Dynamic Fair Dealing

Creating Canadian Culture Online

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DYNAMIC FAIR DEALING

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Introducing Dynamic Fair Dealing: Creating Canadian Digital Culture

ROSEMARY J. COOMBE, DARREN WERSHLER, AND MARTIN ZEILINGER

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 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, negotiation, 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.

PART A

The Canadian Copyright Context

1 Copyright and Freedom of Expression: Fair Dealing between Work and Play

BITA AMANI

Copyright, a creature of statute, provides explicit rights and remedies that are exhaustively defined in the Canadian Copyright Act. Copyright law has a dual purpose: to promote the creation and broad dissemination of works while expanding the "expressed universe" (McCutcheon 2007: 141). To this end, copyright protects original expressions rather than ideas. Owners have the exclusive right to reproduce a "work" (s. 3), but not the exclusive right to use it. Copyright is also subject to certain exceptions and limitations – including the fair dealing provisions – that implicitly acknowledge that the public needs to be able to use works for specific purposes. Nevertheless, how a person may use protected expression in further expressive activity is a source of significant legal contention, stemming both from uncertainties in the law and from the practical obstacles that face parties engaged in litigation.

The difficulty with copyright is the inability of anyone to know, at any given time or with certainty, what cultural content is fenced in as a protected *work*, and what is available for *play* in the protean space beyond. Just as any copyright-protected work contains both idea and expression, the line between the private and the public is also internal and traverses the work even as it "separate[s] protectable from non-protectable elements" (Craig 2010: 225). Moreover, copyright law continues to struggle with the spurious exercise of determining whether a work is original, no matter how low the threshold for this definition. To the extent that only that part of an expression that originates with an author constitutes a protected work, the boundaries of a copyright-protected work can only be approximately imagined. Generally, assertions of intellectual property (IP) rights are given priority, against which the expressive rights of others struggle to find voice. Copyright's function is not exhausted,

however, by what it prevents people from doing with copyrighted expressive work. Equally important is its fundamental role in facilitating permissible and, indeed, desirable uses of such expression by establishing and enforcing the boundaries of these state-sanctioned rights. When and how, for example, can you "remix" the cultural content of a work, recreate it, or critically reproduce it? This chapter develops the argument that certain playful expressive activities, while not always producing copyrightable works per se, are defensible exercises of constitutional rights within the ambit of s. 2(b) of the Charter of Rights and Freedoms (hereinafter, the Charter) which protects freedom of expression over and above copyright's belaboured classifications.

If a cultural creation is both original and expressive, and thus deemed a work, it is not only a constitutionally protected form of expression but also protected by copyright. What is often overlooked in copyright disputes, however, is that the same constitutional protection must be extended to meaningful forms of expressive play, even when and perhaps especially when they will not qualify for proprietary protection. With its propensity to value work and vilify play, copyright law has proven to be no fun at all, and continues to artificially construct value through the rhetorical deployment of a romanticized trope of authorship that serves primarily to protect commercial investment. Moreover, expression – particularly in the digital realm – is simply not all about work. From the perspective of those engaged at ground zero – the YouTube generation of fan fiction writers, gamers, mashers, samplers, jammers, and transformers of popular culture – digital culture is, in fact, all about play. "Work" characterizes only a sliver of expressive activity within digital environments and does not capture its motivations; if Girl Talk – a pre-eminent mash-up artist and champion of the playful use of protected works – quit his day job as a biomechanical engineer to pursue remixing full-time, it was presumably because he had more fun engaged in such play. However, the burden of proof may be too costly for the author of expressions that creatively draw upon the expressions of others; it may render the justification of the exercise of expressive freedom simply too much work. Or, to put this another way, if expression automatically equals work, then many authors continue to be dispossessed from their means of production, since the resources with which they labour and the expressive inputs into their meaning-making are tied up with state-sanctioned property rights.

Although this has yet to have a full chilling effect on digital play, it does pose ominous limits and shifts policy conversation from balancing rights to enforcing absolute rights. As a society, we need to renegotiate

the permissibility of playful engagement with protected cultural artefacts to ensure fair access to cultural expression and equal access to the constitutional right to express ourselves.

Monopolies on Freedom of Expression: All That Is (Un)Fair in Copyright Wars

Although expressive freedom is constitutionally protected in Canada, copyright law subordinates such freedom by clearly privileging the rights of copyright owners as property. In the current "copyright wars" (Patry 2009, Yu 2005), an owner's duly protected freedom of expression has greater power in the universe of expressive freedom because it contains the ever-latent capacity to subvert the cultural uses of creative practitioners in digital play by rendering these infringements of copyright. Federal law confers on copyright owners not only an exclusive right to control the communication of the expressive work, but by corollary, the nature of the monopoly confers an exclusivity that serves to undermine the very expressive freedom of others. In short, copyright law not only grants exclusive rights as specific privileges, but also privileges a particular elitist vision of culture in which only creators and distributors of works speak expressively and, in turn, use these privileges to silence the playful expressions of others. Copyright owners have become, effectively, cultural managers by authority of the Copyright Act. By an Act of Parliament, freedom of expression has, thus, been transformed from a constitutionally protected right in public law to an issue of peripheral management for private parties imposing their copyrights through licensing, rent collection, or litigation. With the assistance of the judiciary in enforcing these property arrangements, owners are delegated regulatory discretion to administer our constitutional rights. In the process, freedom of expression is rendered anathema to IP rights – copyright's foe.

In digitally networked environments, expression is fluid and expansive. Adaptable and adapted to the ecology of the World Wide Web, expression involves relational processes that produce creative content and resist binary classifications of work and play. The shifting structure of control over communications systems in digital environments, moreover, has practically contested the traditional capacity of copyright owners to enforce their rights. Copyright laws were "drafted with a particular model of mass communications in mind: one in which all copies issued from the centre, with the media owner at the centre and a passive, receiving public at the end nodes" (Cahir 2007: 73). In

digital worlds of networked communications, however, any dealing with a work requires some reproduction, however transient (Litman 1994), meaning that copyright and its limits are implicated nearly every time users of cultural goods communicate and disseminate expression. Not surprisingly, new mechanisms for proprietary management have emerged in response, dramatically altering the dynamics of copyright's "war game" from defining the scope of the rights that authors and their assignees actually have to ensuring legal protections for digital rights management (DRM) mechanisms. These new tools technologically *impose* the copyright holder's expansive interpretation of his own proprietary rights on all users, regardless of what entitlements the latter might have in their own right. Law reform efforts in Canada have sought to entrench such remedial market responses into further statutory protections for copyright owners.

The battle continues and the rhetoric of "war" commonly espoused by copyright owners in this debate has turned the regime into a parody of expressive freedom. Peter Yu (2005: 681) notes that in the United States "[in its] desperate attempt to protect itself against digital piracy, the recording industry has sued, or threatened to sue, virtually everybody – telecommunications service providers, consumer electronics, corporate employers, universities, lawyers, college researchers, hackers and cryptographers, and students" (citations omitted). Such strong enforcement pursuits have proven to be both unpopular and provocative, fostering a countercultural movement of enormous energy and conviction (Vaidhyanathan 2004). Against the litigious agenda of copyright owners, it is left to our fair dealing provisions to define the permissibility of copying processes and outcomes to be negotiated by settlement or litigation.

To that end, the 2004 Supreme Court of Canada (SCC) decision in *CCH Canadian Ltd. et al.* v. *Law Society of Upper Canada*, and public discussions on copyright reform since, have raised public hopes that a more socially instrumental approach to copyright might finally have achieved legitimacy, if not primacy in legal analyses of infringement. The judgment in *CCH* indicated, as no Canadian case had before, that the function of copyright was a social one in which individual private rights must be balanced with social benefits. Recognizing fair dealing as an "integral part to the *Copyright Act*" (para. 48), the Court affirmed it as a *users' right* (see also Craig and Maxwell, this volume). Practically speaking, however, it continues to be the defendant to a copyright suit who is burdened with defending the propriety of his expression as fair

dealing. She must prove that her expression not only falls within the scope of one of the specifically enumerated exceptions, but also that her use of it was actually fair (*CCH* para. 50). As fairness is not defined in the Act, this remains a contextual inquiry: "whether something is fair is a question of fact and depends on the facts of each case" (para. 52), leaving enormous discretion with the judiciary and impossible evidentiary obstacles to face defendants.

Given these impediments, it becomes important to ask whether the assertion of copyright infringement does not unduly impinge upon constitutionally protected expression. In other words, we might first ask whether copyright's limitation on constitutionally protected expression is justified under section 1 of the Charter, rather than whether dealings with the contents of the protected work are permissible under copyright's defence of fair dealing. The current approach defers analysis of the propriety of the defendant's conduct from consideration of her constitutionally prior expressive freedoms to focus on the appropriate limits upon the owner's exclusive property rights. This approach makes it difficult to give any real credence to the much-vaunted principle of balance between the interests of owners and users. For example, despite the evident sympathies towards the public indicated in *CCH*, the net result of the judgment as legal precedent was: first, a relatively low threshold for granting rights, based not on creativity but on skill and judgment; and second, a clear but lesser statement of judicial opinion affirming the need for more nuanced determination of appropriate limits to these rights. In the alternative vision proposed here, the broad definition of freedom of expression in the Charter would significantly change the dynamics of the copyright balance by facilitating a potential finding of breach of expressive freedom. Whether the expression is work or play would be immaterial under the Charter analysis as a legal measure of worth for protecting freedom of expression. The balance of proof would be shifted to its rightful holder, the copyright owner, to justify copyright's limits upon constitutionally protected rights.

Nevertheless, the *CCH* decision was a welcome and timely judicial endeavour to explicitly adopt the language of users' rights in the context of copyright disputes, and more so for resisting the urge to narrow the range of permissible dealings on account of the commercial context. For those in the digital space, it was especially important given the subculture of commonplace but culpable infringement in which everyday users of cultural texts playfully work to transform the meanings of cultural goods, to undermine corporate and state hegemony and to

challenge dominant meanings as well as the legal authority to engage in meaning making. Users who are now more accurately described as productive players (be they primarily authors, artists, bloggers, consumers, creative workers, gamers, or software developers) thereby threaten to trigger a cultural revolution. Such a revolution may compel a re-examination of our very ideas of culture – from the conservative view of the authentic representation of an aesthetic reinforced by the conversion of expressive activity into fixed works and ultimately commodity goods, to a greater appreciation for the social structures and forces that lie behind the manifest appearances of everyday life (Hebdige 1979: 6–7) – much like punk culture did before it. These are revealed when such commodities and their meanings are shown to be socially constructed by relations of power buttressed by law. Until then, copyright law continues to enforce a paradigm of control according to which "everything in everyday life is dependent on the representation which the bourgeoisie *has and makes us have* of the relations between men and the world" (citing Barthes, original emphasis). Such power inevitably intrudes on the domain of individual liberty and impacts not only our freedom of expression but the "freedom of a person" (Rothman 2010: 49) more generally. The agency and playful labour of vast numbers of citizens continues to be alienated from them even as copyright's mappings of our social culture are increasingly resisted within the Internet's infrastructure of disaggregated control, a social web that cultural studies scholars might refer to ecologically as an "organic society" (Hebdige 1979: 6).

An organic society is one that is alive and *grows* (often symbiotically) not only through production, but also through reproduction and mutation of its cultural core structures, narratives, symbols, and meanings. Digital culture similarly thrives through cross-fertilization, hybridization, and sampling. As other contributors to this volume indicate, with regard to fan fiction (Westcott) and the free circulation of avant-garde art (Goldsmith), for example, the incentive for players in digital contexts is very often simply to maintain an identity, expressively survive, and interrelate in an ecosystem of shared culture. Currently, however, this incentive appears as diametrically opposed to copyright law's need to petrify fixed original works in a particular time, place, and technological medium, unless otherwise authorized by a singular proprietor (Amani 1999a, 1999b). Unless those who champion the public domain for the purpose of ensuring vibrant and sustainable cultural development

intercede, the dominance of one species of expressions by artificial (state-supported) structures will throttle the evolution and development of another, not because play, as a form of expression, is inevitably more vulnerable than work, but because, as we have seen, the digital environment in which play thrives has become ever more hostile towards it. In this context, the importance of the right to freedom of expression for sustaining a robust and meaningful cultural life must be reconsidered.

The Constitutional Guarantee of Freedom of Expression in Canada

In 1997, David Fewer called for a more principled and comprehensive approach to copyright regulation by Parliament and the courts, one that was reconcilable with and accountable to constitutional guarantees of freedom of expression in the Charter. Fewer was dismayed at the lack of Canadian judicial consideration of the inherent conflict between copyright and freedom of expression:

> One might presume that litigation under the Canadian *Copyright Act* would attract considerable constitutional scrutiny: freedom of expression and the law of copyright in Canada should not easily coexist. After all, the *Copyright Act* deals exclusively with the manipulation of expression, which enjoys constitutional protection. (1997: 177)

A decade and a half later, we should be even more distressed by the fact that our policy makers continue to ignore this friction even as it has become ever more pronounced in digital environments.

In *Irwin Toy* v. *Quebec* (1989), the majority of the SCC confirmed that there were three main reasons for protecting expressive freedom:

> (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated. (para. 976)

The SCC's position was that "activity is expressive if it attempts to convey meaning" (para. 968). Peter Hogg (1992) explains that "this broad definition has been supported by a willing acceptance of the broadest rationale for the protection of expression – the realization of

individual self-fulfilment – as well as the Court's view that the Charter should be given a generous interpretation" (1992: 963). While copyright has certain inbuilt limits to extending protections – such as the doctrine of originality, the fixation requirement, the concept of protectable "works," and the distinction between idea and expression, referred to above – the Charter has no requirement of novelty or originality for the purpose of recognizing and defending expressive practice.

There is a good argument to be made that copyright and freedom of expression are compatable and reinforcing because copyright is not a right but a privilege (Boyle 2003) designed to invite expression and bestowed as a matter of cultural policy (Vaidhyanathan 2001). The federal authority to create copyright law is provided under the division of powers in section 92 of the Constitution Act of 1867 and so copyright is borne from federal statute. Freedom of expression, on the other hand, is guaranteed by the Charter under section 2(b), which asserts: "Everyone has the ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." It is therefore a legal imperative that section 2(b) rights be given priority when in conflict with copyright law, unless justified by section 1 of the Charter (as a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society). The reluctance to confront section 2(b) of the Charter in copyright cases may stem from a practical preference by lawyers and judges to endorse copyright law's internal limits over an external one of such significance and consequence. Charter litigation demands fresh expertise and poses new costs, delays, and dangers. This reluctance may also be part of a more general tendency to narrow the construction of available defences (Fewer 1997: 212). Others have suggested that courts are loath to go beyond copyright doctrine unless these internal limits are wholly ineffectual (Reynolds 2006: 184). Nonetheless, Charter rights are part of the supreme law of the land and although Charter concerns and implications may be to some degree addressed by copyright's internal limits and exceptions, it is clear that where the issue of freedom of expression is raised, an exhaustive Charter analysis is necessary (Fewer 1997: 212–35). Still, such an inquiry is exceptional rather than ordinary.

Another interpretive obstacle that may have delayed such claims is the principle in s. 32(1) that the Charter only applies to public parties, which would not appear at first glance to extend scrutiny to private litigants in copyright disputes. The SCC has established, however, that "in the context of civil litigation involving only private parties, the Charter will apply to the common law only to the extent that the common law is found inconsistent with Charter values" (*Hill* v. *Church of Scientology Toronto*, para. 95). Moreover, as Fewer (1997) observes, the Supremacy Clause (s. 52) of the Constitution Act, 1982 does not differentiate when instructing that "any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" (212). Thus, Fewer contends, "any law – including the common law – that is inconsistent with the Charter should therefore fall under some degree of scrutiny" (213). The government action requirement for raising a Charter defence is readily met where there is the potential for criminal prosecution as is the case for copyright infringement. The SCC has also been sympathetic to Charter claims "where individuals exercise statutorily conferred powers" and "but for the *Copyright Act* – an act of Parliament – the defendant would not be brought before the court to defend his or her expressive activities" (214–15).

Rather than assume that the Charter is redundant because of existing internal copyright limits and safeguards such as the defence of fair dealing, we must acknowledge and embrace Charter compliance as a check on copyright's public reach. Charter analysis is a principled method for reconciling rights of expression with allegations of infringement, providing some normative content for the user's rights side of the social balance that copyright is meant to accomplish. Decisions by the judiciary in copyright cases, and the process by which they are reached, are also subject to Charter review: "the Supreme Court has embraced the reasoning that, after all, court orders are little more than the state's imposition of its will upon private citizens" (216). Fewer's conclusion merits repeating: "Defendants asserting expressive values who are faced with crippling court-ordered injunctions or damages or orders of delivery, could challenge those court-ordered remedies – or at least the court's choice of remedy – as infringing freedom of expression" (217).

Nonetheless, most defendants have neither incentive nor resources to prolong litigation when confronted with scales of justice clearly skewed in favour of copyright owners (Lessig 2004, Coombe 1998, Gaylor 2008). Although public interest in copyright's prohibitions on freedom of expression is increasing, defendants appear to settle or pay the licensing fees requested by the plaintiffs, rather than add further litigation costs and procedural complications by raising a constitutional defence. Perhaps they also recognize that judges have historically been and likely will continue to be cautious with Charter rights in copyright

cases because the wholesale privileging of copyrights over expressive works might be found offensive to constitutional guarantees of freedom of expression. This seems especially arguable given the SCC's expansive interpretations of freedom of expression.

In *Irwin Toy*, for instance, the SCC acknowledged that breaking the law (e.g., by illegally parking a car) can be a constitutionally protected expression under section 2(b) of the Charter, if it is done with an expressive purpose – for example, in protest of parking regulations (para. 969). If the act of copying can be considered an act of constitutionally protected expression, then the criminality of the large community of infringers is entirely defensible; one might even say that it is to be encouraged (Gaylor 2008). Are such defiant acts simple vigilantism or might they be seen as an indirect form of constitutional advocacy? As Penalver and Katyal (2009) argue, the acts of "scofflaws" often provoke us to consider the extent to which positive laws accord with our more fundamental values. This raises the possibility of evoking a constitutional challenge against the federal regime itself. Such an action would demand that a court "draw a line embodied by the fair dealing defence" (Fewer 1997: 216), between those kind of takings from the universe of expression that are appropriate and in the public interest and those that are infringing appropriations, allowing for substantial, but permissible takings. In short, such Charter litigation "argues that the [Copyright] Act gets the line wrong" (216).

Whether copied in substantial or insubstantial part, expression that creates and conveys meaning constitutes a legitimate exercise of freedom of expression. The remedies, common law doctrines, and defences of copyright must therefore be interpreted in full compliance with section 2(b) of the Charter. As long as copyright cases refrain from directly engaging the constitutional issue of freedom of expression as central to any finding of copyright infringement, the internal limits of copyright doctrines such as originality, the idea/expression dichotomy, the concept of substantial taking, and fair dealing are, for better or worse, the more immediate safeguards for our constitutional expressive freedoms and the only means we have to ensure that copyright retains any sense of balance. We can only hope that more judgments respecting freedom of expression to limit copyright owners' exclusive rights will eventually mitigate the censorious climate developing in digital environments.

In this latest context, we are collectively witnessing copyright law's full maturation, As many critics have noted, copyright evolved from a tool of state censorship to a tool of private censorship (Lessig 2004, Moore 2003, Vaver 2006), and it is increasingly a means of eliciting self-censorship against the uncertain exercise of IP enforcement (Sunder 1996). When aggregated, the costs of copyright litigation, the financial vulnerability of defendants, and the understandable propensity to settle rather than engage in legal struggle all militate to turn copyright into a predatory tool of cultural censorship (see also Knopf 2006a). For example, Matt Groening, the creator of *The Simpsons* was amenable to the incidental use of his work in a documentary film to make a critical cultural commentary, but Fox, which held the rights, demanded $10,000 for use of the relevant 4.5 second clip. As Larry Lessig (2004) tells the story, although the critical use of the clip without any permission or payment of royalty would almost certainly be a fair one, the filmmaker was unable to proceed because the production company's errors and omissions insurance required prior clearance of any and all copyright-protected materials (95–8). "Working on a shoestring," the filmmaker could not reasonably make a fair use argument at the end of the industrial process when release deadlines loom, tempers are short, and budgets overextended (98–9). If this is the case under US flexible fair use provisions, such tendencies are only exacerbated in jurisdictions like Canada with strict fair dealing exemptions.

The rhetoric of "copyright wars" may be helpful for emphasizing high stakes with winners, losers, and resource disparities; however, it also serves to underplay the real impact of these cultural wars on the public and social interest (Hughes 1999). It is still not taken for granted that intellectual properties have a cultural life – that they are dialogic forms borne by a social communicative process of creative meaning making in which the consumption and reproduction of existing cultural forms is an integral part of all cultural production (Boon, this volume; Coombe 1991, 1998) and vital social values placed on community (Craig 2006). Copyright in an expressive work rarely recognizes its personal meanings, social origins, or interpersonal value. Increasingly, copyright privileges are shaped only to ensure the commercial exploitation of expressive works after these have been created. Ask any author alienated from her work (as nearly all authors seeking dissemination of their work are likely to be, once they assign their copyright to their commercial publishers), and she will tell you that even if she supports your derivative creations as forms of expressive freedom, her publishers leave her no room to bless your play. Where copyright is only deemed valuable in a market context – a limited system of commodity exchange – the social nature of expressive work is denied, and it is

linked to a dominant and inadequate conceptual articulation of property as a form of exclusion rather than relation (Carpenter, Katyal, and Riley 2009; Craig, Turcotte, and Coombe 2011). This feature of copyright is perhaps most troubling in digital environments, where dialogic social play is an integral and critical feature of cultural growth and development (Reynolds 2006, Corneliussen and Rettberg 2008, Coombe, Herman, and Kaye 2006).

I Fought the Law, so Who Won?

The expansion of the universe of expressions that copyright regimes ideally seek to promote is highly valued in free and democratic societies, and it is constitutionally protected activity in Canada, regardless of whether or not the expressions in question constitute copyrightable work. Basic principles of constitutional jurisprudence support Fewer's observation that copyright as a mere property interest is an example of "economic rights that do not also evoke values enshrined in freedom of expression" and thus does not command Charter rights in its own right (1997: 222). The integrity of this position is further supported by the desired policy objectives of the copyright regime itself, which promises to enable and ensure a greater amount of publicly available, intrinsically valued expression (McCutcheon 2008). When copyright law ceases to do this, and fair dealing does not function to enable a greater amount of publicly available, intrinsically valued expression, it loses its legitimacy and its claims upon us.

If freedom of expression as a practice is to flourish, we need the freedom to access, use, and learn from the cultural contributions of others in the public sphere, which, in digital environments, inevitably demands their reproduction. Copyright owners now seek to further obstruct these exchanges in digital environments with pay-per-use and complex one-click licensing agreements supported by the threat and costs of litigation. Insofar as such practices gain the benefit of legal protection, copyright will continue to be used to further circumscribe the expressive freedom of others, coercively eliciting permission where none may be required by law. As we have seen, copyright may also censor those who are too poor to pay or otherwise disenfranchised from defending their dealings, however fair these might be. The emerging culture of copyright is thus entirely a culture of exclusive proprietary rights, rather than one that entails duties of any kind (Vaver 2006). If *CCH* belatedly recognized the rights of users under Canadian law, the

case did little to advance copyright holders' duties or encourage a field of respect for dialogue and communicative cultural exchange. To counter this development, we must embrace our freedoms of expression as part of a rights framework that legitimates a wider range of reproductive activities as acts of cultural fair dealing. Money talks, but justice should be more widely affordable. How copyright law adapts to such social justice issues may be the most significant indicator for its prognosis in the twenty-first century.

5 Publicly Funded, Then Locked Away: The Work of the Canadian Broadcasting Corporation

KYLE ASQUITH

Overregulation stifles creativity. It smothers innovation. It gives dinosaurs a veto over the future.

Lawrence Lessig, *Free Culture*

But if public broadcasting is to play a significant role in the commons, it must insulate programming decisions from both politics and an ever-growing commercial orientation.

Jeff Chester, *Digital Destiny*

Canadian citizens, artists, activists, and scholars often call for new intellectual property (IP) regimes that foster innovation and creativity, privilege the public domain, recognize the dialogic connection between creators and users in the digital age, and highlight creator and user rights over punitive punishments (Geist 2005). With a viable public domain that meaningfully responds to what the public needs from this sphere (see Craig, this volume), and an approach that frames the notion of fair dealing as a user right rather than an exception or defence, Canada's digital media landscape could be a cultural commons where citizens are in a constant dialogue, engaged, and simultaneously creators and users (Drassinower 2005: 466). This discourse, one of citizenry, common space, creativity, culture, and dialogue, is not unique to Canadian copyright debates in recent years; rather, much of this rhetoric has been used for decades to define and justify the purpose of Canadian public broadcasting. From the emergence of radio in the 1920s through the countless Standing Committee reports and political speeches on public broadcasting that followed, similar values have

been invoked repeatedly: the simultaneous rights of audiences and producers, creativity, innovation, accessibility, and a desire for a common sphere that fosters critical national dialogue (Peers 1969: 440).

Whereas public broadcasting ideals should overlap nicely with goals of the free culture movement (see Lessig 2004) or the values of "copyleft," this chapter explores how the Canadian Broadcasting Corporation's content ownership practices are inconsistent with these goals and values. When discussing how the CBC seeks to police its intellectual property at the expense of protecting the public good, we are not necessarily looking at how archaic IP laws impact Canadians. Instead, we can spotlight how institutional policy and institutionalized ways of thinking shackle Canadian creators and users.

Publicly Funded, Then Locked Away: CBC Radio One's *The Contrarians*

Jesse Brown, a Toronto humourist, journalist, and producer, created and hosted *The Contrarians* on CBC Radio One in the summer of 2007. The program introduced unpopular and sometimes uncomfortable ideas. With special guests and interviews, Brown would introduce a contrarian position (thesis), provide the alternative argument (antithesis), and eventually arrive at some kind of conclusion (synthesis). The series was playful – one *Contrarian* episode suggested that copyright law should be abolished, while another episode was based on the suggestion that hip hop is the greatest cultural form of the century – and Brown certainly had fun introducing positions that he did not necessarily support. The purpose of the program was to demonstrate that no unpopular idea is so extreme, controversial, or counter-intuitive that we should avoid thinking it through before casting it aside. Its goal was never to sway an audience, only to challenge thought orthodoxy and demonstrate the value of lively debate.

The flavours of "thought orthodoxy" Brown selected to challenge were deliberate. In fact, *The Contrarians* subtlety challenged a certain kind of CBC orthodoxy. One *Contrarians* episode, for example, questioned the positive connotations associated with a Canadian identity. Perhaps a bigger attack on the institutional culture of the CBC was the contrarian position that suggested, "multiculturalism doesn't work ... we only eat each other's sandwiches." This thesis on multiculturalism was taken up in Brown's pilot episode. Incidentally, the CBC executives who green-lit the series were very enthusiastic about his playful stance

on multiculturalism – in fact, they encouraged him to be edgier and to go further. Brown was, understandably, pleased with the enthusiasm of CBC programmers.

The level of freedom Brown enjoyed at the start of the project disappeared once the summer series ended. Although he was able to posit, in one episode, that copyright should be abolished, after the summer ended Brown quickly learned that the CBC takes its role as a copyright holder very seriously. Like many freelancers, Brown maintains a personal online portfolio, and at one point, he included several excerpts from *The Contrarians* on his website. This site was never promoted to listeners, and was certainly not intended as an archive of CBC content or a pirate channel to deliver Radio One programming. Nevertheless, CBC management quickly contacted Brown to remind him that his contract prevented him from posting show material on the website. The CBC's takedown request was puzzling. Although the CBC certainly had the right to enforce its contracts, what exactly the CBC had to gain from Brown removing the content was unclear. At the time of the request, the series was over, and as far as Brown was told, management had no intentions of re-airing or repurposing it, nor was CBC Radio One archiving the series in any publicly accessible way. *The Contrarians* aired at a time when the CBC was just beginning to dip its toes into podcasting. Only a few programs were permanently archived as podcasts, and given the limited nature of the summer series, Brown could not convince the broadcaster to archive *The Contrarians* online.

The frustration Brown experienced in not being able to showcase his work in an online portfolio, however, seems relatively minor when compared with the larger issue here: publicly funded media content is being locked away from the citizens whose tax dollars funded the program in the first instance and who are, therefore, in significant ways its producers. The CBC clearly has a problem with content circulating beyond its immediate control, even when this circulation benefits Canadians. In the months following the show, Brown received dozens of requests from listeners for copies of the show. Numerous teachers contacted Brown, asking for episodes to use as teaching resources on topics including copyright law, multiculturalism, and feminism. As it turned out, *The Contrarians* furnished a useful aid for debating teams, who have also been in touch with Brown requesting episodes. Brown's hands were tied. Given his experience posting samples on his personal website, Brown could not personally distribute episodes of *The Contrarians* – a troubling situation considering both the nature of the

show and the CBC's ostensible purpose in fostering a national cultural commons. The requests Brown received were arguably consistent both with fair dealing and what public broadcasting *should* be aiming to encourage: the spreading of ideas, particularly to help educators and students, and hence, to further dialogue, critical thought, and creativity.

For a show like *The Contrarians*, the CBC owns everything: the name, the interviews, and the episodes. CBC contracts even require a producer to waive his moral rights, so that Brown cannot even protect the integrity of *The Contrarians*. In sum, Brown's CBC contract not only stopped him from posting a clip of *The Contrarians*, but also prevented him from having any control over his own creative work – including what happened to that work after the series aired. Yet, the CBC's overzealous content ownership rights, enforced via contract, did not originally bother Brown. He envisioned himself working for the public and offering a public service. CBC Radio One does not carry advertising, and it is, therefore, almost entirely funded by parliamentary allocations. As such, Brown was comfortable reducing his creative labour to a "service" – as opposed to "producing a show." Perhaps no one other than the Canadians who fund, listen to, and enjoy public radio should be understood to "own" this show. If Brown is comfortable with the fact that he does not own his CBC-produced work, he is nonetheless uncomfortable with having this work locked away from the public, especially when the CBC is unlikely to be harmed (financially or otherwise) should it allow teachers, students, and other citizens to benefit from these old episodes.

A Larger Trend Emerges: www.CBC.ca and iCopyright

Brown's experience with *The Contrarians* is not an isolated incident for Canada's public broadcaster. In early 2010, the CBC website implemented the controversial iCopyright "instant licensing" system that created uproar among many Canadians. Significantly, this move suggested that the CBC has an institutional bias towards an interpretation of copyright more consistent with the perspective of an American entertainment conglomerate than an institution envisioned to protect the public interest and to foster a Canadian cultural commons. An American firm, iCopyright offers a supposedly "intelligent copyright" payment system that has been adopted by several major institutions including, notably, the Associated Press. Briefly stated, iCopyright instantly creates licences that permit users to make copies of and otherwise

redistribute website content. Visitors who click the "licence" link at the top of an article can purchase the rights to display the full article on their website or blog for a monthly fee of $250. The standard "print" and "email" article tools are also connected with the iCopyright system; users can make five free printouts, or purchase the right to print additional copies.

At best, this licensing system is wholly unnecessary. Although promoted by iCopyright as a way to clarify to users what they can and cannot do with online content, there are already legal frameworks in place – namely, fair dealing provisions – that allow users to quote from materials, and in some cases reproduce them entirely, for purposes of news reporting, study, research, and criticism. If the CBC feels that users are confused about how they can or cannot use cbc.ca materials, an explanation of *user's rights* would be a more appropriate response by a public institution than a perplexing licensing system that speaks only to the CBC's rights as the copyright holder.

At worst, by placing significant, costly, and at times confusing restrictions on how online CBC productions may be shared, iCopyright flies directly in the face of CBC's public service mandate. The new www.CBC.ca implementation goes against the spirit of fair dealing, the capacities of the Internet, and the objectives of public broadcasting. The system of iCopyright is designed to extract commercial value from the standard "Article Tools" options – for example, print, email, or share on a multitude of social network sites – generally seen on the vast majority of online news services. The iCopyright service fills a market niche, serving content providers who are obsessed with return on investments and paranoid that they are losing revenue by allowing users to send articles to their friends. Making this point explicitly, an iCopyright white paper declares that "each article tool should be a sampling stand with a cash register waiting to ring up a sale for the customer who wants more than a free sample" (iCopyright Inc. 2009: 3). Finally, as a method to enforce the licences, iCopyright advertises rewards of up to $1,000,000 for reporting "piracy." By electing to align itself with an organization like iCopyright, the CBC appears to be adopting a position with regard to content ownership and copyright policing that is remarkably similar to that of the American entertainment industry.

Canadian legal scholars, bloggers, and journalists (including Jesse Brown) criticized the CBC's adoption of the iCopyright licensing system, noting that it is a distinctly American interpretation of copyright created by an American company. Similarly, critics pointed out that as

Canadians we fund and, hence, should have certain implicit rights to the content produced by the CBC. Licence fees upwards of $250 per month are astronomically high for a publicly funded content provider. On a positive note, within a matter of days, the CBC acknowledged the criticisms and opened up dialogue on the CBC's official blog (http://cbcrcblog.com/), reassuring its audience that not much had changed. Users were still welcome to quote from cbc.ca works in blog posts, and spread content via social networking sites, just as they were before the new licensing system. Although the CBC acknowledged the public confusion, it did not go so far as to terminate the iCopyright features. Critics wondered why, if "not a lot has changed," the CBC needed to bother with this service. There is a parallel here to Brown's encounter after *The Contrarians* program ended; if the CBC had little to gain by keeping the show locked away from listeners and educators, then why would it pursue Brown to remove all excerpts from his website? Once again, we have a situation where users have something to lose from the CBC's ardent policing of its copyrights, but whether the CBC has anything to gain is questionable.

Imagining a Different Public Media Future

A simple but compelling argument can be made that publicly funded media content should be publicly licensed and generally publicly available for use. Throughout the history of Canadian public broadcasting, the CBC has been positioned as a protector of the public interest, national identity, and cultural sovereignty (Standing Committee on Canadian Heritage 2003: 177). Sequestering content or making Canadians pay hefty licences to use it are ineffective ways to achieve such lofty goals. By the same token, overzealously protecting content appears to go against the CBC's mandate, as detailed by Canada's 1991 Broadcasting Act, which states in section 3(m)(vii) that CBC programming "must be made available throughout Canada by the most appropriate and efficient means and as resources become available for that purpose."

Part of serving the public interest involves ensuring that all content is properly and publicly archived – and the resources are now available to do this. In this sense, the CBC's online offerings may be contrasted to the National Film Board of Canada's much-praised NFB.ca "Screening Room," launched in 2009. Visitors from around the world can watch a selection of 1,500 (and quickly growing) high-quality, publicly funded Canadian productions, online, for free. Each video offers a "share it"

shortcut that allows users to embed the video in a blog, website, or share it through a variety of social media tools. The NFB even offers an iPhone application. To be fair, the CBC is aware of the benefits and efficiency of digital distribution. The CBC's online presence is extensive, and, compared with many private broadcasters, CBC Radio has been on the leading edge of podcasting. But, as the case of *The Contrarians* shows us, despite a strong online presence, content is falling through the cracks. Worse still, as the case of iCopyright illustrates, the CBC is frequently policing its rights as a content owner without considering whether Canadians should have inherent rights to the content.

Compared with a private broadcaster, the CBC has less to lose and can afford to stick its head out on the digital line: the CBC does have to answer to the Heritage Minister and to Parliament, but CBC management does not have to answer to shareholders and CBC Radio executives do not even have to answer to advertisers. Furthermore, the CBC has an institutional history of taking risks, innovating, and connecting with Canadians in new ways. The institution revolutionized radio in the late 1960s by debuting shows like *As It Happens*. A "call-out" show, *As It Happens* was intended to stir up dialogue across the country and to offer a "meeting place for public debate and cultural exchange in Canada" (Standing Committee on Canadian Heritage 2003: 191). The public broadcaster has always pushed the envelope, and in many ways has been well *ahead* of the free culture movement of the past decade. Public broadcasting is fundamentally about providing content *for free* in an effort to provoke critical dialogue, to entertain, and even to inspire others to create; public broadcasting should contribute to a greater Canadian cultural commons. Given its mandate, funding source, and history, the CBC is well equipped to set the bar for Canadian broadcasting – and, historically, it has in some instances.

Over the past two decades, however, as technology has opened up new options to reach Canadians in innovative ways, the CBC has started to behave more and more like a paranoid private entertainment conglomerate, interested in the bottom line, and in control over content. A user's right to content, especially content he or she helped to fund, is marginalized among these increasingly more commercial priorities. This is not wholly surprising given the political climate. Supporters of the CBC recommend stable, long-term funding to allow the public broadcaster to take risks and better serve audiences (Standing Committee on Canadian Heritage 2003: 217). Instead, the CBC has been in crisis since the 1990s, subject to budget cut after budget cut, and

consistently placed in a position of having to justify its very existence to Parliament. These macro-political forces leave the CBC with few options other than a more commercialized business model and an emphasis on meeting short-term budgetary goals. Accordingly, in early 2009, amid some of the most significant job cuts in CBC history, rumours circulated that the CBC might open up Radio One and Radio Two to commercial advertisements (Friends of Canadian Broadcasting 2009), presumably to curb the costs of keeping content available. Archiving material properly does require time, skill, and resources. As Chester (2007) cautions, "while the Internet has an endless source of such non-profit information, it is important to make such content readily accessible and easily locatable" (196). Simply making content available is only half of the battle; making content available in an accessible, useful, non-proprietary, and publicly licensed system is another story. Properly indexing and tagging this content is powerful but costly. The commercialized decision makers at the CBC might ask, "What return do we see on this investment?"

There are, indeed, internal – or institutional – politics at play. There is no caricatured, conniving mastermind to blame in this story. There is no recording industry president aiming to alienate producers from their work or divorce Canadian citizens from the content they help to fund. As Brown's experience illustrates, the interests of CBC workers are often consistent with the interests of CBC listeners; unlike some other debates over intellectual property, this is not an adversarial situation where user rights face off against, or must be balanced against, the rights of creators. Creators of CBC's works, like Brown, have an important place in promoting and protecting the public interest because they are members of the same publics. The CBC is equipped with staff, producers, and managers with progressive ideas when it comes to the distribution of digital content. These workers, however, deal with a larger institutional hierarchy and culture. It is through institutionalized biases that CBC management may have trouble deciphering the difference between reproduction, distribution (e.g., Brown's home page), and infringement. Through fair dealing provisions, however, copyright law has the potential to distinguish simple reproduction from infringement although the CBC's deeply embedded corporate culture may lack an understanding of this nuance.

Whether we take the case of the CBC requesting Brown to take down excerpts from *The Contrarians* from his personal website, or the more recent implementation of iCopyright on CBC.ca, the public broadcaster

is clearly taking a narrow interpretation of its IP rights and applying these rights in a manner that is consistent with the interests of American recording and motion picture industries. Fair dealing provisions may permit users to reproduce CBC.ca pieces, even entire articles, but the use of iCopyright demonstrates a flawed understanding of fair dealing. The CBC appears to have a corporate bias towards protecting content as a means to protect direct revenue and indirect equity through tight control of the CBC "brand." This attitude is inconsistent with the public broadcaster's mandate of serving the public interest and creating a common cultural space for national dialogue. It is worth reiterating that public broadcasting in Canada, from the earliest days of radio, has been premised on resisting commercial influence and giving away content for the greater cultural good. This attitude of prioritizing protection and permissions is also, as other contributors have noted (Amani, this volume) inconsistent with the nature of communications and social practice in digital media landscapes. Finally, it would seem that the CBC has little to lose by providing a wealth of content online or in allowing users greater freedom in terms of how they can (re)use this content. *The Contrarians* run was over when Brown received a takedown request from the CBC, and the iCopyright licensing system is unlikely to turn into a major revenue source or solve the broadcaster's financial woes.

How can the CBC alter its philosophy? One way to move the CBC beyond its current mentality would be the adoption of some kind of public media "Bill of Rights." This is something Brown suggests to ensure all publicly funded media content is, at minimum, easily accessible to all Canadians. This Bill of Rights could plainly state that Canadians own the CBC content that they fund, and motivate the CBC to make all content publicly accessible. This public media Bill of Rights could also be adapted for other kinds of publicly supported media, like the NFB or Telefilm movies, and television programs supported by the Canadian Television Fund. However, because television shows and films are often supported through a combination of public and private funds, forcing producers to make their work publicly accessible, publicly licensed, or even part of the public domain becomes more complicated. Such a move would need to frame issues of content ownership in a positive way – a focus on user rights would need to replace the CBC's current fixation with licences, permissions, and punishments.

Pushing this argument further, the Bill of Rights could require the use of Creative Commons (CC) licensing as a way to give Canadians greater control over their public media. CC licensing would provide the

CBC with a flexible way to determine what content can be shared and the conditions under which it can be redistributed. In other words, the CC system could do many of the allegedly "instant" and "flexible" things iCopyright licensing claims to take care of, without the need to contract with an American company, sacrifice public service ideals, or antagonize a large number of Canadians. Adopting a CC licensing system for CBC.ca material could set the CBC free from its costly, narrow-minded, and heavy-handed approach to copyright protection; provide an opportunity to recognize the value of spreading content (instead of sequestering it); and, thus, connect the spirit of public broadcasting with the spirit of the Internet as a networked common space. The "rights" to CBC content could lie in the hands of the many, rather than a singular controlling broadcaster. This would require a fundamental change in CBC corporate philosophy, but – unlike other private broadcasters or private news organizations – the CBC actually does have the freedom to make such a daring move.

Ensuring that CBC content is publicly accessible and licensed is an objective for which the public broadcaster should strive. An even gutsier move – and one Brown also champions – would be to make public media content, or at least all public radio content, part of the public domain. *As It Happens* debuted over forty years ago on Radio One as an innovative and edgy way to create public dialogue. What better way to create a dialogue and sense of community among Canadians than tossing content out into the public domain, and allowing users to use it, break it down, and rebuild it into something new. Putting content into the public domain might even help the CBC deal with its dwindling human and financial resources. As noted, there are challenges in properly organizing, indexing, and tagging material – it takes time and money. Instead of attempting to do this in-house, the CBC could send the raw material out into the commons and allow eager users to develop their own ways of organizing and indexing it in socially and historically meaningful ways. A new partnership between CBC Radio and Canadians might thus be born. Despite chronic budget challenges, a bright digital future for the CBC is not unrealistic. The CBC is already a leader in some aspects of digital distribution. With a bigger push, the public broadcaster could continue to set and raise the bar, putting pressure on private broadcasters to keep up with the CBC's contributions not only to public service and public dialogue, but also to the public domain.

Table 14.2 Closed Access in Two University Repositories

Articles	University of Southampton[a] (UK)	Universidade do Minho (Portugal)
Total	7,864	7,515
Closed access	551 (7%)	353 (5%)

[a] Since 2001.

closed access content. Immediate deposit can be universally mandated by all funders, all universities, and all research centres: there is no remaining need to worry about the legality of adopting a mandate at all, nor any need to allow opt-outs, waivers, or delayed deposit, because obligatory deposit is separated from the optional OA setting, with the fair dealing button bridging the gap for those who cannot provide open access immediately. Researchers from all disciplines can be confident that the couple of clicks required to give a fellow researcher access to their closed access article is legal – and fair.

15 The Evolution of Cultural Heritage Ethics via Human Rights Norms

ROSEMARY J. COOMBE AND NICOLE AYLWIN

The rights of peoples with respect to cultural heritage goods pose new and pressing challenges in terms of balancing the exercise of intellectual properties with individual freedoms of creativity, collective rights, and international human rights obligations. Digital technologies heighten anxieties around cultural appropriation because they enable the reproduction and publication of cultural forms at unprecedented speeds (Burri-Nenova 2008). If, as Michael Brown (2005) argues, digitization has accelerated the social decontextualization of cultural objects, it has also increased awareness of the exploitation of cultural heritage resources. Digitization has further enhanced political consciousness about the injuries these practices may effect, while fostering new initiatives for managing and sharing cultural heritage resources in a politically sensitive manner (Coombe 2009). Digital communications also afford new opportunities for communities to benefit from new uses for traditional cultural expressions that promote sustainable development (Antons 2008; Burri-Nenova 2008, 2009; Sahlfeld 2008).

In light of the increased spread and availability of digital technology, issues of cultural appropriation have received new scrutiny. The tendency to treat all cultural forms in digital media ecology as mere "information" enables everyone to access and make use of cultural goods – assuming we overlook the "digital divide." Nonetheless, it is important to recognize that when creativity involves a practice described as appropriation, an assertion is being made that a text has been moved or removed from its authorizing context, or that it has, in some other significant sense, been taken (Meurer and Coombe 2009). In some cases, this decontextualization may be deliberately and critically intended – to challenge the fields of meanings in which the object properly figures,

to assert an alternative ownership over it, and/or to consider the importance of other realms of connotation in which it might signify. Other allegations of appropriation may occur when a cultural text is understood to have been *improperly* recontextualized to the harm of those who have serious attachments to its positioning in specific worlds of social meaning. In this chapter, we deal primarily with those forms of appropriation that effect injury to groups, primarily because of the power relations at work in digital environments that enable old inequities to be perpetuated in new ways.

As a representative example of this latter type of appropriation, anthropologist Steven Feld (2004) traces the sampling of a Solomon Islands Baegu lullaby by world music producers who earned handsome profits from their derivative work without compensating the singer or her community. Such appropriations are enabled by legal interpretations of oral tradition that invisibly transform the status of "signifying that which is vocally communal to signifying that which belongs to no one in particular" (74). Unless we know more about the social and cultural significance of such songs, however, we cannot deem such appropriations to be harmful nor characterize such takings as unethical. The status of ethno-musicological recordings as informational goods is also questioned by Coleman and Coombe (2009), who, as a moral philosopher and legal theorist, respectively, demonstrate that in certain Indigenous societies, music fulfils functions beyond those of expression or entertainment, and serves performatively – as a legal mechanism to transfer property rights and responsibilities. The categorization of such recordings as informational goods ignores the customary legal functions of the songs they register to the potential injury of a community and may even potentially affect the legal recognition of its territories. Both the "free sampling" of these recordings and restrictions of access to the work of a people's ancestors – by virtue of intellectual property (IP) protections held in the recordings themselves – serve to perpetuate histories of colonial subjection, in which Indigenous culture was both targeted for eradication in community life and "salvaged" for the edification (and enrichment) of others. These studies suggest that both global IP regimes *and* the prevailing ethos and ethics of a universal digital cultural commons may provide insufficient recognition for community rights and interests.

Most of the essays in this volume assume that we need to understand the digital use of cultural goods – including protected intellectual property – as creative activity that actively produces our cultural

heritage. Rather than the passive appreciation of a field of static works, then, cultural heritage is the result of a dynamic, expressive, and productive practice of dialogue. This approach is consonant with an international movement to revalue cultural diversity and reconceptualize heritage values. However, this global revaluation of heritage also situates such cultural activities in the normative field of human rights. This has a number of implications for our ethical orientations when we share cultural forms in digital environments. When we consider our cultural activities with the copyright-protected goods of others as a matter of cultural rights, new freedoms come into view, but so do new responsibilities. In other words, although access and participation rights have become a major part of contemporary rhetoric about expressive liberties, we also need to acknowledge the necessity of respect for the cultural properties and heritage interests of others.

Cultural Heritage and Human Rights: New Relationships and Challenges

Cultural rights have authoritative origins in the 1948 United Nations Declaration of Human Rights (Silverman and Ruggles 2007, Arzipe 2010), specifically in Article 27, which specifies both that (1) "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits," and that (2) "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." The text simultaneously recognizes both individual rights to participate in the cultural life of a community and private rights to benefit from the creation of cultural goods, which means that proprietary rights that wholly exclude others from all use of works would rarely qualify. As a human right, an author's material and moral interests carry weight. However, corporate exercises of IP rights that wholly prohibit the use of cultural objects – and, therefore, prevent cultural expression, participation, and the public enjoyment of the arts – do not. Digital technologies clearly enable new forms of access to cultural works and participation in cultural life, so exercises of intellectual property that constitute the simple trumping and trampling of those rights in the name of corporate profit should have little normative purchase. Cultural rights also address the interests and needs of collectivities, particularly minority groups and Indigenous peoples, whose rights with respect to cultural goods

bear a distinctive relationship to their dignity, autonomy, and potential self-determination.

Contemporary debates about the extension of IP rights and the endangerment of the public domain, however, have largely ignored questions of cultural rights (Coombe 2005, 2006). Perhaps this is because the most publicized IP activists operate within US legal traditions, where the cure for ever-greater expansion of copyright monopolies is a combination of a robust jurisprudence of "fair use" and strong constitutional protection for freedom of speech. At the same time, they rightly lament the lack of certainty that such principles provide to the average user of cultural works (e.g., Boyle 1996, 2008; Lessig 2001, 2004; McLeod 2001, 2007; Vaidhyanathan 2001, 2004). It should be clear that in Canada we lack this strong jurisprudential foundation, along with any legitimated recognition of the constitutional dimensions and limits to copyright (Amani, this volume; Reynolds 2006). We do, however, have distinct international obligations to respect social, economic, and cultural rights, to which we give, at least nominally, greater allegiance than does our southern neighbour. The International Covenant on Social, Economic, and Cultural Rights, for example, alludes to rights of intellectual property as means to serve specific ends (protecting an author's moral and material interests), and arguably IP should be so limited. Moreover, as human rights, intellectual properties should be governed by the overarching human rights obligation to identify and take specific measures to improve the position of the most vulnerable and disadvantaged groups in society.

The assumption that there is or should be a singular or unitary public domain of cultural materials does not acknowledge the interests of ethnic minorities and Indigenous peoples and their distinctive histories (Hardison 2006, Graham and McJohn 2005, Brown 2003). These include long periods of forced assimilation, prohibitions on Indigenous cultural practices, and the appropriation of cultural forms by majority groups under situations of internal colonialism, where heritage may be the basis of group identity and an integral resource for the continued survival of a people and their self-determination. Indigenous heritage has often been seen as de facto public domain material (Nicholas, this volume); appropriations are often justified by enduring colonial narratives that place Indigenous culture in the past with little regard for its importance as "living culture" (Aylwin, this volume). But, as Bowrey and Anderson (2009) argue, the assertion of a cultural commons is a

political act that serves particular interests and ignores others, leaving existing relations of power intact and ignoring the disparate means that groups have to represent themselves in public fora.

Movements to enhance human rights have been instrumental in opening up spaces for non-state actors such as NGOs and advocacy groups to draw attention to the plight of Indigenous peoples, questioning the modern relationship between the state and the individual as the primary vector of rights violations and providing new opportunities to acknowledge social collectivities as rights-bearing subjects (Anaya 2004). Two major international human rights covenants, the International Labour Organization Convention No. 169, adopted in 1989, and the 2007 Declaration of the Rights of Indigenous Peoples, for example, reiterate as principles of international human rights that Indigenous communities have some measure of control over their cultural heritage (Ahmed, Aylwin, and Coombe 2009).

International human rights norms demand a special sensitivity to the rights of minorities and Indigenous peoples, whose cultural rights have often been violated through a long history of sanctioned state initiatives designed to forcibly assimilate minorities and to catalogue their allegedly "dying" cultures (Nicholas, this volume). Recently, however, international policy has recognized that Indigenous and minority heritages are not remainders of the past, but dynamic and ongoing reservoirs of knowledge, practices, innovations, and expressions invaluable for maintaining the interlinked goods of cultural and biological diversity while providing the basis for sustainable development. The World Intellectual Property Organization (WIPO), for example, has accepted the need to reach out to "new beneficiaries" and acknowledged the need to find new means to recognize, maintain, and protect traditional cultural expressions (TCEs) if the global IP system is to retain legitimacy (Graber and Burri-Nenova 2008). Although rarely framed as such, these efforts involve the elaboration of cultural rights principles.

Many of WIPO's draft legislative provisions (the Provisions) for the protection of TCEs – internationally negotiated over the past decade – are designed to recognize that the cultural heritage of Indigenous peoples and other cultural communities has inherent value, and provides people with culturally meaningful resources that can be used to meet community social needs and promote development guided by community aspirations. They aim to prevent misappropriations and misuse of heritage that might damage the integrity of community identity:

> Protection should respond to the traditional character of TCEs/EoF [expressions of folklore], namely their collective, communal and inter-generational character; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community. (WIPO 2010)

The Provisions draw upon legal principles such as copyright, moral rights, performance rights, unfair competition, trademark, certification and collective marks, fiduciary obligation, and the prevention of consumer confusion; they are balanced by familiar IP exemptions. Some dimensions of these new proposals to provide protection for TCEs outline exclusive rights that may allow communities to use their TCEs as the basis of economic development strategies (Art. 2, Art. 4). They also provide means to insist upon fair compensation and recognition of source and/or to insist that researchers and corporations follow local customary protocols (Art. 4). In some limited instances, communities are enabled to prevent the use of especially significant TCEs by others who may use them in ways that are contrary to a community's aspirations and cultural identity (Art. 3). Ultimately, the guiding principles of the Provisions rest on a renewed valuation of cultural distinction; they are designed to promote respect for traditional cultures and the intergenerational character of heritage (Coombe 2009). This may be read as an indication that WIPO is gaining awareness that IP rights need to be shaped in such a way that they respect the principles of cultural rights enshrined in the international human rights framework.

These developments should not be interpreted to suggest that Indigenous peoples have no interest in sharing their knowledge, or that the concept of the commons is necessarily alien to their needs. Indeed, there have been various initiatives to create commons of traditional knowledge as well as proposals for using open source (OS) software models to manage traditional knowledge. As early as 2005, it was suggested that despite their seemingly disparate interests, open knowledge advocates and traditional knowledge rights advocates might both agree on the need for a "some rights reserved" model for sharing cultural materials in digital environments (Kansa et al. 2005), in order to prevent undesirable forms of unfair exploitation that might detract from community abilities to share resources in the future. Building upon the voluntary licensing tools pioneered by the Creative Commons (CC), originating communities could impose their own restrictions on

how cultural content was used. In this way, it might be possible to avoid both exclusive private rights and a universalizing public domain that fails to consider local needs and values:

> As Creative Commons has demonstrated, enhancing communication requires recognition of the motivations and interests of content creators. By extension, recognition of the motivation and interests of researchers and members of indigenous communities must be a priority. In the case of traditional knowledge and field sciences, we must similarly explore how to facilitate negotiations that reconcile the needs and interests of all the diverse stakeholders. It is only by considering these diverse perspectives and interests that we can hope to build communication frameworks that encourage both greater respect for multiple claims of ownership and enhanced openness, sharing, and creative use of information. (Kansa et al. 2005: 292)

Recently, for example, a group of elders, traditional knowledge practitioners, and legal activists met in South Africa to devise the principles of a Traditional Knowledge Commons (that drew upon values expressed by traditional healers in Rajasthan) and to develop a biocultural community protocol to govern access to traditional knowledge. Such protocols are charters "developed as a result of a consultative process within a community that outlines the community's core cultural and spiritual values and customary laws relating to their traditional knowledge and resources" (Abrell 2010: 7). They outline terms and conditions of access and are "used to emphasize the central importance of the interdependence of traditional knowledge, biodiversity, land, cultural values and customary laws to the holistic worldview of many indigenous communities" (7).

Recognizing that many Indigenous and local communities conceptualize their relationships to their knowledge and heritage as involving not only rights but also customary responsibilities and obligations to peoples, territories, and ecosystems, activists argue that any mechanisms to "protect" knowledge or to share it must take customary law into account as a fundamental matter of human rights (8). A Traditional Knowledge Commons based on the online use of general public licences for non-commercial use of knowledge and cultural expressions has also been proposed by indigenist advocates as a means of creating a more sustainable knowledge commons based on conditions of mutual recognition and respect (Christen 2012).

Digital communications will not fulfil *all* needs for knowledge transfer and exchange between communities. From a cultural rights perspective, it might be just as valuable to enable and support cross-cultural exchanges that enable traditional healers to share their knowledge as it might be to build online databases, especially given the tacit, embodied, and sociological dimensions of much traditional medicinal knowledge. Still, the endeavour to imagine new means for practitioners of traditional knowledge to communicate and exchange information online in a fashion that respects and communicates their values has produced many initiatives. The Honey Bee Network, for example, involves documenting agricultural innovations and traditional practices among communities in seventy-five countries, in order to enable local communities to share their knowledge for the enhancement of community security and sustainable development (http://www.sristi.org/hbnew/index.php). Such initiatives are concomitant with new valuations of cultural heritage and evolving legal recognitions of cultural rights.

Cultural Rights and Heritage Interests

The management of cultural heritage properties is one area in which cultural rights are increasingly recognized in practice. Canada has historically played a key role in the work of UNESCO – the UN body responsible for preparing and interpreting international normative principles and instruments with regard to cultural heritage – and has recently ratified the International Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which links the management of cultural heritage to respect for cultural difference and the promotion of diversity (Aylwin, this volume). During the 1980s, international debates about the meaning and value of cultural heritage were positioned within larger deliberations about the relationship between culture and development. In 1987, the United Nations launched its World Decade for Cultural Development (1987–1997), adopting a more anthropological view of culture as a way of life and a form of social organization (Blake 2009: 48). This new definition reinforced the idea that cultural heritage could not be restricted to historical sites and monuments, but also needed to include oral tradition and expressive culture (Blake 2009). In 1995, at the UNESCO General Conference, the World Commission on Culture and Development solidified this new perspective in its report *Our Creative Diversity*, by highlighting that

heritage is made up of more than monuments and historical sites, and that both tangible and intangible cultural heritage are key to "ensuring the flourishing of human existence" (Arzipe 2010: 32).

Claims to heritage have since become central to the collective struggles of many marginalized peoples, who see culture as a concept to be used reflexively when engaging with state institutions or non-governmental organizations. The purposes of this reflexive use include asserting identity, demanding greater inclusion in political life, local autonomy, and control over resources, and also enabling the search for new forms of engagement with (and resistance to) global markets (Coombe 2009). Cultural distinction has gained new international purchase as a valuable social, political, and economic resource (Yúdice 2003, Rao and Walton 2004, Comaroff and Comaroff 2009). As marginalized communities attempt to regain control over their cultural heritage, cultural rights have been vehicles for the pursuit of political claims. Cultural claims now figure in struggles for political autonomy, legal entitlements to territory and other resources, and designs for alternative forms of development (Coombe 2011a, 2011b; Marrie 2009; Robbins and Stamatopolou 2004).

Claims by groups that seek the acknowledgment of their cultural distinction have too often been characterized as an expression of an inherent or universal need for recognition. This has the effect of siphoning off the political context in which such claims are made, and separates them from the more pressing economic disadvantages that marginalized peoples often face (Holder 2008, Fraser 2000). Conceiving of struggles over the recognition of difference narrowly, as a form of mere identity politics, may have the effect of minimizing political and economic interests that may be central to them, such as the assertion of self-determination and the redistribution of material resources (Jung 2003, 2008).

New forms of cultural heritage preservation are being negotiated to meet political and economic needs. Archaeologists, cultural resource managers, and museum curators, among others, have come to understand that the management of heritage is crucial to contemporary political movements of decolonization that redefine relationships between the modern state and resident minorities (Coombe 2009: 399). New and creative uses of intellectual properties, particularly in the area of digital heritage management, have allowed Indigenous groups to limit inappropriate use of heritage while building goodwill between various stakeholders. One such project is the Mukurtu Archive, an archiving

tool that uses OS software designed by an Indigenous community to dictate how their cultural goods are circulated, accessed, and viewed, based on rules consistent with their own customary cultural protocols (Christen 2012, n.d.). In similar fashion, the Indigenous Knowledge and Resource Management in Northern Australia project created a digital Indigenous knowledge archive that gave Indigenous researchers the primary role in developing protocols for database structures. As Verran (2009) suggests, this meant that Indigenous property rights were protected in a way that facilitated intergenerational transmission of knowledge, relinking people and places, clans and territories, a process crucial to Indigenous territorial entitlement and political self-determination.

Canada is no stranger to efforts of rethinking cultural heritage management with the goal of giving effect to cultural rights principles. The country boasts a progressive museum movement that recognizes the needs of diverse communities, is sensitive to the politics of multiculturalism, and promotes intercultural dialogue (Houtman 2009). The University of British Columbia's Museum of Anthropology, for example, is a world leader in collaborative practices. Its former director, Michael Ames, critiqued traditional museum practices and called "for their democratization in favour of the under-represented people of the world," championing the rights of all peoples to tell their stories and curate their own exhibitions (Mayer and Shelton 2010: 11). It is now widely acknowledged that the museum is "a performative space in which to develop new practices that meet the ethical, political and representational challenges posed by pluralism" (Phillips 2005: 89). To further this recognition, from 2005 to 2010 the Museum undertook a massive restructuring of its institutional, space, and presentation policies in order to better recognize Indigenous stakeholders and the continuing rights of descendant communities with respect to the cultural materials held in the Museum's collections. In the *Management of Culturally Sensitive Material* policy statement, the Museum affirms its commitment to the values and beliefs of the cultures it represents:

> We know that our collections contain items which are important to the originating communities, and whose placement and care within the museum continue to affect the values and beliefs of those communities. The museum recognizes that these objects have a non-material side embodying cultural rights, values, knowledge, and ideas which are not owned or possessed by the museum, but are retained by the originating communities. (Cited in Laszlo 2006: 304)

Digital communications enable museums to give greater effect to rights principles. Museum restructuring has included the development of the Reciprocal Research Network, an online research community that allows geographically dispersed users, including international museums holding Northwest Coast collections, and First Nation elders, artists, families, and researchers to share knowledge about the history and significance of cultural artefacts as research partners (Rowley et al. 2010). They hope that respect for cultural heritage rights will be achieved by new and potentially more intercultural and dialogic strategies in a digitally connected world. For the first time, through activities that Houtman (2009) has described as "virtual repatriation," communities striving to reclaim lost cultural histories and families tracing their ancestry have access to cultural heritage held in distant museums (12). Moreover, museum archives are attempting to develop new protocols that balance the competing needs of different members of the public, recognizing that users and those peoples represented in the holdings may have distinctive interests:

> Many of the ethnographic materials we house are considered by First Nations communities to be cultural property and to contain cultural copyrights that are retained by the peoples depicted. The case of images that portray ceremonial rituals and objects that are not intended to be seen by the uninitiated provides a good place to illustrate a number of the points under discussion and to begin to look at practical steps that the Museum of Anthropology archives has taken to improve the way it administers ethnographic records. We have consulted with First Nations groups about which of our records contain culturally sensitive images. Thumbnails of those images have subsequently been removed from our finding aids, with a note indicating what was removed and why. For the time being these images are restricted to all but members of the communities depicted. Currently, we have no protocols in place to handle requests from others to view these restricted images, but are in the process of setting up partnerships with communities to determine answers to questions of access and control of this type of material. (Laszlo 2006: 305)

The use of the term "cultural copyright" by this museum administration suggests that the logic of *both* IP and cultural rights now informs archivists' understanding of the collective heritage interests of stakeholder groups. Although archivists might be expected to encourage and promote the greatest possible use of the records in their care, they are also required to give attention to issues of privacy, confidentiality,

and preservation, mandates that have been interpreted to accommodate the cultural and spiritual concerns of groups for whom certain cultural materials have historical significance as markers of their identity as a people. This is not to restrict access to materials simply because some groups might find them offensive, but rather to restrict only the circulation of images that have important sacred and ritual properties to specific communities, a process that will involve continual dialogue and collaboration.

In projects such as these museum initiatives, new forms of negotiated proprietary claims and relationships contribute to an emerging form of cultural rights dialogue. International instruments addressing the rights of Indigenous peoples – the most significant of which is the Declaration on the Rights of Indigenous Peoples (the Declaration) – have fundamentally altered the international consensus on the scope and meaning of cultural rights (Holder 2008). Prior to the negotiation of the Declaration (a 20-year process), international law largely objectified culture. Cultural rights protected heritage practices and cultural identifications only to the extent that these could be fixed as static symbols subject to state cultural recognition. This served to emphasize rights of access, preservation, and use (17), rather than material domains where communities have authority and political voice (12). As culture has come to be regarded as an activity and resource, however, its political and economic dimensions have come to the fore, putting new emphasis on community security, economic stability, and sustainable development. More and more, cultural rights claims have enabled groups to achieve control over significant material resources (Robbins and Stamatopolou 2004) and have heightened their stakes in fields of cultural representation.

Cultural rights now are broadly conceived to incorporate protections for minority communities, and to enable them to develop their capacities to engage with their cultural heritage in meaningful ways. Their recognition has prompted new forms of respectful, mutually beneficial negotiation between parties. New technologies make access to and the sharing of intangible heritage virtually effortless, but the dialogue and deliberations necessary to use digitalization to achieve greater respect and recognition between communities, and a more equitable share of political and economic benefits, are still works in progress.

16 Indigenous Cultural Heritage in the Age of Technological Reproducibility: Towards a Postcolonial Ethic of the Public Domain

GEORGE NICHOLAS

In *The Past Is a Foreign Country* (1985), David Lowenthal explored the degree to which objects, architectural motifs, and other manifestations of the past permeate the present. He concluded that contemporary Western society – from clothing styles to architecture to art and literature – is largely composed of elements derived from other times and places. Our access to cultures, both foreign and ancient, is the culmination of centuries of archaeological and historical inquiry, now facilitated by the ease of worldwide travel and electronic communication; never before has there been such ease of access to world cultural heritage.

The idea that we are the product of everything and everyone that has come before us fuels the notion that society does (and, indeed, should) benefit from mutually shared ideas and information, a position promoted by the open access (OA) and access to knowledge (A2K) movements, and by individual scholars (e.g., Boyle 1996, Lessig 2001, Young 2008). New reproductive technologies and cultural borrowing have inspired creativity, such as perpetuating ancient stories through new media (e.g., the retelling of Homer's *Iliad* in the 2000 film *O Brother, Where Art Thou?*) or the development of new music genres (e.g., David Byrne and Brian Eno's use of sampled voices in their 1981 *My Life in the Bush of Ghosts*). Yet, the benefits to society of such creativity are tempered by the need to reward the efforts of those whose research or creative efforts have produced new products. In Western law, protection of intellectual property is based on property values and "rights," ownership is based on individual rights, and infringement results in economic loss. Protection is available through such means as copyrights, patents, trademarks, and trade secrecy law. Each protects very specific types of intellectual property. Generally, the legal protection

video. We must keep adapting in order to meet the demands of changing times, attitudes, and technologies.

Yet, we've always kept a disclaimer on our film page, drawing attention to the fact that the quality of our hosted material is poor, and no match for the real thing – and thereby hoping to instil in our viewers appreciation for the sources themselves. But, for many people, UbuWeb is the real thing inasmuch as, say, the Van Gogh poster in my teenage bedroom for all intents and purposes became the real thing as I wasn't able to go to Europe to experience that "real thing" until I was in my twenties. Hence, our histories, based on our experiences, become extremely localized and subjective based on our access.

Are we crazy? Yes. Are we exposing ourselves to great risk? Yes. Could we get screwed? Yes. What we're doing is clearly wrong, and we wouldn't have a foot to stand on in a court of law, even though we don't sell anything. But we – and the art/cyber/academic/communities – seem to think the good greatly outweighs any damage. And the amount of emails and feedback generated by the site confirms our hunch. Every day, dozens of appreciations are sent worldwide; once every other month, or so, we get a complaint. Oddly enough, in spite of all, it seems to be working.

20 Remixing bpNichol: Direct Dealing and Recombinatory Art Practices

JUSTIN STEPHENSON

> Language today no longer poses problems of meaning but practical issues of use; the relevant question being not "what does this piece of writing mean?" (as if meaning was somehow a represented essence in a sign the activity of reading substantially extracts) but "how does this writing work?"
>
> Steve McCaffery (2000 [1986]: 148)

For artists to produce the kind of culturally complex recombinatory art or remixing (Amani, this volume) that is fundamental to contemporary digital art practices, they need to either engage in acts of plunder or go through an onerous bureaucratic process to obtain the rights through middle men such as clearance agencies. Alternatively, they can do the work of dealing with the rights holders directly. I argue that this third way of dealing, through negotiations with authors or original rights holders – what could be called "direct dealing" – is the most practical and arguably the most advantageous way for digital artists to legally remix creative materials that fall under copyright. Sometimes such negotiations are very difficult, but sometimes they are surprisingly pleasant.

This observation was born of my efforts working on a digital video project based on the ouevre of Canadian poet bpNichol, tentatively called *The Complete Works*, conceived of as a translation of Nichol's writing into video form. The idea of translation has developed to encompass the idea of "remixing" his work in digital moving image. As a remix, the video relies heavily on Nichol's published work, all of which is protected by copyright, and all of which would be next to impossible to clear using standard legal practices given the working methodology

of the video. Through this initiative, I became involved in designing the cover for Nichol's recent collected works, *The Alphabet Game* (2007), and the major art for the accompanying website, the *Online Archive for bpNichol* (bpNichol.ca).

For a creator proceeding according to the letter of Canadian copyright law, the normal process of working with materials by authors living or dead but still under copyright would be to secure an assignment of numerous rights to specific published and unpublished materials (Murray and Trosow 2007). Moreover, it would seem that artists wanting to remix copyrighted materials would also need to establish how and if the integrity of the work would be maintained in their remix, a rather difficult question to answer because it is one that has an irredeemably subjective element. Further, the ways in which work would be used in conjunction with other cultural material, and the potential danger thereby posed to the reputation of the author, would have to be assessed to ascertain how or if an author or his estate might lay claim to moral rights infringement. All such determinations rely on digital artists having a specific preconceptualization of what they are doing creatively, and to what end, before they engage in the process of doing it, which is rarely the case for many artists working in this genre.

Instead of going through this "normal process" for my project, I went to bpNichol's estate directly to ask for permission to use his work in my film – I gave Ellie Nichol, bpNichol's widow and executor, an idea of what I was doing, and the nature of my creative process, and she agreed to allow me to work with the materials I found most useful and promising. This approach is only possible when an author has not assigned his copyright, and thus where rights remain with a creator or her descendants. The possible benefits of such direct negotiations, I believe, provide some potential reasons why authors and artists might want to refrain from assigning their copyright to collective bodies or from waiving their moral rights. Authors and their families can negotiate in ways far more sensitive to the nuance and context of subsequent digital works and their relationships to the original author's values than corporate copyright collectives are likely to have any interest in doing. What is a purely bureaucratic and economic transaction for a collective is a matter of professional reputation and artistic community for the original creator; direct dealing provides an opportunity to publicly commemorate a loved one for the artist's descendants.

Directly negotiating permission for my project from the estate had a number of unanticipated benefits. When I began the video, in 1999, there

were no substantial online archives of bpNichol's work. An important part of his creative process was publishing poems in small runs as chapbooks or as various forms of "ephemera" associated with the events at which he composed and performed. These ephemeral works are very hard to find outside of private collections and the holders of such collections were largely unknown to me. Not only was Ellie Nichol able and happy to provide me with access to bp's personal library of published works, she introduced me to filmmaker Brian Nash, who generously gave me access to the considerable digital audio tape archive of Nichol recordings that he had compiled, organized, and logged for his 1997 film, *bp: Pushing the Boundaries*. One introduction led to another, unlocking a cascade of new and formerly unknown materials from people and institutions in Nichol's personal and artistic networks of friends and colleagues. Working through a collective would never have yielded such a rich treasure trove of work to add to the record of Canadian cultural heritage.

With introductions from Ellie Nichol and Brian Nash, I made contact with Roy Miki, Stephen Ross Smith, Stephen Scobie, Daphne Marlatt, Douglas Barbour, Lia Paz, Gil McElroy, Darren Wershler, Nicki Drumbolis, and Paul Dutton, to name a few, all of whom contributed bibliographic leads, actual chapbooks and ephemera, analysis, and even unknown recorded performances of Nichol's work. Coach House Books has been, and continues to be, an important source of support and information regarding Nichol's work. The Simon Fraser University Library Special Collections provided a wealth of materials. Only with Ellie Nichol's permission and her introduction would the late Gene Bridwell have given me the hours of assistance he did, navigating the countless manuscripts and notebooks held in the SFU collection. In addition to helping me build a rich body of material from which to draw for the video, dealing directly with all of these people and institutions helped me develop a much richer historical and socially contextualized understanding of bpNichol and his oeuvre. The subsequent development of digital archives will enable these conversations to continue with a wider group of fans, friends, and admirers online, while continually adding to the cultural knowledge we have of the man, his work, and his community. With such new forms of electronic distribution, access to the Nichol materials is much more easily facilitated than when my project began. One can find an array of his work at the Online Archive for bpNichol (bpnichol.ca), at PennSound (www.writing.upenn.edu/pennsound/x/Nichol.php), on the Coach House Books website

(www.chbooks.com/online), at Karl Young's Homepage Away from Home for bpNichol (www.thing.net/~grist/l&d/bpnichol/bp.htm), Jim Andrews' digital restoration of First Screening (www.vispo.com/bp/introduction.htm) and on UbuWeb (www.ubuweb.com).

A defining aspect of contemporary digital video making is the ability to easily combine a range of materials from a variety of sources to create something new. As other scholars in this volume elaborate, the remix reiterates something that has been a part of textuality and creativity since the beginning of language in the form of the quotation (Lessig 2008). The quotation is ubiquitous in written texts, speeches, and everyday discourse. With contemporary digital technology, quoting, an integral part of creative practice, as contributors Amani, Boon, and Reynolds (this volume) suggest, becomes both more compelling and more complex. Images, audio, text, and video are all usually held in complicated entanglements of copyright and artists and curators have little sense of how the criteria for "fair dealing" pertaining to whether they have taken a substantial part, or engaged in "review" or "criticism" are likely to be determined with respect to their own work of quoting multimedia works in online remixes.

Recombinatory practices are a defining aspect of contemporary digital art. Paul D. Miller (2004), aka DJ Spooky, takes the idea of quotation further to see remixing in the form of sampling as a method of composition in and of itself: "This is a world in which all meaning has been untethered from the ground of its origins and all signposts point to the road that you make up as you travel through the text" (5). The road is the work the artist is creating – selection and combination of materials are compositionally or methodologically determined rather than being determined by semantics or the original context of the source material. The complex network of contexts built up from the combinations of samples become intertextual properties rather than clearly defining or supporting the direction of the work. This poses an even greater challenge to the notion of the integrity of the original materials.

As a hip hop artist operating in the United States, Miller is working in a different medium, country, economy, and cultural context than bpNichol, and a different context from what I operate in as an independent digital media artist in Canada. The available sounds he uses for his remixes come from libraries that have been produced purposely for his work, copyrighted materials that he has privileged access to, or work that is now in the public domain. Sampling does not obviously fall under the fair use exception in the United States or the fair dealing

clauses in Canada (see Boutros, this volume). If a remixed work is to be legally legitimate in either country, copyright permission is usually considered necessary for recognizable source materials.

The remix is a culturally complex object that is built up from layers of quotations that originally "belonged" elsewhere. As my work with Nichol's record illustrates, and the work of users of the digital archives of his work will continue to illustrate, such remix is not only a unique combination of creative materials, but also a social network that layers the cultural, political, and economic contexts in which the materials were created and collected. For digital artists working in this recombinatory mode, access to such materials is significant not only in the practical aspects of production (what can and cannot be used), but also in the creative development of the new work: the degree of access changes the kind of creative processes in which an artist can engage, and ultimately, the kind of work that can be produced.

Improvisation, deconstruction, fragmentation, and free play are important aspects of bpNichol's poetics that inform the working methodology of the video I created. His work contains a veritable catalogue of textual strategies, techniques, and processes. "If I can keep moving the structure of the poem around, hopefully I can encompass different realities and different ways of looking at things" (Nichol 2002: 276). The spirit of Nichol's own poetics of reconfiguration is thus the basis of the working methodology for my Nichol video and, in this sense, extends and projects his moral rights by embodying his personal mode of creativity. In *Rational Geomancy* (1992), for example, Steve McCaffery and Nichol discuss translation as a creative act in which one aligns the signs in the destination text to create a new version of the source text. Their idea of translation resonates strongly with the contemporary notion of the remix. It necessarily involves rereading and reinscribing a work. To translate Nichol's work in this spirit means to cut it up, rearrange it, put it though translational systems, to see it in and from a different range of contexts. For digital artists working in recombinatory modes, to really *work* with a work is to deploy it in a manner that may challenge the idea of its integrity. For some authors, this is precisely in line with their own values, but others and their estates and publishers who hold moral rights posthumously may well voice strong opposition to such practices.

It should be clear that rights holders have the potential to act as gatekeepers not only to cultural materials, but also to their meanings through their rights to prohibit transformative reproductions (Bowrey

2005, Coombe 1998). Moreover, section 14.1 of the Canadian Copyright Act (2010) states that the copyright holder has a moral right to maintain the integrity of the work. This could be interpreted in many different ways, however, depending on the intentions and philosophy of the author. McCaffery (2000) describes a poetic in which a literary work becomes a "methodological field" rather than a "fixed object of analysis" (148). The integrity of a poem as method, such as Nichol's *Translating Translating Apollinaire* (1979) is in its continual manipulation, reformulation, and mutation into alternative and sometimes-unrecognizable forms. A more conventional sense of what the integrity of a work means might completely misread the authorial intent of this work. Rights holders, who may be far removed from the original author in commercial contexts where rights are repeatedly assigned, thus have the potential to regulate how a work is read and what it ultimately means.

In my remixes of Nichol's work, I am often putting the poems through processes that radically change their content and appearance. An example would be the sound and visual text for *Interrupted Nap* (1990), which I am using to create new animated visuals to attach to a sound recording made by Nichol (1982). From a conventional perspective, it might be argued that the integrity of the text has been completely mutilated or distorted because I have chosen to entirely reformulate it based on the possibilities available in my digital video practice and those posed by the recording. I am using and inverting a "see-and-say" method that Nichol himself used to create the original performance of the poem so as to produce a new animated visual text that no longer uses the original visual text at all. If a holder of moral rights were to consider the integrity of the piece to lie in its content or in the visual configuration of the original text rather than its method, moral rights could be invoked to prevent this segment of the video from being made, despite the fact that my work carries out the intentions of the author and his personal vision for the original.

Although Nichol's poetic methodologies resonate with contemporary digital practice, the publishing environment is now radically different than the one in which he composed his work. As a poet active from the 1960s into the 1980s, Nichol's work was rarely distributed electronically, nor did it for the most part exist in a networked environment where it would be publicly searchable (although Nichol cofounded the BBS-based e-magazine *Swiftcurrent* in 1984, so some such pieces do exist). The materials Nichol drew upon in the production of

his work – "found texts" and otherwise – were not widely known and not easily located and identified. Nichol did not have access to the kind of casual searching that Internet search engines now allow, but neither were the kinds of cultural appropriation in which he engaged so susceptible to the claims of copyright holders who can now, through the same means, easily learn about remixes of their work. Networked cultural environments simultaneously pose new opportunities and new dangers for works of quotation and translation.

In such environments, the social and professional context in which cultural practitioners work and the symbolic capital they are able to claim become especially important. As an independent digital media artist, my credibility was buttressed by my history of relationships with the Nichol family; I first read *Gorg, a Detective Story* some twenty years ago and began a correspondence with Ellie Nichol at that time. As a graduate student who was able to turn this video project into a Master's research project, I was able to build on this social capital as well as the fact that the video received both Canada Council and Ontario Arts Council funding. Such a history of validation provided a context that furnished me with ongoing privileges in terms of my access to copyright materials that might otherwise have been foreclosed. Nichol's estate has granted me open-book access to his material, musicians have granted me formal and informal permissions to use their work, and authors and performers have generously agreed to appear and/or have their work included in the video without charge. I allocated a small fee for the estate, which I paid using grant money received from both the Canada Council and the Ontario Arts Council. Such open access allows an artist considerable leeway in drawing upon the material for improvisation – it allows for an open dialogue with the work in which the process of creation is not driven by a defined outcome, as is usually the case in commercial contexts.

In my role as an independent media artist, I am in a very different position with respect to rights issues than when I am acting as a professional/creative director. These differences involve both practical and conceptual considerations, based on different approaches to securing access to source materials, which in both instances serves as a primary driver in creative development. Professionally, I work primarily in the United States on commercial, broadcast design, and interactive media projects for broadcasters and advertising agencies. Copyright issues are dealt with by multiple legal teams representing the client, the agency,

the broadcaster, and my company. In this environment, I have seen projects live and die around mere seconds of music and video belonging to rights holders.

In some cases, it is clear what can be used and what cannot; in others, rights agreements are so subtle and complex that any use becomes the subject of speculative interpretation. In one instance, a large-scale interactive project that took us six months and countless resources to produce was "shelved" after completion because of ongoing uncertainty around the usage of music that had been previously cleared for use in radio promotional contexts. Despite the fact that the project had proceeded on the basis of consulting lawyers' approval of the use of the music in our own radio promotion effort, we found that no one would host the site for fear of litigation. Huge amounts of energy, creativity, resources, and time are often wasted because of such legal uncertainties. In a professional commercial context, all uses of protected materials need to be defined, interpreted, and cleared ahead of time.

The more general the specification of the use, the more expensive the licence to take advantage of the material becomes. Licences to use protected cultural content will often be accompanied with new and further detailed restrictions on how it can be used and specifications for the contexts of its association with other cultural materials, all of which creates further interpretive dilemmas as well as new costs. It also compels different ways of working. When navigating rights agreements in a commercial context, a clear statement of the nature of the use needs to be made – where it will be used, for how long, on what platforms, in what territory, and, depending on the material, in what creative framework. Placing an end result on the use of the material, even if one is working with a friendly rights holder, puts pressure on creative work in a way that limits potential avenues of exploration, combination, and interpretation. As a consequence, improvisational remix methods are not commonly used in commercial contexts because they are too expensive and approvals too onerous.

It might be argued that my experience with bpNichol's work is unique because his estate continues to allow his work to circulate within what Pauline Butling and Susan Rudy (2005) describe as a small-press "gift economy" typified by a surplus of goods that were often given away for the good of the community. Nichol certainly produced an excess of material; he donated thousands of hours of writing, publishing, and editing work. He gave away armloads of copies of his magazine *grOnk*, which published the work of Canadian and international

avant-garde poets. Such reciprocal gifting produced a closely linked network of artists who collectively developed much of the contemporary poetry of that historical period. The Nichol estate's generosity in providing access to his art, poetry, and ephemera supports continued interest, distribution, and artistic engagement with his work, which arguably ensures its ongoing social and symbolic value. It allows his work to be explored in new ways, and to continue to develop. The continued circulation of his work ensures that it remains vital and relevant. My own creative work contributes to establishing his significance in Canadian cultural history while keeping the legacy of his way of doing cultural work alive.

All of this is not to suggest that bpNichol had no institutional or commercial presence, and where he did, my own creative efforts are transformed in instructive ways. Where his work is part of media program, such as Phyllis Webb's interview with him on CBC TV's *Extensions* (1967), I would have to pay for materials. In correspondence with staff at the CBC Archives (https://archivesales.cbc.ca/), I was quoted the sum of $85 per second with a thirty-second minimum for worldwide rights in all media in perpetuity – the rights required for use in a video that may be broadcast, shown at festivals, and made available online. In addition to the fee, I need to provide proof that I have permission to use the material from any underlying copyright holders. This is onerous because it requires me to ensure that all rights were cleared to make the original television program from which I am quoting (an impossible task when the program is over 40 years old). Radio clips will cost me $42.50 per second. These are prohibitive costs for a creative project of this nature and will almost certainly ensure that I will not use materials in the public record, which for many viewers provide an important aura of authenticity. As Asquith (this volume) suggests, it seems especially unfair when publicly funded institutions, who should hold these historical records for the public, price this material so as to make it impossible for artists to comment and reflect upon our country's cultural history.

The law and jurisprudence of fair dealing make no allowances for the creative work I do and the kind of cultural history to which I contribute. The bpNichol video project exemplifies a creative practice of remixing that by necessity uses materials protected by copyright. The copyright law under which I have had to work has provided no practical way for digital artists like myself to engage in recombinatory creative practices. It is impossible to submit for the consideration of all rights holders a

specific description of all the possible permutations that the source material might take in a recombinant work. The legislative amendments that are now promised to enable non-commercial transformative work as fair dealing give me little comfort, given the ambiguous condition that one's work has no effect upon the market for the original, which is a highly speculative exercise. The overwhelming public perception is that one is still effectively forced to either "steal" the work or go through the requisite clearing agencies. Instead, I'd advocate doing the hard work of directly dealing with the copyright holders, publishers, archivists, peer communities, and institutions to arrange the kinds of access and permission required to legally engage in a remixing practice. Such direct dealing is only possible where the original authors and artists have not assigned their copyright-protected materials to corporations and licensing collectives. Where such windows of opportunity exist, creators need to do a tremendous amount of work, but it is, ironically, the only practical way for independent artists to access the richness of cultural expression that the law of copyright ideally promises yet materially withholds.

PART C

Making Our Digital Heritage a Dynamic One

as a matter of principle, and will not pick up films that include materials "covered" by nothing but fair dealing arguments.

Despite ongoing efforts to reform the Canadian Copyright Act and to encourage broad interpretation of its fair dealing provisions, the fact remains that in the current cultural climate thick with the fear of copyright litigation, few producers and distributors are inclined to support the creation of new cinematic works similar to *Very Nice, Very Nice*. How is it that a practice such as Lipsett's found footage collage, once broadly admired by critics and popular audiences, has fallen into such disrepute? The film's continued popularity suggests that public perception of Lipsett's appropriation-based practice has remained unchanged. The problem is, rather, that public appreciation of and access to this type of creative expression is today hampered by copyright legislation and the fear of litigation it engenders. Only further copyright activism and reform measures can ensure that institutions such as the National Film Board can honour their mandate of providing fair access to the archived troves of Canadian culture.

24 Chipmusic, Out of Tune: Crystal Castles and the Misappropriation of Creative Commons–Licensed Music

MARTIN ZEILINGER

A recent controversy surrounding the internationally successful Toronto-based band Crystal Castles provides unique insight into emerging intellectual property (IP) norms. Throughout 2008, it became evident that the band had repeatedly and unapologetically sampled Creative Commons (CC)–licensed music without seeking permission from the original creators, and without crediting them appropriately. Two points complicate this issue in interesting ways: first, the sampled works were protected by licences designed to enable, rather than prevent, the creation of derivative works; second, the band's illicit sampling involved *chipmusic*, an experimental type of electronic music created by repurposing sound chips from electronic devices and using them as instruments. Although Crystal Castles was accused of misappropriating other artists' work in their music, chipmusic itself is at its core an appropriative practice that reuses existing, proprietary hardware and produces recognizable sounds often associated with copyrighted, trademarked, or patented cultural content such as video game soundtracks.

Chipmusic has strong conceptual links to traditions of software hacking and open source (OS) culture, and based on this background, it is often purposefully created and circulated in contexts in which the creative expressions it yields can remain free to be shared and reworked by others. Crystal Castles, however, remains outside of this cultural community: its actions served to pull creative expressions meant to be freely accessible into the purview of copyright law – the band releases its music on commercial labels, and claims conventional intellectual property (IP) rights in it. This unfair collision of different collective and private stakes begs the question of how alternative creative communities can ensure fair access to works they seek to protect against commercial misappropriation.

The specific CC licences used for the original works in question require attribution, non-commercial use, and release of the derivative work under the same licence. Crystal Castles' use violated all of these requirements. To date, the chipmusic community has exposed six Crystal Castles' songs as partly or almost entirely based on samples from creations of the two chipmusic artists Covox and Lo-Bat (for the full list of sampled songs, see Kumar 2008). In response to these allegations – none of which were brought to court – Crystal Castles, as well as the band's management, have displayed a disgraceful unwillingness to acknowledge, let alone undo their offence. Given the ideological background of the infringers, who are celebrated stars on a "new punk" firmament, as well as that of the victims, who, as noted, are more closely linked to OS culture, the fact that no infringement action was ever brought in this dispute is particularly interesting for my following discussion. As I will show, arguments surrounding misappropriations by Crystal Castles have effectively taken the shape of open, Web-based debates about fair practices of accessing already-authored works, rather than following the litigious path of today's clearance culture. The public, quasi-democratic sphere of blogs and online discussion forums thus emerges as an alternative, extra-juridical legal space that is more appropriate for negotiating Crystal Castles' offence than the established system of enforcing IP rights.

In retracing some of these negotiations, my discussion of the Crystal Castles case will suggest that underground culture no longer provides the kinds of lawless or law-free spaces previously associated both with punk culture's mockingly nihilist approach to property and with the ethos of hacking. Furthermore, these debates represent a partial result of artists' growing acknowledgment that, in the past, murky definitions of an artwork's legal status have facilitated the expansion of capitalist enterprises' foothold in the realm of cultural production, rather than protecting creators from such advances. In this sense, the reactions to Crystal Castles' unauthorized sampling of works released under CC licences indicate that creators are becoming more aware of the shortcomings of copyright and IP provisions (including alternative models), and that they may prefer to take recourse, instead, to non-juridical measures and collectively agreed-upon ethical principles that seem better suited to keeping the collective creative current running.

Accordingly, creative communities such as the independent chipmusic scene more frequently aim to negate the capitalist property relations underlying different national IP legislations by forming alternative

moral economies of collaboration, fair exchange, and sharing (see Zeilinger 2012). CC licences provide one such alternative, but have been recognized as unable to protect artists' interests according to the ideals to which they may subscribe. Alternative principles of regulating access to creative expressions are not always framed in legal language, and the issues to which they respond are commonly not negotiated in courtrooms. What follows is a discussion of the "para-legal" creative community of chipmusic artists, and observations of how they deal with issues of the unauthorized reuse of expressions that are designed both for fair access and for a certain measure of creators' control over them. The Crystle Castles case, it will be seen, pinpoints the need for creative communities to consider establishing intricate discourses of fair dealing founded on ethical, rather than legal rhetoric.

Misappropriation and "Applied Fair Dealing"

The discussions that followed Crystal Castles' sampling of CC-licensed chipmusic took the shape of an open debate regarding the lived praxis of fair dealing and the self-governing capacities of contemporary underground culture. However, since the actual enforcement of IP rights in the conventional sense was never at stake in these debates, their most interesting aspects concern not legal theories of fair dealing, but rather what we might call "applied fair dealing," that is, the ways in which artists and audiences themselves go about the constitution and implementation of models of fair exchange, collaboration, and circulation of creative expressions.

Crystal Castles is a two-member electronic music act founded in around 2003 in Toronto. According to the founding myth the band itself likes to maintain, everything began when an unrehearsed microphone test, recorded in a basement in April 2005, was accidentally released onto the Internet and became an instant hit. The band's singer Alice Glass, it is said, didn't know about the recording until a British label asked for permission to release it officially (Gillen 2009). Such stories of accidental genius, which Crystal Castles has promulgated in numerous interviews, were received enthusiastically by the mainstream music press, and have been used to cast the band as a creative phenomenon rather than a commercial construct, as an incident without any precedents very much in line with traditional concepts of Romantic genius. This kind of reception also allowed reviewers to compare Crystal Castles' rise to fame to the historical emergence of punk. The BBC, for

example, has noted that listening to Crystal Castles' music "is to be cast adrift in a vortex of deafening pain without a safety net ... [feeling that] you could do anything in the world, but that nothing would ultimately mean anything" (Hammer 2008: n.p.). This description is strongly reminiscent of how punk aesthetics were often described, and Crystal Castles has indeed been eager to embrace punkish attitudes, for example by violently casting off any suggestions of conceptual links between their music and other genres. This freed the band to do "anything in the world" as if that really meant "nothing" to its members – including the use of other artists' creations without permission or acknowledgment. With this attitude, a pseudo-anarchic stage presence, and a sound sufficiently dissonant to disguise Crystal Castles' indebtedness to a variety of mainstreamed genres, the band went on a quick rise to international fame, and, before too long, was hailed as "the most ... original band in the world right now" (Stubbs 2010).

Chipmusic itself had briefly appeared on the stage of popular media attention even before Crystal Castles' stellar rise to fame, namely, when Malcolm McLaren (the self-declared "creator" of the Sex Pistols, who had played a central role in the commodification of the punk phenomenon) announced his "discovery" of the form in a 2003 article for *Wired Magazine* (McLaren 2003). McLaren described chipmusic as a new kind of electronic punk, music made by "reverse engineering" video game hardware from "the antediluvian 8-bit past," with a sound "as though Twiggy were somehow stuck inside *Space Invaders*" (n.p.), a description that can also be applied to Crystal Castles' eponymous 2008 debut album. McLaren, it seemed, wanted to commandeer chipmusic just as he had commandeered the punk phenomenon several decades earlier, and recounted how he had discovered this new type of punk in Paris, in an "Ali Baba's cave of outdated studio equipment," where he explored music made on old Nintendo Game Boys, by artists he described as "the Velvet Underground of the 21st century" and "the new ABBA" (n.p.). Yet, the world didn't seem ready for McLaren's discovery, and it was not until five years later that Crystal Castles brought the term chipmusic back to broader public attention when the band fulfilled McLaren's vision and emerged as a seemingly radical subcultural phenomenon able to take the music world by storm as punk once had.

What both McLaren and Crystal Castles failed to notice (or chose to ignore) was that a vibrant chipmusic scene had, in fact, existed for quite some time, and that it was by no means a fledging art form in need of a maestro or a headliner. Conceptually, chipmusic is related to the

precursors of today's OS movement, and its practitioners tend to have a sophisticated understanding of what it means to appropriate, reuse, and share in a fair manner. Unsurprisingly, the community took offence both at McLaren's attempt to seize the chipmusic phenomenon and then, several years later, at Crystal Castles' denials of any connections to existing musical scenes, denials that laughed in the face of the band's proven misappropriations. McLaren's 2003 "discovery" was quickly denounced in a politely cynical open letter posted online (see gwEm 2004). Crystal Castles' transgression, however, couldn't be tossed out so quickly. The band already had a reputation for disrespectfully ill-treating peers, which had earlier surfaced in its unauthorized use of visual artist Trevor Brown's drawing "Black-Eyed Madonna" as an album cover and on band merchandise. Now, Crystal Castles' unauthorized sampling of openly accessible chipmusic spawned an ongoing debate on artistic integrity in the age of reproductive media, on the ethics of collaboration, and on the considerable difficulties of regulating access in an open artistic community.

Chipmusic Past and Present

Chipmusic has been created for at least two decades. The form is hard, if not impossible to pin down as a genre. Over time, chipmusic artists have ventured into the realms of techno, pop, jazz, and even classical music. Rather than referring to any one musical genre, chipmusic is thus better defined as implying the use of a specific technology, and the term designates the use of a particular medium for musical expression. In chipmusic's most purist definitions, this medium takes the form of sound chips found in early video game consoles such as the Nintendo Entertainment System and the Nintendo Game Boy, or in obsolete home computer systems including the Commodore 64 and the Atari ST. Chipmusic artists use the sound chips contained in these machines as instruments, and "play" them much like one would play any other sound-generating device. In the term's literal sense, chipmusic thus refers to the appropriative use of outdated sound chips for the real-time synthesis and sequencing of chip-generated sounds. A considerable part of the aesthetic appeal of these appropriated instruments lies in the skill and knowledgeability required for their use. Equally important are chipmusic's referential qualities; many of the sounds produced are strongly reminiscent of the early days of personal computing, of specific video game consoles, etc. This positions

the art form in a contentious relationship with patented sound synthesis technology, with proprietary cultural artefacts such as video game soundtracks, as well as with the production contexts and cultural environments evoked by such artefacts.

Perhaps the most important characteristic of chipmusic, however, are the principles of openness and collaboration underlying many chipmusic creations. Representing an art form in which lines between listeners, creators, and critics are extremely blurry, chipmusic is often circulated under no copyrighted licences or very open licences, parly because the form lists early manifestations of radical OS culture among its conceptual and ideological precursors. The biggest influence among these is the *demoscene* of the the 1970s and 1980s, which grew out of the practice of removing copy protection from computer games so that they may be freely circulated. When such hacked games were booted, a signature identifying the hacker would briefly be displayed. Soon, instead of using simple signatures, hackers began to show off their skills by programming more elaborate audiovisual sequences – the "demos" from which the scene derived its name. In order to work with the limited capacities of early personal computers and to keep files small, demos were written and circulated as executable code, rather than as large audiovisual files. This meant that every time they were triggered, demos were thus executed (or performed) in real time by the host machine's hardware. At the same time, most demos were also created in the spirit of collaboration and collective ownership: whoever opened them was free not only to use the cracked software they accompanied, but also to access the files containing the demo code and to manipulate it.

Today, some chipmusic is sample based and recorded conventionally. However, many of the most acclaimed chipmusic artists follow in the traditions of the demoscene and cast chipmusic as a primarily collaborative art form produced (and sometimes circulated) as editable, executable code, rather than as conventional sound recordings (e.g., audio CDs or MP3 files). The code represents a kind of instructional sheet music (similar to piano rolls), used to generate a composition anew each time it is executed. Code-based chipmusic, in other words, is a form of creative expression whose important ideals of openness, copyability, and shared access are built in on a technological level. In technical terms, chipmusic's existence as editable code that is used to generate sounds in real time has important implications for what copyright discourse might call the "fixity" of chipmusic works, as it suggests that

chipmusic has traditionally not favoured fixed, copyrightable expressions. More importantly, it can be derived from this tradition that code-based chipmusic has little to do with the simple sampling and replaying of pre-recorded sounds – instead of referring to unalterable, DRM-protected sound files such as those found on audio CDs, the concept of chipmusic originally foregrounded reusable, editable read/write code similar to the demos described above.

With the emergence of high speed Internet and the availability of convenient audio formats such as MP3, the modalities of circulating chipmusic have drastically changed. Today, many artists make their work available in the form of conventional recordings, often bound in downloadable but otherwise unalterable formats. This may appear puzzling, as it seems to render chipmusic a less open and collaborative form. However, this shift to new modalities of distribution serves, in fact, to explain the chipmusic community's predilection for alternative IP licensing schemes. In scaling down their reliance on the technologically built-in openness of early chipmusic technologies, many musicians quickly embraced a different type of collectivity, namely, one regulated by agreed-upon fair dealing practices and the use of alternative licences such as those offered by the Creative Commons. Because such licences are commonly designed to enable rather than prevent access and redistribution, this transition allows chipmusic to retain its ties to technological and ideological precursors on a conceptual level. This insistence on fair dealing practices also shaped the community's response to Crystal Castles' unauthorized sampling.

While protecting chipmusic's non-commercial ideals, the CC licences simultaneously ensure artists' continued ability to creatively rework each other's compositions. What the chipmusic scene may seem to have lost in adopting more rigid formats of distributed music, it thus made up for by embracing a licensing system that accommodates and safeguards the community's legacy of collaborative artistic creation, and embodies chipmusic's adopted ethics of fair dealing. Furthermore, even in the face of the easy availability of digital sampling tools and high speed Internet connections, the form's focus on technological minimalism and its aesthetics of openness means that outdated sound chip hardware, such as the Nintendo Game Boy, continue to be the most-used tools of chipmusic artists. Overall, the shift from open, inherently modifiable technologies to the use of the CC licences thus denotes the continued implementation of open access practices by other means.

How Can Alternatives to Conventional IP Models Be Enforced?

Clearly, Crystal Castles' sampling practices have really very little to do with the aesthetics of chipmusic. The commercial nature of the band's unauthorized uses constitutes a strong breach of the ethical principles governing chipmusic. The most important question emerging from the Crystal Castles' offence, consequently, is how chipmusicians and other creative communities embracing openness and sharing as part of their creative approach can "handle 'unlawful' use ... by mainstream artists and companies" (Carlsson 2008: 162).

The chipmusic community's reactions ranged from flattered to furious. Some of the implicated artists felt that Crystal Castles has actually improved their creations. One of them, a musician known as Lo-Bat, does not perceive Crystal Castles as having stolen from him, and rather than asking them for compensation argues that the band has essentially enriched the community as a whole – "the twist they've put on it makes it sound better than anything the community could ever create, myself included ... thanks to them, people know more about chiptune; and ... want to hear this music" (Kirn 2008a: n.p.). Most chipmusic artists, however, felt outraged that Crystal Castles had not honoured any of the requirements stipulated in the specific licences used for the works in question. To make matters worse, in a display of punkish mockery, Crystal Castles and its management denied their actions, as well as any general knowledge of or interest in the ethics of chipmusic. This denial violated not only the relevant licensing conditions, but also the community's principles of ethical and fair conduct, which encourage sharing and collaboration. Accordingly, one representative comment posted on a popular electronic music weblog notes that "the notion that hipsters can co-opt the chip music scene's cultural currency without dues paid ... really bother[s] folks," and goes on to complain that Crystal Castles were "disingenuous about their process, fabricating some sort of creation myth ... rather than owning up to technical aspects of their craft" (Kirn 2008a: n.p.). Crystal Castles' retorts to such criticisms certainly did not help – in one interview, the duo stated, "We both hate video games. We were just breaking apart electronics and toys to get annoying sounds" (Boles 2008: n.p.). On numerous occasions, Crystal Castles have also insisted that their sound is absolutely original, a result from simply "wiring an old keyboard to an Atari computer soundboard" (n.a. 2010: n.p.); and, in still more interviews, the band asserted that they learned about the "8-bit [chipmusic] scene" only peripherally: "[We] really don't have anything to do with [it]. It's a completely different world" (Lindsay 2008: n.p.). The chipmusic community, angered by what it considered a mix between PR ploy and arrogant ignorance, was quick to refute each of these statements in turn. It pointed out that the name Crystal Castles is, in fact, the name of a highly influential 1980s arcade video game; it showed how impracticable the band's simplistic idea of "circuit-bending" (the rewiring of electronic hardware) is; and, most importantly, it proved, with the help of sophisticated homebrew spectral graph audio analyses, that rather than not having "anything to do with" chipmusic, Crystal Castles had illicitly used it in at least six of their songs (see nitro2k01 2008).

The debates surrounding Crystal Castles' illegitimate sampling peaked in late 2008, but arguments concerning the legitimacy and "fairness" of the band's sampling practice continue to dominate the comment sections of articles and Web postings speaking to the band's "originality" and genius. Likewise, heated conflicts concerning the ethical implications of the activities of Crystal Castles continue to play out in discussion forums across the Internet. It is interesting to note that even though the misappropriated works are covered by alternative copyright licences, wherever litigation of Crystal Castles' activities is brought up as a possible response it is commonly dissuaded as inappropriate. Instead, discussion continues to focus on the band's attitude, and on exposing their actions to unknowing fans. There appears to be a consensus, among the chipmusic community, that the real problem is not the missing compensation for infringed IP rights. Indeed, such compensation would only serve to reinforce the notion that chipmusic can be treated as just another type of property. Instead, online discussions commonly identify the main problem as the purposeful misinterpretation of licences "designed to encourage sharing" (Kirn 2008a: n.p.). The artists in question have recognized, it seems, that the most obvious reaction to the actions of Crystal Castles, namely, to file a legal complaint for copyright infringement, would mean to betray efforts to keep chipmusic outside the realm of traditional cultural ownership and property exchanges.

As the chipmusic artist M-.-n comments, the lack of understanding of copyright-related concepts such as fair use and fair dealing is "quite a big deal since a LOT of artists are trusting creative commons and this story puts the license to doubt, since it seems people can break it" (Kirn 2008a: n.p.). It is "laughable," another comment reads, that "these kids are playing in Lo-Bat's home country in the largest club now and the

promo text states they invented the genre" (ibid.). Again, such comments show that the payment of licensing fees or royalties is clearly not the real issue – what angers and concerns the community, instead, is that "the mainstream music community can just pillage ideas from a less commercial almost hobby community [sic] and get away without paying a bit of respect" (nitro2k01 2008: n.p.).

Perhaps Lo-Bat, the chipmusic artist whose work was misappropriated in as many as five Crystal Castles' songs, should have the last word in this survey of opinions. His perspective on the controversy is exemplified well by the fact that most of his public postings on the matter are published anonymously (although they have been attributed to him by insider observers within the community). Lo-Bat is vehement in his insistence that his complaints are not voiced in order to draw attention to his own work (see, e.g., comments in Kirn 2008a). By explicitly stating that the chipmusic community should focus on collectivity instead of foregrounding individual artists, Lo-Bat condemns the egomania of Crystal Castles. In his critique, the conviction that the practices of Crystal Castles are unethical remains intact, but, the artist states, the band's misappropriation simply makes it more important for the community to now take advantage of the attention it is receiving as a collective. Stating that true talent will prevail where illegitimate copying will fail, he provokes his peers by asking, "Imitators, impostors and 'thieves' will fizzle, and now that the spotlight is on you, what will you do to prove your longevity?" (Kirn 2008a: n.p.).

From the survey of perspectives surveyed above, three interrelated reasons for the chipmusic community's reaction to Crystal Castles' unfair sampling can be distilled: first, chipmusic itself is based on the repurposing of existing technologies, and its practitioners therefore tend to be sympathetic – at least in principle – towards the general concept of cultural appropriation; second, the legal status of chipmusic itself is not entirely clear, since the form is essentially based on the repurposing of patented (if obsolete) technology, and yields works that imitate copyright-protected works; lastly, and most importantly, the chipmusic scene established itself in conscious opposition to conventional discourse on the commercial production and circulation of cultural commodities and is, therefore, highly reluctant to use mainstream copyright licences.

Online, the fans and supporters of Crystal Castles often appear wilfully oblivious to the sampling controversy, and condemn posters that challenge the band's integrity as "flamers" (i.e., incandescent Internet

posters) who envy the duo's genius. And still, the affected chipmusic artists will not go down the vengeful path of litigation. As one commenter very accurately noted on a blog entry devoted to the issue, "this isn't about the law – it's about a very nebulous code that [Crystal Castles] broke" (Kirn 2008b). It appears to be difficult for the chipmusic community to formalize this code. Regardless of this fact, it is clear that Crystal Castles' unauthorized sampling was perceived as offensive in several ways: the band ignored licensing schemes designed to ensure the possibility of collaboration while safeguarding fair dealing conventions; the band members wrongfully denied any practical or conceptual connections to the chipmusic community (which violates both relevant licences and the community's ethical ideals); and lastly, Crystal Castles committed the aesthetic fallacy of sampling prerecorded sounds rather than write or manipulate executable code to generate their own music, again contradicting certain established traditions of chipmusic creation.

"What's the point of starting a band if you're not going to do something new?," Crystal Castles' singer asked in an interview (2010: n.p.). As nitro2k01's spectral graph analyses have conclusively shown, however, Crystal Castles' approach to creating music is hardly original in any sense of the term, and certainly does not always produce "new" material. At least the band's unauthorized sampling and the reactions it triggered has raised some new, rarely discussed questions that go beyond obvious issues related to unlicensed uses of intellectual property. How can a creative community effectively protect its works when it does not subscribe to conventional copyright models and when it refuses to invoke such models as a response to infringement? Are there practicable alternative ways of enforcing such protection, beyond denouncing misappropriation after the fact? And finally, are punkish views on ownership boasted by bands such as Crystal Castles viable in a cultural landscape in which underground cultures are well networked and organized, and better informed than ever before about law and discourses on practices of fair access to creative expressions?

Amateur spectral graph analyst nitro2k01 comments on these issues in an appropriately tongue-in-cheek fashion by identifying a commercial trend behind the band's violation of an open community's fair dealing practices and calling it "[t]he new kind of punk, copyright infringement for money" (nitro2k01 2008: n.p.). Meanwhile, Crystal Castles is, supposedly, putting together a "compilation of [their] favourite 8bit songs for release on Lies Records" (Kumar 2008: n.p.) – a gesture

meant to restore the band's standing with the chipmusic community, but in fact symptomatic of a further attempt to pull alternative artists into a world of commercial music with which they do not wish to be associated.

Conclusion

Music critics still tend to shy away from discussing the legal implications of Crystal Castles' chipmusic sampling controversy, and, all too often, continue to take the band's energetic live shows and commercial success as a guarantee for its originality. In the long run, however, commenters both from inside and outside the chipmusic scene agree that Crystal Castles "were doing themselves no favour with the 'so what, who cares' attitude ... [I]t loses them the respect of more mature music fans and critics" (Thiessen 2008: n.p.). At least in the alternative music press, Crystal Castles has been dethroned as the "next big thing" precisely because of the attitude the band brings to serious infringement allegations involving their peers (Topping 2008).

But how much can be expected, in the long run, from an industry whose economic success depends on a mix between the assimilation of underground artists into the higher echelons of commercial success and the subsequent exploitations of these artists? Awareness of the problems that commercially informed copyright regimes raise for independent artists who believe in collective creativity will not likely be highlighted by the music industry, nor by policy makers. It may be a more viable trajectory for underground cultural movements such as the chipmusic scene to establish their own ethical codices of fair dealing and to fortify their collaborative approaches to creativity in this way. As evidenced by commentary such as the following by John Darnielle of the highly successful indie band The Mountain Goats, creative communities' rallying cries for fair alternatives to conventional copyright models are not falling on deaf ears: "Sure, they made one of my favourite albums of the year so far, but ... Crystal Castles can go to Hell and stay there" (Darnielle 2009).

25 "My Real'll Make Yours a Rental": Hip Hop and Canadian Copyright

ALEXANDRA BOUTROS

At the heart of current debates about "copyrights" and "copywrongs" is the hope that copyright will protect and promote the best interests of both artists and the public, but also fears that it will simply promote corporate interests, undermining artistic practices and stifling audience participation and access to culture in the public sphere. Such discussions about who owns culture and who has access to it are particularly loaded in the context of hip hop music. Hip hop's history as a black cultural form, its early social location as a cultural movement for disenfranchised black youth in the United States, and the current debates around its commercialization have meant that hip hop inevitably raises questions about what it means to produce, distribute, and own black culture. If balancing artists' rights to reimbursement with audiences' rights to easy access to artistic and cultural work is at the heart of copyright discourse, then unpacking the nuances of this hoped-for balance in the context of hip hop is an important part of ensuring that copyright reform takes into account diverse forms of cultural production.

What do debates about the intersection of digital sound technology and copyright violation signify in the context of hip hop? Given the centrality of the United States both to the origins of hip hop and to what some see as an increasingly homogenized global response to copyright infringement and digital sharing, how do current developments in the United States impact Canada? This chapter focuses on how debates around intellectual property (IP) encode certain assumptions about cultural production, and explores Canadian hip hop culture's relationships to copyright and (illegal) digital file sharing, or piracy. Some of the most vocal advocates of copyright reform have noted that the easy accessibility of digital, inherently reproductive media has animated a

27 Child-Generated Content: Children's Authorship and Interpretive Practices in Digital Gaming Cultures

SARA M. GRIMES

The Internet offers users of all ages opportunities to collaborate in the creation of shared cultural artefacts and experiences. But, while children's use of information communication technologies (ICTs) has been the subject of numerous policy and legal debates in recent years, the emerging role of children as creators of digital content continues to slip under the regulatory radar. In contrast to high-profile issues such as videogame violence and copyright infringement, very little attention is paid to the contributions children make to online cultural production. Yet, ICTs provide children with increasingly important opportunities to create and distribute content across a variety of cultural forums, from emerging spaces such as virtual worlds and social networks to traditional media formats such as television. This is particularly the case now that increasing numbers of children have gained access to "Web 2.0" – second-generation Web applications greatly enhancing the ease with which non-expert users are able to produce and distribute content (often called user-generated content or UGC) online.

Children's role in the Web 2.0 phenomenon is rarely discussed in terms of authorship, ownership, or immaterial labour. However, as with any other user group producing content online, children have become embroiled in complex economic relationships that raise ethical and legal issues demanding of further analysis and consideration. Of primary concern is the way in which children's contributions to UGC culture are frequently exploited for commercial gain. From market research preying upon children's trust (Pybus 2007, Steeves and Kerr 2005) to viral marketing tactics exploiting children's peer relationships, to corporate claims of intellectual property (IP) ownership over children's online submissions, industry standards of practice threaten

to undermine the democratic potential of children's digital cultural participation and engagement. Using examples drawn from a number of popular children's online (and Internet-enabled) games and other applications, this chapter provides an overview of the unfolding relationship between child-generated content and the ongoing commercialization of children's digital culture, as well as the implications for children's emerging privacy, authorship, and cultural rights within the digital public domain.

Children as Cultural Producers

Emerging studies of social-networking sites and UGC tools reveal growing participation rates among increasingly younger users. Although a study conducted in 2005 by the Pew Internet and American Life Project described more than half of American teens as "media creators" – producing blogs and websites, posting original artwork and videos, and "remixing" pre-existing content into new compositions (Jenkins 2008) – more recent research conducted by the National School Boards Association (2007) found more than a third (37%) of "students with online access" aged nine to seventeen years to have created websites and online profiles, and nearly a third (30%) to be maintaining their own blogs. Although comparable data on Canadian children is not currently available, previous research suggests that children across North America follow similar patterns when it comes to ICT usage, visiting many of the same websites and exhibiting many of the same (or similar) preferences and behaviours (Steeves 2005, NPD Group 2009).

One of the most significant ways children engage in the production of UGC is within the context of digital games (including game-themed virtual worlds, computer games, and console/handheld games). Digital games represent an immensely important part of children's online experience. A survey commissioned by the Entertainment Software Association of Canada (2011) found that, in 2009, 91 per cent of Canadian children aged six to twelve years had played a video game at least once in the previous four weeks, and 26 per cent reported gaming on a daily basis. As in other areas of digital gaming culture, a growing number of children's games now feature tools for producing and distributing UGC among social networks (Shuler 2007). Coinciding with the Web 2.0 phenomenon, the emphasis within the children's game industry has shifted towards providing players with greater opportunities to collaborate and contribute directly to the games' contents.

An example of this shift is the recent rise in popularity of virtual worlds designed specifically for children (Rusak 2008). Beginning with the massive success of two Canadian virtual worlds in 2006, *Club Penguin* and *Webkinz*, the children's market for virtual worlds has mushroomed over the past few years. In 2008, industry analyst Virtual Worlds Management claimed there were over two hundred virtual worlds for children and youth either live or in development. The vast majority of these were either game-themed (also known as "massively multiplayer online games," or MMOGs) or otherwise centred on play (featuring virtual paper dolls, virtual pets, mini-games, or tools for make-believe play). The top-ranking virtual worlds for children currently claim "populations" of over ten million players, and industry analysts estimated that over 24 per cent of children visited a virtual world at least once a month in 2007 (Oser 2007).

Research into children's engagement with virtual worlds is still in the early stages; nevertheless, preliminary findings suggest child players adopt many of the same behaviours found among teens and adults, including community building, collaborative play, and UGC production (Fields and Kafai 2010; Jackson, Gauntlett, and Steemers 2008; Marsh 2008; Crowe and Bradford 2006). These findings are supported by preliminary user trend surveys, such as the National School Boards Association (2007) report, which found that even before the children's virtual worlds boom had taken place, approximately one in six students with online access had used online tools to create and share virtual objects commonly found in virtual worlds and MMOGs, such as "houses" and "clothing" and virtual characters. Although children's virtual worlds generally contain fewer affordances and design features than those created for teens and adults (Grimes 2010), child players, it appears, are nonetheless able to use these worlds for a variety of creative practices.

In addition to virtual worlds, children have access to UGC tools in a variety of further gaming formats. Console and computer games both have a long history when it comes to enabling high levels of user customization and creativity, as seen in early titles such as Mattel's *Barbie Fashion Designer* (1996) and EA's *The Sims* (2000). With the introduction of Internet-enabled console systems, opportunities not only for generating but also for sharing and distributing game content have expanded significantly. Like MMOGs, a growing number of "UGC games" now allow players to create and exchange virtual items. Some even include tools for constructing entire levels and missions, which allow non-expert players to contribute directly to the game design.

Examples can be found in two highly acclaimed titles released in 2008, which centre almost entirely around the creation and manipulation of UGC: Media Molecule's *LittleBigPlanet* (rated "E" for "Everyone") and EA's *Spore* (rated "E10+" for "Everyone aged 10 years and over," with a number of sequels rated "E"). Because the games are Internet enabled, players can share their finished products (game levels, species of creatures, costumes, etc.) with other players, contributing to vibrant networks of user-creators. Although *LittleBigPlanet* and *Spore* are not specifically "children's games," but rather games targeting a broad demographic, they nonetheless represent important new opportunities for children to engage in increasingly sophisticated forms of UGC. In addition to their E ratings, the games' child-friendly designs and numerous child-targeted marketing initiatives (including cross-promotions for tie-in toys and children's merchandise) indicate that the games' developers perceive children as a key market segment for these particular titles, as well as for UGC more generally.

The introduction of UGC tools into children's gaming cultures is significant for a number of reasons. For one, younger children rarely have the technical knowledge and skills required to engage with complex technological systems at the level of design, such as hacking or programming code (Brin 2006, Donovan and Katz 2009). UGC solves this problem by providing accessible, and increasingly child-friendly, tools for both creating and disseminating content. In this respect, the term "user-generated content" can be confusing, because it does not tend to include more specialized forms of content creation, such as coding, or technological interventions requiring technical expertise, such as hacking. The current discussion is in keeping with common applications of the term as encompassing only those forms of content production and generation made accessible to "everyday" (layperson) users through some type of WYSIWYG ("what you see is what you get") interface. These tools thereby have the potential to greatly facilitate children's entry into media and cultural production.

Second, despite widespread enthusiasm about the democratic potential of Web 2.0, the majority of social-networking sites, MMOGs, and other UGC forums formally prohibit users under the age of thirteen years. Although children are frequently celebrated within popular discourses for their seemingly innate ability to navigate ICTs (Banet-Weiser 2004, Narine and Grimes 2009), they also remain the subjects of numerous moral panics about the potential dangers of life online. This social ambivalence has produced a complex regulatory climate both in the United States and Canada, wherein children's participation in

online culture is at once encouraged and restricted by public funding initiatives, child-specific legislation, and self-regulatory expectations (around privacy, e.g.), as well as mutable public concern. As a result, many developers have hitherto appeared unwilling to take on the added legal and ethical responsibilities associated with child users, which are thereby minimized through the inclusion of formal age restrictions (Montgomery 2007, Livingstone 2008). While many children may access the sites anyway, their participation is inevitably limited by the terms of service (TOS) contracts and other mechanisms working to exclude them. The introduction of child-friendly forums for UGC thus provides a surprisingly rare outlet for children to participate in peer interaction and creative self-expression within a digital community of interest.

Another important aspect of this development is that it affords new opportunities for children to engage directly and collaboratively with elements of their shared culture. To date, many of the most popular children's UGC games have centred on themes and characters drawn from pre-existing media texts and toy lines (Grimes 2010). Even within titles that contain original themes, tools, and characters, such as *LittleBigPlanet*, copyrighted content occupies a prominent role. For instance, players of *LittleBigPlanet* can purchase branded downloadable content, such as official Marvel and Disney costumes. Concurrently, the creation of content that pays "unofficial" homage to popular media texts and characters has emerged as a notably common trend among (at least some) of the players of these games (Pigna 2008).

The incorporation of corporately produced content within forums seemingly designed to encourage user appropriations and interpretation should not be underestimated. Children's culture is heavily dominated by wide-reaching media brands using transmedia intertextuality to extend characters and storylines across an expansive array of formats and consumer products. Popular media brands come to function as key features of children's "symbolic culture" (Griffiths and Machin 2003), providing a shared frame of reference through which children organize their play and various social interactions. While the impact this has on the diversity and richness of children's cultural experience is beyond the scope of this chapter, studies do reveal that through creative engagement and collaborative play, children can exert high levels of agency, creativity, and even resistance in their engagements with these texts (Willis 1991, Götz et al. 2005, Formanek-Brunell 1998). Work by Schwartzman (1978) and Sutton-Smith (1986) suggests that the flexible, parodic, and subversive nature of children's play makes it a particularly conducive context for transformative forms of interpretation. Others

maintain that children's playful interactions with corporately produced texts can actually function as important forums for assessing, negotiating and challenging dominant ideologies (Gussin Paley 2004).

The introduction of spaces where children are able not only to engage, modify, and reinterpret corporately produced texts, but furthermore to publish their appropriations in a public domain could represent an important reconfiguration of existing power relations within children's culture. Traditionally, children's uses and reinterpretations of corporately produced texts have taken place almost solely within the private sphere – in the bedrooms, playgrounds, and classrooms of contemporary childhood – and they have, thereby, been largely limited to individual (or immediate community) experience. In this respect, UGC games could fill a key function, by providing not only spaces where children can explore content creation in a playful setting, but also opportunities for children to collaboratively interact with elements of their shared cultural landscape.

The idea that engaging in creative appropriation of copyrighted works has broader cultural value has found additional support in current regulatory initiatives, including the recent amendments to the Copyright Act (see Reynolds, this volume). In addition to broadening the general definition of fair dealing to include exceptions for education, parody, and satire, the amended Act provides a section delineating a set of easily attainable conditions under which non-commercial user-generated content that uses some form of copyrighted work does not constitute an infringement. Although several questions remain as to the strength and viability of these particular clauses in relation to the amended Act's broader privileging of copyright owners' ability to extend their control over how their works are used (through technological protection measures and rights management information), the amended Act's articulations of fair dealing and user-generated content nonetheless represent a significant step towards a formal acknowledgment of the cultural rights of the everyday user, which necessarily (albeit not explicitly) extends to child users as well.

Authorship, Distributed Agency, and Fair Dealing

UGC games may, indeed, hold a significant amount of potential; however, they also draw attention to a number of important, and as yet unresolved, questions about the role and status of children as content producers. This includes a number of difficult questions pertaining to authorship, intellectual property (IP) ownership, and fair dealing, each

of which are further complicated because the users in question consist of minors with limited – and oftentimes ill-defined – legal rights and responsibilities when it comes to issues of cultural participation. Western culture has traditionally contained very few opportunities for children to participate directly in the large-scale production and dissemination of content, and as such, it is still largely perceived as created for children by adults. Thus, while child-generated content clearly presents a unique new problematic to existing relationships of (cultural) production, it remains unclear how children's special needs and vulnerabilities will be accounted for as they move into various realms of cultural production.

Within adult and teen-oriented gaming cultures, a similar set of issues has already emerged as a key source of debate and legal conflict. For example, Coombe, Herman, and Kaye (2006: 194) describe many MMOGs and virtual worlds as relying quite heavily on "distributed agency," which refers to the "network sociality of cultural production" generated by a game's players. This production process includes both everyday player practices, such as community building, role playing, and creating UGC, as well as more sophisticated (and technically specialized) appropriations of the games' code and contents, such as machinima, "modding," and distributing game patches. As Coombe, Herman, and Kaye (2006) argue, distributed agency is a form of collaborative co-creation that replaces and challenges traditional notions of authorship.

Although collaborative, as well as highly dependent on players' creativity and immaterial labour, the products emerging from distributed agency are nonetheless almost always framed in proprietary terms within the games' end-user licence agreements (EULAs) and TOS contracts. In most cases, the contracts also assign ownership and copyright of that property to the games' corporate owners. These claims raise serious questions about where the players' authorship and ownership rights fit in, questions that in some cases have surfaced as full-fledged legal disputes over whether or not players have the right to sell their in-game creations, or whether game owners have the right to revoke a player's access to their in-game creations (Lastowka and Hunter 2004).

A complicating factor here is the embeddedness of these virtual products within corporately owned game code, as well as their derivation from copyrighted themes, imagery, and narratives. Within this context, "distributed agency" manifests as a "hybrid joinder of the positions of producer and consumer," a position evoked within the Lister et al. (2003) notion of the "prosumer" (34). Thus, while many of the arguments

against EULA claims are highly compelling, and although the language of EULAs is clearly "subject to legal scrutiny" (Lastowka 2010), the contracts have yet to be successfully challenged within a judicial system. As such, deeply ambiguous questions about authorship, control, and the potential rights of "prosumers" are mired in a de facto resolution supplied by corporately delineated and enforced EULAs.

By focusing almost solely on adult players, those engaged in this debate have avoided addressing how the situation is further problematized by the involvement of minors. For instance, minors' contracts are voidable in Canada and the United States, which presents a weighty challenge to claims dependent on the validity of TOS contracts and EULAs. With increasing numbers of children creating and sharing content across a growing array of media, it is becoming more crucial than ever to include in this discussion a broader consideration of these types of exceptions, along with an examination of how relationships between players and corporate game owners might be transformed to better accommodate children's special rights and legal status. In the meantime, the corporate owners of children's UGC forums will continue to attempt to address these issues on their own terms and prerogative. In some cases, this might result in important advances for children's cultural rights. For instance, players of *LittleBigPlanet* retain ownership of their UGC under the terms and conditions delineated in the TOS. In other games, however, more dubious solutions will be implemented, as in the case of a fairly common TOS stipulation seeking to enrol parents as agreeing parties in the contractual relationships "entered into" (albeit often unknowingly) by their children.

Another key issue is what space (if any) will be allotted to fair dealing within children's cultural production. The marked emphasis placed on branding and cross-promotion throughout children's culture means that questions of distributed agency become even more complex when applied to child-generated content. Within commercial games and virtual environments, children's production of UGC is not only embedded in corporately owned game code, but is in many cases even more heavily derived from existing (corporately owned) content than the products at the centre of the IP debates described above. For example, the UGC tools provided within children's virtual worlds are often significantly more limited than those available in teen and adult-oriented titles, and frequently they conform to parameters set by established media and toy brands (Grimes 2010). By confining children's creative "prosumption" to a limited range of pre-approved, brand-friendly options,

the technological design of virtual worlds such as *Club Penguin*, *Barbie Girls*, and *Nicktropolis* affords a type of UGC more closely resembling customization than creative appropriation.

In some children's virtual worlds, UGC conforming to the "official" texts is highly encouraged, as long as it abides by the terms of service and appears within the context of a corporately controlled channel. For instance, children are invited to submit artwork and fan fiction based on the *Club Penguin* universe for publication in an in-game, weekly newspaper edited by the game's moderators. Conversely, children's creative reinterpretations of existing media content are frequently under threat of removal or ban, particularly if these don't accord with the desired brand image. In other cases, both forces work in concert. In the example of *LittleBigPlanet*, purchasing the "official" Disney-branded content gives players a limited licence to use the items in their user-generated level designs. At the same time, levels containing player-made, do-it-yourself versions of Disney characters are formally restricted by the game's EULA, and can be removed from the PlayStation Network at any time.

The increasingly symbiotic relationship between child-generated content and copyrighted materials within UGC games makes explorations of player authorship and distributed agency within these contexts all the more challenging. Yet, this relationship must also be examined in terms of its congruency with the wider cultural practices of North American children. As described above, children's symbolic culture is filled with traditions of appropriation, subversion, and other forms of engagement with the media characters and brands permeating their everyday lives. That children might, in fact, have an impetus to extend these interpretive practices into the digital realm is not at all surprising. As it currently stands, however, transporting these types of practices online implies subjecting them to corporate copyright claims and brand management tactics. These tactics, in turn, work to undermine children's sense of ownership over the products of their digital participation, as well as to limit children's freedom to manipulate the contents of their shared culture. Through such processes, child-generated content becomes reconfigured as little more than a new, "interactive" form of consumer practice. This makes it easier to suppress traditions of media appropriation, interpretation, and bricolage that have long occupied a legitimate and valued place within children's cultural practice. Instead, children's UGC is configured to both support corporate ownership

claims over its productive dimensions and pre-empt children's authorship rights before they have even been properly introduced.

Notions of fair dealing offer a promising entry point for formulating child-centred alternatives to these corporately biased frameworks. Rather than simply approaching these issues via the proprietary terms introduced in EULAs, we might instead begin to consider how children's cultural rights can also be advanced through a better delineation and protection of their right to access and manipulate elements of their shared culture. One of the major questions to be answered is whether children's creative engagements with popular texts will ultimately continue to be understood as intrinsic, beneficial, or otherwise valuable facets of children's cultural participation. If so, what provisions will be set in place to ensure children's ability to engage with these materials in their play, socialization, and informal learning processes without undue levels of corporate interference and control, both on- and offline?

Conclusion

Despite the discourses of empowerment often associated with Web 2.0 and user-generated content, nothing indicates that increased user participation alone will lead to a more democratic culture. The North American cultural climate remains characterized by strong tendencies towards corporate monopolization, privatization, and expanding copyright regimes (Coombe 2003). In the absence of adequate government intervention, corporate interests have taken the lead role in redefining the foundational tenets of our culture, including authorship, ownership, fair dealing, and the public domain. As users continue to engage in practices of distributed agency and share content online, the need for a formal acknowledgment and delineation of their rights (and responsibilities) as cultural producers, authors, and consumers has become critical. This is particularly true of children, whose participation in the process of cultural production introduces an entirely new set of issues, questions, and responsibilities, with very little historical precedence to fall back on. As children's involvement in cultural production and media has been identified as a key entry point for the advancement of all children's rights (Hamelink 2008), it is crucial that their emerging status as cultural producers be properly addressed, protected, and fostered, within both regulatory frameworks and industry standards of practice.

Deal with It

LAURA J. MURRAY

"Fair dealing" is an odd phrase, when you think about it. The word "fair" drops us into childhood, to sudden betrayals at dusk just before the streetlights come on, or to the sound of a parent's footsteps coming down the basement stairs to break up a fracas. We can all remember times when we said, "It's not fair!" and the big kids laughed in our face. And we can remember times when somebody else said, "It's not fair," and the adult took the football or candy away from us, *our* football or candy, that *we deserved*. If we're lucky, we recall the vindication of unfairness righted, the doll back in our arms again, if only for "a turn." Self-interest and community interest jostle for power within the word "fair." Fairness is a widespread cultural aspiration: although we all know that "life's not fair," we still keep after it. Fairness is the first ground on which we learn to argue, to mobilize evidence, and it's also the first ground on which we learn to accept compromise or stalemate. Children know that if they can't agree on what's fair, they risk imposed accommodation or deprivation. But unless you're just talking of cutting a piece of cake exactly in half (you cut; I choose), there is hardly ever a formula for fair. Decision depends on a range of contextual facts and implicit or explicit norms. We have to know who had it yesterday, who is bigger or littler, who behaved better, and what the alternatives to "it" are, and we also have to know which of these matters and in what way. In some families, for example, the younger child will be given advantage when all else is equal; in others, the older. Fairness is local. You can't work fairness out once and for all: you have to practise, improvise, defend yourself, every time.

Then there's "dealing." Wheeling and dealing. Plain dealing. Drug dealing. Dealing with it. The *Oxford English Dictionary*'s first meaning is

"division; distribution (of gifts, blows, cards, etc.); sharing," from which they move on to "intercourse, friendly or business communication, connection," and "trading, trafficking; buying and selling." At its essence, dealing seems to be orderly interaction, with a notable amplitude of reference from play to combat to commerce. There is an emphasis on human *activity*: selling is an ongoing practice, not a mechanical exchange of objects for cash. Thus, even *Black's Law Dictionary*, which sees the term "dealing" more narrowly as "transactions in the course of trade or business," evokes a continuity of practice that dealing serves and subtends. Dealing is about keeping things moving, keeping them calibrated, keeping relationships alive even when they are adversarial.

Which leads us to "fair dealing." What is fair dealing, anyway?

The usual answer is that it is an exception within the Copyright Act that allows works to be used without permission under certain specified conditions. Much more than that the Act famously does not say, however, and despite fair dealing's history in the courts, including some major Supreme Court cases, it remains somewhat elusive. So, it's a major achievement that several of the essays in this book seek to clarify the scope of fair dealing as a statutory instrument. How can we place fair dealing with regard to other legal concepts such as the public domain or Charter rights (Craig, Amani, this volume)? What filmmaking or archiving or artistic or scholarly practices does it enable (Zeilinger and Horwatt, Meurer, Reynolds, Westcott, this volume)? These are crucial areas for illumination, partly because a lot of creators do their work in institutional or commercial contexts where people other than themselves decide the risk tolerance. A scholar or an archivist may be willing to take chances where his or her funders or producers or Web hosts are not (Goldsmith, this volume). Thus, any argument that can reassure an institution or its representatives that permission and payment are not always required is a Very Good Thing. And any tool that can render fair dealing as routine as the ubiquitous click-through licence is also of great value: the "fair dealing button" for access to copyrighted digital materials is a lovely little bit of pragmatism (Sale et al., this volume).

But, the main thing that will strike any reader of this volume is that many essays depart entirely from fair dealing as Parliament, courts, and lawyers might recognize it. There's a chapter on net neutrality; another on geo-blocking. There's a chapter on "open teaching." We hear about why the CBC shouldn't be locking down its content, and how one might go about devising a digital arts archive. There are discussions of Indigenous cultural rights and children's online user generated

content, which speak to the idea of group rights and cultural policy. Zeilinger calls for acknowledgment of "what we might call 'applied fair dealing,' that is, the ways in which artists and audiences themselves go about the constitution and implementation of models of fair exchange, collaboration, and circulation." Wagman and Urquhart "move some distance from the conventional, strict, meaning of fair dealing and ... invoke what we call the various 'deals' media consumers are offered, the relative 'fairness' of these deals, and demonstrate how media consumers through their concrete actions 'deal' with the conditions they are presented with."

In such breadth, the collection mobilizes a plural and informal definition of fair dealing that transcends the strict legal definition. When Che, for example, writes that "the transparency of code in open source software enables and promotes expanded prospects for peer review and, consequently, an ethic of fair dealing," he is using the term "fair dealing" to mean something much broader than the statute indicates. Is he wrong? In the technical sense, without doubt – but perhaps he's onto something. In its (welcome) championing of fair dealing in *CCH* v. *Law Society of Upper Canada* (2004), the Supreme Court elevated fair dealing to the status of a "user's right"' And, yet, is not "user's right" a less capacious and more constraining category than "fair dealing"? "User" puts the action in a combative light (user vs. creator/owner), and "right" contains us within an individual rights discourse. Dealing, as we have seen, is relational and process based; use seems terminal and finite and individual. Fairness is a discourse of practice; right is a discourse of law. The two terms seem to come from entirely different political cultures or cultural politics. This book suggests that fair dealing has a meaning, or is participating in a contest of meanings, prior to and parallel with statute, and that as a term it is more alive in our culture than user's rights are.

Various contributors make this point, in very different ways. Seeking to foster more active engagement with fair dealing, Boon asserts that practice "is a matter of value and competence, rather than right. One does not need to own in order to practice. If anything, a practice owns us, reshapes and reconfigures us, and inserts us in a dynamic collectivity." Amani points out that "the inability to know at any given time with certainty what cultural content is fenced in as a protected *work*, and what is available for *play* in the protean space beyond." Craig seeks to place fair dealing within "a cultural commons that is distributed and disaggregated," urging us to focus "on uses as opposed to works (or

parts of works) as [the] relevant unit of analysis." Lorimer claims that "the point of open access is to make what would come under fair dealing the rule, rather than a legal exception. Indeed, open access wants a wide swatch of uses to be recognized as entirely legitimate." Maxwell invokes Barrie and Moss's critique of the Creative Commons as reinforcing the misconception that copyright is "all rights reserved" when, in fact, copyright is a finite bundle of rights within a broader and established practice of circulation of scientific knowledge.

In the *CCH* case, there's one little sentence that has always resonated louder with me than all the others: "it may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair." Relevant, indeed. This sentence imposes a serious responsibility on all of us working and playing with cultural and intellectual expression. It means that *our practice* is *legally weighty*. We can't cower waiting for the law to tell us what to do; *we* make it; the law waits for *us*. This is absolutely essential to understand, because the "grey areas" of fair dealing, even with the *CCH* tests, are frustrating. We just want to *know*. Is it fair dealing, or not? Well, it seems true to the etymology and affective aura of both "fair" and "dealing," as sketched above, that a simple answer is just not available. But, it might also follow from the resonances I've sketched above that we shouldn't be frightened of that. I didn't evoke the world of childhood to belittle discussions about fairness. On the contrary, my point is that adjudicating and working out fairness is something that we really know how to do. We have been practising it since before we learned to talk. It isn't always pleasant or easy, but we can deal with it.

There is something specifically Canadian about this, too, despite fair dealing's counterparts in the legal traditions of other nations. Its recently expanded permitted purposes (review, criticism, news reporting, research, private study, education, parody, and satire) indicate that it's a way to calibrate advantage between creators, publishers, and producers, on one the hand, and education, research, cultural commentary, and journalism, on the other. All good things; all, in Canada, vying for government support. If the resources mostly come from the same source, and the component actors aspire to the same broad goals of supporting democracy, literacy, and creativity, cooperation rather than competition is the most appropriate behaviour. Monetizing every exchange would be as pointless as monetizing every exchange between siblings. The relationship between the arts and postsecondary education in Canada, for example, is not only a commercial one, although

students and universities buy many cultural products: affordable postsecondary education is a support for emerging artists, and much art is produced and exhibited within postsecondary institutions. Journalism sometimes borrows through fair dealing and sometimes lends. Free excerpts from books or movies draw readers or viewers to newspapers or TV, and also (if the review is not a pan) draw viewers to the source. Many individuals work in more than one of these sectors and find themselves on both the donor and recipient end of fair dealing.

With the occasional contest and adjustment to accommodate technological change (let's face it: actual copyright lawsuits are all but unknown in Canada), this has all been fairly routine and uncontroversial for a long time. But, it has become controversial as we enter into a neoliberal economic vision of entrepreneurialism and competition. Artists, art galleries, educational institutions, and public broadcasters alike, feeling funding squeezes and much competition for audience attention, are urged to look for "new revenue streams." As they try to garner more corporate support and provide more "market value" to "growing their customer base," they also eye each other to help meet that relentless "bottom line." Why should they forego any potential revenue capture, even from each other? Large media corporations, after all, don't give free rides to artists who want to remix their "properties" and try to leverage new technologies to buy once (from a freelancer, say) and sell many times (in different media); these are the role models we're supposed to be following; and so the Canadian way of sharing public resources starts to seem rather soft and old-fashioned. Along with musical instruments in schools, public broadcasting, and museums, it might seem that fair dealing is a luxury we can't afford any more.

But, this book shows that fair dealing is not a luxury and we can afford it. In fact, it's lawsuits that are the luxury we can't afford, even if we wanted to or thought we could win, and whatever reforms to the statute we might propose or achieve. Lawsuits are only within reach for large moneyed interests. So, the law can be there as a threat, or a touchstone, but it can and should never replace improvisation, discussion, and attempted fair dealing between ordinary people.