The Lyrical Boundaries of Fair Dealing:

Copyright, Community, Context, Coercion, Consolation

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Abstract

Informed by the methodologies of lyric scholarship and poetic analysis (elided here to lyric analysis), and written in a concrete, visual, call-and-response format, this project provides a critical, lyrical, and material examination of the legal concept of fair dealing, its various stakeholder communities, and its role in Canadian society and education. Fair dealing is approached as a flexible, quasi-lyrical boundary object that is variously—even adversarially—defined by educational, legal, and commercial communities of practice that have a vested interest in the evolution of copyright law in Canada.

Keywords

Boundary objects; communities of practice; copyright; fair dealing; library science; lyric scholarship; poetic analysis; postsecondary education; Supreme Court of Canada.

In Memory Of

Carl Withrow Gilroy, 1922-2018

Andrew Anthony Vaughan, 1983-2020

Malcolm Earl Sibley, 1930-2021

Iona Gwendolyn Gilroy, 1936-2021

Wendy Dawn Sibley, 1968-2021

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I would be remiss to leave out my partner, Scott, who quite literally keeps me nourished, hydrated, safe, and warm on study days, tolerates Wrekmeister Harmonies on infinite repeat, and always sharpens my political and social grievances with the whetstone of history.

I am indebted to copyright expert William Patry, who replied to my fan letter with a box of books that shaped this project in countless ways, particularly William St. Clair's *The Reading Nation in the Romantic Period.*

Lastly, perhaps most importantly, I want to acknowledge that I am a settler who lives and works in Mi'kma'ki; I benefit from settler colonialism. The brutal realities of this ongoing system have kept the anti-Indigenous, racist, appropriative, and extractive aspects of Canadian and Anglo-American copyright regimes on my mind throughout this project. My hope is that other student researchers may benefit from the resources I've assembled here and build my rough criticisms of copyright and fair dealing into something more polished, richer, and of more benefit to marginalized and exploited stakeholders.

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The problem is deeper. It is that learning as such proceeds through copying. Culture is copying. To be sure, its transmission cannot be reduced to 'mere' copying but, like digital technology, it is inescapable in its absence.

Abraham Drassinower[1]

When communities of practice are considered in a broader context, their boundaries define them as much as their core. Boundaries reflect the fact that people and communities are always engaged in learning and that learning creates bonds. In this sense, boundaries are a sign of depth.

Etienne Wenger[2]

Lyric is rooted in an integrity of response and co-response; each dimension attending to the others. The mouth of lyric is an ear.

Jan Zwicky[3]

Old and new make the warp and woof of every moment.

Jonathan Lethem[4]

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[1] Drassinower, 2005, p. 1.

[2] Wenger, 1998, p. 254.

[3] Zwicky, 2003, p. 181.

[4] Lethem, 2007, p. 8.

Introduction

1. White space: What this is not / is no longer

This project has gone through many iterations since its rocky start in 2016. I initially planned to study the copyright notices that publishers place on the title page verso[5] of each book they produce. Some are threatening, others friendly. Some acknowledge users' rights such as fair dealing,[6] while others have a strictly copyright maximalist[7] bent. Some are textbook legalese, while others include flourishes that point to the political, social, and economic concerns of various publishers. This variety cried out—indeed, still cries out—for close qualitative analysis. But such an adventure is now well beyond the scope of this project.

I also considered getting with the zeitgeist by trawling social media—particularly #CopyrightTwitter—for discussions of fair dealing. Online copyright chatter has broadened my perspective significantly over the years and introduced me to many of the scholarly sources that I refer to throughout this project. But on further consideration, a social media analysis did not seem worth the risk of scope

[5] The title page verso, or "TP verso," often referred to as the "copyright page" of a book, usually includes the publisher's contact information, information about the author, an ISBN (international serial book number), a CIP (cataloguing-in-publication) record for use by library cataloguers, and a copyright notice/warning that begins with, "All rights reserved."

[6] Fair dealing is, generally speaking, a key term in the Copyright Act of Canada. It refers to a list of situations in which Canadians may perform unauthorized copying that might otherwise be considered copyright infringement. Fair dealing will be discussed, problematized, and re-defined at length throughout this document.

[7] The concept of copyright "maximalism" will come up again in later chapters. The term is a somewhat pejorative shorthand for a particular school of thought. Stakeholders accused of maximalism tend to broadly interpret copyright infringement, while insisting on a narrow interpretation of exceptions and users' rights—often framing these rights and exceptions as mere "loopholes." Though maximalism is out of step with current trends in copyright law, it should never be discounted by students, educators, or scholars; it remains a powerful rhetorical and legal tool for rightsholders.

creep, datedness, or coming up against ethical boundaries. Tweets may technically be public discourse, but most people chattering away on social networks generally aren't doing so for the sake of contributing to academic research. Considering the capacity of both copyright protections and public domain rules to exploit (and poach from) marginalized communities and voices, it would be hypocritical of me to extract my research material from the publicly available contents of a social network; I would risk arriving at my conclusions in bad faith.

I initially planned to incorporate agnotology[8]—the study of ignorance, disinformation, and misinformation—into my thesis, with critical discourse analysis[9] (CDA) as the methodological vehicle for that work. I came across the concept of agnotology during the coursework portion of my degree, while researching infamous tobacco and petroleum disinformation campaigns. I was electrified by the idea of incorporating the *opposite* of education into an Education thesis; CDA seemed an appropriate companion because of its capacity to expose the inner and/or ideological workings of language. But I ultimately set aside both agnotology and CDA for a variety of practical reasons. As with my social media idea, I was concerned about scope creep—the risk of over-burdening my project with every idea or concept that interested me, at the expense of clarity or utility.

I considered whether competing perspectives on copyright and fair dealing had more in common (overall) with a) the deliberate strategizing of disinformation campaigns, or b) the competing definitions of boundary objects[10] within and among communities of

[8] Proctor, 2008.

[9] Fairclough, 2013.

[10] Star, 2010.

practice.[11] I decided on the latter. While corporate rightsholders rely (to some extent) on public ignorance to protect their assets, only the actions of the most consequential and litigious intellectual property[12] rightsholders (i.e., pharmaceutical companies) come within arm's reach of the deadly disinformation campaigns surveyed by the most compelling agnotology research. Medical patent law is well beyond the scope of this project, not to mention my professional expertise as a library worker.

As my research progressed and I learned more about the methodological potential of lyric scholarship and poetic analysis[13], I asked myself a similar question regarding critical discourse analysis. Would I be better prepared and more capable of analysing competing perspectives on copyright and fair dealing via a) critical discourse analysis, or b) lyric analysis? I made my decision in 2017, when a former Mount Library colleague and I wrote "The Creature Questions its Reflection: Lyrical Feminist Explorations of Reference Desk Interactions," which became a chapter in Maria T. Accardi's *The Feminist Reference Desk*.[14] Alex Hanam and I used lyric analysis and free verse to play with, respond to, and deconstruct various ideas from library science and social science as they pertain to library workers' real-life experiences in front-line service. After the experience of writing and publishing a "lyrical" book chapter, I felt confident that an analysis of copyright and fair dealing concepts could be well served by a lyric approach. Lyric analysis allows this thesis to moonlight as a work of creative non-fiction—a literary artifact built on a foundation of professional and political convictions, research, pedagogy, and play.

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[11] Wenger, 1998.

[12] Intellectual property is not a synonym for copyright. IP is generally understood to consist of copyright, patents, trademarks, trade secrets, etc. See: Vaver, 2011.

[13] Zwicky, 2011.

[14] Gilroy & Hanam, 2017.

2. Ink space: What this is / has become

This project is, first and foremost, an Education thesis. Not only have I assembled it as part of my Master of Arts in Education degree, but most of my daily interactions with copyright take place in the context of my work as a library technician and library manager at a small Canadian university. I began my library career in special education, sourcing and distributing alternate format materials for K-12 students with perceptual and print disabilities. Working with/for disabled students concretized my understanding that ableism is one of the most socially harmful aspects of Anglo-American (including Canadian) copyright regimes. Likewise, the rights of disabled people provide one of the most significant imperatives for copyright reform and critique.

I brought these convictions with me when I became a university library technician specializing in course reserves. University library reserves—particularly online/digital reserves—requires a nuanced understanding of the user rights and exceptions in the Copyright Act of Canada, case law, and institutional fair dealing guidelines. As Abraham Drassinower says in *What's Wrong with Copying?*, "learning as such proceeds through copying."[15] Education, copying, and cultural discourse are virtually inextricable.

My graduate Education coursework and practicum also exposed me to the theoretical foundations on which this project turns: communities of practice and the role of boundary objects in defining and shaping communities. I encountered Etienne Wenger's communities of practice scholarship in a course on continuing professional education, and later used my practicum to [attempt to] establish a social and professional community of practice for library technicians in Nova Scotia. That project was equal parts discouraging and

[15] Drassinower, 2015, p. 1.

instructive: low salaries, unconventional work hours, high workload, and burnout contributed to a general sentiment of "community" being an unaffordable or unattainable luxury.

To my surprise, organic (if unintentional, even unconscious) communities of practice—many including library staff—revealed themselves as I began researching copyright for my thesis. These communities are not shaped by pub nights, departmental meetings, nor well-intentioned graduate students on a mission. These communities are instead shaped by online and in-person interactions with laws and norms, converging or diverging philosophies, biases, concerns, fears, and even (especially) by semantics and varying definitions of common terminology. In other words, these copyright stakeholder communities were/are shaped by boundary objects.

Originally defined by sociologist Leigh Star, boundary objects have found a natural home in the study of communities of practice. Constellations of boundary objects help to determine membership, non-membership, and multi-membership in various communities. I am one such copyright stakeholder: a graduate student, professional library worker, musician, and writer. I feel a natural (if diffuse) sense of community with legal scholars, writers, and library scientists whose understanding of / discussion of key disciplinary concepts enriches or enhances my own. This is particularly true of fair dealing. Various/competing legal, scholarly, artistic, and cultural understandings of this key legal concept—as a loophole, an exception, a right, a technicality, a source of freedom, a lesser evil, a diversion, a decoy, etc.—can trace allegiances, shape research, and even constrain cultural production.

My research found an unruly and troubling *objet d'art* in 2017, when the Federal Court decision *Canadian Copyright Licensing Agency v. York University* sent shockwaves through Canadian postsecondary institutions by mandating that York participate in Access Copyright's tariff scheme and questioning the "liberal" interpretation of fair dealing that postsecondary institutions had been relying on for more than a

decade.[16] In 2021, the Supreme Court of Canada ruled on York University and Access Copyright's appeals,[17] dismissing the mandatory tariff argument, reaffirming the broad scope of fair dealing, and acknowledging the value of institutional fair dealing guidelines as a complement to analysis based on legislation and case law. With this latest copyright skirmish complete, I felt confident that I could return to my research and offer something of merit to my scholarly community.

The discourse and repartee in the York cases bear traces of various copyright communities of practice / stakeholder communities, their various interpretations of fair dealing, and how their interpretations of that concept shape the identity of these communities. I conclude my investigation of fair dealing and boundary objects with a look into the language in these two pivotal court cases—a lyrical illustration/portrait of the constellation of communities, practices, and boundaries that constitute the rhetorical landscape of copyright in Canada from the vantage point of an academic library technician and graduate student.

[16] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004.

[17] *York University v. Canadian Copyright Licensing Agency*, 2021.

Meta-Methodology and Resonance: Lyric Analysis *qua* Lyric Analysis

Perhaps, at first light, *lyric* reads not as scholarly methodology but as play, or as *merely* play—as the pinball spangle of young dancers or seasoned gymnasts—the lighthearted refrain of a pop tune that grabs you at 16 and never lets go.

But it is an economy of movement, not merely a stinginess with words, that is close to our heart: lyric is lithe. […] Lyric is an attempt to comprehend the whole in a single gesture.[18]

See? There is play in this, as Jan Zwicky says, and physicality—space-taking, space-giving—but it's serious play / can be serious play—the kind of play that emerges from practice, from focus [*clarity*], from the skill and judgement to understand what is superfluous, what is essential, which knots are holding the apparatus together [*coherence*] and which are merely tangles:

[18] Zwicky, 2011, p. 73.

Thinking in love with both clarity and coherence—with clarity as coherence [...]. Lyric is not, in this sense, a 'response': it is not defined by an attitude to what it knows, but by the structure of its knowing.[19]

A lyric structure of knowing, for me, here, in this project, is *not* response (as Zwicky wisely cautions) or at least not *just/merely* response, but instead a kind of visual call-and-response, which is something entirely different: song structure, play structure—lyric structure.

And while this structure can yield both beauty and economy, the word processing / formatting work required to get there can be painstaking: careful matching of columns and lines, empty spaces, and section breaks in an electronic grid. Warren Heiti, in an essay on Zwicky's work, offers an elegant solution, already employed here:

[19] Zwicky, 2011, p. 153.

Excerpts from Zwicky's work, and the

work of a few other thinkers, are set

flush left and determine the rhythm;

my commentary, indented toward the

right margin, responds by offering

tentative extensions.[20]

The zigzag format of Heiti's essay provides ample room to play, manoeuvre, gesture and lyricize—and honours scholarship and expertise with a visually prominent place on the page. This format also respects the linearity that screen readers and other accessibility devices often require to function. Attentiveness to access is an imperative that can be understood lyrically:

[20] Heiti, 2010, p. 114.

Lyric is rooted in an integrity of response and co-response; each dimension attending to the others.

The mouth of lyric is an ear.[21]

Though I am constructing this thesis visually, verbally, and spatially, poetry and lyric always arrive bundled with oral, auditory, and resonant facets [*dimensions*] that command our attention.

Poetry and inquiry[22] *ask us to listen deeply. We must put ourselves in the context; we must*

feel,

taste,

hear

what someone is saying. Sometimes we must learn to listen under the words, to hear what is not being said.[23]

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[21] Zwicky, 2011, p. 181.

[22] Lorri Neilsen Glenn refers here to poetic inquiry, which, for the purpose of this project, can be considered roughly interchangeable with lyric scholarship or lyric analysis.

[23] Neilsen, L., 2004, p.42; formatting mine.

In a metaphor, a gesture that takes its life from one context is suddenly manifest as a gesture in a context in which we had not noticed its possibility before.[24]

By gesturing to the space *under the words*, Lorri Neilsen Glenn invites serious consideration of—serious listening for—metaphor and resonance (tectonic, seismic), which (of course) echoes through all of Zwicky's work:

The lyrical turn of phrase that at first seems fanciful or superfluous may turn out to be a useful metaphor—a useful instrument [*a lyre?*]—for conveying the resonance and relatedness of disparate ideas—rendering the unfamiliar familiar, and vice versa.

But the metaphor-work of lyric analysis is not just an aesthetic or philosophical endeavour—it has an inherent capacity for material, political, and critical work. It cannot walk by a guitar without plucking a string; it cannot walk by puddle without making a splash.

[24] Zwicky, 2003, p. 75.

To see the poem as work-place is to expose the workings of language, and to make fraught our relationship to the object world.[25]

Nick Selby refers here to *the poem* rather than scholarship based on poetic contours and rigour, but that fraught relationship—that string tension, that integrity, that pull—is equally true of lyric analysis. Star extends Selby's point to account for power:

Among other things, we create metaphors—bridges between those worlds. Power is about whose metaphor brings worlds together, and holds them there.[26]

Metaphors are the power source of lyric analysis. But this is more than a simple chemical reaction. Instead, lyric analysis can chop, blend, masticate, digest, purify, condense, render, distil—organic, ecologic meta-metaphors for the work and economy of this methodology.

[25] Selby, 1997.

[26] Star, 1991, p. 52.

In the context of my thesis, lyric analysis provides a framework for prying open legal metaphors, the power relations that shape them, and their material and political consequences. It is through such political and material resonance that lyric analysis proves its appropriateness to this project—one of copyright law and its boundaries; private power and public culture; community and individuality.

The Lyrical Resonance of Communities, Practices, and Boundaries

And there may even be such a thing as lyric community—though the odds against its achievement increase with the addition of each 'self,' ~~*and increase dramatically with the presence of aggression or fear.*~~[27]

We are here now, and we will return here later, that other *here* being threats to lyric and community, struck through not to dismiss or discount, but to promise, pause, shift focus, tighten the aperture. Because the tensions of copyright law and fair dealing—its legacies and conflicts—the communities it creates and the communities it jeopardizes—are one such constellation of threats, and a double-edged opportunity for lyric exploration.

We will return *here* to income and lost income; power and diminishment; prestige and appropriation. We will return to writers, teachers, researchers, owners, rights holders, makers, vendors, *copiers*. But we are not quite [t]here yet.

[27] Zwicky, 2011, p. 288; strikethrough mine.

For the moment, Zwicky's nod to *lyric community* serves as a natural bridge between lyric analysis and communities of practice.

Lyric is not only structure, but also communion.

Lyric is not only form, but also practice.

Recall from the previous chapter that:

To see the poem as work-place is to expose the workings of language, and to make fraught our relationship to the object world.[28]

Likewise, to see *lyric* as work-place is to expose the workings of *discourse,* and to make fraught (*and to call up, out, into the light*) our relationship *to each other—our communities.*

Lyric analysis shares something of its spirit and thrust with various discourse analysis methodologies. Both *make fraught* through practices such as close reading for cultural and creative context and subtext:

[28] Selby, 1997.

Discourse for these researchers is 'an interrelated set of texts, and the practices of their production, dissemination, and reception, that brings an object into being.'[29]

The above texts, together, suggest important—if difficult to chase, if more difficult still to pin down—correspondences between:

a) discourse / language / lyricism;

b) the insistent physicality of objects (widely and variously conceived); and,

c) the more diffuse or suggestive physicality, space-taking, and meaning-creation of community.

Man appropriates his total essence in a total manner, that is to say, as a

hearing, smelling,

tasting, feeling,

thinking, being aware,

sensing, wanting,

acting, loving—

[29] Philips & Hardy, 2002, p. 3, quoted in: Richards & Morse, 2013, p. 73.

in short, ***all the organs of his individual being like those organs which are directly social in their form, are in their objective orientation or in their orientation to the object, the appropriation of that object, the appropriation of the human world****; their orientation to the object is the manifestation of the human world; it is human efficaciousness and human suffering, for suffering, apprehended humanely, is an enjoyment of self in man.*[30]

Marx is, in the least, a necessary footnote in any critical project about copyright law, developing as it has in tandem with capitalism. But here, his breathless prose—which he always staunchly defended as scientific[31]—celebrates a crackling chemical reaction of our individual sensory perception and our shared experiences—and the community that bubbles over and precipitates as a result. The resulting

[30] Marx, 1844a, p. 87; formatting and emphasis mine.

[31] Marx and Engels described the work of other socialists and communists as "scientific," while Engels later described Marx's work as "scientific socialism." See: Marx, 1844b; Engels, 1880.

instructive / illuminating / lyrical mess is what we are, what community is and enables: *human efficaciousness and human suffering*.

Etienne Wenger's communities of practice scholarship and his thoughts on human interconnectedness harmonize almost uncannily with Marx's 1844 ruminations on the social lives of humans:

Taken separately, the notions of individual and community are reifications whose self-contained appearance hides their mutual constitution. We cannot become human by ourselves […].[32]

To extend Marx's "organ" metaphor on Wenger's terms, *individual* and *community* are interdependent, inter-reliant, mutually beneficial organ systems that we [at least the western "we" that created and perpetuates Anglo-American copyright systems] cannot help reifying, ossifying, objectifying, carving up—because that is one of those

[32] Wenger, 1988, p. 146.

things we [same caveat] tend to do. But so too is community—one of those deeply human things we cannot help but be / do / form.

Not every practice is inherently communal, nor is every community a *community of practice*. Wenger's definition gives communities of practice a bit of rippling surface tension—some workable, practical boundaries:

> *Communities of practice are groups of people who share a concern, a set of problems, or a passion about a topic, and who* ***deepen their knowledge and expertise in this area by interacting*** *on an ongoing basis.*[33]

Communities of practice include an educational or expertise-building element—something that contributes to members' understanding of the shared practice. Members of a community of practice do not advance or progress as legion; formal training programs are not communities of practice by default, though organizing training or workshops could be within the purview of certain communities of

[33] Wenger, McDermott, & Snyder, 2002, p. 4; emphasis mine.

practice. The peaks and valleys of expertise in a community of practice are the sites of communal and individual convergence and divergence—the sites of accomplishment, mistakes, and mess—Marx's embrace of *human efficaciousness and human suffering.*

Nor do the *interactions* Wenger refers to need to be explicitly organized or regimented. Copyright communities of practice are mostly/largely diffuse—characterized as much by intermittent, scattered, irregular discourse, criticism, preoccupations, worries, and research as they are by scholarship, professional bodies, or conferences. Communities of practice such as this are no less valid for their lack of formality, because at their core:

Communities of practice are the locus of 'real work."[34]

Here Wenger and Marx converge again in the materiality of the human animal—what we do and accomplish in connection with others or in response to those connections—what we reify, rightly or

[34] Wenger, 1998, p. 243.

wrongly—where we draw boundaries and which objects we draw [with].

Practice is the source of its own boundary […].[35]

Wenger's scholarship on communities of practice finds one of its most important organizing metaphors in Star's concept of boundary objects. The *real work*[36] of practice is also the *real work* of defining a community's boundaries and creating, identifying, and/or defining boundary objects. Likewise, existing boundary objects guide and shape community identity, practice, and *real work*.

Just as what Wenger calls real work need not take the form of physical toil, boundary objects may be metaphorical, figurative, disciplinary, or linguistic:

Boundary objects are a sort of arrangement *that allow different groups to work together without consensus.*[37]

[35] Wenger, 1998, p. 113.

[36] Wenger, 1998, p. 243.

[37] Star, 2010, p. 602; emphasis mine.

Among other things, ***we create metaphors—bridges between those worlds.*** *Power is about whose metaphor brings worlds together, and holds them there.*[38]

Arrangement: not just structure or order, in keeping with the physical heft of the 'object' metaphor, but also an agreement, a plan. Star knew exactly what she was saying—exactly what she was coaxing from her concept and her readers. She chose a word with a constellation of resonant near-synonyms that can only enrich the metaphor:

Here Star's exploration of boundary objects finds a physical metaphor in *bridges,* while simultaneously describing metaphors *as* bridges—the kind of lyric turn or lyric self-reflexiveness we might see in Zwicky's work, with boundary objects serving as a fulcrum or pivot point.

[38] Star, 1991, p. 52; emphasis mine.

Boundary objects—as signposts for community identity and values—may allow various stakeholders or groups to work together *without consensus*,[39] but Star's point about *power* and metaphor signals hegemonic and coercive potential hiding within 'agreeing to disagree':

The production of boundary objects is one means of satisfying these potentially conflicting sets of concerns. ***Other means include imperialist imposition of representations, coercion, silencing, and fragmentation.***[40]

Star and Griesemer's concern can be extended to boundary objects themselves. Boundary objects may serve as an alternative to *imperialist impositions* or *coercion*, or they themselves may be misused as a vehicle for such exercises of power.

These subtle warnings about real power and its real ramifications in the context of communities of practice recur

[39] Star, 2010, p. 602.

[40] Star & Griesemer, 2015, p. 193.

throughout Wenger's scholarship as well as Star's. This is perhaps the underside of Wenger's *real work*:

> *I have argued that a community is not necessarily peaceful […]. Similarly, a community may be harmonious, but it is nevertheless important to consider issues of negotiability and ownership of meaning and not simply assume a stable, self-sustaining unity.*[41]

These notes of caution even surface in Zwicky's lyric contemplations. Recall from the beginning of this chapter:

> *And there may even be such a thing as lyric community—though the odds against its achievement increase with the addition of each 'self,'* ***and increase dramatically with the presence of aggression or fear.***[42]

Though Wenger and Star do not specifically caution against larger communities of practice, or laud smaller ones, Zwicky makes plain the numbers game of probability, material consequences, and

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[41] Wenger, 1998, p. 212.

[42] Zwicky, 2011, p. 288; emphasis mine.

hegemony that wedges itself up against this metaphor. *Aggression or fear* might cultivate communities of practice that have antisocial, inhumane, or inequitable goals/consequences. Size, scope, or a fragile or diffuse sense of identity might increase the chance of such harmful factors infiltrating communities of practice that have otherwise equitable concerns, objectives, and boundaries.

So, we return now *to income and lost income; power and diminishment; prestige and appropriation.* We return now *to writers, teachers, researchers, owners, rights holders, makers, vendors,* ***copiers***[43] and their diffuse, unevenly defined, and often mercurial communities of practice.

[43] See my opening comments in this chapter.

Copyright Stakeholder Communities and the Fraught Boundary Object of *Fair Dealing*

The horror of the copy is thus but an exaggeration of our autonomy, an understatement of our community.[44]

Marcus Boon celebrates copying, reproduction, and imitation as practices that are integral to humanity, to civilization—stories, medicines, farming practices, advice, art, language—all cumulative across generations of families, scholars, communities—all susceptible (though not inevitably) to improvement or refinement over time. *The horror of the copy*, meanwhile, is a contemporary, Western tangle of preoccupations related to property, rights, individualism, rent-seeking, contracts, mechanical reproduction, self-sufficiency, survival, and capitalism—tacit failures of community.

[44] Boon, 2010, p.16.

> ***Fiat ars—pereat mundus*** *says Fascism, looking […] to war for artistic satisfaction of the different kind of sensory perception brought about by technology. This is clearly the culmination of l'art pour l'art.*[45]

Fiat ars—pereat mundus: "Let art be created, though the world perish." Walter Benjamin warned that violence and oppression are the *culmination of [art for art's sake]*—in other words, art devoid of a functioning community—art as commodity, as an *exaggeration of our autonomy*[46]—art as an aesthetic weapon of isolation, superiority, oppression, dominion.

There are significant parallels between this political impoverishment of art and the economic impoverishment cultivated through regimes of copyright and intellectual property, which interpret virtually all cultural [re]production as commodities or private properties—or assign cultural output to one of various

[45] Benjamin, 1936/2008, p. 38.

[46] Boon, 2010, p. 16.

legitimate or illegitimate tiers of copying. But copying itself does not inherently reduce or diminish art; art flourishes via lyric resonance, discourse, interpretation, dialogue, reflection, reimagination. Rather, diminishment occurs when conceiving of art and culture as either commodity or weapon—as property or lever of hegemonic power.

The aesthetics of fascism are ***directed towards eternity****. It is not just that the spirit of generalization is opposed to the nature of lyric awareness: fascistic aesthetics attempt to make lyric ideals synchronistic.*[47]

With Benjamin and Zwicky's concerns as backing, it would be tempting to equate copyright maximalism with fascism and call it a day. But this would be unfair to anyone reading and to myself—not to mention any marginalized or otherwise less-powerful copyright stakeholders whose legitimate fears and concerns have translated into support for a strict interpretation of copyright infringement and a narrow interpretation of fair dealing.

[47] Zwicky, 2011, p. 287.

Though my professional experience indicates that copyright maximalism is ultimately harmful to artists, students, and the public, I have never been at the blunt end of a bad book contract, nor have I been unable to buy groceries because of inadequate royalty payments. Our copyright system and the capitalist economy it mediates represent a massive reservoir of hegemonic power. Alternatives are not readily apparent; the only implied or suggested alternative is deeper poverty for creators, or a diminished artistic legacy.

Instead, I wish to call attention to the resonance between Zwicky's phrase

directed toward eternity

and Benjamin's

let art be created, though the world perish.

Together, these words pinpoint a significant source of *aggression or fear*[48] that cultivates coerced support for maximalist interpretations of copyright as well as a sense of copyright's inevitability.

Corporate rightsholders that petition governments for longer copyright terms are *directed toward [one vision of] eternity* (eternal licensing fees and other sources of profit) that is disguised as another, less extractive *vision of eternity*: artistic or creative legacy. But the former inevitably impoverishes the latter—makes it into an *exaggeration of our autonomy*[49] by eschewing any possibility of legacy via community. Instead, we are left with profit as legacy—licensing as legacy. Art that is created *though the world perish* is not just/only the fascistic theatre of war and genocide. Through the lens of capitalist exploitation and extraction, the cry might be:

let [intellectual property] be created, though [community] perish.

[48] Zwicky, 2011, p. 288.

[49] Boon, 2010, p.16.

Legal concepts of fair abridgement, fair use, and fair dealing[50] appear in Anglo-American (including Canadian) copyright legislation, ostensibly to soften the body blow of copyright-induced cultural monopolies—to provide a bit of space for people to participate, dialogue, copy, riff, and respond via (in the words of the Copyright Act of Canada):

research, private study, education, parody or satire[51]

criticism or review[52]

news reporting[53]

Fair dealing permissions are variously interpreted as exceptions, loopholes, rights (and so on), depending on the fears and biases of individuals and the stakeholder communities with which they identify. Opinions on the true definition, purpose, and repercussions

[50] See Appendix for more details.

[51] *Copyright Act*, s. 29, 1985.

[52] *Copyright Act,* s. 29.1, 1985.

[53] *Copyright Act*, s. 29.2, 1985.

of fair dealing are as varied as fingerprints throughout the legal profession, academia, education, the publishing industry, creators' groups, and the public.

And these definitions matter to group/community identity. Even in copyright communities of practice that are not consciously or deliberately defined (which most are not), varying definitions may signal community in/out status, political values, economic values, etc. Fair dealing qualifies, by Star's definition, as a boundary object. Fair dealing is, at minimum, *a sort of [legal] arrangement that allows different [copyright stakeholder] groups to work together without consensus.*[54] The concept of fair dealing fulfills the role of boundary object—and the inter- and intra-community arrangements enabled by boundary objects—whether focus is placed on the legal or educational aspects of the metaphor.

[54] Star, 2010, p. 602; emphasis mine.

In open systems, the lack of a sovereign arbiter means that questions of due process must be solved by negotiation, rules and procedures, case precedents, and so on.[55]

This deeper exploration of Star's concept has even more legal resonance: *negotiation, rules and procedures, case precedents.* Any suggestion that the Supreme Court of Canada or the House of Commons could be a *sovereign arbiter* of inter- and intra-community disagreements does not hold; case law and legislation are always subject to lobbying and legal challenges, not least by copyright owners with an eye for control and revenue *directed toward eternity.*[56]

Tina Piper issues an invitation to explore the possibility that an important 2004 Supreme Court of Canada copyright case[57] (best known for its expanded, liberal interpretation of fair dealing) might be

[55] Star, 1988/2010, p. 248.

[56] Zwicky, 2011, p. 287.

[57] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004.

[…] something ***other than*** *the apotheosis of copyright case law, [or] the final stage of evolving precedent […].*[58]

Piper challenges the nigh-holy invincibility that many copyright communities of practice in Canada ascribe to legal decisions that best complement their needs and concerns.[59] I have observed this phenomenon most often in relation to the 2004 *CCH* case and the UK's 1710 *Statute of Anne*.[60]

This dreamed-of legal invincibility or permanence, especially in the case of *CCH*, would allow (for example) educators and institutions to produce copying guidelines and practices that would stand unchallenged for years, possibly decades. But again, neither courts nor legislative bodies nor administrators are truly *sovereign arbiters*. Fittingly, the Supreme Court of Canada, in *CCH*, implores

[58] Piper, 2014, p. 120; emphasis mine.

[59] Shortly after graduating from my Library Technician program, I interviewed for a Copyright Assistant position. I quietly vowed to get "CCH v. LSUC" tattooed on my arm if I happened to be the successful candidate. For better or worse, neither came to pass.

[60] *An act for the encouragement of learning* […], 1710.

anyone invoking fair dealing to actively and thoughtfully analyse their copying practices on an ongoing basis[61]—Supreme Court Justices understanding as well as anyone the *gradient* of legal interpretation and case law—its porousness.

The attachment / identification that some copyright stakeholder communities have to/with certain landmark copyright cases signals how

[…] appealing to formal legal mechanisms is generally a sign of either the breakdown of group norms or of outsider presence within those groups.[62]

Piper's comments, in the context of this project, suggest that selective community identification with / attachment to certain copyright cases might indicate a dearth or loss of useful community norms or expectations. If copyright communities of practice rely overmuch on certain legal structures or frameworks, and less on local, internal, or

[61] *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004, para. 53.

[62] Piper, 2014, p. 121.

cultural sources of norms or practices, this could indicate that these various inter-related communities, despite multi-membership,[63] have lost some or all of that important ability to work directly *together without consensus.*[64] The nuance and contours of various definitions of fair dealing would seem to highlight this risk.

Until recently [the turn of the millennium], fair dealing was not considered more than ***a fairly long-shot defense*** *to allegations of infringement.*[65]

Since I was old enough to buy a drink but still too young to rent a car, fair dealing has been popularly and *liberally* interpreted as a *user's right*[66] by stakeholders such as [many] legal scholars, librarians, and tech journalists; so, reminders or recollections of fair dealing's pre-millennial relative obscurity read like fables. But this prior legal reality of copyright maximalism could reassert itself at any time; what may

[63] Wenger, 1989.

[64] Star, 2010, p. 602; emphasis mine.

[65] Murray & Trosow, 2013, p.71; emphasis mine.

[66] *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004, para. 48.

appear to be a legal *sovereign arbiter* is inevitably time-bound and subject to re-interpretation.

The Supreme Court in a landmark 2004 ruling did reduce the scope of uncertainty and confusion, in a case where the activities of a law society that provided photocopying services for legal research were treated as fair dealing. ***But the concept itself remains so inherently amorphous that expensive lawsuits testing its boundaries are bound to continue.***[67]

Ongoing attempts by organizations such as the Writers' Union of Canada[68] and Access Copyright[69] to return to a system of tighter control of fair dealing and fewer legal exceptions to copyright infringement point to an almost mythically expansive underlying gulf in understanding: there is virtually no agreement between [and only a moderate amount *among*] what we might loosely call "maximalist" and

[67] Vaver, 2011, p. 236; emphasis mine.

[68] The Writers' Union of Canada's website: https://www.writersunion.ca/

[69] Access Copyright's website: https://www.accesscopyright.ca/

"reform" stakeholders on the philosophical or practical boundaries of fair dealing, how it should be interpreted to best serve society, or whether that is even possible or desirable.

The demarcation between various possible uses is ***beautifully graded and hard to define.***[70]

Jonathan Lethem describes here the paradox of legislating cultural activity—copying, storytelling, discourse, resonance. What appears from a distance (or to a casual onlooker) to be a line of *demarcation* (boundary, border) may, on closer inspection, be an *amorphous*[71] *grad[ient]* or a shadow. What at first seems to be a clear-cut example of either fair dealing or copyright infringement may reveal itself to be the opposite, or neither. A lower court's decision may be overruled by a higher court; either court's conclusions may reappear later as precedent; and various creators or creative communities may

[70] Lethem, 2007, p. 64; emphasis mine.

[71] Vaver, 2011, p. 236.

continue, unphased or unaware, with entirely different norms around copying—interpreting similar boundary objects to have radically different boundaries.

*One should first screen out what cannot be a substantial part. **'Part' means portion, not 'particle.'** A copyright owner cannot therefore control every particle of her work […].*[72]

David Vaver refers here to the term *substantial part,*[73] used in the Copyright Act of Canada (*the sole right to produce or reproduce the work or any substantial part thereof [...]*) to distinguish between instances of copying that may be subject to one or more types of analysis (i.e., fair dealing analysis), and copying that is too insignificant or insubstantial to make a legal fuss about.

Among copyright stakeholder communities in Canada, *substantial part* has an inverse relationship with fair dealing. Copyright

[72] Vaver, 2011, p. 182; emphasis mine.

[73] *Copyright Act*, 1985, s. 3.1.

stakeholders who advocate for a high *substantial-part*-threshold, such as Vaver, above, tend to support more expansive, liberal, lower-threshold definitions of fair dealing—and critique the opposite:

Every business dreams of ways to put off competitors and copycats. Everyone would like the life of a rentier who gets a cut of what others make without working for it.[74]

Substantial part and *fair dealing* may be understood as two inter-related boundary objects that resonate with and co-define each other while deepening copyright stakeholder communities' understanding of their [nonetheless *beautifully graded and hard to define*][75] community identities: only when copying is substantial or consequential can it *fairly* be evaluated for fairness or legality; to subject incidental, insubstantial copying or reproduction to a legal test for which it does not qualify would be inherently *unfair*.

[74] Vaver, 2011, p. 2.

[75] Lethem, 2007, p. 64.

The merely **technical use** *of the material form of a work as a search tool is certainly lawful. But it is not fair use. Rather, it is a* **nonuse** *of the work. Therefore, it is not subject to fair use analysis.*[76]

Drassinower, who supports a user rights- and author rights-based understanding of fair dealing (and its American cousin *fair use*), brings a similar critical approach to another key term in copyright law: *use* itself. If *substantial* copying is a prerequisite for fair dealing analysis, then *use* or *nonuse* may be considered an even-more-foundational prerequisite for analysis of substantiality.

Nonuse might be understood as the infinite, incidental, instrumental interactions we have with copyrighted cultural materials on a daily basis, simply by casually participating in that same culture:

whistling Cyndi Lauper;

doomscrolling through Twitter;

doodling the old Xerox logo, the better one;

[76] Drassinower, 2015, p. 13; emphasis mine.

quoting the first Ninja Turtles movie;

taking a selfie by a bus stop

because there's a hideous ad for Colgate

on the side.

A small number of unintentionally self-caricaturing copyright maximalists indeed argue that such ephemeral interactions are not only *use*, but also *substantial*, *unfair*, infringing, and subject to compensation, and should remain so in perpetuity:

Unfortunately, some courts still work on the 'rough practical test' frequently trotted out by claimants' lawyers, that 'what is worth copying is prima facie worth protecting.' This nonsense, taken literally, begs all questions of copyrightability, infringement, and substantiality.[77]

[77] Vaver, 2011, p. 189.

The identity of such stakeholders—as absolute (if misguided) defenders of private property and natural law[78]—is, again, directed toward *eternity*—though feasibility and enforceability *perish*.

But even without going to those extremes, it is clear that various understandings of *use* or *nonuse* will, like *substantiality*, affect stakeholders' individual and community identity, as well as their understanding of key boundary objects such as fair dealing.

The list is categorical: that is, before a user can rely on the fair dealing doctrine, that use must fall within one of those eight enumerated categories set out in the Act. This requirement runs counter to popular belief. ***People often invoke fair dealing in conversation by noting that they have used only a very little of the source*** *[…].*[79]

Laura J. Murray's observation about the casual misuse or misunderstanding of fair dealing points to one of the more important

[78] Proponents of longer copyright terms and a private property /natural law interpretation of copyright often defer to John Locke (St. Clair, 2004, p. 90). Ironically, Locke "understood that intellectual property was essentially different and argued for a limited time period" (p. 92).

[79] Murray & Trosow, 2013, p. 74.

consequences of rhetorically manipulating the concepts of use, substantiality, and fair dealing in a way that fails to account for everyday, ephemeral interactions with culture. The capitalist context [that mediates and monetizes so much Western popular culture] benefits from the obscurity of *nonuse* and *insubstantiality*—concepts that would shield innocuous human activities and expressions from legal interrogation.

In their absence, fair dealing takes on an outsized role in the popular imagination that may ultimately dilute its legal function and subject stakeholders such as students and teachers to unnecessary legal risks. In other words, if *everything* is fair dealing, *nothing* is fair dealing; if copyright stakeholder communities of practice rely on this boundary object to the exclusion of all others—if their identity is determined so narrowly—they may be particularly vulnerable to unscrupulous or predatory copyright claims or sudden changes in the legal landscape.

Sam Popowich extends this warning to include fair dealing as a whole / on principle:

Fair dealing provisions are, to my mind, part of the ***attempt to manage the exchange value of intellectual commodities****, just as copyright does. They are a recognition on the part of the state that the free market principle—which would prevent all uncompensated copying due to the foundational legal framework of private property—would have social (educational, innovative) consequences that requires the right to copy to be protected. In this particular instance,* ***the state is mediating the requirements of two constituencies of the capitalist economy*** *[…]. So fair dealing does not, in fact, balance the "rights" of users and creators in some kind of altruistic sense; it does so only to* ***further the development of the capitalist economy through innovation and market expansion****. The use of the term* ***"fair" here is simply propaganda,*** *since it's based on inherently unfair relations of production.*[80]

[80] Popowich, 2017.

Indeed, if capitalist hegemony is as *directed toward eternity*[81] as I claim—if intellectual property truly is among capitalism's most important vehicles—then fair dealing (however practical it is for mediating many scholarly and artistic uses of cultural materials) must be interrogated as integral—not as an antidote—to our acquisitive, extractive, wealth-consolidating economic system.

Modern copyright law developed in tandem with global capitalism, and the UK's high monopoly period of copyright maximalism developed *after* the supposed high-water mark of the Statute of Anne.[82] British copyright law lacked explicit fair dealing provisions for 200 years, but the concept is not much younger than Confederation, appearing in Canadian law shortly after the First World War.

[81] Zwicky, 2011, p. 287.

[82] Roughly 1731-1773. St. Clair, 2004, p. 485-486.

The Canadian apotheosis of fair dealing in 2004 didn't coincide with or reverberate from a move toward equity within Canadian society. Rather, the Canada of 2004 was sending soldiers into Afghanistan; paying its debts on the backs of gutted social programs and reduced funding for public education; and watching the electoral rise of neoconservatism and a 'unified right.' *CCH*'s liberal interpretation of fair dealing was, at best, a *mediating* pressure release valve in a moment of austerity and crisis. This release provided copyright stakeholder communities with a frenetic, crackling, *fraught* boundary object—one ripe for interpretation and reclamation—in the form of reinvigorated fair dealing.

Coda: Lyrical-Legal Resonance on the Border

[W]hat ordinary people would regard as trivial [copying] is often inflated by IP owners into a big deal. And as a class, they are a litigious lot.[84]

Powerful rightsholders and adjacent stakeholders continue to resist the Supreme Court of Canada's support for liberal interpretations of fair dealing, as well as the court's understanding of fair dealing as a user's right. The Supreme Court ruled on five such landmark cases in 2012 alone.[83] Since my research project began in 2016, higher courts in Canada (including the Supreme Court) have provided a total of *three* rulings related to a single dispute between Access Copyright and York University. The first and third of these will be the focus of this final chapter.

Indeed, the copying at the centre of many of these cases is the sort of *trivial* thing that, for better or worse, most people never think twice

[83] Geist, 2013.

[84] Vaver, 2011, p. 686.

about—analogue and digital reproduction processes that hum away in the background of Canadian society:

> Public school teachers' faces lit from below as they photocopy articles and stories for their students after rummaging through classroom shelves and visiting the school library.
>
> > Indecisive mid-aughts music fans previewing mp3s before buying the latest trophy for their vinyl collection or their iPod.
>
> Professors posting PDFs of class readings to virtual classrooms, where overworked undergrads are hopefully a bit more likely to actually see them, read them, even show up for class ready to talk.

Time and again, copyright stakeholders have approached courts seeking definite answers to questions of practice—to questions of whose working definition of fair dealing is the fairest of all—whose border is most legitimate—and for whom, and why.

The ***seemingly arbitrary lines*** *that courts and the law must draw, in copyright as elsewhere, are not dictated or even determined by the simple application of legal doctrine to specific circumstances.* ***There is no legal formula*** *that can produce a definitively "right" answer to the question of how much of a plaintiff's work constitutes protectable "original" "expression," or how "substantially similar" a defendant's work must be in order to "reproduce" it.*[85]

Time and again (yes, again), the confidently erected border walls of commercial interests and lower courts have given way to the Supreme Court's relative deference to nuance and resonance—to a quasi-lyrical process of fair dealing analysis that is, by necessity, unique to each situation—a vessel that veers in a particular direction but cannot (or may not) come to shore—shore, of course, being a border of another kind.

Just don't imagine there are purposes in which politics play no role.[86]

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[85] Craig, 2019, p. 311; emphasis mine.

[86] Zwicky, 2003, p. 107.

This warning of Zwicky's serves as a reminder that lyrical nuance, resonance, or sophistication should not be interpreted as an exemption from power structures or biases. Courts, recall, are not truly *sovereign arbiters*;[87] nor can they be arbiters of unassailable objectivity; courts may be apolitical in a literal sense, but justices are ultimately subject to the same power structures as the people they serve.

Liberal, lyrical case-by-case interpretations of fair dealing may be ideologically appropriate to a western liberal democracy, but so too is an emphasis on individualism over community. A court's emphasis on the individual autonomy and decision-making of would-be defendants or would-be fair dealers may obscure some aspects of coercive power relations within society even as it critiques or brings to light other aspects of the same.

[87] Star, 1988/2010, p. 248.

Postsecondary educational institutions in Canada may be said to inhabit the middle ground of power relations and cultural capital: not as powerful as corporate rightsholders, courts, or governments; nor as vulnerable as the individual students, researchers, or educators who comprise their scholarly communities.

Since the mid-aughts,[88] universities and colleges have responded to the ongoing litigiousness of corporate rightsholders and the Supreme Court's emphasis on individualized fair dealing analysis with in-house attempts at pragmatic objectivity that might satisfy courts, copyright owners, educators, and students. These attempts generally take the form of institutional fair dealing guidelines.

Several years ago, the Canadian Copyright Licensing Agency (known as Access Copyright) claimed that York University violated Access's tariff scheme by relying on its institutional fair dealing

[88] AUCC (now Universities Canada) first developed model fair dealing guidelines after the 2004 *CCH* decision, and substantially revised them in 2012, following several additional Supreme Court decisions and an update to the Copyright Act. See: Universities Canada, 2012. See also: *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 175.

guidelines for much of its educational copying. In 2017, a Federal Court judge agreed, adding that York's guidelines were arbitrary in nature. The Supreme Court of Canada disagreed with the Federal Court, as well as the Federal Court of Appeal, in 2021.

That disagreement—a lyrically rich source of disputed boundaries, definitions, practices, and community identities—forms the remainder of this chapter. My lyric analysis will move from a 2-column to 3-column structure, in which

quotations from *Canadian Copyright Licensing Agency v. York University* (2017) will be on the left;

corresponding quotations from the 2021 Supreme Court case *York University v. Canadian Copyright Licensing Agency* to the right;

and my interjections awkwardly asserting themselves in the centre:

rifling referee, least sovereign of arbiters, unqualified judge of judges.

Though it is perhaps most commonly referred to as an *exception* to copyright infringement, definitions or descriptions of fair

dealing in the 2017 and 2021 York cases range from cool derision to *apotheosis*.[89] It is an:

exception[90]

right[91]

exception[92]

user's right[93]

substantive users' right[94]

statutory defence[95]

modern fair dealing doctrine[96]

statutory exception[97]

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[89] Piper, 2014, p. 120.

[90] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, para. 95.

[91] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, introduction.

[92] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 13.

[93] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, introduction.

[94] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, para. 85.

[95] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 13.

[96] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, para. 90.

[97] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 188.

fair dealing is no exception[98]

exception[99]

one of the tools[100]

public interest[101]

defence[102]

user's right[103]

user's right[104]

user's right[105]

The variety of language used by the Supreme Court (on the right) seems to deliberately avoid the more conventional terminology of the earlier Federal Court case (on the left), only once referring to fair

[98] *York University v. Canadian Copyright Licensing Agency (Access Copyright*), 2021 para. 90.

[99] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017 para. 204.

[100] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021 para. 90.

[101] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021 para. 94.

[102] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017 para. 220.

[103] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021 para. 94.

[104] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021 para. 101.

[105] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021 para. 104.

dealing as an *exception* and otherwise lauding the concept (and the Supreme Court itself, by extension) as contemporary, progressive, imperative.

The Supreme Court's working thesaurus is especially notable considering it dismissed—and only provided comments on—York's request for appeal regarding the fairness of its guidelines. The Supreme Court's comments show a richer and more nuanced engagement with the scope of fair dealing than does the Federal Court's actual judgment on the same.

And then there is the matter of fair dealing and quotation marks in the 2017 Federal Court judgement. Intended simply as a stylistic choice, perhaps, but the frequency with which quotation marks are placed around "fair dealing" gives this punctuation the ability to speak without speaking. Employed as "scare quotes" rather than proper quotations, these marks visually seed doubt—cordoning off or restraining the legitimacy of a supercentenarian legal concept that is key to the case at hand:

including statutory defences such as "fair dealing"[106]

relevant to the analysis of the "fair dealing" exception[107]

if copying was done within its definition of "fair dealing"[108]

thereby effectively reading "fair dealing" out of s.29[109]

not persuaded to read the "fairness" requirements differently[110]

it could have easily written "fair dealing" out of s.29[111]

I can offer no comparison here with the 2021 Supreme Court case, which only uses quotation marks when directly quoting other cases or legal expertise.

The two decisions also differ wildly in their view of institutional fair dealing guidelines in general, and York's in particular.

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[106] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 13.

[107] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 106.

[108] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 174.

[109] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 186.

[110] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 355.

[111] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 355.

The Federal Court decision leaves no doubt as to its opinion on the guidelines:

not fair in either their terms or their application[112]

tends toward unfairness[113]

equally as unfair[114]

further point to the unfairness[115]

underscores the unfairness[116]

the unfairness of the Guidelines is exacerbated[117]

tends towards unfairness[118]

tend to be unfair[119]

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[112] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 14.

[113] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 18.

[114] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 22.

[115] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 27.

[116] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 28.

[117] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 117.

[118] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 266.

[119] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 276.

this points to unfairness[120]

the York Fair Dealing Guidelines are not fair[121]

> In contrast, the Supreme Court treads lightly on questions related to the guidelines, indicating that Access Copyright has no standing to bring an infringement suit (rather than a tariff complaint) against York University. As a result,
>
> > *the [previous] analysis [from other courts] is inevitably anchored in* ***aggregate findings and general assumptions*** *without a connection to specific instances of works being copied. All of this makes consideration of the Guidelines in this case inappropriate.*[122]
>
> Rather than close analysis, the Supreme Court provides a general observation about the value of fair dealing guidelines to postsecondary education:

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[120] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 354.

[121] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 356.

[122] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2021, para. 83.

> *There is no doubt, as York argued, that guidelines are important to an educational institution's ability to actualize fair dealing for its students.*[123]

This statement surprised me, given the Supreme Court's general emphasis, beginning in 2004, on conducting a unique, iterative fair dealing analysis in each situation—one that requires an understanding of both the *Copyright Act* and case law.[124] Guidelines certainly do not preclude case-by-case analysis—they are just/only guidelines, after all—but may make it less likely for this analysis to occur. The continued litigiousness of entities such as Access Copyright appears to have led to a slight shift in approach—a pragmatic reality check. Without some degree of certainty—some guidance—many stakeholders (especially those without specialized knowledge of copyright) could be left adrift, without a clear sense of their relationship to fair dealing—left without borders to defend:

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[123] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, para. 85,

[124] *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004, para. 53.

Institutionalized guidelines can help overcome this impediment.[125]

In addition to declaring them unfair *ad nauseum*, the Federal Court attacked York's guidelines from all sides, simultaneously critiquing them as arbitrarily quantitative and deterministic, but also overly subjective and unmoored. On the one hand:

the Guidelines make an ***arbitrary*** *distinction*[126]

put copyright compliance on ***autopilot***[127]

while ***arbitrary or bright line thresholds*** *may be convenient, convenience of the user is not a factor*[128]

But on the other hand:

York ***failed to adduce any evidence*** *with respect to the* ***qualitative importance*** *of the parts copied.*[129]

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[125] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, para. 85.

[126] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 21; emphasis mine.

[127] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 28; emphasis mine.

[128] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 309; emphasis mine.

[129] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017 para. 316; emphasis mine.

shows **no external basis** *for the thresholds*[130]

a better system of protection and **more certain criteria** *(such as in a licence or*

in a tariff) would assist[131]

Most university fair dealing guidelines in Canada are based on AUCC (now Universities Canada) guidelines first developed in the mid-aughts. The Federal Court even acknowledges this:

By way of background, it was the AUCC who first developed a fair dealing policy

in 2004 following the decision in CCH[132]

These older/original fair dealing guidelines drew from case law, stakeholder feedback, common practice, even borrowing (to the best of my recollection, as an undergraduate student at the time) some language from older CanCopy (now Access Copyright) photocopying rules. The Federal Court likewise acknowledges that

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[130] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 307; emphasis mine.

[131] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 187; emphasis mine.

[132] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 175.

AUCC engaged external legal counsel to develop the revised policy and instructed counsel to consult the university community (meaning university libraries, vice-presidents, and academics).[133]

The Federal Court also stresses the importance of established community practices in determining institutional guidelines:

It may be relevant to consider the custom or practice in the industry[134]

Yet the court ultimately questions the integrity of York and Universities Canada / AUCC for doing exactly this:

No explanation was ever given for this one-sided consultation process.[135]

Vaver's 2011 prediction that *lawsuits testing [fair dealing's] boundaries are bound to continue*[136] has proven true in the decade since. But in this particular instance, the legal action may be less due to fair dealing's

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[133] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 177.

[134] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 276.

[135] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 177.

[136] Vaver, 2011, p. 236.

inherently amorphous[137] nature than the result of an intentional injection of doubt and amorphousness—the deliberate destruction of inconvenient but well-established boundaries—on part of Access Copyright and the Federal Court.

While the Federal Court appears to be of the opinion that industry bodies such as Access Copyright should be arbiters of fairness—responsible for defining its own boundaries as well as the functional boundaries of other copyright stakeholder communities, the Supreme Court clearly sees its own jurisprudence as the preferred source of that type of guidance—trickling down / diffusing, in kind, to individual creators and users—neither legally nor practically mediated by corporate or industrial players. While the Federal Court bemoans York University's

new regime of Fair Dealing Guidelines[138]

[137] Vaver, 2011, p.236.

[138] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017, para. 75.

and praises the increased certainty and objectivity available through licensing and tariff regimes,[139] the Supreme Court lauds its own

> *modern fair dealing doctrine [which] reflects its more general [move from author-centric perspectives]*[140]

and warns that the clear-cut certainty offered by tariffs and blanket licenses (rather than Supreme Court jurisprudence and guidelines inspired by it—as most universities' guidelines are) could prove to be a double-edged sword. If a university is subject to a mandatory tariff and

> *attempts to clear its copyright obligations using alternative licences and fair dealing, a single infringing use—one that was not authorized by fair dealing or independently licensed—could thereby become a tripwire making the university liable to pay the full royalties in a tariff.*[141]

The Supreme Court sees itself as being

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[139] *Canadian Copyright Licensing Agency (Access Copyright) v. York University,* 2017, para. 187.

[140] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, para. 90.

[141] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021 para. 72.

> *"at the vanguard in interpreting copyright law as a balance between copyright rights and user rights", and its understanding of fair dealing is no exception*[142]

and reminds Access Copyright, the Federal Court, and the Federal Court of Appeal that

> *the public benefits of our system of copyright are much more than "a fortunate by-product of private entitlement."*[143]

Indeed, *private entitlement* may be an accurate (though uncomplimentary) description of Access Copyright's understanding of its role in determining and asserting the contours and boundaries of fair dealing within Canadian society and among other stakeholder communities. Through the types of legal complaints it launches, the organization makes clear its belief that it represents the rightful arbiters of what is legitimate or illegitimate copying—that is, the

[142] Tawfik, 2013, p. 195, quoted in: *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, para. 90.

[143] Craig, 2002, p. 15, quoted in: *SOCAN v. Bell Canada*, 2012, para. 9; subsequently quoted in: *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, para. 91.

writers and other creators who may be said to produce intellectual property and intellectual capital.

The Supreme Court of Canada, meanwhile, through the judgements and comments it produces, argues not only for a liberal, diffuse, individualized interpretation of fair dealing, but also for the court itself to be seen as the guardian of this interpretation—to be the last line of defence in an ongoing border skirmish—an ongoing disagreement at the boundaries of fair dealing and infringement.

The unacknowledged terrain underfoot, of course, is the capitalist context of Canadian society and its modes of production—equally important to a) Access Copyright's understanding of itself as the proper representative of the producers of intellectual property, and thereby the source of the most correct and accurate definition of fair dealing; and b) the Supreme Court's understanding of itself as both definer and defender of liberal fair dealing. While this diffuse, almost lyrical approach to fair dealing imbues other stakeholder communities with agency, it leaves individuals and communities of

practice vulnerable to the limits of their own legal knowledge, as well as vulnerable to more powerful stakeholders who have a vested interest in controlling the public's interactions with copyrighted cultural materials.

Conclusion

1. Ink space: Where this landed

I hope I have shown that fair dealing is a fraught and over-wrought boundary object for various legal, educational, creative, and commercial communities of practice within Canada. Fair dealing is a legal tool that relies on liberal and neo-liberal subjectivity in order to function as a mediator of divergent interests within the Canadian economy and Canadian society. Fair dealing analysis is an iterative, resonant quasi-lyrical process that misuses lyricism by individualizing and diffusing both the benefits and the risks (i.e., infringement) of producing, using and reproducing copyrighted materials. In other words, fair dealing hijacks lyrical resonance in order to sustain itself as a viable concept. It claims the interpretive labour of copiers/users as its own, without a corresponding promise of safety or protection—only a suggestion of the possibility. This diffuse process allows fair dealing to be variously defined—to serve as a boundary object for various stakeholders—without a permanent rhetorical or internal commitment to any particular practice or iteration.

Fair dealing may be practically useful, yet it is politically and ideologically compromised. While some stakeholders and their copyright communities of practice see fair dealing as a potential source of safety, security, protection, or defense—recall that it is often described as a defense to accusations of infringement—other such communities may see it as a tool-turned-weapon and a threat to their livelihood. Due to its amorphousness—its overdetermined yet poorly defined boundaries and borders—it accomplishes neither of these functions with any notable efficacy. Fair dealing falls short of its perceived boundary object role/definition for copyright reformers; maximalists fearful or hawkish; creators emerging or established; students and educators; and so on. Fair dealing's limited capacity to serve

any of these communities particularly well—to leave them wanting for a boundary object that thoroughly and accurately reflects their values and concerns—is, if nothing else, something that all such stakeholders have in common.

In other words, fair dealing will never be a *de facto* social program or a component of our social safety net. A legal tool this amorphous and malleable—this diaphanous—is not built for that sort of pro-social, politically consequential heavy lifting. Yet this is what artists and creators often seek from copyright law and why they often seek to constrain fair dealing by cooperating with corporate interests. There is virtually no social safety net for the creative economy; creators are simply making use of the tools on offer, including industry groups seeking to increase royalty payments.

In a matter of speaking, a social safety net is also what students and educators seek from fair dealing. They seek assurance that they (or their students) will be able to afford their education, in terms of both money and time: time to complete readings between class; time to keep or pick up a part-time job; enough hours at work to pay their tuition. Institutional copying (i.e., course packs, online reading lists) take the edge off those needs and help to make school manageable—to keep it within arm's reach in an age of stagnant wages and austerity politics. Fair dealing is over-determined and over-wrought precisely *because* of the capitalist context to which it owes its existence—the context which it mediates, and which it cannot repair or ameliorate.

2. White space: Where this leads

This project only scratches the surface of my interest in copyright law and the methodological potential of lyric analysis. With infinite time and stamina, perhaps I could have explored the rhetorical correspondence between public domain and fair dealing; the subtle but

important distinctions between fair dealing and fair use; how public intellectuals self-sort into particular communities of practice based on their online public reactions to new copyright case law; the consequences of constrained or liberalized fair dealing on people with disabilities; or how Western societies might develop a dynamic ecology of copying and cultural stewardship that transcends jurisprudence and guidelines. I sincerely hope that a future reader will take one of these ideas and run with it.

These borders are open and unguarded.

Appendix: Copyright & Fair Dealing Timeline

1710 The Statute of Anne, generally regarded as the first modern copyright law, appears in England. It does not include any fair use or fair dealing exceptions. "The 1710 Act, despite its claims to encourage learning, was essentially the booksellers' law."[144]

1731-1773 Considered the "High Monopoly Period," when English publishers and booksellers enforced perpetual copyright, despite passage of the Statute of Anne in 1710.[145]

1741 A British copyright case results in the doctrine of "fair abridgement," a precursor to fair use and fair dealing.

1774 Legal questions arise in the UK as to whether "the monopoly of the London booksellers was not in the public interest, and […] maintained the price of books at an artificially high level,"[146] leading to "the abolition of perpetual copyright."[147]

1860s The term "intellectual property" emerges in Germany and is later adopted by the UIBPIP (now known as WIPO).[148]

1868 In the wake of Confederation, Canada adopts British-style copyright legislation.[149]

1880s First appearance of the term "public domain."[150]

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[144] Feather, 2006, p. 67.

[145] St. Clair, 2004, p. 485-486.

[146] Feather, 2006, p. 67.

[147] St. Clair, 2004, p. 246.

[148] Craig, 2019, p. 8.

[149] Vaver, 2011, p. 61.

[150] Craig, 2019, p. 17.

1911 First appearance of "fair dealing" in British copyright law.[151]

1921 British concept of "fair dealing" appears in Canadian copyright legislation.[152] The 1921 Act is considered "Canada's first domestic copyright legislation."[153]

1980s Legal experts begin to interpret the concept of the "public domain" as the opposite or inverse of copyright.[154]

2004 The Supreme Court of Canada rules on *CCH Canadian Ltd. v. Law Society of Upper Canada*, urging a "liberal" interpretation of fair dealing, framing it as a "user's right," and providing a multi-factor test for fair dealing analysis.[155]

2010 The Copyright Board rules on a new Access Copyright interim tariff for Canadian post-secondary institutions that would increase per-student costs for signatories by orders of magnitude.[156]

2010-2011 Canadian universities begin cancelling their licensing arrangements with Access Copyright *en masse*.[157]

2012 The Copyright Modernization Act expands fair dealing in Canada to include education, parody, and satire.

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[151] *Copyright Act*, 1911.

[152] Vaver, 2011, pp. 55-56.

[153] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021, para. 48.

[154] Craig, 2019, p.17.

[155] Murray & Trosow, 2013.

[156] AUCC, 2011.

[157] Cavan, 2011.

2012 Weeks later, the Supreme Court of Canada rules on five copyright cases—the "pentalogy" —and reaffirms their commitment to a "liberal" reading of fair dealing.[158]

2017 An Ontario Federal Court ruling pertaining to copyright tariffs finds in favour of Access Copyright and questions the legality of York University's copyright tracking system.[159]

2020 The Federal Court of Appeal rules in favor of York University re: mandatory tariffs.[160]

2021 The Supreme Court of Canada dismisses any further appeals re: York v. Access and again reaffirms their commitment to a liberal interpretation of fair dealing.[161]

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[158] Geist, 2013.

[159] *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017.

[160] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* [FCA] 2020.

[161] *York University v. Canadian Copyright Licensing Agency (Access Copyright),* 2021.

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