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Securing the Future of Copyright Users' Rights in Canada

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Purpose

- › To identify the shortcomings associated with the copyright balance approach to users' rights
- › To propose a human rights approach as an alternative

Copyright balance approach to users' rights

- › Balance is the purpose of the Copyright Act:

The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator [CCH, quoting Théberge]

- › As an element of balance, copyright exceptions are “users’ rights”:

users rights are necessary “*to maintain the proper balance between the rights of a copyright owner and users’ interests*” [CCH]

Shortcomings of the balance approach to users' rights

- › Departure from the traditional formula of copyright balance in Canada
 - Exclusive rights
 - Exceptions and limitations
- › “*Théberge reflected a move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace.[SOCAN v Bell]*”
- › *But, Théberge* explicitly acknowledged the traditional formula of balance

Shortcomings of the balance approach to users' rights (CONT)

"Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain ..." [*Théberge*, para 32].

Shortcomings of the balance approach to users' rights (CONT)

- › Departure from the traditional formula of copyright balance in international copyright law
- › TRIPS, WCT, and WPPT refer to balance
- › Balance in these instruments evolves around copyright protection, on the one hand, and copyright exceptions and limitations, on the other
- › Copyright exceptions along with infringement exceptions and limitations prove that balance was “very present to the minds of” the drafters of the Berne Convention (Daniel Gervais, “Making Copyright Whole...” 2008)

Shortcomings of the balance approach to users' rights (CONT)

"The treaty's endorsement of balancing principles in copyright law, in particular, the importance of considering the impact of copyright rules on education, research, and access to information, is consistent with longstanding principles of U.S. copyright law." [Pamela Samuelson, The U.S. Digital Agenda at WIPO, 1997]

Shortcomings of the balance approach to users' rights (CONT)

- › The declining utility of balance in copyright law discourse

In CCH this Court raised expectations when it held that fair dealing is a "user's right". Those raised expectations have led users like the appellants to ask that the right be clarified and made more predictable. However, this should not come at the expense of upsetting the balance between users' and creators' rights under the Act [Factum Submitted by Access Copyright to the Supreme Court of Canada (2012)]

Shortcomings of the balance approach to users' rights (CONT)

- " 'balance' often seems to resemble a coded version of 'cutting back on exclusive rights' or, more baldly, 'users' rights.' [Jane Ginsburg, European Copyright Code..., 2011]
- Balance "is unable to produce principled justifications for its outcomes and allows the judiciary to intrude into the mission of the political institutions of the state." [Paul Kahn, The Court, the Community and the Judicial Balance..., 1987]

Human rights approach to balance

› ICESCR, art 15:

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Human rights approach to balance (CONT)

› UDHR, art 27:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Human rights approach to balance (CONT)

- › Canada is a Member State to the ICESCR
- › SCC emphasized “[t]he important role of international human rights law as an aid in interpreting domestic law.” [*Baker v Canada*]
- › The Copyright Act “strike[s] a fair balance between the rights of creators to receive remuneration for use of their works and the needs of users to have reasonable access to these works” under the ICESCR [ESC, Implementation of ICESCR: 3rd periodic reports submitted by States (Canada), 1998].

Human rights approach to balance (CONT)

- › Courts must “assume their role in protecting certain fundamental principles as essential to the rule of law and the expression of democratic will, even if these ‘deep rights’ were not in written form.” [Beverley McLachlin, C] “Unwritten Constitutional Principles... (2006)]
- › Fundamental principles that “can prevail over laws and executive action” “customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal instruments to which the state has adhered.” [ibid]

Human right to take part in culture

- › ICESCR, art 15(1)(a)(b); UDHR, art 27(1)
- › Copyrighted works are a component of culture
[W]ays of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives [General Comment No. 21]

Human right to take part in culture (CONT)

- › The right to take part in culture entitles everyone to:
 - (a) access to culture: “to know and understand [their] own culture and that of others through education and information;”
 - (b) participate in culture: to “seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity”

Human right to take part in culture (CONT)

(c) contribute to cultural life: “to be involved in creating the spiritual, material, intellectual and emotional expressions of the community” and “to take part in the development of the community to which a person belongs.” [General Comment No.21]

- › The entitlements are interconnected
- › They belong to humans

Human right to take part in culture (CONT)

- › They are interdependent with everyone's human right to education (UDHR, art 26; ICESCR, arts 13&14)
- Education is a channel “through which individuals and communities pass on their values, religion, customs, language and other cultural references, and which helps to foster an atmosphere of mutual understanding and respect for cultural values.” [General comment No. 21.]
- It has 4 essential features (4-A scheme): availability, accessibility, acceptability and adaptability.

Human right to take part in culture (CONT)

- › The entitlements under the right to take part in culture are interdependent with everyone's freedom of expression (UDHR, art 19 & ICCPR, art 19)
- Freedom of expression includes "the expression and receipt of communications of every form of idea and opinion capable of transmission to others." [General Comment No. 34]
- At the same time, the right to take part in culture includes "the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind [...]" and which "implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning." [General Comment No. 21]

Substance prevails over form

- › “It may not just be the Charter that is affecting how the Supreme Court views copyright today. International human rights law may be playing its part, too. When Abella J. spoke in *SOCAN v. Bell*--the music preview (or more accurately music pre-hearing) case--of the role of user rights as being ‘to achieve the proper balance between protection and access’ in the Copyright Act, ... she was partly reflecting how international human rights law treats intellectual property rights. To reflect human rights fully, however, she would have reversed the order of her statement, to say that user rights reflect the proper balance between, first, access and, second, protection. That is how both the *Universal Declaration of Human Rights of 1948* and the *International Covenant on Economic, Social and Cultural Rights of 1966* prioritize access and intellectual property. [David Vaver, “User Rights, 2013].

Substance prevails over form

- › In *SOCAN v Bell*, the SCC's liberal interpretation of research as a purpose of fair dealing is infused with the content of the human right to culture as supported by the human right to education and freedom of expression:
 - Research includes research for "creative purposes", research for the purposes of the "dissemination of works" and "private study."
 - The meaning of research captures "many activities that do not demand the establishment of new facts or conclusions."
 - The dissemination of copyrighted works per se falls within the meaning of research

Interdependence between users' human rights and authors' moral and material interests

- › Authors' moral and material interests (UDHR, art 27(2); ICESCR, art 15(1)(c))
- › Protection has two pillars: a human author and a scientific, literary, or artistic work connected to its human author
- › Examples of possible implementation through one-time payments, copyright, etc
- › Authors' moral and material interests "[do] not necessarily coincide" with copyright [General comments No. 17]
- › Protection of material interests must be "effective" in that it is capable of "enabling authors to enjoy an adequate standard of living." [General comments No. 17]

Interdependence between users' human rights and authors' moral and material interests (CONT)

- › Exclusive right regime is only one model for giving effect to authors' moral and material interests.
- › Conflicts arise between this model and users' human rights when exclusive rights regimes go beyond the scope of authors' rights in human rights law (e.g. an author's exclusive rights last after his or her death.)
- › The right to take part in culture is limited: it is not allowed "to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the [ICESCR]" [General comments No.21]

Interdependence between users' human rights and authors' moral and material interests (CONT)

- › users' human rights do not necessarily result in depriving authors of their moral and material interests (e.g. the success of open source movement)
- › Implementing users human right in exclusive systems, such as copyright, by means of fair dealing, for example, is subject to the fairness analysis (e.g. CCH 6 factors including "the effect of the dealing on the work.").

Conclusion

- › Copyright users' rights echo the values they serve in international human rights law
- › The persuasiveness of the notion of balance to seek entitlements in copyrighted works, by authors or users, is eroding
- › A human rights approach to users' rights in Canada is only one step towards a holistic, and explicit, human rights approach to copyright law in Canada. This journey is yet to start