

Articles

Introduction to Part Two of *New Fronts in the Copyfight*

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Abstract

This article introduces the second part of *New fronts in the copyfight: Multidisciplinary directions in critical copyright studies* (the first part of which appeared in *DSCN* Vol. 4 [2014]). The article surveys recent and ongoing developments of note in the global intellectual property regime, such as the Trans-Pacific Partnership, and relates these to the articles included in this second instalment of this series: "It's creativity, Jim, but not as we know it" by Carolyn Guertin; "Transproperty" by Daniel Downes; and the guest editor's review of Rosemary Coombe et al's collection *Dynamic Fair Dealing: Creating Canadian culture online*.

Cet article présente la deuxième partie de *New fronts in the copyfight: Multidisciplinary directions in critical copyright studies* (dont la première partie a paru dans *DSCN* Vol. 4 [2014]). L'article enquête sur l'évolution récente et les développements actuels qu'il convient de remarquer au sein du régime mondial de la propriété intellectuelle, comme le partenariat transpacifique, et les rattache aux articles inclus dans la deuxième tranche de cette série : « It's creativity, Jim, but not as we know it » de Carolyn Guertin; « Transproperty » de Daniel Downes; et la critique de l'éditeur invité de la collection *Dynamic Fair Dealing: Creating Canadian culture online* de Rosemary Coombe et al.

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Introduction

This second installment of *DSCN*'s special series, *New fronts in the copyfight*, appears in the wake of the dramatic federal ouster of the Conservative government and the formation of a Liberal government that faces difficult decisions on matters of Canadian public discourse, intellectual property law, research, culture, and expressive freedoms. The new government has already unmuzzled federal scientists; artists, academics, and progressive organizations are mobilizing the public to call for the repeal of Bill C-51 and for the un-muzzling of federal scientists. Of particular concern for Canadian copyright experts, for digital humanists, and for, well, anyone who uses the Internet is the Trans-Pacific Partnership (TPP):

The fact that close to 800 million Internet users' rights to free expression, privacy, and access to knowledge online hinged upon the outcome of squabbles over trade rules on

cars and milk is precisely why digital policy considerations do not belong in trade agreements. Hollywood, other major publishers and even big tech companies have taken advantage of this secretive, corporate-captured process to pass rules that they could not otherwise get away with in an open, participatory process ([Sutton 2015](#)).

The now-defeated Conservative government, which continued to negotiate the deal after calling the election—having changed the law to let it do so ([Geist 2015b](#))—committed Canada to agree to the TPP in eleventh-hour and still-secret negotiations during the Canadian election campaign. But this sweeping corporate-rights deal is far from done. The leak of the TPP's intellectual property chapter confirms experts' fears that Canadian copyright law, last overhauled only three years ago, will need further—and drastic—revision in order to meet the needs of the TPP, which represent, in essence, the interests of the US Trade Department ([Geist 2015a](#)). Public and press pressures now mount to extricate Canada from at least the "copyright concessions" of the TPP ([Globe Editorial 2015](#)), a deal that in any event would still need to pass through Parliament, the US Congress, and the legislative bodies of its other signatory states. What is already known about the copyright-toughening, Internet-censoring, and investor-state dispute settlement provisions in the draft to which the dozen or so nations party to it have agreed ([McCutcheon 2015](#)) should give the new Liberal government cause for concern ([Knopf 2015b](#)), not only because these provisions fly in the face of the government's stated commitment to Canadian arts and culture but also because they would chill and suppress the very dynamic digital culture that the Liberals' youth-voter oriented campaign leveraged for its success at the polls.

The socially damaging implications of the TPP are making unexpected allies: Broadview Press co-founder and CEO Don LePan wrote an open letter that details the harm the TPP would do to Canadian publishing and the public domain, and that, in the process, cites and makes common cause with University of Ottawa digital copyright expert Michael Geist—with whom LePan has vigorously disagreed in the past over copyright issues, for instance over university fair dealing policies and Access Copyright. With reference to published and in-production editions of works by George Orwell and T.S. Eliot, LePan illustrates the prospective havoc that the TPP's extension of copyright from 50 to 70 years after the author's death would wreak on Canadian publishing: "If the TPP is approved in Canada, then, say goodbye to those Orwell and Eliot editions. Indeed, given that the application would appear to be retroactive in Canada, say goodbye to a number of books that we've been making available in Canada for some time already" ([LePan 2015](#)).

Meanwhile, as Geist observes, "aggressive lobbying efforts" by rights holder interests and intermediaries are now "likely aimed at entrenching the [TPP's] copyright term extension requirement ... and placing fair dealing reform at the head of the line for the 2017 Canadian copyright review" ([2016](#); cf. [Nair 2016](#)). As Howard Knopf ([2015a](#)) has been reporting, Access Copyright continues to pursue its legal action against York University's fair dealing policy (which goes to trial at the Federal Court in May 2016), and its lopsided hearing at the Copyright Board (which now appears to be asking some tough questions of Access Copyright, in the absence of adversarial parties that would normally do so), while more recently proposing a "federated search service" that seems to replicate what most university libraries already offer, and that it now wishes to sell to the postsecondary sector it has so profoundly alienated with the two aforementioned actions ([Tiessen 2015](#)).

In addition to these developments in the global and national regulatory contexts, the proliferation of various forms of digitization across Canadian postsecondary education—from the now-conventional use of third-party-vendor Learning Management Systems (LMS), to the emergence of electronic

textbooks, to the controversial teaching model of the massive, open online course (MOOC)—harbour not only important risks and affordances for research and teaching, but also greater uncertainties over intellectual property, its ownership, and its distribution. These uncertainties came to the fore in a panel about online learning in which I took part for the Western Regional Faculty Associations Conference in Saskatoon, about a week after the 2015 Canadian election. The discussion demonstrated great interest—and disquiet—about intellectual property issues in higher education, particularly in the context of faculty labour, ownership of the intellectual property that it produces, and the appropriations of that property by institutions and administrations that are being governed more according to increasingly corporate, neoliberal models, and less as public services for the production of an educated citizenry and of knowledge as a public good.

The creep of corporatization in Canadian higher education and the increasingly complex and layered commodification of publicly produced knowledge as "intellectual property" are, of course, both symptoms of the globally consolidating regime of neoliberalism that a secretive deal like the TPP seeks to codify and enforce, with teeth. The contributions to this installment of *New fronts in the copyfight* theorize the growing complexity and strength of the IP regulatory regime—and also theorize ways to navigate, leverage, and resist this regime, towards a more robust and dynamic public sphere.

To make sense of the thickening complexity of intellectual property and how the cultural industries protect it, Daniel Downes, director of the University of New Brunswick's Information and communication studies program, folk singer-songwriter, and author of *Interactive realism: The poetics of cyberspace* (2005), introduces a theory of what he calls "transpropertied" media. Building on Henry Jenkins' (2006) theory of "transmedia"—texts and other cultural productions that become franchises adapted and repurposed for various media (e.g. *The Matrix* as comic book, film, game, and TV series)—Downes' notion of "transproperty" focuses on the commodity structuring of such transmedia texts; he demonstrates how different forms and layers of intellectual "propertization"—especially copyright and trademark—converge to provide overlapping layers of enforceable protection for the popular productions of the cultural industries. Such transpropertization allows rights owners to disaggregate components of their properties—imaginary settings, fictional characters—so that they can be not only separately leased and licensed, but also protected by multiple IP regimes. Marvel Comics, to take one of Downes' illustrative cases, fiercely enforces its copyright and trademark in its characters, sometimes in conflict with the very businesses it licenses its properties to.

Fans and fan culture, of course, are also often on the receiving, cease-and-desisting end of transproperty rights enforcement, for participating in appropriations, recontextualizations, and other derivative and transformative uses of popular cultural texts and brands. Carolyn Guertin, author of *Digital prohibition: Piracy and authorship in new media art* (2012), complements Downes' contribution with the appropriately titled "It's creativity, Jim, but not as we know it," an article that theorizes the creativity of online remix practices. Rather than delve into either the longer history of remix as it arose in 20th-century DJ culture, or the rapid and continuing transformation of the global IP regime (see [Brewster and Broughton 2006](#) on the former; and [Smith 2014](#), in this series, on the latter), Guertin focuses on audio-visual, digital remix, in order to redefine "creativity" by anatomizing and explicating the emergent forms of recombinant creativity particular to the context of networked computing (a communication technology founded on and structured by electronic copying practices and protocols).

While Downes elaborates a theory of the multi-modal ways in which cultural works becomes commodified and policed, Guertin elaborates a theory of the multi-media ways in which cultural

works become appropriated and deterritorialized; the ways they furnish source material for new forms and platforms of cultural production, and the ways they establish grounds for a renovated, digital redefinition of what creativity means for a mediascape whose productions and objects can all be used, in whole or in part, for wholly new works and new kinds of work.

Guertin draws her examples of digitally contextualized remix creativity mainly from the unabashedly "pirate," globally distributed scene of digital video cut-up and pastiche. Some of the production methods of these digital filmmakers, like those of "Pixel Pirate," pointedly infringe copyright, or risk infringement charges, as an integral part of how they critique and challenge copyright law—not unlike the risky, Twitter-distributed #icanhazpdf protest against scholarly journal paywalls ([Gardner and Gardner 2015](#)). But whether these remix artists' excerpting and recontextualizing practices actually constitute copyright infringement depends (whatever Hollywood studios or the RIAA might argue) on legal considerations of fair dealing (in the USA, fair use): the legal provisions in copyright law that allow for users of copyrighted works to make certain, limited appropriations and reuses of such works. This aspect of copyright law too is changing, even since the Supreme Court of Canada's 2012 quintet of five landmark rulings that firmly reinforced the statutory role of fair dealing as not just a defence against infringement allegations but more importantly a users' right. Two US rulings from September of this year (2015) have given further heft to fair use as a users' right: in *Lenz v. Universal*, the "dancing baby" case, the Electronic Frontier Foundation sued Universal Music for issuing a DMCA notice to Youtube that instructed it to remove a short home video that Stephanie Lenz had posted in 2007; the video shows her toddler dancing while Prince's "Let's Go Crazy" plays in the background. The US Court of Appeals for the Ninth Circuit found Lenz' use fair and ruled that "copyright holders like Universal must consider fair use before trying to remove content from the Internet" ([Jeschke 2015](#)). (While this ruling pertains to a US case originating in 2007, it's worth noting that in Canada, this kind of Youtube reuse has, since 2012, been explicitly protected by Bill C-11's amendment expanding the copyright act's fair dealing language.) And in *Good Morning To You v. Warner/Chappell*, US District Judge George King ruled that the copyright in "Happy birthday," long held and exploited by Warner/Chappell music, is invalid, and thus placed the famous song in the public domain (where, perhaps, you may have reasonably assumed it already was). Whether Warner/Chappell will have to pay back the significant sums it has extracted in licensing fees for its performance has yet to be decided ([Mullin 2015](#)).

Taken together, these US rulings illustrate the importance and interdependence of fair use (or fair dealing) and the public domain as important users' provisions in copyright law, provisions that have shown promising signs of strengthening lately, towards the rebalancing of an IP regime that has been too long and too steeply imbalanced in favour of rights holders. To round out this instalment, then, I've contributed a review of *Dynamic Fair Dealing: Creating Canadian culture online*. This 2014 collection, edited by Rosemary Coombe, Darren Wershler, and Martin Zeilinger, presents a diverse, multidisciplinary, and interrogative set of arguments and cases towards not just critically understanding fair dealing as a users' right in Canada, but also, moreover, modeling many different ways to exercise, entrench, and expand that right. And it's a right that needs to be exercised, that needs more academics and public intellectuals, scientists, and artists to exercise it and to learn how to exercise it robustly and most effectively. If we don't, we risk losing this hard-won right; we have to recognize that—not only despite but also because of fair dealing's robust new powers for users and educators—there's a long line of lobbyists and private interests, from Access Copyright to the USTR, who are continually campaigning to tilt even the quite modest, aforementioned IP rebalancing acts back sharply in ever firmer favour of corporate rights holders.

The IP regulatory environment continues to pressure and transform the production and distribution of knowledge, presenting new and moving targets for producers and users alike (as well as "producers" [Bruns 2008]); and one of the defining tensions of this fraught environment is that between the "open" ethos of accessibility and the public good, and the imperative for ever-greater profits and shareholder value, a tension that for McKenzie Wark is that between workers and owners in the the information society: between "the hacker class" that produces knowledge and culture, and the "vectoralist class," those who control the means and channels of distribution:

The ideology of "intellectual property" is nothing but the blurring of the line between producers of new information—the hacker class—and those who come, in the long run, to be its owners—the vectoralist class. ... The mission of the hacker class might be to hack into existence practices by which information can be extracted from the commodity form and returned to the realm of the gift (Wark 2007, 153).

As just one modest step towards transferring more knowledge into "the realm of the gift," then, take this series as a critical intervention in current IP debates, and make of it what you will. It's information that wants to be free.

Works Cited / Liste de références

Brewster, Bill and Frank Broughton. 2006. *Last night a DJ saved my life: The history of the disc jockey*. 2nd ed. London: Hodder Headline.

Bruns, Axel. 2008. *Blogs, Wikipedia, Second Life, and beyond: From production to produsage*. New York: Peter Lang.

Downes, Daniel. 2005. *Interactive realism: The poetics of cyberspace*. Montreal: McGill-Queen's University Press.

Gardner, Carolyn Caffrey and Gabriel J. Gardner. 2015. "Bypassing interlibrary loan via Twitter: An exploration of #icanhazpdf requests." In *Association of College and Research Libraries Conference*, Portland, March 26. <http://www.ala.org/acrl/sites/ala.org.acrl/files/content/conferences/confsandpreconfs/2015/Gardner.pdf>

Geist, Michael. 2016. "FAIR ACCESS: Strikes the right balance on education and copyright." *Academic Matters*. January. <http://www.academicmatters.ca/2016/01/2279/>

_____, Michael. 2015a. "Canada caves on copyright in TPP: Commits to longer term, urge ISPs to block content." *MichaelGeist.ca* (blog). Last modified October 9. <http://www.michaelgeist.ca/2015/10/canada-caves-on-copyright-in-tpp-commits-to-longer-term-urge-isps-to-block-content/>

_____. 2015b. "Canadian government amends 'caretaker rules' to give itself power to continue negotiating TPP." *MichaelGeist.ca* (blog). Last modified August 4. <http://www.michaelgeist.ca/2015/08/canadian-government-amends-caretaker-rules-to-give-itself-power-to-continue-negotiating-tpp/>

Globe Editorial. 2015. "Copyright concessions may be downside of TPP deal." *Globe & Mail*, October 22. <http://www.theglobeandmail.com/globe-debate/editorials/copyright-concessions-may-be->

[downside-of-tpp-deal/article26939204/](https://www.eff.org/press/releases/important-win-fair-use-dancing-baby-lawsuit)

Guertin, Carolyn. 2012. *Digital prohibition: Piracy and authorship in new media art*. London: Continuum.

Jenkins, Henry. 2006. *Convergence culture: Where old and new media collide*. New York: New York University Press.

Jeschke, Rebecca. 2015. "Important win for fair use in 'dancing baby' lawsuit." *Electronic Frontier Foundation*. Last modified Sept. 14. <https://www.eff.org/press/releases/important-win-fair-use-dancing-baby-lawsuit>

Knopf, Howard. 2015a. "Access Copyright gets its wish for a post-secondary tariff hearing at the Copyright Board." *Excess Copyright* (blog). Last modified July 25. <http://excesscopyright.blogspot.ca/2015/07/access-copyright-gets-its-wish-for-post.html>

_____. 2015b. "My unsolicited advice to Prime Minister-designate Justin Trudeau & his team on TPP, copyright, CBC, cabinet & committees." *Excess Copyright* (blog). Last modified October 23. <http://excesscopyright.blogspot.ca/2015/10/my-advice-to-prime-minister-designate.html>

LePan, Don. 2015. "Copyright, the TPP, and the Canadian election." *Broadview Press*. October. <http://mailer.barkingdogstudios.com/t/ViewEmail/r/B2F36D1A1FE852952540EF23F30FEDED/5E961070416257DF6E6039C17E42EE19>

McCutcheon, Mark A. 2015. "Make the Trans-Pacific Partnership (#TPP) a bigger issue in the 2015 federal election: It's not 'free trade,' it's anti-democratic privatization and censorship." *Academicalism* (blog). October 8. <https://academicalism.wordpress.com/2015/10/08/tpp-issue-in-canada-election42/>

Mullin, Joe. 2015. "Documentarian wipes out Warner's \$2M 'Happy Birthday' copyright." *Ars Technica*, September 22. <http://arstechnica.com/tech-policy/2015/09/judge-warners-2m-happy-birthday-copyright-is-bogus/>

Nair, Meera. 2016. "In defense of fair dealing." *Fair Duty* (blog), January 18. <https://fairduty.wordpress.com/2016/01/18/in-defense-of-fair-dealing/>

Smith, Peter J. 2014. "The rise, fall, and rise of ACTA?" In *New fronts in the copyfight*, special issue in *Digital Studies/Le champ numérique*, edited by Mark A. McCutcheon. http://www.digitalstudies.org/ojs/index.php/digital_studies/article/view/261/325

Sutton, Maira. 2015. "Trade officials announce conclusion of TPP—now the real fight begins." *Electronic Frontier Foundation*. Last modified October 5. <https://www.eff.org/deeplinks/2015/10/trade-officials-announce-conclusion-tpp-now-real-fight-begins>

Tiessen, Rob. 2015. "#Access Copyright hopes to develop a federated search service? And sell it to the University of Alberta?" *Twitter*. 11:26 am, October 21. <https://twitter.com/robfromcalgary/status/656899467841421312>

Wark, McKenzie. 2007. "Goodbye to all that." In *Postmodernism: What moment?* edited by Pelagia Goulimari, 146-53. Manchester: Manchester University Press.

