

***Situating the Learner within the
Copyright Paradigm: Fair Dealing
in Historical Context***

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SCC in CCH (2004)

“...the fair dealing exception is perhaps more properly understood as an *integral part* of the *Copyright Act* than simply a defence... The fair dealing exception, like other exceptions...is a user's right. In order to maintain the *proper balance* between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver... has explained...: 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.'”

Theberge v. Galerie d'Art du Petit Champlain

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology...

The Enlightenment and the Diffusion of Knowledge

Proliferation of vehicles to disseminate useful knowledge:

- ✓ Learned Societies and Associations
- ✓ Circulating libraries and public libraries...
- ✓ Universities, museums...

The Diffusion of Knowledge

✓ Public schools/universal education

Thomas Jefferson (1778): Government must try to “illuminate...the minds of people at large...without regard to wealth, birth or other accidental condition or circumstance”

These same values about the benefits of universal education were prevalent in the British North American provinces

The Diffusion of Knowledge

✓Copyright Law –
For the Encouragement of
Learning

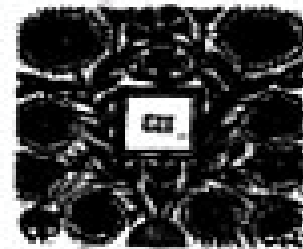
Knowledge-centred
Policy

(261)

Anno O^{mn}ino

Annæ Reginae.

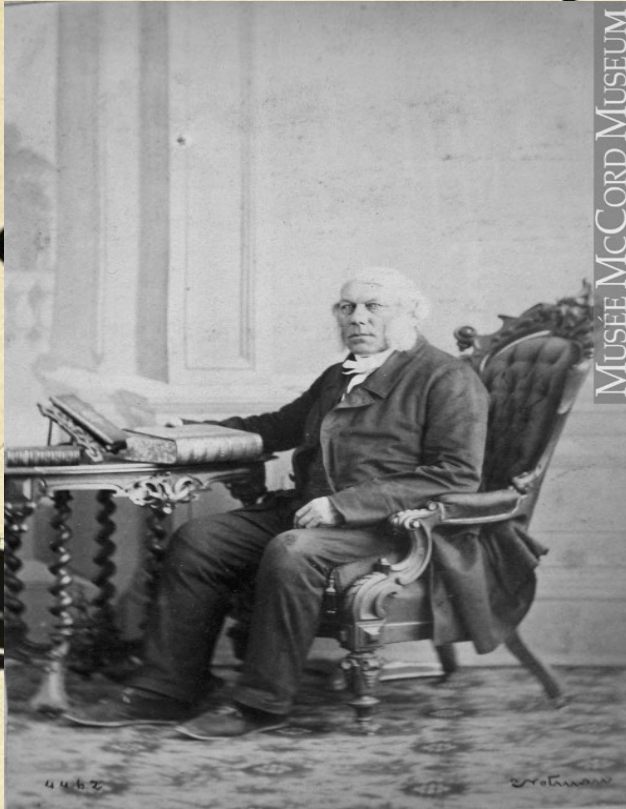
An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books, in the Authors or Purchasers of such Copies, during the Times therein mentioned.



Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices in the future, and for the

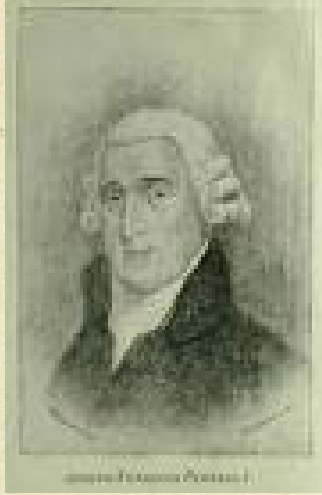
Encouragement of Learning, Her Majesty's most Excellent Majesty Queen Victoria, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the Authority of the same, have enacted, that from and after the tenth Day of April, One thousand eight hundred and six, the Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books, shall or shalls thereof, or the Bookeller or Book-Sellers, Printer or Printers, or other Person or Persons, who hath or have Purchased or acquired the Copy or Copies of any Book or Books, in order so Print or Reprint the same, shall have the sole Right and Liberty of Printing such Book and Books by the Term of One and twenty Years, to Commence from the said tenth Day of April, and so long; and that the Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and be Written, or Written, shall have the sole Liberty of Printing and Reprinting such Book and Books by the Term of four-

**Rev. R. Burrage (1794-1864) Testimony –
Special Committee to Enquire into State of
Education, Lower Canada 1824**



Schools in the country...have been all along very imperfectly supplied with Books...this must have operated very materially in retarding education. ...But, that Education may go on well; and that the Scholars may make the best use of their time, it is above all things necessary that the same books should be used throughout the School, and that each boy should have his own supply...

Petition of Joseph-Francois Perrault (1830)



“That there being a deficiency in this Country of books for giving instruction methodically in the French Language, the Petitioner has compiled a few, which in his opinion are adapted to the use of Elementary Schools.”

“the Petitioner’s means are not ample enough to enable him to have a sufficient number of copies printed....so as to reduce them to the moderate price ...which would place them *within the reach of every individual*...

1831 Petition of William Morris

I lay before the Committee a Manuscript Book containing a treatise on Arithmetic and practical Geometry. I have adopted in my School, as much as I could, the system contained in my Book; the want of printed Copies has prevented me from making use of it altogether. I am of opinion that if my work was printed and put into practice, *children could learn* all the rules that it contains in one year. I have not dared to get it printed. Mr. Cary would not print it, but at a price I feared to give.

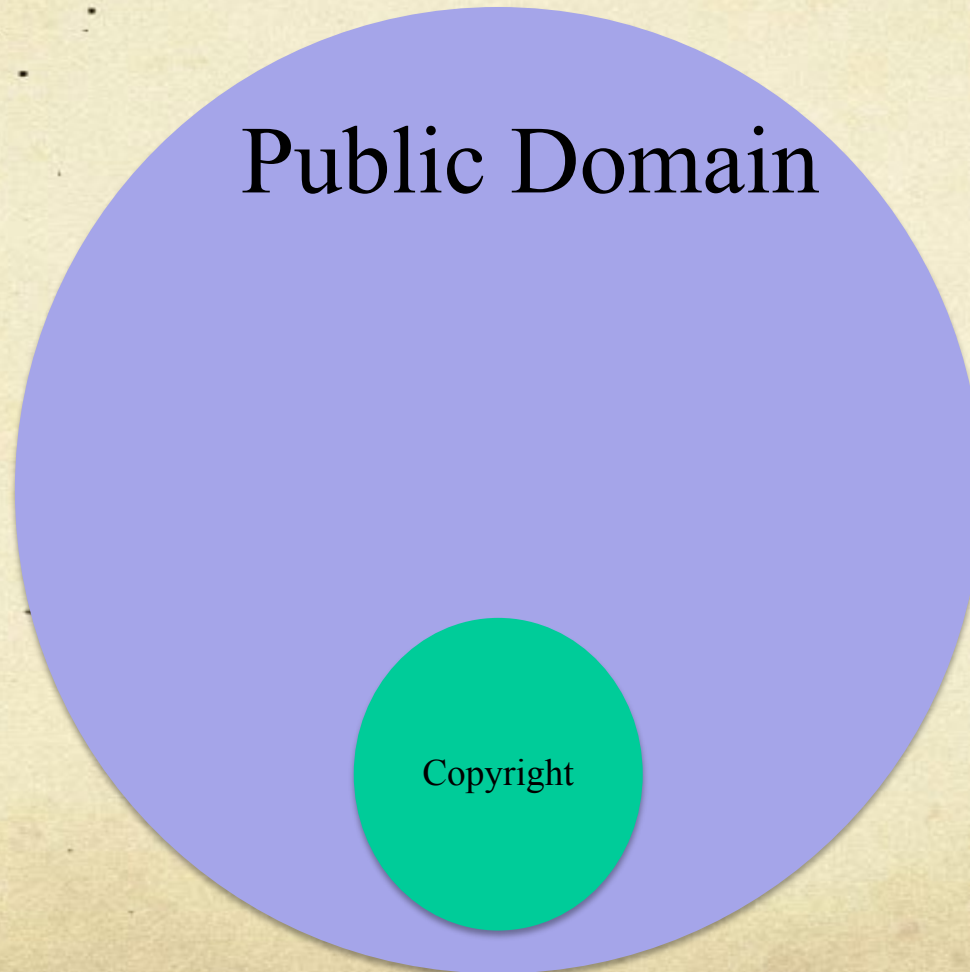
First Report of the Standing Committee on
Education and Schools, 23rd January 1832 – 2
Will IV Appendix I.i

John Neilson (1776-1848)



“The necessity of such Books [schoolbooks], and the little encouragement existing at present for time, talents and capital employed in this way...induced your Committee to recommend the introduction of a Bill securing Copyright...”

19th c. Copyright: An Island in the Public Domain Sea



Copyright Was Inherently Limited in Scope

- Mandatory Formalities
- Limited Duration – fixed number of years
- Some works were ineligible as a matter of principle
- Very narrow scope of infringement

Then....copyright infringement expanded beyond literal copying to ‘colourable imitations’

Cary v. Kearsley (1802) UK

“That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt a part of the work of another; he may so make use of another’s labour *for the promotion of science, and the benefit of the public*: but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*” –

Was the defendant’s action “fairly done with a view of compiling a useful book, for the benefit of the public..or taken colourable, merely with a view to steal the copyright of the plaintiff”

Drone on Fair Use” (1879)

“It is a recognized principle that every author, compiler, or publisher may make certain uses of a copyrighted work, in the preparation of a rival or other publication. The recognition of this doctrine is essential to the *growth of knowledge*, as it would obviously be a hindrance to learning if every work were a sealed book to all subsequent authors. “

Numa Droz (1884)

The President of the preparatory Diplomatic Conferences on the Berne Convention remarked:

”Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. *The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses*”

Quebec Jurist Pierre-Basile Mignault (1854-1945)

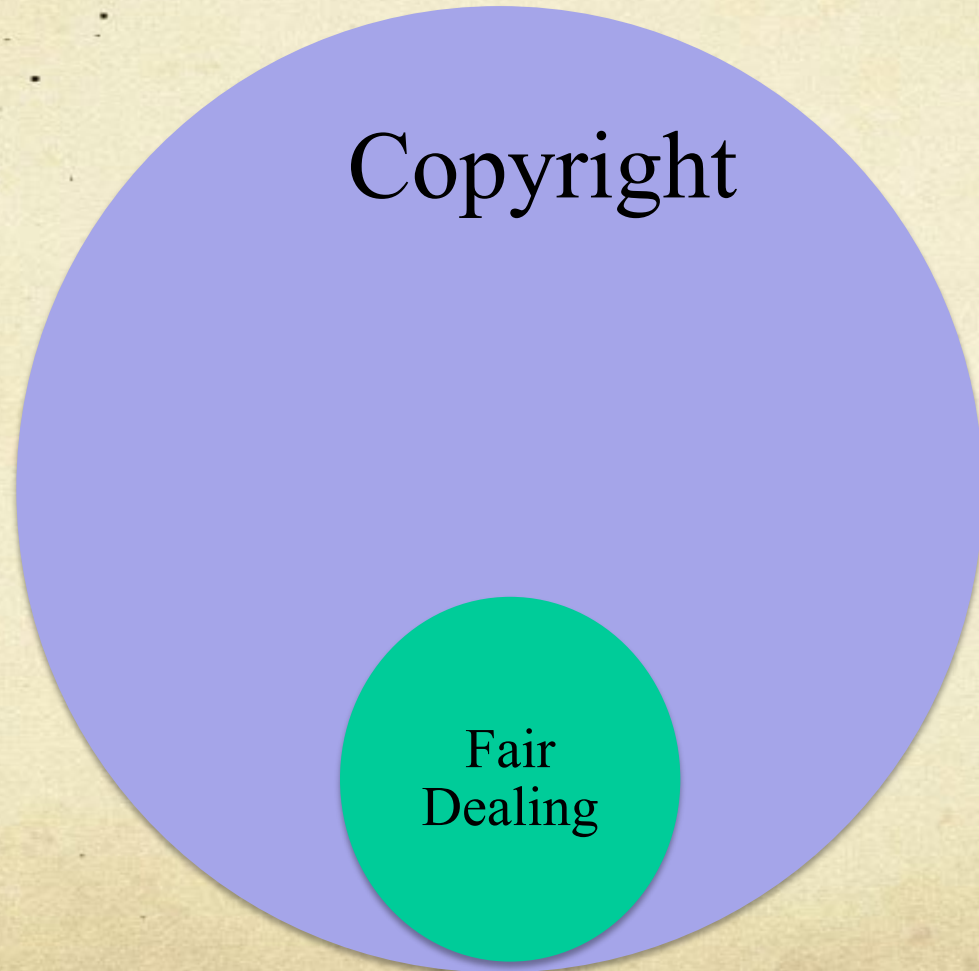


Writing about Canadian copyright law, Mignault recognized the concept of legitimate uses, quoting Drone: “the aim of the law is to *encourage learning* by allowing fair use to be made of a copyright work” (1881)

Printer/Publisher and Copyright Expert Samuel Edward Dawson (1833-1916)

“The fact simply is that literary property is a recent creation... and that in creating it, the *law has put such limitations upon it as are necessary*... The time is continually extending, and the copyright holders are still dissatisfied and clamour for a perpetuity of monopoly... Those who enjoy the fruits [of the author’s] labour should pay for the privilege, but I am arguing against the demand to enclose in perpetuity *the common ground of intellectual life*.” (1882)

20C and 21C Fair Dealing: An Island in the Copyright Sea



Fair Dealing

Fair dealing for the purpose of research, private study, education, parody or satire, criticism or review, news reporting does not infringe copyright.

“User Rights are Not Just Loopholes”

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Channeling the Past: For the Encouragement of Learning

“Teachers have no ulterior motive when providing copies to students...the teacher’s purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.” [Abella J., Alta (Ed) v. CCLA 2012]