- (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,
- (h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,
- (i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and
- (j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

and to authorize any such acts'. Copyright Act, s. 3(1).

that by this Act only the owner of the copyright has the right to do,²⁵ the next provisions until section 28 allow the copyright owner to bring an action in various circumstances that differ from those envisaged in section 3. Most of them are known as instances of ‘secondary infringements’,²⁶ an appellation that aims to set them apart from the ‘primary infringements’ that would result from the combination of section 27 (1) with section 3. This is where one finds, for example, the provision that addresses the behaviour of ‘enabling parties’ in the world of digital networks, enablers that facilitate infringements of copyright.²⁷

Part IV of the Act deals with remedies. It specifies the basic remedies to which a copyright owner is entitled when there is an infringement of copyright in his work.²⁸ Among them are remedies, some old and some recent, that have extended the copyright owner’s rights beyond the strict protection of the infringed work. For instance, it is a legal fiction that gives him the right to recover the possession of the infringing copies – and of the plates used to make them – as if they ‘were the property of the copyright owner’.²⁹ This property right of the copyright owner is thus indirectly recognised as a right that does not naturally flow from the right in the protected work itself. The proclivity to exert some control through copyright law over elements that are not protected as original works has given rise to elaborate schemes that extend the copyright owner’s dominion beyond the protected works: the willingness to follow up on the saying that ‘the answer to the machine is in the machine’ has led to the creation of ‘copyright’ remedies for the violation of technical protection measures that are designed to enhance the protection of works.³⁰ Together with the provisions related to rights management information, they have become the distinguishing features of the ‘paracopyright’ scheme that was officialised by the 1996 WIPO copyright treaties.³¹

Whatever their justification, measures such as those found in Parts III and IV of the Canadian Copyright Act serve to illustrate an expanding

²⁵ Copyright Act, s. 27(1).

²⁶ Copyright Act, ss. 27(2)–27.1.

²⁷ Copyright Act, s. 27(2.3).

²⁸ Copyright Act, ss. 34–45.

²⁹ Copyright Act, s. 38(1).

³⁰ Copyright Act, ss. 41–41.21.

³¹ WIPO Copyright Treaty, Art. 11 & 12; WIPO Performances and Phonograms Treaty, Art. 18 & 19.

definition of copyright law that has become a source of tension in our understanding of the inherent nature of copyright protection.³²

Copyright protection today embodies more than the section 3 rights, and the extension of copyright through related mechanisms gives fodder to those who challenge its legitimacy. From this perspective, today's 'para-copyright' phenomenon can be viewed as the digital equivalent of the older antagonism between copyright and neighbouring rights.

Copyright v. neighbouring rights

Today's almost universal understanding that copyright law can protect elements other than original works, i.e., minimally performances, sound recordings and broadcast signals, is not rooted in the traditional apprehension of the discipline. It is only because of the advent of the recording and radio industries that new objects, for which a protection scheme along the lines of copyright law became of interest, made their way into copyright law 'broadly speaking'. The long-standing mistrust between neighbouring rights owners and authors, who feared a reduction of royalties because of the presence of new claimants in the remuneration schemes, evolved into a determining feature of the identity of neighbouring rights:

Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.³³

The Rome Convention does not name the protection that is accorded to the rightholders, hence the possibility for member states to designate it under different names. While author's rights countries have generally preferred terminologies that highlight the difference between the protection of works and that of the objects of the Rome Convention,³⁴

³² For a general discussion on these measures, see S. Dusollier, *Droit d'auteur et protection des œuvres dans l'univers numérique: droits et exceptions à la lumière des dispositifs de verrouillage des œuvres* (2nd ed., Larcier, 2007).

³³ Rome Convention, Art. I.

³⁴ Since the first directive that targets them, the EU terminology has been referring to 'related rights'. See Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), [2006] OJ L 376/28.

copyright countries have no similar qualms. To wit, the Canadian Copyright Act calls the protection ‘copyright’.³⁵

Behind the same word lie, however, two distinct realities. If a good part of an author’s rights is spelled out in Part I of the Act, the ‘copyrights’ granted to performers, phonogram producers and broadcasters are set out in Part II. Even a cursory reading makes it obvious that the scope of the Part II copyrights is different. The legislator itself acknowledges this difference and, in cases throughout the Act where the use of the word ‘copyright’ could breed some confusion as to which ‘copyright’ is meant, it specifies the protected object (a work or a performance, a sound recording or broadcast signals) or the identity of the copyright owner.³⁶ All this care about the proper identification of the rights at stake in each provision that could otherwise be ambiguous is in addition to the very definition of ‘copyright’ in the main provision of the Act on definitions:

‘copyright’ means the rights described in

- (a) section 3, in the case of a work,
- (b) sections 15 and 26, in the case of a performer’s performance,
- (c) section 18, in the case of a sound recording, or
- (d) section 21, in the case of a communication signal.³⁷

As if this drafting strategy were not enough, the Act also replicates Article 1 of the Rome Convention as a general rule of interpretation:

No provision of this Act relating to

- (a) copyright in performer’s performances, sound recordings or communication signals, or
- (b) the right of performers or makers to remuneration

shall be construed as prejudicing any rights conferred by Part I.³⁸

The Canadian Parliament went further than the international text requires in ensuring that the ‘new’ copyrights do not affect negatively the copyrights in works. The usual wariness of authors towards neighbouring rights owners translated itself into a warning to payers of royalties who

³⁵ Copyright Act, Part II: Copyright in Performers’ Performances, Sound Recordings and Communication Signals and Moral Rights in Performers’ Performances.

³⁶ See, for example, section 30.7 of the Copyright Act.

³⁷ Copyright Act, s. 2.

³⁸ Copyright Act, s. 90.

might be tempted to give less to authors because new categories of rightholders would also be entitled to royalties. The second half of section 90 continues to say that the Part II copyrights cannot be construed 'in and of [themselves] ... as prejudicing the amount of royalties that the Board may fix in respect of those rights'.³⁹

The introduction of Rome-style neighbouring rights in the Canadian Copyright Act in 1997⁴⁰ was not the first time that Parliament arbitrated between different categories of rightholders. It went through a similar exercise when it revisited the status of moral rights in 1988.

Economic rights v. moral rights

In 1931 Canada became the first copyright country to introduce moral rights into its copyright statute. Thus one might think that Canada has become an expert in mediating the conflicts between copyright owners and authors. It took one court decision in which the author succeeded in being vindicated on the basis of his right of integrity⁴¹ to launch a general revision of moral rights in the country.⁴² The fear that overly sensitive authors might disrupt the economic exploitation of works necessitated some form of appeasement.

The conciliation of both types of interests explains various precisions in the text that seek to curb any author's inclination towards unreasonableness. The right of paternity can only be asserted when 'reasonable in the circumstances'⁴³ and the right of integrity, only if the work or the performance is used 'to the prejudice of its author's or performer's honour or reputation'.⁴⁴ In a similar vein, while the author or the performer cannot assign their moral rights,⁴⁵ waivers are allowed without any formal requirement.⁴⁶

The balancing act that these measures embody is fairly similar to the one other copyright countries have sought to achieve. Of course, the obligation derived from Article 6bis of the Berne Convention to protect

³⁹ *Ibid.*

⁴⁰ Act to amend the Copyright Act, SC 1997, c. 24.

⁴¹ *Snow v. The Eaton Centre Ltd*, (1982) 70 CPR (2d) 105 (Ont HC).

⁴² Moral rights were part of Phase I of a general revision process that started in 1987 and that is still ongoing. See Act to amend the Copyright Act and to amend other Acts in consequence thereof, RSC 1985, c. 10 [4th Supp.].

⁴³ Copyright Act, s. 14.1(1) (authors), s. 17.1(1) (performers).

⁴⁴ Copyright Act, s. 28.2(1).

⁴⁵ Copyright Act, s. 14.1(2) (authors), s. 17.1(2) (performers).

⁴⁶ Copyright Act, s. 14.1(2)-(4) (authors), s. 17.1(2)-(4) (performers).

moral rights is itself a compromise position, since it does not impose any obligation beyond the right of paternity and the right of integrity.

The development of ‘new rights’ in the copyright environment thus immediately provokes adjustments within the existing framework. The changes required by the recognition of moral rights or of neighbouring rights, for example, lead to the identification of the parties who have been at odds with the implementation of such new realities of copyright law. They show awareness that new policy orientations within copyright law involve a re-examination of the prevailing operation of the statute. The addition of new rights that bring with them new rightholders gives birth to new dynamics that are easier to recognise than the more subtle changes brought about by the creation of new remedies. In the Canadian context, the decision to concentrate copyright-related changes in the Copyright Act itself can partly be attributed to the constitutional environment of the country, since legislative power over copyright is firmly entrenched in the federal government.⁴⁷ It is therefore more expedient to rely on the Copyright Act as the preferred framework in which to effect changes – because the constitutional legitimacy is better assured – rather than on any other type of mechanism that would become more prone to challenges by dissatisfied stakeholders.

Hesitations over the Canadian constitutional division of powers have not played a role in the next area of tensions in copyright law.⁴⁸

Tensions Between Rights and Exceptions

With the advent of digital technology, the most pronounced tensions in copyright law have been those surrounding the debate over exceptions to copyright law. While some fields have never been subject to copyright law – if only through the time limits imposed on copyright protection – the new empowerment that digital technology offers users has increased and further highlighted the conflictual relationships between authors and copyright owners, on the one hand, and users of all sorts, on the other. Developments in both the Canadian legislature and the Supreme Court of Canada in 2012 have drawn attention to the economic and intellectual stakes that exceptions represent in copyright law.

⁴⁷ Constitution Act, 1867 (UK), 30 & 31 Vict. c 3, s. 91(23).

⁴⁸ Although the issue could have been raised when the ownership rule over commissioned paintings, photographs and portraits has been abrogated and replaced by an ‘exception’ in favour of the commissioning individual who uses them for private purposes. Privacy and publicity rights are considered the domain of provincial regulation. See Copyright Act, s. 32.2(1)(f).

Economic tensions

Exceptions to copyright are measures that encroach, either fully or partially, on the exclusive character of the right. They come in all shapes and sizes: sometimes very specific,⁴⁹ sometimes rather broad.⁵⁰ Whatever purpose they are designed to serve, their application represents a lost opportunity to derive some income from circumstances that would otherwise provide remuneration to the copyright owner if he were to exercise his rights. A cursory glance through the many statutory exceptions now found in the Canadian Copyright Act might give the impression that the debate over copyright exceptions reflects a binary world of copyright owners and copyright users. The reality is a little more complex.

Let us take as an example the exceptions that abound in the field of education, where access to knowledge is a social good that is seen as worthy of promotion at the expense of copyright protection. A reading of both the statutory provisions and the seminal decision of the Supreme Court of Canada on the subject in 2012, *Alberta (Education) v. Access Copyright*,⁵¹ brings an awareness of the multiplicity of parties whose economic interests influence their attitude towards these exceptions: authors, copyright owners (often publishers), collective societies, educational institutions of all levels and their representative associations, government departments of education, parents, students, makers of technology in the education process, libraries and so on. All of these parties have some financial gain or loss at stake in the determination of the scope of copyright exceptions in the field of education. It would be fallacious to pretend that the monetary implications of exceptions can be explained only in terms of one category of payers and one class of users. An oversimplification of the issue masks a very complex reality and can easily smack of demagoguery.

Behind this talk of money lurks a very real debate on the theoretical foundations of copyright.

⁴⁹ See, for example, the exceptions for encryption research (s. 30.62) or to assess the security status of computer systems and networks (s. 30.63).

⁵⁰ The fair dealing exceptions that impose no condition with respect to the identification of the author of the work that is being used come to mind: 'Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright'. Copyright Act, s. 29.

⁵¹ 2012 SCC 37.

Theoretical tensions

The theoretical *raisons d'être* for copyright protection are numerous. Some will strictly focus on the person of the rightholder, while others will refer to social objectives in which rightholders have a role to play along with other persons and entities.⁵² To consider exceptions to copyright rights always implies revisiting their theoretical foundations because the protection scheme that the rights create is asked to yield to other social values that are considered superior. This is particularly true when the exception is an entirely free one, like the fair dealing or fair use exception. In such cases, moreover, it is possible to narrow down the identification of the parties on both sides in order to make them fit the theoretical discourse on the exception of stake. An analysis of exceptions in the educational sector can thus be presented as a battle of corporate entities (collective societies) against students⁵³ instead of a match between authors and governmental departments of education that would otherwise be paying royalties. The pairing is not dispassionate and can shape the debate with profound consequences.

The decision by the Supreme Court of Canada in *CCH Canadian v. Law Society of Upper Canada* to define exceptions as users' rights,⁵⁴ a label that it continues to give to exceptions, has had a profound impact on the legislator when it adopted the *Copyright Modernization Act* in 2012.⁵⁵ The identification of the ultimate individual user as the counterpart to copyright owners who act through a corporate entity deliberately deflects the debate away from a pairing that would give rise to different alignments if individuals were on the 'copyright' side and 'anonymous' corporate or governmental entities, on the side of exceptions. However, any combination would shape the discourse in its own peculiar way.

Another example of a situation where tensions between copyright owners and users of copyright materials have become visible is where the encroachment on the copyright monopoly nevertheless involves some remuneration. For example, the regime governing the cable retransmission of works is included with other exceptions in Part III of the Copyright Act and gives rise to a form of remuneration in some circumstances.⁵⁶ The private copying regime that targets musical works

⁵² The literature on this topic is always growing. For a good summary, see G. Dutfield & U. Suthersanen, *Global Intellectual Property Law* (Edward Elgar, 2008), 47–77.

⁵³ As in *Alberta (Education) v. Access Copyright*, supra, note 50.

⁵⁴ *Supra*, note 8.

⁵⁵ S.C. 2012, c. 20.

⁵⁶ Copyright Act, s. 31.

recorded on sound recordings is set out in an entirely autonomous part of the Act, Part VIII, where it is also presented as a mechanism that is tied to an exception.⁵⁷ Both regimes involve collective societies that must file proposed tariffs with the Copyright Board in order to validate the rates of royalties that they will collect from various users.⁵⁸ Yet, there is hardly any difference between these processes and the one that governs performing right societies that must seek to have tariffs approved by the Board for the use of their repertoire on the basis of their exclusive rights.⁵⁹ Are the remunerated exceptions truly exceptions, or are they just a smoke-and-mirrors device designed to exact some royalties? As in so many cases, the answer may lie somewhere in between.

As more and more persons who may want to assert their ‘rights’ against copyright owners will resort to the users’ rights imagery,⁶⁰ authors and copyright owners are living an identity crisis of a different kind.

⁵⁷ Sections 80 and 81 of the Copyright Act read as follows:

80 (1) Subject to subsection (2), the act of reproducing all or any substantial part of

- (a) a musical work embodied in a sound recording,
- (b) a performer’s performance of a musical work embodied in a sound recording, or
- (c) a sound recording in which a musical work, or a performer’s performance of a musical work, is embodied

onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer’s performance or the sound recording.

81 (1) Subject to and in accordance with this Part, eligible authors, eligible performers and eligible makers have a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of the reproduction for private use of

- (a) a musical work embodied in a sound recording;
- (b) a performer’s performance of a musical work embodied in a sound recording; or
- (c) a sound recording in which a musical work, or a performer’s performance of a musical work, is embodied.

⁵⁸ Copyright Act, ss. 71–76 (retransmission) and ss. 83–88 (private copying).

⁵⁹ Copyright Act, ss. 67–68.2.

⁶⁰ It was again the case in *CBC v. SODRAC 2003 Inc.*, 2015 SCC 57, where the ephemeral recording exception was at stake.

Tensions over the Representation of Copyright Interests

The collective management of copyright is an unavoidable component of copyright law in an era of increasing mass uses of works, yet the concept of collective management covers a wide variety of practices. This means that collective societies that started to operate according to a particular way may suddenly be forced to take into consideration other collective societies whose activities may interfere with their own. The Canadian scheme is further complicated by the existence of another form of collective representation of authors that can directly interfere with traditional copyright collective management.

Collective societies v. collective societies

The website of the Copyright Board of Canada currently lists 38 collective societies that operate in Canada.⁶¹ Each collective society has its own purpose, which may have an impact on how other collective societies may wish to fulfil their mandates: as technology provides increasing opportunities to exercise copyright rights, the relative value that a right may have, compared with the value of another right represented by a different collective society, is likely to shift. The combination of instances of reproduction rights and of communication rights in internet transactions has become one of today's most difficult challenges to the application of copyright law in this now no longer new medium. A preoccupation with the overall functionality of the business transactions is reflected in two approaches that have been developed to help ease the tensions between collective societies in such circumstances.

The first strategy that has been deployed can be seen in a decision of the Copyright Board of Canada. The text of the Copyright Act is drafted in such a way that it contemplates the filing of proposed tariffs by collective societies individually. In a decision concerning digital pay audio services where each collective society had filed separately for tariffs, the Board decided to merge the two processes into one. Its initiative was approved by the Federal Court of Appeal, sitting in judicial review, which judged that the Board had the expertise to manage its cases as efficiently as it deemed fit.⁶² Since that decision, the Board has continued to resort to this practice whenever it deems it more expedient to have a broader picture of the situation for its determinations.

⁶¹ <<http://www.cb-cda.gc.ca>>.

⁶² *NRCC v. SOCAN*, 2003 FCA 302.

It is still too early to tell if the second approach to defining the relationships between collective societies will actually help to diffuse tensions. In its 2012 decision in *Entertainment Software Alliance v. SOCAN*, the Supreme Court of Canada elevated the notion of technological neutrality to the status of a founding principle of the copyright legislation, on par with the need to balance its interpretation in light of copyright owners' rights being met by users' rights.⁶³ On the facts of the case, technological neutrality meant that downloading video games cannot give rise to payments for the communication to the public by telecommunication of the music integrated in the games because the buyer of a hard copy of the same video game would not be making such a payment. The principle of technological neutrality was reiterated and expanded three years later in *Canadian Broadcasting Company v. SODRAC*.⁶⁴ In addition to an application of technological neutrality in the same vein as in *ESA v. SOCAN*, the Court also instructs those who seek to put a value on an activity that triggers a copyright right to take into consideration the value of the effort made by the user in adapting to the new technology.⁶⁵ The rebalancing of the value of copyright in a given situation thus hinges on the integration of multiple positions where each stakeholder aims for a solution that is rooted in his own perspective.

As if the potential for fratricidal relations between collective societies were not already high enough, the Canadian legislative framework allows for a similar kind of feud between collective societies and artists' associations.

Collective societies v. artists' associations

Because of a special quirk in the evolution of the protection of artists' works in Canada, the collective management of the remuneration flowing from the use of copyright-protected works is not the exclusive domain of the collective societies that abide by the Copyright Act. In the late 1980s, when neighbouring rights were not yet part of the Copyright Act, the Quebec government voted two laws commonly known as 'status of the artist' legislation.⁶⁶ Their purpose was to enable artists in various sectors

⁶³ 2012 SCC 34, at ¶9–10.

⁶⁴ 2015 SCC 57, at ¶65–96.

⁶⁵ *Ibid.*, at ¶75.

⁶⁶ Act respecting the professional status and conditions of engagement of performing, recording and film artists, CQLR, c. S-32.1; Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, CQLR, c. S-32.01. Two other provinces enacted 'status of the artist' legislation, but none provides a mechanism akin to the

of the cultural industries to negotiate collectively their working conditions despite the fact that they were not necessarily (and most often not at all) employees. The recognition of their associations allows the latter 'to collect any amounts due to the artists whom [they] represent, and remit the amounts to them'⁶⁷ and 'to negotiate a group agreement, which must include a model contract for the performance of services by the artists'.⁶⁸ Unwilling to be upstaged by a provincial government, the federal Parliament adopted a similar statute in 1992 for negotiations by artists with federal institutions.⁶⁹

It took more than 20 years for the Supreme Court of the country to be solicited for an opinion on the relationship between the two representation processes. Do the negotiations undertaken based on status-of-the-artist legislation – and, in the circumstances, the federal one – not interfere with the collective management that is framed by the Copyright Act over which Parliament has exclusive jurisdiction?

The fact that it was the federal status-of-the-artist legislation that was at stake, instead of one of the Quebec statutes, prevented an argument based on the constitutional division of powers that could have raised the issue of federal paramountcy. Failing that, all that remained was the basic presumption that statutes are validly enacted and that Parliament had not seen fit, in this case, to prefer one regime over the other. The Supreme Court therefore upheld the validity of the status of the artist legislation and of its negotiation structure. It considered that the 'minimum fees for existing works do not apply to or bind collective societies'.⁷⁰ Furthermore,

The collective bargaining conducted by artists' associations such as CARFAC/RAAV under the [Status of the Artist Act] in respect of scale agreements covering existing artistic works does not contradict any provision of the Copyright Act. Artists' associations are simply bargaining agents. They have not taken or granted, and do not purport to have taken or granted, any assignment or exclusive licence, or any property interest, in any artist's copyright (see *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37,

recognition of associations that represent artists: Status of Ontario's Artists Act, 2007, S.O. 2007, c.7, Sched.39; The Arts Professions Act (Saskatchewan), S.S. 2009, c. A-28.002.

⁶⁷ Act respecting the professional status and conditions of engagement of performing, recording and film artists, s. 24(5).

⁶⁸ Act respecting the professional status and conditions of engagement of performing, recording and film artists, s. 24(7).

⁶⁹ Status of the Artist Act, S.C. 1992, c. 33.

⁷⁰ *CARFAC v. National Gallery of Canada*, 2014 SCC 42, at ¶24.

[2007] 3 S.C.R. 20, at paras. 26–28). For this reason, s. 13(4) of the Copyright Act, which requires assignments and grants of exclusive licences of copyrights to be in writing, is not applicable.⁷¹

It is difficult to believe that the coexistence of these two types of negotiation structures is an easy one. Yet the fact that it took so long for such a judicial conflict to arise bears testimony to the ability of these organisations to manage their antagonisms. There is already so much tension present that it may be preferable to focus on issues that can be perceived as more fundamental to the definition of copyright protection, issues such as the role that exceptions now play in our understanding of copyright law or the recalibration of rights because of digital technology.

The tensions that run through copyright law seem to be increasing. Fifty years ago, as one can take stock of the impact that technology – and especially digital technology – has had on this area of intellectual property law, copyright law was a quieter scene. The examples that have been used here to identify tensions in the law today can be encapsulated in some very broad statements that refer to specific arbitrations made by Parliament or by the courts: ‘the arrival of neighbouring rights can upset authors’ or ‘exceptions are users’ rights that counterbalance the copyright monopoly’. Yet in addition to these widely acknowledged battlegrounds, other sources of tension – and very real ones at that – exist in copyright law; they may simply be less visible.

HIDDEN TENSIONS

Arbitration among various interests, whether as a Parliament or as a court, is an inherent part of legislative and judicial activities. Multiple stakeholders voice their opinions in the hope that theirs will prevail, and the final result can be analysed in terms of wins and losses. The public nature of these processes ensures that, whatever the result, analysts who want to understand what has happened are able to identify the forces that were at work. The ability to deconstruct meaningfully the new ‘balance’ that has been achieved, however, may require more than the weighing of substantiated arguments: beneath the public discourse can lurk some hidden – theoretical – tensions that also influence how copyright takes shape. One of these tensions stems from the appreciation of the justifications for copyright law, while another depends on an acknowledgement

⁷¹ *Ibid.*, ¶22.

that the persons who are affected by copyright law exist through shifting identities.

Justifications for Copyright Law

Theories to explain why copyright law exists – or should not exist – have proliferated over the years, even centuries. Intertwined with historical analysis, they will often include learned exegesis of the terminology used in this field: the well-known comparison of ‘copyright’ with the multiple linguistic versions of ‘author’s right’ continues to be fine-tuned with new insights.⁷² Generally speaking, all these theories seek to throw light on copyright law as a whole and not on specific aspects of the law. One general theoretical debate that can, however, rely on several specific indicators in a copyright statute is the one that opposes the qualification of copyright law as a property right against the idea that it is merely an instrument of economic policy. The Canadian Copyright Act can be used here to illustrate how ambivalent the legislator can be about the issue.

Copyright as a property right

References to copyright as a property right abound in the Canadian Copyright Act. Apart from the fact that the Copyright Office – where copyrights can be registered together with their assignments and licences⁷³ – is housed in the Canadian Intellectual *Property* Office, much of the terminology of the Act is replete with expressions that evoke property concepts. The very notion of copyright *ownership* is central to the working of the law since, apart from the situations that pertain to moral rights where it is the author who is involved, rights and remedies are defined for the benefit of the copyright *owner*. It explains why it is necessary to state that ‘[s]ubject to this Act, the author of a work shall be the first *owner* of the copyright therein’.⁷⁴ The status of owner is also the subject of several presumptions that reinforce it: a presumption in favour of the plaintiff-owner when the defendant challenges the copyright

⁷² Some classics in this field include J.C. Ginsburg, ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’ (1991) 147 *RIDA* 57; A. Strowel, *Droit d’auteur et copyright – Divergences et convergences* (Bruylant, 1993); F. Rideau, *La formation du droit de la propriété littéraire en France et en Grande-Bretagne: une convergence oubliée* (Presses universitaires d’Aix-Marseille, 2004).

⁷³ Copyright Act, ss. 54–59.

⁷⁴ Copyright Act, s. 13(1) (emphasis added).

owner's right⁷⁵ and presumptions to the same effect in circumstances already identified in Article 15 of the Berne Convention.⁷⁶

The provisions on remedies also refer to property concepts, though one must recognise that they relate to infringing *copies* of the protected work. The Act specifically includes the right to obtain the delivery up of infringing copies in its list of possible remedies,⁷⁷ and extends the copyright owner's property right to these copies and 'all plates used or intended to be used for the production of infringing copies'.⁷⁸ Similarly, the remedies that accompany the protection of technological protection measures (TPM) also refer to the delivery up of the material used for circumventing such measures. Indeed, the very concept of the TPMs is based on the imagery of property rights: 'controlling access', 'circumventing', 'avoiding, bypassing, removing'⁷⁹ are all terms that could be used in the context of real property rights.

Despite their personality rights overtone, the provisions on moral rights of the Canadian Copyright Act contain rules on the legal devolution of moral rights upon death that again conjure up the idea of copyright as a property right:

The moral rights in respect of a work pass, on the death of its author, to

- (a) the person to whom those rights are specifically bequeathed;
- (b) where there is no specific bequest of those moral rights and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed; or
- (c) where there is no person described in paragraph (a) or (b), the person entitled to any other *property* in respect of which the author dies intestate.⁸⁰

The characterisation of copyright as a property right that can be bequeathed echoes the qualification made by the Quebec legislature in the Civil Code of Quebec where, in Book Four (on Property), it includes rights of intellectual or industrial property in the concept of 'capital', one of the components of property when property rights are described in relation to their proceeds.⁸¹ In its chapter on matrimonial regimes, the

⁷⁵ Copyright Act, s. 34.1(1).

⁷⁶ Copyright Act, s. 34.1(2).

⁷⁷ Copyright Act, s. 34(1).

⁷⁸ Copyright Act, s. 38(1) (a).

⁷⁹ Copyright Act, s. 41.

⁸⁰ Copyright Act, s. 14.2(2)(c) (emphasis added).

⁸¹ 'Capital also includes rights of intellectual or industrial property'. Art. 909(2) *Civil Code of Quebec*.

Civil Code of Quebec reiterates that '[i]ntellectual and industrial property rights are private *property*'.⁸²

The notion of copyright as a property right is obviously useful to apprehend the exercise of the right, whether it be through contractual transactions or judicial redress. It is, however, a rather static definition of copyright protection compared to an analysis that focuses on the dynamics of the protection.

Copyright as economic regulation

That copyright law is a tool of economic regulation becomes apparent the moment there is talk of copyright reform. Various groups start putting forward their interests, and support for their positions is organised (more or less successfully). The same phenomenon happens both within sovereign states and in supranational or international contexts. Apart from these political processes, the economic regulation at work can be seen in the copyright laws themselves where various provisions reflect decisions that suppose a particular approach to the industries that partake in the creation and dissemination of works. Two examples, again primarily drawn from the Canadian experience, will serve to illustrate this point.

The first, more universal, example focuses on the development of the various rights to be exercised by copyright owners. The scope of these rights is not static; on the contrary, it is constantly redefined because of technical and commercial evolutions. One can use the public performance right as an example of *technical* evolution. If, at the beginning, it was identified to cover the equivalent of stage performances, the advent of radio communication led to the creation of a right to broadcast works that was later expanded to the world of television. Developments in communication technology led to a preference for a right to communicate to the public by telecommunication,⁸³ a nomenclature wide enough to include cable, satellite and internet communications.⁸⁴ More recently, the perception that existing prerogatives in copyright laws around the world did not sufficiently address internet communications led to the formulation of the right to make protected works and objects available to the

⁸² Art. 458 *CCQ* (emphasis added).

⁸³ Copyright Act, s. 3(1)(f).

⁸⁴ See the definition of telecommunication in section 2 of the Act: '*telecommunication* means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system'.

public.⁸⁵ At the root of each new right in the Copyright Act – or of each new extension of the rights to new technological means through judicial interpretation – lies a decision of whether or not to impose an obligation to negotiate commercially the use of the works and objects that become subject to this right.⁸⁶

An awareness of commercial contexts in which copyright can become relevant can also lead to the recognition of new rights. It does not necessarily mean that the activities are new. Paintings and sculptures have been exhibited for centuries, yet a public exhibition right for them is far from widespread.⁸⁷ Similarly, works of art have been bought and resold since times immemorial, but the resale royalty right is only subject to the principle of reciprocity, rather than that of national treatment in the Berne Convention,⁸⁸ an indication that the art world is not fully ready for it yet. The rental right provides another interesting example. Again, the concept of rental is nothing new, but its international regulation substantiates the idea that it was relevant only to some industries, i.e., records, computers and film.⁸⁹ The latter provides a particularly telling case, since its implementation depends on the harm that this industry may suffer with respect to its exercise of the reproduction right:

⁸⁵ This right, formulated in Article 8 of the WCT and Articles 10 and 14 of the WPPT, is presented as an element of the definition of the right to communicate to the public by telecommunication in the Canadian Copyright Act: 'For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public'. Copyright Act, s. 2.4(1.1).

⁸⁶ The decision *not* to interpret the right to communicate to the public by telecommunication so as to include transmissions by downloads in *ESA* (*supra*, note 63) automatically meant that no royalties would be paid when video games were acquired by buyers through downloads rather than when they were sent by streaming. The case provided an opportunity to revisit the relationship between the right to communicate by telecommunication and the reproduction right 'during' an internet transmission, but the Court did not expand on this issue. Now that the right of making available has become part of the law, it will be interesting to see to what extent the Court will revise the position it took in that case.

⁸⁷ Its introduction in the Canadian *Copyright Act* is also based on a gradual phasing in: the copyright owner has the right 'to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan'. Copyright Act, s. 3(1)(g).

⁸⁸ Berne Convention, Art. 14ter.

⁸⁹ TRIPs Agreement, Art. 11 and 14(4).

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.⁹⁰

In the Canadian context, the application of this rule has meant that the rental right applies only to computer programs and to sound recordings of musical works.⁹¹

Just as the existence of a register for copyrights is related to the status of copyright as a property right, there can be other copyright institutions that partake more of economic regulation. The traditional role of the Copyright Board of Canada has been to umpire negotiations between collective societies and users of works and other protected subject matters.⁹² When its ancestor was created in 1936, it was precisely to keep a check on the power of musical performing rights societies whose monopoly over the availability of musical works was considered potentially problematic.⁹³ This antitrust law function exists today in a very explicit manner: the filing with the Copyright Board of some licence agreements between collective societies and users means that the main conspiracy provision of the Competition Act does not apply to the transaction.⁹⁴ Moreover, it also allows the Commission of Competition to have access to these agreements so he may 'request the Board to examine the agreement' if he finds it contrary to the public interest.⁹⁵

It is, of course, possible to consider all property rights as a form of economic regulation; but the constant evolution of copyright law, driven by technological and commercial developments, belies a qualification that does not focus enough on the inherent capability of copyright law to redefine itself. Not to be aware of copyright law as an instrument of commercial policy that is in an incessant flux can lead legislators and courts to disconnect from a reality that is all too manifest in daily life.

⁹⁰ TRIPs Agreement, Art. 11.

⁹¹ Copyright Act, ss. 3(1)(h) & (i), 15(1)(c), and 18(1)(c).

⁹² Copyright Act, ss. 66–78 and 79–88.

⁹³ M. Héту, 'La Commission du droit d'auteur: fonctions et pratiques' (1993) 5 *Cahiers de propriété intellectuelle* 410.

⁹⁴ Copyright Act, s. 70.5.

⁹⁵ Copyright Act, s. 70.5(5) and 70.6.

Part of the difficulty in identifying the theoretical reference scheme for copyright law lies in the fact that the identities of the persons who are affected by it are always shifting.

Shifting Identities in Copyright Law

Any situation that involves a copyright-protected object impacts a relationship where at least two 'sides' can have a different opinion as to the status of the object. The very act of creation can breed multiple situations of this kind: the author versus the public at large, the author versus a previous author, the author versus an employer (an individual or an institution or a business concern), the author versus a commissioning party (again, some variety of identities), the author versus a model, and so on. Disputes of the kind that can lead to judicial processes offer additional examples of conflictual relationships over copyright works. An author's relationship with the 'public' of his work can thus take on different realities; yet in each case one is tempted to summarise the arguments as yet another example of the author's proprietary rights against 'the public'.

As was mentioned earlier,⁹⁶ the identification of the party whose interests are seen as competing with those of the author is no trivial decision since it immediately affects the perception of the situation. The Canadian Copyright Act, like any other copyright statute, cultivates, albeit unconsciously, this ambiguity. For the most part, it is drafted in terms of 'one' author or copyright owner who is exercising rights over 'one' work that may be at odds with 'one' third party. That this individualised perspective can often appear discordant with exploitation reflects a rise in the social and economic importance of communal behaviour.

Emphasis on the individual

It is quite exceptional when the Copyright Act explicitly refers to a situation that involves more than one party, one work or one activity. One does not even notice how much the scheme is presented as a right 'in relation to a work [that] means the sole right to produce or reproduce *the* work'.⁹⁷ Categories of works are identified in the singular form, though their definition can refer to sub-genres in the plural.⁹⁸ They are usually

⁹⁶ See the text accompanying footnotes 53–55, *supra*.

⁹⁷ Copyright Act, s. 3(1).

⁹⁸ For example: "literary work" includes tables, computer programs, and compilations of literary works', Copyright Act, s. 2.

presented as the work of one author,⁹⁹ and it is only in the provisions on the term of copyright that references are made to works of joint authorship.¹⁰⁰ ‘Collective works’ are also exceptional situations.¹⁰¹ The same singular form is generally also used with respect to neighbouring rights,¹⁰² though uniformity is certainly not prevalent: titles of sections are more often in the plural form, while the provisions are usually written in the singular form.¹⁰³

Provisions that define infringements and remedies allude to the parties on both sides as individual persons:

It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.¹⁰⁴

and

Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.¹⁰⁵

They match the drafting of the exceptions, which overwhelmingly seem to be for the benefit of individuals.¹⁰⁶ The specific exceptions for educational institutions, however, necessarily contemplate a plurality of individuals in each institution.¹⁰⁷

⁹⁹ ‘Subject to this Act, the author of a work shall be the first owner of the copyright therein’. Copyright Act, s. 13(1).

¹⁰⁰ Copyright Act, s. 9(1).

¹⁰¹ Copyright Act, s. 2.

¹⁰² For example: ‘Subject to subsection (2), the maker of a sound recording has a copyright in the sound recording, consisting of the sole right to do the following in relation to the sound recording or any substantial part thereof’. Copyright Act, s. 18(1).

¹⁰³ For instance, section 18 (*ibid.*) is the first provision of a part of the Act entitled ‘Rights of Sound Recording Makers’.

¹⁰⁴ Copyright Act, s. 27(1).

¹⁰⁵ Copyright Act, s. 34(1).

¹⁰⁶ Some are more explicit about this than others. See, for example, section 29.22 (which deals with reproductions for private purposes) which starts with ‘It is not an infringement of copyright for an individual to reproduce a work or other subject matter’.

¹⁰⁷ Copyright Act, ss. 29.4–30.04, 30.3–30.4.

This is not to say that there are no pointed references to collective activities, such as the right of public performance¹⁰⁸ and the right to communicate to the public by telecommunication.¹⁰⁹ Given that they immediately conjure up the reverse notions of private performances and private communications as elements of their construction, it is worth noting that they have no equivalent in the context of reproductions: although the private copying activity is well-known, one hardly ever hears about ‘public copying’ or ‘public copies’. In the field of exceptions, some refer expressly to public situations: public lectures,¹¹⁰ news reporting of political public meetings,¹¹¹ readings,¹¹² The community dimension of agricultural fairs¹¹³ and of activities ‘in furtherance of a religious, educational or charitable object’¹¹⁴ partake of an awareness of social contexts. Even outside the statutory provisions one can float the idea of a ‘public interest’ defence in response to an affirmative enforcement of copyright.¹¹⁵

Of course, the element of copyright law that extends well beyond the individual is collective management. It is so much engrained in the implementation of copyright that we often forget that behind their corporate identities lie the great number of authors and other rightholders whom they represent – and who are so individually pinpointed in the Act. The amalgam of collective societies with big (and bad!) corporate interests permeates the Supreme Court of Canada’s decisions on the definition of rights¹¹⁶ and exceptions¹¹⁷ since the turn of century. Except for the first case in which the epithet of ‘users’ rights’ was officially approved, it is worth remarking that the decisions that continued to hone the qualification of exceptions as such all involved collective societies that were playing the same role in these cases as the legal publisher in the *CCH Canadian* decision that inaugurated it.¹¹⁸

¹⁰⁸ Copyright Act, s. 3(1).

¹⁰⁹ Copyright Act, s. 3(1)(f).

¹¹⁰ Copyright Act, s. 32.2(1)(c).

¹¹¹ Copyright Act, s. 32.2(1)(e).

¹¹² Copyright Act, s. 32.2(1)(d).

¹¹³ Copyright Act, s. 32.2(2).

¹¹⁴ Copyright Act, s. 32.2(3).

¹¹⁵ See S. Handa, *Copyright Law in Canada* (Butterworths, 2002), 315–318.

¹¹⁶ *SOCAN v. ESA*, *supra*, note 63; *Rogers Communications Inc. v. SOCAN*, 2012 SCC 35; *CBC v. SODRAC 2003 Inc.*, *supra*, note 10.

¹¹⁷ *SOCAN v. Bell*, *supra*, note 10; *Alberta (Education) v. Access Copyright*, *supra*, note 10; *CBC v. SODRAC 2003 Inc.*, *supra*, note 10.

¹¹⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada*, *supra*, note 8.

Although it is largely drafted in terms of individuals, a style that is admittedly not exclusive to copyright statutes, the Copyright Act gives rise to a good number of transformations of these individuals into larger bodies, both on the right owners' side and on the users' side. An awareness of this phenomenon can help to appreciate better the role of the various parties in an era that combines so uniquely individual and communal behaviours.

The rise of communal behaviours

Mass uses of works are nothing new to copyright law. Depending on one's willingness to take a broad view of the situation, their starting point can be the days of the internet, home-taping, photocopying, radio or even theatre performances. The contemporary understanding of mass uses is, however, related to the use of technology by individuals who believe their activities are private. The person who photocopies a journal article to have it always at hand for consultation when preparing an assignment and the one who records a television programme for later viewing sincerely believe that these actions are of no concern to anyone else. Yet the aggregate of these individual behaviours may have an impact on the royalties derived from the use of these works by 'the public'. The willingness to make that step in the reasoning on the scope of copyright law has rarely been forthcoming. The histories of the right of public performance and the right of reproduction are filled with hesitations whenever new opportunities arise to expand their meaning.

The pressure that radio broadcasting has applied to the development of the public performance right has been so great that it was impossible to extend a right meant for live community activities in theatre settings to individualised receptions of works in private premises. The right to broadcast works thus became a distinct prerogative,¹¹⁹ even if the central element that is the audience in a *public* performance has been fractured into as many listeners – or small clusters of listeners – over the broadcast territory. Despite this physical difference, the notional similarity is unmistakable. The technological specificity of the broadcasting right prevented its extension to cable activities to such an extent¹²⁰ that it became necessary to change the terminology: the

¹¹⁹ Copyright Act, s. 3(1)(f) before 1988.

¹²⁰ The reasoning in *Canadian Admiral Corporation, Ltd. v. Rediffusion, Inc.*, [1954] ExCR 382, a first instance decision, was considered so fundamental that it held sway until the issue became a bone of contention between Canada and the United States.

broadcasting right morphed into the right to communicate to the public by telecommunication.¹²¹

Thanks to the neutrality of that terminology, the courts easily recognised its ability to target internet transmissions¹²² even if it meant that, in addition to the spatial disintegration that broadcasting had represented earlier, a temporal disconnection in the enjoyment of works was overcome.¹²³ Hindsight may make this evolution seem logical and natural, but it is easy to forget the intensity of the debates that each step in the process represented.

The relative readiness to extend the reach of copyright law to such fragmented operations of communication can only have been accepted because it is in keeping with the observation that, indeed, a public is reached through these various technologies. It has become accepted to look beyond the individual behaviours, to identify the social phenomenon that electronic mass media represent, and to make copyright relevant in this context.

The reproduction right has not benefitted from the same recognition. The evolution it has known pertains more to its technological manifestations than to the social environment in which it developed. A big jump was made when it became accepted that the reproduction right applied not only when works were printed, but also when they were metamorphosed into pianola rolls and wax cylinders. Even if some instruments were required to ascertain the works embodied in them, the technical analogy with the printing process was easy. It did not take long for the next big leap of faith to take hold in copyright law: despite their acknowledged potential to be evanescent, digital reproductions became part of our contemporary understanding of 'copies'. An exception for 'temporary reproductions for technological processes', a modern-day equivalent of the ephemeral recordings exception,¹²⁴ is an upshot of this acceptance.¹²⁵ Unlike what has been happening with respect to the public performance right, which also had to adapt to significant technical changes, the reckoning of the social transformation that this new world of reproduction was bringing has not reached the same magnitude. How else

¹²¹ Canada–United States Free Trade Agreement Implementation Act, SC 1988, c. 65, Art. 2007.

¹²² *SOCAN v. Canadian Association of Internet Providers*, 2004 SCC 45.

¹²³ The phraseology of the making available right explicitly recognises 'that members of the public may access ... works from a place *and at a time* individually chosen by them'. WIPO Copyright Treaty, Art. 8 (emphasis added).

¹²⁴ Berne Convention, Art. 11bis (3).

¹²⁵ Copyright Act, s. 30.71.

can one explain the obdurate refusal of the Federal Court of Appeal of Canada to extend the private copying scheme for musical works, performers and record producers beyond the CD technology in the early 2000s despite a rather technologically neutral text¹²⁶ and Parliament's deaf ear to reverse these decisions in the Copyright Modernization Act¹²⁷ 2012? Instead, numerous exceptions to the reproduction right were introduced.¹²⁸

While industries rarely acquiesce to the long arm of copyright law without a fight, the reason for the disparate appraisal of mass behaviours could lie in the difficulty of differentiating between two categories of users who, according to the Supreme Court of Canada, have rights to balance against the copyright owner's monopoly. There are individual users, the ultimate 'consumers' of the works; but there are also technical or business users, the various intermediaries thanks to whom the works reach their audience. Which class of users does the Supreme Court of Canada have in mind when it refers to the users who enjoy 'users' rights'? The contortions it created in the Access Copyright decision to claim that the 'teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study'¹²⁹ in order to conclude that photocopies made by the teachers for distribution to their students cannot be subject to the Copyright Act because they fall under the exception of fair dealing for private study are just as intricate as when it says that the calculation of royalties to be paid by a broadcaster for various copies made in the course of delivering works to the public must include a comparison between 'the value derived from the use of reproduction in the two technologies',¹³⁰ in order to counterbalance the value of the 'new' use the copyright owner has identified.

Confusion as to whose interests are being put in the balance against those of authors and copyright owners only fuels unpredictability about the outcome of the balancing exercise. There are already many instances where tensions in copyright law are well known. When new circumstances arise that challenge them, the prevalent guiding principles provide frameworks for interpretation. Hidden tensions, however, prevent frank and open debates on the direction that copyright law may take when new

¹²⁶ *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424; *Re Private Copying 2008–2009*, 2008 FCA 9.

¹²⁷ *Supra*, note 55.

¹²⁸ See, in particular, Copyright Act, ss. 29.21–29.3, 30.04.

¹²⁹ *Alberta (Education) v. Access Copyright*, *supra*, note 10, at ¶23.

¹³⁰ *CBC v. SODRAC*, *supra*, note 10, at ¶73.

challenges appear and can only lead to outcomes that leave much to be desired. A tightrope walker cannot make it safely to the next stage of her journey if there are hidden weights in her pole.