

# Taking User Rights Seriously

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## A. INTRODUCTION

The recent Supreme Court of Canada decision, *CCH Canadian Limited v. Law Society of Upper Canada*,<sup>1</sup> is rightly and widely regarded as bringing forth a truly fundamental shift in the way Canadian copyright law is to be understood and practiced.<sup>2</sup> Not least among the reasons the decision is of such importance is its affirmation of “user rights” as a concept integral to

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1 *CCH Canadian Limited v. Law Society of Upper Canada*, 2004 SCC 13, <[www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1\\_0339.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0339.html)>, [2004] 1 S.C.R. 339 [*CCH* cited to S.C.R.].

2 See Daniel J. Gervais, “Canadian copyright law post-*CCH*” (2004) 18 IPJ 131, <[www.commonlaw.uottawa.ca/faculty/prof/dgervais/Westlaw\\_Document\\_15\\_08\\_57\\_2800.pdf](http://www.commonlaw.uottawa.ca/faculty/prof/dgervais/Westlaw_Document_15_08_57_2800.pdf)>; Matthew Rimmer, “Canadian Rhapsody: Copyright Law and Research Libraries” (2004) 35 AARL 193; Teresa Scassa, “Recalibrating Copyright Law? A Comment on the Supreme Court of Canada’s Decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*” (2004) 3 CJLT 89; Barry B. Sookman, “*CCH*: A Seminal Canadian Case on Originality and the Fair Dealing Defence” (2004) 18 BNA WIPR 08, <[http://mccarthy.ca/pubs/publication.asp?pub\\_code=1592](http://mccarthy.ca/pubs/publication.asp?pub_code=1592)>; Michael Geist, “Low-Tech Case Has High-Tech Impact”

copyright law. In the Court's eyes, user rights are as central to copyright law as author rights. *CCH* thus affirms the irreducible centrality of the public domain in Canadian copyright jurisprudence.

Informed legal change is unthinkable in the absence of normative vision. With that in mind, this paper provides an understanding of the centrality of the public domain in Canadian copyright jurisprudence. The paper develops this understanding along four distinct yet related axes. First, I will discuss the role of the public domain in the very formation of the author's right by way of the "originality" requirement. Second, I will examine the role of the public domain in the limitation of the scope of the author's right by way of the "fair dealing" defence, regarded by some as the user right *par excellence*.<sup>3</sup> Third, I will sketch the ways in which the concept of user rights catalyzes a deepening of our conception of the wrong at stake in copyright law — that is, of the mischief that the *Copyright Act*<sup>4</sup> targets. This understanding supports a view of the legitimacy of incidental reproductions in the course of Internet "browsing" as a user right. And fourth, by way of conclusion I will briefly describe a vision of the purpose of copyright law in which the centrality of user rights is absolutely non-negotiable.

## B. ORIGINALITY: AUTHORS AS USERS

In *CCH*, the Supreme Court sets out to settle the meaning of originality in Canadian copyright law. Faced with a battle between two opposing originality schools, the "sweat of the brow" and the "creativity" schools,<sup>5</sup> the Court refuses to take sides in the debate. It posits, rather, a third standpoint, for which the requirement of originality is one of "skill and judgment." The Court formulates its refusal to side with either school in terms of the stated purpose of copyright law as a "balance" between promoting the public interest and obtaining a just reward for the creator. Thus, while the sweat of the brow school fails to meet with the Court's approval because it is seen as supporting too author-centred a standard, the creativ-

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*Law Bytes Toronto Star*, 22 March 2004, <[www.lawbytes.com/resc/html\\_bkup/mar222004.html](http://www.lawbytes.com/resc/html_bkup/mar222004.html)>.

3 See Gervais, above note 2 at 155.

4 *Copyright Act*, R.S.C. 1985, c. C-42, <<http://laws.justice.gc.ca/en/C-42/>>.

5 On the struggle between the sweat of the brow and creativity schools, see Abraham Drassinower, "Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law" (2004) 1 UOLTJ 105, <[http://web5.uottawa.ca/techlaw/resc/UOLTJ\\_1.1&2.doc%205%28Drassinower%29.pdf](http://web5.uottawa.ca/techlaw/resc/UOLTJ_1.1&2.doc%205%28Drassinower%29.pdf)> [Drassinower, "On Originality"].

ity school fails because its standard is regarded as too public-centred. The Court's own "skill and judgment" standard is presented as "workable yet fair," an in-between truly attuned to the dual purpose animating copyright law as a whole.<sup>6</sup>

While important ambiguities regarding the difference between the Court's skill and judgment standard and the creativity standard have been noted,<sup>7</sup> few would doubt that *CCH* represents an unambiguous rejection of the sweat of the brow standard, a standard many regard as the traditional Anglo-Canadian standard.<sup>8</sup> This rejection of the traditional approach to originality is a key element of the judgment's status as a landmark affirmation of the pervasive role of the public domain in copyright law.

There is no need to permit enthusiasm about the judgment, however, to obscure an appreciation of the fact that the traditional approach to originality was itself by no means altogether unsympathetic to the public domain. The classic case of *University of London Press v. University Tutorial Press*,<sup>9</sup> for example, defines originality in the following, oft-quoted passage:

The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of "literary work," with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work — that it should originate from the author.<sup>10</sup>

Originality is literally a matter of origination, of source. That is why originality has nothing to do with novelty or uniqueness. The question at the heart of every originality case is not "is this new or unique?" Rather, the question is, "where did this come from" or, "did this come from or originate from the author?" If the answer to this question is yes, originality exists, even if the work in question happens to be identical to a previously

6 *CCH*, above note 1 at para. 24.

7 See Drassinower, "On Originality," above note 5 at 123; Gervais, above note 2, at 7; Scassa, above note 2 at 91.

8 See, for example, Norman Siebrasse, "Copyright in Facts and Information: *Feist* is Not, and Should Not Be the Law in Canada" (1994) 1 CIPR 191.

9 *University of London Press v. University Tutorial Press*, [1916] 2 Ch. D. 601 [*University of London*].

10 *Ibid.* at 608–9.

existing work. It is entirely possible to be original for copyright purposes and at the same time be identical to some pre-existing work.<sup>11</sup> This is because, as *University of London Press* teaches, originality is not about the work's relation to other works but about the relation between author and work. What a plaintiff has to show is not that her work is new or unique but that she herself came up with it, that she did not copy it from another work.

This rejection of novelty as the appropriate standard contains an oft-neglected lesson about copyright law. Although copyright law tells us that the author cannot *copy* from other works, copyright law also tells us that the author can nonetheless *draw* from other works. She draws inspiration from other works, finds herself stimulated and encouraged by them, derives nourishment, as it were, from their substance, uses them as starting-points, or perhaps even tries and succeeds in re-expressing in her own words the very same thoughts she finds in the works of others.<sup>12</sup> The absence of a novelty requirement means that none of those activities preclude the author's originality for copyright purposes. What matters is not that the author says something new, but that she says it in her own voice. Thus, for example, in *University of London Press*, drawing from the common stock of knowledge available to mathematicians did not preclude the originality of the examination papers composed by Professor Lodge and Mr. Jackson.<sup>13</sup>

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11 This is known as the defence of independent creation. Consider the famous dictum of Justice Learned Hand in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir, 1936) at 54: "if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author," and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." See also David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 57–58.

12 This possibility of re-expressing thoughts drawn from another's work in one's own words illustrates the idea/expression dichotomy, which provides that copyright protects expressions but not ideas, the form in which thought is expressed but not the substance of the thought itself. For discussion, see Abraham Drassinower, "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law" (2003) 16 Can. J. L. & Jur. 1 [Drassinower, "A Rights-Based View"].

13 *University of London*, above note 9 at 609. In *University of London*, the originality of entrance examinations composed by Professor Lodge and Mr. Jackson was in issue. The Court stated, *inter alia*, that the fact that the authors "drew upon the stock of knowledge known to mathematicians" by no means precluded a finding of originality. "Professor Lodge and Mr. Jackson proved that they had thought out the questions which they set, and that they made notes or memoranda for future questions and drew on those notes for the purposes of the questions

We can and should infer from this that the law of copyright does not conceive of the author as someone who comes up with something radically new out of nothing. The standard is not a creation *ex-nihilo* standard. On the contrary, the author can and does draw from the works of others. She uses pre-existing works as her own material. The author is not isolated from the world in which she lives and from which she draws her intellectual nourishment. Copyright law sees the author as constantly engaged in a dialogue with that world in general, and indeed with other works that populate that world. It understands authors as embedded in a culture that nourishes and influences them, yet from which they derive their own voice. Originality is not a prohibition on copying *per se* — it is more accurately grasped as a distinction between permissible and impermissible copying, between drawing from and copying from, between saying things in one's own words and merely repeating the words of another.

Once we appreciate the originality requirement in this light and see the author not only as producer or creator but simultaneously as user of other pre-existing materials, as architect rather than manufacturer, then we may grasp another important lesson about copyright law. The law of copyright is not only a law about the rights of authors, it is also a law about the rights of users. Most grasp this proposition by saying that copyright law is about the “balance” to be struck between the rights of authors and the competing claims of the public interest in the flow of information and ideas, in the ongoing dialogues forming the substance of our knowledge and culture. Yet it is important to add immediately that the balance in question is less about invoking the public interest as a “trump” that deprives the author of rights she may otherwise have, than about trying to appreciate that the author is herself a user, and that therefore the rights of users are not so much exceptions to the author's rights as much as themselves central aspects of copyright law inextricably embedded in authorship itself. Authorship is itself a mode of use. This is why to formulate the requirement of originality, even if in terms of a classic traditional judgment such as *University of London Press* is, inevitably, already to engage the problem of the relation between author and public, creators and users. In this respect, *CCH* is a landmark judgment not because it innovates but because it renders manifest the public's presence inherent in the very formation of the author's right. The invocation of user rights as central to

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which they set. The papers which they prepared originated from themselves, and were, within the meaning of the Act, original.”

copyright is also an evocation of the author as user — an affirmation of the intertextuality of creation.

### C. FAIR DEALING: USERS AS AUTHORS<sup>14</sup>

In *CCH*, the Supreme Court provides an understanding of the fair dealing defence. It is this aspect of the judgment that explicitly formulates the concept of user rights. The following passage illustrates both the letter and the spirit of the Court's position:

Before reviewing the scope of the fair dealing exception under the Copyright Act, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright 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 Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.<sup>15</sup>

To put it otherwise, the defence of fair dealing, which specifies permissible uses of copyrighted works even in the absence of the copyright owner's consent, is to be understood and deployed not negatively, as a mere exception, but rather positively, as a user right integral to copyright law.

The Court's affirmation of the integral status of user rights takes place in and through the familiar vision of copyright law as a balance between "dual objectives": promoting the public interest on the one hand, and obtaining a just reward for the creator on the other.<sup>16</sup> In the Court's view, the traditional approach to fair dealing as a mere exception falls short of the appropriate balance. It upholds the authorial domain at the expense of the public. Thus the vision of copyright law as a dual objective system presides over an integration of user rights intended to restore the lost copyright balance.

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<sup>14</sup> This section contains paragraphs closely following the text of parts of Abraham Drassinower, "Notes on the Public Domain," in *Intellectual Property Law*, Volume 15 Molengrafica Series, Intersentia Publishers, Antwerpen, (forthcoming 2005).

<sup>15</sup> *CCH*, above note 1 at para. 48.

<sup>16</sup> *Ibid.*, at para. 10, citing *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, <[www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2\\_0336.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html)>, [2002] 2 S.C.R. 336 at paras. 30–31.

Nonetheless, the bare assertion that copyright law is a dual objective system is not itself sufficient to accomplish the desired task of integration. In the absence of an elucidation of the unifying principle holding author and public together, it is by no means clear that copyright is a “system” at all. The question is how copyright is to be understood as indeed one thing with dual objectives, rather than two things that happen to have been thrown together in the same place for no apparent reason. The elucidation would focus neither on the author nor on the public but on the conditions for the possibility of the “balance” linking them as aspects of a single system. Authorial and public domains — author rights and user rights — would appear thereby as components of a single yet differentiated whole.

It is possible to suggest that the word “integral” in *CCH* means nothing more than that the fair dealing provisions, contrary to much previous Canadian jurisprudence,<sup>17</sup> are to be interpreted liberally and generously. Along these lines, what *CCH* requires is not something as grand and perplexing as a reduction of author and public to a single principle, but rather a pragmatic affirmation of the public dimension of copyright law in the context of a history of neglect. Yet in the absence of the principle that integrates them, author rights and user rights would remain exceptions to each other, not aspects of an integrative and integrated vision. Author and user rights would remain, that is, merely opposing impulses held together by nothing more than the stubborn insistence that they are indeed constitutive parts of a dual objective system curiously devoid of an animating principle.

The oddities of the resulting situation could be described as follows. On the one hand, because it would appeal to considerations external to authorship itself, the defence of fair dealing — and therefore user rights — would remain an exception to the normal operations of copyright law. On the other hand, because fair dealing would at the very same time be posited not as a mere exception but as an irreducible internal dimension of copyright law, the status of user rights as mere exceptions would be intolerable. Thus, in order to affirm and acknowledge the constitutive role of the defence, we would be compelled to assert that author rights should themselves be grasped as an exception to the normal operations of user rights. The inevitable upshot would be that the Supreme Court’s achieve-

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17 See, for example, *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 F.C. 306, <[www.canlii.org/ca/cas/fct/1996/1996fct10133.html](http://www.canlii.org/ca/cas/fct/1996/1996fct10133.html)> (T.D.) at para. 65 (Fair dealing provisions “should be restrictively interpreted as exceptions.”).

ment in *CCH* would be reduced to the level of staging a raging battle of exceptions in search of an absent rule.

It is therefore difficult to avoid the conclusion that the Court's integrative aspiration turns on the possibility of grasping user rights as an incidence of authorship itself. There is of course no need to regard that conclusion with apprehension, as if it were some kind of surreptitious effort to tame the vindication of the public domain by intertwining its operations with those of authorship itself. On the contrary, the affirmation of the constitutive and limiting role of the public domain proceeds all the more effectively when it constrains authorship internally.

The fair dealing provisions in the Canadian *Copyright Act* permit substantial reproduction that would otherwise be an infringement where the reproduction in question is for the purpose of research, private study, criticism, review, or news reporting.<sup>18</sup> Not all acts of reproduction for these allowable purposes, however, meet the requirements of the defence. The acts of reproduction in question must be for one of the allowable purposes, but they must also be "fair." The threshold determination that the defendant's dealing with the plaintiff's work falls within the statutorily specified purposes gives rise to an inquiry into whether the dealing is fair. This determination of fairness amounts to an examination of several factors pertinent to the dealing, including, as formulated by the Supreme Court in *CCH*, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the plaintiff's work, and the effect of the dealing on the work.<sup>19</sup>

Generally speaking, these factors govern a determination of whether the dealing is reasonably necessary for its purpose. The fairness of the dealing is assessed in relation to the purpose used to justify the dealing.<sup>20</sup> Thus, for example, the permitted amount of the dealing varies in accordance with the invoked purpose. What is fair for the purposes of research or private study need not be fair for the purposes of criticism or review.<sup>21</sup> The permitted amount of any given dealing is not in fact a quantitative category. At

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18 *Copyright Act*, above note 4, ss. 29 (research or private study), 29.1 (criticism or review), & 29.2 (news reporting).

19 *CCH*, above note 1 at paras. 53–60.

20 *Beloff v. Pressdram Ltd. and another*, [1973] 1 All E.R. 241, [1973] F.S.R. 33 (Ch. D.) at 61 F.S.R. (the "fairness [of the dealing] must be judged in relation to that purpose").

21 *CCH*, above note 1 at para. 56 ("For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of

stake is not an allowable proportion either of the plaintiff's work (as in how much of the plaintiff's work was reproduced) or of the defendant's work (as in how much of the defendant's work is made up of reproduced material).<sup>22</sup> The fair amount is rather a relation between what is reproduced and the purpose of the reproduction. A fair dealing is a dealing reasonably necessary for its purpose. Thus, what transforms an otherwise infringing reproduction into the legitimate exercise of a user right is nothing other than the fit between the reproduction and its (allowable) purpose.

The defence of fair dealing, then, permits the defendant to establish that, in spite of the appearance of infringement as a result of the defendant's act of substantial reproduction, the defendant's work is after all his own, not truly a copy of the plaintiff's. A finding of fair dealing means precisely that the act of substantial reproduction that gives rise to the fair dealing inquiry fails to mature into a finding of infringement. The defence gives the defendant the opportunity to show that his substantial reproduction of the plaintiff's work does not negate his own authorship. Fair dealing stands for the proposition that responding to another's work in one's own does not mean that one's work is any less one's own. Thus the defendant who makes out the fair dealing defence is an author in her own right.<sup>23</sup> It is as author that the defendant is a fair user. This, then, is

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criticism, it will not likely be fair to include a full copy of the work in the critique"). See also Vaver, above note 11 at 192.

- 22 As the court notes, "it may be possible to deal fairly with a whole work." See *CCH*, above note 1 at para. 56.
- 23 See, for example, Gideon Parchomovsky, "Fair Use, Efficiency and Corrective Justice" (1997) 3 *Legal Theory* 347 at 371 ("only authors, but not copycats, should be entitled to the fair use privilege."). In the American law of fair use, the requirement that the defendant's work be "transformative" calls for the defendant's engagement as an author. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) at 579 [*Campbell*] (holding that the fair use analysis asks "whether and to what extent the new work is 'transformative'"). For discussion of the central role of transformativity in fair use, see Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, (San Francisco and Newark: Matthew Bender & Co., Release 65, December 2004) vol. 4 § 13.05[A][1][b]. Both Scassa and Gervais underline emerging similarities between American fair use and Canadian fair dealing as provided in *CCH*. See Gervais, above note 2 at 159; Scassa, above note 2 at 96. There can be no doubt, of course, that *CCH* concerned *photocopying* and that the defendant institution doing the copying was not itself transforming anything or itself engaged in any of the allowable fair dealing purposes listed in the Canadian *Copyright Act*. Nor can there be any doubt, however, that in *CCH* the Supreme Court of Canada unambiguously held at para. 62 that the Great Library could rely on the purposes of its patrons to prove that its dealings were fair. Thus at para. 64 the Court found that "When the Great Library staff make

the point: fair dealing is a user right rather than a mere exception because it arises from and affirms the very same principle that gives rise to the plaintiff's entitlement. It would indeed be exceptional for the plaintiff to assert her own authorship in a manner inconsistent with the defendant's authorship.

Boldly stated, this means that any other understanding of the concept of user rights debases the Court's integrative aspiration into yet another episode in the battle of exceptions that the Court seeks to stabilize and transcend. It also means that to the extent that fair dealing is predicated on the defendant's own authorship, the fair dealing provisions ought to be amended so as to make it clear that the listed categories (i.e., criticism and review, news reporting, and research and private study) are not exhaustive but rather illustrative of a higher principle of authorship equally applicable to both parties. Indeed, it is that principle that makes intelligible the internal connection between author rights and user rights as aspects of a dual objective system.

The reason fair dealing affirms the free availability of another's expression only where such expression is reasonably necessary to one's own is that the "fairness" in fair dealing operates bilaterally. Fair dealing must be fair to both plaintiff and defendant. Nor could we conceive "fairness" otherwise. This means that fair dealing must impose limitations not only on the plaintiff's copyright but also on the kinds of uses that the defendant can make of the plaintiff's work. Thus the defendant can legitimately use the plaintiff's work only where the purpose of such use engages the defendant's authorship and only to the extent that such purpose reasonably requires. If fair dealing is to be "fair" in the sense of being bilaterally consistent with the authorship of each party, then the allowable purposes must be understood in this twofold manner, as purposes which on the one hand make the plaintiff's work freely available to the defendant, yet on the other specify the conditions that limit that availability. Fair dealing affirms the defendant's user right while preserving the plaintiff's authorial right. This is why the fair dealing purposes allow certain copying but do not thereby legitimate all or any copying. The fairness of the dealing

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copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research." Note also that, earlier in its decision, in the course of asserting at para. 51 that research allowable under the fair dealing provision is not limited to "non-commercial or private contexts," the Supreme Court quoted with approval the Court of Appeal's characterization of the research in question as "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums...."

operates as a balanced recognition of the parties' equal claims as authors. It affirms and sustains the higher principle of authorship to which both parties appeal and to which they must both be subject.

The understanding of users as authors that emerges from the analysis of fair dealing is therefore nothing other than the obverse of the equally necessary understanding of authors as users that emerges from the analysis of originality. All authorship is intertwined with the works of others.<sup>24</sup> Precisely because his own original work itself presupposes the intertextuality of creation, the plaintiff's right to exclusive reproduction does not include the exclusive right to address or respond to his own work. Fair dealing assures the viability of this creative intertwining by ensuring the free availability of another's expression where it is reasonably necessary to one's own. Originality and fair dealing are radically continuous in that, albeit in different senses, they both manifest an insistence to affirm the intertextuality of creation as the ground from which one's own voice arises and must necessarily arise.

#### D. "BROWSING": LEGITIMATE NON-AUTHORIAL USE

One might understandably suspect that the construal of fair dealing as a user right predicated on the user's own authorship is not sufficiently wide to capture varieties of use that, even intuitively, appear necessary to a vibrant public domain. To put it otherwise, in what way, if any, could the foregoing account deal with users who are not also authors? It may well be the case that most non-authorial or merely consumptive uses ought to be regarded as infringing. Even so, the question is whether the foregoing account of the principle of authorship can ground the legitimacy of *any* such uses.

The question is of particular interest with respect to the much-touted encounter between copyright law and digital media and technology. The following passage from Jessica Litman's *Digital Copyright*<sup>25</sup> encapsulates the issue well:

Today, making digital reproductions is an unavoidable incident of reading, viewing, listening to, learning from, sharing, improving,

<sup>24</sup> See, for example, Jessica Litman, "The Public Domain" (1990) 39 Emory LJ 965.

<sup>25</sup> Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books, 2001) [Litman, *Digital Copyright*]. For a review of Litman's book, see Jane Ginsburg, "Can Copyright Become User-Friendly? Essay Review of Jessica Litman, *Digital Copyright*" (2001) 25 Columbia JL & The Arts 71, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=288240](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=288240)>.

and reusing works embodied in digital media. The centrality of copying to use of digital technology is precisely why reproduction is no longer an appropriate way to measure infringement.<sup>26</sup>

There can be no doubt that it is difficult to remain unmoved by Litman's suggestion that a body of law that, for example, makes Internet "browsing" (which requires the creation of temporary copies) illegal is a body of law that requires radical revision. Moreover, to the extent that such revision would require jettisoning copying or reproduction as the fundamental copyright right, such revision would entail the abolition of copyright as we know it. Litman's thesis is that, in the digital world, the copyright "balance" is no longer adequately served by application of the concept of reproduction. Thus, whatever concept would emerge in its stead could hardly justify using the word *copy-right* to describe the body of law it would organize.<sup>27</sup> One might say that Litman's engaging reflection is self-consciously designed to demonstrate that the phrase that serves as its title — i.e., "digital copyright" — is an oxymoron.

As I see it, Litman's point is that copyright is unsuitable to regulate the digital world because the pivotal concept of reproduction cannot on its own terms distinguish between uses incompatible with the copyright balance and uses compatible with such balance. Digital technology ruptures the continuity between copyright theory and copyright doctrine, such that the concept of reproduction no longer adequately separates infringing from non-infringing use. Applied in the digital environment, the right of reproduction grants owners the exclusive right to view their works where such viewing requires — as it does in the case of "browsing" — the making of temporary copies. Thus, to insist on reproduction as the central organizing category of copyright law is to upset the copyright balance so as to grant owners a new and unprecedented control of access to copyrighted works.<sup>28</sup> It is as if copyright owners were given the right to charge a fee every time one flips through the pages of a book.

The proposition that the centrality of copying to digital technology requires radical revision of copyright law, however, assumes that, as a strict

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26 Litman, *Digital Copyright*, above note 25 at 178.

27 *Ibid.*, at 180.

28 For a different view of the relation between the right of reproduction and the Internet, see Jaap H. Spoor, "The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right?" in P. Bernt Hugenholtz, ed., *The Future of Copyright in a Digital Environment* (The Hague: Kluwer Law International, 1996) at 67.

legal matter, reproduction and infringement are equivalent categories. But that is simply not the case. The force of the Supreme Court of Canada's insistence that fair dealing is a user right rather than a mere exception is most visible at this point. Cast as a user right, what fair dealing shows is not that certain reproductions are in some way to be exceptionally excused, but rather — and more deeply — that reproduction is not *per se* wrongful. Reproduction and infringement are hardly equivalent categories. The very existence of the fair dealing defence is ample proof of that proposition. Copying, that is, does not quite capture the nature of the wrong in copyright law.

Revisiting the fair dealing defence at this point will help us deepen our appreciation of the nature of the wrong in copyright, and therefore of the concept of user rights and of the possibilities of applying that concept to the paradigmatic example of Internet “browsing.”<sup>29</sup> The starting point is the observation that if we persist in thinking of the wrong in question as a matter of copying (i.e., substantial reproduction), then we render ourselves unable to grasp fair dealing as a user right. For once we have assumed that “copying” is wrongful, we have of course already assumed that the defence of fair dealing is but an exception, a suspension of the normal operations of copyright law. The proposition that fair dealing is a user right must therefore amount to an insight into the very nature of the wrong at issue in copyright law. This insight must itself amount to a deepening appreciation of our concept of that wrong, such that substantial reproduction is a necessary but not a sufficient condition of infringement.<sup>30</sup>

Grasping the nature of this wrong requires explicating the importance of the observation that substantial reproduction by the defendant does not automatically generate the inference that the defendant is not an author in his own right. The fact that the defendant has copied does not mean that he is just a copycat. We might say that, strictly speaking, fair

29 The following remarks on fair dealing contain paragraphs closely following the text of parts of Drassinower, “Notes,” above note 14.

30 Another way to put it is to say that deepening our concept of the wrong in copyright law — i.e., the mischief the statute targets — is the only possible way to think through the co-existence of s. 3 (affirming the copyright owner's exclusive right of reproduction) and, to take one of the fair dealing variants, s. 29.1 (affirming that fair dealing for the purposes of criticism or review is not an infringement of copyright) of the Canadian *Copyright Act*. If both of these propositions are true, as they must be, then it must be the case that “reproduction” (i.e., copying) and “infringement” (i.e., the wrong in question) are not equivalent categories, and that the reproduction is necessary but not sufficient for infringement to be maintained.

dealing specifies situations wherein, contrary to appearances, the characterization of the defendant's act as an act of substantial reproduction is inaccurate. It is of course true that these are situations in which the defendant has used the plaintiff's work, and in which this use has taken the form of a substantial reproduction. But it is equally true that in these situations the defendant has not, so to speak, placed himself in the position of the author of the work he has substantially reproduced. On the contrary, the defendant has addressed the plaintiff's work from his own position as author. For lack of a more elegant locution, let us say that the defendant has not abrogated to himself the plaintiff's authorial locus. His defence is, after all, that he is equally an author.

To put the same point differently, the substantial reproduction at issue fails to mature into a finding of infringement because the defendant's act is not inconsistent with the plaintiff's authorship in the sense of amounting to an abrogation thereof. It is this element of abrogation that is lacking for the offence to be made out, and it is this absence that the defence of fair dealing demonstrates. The wrongful abrogation has not taken place because the substantial reproduction is but a reasonably necessary incident of the defendant's own authorship. What the defendant has done is addressed the plaintiff's work in his own, not reproduced that work pure and simple.

The wrong in copyright law, then, is this unauthorized placing of oneself in another's authorial locus.<sup>31</sup> One way to grasp this is to observe that "reproduction" is not an empirical category, a determination of which can be made by looking at the works pure and simple, as if in search of a physically invaded portion of a trespassed parcel. Rather, the determination of whether the requisite wrong has taken place is also, and inevitably, a determination of whether the reproduction is indeed what it appears to be: namely, an indication that the defendant has placed himself in the plaintiff's authorial locus. Fair dealing is but a way of showing that he has not. The point of the defence of fair dealing is precisely to show that no wrong has taken place. Therefore, no exception is necessary to excuse some would-be wrong. The defence shows that there has actually been no "copying" or "reproduction" in the appropriately normative signification of those terms as a matter of copyright law. Fair dealing is therefore not about a wrong that must be excused but about the exercise of a right to respond

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31 See Immanuel Kant, "On the Wrongfulness of Unauthorized Publication of Books" in *Practical Philosophy*, trans. and ed. by Mary J. Gregor (Cambridge: Cambridge University Press, 1996).

to another's original expression through one's own. This is why it is a user right, not merely an exception to copyright infringement. Once again, *CCH* is a landmark judgment not because it innovates but because it renders explicit insights already contained in the structure of copyright law.

We can now briefly broach the implications of this conception of the wrong in copyright for an understanding of the legitimacy of Internet browsing. Note that, in the case of fair dealing, the defendant offers her own authorship not for its own sake but as indicative of the fact that she has not placed herself in the plaintiff's authorial locus. It is not the defendant's authorship *per se*, but rather what that authorship indicates, that establishes the absence of the wrong. The important inference to draw here is that while it is true that being an author in one's own right can serve to indicate that one has not abrogated another's authorial locus to oneself, it is not necessarily true that being an author in one's own right is the only way to escape the web of liability. It is one thing to assert that the legitimacy of fair dealing as a user right is predicated on the defendant's authorship. But it is quite another to assert that user rights *as such* are predicated on such authorship. On the contrary, legitimate, non-authorial use remains a possibility to the extent that use of another's work in contemplation of one's own is but an instance of a more general category of user rights. Indeed, on this view, Internet browsing appears as a paradigmatic example of a situation in which non-authorial use clearly involving reproduction nonetheless fails to place the user in the author's place. The point is that no wrong arises where the reproduction in question is but incidental to viewing a publicly accessible work.

The proposition that Internet browsing amounts to non-infringing use is hardly controversial. The preferred approach to the legitimacy of browsing, however, is an implied licence approach that, as such, grounds the legitimacy of browsing not in the incidental character of the reproductions in question but rather in the copyright owner's consent.<sup>32</sup> The approach thus assumes the owner's exclusive right to browse, yet puts forward through the owner's imputed consent reason to preclude a finding of infringement. By contrast, the approach that focuses on the incidental char-

32 On browsing and implied licence or authorization, see Sunny Handa, *Copyright Law in Canada* (Markham, ON: Butterworths Canada, 2002) at 292–94; Barry B. Sookman, *Computer, Internet and Electronic Commerce Law*, looseleaf (Toronto: Carswell, 2005) at 3-213; Roger T. Hughes, *Copyright and Industrial Design*, 2nd ed. looseleaf (Toronto, Carswell, 1991) at 499. See also Glen A. Bloom & Thomas J. Denholm, "Research on the Internet: Is Access Copyright Infringement?" (1996) 12 CIPR 337.

acter of the reproductions in question runs through the browser's right to view publicly accessible material. It is a user right, not simply an exception — licenced or otherwise — to copyright infringement. Thus, whereas the implied licence approach more or less successfully cloaks the rupture between copyright law and digital technology, the user rights approach interprets the legal significance of the technology from the viewpoint of a renewed understanding of the law — of the nature of the right and wrong in issue. Because it refuses to grant the author an exclusive right to read her already published work, the user rights approach has no need to find the prerogative to licence Internet browsing within the purview of the author's copyright.<sup>33</sup> Browsing is a user right precisely because it amounts to *non-authorial* use.<sup>34</sup>

## E. TAKING USER RIGHTS SERIOUSLY

As we have noted, the Supreme Court's analyses of the categories of originality and fair dealing in *CCH* take place against the backdrop of an explicit statement that the purpose of Canadian copyright law is “to balance the public interest in promoting encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”<sup>35</sup> The rejection of the “sweat of the brow” originality standard in favour of a “skill and judgment” standard, as well as the vindication of user rights in support of large and liberal interpretations of fair dealing, are but intertwined aspects of a (re-)formulation of the very purpose of Canadian copyright law.

It is important to keep in mind, however, that the Court's unambiguous affirmation of the integral role of the public domain in copyright law

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33 I have taken the phrase “an exclusive right to read” from Jessica Litman, “The Exclusive Right to Read” (1994) 13 *Cardozo Arts & Entertainment Law Journal* 29.

34 In *Society of Composers, Authors, and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, <[www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol2/html/2004scr2\\_0427.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol2/html/2004scr2_0427.html)>, the SCC found, at para. 116, that “Caching’ is dictated by the need to deliver faster and more economic service, and should not, when undertaken only for such technical reasons, attract copyright liability.” The Court's conclusion that caching should not attract copyright liability is consistent with the view that, like browsing, caching amounts to legitimate non-authorial use. See also s. 20 of *Bill C-60, An Act to amend the Copyright Act*, <[www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60\\_1/C-60\\_cover-E.html](http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html)>.

35 *CCH*, above note 1 at para. 23.

stops short of a relegation of the author to the level of a merely secondary consideration. The Court regards copyright as a “dual objective” system, of which author and public are equally constitutive. This factor sharply differentiates the Canadian from the American construal of the purpose of copyright law.<sup>36</sup> In the United States, the purpose of copyright law is not “dual.” On the contrary, copyright law ultimately serves the public interest and nothing other than the public interest: “The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’”<sup>37</sup> It is trivially true, of course, that the author plays an important role in American copyright jurisprudence, but this role nowhere reaches the status of an autonomous objective in its own right: “The author’s benefit, however, is clearly a ‘secondary’ consideration. ‘The ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.’”<sup>38</sup> It is also trivially true that American jurisprudence, too, casts the author-public relationship as a “balance,” but, once again, this is a balance entirely devoted to the public interest, and in which the author figures only as an instrument of the public’s interest.<sup>39</sup> It is by no means a balance *between* author and public, in which the author’s claims (i.e., “obtaining a just reward for the creator”) arise as a matter of justice.

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- 36 Commentators have noted the elements of convergence arising through *CCH* between the stated purposes of Canadian and US copyright jurisprudence. Thus, Teresa Scassa has observed that *CCH* “cements a very recent shift (i.e., since the 2002 case of *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, <[www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2\\_0336.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html)>, [2002] 2 S.C.R. 336) in approach to copyright by the Canadian Supreme Court,” and that, at least in theory, the shift “further aligns Canadian copyright law with US law.” See Scassa, above note 2 at 96–97. Similarly, to give but one more example, Robert Howell concurs with the view that “after *Théberge* a substantial similarity of theoretical underpinning exists between Canada and the United States is ... strengthened by *CCH*.” See Robert G. Howell, “Recent Developments: Harmonization Opportunities for Canada” (2004), 1 UOLTJ 149 <[http://web5.uottawa.ca/techlaw/resc/UOLTJ\\_1.1&2.doc%207\(Howell\).pdf](http://web5.uottawa.ca/techlaw/resc/UOLTJ_1.1&2.doc%207(Howell).pdf)> at 169. For an important and different account of the significance of *Théberge* in regard to the question of the purpose of Canadian copyright law, see Myra Tawfik, “Copyright as Droit d’auteur” (2003-2004) 17 IPJ 59.
- 37 See *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 at 349 (1990).
- 38 *Computer Assocs. Int’l v. Altai, Inc.*, 982 F.2d 693 at 696 (2d Cir. 1992).
- 39 *Ibid.* (“Thus, the copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation.”)

What matters about this distinction between Canadian and American jurisprudence is that it suggests a set of discursive possibilities that have not developed in the United States but which may nonetheless develop vigorously in Canada. Generally speaking, the hegemony of instrumentalist thinking in the United States means that copyright discourse stages a battle between copyright “maximalists” and copyright “minimalists,” between those who see strong protections as conducive to the public interest and those who, on the contrary, see weaker protections as conducive to the public interest.<sup>40</sup> Whatever their differences, however, these loyal opponents share a fundamental belief that copyright is but an instrument of the public interest, such that neither authors nor users could possibly assert their claims as a matter of inherent dignity.

In Canada, however, the persistence of the language of justice and fairness in copyright jurisprudence carries with it additional discursive possibilities indicative of richer normative horizons. These possibilities include affirmations of authorial entitlement from a rights-based perspective, as a matter of inherent dignity. It is not often noted, however, that these possibilities also include what we might call a rights-based minimalist discourse insistent upon formulations of the inherent worth not only of the author’s but also of the public’s domain.<sup>41</sup> The language of justice and fairness is by no means necessarily maximalist. Proponents of expansive copyright protection neither do, nor can, have a normative monopoly on rights-based accounts of copyright law. On the contrary, users, too, have rights worthy of being regarded as ends in themselves. These rights are inseparable from and embedded in any affirmation of the dignity of authorship itself.<sup>42</sup> As *CCH* teaches, they are absolutely integral to the innermost structure of copyright law. To take them seriously is to refuse to see them as negotiable instruments intended to serve goals external to themselves.

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40 For discussion, see Neil W. Netanel, “Copyright and a Democratic Civil Society” (1996) 106 *Yale LJ* 283 <[www.history.ox.ac.uk/ecohist/readings/ip/netanel.htm](http://www.history.ox.ac.uk/ecohist/readings/ip/netanel.htm)>.

41 See Drassinower, “A Rights-Based View,” above note 12 at 21 (“the rights-based account regards both the author’s right *and the public domain* as a matter of inherent dignity.”).

42 To put it otherwise, what matters is not that we take sides in the opposition of author and public but that we seek discursive possibilities that grasp the conditions of their co-existence as aspects of a single system. This means that the opposition worthy of our attention is not one between author and public but between perspectives that assert that opposition and perspectives that seek to resolve it at a higher level.