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Recognizing the Relevance of Human Rights: The Application of the Presumption of Conformity in the Context of Copyright

*Graham Reynolds**

This article discusses the application of the presumption of conformity with international law in the context of copyright. Although Canadian courts have applied the presumption of conformity in a number of copyright cases, no Canadian court has explicitly considered, under the presumption of conformity, whether interpretations of provisions of the Copyright Act are consistent with, or reflect the values and principles of, international human rights treaties that Canada has signed and ratified.

In this article, I will argue that Canadian courts applying the presumption of conformity in the context of copyright should do so with reference to Canada's obligations under international human rights treaties as well as its obligations under international intellectual property rights agreements. Using fair dealing as my illustrative example, I will offer some preliminary reflections on the impact of applying the presumption of conformity in the context of copyright with reference to Canada's human rights obligations.

Dans cet article, l'auteur traite de l'application de la présomption de conformité au droit international dans le contexte du droit d'auteur. Même si les tribunaux canadiens ont appliqué la présomption de conformité dans un certain nombre d'affaires en

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matière de droit d'auteur, aucun tribunal canadien n'a explicitement examiné, dans le cadre de la présomption de conformité, si les interprétations des dispositions de la Loi sur le droit d'auteur reflétaient les valeurs et les principes des traités internationaux relatifs aux droits de la personne que le Canada a signés et ratifiés, et s'ils y étaient conformes.

L'auteur soutient que les tribunaux canadiens qui appliquent la présomption de conformité dans le contexte du droit d'auteur doivent le faire en se référant aux obligations du Canada en vertu des traités internationaux relatifs aux droits de la personne ainsi qu'aux obligations en vertu des accords internationaux relatifs aux droits de propriété intellectuelle. En se servant de l'utilisation équitable à titre d'exemple, il offre quelques réflexions préliminaires sur les répercussions de l'application de la présomption de conformité dans le contexte du droit d'auteur en référence aux obligations du Canada en matière de droits de la personne.

1. INTRODUCTION

One of the many contributions of David Vaver's scholarship has been to highlight the connections and tensions between copyright and human rights.¹ Critical of the idea of copyright as a form of property, the sole purpose of which is to benefit copyright owners,² Professor Vaver has advocated throughout the course of his career for a copyright regime that balances between owners, users, and the public more broadly,³ and that reflects human rights values and

¹ See, for instance, David Vaver, "Copyright Defences as Human Rights" (2013) *J. C'right Soc'y of the USA* 661 at 671-72; David Vaver, "Intellectual Property: The State of the Art" (2001) 32 *V.U.W.L.R.* 1 at 15.

² See for instance, David Vaver, "Intellectual Property Today: Of Myths and Paradoxes" (1990) 69 *Can. Bar Rev.* 98 at 125-28.

³ See, for instance David Vaver, *Copyright Law* (Toronto: Irwin Law, 1997) at 146 and 171; David Vaver, *Intellectual Property Law* (Toronto: Irwin Law, 2011) at 14.

principles including fairness,⁴ justice,⁵ responsibility,⁶ equality,⁷ and free speech.⁸

Building on Professor Vaver's work in this area, this article will discuss the application of the presumption of conformity — the “well-established principle of statutory interpretation that legislation will be presumed to conform to international law”⁹ — in the context of copyright. Canadian courts have applied the presumption of conformity in a number of copyright cases.¹⁰ In each of the decisions in which this presumption has been applied, courts including the Supreme Court of Canada (SCC) have done so with reference to Canada's obligations under international intellectual property agreements.¹¹ Despite growing awareness of the many connections between copyright and human rights (as well as between intellectual property and human rights more broadly),¹²

⁴ David Vaver, “Creating a Fair Intellectual Property System for the 21st Century” (2001) 10 Otago L. Rev. 1.

⁵ David Vaver, “Reforming Intellectual Property Law: An Obvious and Not-so-obvious Agenda” [2009] IPQ 143.

⁶ David Vaver, “Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties” (2007) 57 Case W. Res. L. Rev. 731.

⁷ David Vaver, “Intellectual Property Today: Of Myths and Paradoxes”, *supra* note 2.

⁸ David Vaver, “Intellectual Property: The State of the Art”, *supra* note 1 at 15.

⁹ *R. v. Hape*, 2007 SCC 26 at para. 53 [*Hape*].

¹⁰ See Part 3.a for discussion of this topic.

¹¹ Canada has signed and ratified a number of international intellectual property agreements, including *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1869 U.N.T.S. 299 (being Annex 1C of the *Marrakesh Agreement establishing the World Trade Organization*, 1867 U.N.T.S. 3) [*TRIPS*]; *Revised Berne Convention*, Schedule II of the *Copyright Act*, R.S.C. 1970, c. C30 [*Berne Convention*].

¹² See, for instance: David Fewer, “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada” (1997) 55 U.T. Fac. L. Rev. 175; Peter Drahos, “Intellectual Property and Human Rights” (1999) 3 *Intell. Prop. Q.* 349; Audrey Chapman, “The Human Rights Implication of Intellectual Property Protection” (2002) 5 *J. Intl. Econ. L.* 861; Pamela Samuelson, “Copyright and Freedom of Expression in Historical Perspective” (2003) 10 *J. Intl. Prop. L.* 319; Ysolde Gendreau “Copyright and Freedom of Expression in Canada”, in Paul L.C. Torremans, ed., *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (New York: Kluwer Law International, 2004); Jane Bailey, “Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process”, in Michael Geist, ed., *In the Public Interest* (Toronto: Irwin Law, 2005); Jonathan

no Canadian court has explicitly considered, under the

Griffiths & Uma Suthersanen, eds., *Copyright and Free Speech* (Toronto: Oxford University Press, 2005); Margaret Chon, “Intellectual Property and the Development Divide” (2006) 27 *Cardozo L. Rev.* 2821 [Chon, “Development Divide”]; Carys Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” (2006) 56 *U.T.L.J.* 75; Paul L.C. Torremans, “Is Copyright a Human Right” (2007) 2007 *Mich. St. L. Rev.* 271; Graeme W. Austin & Amy G. Zavidow, “Copyright Reform through a Human Rights Lens” in Paul L.C. Torremans, ed., *Intellectual Property and Human Rights* (Kluwer Law International 2008); Daniel J. Gervais, “Intellectual Property and Human Rights: Learning to Live Together” in Paul L.C. Torremans, ed., *Intellectual Property and Human Rights* (Kluwer Law International, 2008); Paul L.C. Torremans, “Copyright (and Other Intellectual Property Rights) as a Human Right” in Paul L.C. Torremans, ed., *Intellectual Property and Human Rights* (Kluwer Law International 2008); Willem Grosheide, ed., *Intellectual Property Rights and Human Rights: A Paradox* (Edward Elgar, 2009); Mary W. S. Wong, “Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights” (2009) 26 *Cardozo Arts. & Ent. L.J.* 775; Lea Shaver & Caterina Sganga, “The Right to Take Part in Cultural Life: On Copyright and Human Rights” (2010) 27:4 *Wis. Intl. L.J.* 637; Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (New York: Cambridge University Press, 2011); Duncan Matthews, *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (Edward Elgar, 2011); Peter K. Yu, “Intellectual property and Human Rights in the Nonmultilateral Era,” 64 *Fla. L. Rev.* 1045; Christophe Geiger, ed., *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2016). I have also published a number of works in this area, including Graham Reynolds, “Reconsidering Copyright’s Constitutionality” (2016) 53:3 *O.H.L.J.* 898; “The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the *Charter* Right to Freedom of Expression in the Context of Copyright” (2016) 41:2 *Queen’s L.J.* 455; and “Moving Past *Michelin*: Towards Judicial Reconsideration of the Intersection of Copyright and the *Charter* Right to Freedom of Expression” (2017) 30 *I.P.J.* 25. In addition to scholarly writing on this topic, one can also point to a recent decision of the Court of Appeal for British Columbia as support for the argument that there is growing awareness of the relationship between copyright and human rights. In *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 [*Vancouver Aquarium*], Bennett J., writing for the majority, stated that: “[w]hile the *Copyright Act* withstood a s. 2(b) constitutional challenge to its validity in *Michelin v. Caw* (1996), [1997] 2 F.C. 306, this does not mean that freedom of expression, as a *Charter* value, should not be considered in an interlocutory injunction concerning copyright issues. In my opinion, it may be highly relevant, depending on the circumstances” (*Vancouver Aquarium*, *supra* note 12 at para. 72). Ultimately, Bennett J. determined that the interlocutory injunction was granted in error, in part

presumption of conformity, whether interpretations of provisions of the *Copyright Act*¹³ are consistent with, or reflect the values and principles of, international human rights treaties that Canada has signed and ratified.¹⁴

The lack of attention paid to this issue is problematic. As noted by LeBel J. in his majority judgment in *R. v. Hape*:

The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result.¹⁵

Failure to properly consider Canada's human rights obligations when interpreting provisions of the *Copyright Act* could thus result in Canada being in violation of its obligations under international human rights treaties, "risk[ing] incursion by the courts in the

because the film — despite containing material that allegedly infringed copyright — "is part of a public dialogue and debate on the issue of whether cetaceans should be kept in captivity, and thus, the *Charter* value of freedom of expression must weigh against granting the injunctive relief" (*Vancouver Aquarium*, *supra* note 12 at para. 82).

¹³ *Copyright Act*, R.S.C. 1985, c. C-42.

¹⁴ Human rights agreements that Canada has signed and ratified include the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 [ICCPR]; the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 [ICESCR]; Other human rights agreements that Canada has signed and ratified include the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970 No. 28, the *Convention on the Elimination of All Forms of Discrimination against Women*, Can. T.S. 1982 No. 31, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, and the *Convention on the Rights of Persons with Disabilities*, 2515 U.N.T.S. 3 [CRPD]. Canada has also adopted and given its full support to the *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [UNDRIP]. As highlighted by an anonymous reviewer, UNDRIP may be particularly relevant in considering future policy reforms in the area of copyright. Consider, for instance, art. 11(2) of UNDRIP, which provides that "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

¹⁵ *Hape*, *supra* note 9 at para. 53.

executive's conduct of foreign affairs and censure under international law."¹⁶

In this article, I argue that Canadian courts applying the presumption of conformity in the context of copyright should do so with reference to Canada's obligations under international human rights treaties as well as its obligations under international intellectual property rights agreements. This article proceeds as follows. In Part 2, I introduce the presumption of conformity. In Part 3, I argue that Canada's obligations under international human rights treaties are relevant obligations for the purpose of applying the presumption of conformity in the context of copyright. In Part 4, using fair dealing as my illustrative example, I offer some preliminary reflections on the impact of applying the presumption of conformity in the context of copyright with reference to Canada's human rights obligations. Part 5 concludes the article.

2. THE PRESUMPTION OF CONFORMITY WITH INTERNATIONAL LAW

John Currie writes that while Canada is bound internationally by international treaties that it has signed and ratified, these treaties "have no formal, direct legal effect of their own within the Canadian legal system."¹⁷ However, although international treaties are not "binding on Canadian legislatures," as noted by Ruth Sullivan, "domestic legislation is presumed to comply with international law."¹⁸ This presumption is referred to as the presumption of conformity with international law (or the presumption of conformity).

Citing to the work of Professor Sullivan, LeBel J., in his majority decision in *R. v. Hape*, described the presumption of conformity as follows:

R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption

¹⁶ *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at para. 47 [B010].

¹⁷ John Currie, *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008) at 235.

¹⁸ Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) at 311 and 314. In *B010 v. Canada (Citizenship and Immigration)*, McLachlin C.J., who delivered the judgment for the court, noted that "[t]his interpretive presumption is not peculiar to Canada. It is a feature of legal interpretation around the world" (*B010*, *supra* note 16 at para. 48).

has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation.¹⁹

Professor Currie writes that "Canadian courts historically refused to give any effect at all to unimplemented treaties."²⁰ However, as Professor Sullivan notes, "it is now common to invoke [international law] as an aid in interpreting domestic legislation."²¹ As described below, copyright is one area in which the presumption of conformity has been regularly applied by Canadian courts, including the SCC.

¹⁹ *Hape*, *supra* note 9 at para. 53. LeBel J.'s discussion of the presumption of conformity in *R. v. Hape* has been cited to with authority in a number of subsequent SCC decisions, including *United States of America v. Anekwu*, 2009 SCC 41 at para. 25; *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 34; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 117; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at para. 60; *B010*, *supra* note 16 at para. 47; and *R. v. Appulonappa*, 2015 SCC 59 at para. 40. Other SCC decisions in which this principle has been applied include *Zingre v. The Queen*, [1981] 2 S.C.R. 392 at 409-10; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1371; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 137; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70; and *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 at para. 50; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46 at para. 39; and *Thibodeau v. Air Canada*, 2014 SCC 67 at para. 113; *M.M. v. United States of America*, 2015 SCC 62 at para. 257.

²⁰ Currie, *supra* note 17 at 246.

²¹ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 567).

3. THE APPLICATION OF THE PRESUMPTION OF CONFORMITY IN THE CONTEXT OF COPYRIGHT

(a) Canadian Courts' Application of the Presumption of Conformity in the Context of Copyright

Canadian courts have applied the presumption of conformity in a number of copyright decisions. The SCC, in particular, has relied extensively on this principle of statutory interpretation. For instance, in *CCH Canadian et al v. Law Society of Canada*, McLachlin C.J., in her judgment for the court, noted that her interpretation of the *Copyright Act's* originality requirement is consistent with the *Berne Convention for the Protection of Literary and Artistic Works* (1886).²² Similarly, in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers (SOCAN v. CAIP)*, Binnie J., in his majority decision, wrote that his interpretation of s. 2(4)(1)(b) of the *Copyright Act* is “consistent with art. 8 of the [World Intellectual Property Organization] *Copyright Treaty*” (WCT).²³ In the same decision, LeBel J., in his dissenting reasons, wrote that his interpretation of s. 3(1)(f) of the *Copyright Act* was consistent with both the *Berne Convention* and the WCT.²⁴ In *Rogers Communications Inc. v. SOCAN*, Rothstein J., in his majority judgment, also noted that the approach that he adopted to s. 3(1)(f) of the *Copyright Act* is consistent with the WCT.²⁵ As well, in *Re:Sound v. Motion Picture Theatre Association*, LeBel J., in his judgment for the court, wrote that:

As this Court noted in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324: “. . . where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations” (p. 1371). In the case

²² *CCH Canadian et al v. Law Society of Canada*, 2004 SCC 13 at para. 19 [*CCH Canadian et al*]

²³ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at para. 97 [*SOCAN v. CAIP*].

²⁴ *Ibid.*, at para. 151.

²⁵ *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at paras. 44-49 [*Rogers*]. At the time that the SCC heard arguments in both *Rogers* and *SOCAN v. CAIP*, Canada had neither ratified nor implemented the WCT (*Rogers, ibid.* at para. 49).

at bar, the Board's interpretation [of the definition of 'sound recording' under s. 2 of the *Copyright Act*] is consonant with Canada's obligations under the *Rome Convention*.²⁶

While the SCC has frequently applied the presumption of conformity in the context of copyright, as noted above, it has limited its application of this presumption to a subset of international law, namely international intellectual property agreements. In the next section, I argue that Canada's obligations under international human rights treaties are also relevant obligations for Canadian courts to consider when applying the presumption of conformity in the context of copyright.

(b) Canada's Obligations under International Human Rights Treaties are Relevant Obligations

The many connections between copyright and human rights justify the treatment of Canada's obligations under international human rights treaties as relevant obligations when applying the presumption of conformity in the context of copyright. One of the mechanisms through which states provide protection for the right of everyone "[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [they are] the author," as guaranteed under art. 15(1)(c) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,²⁷ copyright both promotes and limits the ability of individuals and groups to exercise rights guaranteed to them under international human rights treaties.

For instance, copyright both supports and limits the right to freedom of expression, as guaranteed under international human rights treaties including the *International Covenant on Civil and Political Rights (ICCPR)*.²⁸ By providing authors with marketable rights in works that they create and from which they can gain income, copyright supports the freedom of expression interests of authors.²⁹ As well, to the extent that copyright acts as an incentive

²⁶ *Re: Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38 at para. 51.

²⁷ *ICESCR*, *supra* note 14 at art. 15(1)(c).

²⁸ *ICCPR*, *supra* note 14 at art. 19.

²⁹ See, for instance Neil Weinstock Netanel, *Copyright's Paradox* (Don Mills: Oxford University Press, 2008).

for the creation and dissemination of expression (a question that has been the subject of vigorous debate³⁰), it also advances the freedom of expression interests of non-copyright owning parties. It does so by increasing the supply of works that can then be used by non-copyright owning parties in certain circumstances during the period of copyright protection, and without restraint after the copyright has expired.

At the same time, however, copyright limits the ability of individuals and groups to exercise their right to freedom of expression. In order to avoid infringing copyright, parties wishing to convey meaning using a substantial amount of another's copyrighted expression — including by incorporating this expression into their own works or by making this expression available to a wider audience — must pay to secure a license, receive permission from the copyright owner, or ensure that their actions fall within one of the defences to copyright infringement set out in the *Copyright Act*. If they are not able to do so, their unauthorized use infringes copyright. A range of penalties are attached to actions that infringe copyright, ranging from financial penalties to criminal sanctions.³¹

Similarly, copyright both supports and limits the “right to participate in cultural life” as guaranteed under art. 15(1)(a) of the *ICESCR*.³² By providing income to authors, copyright helps to create the conditions through which authors can participate in society. At the same time, copyright also limits the ability of

³⁰ The question of whether and the extent to which copyright acts as an incentive for the creation and dissemination of expression has been the subject of significant scholarly attention. See, for instance: David Vaver, “Intellectual Property Today: Of Myths and Paradoxes”, *supra* note 7; Raymond Shih Ray Ku *et al.*, “Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty” (2009) 62 *Vand. L. Rev.* 1669; Shyamkrishna Balganes, “Foreseeability and Copyright Incentives” (2009) 122 *Harv. L. Rev.* 1569; Julie E. Cohen, “Copyright as Property in the Post-Industrial Economy: A Research Agenda” (2011) 2011 *Wisc. L. Rev.* 141; Shyamkrishna Balganes, “The Normative Structure of Copyright Law”, in Shyamkrishna Balganes, ed., *Intellectual Property and the Common Law* (Cambridge University Press: 2013).

³¹ See Part IV of the *Copyright Act*, *supra* note 13.

³² *ICESCR*, *supra* note 14 at art. 15(1)(a).

individuals and groups to participate in cultural life by restricting their ability to access and use copyrighted works without authorization.³³

As well, by giving authors who retain copyright in works that they create a degree of control over whether and how their work is presented, copyright provides a degree of protection for authors' privacy rights, as well as a degree of protection against "unlawful attack[s] on their honour and reputation."³⁴ At the same time, however, attempts to enforce rights in copyrighted expression through tracking or monitoring of online behaviour, as well as through digital rights management technologies, may infringe the right of individuals to protection against arbitrary or unlawful interference with privacy.³⁵

The description of the relationship between copyright and human rights, as set out above, is by no means exhaustive.³⁶

³³ Article 30(3) of the *United Nations Convention on the Rights of Persons with Disabilities*, which Canada has signed and ratified, provides that "States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials" (*CRPD*, *supra* note 14 at art. 30(3)). It is conceivable that Canadian courts could adopt interpretations of provisions of the *Copyright Act* that result in "unreasonable or discriminatory barrier[s] to access by persons with disabilities to cultural materials" (*CRPD*, *supra* note 14 at art. 30(3)), placing Canada in breach of its obligation under the *CRPD*. My thanks to Ariel Katz for bringing this article to my attention.

³⁴ *ICCPR*, *supra* note 14 at art. 17; *ICESCR*, *supra* note 14 at art. 15(1)(c).

³⁵ *ICCPR*, *supra* note 14 at art. 17. See, for instance, Ian Kerr, Alana Maurushat & Christian Tacit, "Technical Protection Measures: Tilting at Copyright's Windmill" (2002-2003) 34 *Ottawa L. Rev.* 6; Julie E. Cohen, "DRM and Privacy" (2003) 18 *B.T.L.J.* 575; Sonia K. Katyal, "Privacy vs. Piracy" (2005) *Yale J.L. & Tech.* 222; and Bill D. Herman, "A Political History of DRM and Related Copyright Debates, 1987-2012" (2012) 14 *Yale J.L. & Tech.* 162.

³⁶ Among other topics that could be canvassed, one could discuss the ways in which Canada's copyright regime advances core human rights values including justice, fairness, equality, discrimination, dignity, and accessibility. Bassem Awad, for instance, argues that recent amendments to the *Copyright Act* designed to implement the *Marrakesh Treaty to Facilitate Access to Publish Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* have helped to make Canada's copyright regime more inclusive (Bassem Awad, "How the Marrakesh Treaty makes the Intellectual Property system more inclusive", *OpenCanada.org* (September 29, 2016), available online at <https://www.opencanada.org/features/how-marrakesh-treaty-makes-intellectual-property-system-more-inclusive/>). At the same time, other

Nevertheless, by highlighting some of ways in which copyright and human rights are interconnected, it provides support for the conclusion that depending on the provision of the *Copyright Act* being construed, Canada's obligations under international human rights treaties are relevant obligations for the purposes of applying the presumption of conformity.

Two consequences, in particular, should result from this conclusion. First, in determining how to construe provisions of the *Copyright Act*, courts must "avoid a construction that would place Canada in breach of [its] obligations" under international human rights treaties.³⁷ Second, when interpreting provisions of the *Copyright Act*, Canadian courts should prefer a construction that — to the extent possible — reflects the values and principles embodied in international human rights treaties as well as other relevant values and principles.³⁸

scholars have highlighted the many ways in which copyright regimes have failed to adequately protect human rights values, including by creating and perpetuating inequalities. See, for instance: Kevin J. Greene, "Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection" (1999) 21 *Hastings Comm. & Ent. L.J.* 339; Olufunmilayo B. Arewa, "TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks" (2006) 10 *Marq. Intell. Prop. L. Rev.* 155; Olufunmilayo B. Arewa, "From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context" (2006) 84 *N.C. L. Rev.* 547; Chon, "Development Divide", *supra* note 12; Keith Aoki, "Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)" (2007) 40 *U.C. Davis L. Rev.* 717; Anupam Chander & Madhavi Sunder, "Is Nozick Kicking Rawls's Ass?" (2007) 40 *U.C. Davis L. Rev.* 563; Margaret Chon, "Intellectual Property 'from Below'" (2007) 40 *U.C. Davis L. Rev.* 803; Kevin J. Greene, "Copynorms, Black Cultural Production and the Debate over African-American Reparations" (2008) 25 *Cardozo Arts & Ent. L.J.* 1179; Kevin J. Greene, "Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues" (2008) 16 *Am. U. J. Gender Soc. Pol'y & L.* 365; Lateef Matima, "Copyright Social Utility and Social Justice Interdependence" (2009) 112 *W. Va. L. Rev.* 97; Olufunmilayo B. Arewa, "Blues Lives: Promise and Perils of Musical Copyright" (2010) 27 *Cardozo Arts & Ent. L.J.* 573; Margaret Chon, "Intellectual Property Equality" (2010) 9 *Seattle J. Soc. Just.* 259; John Tehranian, "Towards a Critical IP Theory: Copyright, Consecration, and Control" (2012) 2012 *B.Y.U. L. Rev.* 1233; Lea Shaver, "Copyright and Inequality" (2014) 92 *Wash. U. L. Rev.* 117; Peter Menell, "Property, Intellectual Property, and Social Justice: Mapping the Next Frontier" (2015) 5 *Prop. Rts. Conf. J.* 147.

³⁷ *Hape*, *supra* note 9 at para. 53.

³⁸ *Hape*, *supra* note 9 at para. 53. This article will focus on Canada's obligations

4. APPLYING THE PRESUMPTION OF CONFORMITY IN THE CONTEXT OF FAIR DEALING: PRELIMINARY REFLECTIONS

In the following section, I discuss the potential force and significance of applying the presumption of conformity in the context of copyright with reference to Canada's obligations under international human rights treaties.³⁹ I do so using fair dealing as my illustrative example. A user right that is linked to many human rights including the right to freedom of expression, the right to participate in cultural life, and privacy rights, fair dealing is provided for under ss. 29-29.2 of the *Copyright Act*. Section 29 provides that "[f]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright," while ss. 29.1 and 29.2 provide that fair dealing for the purpose of criticism (s. 29.1), review (s. 29.1) and news reporting (s. 29.2) do not infringe copyright if certain attribution requirements are satisfied.⁴⁰ Neither the fair dealing categories nor "fair dealing" itself is defined in the *Copyright Act*.

The prevailing approach to fair dealing in Canada was set out by McLachlin C.J. in her decision for the court in *CCH Canadian Ltd. v. Law Society of Upper Canada*.⁴¹ In her decision, McLachlin C.J. clarified that the fair dealing analysis proceeds in either two or three steps, depending on the category of dealing in question.⁴² First, the defendant must establish that the dealing falls within one of the eight fair dealing categories listed above. Second, the defendant must establish that the dealing is "fair."⁴³ In the event that the defendant wishes to argue fair dealing for the purpose of

under international human rights treaties. The potential impact of Canada's human rights obligations under customary law on copyright will be addressed in a separate work.

³⁹ While a fulsome analysis of this topic is beyond the scope of this article to address, I will suggest several consequences that could result that will be addressed in further detail in a separate work.

⁴⁰ *Copyright Act*, *supra* note 13 at ss. 29-29.2.

⁴¹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, *supra* note 22 at paras. 48-60.

⁴² *Ibid.* at para. 50.

⁴³ In the context of discussing this second step, McLachlin C.J. outlined out a number of factors that can be used by courts to determine whether a dealing is fair, namely the purpose of the dealing, the character of the dealing, the amount

criticism, review or news reporting, they must also satisfy the attribution requirements outlined in ss. 29.1 or 29.2 of the *Copyright Act*.

In addition to setting out the correct approach to fair dealing, McLachlin C.J. — citing to the work of Professor Vaver — also discussed the nature of fair dealing, writing that “[t]he fair dealing exception, like other exceptions in the *Copyright Act*, 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.”⁴⁴

The SCC affirmed the nature of fair dealing as a user right in several copyright decisions handed down in 2012.⁴⁵ In these decisions, the SCC also provided additional clarity with respect to both the nature of users’ rights as well as certain aspects of fair dealing as a user right. In *SOCAN v. Bell*, for instance, Abella J., who delivered the judgment of the court, wrote that “users’ rights are an essential part of furthering the public interest objectives of the *Copyright Act*,” that fair dealing is “[o]ne of the tools employed to achieve the proper balance between protection and access in the *Act*,” and that “[i]n order to maintain the proper balance between these interests, the fair dealing provision ‘must not be interpreted restrictively’.”⁴⁶

Several scholars have noted how the SCC’s approach to fair dealing advances and supports internationally-guaranteed human rights including the right to freedom of expression.⁴⁷ Professor Vaver, for instance, highlights how language used by Abella J. in her decision for the Supreme Court of Canada (SCC) in *SOCAN v. Bell* tracks closely to the language of international human rights

of dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work (*ibid.* at para. 53).

⁴⁴ *Ibid.* at para. 48.

⁴⁵ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para. 22; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 at para. 29 [*SOCAN v. Bell*].

⁴⁶ *SOCAN v. Bell*, *ibid.* note 45 at para. 11.

⁴⁷ See, for instance, Vaver, “Copyright Defences as User Rights”, *supra* note 1; Jane Bailey, “Deflating the Michelin Man” in Michael Geist, ed., *In the Public Interest* (Toronto: Irwin Law, 2005); Graham Reynolds, “The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright” (2016) 41 Queen’s L.J. 455.

treaties. Specifically, he notes that “[w]hen the Supreme Court speaks of copyright law’s need to achieve a ‘proper balance between protection and access,’ the language echoes the customary international law of human rights treaties such as the Universal Declaration of Human Rights of 1948.”⁴⁸

Nevertheless, even if the SCC’s approach to fair dealing is already broadly aligned with Canada’s human rights obligations, several additional consequences might result from treating international human rights treaties as relevant instruments for the purpose of applying the presumption of conformity in the context of fair dealing. First, doing so would provide additional support for a number of aspects of the SCC’s current approach to fair dealing. Courts could state, for instance, that the SCC’s articulation of fair dealing as a user right is consistent with Canada’s human rights obligations, in that this conception of and approach to fair dealing preserves space within copyright for individuals and groups to exercise the rights guaranteed to them under international human rights treaties that Canada has ratified including the *ICCPR* and the *ICESCR*.

Second, treating Canada’s obligations under international human rights treaties as relevant obligations for the purpose of applying the presumption of conformity in the context of copyright would help guard against the possibility that future courts interpreting provisions of the *Copyright Act* will inappropriately restrict the scope of fair dealing by giving undue weight to Canada’s obligations under international intellectual property agreements.

One decision that can be critiqued on these grounds is *Collective Administration in relation to rights under sections 3, 15, 18 and 21 (Re)*, [2009] C.B.D. No. 6 (*Collective Administration*). One of the issues dealt with in this Copyright Board of Canada decision was whether the photocopying of short excerpts of works by teachers at their own initiative for their students constituted fair dealing. Despite not being able to quantify the “impact of photocopies made in support of these practices,” the Copyright Board concluded, in the context of considering the effect of the dealing on the work factor as part of the fairness analysis, that this impact is “sufficiently important to compete with the original to make the dealing unfair.”⁴⁹

⁴⁸ Vaver, “Copyright Defences as User Rights”, *supra* note 1 at 671-72.

⁴⁹ *Collective Administration in relation to rights under sections 3, 15, 18 and 21 (Re)*

The Copyright Board also wrote that “even if it were possible to show that each downstream dealing by a student is research-based and fair, the upstream dealings of teachers making copies for their entire class would not be,” and that “even when regarded as facilitation, a systemic practice that competes with the market of the original must not be permitted, regardless of whether downstream dealings fall under the fair dealing exception.”⁵⁰

In support of these statements, the Copyright Board made reference to three-step test, described by Daniel Gervais as “the cornerstone for almost all exceptions to all intellectual property rights at the international level.”⁵¹ Originally set out in art. 9(2) of the *Berne Convention*, a modified version of this test was later incorporated into *TRIPS* as art. 13, which reads: “[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”⁵²

Considering the fairness analysis in light of both art. 13 of *TRIPS* and art. 9(2) of the *Berne Convention*, the Copyright Board wrote in *Collective Administration in relation to rights under sections 3, 15, 18 and 21 (Re)* that their approach, as described above:

[S]eems to be the only one that conforms with article 9(2) of the [*Berne Convention*] and article 13 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* concluded within the framework of the World Trade Organization. It is not necessary to make an exhaustive analysis of these provisions. That said, it seems self-evident that copies made on a teacher’s initiative for his or her students either conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holders. Lately, the Supreme Court has been placing significant emphasis on treaties that Canada has not yet ratified [(the WCT)]; it seems even more crucial to account for those that have been.⁵³

(July 17, 2009), Majeau, [2009] C.B.D. No. 6 at para. 111 [*Collective Administration*].

⁵⁰ *Collective Administration, ibid.* at paras. 112-113.

⁵¹ Daniel Gervais, “Towards a New Core International Copyright Norm: The Reverse Three-Step Test” (2005) 9 Marq. Intell. Prop. L. Rev. 1 at 13.

⁵² *TRIPS, supra* note 11 at art. 13; *Berne Convention, supra* note 11 at art. 9(2).

⁵³ *Collective Administration, supra* note 49 at para. 114.

On appeal (as *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*), Abella J., in her majority judgment, determined that the Copyright Board misapplied a number of the fairness factors, and as a result that “its outcome was . . . unreasonable.”⁵⁴ Neither Abella J. in her majority judgment nor Rothstein J. in his dissenting judgment cited to the passage in the Copyright Board’s decision that referenced the three-step test. Abella J., however, was highly critical of the Copyright Board’s approach to the effect of the dealing factor.⁵⁵

Reference to Canada’s obligations under international human rights agreements, as well as human rights values, could have provided additional support for Abella J.’s conclusion. For instance, it could be argued that the Copyright Board’s approach to the effect of the dealing factor in *Collective Administration in relation to rights under sections 3, 15, 18 and 21 (Re)*, by significantly narrowing the scope of the fair dealing defence and limiting its availability in the educational context, fails to adequately reflect the values and principles of international human rights treaties that Canada has signed and ratified, including but not limited to the values of accessibility,⁵⁶ non-discrimination, equality, and freedom of expression.

It could also be argued that the Copyright Board’s approach to the effect of the dealing factor is inconsistent with Canada’s obligations under human rights instruments including the *Convention on the Rights of the Child*.⁵⁷ For instance, Abella J.’s conclusion that the Copyright Board’s outcome was unreasonable could be supported by reference to art. 3 of the *Convention on the Rights of the Child*, under which “the best interests of the child shall

⁵⁴ *Alberta (Education)*, *supra* note 45 at para. 37.

⁵⁵ See *Alberta (Education)*, *supra* note 45 at paras. 33-36. Among other statements, Abella J. writes that “[i]n addition, it is difficult to see how the teachers’ copying competes with the market for textbooks, given the Board’s finding that the teachers’ copying was limited to short excerpts of complementary texts” (*Alberta (Education)*, *supra* note 45 at para. 36).

⁵⁶ See, for instance, Yannis Vardakastanis, “Opinion of the European Economic and Social Committee on ‘Accessibility as a human right for persons with disabilities’”, TEN/515-EESC-2013, January 21, 2014 on the electronic publication of the Official Journal of the European Union, 2014 O.J. (C 177) 15, available online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.177.01.0015.01.ENG&toc=OJ:C:2014:177:FULL.

⁵⁷ *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, *supra* note 14.

be a primary consideration.”⁵⁸ It could be argued that the Copyright Board’s approach to the effect of the dealing factor fails to give due regard to the best interests of the child by severely limiting the ability of children to access educational materials without first paying a licensing fee. One consequence of this approach is that absent additional intervention, students from schools with fewer financial resources would have access to a more limited range of educational materials than schools with greater financial resources. This is arguably inconsistent with art. 28 of the *Convention on the Rights of the Child*, under which “State Parties recognize the right of the child to education . . . on the basis of equal opportunity” (emphasis added).⁵⁹

This is not to suggest that Canada’s obligations under international intellectual property agreements are not relevant obligations for courts to consider when applying the presumption of conformity in the context of copyright. Both sets of obligations may be relevant, depending on the provision in question. Furthermore, depending on the context, these obligations may appear to conflict or be in tension with each other. However, as McLachlin C.J. writes in her judgment for the court in *R. v. Appulonappa*, “the way forward lies in an interpretation which harmonizes obligations in the international instruments to which Canada is a party in a way that avoids conflict and gives expression to each of the various commitments.”⁶⁰

Third, treating Canada’s human rights obligations as relevant obligations in applying the presumption of conformity in the context of copyright could also support further modifications to the fair dealing analysis as applied by Canadian courts. For instance, existing fairness factors may be applied differently in light of Canada’s human rights obligations. In applying the purpose of the dealing factor, a court could consider whether the goal of the dealing supports or advances human rights values.⁶¹ As well,

⁵⁸ *Ibid.* art. 3.

⁵⁹ *Ibid.* art. 28.

⁶⁰ *R. v. Appulonappa*, 2015 SCC 59 at para. 45. McLachlin C.J. wrote this statement in the context of “conflicting statements of the legislative objects of a statute” (*ibid.* at para. 45).

⁶¹ Take, for instance, the example of an amateur archivist making unauthorized copies of copyright-protected works. In addition to describing the goal of this dealing as to enable themselves and others to continue to engage in research, private study, review, and/or criticism of this work, the court could also

applying the fairness analysis in light of Canada's human rights obligations could also lead to the development of new fairness factors that focus more squarely on the effect of the dealing on human rights values and principles, including the impact that a finding of infringement may have on inequality, justice, or accessibility.⁶²

5. CONCLUSION

In this article, I have argued that Canada's obligations under human rights treaties are relevant international obligations for the purposes of applying the presumption of conformity in the context of copyright. As such, Canadian courts tasked with interpreting provisions of the *Copyright Act* must "avoid a construction that would place Canada in breach of [its] obligations" under international human rights treaties.⁶³ As well, Canadian courts, to the extent possible, should prefer interpretations of the *Copyright Act* that reflect the values and principles embodied in international human rights treaties over those that do not reflect these values and principles.⁶⁴

Using fair dealing as my illustrative example, I provided some preliminary reflections on several implications that could result from treating Canada's human rights obligations as relevant obligations for the purposes of applying the presumption of conformity in the context of copyright. It is my argument that doing so could provide additional support for a number of aspects of the SCC's current approach to fair dealing; help guard against courts adopting interpretations of provisions of the *Copyright Act* that give undue weight to Canada's obligations under international intellectual property agreements at the expense of Canada's human rights obligations; and support further modifications to Canada's fair dealing defence that would reflect human rights values and

highlight the connection between preservation and the human rights value of accessibility.

⁶² As McLachlin C.J. noted in *CCH Canadian et al.*, "[i]n some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair" (*supra* note 22 at para. 60).

⁶³ *Hape*, *supra* note 9 at para. 53.

⁶⁴ *Ibid.*

principles, including through the articulation of new fairness factors.

Treating Canada's obligations under international human rights treaties as relevant obligations for the purpose of applying the presumption of conformity would serve as an acknowledgment of the many connections between copyright and human rights — connections that Professor Vaver has emphasized throughout the course of his career. Doing so would also help to construct a copyright regime that while remaining consistent with Canada's obligations under international intellectual property agreements, also reflects and embodies Canada's human rights obligations as well as human rights values.

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