

Review Articles

Fair dealing: We've got it let's use it

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Abstract

This review of Rosemary Coombe et al's edited collection *Dynamic Fair Dealing: Creating Canadian culture online* (University of Toronto Press, 2014) sketches the global and Canadian copyright contexts that make this book so timely and important for Canadian academics, and critically assesses the book's contributions, noting highlights among individual chapters and arguments common to the whole. The review queries in particular a curious contradiction between the book's stated commitment to improving digital, public access to knowledge and its form as a paperbound volume with no digital Open Access edition beyond a handful of individual chapters made available by individual contributors.

Cette critique de la collection publiée *Dynamic Fair Dealing: Creating Canadian culture online* (Presses de l'université de Toronto, 2014) de Rosemary Coombe et al est une ébauche des contextes internationaux et canadiens de la propriété intellectuelle, qui font que cet ouvrage est très à propos et important pour les universitaires au Canada, et évalue de façon critique les contributions au volume, en soulignant des points marquants parmi les chapitres et les arguments individuels et communs à son ensemble. La critique s'interroge en particulier sur une curieuse contradiction entre l'énoncé d'engagement qui vise à améliorer l'accès numérique du public aux connaissances et la forme elle-même de l'ouvrage comme volume version papier sans édition d'accès ouvert numérique, outre quelques chapitres individuels mis à la disposition du public par des collaborateurs individuels.

Keywords: [Copyright](#), [Canada](#), [intellectual property](#), [fair dealing](#), [culture](#), [Internet](#)

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Review

As I write this review, the Trans-Pacific Partnership (TPP) has just been agreed on in principle by the trade representatives of the twelve states party to it. This isn't the place to get into all the causes for grave concern raised by this wide-ranging agreement that, in effect, "exports US laws to other countries" ([Geist 2015](#)), from its provisions for Investor-State Dispute Settlement (ISDS) that let foreign firms sue a country for passing laws that interfere with profits (even if said laws clearly protect the public interest), to its repackaging of sweeping Internet censorship, access-blocking, and surveillance provisions that the US and the Internet-using world thought they had roundly rejected in killing the USA's SOPA bill in 2011. The detail worth noting in this forum is the likelihood that—should the TPP eventually pass the elected legislative bodies of the several states that have agreed to it (a passage by no means certain, and certainly worth fighting)—the Canadian government will have to revise the copyright laws it last revised just three years ago in order to extend the term of copyright protection to conform with US law as a new international standard. As it happens, the amended copyright act is coming up for review in 2017, and, in anticipation of that review, copyright maximalist interests like Access Copyright continue to lobby and litigate against fair dealing's expansions and for further strengthening copyright holders' protections ([Geist 2016](#)).

In Canada, copyright protection extends to fifty years after the author's death. In the USA, protection lasts seventy years after the author's death. That near-century's worth of copyright protection is already interfering with the contours and content of the public domain—the body of intellectual properties (texts, art, music, audio-visual productions) whose copyright terms have expired—in that a great deal of the last century's recorded cultural history is still under copyright-protected lockdown, unavailable to the public domain. Meanwhile, recent scholarly studies, like the British government-commissioned report *Digital opportunity* ([Hargreaves 2011](#)), have reviewed extensive economic evidence to assert that today's long posthumous copyright terms provide no financial incentive to create new work. (As mentioned in the introduction to the first installment of this *Copyright* series, some scholars suggest as adequate for incentive to new creation a term of no more than about a dozen years; see [Pollock 2007](#).) Yet Canada now finds itself in a position of needing to yet again review its quite recently revised copyright law to extend the fifty-year posthumous protection by another two decades. Should that extension come to pass, what will happen to all the works whose Canadian copyright terms have expired under the fifty-year term—works by major authors like William Faulkner, Ernest Hemingway, C.S. Lewis, Malcolm Lowry, Flannery O'Connor, Sylvia Plath, and E.J. Pratt? Will these copyright-expired works stay in the existing public domain, or will they be retroactively returned to copyright-protected status? Correspondingly, and more to the point of this review, what will happen to derivative works that have made adaptive or transformative use of these works, or have otherwise dealt fairly with them, in good faith? Would their legal use of previously public-domain works abruptly become illegal, should the source works revert to protected status?

Both questions illustrate the complex and fast-changing contexts of copyright regulation in the digitally networked, neoliberally governed world. And both are the kinds of questions—although not the very questions—tackled by the contributors to *Dynamic Fair Dealing: Creating Canadian culture online*, an impressive and diverse collection edited by Rosemary Coombe, Darren Wershler, and Martin Zeilinger. Published in 2014, the volume notes the political pressures that "US trade dictates" have exerted on Canadian copyright law and its reform ([Coombe et](#)

[al. 2014, 13, 39](#)), pressures that have not originated with the TPP (see [Smith 2014](#); see also [McCutcheon, 2009](#), my article on how USTR pressures on Canadian policy play out in Hollywood productions). These political pressures, while not a main subject of the book, nevertheless form the global policy context that underscores the stakes of the national subjects the book does address. Moreover, the book details many different specific, pragmatic tactics for making liberal fair-dealing use of copyrighted materials, in and against the ever more restrictive and globally interconnected copyright regime that the TPP is just the latest "forum-shifting" attempt not only to cement but to move beyond the jurisdictional agency of sovereign nations. The corresponding national policy context is distinguished by major undertakings in Canadian legislation and the judiciary: the transformation of Canadian copyright law itself (a process years in the making); and the progress of a series of important copyright cases through Canada's tribunals and courts. Most of these undertakings were finalized around the same time as this book was: the authors finished the introduction in the summer of 2012, which was when Bill C-11 (the Act to Amend the Copyright Act) passed, and when the Supreme Court issued five decisions on cases in which fair dealing specifically was at issue ([Coombe et al. 2014, 11](#)). That "pentology" of rulings and Bill C-11's amendments, taken together, have significantly strengthened Canadian copyright law's provisions for fair dealing: the right of users—not creators—of copyright-protected works to make certain reuses and reproductions of such works for certain purposes.

Building on the landmark 2004 Supreme Court decision in *CCH v. LSUC*, which argued fair dealing is better understood and exercised not as a defence in infringement cases but as "a user's right," and cognizant of that argument's voluble reinforcement in the Supreme Court's 2012 rulings, the editors "assert the primacy of fair dealing as a human capability, an individual responsibility, and a citizen's right," and argue for a more robust and "affirmative practice" of what they term "dynamic fair dealing—emergent approaches to the creation, circulation, and management of digital cultural objects that challenge traditional paradigms of intellectual property or pose alternatives to them" ([Coombe et al. 2014, 5](#)). This argument for dynamic fair dealing also entails a critique of the limits of existing fair dealing policy and practice—despite its substantial recent gains. The editors, like several contributors (notably Bitá Amani and George Nicholas), note that—unlike its US counterpart, fair use doctrine—fair dealing remains narrower, more limited, and thus in need of reconceptualization for a digitally networked world. The overarching argument of the whole book, then, is encapsulated in this quotation:

Copyright laws that contain narrow and rigid fair dealing provisions not only make it difficult to read, write, learn, and create, they make it impossible for our culture to evolve in a fashion that respects the work we do as creators, students, scholars, consumers, and citizens. They serve primarily to protect corporate investments rather than public interests ... In the longer term, we hope that the inherent tendency of digital technologies to facilitate copying, sharing, and cultural exchange will be embraced as a positive quality, which may also encourage a principled return to copyright law's original purpose of enabling learning, creativity, cultural productivity, scholarship, critical conversation, and expressive collaboration, while furthering copyright policy objectives and supporting cultural rights. In such a world, the practice of fair dealing would be considered a fundamental cultural right rather than a mere exemption to the economic privileges of others ([Coombe et al. 2014, 39](#)).

Echoing and extending this thesis, Amani pays critical attention to what might seem an obviousness that, in Canadian jurisprudence, is anything but: the relationship between copyright law and section 2(b) of the Charter, which protects freedom of expression: it is "a legal imperative," she writes, "that section 2(b) rights be given priority when in conflict with copyright law ... we must acknowledge and embrace Charter compliance as a check on copyright's public reach" (Amani quoted in [Coombe et al. 2014, 50-1](#)). By exploring the legal and jurisprudential link between copyright and Charter rights, Amani argues for a fair dealing more like American fair use, which in the USA is more often weighed in light of First Amendment rights to free expression—and for fair dealing's role in advancing Canadians' expressive freedoms beyond the tacitly commercial ambit of intellectual property law.

Amani's argument belongs to the first of four major sections into which the chapters are organized: The Canadian Copyright Context; Mediations; Making Our Digital Heritage a Dynamic One; and Afterword ("Reflections"). The first and biggest section opens to critical interrogation some of the foundational discourses at work, chiefly intellectual property; fair dealing; and the public domain. The questions asked here are provocative. Marcus Boon, the only contributor to substantially address the turmoil in which the photocopy royalty collecting agency Access Copyright has embroiled Canadian postsecondary institutions (quoted in [Coombe et al. 2014, 56-9](#)), reflects on a particular interaction he had with the agency, as a basis for working out a trenchant theorization of copying as a critical practice of "depropriation" (*ibid.*, 62). Carys J. Craig, inquiring into the relationship between fair dealing and the public domain (those works whose copyrights have expired), argues for a more nuanced, "pragmatic public domain that moves beyond a simple public/private dichotomy" (quoted in [Coombe et al. 2014, 73](#)). Kyle Asquith asks why the CBC so "ardently polic[es] its copyrights" when its media content is publicly funded; shouldn't it be "publicly licensed and generally publicly available?" (quoted in [Coombe et al. 2014, 95](#)). OpenMedia.ca founder Steve Anderson explains net neutrality and threats to it posed by corporate concentration of Internet Service Provider (ISP) ownership, and related contributions in this section explain—and stress the public-interest importance of—the GPL and Open Access movements, as well as the implications of the region-based "geoblocking" of web content, and the need for copyright and fair dealing to accommodate users with perceptual disabilities.

This first section and the second, Mediations, cover the widest ground and so may hold the most interest for the majority of postsecondary educators and researchers. The first focuses on the overall Canadian IP context and its key terms, and on major mobilizations and arguments for "openness" against an inexorably constricting IP regime. The Mediations section extends that focus by elaborating on Open Access, then introduces analyses of digital archiving and cultural heritage in relation to not only fair dealing but also cultural difference.

One of the most remarkable arguments in this section concerns an add-on for institutional repository software, "Request Copy"; or, as the five co-authors (Arthur Sale, Marc Couture, Eloy Rodrigues, Leslie Carr and Stevan Harnad) call it, "the fair dealing button." This add-on, pioneered for the [EPrints Institutional Repository software](#) but since adapted for other such programs, like [DSpace](#), builds ingeniously on fair dealing and institutional repository mandates. Institutional repositories (IRs) have arisen and spread in tandem with the growth of the Open Access movement. But publishers have quite varied policies and allowances for IRs or for researchers' self-archiving of work; as the authors note, "previously, making the world's refereed research accessible entailed trying to persuade publishers to approve self-archiving of the author's accepted manuscript"—and, understandably, such efforts of persuasion, coupled with navigations of copyright law and negotiations

of author contracts, mean more work than many researchers can afford to spare. The "Request Copy" button detaches deposit from access control, abandoning the "Open Access" mandate to advance a slightly different mandate: an "immediate deposit/optional access" (IDOA) mandate, which would require all research publications to be deposited, whether publishers stipulate the publications stay closed or allow them to become open. The Request Copy button also builds on the recent strengthening of fair dealing provisions for educational use. So what the Request Copy button provides is a one-click way for someone searching an institutional repository to send an automated e-mail request to an article's author, asking the author to send the user a digital copy of the article, which is entirely permissible under fair dealing. As a result, this add-on, together with the IDOA mandate, "makes the universal adoption of deposit mandates both legal and useful" (Sale et al. quoted in [Coombe et al. 2014, 197](#)) and provides "almost open access" for embargoed content, and also for permanently closed access content" (ibid., 199-200). I found Sale et al.'s argument so compelling that I have already proposed the adoption of the add-on at my own university, which happens to be in the middle of upgrading our IR anyway, and the proposal has been received with interest and support from those in charge of the upgrade. A further question prompted by the fair dealing button, however, is whether its affordance can be offered for publications whose copyright the author has conferred to an academic journal or press, as is relatively common in scholarly publishing. So contractual terms that require the author to sign over copyright in a work but do not permit self-archiving would thus also not permit the author to share that work in the way the fair dealing button enables. (Following this matter is a larger, jurisprudential question: does fair dealing as a now-statutory users' right trump a publisher's author contract, or vice versa?)

As compelling as the fair dealing button proposal, and somewhat in the same spirit of opening access to knowledge, if in a very different historical and material context, is George Nicholas' argument for "a postcolonial ethic of the public domain." The cluster of articles on cultural heritage and digital archiving introduce much-needed concepts for critical IP studies in the postcolonial world, concepts like "cultural rights" (Coombe and Aylwin quoted in [Coombe et al. 2014, 203](#)). Nicholas studies the case of the international Intellectual Property Issues in Cultural Heritage (IPinCH) research project to "challenge the notion of Indigenous heritage as de facto public domain, identify some of the harms or costs that inappropriate use of their heritage has on First Nations and other Indigenous peoples, and ... discuss the need for developing a postcolonial research ethic that will facilitate or encourage fair dealing" (quoted in [Coombe et al. 2014, 214](#)). Nicholas makes a strong case that resonates with Len Findlay's influential exhortation to "always indigenize" the postcolonial university, and with associated efforts, "to decolonize the disciplines" (1999: 220). What the case of IPinCH illustrates is how extending these efforts and enacting a postcolonial research ethos means reconceptualizing fair dealing, and paying renewed, contextually and culturally sensitive attention to, for example, "the Creative Commons concept of some rights reserved" so that Indigenous communities retain privileged access and rights to their cultural heritage, and enjoy a decisive, collaborative role in research and archival practices involving it.

The second section bridges to the third by turning to the avant garde and appropriation art, considering parody and poetics in chapters including one by Kenneth Goldsmith, the leading proponent of "uncreative writing" and curator of Ubu Web. UbuWeb is an archive of avant-garde cultural works whose overall approach to getting permission for the works it houses has been not to ask for it in advance, but to explain its rationale when challenged; somewhat surprisingly, this approach, which Goldsmith illustrates with sample correspondence between himself and rights-holders, has apparently worked quite well, inasmuch as the archive has survived and grown for a relatively long time on the open web.

The third section, then, concerns fair dealing's role in varied cultural and pop-culture practices: theatre archives, literary reading events, the NFB, chiptunes and hip hop, fan fiction and gaming. Theatre and film, because their production involves the work of large teams of people, prove especially complex and, well, messy subjects for copyright and fair dealing; as David Meurer concludes in a much-needed critical look at the copyright complexities of theatre performance and its archiving, "rich collections of cultural resources that define Canada's heritage and may be capable of invigorating it are kept offline by outdated policies" (quoted in [Coombe et al. 2014, 283](#)).

This frustration with the inaccessibility of Canadian cultural heritage, especially in the digital domain and especially as a tradition largely supported by public funds and public interest-oriented cultural policy, is a recurring theme throughout the collection, culminating in the last section's closing reflections from Laura Murray, co-author of the excellent *Canadian copyright: A citizen's guide*, and from Darin Barney, who amplifies the volume's overarching "call to arms for academics, artists, and activists to defend Canada's emerging digital culture" ([Coombe et al. 2014, 3](#)) by exhorting readers to follow UbuWeb's example, shoulder some responsibility (and, yes, risk), and "pull up the stakes and fill in the ditches" (quoted in [Coombe et al. 2014, 359](#)) of the new information enclosures, in order "to make the world more interesting and egalitarian" (ibid., 358).

Besides its bracing manifesto character, the volume has additional value as an introduction to several subjects on which copyright concerns closely encroach: Open Access, net neutrality, fan fiction and other appropriation art forms, postcoloniality, and digital gaming, to name a few. The contributors addressing these varied areas, all connected by the pervasive regulatory regime of intellectual property, are likewise diverse: they include scholars in various disciplines (law, communications, literary and cultural studies, anthropology); artists and cultural practitioners; organizers of cultural institutions and events; and representatives of publishing and other cultural industries. As a result, the volume also advances several diverse but similarly critical perspectives on copyright generally and fair dealing in particular, critiquing and reconceptualizing the latter, and—most practically—modelling "dynamic" fair dealing towards its wider social uptake and more robust legal enshrinement.

Despite these strengths, the collection has its limitations. I find the book rather thin on mentions of postmodernism (for one example, see [Coombe et al. 2014, 28](#)). This not surprising in itself, given the waning popularity of postmodernism in twenty-first century scholarship and criticism, but I think that postmodern theory and copyright studies have a lot to offer each other ([Jaszi 2009](#); [Williams 2011](#)), and that maybe the former's eschewal of the latter in the 1980s and '90s may have cost postmodernism some of its intellectual traction.

Given the volume's excellent coverage of Open Access, open software development, and Access To Knowledge initiatives, I also thought it might have more to offer about points of contention for these initiatives, such as the Elsevier boycott, the Google Books settlement, and the Hathi Trust archive. And the timing of the volume's publication, mentioned above, has left it an artifact of a specific temporal cusp; it's both

extremely relevant to the rapidly changing, globalized milieu of intellectual property regulation, and at the same time somewhat self-conscious about its limited capacity to address the Canadian copyright law changes that took place in 2012, as this book was just leaving its authors' hands but before reaching readers in the dramatically different fair dealing environment of 2014.

But my main reservation with *Dynamic Fair Dealing* concerns a question I found myself asking more or less the whole time I read it: why is this "manifesto" for "dynamic fair dealing" to "challenge and change the status quo" (Coombe et al. 2014, 39) only available in print format? And why has it been published by a press with a [relatively closed-access policy](#)? The second question is actually pretty easy to answer: U of Toronto Press ranks among Canada's most prestigious academic publishers, and wields formidable distribution and promotional power. But the consequent absence of a digital edition, ideally an Open Access edition, would seem to contradict the core argument this book makes. (Relatedly, only one of the contributors has retained copyright, while the others have all signed theirs over to the publisher.) An online search for the contents of this book turns up a Google Books digital version that can be previewed, though the preview is inevitably selective and piecemeal. However, an online search also yields ten of the book's twenty-nine chapters, some complete as they appear in the volume, others in excerpted or adapted form.

If the unavailability of a complete Open Access edition appears to contradict the book's main thrust, it also demonstrates important symptoms of copyright that the book diagnoses: "the difficulties that face Canadian cultural practitioners, researchers, educators, citizens, and activists in today's prohibitive culture of licenses and permissions" (Coombe et al. 2014, 39); and the difficulties of its own stated, interrelated tasks—"to defend Canada's emerging digital culture" (ibid., 3), to "provid[e] an inclusive, interdisciplinary venue for a discussion of how everyday practices are relevant to IP reform" (ibid., 6), "to inform, educate, and persuade critics, policy makers, and custodians of cultural content" (ibid., 5), to problematize fair dealing's strict interpretations "and what might be done about it in a digital world" (ibid., 13), and to show "how important fair dealing is in Canadian cultural life and heritage" (ibid., 39). In addition, Open Access is sometimes difficult, sometimes onerous, and sometimes downright inadvisable for—or even legitimately eschewed by—some researchers.

However, several important critical copyright studies—by major scholars, from major, prestigious presses—have appeared in Open Access editions and have thus set expectations for work on this subject to thus embody its arguments. Examples include Lawrence Lessig's *Free culture* (2004); James Boyle's *The public domain* (2008); Adam Haupt's *Stealing empire* (2008); Michael Geist's series of collections intervening in copyright reform, such as *The Copyright pentology* (2013); and Boon's *In praise of copying* (2010).

So, to help this otherwise imaginative, incisive, and inspiring book put its form where its content is, I've assembled *Dynamic Fair Dealing: The DIY, Open Access, abridged edition*. With almost a third of the original's content, it's a very generous sample to provide with a review.

Dynamic Fair Dealing: The DIY, Open Access, abridged edition

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But I still heartily recommend the whole book, of course. For educators and researchers who depend on digital teaching, archival, and related technologies especially, *Dynamic Fair Dealing* shares a wealth of practical solutions and provocative ideas for flexing the fair dealing affordances in accordance with its recent strengthening in Canadian copyright law—and in robust ways that can weather the turbulence of the tempestuous global IP regime.

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