Nair, Meera, Copyright Officer, Northern Alberta Institute of Technology, "Fair dealing; equal under the law and inviolate in contract"

Over the past fifteen years, decisions of Courts and actions of the Federal Government have brought in a series of modest changes to the system of copyright in Canada. These incremental steps have coalesced into the achievement of a definitive position: that to support its underlying purpose, copyright is, and must necessarily remain, a set of limited rights. Such an achievement is simultaneously over and underwhelming. In a world governed by the perception that copyright is absolute, it is no small accomplishment to consistently articulate the legitimacy of curbing copyright's claim to sweeping powers. At the same time, a bare statement of fact seems hardly worthy of plaudits.

Despite the enviable recognition from above, implementation of user rights remains hampered by lack of support from below. A particularly thorny issue is whether a facet of copyright's limits, namely the realm of exceptions which accompany the grant of copyright, may be set aside through a contractual agreement between two parties? Proponents of the sanctity of contract immediately and vehemently argue, *yes*. In reality, most questions pertaining to law must first be answered as, *it depends*. Facts and circumstances are germane to the validity of any proposition.

Copyright is accepted without question as a right; fair dealing has been acknowledged as having that same stature through our highest court's designation of fair dealing as a user's right. Yet begrudging token acceptance, or continued dismissal,[1] is a still-too-frequent reaction to the dialogue of user rights. The impediment to unreserved recognition of user rights appears to be the uncomfortable realization that by extending rights to include fair dealing, copyright loses its supremacy. A reaction that might feel familiar to every minority group which has sought to: (i) be granted the same stature as that of the ruling majority; and (ii) be treated with equal respect thereafter. As an academic exercise, is there a connection between Canada's particular history of equality rights and fair dealing? And if so, how might past discussion of the expansion of equality rights in Canada inform the co-existence of fair dealing and copyright?

With an eye to forestall confusion as to the aim of this paper, it must be emphasized that this author is not stating that copyright or user right has the stature of a constitutionally protected right. Nor does she suggest that the challenges felt by those caught within the copyright /user right debate are in any way on par with past and present diminishment of people suffering from discrimination by gender, ethnicity or identity. What is sought is a mode of analysis with which to develop a productive co-existence of copyright and user right.

Exploration begins in Section II through broad consideration of the apolitical purpose of copyright, shaped as that is by a subtle yet pervasive theme of multiculturalism that has come to

[1] For example, "In the leading case, *CCH Canadian v. Law Society of Upper Canada* [citation omitted], fair dealing ceased to be a mere defence and was newly deemed by the SCC to be a 'user right' — whatever that means;" see Richard Owen, "How to really support Canadian culture: Heritage and the copyright brief," (July 2016) *Commentary*, MacDonald-Laurier Institute online: <http://www.macdonaldlaurier.ca/files/pdf/MLICommentaryOwens_web.pdf>.

be prized in Canadian culture.[2] The section concludes with the pre-eminence of the public domain, and the role of exceptions towards maximizing the public domain. Section III looks to alternative conceptions of ownership and property that better suit the communal nature of the public domain. In particular, the perspective of First Nations' people, where ownership is construed through the relationships of belonging and sharing, is more apropos than the impersonal, alienability framework of Western property law.

Some may question the wisdom of this choice of perspective; arguably, the challenges that First Nations people continue to face with respect to asserting control and use of their landed domains illustrate that the aboriginal paradigm of ownership as belonging is not well received. Nevertheless, there is merit to recognizing that aboriginal approaches to property have more in common with the creative process than the Western ideals of solitary genius and alienable property rights.

Drawing from prior Supreme Court explorations of aboriginal rights, Section IV proposes a model of analysis to determine how either copyright or user right may be limited, when the two are in conflict. (That rights are limited should come as no surprise to Canadians, what is necessary is a means to determine when one right must give way to another.) With model in hand, the author evaluates an imagined dispute between contractual terms governing use of resources and application of fair dealing, to the conclusion that fair dealing must take priority.

[2] Raymond Williams described *culture* as one of the most complicated words in the English language; "… a culture is not only a body of intellectual and imaginative work; it is also and essentially a whole way of life." Raymond Williams, *Culture and Society* (Hammondsworth: Penguin, 1968) at 312.