

Securing the Future of Users' Rights in Canada

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In *Théberge v Galerie d'Art du Petit Champlain Inc.*,¹ the Supreme Court of Canada (SCC) reinterpreted the purpose of the Copyright Act.² Writing for the majority of the Court, Justice Binnie held that “[t]he 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 ...”³ After *Théberge*, the SCC released decisions affirming balance as a purpose of the Copyright Act and elaborating its elements.⁴ Accordingly, in *CCH*, it held that “fair dealing exception, like other exceptions in the Copyright Act, is a user’s right.”⁵ The concept of “users’ rights” does not appear in the Copyright Act, Berne Convention, or TRIPS. Instead, the SCC reasoned its new approach to fair dealing, and other copyright exceptions, on the ground that users’ rights are necessary to “maintain the proper balance”⁶ under the Copyright Act.

The future of users’ rights in Canada is uncertain: they are still copyright infringement exceptions in the Copyright Act even after an amendment to the Copyright Act subsequent to *CCH*. Moreover, although courts have often invoked the balance metaphor to convey legitimacy on the process and outcome of their adjudication on human rights and freedoms, invoking balance as a justification of users’ rights comes with the shortcomings associated with this metaphor.⁷ Furthermore, after *CCH*, there have been, and will be, attempts to convince the SCC to reconsider its approach to users’ rights in Canada. Therefore, the purpose of this submission is to unfold the human rights nature of users’ rights.

The enjoyment of arts and the benefits of science is intrinsic to human dignity. Article 27(1) of the Universal Declaration of Human Rights⁸ proclaims that “[e]veryone 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”. Similarly, article 15(1) of the International Covenant on Economic, Social and Cultural Rights⁹ recognizes everyone’s right: “a. [t]o take part in cultural life; b. [t]o enjoy the benefits of scientific progress and its applications.” Examining the drafting history of these two articles and relevant interpretations by international human rights law bodies, the submission will argue that: First, framing copyright exceptions as users’ rights derives its support from the human right to culture: the human right to culture entitles individuals to access, use, and share culture including intellectual works protected by copyright. Second, the human right to culture is limited by authors’ moral and material interests in international human rights law, which do not

¹ [2002] 2 S.C.R. 336 [*Théberge*].

² The first interpretation of the purpose of the Copyright Act was in *Bishop v. Stevens*, [1990] 2 S.C.R. 467.

³ *Théberge*, para.30.

⁴ E.g. *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 (*CCH*); *Euro-Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 SCR 20; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36; *Robertson v Thomson Corp.*, 2006 SCC 43; *Alberta (Education) v Canadian Copyright Licensing Agency* 2012 SCC 37.

⁵ *CCH*, para 48.

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⁷ See e.g. Paul W. Kahn, “The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell” (1987) 97 Yale LJ 1; Ronald Dworkin, “The Threat to Patriotism”, New York Review of Books 49:3 (28 February 2002) 44.

⁸ Universal Declaration of Human Rights, GA Res 217 (III), UNGAOR, 3d Sess, UN Doc A/810 (1948) (UDHR).

⁹ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46.

necessarily coincide with copyright. The importance and weight of users' rights in culture, arts, and science must not be measured by the extent to which they trump or are trumped by authors' moral and material interests. Both sets of rights are indivisible, interdependent, interrelated, and mutually enforcing. Hence, copyright law and judicial interpretation must give due weight to this inherent coexistence.