Copyright and Artistic Works in Canada: Toward a Theory of Aesthetic Judicial Judgements

by

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ABSTRACT

COPYRIGHT AND ARTISTIC WORKS IN CANADA: TOWARD A THEORY OF AESTHETIC JUDICIAL JUDGEMENTS

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This thesis explores the boundaries of copyright case law pertaining to artistic works in order to begin working toward a theory of aesthetic judicial judgements pertaining to artistic works in the Canadian context. The research focuses on the historic status of artistic works in copyright case law, and considers decisions made following the 2012 amendments to the Copyright Act.
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INTRODUCTION

The legal system closes itself off from other discourses and practices, with the intention of maintaining an appearance of objectivity and purity, leaving legal scholars to treat it as a self-sustaining system that follows its own logic. Part of the purpose of my entry into this area of study is to understand what elements the courts use in studying works of visual art, and what makes these works legally different from other forms of property protected by intellectual property laws. I will begin with an introduction to copyright and our understanding of it today. Copyright is a subset of intellectual property law, a group that also includes trademarks and patents and protects works that are the products of the human mind. The reasoning behind copyright protections variably follows the four analytical intellectual property categories outlined by William Fisher:

1. Utilitarian, where intellectual property rights should achieve the greatest good for the most significant number of people;
2. Labour theory, where intellectual effort applied to raw materials that are available to all results in creations of enhanced value, and that this effort should be rewarded;
3. Protection of the author's personality attached to works, using property rights as a way to promote human interest through moral rights and droit d'auteur; and, lastly,
4. Social planning theory, a broad version of intellectual property rights serving society.¹

The issue with these categories is that alone no single one is sufficient to encompass all of copyright law; they're all interconnected. Considering them together enables pinpointing of the

inadequacies and agendas of existing intellectual property regimes among those who shape the law and those who look to understand it. As law and art become increasingly engaged with each other, knowledge of the law as it applies to art will serve to influence from the bottom up as well as the top down. This thesis examines the intellectual property law pertaining to copyright in Canada and the status of works of visual art and associated historical establishment of its definitions according to case law. Examination of this area is a response to a lack of existing resources that use Canadian court cases as examples when discussing how courts determine infringement in cases specific to art works. The beginning assumption of law pertaining to artistic works, and therefore of this focused area of study, is that artworks are special types of property, with the attached “common sense” that all good art is the result of technical skill and creativity, and that these can be visually observed and measured in both quantitative and qualitative terms.  

Though many types of law have an influence and effect on art (tax exemptions, customs categorizations, etc.), the intellectual property subset that is copyright law generates intense debate over its enforcement and resulting court decisions. Copyright has evolved from only protecting text-based works to include an ever-growing number of products, regulating them through jurisprudence before codifying their inclusion though legislation. In the late nineteenth century, the measurement of whether a copy infringed copyright was literal, as in Hanfstangel v. Empire Palace from 1894. David Vaver wrote, in reference to this case: “a tableau vivant derived from a painting was in no way a copy – just try hanging it on a wall!” This view evolved

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3 Hanfstangl v. Empire Palace, [1894] 2 Ch. 1 (C.A.).
to the analysis of copying as a matter of degrees. The *Copyright Acts* of the United States, United Kingdom, and Canada provide protection to every original literary, dramatic, musical and artistic work that is fixed in any medium. A creative work being copyright protected requires that it contain the expression of an idea, which is composed of original elements. Ideas themselves are not copyrightable – the copying of an idea alone is plagiarism, which, by this definition, may be different from copyright as federally defined in the countries mentioned above.\(^5\)

Today, as copyright covers not only literary and artistic works, but also the products of entertainment and billion dollar industry, American lobbying groups and proposed legislation exert worldwide influence on copyright law.\(^6\) Regarding artistic works, American case law and its means of determining infringement is the most frequently cited in both visual culture and legal scholarship. American fair use exceptions allow for use of parts of copyrighted materials based on uses such as satire and parody. In addition to fair use exceptions, American jurisprudence also includes the measurement of transformation: ie. whether a new work has adequately transformed a copyright protected work “with new expression, meaning, or message.”\(^7\) This measure had a significant impact on the decision in *Blanch v. Koons*, the first of Jeff Koons' American cases decided in his favour.\(^8\) Koons was found to have adequately

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\(^5\) However, laws may also differ on a state or provincial scale. Copyright infringement and violation are the terms used in the *Copyright Act*, while plagiarism, piracy, bootlegging, and counterfeiting are all publicly used terms that tend to be applied interchangeably. According to *Black's Law Dictionary*, plagiarism is defined as: “the act of appropriating the literary composition of another, or parts or passages of his writings, or the ideas or language of the same, and passing them off as the product of one's own mind” - a definition which does not rely on fixation.

\(^6\) For example, the current debate surrounding the Trans-Pacific Partnership (TPP) and its proposed section on intellectual property rights. Electronic Frontier Foundation (EFF), “Trans-Pacific Partnership Agreement,” 06/05/2015. https://www.eff.org/issues/tpp.


More recently, the final 2013 *Cariou v. Prince* case determined that artist Richard Prince had transformed twenty five of thirty one photographs by Patrick Cariou enough to qualify as fair use, overturning the 2011 decision that found all of Prince's works to be infringements, and granting them to Cariou for destruction. Art lawyer Sergio Muñoz Sarmiento and art historian Lauren van Haaften-Schick came up with four questions raised by the *Cariou v. Prince* case that align with Fisher's theories of intellectual property:

1. What is the meaning of transformation and how is it applied in cases?
2. How are judges working as the final determinants of aesthetic taste and properties?
3. What artists or artistic mediums are likely to receive preferential treatment?
4. What are the associated issues of labour and compensation?  

In a Canadian context, these questions lead to an analysis of case law that follows the most recent 2012 amendments to the *Copyright Act*. These amendments were mobilized by the idea, previously determined in *CCH v. Upper Canada* and the cases of the Copyright Pentalogy, that Canada's fair dealing exceptions should be interpreted on the basis of maintaining a balance between creator rights and user rights. Additionally, Canada does not

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10 *CCH Canadian Ltd. v. Law Society of Upper Canada* [*CCH v. Upper Canada*], [2004] 1 SCR 339, 2004 SCC 13. On July 12, 2012 the Supreme Court of Canada ruled on an unprecedented five copyright cases in one day. These cases are referred to as the “Copyright Pentalogy”. The cases emphasized the importance of the treatment of copyright exceptions as users' rights and that the Court endorses technological neutrality. Michael Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013).
follow the American measurement of transformation in arriving at these decisions. Understanding the current position of Canadian courts on artistic works will lead to better understanding of legal judgements pertaining to works of art and their practical applications in Canada as the owner of a copyright system that maintains separation from its American neighbour in both intent and scope of protections.\(^\text{11}\)

Though there is no single example covering as many areas of discussion about art and copyright infringement as *Cariou v. Prince* in Canada, the 2013 *Rains v. Molea* case before the Ontario Superior Court covers many of the relevant issues using a Canadian-specific framework. In the case, Toronto artist Malcolm Rains sued fellow Toronto artist Bogdan Molea, citing copyright infringement of both his individual works and the style in his *Classical Series*, made up of paintings of crumpled paper he had been making, exhibiting and selling since the early nineties.

Instead of fair use and the measure of transformation, in determining infringement, Canadian courts generally analyze six factors:

1. The purpose of the dealing, what is the artist's intention in creating a work?
2. The character of the dealing;
3. The amount of the dealing, whether or not a substantial part of an existing work was used;

\(^{11}\) These protections are currently distinct for everything but sound recordings and performances. The 2015 Budget includes a proposal to extend the term of protection for these works in Canada from 50 years after the release of the recording to 70 years. Canada, “Strong Leadership: A Balanced-Budget, Low-Tax Plan for Jobs, Growth and Security,” Tabled in the House of Commons By the Honourable Joe Oliver, P.C., M.P. Minister of Finance, 21/04/2015, 305-306. [http://www.budget.gc.ca/2015/docs/plan/budget2015-eng.pdf](http://www.budget.gc.ca/2015/docs/plan/budget2015-eng.pdf). Following this, the International Confederation of Societies of Authors and Composers released a formal statement requesting that Canada extend protections for other types of works as well. 07/05/2015. [http://www.cisac.org/Newsroom/News-Releases/Canada-s-Copyright-Term-Extension-Plans-should-Include-Authors](http://www.cisac.org/Newsroom/News-Releases/Canada-s-Copyright-Term-Extension-Plans-should-Include-Authors).
4. Alternatives to the dealing – if material exists in the public domain that could be used instead of using a copyright protected work;

5. The nature of the work;

6. And the effect of the dealing on the market of the original.\textsuperscript{12}

Before examining infringement and fair dealing, courts must determine that the works under examination qualify as original enough to be copyright protected. The term originality is not defined in the legislation – its definition relies on precedent. Establishing originality requires meeting a low standard of creativity that functions to cover an array of types of work. In \textit{Rains v. Molea}, Malcolm Rains' oil paintings, each painted over several weeks of work, met these requirements, as did oil paintings of crumpled pieces of paper created by Bogdan Molea. Comparisons between works by the two artists and the series of Rains' works as a whole, were not necessary to establish originality because the standard of skill and judgement required in creating was intended to be minimal. These comparisons become relevant when establishing whether a substantial part of a copyright protected work was used in the creation of a new work and it is the responsibility of the plaintiff to demonstrate this.

The analysis of whether a substantial part of a protected work was used in creating a new work or set of works is the heart of both infringement decisions and public responses to these decisions. Often these responses are based on assessment of immediately apparent visual similarities between works, but that is not how the legal standard functions. In his submissions, Rains first insisted that all of Molea's works shared specific aesthetic similarities to his own, including: the use of dark backgrounds, the reflection (or lack thereof) of the paper on the

\textsuperscript{12} \textit{CCH v. Upper Canada}, paras. 53-60.
surface painted beneath it, the use of earth tones, and a “subconscious resonance” between two shapes of crumpled paper.\textsuperscript{13}

In claiming that Molea used a substantial part of his work, Rains was basing his submitted assessment on there being a feeling or Gestalt common to his paintings in the classical series, which was, in his opinion, both identifiable and attributable to him. The idea of a feeling within a work that can be attributable to a particular artist also carried some weight in the 2013 Cariou \textit{v. Prince} judgement, while attribution of a common feeling to a work and the measurement of whether this constituted an original and substantial part of the work in Canada relied, in part, on the decision from \textit{Cinar \textit{v. Robinson}} 2011, a case whose unanimous 2013 Supreme Court of Canada judgement established that the measurement of a substantial part, across Canada, requires a “qualitative, holistic” approach.\textsuperscript{14} This standard follows British case law, and is different from earlier standards that called for the analysis of objective similarities between works,\textsuperscript{15} a point which Rains attempted to demonstrate, or the application of a purely visual comparison between artistic works.\textsuperscript{16} Using a qualitative, holistic analysis in \textit{Cinar \textit{v. Robinson}}, the Justice found that Cinar France Animation had copied the visual appearance, personality traits of characters, and visual aspects of the setting of Robinson's cartoon \textit{The Adventures of Robinson Curiosity} (1985-1987) in making their own show, \textit{Robinson Sucroë} (1995). Taken as a whole, these elements were determined to be enough of a substantial part of Robinson's work that Cinar had infringed his copyright.\textsuperscript{17}

\textsuperscript{13} \textit{Rains \textit{v. Molea}}, 2013 ONSC 5016 (CanLII), http://canlii.ca/t/g03f7, para. 32.
\textsuperscript{14} \textit{Cinar Corporation \textit{v. Robinson}}, [2013] 3 SCR 1168, 2013 SCC 73 (CanLII), http://canlii.ca/t/g2fgx, para. 35.
\textsuperscript{16} \textit{Hanfstaengl \textit{v. Baines}}, in which the judge deemed a tableau vivant to be completely different from a painting, since anyone could immediately see the difference between the two.
\textsuperscript{17} \textit{Cinar Corporation \textit{v. Robinson}}.
As in the United States, in Canada community consensus determines use in substantial measure. But, in establishing agreement on the part of a work’s intended audience, Canadian courts may call upon expert witnesses to point out similarities between works that may not immediately be clear to their intended audience. In *Rains v. Molea*, an art expert backed each artist. Rains' expert was underprepared, having examined none of the original paintings, and was unable to make decisive declarations about similarities between the works based on the reproductions used in court. Because of this, the Justice dismissed her analysis. Molea's expert, on the other hand, made statements about Rains' use of commonplace techniques and subject matter common to painting and drawing, also stating that the concept of *gestalt*, through which Rains was attempting to unify the works in his *Classical Series* as a compilation of artistic works, was “increasingly untenable in the contemporary art world.” These arguments against Rains were further reinforced by Rains himself as he submitted the crumpled paper works of another artist, Daniel Adel, as further examples of works which infringed upon his own.

Like Molea's works, Rains compared Adel's works to his own based on the expression of realistic pieces of crumpled paper, the use of dark backgrounds, and the shapes of the pieces of paper in the paintings. These submissions, made as demonstrations that his copyright had been violated, in fact ended up further proving the point, made by Molea's expert, that Rains' expressions were ideas commonly used in artistic practice. The Justice in the case, Justice Chiapetta, took the position that such common elements were not copyrightable, either individually or as parts of a greater whole. The Justice stated: “Rains cannot establish

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18 *Rains v. Molea*, para. 20.
19 Ibid., para. 36.
20 Outside of court, this is quickly demonstrable by doing a Google Image Search for “crumpled paper paintings”, though Canadian judges are not permitted to consult outside sources in this way according to *R. v. Ghaleenovee*, 2015 ONSC 1707 (CanLII). http://canliiiconnects.org/en/commentaries/36529.
infringement by relying on his use of the noted unoriginal, commonplace, historical painting techniques. This would be akin to Shakespeare reliance on his use of iambic pentameter in his writing or Drake relying on his use of 16 bars to a verse in his music.”

Justice Chiapetta's final decision therefore did not need any expert intervention at all, and I believe that this is because the works under examination are all oil paintings, a familiar artistic medium that, because of association with fine art tradition, allowed the Justice to feel comfortable in relying on the legal concepts of the idea expression dichotomy and the federal stance on maintaining the rights of creators without overly restricting the rights of users. In the case of Cariou v. Prince 2013, the contentious element was that the decision set precedent for artists to make use of the works of others as raw materials from which to create their works, so long as they altered them enough “with new expression, meaning, or message.”

The measurement of transformation has more traction in areas where civil law forms the basis of judicial reasoning, resulting in an overlap of economic rights and moral rights. Interestingly, in these cases it often functions in the opposite way as in the final 2013 Cariou v. Prince decision – to further protect the rights of the artist who created the works that were used. This has been seen in Québec, where a combination of Canadian British-based federal law and Quebec law based on the French Code Napoléon determined the outcome of copyright cases. For example, in Boire v. Lefebvre, gallerist Louise Lefebvre was found to have infringed the copyright of her client, sculptor Michel Boire, when she used a photograph she took of his sculpture in promotional gallery material without asking. Although the artist was her client, the Quebec court still found in his favour. The Cinar v. Robinson case, which came up through Québec provincial courts before

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21 Rains v. Molea, para. 40.
being appealed to the Supreme Court, ended in a decision noting the relevance of Québec's system and its author protections to the overall Canadian assessment of copyright infringement.

While to date there no Canadian case covers the primary issues relevant to copyright and art as *Cariou v. Prince* does in the United States, the Canadian legal system considers works of art in copyright cases making subtle, but important distinctions from its American counterpart that result in our remaining a small pocket of resistance to American lobbying groups and the fast-moving global trend of expansion of protections for works and contraction of user rights. The implications are that legal disputes, though settled between two parties, may impact future judicial decisions on the role of art, influencing decisions on the part of artists as to their practices, whether or not a “chilling effect” can occur through overly restrictive application of copyright, as Malcolm Rains did in preventing artist Brock Irwin from painting crumpled paper, remains to be seen. The role of economic compensation in rewarding those who make creative works is an open question.

Canadian copyright infringement judgements favour the maintenance of balance between the rights of creators and those of users. However, in constructions of intellectual property regulations globally, there is a tendency towards expansion of protections and the rights of the individual over those of the community. This trend has played out in decisions concerning artistic works in the United States most divisively in the final 2013 *Cariou v. Prince* decision, which many view as having a negative effect on legal assessments of creative production. This thesis looks at artistic works and their treatment under Canadian copyright law, which retains

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23 Legally, the term “chilling effect” refers to preventing a person or group from doing something they would normally do using the threat of legal consequences. In regards to artistic works, this can refer to reduction in producing creative works, or in changes to the materials used in making works. Casey Fiesler, Jessica L. Feuston and Amy S. Bruckman, “Understanding Copyright Law in Online Creative Communities,” *GVU Center, Georgia Institute of Technology*, 2015. http://dx.doi.org/10.1145/2675133.2675234.

24 Rains v. Molea, para. 37.
distinctions in interpretation of copyright from American copyright, despite pressures to the contrary. This thesis moves towards a better understanding of how Canadian copyright works in practice when examining artistic works in court cases. Chapter 1 introduces basic concepts and ideas that are germane to the issues, Chapter 2 surveys the role judges play in determining copyright infringement through measures of analysis largely established through jurisprudence in Canadian copyright cases, and Chapter 3 looks at additional issues of work and compensation.

This work is the beginning of study required to move away from the American-centered debate about copyright and artistic works by using examples that are relevant in Canadian contexts. Although Canadian courts arrive at final decisions based on different standards of legislation and its interpretation than American courts, it is only a matter of time before we see highly public and expensive trials concerning copyright infringement if decisions and legislation follow their established expansion of protection and narrowing of exceptions. Canadian Parliament is very inclined to be aware of external developments when encoding legislation; Canadian statutes are formed from a combination of legislation, historic context, domestic case law, and international conventions, all of which are relevant to discuss in terms of our current conceptions of artistic works within the copyright system.25

In order to begin to build a theory behind the treatment of works of art in a Canadian legal context I have chosen to use the question model proposed by American attorney Sergio Muñoz Sarmiento and American art historian Lauren van Haaften-Schick as published in the *Texas A&M Law Journal* in August 2014 that focuses on the 2013 *Cariou v. Prince* decision.26 In the case, artist Richard Prince created thirty one works using elements of photographer Patrick

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Cariou's photographs from his book *Yes, Rasta* (2000), altered by visual elements like collage, addition of colour or paint, and change in scale. The resulting series, titled *Canal Zone*, was exhibited at the Gagosian Gallery in New York in 2008. Cariou filed suit against Prince, the gallery, and Larry Gagosian for infringement of his copyrights in the same year. In 2011 Judge Deborah Batts of the Southern District Court of New York (S.D.N.Y.) made the decision that the commercial nature of Prince's works infringed upon Cariou's copyright, and ordered that Prince must not only compensate him, but that he would also be required to defer all of his infringing works to Cariou. However, in 2013 the appeal before the Second Circuit Court in Manhattan dramatically reversed the decision, basing its analysis on jurisprudence that considers transformation, rather than the commercial nature of works, as the strongest measure of whether or not a work that uses elements of an existing copyright work is considered to be an infringement. All but five of Prince’s works were found to be fair use of Cariou's photographs.

In their paper, Muñoz Sarmiento and van Haaften-Schick suggest four questions about art and copyright law raised by the *Cariou v. Prince* cases:

1. What exactly is the meaning of transformation in terms of its application in American fair use exceptions?

2. How do judges function as the final determinants of aesthetic taste and properties when copyright infringement is in question?

3. What artistic mediums or artists are more likely to receive special treatment by judges in these cases?

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4. What issues arise in terms of the use of creative labour and compensation for creation of works?²⁸

This thesis examines the answers to these questions in a Canadian context using copyright cases that deal with works that are considered by the court to be artistic works and works that potentially infringe the copyrights of the creator(s) of these works. In order to find these cases, Canadian legal textbooks and the Canadian Legal Information Institute (CanLII) database were used to construct an overview of cases decided in Canada that pertain to copyright of artistic works. The focus is on Canadian court cases that were resolved after the 2004 paradigmatic shift of Canadian copyright interpretation towards balancing the rights of creators and the rights of users. Cases were drawn from legal textbooks and from the online, open-access Canadian Legal Information Institute (CanLII) database, to assess aesthetic judicial reasoning in Canadian copyright cases that pertain to copyright works of visual art specifically. As attention to intellectual property issues steadily increases, it is important to examine current Canadian judicial reasoning in resolving cases that include the classification of works of art for copyright purposes in order to set a solid foundation for where these decisions could lead in the future. The construction of a clear set of standards followed in these cases is difficult to determine due to the complicated nature of the relationship that the legal system has with images, as well as the wide variety of materials apart from legislation that make up judicial reasoning. The research for this thesis is intended as the starting point in moving towards a thorough examination and eventual definition of Canadian judicial aesthetic theory using Canadian copyright cases that deal with artistic works. The first step of which is to define the relevant terms.

²⁸ Muñoz Sarmiento and van Haaften-Schick, 942.
**Defining Copyright**

At its most basic, copyright is the right to copy a creative work, granting the first creator the sole right to reproduce that work or any substantial part of it in any material form. It is a subset of intellectual property law, a group made up of patent, trademark, and copyright law; laws designed to protect the products of the mind. Common law countries, such as the United States, United Kingdom, Canada, and Australia, treat copyright predominantly as an economic right, while civil law countries like France and Germany, and those influenced by the *Napoleonic Code* (including smaller regions within countries, such as the province of Québec) consider copyright as a way to protect the personality of the author (*droit d'auteur*) that remains attached to the work that they have created.\(^{29}\) Copyright laws and interpretations of them vary by area but, taken as a whole, copyright is both a means of protecting economic interests and private property, and is also an important cultural and social policy tool. When these laws are interpreted through the courts, there are many different ways a single legal dispute may be resolved depending on the judicial philosophy and reasoning of the judge. Each views the purpose of law through the legal philosophy they follow, and sometimes just rulings are the desired outcome while statutory laws are inflexible, leading to a conflict of purpose.\(^{30}\) For example, prior to the introduction of the *Copyright Modernization Act* to Canada's copyright legislation, the decision in *CCH Canadian Ltd. v. Law Society of Upper Canada* was a new interpretation of the statutory


text, expanding the definition of originality and broadening permitted uses of copyrighted material.31

In addition to protecting the products of the mind, a common feature across all three types of intellectual property as they are currently understood is their tendency towards expansion of protections and narrowing of exceptions. David Vaver characterizes the expansion of copyright law “to cover almost any scratch, squiggle or squawk” as a result of following the examples set by patent and trademark laws to attempt to account for and categorize every conceivable type of work.32 This he refers to as the “intellectual crisis of intellectual property”, wherein intellectual property is conceptualized and treated as an absolute system by lawyers and lawmakers, then used as an ever-expanding analytical framework.33 This framework sets the parameters for intellectual property to be studied interdisciplinarily, as it covers every piece of property and creation conceivable. Existing case studies in the United States, United Kingdom, and Canada demonstrate ongoing consideration by judges and attorneys of the array of products within this system in the same way as one would consider privately-owned physical property: subject to normalized ideas of narrow regulatory rights around a created piece of work.34 Questioning this systematic conception and legal management of the works as covered by copyright law, Carys Craig and others suggest that there is need for a shift in the understanding of the purpose of these laws. In her book Copyright, Communication and Culture: Towards a

31 CCH v. Upper Canada; Carys J. Craig, Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law (Cheltenham, UK: Edward Elgar Publishing Ltd., 2011); Michael Geist, ed., In the Public Interest: The Future of Canadian Copyright Law (Toronto: Irwin Law, 2005).
33 Vaver, “State”.
*Relational Theory of Copyright Law*, she suggests reframing the concept of what the copyright conception of “original expression”, the basis of what is protected by copyright law, means – framing it as a communicative act rather than referring to a final, unchangeable object or product that is the result of the process of creation.35

Examining the copyright system's categorization of visual artistic works and their associated original expression, scholars Costas Douzinas and Cornelia Vismann are both concerned that jurists are, by virtue of their training in the analysis of text, afraid of images.36 This is because, in dealing with issues of images specifically, geographically disparate legal systems follow the established trend of expansion and are concerned with applying narrow boundaries as a way to fit works into an ordered system of meanings and applications, attempting to remove aspects of ambiguity and possibility of multiple meanings; traits associated with images and visual art.37 Compared to writing, which forms the basis of legal regulations and thought, images are made to appear to be non-committal and open to extended and potentially endless interpretation. The same, however, could be said for legal text. The illusion of legal text as a solid and unshifting discourse results in viewing text as immutable and opposed to change, which leads to the categorization of images as the outside, confusing “other” to the comforting stable system of legal or literary text and its conceptions of property and rights associated with naming and ownership.38

35 Craig, *Relational*. This does not necessarily mean that copyright is an absolutely closed system seeking to regulate end products and the economic gains to be had from their creation. Since copyright values all creative effort instead of getting into discussions of artistic merit, there is potential open for interpretation that allows for a balance between creator and user rights.
Looking at copyright in this way, it starts with written words as model and attempts to fit everything into a reading that would apply to literary works. According to Rebecca Tushnet, two positions regularly taken on non-textual creative works is that they are either transparent, requiring no interpretation because their meaning is obvious, or they are opaque and impossible to interpret, to a degree that courts see no point in trying to understand them.\(^3^9\) She credits this oscillation between opacity and transparency in dealing with artistic works as the basis of much “bad law” pertaining to images.\(^4^0\) When copyright law analyzes texts, what is emphasized is how carefully the author made decisions of choice of words and arrangement - that the end result was completely purposeful and non-accidental, while the creation of images is seen as a happy accident and/or result of luck, free of serious effort, that serves to reduce the appearance of validity of certain types of creative work.\(^4^1\) At the same time, the intersections of non-textual creative works and copyright are increasingly a part of both legal and popular discussion and account for an increasing percentage of copyright case law. Interestingly, despite the attention given to text, Deborah Gerhardt reported in 2011 that only 35% of publication cases in district courts in the United States were concerned with text-based works, while 52% concerned art, music or film.\(^4^2\)

The role that the potential for the reproduction of works plays in the construction of our existing conceptions of copyright law and its role in regulation cannot be underestimated. In her article "Commodification as Censor: Copyrights and Fair Use", Martha Buskirk argues that the establishment and development of the text of copyright law occurred as a series of responses to

\(^{40}\) Ibid.
\(^{41}\) Ibid., 713.
various new forms of technology and their accompanying potential for activities that disrupt standing social norms. As technologies capable of reproduction became more widely available, practices of and concern for unfair gains of profit through using the work of another resulted in regulation of works and punishment for those who sought to go outside of these regulations.

The possibility of reproduction of works on a mass scale, and its accompanying potential for devaluation of reproduced creative works, may be the driver for advocating for the increase protection to ensure compensation for creative works. There is a related perception that reproducibility leads to increased access to information, boosting democracy and freedom of information. Walter Benjamin, in his often-cited 1936 essay "The Work of Art in the Age of its Mechanical Reproduction", defines the “aura” of a work as a set of properties integral to an original, and is an extension of the origin of art in ritualistic or religious practice, whose originality is attached to the idea of authorial genius. Reproductive capabilities allowed by increased access to technology may remove works of art from the ritual nature of worshipping what is unique and scarce, distancing copies from the “aura” of their origins, resulting in works of art for which authenticity is difficult to locate and the source of works is difficult to identify. For Benjamin, mechanical reproduction is viewed as a way to disarm traditional concepts of creativity, genius, and everlasting value.

Copies have always been made in limited numbers by methods such as casting and engraving, but it was not until the nineteenth century that lithography, a high speed, marketable

44 Buskirk, “Commodification,” 84-86, 90; Lawrence Lessig, The Future of Ideas: The Fate of the Commons in a Connected World (New York: Random House, 2001); as of writing, copyright infringement has been criminalized in several countries, including in the United Kingdom in 2015 through the Enterprise and Regulatory Reform Act.
46 Benjamin, Work, 11-12.
47 Ibid., 1-2.
practice, allowed for reproduction of events on a large scale.\textsuperscript{48} And, if the technologies of production and reproduction have changed, the legal conception of what is or is not a copy of a creative work has also changed. In the nineteenth century, the legal idea of a copy applied exclusively to literal copying; infringement only occurred where anyone could not spot the difference between the original and the copy. For example, in \textit{Harriet Beecher Stowe v. Thomas} (1853) 23 Fed. Cas. 201, the translation of a text from English to German was not considered copying because anyone could immediately see the difference that occurred via a change in language.\textsuperscript{49}

In terms of artistic works, what is and is not protected by copyright is accounted for using what is referred to as the idea/expression dichotomy. In Canadian case law, \textit{Moreau v. St. Vincent} confirms the importance of this separation in ensuring that copyright holders do not maintain absolute monopolies on ideas as well as the expressions of those ideas.\textsuperscript{50} Copyright protects the form in which ideas are expressed and not the ideas themselves. To differentiate copyright from plagiarism requires the protection of the expression of ideas, not of the ideas themselves. As with the \textit{Beecher Stowe} case, the idea of a literal copy also applied in the case of \textit{Hanfstaengl v. Empire Palace} [1894] 2 Ch. 1 (C.A.), a British case wherein a \textit{tableau vivant} could not be considered to be a copy of a painting, as their differences were immediately apparent.\textsuperscript{51} The separation between idea and expression occurred only at the level of exact copies in terms of their appearance to the casual observer. Today the dichotomy becomes necessarily

\textsuperscript{48} Ibid., 3-4.
\textsuperscript{49} Vaver, “State,” 6.
apparent in infringement cases where elements of style, technique or other single elements of a work have been used in a different context, but where literal copying has not taken place.

The question of what constitutes art appears frequently in court cases, and is divided by Christine Haight Farley into two types of cases that seek to answer it: cases that determine the work's classification as a work of art, and cases in which the value of the work as art operates below the surface. Unlike earlier means of determining infringement by whether or not a copy is literal, courts often compare works in copyright cases by examining visual elements of works in copyright cases. These cases demonstrate explicit resistance on the part of judges to engage in aesthetic analysis, although they often end by doing so regardless. Haight Farley suggests that the courts should make use of scholarship that seeks to answer the question of what art is, as it has a long history that can be utilized in cases, allowing for decisions that are open, reflective, and examining of the prejudices towards art that exist within the judicial system that are not discussed outright. This would situate the discourse of aesthetic philosophy within the legal system and would suggest ways of integrating the academic and scholarly study of aesthetic decision making with legal rhetoric and discourse. This view, however, is countered by longstanding international jurisprudence and legal scholarly opinion which suggests that judges have no place in making aesthetic judgements, and that the law progresses alongside philosophy

52 Haight Farley, “Judging Art”.
with the caveat that the law maintains reservations or even “downright hostility” towards art and images. With the caveat that the law maintains reservations or even “downright hostility” towards art and images.

The types of works protected by copyright are plentiful - copyright law provides protection to original works of authorship, making it relevant in to define some parameters for a test of originality. In her article “Originality in Postmodern Appropriation Art”, Julie VanCamp sees a need to distinguish the meaning of the term from the evidence used to construct it: we already distance works historically, so it follows that works can be original without being historically novel across all creation by humans. In VanCamp's conception, a measure of originality would be similar to that of determining artistic merit suggested by Carys Craig; measurable by their addition of a dialogue to a stream of culture. The basis of intellectual property protection is the idea of an original object with an original author. That postmodern and post-structuralist theory has already moved to consider that the conception of an author is not only a means of controlling social bodies by documentation but is, in fact, dead, so that viewers and users are those who provide meaning, does not factor in the discourse of intellectual property that seeks to only protect the rights of those with original works, without consideration for what changes may occur to these works once they are made available to the world.

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59 Ibid., 255; Craig, Relational.
John Carlin, a legal authority with a base in art historical studies, considers the question of appropriation: the ways in which it is seen as violating both the letter and spirit of current intellectual property law, and suggests means for striking a balance between artistic production that currently violates these systems that will maintain artist rights and protection. His suggestion is to make the doctrine of fair use in the United States Copyright Act more discriminating and socially beneficial by adapting it to changing conditions of artistic production, and argues that fair use doctrines should be equally applicable to the use of trademarks in order to allow critique and parody that make use of strictly commercial interests. Carlin’s view is that ownership and control of images should be upheld, but that expanded fair use laws would allow artists to make use of and comment upon these protected images in order to maintain constitutionally-protected freedom of expression. Kenneth Crews, former Director of the Copyright Advisory Office at Columbia University, believes that a lack of proper information about copyright in institutions has resulted in an overreaching of claims to ownership of images through individual policies and procedures, and that many policy makers have suggested better alternatives and standards to current practice in the United States. David Vaver agrees with this point of view, arguing that it is an imbalance in knowledge as to what may be protected or not, couple with the potential consequences for transgressing what is put forth as acceptable protection, especially across international borders, that leads to overreaching of copyrights, not the laws themselves. Many times the overreaching of proprietary claims is not intended to limit access by directly asserting control and power; both those that do and those that do not understand copyright laws give them

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62 Ibid., 139.
wide berth to avoid the potential for litigation.\textsuperscript{65} The Vaverian solution suggested is a return to simplicity in our conceptions of copyright, providing less coverage of things by copyright by differentiating between works that are inherently expressive and those that are incidentally expressive, in order to reduce the potential for overreaching and abuse of copyright law, so that the works which are granted protection are those that contain expression that the public values.\textsuperscript{66}

A brief history of copyright worldwide at this junction will help to explain the creation of contemporary copyright law.

The beginnings of encoded copyright protections can be found in the 1719 British \textit{Statute of Anne}, also known as \textit{An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned}, which provided copyright protection for authors of literary works for up to 28 years.\textsuperscript{67} These protections were partially granted in response to the emergence of the printing press and its accompanying ease of reproduction of literary works by those seeking to profit from their sales, whether or not they had permission from the author.\textsuperscript{68} It took many years for copyright legislation to evolve to include the multitude of types of works that are protected today.

Copyright legislation has historically required flexibility and is largely an act of delayed


\textsuperscript{66} Nimmer, “Beauty”; Vaver, “Harmless”; Vaver, “State”. While both Vaver and Nimmer clarify that these distinctions will not rely on aesthetic judgements, use value judgements present a different series of issues that will not be addressed in this thesis.

\textsuperscript{67} Myra Tawfik, “History in the Balance: Copyright and Access to Knowledge,” in \textit{From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda,} 69-89. Michael Geist, ed. (Toronto: Irwin Law, 2010) \url{http://www.irwinlaw.com/content_commons/from_radical_extremism_to_balanced_copyright}.

\textsuperscript{68} Adrian Johns, \textit{Piracy: The Intellectual Property Wars from Gutenberg to Gates} (Chicago: University of Chicago Press, 2009); M. Rose, \textit{Authors and Owners: The Invention of Copyright} (Cambridge, Mass.: Harvard University Press, 1999). Whether the protections were intended to benefit the publishers, as in Johns' argument, the authors, as in Rose's, or the greater public, as Tawfik argues, is the approach to historical copyright taken in the 21\textsuperscript{st} century, is a matter of ongoing debate.
response to changing trends, at which points its parameters have traditionally expanded to keep up with changes in society that are already common practice.\textsuperscript{69} This necessity for flexibility in the fair dealing provisions of both the United Kingdom and Canada as well as fair use in the United States suggests that legislated boundaries left purposely ambiguous avoid a need for constant revision and that, while legislation is being proposed, it requires a measure of foresight to possibilities of future creation and use.\textsuperscript{70} Rigidity in the copyright system's consideration of artistic works is in place to define parameters and is easily complicated by using several types of art or objects in a single piece of work, or by changing between different forms of media. Regardless of agreement on the intentionality behind copyright protections, the drive towards international agreement on protection terms and requirements began with the introduction of the \textit{Berne Convention}.

\textbf{International Copyright Conventions}

Canada is a member country of the first international provision for author rights, the \textit{Berne Convention for the Protection of Literary and Artistic Works}, was put into use in Switzerland in 1886. Prior to its introduction, copyright laws were entirely reliant on localized protections in countries or smaller regional areas. At the convention's base is the idea that each member country will provide automatic protection for creative works, attributed to a sole author. Protected works include any in the literary, scientific, and artistic domain, regardless of the medium of expression. The term of protection for most types of works is the life of the author plus at least fifty years, although the post-mortem portion may be extended on a national basis.\textsuperscript{71} Under the convention, a wide range of works are accounted for specifically, including: books,

\begin{itemize}
\item \textsuperscript{69} Shih et. al.; Vaver, “State”.
\item \textsuperscript{70} Tushnet, “Worth,” 711.
\item \textsuperscript{71} WIPO, \textit{Berne Convention}, Article 7.
\end{itemize}
pamphlets, lectures, addresses, sermons, dramatic or dramatico-musical works, works of choreography, acting in a form that is fixed in writing or otherwise, musical compositions, drawings, paintings, works of architecture, sculpture, engraving, lithography, illustrations, geographical charts, plans, sketches, translations, adaptations, arrangements of music and other reproductions in an altered form of literary or artistic work, as well as collections of works. Since the beginning of the nineteenth century, laws affecting visual art, such as duties exceptions, were made to encourage creation of more artistic works, even “non-traditional” forms like collage and non-representational art. Public rights to access works, including exceptions outlined in copyright acts and impetus towards maintenance of a public domain, categorized as “user rights”, account for uses of cultural products that do not suffer a loss to the product itself from being repeatedly used.

At issue internationally is transnational, cross-border exchange of creative products, whether in physical or digital form. Rights holders and their heirs, families or invested parties are set up by current systems against advocates of free speech, creation and scholarly access when intellectual property issues are viewed through the lens of economic copyright, a relatively quantitative means of determining value. Another way of conceptualizing copyright considers qualitative externalities or relational copyright - the importance of works to collective memory and their contribution to society; external factors that influence and are influenced by copyright and are difficult to measure quantitatively.

United Kingdom

73 Craig, Relational, 170; Lessig refers to this type of resource as “non-rivalrous”. Lessig, Future, 21.
The dominating ideas under United Kingdom copyright law are that copyright seeks to protect the skill and labour of the artist, and that it is “unjust to reap where you have not sewn.”

Historically, British copyright has been conceptualized as rigid in its interpretation of copyright law. Regarding this, Justice Laddie wrote:

Rigidity is the rule. It is as if every tiny exception to the grasp of copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls...[T]he drafting of the legislation bears all the hallmarks of a complacent certainty that under copyright protection is morally and economically justified.

In the United Kingdom, copyright protection for most artistic works is defined by the Copyright, Designs, and Patents Act (CDPA) which accounts specifically for any painting, drawing, diagram, map, chart of plan and any engraving, etching, lithograph, woodcut or similar work, photograph, sculpture or collage, in each case irrespective of artistic quality; a work of artistic craftsmanship; or a work of architecture (a building or model of a building).

The terms of protection afforded by British copyright since 1842 had been forty-two years from publication or seven years after the death of the author, whichever was longer, but the Britain Act of 1911 moved to fixed term copyrights, a definitive post-mortem term of protection and codified fair dealing provisions. Defining the terms of artistic works follow ordinary usages in cases: whether something is a painting or a drawing is a question of fact that requires no particular measure of artistic merit to be afforded copyright protection.

However, in determining these facts, some element of fixation has been found to be necessary. For example, in the case of Creation Records Ltd. v. News Group Newspapers Ltd.

76 United Kingdom (UK), Copyright, Designs and Patents Act (CDPA) s.4, s.4(2).
78 Stokes, Art, 274.
an assembly of found objects in a pool, photographed for the cover of an Oasis album was determined not to be a collage because it existed for only a few hours and did not contain any exercise of craftsmanship. Therefore, the position on the nature of ephemeral works in the United Kingdom, even those fixed by permanent means, remains unclear, and so does the potential for fair dealing of these works.

A limited number of fair dealing exceptions are given for the use of copyright protected works:

1. For private study, or research for a non-commercial purpose where sufficient acknowledgement is given;
2. For criticism or review, or reporting current events (including use of photographs) where there is sufficient acknowledgement (other than where this is impossible);
3. Incidental inclusion in an artistic work, sound recording, film or broadcast;
4. Some limited exceptions dealing with representation of certain works on public display, the advertisement of the sale of an artistic work, and making of subsequent works by the same artist.

Ways of testing for infringement of a copyright include: whether or not the allegedly infringing work incorporates a substantial part of the skill and labour put into the copy's work by the designer and whether or not the infringer has incorporated a substantial part of the independent skill and labour contributed by the original author. In determining whether

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80 Stokes, Art, 275-276.
81 UK, CDPA s.29
82 Ibid., s.30
83 Ibid., s.31.
84 Ibid., s.62-64.
85 Stokes, Art, 278.
infringement has occurred, works that have long been incorporated into the language of art practice and study may be difficult to account for. “Readymades” or found objects would likely be categorized under the CDPA definition of sculpture to be protected. Their originality might be found in taking the object from its original context and exhibiting it in an artistic venue. Simon Stokes believes that judges might be more lenient and and less concerned with infringement if the found objects positioned as readymades served initial purposes that were not artistic in nature, as utilitarian objects are not usually afforded copyright protection. Appropriation art which, like readymades, depends on re-contextualizing of elements, is still encounter debate as to its measure of originality and, much like in Canada and the United States, artists who make direct copies, no matter the purpose or context, can be charged with copyright infringement. Because conceptual art is not specifically accounted for in the CDPA list of protected works, artists may have difficulties arguing for protective rights for their works. Non-traditional mediums of expression may also be points of contention in establishing what is or is not an artistic work, as in the case of Merchandising Corporation v. Harpbond (1983) FSR 32, where performer Adam Ant's face makeup was determined to not be a painting because a painting has to be on a surface of some kind; a decision that relied on the idea/expression dichotomy when stating: "[a] painting is not an idea: it is an object; and paint without a surface is not a painting."

Similarly, despite it often taking an easily recognizable, fixed form, photography remains an issue for intellectual property law, as every photograph is a copy of something and its status as a form of fine art is not universally agreed upon. United Kingdom law offers a wide spectrum of human intervention to examine for the consideration of originality in photographs: angle of shot, use of filters, exposure, specific scene or style of subject, context (a photographer being in

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86 Stokes, Art, 277.
the right place at the right time), and that some work must go into creation of a photograph.\textsuperscript{88} Copies of artworks and photographs remain points of contention. In \textit{antiquesportfolio.com v. Fitch}, photographs of three-dimensional artefacts and antiques were found to be protected by copyright after they were scanned from an encyclopedia for use on a website. The court determined that the photos were original works based on lighting, angle, focus, and subject matter choices, and that scanning and uploading them constituted infringement.\textsuperscript{89} Similarly, in the case of \textit{Interlogo v. Tyco}, the court determined that copying cannot be an original work. Even a tracing, no matter how much effort, skill or time goes into creating it, is not copyrightable.\textsuperscript{90}

Generally speaking, those who put skill, time and effort into creating works would like to reap the economic benefits of copyright protections, especially as art works are being increasingly taken up in the cultural industry for advertising purposes. In the United Kingdom, the \textit{Artist’s Resale Directive} has been implemented to ensure that artists receive a portion of the resale price of their works.\textsuperscript{91} There is tension between protection rights for artists seeking economic gain from their work, and from artists who wish to remix, reuse, appropriate or participate in a cultural dialogue created by an existing work that is copyright protected. The illusion that every important and allowed work is completely original and not derived in any way from something existing is a fallacy that could encourage over protection of art works.


\textsuperscript{90} \textit{Interlogo v. Tyco}.

\textsuperscript{91} Stokes, \textit{Art}, 272. Canada still struggles with the idea of creating a program of rights to provide further economic incentives to artists and authors without unbalancing the current government copyright program of maintaining a balance between creator and user rights.
United States of America

The largest issues differentiating American copyright from that of the United Kingdom and Canada are fair use exceptions and their interpretation, and ongoing pushes towards copyright term extensions. The United States House of Representatives and entertainment lobbies have advocated for longer copyright terms such as the Sonny Bono Copyright Term Extension Act of 1998 which added 20 years to the copyright of published and unpublished works created between January 1, 1923 and December 31, 1977, meaning that they are copyrighted for 95 years post-creation, while the basic term of protection in the United States is the life of the author +70 years.92

The American provisions of acceptable infringement, fair use standards, were indoctrinated in the 1976 reforms to the 1909 Copyright Act; moving from a model of regulatory copyright to one of proprietary copyright or, as described by Saint-Amour: “from limited bundle of rights to absolute entitlement.”93 In providing exceptions to these entitlements, §107 of the United States Copyright Act calls for a four-factor test in determining fair use as a defence against copyright infringement, requiring judges to consider:

1. What is the purpose and character of the work in question? Was the new use sufficiently transformative of the original work, did the new work serve a commercial or non-profit educational purpose?
2. What was the nature of the copyrighted work?
3. What portion of the copyrighted work was used?

92 Saint-Amour, Modernism, 1-3; “Copyright Term and the Public Domain in the United States,” Cornell University, 01/01/2015, http://copyright.cornell.edu/resources/publicdomain.cfm.
93 Saint-Amour, Modernism, 10.
4. What was the effect of the use on the market for the copyrighted work?\textsuperscript{94}

\textit{Copyright in Canada}

In Canada, section 5(1) of the \textit{Copyright Act} gives copyright protection to every original work that is fixed in any medium. The Canadian common law and statutory legal system is derived from the British system following the English victory in the 1759 Battle of Québec. The Canadian system is a bijural legal system that is divided between public (common) and private (civil) law, where individual provinces have control over civil matters. To account for Québec’s separate legal system, federal laws must by drafted in both official languages and must adhere to the common and civil practices in all provinces. For issues of copyright, the administrative body of the Copyright Board of Canada reviews cases outside of the court system, exercising authority given to them by law, although the courts are able to review their decisions and proceedings. The Canadian Intellectual Property Office (CIPO, an agency of Industry Canada) administers the \textit{Copyright Act, Patent Act, Trademark Act, Industrial Design Act, and Integrated Circuit Topography Act}. The \textit{Copyright Act} is a shared responsibility with Canadian Heritage, and also includes the \textit{Plant Breeders Rights Act}, administered by Canadian Food Inspection Agency.\textsuperscript{95}

The first wholly Canadian \textit{Copyright Act} was passed in 1921 and came into effect in 1924, closely modelled after the British Copyright Act of 1911, both of which were written to comply with the \textit{Berne Convention}. Copyrights for creative works are automatically guaranteed upon their creation following this convention. As soon as a work is written or recorded in a physical medium, the author is entitled to copyright of the original and any derivative works, unless these rights are disclaimed by the author or the copyright expires. Protection applies immediately to

\textsuperscript{94} USA, \textit{Copyright Act}.

works that are: literary (including computer programs), dramatic, artistic, musical or compilations (multimedia or databases are included).

Canada has been increasing its prominence as a country with a vested interest in copyright as a tool to aid not only authors, but also those who make use of cultural products in every foreseeable capacity, independent of the medium of expression.\textsuperscript{96} The Copyright Act of Canada follows standards of author/creator protection afforded by the international regulatory standards not only of the Berne Convention, but also the Universal Copyright Convention (UCC) of 1952, as well as the World International Property Organization (WIPO) Copyright Treaty of 1996, and its regulation is an area of federal concern, outlined in section 91(23) of the 1867 Constitution Act.\textsuperscript{97} Works for which copyright is automatically granted to the creating author are numerous, and ever-expanding.\textsuperscript{98} The intent of copyright is not to reward artistic merit, but to reward creative effort, as measured in Canada by a standard of originality.\textsuperscript{99} Protection of works grants the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, thus securing the rights of the author to their own work, whatever their intention in creating it.

The CCH Canadian Ltd. v. Law Society of Upper Canada case set the measurement that has not only become the common law standard for what constitutes originality and an original piece of work in Canadian copyright cases, but shifted the focus of interest towards a balance

\textsuperscript{96} Craig, Relational; Michael Geist, ed., Pentalogy; D'Agostino, “Healing”.
\textsuperscript{98} Canada, “Modernization”; Craig, Relational; Geist, Pentalogy.
between the rights of the author and the rights of users. The six standards for measuring originality are:

1. The Purpose of the Dealing, where allowable purposes should not be interpreted in a restrictive way, because that might restrict the rights of users;
2. The Character of the Dealing, where courts should examine the number of copies made and relevant industry standards;
3. The Amount of the Dealing, where the extent of the copying might be different when the amount of dealing and importance of the allegedly infringed work should be considered;
4. Alternatives to the Dealing, whether a public domain or non-copyrighted option was available;
5. The Nature of the Work, looking at whether or not the work has been published, whether the use was acknowledged, whether the use was beneficial to the public or whether it was confidential;
6. Effect of the Dealing on the Work and whether copying will affect the market of the original work.\textsuperscript{100}

Infringement occurs if all or a substantial part of a protected work are made use of, with or without attribution, including indirect use, assisting of another in making infringing copies, for which innocent intention is not a defence. Much like in the United Kingdom, certain exceptions apply to use of copyright protected images, accounted for under the fair dealing provisions of the Copyright Act. These provisions include use for private study or research, or for criticism and review as long as the source and author are acknowledged. Fair dealing provisions not outlined in statutory law have been part of some extremely important Canadian cases which serve to

define these provisions and account for new uses of existing technologies. The *Copyright Act* also outlines measures to take should infringement of various types should occur. Section 28.2 covers infringement of the moral rights of artists, while section 27.2 covers secondary infringement, and sections 35, 38.1, 39 and 42 suggest remedies for infringement or ignorance of a copyright. There are also limitations on civil cases to make use of these remedies. Where plaintiffs knew, or could be expected to know of the infringement when it happened, infringement proceedings must start within three years after the occurrence, or where the plaintiff could not have known of the infringement, within three years after the first time the plaintiff knew of it.\footnote{Canada, *Copyright Act* s.41(2).}

According to Carys Craig, prior to shift towards user rights following the Supreme Court's decision in *CCH v. Upper Canada*, courts having strict fair dealing rules to follow meant that they did not have to argue the merits or public benefits that might come from infringement of a copyright; their primary concern was for the rights of the original creator/owner of a protected work.\footnote{Craig, *Relational*, 165.} Examples include cases such as *Hager v ECW Press Ltd*, in which a biography was found to not fall under fair dealing for research because the perceived intention of fair dealing for use and research was considered to not apply to works that are communicated to the public. Narrow fair dealing for the purposes of private study were highlighted by the case of *Boudreau v. Lin*, where copying and selling course materials for an entire class was determined to not be private study.\footnote{Ibid., 165.} Finally, the example that best highlights the conflicts between corporate rights holders, freedom of expression and copyright is the case of *Cie Générale des Etablissement Michelin - Michelin & Cie. v. C.A.W. - Canada.*\footnote{*Michelin v. C.A.W.*, [1997] 2 FCR 306, 1996 CanLII 11755 (FC), http://canlii.ca/t/4g4v.} The defendant in the case
parodied the Michelin Man corporate logo in a protest pamphlet about employee rights. This use was found by the court to not be criticism and therefore not defendable according to the state of the *Copyright Act* at the time, which changed following the *CCH* decision.\(^{105}\)

While Canada remained a British colony, the *British Fine Arts Copyright Act* of 1862 (and its previous iterations of 1734, 1766, 1777, 1836) and the 1814 *Sculptures Copyright Act* did not extend to its shores. The 1903 *Graves v. Gorrie* case clarified that copyright for pictures and drawings applied in Canada. The 1875 *Canadian Act* was the first piece of legislature in Canada that extended protection for published artistic works, but only accounted for literary and drama-co-musical works. Prior to this, copying of unpublished works was protected through common law.\(^{106}\) The 1903 *Graves v. Gorrie* case highlighted the absence of protection for pictures, drawings and photographs in the British colonies, solidifying the fact that to obtain copyright in these works, Canadian law, not British, must be complied with, and Canadian law should account for the same artistic works as defined by the *Berne Convention*.\(^{107}\) The author of any original painting, drawing, statue, sculpture, or photograph, or anyone who invented, designed, etched, engraved, or caused to be engraved, etched or made from their own design any print, cut or engraving were offered copyright protection for their published work.\(^{108}\)

In Canada, parameters for consideration of artistic merit are at issue when defending existing works against charges of child pornography as outlined in *Canadian Criminal Code* section 163.1, enacted in 1993. This section of the *Code*, known as the *Child Pornography Act*,

\(^{105}\) Ibid.


\(^{108}\) R.S.C. 1906, c.70; McKeown, *Fox*, 10:3.
is the only statute that provides for defence of objects brought into question via considerations of artistic merit.

**Obscenity and Artistic Merit**

Closely following art law news suggests that there has been more discussion around litigation, art preservation and quality under obscenity laws than under any other types of laws that share an interest in art, and that the aesthetic judgements presented in legal cases may now surpass the decisions of art critics. In the United States, precedent set by the 1973 *Miller v. California* case exempts works of “serious artistic value” from being tried or censored by obscenity laws. In the United Kingdom, the *Obscene Publications Act* of 1959 prevents criminal convictions for distributing obscene works that are judged to be “for the public good in the interest of art.” Consequences of obscenity prosecution include fines, imprisonment or potential destruction of works. The United Kingdom *Obscene Publications Act* explicitly calls for expert witnesses to contribute to the discussion of whatever work is in question. Decisions based on artistic merit differ from those that determine copyright cases in their need to define quality, where copyright only explicitly requires a measure of creativity. Some criteria for determining the economic value of a work of art are:

1. Size, medium, subject matter, condition, date of creation, style, author, provenance, authenticity, past exhibitions;
2. Standing of the artist in their school, profession and time period;
3. Sale prices of artists and contemporary works;

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112 Ibid.
4. Economic state of the art market;
5. Historical, social, political, moral, or other importance of the work
6. Aesthetic and artistic merits of the work.¹¹³

These criteria considered separately from suggested determinants of artistic value, though the
majority of considerations are the same:

1. Workmanship or craftsmanship in the work;
2. Subject matter, form and content;
3. Relation to the artist's other works and to works by other artists and artistic movements
   and trends;
4. Physical characteristics: size, medium, condition;
5. “Other relevant data”: including date of creation, style, author, provenance, past
   exhibition;
6. Ornamental value and appeal to the “eye of the beholder”.¹¹⁴

Karlen suggests that artistic value should be split into the categories of artistic merit (referring to
the workmanship, manner of execution and the manner of presentation of the work) and art
historical importance. Forgeries are a perfect demonstration of this division, as they possess the
same aesthetic qualities of the originals they are derived from, and cannot have the same measure
of artistic merit or creativity according to the legal system, but they may maintain art historical
value and retroactively further demonstrate the important position or value of the original that
was attempted to be disseminated as genuine. Closely-related obscenity laws in Canada, initially
incorporated into statutory law to prevent the production and sale of hate literature, do not

¹¹³Albert Elsen; John Merryman. *Law, Ethics and the Visual Arts.* (NY 1979), 282 on the economic valuation of
works of art for tax reasons; Karlen, “What,” 312.
include such provisions. Canada's first copyright law denied copyright entirely to any “immoral or licentious, treasonable or seditious book”, a provision that was dropped in creating the 1921 Copyright Act.\(^{115}\) When faced with charges that a work of art is obscene, the defence of artistic merit has been set as precedent in our common law system through court cases such as \textit{R. v. Butler} in 1992, which took into consideration the rights to freedom of expression guaranteed in the \textit{Canadian Charter of Rights and Freedoms}.\(^{116}\) The first case in which the \textit{Child Pornography Act} was brought up against a Canadian artist and their hosting institution occurred in Toronto in 1993. In December, police removed five paintings and thirty-five drawings from a Mercer Union exhibition of the works of artist Eli Langer.\(^{117}\) Three paintings and fifteen drawings were left, not subject to allegations of creating and disseminating child pornography, and therefore not subject to seizure by the Morality Bureau of the Metropolitan Toronto Police. The then newly-instigated child pornography laws required the court to acquit should there be artistic merit, or an educational, scientific, or medical purpose to the works in question. The final outcomes of the case were to outline that in order for anyone to be charged under the \textit{Child Pornography Act} in the future, the standard of artistic merit must be negated by the Crown beyond a reasonable doubt before criminal sanctions may be imposed. This objective standard outlines that the creator must have had an artistic purpose, and also have produced something with artistic merit. The judge argued that, although this does not protect artists who fail with their artistic intentions, the community standards of tolerance take on more importance than the consideration of freedom of


\(^{116}\) \textit{Canadian Charter of Rights and Freedoms} s. 2(b).

expression. The judge further outlined factors to guide courts for future development of a legal standard of the artistic merit defence:

1. That the word merit implies applications of standards by those other than the artist who created the work
2. The word “artistic” includes work that is sincerely created, skillful, and sensitively produced
3. That judges should not be art critics or impose their tastes. Purpose and integrity of the artist and technical merit of the work are more significant determinations, mediated by members of the artistic community.

For a work to legally have artistic merit, it must have the potential to provide something of value to the viewer, a view that is not far removed from David Vaver's conceptualization of copyright protection based on inherent expression. But community norms are also a factor. The artistic merit defence will fail if the work is deemed to exceed moral standards in the community, even if the depiction has merit through the eyes of the artistic community.
CHAPTER 1: ASSESSMENT OF INFRINGEMENT

“No one captures an idea by being the first to depict it visually.”

Canadian law derives from many sources, both within the common law tradition, as well as continental and civil law concepts; it is based overall on British law, but pays especially close attention to the laws and lobbying put into effect by the United States and American corporate interests. As far as the general awareness of copyright law in North America is concerned, high profile cases involving large corporations or famous participants garner media attention and are therefore better known than Canadian cases. The distinctions between Canadian and American encoded copyright laws and interpretations of them are often confused or blended into a seemingly unified set of rules. *Cariou v. Prince* has perhaps become known as the defining copyright infringement case concerned with art and fair use in the United States. Its 2011 and 2013 decisions brought up many issues surrounding the use of existing creative works to make new creative works – including intentionality in creating works of art, the division of labour that exists between the definition of a commercial artist and a professional fine artist, and popularly held views of what art is today. In Canada, some of these issues have been examined, most relevant to the discipline of art in the chapter “Appropriation Appropriated: Ethical, Artistic, and Legal Debates in Canada” by Laura Murray and Kirsty Robertson. However, as timely and useful as their chapter is in examining the intersections of appropriation art and law in Canada, it lacks a detailed and subtle analysis of case law in Canada that concerns works of art and copyright infringement. Largely in both cases themselves and writing about them, American

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sources alone are cited as the titular examples of how works of art are viewed through the lens of the legal system.

There is no single court case in Canada that lends itself to a picture of what copyright for works of art looks like in a Canadian context, we do not currently have a multi-million dollar appropriation art debate to refer to in court. The picture of copyright and artistic works in Canadian copyright must be assembled from a selection of court cases, acting as does the definition of a “Monet” in the movie *Clueless*: “It's like a painting, see? From far away, it's OK, but up close, it's a big old mess.”\(^{119}\) While it is not necessarily a mess, the picture is definitely one that is difficult to fully grasp without thorough knowledge of Canadian case law. Few court cases make any definitive statements about the status of visual art in Canada as concretely as what can be extrapolated from the *Cariou v. Prince* case; which is not to say that a case like it is not in Canada’s future. In the final second circuit decision of 2013 twenty five of Richard Prince’s thirty one works were determined to be transformed enough qualify for fair use exceptions and not be considered infringements of Patrick Cariou’s photographs.\(^{120}\) Canadian copyright law differs from American copyright law in both its coded law and jurisprudence on the determination of copyright infringement. Fair dealing exceptions in Canadian law are similar to American fair use exceptions in that they allow for the defence of certain uses of copyright protected work without the permission of their creator. To work towards an answer to Muñoz Sarmiento and van Haaften-Schick's first question in a Canadian context, knowledge of fair dealing exceptions, as well as court cases that look at the historically defined definition of an “original” creative work and what use of a “substantial part” means in Canadian law are


\(^{120}\) The case was not subsequently appealed, as many thought it might be, but instead settled out of court for an undisclosed sum.
necessary to have as compared to the American considerations of fair use and transformation. These are the tools used by judges to determine firstly whether works are original and thus qualified for copyright protection, and secondly whether a substantial part of a copyright-protected work has been used to create a new work. In Canada, the expressed intention of copyright law and its interpretation to maintain balance between users and creators leads to different interpretation of exceptions than can be found in the United States. Section 2 of the Canada Copyright Act defines an “artistic work” as a painting, drawing, map, chart, plan, photograph, engraving, sculpture, work of artistic craftsmanship, an architectural work or compilation of artistic works, limiting the scope of this investigation to these types of creative works. When considering any type of copy of a work, Canadian law protects metaphorical or non-literal copying, which may include transfer to another medium or transfers from two to three dimensions, but not literal physical or mechanical copying.

The limits of copyright law in Canada are defined by the Canada Copyright Act, R.S.C. 1985 C-14. Copyright grants the first creator of a work the sole right to reproduce that work or any substantial part thereof in any material form. Copyright is granted automatically to any creative work that is fixed in any medium. Additional rights include the right to perform the work in public, and to publish a previously unpublished work. Owners also maintain the rights to produce, reproduce, perform or publish any translation of a work; to reproduce, adapt and publicly present a cinematographic work; to communicate the work via telecommunication; to present the work at a public exhibition; to sell or otherwise transfer ownership of a tangible

121 The terms “owner” and “creator” are used interchangeably since copyrights can be assigned, and do not always belong to the creator of the work. For example: a photographer may have decided to keep the rights to their own photographs although they may have been hired by a newspaper, or they may have given those rights to the paper via contractual agreement.
object, or to authorize any of the preceding acts.\footnote{\textit{Canada Copyright Act}, s.3.1.} In order to determine in court whether or not a work is afforded copyright protection, the work must be not only fixed in any material form, but must also be considered original. There are not many copyright cases that make it to court in Canada. However, Canadian copyright is shaped by outside influence and lobbies, especially pressures from the American side of the border.\footnote{Sara Bannerman, \textit{The Struggle for Canadian Copyright: Imperialism to Internationalism 1842-1971}. Vancouver: University of British Columbia Press, 2013.} Copyright cases provide an overview of jurisprudence regarding all aspects of copyright law – standards of originality, measurements of the use of a substantial part of a copyright protected work, allotment of damages, and clarification of terms used within the \textit{Copyright Act}.

Canadian law is derived from both British and French common and civil law. A formal, independent Canadian \textit{Copyright Act} was not implemented until 1921, and then was not amended until 1976. The most recent amendments, known collectively as the \textit{Copyright Modernization Act}, went into effect November 7, 2012, and expanded fair dealing provisions and reduced penalties for non-commercial fair dealing of copyrighted works. Several important distinctions can be found between Canadian and American copyright law in the current focus of the perceived intention of copyright, the differences between fair use and fair dealing exceptions and their interpretations in court, and in the amount of time a work remains under copyright protection. Emphasis in Canadian copyright cases is placed on maintaining a balance between the rights of creators and the rights of users,\footnote{See \textit{CCH v. Upper Canada}; Government of Canada, “Balanced”; \textit{Rains v. Molea}; \textit{Théberge v. Galerie d'Art du Petit Champlain inc.}, [2002] 2 SCR 336, 2002 SCC 34 (CanLII), http://canlii.ca/t/51tn.} and this focus forms the basis of the cases examined in this thesis. Works are only protected by copyright if they contain original expression. Copying a work or parts of it is deemed to be infringing if the original elements of
the copyrighted protected work are copied.\textsuperscript{125} To determine infringement, courts look at the similarities between works, not the differences.\textsuperscript{126} If an original and substantial part of a creative work is copied, this copying amounts to infringement. This chapter examines the role that measurements of fair dealing, originality and what constitutes a substantial part of a work play in Canadian copyright cases, and how these differ from American fair use standards and the assessment of transformation when examining artistic works.

\textbf{Originality}

The \textit{Canada Copyright Act} does not define the term “original” outright, what is used to define the term is a combination of case law and legal scholarly opinion. The measurement of originality offers a bare minimum standard that can be used to determine whether a work qualifies for copyright protection, allowing for a broad array of types of work to be protected through analysis of both the process of creation and the end product that is the result. These measures are used both in determining copyright protections for the plaintiff and for the defendant's works in copyright cases. Section 5(1) of the \textit{Copyright Act} provides copyright protection to “every original, literary, dramatic, musical, and artistic work that is fixed in any medium.” This openness to interpretation allows for the maintenance of a very low threshold that must be passed in order for a creative work to qualify for copyright protection. The factors that courts use to determine whether a derivative work is eligible for its own copyright protection can be found in the fair dealing exceptions outlined in copyright legislation, as well as in the legal opinions and court cases which expand upon these ideas. The measurement of originality determines whether or not a work that makes use of a copyright protected work is or is not an infringement. Subotnik considers these subjective views as proxies or stand-ins for a defined


\textsuperscript{126} Cinar v. Robinson 2013; Harris, \textit{Canadian}, 217.
originality standard, and groups them by judgements of ontology, narrative and comparison of works.\textsuperscript{127} The proxy of ontology, an examination of the effort and process of creating a work, is measured in Canadian terms through “skill and judgement” which will “necessarily involve intellectual effort” and “must not be so trivial that it could be characterized as a purely mechanical exercise.”\textsuperscript{128} The proxy of narrative examines creative works through authorial intent, fitting works of visual art into a type of examination that is used in examining the originality of text-based works.\textsuperscript{129} The third proxy, that of comparison, treats images as images – comparing works to other works directly, looking at their underlying subjects through the established measurements of fair dealing exceptions.\textsuperscript{130}

Human talent and intellectual intervention are often interpreted as the necessary driving forces behind the creative process. This view of what the necessary elements of originality are is opposed to creations that are made through technical-based use, by “sweat of the brow” (effort alone) or by machine. Following the \textit{CCH v. Upper Canada} decision, Canadian courts rejected British standards of “industriousness” and also the American elevated creativity standard established after the decision in \textit{Feist v. Rural Telephone Service Co}.\textsuperscript{131} The legal directive for Canadian judges is to find a combination of skill and judgement used in the creation of an artwork, a threshold set low enough to protect any work generated by creative processes but not

\textsuperscript{128} \textit{Rains v. Molea; Théberge v. Galerie d’Art; CCH v. Upper Canada}, paras. 11, 16.
\textsuperscript{129} Subotnik, “Originality,” 1495.
\textsuperscript{130} Ibid., 1494.
actions considered to be the result of time or labour alone. Even where “creativity” has been employed as a label for the intangible effort required to distinguish an original work from a copy, courts have emphasized that the standard is extremely low. British, Canadian and American jurisprudence has firmly established that copyright law is unlike patent law in that novelty, difference from “prior art”, or non-obviousness are not required, and that courts must not subjectively judge the quality or merit of an author's work. In Ladbroke v. William Hill, for example, the Court noted that aesthetic quality or virtue is not required for copyright protection. In University of London Press, it was said that copyright could subsist “irrespective of the question whether the quality or style is high.”

This originality standard, established as being dependent on skill and judgement, put these skills within a framework of valuation of creative work. As the Canadian standard moved away from both “industriousness” and “sweat of the brow”, what ended up being the measurement of originality in compilations? The objectivist assessment of skill and labour, prior to the Feist and Tele-Direct decisions, was the standard of originality following the British common law tradition. Within the civil law, droit d'auteur, tradition, the subjectivist measurement of creativity still forms the basis of originality assessments. In the Tele-Direct decision, the measurement of originality in a compilation depended on skill, judgement or labour. Post-CCH the word “labour” was cut from the assessment as a means to keep a robust public domain by limiting claims of copyright protection based on effort alone.

133 McKeown, Fox, 112-114.
136 Gervais, “Feist goes global,” 942
137 Craig, “Resisting Sweat and Refusing Feist,”
provision designed to maintain the public domain and limit overreaching of copyright is through fair dealing provisions outlined in s.29 of the *Copyright Act*.

**Fair Dealing**

Fair dealing is the most important set of factors in determining whether or not the use of a copyright protected work in creating another work is or is not defensible. Following the opinion of Chief Justice McLachlin in the *Michelin v. C.A.W.* case: “fair dealing does not merely excuse infringement, but rather defines it”;¹³⁺ fair dealing provisions outlined in s.29 of the *Copyright Act* allow for many uses of copyright protected works without the need for the creator or owner to grant permission.¹³⁻ It is important to remember, however, that fair dealing provisions are a defence, not a right, meaning that they only function within the context of a court case. Section 29.21 of the *Copyright Act* also contains exceptions known as User Generated Content (UGC) provisions; exceptions for content that is created using original, copyright protected works and that is non-commercial in nature, such as works of fan fiction.¹⁴⁰ Fair dealing and a broad interpretation of it allow for response and adaptability to changes in technology or changes in judicial and public opinion without the necessity of constant revisions to legislation. Some Canadian legal experts disagree on whether or not the increased fair dealing provisions added to the *Canada Copyright Act* by the *Copyright Modernization Act* in 2012 do, in practice, result in an increased balance between creator and user rights. Attorney and law professor Carys Craig believes that prior to the *CCH* decision, courts following strict fair dealing rules meant that they did not have to argue about any potential merits or public benefits that might arise as a result of

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¹³⁺ Craig, *Relational*, 167; *Michelin v. CAW*.

¹³⁻ *Canada Copyright Act*.

¹⁴⁰ Ibid.
an infringement of a copyright, a concern that becomes less abstract as more people have the means to acquire and manipulate copies of creative works.¹⁴¹

Economic rights in copyright law position creations as objects of commerce with inherent monetary value by exchange. Part of the purpose of these rights is to protect the rights of creators to be financially compensated for their works. However, copyright exceptions also play a vital role in ensuring that creators do not hold a monopoly on works. Fair dealing exceptions include use for: parody, satire, educational, and research uses, and they assist in maintaining the balance between owner and user rights. Knowledge of fair dealing exceptions and their differences from American fair use exceptions is important to position and argue their role in Canadian copyright infringement cases. Differences in interpretation of these provisions occur when discussing the reach copyright should be permitted in protecting economic rights of creators. In addition to differences of intent in maintaining fair dealing standards when compared to American fair use, there are slight variations in wording and interpretation of meanings between Canadian fair dealing and American fair use in determining whether or not infringement of a copyright has occurred in a case:

<table>
<thead>
<tr>
<th>United States 4 Factor Fair Use Test (United States Title 17 s.107)</th>
<th>Canadian 6 Factor Fair Dealing Test (Canada Copyright Act s.29)</th>
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</thead>
<tbody>
<tr>
<td>Purpose and character of the work in question</td>
<td>Purpose of the dealing</td>
</tr>
<tr>
<td>Nature of the copyright protected work</td>
<td>Character of the dealing</td>
</tr>
<tr>
<td>What portion of the original work was used?</td>
<td>Amount of the dealing</td>
</tr>
<tr>
<td>What was the effect on the market of the original work?</td>
<td>Alternatives to the dealing</td>
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</tbody>
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¹⁴¹ Craig, *Relational*, 164-165. For example, see *Michelin v. CAW*. The defendant parodied the Michelin Man corporate logo in a union employee rights protest pamphlet. This use was found to not be adequate as used for criticism, and was therefore now allowable according to fair dealing provisions of the time. This case also demonstrates the potential copyright law holds for the restriction of image-based free expression in Canada.
Supplementary to the four and six factor exception tests, a tradition has been established in American legal decisions that is distinct from interpretations of fair dealing in Canada, but it is influential to such a degree that Canadian judges actively point out when claimants try to make use of it in court. Justice McLachlin in *Théberge v. Galerie d'Art* directly addressed the need to distance Canadian from the American measure of transformation in determining the outcome of copyright infringement cases in saying:

> In my view, with respect, this expansive reading of the s.3(1) of economic rights tilts the balance too far in favour of the copyright holder and insufficiently recognizes the proprietary rights of the appellants in the physical posters which they purchased...The United States conception of a 'recast, transformed, or adapted' derivative work would be introduced into our law without any legislative basis.

**Transformation**

The finding of fair use through a consideration of transformation has been established through American case law and scholarly opinion. There is no directly analogous measurement in Canadian law. The American idea of a transformative property was first explicitly outlined in a paper by Pierre N. Leval that was then used in *Campbell v. Acuff-Rose Music* in 1994, which defended the rights of 2Live crew to parody Roy Orbison's song “Pretty Woman.”

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142 *CCH v. Upper Canada*, paras. 11-16. Detailed analysis of the differences between Canadian fair dealing and American fair use exceptions can be found in D'Agostino. “Healing,” 309. D'Agostino provides an optimistic view of open-ended Canadian policy as the most beneficial for both creators and users. However, the American fair use model is more and more frequently setting the standard for copyright exceptions through the high visibility of its copyright cases and the amount of economic power the country and its intellectual property and entertainment industries hold when cross-border exchanges are being legally negotiated.

143 See *Théberge v. Galerie d'Art*, 370-373 paras. 70-73 for an example of this.

144 Ibid., 354 para. 28(viii), 355 para. 29.

Consideration of the extent to which the new work altered the original with “new expression, meaning or message” formed a large part of the decision, to the point of making the measure of commercialization, a measurement that is part of the four-factor fair use test, less significant in reaching a decision about infringement.\textsuperscript{146} The measurement of the degree of transformation is that it should be “obvious to what an ordinary person would find.”\textsuperscript{147} This measurement was subsequently used in determining the outcome of two high-profile art law cases – first \textit{Blanch v. Koons}\textsuperscript{148} and then more recently \textit{Cariou v. Prince}. \textsuperscript{149}

When looking at fair use exceptions, American court cases rely on the established measures contained within the U.S. \textit{Copyright Act} as well as this measure of transformation. At issue in using this determination is whether or not judges making aesthetic assessments leads, overall, to their ignoring of evidence or evidentiary material in their analyses.\textsuperscript{149} In \textit{Cariou v. Prince}, the difference between the initial 2011 and final second circuit 2013 decisions lies predominantly in the comparative analyses of the judge in determining which of Prince's works were transformed enough to qualify as fair use of Cariou's works. In this decision, each of Prince's thirty one works were directly compared to the Cariou works they were derived from, and twenty five works were considered transformed enough to constitute fair use, while six were determined to be infringements. As a way to further the American copyright intention of promoting “progress of the useful Arts and Sciences in original expression”, the measure of transformation has become a critical means of finding fair use in copyright cases. This measure may also be given more weight than whether or not potentially infringing works were made with

\begin{thebibliography}{9}
\bibitem{147} Leval, “Toward”.
\bibitem{148} Blanch v. Koons.
\bibitem{149} Muñoz Sarmiento and van Haften-Schick, 948.
\end{thebibliography}
a commercial purpose.\footnote{Leval, “Toward”.} Despite this American focus on the measurement of transformation, there is no exact analogue in Canadian law. In fact, judges and scholars actively advised against its inclusion.\footnote{For example, see Théberge v. Galerie d’Art, 372 para. 73 “...United States court decision, even where the factual situations are similar, must be scrutinized very carefully because of some fundamental differences in copyright concepts which have been adopted in the legislation of that country”.
} Instead of transformation, Canadian law examines a combination of originality standards through fair dealing exceptions, and whether or not a substantial part of a copyright protected work has been used in creating a new work.

**Substantial Part**

In determining whether or not the use of a substantial part has occurred in a copyright infringement case, courts look at parts of the copyright protected work that were reproduced in both quantitative and qualitative terms.\footnote{Brathwaite, “Derivative,” 203; Cinar v. Robinson; Harris, Canadian, 139.} The most recent Supreme Court definition of measurement in finding what constitutes a substantial part of a copyright protected work being used in a new work can be found in the 2013 *Cinar v. Robinson* decision.\footnote{Cinar France Animation v. Robinson, [Cinar v. Robinson 2013] 3 RCS 1168, 2013 CSC 73 (CanLII), http://canlii.ca/t/g2fgz, paras. 59, 61.} Substantial part measurement was used in *Rains v. Molea* in terms of the formal qualities used in each of Rains' individual works when compared to seventeen of Molea's paintings, and whether or not Rains' entire series of crumpled paper works were copyrightable as a compilation of artistic works.

Common techniques are not copyrightable, so the plaintiff cannot rely on these similarities to establish infringement. This was upheld by the presiding Justice, who additionally rejected the aesthetic analysis of Rains' expert on the grounds that she had not seen the original artworks, did not assess similarities between works prior to trial, could not assess the qualities of the paintings via projected reproductions of them, and admitted to many differences between the two sets of
works. Molea's expert correctly stated that “there is nothing about Rains' works that is unique in the artistic sense; although the Classical Series images are original works, they are thoroughly conventional.” The measurement of originality in the decision, however, relied not on the close analysis of reproductions of seventeen paintings from each artist that were brought in as evidence but rather on the determination that ideas are not copyrightable and that a finding in favour of Rains would result in limiting the public domain well of ideas from which artists are free to draw.

Rains also sought to defend his crumpled paper paintings produced since 1991, as his Classical Series, a compilation, defined as an artistic work in itself by s.3 of the Canada Copyright Act. For a compilation to be considered adequately original to qualify for copyright protection, like with any artistic work, its arrangement must be the product of skill and judgement. Rains' expert argued that the unifying element of Rains' works could be found in gestalt (essentially a pattern of elements), thus the feeling that one may have when examining an artist's work as a whole that arguably might be exclusive to Rains and his work. Gestalt can be defined as a whole that is greater than the sum of its parts, and its consideration in terms of Rains' assembly of a compilation is similar to the American Feist v. Rural Telephone Co. decision, a landmark case that determined that the manual effort in the organization of creating a telephone directory was not adequate to granting it copyright protection, though creative selection in the creation of a compilation of data would be. In addition to no skill or judgement going into Rains' assembly of his Classical Series, in Rains v. Molea, Justice Chiapetta rejected claims of gestalt as connoisseurship based on Molea's expert’s argument that the concept of

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154 Rains v. Molea, para. 31.
155 Ibid., para. 36.
gestalt “has little currency in contemporary art criticism and theory.”

The Justice determined that extending copyright protection to subjective visual perception of an artistic work would tip the scale heavily in favour of creators, thus harming the public domain. The concept of gestalt aligns more closely with the impetus behind droit d'auteur and moral rights legislation, in that they both seek to defend the personality of the artist that is attached to their work; an alignment that may have resulted in a different decision, or at least an acknowledgement of this alignment, in a country where civil law reigns.

Legally, there is no meaning of “produce” that is distinguished from to “reproduce”; the term reproduction only applies in these cases if a substantial part of an original work has been copied. The test for what constitutes a substantial part varies, but in Canada the 2013 Cinar v. Robinson decision provides an overview to determine whether or not a substantial part of a work has been used to create a potentially infringing work. The issue is whether the features used from the original work constitute a substantial part of the work in question, not whether or not those elements make up a substantial part of the potentially infringing work. Altering copied features or integrating them into a work that is visibly different from the original does not excuse a claim that a substantial part of the work was copied. The considerations are intertwined with the need to protect the skill and judgement put into creating original works, while also leaving elements of a work that are drawn from places like the public domain free for future use.

Canadian copyright law recognizes what is referred to as “metaphorical copying”, which may be

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157 Rains v. Molea, para. 20.
158 Ibid., para. 22.
159 “...our courts have not given an independent meaning to produce as distinguished from reproduce in s. 3(1) of the Act. Nor have the courts done so under the English Act. In fact, in that country, the word produce was thought to be of such little consequence that it was eliminated from the Act by amendment in 1956” C. Brunet “Copyright: The Economic Rights” in G.F. Henderson, ed., Copyright and Confidential Information Law in Canada (Scarborough, ON: Carswell, 1994), 136-137.
interpreted as the transformation to another medium from an existing work. Transformation of a work of visual art from a two to a three dimensional object (or vice versa), or from one medium to a different type of medium could likewise be interpreted as infringement even if the transformation itself was the product of skill and effort, if the economic rights of the creator or owner of the copyright have been affected.\textsuperscript{161}

\textit{Reproduction and Derivatives}

Another distinction between American and Canadian copyright law is the designation and definition of derivative works. Appropriation art is one type of derivative work that makes use of existing works, and can include works of collage, pastiche, re-photography, and various other derivations of existing works, whether those works are copyright-protected or in the public domain. As fixation in any medium is a requirement for protection of a work, production is the initial materialization and reproduction is the subsequent materialization, fixation in a new medium is therefore fundamental to the act of reproduction.\textsuperscript{162} Derivative works that contain elements of copyright protected works are one exception to this protection. They have an unresolved and changing definition, and therefore represent a complex sub-issue in copyright law that must be examined on its own before looking at the ways in which users interact with this type of work. Derivative works are works that are based on existing, copyright protected works. The definition of a derivative work varies according to the current position of the courts on originality, how much of an original work can be used in a derivative work before it is considered an infringement, and the amount of transformation to an original copyright protected work in creating a derivative work. These influences on the definition of derivatives are negotiated through a combination of legislation, legal opinion, and jurisprudence. Derivative

\textsuperscript{161} Théberge v. Galerie d'Art, 2002 SCC 34, 361 para. 47.
\textsuperscript{162} Théberge v. Galerie d'Art, 340.
works can be produced by the owner of the copyright of the underlying work(s) without any restriction, made using work(s) in the public domain, or produced by a second party with or without permission of the owners of the original work(s).\textsuperscript{163}

In \textit{Théberge v. Galerie d’Art}, the meaning of “to reproduce” in terms of copyright infringement is examined when considering the movement of a creative work between different types of media. In this case, the ink from posters was removed from one medium (paper) and applied to another (canvas). The important facet of this decision was the determination of whether or not this transfer resulted in what could be considered as a new artistic work produced “in any material form” as found within s. 3(1) of the Canadian \textit{Copyright Act}. The case attempts to determine what reproduction is in Canadian law when a change in medium occurs but the originals are destroyed in the process. Claude Théberge, a painter, gave rights to publish reproductions of his work on stationery products via a publisher. The galleries named in the case purchased these products from the publisher, then transferred the images to canvas by lifting ink from the purchased reproductions.\textsuperscript{164} Copyright infringement is defined in s. 2 of the \textit{Copyright Act} as “any copy, including any colourable imitation, made or dealt with in contravention of this Act”. \textit{Théberge v. Galerie d’Art} involved elements of both the separate economic and moral rights of the artist as plaintiff, determining that neither production of a new artistic work nor reproduction of a substantial part of the original work occurred in this transfer.\textsuperscript{165} To arrive at this conclusion, Justice McLachlin examined the historical scope of the meaning of reproduction under the \textit{Copyright Act}. Reproductions usually produce additional or new copies, but this is not

\textsuperscript{163} These uses are limited to works that are made publicly available, which does not apply to unpublished works, or works published for private purposes. Works are not copyright protected until published in some form, and unpublished works qualify for copyright protection upon their first publication.

\textsuperscript{164} \textit{Théberge v. Galerie d’Art.}, 336-337.

\textsuperscript{165} Ibid., 338.
relevant in this case because the idea of transfer is interpreted as a “literal, physical, mechanical transfer in which no multiplication takes place.”166 In making his ruling, the Justice considered the broader implications of considering transfer between media of a legally acquired work. He determined that allowing creators to dictate what happened to their work after it was sold to a second party would tilt the balance too far in the favour of copyright owners.167 The definition of reproduction as it pertains to economic rights was therefore not satisfied by transferring a work from one form of display to another; the owners of the posters did not infringe the artist's copyright. Emphasis on the importance of the rights of owners to make changes to works that they own can also be found in Fetherling v. Boughner, in which Judge Southey stated that the purchaser of a magazine should be allowed to cut, frame, and sell elements from it without infringing copyright, or to re-sell the magazine without intervention by the original owner of its copyrights.168

Derivative works that are themselves considered works of art come from a long tradition of art that is made using both knowledge of and copying of existing art works. Original works of art are afforded special protections within the legislation of both Canada and the United States given their unique nature, low production numbers, and the idea that works of art are created with more skill and intellect than other categories of work.169 In addition to the special status afforded to works of art, current exceptions in Canadian copyright law may serve to complicate the separation of the terms “user” and “creator”. Black's Law Dictionary defines a derivative work as: “an artistic work taken from existing works that are copyrightable and must be original

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166 Ibid.
167 Ibid.
169 These considerations in Canada include: an exhibition right, expanded moral rights, and an artist resale right. The exhibition right and moral rights specific to visual artists are provided in Canada Copyright Act s.41,44.
to be a work in its own right.”¹⁷⁰ This standard for originality is important in measuring the
difference between a derivative work that qualifies for its own protection and one that is
considered an infringement. In an international context, what constitutes a derivative work is
outlined in Article 2 Section 3 of the Berne Convention, which provides four types of derivative
works:

- Translations
- Adaptations
- Musical arrangements
- And “other alterations of a literary or artistic work”.¹⁷¹

The last category listed includes any and all uses of works of art, broadly defined, including any
works that could qualify as a derivative, including: appropriation art, collage, pastiche, and
rephotography, among others. Derivatives use some parts of what makes a primary, copyright
protected work original, with the purpose of adding to, or transforming these elements.¹⁷² In legal
terms, derivatives are different from reproductions, which copy both the idea and the expression
of the primary work, making them ineligible for copyright protection. However, the legal line
separating what constitutes an idea as separate from the expression of that idea is under constant
negotiation. The separation is dependent on the idea/expression dichotomy, which defines
copyright as usable to protect the expression of ideas, but not to protect ideas that have not been
expressed or fixed in some form. Works that use artistic practices such as re-photography and
appropriation qualify as non-infringing derivative works only if the works in question are
considered to be original enough to qualify for their own copyright protections.

¹⁷⁰ Black’s Law Dictionary.
¹⁷¹ WIPO, Berne Convention.
¹⁷² Gervais, “Derivative”. 
The American definition of a derivative work can be found in §101 of the United States Copyright Act which defines it as: “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship is a derivative work.” Additionally, both compilations and derivative works are included as eligible for protection under §102 with the caveat that works that use existing material will not have copyright protection afforded to any part of the work that uses the original material unlawfully and does not expand the copyright of the original work in any way.\textsuperscript{173} In both the United States and Canada, original elements added to a derivative work are the only elements of a derivative work that qualify for copyright protection. Under the American and the Berne Convention definitions of derivative works, there is the implication that an amount of skill and effort has gone into the translation or adaptation of a work, so that the resulting final outcome can be seen to be a production rather than a reproduction of an existing work. The examples in Canadian law that might be referred to as derivative works are found in s.3(1)(a) to (e) of the Copyright Act imply that they are reproductions, because their creation results in new copies of the existing work.\textsuperscript{174} In Canadian copyright law, s.3(1)\textsuperscript{175} has been interpreted to mean that creators hold the exclusive right to make derivative works from their existing copyright protected works, unless a derivative use falls under fair dealing provisions.\textsuperscript{176}

\textsuperscript{173} U.S. Copyright Code §102, 103.
\textsuperscript{174} Canada Copyright Act s. 3; Théberge v. Galerie d'Art, 362 para. 49.
\textsuperscript{175} This section gives creators the right “to produce or reproduce the work...in any material form whatsoever”.
\textsuperscript{176} Théberge v. Galerie d'Art, 372 para. 73; Michelin v. CAW.
Derivative works are defined as works that appropriate and original creations and rework the primary author's original intent in a new creation. Derivative works appropriate elements of works that, if put on an abstraction continuum that differentiates ideas (that are by nature unprotected by copyright) from expressions (which are protected), they are often closer to abstract ideas. Thus it is difficult to negotiate protections for them since they flirt with copyright. The challenge posed by derivative works that makes it necessary for courts to first determine whether or not the appropriated elements in a derivative work are ideas or ideas that were fully expressed in the original work before a case can be settled. It is difficult for the courts to identify the precise aspects that separate inexact, infringing copies from those that are not infringements because historically courts have made determinations on a case-by-case basis when a perceived copyright infringement has resulted from the production of derivative works. A decision of infringement is arrived at when the production of the derivative work shows no evidence of skill or judgement in its execution or, on occasion, when substantial parts of the expressed elements of the original work in question are evident in the derivative work.

**Moral Rights**

Laid out in addition to the economic rights afforded by the Canadian Copyright Act, moral rights in Canada are part of the Act but are considered separately from its direct economic protections outlined above. Moral rights protect the personality of the artist and defend their work against destruction or mutilation, potentially giving creators some measure of control as to what may happen to their work after it is sold to a second or third party. These rights make up a more significant part of legislation in the province of Québec, as a combination of economic

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178 Ibid.
179 *Canada Copyright Act* s.28.
and moral rights referred to as *droit d'auteur*, than they do within either federal law or provincial law of other provinces.\(^\text{180}\) Even so, the economic value of art as it pertains directly to a creator is largely dependent on the association of their name with specific works of art. As civil law professor Ysolde Gendreau points out:

> ...the present text of the Copyright Act does little to help the promotion of the fusion of moral rights with the economic prerogatives of the law, since there is no comprehensive definition of copyright that embodies both. s. 3 of the Act, which is drafted as a definition of copyright, only refers to the economic dimension of copyright law. Moral rights are defined and circumscribed in entirely different sections. This absence of cohesion leads to the separate mention of “copyright” and “moral rights” whenever Parliament wants to refer to both aspects of copyright law and to the near duplication of the provisions on remedies for moral right infringements.\(^\text{181}\)

The landmark moral rights case in Canada is *Snow v. Eaton Centre*. Artist Michael Snow defended his work, *Flight Stop* (1979), that is housed in the Eaton Centre in Toronto, against the shopping centre's wishes to alter his work by tying ribbons around the neck of the geese at Christmas.\(^\text{182}\) Section 28.2 of the moral rights protections in the *Copyright Act* outline a measurement similar to the consideration of the use of a substantial part of an original work used to create a derivative. The section outlines that a change in “the physical...structure containing a work...shall not, by that act alone, constitute a distortion, mutilation, or other modification of the work.” It is similar to substantial part measurement, but different in its application.\(^\text{183}\) Both look at qualitative and quantitative measurements of what amount of change to a work is considered to allow for a derivative to not be an infringement of copyright. However, the moral right

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\(^{183}\) Canada, *Copyright Act* s. 28.2(3).
definition of a change to the physical structure of a work indicates that changes in medium are
not adequately distortion or mutilation to the structure of a work, and the author's personality
attached in that work, to constitute an infringement through this measure.

It is important to distinguish the difference between the definition of a medium, which is
protected by s.3(1) and connected to the work via economic rights, and “structure” as defined in
s. 28.2(3) of the Act under moral rights regarding the integrity of a work. The Théberge case
demonstrates one way in which a conflict exists between creators, who are financially dependent
on being personally associated with their work, and the owner of the physical property and the
economic rights that go with it. Following the decision in Snow v. Eaton Centre, artist Michael
Snow maintained some control over his work after selling it through moral rights, not economic
rights, and the same may have applied here. Although the final decision was that the moving of
the ink on the Claude Théberge posters from paper to canvas could not be categorized as
reproduction by the court, had the plaintiff chosen to argue that their moral rights had been
harmed by the association of their name with the resulting creative products, the case may have
been decided differently. However, the majority of copyright cases dealing with artistic works in
Canada and the United States deal with the economic rights of copyright law. These cases will be
examined in the following chapter.

184 Théberge v. Galerie d'Art, 340.
185 Ibid. 350 para. 17-18.
186 Ibid., 357 para. 36.
CHAPTER 2: JUDICIAL REASONING IN CANADIAN COPYRIGHT CASES

It would be a dangerous undertaking for persons trained only in the law to constitute themselves as final judges of the worth of pictorial illustrations. At the one end, some works of genius would be sure to miss apprehension. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be doubted for instance whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.


This chapter outlines the cases in Canada in which judicial decisions in copyright cases rely on visual judgements in assessing whether or not infringement has occurred in order to argue that while there is not currently a Canadian equivalent to the Cariou v. Prince case, the Canadian legal system considers and compares works of art in much the same way as its American counterpart through copyright infringement cases. Although Canadian courts arrive at different final decisions, it is only a matter of time before we see highly public and expensive trials that concern copyright infringement in defining what is or is not able to be called a work of art. This chapter examines how Canadian judges look at aesthetic properties in copyright infringement cases by looking at artistic work comparisons in Canadian copyright cases to determine whether or not there is an equivalent Canadian copyright case or set of cases in which aesthetic properties play a determining role in the final outcome. What is missing from existing scholarship is a detailed and subtle analysis of how judges in Canada function as the determinants of aesthetic taste, and which measurements are relevant to determining infringement in copyright cases. This chapter will first discuss a set of cases to establish the basis of aesthetic judicial theory in Canada, and it will establish whether or not the players in these cases, judges, plaintiffs, and defendants, are looking towards American examples. Since Canadian and American copyright laws maintain significant differences in both their legislation
and interpretation,\textsuperscript{187} it is important to determine whether Canadian judges are exhibiting the behaviours described by Muñoz Sarmiento and van Haaften-Schick in deciding outcomes of copyright infringement cases that involve artistic works.

Turning again to \textit{Cariou v. Prince}, Muñoz Sarmiento and van Haaften-Schick point to a documented tendency of judges to stick to a Formalist analysis of the surface qualities of images;\textsuperscript{188} a view that is shared by several other academics, both from within and outside of legal study.\textsuperscript{189} Visual analysis of artistic works in court cases is based on entrenched ideas of what art is or is not, and what makes good or bad art; a framework that is based on existing case law. In the Second Circuit \textit{Cariou v. Prince} decision from 2013, for example, the process by which Prince creates his (high art) works is discussed, while Cariou's photographs are referenced only in terms of the final result of the images, as (low art) commercial photographs in a coffee table book.\textsuperscript{190} Muñoz Sarmiento and van Haaften-Schick attribute this to two subjective and aesthetically-based judgements made by Judge Barrington Parker of the Second District Court of New York: (1) providing more weight in terms of the effort in transforming a work to the practice of painting, and (2) analyzing one type of artistic work in a different way than another.\textsuperscript{191} This leads to a necessary examination of the treatment of artistic works by judges in cases that require direct comparisons and analysis of artistic works. Both Muñoz Sarmiento and Van Haaften-Schick and Williams establish that certain artistic mediums, like painting and sculpture,

\textsuperscript{188} Muñoz Sarmiento and van Haaften-Schick, 957.
\textsuperscript{190} Muñoz Sarmiento and van Haaften-Schick, 957; \textit{Cariou v. Prince} 2013, 11-12.
\textsuperscript{191} Muñoz Sarmiento and van Haaften-Schick. 948.
are more likely to receive preferential treatment by American and British judges, respectively.\textsuperscript{192} These judicial opinions functions in two national systems that influence and form the basis of Canadian law.

As American cases function as the most primarily visible examples of the treatment of artistic images in both academic and popular discourse on this issue, \textit{Cariou v. Prince} is the current definitive example of a copyright case, specific to works of art, in which judicial aesthetic opinion played a role in the outcome. In its American context, it has set a precedent for the importance of the analysis of transformation between works in copyright cases as the reigning standard for a finding of fair use, and how this standard is measured. There are both those who agree with this means of assessment and those who disagree, but regardless of opinion this case was both highly public and widely influential on shaping both public and legal opinion of how works of art and artists are treated and how fair use is established as a defence in copyright infringement cases; a treatment that is likely to influence opinion outside of American borders, despite variations in copyright law between countries. In order to examine any potential future impacts of this specific case and its comparative analysis of art works on Canadian copyright decisions, it is essential to analyze current Canadian judicial opinion on works of art in order to determine, first, whether or not there is an equivalent case or set of cases which set the standards for this analysis, second, whether or not prior American influence has played a role in Canadian artistic work copyright cases, and third, whether or not judges are demonstrating the same biases towards specific works of art as identified by Muñoz Sarmiento and van Haaften-Schick, Pila, and Williams. As outlined in the preceding chapter, in the United States the

\textsuperscript{192} For some examples see \textit{Cariou v. Prince} [\textit{Cariou v. Prince} 2011], 784 F. Supp. 2D 337, 351 (S.D.N.Y. 2011); \textit{Cariou v. Prince} 2013 and \textit{Blanch v. Koons}. Opinions from both American and British court cases inform Canadian law.
determination of whether or not a new work has adequately “transformed” an existing one has become a dominating concern in copyright cases and is measured by its obviousness to a “reasonable observer” through assessment of visual similarities between works. In a Canadian context, direct aesthetic comparisons between works in copyright infringement cases are used when assessing fair dealing based on the measurement of originality in a work and whether or not a substantial part of a copyright protected work has been used in the creation of a new work that potentially infringes its owner’s copyright.

**Defining an Artistic Work**

Artistic works are those defined under section 2 of the *Canada Copyright Act* in a list that is not intended to be exhaustive, but that specifically accounts for: paintings, drawings, sculptures, engravings, maps, charts, photographs, architectural works, works of artistic craftsmanship and compilations of artistic works.\(^{193}\) For works that are not specifically accounted for in the legislation, in the 1968 *Cuisenaire v. South West Imports*, the court insisted that a work: “to some degree at least, be a work that is intended to have an appeal to the aesthetic senses not just an incidental appeal...but as an important or one of the important objects for which the work is brought into being.”\(^{194}\) The meaning of “artistic work” as outlined here has only been defined once to date in Canadian case law through Justice Reed in *D.R.G. Inc. v. Datafile Ltd.* In this case, colour-coded file folder labels were registered for copyright protection

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\(^{193}\) The definition of “sculptures” also includes casts and molds, “photographs” includes negatives, plates, and anything that could be considered a photographic work, and the definition of “engravings” also specifies the inclusion of lithographs and non-photographic works (*Canada Copyright Act* s.2). For photographs taken before November 7\(^{th}\), 2012, the author of a photograph is the person or corporate entity that owns the initial negatives or other plates at the time it was made. If there weren’t any negatives made, the author is the owner of the individual photograph at the time of its taking. Harris notes that if other fixation of photographs, such as digital, might also be considered in the same way as a negative or plate. Before January 1, 1994, only photographs that had an accompanying negative were protected by copyright (Harris, *Canadian*, 88, 106).

as artistic works. The Justice in the case, Reed J. defined the open-ended nature of “artistic works” as follows:

In my view the phrase 'artistic work' is used merely as a generic description of the type of works which follow. It is used as a general description of works which find expression in a visual medium as opposed to works of literary, musical, or dramatic expression.\textsuperscript{195}

The \textit{Canada Copyright Act} does not provide an explicit definition for each medium on the list. Therefore whether or not something is, for example, a painting is a matter of fact that will be determined case by case.\textsuperscript{196} In a British example of defining an artistic work that appears in Canadian legal reference, Lord Justice Lawton determined that makeup, even applied in a distinctive pattern, did not constitute a painting. He stated:

It seemed to me....(and I want to be restrained in my language)....that it was fantastic to suggest that makeup on anyone's face could possibly be a painting... a painting must be on a surface of some kind. The surface upon which the startling makeup was put on Mr. Goddard's face and, if there were a painting, it must be the marks plus Mr. Goddard's face. If the marks are taken off the face there cannot be a painting. A painting is not an idea: it is an object: and paint without a surface is not a painting. Makeup, as such, however idiosyncratic it may be as an idea, cannot possibly be a painting.\textsuperscript{197}

When referencing this case, McKeown outlines some things that could be considered as drawings following allowances made in copyright decisions: plans and sketches for machinery or buildings, trade marks of distinctive design or logos, advertising matter, tombstones, drawings of comic strip characters, knitting patterns, engraving plates and prints.\textsuperscript{198} This ever-expanding list of protected types of work runs counter to suggestions made to “restore beauty to copyright” by

\textsuperscript{196} McKeown, \textit{Fox}, s.10:11(a).
\textsuperscript{198} McKeown, \textit{Fox}, s.10:11(b)-(d).
limiting the inclusion of incidentally expressive works, such as advertising. Once works are determined to fall under the purview of the “artistic works” section of the *Canada Copyright Act*, the next decision to be made in cases is whether copyright subsists in each work that is under examination. Determining differences in copyright protection for works that are inherently expressive and works that are incidentally expressive requires examination of the intentions of the creator in making the work(s) in question, as well as the use value determined by the target audience or market of the work; being the primary factor of judgement over comparisons between works in determining infringement. As a concept, infringement is simple as McKeown outlines: “Resemblance between a painting, drawing, or photograph without evidence of copying directly or indirectly is not infringement.” For copyright infringement to be determined, the potentially infringing works must satisfy the definition of infringement found under s. 2 of the *Copyright Act*. Infringing in relation to a work is defined as “any copy, including any colourable imitation, made or dealt with in contravention of this Act”.

**Originality**

In the 2012-2013 *Rains v. Molea* case, seventeen oil paintings by each artist, all of crumpled pieces of paper, were examined and all were found to be adequately original under their own merits to qualify for copyright protection. Each of Rains' were seen by the presiding Justice, Justice Chiapetta, to satisfy the originality requirement for copyright protection. The Justice took into account the artist's skill and judgement in determining as suitable vantage point from which to paint the subject as well as the two to three weeks of effort it took to create each painting. Molea's works were also determined to be adequately original by their own merits of

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skill and judgement in creation. The legislated stipulation that works need not be novel or unique to qualify for protection was enough to determine originality. To determine whether or not the Malcolm Rains' copyright had been infringed, the following issues were taken into account:

1. Whether copyright subsists in each image in Rains' series of works, referred to as the *Classical Series*, and/or the series as a compilation of artistic and if that copyright does subsist, whether or not Molea had created works that infringed Rains' copyright;
2. Whether or not Molea had access to Rains' work;
3. Whether or not Rains' work was the source of Molea's works;
4. Whether or not limitations apply to Rains' claims of infringements;
5. If infringement was found, what the remedies for it would be.²⁰¹

Legally, s.5(1) of the *Copyright Act* gives copyright protection to every original artistic work.²⁰²

Common techniques are not copyrightable, so the plaintiff cannot rely on these similarities to establish infringement. The judge rejected Rains' expert witness's opinion on similarities between works because the expert had not seen the original works, did not assess similarities between works before trial, could not assess the qualities of the paintings via projected reproductions of them, and admitted to many differences between the two sets of works.²⁰³ Molea's expert, on the other hand, compared all images pre-trial, concluding “there is nothing about Rains' works that is unique in the artistic sense; although the *Classical Series* images are original works, they are thoroughly conventional.” Rains' paintings are “commonplace and include tropes used frequently by painters for centuries,” including his use of strong light and shadow, and frequent incorporation of Mediterranean tiles. Justice Chiapetta noted the necessary reality of creating works of visual art is using

²⁰¹ *Rains v. Molea*, para.6.
²⁰² Defined as paintings, drawings, maps, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works and compilations of artistic works, *Canada Copyright Act* s.2.
²⁰³ *Rains v. Molea*, para.31.
common tropes, but acknowledged that the ideas within those tropes are not protectable. This goes against the merger doctrine, which states: “if an idea can be expressed in only one or in a limited number of ways, then copyright of that expression will be refused for it would give the originator of the idea a virtual monopoly on that idea. In such a case, it said the expression merges with the idea and is thus not copyrightable.” The merger doctrine does not apply to the facts of this case because in addition to determining the subsistence of copyright in each individual creative work in his Classic Series, Rains also claimed that this series should also be protected as a compilation of artistic works. To answer the question of whether or not infringement of Rains' copyright had occurred, direct comparisons between works, with what Rains viewed as the copied elements highlighted, were used. Rains insisted that overall, Molea's works are colourable imitations of his own, leading to confusion between the two artists, who both sold their works through commercial galleries in Yorkville, Toronto. The justifications given by Rains in directly comparing seventeen of his own works to seventeen of Molea's which he considered to be infringements included:

- That the paintings both contained crushed paper forms against dark backgrounds (i, ii, iv, vi, viii, x, xi, xiv, xvii) sometimes with the inclusion of a reference to the surface the paper was sitting on (iii, ix) or to the lack of a representation of a surface (iv, x, xvi, xvii);

- The specific shape into which the paper in the painting was crumpled or crushed, variously into a “pointed paper form” (i), “wing-shaped” (iv), “a U-shaped form” (v), that “the shapes are similar” (vi), and that “they are both complex shapes (xiv);

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204 Ibid., para.13.
206 In the proceedings, however, only reproductions of the works in question were analyzed. This created issues when Rains's expert witness failed to examine the original paintings and admitted to being unable to make aesthetic comparisons based on the photographic reproductions. See Rains v. Molea, para. 31.
• Where the paper form was crumpled, or what direction in the painting it curved towards (i, iii, v, x, xi, xii, x, xvi);

• The directionality of the light source and shadow in the paintings (vii, x, xv, xvii);

• That two paintings share “radiations indicative of a subconscious resonance” (vii);

• And that two paintings share earth-tone backgrounds (v).\textsuperscript{208}

Rains also submitted eight of artist Daniel Adel's works for comparison with his own, on the basis that they, like Molea's works, infringe on the gestalt of his \textit{Classical Series} of works.\textsuperscript{209} Rains similarly compared the collective works to his own based on their similarly dark backgrounds, use of Greek tiles, and duplication of shapes taken by the crumpled pieces of paper.\textsuperscript{210} Molea's expert made use of these examples to further illustrate the point that Rains' subjects and means of representing them were widespread and commonplace.\textsuperscript{211} Rains also mentioned that, through an informal claim of infringement, he had successfully prevented another artist, Brock Irwin, from painting similar, realistic oil paintings of crumpled pieces of paper.\textsuperscript{212} This is only a small example of a “chilling effect”, Rains used the threat of legal action and took advantage of the lack of pertinent information about the practicalities of copyright case law to censor another artist.

\textbf{Substantial Part}

Following assessments of originality, another measurement used when comparing works is whether or not substantial part of what makes a work original has been used in the potentially

\textsuperscript{208} Rains v. Molea, para. 32.
\textsuperscript{209} Ibid., para. 36.
\textsuperscript{210} Ibid.
\textsuperscript{211} Rains v. Molea, para. 36.
\textsuperscript{212} Ibid., para. 37.
infringing work(s). As outlined by McKeown: “[u]nless a substantial part of a work is reproduced, there can be no cause of action for infringement.”213 A recent landmark case concerning the measurement of what constitutes a substantial part of a copyright protected work being used in a new work is Cinar v. Robinson, 2013 SCC 73, and its 2011 decision is quoted in Rains v. Molea in terms of the formal qualities in each of Rains' individual works when compared to Molea's paintings. According to Justice McLachlin in Cinar v. Robinson 2013:

“This question [what constitutes a substantial part] should be answered from the perspective of a person whose sense and knowledge allow him/her to fully assess all relevant aspects – patent and latent – of the works at issue.”214 The measurement of whether or not a substantial part of a copyright protected work has been used in the creation of a new work is not an objective question centered on quantity, but also a question of quality and on that must take into account what the original parts of a work contribute to that work's artistic merit or value. In determining infringement, works are assessed first by their similarities. Prior to the 2013 resolution of Cinar v. Robinson, Canadian courts still followed the examples set by British cases Bauman v. Fussell in 1978, and Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. in 1964. According to Bauman v. Fussell:

The essence of an artistic work is that which is visually significant. The test to be applied is purely visual, both works being compared oculis subjecta fidelibus215. Whether the feeling or artistic character of the plaintiff's work has been taken may be relevant to the question of whether a substantial portion of the plaintiff's work has been copied or reproduced.216

And according to Lord Evershed in Ladbroke v. William Hill:

213 McKeown, Fox, 21:6(c).
214 Cinar v. Robinson 2013, para.51.
215 Translated as “Things that enter by the ear affect the mind less, than those which are presented to the faithful eyes” in Alexander Adam, A Compendious Dictionary of the Latin Tongue, (Edinburgh: The British Library, 1814), 675.
...what amounts in any case to substantial reproduction...cannot be defined in precise terms but must be a matter of fact and degree. It will, therefore, depend not merely on the physical amount of the reproduction but on the substantial significance of that which is taken.\textsuperscript{217}

These types of substantial part interpretation are what lead to Rains's attempt to define his \textit{Classical Series} based on an overall feeling or gestalt that is common to all his works. The first claim Rains made was to determine the subsistence of copyright in each of his works, but Rains also submitted the claim that the entirety of his \textit{Classical Series} formed a compilation that itself is qualified for copyright protection. On this issue the judge ruled that there was no skill and judgement in the arrangement of the series.\textsuperscript{218} Justice Chiapetta felt that a common subject matter in a body of work was not sufficient to constitute an artistic \textit{oeuvre}, dismissing the claim in stating: “[t]here is no originality in the label itself.”\textsuperscript{219} The claims of \textit{gestalt} were rejected following expert opinion that \textit{gestalt} has “little currency in contemporary art criticism and theory”, and that the concept of \textit{gestalt} as something in the work that makes the work identifiable as the product of a specific author is “increasingly untenable in the contemporary art world.”\textsuperscript{220} This argument differs from the analysis of transformation used by Judge Parker in \textit{Cariou v. Prince}, who maintained that Prince’s twenty five non-infringing works were different in expressive intent from Cariou’s photographs. The decision in \textit{Rains v. Molea}, referring to the measurement of skill and judgement as defined in \textit{CCH v. Upper Canada},\textsuperscript{221} relied on an overarching concern with not granting creators a monopoly over an idea. American, British and Canadian law all have established jurisprudence that shows measures of novelty or uniqueness

\textsuperscript{218} \textit{Rains v. Molea}, para. 17.
\textsuperscript{219} Ibid., para. 19.
\textsuperscript{220} Ibid., para. 20.
\textsuperscript{221} \textit{CCH v. Upper Canada}, paras.11, 16.
are not requirements, and that judges must not make subjective judgements as to artistic merit of a creator’s work.\textsuperscript{222}

A comparative analysis between works under claim of copyright infringement is relevant to the analysis of transformation in the United States, and to the measurement of whether or not a substantial part of a protected work was used to create a new work in Canada. Both analyses make use of perceptions of visual aesthetics. This makes artistic merit an implicit part of court cases in which works of visual art are being examined. In \textit{Cariou v. Prince}, the differences between the 2011 initial ruling and the final Second District decision in 2013 lie in the aesthetic analysis that was used to determine which of Prince's works in the \textit{Canal Zone} series transformed Patrick Cariou's photographs enough to qualify as fair use. In this decision, each of Prince's thirty one works were directly compared to the Cariou works they were derived from. Transformation played a significant part in determining – by means of aesthetic judgement – whether or not a measure of transformation in “context, meaning, and intent” had taken place from Cariou's to Prince's works. The determination as to whether or not a new work has adequately “transformed” an existing one is measured by its obviousness to a “reasonable observer” through assessment of visual similarities.\textsuperscript{223} According to Second Circuit Judge Barrington Parker, twenty five of the thirty one works by Prince demonstrated an entirely new aesthetic using Cariou's photographs. The Judge stated: “Where Cariou's serene and deliberately composed portraits and photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative.”\textsuperscript{224} The final decision arrived at in this case, however, was not supported by all.

\textsuperscript{222} For an American example, refer to \textit{Bleistein v. Donaldson Lithographic Company}, 188 U.S. 239 (1903) p. 251. For a Canadian example, refer to \textit{CCH v. Upper Canada}, para. 56; McKeown, \textit{Fox}, 112 – 114.

\textsuperscript{223} Muñoz Sarmiento and van Haaften-Schick, 947.

\textsuperscript{224} \textit{Cariou v. Prince} 2013, 12 para. 22.
dissenting opinion to the final judgement opposed the use of aesthetic judgements in copyright infringement cases. The dissenter, Judge Wallace of the Second District Court of New York, does not believe that a simple visual side-by-side analysis is an adequate means of measure because it calls for judges to “employ [their] own artistic judgement[s].” In this he is mirroring Justice O.W. Holmes's 1903 declaration, in *Bleistein v. Donaldson*, that judges should not be the final determinants of artistic taste. Canadian courts accomplish this by following the established conventions for attempting to find balance between the rights of users and those of creators, so what does this mean when ensuring that creators of original works are compensated for their efforts?

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225 Muñoz Sarmiento and van Haaften-Schick, 948; *Cariou v. Prince* 2013, 714 F. 3d at 712.
226 *Bleistein v. Donaldson Lithographic Co.*
CHAPTER 3: COPYRIGHT AND INTENTIONALITY

For the intellectual property system to survive, it must gain and keep public respect. To be respected, it must be known. To be known, it must be understood. To be understood, it must be coherent and persuasive.


Arguments against judges making aesthetic decisions suggest moving towards the consideration of the purpose of copyright law to determine whether or not the use of a copyright protected work is or is not infringement, including suggesting that judges should seek to equally consider the rights of creators and the rights of users of creative works. Since the 2004 decision in *CCH v. Upper Canada*, Canada has been self-identifying as a country with a vested interest in copyright as a tool to aid both authors/creators and those who make use of cultural products in every foreseeable capacity, independently of the chosen medium of expression. Copyright protection of works grants the sole right to the owner of the copyright the rights of the author/creator to their own work, whatever their intention in creating it. Copyright partially exists as an economic incentive for creators to continue creating new, original expressions for which they will be compensated. Additional intentionality in the interpretation of copyright law in cases can be found in the officially stated purpose of Canadian copyright law: to strive to maintain a balance between the right of the original creator and the exceptions allowed to the user of their creation. This leads to a standard of interpretation being applied in the courts that considers the impact a judgement could potentially have on the general public as “users” of copyright protected works. The intent of copyright is not to reward artistic merit, but to reward

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228 Government of Canada, “Balanced”.
229 For more on economic incentives, compensation for creative work, and copyright law, see the next chapter.
230 *CCH v. Upper Canada*; Geist, “Pentalogy”.
creative effort, as measured in Canada by a standard of originality.\textsuperscript{231} The underlying intention in determining the outcome of copyright infringement cases is, therefore, not only to protect the economic rights of creators, but to ensure that these rights are not over-extended in such a way that they limit the rights of users.

In the case of \textit{Théberge v. Gallerie d'Art} the importance of copyright in promoting the public interest was reinforced when the judge stated: “dissemination of artistic works is central to developing a robustly cultured and intellectual public domain.”\textsuperscript{232} This judgement was later cited in \textit{Rains v. Molea}, wherein Justice Chiapetta arrived at the decision most likely to support the Parliamentary initiative for copyright to aid in maintaining balance between the rights of creators and those of users.\textsuperscript{233} Rains's paintings of still lives in oil of crumpled white pieces of paper against a dark background, as part of a series of similar images painted over the course of twenty two years did not constitute in themselves adequately original copyrightable expression for a single person to claim copyright protection in the subject matter depicted. Rains's claim that Lucian Bogdan Molea had infringed his works by painting his own still life paintings of crumpled pieces of paper was dismissed as being overly restrictive to ideas that are common to the visual arts. The Justice in this case believed that the creator/user balance was additionally maintained by dismissing Rains' claims of copyright infringement to his \textit{Classical Series} of works as a collection. To demonstrate that Molea had infringed the copyright of Rains in painting pictures of crumpled pieces of paper, there had to be evidence that Molea had access to the works he allegedly copied. Justice Chiapetta noted that in this case it was clear that Molea had previously seen a number of canvasses in Rains' series, however, this general access to a

\textsuperscript{231} Brathwaite, “Derivative,” 200; \textit{Canada Copyright Act}; McKeown, \textit{Fox}.
series that Rains had painted over a span of twenty years was insufficient to demonstrate that Molea had infringed his copyrights. It became necessary for Rains to demonstrate Molea's access to the particular works being examined, and the Justice found that Molea provided a logical explanation for the development over time of his own paintings of crumpled paper. In Justice Chiapetta's view, extending copyright protections to visual perceptions of artistic works would tip the scale too heavily in favour of creators, potentially harming the availability of public domain expressions of ideas from which to draw. The application of copyright to works of visual art in this case required the separation of concept and techniques from individually considered works. If infringement had been found, a precedent would have been set in protecting broadly defined ideas, like the representation of crumpled paper, rather than the specific expression of that idea, potentially limiting the rights of artists to represent this idea in any format. Since Rains v. Molea contained aesthetic judgements referring to paintings, a medium described in several sources as receiving privileged treatment over other artistic mediums in court cases, the remainder of this analysis will look at judgements made regarding some other types of artistic works as defined by the Copyright Act – photographs and maps.

Muñoz Sarmiento and van Haaften-Schick point to a trend in American copyright cases of privileging certain artistic mediums over others. For example, in Cariou v. Prince, more analysis is given to Prince’s act of painting as a creative skill than it is to Cariou's photography. Artistic works as defined by the Canada Copyright Act include a variety of works: paintings, photographs, drawings, sculptures, architectural works, works of artistic craftsmanship and compilations of artistic works. This list is not meant to be interpreted hierarchically, nor is it

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234 Rains v. Molea, para. 22.
235 For additional examples, see Williams, “Disparity” and Tushnet, “Worth”.
meant to be restrictive.\(^\text{236}\) Changing the medium of artistic expression can be interpreted as original enough to qualify for fair dealing provisions if there is a non-mechanical and non-trivial use of skill and judgment that originates from the creator of a derivative work. If that creator does, however, reproduce a substantial part of an existing copyright protected work, their actions could also be considered to be infringing. It is an ongoing question, determined on a case-by-case basis, as to whether or not derivative works meet the necessary qualifications to be considered as copyright protected works.\(^\text{237}\) Interestingly, the majority of available Canadian copyright cases concerning artistic works in which a change of medium occurs deal with photographic works. Photography is associated with the idea of the truth in the nature of appearance, and it involves the intervention of technical processes in creation, this leads to its potential misunderstanding as an art form. For example, a photograph of a two-dimensional work, such as a painting, could be interpreted as an exact copy of that painting since photographs are mimetic and therefore arguably little “creativity”, according to the standard used in *Bridgeman I* and *Bridgeman II*, has been used in its creation.\(^\text{238}\) However, a photograph is also an artistic work in its own right. A photograph of another artistic work is a derivative work, whether or not the derivative is an infringement of copyright can only be determined by examining the degree of effort and skill used in its creation.\(^\text{239}\) Photographing a painting might require skill and

\(^{236}\) McKeown, Fox.

\(^{237}\) Brathwaite, “Derivative” and Craig, Relational.


\(^{239}\) Brathwaite, “Derivative,” 198.
judgement in selection of lighting, positioning and editing, but would probably fail the test for originality. In the case of a photograph of a sculpture such as a statue, because the medium has significantly changed, it is less likely that the photograph will be read as a copy of the original expression in the statue, because the medium had significantly changed. However, cases do not always follow these expected trajectories, as will be discussed in the next section.

**Case Studies: Photographs**

As noted earlier, photography is a reproductive technology whose legal status has long been in flux. The creation of photographs posed a challenge to copyright framed as the products of machines that created re-productions of the world as it objectively existed. Even today, photographs are “taken” rather than “made”. Although it is by no means an emerging technology, copyright decisions regarding photographic works still fail to acknowledge the ways in which a photographer has creative agency over their work and can manipulate the image at points other than during the photographing. \(^{240}\) This makes the legal view of the photographer's role in photography, as a selector, rather than a creator, immediately different from the assumptions inherent to the assessment of skill and work that go into creating traditional types of artistic works like painting or sculpture. These legal categorizations, whether encoded into law or implied via jurisprudence, legitimize public conceptions of the nature of photography and its various roles as objective re-presentation of reality, form of commercial art, or as a category of fine art.

Perception of the nature of photography as a derivative work has changed greatly within the legal system over the past one hundred and fifty years. As Canadian law derives much from

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the British legal system, important United Kingdom decisions regarding photography provide a good point of departure beginning in 1869 with *Graves v. Ashford*, which concerned photographs of engravings. The presiding Justice, Justice Blackburn stated: “All photos are copies of some object, such as a painting or a statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement.” According to this interpretation, every photograph is considered derivative. Further clarifying the status of photographs of works of art specifically, Justice Blackburn wrote: “[b]ut only when that object is itself a ‘work’ will the photo be a derivative work.” Therefore the *Graves* case established that all photographs are derived from something existing, so photographs of works of art are no different and should also qualify for copyright protection.

The development of American law on copyright of photographs was largely based on establishing at what point the creation of an image, mediated by the use of a machine in the form of a camera, gained acceptance as a work of art. In the 1874 *Udderzook v. Commonwealth* decision, the judge reinforced the view that even though a photograph's creation had an aspect of human intervention involved, it was so based in science that photographs could be guaranteed as documents, and used as evidence in court cases. Ten years later, in *Burrow-Giles Lithographic Co. v. Sarony* (1884) 111 U.S. 53, the work of photographer Napoleon Sarony, a portrait of Oscar Wilde, was considered to be a unique photograph, and the work of a human creator, not that of a machine. To quote Justice Miller: “[t]he plaintiff made [the photo] entirely from his own mental conception...From the disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit.” The work was considered as something separate

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242 Ibid. 31 at 35.
244 *Burrow-Giles Lithographic Co. v. Sarony* (1884) 111 U.S. 53, paras. 54-55.
from the “ordinary production” of a photograph: in which a machine is what performs the function of documenting whatever is in the photograph, with the human intervention in the process left unaccounted for. This decision reinforced the view of photographer as an artist under American copyright law under specific conditions of their work in setting up a specific moment to then be captured by the camera. Despite this decision and the increase of consideration of photographs as artistic works, more recent cases were not always in agreement as to the legal status of photographs of existing works of art.

The Bridgeman Art Library v. Corel Corporation cases were a set of decisions that involved changes in media, photography, digital images and crossing of international lines. The cases were brought to the Second District Court of New York at the end of the twentieth century, and were tried on terms of British law, but Judge Kaplan made mention of the fact that the same decision would have been made under American law. At issue was whether exact colour transparencies of public domain paintings could hold their own copyright protections. The Court decided that no creative choices went into the creation of the transparencies and did not meet the modicum of creativity standard for originality. The cases determined overall that changing medium alone does not constitute originality, much like in the case of Rogers v. Koons. In his article “Size Matters (or Should) in Copyright Law” Justin Hughes argues that small works such as these transparencies, which he refers to as “microworks”, are denied copyright protection because even if they are original, they are never fully considered as “works”. This is not based on the fact that the hand and skill of the photographer is not immediately apparent in looking at them, but instead due to their small size. The ability of a court to assess the creativity and skill

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245 Bridgeman I and Bridgeman II.

of a creative producer through immediately apparent visual qualities in artistic works often plays a role in decisions wherein traditional forms of fine art are compared with those less familiar.

The 1978 decision in *Bauman v Fusell* demonstrated the importance of knowledge of painting as an art over photography in determining that a painting of a photograph was not an infringement of the photograph’s copyright. The photographer, Bauman, took a photograph of two roosters in a cockfight from which the defendant Fusell made a painting, reproducing the position of the birds from the photo. The positioning in the photograph was found to not be original enough to gain its own copyright protection, although Justice Romer believed that this positioning was central to the photograph and thus should, in theory, grant the photograph protection. He stated: “[w]hile it may be relevant to the question of copyright in a photograph whether the photographer personally arranged the subject matter, that factor will be important in determining the nature of protection granted to the photograph and whether a subsequent work infringes its copyright.”

Photographs occupy a space between art, documentation, and commercial product. At different points of time, it has been debated whether or not photographs can satisfactorily be classified as works of art in their own right. In terms of copyright law, photographs must meet the usual standards of originality and creative effort in order to qualify for protection. Nimmer and Nimmer write of one situation in which a photograph should fail the originality requirements for copyright protection: “[w]here a photograph of a photograph or other printed matter is made that amounts to nothing more than slavish copying.” This view is challenged by many existing

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249 Melville B. Nimmer, *Nimmer on Copyright* Vol. 1 §2.08[c][2] 1963, note 31. This is often quoted in copyright cases – for examples see *Bridgeman I* and *Bridgeman II* and *Meshworks v. Toyota*. 
artist's practices that have been integrated into the art world vocabulary for many years: appropriation, collage, pastiche and mixed media.

The United Kingdom was early in legally recognizing photographs as works of art in the late 1800s. In its 1886 and 1908 iterations, the international Berne Convention listed literary and artistic works as separate from photographs.\textsuperscript{250} It was not until 1948 that “photographic works” were recognized in the Convention as a category of protected artistic work, but the World Intellectual Property Organization now suggests that: “as to photographs, the doubts about whether they really merit being treated as works of art were stilled” by an adoption of a minimum number of years they must be afforded copyright protection.\textsuperscript{251} The question of the nature of photographs as artistic works has been poked at through various court cases, many of which vacillate between viewing photographs as a document or viewing photographs as works of art.\textsuperscript{252} When considering photographs as documents, a long history of scientific, ethnological and anthropological history can be called forth.\textsuperscript{253} Photographs were, and are often still, viewed as objective captures of a situation – a use that has been, and remains, common in news reports, documentaries and in providing evidence in court cases.

In Canada, a change from one artistic medium to another may be considered an infringement of copyright in certain cases. In \textit{Boire v. Lefebvre}, gallery owner Louise Lefebvre photographed one of artist Michel Boire’s sculptures for use in promotional materials for her gallery in Berthierville, Québec. The change in medium from sculpture to photograph was

\textsuperscript{250} WIPO, \textit{Berne Convention} Articles 2,3.
\textsuperscript{251} WIPO, \textit{Guide to Berne Convention}, 49 art. 7 para. 4.
deemed an infringement through violation of the rights of the artist - he had not been asked for permission to use his work, and the use of the photograph was deemed to be commercial in nature.254 There was no discussion in the case regarding whether or not Lefebvre's photograph of the sculpture qualified for its own copyright protection. Interestingly, the photograph was published by the gallery to promote a show that included the artist’s work,255 although this use was viewed by the court as being overall more beneficial to the gallery owner than to the artist.256

Maps

According to section two of the Canada Copyright Act, maps are also considered copyright protected artistic works. In Weetman v. Baldwin the claimant used a combination of aerial photography and topographical photography to make a recreational map by digitally combining the photographs with data sets obtained from the Government of British Columbia.257 He purposefully mislabeled a lake so that any copyright infringement would be immediately obvious. After his map was made available for purchase, he created another map on which he purposely mislabelled some roads and trails. The judge in the case held that the differences in the claimant's orthophoto map, a map made by assembling orthophotographs (images that are made from aerial photographs by eliminating distortions of angles and scales to give a result corresponding to a planimetric map258), which were the natural result of his selection of sources, interpretation of those sources and skill and judgment in depicting that information were capable of copyright protection.259 The originality and creativity that was copyright protected were the

254 Boire v. Lefebvre, paras. 40-52.
255 Ibid., para 16.
256 Ibid., para 34.
259 Applying the decision from Mason v. Montgomery Data Inc. 967 F 2d 135 (5th Cir. 1992).
claimant's combination of the aerial photographs with the government data sets using specially created software to achieve a standard of accuracy and detail that was not found in existing maps of the same area. The judge found on the evidence that the defendant had infringed the claimant's copyright by copying at least six features from the claimant's map, including the name of the mislabeled lake.260

A similar case to Weetman v. Baldwin, R v. Allen, also involved maps. In this instance, the judge examined whether or not maps made for promotional purposes by tracing from an existing book of maps infringed on the rights of the creator of the maps within the book.261 The defendant traced maps from the plaintiff's book, done to the degree of identical pagination, size, and scale, a process involving approximately two-thousand five hundred hours of work.262 In determining originality in the maps, the judge took a position between the extremes of “sweat of the brow” and “creativity” requirements, choosing to measure originality in the maps based on them being the products of skill and judgement. Thus he took account of and analyzed the processes used in creating the maps. The plaintiff produced his map book by tracing a wall map and scanning tracings done on clear plastic - a common method according to the judge - but chose to uniquely bind his book, and add details such as zoning, parks, buildings and subdivisions by hand, meeting the standard of skill and labour outlined by the judge.263 The defendant's work, on the other hand, was found to have minor cosmetic changes made to the maps in making reproductions of them, including the removal of certain elements and changing of colour coding. These changes were determined by the judge to be for the sake of style rather than originality, and done for the purpose of cost reduction only, which involved no intellectual

260 Weetman v. Baldwin.
261 R. v. Allen, 2006 ABPC 115 (CanLII) http://www.canlii.ca/t/1n27h.
262 Ibid., paras.8-9.
263 Ibid., paras.17-21.
effort, making them infringements.\textsuperscript{264} Moreover, the judge believed that the defendant's copying was done with knowledge that he was likely infringing copyrights.\textsuperscript{265}

As in \textit{Cariou v. Prince}, in some Canadian cases there is a tendency for aesthetic assessment to enter into comparing potentially infringing works to works they are alleged to have derived from, whether they be brought in by the plaintiff, as was the case in \textit{Rains v. Molea}, or by the jurisprudence from an array of existing examples. The concern with judges making artistic judgements is that these measures would lead to ignoring of the actual works submitted as evidence in conducting their analysis.\textsuperscript{266} Using comparative aesthetic analysis has had a significant impact on the measurement of what constitutes a substantial part of an original work, as seen through \textit{Cinar v. Robinson}.\textsuperscript{267} This case’s use in \textit{Rains v. Molea}, however, did not give additional weight to the aesthetic analysis submitted by the plaintiff to compare any of the crumpled paper works in question.

One main intention of copyright law is the guarantee of compensation for creative work. Much of the basic premise of copyright is the protection of the potential for a creator to be rewarded for their work by granting them a temporary monopoly on its use.\textsuperscript{268} A 2013 Parliament of Canada House of Commons Committee on the Intellectual Property Regime in Canada clarifies the economic intention behind Canadian copyright law: “[i]t is a market-place framework that aims to spur innovation and creativity, and this is done largely by granting exclusive economic rights. It is also about supporting the dissemination of knowledge.”\textsuperscript{269}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{264} Ibid., paras.22-30.
\item \textsuperscript{265} Ibid., paras.31-46.
\item \textsuperscript{266} Muñoz Sarmiento and van Haaften-Schick, 948; \textit{Bleistein v. Donaldson}.
\item \textsuperscript{267} \textit{Cinar v. Robinson}.
\item \textsuperscript{268} Diane Leenheer Zimmerman, “Copyrights as Incentives: Did We Just Imagine That?” \textit{Theoretical Inquiries Law} 12, no.29 (2011).
\end{enumerate}
\end{footnotesize}
protection has been attributed to both rewarding creators as well as providing incentive for new creations to be made. Arguments for increased economic incentives for creators can sometimes be at odds with groups that are trying to ensure there is no overreaching of copyright law that would potentially limit freedom of expression. At issue in arguing these points is a lack of quantifiable information on the subject in Canada. Copyright numbers are difficult to access because registration of copyright is not required in this country in order for a work to be copyright protected, although it does help in case of legal disputes. Only 8,200 copyrights were registered in Canada in 2013 according to a House of Commons Intellectual Property Regime Report.\textsuperscript{270} To give some idea of the potential economic gains or losses possible through misunderstanding of copyright law, a 2009 American study, following analysis of registered copyrights from 1876 to 2006 found that: “[p]opulation size, not law, is uniformly and consistently the best predictor of the number of new works produced”,\textsuperscript{271} suggesting that increased copyright protection of works is not dependent on increased copyright restrictions and author protection; works will be produced regardless. The study did find that copyright law instead plays a role in the distribution of wealth, estimating that the value added to the American Gross Domestic Product in 2005 by all copyright industries was 1.38 trillion dollars, but that this did not also increase the number of works created, and the wealth was maintained amongst a small group.\textsuperscript{272} This fails to meet the standard of “spurring innovation”, one of the stated purposes of intellectual property protections, on a large scale, and suggests that the works of some are of greater importance than those of others, potentially tilting the balance in favour of creators over users. The argument for users being able to profit from content that they have

\textsuperscript{270} Ibid.
\textsuperscript{271} Shih et. al., 1720.
\textsuperscript{272} Ibid.
generated is that they have the full capacity to ask permission from the creators of the original works. If they fail to do so, those creators are within their rights to sue, potentially seeking an injunction, damage payments, or both as “[t]he onus is on the infringer to satisfactorily separate non-infringing from infringing activities.” 273 When a balance is struck between the rights of users and those of creators or owners, the question becomes when is enough of the substance taken from a work that it harms the owner of the original work in question. 274 It can be extremely difficult to determine in the case of mixed-media works, which require viewing of both the work as a whole and as separate pieces of media that it is comprised of, should it use parts of the works of others.

In Canada, reproduction rights organizations (RROs) such as the Canadian Artists Reproduction Copyright Collective (CARCC) are non-profit collectives of artists (including musicians, performers, etc.) that offer licensing for exhibition, reproduction, telecommunication and copyright clearance for artists. 275 According to RROs, potential issues include working for an artist resale right, and affording increased protections to creators of specific types of work. In opposition to views that creative works require greater protection, in 2006 Gordon Duggan began the Appropriation Artists Coalition (AAC), a group comprising over six hundred members including individual artists, artist groups, and art institutions. 276 Members of this group work under the mandate of keeping access to copyright protected works open and available, advocating for the right to artistic freedom to transform the “raw materials” of culture in order

275 CARCC 2014; SODRAC 2014.
for culture to be advanced. Simply, the AAC is arguing for a right to the transformative property afforded to American fair use cases, such as *Cariou v. Prince* and *Blanche v. Koons*, while at the same time artists and reproductive rights organizations are arguing for additional rights to compensation for their creative effort. The 2011 *Cariou v. Prince* decision given by Judge Batts, which was decided in favour of Patrick Cariou, emphasized that a finding of fair use in the case would be possible only under different circumstances of value and economics.\textsuperscript{277} This consideration of the works did not find that Prince had adequately transformed Cariou's works, and that he had experienced large economic gains from his copyright infringement. The *Rains v. Molea* decision in Canada comes closer to this initial decision than to the final one in 2013, where twenty five of Prince's works were found to be transformative and qualifying for fair use, regardless of any economic gains Prince received from his use of Cariou's work. Although the works of both Rains and Molea were commercial, each gained economically from the sale of their work. Fair dealing with a work for commercial purposes is not necessarily unfair in Canada, but is measured according to originality and substantial part standards rather than the measurement of transformation.\textsuperscript{278}

The lack of proper information about copyright in institutions has been advanced as having resulted in an overreaching of claims to ownership of images through individual policies and procedures.\textsuperscript{279} Many policy makers have suggested better alternatives and standards to

\textsuperscript{277} "Prince appropriated entire photos, and in the majority of his paintings, Prince appropriated the central figures depicted in portraits taken by Cariou and published in *Yes, Rasta*. Those central figures are of overwhelming quality and importance to Cariou’s photos, going to the very heart of his work. Accordingly, the amount of Prince’s taking was substantially greater than necessary, given the slight transformative value of his secondary use." *Cariou v. Prince*, 784 F.Supp.2d 337 (2011).

\textsuperscript{278} *CCH v. Upper Canada*, para 51; *Access Copyright v. Alberta (Education)*, para. 99.

current practice in the United States.\textsuperscript{280} Vaver agrees with this, arguing that an imbalance in knowledge as to what is protectable and the potential consequences for transgressing what is put forth as acceptable protection, especially across international borders, is what leads to overreaching of copyrights; according to Vaver, there are no real issues with the laws themselves.\textsuperscript{281} Many times the overreaching of proprietary claims is not intended to limit access by directly asserting control and power; both those that do and those that do not understand copyright laws give them wide berth to avoid the potential for litigation.\textsuperscript{282} The result of a lack of circulation of concise and accurate information about copyright is layers of protection for images derived from public domain images on websites, in pamphlets and in the other ephemera surrounding exhibitions such as the \textit{catalogue raisonné}. The nature of copyright, shaped by both law and court cases, has the potential to lead to an inability of creators to ascertain “with clarity the scope of entitlements in information”\textsuperscript{283} a cohesive view of how to negotiate copyright, potentially leading to what has been referred to as a “chilling effect” on creative production.\textsuperscript{284} A full quantitative analysis would be required to measure the actual revenues gained by artists through each of these channels separately, and to examine which institutional bodies in Canada make use of these groups to license artists’ images. RROs represent individual artists and artist collectives, classified here as users of images that are themselves also creators. CARCC recommends that its affiliates not assign their rights to reproduction to any third party, including educational and promotional purposes. They recommend instead allowing the collective, which is affiliated with the \textit{Canadian Artists Representation/Front Artistique Canadian} (CARFAC), a

\textsuperscript{281}Vaver, “Harmless,” 19-20.
\textsuperscript{282}Ibid., 22; Tanner.
\textsuperscript{284}Casey Fiesler et al., “Understanding Copyright Law in Online Creative Communities,” Working paper, Georgia Institute of Technology 12/2014. http://dx.doi.org/10/1145/2675133.2675234
group that lobbies for the rights of artists in Canada, especially to exhibition rights and lobbying for an artist resale right in Canada. This suggestion is likely to be accepted in order to negotiate additional revenue for rights that are paid for as larger group bundles, but the financial merits of this practice are quantitatively unconfirmed.

**Creative Production**

Muñoz Sarmiento and van Haaften-Schick point to several impacts that the decision in *Cariou v. Prince* could have on artist rights to remuneration from the copyrights to their works and be compensated for their creative labour. They view the dispute as one of celebrity fetishization against a measure of artistic labour, engaging with Howard Becker's conception of art worlds, wherein “some members of a society can control the application of the honorific term art, so not everyone is in a position to have the advantages associated with it.” Murray and Robertson share agreement that “free culture” discourse hides issues of labour, gender, the environment, and social justice. The authors believe that cases like *Cariou v. Prince* privilege the celebrity, highly paid artist over others who produce creative works, such as the commercial photographer and privilege painting over photography as creative work. Muñoz Sarmiento and Van Haaften-Schick believe that a bias exists in American law towards traditional art forms, such as painting, and that monetary value is the primary means by which the value of cultural property is measured. Copyright protections in Canada are afforded to the original creator of a work that is fixed in any medium, regardless of the work's merit or lack thereof. The right to create derivative works from this original is also an economic right afforded to the creator, so

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287 Muñoz Sarmiento and van Haaften-Schick, 943.
288 Ibid., 943.
that they may profit from their effort, and this reward system is often considered to be what generates further creative production.\textsuperscript{289}

Copyright protections in Canada are afforded to the author during their lifetimes and for fifty years after their death. Once this finite point has been reached, the work enters the public domain and may, in theory, be used by anyone as they see fit. This discussion sets up a framework by which to examine Canadian copyright cases that deal with works of visual art. In addition to the consideration for balance between the rights of users and creators in common law practice, \textit{Copyright Modernization Act} amendments include copyright exceptions for the rights of users under the heading “Non-Commercial User-Generated Content.”\textsuperscript{290} These rights extend the fair dealing provisions that were always a part of copyright law in Canada, and they amplify the views put forth in cases such as \textit{CCH Canadian Ltd. v. Law Society of Upper Canada} and \textit{Théberge v. Gallerie d’Art} that consider user rights to be at least as, if not more important than, author or owner rights. Under these provisions, it is not an infringement for anyone to use one copy of an existing work that has been published (read: not exhibited) and made available to the public to create specific types of non-commercial derivative works.\textsuperscript{291}

\textit{User-Generated Content}

The term “user” is not defined in the \textit{Canada Copyright Act}, but “use” is, as: “to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything”.\textsuperscript{292} Users are, however, able to authorize intermediaries to disseminate their work.\textsuperscript{293} When designating users as individuals, User-Generated Content (UGC) exceptions

\textsuperscript{289} Vaver, “State”.
\textsuperscript{290} \textit{Canada Copyright Act} s. 29.21.
\textsuperscript{291} Ibid.
\textsuperscript{292} \textit{Canada Copyright Act}, s.2.
\textsuperscript{293} A good example of this exception is uploading Youtube videos.
refer to members of the general public, who function as amateurs or hobbyists, and who cannot
gain professional financial compensation for their work. Like derivative works, user generated
content may contain layers of copyrighted material. Not only will the original work be
copyrighted, but the resulting work must be adequately original to qualify for its own
copyright, therefore skill and judgement must be used in its creation. Much like the term
“user” itself, there is no definition given for what types of works User Generated Content
encompasses. One definition offered by Daniel Gervais is “content that is created in whole or in
part using tools specific to the online environment and/or disseminated using such tools.”
Another definition, offered by Debora Halbert is that User Generated Content is “used to
describe activities engaged in by those typically not seen as cultural producers but cultural
consumers.” A good way of conceptualizing who is a “user” could be along a spectrum from
the general public to professional authors/creators, allowing for multiple categories of content
users in between the two extremes. As the different inflections of the various definitions suggest,
it remains unclear whether or not UGC provisions will apply solely to digital content, or if they
have broader implications. Under current UGC provisions, it is not infringement for someone to
use an existing work or copy of one that has been published and made available to the public to
create a new work that will have its own copyright so long as:

1. The use is non-commercial;

2. The use doesn't have an effect on the market or potential market of the original;

3. The source is mentioned if it is “reasonable to do so”;

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294 Canada Copyright Act s. 29.21.
4. And the “user” had reasonable grounds to believe that the initial work was not infringing copyright.297

The Copyright Modernization Act (CMA) made a series of amendments to the Canadian Copyright Act, the majority of which went into effect on November 7, 2012. Many of the changes followed decisions on originality and user rights from several important court cases, including CCH Canadian Ltd. v. Law Society of Upper Canada, Théberge v. Gallerie d'Art, Robertson v. Thomson and Euro Excellence Ltd. v. Kraft Canada Inc.; all of these were important Supreme Court copyright decisions from the early 2000s.298 The purpose of copyright can be viewed as many things, but in the preparation of the CMA, the Government of Canada's stated purpose was to find “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”299 Dealing with a work for commercial purposes, however, has not necessarily been found to be unfair following decisions in CCH v. Upper Canada and Alberta (Education) v. Access Copyright. Cases from the 2012 copyright pentalogy emphasized fair dealing provisions as users rights rather than as exceptions.

When thinking about compensation rather than rights, it is taken for granted that “users” are generally amateur and value exposure, and that large-scale dissemination is an adequate reward for creative work that must have been created with enough skill and judgement to qualify for copyright protection.300 If the stated purposes of copyright are to increase creative output,

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297 Canada Copyright Act s.29.21.
298 CCH v. Upper Canada; Théberge v. Gallerie d'Art; Robertson v. Thomson and Euro Excellence Ltd. v. Kraft Canada Inc.
299 Government of Canada, “Balanced”.
provide just reward for the creators of works, three categories of users can be extracted from this definition:

1. Users as creators – artists, authors, users in terms of User Generated Content provisions in the *Canada Copyright Act*;

2. Users as members of the general public – sometimes also includes those making User Generated Content (still being negotiated), commonly considered to be the “consumers” of creative work; and

3. Users as intermediaries or disseminators of images – museums and galleries, commercial image licensing groups, image sharing collectives.

Whether or not commercial use is covered by UGC exceptions in the future, currently users are thought to neither require nor deserve much compensation for their creative labour. As Teresa Scassa outlines: “[t]he user, in exchange for their content, receives no payment, but rather an unprecedented vehicle of dissemination with global reach and opportunities to gain profile, to develop or enhance reputation, and even to move at some point toward professional status.”

It is clear that this interpretation excludes creators of a certain type from profiting directly from their work. That creative producers cannot live on enhanced reputation and profile is the same argument that was put forth by CARFAC in 1988 when arguing for special considerations for works of art and artist compensation. With the UGC provisions in place, users are still able to negotiate authorized use of copyright with the owners if they want to use their creations for profit, otherwise copyright owners are still able to seek injunctions against them. The infringer has to prove that some of the profits were gained from the contribution of their own work or

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302 That art is different, rare, requires different compensation models than literature or music.
reputation, so there is a line to be crossed when the view of a user as an amateur becomes the user as a creator in their own right. User generated content is being harvested to generate profits through the intermediaries who use their products to indirectly profit from the creations of others. However, there is no simple way to separate the viewers of the content from the creators; they are not mutually exclusive terms. The line between creators and users is not as clear as it first appears to be.

**Users as Intermediaries**

Much like users who are also creators, not everyone benefits from an economically-focused solution to copyright issues. In 2010, 72% of Canadians reported attending a performing arts event or cultural festival, and 48% visited a museum. Canada also has a large portion of the population connected online. In 2010, 94% of Canadians under 45 and 80% between 45 and 64 years old reported using the Internet, making image reproduction rights a relevant issue to a majority of Canada’s population rather than a niche area of concern. In this instance, while the simple solution to maintaining economic value in creative works would appear to be increased copyright protections and measures to prevent infringement, a 2013 University of Toronto working paper demonstrated that sharing restrictions have a negative impact on both discovery of new items, as well as on overall sales, especially of “long-tail” items – those which are not the most popular or well-known. The conclusions found in the paper were also that firms should consider their intellectual property as assets, since they are tied directly to sales in the case of music products. Both Zhang and Craig suggest that taking steps such as removing digital lock

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306 Ibid., 34
or technological protection measures that restrict use of copyright-protected works would be beneficial not only to the creators of works, but also to second parties disseminating those works.\textsuperscript{307} Hence, in terms of the intermediaries who manage the rights to copyright-protected works and their reproductions, opening up their images to the public domain could be an easy way to further their mandates of service to the public while gaining publicity as their images are circulated by others and remixed by users.\textsuperscript{308} It would also generate sales profits through the offering of reproduction services that are accessible to all users of the internet who are interested.

In addition to specifics in exceptions and interpretation, Canadian artists have rights that are distinct from those afforded to American artists – moral rights and exhibition rights. The application of these separate sets of rights varies as borders are crossed, and raises questions as to when they do and do not apply.\textsuperscript{309} The \textit{Berne Convention} does not limit the application of moral rights to the original work – the reputation of an artist may also be harmed if a copy of their work is unattributed, improperly attributed, or distorted. The American \textit{Visual Artist Rights Act (VARA)} specifically protects only the original art work, not copies of it and, as the title suggests, is only applicable to works of visual art. Section 14 of the \textit{Canada Copyright Act}, on the other hand, applies to all copyrightable works and makes no distinction between the original work and copies of it, as discussed in \textit{Boire v. Lefebvre}.

Therefore, in dealing with copyrightable works, moral rights questions must also be addressed. Moral rights grant creators the right to prevent the modification, destruction, or mutilation of their work, or to argue against a derivative work on several grounds. Moral rights

\textsuperscript{307} Ibid.; Craig, \textit{Relational}.


\textsuperscript{309} Lang Rottenberg 1997, 411.
for artists are covered under s.14.1 and s.17.1 of the *Canada Copyright Act*, and are both non-transferrable and in effect for the duration of the life of the artist. They include rights of paternity and rights of integrity. Rights of integrity contain special conditions for works of visual art: moral rights of the artist are violated if works are distorted, mutilated or modified, while moral rights associated with other types of creative works require a measure of prejudices to the honour or reputation of the author. Users of images on a broad scale, such as museums, should consider whether or not moral rights apply in every specific instance, for example, whether or not posting reproductions of images online will violate not only an artist's economic rights allotted by copyright, but also the artist’s moral rights.

While economic rights are regulated by copyright, the moral rights of the original artist to the integrity of their work may also be used halt an infringement. A derivative work might be seen by the original artist to trivialize a specific work of theirs, or their entire body of work. Artists whose works are used to make derivative works from may also disagree with the way in which the derivation is being used. Unlike copyrights, moral rights are non-transferrable and protect the identity and personality of the creator, though they can be waived. As with economic rights, as borders are crossed, rules change, complicating the issue of which set of rules to apply. Examining the intersections (or lack thereof) of economic and moral rights within common law systems further complicates the issue of compensation: attribution is part of the drive behind financial rewards for creative work. As with the broader picture of copyright for artists in Canada, it is an intricate issue that remains little studied.

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310 *Canada Copyright Act* s.14.1, 17.1; Harris, *Canadian*, 152-154.
CONCLUSION

This document stands as a preface to a longer, theoretically necessary discussion of aesthetic judicial reasoning as concerns Canadian copyright. The goal of this thesis was to organize the vast array of court cases -- in Canada, in Britain, and in the United States -- case law, and legal theory making possible a critical discussion of the current Canadian preoccupation with balancing creator and user rights. The impulse to write this thesis originated in a problematic aspect of copyright in Canada: a distinct lack of clarity on the part of academics, librarians and other professionals in the art world as to rights for non-textual works. A problematic aspect of relating reproduction rights to the visual arts is that despite its mandate to give artists power, the aim to provide protection for artworks, copyright is based largely on complex legal precedent, which members of the arts community tend to disconnect from. Adding to the confusion is the fact that a lack of aesthetic knowledge in the legal system means that individual judges understand art and images very differently. This examination of Canadian copyright law has revealed that there is no single court case in Canada that lends itself to a generating a “snapshot” of what copyright in works of art looks like in a Canadian context; this picture must be assembled from a selection of court cases. Like a mosaic, Canadian copyright only appears solid when viewed from a distance.

Are the issues with measures of originality, transformation, aesthetic taste, preferential treatment of certain artistic media and creative work, set out by Muñoz Sarmiento and van Haaften-Schick, fully articulated and their effects clearly evaluated under Canadian law? Do we need more discussion about art in order to understand the extent to which visual images are misinterpreted in courts because a lack of knowledge? These are questions that can only be addressed once a typology of copyright such as this thesis has set out -- by reference to the
history of copyright, landmark case studies, scholarship, and critical analysis – has been published, making possible an informed discussion. Examining cases and scholarship cited in Canadian copyright decisions, it is apparent that an American influence looms large in the minds of Canadians dealing with the copyright system, both from the perspective of plaintiffs and defendants and that of judges. Current copyright cases concerned with artistic works are scattered throughout the provincial courts, but have yet to reach a Supreme Court decision that has been as much of a landmark as any of the five Copyright Pentalogy cases and their role in clarifying Federal concern for a balance between creator and user rights even prior to the Copyright Modernization Act.

As this thesis has demonstrated, only a few legal cases make any kind of statement about visual art and copyright in Canada, and none as concretely as what can be extrapolated from the American *Cariou v. Prince* case. This is not to say that a case like it is not in Canada’s future. The *Rains v. Molea* case functions as an example of a Canadian copyright involving works of traditional fine art brought to court after the Copyright Modernization Act went into effect. Its final decision demonstrates the influence that the concern for balance between user rights and creator rights has even in the provincial court system. The case is problematic, however, in its demonstration of the ability of a single artist to make use of legal threat to prevent another from using their idea without bringing them to court at all. After examining the varying nature of treatment towards artistic works that do not necessarily fit easily into the “common sense” definitions of traditional fine art, I believe that a similar case may have reached a different conclusion if the works in question were not both paintings.
Like the complicated rules governing the treatment of artistic works that are brought under the purview of the courts through lawsuits, concern over what is or is not permitted to be done with copyright protected works of visual art is a complex issue. There is a split between the considerations of legislation, case law, and legal opinion that has been used in a variety of copyright cases without being legislatively codified. This division has been ongoing in Canada since the earliest exclusively Canadian case that dealt with an artistic work, and remains unresolved by further amendments to the Copyright Act. Those who are not experts in the field of copyright specifically are nonetheless expected to be aware of and knowledgeable about their rights when it comes to what they are permitted to do with creative works. This is further complicated by differences in legal opinion and exchange of ideas and their expressions across borders, discussions which are specialized in nature and often not openly shared. The implications are that those who can afford the time and the expense of managing creative properties via the courts have a distinct advantage when it comes to negotiating what is and what is not considered to be copyright infringement. While the existence of a verifiable chilling of creative work based on the looming cloud of legal threat is unverified, the advantage gap when it comes to copyright infringement is widened by a lack of access to relevant information, and by the ability of those “in the know” to enforce their own views on copyright through either direct or indirect threats of legal action and cease and desist letters.

This thesis, which was necessary to define the terms most readily identified with copyright, therefore informs a broader discussion of visual culture regarding theories of artistic value, originality, appropriation and cultural consumption. Following the differentiation of areas from one another, an investigation of existing case law was required. Through increased scholarship about the practical realities of copyright protection, it is becoming clearer that
overreaching restrictions on cultural products may restrict, rather than expand, the potential gains of access to creative works both in terms of economic gain and increased visibility of niche objects. The subject of the acute effects of wider awareness of the existence of copyright law without accompanying knowledge of how to navigate legal challenges will accordingly be given priority in another body of work. A future study, one that quantifies and clarifies the treatment of artistic works via copyright, may perhaps function as a site of intervention via mediation (rather than through lawsuits) for art criticism, connoisseurship, and judicial reasoning in examining works of art within a legal framework. For those who wish to benefit from protections for creative work, regardless of their intention, it is important that the legally created benefits and pitfalls be both visible and understood on a scale relevant to all those who create and make use of artistic work.
BIBLIOGRAPHY


Alberta (Education) v. Access Copyright, 2010 FCA 198 (CanLII), http://canlii.ca/t/2bt17.


Boire v. Lefebvre, 2013 QCCQ 921 (CanLII) http://canlii.ca/t/fw4qn.


*Cinar France Animation v. Robinson,* [Cinar v. Robinson 2013] 3 RCS 1168, 2013 CSC 73 (CanLII), [http://canlii.ca/t/g2fgz](http://canlii.ca/t/g2fgz).


“Copyright Term and the Public Domain in the United States,” *Cornell University,* 01/01/2015, [http://copyright.cornell.edu/resources/publicdomain.cfm](http://copyright.cornell.edu/resources/publicdomain.cfm).


Crews, Kenneth D. “Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching.” 


*Frances, Day and Hunter Ltd. V. Twentieth C. Fox Corp.*, [1939] 4 All E.R. 192.


Geist, Michael, ed. *In the Public Interest: The Future of Canadian Copyright Law.* Toronto: Irwin Law, 2005.


*Hager v ECW Press Ltd.,* 1998 CanLII 9115 (FC), [1999] 2 FC 287. [http://canlii.ca/t/1hcj4](http://canlii.ca/t/1hcj4).


International Confederation of Societies of Authors and Composers, “Canada's Copyright Term Extension Plans Should Include Authors,” 07/05/2015. [http://www.cisac.org/Newsroom/News-Releases/Canada-s-Copyright-Term-Extension-Plans-should-Include-Authors](http://www.cisac.org/Newsroom/News-Releases/Canada-s-Copyright-Term-Extension-Plans-should-Include-Authors)


R. v. Allen, 2006 ABPC 115 (CanLII), http://canlii.ca/t/1n27H.


Rains v. Molea, 2013 ONSC 5016 (CanLII), http://canlii.ca/t/g03f7.


*Turner v. Robinson* (1860), 10 IR. Ch. R. 121, 510.


*Weetman v. Baldwin,* 2001 BCPC 0292 (CanLII) [http://canlii.ca/t/5lrh](http://canlii.ca/t/5lrh).


