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Introducing Dynamic Fair Dealing: Creating Canadian Digital Culture

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A Manifesto for a Robust Culture of Fair Dealing Online

The call for the papers that comprise this volume began as a manifesto: a call to arms for academics, artists, and activists to defend Canada's emerging digital culture. We posed a series of queries, declarations, and provocations that distilled into a single question: given the legal, social, and practical contours of cultural life in a digital era, how can we collectively ensure that digital technologies best serve the creative and social needs of Canadians?

To answer this question, we need to better understand the activities and aspirations that animate the work that Canadians actually *do* in digital environments. We are all aware that networked digital technologies provide significant tools and unique opportunities for democratically transforming cultural life. Nonetheless, as critics such as Darin Barney (2000) remind us, the progressive possibilities of such technologies are not inherent, but shaped by their social regulation. Thus, our manifesto:

> The process of "dealing" itself – that is, the dynamic, complex, contingent, and shifting set of relationships and practices characteristic of the space *between* digital cultural creation and regimes of law and social regulation – has eluded the attention of scholars for too long. This is not surprising, because the fair dealing provisions in Canada's Copyright Act have been "poorly applied and underused" (Handa 2002: 288). Dealing with cultural goods and conducting social negotiations about their propriety shapes the quality and experience of digital culture in Canada. What constitutes "fairness" within digital networks is constantly and contextually evolving, and

demands a greater degree of attention than we currently afford it. Critics, activists, librarians, scholars, creators, and citizens' groups everywhere are embroiled in complex debates over intellectual property (IP) rights' extensions, corporate enforcement practices, and exercises of digital rights management. Many believe that as forms and exercises of power, such attempts to extend the reach of IP rights are illegitimate, excessive, or simply out of step with the realities of contemporary cultural expression, production, and exchange in digital environments. In short, despite the capacity for collaborative creation that digital technology affords, and despite the ostensible commitment from all levels of government to make Canadian cultural content more accessible, IP laws in Canada pose unnecessarily punitive prospects for potential liability.

Through the concept of fair dealing, the Canadian Copyright Act is supposed to enable Canadians to access and engage with copyright-protected cultural works. Such engagement is a necessary part of learning, creativity, cultural productivity, scholarship, critical conversation, and expressive collaboration. Nonetheless, many creators, educators, and researchers experience the Copyright Act as obstructing rather than facilitating access to works. Ironically, the rights created under copyright law often obstruct what they are traditionally designed to enable: fair access to cultural expressions, with the aim of encouraging innovation and creativity to the benefit of society at large. It's not simply that they don't adequately serve the needs of Canadian creators, the cultural industries, and everyday users of cultural goods in digital contexts. They may also be used to exert a chilling effect on Canadian cultural exchange.

If we really want to encourage democratic, dialogic, pluralist, and polyvocal forms of cultural practice in digital environments, we are faced with several urgent tasks. We must explore the potentials and limits of existing practices, while developing new forms of knowledge, negotiation, and techniques that articulate and honour the rights of both creators and users of cultural content, and, to ensure the viability of these new practices, we must insist upon the protection and elaboration of a robust and vibrant public domain. To accomplish this work, it is necessary to assert the primacy of fair dealing as a human capability, an individual responsibility, and a citizen's right. Fair dealing cannot be a limited default category based on the assumption that *any* digitization of protected material is a reproduction and therefore an infringement. Such an assumption deprives us of the critical capacity for digital literacy. Instead, we aim to define, assert, and defend fair dealing as the affirmative practice in which we engage when we actively encounter, critically consider, and/or transform

> cultural content online. Moreover, we need to find ways of using such practices to drive conversations about the cultural worlds we envision and aspire to as Canadians, and the cultural policy reform necessary to meet these objectives.

When we issued this provocation and invited others to help us map the terrain of this volume, we received a wealth of responses. The following chapters were written as a collaborative project by thirty-four scholars, activists, and creative practitioners from a range of disciplines and professions, with experiences in many different fields and genres. These essays place particular emphasis on practices of what we call *dynamic fair dealing* – emergent approaches to the creation, circulation, and management of digital cultural objects that challenge traditional paradigms of intellectual property or pose alternatives to them. Legal theorists and policy makers face a tremendous task in their aim to achieve a balance between owners' and users' rights. The contributors approach this challenge by asking how we do so in a fashion that fairly accommodates the opportunities for collaboration, copying, sharing, and creative reuse that digital media afford Canadians – opportunities that many citizens now perceive as rights.

One of the tasks of this book is to provide significant grassroots case studies and empirical evidence of open content strategies, alternative models, and successful cultural practices. As a means to inform, educate, and persuade critics, policy makers, and custodians of cultural content, we would rather proceed by way of example than by abstract theory or polemic. Our approach is explicitly micro-political, focused on building progressive cultural policy from the bottom up. This is especially important in a Canadian context, where the borders between artists, academics, audiences, and arts administrators are particularly permeable, and individuals act in all of these capacities simultaneously or by turns. Rather than accepting shouting matches between consumers and the cultural industries as the norm, this book explores possibilities for new arrangements that redefine interests in the very activities of circulation, use, modification, attribution, criticism, research, review, and reporting – fair dealing, in short – that digital technology enables and that online communications invite.

The adjective "dynamic" emphasizes that fair dealing is a dialogic, performative, and continuous activity. As performers par excellence, artists and cultural creators can and should participate in this dialogue with all of the zeal and ingenuity that they bring to their work itself.

There is too little public input and too little empirical evidence to inform the direction of Canadian cultural policy. As artists, librarians, writers, publishers, students, scholars, historians, activists, consumers, and citizens, Canadians need to have their interests considered, their practices documented, and their aspirations voiced. We should share social and technological innovations that meet our diverse needs in digital environments and explore the greater prospects and limits of such practices so that we can disseminate and improve on them. Our ultimate goal is to foster the creation of knowledge, practices, and innovations that will contribute to the creation of a dynamic and dialogic Canadian cultural heritage in new media environments.

This book constitutes an interdisciplinary conversation about the opportunities and constraints that Canadian intellectual property laws pose for cultural activities in digital environments. Our focus is not on Canadian cultural content per se, but on the specific policy issues that arise when engaging with digital content in a Canadian context. How do the particularities of Canadian IP laws, educational and cultural institutions, media forms, creators' collectives, geographical diversity, technologies, traditions, and audience expectations create problems or shape opportunities for more open and democratic approaches to the use of digital culture? We provide a wide range of critical perspectives on what it means and what it *should* mean to deal fairly in Canada. Rather than treat fair dealing as an abstract legal concept, our authors reframe it as a practice in which all participants in digital cultural exchange necessarily engage during the course of their daily activities. What the contributions to this book share is the conviction that if we want to bring Canada's IP laws back into step with the everyday norms and practices of Canadian cultural production, then copyright reform is necessary and inevitable, if far from simple and self-evident. Accordingly, this volume provides an inclusive, interdisciplinary venue for a discussion of how everyday practices are relevant to IP reform as a matter of cultural policy.

We understand this effort as a continuation of a project that Laura Murray and Sam Trosow began in *Canadian Copyright: A Citizen's Guide* (2007, 2013), a general primer on Canadian copyright that familiarized the Canadian public with our national legislation and its interpretation by focusing popular attention on the importance of users' rights. Despite the existence of a number of digital venues for journalistic writing on the need for law reform (such as the blog *Excess Copyright*, maintained by copyright advocate Howard Knopf, *IP Osgoode's IPilogue*, and

Michael Geist's blog at michaelgeist.ca, which leads the field) there has been little sustained interdisciplinary conversation about copyright in Canada generally, or about fair dealing in particular. We seek to consider these issues in a fashion more sensitive to the specificities of Canadian digital infrastructures, educational institutions, funding bodies, cultural policy, and popular culture, which are missing in more purely legal accounts. Economic and technological barriers have restricted the ability of many in the arts and non-profit sectors from sharing materials online, even when the legal issues have been resolved.

Debates about copyright, author's rights, and their appropriate limits are attracting an increasing amount of public attention, but few works address the range and diversity of positions and perspectives on copyright that characterize Canadian public interest and activity. We thus seek to add to what Ysolde Gendreau and her collaborators (2008) refer to as "an emerging intellectual property paradigm" by acknowledging the creative practical work that Canadians do in managing cultural goods in digital environments. We also seek to add new dimensions to both the practice and concept of copyright reform. Michael Geist's collections of essays on proposed reforms to the Canadian Copyright Act (2005, 2010b), for instance, were timely and important efforts to bring a legal academic perspective on copyright reform to the attention of the wider public, an agenda Geist pioneered through his well-known columns in the *Toronto Star*. Our interventions contribute a broader range of academic and practical expertise to this endeavour.

Although legal scholars (Bita Amani, Carys Craig, Graham Reynolds) are well represented in this volume, we have juxtaposed their voices with those of scholars in communications (Kyle Asquith, Alexandra Boutros, David Meurer, Matt Soar, Peter Urqhuart, Ira Wagman), cultural policy (Nicole Aylwin), publishing (Rowland Lorimer, John Maxwell), literature (Marcus Boon), film studies (Eli Horwatt) information management and pedagogy (Alec Couros, Deborah Fels, J.P. Udo), anthropology (George Nicholas), information technology (Sara Grimes), computer science and software design (Leslie Carr, Marc Couture, Eloy Rodrigues, Arthur Sale), digital production, design, and administration (Steve Anderson, Eliot Che, Justin Stephenson), lawyers (Ren Bucholz, Grace Westcott), and artist-activists in the cultural sector (Kenneth Goldsmith, Suzanne Zelazo). As such, our contributors express distinctive perspectives and propose unique practices and ethics to take advantage of the tremendous cultural opportunities that digital technologies have enabled. Our own backgrounds in anthropology, law,

and cultural studies (Coombe), literature, publishing, and communication studies (Wershler), as well as comparative literature, film, and new media (Zeilinger), informed our choices.

Given the American dominance of news media, Canadians are accustomed to critiques of copyright that have their origins in the United States. Such criticisms presuppose the American constitutional tradition, which, in terms of the limits it poses to copyright's reach, privileges freedom of speech. The nature and consequences of the potential conflict between freedom of speech and the copyright power is the subject of great concern, much of it critical of the overreach of corporate copyright and trademark holders into the public realm of expressive freedoms (Benkler 1999, Coombe and Herman 2001, McLeod 2005, Vaidhyanathan 2001; however, see Netanel 2008). Although this conflict was first addressed in the US constitutional context, the issue has also surfaced and attracted critical attention in Europe (Bonadio 2011, Hugenholtz 2001, Montero and Van Enis 2011, Porsdam 2009, Voorhoof and Cannie 2010), the United Kingdom (Akester 2010), and South Africa (Haupt 2008, Nwauche 2008). As Bita Amani's essay in this volume shows, despite the prescient scholarship of David Fewer (1997), the Canadian tradition of considering the intersection of intellectual property and freedom of expression is far less developed.

A series of books, ranging from Jane Gaines' and Rosemary Coombe's early volumes, *Contested Culture: The Image, the Voice and the Law* (1991) and *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (1998), respectively, through to Lawrence Lessig's renowned *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004), have extensively documented the obstacles that copyright and the more general legal terrain of intellectual property pose to creativity, cultural critique, and democratic dialogue. The opportunities and limits that the American doctrine of fair use poses to culturally expressive activities have been addressed by Siva Vaidhyanathan (2001, 2004) and William Patry (1985, 2009), and memorably spoofed and satirized by scholars, activists, and musicians (Demers 2006; Levin 2003; McLeod 2001, 2005, 2007; Negativland 2003, 2009). Critics deem the concept of fair use to be in dire need of reconceptualization and reform in the digital era (e.g., Aufderheide and Jaszi, 2011, Gillespie 2007). Most critics are frustrated by the lack of any overarching American cultural policy principles to balance the voracious appetites of corporate IP holders. As we shall discuss, they have founded initiatives such as the Creative Commons (CC), open source (OS),

and the access to knowledge (A2K) movements, in order to stimulate civil society practices of cultural policy making in the absence of decisive government political activity that addresses public needs.

The Canadian common law concept of fair dealing, rarely considered in juxtaposition to freedom of expression as a human right, has received far less critical academic attention than the American fair use doctrine. In part, this may be because Canadian legal history provides little assurance with respect to the likely success of a fair dealing argument and the concept received relatively little attention during most of the twentieth century. Rather than engaging in risky copying activities, authors, publishers, creators, and users chose to, or were advised to, err on the side of caution.

The concept was included in Canada's first Copyright Act of 1921, which came into force in 1924 and provided, without much deliberation, that no copyright infringement was constituted by fair dealings "for the purposes of private study, research, criticism, review, or newspaper summary" (c. 24). Although insubstantially amended by statute in 1993, fair dealing remained stable, little invoked, and largely uncontested. In 1997, Bill C-32 introduced a series of exemptions that pertained to educational institutions, libraries, and uses by and for perceptually challenged individuals. These exemptions provided detailed language that could potentially have strengthened a fair dealing defence; they were also, however, perceived to limit the concept's usefulness by outlining very specific limits on available exemptions that could thus be interpreted more narrowly.

Prior to 2012, the most important indication that new perspectives on fair dealing were needed and emerging, was the 1997 *Allen* v. *Toronto Star Newspapers Ltd.* case and the landmark Supreme Court decision in *CCH Canadian Ltd. et al.* v. *Law Society of Upper Canada* (2004). In the first case, the Ontario Divisional Court allowed a fair dealing defence to apply to the copying and reproduction of an entire photograph, effectively reversing *Zamacois* v. *Douville* (1943), in which it was established and later accepted – in cases including the infamous *Michelin* v. *CAW* (1997), which Reynolds examines in this volume – that a fair dealing defence was not available for activities that involved the use of a complete work. *CCH* continued this trend and, significantly, established that fair dealing was a substantive users' right that "should not be given a restrictive interpretation" (para. 54).

The *CCH* case concerned photocopying and document delivery services offered by the Law Society of Upper Canada's library, which were

alleged to infringe the copyrights of several law publishers. The Law Society invoked fair dealing as their defence, but in the initial 1999 trial court ruling, fair dealing was strictly construed and found inapplicable to the copying practices in question. When this decision was reversed by the Federal Court of Appeal, and this reversal confirmed by the Supreme Court in 2004, an important step in the direction of stronger fair dealing in Canada had been taken. Fair dealing, as the Supreme Court now clearly stated,

> is perhaps more properly understood as an integral part of the *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 *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. (para. 48)

The *CCH* decision is today widely viewed as having provided a much-needed and long overdue indication that fair dealing was to be taken seriously and that users could have some faith that at least some of their dealings with copyright-protected works that involved their reproduction would be permitted. Nevertheless, because the Supreme Court also asserted that fair dealing was "impossible to define" (para. 52) and that it required a careful case-by-case re-examination to definitively conclude, no great clarity was provided to the public as to what dealings were, in fact, permitted. The language employed by the Supreme Court was not, moreover, implemented in other significant decisions, interpreted by institutions, or propounded by government institutions, with the consequence that individual users continued to shy away from activities that might later require them to invoke their rights of fair dealing. This situation was exacerbated by the growing power of Access Copyright (formerly the Canadian Copyright Licensing Agency), which generally overstated the strictness of the Copyright Act and continued to assert that no uses that could be paid for were fair dealing; causing educational institutions, in particular, to convey overly restrictive copyright guidelines to their users (see Trosow et al. 2012).

As many of our contributors note here, fair use is a broad and general category animated by general principles that enable the judiciary to exercise discretion in deciding whether acts are infringing, whereas fair dealing exceptions, in comparison, are narrowly defined and precisely enumerated activities. The former is commended for its flexibility but

decried for its uncertainty, while the latter has the virtues of certainty. However, the enumerated activities of fair dealing are generally too static to encompass continuing social and technological changes in the ways that Canadians use culture and knowledge – a shortcoming profoundly exacerbated by the advent of online activities.

Clearly, we are not alone in this recognition. As we finished this introduction in the summer of 2012, the Copyright Modernization Act Bill C-11 received royal assent, and five major Supreme Court of Canada judgments pertaining to copyright (the so-called pentology) were released. The imminent legislative amendments spell some improvements for creators and users of content in digital environments by expanding fair dealing to include some limited educational purposes and for parodic and satirical uses. It has also established other important users' rights, such as the right to make backup copies and shift content between formats. However, the Bill's strong protection of "digital locks" (technological means of digital rights management) threatens all of these user rights by treating the circumvention of such locks as an act of infringement despite the otherwise lawful nature of the use, suggesting ongoing legislative ambivalence about the fundamental importance of fair dealing in digital environments.

The Supreme Court pentology contains no such ambivalence, greatly increasing optimism for the future of fair dealing in Canada (Geist 2013). These cases reiterate the Court's continued insistence that a "large and liberal interpretation" should be applied when interpreting whether practices fall within the category of fair dealing to ensure that user rights "are not unduly constrained" (citing *CCH*, para. 51). Significantly, in a 5–4 split decision, in *Alberta (Education)* v. *Access Copyright*, the Court rejected the argument raised by Access Copyright that copies of works made for students by teachers at their own initiative for classroom use should not be considered as private study or research, but rather as instruction, which Access Copyright argued should not qualify as fair dealing (see Crowne 2012a). The Court decided that such copying was, indeed, done for the accepted purposes of research and private study, because, as a user's right, the relevant perspective from which to consider the purpose of the use was the user, in this case the student, whose research and private study was facilitated by the teacher's instructional use of the copy. This decision calls into question the much-debated model licence agreements between Access Copyright and several Canadian universities (Geist 2012), a critique anticipated and elaborated upon by our contributor Marcus Boon.

The same insistence on a liberal, user-centred interpretation of fair dealing characterizes the Supreme Court's unanimous decision in *SOCAN* v. *Bell Canada*, which found that the provision of online song previews, streamed to consumers before they decided to purchase and download musical works, was protected as fair dealing for the purposes of research (see Crowne 2012b). The Court rejected SOCAN's argument that research must serve to foster creativity and affirmed, instead, that research can "be piecemeal, informal, or confirmatory" and can "be undertaken for no purpose except personal interest" (para. 22), significantly because the dissemination of works – not merely the promotion of creativity – is one of the Copyright Act's purposes and in the public interest.

In these landmark decisions, the Supreme Court reaffirms the significance of fair dealing in digital environments as the exercise of users' rights that must be largely and liberally interpreted. In these welcome judgments, the Court also stressed the objective of technological neutrality, that is, the propriety of having the Copyright Act applied in a way that operates consistently, regardless of the form of media involved or its technological sophistication. This principle is of particular relevance to academic observers, activists, and user groups concerned with opportunities for dealing fairly in digital contexts. Nonetheless, the ongoing demand for royalties for digital fair dealing activity by licensing collectives for eight years after the *CCH* decision acknowledged the integral nature of fair dealing in the copyright system and the public interests the system is designed to serve, suggests that the social and economic landscape does not immediately change as a consequence of appellate-level legal decisions, which are optimistically interpreted by copyright owners as restricted to their own narrow facts. Ultimately, the statutory formation of fair dealing still frames it "as a narrow exception to copyright rules" and one that for too long has been "encumbered with an apparent, if unarticulated sense that use of another's work without permission [is] *de facto* unfair" (Craig 2005: 438, 443).

Many Commonwealth jurisdictions, including Australia, Canada, India, and Singapore, adopted the 1911 UK Copyright Act, the basis for the fair dealing exceptions, either directly, or as a model for their own laws (Burrell and Coleman, 2005: 249), which have been variously updated or amended in different jurisdictions (e.g., Handler and Rolph 2003, McLay 1999). Significantly, the Australian government considered moving from a fair dealing to a fair use defence in 2005, in response to growing demands for copyright reform. These demands included the pressures of a fair trade agreement with the United States,

as well as civil society interests in a more balanced relationship between owners' and users' rights perceived as likely to be further undermined by compliance with US trade dictates. The proposal was rejected and the amended legislation included a long and detailed list of exempted fair dealing activities rather than a more general and flexible fair use defence. A flurry of critical scholarship quickly followed; most critics despaired of the lost opportunity to counteract the expansion of copyright holder privileges (Weatherall 2007) and the flexibilities lost through rejection of fair use (Baron 2007), but others argued that some of the newly delineated usages might actually provide greater scope for user activity in digital environments (Austin 2010), a prospect that Bill C-11 might also hold for Canadians, were it not for the spectre of users having their rights foreclosed by ever more sophisticated technological locks. Despite the fact that Canada is subject to many of the same pressures that Australia faces and shares a similar legislative history, Canadian fair dealing has been neglected as a subject of critical scholarship, subjected to far less public inquiry and less policy scrutiny than can continue to be warranted. The rapid transformations of the ways in which culture is used and generated through digital technology suggests that strictly defined fair dealing exceptions will continue to privilege holders of legal rights while disregarding public benefits. Our authors explain why this is the case and what might be done about it in a digital world characterized by dynamic fair dealing. In this way, they make a specifically Canadian contribution to one of the major reform efforts currently pursued by the A2K movement: the rebalancing of copyright regimes through the formulation of an international legal instrument to create minimum mandatory limitations and exceptions to copyright powers (Franz 2010).

Overview of the Volume and the Contributions

This book consists of an introduction and three distinct parts, each of which provides a distinct perspective from which to consider the context, conditions, process, and practice of fair dealing in Canadian digital culture.

Part A The Canadian Copyright Context

The first part of the volume provides theoretical context for the chapters to follow, and stakes out the major issues to be addressed throughout the book. It serves the purpose of (re)familiarizing readers with the

legal concept and interpretation of fair dealing and offers a broader context for understanding Canadian copyright law by placing particular emphasis on the public domain in which fair dealing functions. The two chapters contained in the first section of Part A address provocative issues around the definition and implementation of fair dealing. These include the concept's impact upon expressive liberties, the uncertainties it poses in everyday activities, and the obstructions its enforcement by collectives pose to learning and creativity (Striphas and McLeod 2006). Law professor Bita Amani argues that to meaningfully update the existing, flawed fair dealing doctrine, we must take seriously the ways in which copyright law contravenes Canada's Charter of Rights and Freedoms – significantly, rights to freedom of expression. She proposes that the Charter, as well as the Copyright Act be invoked in intellectual property disputes, and strongly argues against the misconception that the two are unrelated. Like John Tehranian (2011), Amani points to the unseemly amount of infringement liability an average person inadvertently accomplishes in a single day, the counter-intuitive role of fair use and fair dealing in actually expanding the copyright monopoly, and the important expressive interests at play in many unauthorized uses of copyright works. Although proposed legislative amendments will exempt non-commercial uses of published works for the purpose of creating new ones from copyright infringement, the qualifying conditions are likely to be difficult for youth to understand or interpret. Amani reiterates Lawrence Lessig's (2008) important point that inherently reproductive digital technologies provide the most important tools of creativity for a new generation for whom digital remixing is a fundamental form of speech, thought, and identity.

Among youth, now the targets of increasingly didactic and moralistic "anti-piracy" campaigns (Bently, Davis, and Ginsberg 2010, Gantz and Rochester 2005, Logie 2003, Yar 2008), the legitimacy of copyright law has reached a new nadir, while important new forms of creativity are imperilled (Reyman 2009). The study of social rhetoric around copyright in digital environments, both by those who are fearful of the new technology and fuelling moral panics (Patry 2009), and by activists promulgating new user's rights (Collins 2010, Postigo 2008b), is an important area of emerging concern for those concerned with the ways in which language shapes the interests we recognize in public policy disputes (Murray 2005, Silbey 2010). The necessity to achieve a balance between access to and protection for intellectual property has preoccupied a full generation of IP scholars, led by the groundbreaking work of

David Vaver (1990). Aware that copyright reform historically tended to be dominated by small groups of industry stakeholders, leaving the public to be represented by educational and library representatives (Geist 2005, Sheppard 2009), these scholars ask whether digital technologies do not demand that the broader public have their interests more fully represented, as users and creators of cultural content (Craig 2005, Drassinower 2005).

Starting from his position in a university classroom, literary theorist Marcus Boon answers this question affirmatively, taking as his point of departure the question of whether Access Copyright (the Canadian agency charged with administering permissions and fees on behalf of copyright holders) interferes with fair access to intellectual property. The question is not merely theoretical; in 2011, a group of Canadian universities collectively rejected the tariff structure proposed by this agency, its assumed monopoly over educational materials, and its interpretation of fair dealing recently legitimated by the *Alberta Education* decision. Boon argues provocatively that copying, an inherent and crucial aspect of human expressivity, is throttled by copyright law and the limited exceptions it recognizes and asserts; in their current and proposed manifestations, these exceptions are not meaningfully related to practices of creative expression. This is particularly true in a networked digital milieu that facilitates copying, sharing, and new forms of collaboration – a contention that other authors in this volume further elaborate, refine, or qualify. Boon's contribution moves us into the notoriously amorphous concept of the public domain, which, although legislatively unacknowledged, is fundamental to understanding how fair dealing functions.

Historically, the public domain was the subject of a scant few prescient books and law review articles (Patterson 1968, Patterson and Lindberg 1991, Lange 1981, Litman 1990). Since the turn of the millennium, the ubiquity of digital technology in consumer societies has renewed critical interest in the concept, and the term "public domain" has attracted enormous new energies (e.g., Dreier 2001, Coombe 2003, Drahos and Braithwaite 2002, Frow 2000, Hemmungs Wirtén 2008, Macmillan 2007a, Waelde and MacQueen 2007). The public domain has variously been characterized as those intangible goods and forms that lack IP protection (Boyle 2003), equated with a cultural "commons" (Gross 2006, Lessig 2001, Starr 2000) or a commonwealth (Bollier 2002), described as a realm of socially shared informational goods lacking commodity status (Therien 2001), or defined by gift relations (Frow 1996),

and is occasionally considered a dimension of the public sphere (Halbert 2005). Definitional and "mapping" efforts (Dutfield 2000, Guibault and Hugenholtz 2006, Samuelson 2003) abound.

The next section of Part A addresses the concept of the public domain and its dimensions as a space of cultural activity. Legal theorist Carys Craig argues that the power of the public domain stems directly from its protean nature as a concept. She suggests that asking what the public domain *is* represents a sort of cognitive error. The relevant question is what we *need* the public domain to be. Craig makes the case for expanding the use of the term "public domain" beyond works publicly available because copyright protection has expired and suggests that existing case law points to a more positive rendering of the public domain as an enlarged space of cultural productivity that serves the public interest. Strengthening and elaborating the concept of the public domain in Canada's legal culture, Craig claims, is closely linked to the development of a robust and dynamic concept of fair dealing.

The next two chapters examine central ambiguities around the status of what might be considered border objects in the public domain. Lawyer Ren Bucholz addresses difficulties that emerge from the public's lack of capacity to access and use orphan works. These works enjoy legal protection but belong to corporate or private entities that cannot be located, making it nearly impossible to obtain licences to take social and creative advantage of them. To remove such works from this legal limbo, and facilitate access to them, Bucholz proposes that Canada's fair dealing provisions encompass and validate the activities of people like amateur curators of "abandonware" (software whose corporate copyright holders no longer exist or cannot be located) who ensure that such works can be accessed and used fairly.

Kyle Asquith is also concerned with issues of access, focusing on publicly funded cultural works that are withheld from public access, by considering Jesse Brown's successful CBC Radio One show *The Contrarians*. Although the CBC hosts freely accessible episodes of many of its shows on its website, this is not one they had made available. As the show's original creator, Jesse Brown wanted to share these episodes with the online public, and consequently, he attempted to host free digital copies as a series of MP3 files on his personal website. The CBC insisted that he had no right to do so. In the course of this dispute, it became evident that despite its national public service mandate, the CBC outsources its IP monitoring to an American corporation, which thereby polices Canadian use of public culture at the Canadian taxpayer's expense. The

result is that content paid for by Canadian tax dollars is unavailable to Canadians. The individual interviews Brown sought to make accessible comprise a very small portion of the CBC's output; nevertheless, the policy precedent that this incident sets is a matter of democratic concern. Asquith calls for the use of public licensing schemes by public institutions such as the CBC as part of a more clearly developed principle of user's rights in Canadian law and culture generally.

As the example of the thwarted hosting of *The Contrarians* MP3 files illustrates, technological innovations are not necessarily useful to members of the public unless they are paired with clear policies that render their use open and democratic. In *Always Already New: Media, History and the Data of Culture* (2006), media historian Lisa Gitelman argues that a medium consists of more than technology itself; it also includes the relationship of that technology to the protocols that shape the ways in which we perceive and make use of it. For example, the first decade of this century witnessed conflicting protocols regarding the use of MP3 technology. The Recording Industry Association of America (RIAA) infamously sued both file-sharing networks such as Napster and a range of US citizens, contending that downloading MP3s was an illegal act. When the Canadian Recording Industry Association (CRIA), attempted to launch a similar series of lawsuits in Canada, the courts denied the request (*BMG Canada Inc.* v. *John Doe*, 2004). Nonetheless, during the same period, Apple sold computers using their "Rip. Mix. Burn." advertising campaign in both countries. As Tarleton Gillespie (2007: 14) asserts:

> technologies can powerfully shape the social activities in which they intervene, sometimes with significant political consequences; at the same time, technologies are also powerfully shaped by the individuals and institutions that produce them and reshaped in powerful ways by users, suggesting that their impact has a lot to do with the meanings that are negotiated and the cultural contexts in which that negotiation occurs.

Thus, the third section of our general contextual grounding of fair dealing focuses on the practices and policies that shape the infrastructures for fair dealing in Canadian digital environments.

In the wake of copyright restrictions that might otherwise inhibit creativity in digital environments, a whole range of new protocols for dealing with digital cultural objects has emerged in the revolutionary operating systems and applications programmed by Free/Libre and

Open Source Software (FLOSS) thinkers and activists like Richard Stallman (2009), Eric Raymond (1997) and Linus Torvalds (1991). Their chief argument is that although strengthening IP regimes stifles democratic debate, their software supports both the creative process and the public discourse vital to democracy: "If people cannot 'speak' without buying the rights to the underlying property, then the needs of democratic citizens are necessarily silenced" (Berry 2008: 32). The most significant of the protocols introduced was the public licence, such as the GNU General Public License (GPL), which encourages the use of copyright powers to enforce sharing rather than restrict it (Kelty 2008). Initially designed to ensure that the source code of a program circulated openly, along with the compiled, executable version of that program (hence, the term "open source"), the GPL also ensures that no one can corral a piece of open code and use it in her or his own commercial products without also sharing her or his own derivative creations, keeping code available, and ensuring the common pool of open code continues to grow in size and complexity (Wershler-Henry 2002: 26–9). People quickly saw the value of the public licensing paradigm for things that did not have source code, such as books, comics, and paintings and adapted the GPL to apply to non-programmed digitized objects. The CC licence is the best-known example. Due, in part, to pundits like Lawrence Lessig and Cory Doctorow (2008), the popularity of public licensing has expanded to include cultural objects of all sorts (Kelty 2011).

Canadian publishing scholar John W. Maxwell, in his chapter, examines public licensing and the development of the concept of "user's rights" as responses to the vast increase in the scope and duration of copyright powers during the past century that has created an unbalanced legal regime (Scassa 2005, Lametti 2005, Tawfik 2005). Arguing against a "pay per use" culture in which every cultural work is owned so as to require clearance before it can be used (Therien 2001), Maxwell advocates the global adoption of the practices and conventions of peer-production–based communities such as Flickr and Wikipedia. Such practices are built on principles of collaboration, sharing, and the providing, rather than the limiting, of access to informational goods. The novel exercise of such rights has helped to forge new communities and legitimize and popularize new norms.

Website developer Eliot Che revisits the importance of open source movements in developing contemporary norms of online sharing and collaboration in his chapter. As the ethos of sharing developed by these movements spreads to the larger cultural sector through wiki-style

knowledge repositories, social networking platforms, and image-sharing sites, Che argues that it is necessary to reconsider the qualities that define the usability of digital goods. Although we often think of digitally provided goods as simply available for public use, the capacity of end users to actually employ digital products such as software is often possible only because of intense, collaborative, cooperative efforts that must continue in order for these goods to produce social benefits. Che proposes that we think of this characteristic of digital products as "social usability," pointing to the benefits that a society draws from the accessibility of social capital represented by software and other collaboratively authored cultural expressions.

In response to the astounding popularity of peer-to-peer (P2P) file sharing, the traditional content industries responded with new technological means and new protocols for concentrating and restricting the online circulation and use of digital cultural objects (Zittrain 2008, Wu 2010, David 2010). Digital rights management (DRM) systems, which encrypt content in order to limit access to it, present a "technological fix" to this problem, enabling producers to physically control and manage digitally distributed information by using contract law to enforce these limitations. The emerging digital landscape is increasingly governed by privately generated norms backed up by legislative bodies, privileging private ordering and displacing public deliberations around the scope of copyright and its limits: "the immediate outcome of this process is to turn large chunks of what was once in the public domain into private goods" (Elkin-Koren 2001: 192). Deployments of DRM can and do result in violation of users' rights of fair use and freedom of expression:

> The attempts thus far to impose technological solutions onto the promiscuity of the Internet have all faced intrepid users who refuse these constraints: from the casual users of peer-to-peer networks to the amateur DJs creating innovative forms of digitally reworked music; from the widespread use of "black market" technologies to the hackers that take on every new system; from academic critics who challenge these strategies to the campus activists who mobilize against them. (Gillespie 2007: 18)

Various solutions to this standoff have been proposed by advocates of methods to provide compensation to owners without controlling the behaviour of users (Fisher 2004, Lessig 2004, Litman 2004, Netanel 2003). Although capabilities for preventing unauthorized file sharing

are still under development, and their long-term viability is uncertain, "right holders are still betting on exclusivity in cyberspace" (Peukert 2009: 153).

Communications scholars Ira Wagman and Peter Urquhart further extend the argument that the part of the Internet we know as the Web has never actually been open As evidence, they discuss the widespread practice of geoblocking – denying access to a Web address based on the geographical location of the user's computer – which is ever more common when real-time streaming video is the means to access digital audiovisual content. Wagman and Urquhart examine the regional imbalance in access to cultural goods that the practice creates in Canada, and question the fairness of this approach. In the final contribution in this section, open media advocate Steve Anderson tracks the accelerating movement of Canadian Internet service providers away from "net neutrality" principles, through their adoption of practices such as the shaping and throttling of traffic and the prioritization of information flow for customers prepared to pay a premium. Overall, the contributions to this section indicate that if some parts of the Web have never been open, other parts are becoming less open than they used to be, a development that has profoundly negative consequences for a supposedly egalitarian public domain.

The accessibility of digital public culture is of great concern in education. Section IV of Part A explores practices of pedagogy and scholarship in which intellectual property rights limit opportunities for learning. The academy is a bellwether for IP management practices; what happens there generally has consequences for the other learning communities that digital media serve. Canadian cultural policy, however, seems oblivious to the academy's innovative efforts to improve and ensure the accessibility of knowledge (Lorimer et. al. 2011). Eroding notions of fair dealing and fair use may adversely affect the sorts of texts that students are encouraged to read and instructed to produce in the classroom (Westbrook, 2009). Legislative allowance for education as a fair dealing purpose must be publicly as well as judicially interpreted in a capacious manner. Education as a public good is non-rivalrous in nature in that students benefit from it without reducing the amount that is available to others; moreover, the more educated the public, the greater the market for copyright-protected goods. Nonetheless, "cases which deal with the exceptions and limitations of copyright law – particularly in determining what is fair – seem to take a restrictive and narrow interpretation" (Wahid 2011: 86, 93). Here, the need for a

practical ethos of fair dealing is especially pressing, as the ability to study society and culture is fundamentally predicated on open access (OA) to texts and other cultural objects.

Given the current limited exceptions to copyright liability, encouraging Canadian educational institutions to take full advantage of the learning opportunities that digital technologies afford is a huge challenge. For example, for audiences with impaired hearing or vision, as J.P. Udo and Deborah Fels show in their chapter, the addition of closed captioning and audio descriptions provide the only means of accessing cultural works. Creating such useful interfaces is virtually impossible to do, however, without engaging in a transformative use of the copyright-protected content, which requires bypassing the access restrictions that copyright puts in place. Udo and Fels argue that to accommodate such activities and the important social functions they serve, we require either a broadening of fair dealing rules to enable accessibility for the perceptually challenged or a commitment by creators, producers, and distributors to guarantee improved accessibility to their works. Such changes are essential to recognizing the cultural rights of people who would be otherwise socially marginalized.

Whereas Udo and Fels are concerned with access to digital works for the general educational needs of disabled learners, the last two chapters in this section deal specifically with issues concerning the study of digital objects in the university classroom. Communications scholar Matt Soar confronts the uncertainties that instructors face when teaching students with and about digital media. This is especially true in classes that have a production component, which necessarily entail using the reproductive capacities of the technology at hand. Alec Couros continues in this vein, presenting his achievements in moving from a conventional passive "teacher network" towards a philosophy of teaching based on openness. Grounding his discussion in his own teaching experience, Couros outlines philosophies and methodologies that are useful in establishing digital pedagogical practices in which students are invited to share in the structuring of university courses and redefine their engagement with and dissemination of course content. As demand for the study of digital materials increases, and more classrooms become equipped with "smart" technologies, an ethos of fair dealing in the classroom becomes a more pressing need.

As our colleague Meera Nair reminded us in an email, much has happened since the call for papers for this volume was first circulated: "In the summer of 2009 Canadians were invited to contribute their opinion

on copyright to the federal Government. The depth and breadth of the response was extraordinary. Thousands of Canadians participated and it became evident that the subject of copyright has moved beyond an archaic specialty within the law to a policy field recognized as having broad public relevance. Many Canadians are now aware of the potential of fair dealing to mediate between the claims of property and the access called for by creators and communities. Yet the nuance of fair dealing has yet to be fully appreciated by universities and publishers – the very institutions that are best positioned to educate all Canadians."

Part B Mediations: Professional Practice and Creative Activity in Three Fields

The second part of the book, "Mediations," considers three fields of professional practice and creative activity: digital publishing, heritage management, and poetics. In each of these fields, the ubiquity of digital technologies ensures that questions of fair dealing continually arise and, due to the historical lack of progressive legislative reform, need to be addressed by committed practitioners, often in innovative and sometimes startling ways.

Publishing is a field that has been reinventing itself since the emergence of networked digital media. In a realm where the profit margin is already much narrower than the music industry, film, or television, publishers simultaneously have to master new technologies while contending with dwindling physical sales and the increasing concentration of digital sales through online portals and e-reader manufacturers like Amazon and Apple, all of whom demand a cut of the retail price. One of the earliest assertions about the effect of digital media on publishing, Stewart Brand's epigrammatic claim at the first Hackers Conference in 1984 that "information wants to be free" (which continues to be misinterpreted as a call for a the total abandonment of copyright), still has a surprising amount of traction. What Brand actually said still holds true: networked digital media creates a deadlock between the increasing value of information and the ease with which we can copy and redistribute it (Clarke 2000). Although the idea that copyright would simply become irrelevant in an era of networked digital publishing was debunked fairly early (by Mark Stefik in 1997), the first serious forays into the question of what digital publishing would become were largely hypothetical exercises in economic theory (e.g., Kahin and Varian 2000). The market for digital books would not really take off for another decade.

Our contributor Stevan Harnad (1998) was one of the first to argue that digital media would affect fair dealing in the academy, by insisting that the "theft" of scholarly text is a victimless crime. Since authors of refereed papers receive no remuneration for them, what needs to be protected against is not the theft of the papers per se, but the loss of attribution of authorship, suggesting that moral rights have particular significance in digital worlds (Rajan 2011). One implication of Harnad's prescient argument is that traditional trade models of publication such as subscriptions or pay-per-use might be replaced by much smaller charges on behalf of the author, in exchange for making the text freely and openly available in perpetuity, so long as attributions remain intact. On this basis, Harnad (1998, 2001) made early arguments in favour of institutionally based open archives of scholarly literature.

The proliferation of digital repositories and OA journals (Brown, Griffiths, and Rascoff, 2007) is presented by its advocates as an antidote to the prohibitive institutional pricing schemes, firewalls, and draconian copyright practices characteristic of many prominent academic journals (Willinsky 2006). Where high-quality digital copies of scholarly materials are available, their usage tends to displace the use of traditional print materials (Joint 2008) and OA digital research is between two and four times more likely to be cited than research published solely in print (Hall 2008: 47). Although implementations of open access have existed since 1969, less than 15 per cent of all peer-reviewed scientific journals are open access, and the majority of academic libraries have yet to implement OA repositories (Theodorou 2010). In the meantime, three companies (Elsevier, Springer, and Wiley) control the publication of 42 per cent of journal articles, and their profit margins have hovered at around 40 per cent for over a decade, a practice of limiting access to research that has been described as "pure rentier capitalism: monopolising a public resource then charging exorbitant fees to use it" (Monbiot 2011). These academic publishers control many of the leading journals; to maintain their reputations and stay on top of the work in their fields, many scholars are simply unable to stop reading or publishing in them. From the perspective of public institutions and at the policy level, conflicts abound. Public institutions cannot afford the price of these subscriptions, but they cannot uphold excellence if they deny faculty and students access to them. The licensing agreements of many databases and electronic journals often specify who is and who is not authorized to use the information they contain. Fair dealing, however, makes no such distinction between authorized and unauthorized users,

creating potential conflicts between academics and librarians about the appropriate use of digital materials (Masango 2009: 234).

Even as OA journals and repositories continue to spread, openness and the free circulation of knowledge as public goods – values traditionally championed by the academy and Internet users in general – are coming into increasing conflict with corporate publishers' appeals for entrenched or even stronger owners' rights. Activists involved in the fight against enclosing "the commons of the mind" are supporters of the basic principle of copyright because it protects and maintains the rights of both the public and individual authors (Willinsky 2006: 41). However, maintaining a balance between owners' rights and those of educators working in the public interest is proving to be difficult because owners increasingly treat all educational uses as simple markets (Herrington, 2001). FLOSS movements, for example, have had little influence in commercial publishing realms.

Early experiments in open commercial science fiction publishing, such as Baen Books' Baen Free Library, suggested that making full-text versions of books available online for free could boost sales of print editions (Flint 2002, Suber 2006: 22–3), an argument later popularized by Chris Anderson's *The Long Tail: Why the Future of Business Is Selling Less of More* (2006). Science fiction authors and editors continue to be leaders in the field; TOR/Forge books recently announced the launch of a DRM-free e-book store for its titles (Tor Management Services). Some mainstream commercial publishers recognized that the circulation of digital versions of a text could serve to increase sales of paper books (Hall 2008: 51) and e-book publishing looked like a promising arena for the development of a regime of fair dealing that served publishers', authors', and readers' needs. Alas, such initiatives were abandoned in favour of competitive, proprietary infrastructure. The current digital publishing environment is dominated by short-lived hardware platforms, competing and conflicting file formats, cumbersome technical protection measures, and increasingly concentrated commercial distribution channels with draconian terms of service, none of which is conducive to fair dealing.

The basic tensions that Stewart Brand described are still very much in operation. At the same time that the OA paradigm is taking hold, the accessibility, ownership, and user rights that we have come to expect from books (such as "first sale" – the right to resell a used book – or the right to share personal copies), along with the cultural political values that scholars and students have traditionally supported (such as the

free circulation of knowledge), are unlikely to continue to exist in the world of Amazon Kindles, Apple iBooks, and Sony eReaders (Striphas 2009). As in the realm of pedagogy, the degree to which digital texts will remain proprietary and the extent to which fair dealing practices will be legitimated is still unclear.

In the interest of providing some context for current discussions, preeminent Canadian publishing scholar Rowland Lorimer traces the modern history of academic publishing from its post–Second World War status as a service industry to its contemporary status as a commercial enterprise and addresses the implications of this transformation for access to scholarly research. Like other scholars and activists concerned about the practice of creating artificial scarcity by using copyright to restrict access to research (see Rees 2010), in his chapter, Lorimer argues the merits of OA publishing as a mechanism to increase both openness and competitiveness in academic publishing.

One of the factors that will determine how open or closed the future of publishing will be is the software that we use to manage digital publishing. Arthur Sale, Marc Couture, Eloy Rodrigues, Leslie Carr, and Stevan Harnad believe that if something isn't part of our digital desktop, it is often too easy to ignore, and that an invisible opportunity to access information often seems like no opportunity at all. Their contribution to this volume describes a tool that helps to instantiate fair dealing practices directly into the fabric of the digital media interface: a software button that allows readers of digital documents to request the author email the text to them for individual research purposes under the provisions of fair dealing.

Rights to particular measures of control over how works are used are clearly matters of concern for a wide range of creators. Practices of fair dealing, like those of intellectual property enforcement, take place in contexts shaped by historical inequalities. Not all peoples have been able to take advantage of the law's categories. Historically, IP law has privileged European categorical systems, and to that extent, it may further entrench socially specific values and world views. Dichotomies between the public and the private developed in early modernity; as many scholars have shown, they served particular interests and delegitimated others (Bowrey and Anderson 2009, Graham and McJohn 2005). Within IP debates, critics have placed particular emphasis on the ways in which a so-called public domain enables and encourages the appropriation of intangible resources held by non-Western others, particularly Indigenous peoples and those in the Global South (Biagioli,

Jaszi, and Woodmansee 2011). This is a dilemma well understood by the World Intellectual Property Organization, which recognized over a decade ago that a singular and wholly unregulated public domain would not meet the needs of many Indigenous peoples and local communities (WIPO, 2003).

Most IP regimes operate on the assumption that creative works circulate through standard forms of publication supported by markets. Rarely do we consider that channels of communication other than arm's-length licensing transactions may be necessary for the sharing of cultural work. Access to and the sharing of benefits from traditional knowledge and traditional cultural expressions may require distinctive forms of relationship involving trust, collaboration, and close apprenticeship. When it comes to traditional forms of cultural work, "the goal of providing and protecting public goods cannot be met by simply assuming their position in a singular public domain populated by cultural resources free for general appropriation" (Coombe 2005: 603). Indigenous peoples, in particular, often hold rights with respect to intangible cultural goods that are coupled with distinctive forms of obligation that constitute their identity as a people and pose new challenges to IP regimes (Brown 2003, 2005; Bowrey 2011; Geismar 2012; Gibson 2007; Graber and Burri-Nenova 2008). Finding means of respecting Indigenous responsibilities with respect to cultural goods also entails a consideration of Indigenous customary law, which, like any new IP consideration, must be tied to global norms (Drahos 2005).

The international human rights framework is the only global normative framework of sufficient legitimacy to engage these issues. Intellectual property rights are positioned as cultural rights within the global human rights framework, and are thus integrally related to rights to cultural heritage, to cultural diversity and the maintenance of cultural identity, as well as to rights of participation and cooperation (Coombe 1998; Ahmed, Aylwin, and Coombe 2009), although the appropriate articulation of these rights is ongoing (Helfer 2007, Macmillan 2008, Wong 2008, Yu 2007). Recognizing, appreciating, and maintaining cultural diversity pose new challenges for copyright law and fair dealing (Wong, Torsen, and Fernandini 2010). The next section of Part B focuses on issues of heritage management, an area in which Canada is emerging as a leader. The essays in this section illustrate the need to formulate policy attentive to issues of multiculturalism and intercultural dialogue in the management of collective cultural heritage.

As cultural policy scholars Rosemary Coombe and Nicole Aylwin remind us, Canada needs to place its fair dealing considerations into a wider cultural policy framework attentive to our human rights commitments. In their chapter, they ask that we reimagine cultural heritage as a dynamic, dialogic activity rather than the appreciation of static works of history – a shift that will bring new responsibilities as well as new rights. Contemporary heritage practice illustrates the emergence of a new cross-cultural ethics of care with respect to cultural properties. Recognizing that property is a relationship between people and that cultural goods are enmeshed in relations of historical identity, practitioners have moved beyond the commodity logic of intellectual property to embrace notions of guardianship and mutual responsibility (Coombe 2009). Putting this ethos into practice is manifest in new employment opportunities, benefit-sharing arrangements, and resource management structures that contribute to new forms of sustainable development based on an acknowledgment of collective cultural rights.

Cultural rights are too often absent from national and international conversations around the ownership of culture, because they concern the rights of groups as well as those of individuals. The overwhelming pervasiveness of digital technologies underlines the need to take cultural rights into account, because such technologies offer both a greater potential for the abuse of cultural rights and new opportunities for cross-cultural dialogue and deliberation (Christen 2005, Graber and Burri-Nenova 2008). Archaeologist George Nicholas illustrates this point in his chapter by focusing directly on the issues that digital media raise with respect to the cultural heritage of Indigenous peoples. He explains why Indigenous cultural heritage should not be considered part of the public domain, and argues for a new postcolonial research ethic to ensure that our use of digital technologies does not exacerbate the injuries inflicted on Indigenous peoples during our colonial past.

Nicole Aylwin closes this section by examining the precarious position that Canada inhabits as a leader in the field of cultural diversity management, ambiguously suspended between commitments to economic stimulation and social objectives that recognize public goods. She points out that policy discourse almost always invokes copyright law as an economic rather than a cultural vehicle, a tendency that calls into question Canada's ostensible objectives of maintaining multiculturalism and furthering intercultural dialogue. Aylwin reminds us of Canadian commitments to human rights as the appropriate normative

framework for appreciating cultural diversity (Donders 2010) and a more responsible way forward with regard to issues of Canadian cultural policy.

Section III, "The Work of Poetics," focuses on how creative expression interfaces with issues of IP rights in literature and avant-garde art. As Marshall McLuhan's useful notion of artists as an "early warning system" in *Understanding Media* (1964) suggests, many of the issues pertaining to fair dealing and the discourse around intellectual property that have become relevant to cultural production and cultural policy at large first surfaced in poetic and artistic practice. Surrealism, Futurism, Cubism, Situationism, Warhol's Pop art, Fluxus and the neo–avant-garde, the conceptual art of the 1960s, contemporary literature and poetry, and virtually all of postmodern art established collage, bricolage, copying, and appropriation as major techniques of twentieth-century artistic production. These techniques also helped to inculcate a strong structure of feeling among artists, critics, and audiences that challenged traditional assumptions about the propriety of asserting property in cultural expressions.

A continuous stream of humanities scholars have reflected on the significance of copying practices in all areas of contemporary human creativity – Benjamin Buchloh (1982), Rosalind Krauss (1985), Frederic Jameson (1991), Jean Baudrillard (1994), and Hillel Schwartz (1996), to name but a few illustrious examples. In the Canadian context, literary theorist Linda Hutcheon (1989) approached the tension between the established canon of expressive works and the copyings and repetitions to which these were subjected in postmodern art (the focus of many ongoing copyright trials). She did so by formulating an influential theory of "complicit critiques" which function by changing the meanings of the originals from which they quote by repurposing their contents. The success of such critique depends on the recognizable invocation and hence the "copying" of these same originals. As Kembrew McLeod and Rudolf Kuenzli (2011) remind us, practices of reproducing cultural texts that critically comment on their cultural meaning are fundamentally important to the projects of creators in virtually all expressive media, from the early twentieth-century avant-gardes and the textual and musical subversion of blues and folk music traditions to contemporary architecture, culture jamming, and digital sampling. Despite ever more convincing theoretical explanations of the critical work that acts of creative appropriation accomplish, the legal landscape around contemporary appropriation art is far from settled (Aufderheide and Jaszi 2011).

The new non-commercial transformative use exemption for consumers, which requires attribution of source, use of a legal copy, and a determination that the use will have "no substantial effect on the exploitation of the original work" is unlikely to counter the chilling effects that threats of copyright infringement proceedings have had on such expression.

Parody has played a historically important role in shaping public understanding of permissible cultural appropriation in the visual and audible arts. As one of the oldest forms of creative expression in which the use of another's work is regarded as a creative act that uniquely conveys expressive value, it marks an important intersection between artistic and legal discourse. Parody represents an important component of the American fair use doctrine, and other national jurisdictions, such as Australia (see Australian Copyright Act 1968, McCutcheon 2008) have amended their copyright legislation to include it. As Carys Craig (2005: 445) suggests, "the transformative value of parody and the power that it wields as a means of social critique make a strong case for its inclusion in the fair dealing defence." In his contribution, legal scholar Graham Reynolds explores the long Canadian history of judicial lack of recognition for parody as a form of fair dealing by way of explaining why an explicit legislative amendment was ultimately deemed necessary, while assessing the prospects of such legislation for protecting parodic expressive practices in digital environments.

Kenneth Goldsmith – writer, artist, and administrator of UbuWeb (one of the largest and longest-standing freely accessible repositories of avant-garde materials on the Internet, including visual and concrete poetry, critical texts, spoken word pieces, films, and videos) – however, eschews law reform and embraces a strikingly different approach in his discussion of his management of online cultural content. Most of the material on UbuWeb was digitized and posted without the permission of its creators. It is kept publicly available thanks to Goldsmith's strenuous efforts to argue for the fairness of his "dealing" on a case-by-case basis, personally negotiating permissions with all creators and rights holders who send him cease-and-desist notices. Goldsmith reports that he is usually able to convince rights holders that it is in their own best interests to leave their materials in the archive, especially when the materials in question are nowhere else available. "Radical works deserve radical distribution," Goldsmith argues – an extreme position that might be considered one end of the spectrum of practices that constitute dynamic "dealing" with respect to copyright-protected objects in digital environments.

Filmmaker and digital media designer Justin Stephenson rounds off this section with an account of his experience with handling permissions while constructing a digital video project based on the creative work of famous Canadian experimental poet bpNichol. Recounting details of personal negotiations with the rights holders of the materials used, he suggests that there is a "third way," suspended, like Goldsmith's more radical approach, between the formal securing of licences and the conscious practising of infringement, based on respectful deliberations with creators (and their estates) about the intentions, desires, and perspectives of the original author as well as those of the creator who seeks to reuse the material. "Direct dealing," so easily facilitated by digital technology, may be quite effective in enabling consensual, fair access to protected cultural expressions. Unfortunately, Stephenson laments, such negotiations remain largely invisible to the institutions that manage copyright and forge cultural policy for Canadians.

The contributors to this part of the volume thus speak to the dynamism of fair dealing as a Canadian artistic practice that contrasts starkly with the static category our legislation bestows upon us. The essays contribute to an emerging field of scholarship that goes beyond general criticism of the law's failure to keep up with the communications and cultural transformations wrought by technological change to consider alternative moral economies or norm-based forms of culture and knowledge that operate outside of, in the shadow of, or as an alternative to formal IP systems (Biagioli, Jaszi, and Woodmansee 2011; Dreyfuss 2010; Zeilinger 2012). Building upon sociological and anthropological studies of communal forms of resource management, a new ethnography of what we might call "vernacular forms of intellectual property" is now emerging (e.g., Buccafusco 2007, Fagundes 2011, Fauchart and von Hippel 2008, Loshin 2008, Oliar and Springman 2011, Raustiala and Sprigman 2006).

A renewed interest in community norms among scholars of intellectual property is similar to the revitalization of interest in customary law among heritage practitioners and museum curators. Both add new dimensions to what is increasingly an interdisciplinary field of scholarship and practice concerned with emerging ethics for governing cultural access and circulation in digital environments. To achieve viable, broadly beneficial reforms in cultural policy, we need to attend to such ethics, which illustrate that alternatives to the current impasse between digital "piracy" and the "clearance culture" are not only necessary, but feasible and perhaps even inevitable (Zeilinger 2011). Whether and to

what extent such empirical knowledge of viable ethical practices will serve to inform legal understandings of intellectual property and the necessary qualities of law reform is an important (if open) question.

Part C Making Our Heritage a Dynamic One

The final part of the volume explores relationships between Canada's cultural past and its cultural futures. Our contributors outline new challenges, and invite readers to consider the new opportunities that digital technology and digital creativity offer for restructuring interactions between creators and communities of users, be they audiences, researchers, or consumers. Coombe and Wershler have long been convinced that digital technologies enable online archives to uniquely balance the rights of creators, cultural institutions, and members of the public as users and creators in their own right. To that end, and with the support of the Canadian Foundation for Innovation and the Ontario Research Fund, they have developed an OS, online content management system (CMS) called Artmob for cultural institutions wishing to make their archives of cultural content digitally available to a broad public. Artmob fulfils and surpasses Canada's fair dealing requirements by fostering collaborative engagements between institutions and Canadian users – be they students, researchers, fans, or consumers – while facilitating the greater range of attribution, criticism, news reporting, and review that the Internet enables.

Artmob is designed to educate the public about copyright and more fully represent the complexity of contemporary cultural production practices while providing institutions with a greater sense of security in posting digitized cultural works. To take but one example: a video recording of a dramatic performance will involve individual performances as well as the reproduction of musical, dramatic, and possibly underlying literary works, each of which is distinct, and all of which may be associated with distinctive rights. Representing them as both singular and bound together within the online presentation of the composite work is important for attribution, licensing, informational, and educational purposes. Although this embedding of works and rights in composite works may be self-evident to IP lawyers, it is far from intuitive for cultural institutions holding archives of such works or to members of the public.

The Artmob project involves the development of innovative software that creates new interfaces to enable institutions to easily identify both

works and rights holders (and others considered worthy of credit in distinctive fields of cultural production) and to make such attribution information available to the public. When such information is incomplete, or where it turns out to be incorrect, the Artmob system enables interested Internet users to provide archive administrators and future users with further context about a work's creation. In this way, the system fulfils twin objectives; not only do we potentially gain a more accurate understanding of the field of actors who hold rights in works, but we learn far more about the social and historical conditions under which works have been created by using the dialogic capacities of digital technology to augment our understanding of our cultural heritage.

Finally, Artmob is structured to invite and enable users to engage in online news reporting, criticism, and review. It encourages those who want to put digitally archived works to new purposes to negotiate directly with archivists and rights holders. In so doing, new and innovative licences for the use of cultural work may be forged and shared. Through the online use of this CMS, the very architecture of publicly available digital cultural archives can incorporate and encourage practices of dynamic fair dealing. The Artmob project is still in its infancy, and the public launch of its OS software is pending as this book goes to press. The remaining essays in the volume explain how and why we consider such a new and dynamic approach to fair dealing in digital environments to be long overdue.

The essays in Section I, "Documenting Pasts and Assessing Virtual Futures," ask difficult questions about popular access to the cultural works and public collections that arguably define Canadian cultural heritage, and illustrate how existing IP law impedes the maintenance and creation of new digital platforms for making this work available. The creation of databases of historically significant, collaboratively authored cultural works is an important example of the kind of activity that fair dealing exemptions should enable. However, as the surveys and case studies in this section show, it can be exceedingly difficult to develop such archives in the current culture of licences and permissions.

Using case studies of digital collections of Canadian theatre materials, sociolegal researcher David Meurer argues that the likely enforcement of Canadian copyright law increasingly puts it into direct conflict with the mandates of libraries, archives, and museums, which are obliged to make materials broadly accessible to the Canadian public. In his chapter, Meurer's chief concern is that the current discourse around copyright pits users against the creators and owners of cultural materials,

with the result that public institutions such as libraries and archives, which should ideally mediate and facilitate access to cultural materials, are given no leverage or voice in public dialogue. Observing the recent development of a legally shaped cultural landscape that does not allow for the creation and dissemination of precisely the kinds of cultural archives most desired by students, researchers, and artists, Meurer concludes that controls on educational and not-for-profit uses of cultural materials need to be loosened in order to allow publicly held material to be made available for activities in the public interest. It was precisely to help arts administrators address these kinds of difficulties that the arts content management software, Artmob, discussed above, was designed.

In her chapter, literary scholar and arts practitioner Suzanne Zelazo examines the logistics around creating large, complex arts websites such as that of Toronto's Scream literary festival, and she explores the difficulty of negotiating permissions to access and reuse cultural works. Citing the increasing number of electronic recording devices, communications tools, and digital storage options now available to creators, festival organizers, and audiences, Zelazo illustrates how basic assumptions among participants and organizers concerning permissible uses for recordings of literary performances have changed over the past decade. With a multitude of different potential rights holders involved in the production and documentation of festivals such as Scream (poets, performers, videographers, curators, designers, etc.), the ways in which our digital cultural heritage is being built are by necessity characterized by dialogic negotiation and significant collaboration. This ethos needs to be reflected in Canada's fair dealing provisions, Zelazo suggests, if we want to ensure the continued survival of cultural events designed to spread and circulate cultural heritage.

In a white paper prepared for the Documentary Organization of Canada (2006a), lawyer Howard Knopf, a prolific and provocative advocate on copyright matters, drew attention to similar problems facing Canada's filmmaking community, by outlining a series of problems facing Canadian creators of documentary films because of the assumption that paid-for permissions are necessary for all uses of protected content. Knopf showed that the work of documentary filmmakers embodies the struggles that face many contemporary cultural creators, since their chosen form of creative expression inevitably relies on the use of materials protected as intellectual property. Nevertheless, Knopf considered the work that documentary filmmakers do as already constituting fair dealing, anticipating the emergence of a more flexible and far-reaching

fair dealing model that the Supreme Court pentology arguably legitimates. Fully functional models of fair dealing, however, will also require the courage of creators of appropriative expressive works to confidently assert and defend their own dynamic acts of fair dealing, which seems particularly desirable when they are making cultural works that educate Canadians about their own cultural history.

The joint contribution of Martin Zeilinger and film scholar Eli Horwatt builds on the concerns outlined by Meurer and in Knopf's white paper. They consider how copyright can obstruct the availability not only of privately owned creative expressions, but also, as Asquith alerted us, of publicly funded works, even when the institutions controlling these works – such as the National Film Board (NFB) of Canada – hold a mandate to ensure public access to the creative expressions they manage. Under any conception of fair dealing, it would seem that publicly funded culturally expressive works should be made available and accessible in the public sphere. Taking as their example Canada's NFB, Zeilinger and Horwatt and illustrate how the public access mandates of cultural institutions are inevitably at odds with the conditions through which they produce and distribute cultural works. These institutions become unnecessarily entangled in a larger clearance culture that puts their legal obligations to rights holders above their statutory obligations to public audiences. The authors argue that certain art forms – in this case, experimental cinema based on the reuse of existing film footage – foreground the difficulties that IP rights pose for creators, producers, and distributors. They conclude that a more comprehensive and flexible fair dealing model is needed to enable public institutions to fulfil their mandates to provide the public with broad access to the cultural creations they finance.

Works such as those discussed by Zeilinger and Horwatt often provoke legal conflicts because, like much of contemporary poetry and visual art, they represent acts of cultural appropriation, which remains a contentious practice in North American copyright law. The "recombinant creativity" that marks such creations is the focus of the last section of this volume, which features case studies from digital media contexts that prompt critical discussions of how conventional understandings of fair dealing fare on the playgrounds (or battlefields) of contemporary cultural production. As we have noted, appropriation and creative reuse of existing work has a long history in the literary and fine arts. These practices have been established as vehicles for dissenting political expression and the critique of commodification in critical thought

at least since Walter Benjamin's work in the 1930s pointed to the potential of technologies of mechanical reproduction to provide users with new capacities to participate in production processes and thereby to resist the control of information by dominant elites (Benjamin 1968 [1936]). Practices of appropriation are recognized as a viable route of critical intervention within copyright regimes (Coombe 1998, Jaszi and Woodmansee 1994, 1996) and have proliferated in digital contexts (McClean and Schubert 2002, McLeod and Kuenzli 2011). As Lev Manovich (2002) argues, practices of reusing and copying, once primarily the critical tools of the artistic avant-garde, are now employed by all users and consumers of digital media, because they are implicit in the basic "cut and paste" operations we perform in digital contexts hundreds of time a day (Reynolds 2009).

Sampling, a contemporary reiteration of older forms such as collage and bricolage, is arguably the dominant mode of recombinant composition involving digital technologies. Manovich (2002: 135) suggests that the disc jockey rather than the poet is now the paradigmatic figure of the contemporary author. Martin Zeilinger's contribution considers how Canadian laws and their interpretation may affect such compositional practices and the communities who adopt them. He observes that even public licensing systems that are designed to facilitate fair dealing and online sampling proceed from the assumption that these licences will be used in good faith. Zeilinger considers the internationally successful Canadian band Crystal Castles and the alternative music community's reaction to their repeated misappropriation of electronic music distributed under CC licences. In light of the difficulty of enforcing such open licensing models, he suggests that artistic communities increasingly establish alternative ethics and protocols for fair dealing, rather than rely on legal models that fail to accommodate their practices and philosophies of creativity, collaboration, and sharing.

Hip hop is one of the most popular musical forms to have negotiated similar questions – not only in the creative underground but also in mainstream contexts. The cultural practice has an uneasy relationship with intellectual property for social and technical reasons alike: it is both a politicized form of creative resistance and a component of affirmative mass culture (Haupt 2008, McLeod and diCola 2011) that relies heavily on sampling and textual referencing. Since the first legal proceedings against hip hop artists in the late 1970s (see George 1998), cases involving sampling artists, record labels, and rights holders have been heard before the highest courts in many legal systems (Vaidhyanathan 2001,

McLeod 2005, Schur 2009). Not only are there ambiguities surrounding the legality of sampling in most legislation, there is no shared philosophy of sampling among practitioners. Musicians can be observed both bragging about the thrill of appropriating samples without having cleared rights *and* the luxury of being able to afford astronomical licensing fees (Demers 2006). In her chapter, communications scholar Alexandra Boutros focuses specifically on the relationship of Canadian hip hop practitioners to collaborative processes of cultural production that foreground "belonging" rather than "owning." Reading hip hop's history as a utopian narrative of collective, open concepts of creative expression that "might have been," Boutros argues that in order to address current cultural inequities, we need more than "technologically facilitated access to the public sphere." She suggests that sampling is a way for Canadian hip hop to index the histories both of the genre and of the individuals involved, while simultaneously exploring how the use of the term "piracy" has kept Canadian hip hop from receiving wider circulation.

Grace Westcott's contribution to this volume focuses on the phenomenon of fan fiction, which raises particularly thorny issues for ascertaining the equities of compensating for creative endeavour. In this area of creative play – in which copyright works are redeveloped and deployed by fans of the original in new creative directions – distinctions between producers, creators, users, and consumers of cultural texts are increasingly difficult to uphold (Jenkins 2006, Collins 2010, Schwabach 2011, McKay 2011). Intellectual property legislation, however, is not being amended to adequately reflect such developments, despite the fact that digital technology renders such positions ever more anachronistic (Jenkins 2008). The potential for unwitting copyright infringement, confusion about the meaning of invited access to intellectual property, permitted uses, and the ownership of new content that emerge here are increasingly evident in many other digital entertainment contexts (Coombe, Herman, and Kaye 2006; Lee, 2009; Postigo 2008a, 2008b). Rights holders in some branches of the entertainment industry, such as distributors of video and online games, are beginning to embrace and even encourage fan-produced derivative works, but this usually occurs within the parameters of strict copyright rules and permissions, with the ultimate purpose of generating further profit (Hayes 2008).

In response, scholars call for policy reform that eases restrictions and takes into account the important functions that the digital realm represents as a creative and learning environment (Livingstone and Brake

2010), or, in the absence of such reform, that we explore and defend the ways in which users assert their determination to create by circumventing technological barriers (Tushnet 2010). By contesting, renegotiating, and in some cases rejecting the equities and ethics of copyright, Westcott argues, fan fiction makes important contributions to a cultural landscape otherwise marketed (and owned) by the entertainment industry. Fan fiction is no longer a marginal subaltern phenomenon, but a popular facet of everyday life in commercial cultures. Nonetheless, unfortunate conflicts between copyright holders and their audiences frequently ensue because most of the works that fan fictions engage are still under copyright. Westcott thus urges the development of "a new kind of digital civility, an online code of respect in engaging with cultural works that recognizes and addresses authors' rights and legitimate concerns," so that it becomes easier for both authors and rights holders to recognize the contributions represented by user-created content. As scholars such as Penalver and Katyal (2009) have demonstrated, those who ignore IP law, protest it, or create alternatives to it, often serve inadvertently to improve its design and operation if their activities are taken seriously.

As a sociologist of information technology, Sara Grimes also approaches problematic encounters between the culture industries and their audiences by scrutinizing the little-explored but increasingly prevalent corporate appropriation of child's play in digital game worlds. Canadian new media scholars Dyer-Witheford and de Peuter (2009: 210) have pointed out the "deep *disparity* between the real conditions of digital production and existing property laws" in digital games. Creativity in this field relies heavily on the adaptation and modification of existing works. So-called consumers often produce much of the games' content. In such cases, the only possible way to ensure that no copyright infringement occurs is through invasions of children's privacy and the hobbling of digital tools to restrict their play. Children's play in these branded virtual worlds, "produces the information and cultural content of the commodity," to use Maurizio Lazzarato's (1996) seminal definition of "immaterial labour," thus providing valuable unremunerated content to cultural industries, which may then sequester it as their own intellectual property.

Grimes responds to the recent call by theorists of immaterial labour to move beyond the preoccupation with individual users as producers to appreciate the value of the work of those peoples whose creative energies are systematically exploited in creating corporately owned

intellectual property and generating its profits (see also Coté and Pybus 2007, Dyer-Witheford, Burston, and Hearn 2010). Children's digital play clearly complicates the division between free and exploited labour (Hesmondhalgh 2011). As parents and educators, we might ask how well do we understand children's online interactions and how often do we reflect upon the nature of their play? How child-appropriate are branded digital playgrounds in which intellectual property functions to prevent children from freely expressing themselves, alienates them from the results of their creative play, and teaches them to be loyal, subordinate consumers (cf. Bakan 2011)? As the last chapter in Part C, Grimes' cautionary tale draws our attention to the potential power that rests with a budding generation of youth increasingly at home in digital worlds and the importance of creating policy that honours their need for a digital cultural landscape that truly encourages, rather than impedes or alienates their creativity, freedom of expression, learning, and citizenship.

Conclusion

Despite the promises of digital technologies, we are currently witnessing a clear shift towards a dramatically less open culture on a variety of fronts: closing bookstores; growing concentration and centralization in the production, circulation, and sales of electronic texts; and unsympathetic governments eager to replace the subvention of culture as a public good with the rhetoric of cultural industry that addresses a narrow range of purely economic concerns. The chilling effects of potential enforcement of copyright in all areas of online activity, the withholding of publicly financed research and creative work, constraints on learning, limitations of constitutional rights, the failure to consider issues of human rights and cultural policy, the marginalization of recombinant creativity, the potential criminalization of new forms of expressive play, and the extension of corporate control over digital creative work that we have explored in this volume illustrate that this tendency to control and contain culture is extending into all dimensions of Canadian social life.

This volume grew out of a concern with the ways in which the interpretation of intellectual property with respect to digital technologies was shaping everyday cultural life in the Canadian context. The characterization of many of the everyday digital "dealings" of canadians as simply unlawful is both inappropriate and inopportune. As our

contributors have illustrated, Canadians involved in creating online culture have done so with goodwill and a sophisticated and evolving ethics with respect to authors' rights, moral rights, users' rights, and human rights. Copyright laws that contain narrow and rigid fair dealing provisions not only make it difficult to read, write, learn, and create, they make it impossible for our culture to evolve in a fashion that respects the work we do as creators, students, scholars, consumers, and citizens. They serve primarily to protect corporate investments rather than public interests. If this opinion seems alarmist, consider that as we wrote the first draft of this introduction, Canadians discovered that officials in the Harper government were taking instruction from US officials representing industry interests in lengthening and expanding copyright protections (Geist 2011). Once again, it would appear that copyright reform in Canada was being driven by foreign interests and corporate agendas. New case law and some very limited legislative reform have, nonetheless, provided Canadians with some reason for optimism that narrow economic interests will no longer fully dominate policy conversations.

At the very least, we hope we have shown how fundamental intellectual property is, not merely to the Canadian economy but to the Canadian public interest and how important fair dealing is in Canadian cultural life and heritage. In the longer term, we hope that the inherent tendency of digital technologies to facilitate copying, sharing, and cultural exchange will be embraced as a positive quality, which may also encourage a principled return to copyright law's original purpose of enabling learning, creativity, cultural productivity, scholarship, critical conversation, and expressive collaboration, while furthering cultural policy objectives and supporting cultural rights. In such a world, the practice of fair dealing would be considered a fundamental cultural right rather than a mere exemption to the economic privileges of others.

The essays collected here speak to the difficulties that face Canadian cultural practitioners, researchers, educators, citizens, and activists in today's prohibitive culture of licences and permissions. Taken individually, the contributions may appear to paint dire pictures of the current status of digital cultural production and creativity. As a whole, however, they point to a shared conviction that our collective desires to create, to share, and to learn by fairly engaging the wealth of expression and the communication channels available to us is sufficiently powerful to challenge and change the status quo. If the legal difficulties we

face when dealing fairly are real ones, we nonetheless, have robust traditions of cultural exchange, collaboration, and intercultural dialogue that illustrate that we are forging a dynamic and evolving digital cultural heritage. Whether these practices avoid the law, challenge it, work in its shadow, or ultimately succeed in changing and shaping it, they suggest that the future of fair dealing is already at hand. The Canadian cultural landscape depends on this field of dynamic practice.