



Introduction

COPYRIGHT LAW is an imperfect but ingenious policy mechanism. In its regulation of ownership arrangements for works of human expression, it has profound effects on culture, democracy, and economics. Over the years, and in different countries, it has been adapted and diversified to many new situations and technologies. Its pieces shift like coloured shards in a kaleidoscope: in any given situation, we see something different. The panorama is endlessly fascinating and dynamic.

We admit that this is an unconventional way of looking at copyright law. Most people don't think of it as beautiful or translucent—they see it as black and white or sometimes all too grey. They try to blow it up, hit other people over the head with it, or run the other way. Most people also see copyright law, along with law in general, as static: some things are illegal, some things are legal, and the judge will tell us which is which. If it isn't static, many people think it ought to be: that with the right tools we can immobilize copyright law and make it more certain. But in fact all law is always developing in a complex and fitful way—

through changing legislation, through legal precedents from case law, and through the practice and beliefs of ordinary citizens. Law is not a thing, but a process based on a set of social relationships.

For many people this aliveness of the law produces confusion, but in copyright, as in other areas of law, we think it also produces opportunities. If ordinary people educate themselves about the history and various incarnations of copyright around the world, they can glimpse principles, costs, and possibilities often masked by the misleading self-evidence of the here and now. Widespread knowledge of existing law can enable people to make more effective use of it—in our terms, to *practise fair copyright*. Widespread knowledge of proposed laws can help us make sure that the kaleidoscope doesn't get clouded over or locked in one position.

These days copyright is becoming part of just about everybody's life. That's why you are reading this book. Whether you are a parent, artist, business person, blogger, teacher, student, or music fan, questions about copyright law have popped into your head or landed in your lap. You may have encountered copy protection on a CD you bought—and after a brief tantrum, you may have wondered if it's possible or legal to disable it. You may wonder if your children's file-sharing will get them, or you, in trouble with the law. You may want to stop people from ripping off your screenplay or photograph. You may wonder whether you should read all that legalese on a software licence or a publishing contract, and whether you'd understand it if you did. You may want to know if it's okay to capture an image from somebody else's website and post it on your own. You may wish you knew how to argue with a boss, a teacher, or a lawyer who says, "You can't do that."

You need information. But what are you getting? If you are a writer or musician, you are being told that as a "content provider," you should be grateful for small mercies: just sign here, shut up, and be glad the big corporations are fighting the pirates on your behalf. If you are a consumer, you are being bombarded with messages that you are a pirate, that pirates are evil, and that pirates will face legal liability if they don't stop their nefarious activities. If you are a teacher or student, your school board or institution is warning you about the evils of piracy with a vehemence formerly associated with anti-drug campaigns.

We think that pirate talk, together with threats of lawsuits against

consumers and promotion of law reform to limit consumers' rights, is a *cause* of a serious legitimacy crisis in copyright law—not a productive solution. True, digital technologies allow easier copying and can increase copyright infringement. Rights holders have reason for concern. But new technologies also allow easier monitoring and control of reasonable and customary consumer use. Consumers notice that digital rights management (DRM) is getting in the way of the enjoyment of materials they buy. They see the big profits of the media conglomerates; they see the vain attempts of the music industry to sustain old approaches to business; and they wonder why they are being cast as the bad guys.

Ironically, creators may be collateral damage in the war against so-called pirates. As journalist John Lorinc has pointed out, “The views of the creators themselves have been overwhelmed by those of producers, publishers and media conglomerates, and assumed to always coincide.”¹ Some consumers have become so incensed at the hypocrisy and greed of the music, film, software, and media industries that they routinely disregard copyright law. Facing strong-arming or indifference from broadcasters, labels, museums, or other distributors, and a blunt sense of entitlement from consumers, creators often feel caught between the frying pan and the fire.

Meanwhile, other consumers are afraid to engage with the cultural objects around them, which limits their ability to become creators themselves. The climate of fear is not only frustrating for individuals, but also detrimental to the broader cultural and political environment.

In fact, most day-to-day activities of most Canadians do not constitute actionable copyright infringement, and they certainly do not constitute theft or pillage. Canadian copyright law is actually much more nuanced than the piracy-as-theft metaphor suggests. The law distinguishes between large-scale commercial infringement, which is indeed damaging to all stakeholders, and the ordinary use of legitimately purchased, borrowed, or viewed materials, which contributes to the growth of culture and democracy.

To recognize and assert such distinctions is, in our view, to practise copyright responsibly. As the Supreme Court declared in *Théberge v. Galerie d'Art du Petit Champlain* (2002), “Excessive control by holders of copyrights and other forms of intellectual property may unduly limit

the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”² The court also noted, “Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.”³ In 2004, in *CCH v. Law Society of Upper Canada*, the Supreme Court was even more explicit about the importance of users’ rights.

The relative balance of Canada’s current copyright situation may be temporary. The Canadian government is under considerable domestic and diplomatic pressure to fortify copyright owners’ rights. As a culmination of consultation beginning in 2001, the Liberal government under Paul Martin introduced Bill C-60 in 2005, although the bill was abandoned when that government fell. The minority government of Stephen Harper, which has engaged in no public consultation, has claimed that new legislation is imminent. When new legislation is introduced the complexity of the issues, the intensity of lobbying efforts, and the fragility of minority governments may slow the process. But slowness is not a bad thing. In 1998 the United States moved quickly to respond to digital technology with new legislation, and Canada can learn from the problems that have arisen from that haste. If Canadian policy-makers manage to maintain users’ rights through the next rounds of copyright reform, they may be able to ease the growing legitimacy crisis in copyright law. This will serve Canada well.

This book has a strong Canadian focus because Canadians are short on practical and accurate information about what we can and can’t do within the framework of our own copyright law. Canadians tend to know more about U.S. law. Copyright litigation in the United States is more frequent and often more notorious; U.S. law has moved fast and controversially in a “maximalist” direction; U.S. copyright warnings and ads preface almost every movie and DVD we watch; and U.S. public interest watchdogs such as the Electronic Frontier Foundation are fighting back with vigour. But there are many important differences between Canadian and U.S. copyright law. We need to know those differences. Canadian law is what we live under, whatever the origin of the materials in question.

We have organized the book into four parts.

In Part I we survey the major philosophical and economic justifications for copyright (chapter 1) and Canadian copyright's origins in British, U.S., and French traditions (chapter 2). While a discussion of philosophical concepts such as utilitarianism may seem intimidating, time spent here may help you to place and assess the copyright claims you hear around you on an everyday basis. The thumbnail early history of copyright has many fascinating resonances with present-day problems and controversies. Canadian copyright law particularly has always been caught between international forces, and it still is: it helps to know where we've come from.

Part II takes us to and through the Copyright Act. Reading the act systematically and understanding its context in case law provide the necessary groundwork for analyzing and crafting solutions in particular situations. In this spirit, we survey (chapter 3) the requirements for copyright to "subsist" in a work (or in some other subject matter), and look at the differences between different classes of works, explaining certain basic requirements such as originality and fixation in a tangible medium. We then enumerate (chapter 4) the rights held by an owner of copyright. While people usually think of copyright as the right to prohibit the making of copies, it is really much broader than that. Chapter 5 addresses the question of *who* owns copyright—it isn't always the author. Chapter 6, on users' rights, explains the scope and details of limitations on owners' rights. Copyright law has often privileged the owners' rights to the detriment of users' rights, but here we review a series of recent Canadian court cases that give more weight to the rights of users of copyrighted materials. Finally, we need to look at what happens if you or someone else wants to act against infringement (chapter 7). This chapter covers practicalities such as statutory damages, cease and desist letters, and the difference between civil and criminal infringement.

Part III covers more specific terrain, considering the issues that copyright presents for people creating and using particular media, or working in certain creative communities, institutions, or industries: from the areas of craft and design and digital rights through education, film, and journalism to websites, among others. In each case we identify special circumstances, real-life examples, and important case law, exploring

sometimes thorny issues of both owners' rights and users' rights. You can dip into these chapters according to your particular needs and interests. They don't have to be read completely or in order, but they do presume that you've read Part II and are comfortable with the basic terms, principles, and building blocks of copyright.

We have three groups of readers in mind for these chapters—as indeed for the book as a whole: independent or freelance creators, amateur creators, and consumers. While the interests of these groups are often distinct, we believe that in the larger context of corporate capitalism they have much in common.

Needless to say, we can't anticipate or answer all of your copyright questions. We don't specifically address many artistic or craft practices—dance, theatre, and video-game design, for example. And in a book of this nature we can't cover all the myriad details of the Copyright Act and case law. When it comes to a particular practice, the law evaluates each fact situation individually, and it isn't often possible to extrapolate with certainty from an analogous situation. So if you have a worrying legal dilemma, you will need to conduct further research or consult a lawyer. But if you have read this book first, you will at least be armed with basic terminology and good questions. You might even get some pleasure in seeing the look of surprise on the lawyer's face when you ask, "But what about Section 14.1?"

Part IV outlines some alternatives and counterparts to copyright, starting with the provocative pairing of Aboriginal customary law and the "free culture" movement, and discussing other ways of supporting creative activity such as grants and tax incentives. We argue that copyright has too prominent a role as "*the* solution" in cultural policy when in fact it functions best as only one policy tool among many others. In the final chapter we present a number of recommendations for reform of Canada's Copyright Act, which is likely to come hard on the heels of this book's publication.

We hope that you will find some answers to your questions in this book. But even more, we hope that once you have read the book, you will be able to "practise copyright" attuned to the big issues of culture and democracy that it raises.