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Copyright and Ethics:

An Innisian Exploration *

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Abstract:

The system of copyright offers more than contemporary perceptions would have us believe. Embedded within its design of control are ethical measures which enhance creative liberty. Properly handled, such measures facilitate the use, and protection, of the common stock of knowledge. This paper examines the intricacies of copyright via the contribution of Harold A. Innis (1894-1952). His expertise with communication, economics, and the law touch the very ambit of copyright. His passion for creating an atmosphere conducive to individual creative liberty has direct relevance to the goals of copyright. Copyright is deemed to function as the means to encourage both creativity and respect for individuality. The late James Carey (1934-2006) said, "Innis' books . . . are not merely things to read, but things to think with" (Carey, 1981: 73). Innis' ideas, particularly his belief that creativity is fostered through the interaction of mainstream thinking with conditions wrought by life in the periphery, show themselves not only in the construction of Canadian copyright law, but in recent interpretation as well.

Keywords: Innis; Copyright; Fair Dealing; Moral Rights; Common Law; Civil Law; Ethics

Résumé:

Le système des droits d'auteur offre plus que les perceptions contemporaines nous laissent croire. Intégrées dans le modèle de contrôle sont des mesures éthiques qui améliorent la liberté créative. Manipulées correctement, ces mesures facilitent l'utilisation et la protection de la provision commune de la connaissance. Cet article examine les subtilités des droits d'auteur via la contribution de Harold A. Innis (1894-1952). Son expertise dans le domaine de la communication, de l'économie et de la loi touche l'étendue des droits d'auteurs et sa passion pour créer une atmosphère conductrice à la liberté créative individuelle a une pertinence directe aux objectifs des droits d'auteur. On considère que les droits d'auteurs fonctionnent comme des moyens d'encourager la créativité ainsi que le respect de l'individualité. Le défunt James Carey (1934-2006) a dit: "Innis' books . . . are not merely things to read, but things to think with" (Carey, 1981: 73). Les idées d'Innis, particulièrement sa croyance que la créativité est nourrie à travers l'interaction entre la pensée populaire et les conditions façonnées par la vie dans la périphérie, sont présentes non seulement dans la construction du droit d'auteur canadien, mais aussi dans les interprétations récentes.

Mots-clés: Innis; Droits d'auteur; Traitement Équitable; Droits Moraux; Loi Civile; Éthiques

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Introduction

This paper explores the ethical relationships inherent to Canada's *Copyright Act* through the writings of Harold Adams Innis (1894-1952). Although Innis did not explore the subject of copyright in detail[1] his writings offer a refreshing point of entry into what is fast becoming a jaded and intractable debate. Copyright is deemed to function as the means to encourage both creativity and respect for individuality. Canada continues to wrestle with the intricacies of reconciling these dual goals amidst geopolitical constraints.

An obstacle impeding progress is the deep-seated belief that all is different now, that digital works and world wide networks have rendered our *Copyright Act* inert. Such is not the case; the Act is media neutral. It is true that the Act does not address specific circumstances of digital file movement. It is equally true that judiciaries routinely have wrestled with questions of unanticipated usage of copyrighted material with, or without, the advent of new technology. A case in point being Harriet Beecher Stowe's action in 1853 regarding unauthorized translation of *Uncle Tom's Cabin*, (Vaidhyanathan, 2001: 48-50). The charge reflected not a concern over technology, but of ethics.

To discover where ethical issues appear within the mandate of copyright, this paper begins by probing Innis' own ethical stance. It provides a brief look at his legal scholarship, particularly Innis' emphasis upon diversity in law. Common law and civil law both have implications for copyright. Bijural Canada is a well placed site of study as is shown here. The

theme of diversity continues through this paper, where attention is brought to the temporal and spatial components of the *Copyright Act*. The paper concludes with one more look to Innis: his feelings regarding the Empire offer insight to the empire of copyright and the implications for civilization.

Catherine Frost reveals Innis' preoccupation with, "what constitutes a good civilization" (Frost, 2003: 13). Innis' lifetime of scholarship followed a poignant question, *how are civilizations to remain civil?* Innis' definitive biographer, Alexander Watson, demonstrates this dimension of Innis' work and personality.[2] Innis' question of civility was not an esoteric inquiry, but shaped by his vision of Canada as an autonomous nation. Innis desired that individual Canadians reach their full potential in self-development and creative expression. The weight he felt of the task at hand, to see such a vision come to fruition, is best read from his own words and supported by one of his peers. From Innis' MA thesis, written in the closing days of World War I:

> It is no occasion for faintheartedness but in the name of those who have fallen in the defense of the liberties of the country and in obligation to those who have returned from that struggle, the Canadian people have before them the task of presenting to the world, a nation morally and materially great, a monument worthy of the men living and dead who have made this possible.
>
> (Innis, 1918: 20)

Following Innis' death in 1953, Alexander Brady wrote:

> The violent years of the Second World War awakened in him, as in many thoughtful people, fundamental questions about the nature of contemporary civilization and the special factors which shaped it and were likely to determine its fate . . . [Innis] had early come to cherish individuality, and was anxious above all that individuals should not be pushed around by public authorities, powerful corporations, or ecclesiastical sovereigns.
>
> (Brady, 1953: 92-93)

By retaining civility across Western civilization, not only would Canadian interests be better served, but the civilization itself would extend its duration by respecting the diversity of those cultures found at its periphery or, as some might say, the margins (Innis, 2003e). Civility shows itself as a conscious respect for individual liberty, allowing each individual the opportunity for betterment. The challenge lies in affording respect for each, with respect for all, with creativity itself hanging upon the outcome.

This same challenge lies at the heart of copyright dispute. Advocates for lesser restrictions via copyright argue that creativity will be undermined if the stock of human knowledge is strictly controlled. The implication being that it is in society's best interests to ensure some measures exist by which others can freely partake of copyrighted work. The converse argument states that without stronger copyright control, creators will not have sufficient incentive to engage in creative activity, which is ultimately to the detriment of society. Setting apart any consideration of society's wellbeing, and beginning with Innis' concern for the individual, where does copyright assist or detract with the goal of allowing each individual to best exploit his or her creative potential?

Innis and the Law: A Brief Look

Innis' writings have been utilized in explorations of aesthetics, antiquity, economics, feminist studies, Marxism, media technology, modernism, postmodernism, political economy, public policy, and systems theory.[3] However, few scholars have examined Innis' interest in law. As with most of Innis' writings his rationale is obliquely stated with supporting evidence flung across a myriad of essays. A key element though, can be distilled from one cryptic remark: *law was found, not made . . .*

> In France and particularly England the weakness of the written tradition favoured the position of custom and the common law. Law was found, not made, and the implications were evident in the jury system, the King's Court, common law, and parliament.
>
> (Innis, 2003b: 21)

That Innis should have felt fondly towards common law, with its antecedent oral tradition, comes as no surprise. But to rest here would be premature; it denies the greater importance of Innis' legal studies, namely his appreciation for diversity in law and his regard for the rule of law. "Innis viewed the rule of law as one of the highest achievements in Western civilization" (Watson, 1981: 563; Watson, 2006: 387). A comprehensive exposition of Innis' writings concerning the development of law is best left for a paper in its own right. Nevertheless, for present purposes, existing scholarship in this area requires some mention. Without recourse to Watson's work, each operating independently, William Christian (1980), Richard Noble (1999), and William Pencak (2005) share a common conclusion: for Innis, the development of law contributed significantly to Canada's potential as a site of innovation and autonomy.

Christian edited Innis' *Idea File*, and included within the finished publication Innis' unpublished notes on law. These notes served as a basis for the only composition of Innis' that directly addressed the law, *Roman Law and the British Empire* (Innis, 2004).[4] Of the *Idea File*, Christian writes, "The reader of the slightly fewer than 1500 notes will have an easier time once he realizes that concern for the dignity and the freedom of the individual lies at the heart of almost every note" (Innis, 1980: xvi). Pencak identifies the importance of diversity in law for Innis; and for Innis, freedom was the essential element to attain diversity. Common law allows for human activity to shape the development of law itself, and is a necessary complement to the more static workings of civil law. The distinction between the two legal regimes lies in the form of their development. Common law begins from practice; civil law asserts legitimacy through principle. Innis' call to preserve the tradition of common law in Canada (Innis, 2004) was to ensure Canadian unity through respect for diversity. Canada, comprised as it is of regions with differing cultural makeup, yields to cohesion by taking into consideration local custom through common law. This was a critical component of Innis' Canadian project (Pencak, 2005: 212).

Pencak identifies Innis' interest in multiple legal perspectives and draws the conclusion of their benefit to individual freedom. His conclusion pairs well with the work of Noble, who begins with Innis' conception of freedom and leads to Innis' calls to preserve Canada's cultural and political institutions, particularly those, like common law, that maintain the oral tradition (Noble, 1999: 31-34). Noble specifically disclaims the notion that he reconstructs Innis'

intellectual context; instead, his reading of Innis "illuminates Innis' political thought" (Ibid: 44). Herein lies the crux of understanding Innis.

Noble traces Innis' views on freedom to the eighteenth-century Whig tradition as espoused by David Hume, Adam Smith, and Edmund Burke – individual liberty meant a realm of non-interference, guaranteed by the rule of law, and applicable to all. Liberty was not license to do as one pleases, but instead the assurance of protection from the arbitrary will of another. Non-interference was necessarily reconciled with some measure of social order. Reconciliation took form through customs that had evolved gradually over time, thus mitigating the likelihood of emotional considerations. One aspect of Noble's analysis that is particularly relevant to the copyright debate is Innis' appreciation for the circumscribing of emotion by reason. By paying close attention to Burke and Hume, beyond any references provided by Innis, Noble uncovers the roots of the Innisian couplet:[5]

> Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their appetites.
>
> (Burke [1881], cited in Noble, 1999: 32)

> Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular. The rules of morality, therefore, are not the conclusions of our reason.
>
> (Hume [1745], cited in Noble, 1999: 33)

Moral restraint induces observation of the law, but the question remains, what is morality and who defines it? Innis does not answer this question. He pursues a framework of legal evolution such that the well-being of the individual is secured from manipulation. If the law is derived from customs and traditions which evolve over time, individuals are less exposed to the tyranny of immediacy where morality is invoked in the interests of the elite. In our contested environment of copyright, the frequent calls to respect intellectual property rights come to mind. It is all too easy to frame an incursion into copyrighted work as a violation of a property right. Such behaviour is deemed evidence of a lack of morality. Outrage conveniently cloaks the reality that copyright is not, *and has never been*, a grant of absolute control. This time-honoured custom began with the construction of the law itself.

Copyright does not protect all and sundry; facts and ideas are never protected. The statutory grant of protection applies only to the original expression of an idea. The textbook example of this distinction is, almost always, *Romeo and Juliet* and *West Side Story*. Even if both works had been created at the same time, copyright law as we know it would recognize each work as an original expression and worthy of protection. Nevertheless, the protection is not permanent, nor absolute. The duration of copyright, roughly speaking, is the lifetime of the creator plus fifty years. During this time, copyright can only exclude use of a creative work when such use involves reproduction of a substantial aspect of the work. Consistent with the indeterminate nature of creativity "substantial" is not defined within the *Copyright Act*. It is decided by the particularities of each situation. And the final opening in the mantle of copyright lies with statutory exceptions that allow some uses of copyrighted work, partial or in entirety, during the term of protection, when certain conditions are met.

Sparse as inquiries concerning Innis and the law are, the conjoined terrain of Innis and copyright law is even more barren. Two explicit connections exist, but firmly set upon Innis'

reputation as a political economist and a communications historian. Harry Chartrand recognizes copyright as a staple of the knowledge economy and reminds us of Innis' work depicting staples as "[engendering] a particular pattern to the economy" (Chartrand, 2006: xv). Ronald Bettig explores the history of copyright law "with the systems approach to the history of communication pioneered by Harold Innis" (Bettig, 1996: 3). The overlap of copyright law with Innis' writings is much broader than these passing references would suggest. Interestingly though, both Bettig and Chartrand open the door to wider possibilities. With respect to various revised approaches of explorations by Innis and others, Bettig writes, "these approaches do not entirely dispense with notions of determination . . . but do disinherit the claim that determination operates only in one direction or in every instance. They resurrect dialectical analysis while recognizing the efficacy of ideology and culture" (Ibid: 11). This melds with Chartrand's observation that, "Just as language structures human thought, law structures attitudes and behaviour contributing to the ethos or distinctiveness of a culture" (Chartrand, 2006: xii). Taken together, law is a medium that structures, and is structured by, the cultural inclinations of the society in which it exists.

To position the law as a medium might invite curiosity, complaint, or perhaps both. While Innis himself allows for a broad interpretation of medium, admitting mathematics to the realm, (Innis, 2007: 88), the challenge for would-be Innis interpreters is that Innis never defined what constituted a medium. Robert Babe suggests a resolution to this challenge:

> Media for Innis . . . are what comes between humans to enable and affect (or bias) their interactions . . . In [Innis'] view whatever orients people towards the past and the future, or conversely induces them to disregard the past and future, is a medium of communication.
>
> (Babe, 2008: 11-14)

This definition permits law to comfortably sit as a medium, yet Frost's deft combination of precision and flexibility also beckons, for Innis "a new medium is that which employs a new material, tool, or process. Changes in these factors therefore imply important changes for communications, knowledge, and ultimately civilization" (Frost, 2003: 11). If this suggests that Innis was strictly a material man, Frost does not leave the matter here. "In the end, Innis was most concerned with the potential for a new medium to effect changes at a broad civilizational level" (Ibid: 12).

Therefore, if a medium is that where changes therein imply changes for communications, knowledge, and civilization, then copyright law, a law intended to further knowledge and retain civility by stipulating terms of communication, is well suited to assume the persona of a medium and well poised for examination through Innis' methodology. A methodology which Frost shows as being much more than a bland assessment of structural characteristics:

> First, [Innis] was attentive to the pre-existing geographic and cultural conditions in which a new medium arose and was adopted; second, he detailed the economic and technological features associated with the medium itself; and third, he was concerned with a medium's potential to influence content and to foster new social and economic monopolies down the line.
>
> (Ibid: 11)

Frost's work invites application; she sets a specific framework for exploration via Innis' method. This paper continues with excerpts from a complete Innisian analysis of copyright in Canada (Nair, 2009), guided by what should rightly be known as Frost's Innis-algorithm.

The Construction of Copyright: Competing Ideologies

If one attempts the middling step of the algorithm, the first hurdle to overcome is to identify "the economic and technological characteristics" associated to the statute. These characteristics of copyright law are found through its structure and language. How is the law designed to ascribe intellectual property rights? What is the underlying intention of recognition of intellectual property rights? And, in the context of that intention, how is language utilized to shape relations between affected parties? To set and interpret copyright law, parliamentarians and jurists could be led by the principle intentions of the statute. The tenor of the nation's legal tradition itself may also offer some guidance. Canadian copyright law presents a challenge; it has no stipulated intention nor does it have a solitary legal tradition.

The granting of copyright as an area of federal supervision came via the *British North America Act* (1867), where copyright was simply listed as one of twenty-nine federal responsibilities (Whyte & Lederman, 1977). Canada's first independent legislation, the *Copyright Act of 1921*, was modeled in the Anglo-American tradition, but with a noticeable difference. The title of the first English copyright law, read as, "An Act for the Encouragement of Learning, by Vesting the Copies of printed Books in the Authors, or Purchasers, of such Copies during the Times therein mentioned" (Talmo, 2009) and the United States Constitution stated that Congress shall have the power, "To promote the Progress of Science and the Useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (United States, 2009). Despite these blueprints, Canadian law contains no specified purpose for copyright. But this omission is not to be lamented. It is to Canadian advantage that a goal of copyright was not fixed in text. There is greater potential for the law to adjust according to the changing circumstances of creative activity and creative flow.

Without an overarching principle, one must look elsewhere for the cultural ambience surrounding copyright in Canada. The titles of our Act provide a clue: *Loi sur le Droit D'Auteur* and *Copyright Act* illustrate two differing conceptions supporting the protection of creative effort. French civil law founds intellectual property as a natural right. Anglo-American common law is inclined towards a utilitarian justification for intellectual property rights. Canadian law draws on both. While the two regimes are often held in opposition, neither regime operated with exclusively one party in mind.

Through examining the development of copyright in France and the United States, it becomes apparent that the two systems were not substantially divergent in their infancy, and, in their maturity, again show signs of similarity. Of note are the works of Gillian Davies (1994), Jane Ginsburg (1994), and Carla Hesse (2002). The development of the law in both countries reveals that cultural endeavor proliferated during periods of lesser attention to intellectual property rights. Both nations strengthened intellectual property protection only after they had accrued an internationally desirably portfolio of works. And, each had their moments of discontinuity between their principled stance on copyright and its execution. The first incarnation of a French copyright law was in aid of reducing a monopoly in the theatre industry; authors did not enjoy broad security in French law until 1957 (Davies, 1994: 78-79). And, although the United States' constitutional language suggests the intention of copyright was public benefit, the

private rights enacted within United States' law steadily expanded throughout the twentieth century with a commensurate decrease in public access (Hesse, 2002: 42). The early overlap of public interest within both systems, together with their later emphasis upon private rights, indicates that the practice and interpretation of copyright law is more subjective than an ideological perspective alone would dictate.

Canada's commitment to diversity and multiculturalism leaves this nation better positioned than most to find accommodation between differing perspectives. The duality of our legal ancestry is to our benefit; although this was not always seen to be the case and the partnership continues to be an uneven one. In 1980, an often-quoted directive from the judiciary instructed that matters of copyright dispute should be resolved without assuming a conclusion as dictated by common law or civil law principles:

> [Copyright] neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute . . . the legislation speaks for itself and the actions of the appellant must be measured according to the statute.
>
> (*Compo Co. v. Blue Crest Music Inc.*, 1980)

The pragmatism offered here may have eased the challenges felt by subsequent judiciaries, but left Canadians poorer with respect to developing a cultural understanding of their law. Fortunately, Canadian legal discourse is showing a greater awareness of its dual heritage (Tawfik, 2003: 60). The Supreme Court of Canada also explicitly, and implicitly, brought into focus the differing legal foundations of copyright in Canada, via *Théberge v. Galerie d'Art du Petit Champlain Inc.* (2002) and *Robertson v. Thomson* (2006). Yet commentary continues to emphasize that these decisions split along cultural lines (Sheffer, 2006: 2-3). More could, and should, be made of the fact that there was both agreement and productive disagreement between the majority and minority opinions. Briefly, in 2002 came a tipping point in judicial treatment of copyright in Canada, opening the door to the idea that copyright is not only an individual right but part and parcel of a system; in 2006 came the cogent reminder that works must conform to the exigencies of the *Copyright Act* (including observance of the statutory limitations inherent to the grant of copyright).

Canada's position on the margins, as a bijural nation, offers an ideal setting in which to situate Innis' writings. The means by which we mediate between our differing traditions should produce a cultural environment hospitable to creativity. In contrast to the instructions quoted above, drawing from Innis suggests that matters of copyright are best resolved by considering the interaction between both legal traditions. Where social utility meets with natural rights is in the belief that creativity itself is valued. Otherwise, the underlying purpose of copyright in either tradition becomes meaningless, raising the question of why have such laws at all? Therefore, natural rights must apply to everyone, including past, present, and future creators. Likewise, consideration of societal benefit must ensure that future creative processes are not stifled by the system purporting to encourage creative effort.

Returning now to Babe's definition of medium, the concern over the past and future seems tailor-made for closer examination of copyright. Using Innis' simple, but enduring, framework of *time* and *space*, if the two elements function cooperatively, there ought to be an attendant benefit for creativity:

> I have attempted to show elsewhere that in Western civilization a stable society is dependent upon an appreciation of a proper balance between the concepts of space and time. . . . [In] attempting a balance between the demands of time and space we can develop conditions favourable to an interest in cultural activity.
>
> (Innis, 2003c: 64-90)

Time maintains the cultural heritage, while space holds stagnation at bay and emphasizes innovation. Time is inclined towards the community; space leans towards the individual. As one would expect with any rule of law, the rights of individuals and individual rights are equally implicated in the construction of copyright law. The *Copyright Act* offers a particular challenge to parliamentarian and jurist alike in that creators straddle both positions in the exercise of their creative endeavours. A necessary first step is to identify where time and space show themselves in the *Copyright Act*.

Time and Space

Time and Money

We have a ready hint with which to identify copyright's spatial component: "Innis understood money, or the price system, to be a space-biased mode of communication *par excellence*" (Babe, 2000: 76; *emphasis is in original*). Part I of the *Copyright Act*, titled *Copyright and Moral Rights in Works*, includes Section 3.1 which delineates the range of control available to copyright holders of original works:

> 3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
> (*a*) to produce, reproduce, perform or publish any translation of the work,
> (*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
> (*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
> (*d*) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
> (*e*) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
> (*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
> (*g*) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

> (*h*) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and
> (*i*) in the case of a musical work, to rent out a sound recording in which the work is embodied, and to authorize such acts.

Innis writes, "The relative emphasis upon time or space [of a medium] will imply a bias of significance to the culture in which it is imbedded" (Innis, 2003a: 33). Section 3.1 suggests, and examining the entire *Copyright Act* confirms, that the structure of copyright shows a spatial bias. The statute is predominantly devised as an instrument of distribution, where the implication is exchange for remuneration. Fortunately, in true Innisian fashion, a countervailing temporal bias exists within this same statute. The temporal orientation is found in periphery of the distribution rights; the measures of moral rights and fair dealing.

Moral Rights: Maintaining the Past

Often described as noneconomic rights, moral rights are an acknowledgment of the intensely personal nature of intellectual effort. A creative work embodies an aspect of the creator's soul; souls can be injured through a careless use of a work. Moral rights are more highly regarded in civil law countries, with France seen as the epitome of moral rights protection. Curiously though, in 1931, Canada became the first common law country to incorporate moral rights into statutory law (Handa, 2002: 372-376). This revision of the law addressed Article 6^{bis} of the 1928 Rome revisions of the *Berne Convention for the Protection of Literary and Artistic Works* (1886) which stated:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
>
> (Ricketson & Ginsburg, 2006: 585-586)

Mira Sundara Rajan, a foremost authority in this area of law, shows that the Berne implementation of moral rights was unduly narrow. By conjoining modification to the charge of harming reputation, creators must prove their reputation is being harmed in order to prevent modification of their work. An alternative implementation could have placed the burden of proof upon those manipulating the creation (Sundara Rajan, 2006: 226). In any case, as moral rights remain outside the enforcement mechanisms of the World Trade Organization their stature on an international level is diminished and they are often relegated to the sidelines of copyright discourse. Yet their importance transcends finance. Sundara Rajan reinforces that moral rights make a larger contribution to culture as a whole; they reflect social attitudes concerning creativity and creative work. Cultures are enhanced when we maintain a cultural heritage; accurate and faithful representation with identifiable authorship serves to protect the historical past from where all future endeavour arises. With language reminiscent of Innis, Sundara Rajan writes, "A cultural environment that is correctly attuned to historical fact will be more compatible with creativity and development" (Ibid).

Moral rights emphasize the importance of the relationship between the author and his or her work, but there exists another dimension of relationship within the creative process. As creativity is founded upon transformation, a measure of humility must exist across the social relationships affected by copyright. And this social attitude is reinforced through the exception of fair dealing.

Fair Dealing: Looking to the Future

The enumerated activities invested with the right of control are expansive, but there still remains a space, outside of this dominant market operation of copyright, where individuals may freely reproduce copyrighted material for good faith, productive purposes. This space comes into existence through the individual right of fair dealing. A modest measure, fair dealing is not an invitation to copy at will. But its importance to the *Copyright Act* cannot be understated; it is the only place within the Act (with its underlying goal of creativity) where some creative effort is actually supported. In Sections 29, 29.1, and 29.2 of the *Copyright Act*, we find:

> Fair dealing for the purpose of research or private study does not infringe copyright.
> Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:
> (a) the source, and
> (b) if given in the source, the name of the
> (i) author, in the case of a work,
> (ii) performer, in the case of a performer's performance,
> (iii) maker, in the case of a sound recording, or
> (iv) broadcaster, in the case of a communication signal
> Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:
> (a) the source, and
> (b) if given in the source, the name of the
> (i) author, in the case of a work,
> (ii) performer, in the case of a performer's performance,
> (iii) maker, in the case of a sound recording, or
> (iv) broadcaster, in the case of a communication signal.

An individual wishing to utilize fair dealing is bound by three conditions: i) the usage of copyrighted material must fall within the enumerated tasks, ii) if the task is criticism, review, or news reporting, the appropriate attribution must be made, and iii) left unsaid but still necessary, the dealing itself must be fair. Undefined in the *Copyright Act*, the meaning of "fair" is determined by the particularities of each situation.

In 2004, through what has come to be known as *CCH Canadian*, a unanimous Supreme Court of Canada held that fair dealing was integral to the mandate of copyright, "to maintain the proper balance between the rights of a copyright owner and users' interests, [fair dealing] must not be interpreted restrictively" (*CCH Canadian v. Law Society of Upper Canada*, 2004). This case concerned a number of issues, including a library's practice of preparing copies of copyrighted material at the request of patrons. The library operated with a well-defined and

astute guidance against which requests of reproduction were considered. After a comprehensive examination by the Supreme Court Justices, the library's actions were accepted as fair dealing. The decision included some memorable words:

> As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. . . . Research should be given a large and liberal interpretation . . . and is not limited to private or noncommercial contexts. . . . It is impossible to define fair dealing, it must be a question of degree.
>
> (Ibid)

Aware of the challenge the last remark poses, our High Court presented Canadians with a six-step framework to guide decisions of fair dealing:

> The purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair.
>
> (Ibid)

Notably, the framework was preceded by a caveat; "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" (*CCH Canadian v. Law Society of Upper Canada*, 2004). The details of the guidance have been well documented (Craig, 2005; Murray & Trosow, 2007; Scassa, 2004); what is pertinent here is the flexibility of the framework. Together with the reference to customs and practices, it brings to mind Innis' desire to maintain the flexibility of custom to mitigate the rigidity of law.

If, as Noble writes, "Innis associates liberty with cultural traditions and historically evolved institutions for reasons other than epistemological skepticism or reverence for traditional wisdom" (Noble, 1999: 34), then placing the clarity of code within the context of historically derived custom, ensures a system of copyright governance which remains flexible and checks inclination to stagnation and dogma. Arguably, the outcome of *CCH Canadian* reflects this melding of legal traditions. But, as Innis was aware, a medium cannot solely dictate a cultural outcome. Outcomes are a consequence of a multitude of factors, including the manner by which prevailing interests utilize, or obscure, the medium. Such has been the case in the wake of *CCH Canadian*.

Despite the considered approach to fair dealing by the Supreme Court, the nuances of the decision were quickly forgotten. Instead, *CCH Canadian* was invoked to fuel the acrimony that already exists between creators and the public. Owners' rights representatives as well as Canadian bureaucrats actively sought to frame *CCH Canadian* as antithetical to creators with Canadian educational institutions distancing themselves from the decision (Murray, 2004; Nair, 2006). It was not until December 2008 that an educational body actively supported the decision and encouraged fair dealing in Canadian academia (Fair dealing, 2008). Given that measures which ensure a legitimate exercise of fair dealing are already part and parcel of approved scholarly behaviour, the reticence of the larger academic community is disturbing. Academic endeavour routinely involves private study, research, criticism, and review. The attribution requirements are met through the practice of citation. And, particularly with respect to research,

the appropriateness of reproduction of copyrighted material is adjudicated through a community of peers found via supervisory committees, editors, and peer-reviewers. Given that the Supreme Court Justices noted the relevance of a customs and practices upon a decision of fair dealing, fair dealing's legitimacy within academia rests upon academic engagement.

Apart from the broader constituency of Canadians as a whole, the academic community is the largest stakeholder in Canada which thrives on fair dealing. Students, teachers, researchers, and administrators all implicitly rely upon this exception. However, the singular benefit is not that of the modest provision of reproduction of copyrighted material, but is the attention fair dealing brings upon the ethical duty shared by all creators, past, present and future. It is a truism that creativity is collaborative; implicitly, or explicitly, when we create, we borrow from others. For creativity to continue, the cycle of unfettered borrowing must also continue. Fair dealing reminds each creator of the debt they carry; a debt that can only be paid forward. Fair dealing is in fact, a fair duty.

Conclusion

This paper is not an attempt to infer what Harold Adams Innis might have said of copyright law. It interprets the contemporary environment of copyright, through Innis' ethical position, shaped as that was by his life experiences and expressed through his scholarship. Innis does not make this easy. Since he lived in a time when loyalties were expressed to King and Country, in that order, Innis' esteem of the peripheral individual was hidden within his essays. He sought to convey a message without openly articulating his stance: that the individual stood ahead of the Empire.[6]

The parallel to the dialogue of copyright is striking. The belief that copyright is a grant of absolute control is so deeply entrenched that to speak otherwise earns one distrust and derision. This mistaken belief, and the attendant behaviour that follows, is expanding the sphere of copyright's control without any Parliamentary alteration to the law. Copyright is fast becoming an empire unto itself. However, if we pay heed to Innis' thoughts, and attend to its margins, the empire need not function to our detriment. The realms of moral rights and fair dealing sustain ethical behaviour via maintaining social relationships across the creative process. Yet, as Innis emphasized with other media, complete use of the law is determined by the relative strengths of interested parties.

Innis' writings are timeless, only the invocation of his work changes. Applying his logic to the medium of copyright law could soothe digitally-invoked angst. Innis' quest to secure creative liberty appears within copyright's perennial challenge to find balance between the rights of the creator and the rights of the public. Balance is a highly contested word, with little agreement as to what it is and how to find it. Following Innis does not decisively answer either question, but provides a means by which to gauge any shifts in the allocation of rights. The structure of the law conveniently falls into spatial and temporal delineation; if either is removed, balance will suffer.

Innis' interest in legal development also surfaces in an analysis of copyright. He saw the merit of diversity in legal heritage; here lay an opportunity for creative betterment. Fair dealing, a site of intersection between civil and common law protection of creative effort, provides a realm of creative liberty set apart from the region of control. Yet fair dealing is losing ground in Canadian education (Nair, 2009). The challenge for Canadian education is to encourage students and teachers to take individual responsibility for their copying. Fair dealing is not permission to

copy without restriction. The analysis required for a decision of fair dealing ensures that all parties are cognizant of their rights and duties under the *Copyright Act.* To take shelter behind an institutional copyright exemption, or blindly enter into a license agreement for copying, means nascent creators will continue to lose sight of the debt they owe to their predecessors. The perception of creativity will remain that of individual undertaking, and copyright will continue to function as a means of absolute control. As Innis said, "the law is apt to become anything boldly stated and plausibly maintained" (Innis, 2004: 52).

Notes

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1 Copyright makes occasional appearances throughout Innis' writings: "American authors with lack of copyright protection turned to journalism. . . . Publishers demand great names and great books if no copyright is involved" (Innis, 2003b: 28-29); "the absence of copyright [meant] large scale piracy of English books in the United States, and a smaller-scale piracy of American ones in England" (Innis, 1946: 53); "Emerson reported the remark of an Englishman: As long as you do not grant us copyright, we shall have the teaching of you" (Innis, 2003d: 171).

2 Alexander Watson filed his Ph.D. dissertation, *Marginal Man: Harold Innis' Communications Works in Context* (1981). Watson aptly notes that unless we understand the context of Innis' work, we shall never understand the content. Updated to address the Innisian scholarship that ensued in the intervening twenty-five years, University of Toronto Press published *Marginal Man—The Dark Vision of Harold Innis* (2006). Watson's work remains the most comprehensive source regarding Innis' work and life.

3 Two compendiums of papers, *Harold Innis in the New Century* (1999) and *Culture, Communication, and Dependency* (1981) illustrate the range of Innisian scholarship.

4 While the title suggests a historical account of the law, the essay appears largely to describe mundane legal practices, United States imperialism, and their combined effect upon Canada. Innis' sequence of historical and contemporary information is erratic in chronology. With careful study though, Innis' pointillist effort yields a broader perspective. He illustrates areas of intersection between Roman law (the praecursor to civil law) and common law, the subsequent reshaping of the actors involved, and the consequent effect upon the world at large.

5 The elements of reason and emotion keep appearing in Innis' writings; *This Has Killed That* (1977), *Political Economy in the Modern State* (1944), *A Plea for the University Tradition* (1944).

6 One instance of unequivocal language lies in the *Preliminary Draft of a World Constitution.* Composed by Innis and several American scholars, it agrees that, "[T]he advancement of man in spiritual excellence and physical welfare is a common goal of mankind" (Hutchins et al., 1948: 3).

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