



McCarthy Tétrault Advance™
Building Capabilities for Growth



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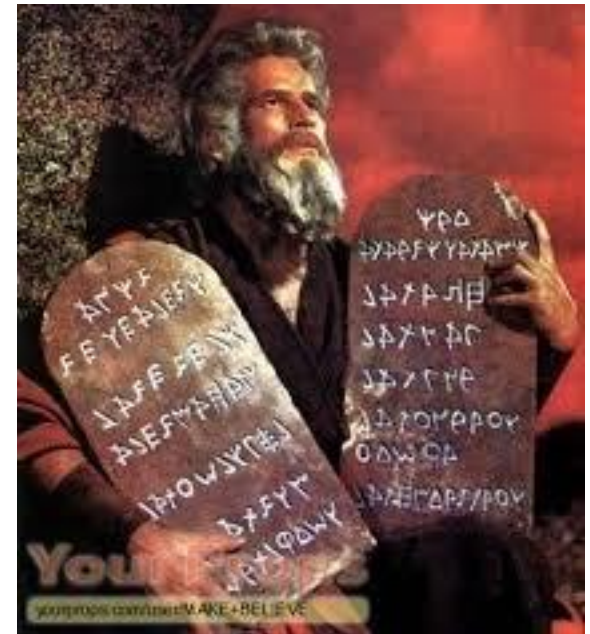
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- Regard for precedents?
- Innovative, evolve with times?
- Decisions more often right than wrong?
- Merely construe the Act and intentions of Parliament?
- Principled, policy driven, balanced?
- User rights v. exclusive rights?
- Respect for international treaties?

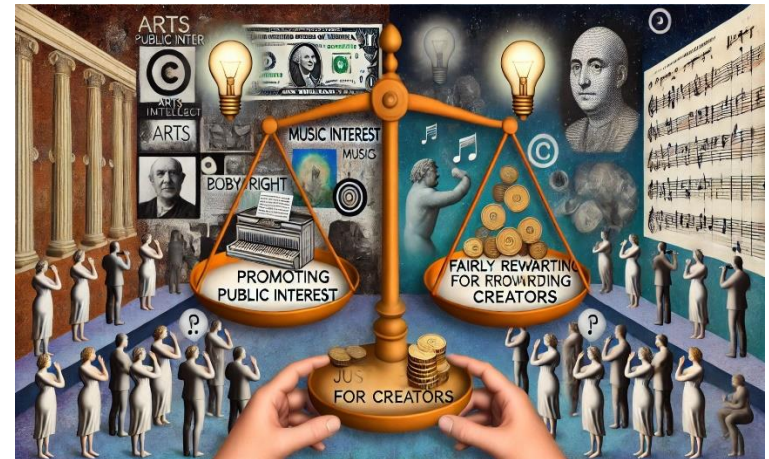


- “The moral basis of copyright rests on the 8th commandment ‘Thou shalt not steal’.” *MacMillan & Co. Ltd. v. Cooper* (1923), 40 T.L.R. 186 (P.C.) per Lord Atkinson
- In *Bishop v. Stevens*, [1990] 2 S.C.R. 467 Justice McLachlin stated that the *Copyright Act* “was passed with a single object, namely, the benefit of authors of all kinds”.
- *Vigneux v. Canadian Performing Rights Society*, [1943] S.C.R. 348, rev’d on other grounds [1945] A.C. 108 (P.C.), Justice Duff stated that the purpose of copyright is to prevent persons from “unfairly availing themselves of the work of others” and that the “protection of authors ... is the object to be attained by all patent and copyright laws.”



“The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)... 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.”

-*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34



“The *Copyright Act* is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. *Reference re Broadcasting Act*, 2012 SCC 4

- “[C]opyright is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright simply creates rights and obligations upon the terms and in the circumstances set out in the statute.” *Compo Co. Ltd. v. Blue Crest Music Inc* [1980] 1 S.C.R. 357



- “The introductory paragraph defines what constitutes “copyright”. It states that copyright “means” the sole right to produce or reproduce a work in any material form, to perform a work in public, or to publish an unpublished work. This definition of “copyright” is exhaustive, as the term “means” confines its scope. The paragraph concludes by stating that copyright “includes” several other rights, set out in subsections (a) through (i). As a result, the rights in the introductory paragraph provide the basic structure of copyright. The enumerated rights listed in the subsequent subparagraphs are simply illustrative.” *ESA (1) v. SOCAN*, 2012 SCC 34



“This is not to say that Canadian copyright law lives in splendid isolation from the rest of the world. Canada has adhered to the *Berne Convention for the Protection of Literary and Artistic Works* (1886) and subsequent revisions and additions, and other international treaties on the subject including the *Universal Copyright Convention* (1952). In light of the globalization of the so-called ‘cultural industries’, it is desirable, within the limits permitted by our own legislation, to harmonize our interpretation of copyright protection with other like-minded jurisdictions.” *Théberge v. Galerie d’ Art du Petit Champlain Inc.* (2002) 17 C.P.R. (4th) 161 (S.C.C.)



- “The Board’s interpretation is not required by art. 8 of the WIPO Copyright Treaty. The Board’s interpretation of s. 2.4(1.1) would fulfill Canada’s obligations under art. 8. But other interpretations of s. 2.4(1.1) that are more consistent with its text, context, and purpose also conform to art. 8... This interpretation of s. 2.4(1.1) is technologically neutral and allows Canada to fulfill its obligations under art. 8 through a combination of the performance, reproduction, and authorization rights in s. 3(1). *SOCAN v ESA* (2), 2022 SCC 30



“Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The “sweat of the brow” approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner’s rights, and fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious — concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the Copyright Act. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339



“The *Copyright Act*... seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works. However, it does not give the author a monopoly over ideas or elements from the public domain, which all are free to draw upon for their own works. For example, “[t]he general stock of incidents in fiction or drama is free for all to use — a substantial part of everyone’s culture, not of any one individual’s work”...

The need to strike an appropriate balance between giving protection to the skill and judgment exercised by authors in the expression of their ideas, on the one hand, and leaving ideas and elements from the public domain free for all to draw upon, on the other, forms the background against which the arguments of the parties must be considered.”



Cinar Corporation v. Robinson, 2013 SCC 73

- “But Crown copyright cannot be so expansive in scope that it allows for the routine expropriation of creators’ copyright in their works. As was noted in *Théberge*, the other half of the *Copyright Act*’s balance is “obtaining a just reward for the creator”. There is also a danger of Crown copyright undermining the very purpose it was meant to serve if interpreted too expansively...”
- “The goal of the s. 12 inquiry in its entirety is to determine whether the degree of direction and control of the Crown over the preparation or publication of the work is sufficient to vest copyright in the Crown.” *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43



- “copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system and fails to take remedial action.”
- “I agree that notice of infringing content, and a failure to respond by “taking it down” may in some circumstances lead to a finding of “authorization”. However, that is not the issue before us. Much would depend on the specific circumstances. *SOCAN v Canadian Assn. of Internet Providers*, 2004 SCC 45

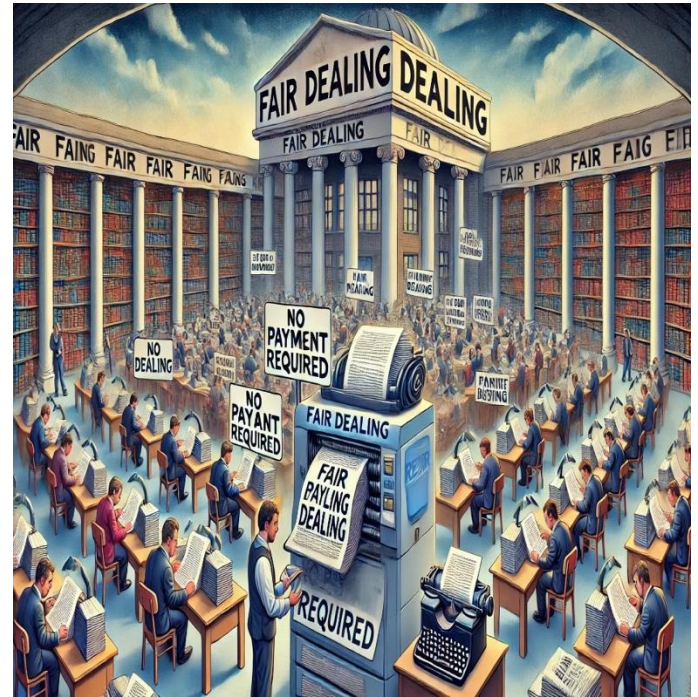


“The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: ‘User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.’” *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339; also *York University v Access Copyright*, 2021 SCC 32

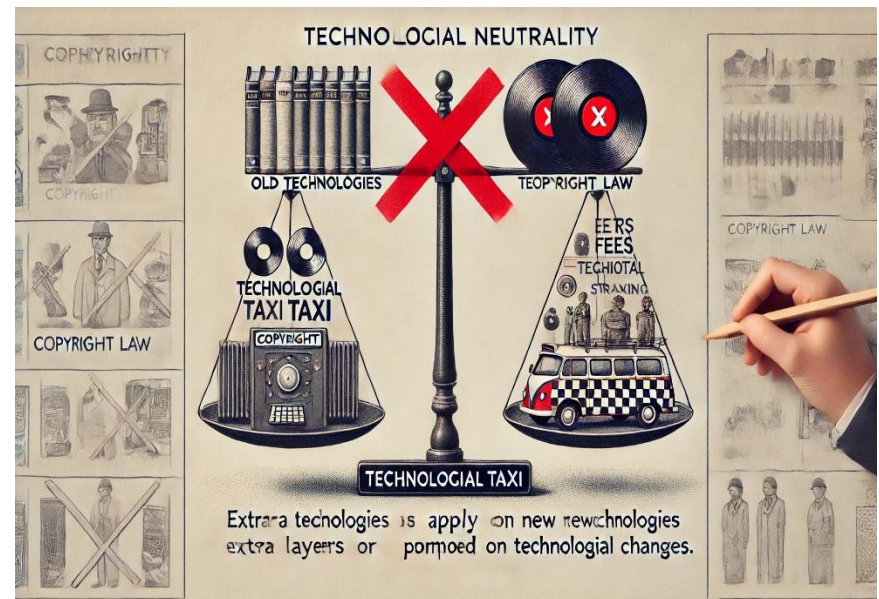


Fair dealing framework:

- User right, large and liberal construction
- Eligible if facilitate fair dealings
- Fairness assessed from perspective of user
- Large scale dealings not inherently unfair
- Availability of license is not relevant
- “Dealing” connotes not individual acts, but a practice or system... Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339; *SOCAN v Bell Canada*, 2012 SCC 36



- “The Board’s interpretation departs from the principle of technological neutrality. It requires that users pay additional royalties to access works online. Requiring that users pay additional royalties based on the mode of the work’s distribution violates the principle of technological neutrality and shifts the balance between users’ and authors’ rights that has underpinned the Copyright Act for decades decisively in favour of authors.” *SOCAN v. ESA* (2) 2022 SCC 30



“The preceding review of the text, legislative context, purpose and supporting jurisprudence all lead, in my respectful view, to the conclusion that s. 68.2(1) does not make tariffs approved by the Copyright Board pursuant to s. 70.15 mandatory against users who choose not to be licensed on the approved terms.” *York University v. Access Copyright*, 2021 SCC 32



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