FAIR DEALING: CANADA HOLDS TO ITS POSITION

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INTRODUCTION

“How did this happen?” This question may indeed be the reaction to the Supreme Court of Canada decisions on fair dealing that were rendered last July 2012. The first one, SOCAN v. Bell Canada,1 decided that listening to excerpts of musical works before purchasing the entire works amounted to a fair dealing for the purpose of research. In the second one, Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright),2 the Court found that copies of works that were made at teachers’ initiative for students as complementary materials constituted acts of fair dealing for the purpose of private study. In both cases, the Court made ample use of the notion of users’ rights, a notion that it had identified in a 2004 decision, CCH Canadian, Ltd. v. Law Society of Upper Canada,3 in order to come to its conclusions.

For any observer of the copyright scene worldwide, a decision by the Supreme Court of any country is usually perceived as an important landmark. In today’s world, when this decision touches upon the interpretation of exceptions to copyright law, the event is all the more newsworthy. Here, we have not only one, but two decisions that pertain to the concept of fair dealing, a concept that is pretty much as central to the overall scheme of copyright exceptions in Canadian law as its cousin fair use is in the U.S., but that has not had the same visibility as its U.S. counterpart. That these two decisions were rendered on the same day as three other copyright decisions by the Supreme Court makes them all the more conspicuous. The copyright pentalogy or quintet, as it is increasingly known, provides judicial confirmation of an approach to copyright that also pervades the 2012 amendments to the Canadian Copyright Act.4

The purpose of this article is not to analyze the decisions through each step of their reasoning. Rather, I would like to take the opportunity that the passage of time has now allowed to reflect on the context in which these decisions were made. Given that the Supreme Court did indeed grant leave to appeal in these decisions, one may safely assume that it did

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so because it wanted to take the opportunity to make its views known on the subject of fair dealing. The Court certainly had good reasons for intervening on this issue. The difficulties come with the way it has handled some of the elements that lurk in the background of its decisions at that particular point in time in the history of Canadian copyright law.

I. RATIONALES FOR INTERVENTION

Many grids of analysis can be used to read the two Supreme Court decisions on fair dealing. Since there have been few decisions on exceptions in Canadian copyright law, these latest ones can indeed be welcomed for their guidance in the interpretation of exceptions in general within the scheme of the entire Act. Since they come fairly soon after the CCH Canadian decision, which also involved the concept of fair dealing, their refinement on the foundations that were laid in that decision can thus be seen as merely bringing grist to the mill of this family of exceptions. However, it is also possible, though less likely, that their impact could be confined to that particular exception in the Copyright Act. The fact that these two decisions involve activities that are particularly relevant nowadays — the use of the Internet as a commercial medium, on the one hand, and education in general, on the other hand — nevertheless increases the bearing of their reasoning. All of these elements can serve as starting points for further reflections on their impact. However, I would prefer to focus here on some background considerations that may have influenced the Court’s intervention in the working of the Copyright Act to the extent that it has so achieved.

The first motivation of a general nature for the Supreme Court to intervene in these cases may have to do with the absence of an identifiable philosophical orientation in the Copyright Act. This phenomenon, which has not gone unnoticed by Canadian doctrine,5 is rooted in both textual and historical considerations.

It is well known that any copyright legislation is at the crossroads of many interests. Yet, nothing in the Canadian Act voices these interests in a clear manner. To wit, when one looks at another statute that is also the terrain of conflicting interests, i.e. the Competition Act,6 one finds in an opening section a statement as to the competing goals that the Act is designed to protect.7 No similar exercise has been achieved in the Copyright Act:

5 Sunny Handa, Copyright Law in Canada (2002) (especially at chapter 4).
6 R.S.C., 1985, c. C-34.
7 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized
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Act, and it is unlikely that such an action could even be attempted in the context of Canadian copyright law, given the heightened sensitivities that exist in that world; but it would one day be interesting to speculate as to what such goals could be if an entirely new statute were to include a similar provision. Since such an event is unlikely to happen, it is no wonder that the Supreme Court feels a certain duty to fill that void. An introductory section that refers to policy considerations may not be the norm among Canadian intellectual property statutes, but the recent amending legislation to the Copyright Act contained some preliminary elements that can be considered forerunners of this kind of legislative drafting. A move by the Federal Parliament in that direction could be all the more warranted by the fact that, unlike the situation in U.S. law, the constitutional text that confers power to the Federal Parliament over copyright is devoid of legitimising language that can provide guiding principles both for Parliament and the courts. In hard cases or in situations where new life must be breathed into the Act, such language can only assist in developing new approaches.

The absence of policy statements, either through constitutional or statutory language, is a fairly easy context to identify. Less visible, though perhaps equally determinative, is the lack of some historical mystique surrounding the legislation. One has in mind here the kind of storytelling that has always been well kept alive by French doctrine about the beginnings and the development of its legislation since the French Revolution. A constant object of scholarly research, the history of the French authors’ rights legislation and movement has given to the French legislator and to the interpreters of their texts a well-documented rallying point for the understanding of the evolution of the law. Whether they agree or disagree with the official take on the copyright legislation, there is a reference point for all involved. One is hard pressed to find a similar reference point in Canadian copyright law. As a child of British colonial copyright legislation, the roots of the current Canadian text are to be found in the 1911 British Copyright Act. The social and political movements surrounding enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Id. s.1.1.

8 Before the first section of the act, there are eight paragraphs that start with “whereas”: An act to amend the Copyright Act, (2012) 60-61 Eliz. II, c.20 (Copyright Modernisation Act).

9 A list would be too long to provide here, but a window onto this world can be found in Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 147 Rev. Int’l Droit d’auteur [R.I.D.A.] 125 (1991).

10 Copyright Act, 1911, 1 & 2 Geo. V, c. 46 (Eng.).
both the British and the Canadian adoption of these texts have certainly not been exploited to the same extent as the beginnings of the French authors’ rights system.\textsuperscript{11} And the special mixture of nineteenth-century British and Canadian copyright developments that predated it has not been exalted either as a foundation for the identity of contemporary Canadian law.\textsuperscript{12} Indeed, if one were to look for an easily identifiable institutional reference point in English copyright philosophy, one might have to go back to the very title of the Statute of Anne of 1710.\textsuperscript{13} The time frame, the geographical distance, and the colonial context may all contribute, however, to foster a sense that the various narratives that are increasingly being identified to explain the development of copyright law in the mother country since those days\textsuperscript{14} are not as relevant here, if at all, as in England. Consequently, the theoretical void that thus exists can be filled by those who have the power to do so.

The Supreme Court of Canada has had few occasions to step into the arena in order to provide the guidelines that the texts have failed to give. Before its decision in 2002 in Théberge,\textsuperscript{15} the decision that can be perceived as the turning point in this matter, its last decision had been in 1990.\textsuperscript{16} After 2002, the pace accelerated sharply, but not all decisions lent themselves to philosophical musings of the kind that can be seen today. In Théberge, reproductions of paintings were at the heart of a conflict between their author and a third party who wanted to use these copies commercially. Two years later, in \textit{CCH Canadian},\textsuperscript{17} a fair dealing exception stood between copyright owners and users who wanted to make use of the works involved. In 2012, fair dealing lies again at the root of two decisions. Of all exceptions in the Copyright Act, fair dealing probably offers the best ground on which to build a doctrine that incorporates the rights and

\textsuperscript{11} For some recent texts on these issues, see Uma Suthersanen, \textit{The First Global Copyright Act} and Ysolde Gendreau, \textit{No Copyright Law is an Island, both in A SHIFTING EMPIRE: 100 YEARS OF THE COPYRIGHT ACT 1911, at 1, 226 (Uma Suthersanen & Ysolde Gendreau eds., 2013)}.

\textsuperscript{12} The beginnings of this kind of research can be found in Pierre-Emmanuel Moyse, \textit{Canadian Colonial Copyright: the Colonies Strike Back, in AN EMERGING INTELLECTUAL PROPERTY PARADIGM — PERSPECTIVES FROM CANADA 107 (Ysolde Gendreau ed., 2008); SARA BANNERMAN, THE STRUGGLE FOR CANADIAN COPYRIGHT: IMPERIALISM TO INTERNATIONALISM (2013)}.

\textsuperscript{13} An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned (the Statute of Anne), 1710, 8 Anne c. 19 (Eng.).

\textsuperscript{14} For a framework for these discussions, see BRAD SHERMAN & LIONEL BENTLEY, \textit{THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW} (1999).


interests of all protagonists in a piece of copyright legislation. *Bell Canada* and *Alberta (Minister of Education)* thus provided the perfect opportunity to consolidate what had been started generally in the Théberge decision and more specifically in the *CCH Canadian* decision.

Any opportunity to delve further into the workings of fair dealing, as of any exception generally, must thus have been welcome by a Supreme Court that has grown more activist since the enactment of the Canadian Charter of Rights and Freedoms in 1982. The advent of the Charter started an era where the courts have been highly solicited for their interpretation of broad policy considerations. For copyright purposes, the increasing intervention of the courts in social matters coincides, funnily enough, with a democratisation of communication means that has a tangible impact on the development of copyright law. The Supreme Court, which is now used to intervening more often in the interpretation of legislation, should therefore not be expected to exercise restraint in the interpretation of a statute that pits against each other so many interest groups. Its willingness to hear the five cases that culminated in its 2012 decisions confirms its desire to play an active role in the orientation of copyright law in Canada. It would certainly be preferable to be able to say that its interventions restored order to a particular segment of social and commercial interaction. In the present case, at least with respect to the fair dealing decisions, it would appear, though, that the court has only succeeded in creating more confusion.

II. PROBLEMS WITH THE INTERVENTION

There is little doubt that a large number of people can rejoice over the Supreme Court decisions on fair dealing. All of those who are in favor of users’ rights or of free use of copyright-protected materials in many day-to-day instances can find cause for celebration. It is, however, possible to find some difficulty with such an unmitigated embracing of these approaches to copyright law as was demonstrated by the Court. Again, comments made here will not bear on the detailed wording of the decisions, but will rather pertain to some fundamental dynamics that were at play in them.

A first observation is directly derived from the absence of philosophical orientation that was mentioned earlier. The absence of a constitutional clause, of a statutory statement, and of a driving historical dimension, is heightened by the very Canadian conflict between copyright and droit d’auteur. The bilingual character of our legislation in and of itself makes this debate inevitable. In an authors’ right system, the overall purpose of the legislation is clear: it is to protect the rights of authors or “creators.”

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In a copyright system, the nature of the vocabulary does not allow for such an easy conclusion. What has been increasingly clear over time, however, is that the neutrality of the copyright terminology helps to understand that the law is meant to arbitrate among varied and opposing interests and rights. Authors and creators, commercial agents of all kinds, as well as the public, either as end of the line consumers or as new creators, all have to come to a common understanding as to the regime of the intellectual creations that the Act protects. The two systems, however, can converge in the following manner: just as the author’s rights countries actually need to make the same arbitration as the copyright countries, the latter also incorporate some of the author’s rights perspectives in their doing. Indeed, an attentive reading of the Act can only lead to the conclusion that it is based on the premise that authors and/or copyright owners are all the ones who are exercising rights, whereas none of their counterparts have such rights to exercise vis-à-vis them. The Supreme Court seems not to have been directed to this very basic observation that is at the root of the relationships between all the parties involved in the dissemination of works. It has elevated users to the same rank as authors and copyright owners without any textual foundation for so doing. While it is true that the rights of the authors and copyright owners are to have some limitations, these limitations can only be articulated on the basis of their counterparts’ interests, and not their rights.

It is surprising that this semantic consideration was not brought to the Court’s attention during these cases, given that the earlier CCH Canadian decision had already set the stage and introduced the concept of users’ rights. A friendly reminder of the lack of textual foundation for this new paradigm could have been voiced in order to allow the Court to backtrack gracefully into an allegorical explanation of the use of this vocabulary. A parallel can easily be made here with any consumer legislation. In that context, nobody finds it surprising that the law should be protecting consumers. For this protection to be realistic, it is of course necessary to consider the interest of merchants who will need to accommodate these rights. But one would be hard pressed to consider that a consumer protection statute gives rights to merchants on an equal footing with the rights of consumers. One may wonder why it is difficult to accept that authors and copyright owners can have rights that can be exercised against third parties. Why are we here witnessing such a willingness to put everyone on the same footing? Is there a malaise with the fact that one is dealing here with the protection of intellectual creations? In a society that claims to want to foster a knowledge economy, should not its laws reflect an importance that is to be given to the knowledge that is produced? Or are we condemned
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to stay a nation of “hewers of wood and drawers of water?” 19 Yes, the works that copyright protects are not always very intellectual or full of wisdom; but that general debate is better suited to cases that deal with the notion of originality rather than exceptions. 20

Another problem with the two decisions comes from their interaction with the amendments that were adopted at about the same time as the decisions were made public. It is indeed hard to believe that, throughout the proceedings, the Court was unaware of the very important amendments that were making their way through Parliament at that time. One of the main objectives of Bill C-11, which was adopted and sanctioned by Parliament on 29 June 2012, 21 was to update the exceptions in the Copyright Act. Among these amendments was a well-publicised drive to expand the fair dealing exception. While no exception corresponding to the situation in the Bell Canada case was introduced, a very charged environment surrounded the extension of fair dealing to education in general. 22 It would have been possible for the Court, in the Bell Canada case, to find that no exception governed the situation; it would have been equally possible for the Court to refrain from expanding “private study and research” to the extent that this exception now plays in the backyard of the new exception of fair dealing for “education.” Just as it was advocating that private study need not be limited to “splendid isolation,” 23 one may wonder why the Court itself was living in such splendid isolation from directly relevant parliamentary debates. In a previous intellectual property case, the Supreme Court had already taken due notice of parliamentary activities in order to refrain from intervening and creating possible conflicts. 24 Why did it not do so here? Now, thanks to its newly found blinkers, au-

19 The expression comes from an English author who travelled on this continent in the nineteenth century. See Anthony Trollope, North America 57 (J.B. Lippincott & Co. 1863).
20 Even then, cases that turn upon the interpretation of originality do not always lend themselves to such a debate.
21 See note 8, supra.
22 See, e.g., Meera Nair, Fair Dealing at a Crossroads, in From “Radical Extremists” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda 90 (Michael Geist ed., 2010).
24 Pioneer Hi-Bred, Ltd. v. Comm’r of Patents, (1989) C.P.R. (3d) 257, 271 (“It is true that most countries give the producers of new plant varieties special protection; even in Canada, several legislative proposals for this purpose have appeared over the years. Though this kind of legislation might act as a catalyst in the development of scientific research in Canada, I consider that this Court does not have the right to stretch the scope of patent protection beyond the limits of existing legislation. Accordingly, since the Patent Act contains no provisions relating directly to biotechnological inventions and
thors and copyright owners, as well as users of all stripes, have years of litigation ahead to make sense of these conflicts.

The potential overlaps with the new text of the Act are perhaps more pressing concerns than the relationship between court interpretations and international texts. Yet, it is well known by now that the guiding principle for the interpretation of exceptions, when one is faced with a new situation, comes from the three-step test that is found in the Berne Convention and in the TRIPs Agreement. It is equally well known, of course, that international texts are not directly applicable in Canadian law. However, while a WTO case against Canada on the basis of the three-step test remains for the moment speculative, a nod to the existence of this test in the judgement would have been welcome in today’s world. After all, in its 1990 decision, the Court made ample use of an argument based on the Berne Convention in order to justify its reasoning.25 A similar use of Article 9(2) of the Berne Convention could have been made here. In an increasingly globalized world, to repeat a well-worn phrase, such a move would not have seemed out of touch with contemporary realities.

If it has not taken heed of developments in the Canadian Parliament nor of the international context in which the country must position itself, the Supreme Court has nevertheless paid attention to the sirens from a segment of society that would be happy to see a copyright world free of charge. To be able to obtain something of value without paying for it is always an interesting prospect. That prospect has an even greater chance to become a reality when it can be justified on some public interest that benefits people who are perceived to be in need of protection. Here, the John Doe consumer and the pre-university student, figures with which any one can easily associate, have become unwitting parties against the big business of contemporary collecting societies. It is worth observing that the Supreme Court has not seen the authors behind the collecting societies that represent them. Had it first identified authors as the frailest parties in these situations, it might have identified other parties as the stronger ones: in the Bell Canada case, these are emblematic telecommunication companies; in the Access Copyright case, they would have been educational institutions that willingly pay for desks, chairs, brick, and mortar. In such contexts, the Court could have seen the fundamental issue as one of allocation of payment for the production of protected materials. To conclude that no payment was due would thus have been less of an option than with the pairing of parties that it chose to identify, that is, nameless copyright owners versus members of a public who are generally in need of protec-

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...tion against big business. With the present decisions, the commercial question of who pays to support the cultural industries that produce materials that everyone needs or wants is given short shrift. The readiness to identify and focus on one kind of relationship to provide context is maybe natural where the multiplicity of parties seems to obfuscate the debate. Do too many chefs spoil the sauce? Well, we now know which ones the Supreme Court prefers to hire until new ones are presented to it.

Indeed, we must now live with the choices that the Supreme Court has made with these two judgments. The Court will ultimately have to unravel the difficult relationship it has de facto created, because of its interpretation, between fair dealing for private study and the new fair dealing for education. That will only come in several years. In the meantime, it will be up to authors, copyright owners, and especially collecting societies, who are perhaps the only ones left with some means to institute court proceedings, to fuel the copyright debate. They must not do so at the expense of their buying public, but they must better explain their role in the functioning of the overall copyright system and their need to be recognized as a pivotal element in the copyright equation. Given the current climate, this mandate is bound to be a difficult one. Just as the authors of the Statute of Anne or of the French Revolution fought for their recognition, the authors of the age of the Internet must lead a similar battle.