

AUTHORSHIP AS PUBLIC ADDRESS: ON THE SPECIFICITY OF COPYRIGHT VIS-À-VIS PATENT AND TRADE-MARK

*Abraham Drassinower**

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* Associate Professor, University of Toronto Faculty of Law; Chair in the Legal, Ethical And Cultural Implications of Technological Innovation; Director, Centre for Innovation Law and Policy. I want to thank Bruce Chapman, Susan Crawford, Rebecca Eisenberg, Paul Geller, Wendy Gordon, Ariel Katz, Jessica Litman, Yoav Mazeh, Margaret Radin, Arthur Ripstein, Andrea Slane, Arnold Weinrib, and the students in the University of Toronto Faculty of Law Fall 2007 Innovation Law and Theory Colloquium for comments on earlier drafts of this Article; the Social Sciences and Humanities Research Council of Canada and the Centre for Innovation Law and Policy at the University of Toronto Faculty of Law for support during the writing of this Article; James Anthony Renihan and Justin Jacob for research assistance; and the Editors of the *Michigan State Law Review*. It goes without saying that the responsibility is all mine. Parts or earlier drafts of this Article were presented at the University of Michigan Law School Intellectual Property Workshop (October 2007); Exploring the Boundaries of Intellectual Property Law Conference at the Radzyner School of Law in Israel (June 2007); II Jornadas Internacionales de Innovación Tecnológica y Derecho at the University of Granada Faculty of Law (April 2007); Barcelona Bar Association Author's Rights Speaker Series (April 2007); Michigan State University College of Law Fourth Annual Intellectual Property and Communications Law Program Symposium (March 2007); University of Toronto Faculty of Law Innovation Law and Theory Workshop (February 2007); University of Windsor Faculty of Law Faculty Workshop (January 2007); Boston University School of Law Intellectual Property Speaker Series (November 2006); University of Ottawa Faculty of Law Torys LLP Technology Law Speaker Series (October 2006); and the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) 2006 Annual Congress in Parma, Italy (September 2006).

I. INTRODUCTION

This Article develops the proposition that authorship in copyright law is a mode of public address. It unfolds two central implications from the concept of authorship as public address. One is that copyright is less an exclusive right of reproduction than an exclusive right of public presentation. Copying for personal use, for example, falls outside the purview of an author's copyright. The other is that what we know as fair dealing in Canada or fair use in the United States is less an exception to copyright infringement than a "user's right" unambiguously integral to copyright law. Once reproduction is no longer grasped as the core of copyright, the uses involved in fair dealing or fair use no longer appear as *prima facie* infringements to be excused by appeal to considerations external to that core. That is, fair dealing or fair use appear not as mere exceptions to infringement, but rather as user rights in and of themselves constitutive of copyright.

The proposition that user rights are integral to copyright is perhaps as old as copyright itself.¹ Even in the face of the growing scope of copyright protection, instances of academic commentary insisting on the all-but-forgotten role of users in copyright law are not difficult to find.² Judicial affirmations of the centrality of users, however, and hence of the internal limits of copyright protection, are at best infrequent. The recent Supreme Court of Canada decision *CCH Canadian Ltd. v. Law Society of Upper Canada*³ is a welcome exception to this trend. In *CCH*, the Supreme Court

1. See, e.g., BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911*, at 28–35 (1999) (discussing fears, during the great "literary property debate" in eighteenth-century England, that "perpetual common law literary property would impinge upon the rights both of other authors and the reading public more generally"). On the literary property debate, see also MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993).

2. See, e.g., Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347 (2005); Abraham Drassinower, *Taking User Rights Seriously*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 462 (Michael Geist ed., 2005); Niva Elkin-Koren, *Making Room for Consumers under the DMCA*, 22 *BERKELEY TECH. L.J.* 1119 (2007); Paul Edward Geller, *Beyond the Copyright Crisis: Principles for Change*, 55 *J. COPYRIGHT SOC'Y* 165 (2008), available at http://www.criticalcopyright.com/Geller-CoprCrisis_Principles.htm; Wendy J. Gordon & Daniel Bahls, *The Public's Rights to Fair Use: Amending Section 107 to Avoid the "Fared Use Fallacy"*, 2007 *UTAH L. REV.* 619; Elizabeth F. Judge, *Intellectual Property Law as an Internal Limit on Intellectual Property Rights and Autonomous Source of Liability for Intellectual Property Owners*, 27 *BULL. SCI. TECH. & SOC'Y* 301 (2007); Jessica Litman, *Lawful Personal Use*, 85 *TEX. L. REV.* 1871 (2007).

3. *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] 1 S.C.R. 339. The case opposed plaintiff publishers CCH Canadian, Thomson Canada, and Canada Law Book, and defendant library Great Library at Osgoode Hall in Toronto, operated by the Law Society of

of Canada unambiguously held that the defense of fair dealing in copyright law is not a mere exception to copyright infringement, but rather a user right equally constitutive of copyright law.⁴

Thus, it is by no means surprising that, beyond its clear transformative impact on Canadian copyright law and practice,⁵ the decision has also generated international attention.⁶ Foremost among the reasons for this interest is, of course, the proposition that fair dealing is a user right, and, more generally, the proposition that exceptions to copyright infringement are to be

Upper Canada. *Id.* ¶ 1. Members of the Law Society, the judiciary, and other authorized researchers could request photocopies of materials from the library. *Id.* The materials were copied by the library staff and delivered in person, by mail, or by fax to the requesters. *Id.* The publishers commenced an action against the library with respect to alleged infringements of copyright resulting from the library's photocopying service, and also from usage by the patrons of self-service photocopiers provided by the library. *Id.* ¶ 2. The Court held, *inter alia*, (1) that the publishers' materials were original works subject to copyright protection, *id.* ¶ 36; (2) that the self-service photocopiers did not implicitly authorize reproduction of the materials, *id.* ¶ 46; and (3) that the library successfully made out the defense of fair dealing for research purposes with respect to the photocopying service, *id.* ¶ 73. In the course of its reasoning, the Court (1) defined originality as "skill and judgment" rather than "sweat of the brow;" *id.* ¶ 24; (2) clarified the concept of "authorization," *id.* ¶ 38; and (3) defined fair dealing as a "user's right" not to be interpreted restrictively. *Id.* ¶ 48.

4. *CCH*, 1 S.C.R. 339, ¶ 48 ("Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The 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. As Professor Vaver . . . has explained . . . 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.'").

5. See Carys J. Craig, *The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest*, 2 U. OTTAWA L. & TECH. J. 425 (2005); Drassinower, *supra* note 2; Abraham Drassinower, *Canadian Originality: Notes on a Judgment in Search of an Author*, in A NEW INTELLECTUAL PROPERTY PARADIGM: THE CANADIAN EXPERIENCE (Ysolde Gendreau ed., forthcoming 2008); Michael Geist, *Low-Tech Case Has High-Tech Impact*, TORONTO STAR, Mar. 22, 2004, available at http://www.michaelgeist.ca/resc/html_bkup/mar222004.html; Daniel J. Gervais, *Canadian Copyright Law Post-CCH*, 18 INTELL. PROP. J. 131 (2004); Teresa Scassa, *Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada's Decision in CCH Canadian Limited et al. v. Law Society of Upper Canada*, 3 CAN. J.L. & TECH. 89 (2004); Teresa Scassa, *Original Facts: Skill, Judgment, and the Public Domain*, 51 MCGILL L.J. 253 (2006); Barry B. Sookman, *CCH: A Seminal Canadian Case on Originality and the Fair Dealing Defence*, 18 World Intell. Prop. Rep. (BNA) No. 8, at 18 (Aug. 1, 2004).

6. See, e.g., Ramón Casas Vallés, *Bibliotecas Jurídicas y Propiedad Intelectual: El Caso de la Gran Biblioteca del Colegio de Abogados de Ontario*, 4 REVISTA JURÍDICA DE CATALUNYA 26 (2005); Matthew Rimmer, *Canadian Rhapsody: Copyright Law and Research Libraries*, 35 AUSTL. ACAD. & RES. LIBR. 193 (2004).

construed not as loop-holes, but rather as integral aspects of the copyright system.⁷

The appeal and interest of a judicial statement of that kind is not difficult to appreciate. The elective affinity of the concept of copyright with the protection of authorial works operates as a kind of bulwark that persistently relegates the domain of use to the level of a mere exception. The result is that formulating a positive account of the public domain remains one of the major and recurrent difficulties in copyright theory and practice. To conceive of the public domain as what is not protected under copyright is to conceive of the public domain negatively—i.e., as whatever is left over once copyright has done its core job of protecting works of authorship from unauthorized reproduction.⁸ This view construes the public domain as necessarily *outside* the core of copyright. It is a way of systematically excluding the public domain from copyright law, as if by definitional fiat. The interest and promise of the concept of user rights as integral to copyright law is to undo this systematic exclusion; user rights restore the dignity of the public domain to copyright law.

Thus, for example, the conceptual and terminological shift in *CCH* from fair dealing as an exception to fair dealing as a user right evidences an orientation bent upon undoing the systematic exclusion of the public domain. To say that user rights are no longer an exception is to say that they are integral to copyright law. Copyright is, therefore, not exclusively about authorial rights; it is equally about user rights. A body of law that excludes user rights is not properly called copyright law. Under this view, the public domain is irretrievably central to copyright.

The view this Article sets forth is that the concept of user rights entails a redefinition of the wrong in copyright—that is, of the very mischief that copyright law targets. If we take user rights seriously, we can no longer say that unauthorized reproduction is the act that copyright law most basically prohibits. “Copying” is not truly the heart of copyright. Rather, copying is but an instance of a higher-order category that defines the nature of copyright more adequately than the exclusive right of reproduction. I will argue that this higher-order category is a right of public presentation, and that, therefore, reproduction is a wrong only where it impinges upon this right of public presentation.

In Part II, I begin by formulating the reasons for which the concept of user rights entails a redefinition of the wrong in copyright. Briefly stated, the point is that once the unauthorized reproductions involved in fair dealing or fair use are viewed as user rights rather than as mere exceptions, reproduction can no longer be regarded as *per se* wrongful. Taking fair dealing

7. *CCH*, 1 S.C.R. 339, ¶ 48.

8. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). See also David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981).

or fair use for the purpose of criticism as a paradigmatic example of a user right, I argue that authors have exclusive rights of reproduction only where such rights are consistent with everyone else's equal authorship. The "fairness" of the dealing in fair dealing or fair use for the purpose of criticism operates as a balanced recognition of the defendant's own authorship claims. Fair dealing or fair use for the purpose of criticism is a user right, and not a mere exception, because it invokes, on the side of the defendant, the very same considerations that give rise to the author's right to begin with. The legality of fair dealing or fair use for the purpose of criticism is predicated on the defendant's own authorship.

In Part III, noting that the example of fair dealing or fair use for the purpose of criticism is insufficient to explore the legality of unauthorized uses *in the absence* of the defendant's own authorship, I develop a concept of authorship—and therefore of the right attendant to it—no longer premised on the wrongfulness of reproduction *per se*. I do so by comparing and contrasting copyright and patent. I undertake this comparison informed by the methodological assumption that the juxtaposition of authorship and inventorship, originality and novelty, will bring into relief features of authorship that are not otherwise as clearly visible.

The upshot of the comparison is a definition of authorship as a mode of communication. Whereas an inventor is someone who offers to the public novel ways of manipulating nature, an author is someone who presents, to borrow a phrase of Immanuel Kant's, a "*discourse* to the public."⁹ The subject matter of copyright, a "work," is an instance of communication that, as such, is addressed to others.¹⁰ In this vein, the wrong in copyright is the unauthorized placing of oneself in another's position as author—i.e., as she who holds the exclusive right to present the discourse to the public.

In Part IV, I elaborate the proposition that, because it *is* an instance of public address, a work is (re-)produced only where it is (re-)communicated. On this basis, the authorship as public address model reinterprets the legal test for copyright infringement, and, in so doing, provides novel approaches to the legality of copying for personal use, Internet browsing and caching, and certain unauthorized uses of copyrighted works affixed by copyright holders to consumer goods as trademarked logos.

Finally, in Part V, I note that the proposition that authorship is a mode of communication prompts questions about the difference between copy-

9. See IMMANUEL KANT, *The Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 353, 437 (Mary J. Gregor trans. & ed., 1996). See also IMMANUEL KANT, *On the Wrongfulness of Unauthorized Publication of Books*, in PRACTICAL PHILOSOPHY, *supra*, at 23, 29.

10. I should note that, for reasons that need not concern us here, Kant's concept of a "*discourse* to the public"—which he offers as a definition of a book—is narrower than our concept of a copyrightable "work." See KANT, *On the Wrongfulness of Unauthorized Publication of Books*, in PRACTICAL PHILOSOPHY, *supra* note 9, at 29.

right and trade-mark. Like a trade-mark, a work of authorship is an instance of communication addressed to the public. Unlike a trade-mark, however, a work is not a signifier of source in the marketplace. Whereas trade-marks invite contractual transactions involving the products they are used to distinguish in the market, works of authorship instead invite and elicit dialogue about the ideas to which they give expressive form.

Thus, while the comparison of copyright and patent yields the proposition that authorship is a mode of communication, the comparison of copyright and trade-mark permits further specification of the kind of communication that is at stake in copyright. Authorship is not merely a mode of communication but a mode of discourse—an address that invites engagement in the mutual intercourse of language.

The concept of authorship as public address captures the specificity of copyright vis-à-vis patent and trade-mark. Because copyright is not an exclusive right of reproduction, but rather an exclusive right of public presentation, copying for personal use does not engage an author's copyright. At the same time, authorship as public address opens itself naturally to fair dealing or fair use for the purpose of criticism. As modes of discourse addressed to others, works of authorship invite and elicit responses from those others. Fair dealing or fair use is not a mere exception. It is rather a way of structuring, as a matter of right, the legality or legitimacy of such responses.

II. BEYOND REPRODUCTION

Though attractive from certain points of view, the proposition that fair dealing is not an exception, but rather a user right, is at best puzzling.¹¹ If we look at the basic features of the fair dealing defense, it is difficult to characterize it as anything other than an exception—that is, as anything other than a suspension of the normal operations of copyright law. Normally, substantial reproduction of an author's work amounts to infringement of the copyright in that work.¹² Fair dealing, however, specifies situations in

11. Because this proposition is unambiguously affirmed in the Supreme Court of Canada's case *CCH*, 1 S.C.R. 339, the discussion that follows refers explicitly only to the Canadian concept of fair dealing and not to the U.S. concept of fair use. The discussion is nonetheless generally applicable to the foundational problem of the relation between authorial entitlement and the limits thereof in copyright law. For a discussion of similarities and differences between fair dealing and fair use, see Gervais, *supra* note 5.

12. See Copyright Act, R.S.C., ch. C-42, § 3(1) (1985), available at <http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-42//en> ("For the purposes of this Act, 'copyright', in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever . . ."); see also *Francis Day & Hunter, Ltd. v. Bron*, [1963] Ch. 587, 627; *Hawkes & Son (London) Ltd. v. Paramount Film Serv. Ltd.*, [1934] Ch. 593, 598-99.

which substantial reproduction is not infringement.¹³ Fair dealing says: “There is no infringement here, even though there is substantial reproduction.” If the general rule is that substantial reproduction amounts to infringement, then fair dealing is a special situation to which the rule does not apply, a situation left out or excluded from the rule; in short, fair dealing is an exception to the general rule.

This impasse is only seemingly insurmountable. As soon as we think of reproduction as the wrong against which copyright protects, fair dealing will appear and remain an exception. By the same token, if fair dealing is not an exception, then the general rule at the heart of copyright cannot be that “there is infringement where there is substantial reproduction.” We therefore need a different rule to make sense of the proposition that user rights are not exceptions. We must stop thinking of reproduction as wrongful. Copyright is not about copying, pure and simple. It follows that, if fair dealing is to be grasped as a right rather than an exception, unauthorized substantial reproduction is not the mischief that copyright law addresses.

What, then, *is* that mischief? If not a right of exclusive reproduction, what is the core of authorial entitlement?

Consider the following thought-experiment: if we take the phrase “user rights” as our cue, we might adopt the proposition “persons are entitled to use the work of others” as our new general rule. Indeed, it seems perfectly conceivable that the general rule we are looking for is that knowledge or information is as “free as the air to common use.”¹⁴ Justice Brandeis, in his famous dissent in the classic case of *International News Services v. Associated Press*,¹⁵ put it as follows: “The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”¹⁶

If we were to assume that the general rule is that knowledge is “free as the air to common use,” then it would follow as a matter of course that an author’s exclusive right to reproduce her work is but an exception to that general rule. Along these lines, the doctrine of originality would be the guardian, as it were, of the sorts of works that copyright law allows into its midst and protects as exceptions to the general rule. On this view, originality, rather than fair dealing, would be the exception; author rights, rather than user rights, would be anomalous.

It is possible, of course, to imagine a world in which user rights are the baseline and author rights the exception. In that imaginary mirror image of

13. See, e.g., *Allen v. Toronto Star Newspapers Ltd.*, [1997] 152 D.L.R. (4th) 518, ¶¶ 38-43; *Beloff v. Pressdram Ltd.*, [1973] F.S.R. 33.

14. *Int’l News Servs. v. Associated Press*, 248 U.S. 215, 250 (1918).

15. *Id.*

16. *Id.*

the world, we would likely hear the complaint that author rights are routinely interpreted all-too-narrowly because of the persistent, yet mistaken view that they are mere exceptions. This complaint would be accompanied, of course, by the *de rigueur* observation that copyright law is neither about authors nor about users but about the “balance” between them, and that so long as we continue to regard author rights as mere exceptions, we will be falling short of that balance, disregarding its fundamental lessons.

In that imaginary world, a judgment affirming emphatically that originality gives rise to an author’s right, rather than to a mere exception to user rights, would likely have a transformative impact on its own jurisdiction, while also generating a great deal of international attention. In that world, we can easily imagine a proliferation of academic commentary highlighting the welcome development of a judicial pronouncement unambiguously vindicating a balanced view of copyright law, a copyright law equally respectful of author rights.

If we persist with our thought-experiment for a moment longer, we can just as easily envisage difficulties in our imaginary world parallel to those we face in the real world of copyright jurisprudence. Speaking about the real world, I noted a moment ago that it is difficult to see fair dealing as anything other than an exception to the general rule that authors have exclusive rights of reproduction. Similarly, in the imaginary world of our thought-experiment, the opposite difficulty would exist. No matter how strenuously we would insist that an author’s right is a right rather than an exception, it would still be hard to see it as anything other than an anomaly, as something that negates the general rule that persons are entitled to use the works of others. If information is free, then an author’s right cannot help but be a mere exception.

If we now permit ourselves to imagine putting these two worlds—real and imaginary—into one, taking the rule of each and putting it next to the rule of the other, we would end up with a predictable and unpleasant squabble. The rule of authors would assert itself against the rule of users, and each would insist that the other be regarded as a mere exception—an unhappy marriage, perhaps, in which each of the participants is willing to grant the other nothing more than what is absolutely necessary for cohabitation to continue without becoming totally insufferable.

This squabble is, of course, not as unfamiliar as our thought-experiment might seem to suggest. The image of the author/user relation in copyright law as a squabble reminiscent of an unhappy marriage is but a way to denote what, in the worlds of copyright theory and practice, we have become accustomed to regarding as the precariousness of the copyright

“balance.”¹⁷ Examples of the use of this “balance” metaphor to capture the core of copyright law literally abound.¹⁸ One might even say that it is impossible to get through a discussion of copyright theory or policy without referring to it. In *CCH*, for instance, the court’s affirmation of the integral status of user rights invokes the familiar vision of copyright law as a balance between “dual objectives,” “promoting the public interest” on the one hand, and “obtaining a just reward for the creator” on the other.¹⁹ In the court’s view, the traditional approach to fair dealing as a mere exception falls short of the appropriate balance, upholding the authorial domain at the expense of the public.²⁰ Thus, the vision of copyright law as a dual objective system presides over an integration of user rights intended to restore the lost copyright balance.²¹

Nonetheless, the bare assertion that copyright law is a dual objective system is not itself sufficient to accomplish the desired task of integration. In the absence of an elucidation of the unifying principle holding author and public together, it is by no means clear that copyright is a “system” at all. The question is how to understand copyright as one thing with two objectives, rather than as two things that happen to have been thrown together in the same place for no apparent reason. Such an elucidation would focus neither on the author nor the public, but instead on the conditions for the possibility of the “balance” linking them as aspects of a single system. Authorial and public domains—author rights and user rights—would appear as components of a single, yet differentiated whole. In the absence of the prin-

17. See, e.g., Teresa Scassa, *Interests in the Balance*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 41 (Michael Geist ed., 2005); Daniel J. Gervais, *The Purpose of Copyright Law in Canada*, 2 U. OTTAWA L. & TECH. J. 315, 320-21 (2000); LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 130-35 (1999); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989). See also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (deploying the concept of “balance” in formulating the relation between copyright and democracy).

18. See, e.g., *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R.336, ¶¶ 30-31; *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339, ¶¶ 10, 23, 48, 70; *Euro-Excellence Inc. v. Kraft Can. Inc.*, [2007] S.C.C. 37, ¶¶ 76, 80; *Canadian Ass’n of Internet Providers v. Soc’y of Composers, Authors & Music Publishers of Can.*, [2004] 2 S.C.R. 427, ¶ 40; *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363, ¶ 69; *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

19. *CCH*, 1 S.C.R. 339, ¶ 10.

20. *Id.* ¶ 48.

21. This paragraph and the next follow closely parts of the text in Drassinower, *supra* note 2, at 467-68; Abraham Drassinower, *Notes on the Public Domain*, in *INTELLECTUAL PROPERTY LAW 2004: ARTICLES ON CROSSING BORDERS BETWEEN TRADITIONAL AND ACTUAL* 137, 143 (Molengrafica Series, F.W. Grosheide & J.J. Brinkhof eds., 2005).

ciple that integrates them, however, author rights and user rights would remain exceptions to each other, not aspects of an integrating and integrated vision.

On the one hand, then, we know that the rule of copyright cannot be that “authors have an exclusive right to reproduce their work.” Such a rule would mean that fair dealing or user rights were mere exceptions. On the other hand, we also know that the rule cannot be that “persons have the right to use the works of others.” Such a rule would mean that originality or author rights were mere exceptions.

What, then, is the rule that somehow holds onto both aspects of copyright, that captures the “balance” we are after?

What we need is an appreciation of what authors and users have in common. On the basis of that appreciation, we could then formulate the conditions of their integration into a single system. In short, we need (1) an appreciation of the extent to which authors are users, (2) an appreciation of the extent to which users are authors, and (3) a consequent understanding of copyright law as a regime that organizes users’ and authors’ interaction.

Put in terms of copyright doctrine, we need to understand (1) that originality is not about the absence of use, (2) that fair dealing is not about the absence of originality, and (3) that therefore originality and fair dealing are not opposing impulses or exceptions to each other, but rather radically continuous and integral aspects of copyright law as a whole. The fundamental problem is that of grasping the nature of the continuity.

A. Authors as Users

The observation that authorship is a mode of use is as old as copyright itself. The idea/expression dichotomy, for example, is at once a prohibition on and an affirmation of imitation in the dynamics of creation. As is well known, the dichotomy is a dichotomy of protection. It provides that copyright does not protect ideas, but only expression. Thus, while a copyright owner can preclude others from copying her expression, she cannot similarly exclude others from the ideas expressed in her work.²² We might say

22. On the idea/expression dichotomy, see, for example, *Moreau v. St. Vincent*, [1950] 3 D.L.R. 713, ¶ 8 (“It is . . . an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own. Every one may freely adopt and use the ideas but no one may copy his literary work without his consent.”). See also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). For commentary on the idea/expression dichotomy, see Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURISPRUDENCE 3 (2003);

that while it is true that, generally speaking, copyright law prohibits *copying* the works of others, it is not true that copyright law disallows *drawing* from the works of others.

We can and should infer from this that the law of copyright does not construe the author as someone who comes up with something radically new out of nothing. The standard is not a creation *ex-nihilo* standard. On the contrary, the author can and does draw from the works of others. She uses pre-existing works as her own material. She draws inspiration from other works, finds herself stimulated and encouraged by them, derives nourishment, as it were, from their substance, uses them as starting points, or perhaps even tries and succeeds in re-expressing in her own words the very same thoughts she finds in the works of others. In short, copyright law sees authors as constantly engaged in dialogue with the works of others, and understands authors as embedded in a culture that nourishes and influences them, yet from which they derive their own voice.²³

Thus, copyright is less about a prohibition on copying *per se* than about a distinction between permissible and impermissible copying—that is, between saying things in one’s own words and merely repeating the words of another. Authorship is less about the absence of copying than about the cultivation and exercise of modes of imitation that amount to more than mere repetition. Copyright law can no more prohibit copying *per se*, than it can prohibit authorship.

B. Users as Authors

The fair dealing provisions in the Canadian Copyright Act permit otherwise infringing substantial reproduction of copyrighted works where the reproduction is for research, private study, criticism, review, or news reporting purposes.²⁴ Not all acts of reproduction for these allowable purposes, however, meet the requirements of the defense. In addition to falling under one of the allowable purposes, the acts of reproduction in question must also be “fair.” The threshold determination—that the defendant’s use of the plaintiff’s work falls within the statutorily specified purposes—gives rise to an inquiry into whether the dealing is fair.²⁵ This determination of fairness amounts to an examination of several factors pertinent to the dealing, in-

Maurizio Borghi, *Owning Form, Sharing Content: Natural-Right Copyright and Digital Environment*, in 5 NEW DIRECTIONS IN COPYRIGHT LAW (Fiona Macmillan ed., 2007).

23. This and the next six paragraphs follow closely parts of the text of Drassinower, *supra* note 2, at 469-72; Drassinower, *supra* note 21, at 144-45, 147-50.

24. Copyright Act, R.S.C., ch. C-42 §§ 29 (research or private study), 29.1 (criticism or review), 29.2 (news reporting) (1985), available at <http://laws.justice.gc.ca/en/Show-FullDoc/cs/C-42///en> at.

25. See, e.g., *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339, ¶ 50.

cluding, as formulated by the Supreme Court of Canada in *CCH*, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the plaintiff's work, and the effect of the dealing on the work.²⁶

Generally speaking, these factors govern a determination of whether the dealing is reasonably necessary for its purpose—that is, the fairness of the dealing is assessed in relation to the purpose used to justify the dealing.²⁷ Thus, for example, the permitted amount of the dealing varies in accordance with the invoked purpose. What is fair for the purposes of research or private study may not be fair for the purposes of criticism or review.²⁸ The permitted amount of any given dealing is not in fact a quantitative category. An allowable proportion either of the plaintiff's work (as in how much of the plaintiff's work was reproduced) or of the defendant's work (as in how much of the defendant's work is made up of reproduced material) is not at stake.²⁹ Rather, the fair amount is a relation between what is reproduced and the purpose of the reproduction.³⁰ A fair dealing is a dealing reasonably necessary for its purpose.³¹ Thus, what transforms an otherwise infringing reproduction into the legitimate exercise of a user right is nothing more than the fit between the reproduction and its (allowable) purpose.

A finding of fair dealing, then, means that the act of substantial reproduction giving rise to the inquiry fails to mature into a finding of infringement. In the specific instance of fair dealing for the purpose of criticism, the affirmative defense permits the defendant to establish that, in spite of the appearance of infringement as a result of substantial reproduction, the defendant's work is after all his own and not truly a copy of the plaintiff's. Fair dealing for the purpose of criticism gives the defendant the opportunity to show that his substantial reproduction of the plaintiff's work does not negate his own authorship.³² The point is that fair dealing for the purpose of

26. *CCH*, 1 S.C.R. 339, ¶¶ 53-60.

27. *Beloff v. Pressdram Ltd.*, [1973] F.S.R. 33, 60 (the "fairness [of the dealing] must be judged in relation to that purpose").

28. *CCH*, 1 S.C.R. 339, ¶ 56 ("For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.").

29. As the court notes, "[i]t may be possible to deal fairly with a whole work." *CCH*, 1 S.C.R. 339, ¶ 56. See also *Allen v. Toronto Star Newspapers Ltd.*, [1997] 152 D.L.R. (4th) 518.

30. *CCH*, 1 S.C.R. 339, ¶ 56.

31. See, e.g., *id.* ¶¶ 56, 57, 60; *Beloff*, [1973] F.S.R. 33.

32. See, e.g., Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 LEGAL THEORY 347, 371 (1997) ("[O]nly authors, but not copycats, should be entitled to the fair use privilege."). In the American law of fair use, the requirement that the defendant's work be "transformative" calls for the defendant's engagement as an author. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding that the fair use analysis asks "whether and to what extent the new work is 'transformative'"). For discussion of the cen-

criticism is a user right rather than a mere exception because it arises from and affirms the very same principle that gives rise to the plaintiff's entitlement—authorship.

The reason fair dealing for the purpose of criticism affirms the free availability of another's expression, where such expression is reasonably necessary, is that the "fairness" of the dealing operates bilaterally. Fair dealing must be fair to both plaintiff and defendant. We could not conceive of "fairness" otherwise. This means that fair dealing for the purpose of criticism must impose limitations not only on the plaintiff's copyright but also on the kinds of uses that the defendant can make of the plaintiff's work. Thus, the defendant can legitimately use the plaintiff's work only where the purpose of such use engages the defendant's authorship, and only to the extent that such purpose reasonably requires. If the dealing is to be "fair" in the sense of being bilaterally consistent with the authorship of each party, then the allowable purpose must be understood in this twofold manner: as a purpose which on the one hand makes the plaintiff's work freely available to the defendant, while on the other hand specifies the conditions that limit that availability. Fair dealing for the purpose of criticism affirms the defendant's user right while preserving the plaintiff's authorial right. This is why the defense allows certain copying but does not thereby legitimate all or any copying. The fairness of the dealing operates as a balanced recognition of the parties' equal claims as authors.

C. Equality

The understanding of users as authors that emerges from the analysis of fair dealing for the purpose of criticism is therefore nothing other than the obverse of the equally necessary understanding of authors as users that emerges from the analysis of originality. All authorship is intertwined with the works of others.³³ Precisely because his own original work itself presupposes the intertextuality of creation, the plaintiff's right to exclusive reproduction does not include the exclusive right to address or respond to his own work. Fair dealing for the purpose of criticism assures the viability of this creative intertwining by ensuring the free availability of another's expression where it is reasonably necessary to one's own. Originality and fair dealing are radically continuous in that, albeit in different senses, they both manifest an insistence to affirm the intertextuality of creation as the ground from which one's own voice arises and must necessarily arise.

tral role of transformativity in fair use, see MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.05[A][1][b] (2004). Both Scassa and Gervais underline emerging similarities between American fair use and Canadian fair dealing as provided in *CCH*. See Gervais, *supra* note 5, at 159; Scassa, *supra* note 5, at 96.

33. See, e.g., Litman, *supra* note 8.

It is as if the law of copyright were saying to the plaintiff in any given copyright action: “You have asserted rights in your authorship; you cannot now turn around and deny the defendant’s authorship.” Viewed in this light, the defense is not about undoing or overlooking a wrong for reasons extraneous to authorship itself. At stake is not an excuse or exception. Rather, fair dealing for the purpose of criticism is an affirmative statement of a person’s right to respond to another’s work in her own. It is as if, upon hearing the plaintiff’s complaint, the defendant were to say: “It is true that I have reproduced your work, but I have not abrogated your authorship to myself. I am equally an author. My use of your work is not ‘piratical;’ it is reasonably necessary to *my* own work. I have done nothing more than respond to your work in my own as you have yourself responded to the work of others in yours.” The defendant’s answer to the plaintiff’s complaint, then, is that his use of the plaintiff’s work is not inconsistent with the plaintiff’s authorship. We might say, by way of preliminary approximation, that the defendant’s reproduction is non-infringing because it does not amount to an abrogation of the plaintiff’s authorship.³⁴

We can now provide an answer to the question of what the rule at the heart of copyright is, once we give up the proposition that reproduction *per se* is a wrong—that is, once we give up the rule that “there is infringement where there is substantial reproduction.” We know, of course, what will not suffice as a new rule. On the one hand, we cannot appeal to a rule—the rule of authors—that provides without more ado that authors have exclusive rights to reproduce their work. This rule is but a restatement of the traditional proposition that reproduction is wrongful. It is no longer serviceable once it is asserted that fair dealing is a right rather than an exception. On the other hand, a rule—the rule of users—that provides without more ado that persons are entitled to use the works of others is also unserviceable. This rule is not a statement of the rights of users within the copyright system but rather a denial of copyright as such. It does not so much integrate the claims of users into the copyright system as it abolishes the claims of authors.

The alternative principle, which the foregoing analysis of fair dealing for the purpose of criticism intimates, is that authors have exclusive rights of reproduction only where such rights are consistent with everyone else’s equal authorship. By the same token, persons are entitled to use the works

34. There can be no doubt that this approach would exert salutary restrictive force on the derivative works right. However, the approach need not eliminate the right, any more than it need lose sight of the distinction, for example, between substantially reproducing another’s work for the purpose of criticizing it in one’s own, and translating another’s work. Whereas the former act reproduces the other’s work as a necessary aspect of one’s own, the latter reproduces the other’s work *as a work*. On the concept of works as works, see *infra* Part IV.

of others provided such use is consistent with the equal authorship of those others. Equality, then, is the category that would make intelligible the connection between author rights and user rights as aspects of the copyright system. On this view, copyright is an egalitarian ethic of authorship.³⁵

To be sure, the particular instance of fair dealing for the purpose of criticism is insufficient to account for the possibility of user rights, if any, that do *not* engage the defendant's authorship. Note, however, that the function of the defendant's authorship in the structure of fair dealing for the purpose of criticism is to establish that no wrong has taken place. The defendant establishes that her unauthorized reproduction of the plaintiff's work is non-infringing by invoking her own authorship. Yet it is not necessarily the defendant's authorship *per se*, but rather what that authorship indicates, that establishes the absence of the wrong—while it is true that being an author in one's own right can serve to indicate that there is no infringement, it does not follow that being an author in one's own right is the only way to escape liability. Thus, the question remains whether non-infringing reproduction *in the absence of the defendant's authorship* is a conceptual possibility.³⁶

The analysis of fair dealing for the purpose of criticism, however, can no longer guide us at this point. Precisely because the defendant's own authorship functions as evidence that no abrogation of the plaintiff's authorship has taken place, the analysis of fair dealing for the purpose of criticism obscures the features of that abrogation. Such an analysis cannot provide us with the tools to determine whether fair dealing for the purpose of criticism is a particular instance of a more general category of user rights—an instance for which reliance on the defendant's authorship is specifically necessary.

One might surmise that analysis of other dimensions of fair dealing—for example, fair dealing for the purpose of research or private study—may be helpful. These other instances of fair dealing, however, while perhaps no longer predicated on the defendant's authorship, would also be instances in which no abrogation of authorship has taken place. The problem of abrogation as such would once again not be brought sharply into relief. Instead,

35. On the role of equality in private law, see generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* (1995); and ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999). On the role of equality in copyright law, see generally Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993); Drassinower, *supra* note 2; and Drassinower, *supra* note 22. See also Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138 (Stephen R. Munzer ed., 2001).

36. See Drassinower, *supra* note 2, at 476.

we would be left with the persistent impression that where the fair dealing conditions are not present, the underlying reproduction is *per se* wrongful.

In other words, what we require at this point is a definition of authorship and of its abrogation—a definition that no longer posits reproduction as wrongful *per se*. In short, the question is what, precisely, an author is, and what does it mean to wrong her.

One way to make headway in this respect is to compare and contrast originality in copyright and novelty in patent—that is, authorship and inventorship—in the expectation that such juxtaposition will generate a definition of authorship revealing features not otherwise accessible. This definition would then permit us to further specify what the wrong is in copyright.

III. WORKS AND INVENTIONS³⁷

“Originality” and “novelty” respectively denote cardinal requirements of copyrightability and patentability. An author’s work is not subject to copyright protection unless it is *original*.³⁸ Similarly, an inventor’s invention is not subject to patent protection unless it is *novel*.³⁹

The familiar distinction between an inventor’s invention and an author’s work teaches that whereas patent is concerned with the inventor’s substantive contribution to existing knowledge, copyright is concerned not with an author’s substantive contribution but only with the form in or through which the author communicates her thinking. Thus, whereas patent focuses on *what* an inventor has to contribute, copyright focuses on *how* an author says what she has to say. It is not the content of what is said—whether novel or otherwise—but the *very saying itself* that copyright deems worthy of legal protection. Copyright has nothing to do with the novelty of the idea or substance expressed.⁴⁰

37. This Part follows closely parts of the text of Abraham Drassinower, *A Note on the Distinction Between Copyright and Patent*, in *INTELLECTUAL PROPERTY AT THE EDGE: NEW APPROACHES TO IP IN A TRANSYSTEMIC WORLD* 285 (2006).

38. Copyright Act, R.S.C., ch. C-42, § 5 (1985), available at <http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-42///en> (“[C]opyright shall subsist . . . in every *original* literary, dramatic, musical and artistic work.”) (emphasis added).

39. Patent Act, R.S.C., ch. P 4, § 2 (1985), available at <http://lois.justice.gc.ca/en/P-4/index.html> (“[I]nvention’ means any *new* and useful art.”) (emphasis added).

40. *Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd.*, [1916] 2 Ch. 601, 608-09, is still good authority for the proposition that original expression is about form, as distinct from content, stating that:

The word “original” does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of “literary work,” with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not re-

Nowhere is this focus on the “pure saying itself” clearer than in the defense of independent creation. The question at the heart of every originality case is not “is this new or unique?” Rather, the question is, “did this come from or originate with the author?” If the answer to this question is yes, originality exists, even if the work in question happens to be identical to a previously existing work. Justice Learned Hand expressed it memorably in *Sheldon v. Metro-Goldwyn Pictures Corp.*: “[I]f by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”⁴¹ One does not fail to use one’s own words just because, coincidentally, another person happens to have used those very same words. The coincidence, however unexpected or unlikely, does not make one’s expression any less one’s own. It is this sense of “one’s own”—that of the origins or pedigree of the expression—that originality recognizes. Originality is about the “pure saying itself.”

What must be shown in order to successfully claim that a work is original, then, is not that the work is new or unique, but rather that the author came up with it—that she did not copy it from another work. Though in Canada it must also be shown that the work displays “skill and judgment,” this additional element of originality does not import a novelty requirement.⁴² Similarly, in the United States, though it must be shown that the work is minimally “creative,” this additional element, once again, does not import a novelty requirement.⁴³ Originality is not about the work’s relation to other works, but rather is about the relation between author and work. Strictly, speaking, no inquiry into the work’s relation to other works is required. The determination that a work is original is a confirmation of the work’s origins.

Things are very different in patent. In patent, there is no defense of independent invention. Patent focuses on the result rather than the source. The operative inquiry is the novelty of this result. The question here is not, “did this come from the inventor?” Instead, the question is, “is this new,” or, “is this something that was previously unavailable to the public?”⁴⁴ If

quire that the expression must be in an original or novel form, but that the work must be not copied from another work—that it should originate from the author. Of course, *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339, ¶¶ 16-25, is the Supreme Court of Canada’s most recent authoritative statement on originality.

41. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936).

42. *See, e.g., CCH*, 1 S.C.R. 339, ¶¶ 16, 24.

43. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991).

44. *See Patent Act, R.S.C., ch. P 4, § 2* (“[I]nvention’ means any *new* and useful art”) (emphasis added); *id.* § 28.2(1)(a) (“The subject-matter . . . must not have been disclosed . . . in such a manner that the subject-matter became available to the public in Canada or elsewhere.”).

the answer is yes, the invention satisfies the novelty requirement. If the answer is no, there is no invention. The determination of novelty is made by comparing the invention and the prior art.⁴⁵ Novelty is a relation between the inventor's product and other pre-existing products. The patent application of a second inventor who comes up with something previously available must fail for lack of novelty, even if she is an "independent inventor." Patent lawyers express this by saying that the invention is "anticipated" in the prior art.⁴⁶

We can summarize the point as follows. There is no such thing as a "second" inventor in patent law—one cannot invent something already available. But copyright operates with a different concept of priority. In copyright, there *is* such a thing as a second author. More precisely, one is an author even if one produces something already available. This is because authorship in copyright is about speaking in one's words, whereas inventorship in patent is about contributing to the prior art.

Of relevance here is an intriguing story by the great Argentinean writer, Jorge Luis Borges, about a fictional novelist named Pierre Menard, whose greatest work consisted of two chapters and a fragment of a third chapter of Miguel de Cervantes's *Don Quixote*.⁴⁷ In his 1956 story, Borges unequivocally affirms that this work of Menard's, identical to parts of Cervantes's, is "perhaps the most significant of our time."⁴⁸ Borges acknowledges that "such an affirmation seems an absurdity," but he insists that "to justify this 'absurdity' is the primordial object of this note."⁴⁹

The task that, in Borges's account, Menard had set for himself when he began writing the *Quixote* in the twentieth century is truly astonishing:

He [Menard] did not want to compose another *Quixote*—which is easy—but *the Quixote itself*. Needless to say, he never contemplated a mechanical transcription of the original; *he did not propose to copy it*. His admirable intention was to produce a few pages which would *coincide*—word for word and line for line—with those of Miguel de Cervantes.⁵⁰

45. See *Free World Trust v. Électro Santé Inc.*, [2000] 2 S.C.R. 1024 ¶¶ 25-26; *Hayden Mfg. Co. v. Canplas Indus. Ltd.*, [1998] 98 C.P.R. (3d) 17, ¶¶ 11-16; *Omark Indus. (1960) Ltd. v. Gouger Saw Chain Co.*, [1965] 1 Ex. C.R. 457, ¶¶ 82-83.

46. See, e.g., *Free World Trust*, 2 S.C.R. 1024, ¶ 25-26; *Beloit Can. Ltd. v. Valmet Oy*, [1986] 8 C.P.R. (3d) 289, 297. See also *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 771 (Fed. Cir. 1983): ("[Anticipation requires that] each element of the claim in issue is found, either expressly described or under the principles of inherency, in a single prior art reference, or that the claimed invention was previously known or embodied in a single prior art device or practice.").

47. JORGE LUIS BORGES, *Pierre Menard, Author of the Quixote*, in *Labyrinth: Selected Stories & Other Writings* 36-44 (Donald A. Yates & James E. Irby eds., James E. Irby trans., 1964).

48. *Id.* at 38-39.

49. *Id.* at 39.

50. *Id.* at 39 (third and fourth emphases added).

Aside from the important question whether Borges manages to justify the “absurdity” to which he devotes his story, we cannot fail to observe that, *assuming Menard succeeded in his task*, the result, though identical to Cervantes’s, would be an original creation for copyright purposes.⁵¹ Borges in fact manages to ascertain the differences between the identical texts of these two works: “The contrast in style,” he writes, “is also vivid. The archaic style of Menard—quite foreign, after all—suffers from a certain affectation. Not so that of his forerunner [Cervantes], who handles with ease the current Spanish of his time.”⁵² The identity of the works is a coincidence, and need not deprive Menard of the status that the title of Borges’s story, “Pierre Menard, Author of the *Quixote*,” rightly attributes to him.

The originality standard in copyright is perfectly consistent with the view that, although he composed a work which had already been written, Menard was nonetheless an author. It goes without saying that the same cannot be true in patent law. To produce anew a previously available invention is to fail the standard of novelty.

One might be tempted to object that the defense of independent creation, by its very nature, addresses only anomalous or exceptional circumstances. The defense of independent creation, however, does not operate in accordance with foreign standards. Nothing could be further from the truth. Independent creation is of the essence of originality in copyright law. The defense of independent creation illustrates the fundamental proposition that originality is about origination, and that the inquiry into originality is an inquiry into source—not an inquiry into the difference between a work and pre-existing works.

Of course, the substantial similarity or identity between newly-created work A and pre-existing work B may function as both the motivation and the foundation for the owner of work B to allege infringement.⁵³ Such similarity or identity, however, cannot in and of itself give rise to liability. The plaintiff must additionally show that the defendant copied the work or at least that the defendant had access to the work.⁵⁴ Where the defendant makes out a defense of independent creation, the defendant succeeds in pre-

51. Menard produced a work substantially similar to Cervantes’s, and he had access to Cervantes’s work. This convergence of substantial similarity and access gives rise to a finding of *prima facie* infringement. If, as Menard proposed, however, the identity between his work and Cervantes’s were a mere coincidence, then Menard’s work is original for copyright purposes. Strictly speaking, it is as an independent creation. There can be no doubt, of course, that Menard would have a hard time proving this in court!

52. BORGES, *supra* note 47, at 43.

53. See, e.g., *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971); *Francis Day & Hunter Ltd. v. Bron*, [1963] Ch. 587, 627; *Preston v. 20th Century Fox Can. Ltd.*, [1990] 33 C.P.R. (3d) 242, ¶¶ 65-68.

54. See *Francis Day*, [1963] Ch. at 598; *Rosenthal Jewelry Corp.*, 446 F.2d at 738; *Preston*, 33 C.P.R. (3d) at ¶ 10.

cluding the very similarity or identity that gives rise to the plaintiff's claim from maturing into a finding of infringement. The defense of independent creation reduces the similarity or identity of the works to the level of a mere coincidence. It reminds us that the role of substantial similarity between the works is to contribute to a presumption—rebuttable upon a finding of independent creation—that the source (or origin) of these works is the same (i.e., that the defendant copied).⁵⁵ Once again, the defense of independent creation is but an assertion of the fundamental proposition that originality is about source, and that the comparison between works is only an aspect of the inquiry into source. If the identity between the works was determinative, we would be operating with concepts drawn from patent law, where the comparison between products, regardless of source, is sufficient to find infringement or anticipation.

We have seen that copyright is not about what is said but about the saying itself. Necessarily implied in this saying is the addressee of the author's speech. An author is not only someone who says something—as if in a vacuum—she is also someone who is addressing others. Her speech is an act of communication. An interpersonal relation is thus at the heart of the very subject matter of copyright. The author's work—the subject matter of copyright—is a relation between persons.

This observation that copyright *subject matter* is an interpersonal relation should be sharply distinguished from the quite different proposition that copyright *law*, as a legal regime, is a relation between persons—that is, an author's exclusive right to summon the authority of the state to preclude others from doing certain acts with respect to the author's work. What I am trying to emphasize here is not that copyright is a legal relation, but rather that the subject matter of this legal relation—i.e., the author's work—is itself a relation between persons.

Patent, like copyright, is also a legal relation. A patent is an inventor's legal right to preclude others from doing certain acts with respect to her invention. Unlike a copyrightable work, however, an invention is not itself an interpersonal relation. An invention is not a mode of discourse addressed to another. In patent, a person offers the public a previously unavailable way of manipulating nature. Thus, the subject matter of patent is an act with respect to nature—that is, a relation between a person and an object.

Viewed in this light, the distinction between patent and copyright is a distinction between subject matter involving a relation between persons and

55. On establishing infringement and the role of independent creation, see *Francis Day*, [1983] Ch. at 627 (“Even complete identity of the two works may not be conclusive evidence of copying, for it may be proved that it was impossible for the author of the alleged infringing work to have had access to the copyright work. And, once you have eliminated the impossible (namely, copying), that which remains (namely, coincidence) however improbable, is the truth; I quote inaccurately, but not unconsciously, from Sherlock Holmes.”).

objects (patent), and subject matter involving a relation between persons (copyright). Patent law is about learning and doing things in and to nature. Copyright law is about speaking to one another. Broadly put, the distinction between patent and copyright is a distinction between technology and culture.⁵⁶

Note that this way of framing the distinction between patent and copyright does not mean that patent law is devoid of discourse. On the contrary, patent specifications, which both claim and define the scope of the inventor's right, are nothing but communications to another. These communications, however, are *about* the subject matter of the right. By contrast, in copyright, the discourse *is* the subject matter of the right. The ongoing conversation through which the law of patent specifies the novelty and utility of its subject matter appears in copyright law as the very subject matter that, regardless of its novelty or utility, is worthy of our attention.⁵⁷ This is yet another way of saying that copyright is not about the content of what is said but about the saying itself.

An inventor offers the public an instrument previously unavailable. This invention is no mere scientific discovery that increases or deepens the public's knowledge for its own sake. As a matter of patent law, the invention must satisfy both a novelty and a *utility* requirement—that which is not useful is not an invention.⁵⁸ Patentable subject matter is by definition radically instrumental. An invention is a tool—a product specifically designed to perform a function. It is not knowledge but *applied* knowledge, not science but the embodied application of scientific knowledge to practical purposes.⁵⁹ An inventor, then, offers the public novel ways of dealing with practical problems.

Things are very different in copyright. An authorial creation is not by definition a tool. It need not perform a function.⁶⁰ It is not an embodied

56. There can be no doubt, of course, that technology is in another sense a part of culture widely conceived. The point here, however, is the distinction between person-object relations and person-person relations. See Jürgen Habermas, *Labor and Interaction: Remarks on Hegel's Jena Philosophy of Mind*, in *THEORY AND PRACTICE* 142 (John Viertel trans., 1973).

57. Were this otherwise, “everybody who made a rabbit pie in accordance with the recipe of *Mrs. Beeton's Cookery Book* would infringe the literary copyright in that book.” See *Cuisenaire v. S.W. Imports Ltd.*, [1969] S.C.R. 208, ¶ 9 (citing *Cuisenaire v. Reed*, [1963] V.R. 719).

58. Patent Act, R.S.C., ch. P 4, § 2 (1985), available at <http://lois.justice.gc.ca/en/P-4/index.html> (“[I]nvention’ means any new and *useful* art”) (emphasis added).

59. THE COMPACT OXFORD ENGLISH DICTIONARY OF CURRENT ENGLISH (3d ed.), available at http://www.askoxford.com/concise_oed/technology?view=uk (“technology: 1. the application of scientific knowledge for practical purposes; 2. the branch of knowledge concerned with applied sciences.”).

60. On the contrary, functionality can disqualify purported creations from copyright protection. See, e.g., *Delrina Corp. v. Triolet Sys. Inc.*, [2002] 17 C.P.R. (4th) 289; Com-

resolution of a practical problem. Rather, a work is a “saying itself,” a mode of discourse addressed to another. As such, an authorial creation inserts itself not into the technological space between persons and objects, but instead into the cultural space between persons.⁶¹ An author addresses the public. It is the form of this address *per se*, neither the novelty nor the utility of its content, that copyright law deems inherently worthy of protection.

The difficulty with imposing concepts derived from the law of patent onto the analysis of copyright law is that such concepts tend to regard copyrightable works as patentable inventions, acts of speech inherently worthy of protection as mere instruments designed to perform functions external to themselves. In short, the logic of innovation cannot help but instrumentalize the world of culture. For these reasons, the category of novelty is not only insufficient to understand copyright, it is uniquely placed to *misunderstand* copyright.

Copyright flows from an act of origination, regardless of novelty and utility. The central concern at issue, therefore, is the act of origination or authorship *per se*. Once concepts drawn from patent law are jettisoned from the analysis, authorship as public address arises as the fundamental axiom of copyright law.

puter Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992); *Hollinrake v. Truswell*, [1894] 3 Ch. 420; *Baker v. Selden*, 101 U.S. 99 (1879). For recent commentary on *Baker v. Selden*, see Pamela Samuelson, *The Story of Baker v. Selden: Sharpening the Distinction Between Authorship and Invention*, in *INTELLECTUAL PROPERTY STORIES* (Jane C. Ginsburg & Rochelle C. Dreyfuss eds., 2005).

61. Though not without controversy, even where copyright ventures into the difficult area of functional works, copyright cannot help but construe these works under the guise of public address rather than that of functionality. Thus, for example, in the seminal case of *Computer Associates International, Inc.*, 982 F.2d 693, the court, on the one hand, noted in unambiguous terms the difficulties involved in treating computer programs as literary works:

Generally, we think that copyright registration—with its indiscriminating availability—is not ideally suited to deal with the highly dynamic technology of computer science. Thus far, many of the decisions in this area reflect the courts' attempt to fit the proverbial square peg in a round hole. The district court . . . and at least one commentator have suggested that patent registration, with its exacting up-front novelty and non-obviousness requirements, might be the more appropriate rubric of protection for intellectual property of this kind.

Id. at 712. On the other hand, as required by statute, the Court did treat computer programs as literary works, stating that writing source code is “comparable to the novelist fleshing out the broad outline of his plot by crafting from words and sentences the paragraphs that convey the idea.” *Id.* at 698 (citing Mark T. Kretschmer, Note, *Copyright Protection for Software Architecture: Just Say No!*, 1988 COLUM. BUS. L. REV. 823, 826). It is as novels (i.e., literary works) that computer programs are subject to copyright protection. On computer software as a form of communication, see Lee Tien, *Publishing Software as a Speech Act*, 15 BERKELEY TECH. L.J. 629 (2000).

IV. WORKS AS WORKS

In the previous Part, the comparison of originality and novelty yielded a concept of authorship as public address. In what way, then, does this concept permit us (1) to deepen our understanding of the wrong in copyright, and (2) to broach the possibility of non-infringing reproduction (i.e., user rights) in the absence of the defendant's authorship?

It will be useful at this point to return for a moment to fair dealing, and specifically, to the example of fair dealing for the purpose of criticism. As we noted, the Canadian law of copyright provides that it is not an infringement of copyright to substantially reproduce a work of authorship, provided that such reproduction is for the purpose of criticism and that the reproduction is reasonably necessary to achieve that permitted purpose.⁶² Generally, we naturally look at this as an indication of what the defendant can do, informing us about the conditions necessary to make unauthorized substantial reproduction lawful. It is equally natural, however, to look at this as an indication of the contours of the author's rights with respect to the work. This shift in focus from the defendant's act to the plaintiff's right suggests that the plaintiff owns his work for *some* but not *all* purposes. For example, the plaintiff does not own his work with respect to the purpose of criticism. For the purpose of criticism, his work is public domain material.

To put it otherwise, the proposition that substantial reproduction for the purpose of criticism is lawful can be understood in two ways. On the one hand, it can be understood as an assertion that fair dealing is an exception to infringement, where infringement is defined as substantial reproduction. On the other hand, it can be understood as an assertion that copyright is not an absolute right of exclusive reproduction, but rather an exclusive right of reproduction only for certain purposes that do not include, *inter alia*, the purpose of criticism. To follow the latter characterization is to conceptualize the category of purpose as a category internal to the definition of an author's copyright. The point is not that certain purposes excuse the defendant from liability, but rather that the plaintiff has rights in the work only when used for certain purposes.

This purpose-centered definition of authorial entitlement permits us to distinguish between ownership and authorship, property and copyright.⁶³ Whereas owners hold rights such that they can preclude any and all uses of the subject matter of their ownership, authors hold rights such that they can preclude only certain uses of the subject matter of their copyright. Authors hold rights in respect of their works not as owners but as authors. The fore-

62. See *supra* Section II.B.

63. For commentary on the relation between authorship and ownership, originality and first possession, see Abraham Drassinower, *Capturing Ideas: Copyright and the Law of First Possession*, 54 CLEV. ST. L. REV. 191 (2006).

going comparison of novelty and originality is useful at this point—it indicates that to hold a work as an author is to hold it for the purpose of presenting it to the public as a discourse. Thus, copyright is less an exclusive right of reproduction than an exclusive right of public presentation.

It goes without saying that this construal of copyright as an exclusive right of public presentation both permits and requires elaboration. If the comparison of originality and novelty indicates that an author holds rights in her work for the purpose of public presentation, it also suggests that—mindful of the great intellectual property triptych of patent, copyright, and trade-mark—we should direct our attention to the law of trade-marks, rather than the law of patent, in search of insights into how an author holds her work. Like a trade-mark, a work of authorship is an instance of communication addressed to the public.

A trade-mark owner has an exclusive right to use his trade-mark for the purpose of distinguishing his goods or services from those of others in the marketplace.⁶⁴ A mark that does not distinguish goods or services is not a trade-mark. This is nothing more than the requirement of distinctiveness,⁶⁵ which encompasses the elementary observation that a trade-mark owner does not have an absolute right of use over his trade-mark. Generally speaking, he does not have, for example, an exclusive right to use the trade-mark in association with significantly dissimilar goods or services in a non-confusing way.⁶⁶ His ownership of a trade-mark is ownership for a particular purpose—it is an exclusive right to use the mark as a distinctive signifier of source in the marketplace. Merely reproducing another's trade-mark is no more trademark infringement⁶⁷ than using another's work fairly for the purpose of criticism is copyright infringement.

The point is that holding a copyright is in one important respect similar to holding a trade-mark: if holding a trade-mark means having an exclusive right to use the mark *as a trade-mark*, i.e., using it for the particular

64. Trade-marks Act, R.S.C., ch. T 13, § 2 (1985), available at <http://lois.justice.gc.ca/en/T-13> (“‘[T]rade-mark’ means (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others.”).

65. *Mattel, Inc. v. 3894207 Can. Inc.*, [2006] S.C.R. 772, ¶ 145 (“Distinctiveness is of the very essence and is the cardinal requirement of a trade-mark.”). “A non-distinctive trade-mark,” as David Vaver puts it, “is a contradiction in terms.” DAVID VAVER, *THE LAW OF INTELLECTUAL PROPERTY: COPYRIGHT, PATENTS, TRADEMARKS* 190 (1997).

66. Even where trade-mark law imposes liability for a defendant's non-confusing use, it does so only where such use is—to track the language of Section 22 of the Canadian statute—“likely to depreciate the value of the goodwill” attaching to the plaintiff's trade-mark—only, that is, by reference to the role of the trade-mark in signifying the plaintiff to the marketplace. Trade-marks Act, § 22(1). See, e.g., *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, [2006] S.C.R. 824.

67. See, e.g., *Compagnie Générale des Établissements Michelin-Michelin & CIE v. Nat'l Auto., Aerospace, Transp. & Gen. Workers Union of Can.*, [1997] 2 F.C. 306.

purpose of distinguishing goods or services, then holding a copyright means having an exclusive right to use the work *as a work*, i.e., using it for the particular purpose of presenting it to the public as a discourse. To wrong another's authorship is to present her work to the public without authorization.

Consider the following example. Assume that I am so enamored of Hegel's *Philosophy of Right* that I make four copies of it, not in order to read or sell the work, but only to use it literally as support—that is, in order to place each of the copies under each of the legs of my desk, so that every time I sit down to work I feel supported by Hegel. I would suggest that these copies of Hegel's work as desk-supports are not “reproductions” of the work within the meaning of copyright law. There can be no doubt that these copies amount to a reproduction of sorts, but the reproduction at stake is a kind of dealing with paper and ink, a re-producing of certain shapes of ink on a page. We do not have a reproduction of the work *as a work*—that is, as a communication to the public. The reproduction in the physical sense is not an infringement of Hegel's authorship. Because a work *is* an instance of communication, it is (re-)produced only where it is (re-)communicated.

Notice the shift in the structure of the copyright liability inquiry entailed in this perspective. We no longer have a situation where a merely physical act of reproduction gives rise to a *prima facie* finding of infringement to be followed by a determination of whether the defendant can now successfully invoke a defense such as fair dealing. Rather, once “reproduction” is unambiguously defined as reproduction *of the work*, the defendant cannot be said to impinge upon the author's exclusive right to reproduce *the work* unless the defendant presents the work in public discourse without “authorization.” Hegel's *Philosophy of Right* as desk-support cannot support a finding of liability.

Thus, the proposition that the wrong in copyright is unauthorized public presentation entails an elaboration of the test for infringement. As we noted above, in a copyright action, the plaintiff must show that the defendant's work is substantially similar to her own and that the defendant in fact copied her work. The plaintiff must show that the substantial similarity between her work and the defendant's is not accidental—i.e., that it is not the result of independent creation. The plaintiff must show that there is a causal connection between the defendant's work and her own—i.e., that the defendant copied. Thus, it is often said that establishing both substantial similarity and causal connection establishes infringement.⁶⁸

Once fair dealing is posited as a user right rather than a mere exception, however, substantial similarity and causal connection can no longer be regarded as sufficient to establish infringement—to regard substantial simi-

68. See, e.g., *Francis Day & Hunter Ltd. v. Bron*, [1963] Ch. 587, 627.

larity and causal connection as sufficient to establish infringement is to regard fair dealing as an exception. The fact that fair dealing is, procedurally speaking, a defense, should not obscure the central point that reproduction (that is, substantial similarity plus causal connection) is not *per se* wrongful. The defendant's reproduction of the plaintiff's work in fair dealing for the purpose of criticism is not a wrong to be excused. Rather, it is a user's right.⁶⁹ To say that reproduction is not *per se* wrongful is to say that the liability inquiry cannot culminate in the determination that the defendant has reproduced the plaintiff's work in a merely physical sense.⁷⁰

This means that the test for copyright infringement must be understood not as an inquiry into whether the defendant has reproduced the plaintiff's work, but rather as an inquiry into whether, under the circumstances, such reproduction supports the inference that the defendant has abrogated the plaintiff's authorship to himself—that is, whether the reproduction is in the service of public presentation. Thus, a third element of the infringement test, in addition to substantial similarity and causal connection, comes into view, namely, the element of abrogation in the sense of public presentation. The final determination of infringement is made at the level of this third element.

For example, copying for personal use would not create liability because it would fail to satisfy this third element of the infringement test. In fact, from the point of view of authorship as public address, because copying for personal use is a reproduction, but not a reproduction *of the work*, copying for personal use is less problematic a user's right than is fair dealing for the purposes of criticism. Precisely because it is personal, copying for personal use does not entail a presentation of the work to the public in any sense.

To be sure, the proposition that copying for personal use is lawful necessarily brings in its wake a whole set of questions about what "personal" means. The point here, however, is not to develop that discussion, but rather to show that the image of the author as someone engaged in a discourse to the public opens up a vast discussion about the legitimacy of unauthorized use, a discussion that cannot arise as freely and fruitfully if reproduction *per se* is wrongful.⁷¹

Paradoxically, from the standpoint of authorship as public address, fair dealing for the purpose of criticism is more controversial than copying for personal use. In the case of fair dealing for the purpose of criticism, the defendant both reproduces *and* presents the plaintiff's work to the public.

69. CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] S.C.R. 339, ¶ 48.

70. Consider in this regard, Euro-Excellence Inc. v. Kraft Can. Inc., [2007] S.C.C. 37, ¶ 79.

71. See JESSICA LITMAN, DIGITAL COPYRIGHT (2001); Litman, *supra* note 2; Geller, *supra* note 2.

There is still no liability, however, because in dealing fairly with the work, the defendant does not in fact reproduce the plaintiff's work *as a work*. Rather, she reproduces the plaintiff's work as a reasonably necessary aspect of her own work—of her own authorial act. Thus, standing on her own authorship, the defendant can successfully claim that her use of the plaintiff's work is not piratical. It amounts not to an abrogation of the plaintiff's authorship, but is instead a response to it. The defendant's work is a case of public address in its own right.

Copying for personal use and fair dealing for the purpose of criticism are not the only instances of non-infringing reproduction that the concept of authorship as public address can illuminate. Section 30.7 of the Canadian Copyright Act, to give another example, provides that it is not an infringement of copyright to incidentally and not deliberately include a work or other subject matter in another work or subject matter.⁷² Incidental use is thus another instance of non-infringing reproduction. Unlike she who deals fairly with a work for the purpose of criticism, the incidental user need not show that her use of the work is reasonably necessary for the invoked purpose. Rather, as Section 30.7 provides, the incidental user need only show that the presence of another's work in her own is neither deliberate nor essential to her own. In a sense, the incidental user must show precisely the opposite of what the fair dealer must show—that is, she must show that the other's work is in fact unnecessary to her own. It is precisely this showing that permits her to claim that she does not wrongfully place herself in another's position as an author. The incidental user does not reproduce another's work *as a work*. On the contrary, the appearance of another's work in her own is merely incidental to her discourse to the public.

The distinction between the reproduction of a work in the physical sense and its reproduction as a work in the normatively relevant sense is also at play in the ongoing encounter between copyright law and digital technology. It is generally accepted, for example, that Internet browsing—which requires the making of temporary copies—is legal on the grounds that by posting the work online, the poster is granting an implied license to others to reproduce that work in order to view it.⁷³ This implied license approach, however, does not question the copyright owner's exclusive right

72. Copyright Act, R.S.C., ch. C 42, § 30.7 (1985), available at <http://lois.justice.gc.ca/en/C-42> ("It is not an infringement of copyright to incidentally and not deliberately (a) include a work or other subject-matter in another work or other subject-matter; or (b) do any act in relation to a work or other subject-matter that is incidentally and not deliberately included in another work or other subject-matter.").

73. On browsing and implied license or authorization, see SUNNY HANDA, *COPYRIGHT LAW IN CANADA* 292-94 (2002); BARRY B. SOOKMAN, *COMPUTER, INTERNET AND ELECTRONIC COMMERCE LAW* 3-213 (2000); ROGER T. HUGHES, *COPYRIGHT AND INDUSTRIAL DESIGN* 499 (2d ed. 1991). See also Glen A. Bloom & Thomas J. Denholm, *Research on the Internet: Is Access Copyright Infringement?*, 12 *CANADIAN INTELL. PROP. REV.* 337 (1996).

to browse. Rather, it assumes that right to be a given, and instead finds in the concept of implied license a way to save the browser from the web of liability.

By contrast, from the perspective of authorship as public address, no wrong arises where the impugned temporary reproductions are merely incidental to an act of viewing publicly accessible works. In exercising her right to view publicly accessible material, the browser is doing nothing more than reading the work. Copies technically incidental to that act of reading are not a vehicle through which the browser wrongfully places herself in the position of the author as someone who presents her discourse to the public. The browser's temporary reproductions are not reproductions of the work *as a work*. On the contrary, the act of reading merely completes the author's act of public discourse. Viewed in this light, browsing is a user right, not simply an exception—licensed or otherwise—to copyright infringement.

"Caching" is another helpful example. In *Canadian Ass'n of Internet Providers v. Society of Composers, Authors, & Music Publishers of Canada*, the Supreme Court of Canada held that "'Caching' is dictated by the need to deliver faster and more economic service, and should not, when undertaken only for such technical reasons, attract copyright liability."⁷⁴ While the court reached this conclusion on the basis of the public interest in "the economy and cost-effectiveness of the Internet 'conduit,'"⁷⁵ the conclusion is consistent with the view that, like browsing, caching does not entail reproduction of the work *as a work*. Just as the authorship as public address approach need not invoke the category of "implied license" in order to formulate the legality of browsing, the authorship as public address approach

74. [2004] 2 S.C.R. 427, ¶ 116. See also *Euro-Excellence Inc.*, [2007] S.C.C. 37, ¶ 81. In *Canadian Ass'n of Internet Providers*, the Supreme Court of Canada defined caching as follows:

When an end user visits a Web site, the packets of data needed to transmit the requested information will come initially from the host server where the files for this site are stored. As they pass through the hands of an Internet Service Provider, a temporary copy may be made and stored on its server. This is a cache copy. If another user wants to visit this page shortly thereafter, using the same Internet Service Provider, the information may be transmitted to the subsequent user either directly from the Web site or from what is kept in the cache copy. The practice of creating "caches" of data speeds up the transmission and lowers the cost. The subsequent end user may have no idea that it is not getting the information directly from the original Web site. Cache copies are not retained for long periods of time since, if the original files change, users will get out-of-date information. The Internet Service Provider controls the existence and duration of caches on its own facility, although in some circumstances it is open to a content provider to specify no caching, or an end user to program its browser to insist on content from the original Web site.

[2004] 2 S.C.R. 427, ¶ 23.

75. *Canadian Ass'n of Internet Providers*, [2004] 2 S.C.R. 427, ¶ 115.

can do without the category of the “public interest” in formulating the legality of caching.

Whereas the implied license and public interest approaches more or less successfully cloak the rupture between copyright law and digital technology, the authorship as public address approach interprets the legal significance of technology from the viewpoint of a renewed understanding of the law—that is, of the nature of the right and wrong at issue. Because it dislocates the centrality of reproduction as the organizing principle of copyright law, the authorship as public address approach can find that the reproductions involved in browsing and caching do not amount to uses of the work as such.⁷⁶ Instead, since browsing and caching are neither implied licensing nor public interest exceptions, they constitute user rights precisely because they amount to *non-authorial* use.⁷⁷

Most recently, Justice Bastarache of the Supreme Court of Canada adopted an authorship-centered approach in his judgment in *Euro-Excellence Inc. v. Kraft Canada Inc.*⁷⁸ *Euro-Excellence* involved the unauthorized importation into Canada of a copyrighted work used as a trademarked logo affixed to chocolate bars by the copyright owner.⁷⁹ Noting that “[n]ot every substantial reproduction of a copyrighted work counts as an infringement of copyright,”⁸⁰ Justice Bastarache held for the defendant on the grounds that the plaintiff’s complaint improperly sought to use the Copyright Act to protect commercial interests “completely unrelated to

76. We might say, for example, that just as she who holds an easement walks on another’s land, but does not thereby use that other’s property, browsing and caching cause copies of a work to be made, but do not infringe the copyright therein. A similar analytic approach toward search engines and the issues involved in the Google library may be possible—the reproductions involved in neither situation appear to be reproductions of the work as a work.

77. I discussed this view of browsing as non-authorial use in Drassinower, *supra* note 2, at 476-77.

78. *Euro-Excellence Inc.*, [2007] S.C.C. 37.

79. The case turned on Section 27(2)(e) of the Canadian Copyright Act. Section 27(2) provides that:

It is an infringement of copyright for any person to

- (a) sell or rent out,
- (b) distribute to such an extent as to affect prejudicially the owner of the copyright,
- (c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,
- (d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or
- (e) *import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c)*, a copy of a work, sound recording or fixation of a performer’s performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

Copyright Act, R.S.C., ch. C 42, § 27(2) (1985) (emphasis added).

80. *Euro-Excellence Inc.*, [2007] S.C.C. 37, ¶ 79.

copyright's intended domain."⁸¹ A distinction between "unauthorized appropriation of the gains of . . . authorship," on the one hand, and "any and all economic gains claimed by an author or copyright owner" on the other, traverses the judgment.⁸² In other words, the domain of authorship governs the determination of whether the economic gains claimed by any given author are indeed the kind of gains that copyright protects. The "work *qua* work,"⁸³ not *qua* signifier of source in the marketplace, grounds the legitimate "interests of the copyright holder *as author*."⁸⁴ Thus, Justice Bastarache concluded that use of the work as "merely incidental" to a consumer good does not attract copyright liability: "The merely incidental presence of the copyrighted works on the wrappers of the chocolate bars does not bring the chocolate bars within the protections offered by the *Copyright Act*."⁸⁵

Albeit brief, the foregoing examples evoke the fruitfulness of the authorship as public address approach. They demonstrate that the characterization of authorship as public address, rather than as mere protection against reproduction, is the axis around which copyright revolves.

Under the aegis of authorship as public address, then, copyright is less an exclusive right of reproduction than an exclusive right of public presentation. This right is necessarily subject to at least two kinds of limitations. On the one hand, the right cannot be asserted in a manner inconsistent with another's equal authorship. Under this rubric, we can understand, *inter alia*, that the defense of fair dealing for the purpose of criticism is a user right recognizing the defendant's equality as an author.⁸⁶ On the other hand, an author's entitlement does not include uses of her work that do not amount to

81. *Id.* ¶ 95. Note that while Justice Bastarache concurred in result for other reasons, his judgment on this issue is a minority judgment.

82. *Id.* ¶ 93.

83. *Id.* ¶ 91.

84. *Id.* ¶ 90.

85. *Id.* ¶ 57. There is clearly a *prima facie* elective affinity between the authorship as public address approach developed here and the authorship-centered approach adopted by Justice Bastarache. Whether the approaches are identical in every respect is another matter. Note, for example, that while Justice Bastarache observed that substantial reproduction need not amount to infringement ("[n]ot every substantial reproduction of a copyrighted work counts as an infringement of copyright," *id.* ¶ 79), and that "caching" does not give rise to liability under Canadian copyright law ("[w]hile 'caching' is certainly an instance of substantial reproduction, it is a technical process only; as such it does not consist in an attempt to appropriate the legitimate economic interests of the copyright holder, and therefore does not constitute infringement," *id.* ¶ 81), he also restricted the "merely incidental" analysis to situations falling under Section 27(2) of the Canadian Copyright Act (the Act is clear that protection extends to, *inter alia*, works produced or reproduced 'in any material form' The 'merely incidental' analysis goes to secondary liability under s.27(2) only" *id.* ¶ 95). The text of Section 27(2) can be found in *supra* note 79.

86. For discussion of the defense of independent creation and the idea/expression dichotomy from the standpoint of equality, see Drassinower, *supra* note 22. See also Drassinower, *supra* note 21, at 145-48.

unauthorized public presentation. Thus, we can also understand, *inter alia*, that reproduction for personal use is a user right flowing from the recognition that an author has exclusive rights with respect to her work, not for any and all purposes, but specifically for the purpose of public presentation. While both kinds of limitations are determinations of the idea of authorship as public address, the limitation flowing from the concept of equality goes to the scope of the right as an exclusive right of public presentation, while the limitation flowing from the definition of a work as discourse goes to the subject matter of the right.⁸⁷

V. WORKS AND TRADE-MARKS: ON FAIR USE AS DIALOGUE

Whereas patent law is about relations between persons and objects, copyright and trade-mark law are both about relations between persons—i.e., about modes of communication. Like a work of authorship, a trade-mark is a communication to the public. But while both copyright and trade-mark are about communication between persons, the mode of communication is different. Whereas the comparison of copyright and patent tells us that a work is a mode of communication, the comparison of copyright and trade-mark tells us what specific kind of communication is at stake. By way of conclusion, I want to elaborate further this distinction between copyright and trade-mark in an effort to bring the specificity of copyright vis-à-vis patent and trade-mark more sharply into relief.

The communication involved in trade-mark law is unidirectional. It flows from the trade-mark owner to the public. A trade-mark transmits information about the source of a product in the marketplace. It is not an invitation requesting a response from the public by way of a dialogue either about the source of the product or about the product itself. A trade-mark provides information about the source of a product in the same way that a one-way traffic sign on a street provides information about the direction to drive on that street. In neither case is the information provided to the public with the expectation that the public engage in a dialogue about it. Motorists are not expected to question or discuss the fact—communicated by the one-way sign—that the street in question is a one-way street. They are expected to follow its command. Similarly, consumers are not expected to question or discuss the fact—communicated by the trade-mark—that the product in question comes from the particular source indicated by the trade-mark. On the contrary, consumers are expected to receive this information passively and to identify the product with the indicated source.

87. Incidental uses such as those contemplated by Justice Bastarache in *Euro-Excellence*, as well as fair dealing or fair use uses other than uses for the purpose of criticism, would likely fit in this classification as subject matter limitations.

Indeed, where discussion or doubt arises as to the indicated source, the trade-mark has likely failed for lack of distinctiveness—that is, the discussion or doubt would be evidence that the trade-mark is no longer an effective indicator of source.⁸⁸ Because it weakens and evidences the weakening of the trade-mark as a distinctive indicator of source, the presence of discussion raises doubts about the very status of a trade-mark as a trade-mark. A trade-mark presupposes the public to which it is directed as a passive recipient of information, not as a participant in a dialogue. The life of a trade-mark as such is rooted in its owner's control of its meaning. The participation of the public in the determination of the trade-mark's meaning indicates that the trade-mark owner has lost this control.

By contrast, works subject to copyright protection are directed to readers and listeners—that is, audiences engaged with and responsive to the work as such, not merely to the work as some sign that merely provides information. An author's public is not a passive recipient but a participant whose response to the work is invited and elicited. A work *is* an invitation to engage in dialogue. Of course, this need not mean that each and every member of an author's audience takes up the invitation. It does mean, however, that one can scarcely be surprised to find that, through the defense of fair dealing for the purpose of criticism, copyright law in fact recognizes this dialogical feature of both work and audience. The defense contemplates, as a matter of right, the expected response on the part of the recipient. It is double-edged. It precludes the author from preventing the expected response, and it also precludes the user from merely repeating the author's work without engaging it. It limits the rights of both users and authors. It institutionalizes the dialogue that traverses the life of the work as a matter of right.

This difference between a work of authorship and a trade-mark as modes of communication, the former dialogical and the latter monological, can be understood as a distinction between differing relations between form and content in each body of law. True, copyright and trade-mark are both about form and not content. Copyright is about expression and not idea. Thus, A can express the very same idea as B in A's own words without infringing B's copyright. Similarly, trade-mark is about the "dress" of the product and not about the product itself. Thus, A can sell the very same product as B clothed in A's own distinctive "dress" without infringing B's trade-mark.

This shared aspect, however, need not obscure their difference. Copyright and trade-mark are both about form, but not in the same way. They are in fact about fundamentally different relations between form and con-

88. See *Aladdin Indus., Inc. v. Canadian Thermos Prods. Ltd.*, [1969] 2 Ex. C.R. 80, ¶ 79; *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, [2006] S.C.R. 824, ¶¶ 18-21.

tent. In copyright, form is a way of explicating substance. Expression is after all just that—a way of expressing an idea.⁸⁹ An expression is an expression only where it specifies an idea—where it renders the general specific. It is a discussion, a treatment, and a rendering of the general in one's own particular words. In trade-mark, however, form is by definition unrelated to substance. It is precisely this lack of relation that makes a trade-mark a trade-mark. A trade-mark can neither describe the product (i.e., be clearly descriptive, such as “orange” for orange juice) nor be the name of the product (i.e., be generic, such as “beer” for beer) it presents to the market. This is why, generally speaking, the strongest of trade-marks have no relation to that product (i.e., are fanciful or arbitrary, such as “Corona” for beer).⁹⁰ Thus, whereas a work is a mode of rendering the substance (i.e., the idea) to which it gives expressive life and form, a trade-mark is but a mode of dressing the ready-made substance (i.e., the product) it presents to the market.

This difference at the level of relations between form and content is also a difference at the level of ownership with respect to the substance at issue in each body of law. The trade-mark owner owns the product which he dresses through his trade-mark. He identifies himself as the source of the product in order to sell it. Thus, the trade-mark is both *mark* and *trade-mark*. Those who receive the communication—i.e., the consumers—have access to the substance of the communication—i.e., the product marked and offered in the marketplace—through a property transfer, a contract of sale. By contrast, an author does not own the ideas she discusses in her work. Unlike the situation in trade-mark, an author's audience has access to the necessarily-shared substance of her communication as a matter of fact and right. Precisely because the substance of her communication is shared, it can be expressed anew by others in the absence of further transactions, whether contractual or otherwise. In short, while trade-marks invite transactions in the market, works invite dialogues about ideas. This difference between trade-marks and works is already contained in the familiar proposition that, whereas trade-marks are indicators of source in the marketplace, works are expressions of ideas not themselves subject to ownership.

The image of authorship that arises from the distinction between copyright and patent thus completes itself through the distinction between copyright and trade-mark. In so doing, this image of authorship reveals the constitutive role of fair dealing or fair use in copyright law. Inventions insert themselves into the *technological* space between persons and objects, offer-

89. CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] S.C.R. 339, ¶ 16 (“What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment.”).

90. See, e.g., Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976).

ing the public novel ways to manipulate nature. Trade-marks insert themselves into the *commercial* space between sellers and buyers, offering the public distinctive ways to identify products. Works of authorship insert themselves into the *cultural* space between persons, offering the public an invitation to dialogue about ideas. Fair dealing or fair use is a user right precisely because it structures the legality and legitimacy of the responses that a discourse offered to the public can and does generate. It is as fundamental an aspect of the dialogue as are the original works of authorship themselves.