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"An Hundred Stories in Ten Days": COVID-19 Lessons for Culture, Learning and Copyright Law

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“AN HUNDRED STORIES IN TEN DAYS”: COVID-19 LESSONS FOR CULTURE, LEARNING AND COPYRIGHT LAW

Carys J. Craig and Bob Tarantino¹

ABSTRACT

In the face of a pandemic, copyright law may seem a frivolous concern; but its importance lies in the ever-expanding role that it plays in either enabling or constraining the kinds of communicative activities that are critical to a flourishing life. In this article, we reflect on how the cultural and educative practices that have burgeoned under quarantine conditions shed new light on a longstanding problem: the need to recalibrate the copyright system to better serve its purposes in the face of changing social and technological circumstances. We begin by discussing how copyright restrictions have manifested in a variety of contexts driven by the coronavirus lockdown, focusing first on creative engagement and then on learning, foregrounding the damage done by encoding a permission-first approach into governance structures and digital platforms. These stories unsettle the common copyright narrative—the one that tells us that copyright encourages learning and the creation and dissemination of works—laying bare its disconnect from the current realities of our digital dependency. Turning to consider the justifications for copyright control, we underscore the critical role of user rights and substantive technological neutrality in crafting a flexible and fair copyright system for the future. The article concludes with some lessons that might be drawn from these tales of copyright in the time of COVID19 to inform the development of new digital copyright norms for whatever “new normal” emerges.

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INTRODUCTION: AN HUNDRED STORIES

It were therefore the height of folly to quit this spot at present... [I]f you take my advice, you will find pastime...in telling of stories, in which the invention of one may afford solace to all the company of his hearers.... So please you, then, I ordain, that...we be free to discourse of such matters as most commend themselves, to each in turn.²

History does not repeat itself; but it echoes. As the Black Death swept across Europe in the fourteenth century, Giovanni Boccaccio wrote his seminal masterwork, *The Decameron*. In it, ten nobles flee pestilential Florence for a country manor, where they regale one another with tales for ten nights. In crafting the hundred tales contained in *The Decameron*, Boccaccio drew from local oral traditions and prior writings—the stories are drawn from across languages, cultures, and centuries, from second century Greek tales to plots derived from Middle Eastern and Indian precursors. It may have been one of the world’s earliest printed books, but six and a half centuries later, as the novel coronavirus pandemic sweeps across the globe,

² Giovanni Boccaccio, *The Decameron* 25 (J.M. Rigg trans., DIGIREADS.COM PUBLISHING, 2018).

The Decameron's recursive storytelling feels familiar. When lockdowns were imposed around the world in response to the COVID-19 threat, people reacted to the sudden social isolation with an upswell of communication and creativity. Desperate to re-establish the relationships, connections, and communities threatened by physical distancing and shutdown orders, people turned to what Boccaccio's narrator would term "the interchange of discourse":³ they reached out and met together online, sang to and with one other from balconies, danced for virtual audiences, read and wrote stories and poems; they took photographs on their solitary strolls, played musical instruments from porches or in one-person parades; they created memes or bravely re-enacted them, taught and took classes online, read and researched, listened, watched, and shared; they expressed their feelings and fears, they followed and reacted, liked and laughed out loud. In so doing, people created and interacted across the physical distance, often by repurposing and reconstituting the raw materials of others' expressions. And thus, like Boccaccio's sheltering storytellers, they filled the loneliness and fought against despair by drawing upon and adding to the vast library of human cultural expression.

In the face of plague or pandemic, copyright law may seem a frivolous concern. But its importance lies in the ever-expanding role that it plays in facilitating or constraining the kinds of communicative activities that are critical to a flourishing life at any moment in history: the visceral need to express oneself and to hear what others have to say, to both be and to have an audience, to see and be seen. In this article, we reflect on how the cultural and educative practices that have burgeoned in quarantine might shed new light on a longstanding problem: the need to recalibrate the copyright system to better serve its purposes in the face of changing social and technological circumstances.

In Boccaccio's time, those seeking flight from the plague "banded together and, dissociating themselves from all others...lived a separate and secluded life... holding converse with none but one another..."⁴ Today, technology permits us to live separate lives in physical isolation without social seclusion, and to converse across cities, communities, and cultures without fear of contagion. As almost every aspect of our lives has so dramatically moved online in 2020, we can see more clearly than ever that digital environments present constantly evolving opportunities for content producers and consumers, copyright owners, users, and the public. But these opportunities also yield ever more pervasive restrictions and controls—borne

³ *Id.* at 12.

⁴ *Id.* at 14.

of a proprietary copyright model—which impede cultural efforts in ways that threaten to erode the public interest that copyright law should serve—now more than ever.

In surveying some of the expressive and educational activities that have arisen during the pandemic, this article exposes a curious dynamic that might surprise readers not well-acquainted with the quirks of copyright law: almost all of the creative and communicative responses described above as examples of the “interchange of discourse” are legally cast in copyright’s syntax as the production of copyright-protected works and/or an infringement giving rise to potential liability. It is a well-recognized paradox of copyright law that its purported goal of incentivizing the creation and dissemination of expressive works can readily be undermined by the liabilities and controls that copyright itself enables and imposes. The public response to the pandemic has brought that tension into sharp relief: in many cases, the copyright system’s celebrated incentive is wholly unnecessary to stimulate creative activity, and indeed it imposes obstacles that creators, audiences, and intermediaries must actively work around. The particular challenges of a digitized environment are similarly laid bare: the same robustly networked society that enables so much communicative activity also offers the technological capacity to monitor and inhibit that communication. This is particularly pernicious when ostensibly infringing communications are prevented from occurring in the first place, such as when algorithmic filters cut off digital streams thereby denying them any audience at all.

In Part II, we discuss how copyright restrictions have manifested in a variety of contexts driven by quarantine conditions, identifying particular instances of potentially infringing activity and responses thereto, as well as possible limits and exceptions that could or should mitigate the risks of copyright overreach. We begin with a discussion of copyright and creative engagement, and then move on to consider copyright and learning, with a focus on the impediments copyright can pose to online education. In Part III, we identify some lessons that should be learned from these extraordinary times and applied to the ordinary operation of copyright law. We revisit the original purposes of copyright law and its evolving justifications and consider the centrality of user rights and the critical role of substantive technological neutrality in crafting a flexible and fair copyright system for the future. The discussion foregrounds the damage done by effectively encoding a permission-first approach into governance structures, digital platforms, and networks, and proposes some potential avenues towards mitigating these harms and correcting copyright’s course.

Ultimately, in telling these tales, we hope to convey that communication and creativity precede copyright, both practically and theoretically; copyright

and its enforcement infrastructure must therefore operate downstream of expression and culture—it should be instrumentalized to encourage creativity and learning without imposing unnecessary liability risks and technological constraints that chill or silence these expressive endeavours. When the pandemic passes, and we emerge from isolation to reflect upon what we have learned, perhaps one more story that can be told—albeit one amongst many hundreds—might be about how we came to appreciate that copyright law, with its established structures of control over expression, should not stand between citizens of a participatory democracy and the urgent benefits of the digital universe.⁵

I. COPYRIGHT TALES TOLD IN QUARANTINE

*Beginneth here the book called Decameron... wherein are contained one hundred novels told in ten days...*⁶

A comprehensive catalogue of the surge in creative and educational activity during the pandemic lockdown is beyond the scope of this—or any—article. Rather, in highlighting particular examples, we aim to identify illustrative patterns of individual and community conduct, along with responses that are either required or enabled by copyright’s legislative framework and its application. Copyright’s systemic bias is in favour of interpreting activity as “infringing” and therefore requiring permission of the rightsholder. This is, in part, a function of copyright’s plenary reach. In Canada, Section 5 of the Copyright Act provides that copyright shall subsist in “every original literary, dramatic, musical and artistic work,” which itself is expansively defined to include “every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression.”⁷ While this breadth is nominally tempered by the requirement that a “work” be “original” to qualify for copyright protection, originality has been rendered an easy threshold to cross: to be original, a work “must be more than a mere copy of another work...[but] it need not be creative in the sense of being novel or unique.”⁸ It requires only that the expressive activity involve a more than mechanical exercise of skill and judgment.⁹ Rightly or wrongly, it is widely agreed that copyright in Canada extends to almost everything from TV show characters to computer software, from accounting

⁵ *Robertson v. Thomson Corp.*, [2006] S.C.R. 43 (Can.), para 79 (Abella J, dissenting).

⁶ Boccaccio, *supra* note 2 at 10.

⁷ RSC 1985, c C-42.

⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] S.C.R. 13, para 16 (Can.).

⁹ *Id.* The Court offered “changing the font” of a work as an example of the kind of effort which would fall below the originality threshold.

forms to land survey plans, and from selfies to seismic data.¹⁰ Its sheer scope is captured in David Vaver’s observation that copyright covers “almost anything written, drawn or expressed.”¹¹

Copyright extends even beyond protecting “works”: it offers protection as well to “sound recordings,” “performer’s performances,” and “communication signals.”¹² For these additional subject-matter, even mere originality is not a prerequisite for protection. The absence of an originality requirement means that copyright extends to protect any sound recording (even recordings of ambient outdoor sounds and surreptitious recordings of other people’s conversations) and the definition of “performer’s performance” is so broadly cast that it could conceivably capture virtually any exercise of an individual’s motor functions. Indeed, with respect to performances and signals, protection is available even in the absence of any recording or tangible “fixation.”¹³

The extent of copyright’s reach is amplified by the capacious interpretation that courts have given to the exclusive rights granted to copyright owners. It has been held that even “broadcast incidental” copies of works—digital copies that never reach an audience but are made solely to facilitate transmissions—infringe the exclusive reproduction right.¹⁴ The exclusive right to perform a work in public has been held to be infringed by television cable companies sending signals to their individual subscribers,¹⁵ when a broadcast is seen by members at a private club, or by customers in a retail showroom.¹⁶ The right to communicate a work to the public by telecommunication is infringed when an individual accesses a work by online stream,¹⁷ and when a hotel offers its guests the ability to view a movie in their room.¹⁸

Thus, any meeting on a Zoom video conference is a welter of potentially

¹⁰ See e.g. *Cinar Corporation v. Robinson*, [2013] S.C.R. 73 (Can.); *Delrina Corp. v. Triolet Systems Inc.* (1993), 156 O.A.C. 166 (Can.); *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 CPR (3d) 257 (Can.); *Keatley Surveying Ltd. v. Teranet Inc.*, 131 O.R. (3d) 703 (Can.); *Geophysical Service Inc. v. Encana Corp.*, [2017] 51 Alta. L.R. (6th) 259 (Can.).

¹¹ David Vaver, *Intellectual Property: The State of the Art* (2001) 32 VUWLR 1 at 3.

¹² See Copyright Act, *supra* note 7, ss 15 (“performer’s performances”), 18 (“sound recordings”), 21 (“communication signals”).

¹³ Fixation is typically a precondition of copyright protection. See *Canadian Admiral Corp. v. Rediffusion Inc.*, [1954] Ex CR 382 (Can.).

¹⁴ *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 S.C.R. 57 (Can.).

¹⁵ *Canadian Cable Television Ass’n v. Canada*, [1993] 2 F.C. 138 (FCA).

¹⁶ *Canadian Admiral Corp.*, *supra* note 13.

¹⁷ *Rogers Comm’ns Inc. v. Soc’y of Composers, Authors & Music Publishers of Canada*, 2012 S.C.R. 35 (Can.).

¹⁸ Copyright Act, *supra* note 7, s 2.4(1)(a).

infringing activities: the painting artfully hanging on the wall behind the interviewee, the photographs pointedly on display, the television playing in the background, the memo that is read aloud, the song that is sung or the dance routine performed—each offers its own flavour of prima facie infringement, often with multiple nested infringements. (Imagine for a moment that the television in the background is broadcasting a music video featuring a choreographed dance performance, thereby yielding separate copyrights for the communication signal, the cinematographic work (i.e., the video), the musical composition, the performers’ performances, the sound recording, and the choreographic work!) The circumstances precipitated by COVID-19 did not introduce these follies into the copyright system, to be sure; but the massive shift to online interaction that it prompted risks accelerating their consequences.

As will be illustrated below, this structure of exhaustive rights-granting coupled with the expansive applications of rights produces an environment in which the perceived need to obtain or grant permission becomes a concern with its own trajectory and resulting inertia. The permission-first approach (whereby savvy users assume that licenses must be sought and obtained from the relevant rightsholder before their activities can safely and lawfully proceed) can hinder the very activities that copyright is intended to facilitate: creation and dissemination.

A. *Copyright and Creative Engagement*

*Beginneth here the first day of the Decameron, in which, when the author has set forth, how it came to pass that the persons, who appear hereafter met together for interchange of discourse, they, under the rule of Pampinea, discourse of such matters as most commend themselves to each in turn.*¹⁹

Many observers have remarked on the flourishing creativity and increased consumption of cultural products brought on by the COVID-19 lockdown.²⁰ The breadth of artistic endeavours prompted by the coronavirus

¹⁹ Boccaccio, *supra* note 2 at 12.

²⁰ See e.g. Charles Falzon, *Creativity in the Time of COVID* (Apr. 20, 2020), RYERSON UNIVERSITY, www.ryerson.ca/the-catalyst/news-updates/2020/04/creativity-in-the-time-of-covid (remarking on “the depiction of the deeply communal, if not spiritual, movement that many are feeling, or the abundant shared humour online, the journalistic reporting of how democracy unfolds, or cultural expression through virtual performances and exhibitions, the monumental task of capturing the true narrative of COVID 19”); Adrienne Jordan, *Making Money During the Pandemic: How COVID-19 is Leading a New Wave of Creativity*, FORBES

lockdown was remarkable. Virtual concerts ranged from the *One World: Together At Home* global live event featuring some of the biggest names in popular music,²¹ and a performance by the Toronto Symphony Orchestra consisting of individual members' renditions pre-recorded in isolation and edited together,²² to spontaneous shows by amateur and professional musicians alike performed on lawns and in driveways.²³ Visual art projects included *The Great Pause Project*, soliciting photographs from around the world to serve as “a repository for observations, reflections and collections from this global pandemic,”²⁴ and Toronto's *When This Is Over Board*,²⁵ which, inspired by the *Before I Die* project,²⁶ consisting of large chalk boards and chalk offered to passers-by to complete the pre-inscribed sentence, “When this is over I want to....”

In terms of audience consumption, the *New York Times* reported that in the first weeks of the lockdown, U.S. consumers increased their use of Netflix, YouTube and Facebook by between fifteen and twenty-seven percent.²⁷ With cinemas closed and blockbuster releases suspended, industry alarms were sounded about “a coronavirus-induced spike in piracy,” and reports circulated of precipitous increases in visits to downloading and streaming sites.²⁸ Video chat apps such as Nextdoor.com and Houseparty saw

(May 22, 2020), www.forbes.com/sites/adriennejordan/2020/05/22/making-money-during-the-pandemic-how-covid-19-is-leading-a-new-wave-of-creativity/#555a015d42b5. For a study of the consumption of various forms of media during the lockdown, see Creative Industries Policy and Evidence Centre, *Digital Culture – Consumer Tracking Study* (June 5, 2020), www.pec.ac.uk/assets/publications/Cultural-consumption-study-week-6.pdf.

²¹ Global Citizen, *One World: Together At Home*, www.globalcitizen.org/en/connect/togetherathome.

²² Melody Lau, *Watch members of the Toronto Symphony Orchestra come together for virtual performance*, CBC (March 23, 2020), www.cbc.ca/music/watch-members-of-the-toronto-symphony-orchestra-come-together-for-virtual-performance-1.5506515.

²³ Kaylen Small, *Coronavirus: Okotoks musicians rock out from driveways to support food bank*, GLOBAL NEWS (May 24, 2020), globalnews.ca/news/6980808/coronavirus-okotoks-music-drive.

²⁴ Great Pause Project, *The Great Pause – Reflections on COVID-19*, www.greatpauseproject.com.

²⁵ “Whenthisisoverboard”, INSTAGRAM, www.instagram.com/whenthisisoverboard.

²⁶ Before I Die, *A Memento Mori for the Modern Age*, beforeidieproject.com. The project lead to the construction of over five thousand walls in seventy-eight countries.

²⁷ Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, THE NEW YORK TIMES (Apr. 7, 2020), www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html.

²⁸ Aric Jenkins, *As coronavirus forces people home, interest in streaming services is surging. So is piracy.*, FORTUNE (Mar. 29, 2020), fortune.com/2020/03/29/coronavirus-streaming-piracy/; see also Ernesto Van der Sar, *Corona Virus Lockdown Boosts Interest in Pirate Sites and Services* (Mar. 16, 2020), torrentfreak.com/coronavirus-lockdown-

usage increases in excess of seventy percent.²⁹ New installations of Zoom’s video conferencing platform increased more than 700% following the March lockdown.³⁰ Livestreaming platform Twitch—used primarily to watch others play videogames—quickly became a popular venue for artists to connect with their fans,³¹ with “Music & Performing Arts” content jumping 385% over the previous year.³²

Lurking in the massive shift to online dissemination and consumption of creative content is the resulting interaction with automated copyright enforcement mechanisms. So, for example, in mid-March YouTube notified its creator community (primarily those with YouTube channels who regularly upload content for viewing by subscribers) that, due to an increased reliance on automated systems (rather than human reviewers) to review uploaded materials, “users and creators may see increased video removals, including some videos that may not violate policies.”³³ The practice of high profile DJs “livestreaming” their sets during the pandemic also offers an illustrative example.³⁴ The livestream capacity of Instagram and Facebook enabled DJs—who perform by mixing together pre-recorded audio tracks—to reach audiences of hundreds of thousands of isolated listeners in lockdown. The practice spread quickly, and by the beginning of June the platforms had implemented controls that sometimes resulted in the sets being cut in mid-transmission.³⁵

On May 20, 2020, Facebook (which owns Instagram) published its

boosts-interest-in-pirate-sites-and-services-200316/.

²⁹ Koeze & Popper, *supra* note 27.

³⁰ Molly Sloan, *The 3 Secrets Behind Zoom’s Triple-Digit Growth* (Apr. 10, 2020), DRIFT, www.drift.com/blog/how-zoom-grew.

³¹ Tatiana Cirisano, *Twitch Users Are Getting Takedown Notices En Masse for the First Time: Here’s Why*, (June 15, 2020), BILLBOARD, www.billboard.com/articles/business/digital-and-mobile/9401590/twitch-users-takedown-notices-copyright-explained.

³² Chase, *State of the Stream April 2020: Valorant and its streamers top the charts, music is having its moment, and streaming hits huge numbers*, STREAMELEMENTS (May 13, 2020), blog.streamelements.com/state-of-the-stream-april-2020-valorant-and-valorant-streamers-top-the-charts-music-is-having-d503aad6c2e7.

³³ YouTube, *Protecting our extended workforce and the community*, YOUTUBE CREATOR BLOG (Mar. 16, 2020), youtube-creators.googleblog.com/2020/03/protecting-our-extended-workforce-and.html.

³⁴ See e.g. Lia Respers France, *DJ D-Nice is Throwing the Best Quarantine Party*, CNN (Mar. 6, 2020), www.cnn.com/2020/03/21/entertainment/dj-d-nice-quarantine-party/index.html.

³⁵ See e.g. Jesse Washington, *DJ livestreams are under attack just when we need music the most*, THE UNDEFEATED (June 3, 2020), theundefeated.com/features/dj-livestreams-are-under-attack-just-when-we-need-music-the-most/ (describing a May 28, 2020 performance which was cut off mid-song due to a lack of clearance).

“Updates and Guidelines for including music in video.”³⁶ The Guidelines state that the licensing agreements that Facebook has entered into with music rightsholders impose “limitations around the amount of recorded music that can be included in Live broadcasts or videos,” and notes that Facebook’s platform employs embedded controls that automatically interrupt or mute livestreams when Facebook’s systems “detect that [a] broadcast or uploaded video may include music in a way that doesn’t adhere to our licensing agreements.” The Guidelines are relatively terse and offer scant and ambiguous guidance (e.g., “shorter clips of music are recommended”). From the DJs perspective, if they were performing their set “live” at a club, the venue itself would be responsible for obtaining a licence from the relevant public performance collective (such as SOCAN in Canada or ASCAP in the United States); but when the performance involves livestreaming their set—because clubs were no longer operating—it appears impossible for the DJ to obtain the necessary rights from any collective (or, if obtained, to advise Facebook of that fact) and, as noted above, even Facebook’s own clearance mechanics appear not to allow the activity to take place if tracks (or excerpts thereof) of a seemingly arbitrary length are played in the set.

The problem is not one only for DJs playing current tracks, but has also captured, for example, fitness instructors trying to livestream exercise classes to members of closed-down gyms; competitive dance students trying to perform new choreography for their teammates; and even classical musicians streaming performances of music that has long been in the public domain and is therefore free—in theory—to be performed without copyright restrictions. Thus, for example, the Camerata Pacifica chamber music group had its pre-recorded performance of Mozart’s Trio in E flat (K. 498) shut off mid-broadcast because Facebook had identified the video as containing an audio work owned by Naxos of America—presumably a different performance of the same public domain work, the legal rights to which are therefore entirely irrelevant to the lawfulness of Camerata Pacifica broadcast. Unfortunately, this is a distinction without a difference for “oft-overzealous” content identification algorithms.³⁷ Some examples have verged on the farcical: during the 2020 iteration of the San Diego Comic-Con event—delivered online due to restrictions on in-person gatherings—the cast of the television

³⁶ Facebook, *Updates and Guidelines for Including Music in Video*, (May 20, 2020), www.facebook.com/facebookmedia/blog/updates-and-guidelines-for-including-music-in-video.

³⁷ Michael Andor Brodeur, *Copyright bots and classical musicians are fighting online. The bots are winning*, WASHINGTON POST (May 21, 2020), www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-the-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886_story.html.

series *Star Trek: Discovery* were conducting a table-read of a script from the show when the YouTube stream was abruptly shut down, to be replaced with a “video unavailable” statement because the video “contains content from CBS ... who has blocked it on copyright grounds.” This notwithstanding that the panel had been sponsored by CBS, which later released a statement acknowledging that “[t]here was an issue with our content protection”.³⁸

Similar stories unfolded with regard to the gaming-focused livestream platform Twitch. While in the early days of the pandemic, record companies and music publishers had “largely turned a blind eye to music licensing issues on livestreams,” by June 2020 they began an active campaign of DMCA takedown demands in respect of old video-clips dating back to 2017 that had included unlicensed background music.³⁹ This move did not reflect any change in the platform’s user guidelines, apparently, but rather a shift in the attention of the music industry to the platform in light of its growing importance in the context of the coronavirus pandemic. With hours watched on the platform growing over fifty percent in the first four weeks of isolation, and music artists turning to livestream performances as an alternative to touring (including the twelve-hour livestreamed coronavirus relief fundraiser *Stream Aid 2020*), music industry executives decided this was the time to take action. As RIAA chairman Mitch Glazier explained, “when we see a platform start to emerge as an important player, our job is to establish artists’ rights as quickly as possible.”⁴⁰ With the company reportedly in active talks in June 2020 with record companies and publishers to secure licences, Twitch also began “working on solutions, starting with expanding the use of content identification service Audible Magic to automatically identify and delete existing clips which may contain copyrighted music.”⁴¹ Twitch users—users, that is, who generate the content streamed over the platform—have complained that Twitch is not advocating on their behalf as creators,⁴² offering a timely reminder that the people posting and streaming content on online platforms are also rightsholders in the copyright scheme, both in their capacity as users of content and as creators, in their own right, of new “user-generated” content.

Many of the preceding dispatches regarding creativity during the lockdown appear to culminate with a similar systemic response: algorithmic

³⁸ Dominic Patten, ‘*Star Trek*’ At Comic-Con @ Home Panel Goes Dark for Short Spell Over CBS Copyright Glitch, *DEADLINE* (July 23, 2020), deadline.com/2020/07/star-trek-comiccon-panel-glitch-copyright-discovery-picard-lower-decks-prodigy-cbs-1202993401/.

³⁹ Cirisano, *supra* note 31.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

copyright enforcement mechanisms employed to prevent infringing activity from occurring. “Algorithmic copyright enforcement” refers to automated systems that screen (often contemporaneously) uploaded or streamed content, matching it against source libraries of copyright-protected materials.⁴³ These mechanisms are generally employed by private online platforms (such as YouTube, Facebook and Twitter) that act as intermediaries providing users with access to content that has been uploaded by others.⁴⁴ Depending on their particular features and operation, once an automated system has identified a “match” (i.e., a *prima facie* infringement), the system can generate a takedown request, automatically block the content, or allow its upload/transmission; in some cases (such as YouTube’s Content ID system) notified copyright owners can elect to permit the continued availability of identified content on the condition that they receive advertising revenues generated by the its monetization.⁴⁵

The frailties and fallibilities of algorithmic copyright enforcement—structural, processual and jurisdictional—have been the subject of academic attention for years.⁴⁶ Structural fallibilities arise from various features the algorithms and their operation: studies have indicated that up to 30% of automated takedown requests are problematic in the sense that there were issues with the accuracy of the “matching” between the library of protected content and the new content;⁴⁷ in addition, because algorithms are designed to perform a binary infringing/non-infringing analysis, they fail to recognize the complex layering of rights that subsist in respect of any particular content, and are ostensibly unable to take into account copyright limitations or exceptions that rely on discretion, context or qualitative subtlety (such as the identification of lawful fair dealing).⁴⁸ Processual frailties are found in the absence of transparency and predictability of “black-box” decision-making, as well as due process concerns such as the removal of content prior to any

⁴³ Henning Grosse Ruse-Khan, *Automated Copyright Enforcement Online: From Blocking to Monetization of User-Generated Content* (2020), UNIVERSITY OF CAMBRIDGE LEGAL STUDIES RESEARCH PAPER SERIES, Paper No. 8/2020, papers.ssrn.com/sol3/papers.cfm?abstract_id=3565071.

⁴⁴ Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement* (2016), 19 Stan. Tech. L. Rev. 473 at 480.

⁴⁵ Those revenues flow back to the party who claims ownership of the underlying content to the exclusion of the user-creator whose video is attracting the views necessary for monetization. See Grosse Ruse-Khan, *supra* note 43.

⁴⁶ See e.g. Perel & Elkin-Koren, *supra* note 44.

⁴⁷ Jennifer M Urban, Joe Karaganis & Brianna Schofield, *Notice and Takedown in Everyday Practice* (2017), UC Berkeley Public Law Research Paper No. 2755628, ssrn.com/abstract=2755628.

⁴⁸ *Copyright Act*, *supra* note 7, ss 29-29.2. See *infra* Part II.C.2.

determination of its lawfulness, and the subsequent absence of a meaningful right of appeal or redress for errors, or penalty for unwarranted removal. Jurisdictional problems are a consequence of the fact that the algorithms tend to encode U.S. copyright doctrines (with the notable exception of fair use)⁴⁹ that are then applied internationally, not taking into account territorial differences in copyright rules that could render uses that infringe copyright in one jurisdiction perfectly lawful in another.⁵⁰

Most troubling in the context of the concerns animating this discussion, is the ability of algorithmic enforcement to prevent communications from occurring at all: as Perel and Elkin-Koren describe it, “once access to materials posted online is blocked or removed, a story may not unfold.”⁵¹ By short-circuiting the conventional process whereby enforcement follows infringement—re-ordering the sequence such that enforcement happens before or coincident with infringement—the communicative acts that underpin the creation and continuance of community are pre-emptively silenced. This inversion of the enforcement process threatens to reify potentially erroneous or overly-expansive owner rights assertions as a result of a number of factors: the initial assertion of ownership by rightsholders is not assessed for validity; the algorithms themselves are not programmed or vetted for compliance with substantive legal entitlements; and, as discussed above, the algorithms are unable to take account of qualitative determinations that define the contours of copyright owners’ rights and can therefore over-enforce those rights even extra-territorially. Consequently, the platforms become “circulation gatekeepers”⁵² while their algorithms become the law of the land. Others have noted the fiscal, technological, and design challenges that confront those who aim to properly reflect fair use entitlements in algorithmic enforcement mechanisms—for many observers, the conclusion is that algorithms simply *cannot* properly or acceptably reflect the pointillist and dynamic nature of copyright’s parameters.⁵³ Perhaps the most pernicious

⁴⁹ 17 USC § 107 (1994). The general and flexible U.S. fair use defense is potentially broader in application, particularly in respect of transformative uses, than most international equivalents.

⁵⁰ Grosse Ruse-Khan, *supra* note 43.

⁵¹ Perel & Elkin-Koren, *supra* note 44 at 491.

⁵² Dustin W. Edwards, *Circulation Gatekeepers: Unbundling the Platform Politics of YouTube’s Content ID* (2018), 47 *Computers & Composition* 61.

⁵³ See e.g. Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law* (2017) 93 *Notre Dame L. Rev.* 499 at 503 (noting the asymmetries between relatively inexpensive and blunt algorithms compared to expensive human monitoring); Dan Burk, *Algorithmic Fair Use* (2019), 86 *U. Chicago L. Rev.* 283 (pointing out numerous theoretical, cognitive, and technical challenges to algorithmic fair use analyses, including the simple fact that fair use “doctrine” is not static but is constantly evolving due to judicial interpretation).

outcome of imperfect algorithmic enforcement of copyright, however, is that it torques the operation and impact of the copyright ecology itself: as Dan Burk describes the problem, the inaccurate mobilization of algorithmic analyses of copyright infringement become the “social, legal and creative default,” and the choices of creators and audiences becomes “informed, manufactured and ultimately distorted by the architecture of regulation.”⁵⁴ All of these factors shift the burden onto users to challenge enforcement claims (when the process permits it) and to justify their own uses (to others and to themselves) within the prevailing grammar of user rights and exceptions.⁵⁵ Even where content is infringing and its removal legally warranted, we would note that the default prioritization of copyright protection over free expression has its own context-specific constitutional implications.⁵⁶ For the moment, however, we emphasize that the unpredictable and seemingly arbitrary enforcement of copyright can have the effect of obstructing the manifold creative activities of downstream content users that have flourished—and nourished us—during lockdown.

B. *Copyright and Learning*

*Succinctness were rather to be desired by students, who are at pains not merely to pass, but usefully to employ, their time... Besides which, as none of you goes either to Athens, or to Bologna, or to Paris to study, 'tis meet that which is meant for you should be more diffuse than what is to be read by those whose minds have been refined by scholarly pursuits.*⁵⁷

As we consider the implications of the COVID-19 crisis and the larger changes it has wrought on Canada’s cultural landscape, we turn our attention now to its impact on the educational environment in particular. Education is, of course, a key ingredient of culture more broadly, contributing to both its construction and transformation over time. Educational institutions and educators play a vital role in shaping individuals, communities, and their interactions, as well as in generating knowledge, contributing to public debate, and cultivating an informed citizenry capable of the deliberative and creative tasks of modern participatory democracy. Beyond such elevated

⁵⁴ Burk, *supra* note 53 at 303–05.

⁵⁵ Grosse Ruse-Khan, *supra* note 43 (Part IV (5)).

⁵⁶ See e.g. Carys J Craig, *Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright* (2006), 56 Univ of Toronto L.J. 75; Graham J Reynolds, *Reconsidering Copyright’s Constitutionality* (2016) 53 Osgoode Hall L.J. 898.

⁵⁷ Boccaccio, *supra* note 1 at 552.

aspirations, however, educational institutions are—usually—where people physically gather together in classrooms and on campuses as part of a community of learning, to acquire knowledge and expertise, to access information resources, to produce intellectual works, to share ideas and to learn from one another. From textbooks and scholarly articles to creative works and performances, and from lectures and presentations to library collections and research databases, copyright-protected content is as vital to education as education is to culture and democracy.

With the arrival of COVID-19, however, schools were suddenly closed, students sent home, classes moved online, and course content hastily delivered through posted materials and recordings, or over online video-conferencing platforms. Textbooks were abandoned in student lockers and library books left on shelves behind locked doors. With little or no preparation, instructors were required to transition from traditional classroom teaching to online curriculum delivery in an extraordinary effort to ensure that students could complete the ill-fated winter semester of 2020. As we embark upon the 2020-2021 academic year, there is currently little clarity or consistency to be found in the stated plans of school boards, colleges and universities, but one thing seems certain: we can anticipate a new normal of ongoing disruption and continued reliance on technology to virtually connect students, instructors and teaching materials wherever physical attendance and assembly are precluded. If we are indeed looking at a long-term shift rather than a short-term solution, then the obstacles to effective online education experienced in early 2020 will have to be addressed. Amongst many others, these include the substantial obstacles presented by copyright law.

To understand why that is the case, we turn now to identify some of the COVID-19-related changes that implicate copyright in new ways or at new moments in the instruction process. First, there is the delivery of lessons online instead of in a classroom. Where instructors would previously have, for example, read aloud to the class from a book, projected images from the front of the classroom, or played videos on a screen in the classroom, these activities are now transmitted over the Internet. For what is dubbed asynchronous instruction (the pre-recording and sharing of lessons for later viewing by students), this involves making and posting a recording of the lesson and whatever materials are being displayed or performed in the course of that lesson. The unfortunate fact is that “copyright is essentially always involved when digital content is used” because “any access or use of content represented in electronic form in the digital environment necessarily involves copying (which in principle implicates exclusive rights).”⁵⁸ For copyright

⁵⁸ Grosse Ruse-Khan, *supra* note 43 at 2.

purposes, then, the act of recording, as well as any uploading and subsequent downloading, will constitute “reproductions in a material form” of any copyright work contained therein.⁵⁹ Posting a recording for later streaming by students may also implicate the “making available” right, which is included within a copyright owner’s exclusive right to “communicate the work to the public by telecommunication.”⁶⁰

For synchronous instruction (the simultaneous delivery and receipt of a lesson over a platform such as Zoom), the online instruction again implicates the exclusive right of a copyright owner to “communicate the work to the public by telecommunication,” which is itself a facet of the owner’s exclusive right to “perform the work or any substantial part thereof in public.”⁶¹ If synchronous classes are simultaneously recorded, the reproduction right will again be triggered. A reproduction or public performance of a copyright-protected work or a substantial part thereof without the consent of the copyright owner is *prima facie* infringing.⁶² Some of these activities (like the preparation of PowerPoint slides) are things that would have been done anyway, while others, such as the audio- or video-recording, posting and streaming of lessons, may now be happening routinely only because the classroom doors are closed. At the receiving end, whereas students might previously have taken their own notes during a lesson, for example, they may now be downloading, saving and even sharing copies of lessons.

As well as delivering lessons, instructors often require students to read in preparation for class. The manner in which those assigned readings can be made accessible to students also interfaces with copyright entitlements. Where students own physical copies of the textbook and were fortunate to have it in their possession when the schools closed, reading it poses no copyright problem. But where students relied upon library books and physical collections on campus, they may now have no way to access that material. Educational institutions, libraries or publishers may be able to make e-Books or digital versions of certain works available if they have entered into digital licensing arrangements; but if these are unavailable or prohibitively expensive, as they often are, then access and use of the materials may simply not be possible. Instructors and students alike have had to take matters into their own hands in many instances, making and sharing scanned copies, photographs or video-recordings of materials so that their students and

⁵⁹ *Copyright Act*, *supra* note 7, s 3(1).

⁶⁰ *Id.*, ss 3(1)(f), 2.4(1.1).

⁶¹ *Id.*, ss 3(1), 3(1)(f); *Entertainment Software Ass’n v Society of Composers, Authors and Music Publishers of Canada*, 2012 S.C.R. 34 (Can.).

⁶² *Copyright Act*, *supra* note 7, s 27(1).

classmates can continue their studies in quarantine. Making, uploading, and downloading digital copies of copyright-protected content all implicate the reproduction right where a substantial part of the work is reproduced. Copying protected works or extracts thereof for educational purposes and classroom distribution is, of course, nothing new; but the utter *reliance* on digital copies precipitated by the closure of libraries and physical obstacles to access has heightened the need for accessible digital content to new levels—and rendered undeniable the urgency of ensuring affordable access to educational materials.

Educators are navigating a complex sea of copyright restrictions, the anxiety-provoking nature of which is compounded by the new technological platforms on which they must function, and the knowledge that almost everything is being recorded. It is hardly surprising that educators are either restraining themselves from reading aloud, from assigning or requiring certain content, or from including images or illustrations in their lessons, or they are scrambling to secure permissions or acquire expensive licenses for their endeavours. They have long been accustomed, after all, to labouring under the shadow of an over-bearing copyright system and within the “clear-for-fear” culture of reasonably risk-averse institutions.⁶³ This pervasive institutional clearance culture interfaces with common contracting practices and the automated enforcement mechanisms described above. A recent study of the terms of licences of several online platforms popular for remote educational content delivery (such as G-Suite for Education, Microsoft Teams, MoodleCloud, and Zoom) found that teachers using those services are typically required to warrant to the service provider that they have obtained permission from all third party rightsholders thereby shifting potential copyright liability from the platforms to the teachers;⁶⁴ only a portion of the licences take account of available legislated exceptions (including exceptions that expressly contemplate remote teaching), and all uses remain subject to the threat of automated enforcement mechanisms (which, again, do not contemplate allowances for limitations and exceptions, risking over-inclusiveness, intrusive monitoring practices, and self-censorship).

So let us turn now to consider some of the ways in which the copyright system has—successfully or unsuccessfully—sought to accommodate the kinds of creative and educational uses described above during the coronavirus

⁶³ See Bitá Amani, *Access Copyright and the Proposed Model Copyright License Agreement: A Shakespearean Tragedy* (2012) 24 IPJ 221.

⁶⁴ See Léo Pascault et al, *Copyright and Remote Teaching in the Time of Coronavirus: A Study of Contractual Terms and Conditions of Selected Online Services* (2020) [forthcoming in Eur IP Rev], papers.ssrn.com/sol3/papers.cfm?abstract_id=3652183.

crisis, whether through permissions and licenses or existing limits and exceptions built into the system. We can then assess how these have fallen short, and the harms wrought by persistent misconceptions of copyright and its consistent overreach.

C. Licences, Exceptions, and Their Limits

1. Extraordinary Measures

Copyright's post-lockdown story was not merely one of content uploads tangling with algorithmic takedowns or teachers struggling to steer through the thickets of legal and institutional barriers. Numerous participants in the copyright ecosystem took steps to ease the process of navigating the tangled web of rights and tried to implement temporary “fixes” to the communicative blockages wrought by the pandemic. We want to draw attention to a few of these attempts at solutions—and their obvious limits.

Online training workshops and public webinars were promptly convened by organizations such as Creative Commons, for example, to advise culture sector professionals about copyright risks in online environments, as well as the availability of copyright exceptions and open access materials that could facilitate ongoing activities.⁶⁵ Some publishers took steps to make certain content freely available online available for a limited time.⁶⁶ In the United States, for example, Playscripts, Inc., a publisher of plays and musicals, made available, on a “one-time, non-precedent setting” basis, more than four hundred of the plays in its catalogue for livestreaming.⁶⁷ The International Federation of Reproduction Rights Organisations (IFRRO) announced that many of its members were “developing and adapting licences to provide access for students, teachers and others working from home or unable to access resources because of library and business closures during the pandemic...at no additional cost to the licensee.”⁶⁸ Canadian examples included COPIBEC, the largest reproduction rights collective in Quebec, which temporarily increased the portion of books, newspapers and magazines that could be scanned, displayed and shared under its licence from 15% to

⁶⁵ Brigitte Vézina, *Our Community is Reducing the Impact of COVID-19 on Science, Education, and Culture* (June 4, 2020), Creative Commons creativecommons.org/2020/06/04/our-community-is-reducing-the-impact-of-covid-19-on-science-education-and-culture/.

⁶⁶ See e.g. Project MUSE, *Free Resources on MUSE During COVID-19*, about.muse.jhu.edu/resources/freeresourcescovid19/.

⁶⁷ See Playscripts, *Approved Plays for Live Streaming* (Mar. 13, 2020), [PLAYSCRIPTS www.playscripts.com/blog/2020/03/approved-plays-for-live-streaming](https://www.playscripts.com/blog/2020/03/approved-plays-for-live-streaming).

⁶⁸ See International Federal of Reproduction Rights Organizations, *IFRRO members are responding to the challenges posed by the coronavirus pandemic*, us16.campaign-archive.com/?u=8353bb14837e4fc186bfea9cc&id=2dcdf36fd4&e=30bddf078d.

35%.⁶⁹

The Association of Canadian Publishers in partnership with Access Copyright (another Canadian collective society administering reproduction rights in literary works) announced their “Read Aloud Canadian Books Program,” accompanied by the following statement:

Many Canadian publishers have received requests from educators and librarians seeking permission to read part of or all of a book and to share a video recording of the reading for “online story-time”....

The [Read Aloud Canadian Books] Program will allow, on a temporary basis, a waiver of licence fees related to the reading of...select in-print books from participating publishers and authors, and the posting of the video recording online.⁷⁰

The waiver requires users to submit a request that includes their personal contact information, educational institution, and details about the work read, how much, and for how long the recording will be made available. Beneficiaries of the waiver are also required to credit the author, illustrator and publisher; state that they are presenting their reading “with permission from Access Copyright on behalf of the Publisher;” and post the reading “within a closed group or password-protected platform” or, if this is “not possible,” on YouTube but marked as “Unlisted.”⁷¹ The post must be deleted or disabled no later than June 30, 2020 (subject to possible extension), and is not to be archived or retained.

The program sheds stark light on the limitations of such temporary grants of permission. Not only are rigorous constraints imposed on educators simply trying to read for their students in quarantine as they would have in the classroom, but information is extracted in exchange for this apparent privilege. More to the point, it is not at all clear that the publishers are waiving anything to which they have a right. As we will see, there are various avenues to this conclusion, from long-standing copyright principles to specific statutory exceptions. If posting a read-aloud recording for one’s students is already perfectly lawful, then the publishers and the collective are purporting to gift something that is not theirs to give. Indeed, if non-infringing uses are “user rights,” as the Supreme Court has repeatedly assured us they are,⁷² then

⁶⁹ Copibec, *Remote Learning: Special Measures for Quebec*, www.copibec.ca/en/autorisation-exceptionnelle-covid19.

⁷⁰ See Access Copyright, *Read Aloud Canadian Books Program*, accesscopyright.ca/read-aloud/.

⁷¹ See Access Copyright, *Read Aloud Canadian Books Guidelines of Use*, accesscopyright.ca/media/1438/read-aloud-canadian-books-program-guidelines-of-use.pdf.

⁷² CCH, *supra* note 8; CBC, *supra* note 14; *Society of Composers, Authors and Music*

the Read-Aloud Program purports to give to educators the privilege of doing what it is already their right to do. Similarly, if teachers in Quebec making digital copies of, say, 25% of a work for students to read at home is already “fair dealing,” then the expanded allowances under Copibec’s licence are “permitting” teachers to do what the law gives them a user’s right to do.

Worse, the illusive benefits of such “temporary passes” may continue to impose costs long after the pandemic is over: by behaving as if a license would be required in the absence of this waiver, one paves the way for the adoption of overreaching licenses in the future—licenses that extract funds for uses that require no permission and for which no payment is due. (As librarians and educators know, there already is an unfortunate history of such extractive and restrictive blanket licensing practices in Canada.⁷³) Securing licenses for non-infringing uses out of an abundance of caution is common practice in certain industries and sectors—educational institutions included. But as Jim Gibson has explained, the result of this “practice of unneeded licensing...is a steady, incremental, and unintended expansion of copyright....”⁷⁴ In this sense, overly cautious licensing practices are subject to the same critique as automated enforcement practices: over time, they establish norms that become the codified (and incorrect) default, thereby defining the de facto parameters within which creative and educational practices occur.

When it comes to textbooks and other volumes usually freely accessible through libraries, some limited temporary measures have again been taken by publishers in recognition of the extraordinary circumstances. A post on the website of Osgoode Hall Law Library, for example, explains: “some publishers are temporarily providing extended access to their electronic materials during the duration of the COVID-19 emergencies. Please note that this is **temporary access** and each publisher provides their own instructions and guidelines....”⁷⁵ Navigating the list of ten or so publishers, it is quickly evident that many titles in their catalogues are unavailable, certain publishers have made nothing newly available, and access to free volumes is stringently limited to particular audiences and for a specified time. In many cases, students were simply unable to access any

Publishers of Canada v. Bell Canada, 2012 S.C.R. 36 (Can.); *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 S.C.R. 37 (Can. Alta.).

⁷³ Amani, *supra* note 63.

⁷⁴ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 Yale L.J. 882 at 887 (2017).

⁷⁵ Yemisi Dina, *E-Book Access @ the Osgoode Law Library* (Mar. 24, 2020), OSGOODE HALL LAW SCHOOL, libblog.osgoode.yorku.ca/2020/03/e-book-access-the-osgoode-law-library (emphasis in original).

physical or digital version of their assigned textbook during this period. For students already encumbered by high tuition rates and debt loads, the prices of physical or digital editions of textbooks can be prohibitive, rendering access to their institution's library collection essential to their education. Meanwhile, libraries wishing to replace paper copies with digital e-books, with a view to enabling lending during lockdown, find that many publishers do not provide electronic purchasing options for libraries,⁷⁶ and even when they do, the budget for digital copies can purchase only a small fraction of the physical copies it would cover.⁷⁷ Once again, then, the temporary measures taken by publishers in the face of this crisis seem lacklustre, and ultimately serve to underscore long-standing problems that pervade commercial educational publishing.

Of course, the access problem entailed by library closures extends well beyond the trials of university students—everyone who would normally enjoy access to books and resources in public and institutional libraries has found themselves shut out. Physical books sit untouched on shelves while e-book loans are rationed out over ever-expanding waitlists. One high profile response to this pressing public need was that of the Internet Archive, which announced a “National Emergency Library”—a “temporary collection of books that supports emergency remote teaching, research activities, independent scholarship, and intellectual stimulation while universities, schools, training centers, and libraries are closed.”⁷⁸ The Internet Archive usually makes scanned digital copies of books in its collection available through a Controlled Digital Lending (CDL) scheme, which means lending occurs under a strict “owned-to-loaned” ratio: the digital copy simply stands in for the lawfully owned hard copy to facilitate access without increasing the

⁷⁶ The University of Guelph Library reports that approximately 85% of existing course textbooks are simply unavailable to libraries in any other format than print, identifying the following publishers as not allowing libraries to purchase e-textbook versions: Pearson, Cengage, Houghton, McGraw Hill, Oxford UP Canada, Elsevier Imprints, Thieme. See University of Guelph Library, *Commercial Textbooks Present Challenges in a Virtual Environment*, lib.uoguelph.ca/news/commercial-textbooks-present-challenges-virtual-environment.

⁷⁷ Paul Ayris suggested that a library budget for fewer than one hundred e-books could purchase up to 20000 paper copies of the same volume. UCL Laws, *UCL IBIL - Covid-19: Copyright, Privacy and Competition Law*, YOUTUBE (June 5, 2020, 11:11 AM), www.youtube.com/watch?v=tI8_SiDVhRM.

⁷⁸ See Internet Archive Blogs, *National Emergency Library*, archive.org/details/nationalemergencylibrary; see also The Lawbytes Podcast Episode 47: Brewster Kahle, Chris Freeland and Kyle Courtney on the Internet Archive's National Emergency Library, MICHAEL GEIST (Apr. 20, 2020), www.michaelgeist.ca/2020/04/lawbytes-podcast-episode-47.

number of borrowers that can access the work at any one time.⁷⁹ Under the National Emergency Library initiative, the CDL restrictions were relaxed and waitlists suspended to allow multiple simultaneous loans of digital copies. According to the Internet Archive’s statement, this was “a response to the scores of inquiries from educators about the capacity of [its] lending system and the scale needed to meet classroom demands because of the [local library] closures.”⁸⁰

The announcement sparked an outcry from publishers and authors’ rights groups, however, who accused the Internet Archive of “aggressive, unlawful, and opportunistic attack on the rights of authors and publishers in the midst of the novel coronavirus pandemic.”⁸¹ The initiative has since been suspended in the face of a copyright infringement lawsuit brought by four commercial publishers in respect of both the National Emergency Library and the usual CDL program.⁸²

There are strong arguments to be made in Canada—as there are in the US and elsewhere—regarding the current lawfulness of making and lending digital copies of the books already held in physical collections.⁸³ The pandemic has only underscored the importance of this practice for enabling and equalizing access to information resources—and yet, judging from the response of publishers and authors, it seems clear that it will take more than the current crisis to move the dial on digital lending as accepted common practice. In the meantime, stringent copyright controls continue to hamper

⁷⁹ See David R Hansen & Kyle K Courtney, *A White Paper on Controlled Digital Lending of Library Books*, HARVARD LIBRARY (2018), nrs.harvard.edu/urn-3:HUL.InstRepos:42664235; see also Emily Hudson & Paul Wragg, *Proposals for Copyright Law and Education During the Covid-19 Pandemic* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617720.

⁸⁰ Chris Freeland, *Announcing a National Emergency Library to Provide Digitized Books to Students and the Public* (Mar. 24, 2020), INTERNET ARCHIVE BLOGS blog.archive.org/2020/03/24/announcing-a-national-emergency-library-to-provide-digitized-books-to-students-and-the-public/.

⁸¹ Association of American Publishers, Press Release, *Comment From AAP President and CEO Maria Pallante on the Internet Archive’s ‘National Emergency Library,’* ASSOCIATION OF AMERICAN PUBLISHERS (Mar. 27, 2020), publishers.org/news/comment-from-aap-president-and-ceo-maria-pallante-on-the-internet-archives-national-emergency-library/.

⁸² See Brewster Kahle, *Temporary National Emergency Library to close 2 weeks early, returning to traditional controlled digital lending*, INTERNET ARCHIVE BLOGS (June 10, 2020), blog.archive.org/2020/06/10/temporary-national-emergency-library-to-close-2-weeks-early-returning-to-traditional-controlled-digital-lending/.

⁸³ See Ariel Katz, *Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge* 13 J.L. & Pol’y for the Info. Soc’y 81 (2016); Adrian Sheppard, *Controlled Digital Lending*, THE QUAD (Feb. 6, 2019), blog.ualberta.ca/controlled-digital-lending-a5e9d14dc56b.

public access to lawfully acquired books.

2. *Existing Limits and Exceptions*

As the above suggests, while the online activities that we have canvassed implicate copyright interests, a significant portion of them may be perfectly lawful uses—even in the absence of permissions and licenses—in light of the limits and exceptions that are an integral part of Canada’s copyright system.

With regard to the kind of consumer-created videos and performances described in Part A, consider, for example, Canada’s unique statutory exception for non-commercial user-generated content, which provides that it is not an infringement of copyright for someone to use an existing copyright work that is publicly available in the creation of a new work, or for them to authorize the new work’s dissemination by an intermediary such as YouTube or Twitch.⁸⁴ The purpose of the use must be non-commercial, the source must be mentioned where reasonable, and there must be no substantial adverse effect on the exploitation of the existing work. While there are uncertainties around the non-commercial purpose requirement and its implications for, say, monetization of a popular video on YouTube, the reality is that this provision should render lawful the vast quantity of user-generated content posted by citizens in their everyday online activities. Indeed, this was the explicit intention behind its enactment.⁸⁵ So that is the good news; the problem is that, under automated content ID systems and extra-territorial application of US law, it does not much matter. The exception is rendered unusable and all but redundant for practical purposes.

Similarly, many of the uses we have described may constitute fair dealing, which is recognized in Canada as a “user right” that the Supreme Court has repeatedly explained “must not be interpreted restrictively.”⁸⁶ While such uses have to be undertaken for a statutorily enumerated purpose, these now include “education,” “parody” and “satire” as well as “criticism or review” and “news reporting”—purposes that “must be given a large and liberal interpretation in order to ensure that user rights are not unduly

⁸⁴ Copyright Act, *supra* note 7, s 29.21 (added by the *Copyright Modernization Act*, SC 2012, c 20).

⁸⁵ The Government of Canada website gave as examples of what would fit within this exception: “making a home video of a friend or a family member dancing to a popular song and posting it online, or creating a ‘mash-up’ of video clips.” *What the Copyright Modernization Act Means for Consumers*, GOVERNMENT OF CANADA [web.archive.org/web/20150325001832/http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01186.html](http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01186.html).

⁸⁶ CCH, *supra* note 8 at para 48.

constrained.”⁸⁷ The assessment of the “fairness” of a use is contextual inquiry and depends on the facts of each case; but where a use is appropriate in light of the purpose, where it does not take more than is reasonably necessary for that purpose, or threaten to act as a substitute in the market, there is a good chance that it is fair and non-infringing.⁸⁸ The fair dealing defence could thus extend to protect many of the transformative creative re-uses of content made by people in their everyday online activities, which are hardly likely to compete in the market for the original work whether or not they have a commercial purpose. As the Supreme Court recently reiterated, user rights play “a vital role in...promoting the public interest. The ability to access and use ‘works’ within the meaning of the *Copyright Act* are ‘central to developing a robustly cultured and intellectual public domain.’”⁸⁹

Unfortunately, the context-specific nature of the fair dealing analysis and its unpredictable application by the courts mean that users are often reluctant to rely upon it, and copyright owners unlikely to concede that it applies. And, as with the user-generated content exception, in the digital context, the lawfulness of fair dealing in principle may not translate into the freedom to deal fairly in practice, especially when online environments are policed by automated content identification.⁹⁰ As we have seen, algorithms, by design, are not trained to conduct such analyses.

Turning again to the educational context, even where institutions have not entered into licensing arrangements,⁹¹ there are also limits and exceptions within the *Copyright Act* that should permit many of the instructional uses that we have described above. Specific limited exceptions for educational institutions permit, for example, the reproduction of a work “or any other

⁸⁷ *Id.* at para 51.

⁸⁸ See e.g. *Bell*, *supra* note 72; *Alberta*, *supra* note 72; *Wiseau Studio, LLC et al v. Harper et al*, 2020 O.N.S.C. 2504.

⁸⁹ *Keatley Surveying Ltd v Teranet Inc*, 2019 S.C.R. 43 at para 45 (citing *Bell*, *supra* note 72 at paras 9–10).

⁹⁰ *But see* *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015) (affirming a lower court ruling that copyright owners must consider whether a use is fair use before they can issue a takedown notice in good faith).

⁹¹ Educational institutions typically pay large sums to license digital resources, with the terms of some of these transactional licences (though not enough of them) permitting the kind of digital uses required for remote instruction. Many institutions also pay a collective society for blanket licences that permit a certain amount of copying of textbooks and other published works in their repertoire. Others have opted out of these blanket licensing arrangements. See Michael Geist, *Myths and Realities about Canadian Copyright Law, Fair Dealing, and Educational Copying*, INFO JUSTICE (Apr. 30, 2019), infojustice.org/archives/41053; see *York Univ. v. The Canadian Copyright Licensing Agency*, 2020 FCA 77; see also Ariel Katz, *Spectre: Canadian Copyright and the Mandatory Tariff – Part I*, 27 IPJ 151 (2015).

necessary act, in order to display it” for the purposes of “education or training,”⁹² as well as the reproduction or communication of works “as required for a test or examination,”⁹³ and the performance of lawfully acquired sound recordings and films to an audience consisting primarily of students. While these provisions apply to acts undertaken “on the premises of the educational institution,” amendments drafted specifically to facilitate distance learning mean that an enrolled student who receives a lesson over the Internet is now “deemed to be a person on the premises of the educational institution.”⁹⁴ Under these 2012 provisions, lessons that contain otherwise infringing acts that are permitted under an exception can be recorded, communicated over the Internet, and copied by students without infringing copyright in the underlying works. Conditions apply, however, requiring measures to limit further communication and copying, and—frustratingly—to destroy copies of lessons within 30 days of the release of final evaluations.⁹⁵ Another 2012 addition allows educational institutions to reproduce, communicate or perform for students works that are lawfully available through the Internet, provided that source and author are attributed, and the work was not protected by a digital lock or notice clearly prohibiting the action.⁹⁶

As this might suggest, the ability of educators to comfortably rely on these exceptions for educational institutions is hampered by their stringent specificity, onerous conditionality and legal complexity (which, in some instances, renders them almost inscrutable even to copyright experts).⁹⁷ Fortunately, it is generally unnecessary to rely on these specific exceptions by virtue of the more expansive fair dealing defence described above, which can broadly apply to fair uses of copyright works for the purposes of research, private study, and—as of 2012—education.⁹⁸ As Lisa Macklem and Sam Trosow have explained, Canada’s fair dealing defence is sufficiently broad to cover many of the educational uses of copyright content for emergency remote teaching.⁹⁹ When it comes to assessing fairness in relation to purpose,

⁹² *Copyright Act*, *supra* note 7, s 29.4(1).

⁹³ *Id.*, s 29.4(2). Section 29.4 exceptions do not apply if the work or other subject matter is commercially available, within the meaning of section 2, in a medium appropriate for the purpose.

⁹⁴ *Id.*, s 30.01(4).

⁹⁵ *Id.*, s 30.01.

⁹⁶ *Id.*, s 30.04.

⁹⁷ *See e.g.* *id.*, s. 30.01 (noting the cumbersome definition of “lesson”).

⁹⁸ *Id.*, s 29 (“Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”); *see* CCH, *supra* note 8 at para 54 (confirming that fair dealing is always available notwithstanding the availability of a specific exception).

⁹⁹ *See* Samuel Trosow & Lisa Macklem, *Fair-Dealing and Emergency Remote Teaching in*

Trosow and Macklem stress, “the extreme and extraordinary circumstances surrounding Covid-19 would weigh heavily here. The public interest goals in supporting both public interest and social distancing goals are indisputable.”¹⁰⁰ While each use requires its own analysis, the point to stress here is that, particularly in the context of the current crisis, a large swathe of the copying and sharing of articles, extracts and images done by instructors for the purposes of providing an education, or facilitating student research and private study, is likely to satisfy the contextual demands of fair dealing. Teachers are unlikely to copy more than is reasonably necessary to achieve their educational objectives; there are few if any realistic alternatives to the sharing of digital copies under these circumstances; and it seems implausible that publishers could show demonstrable economic harm as a direct result of the copying, particularly when the move online occurred when it was impractical to expect students to purchase more books.¹⁰¹

Unfortunately, however, at the institutional level, there typically remains a great deal of uncertainty around what constitutes lawful fair dealing practices, and a reluctance to rely on the user rights of students and educators in the face of threats of litigation and liability.¹⁰² With increasing uncertainty around this question in Canada, we can expect to see educational institutions continue their cautious approach to educational copying, entering costly and restrictive commercial licenses, purchasing expensive paper and digital copies, and imposing onerous limits and responsibilities on instructors tasked with continuing to satisfy learning objectives under ongoing quarantine conditions. Here, as elsewhere, the COVID-19 crisis has only revealed and exacerbated long-standing problems in our copyright system and its operationalization. It has laid bare not only the copyright-related challenges

Canada, SAM TROSOW (Mar. 21, 2020) samtrosow.wordpress.com/2020/03/21/fair-dealing-and-emergency-remote-teaching-in-canada/.

¹⁰⁰ *Id.*

¹⁰¹ *Cf.* Alberta, *supra* note 72 at para 35–36; *see also* CCH, *supra* note 8 at para 70 (the Court confirmed that “The availability of a license is not relevant to deciding whether a dealing has been fair”).

¹⁰² This situation has not been helped by the recent Federal Court of Appeal ruling in *York Univ. v. Access Copyright*, in which it was held that universities are not mandated to enter into costly blanket licensing arrangements with copyright collectives, but nor can they comfortably able to rely on Fair Dealing Guidelines like those in place at York University to shield them from infringement liability. *See* *York Univ. v. Access Copyright*, *supra* note 91. The reasons supporting the latter conclusion were frequently at odds with Supreme Court authority, however, and ought not to survive an appeal to that Court. *See* Michael Geist, *Federal Court of Appeal Deals Access Copyright a Huge Blow as it Overturns York University Copyright Decision* (Apr. 23, 2020), MICHAEL GEIST www.michaelgeist.ca/2020/04/federal-court-of-appeal-deals-access-copyright-huge-blow-as-it-overturns-york-university-copyright-decision.

that users (students and educators) must navigate to meet the demands of lockdown and emergency remote teaching; it has revealed that copyright controls and traditional publishing practices have hampered the ability to access materials in the way that users would prefer (or as required by circumstance). Thus, students are cut off from affordable digital content while educators are stymied in their efforts to migrate their teaching from physical to virtual environments.

The crisis has also revealed a wide gap between the actual limits of copyright in law—which have been carefully crafted in Canada in recent years to achieve an appropriate balance between copyright owners and users—and the restrictions that (real or perceived) copyright control continues to impose upon pedagogical practices and knowledge-sharing in reality. Many of the existing allowances within the copyright system are, in practice, not up to the task required of them: they tend to be either too ambiguous to offer clear guidance upon which users, educators, and institutions can comfortably rely; or they are so opaque or persnickety that they are rendered impenetrable and impractical. Here, again, the accrued complexity of the copyright system, with its multiple overlapping rights and limits, generates its own inertia: attempts at corrective actions are generally limited in scope or accessible only to experts already steeped in copyright’s subtleties, thereby serving to perpetuate a constricted approach to creative and educative activities. As we will see in Part III, this gap between user rights and copyright restrictions reflects a damaging dissonance between the original objectives and public purposes of the copyright and its impact on living and learning in an increasingly digital world.

II. LESSONS FROM ISOLATION

*I acknowledge that the things of this world have no stability, but are ever undergoing change.*¹⁰³

Part II considered the kinds of solutions that have been employed in efforts to sustain creative and educational practices during the pandemic, identifying the significant copyright-related barriers to creative users and online learners—and suggesting that these reveal larger, more fundamental problems with the system and its operation. Education and cultural activity can be threatened—silenced even before a sound has been uttered—if sufficient friction is introduced into the system in which they occur; as we have seen in Part II, a permission-first sensibility permeates many

¹⁰³ Boccaccio, *supra* note 1 at 552.

educational environments, even when not warranted, and the very channels of digital communication are increasingly being designed to monitor and impede communicative activities even when the matter of “infringement” does not admit of a simple determination. In Part III, we turn to tell a grander tale of copyright and its teleology, in the hope that we can imagine a happier ending to these unwinding stories of copyright in the time of COVID.

A. *Copyright’s Role in The Information Ecosystem*

Perhaps the place to start is at the beginning? A great deal of scholarship has examined the historical origin story of modern copyright law to try to extract lessons about its initial justifications and intended purpose that might inform our current constructions.¹⁰⁴ While such historical explanations are not syllogistically determinative, as Peter Drahos explains, “[h]istory is one distinctive kind of story-telling and [intellectual property] is an area in need of many more critical historical stories.”¹⁰⁵ With this in mind, one oft-made point bears mentioning for those more familiar with today’s proprietary model of copyright owners’ entitlements than with their pragmatic and instrumentalist underpinnings: the first copyright legislation, the Statute of Anne of 1710, was entitled “*An Act for the Encouragement of Learning*.”¹⁰⁶ By placing a limited term right to control the printing of copies in the hands of authors, the story goes, copyright at its inception was aimed at breaking up the printing monopoly enjoyed by the Stationers, and thereby furthering the interests and education of an increasingly literate public. Indeed, the Act contained provisions aimed at ensuring the accessibility of published books, including a mechanism for controlling the prices of books if found to be “too high and unreasonable,” and a statutory duty for printers to deliver books to university libraries in Scotland and England.¹⁰⁷ There are prequels even to that copyright story. Libraries and universities predated copyright, and their role in “the ‘encouragement of learning’ was acknowledged before legislators

¹⁰⁴ See e.g. Lyman Ray Patterson, *Copyright in Historical Perspective* (VANDERBILT UNIVERSITY PRESS, 1968); Mark Rose, *Authors and Owners: The Invention of Copyright* (HARVARD UNIVERSITY PRESS, 1993); Ronan Deazely, *On the Origin of the Right to Copy* (HART, 2004).

¹⁰⁵ Peter Drahos, *A Philosophy of Intellectual Property* (AUSTRALIAN NATIONAL UNIVERSITY ETEXT, 2016) at 17, press-files.anu.edu.au/downloads/press/n1902/pdf/book.pdf. Drahos continues: “One purpose of such stories would be to help evaluate the orthodox forms of justification for intellectual property.”

¹⁰⁶ The full title was “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.”

¹⁰⁷ *Statute of Anne 1710*, 8 Anne, c 19, ss IV–V; see Katz, *supra* note 83 at 85.

decided to grant authors exclusive rights in their writings”—and was expressly preserved in the first copyright statute.¹⁰⁸ As Ariel Katz explains:

“The historical precedence of libraries and the legal recognition of their public function cannot determine every contemporary copyright question, but this historical fact is not devoid of legal consequence... As long as the copyright ecosystem has a public purpose, then some of the functions that libraries perform are not only fundamental but also indispensable for attaining this purpose.”

Notably, this passage was recently quoted by the Internet Archive in its defense of the National Emergency Library, supporting the following assertion: “Libraries buy books or get them from donations and lend them out. This has been true and legal for centuries. The idea that this is stealing fundamentally misunderstands the role of libraries in the information ecosystem.”¹⁰⁹ To do essentially the same thing, the argument goes, but employing the benefits of digital technologies to do it better, is simply to perform the same role within the information ecosystem without being subjected—unnecessarily—to the constrictions of the physical world.

When it comes to understanding the information ecosystem, we are in a very different world from that of the early days of the commercial printing press, with different capacities and different constraints. Yet clear parallels might be drawn between the paradigm-shifting emergence of printing technologies that features in the copyright origin-story and the emergence of digital technologies in the Internet era. Towards the turn of the 21st century, content industry incumbents became concerned about the potential for the Internet to destroy the economic benefits they had come to enjoy as content providers, just as the Stationers of seventeenth century England worried about the de-monopolization of the printing presses. They moved to strengthen copyright and expand its effective reach into the online environment, just as the Stationers sought to re-establish their permanent monopolies through the extension of common law copyright.¹¹⁰ With the conclusion of the World Intellectual Property Organization’s Internet

¹⁰⁸ Universities were permitted to print and sell books regardless of any exclusive rights granted to others, and publishers were required to provide the best quality copy of every printed book for the use of public libraries and universities. *See id.* at 84–85.

¹⁰⁹ *See* Chris Freeland, *Internet Archive responds: Why we released the National Emergency Library*, INTERNET ARCHIVE BLOGS (Mar. 30, 2020), blog.archive.org/2020/03/30/internet-archive-responds-why-we-released-the-national-emergency-library/.

¹¹⁰ *Millar v. Taylor* (1769), 98 ER 201, 4 Burr 2303 (KB); *cf.* *Donaldson v. Beckett* (1774), 1 ER 837, 4 Burr 2408 (HL).

Treaties in 1996,¹¹¹ and the enactment of the international standard-setting U.S. *Digital Millennium Copyright Act* in 1998,¹¹² the copyright system was shored up for a digital future before that future had even taken form. This system we now see shaping our online lives—a system of extended private rights and digital locks, of notice-and-takedown obligations and redundant user rights—is not an accident but an accomplishment of economic power and political persuasion.

As Ruth Okediji has explained, the pre-emptive move to safeguard copyright during the digital shift pivoted on the old presupposition that proprietary control was a critical incentive for knowledge production; but it failed to acknowledge the extent to which digital technologies had fundamentally “disrupted long-settled canons of [this] classic copyright defense,” both by “perfecting authorial control over terms of access to creative works,” and by “illustrat[ing] clearly a truth muted by the regimented world of print works, namely, that robust creativity and corresponding economic success require users’ ability to access and fully engage creative content...¹¹³ Seemingly lost in this process was the connection between the capacities of digital technology and the objectives—as opposed to the traditional operation—of the copyright system. As Paul Goldstein wrote, the arrival of the Internet may be “the ultimate phase in copyright’s long trajectory, perfecting the law’s early aim of connecting authors to their audiences.”¹¹⁴ As Cheryl Foong has since explained, “internet communications hold vast potential for furthering copyright’s dissemination function more effectively than ever before.”¹¹⁵

Put another way, technology has achieved in leaps and bounds what copyright, with its internal paradoxes, could only ever inch us towards: the development of “a robustly cultured and intellectual public domain.”¹¹⁶ Network technologies have an incredible capacity to advance the social objectives that justify the copyright system—but, as we have seen, that capacity can be constricted by its oppressive operationalization. The protection of copyright and incumbent industry interests has become an end

¹¹¹ *WIPO Copyright Treaty*, Dec. 20, 1996 (entered into force Mar. 5, 2002).

¹¹² *Digital Millennium Copyright Act*, Pub L No 105-304, 112 Stat 2860 (1998).

¹¹³ Ruth L Okediji, “The Regulation of Creativity Under the WIPO Internet Treaties” (2009) 77 *Fordham L Rev* 2379 at 2380.

¹¹⁴ Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox*, revised ed (STANFORD LAW AND POLITICS, 2003) at 216, cited in Cheryl Foong, *The Making Available Right: Realizing the Potential of Copyright’s Dissemination Function in the Digital Age* (EDWARD ELGAR, 2019) at 8.

¹¹⁵ *Id.*

¹¹⁶ Bell, *supra* note 72 at paras 9–10.

in itself; when copyright policy prioritizes the protection of copyright owners' exclusive control over the advancement of its public purposes, it undermines its own justifications and threatens its own legitimacy as a constitutional limit upon free expression.¹¹⁷

The point of this story become clearer when we turn to consider copyright's purposes. Ascribing purpose to copyright law is, admittedly, a fraught task. An enormous number of possible goals have been assigned to the copyright system across space and time, many of them in obvious tension. We have already seen that the original stated purpose was 'the encouragement of learning.' The United States Constitution, most famously, describes the purpose as "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their respective Writings."¹¹⁸ The Supreme Court of Canada has more recently described the ends of copyright 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."¹¹⁹ It has since elaborated: "[t]he proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature."¹²⁰ Canada's 2012 *Copyright Modernization Act*, which implemented the aforementioned WIPO Internet Treaties, described the *Copyright Act* as "an important marketplace framework law and cultural policy instrument" that "supports creativity and innovation and affects many sectors of the knowledge economy," with the grant of exclusive rights aimed at providing rightsholders with recognition and remuneration, while also limiting those rights to "enhance users' access."¹²¹ Most recently, the Supreme Court has opined that "balance between creators' rights and users' rights must inform the proper interpretation and scope" to be given, not only to the exceptions and limitations in the *Copyright Act* but to all of its provisions.¹²² Thus, as the Supreme Court explained:

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.... *Théberge* focused attention on the importance copyright plays in promoting the public interest,

¹¹⁷ See Carys J. Craig, *Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright*, 56 UTLJ 75 (2006).

¹¹⁸ US Const. art I, § 8, cl 8.

¹¹⁹ *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 S.C.R. 34 at paras 11–12, 30.

¹²⁰ CCH, *supra* note 8 at para 10.

¹²¹ *Copyright Modernization Act*, SC 2012, c 20, Preamble.

¹²² Keatley, *supra* note 89 at para 47.

and emphasized that the dissemination of artistic works is central to developing a robustly cultured and intellectual public domain. ...[B]oth protection and access must be sensitively balanced in order to achieve this goal.¹²³

Even from these synopses we see myriad burdens placed on the copyright system: encouraging the creation of works, protecting the economic and moral rights of authors, incentivizing the development of distribution mechanisms for the dissemination of creativity, enabling users to access existing works and create their own new works, maintaining a market for creative expression and encouraging innovation. But the big picture also comes into focus: ultimately, copyright is a state-constructed system of entitlements granted by law to support communicative activity and a vibrant public domain by incentivizing and facilitating creativity and dissemination.¹²⁴ It follows that copyright's allocation of rights, liabilities and limits should be balanced to "maximize social engagement, dialogic participation and cultural contributions."¹²⁵

What remains, then, is to consider what the shift from analog to digital—and now from the pre-COVID "normal" to the "new normal"—should mean for this delicate balancing act, and the capacity of copyright law to achieve its goals. What seems obvious in the very concept of balance is the need to adjust the weight and distribution of rights and interests in order to maintain a consistent equilibrium as the ground beneath us shifts. The Supreme Court has already captured this notion of purposive rebalancing in its expansive vision of "technological neutrality" as a guiding principle in the application of copyright norms. Justice Abella explained in a 2006 concurring decision:

The *Copyright Act* was designed to keep pace with technological developments to foster intellectual, artistic and cultural creativity. In applying the *Copyright Act* to a realm that includes the Internet...the public benefits of this digital universe should be kept prominently in view.... "The Internet and new technologies have unleashed a remarkable array of new creativity, empowering millions of individuals to do more than just consume our culture, instead enabling them to actively and meaningfully participate in it."¹²⁶

In 2012, a majority of the Supreme Court articulated a substantive

¹²³ Bell, *supra* note 72 at para 9–10.

¹²⁴ See Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar, 2011) at 52.

¹²⁵ See *id.* at 54.

¹²⁶ Robertson, *supra* note 4 at para 79 (citing Michael Geist, *Our Own Creative Land: Cultural Monopoly & The Trouble with Copyright* (THE HART HOUSE LECTURE COMMITTEE, 2006) at 9, cdn.michaelgeist.ca/wp-content/uploads/2006/05/hhl06_Online_Book.pdf).

version of this principle when it insisted that “the traditional balance between authors and users should be preserved in the digital environment.”¹²⁷ More recently, in dissent, Justice Abella wrote:

The question...is how to preserve [the balance that best supports the public interest in creative works] in the face of new technologies that are transforming the mechanisms through which creative works are produced, reproduced and distributed. . . . The answer to this challenge, in my view, lies in applying a robust vision of technological neutrality as a core principle of statutory interpretation under the *Copyright Act*.¹²⁸

A robust vision of technological neutrality asks how the law ought to apply if it is to further the purposes of the copyright system. The consistency sought is not consistency in the application of the law, but rather in the steady pursuit of its normative objectives in the face of change. Such a purposive approach to technological neutrality does not necessarily act as a restraining influence on expansions or contractions of copyright rights (whether those of owners or users)—the point is not to “maintain” or “restore” a *status quo ante*, but to ensure that, as the cultural environment in which copyright is deployed changes, copyright entitlements do not become ossified and reflective of a past that no longer obtains. For present purposes this means that, as cultural and educational activities shift online for the foreseeable future, the legal claims enabled by copyright may need to be curtailed so that they do not unduly inhibit the very activities those claims are nominally intended to enable.¹²⁹

Thus, if a primary goal of the copyright system is to maximize the distribution of intellectual works, then it follows that the narrowing opportunities for physical distribution of copies should be compensated for by a broadening of opportunities for digital distribution. If a primary goal of the copyright system is to encourage people to engage in creative expression, then it follows that a swell of creative engagement by the masses should be facilitated as opposed to quashed. And if a primary goal of the copyright system is to sufficiently reward those who create intellectual works for the benefit of us all, then it follows that people’s creative endeavours should be

¹²⁷ ESA, *supra* note 61 at para 8 (citing Carys J. Craig, “Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32” in Michael Geist, ed, *From ‘Radical Extremism’ to ‘Balanced Copyright’: Canadian Copyright and the Digital Agenda* (IRWIN LAW, 2010) 177).

¹²⁸ CBC, *supra* note 14 at paras 147–48.

¹²⁹ Carys J. Craig, *Technological Neutrality: Recalibrating Copyright in the Information Age*, 17 *Theor. Inq. L.* 601 (2016).

permitted whatever audience and recognition they are able to garner, accompanied by the rewards that come with that recognition (whether financial or personal, external or internal). In other words, the copyright balance—the balancing act between enforcing owners’ rights and protecting users’ rights, and between protection and access—must adjust to the new realities of the times in which we find ourselves. That may mean giving greater weight to users’ rights of access than to owners’ rights to exclude when we find ourselves at a moment in history in which physical exclusion is inescapable, and digital access is the only open door to creative engagement, education, and participatory culture.

B. *Some New Norms For A “New Normal”?*

In the stories we have told so far, we see both the promise and the copyright-stunted potential of network technologies to smooth over the gaps between our offline isolation and our online sociality. During a viral pandemic, in a period of physical distancing, these gaps can feel more like gaping chasms. But even when we return to normal—whatever our new normal is—the copyright lessons we should have learned in isolation will have much to teach us about improving the next chapter in our digital future. So having pointed to the interplay of copyright’s policy purposes, the central role of user rights, and the principle of substantive technological neutrality, we want to braid a few narrative threads into the next passages of copyright’s story.

First, it should be clear that the shift from the analog to the digital world has implicated copyright in the everyday activities of engaged citizens—in their personal communications and intellectual pursuits—in a way and to an extent that was never previously the case. Even activities that implicated copyright interests in the offline world were often irrelevant to the overall functioning of the system and unlikely ever to be “caught” in what was an inherently “leaky” system. This leakiness was a feature and not a bug of the copyright system—mitigating the consequences of copyright’s paradox. But now, as our whole lives move online, technology is increasingly plugging these “leaks” and transitioning us towards a time of perfect content monitoring by circulation gatekeepers and absolute automated control. As Jessica Litman has wryly observed, however, only the “breathhtaking hubris” of copyright lawyers can explain the apparent assumption that copyright law should “govern every single way that information coded in electrons can move from one computer to another.”¹³⁰ We need to actively *recalibrate* the

¹³⁰ Jessica Litman, *Digital Copyright* at 30, (PROMOTHEUS BOOKS, 2006).

copyright system to restore its equilibrium in the digital environment, recognizing that there is nothing perfect about perfect control, and counterbalancing technical measures by building leaks and limits back into the system by design.

That lesson flows swiftly into the next: user rights are vital to maintaining the appropriate balance between rewarding authors and the public interest that underpins a normatively coherent copyright system, and it is therefore essential to copyright's legitimacy that we find ways to better safeguard users' rights in our online interactions. Not only does this require that strong, flexible, technologically neutral and readily comprehensible exceptions are shored up in our copyright law, but also that these rights can be enjoyed and, where necessary, enforced by users. This will demand careful attention to the algorithmic systems that identify, block, and take down lawful content, with a view to ensuring improved transparency, accountability, and attention to the complexities of the various legal rights at play. It will also require improved system architecture for enabling users to interact with moderators and (human) decision-makers for the purposes of mediating disputes and easily mounting appeals. As Niva Elkin-Koren has suggested, this could include algorithmic enforcement of user rights as an equally automated countermeasure to redress the current imbalance.¹³¹

We would like to imagine that the next twist to the tale of algorithmic enforcement will see user rights faithfully reinscribed into the code that governs online life, together with a capacity to operationalize jurisdiction-specific copyright limits and exceptions, and mechanisms to appropriately privilege access and sharing over takedown measures, at least pending human review.¹³² Where identified content is monetized rather than removed, such systems should also recognize creative users as authors in their own right, enabling a more just distribution of funds between multiple overlapping rightsholders, and thereby encouraging rather than punishing downstream

¹³¹ Niva Elkin-Koren, *Fair Use by Design*, 64 UCLA L. Rev. 1082 (2017). But note that Burk, among others, has queried whether such automated (or human) countermeasures are feasible at scale (see Burk, *supra* note 53 at 300ff).

¹³² See Communia Association, *Article 17 Implementation: German Proposal Strengthens the Right of Users and Creators*, COMMUNIA (June 24, 2020), www.communia-association.org/2020/06/24/article-17-implementation-german-proposal-strengthens-right-user-creators (describing the German proposal to enact a system whereby users must be able to “pre-flag” uploads that make use of protected works covered by an exception, that are openly licensed or free from copyright. Works that are “pre-flagged” and not obviously infringing cannot be automatically filtered and may be removed only after human review by the rightsholders (in the meanwhile they must remain online)).

dialogic creativity.¹³³

The mechanisms that might be deployed to revive or preserve users' rights could take a variety of forms, coming from both within and beyond the copyright system. Some combination of copyright reform and consumer protection measures, for example, could seek to ensure that copyright users' rights cannot simply be overridden by boilerplate contracts (such as platform terms of service), thereby placing the onus onto online service providers to ensure that their offerings are properly solicitous of a broad fair dealing defence and other consumer concerns.¹³⁴ Judicial dialogue also has a key role to play (as *Théberge* and its progeny aptly demonstrate): just as U.S. courts have reminded copyright owners that they must give good faith consideration to potential fair use defences before issuing take-down demands,¹³⁵ courts should be attentive to the importance of effecting balance—possibly through judicious application of technological neutrality as an interpretive device—when making decisions about infringement, injunctions, and the allocation of rights and obligations;¹³⁶ copyright operates within an ecology of technology and practice, and judicial decision-making should be alive to those material realities. Beyond law, the technology and engineering praxis demands a deeper interdisciplinary dialogue to close the chasm between nuanced legal norms and the technological architecture through which their stringent regulatory force is felt.

The final narrative thread we want to pull upon here is the clear need to fundamentally rethink traditional publishing models in the textbook market and more broadly. If physical books are increasingly inaccessible—whether due to physical distancing or prohibitive pricing—and increasingly undesirable in a digital world, we have to critically re-examine a system that locks institutions, libraries, students and educators into limited and unworkable options as ostensibly captive audiences. The flaws of the old system have now been fully exposed. Rather than waiting endlessly for market incumbents to embrace the digital shift, it is time for educational institutions, instructors and faculty members to turn the page on proprietary textbooks and to commit instead to developing Open Educational Resources, and to making Open Access publishing the default not only for scholarly research but for teaching materials across the board.¹³⁷ Rather than relying on

¹³³ Grosse Ruse-Khan, *supra* note 43.

¹³⁴ See e.g. Pascale Chapdelaine, *Copyright User Rights – Contracts and the Erosion of Property* (OXFORD UNIVERSITY PRESS, 2017).

¹³⁵ See *Lenz v Universal Music Corp*, *supra* note 90.

¹³⁶ See CCH, *supra* note 8 at para 11 (describing the *Copyright Act* as setting out “the rights and obligations of both copyright owners and users”).

¹³⁷ See Hudson & Wragg, *supra* note 79; see also Trosow & Macklem, *supra* note 99; see

expensive and restrictive licenses, libraries and users need the option of affordable openly licensed materials that actually facilitate online access. They also need the confidence to engage in and facilitate fair dealing practices and other lawful uses, which means systematically safeguarding them against threats of litigation and potentially devastating liability.

Of course, these three threads—restoring copyright’s equilibrium in the digital environment, shoring up user rights in practice, and reimagining traditional publishing models—only begin to gesture towards solutions to the many problems identified in these tales of copyright during the COVID crisis. But by pointing to a variety of potential dynamic responses to the copyright risks and restrictions that have revealed themselves during this trying time—as well as the framing principles that ought to guide them—we hope to finish this story on something of a positive note.

CONCLUSION

These stories about copyright, creativity, and learning in the time of COVID offer avenues to re-examine the common copyright narrative—the one that tells us that copyright encourages learning and the creation and dissemination of works—and to lay bare its disconnect from the current realities of our digital dependency. The legal structure of copyright has been designed over time to effect a form of polycentric balancing, granting expansive rights but also tailoring their limits and curtailing their reach in an effort to recognize the symbiotic and dialogic relationships between creators and audiences, educators and learners. But digitized enforcement mechanisms appear incapable of giving effect to those fine-grained calibrations, and the complexity of layers of copyright interests—combined with risk-averse individual responses and institutional policies—means that information flows, whether educational or creative, are unjustifiably choked off just when we need them most. The lessons to be taken from these tales are not limited to the current crisis but should inform our evolving copyright norms in whatever “new normal” emerges; they are lessons for how copyright should and should not work if it is to serve its policy objectives and consistently advance the public interest over the course of time and social change. There are any number of positive outcomes that might emerge from this crisis for copyright policy and our larger information ecosystem, if only we digest the lessons of the past and use our collective creativity to imagine an alternative future—as all the best storytellers do.

In truth, had it been honestly possible to guide you whither I would bring

e.g. OER4Covid, *OER Support Group For Educators During Covid-19*, oer4covid.oeru.org/.

*you by a road less rough than this will be, I would gladly have done so.*¹³⁸

¹³⁸ Boccaccio, *supra* note 1 at 12.