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On the Uneasy Interface between Economic Rights, Moral Rights and Users' Rights in Copyright Law: Can Canada Learn from the UK Experience?

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Abstract

Copyright in Canada is subject to a number of statutory defences, of which parodies and non-commercial user-generated content (UGC) are but two examples. However, the interface between these defences and the protection of moral rights is not very clearly delineated in Canada's *Copyright Act*. The statutory defences appear to immunise a user from liability for traditional copyright infringement but not from claims of moral rights infringement. Under this fragmentary approach, users engaging in acts of fair dealing or in the production of non-commercial UGC might still find themselves vulnerable to attack from author-claimants alleging that their moral rights have been violated. Through a comparative survey of key legislative provisions in Canada and the United Kingdom, this article explores the extent to which Canada can learn from the UK experience, and considers the viability of streamlining the scope of the statutory defences to copyright infringement, in order to clarify the interface between users' rights, moral rights and economic rights.

Keywords
copyright; moral rights; users' rights; statutory defences; fair dealing; interface

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1 Introduction

> If I have seen further, it is by standing on the shoulders of giants.
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> – Isaac Newton

Creative expression can perhaps be considered one of the hallmarks of an advanced civilisation. Newton's quotation serves as a fitting reminder that all artists, authors and inventors, however gifted, owe their wondrous accomplishments to the body of knowledge and intellectual achievement that has been built up over time. Art is therefore never static, but is a symbol of the constant re-construction, renewal, and re-interpretation of ideas. In this regard, all artists are "borrowers" in the sense that they take from the work of their predecessors and transform, translate and re-articulate its form and content, clothing each old idea with a new sheen of ingenuity and imagination.[1] The process of creating new content is therefore inextricably bound up with the act of using extant material, such that authors are also users of *other* authors' ideas and expressions.

Yet, the intertwined nature of authorship and use can generate issues of some complexity for copyright in contemporary society. Questions of infringement can arise if the use by an author of an earlier work amounts to a qualitatively significant portion of the original. Though they seek to transform the underlying works into "new" products with creative or humorous elements, authors of parodies and user-generated content often need to "borrow" material

1 Under this broad interpretation of the term "user", all creators can be considered to have exploited, purchased or utilised existing technologies at some point in the production of their "new" works. The act of drawing upon older works for inspiration is not a new phenomenon, but rather a historical practice that continues to animate the creative ethic of producing intellectual work. See Greg Lastowka, "User-Generated Content and Virtual Worlds" (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 893-917, p. 897.

from other sources in order to perform their intended functions. From Duchamp's moustachioed version of the Mona Lisa in the year 1919 to the colourisation of "The Asphalt Jungle"[2] and the reinterpretation of the "Gangnam Style" dance routine by amateur dance groups, significant traces of the original works remain – traces which, if absent, would likely obliterate any connection with the derived compositions, thereby defeating their very purpose. A successful parody therefore owes its success to a recognised connection with the parodied work,[3] while managing to distinguish itself sufficiently from the author's original.[4] Interestingly, in spite of this connection, copyright holders are unlikely to voluntarily grant licences to parodists to allow them to engage in use which essentially subjects their work to ridicule or satire.[5] Quite ironically, parodists themselves are unlikely to seek permission for their satirical activities, either because the copyright owner's "stamp of approval" might not be forthcoming, or because such approval might eviscerate the quality of irreverence that gives a parody its impact.[6] Although protecting freedom of

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[2] It is nevertheless open to some debate as to whether the colourisation of a film constitutes a derivative work involving the exercise of creative choice.

[3] The connection that a parody has with the parodied work is sometimes referred to as the "conjure up" test, which allows an observer to relate the parody to the original whilst distinguishing one work from the other. In this respect, a successful parody must be "evocative" of the underlying work from which it has been derived in order to fulfill its intended purpose. See Geri J. Yonover, "The Precarious Balance: Moral Rights, Parody, and Fair Use" (1996) 14 *Cardozo Arts & Entertainment Law Journal* 79-126, pp. 105-106.

[4] See Sam Ricketson & Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd ed. (Oxford: OUP, 2006), para. 10.29, who note that the reader or observer of a parody would be perfectly aware that the piece is not the work of the author whose *oeuvre* is being parodied.

[5] *Supra* n. 3, p. 103.

[6] In this regard, it has been observed that a parodist who identifies or is made to identify the author of the work being parodied might in some circumstances be viewed as making an implied admission that the parody has failed. See Robert Burrell & Allison Coleman, *Copyright Expressions: The Digital Impact* (Cambridge: CUP, 2005), p. 61.

expression through "users' rights"[7] is often touted as an important dimension of copyright law, the artistic freedoms of parodists and users can nevertheless be severely curtailed through the threat of litigation relating to either copyright infringement or to the violation of authors' moral rights.[8]

Not all user-generated content, however, seeks to ridicule or poke fun at other works. Parodies and user-generated content can be situated under the broader umbrella term "derivative works". Derivative works, which may in some cases attract copyright protection in their own right if they are sufficiently original,[9] raise potentially contentious issues in copyright law because of the way in which they modify, transform or adapt other (earlier) works.[10] Derivative works include user-generated content (UGC),[11] which is, in turn, broader in scope than parodies. The term "UGC" encompasses both creative derivations of an original work that are laudatory, such as fan art, as well as critical, parodic, satirical, or humorous reflections of the original, such as outlandish mimicry, mockery or imitations. Clearly some UGC is benign in orientation, though obviously many examples of parodic content would not be generated in good

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7 See *CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 SCR 339 (hereinafter *CCH Canadian)*, para [51], where it was held that "[r]esearch" under section 29's fair dealing provision must be given a "large and liberal interpretation in order to ensure that users' rights are not unduly constrained."

8 See *supra* n. 3, p. 103.

9 See for instance *Redwood Music v Chappell*, [1982] RPC 109.

10 See Teresa Scassa, "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Michael Geist (ed.), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press) 431-453, p. 440, who raises the question of whether a compilation or a mix-tape could be considered a "new work" in which copyright subsists.

11 According to Peter Yu, examples of such content include remixes, mash-ups, cut-ups, spoofs, parodies, satires, caricatures, pastiches and machinimas. See Peter K. Yu, "Can the Canadian UGC Exception Be Transplanted Abroad?" (2014) 26 *Intellectual Property Journal* 175-203, p. 178.

faith.[12] It has been observed that parody "smacks of irreverence" and is usually critical, rarely engaging in a deferential or loving treatment of the underlying work.[13] That an author might take umbrage to the treatment of the work by a user is certainly a very real possibility.

Currently, the statutory defences in Canada against copyright infringement, including the relatively new "UGC-exception",[14] provide very limited shelter against claims of *moral* rights infringement. Moral rights introduce an added layer of complexity to the process of defining the boundary between permitted use and actionable conduct in the context of derivative works. While copyright protects the economic interests of the owner (sometimes though not always the author, since copyright ownership may vest in another party, either through law or through assignment), moral rights on the other hand protect the reputational and personality interests of the author. Moral rights include the right to be identified as the author of a work (the right of attribution) and the right to object to derogatory treatments or mutilations of the work that would prejudice the author's reputation (the right of integrity).

This article argues that fair-dealing parodies and other user-generated content, whether laudatory, satirical, or critical, play an important role in enhancing cultural discourse and communication in society.[15] As such, the current fragmented approach in the Canadian *Copyright Act* toward exonerating

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12 See Mark A. Petrolis, "An Immoral Fight: Shielding Moral Rights with First Amendment Jurisprudence when Fair Use Battles with Actual Malice" (2008) 8 *John Marshall Review of Intellectual Property Law* 190-215, p. 198, citing the landmark case of *Campbell v Acuff-Rose Music, Inc.*, (1994) 510 US 569.

13 See *supra* n. 3, pp. 103 and 110.

14 See section 29.21 of the *Copyright Act* of Canada, R.S.C., 1985, c. C-42.

15 By generating UGC, users are not merely participants but rather active contributors to the "cultural dialogue" of society. See Fraser Turnbull, "The Morality of Mash-Ups: Moral Rights and Canada's Non-Commercial User-Generated Content Exception" (2014) 26 *Intellectual Property Journal* 217-236, p. 220.

certain works from liability for infringement should be replaced with a more internally consistent framework, which clarifies the scope of the protective "umbrella" offered to users against liability for *both* copyright *and* moral rights infringement. The article will offer three principal arguments in support of a more harmonious and integrated copyright system in Canada which attempts to streamline the defences to copyright and moral rights infringement, whilst drawing upon insights gleaned from the UK experience. The larger aim of this analysis is to refocus attention on the need to place clearer limits on the rights of authors, so that moral rights cannot be used unreasonably as a weapon to target forms of fair speech or expression that are statutorily protected as being in the public interest.

Part 2 of this article will sketch the contrasting orientations of economic and moral rights, and situate Canada's approach within the common law and civilian approaches to moral rights protection. It will also investigate the fascinating intersections and tensions between the economic and moral rights regimes within the statutory framework of the Canadian *Copyright Act*. Part 3 will explore a number of arguments in favour of constructing a more internally consistent *Copyright Act* which encompasses both moral rights and economic rights within a unified framework. Part 4 seeks to evaluate the extent to which Canada can learn from the structure of the UK's copyright statute, and to outline a number of legislative responses that would facilitate the entrenchment of a more coherent and internally consistent treatment of economic interests and personality rights. This is followed by some concluding remarks in Part 5.

2 Exploring the encounter between economic rights and moral rights in comparative perspective

Striking an equitable balance between the protection of exclusive rights and the preservation of civil liberties such as freedom of expression has always been a challenge for intellectual property law. To this end, the fair dealing provisions in the Canadian *Copyright Act* serve an important function in mediating the interplay between owners' rights and users' rights by acting as a bulwark against encroachment by monopoly rights upon the public's right to use and adapt information for purposes that are essential for human communication and cultural dialogue.[16] The fair dealing provisions provide shelter against infringement in respect of activities that provide some form of public benefit, such as news reporting, parodies and private study and research. Although not classified as a fair dealing defence by pedigree, a provision relating to non-commercial user-generated content was added to the statutory scheme in November 2012, by dint of the *Copyright Modernization Act*,[17] broadening the panoply of activities that are exonerated in Canada from liability for copyright infringement.[18] This provision now aligns Canada's position with a

[16] In addition to the guidance provided by the Supreme Court of Canada in *CCH Canadian* regarding the integral role of users' rights in Canadian copyright law, it has also been held that users' rights are to be interpreted from the point of view of the user, rather than the content provider or copyright owner. In the case of *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, [2012] 2 SCR 326, for instance, the use of previews of musical works by a distributor to increase sales was held to be fair dealing due to the fact that customers used these previews to decide whether or not to make purchases.

[17] Copyright Modernization Act 2012, SC 2012, c. 20. Most of the provisions in the *Copyright Modernization Act* (formerly Bill C-11), which was designed to amend Canada's *Copyright Act*, entered into force on November 7, 2012. The remaining provisions were brought into force by January 2, 2015.

[18] See *supra* n. 11, pp. 177-178, where it is suggested that the Canadian UGC exception provides a useful starting point for exploring how copyright law could accommodate the needs and interests of Internet users in their efforts to create UGC, many examples of which can be found on YouTube and other social media platforms.

recommendation made some years ago by Lawrence Lessig – that legislation should exempt non-commercial UGC from "the requirements of fair use or the restriction of copyright."[19]

Interestingly, however, artistic freedom in Canada still appears to be somewhat unevenly protected by the economic and moral rights regimes enshrined in the *Copyright Act*. In the case of *Théberge v Galerie d'Art du Petit Champlain Inc.* (*Théberge*),[20] Binnie J of the Canadian Supreme Court noted that the "separate structures" in the Canadian *Copyright Act* for economic rights and moral rights serve as evidence that Parliament intended a "clear distinction and separation" between the two species of right.[21] This quality of "separateness" can also be observed in the absence of a clearly-defined interface between the two sets of statutory defences. The fair dealing and related provisions appear to immunise the identified categories of activity from liability for copyright infringement, but *not* generally for moral rights infringement. This creates the possibility that a user who escapes liability for infringing copyright might nevertheless be subject to a moral rights complaint if the use in question allegedly injures the personality of the author.[22] The fear of litigation and liability may have a chilling effect on the generation of parodies and other expressive activities by users if statutory defences to copyright infringement do not sufficiently protect parodic or derivative expression.[23] In this regard, the interface between fair dealing and moral rights in the Canadian copyright scheme is not very clearly defined. While the provisions on criticism or review, news reporting and UGC

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[19] See Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Books, 2008), p. 255.

[20] [2002] 2 SCR 336.

[21] *Ibid*., para. 59.

[22] See *supra* n. 15, p. 235, where it is noted that certain forms of UGC may be suppressed by "overzealous moral rights claims".

[23] See *supra* n. 3, p. 104.

do make non-explicit references to the moral right of attribution as requirements for successful invocation of the respective defences,[24] the provision on parody, satire and research makes no mention whatsoever of moral rights.[25] None of the above provisions mention the moral right of integrity.[26] This creates the rather uncomfortable situation that a defence might provide immunity from liability for one kind of infringement (of an economic nature) but leaves the user open to attack by the moral rights holder. In particular, unauthorised modifications or distortions of a work could still potentially lead to liability for infringement of the moral right of *integrity*.

This somewhat awkward conundrum can be better understood by tracing the (civilian) origins of moral rights, which are in some ways considered a newcomer to the shores of the English, American, and Canadian copyright systems.[27] At the international level, the subject of moral rights remains a controversial minefield, with no uniform consensus on the appropriate level of protection.[28] Various commentators have questioned whether moral rights are

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24 See sections 29.1, 29.2 and 29.21(1) of the Canadian *Copyright Act*. To invoke these defences, it is necessary, among other things, for the source of the protected use to be mentioned. However, these provisions do not expressly refer to the moral right of attribution. The text of these provisions will be discussed in greater detail in section 4 of this article.

25 See section 29 of the Canadian *Copyright Act*, which merely states that: "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe *copyright*." (emphasis added)

26 For two seminal Canadian cases concerning an artist's or author's right to integrity of the work, see S*now v The Eaton Centre Ltd.*, (1982) 70 CPR (2d) 105 (Ont. H.C.) and *Prise de parole Inc. v Guérin, éditeur Ltée.*, (1996) 73 CPR (3d) 557 (Fed. C.A.). For other Canadian decisions touching upon the moral right of integrity, see, *inter alia*, *Patsalas v National Ballet of Canada*, (1986) 13 CPR (3d) 522 (Ont. S. Ct.) as well as G*nass v Cité d'Alma*, unreported (Que. S. Ct. Nov. 23, 1973), Doc. A-158, affirmed in unreported decision Doc. 200-09-0000232-745 (Que. C.A. June 30, 1977).

27 See Robyn Durie, "Moral Rights and the English Business Community" (1991) 2(2) *Entertainment Law Review* 40-49, p. 43, who describes a "reticence" in the UK toward acknowledging moral rights.

28 It is interesting to note that while the Berne Convention contains a specific moral rights provision in Article 6[bis], the TRIPS Agreement has expressly excluded this provision from its importation of the substantive Berne provisions. Article 9(1) of the TRIPS Agreement

only grudgingly accommodated within the US copyright system,[29] with some observing that the concept of moral rights is generally unsettling to the average American lawyer,[30] and others suggesting that the United States government fiercely resisted accession to the Berne Convention for over 100 years, joining only in 1988.[31] In a similar vein, the moral rights provisions in the UK's *Copyright, Designs and Patents Act 1988* (CDPA) have been described as "half-hearted" and "cynical", reflecting a lack of conviction on the part of the drafters in the viability or desirability of moral rights.[32] This has resulted in a moral rights regime under the CDPA that is "riddled with exceptions", rendering the attempt to implement moral rights in the UK somewhat incoherent and insincere, in the view of some commentators.[33] It has been suggested that copyright jurisdictions which remain generally hostile to the concept of personality interests do moral rights more harm than good by enacting a vague or incoherent statute that is pockmarked with exceptions.[34] Yet other commentators have argued that moral rights are not

provides that "Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom." Further, in the European context, Bently and Sherman observe that the directives have "steered clear" of moral rights, citing Term Dir., Art. 9, Recital 20; Database Dir., Recital 28; Info. Soc. Dir., Recital 19 as examples. They also note that the *travaux préparatoires* of these instruments reflect an intention to introduce moral rights provisions, which however failed to bear fruit owing to the lack of consensus on the matter. They are however quick to point out that the moral right of attribution is recognised in EU law to the extent that some exceptions in the Directives are dependent on attribution of the source or author for their operation. See Lionel Bently & Brad Sherman, *Intellectual Property Law*, 4th ed. (Oxford: OUP, 2014), p. 291.

[29] Amy M. Adler, "Against Moral Rights" (2009) 97(1) *California Law Review* 263-300, p. 266.

[30] Michael B. Gunlicks, "A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy" (2001) 11 *Fordham Intellectual Property, Media & Entertainment Law Journal* 601-669, p. 604.

[31] Gillian Davies & Kevin Garnett QC, *Moral Rights* (London: Sweet & Maxwell, 2010), p. 38.

[32] See for instance Jane Ginsburg, "Moral Rights in the Common Law System" [1990] *Entertainment Law Review* 121-130, p. 129 and Davies & Garnett QC, *Moral Rights*, *ibid.*, 16.

[33] See Ginsburg, *Moral Rights*, *ibid*.

[34] Ginsburg, *Moral Rights*, *ibid*., pp. 129-30. It has also been observed that the scope of moral rights needs to be "clearly delineated" in order to work effectively. See Gerald Dworkin,

entirely anathema to common-law copyright systems, and can be integrated harmoniously within a statutory framework, in line with the legislative models adopted in several European Union countries.[35]

The economic or pecuniary rights that are primarily associated with copyright protection derive largely from the Anglo-American paradigm of protecting intellectual works with creative or original expression.[36] Moral rights, in contrast, trace their beginnings to the *droit d'auteur* or *Persönlichkeitsrecht*[37] traditions of Continental Europe, which treat as almost sacrosanct[38] the special connections that authors have with their works.[39] Despite the purportedly harmonising effect of Article 6*bis* of the Berne Convention, "no two countries that give serious thought to moral rights ever produce the same set of provisions."[40]

"Moral Rights in English Law - The Shape of Rights to Come" (1986) 8(11) *European Intellectual Property Review*, 329-336, p. 336.

35 See for instance *supra* n. 30, p. 649 and Ysolde Gendreau, "Digital Technology and Copyright: Can Moral Rights Survive the Disappearance of the Hard Copy?" (1995) 6(6) *Entertainment Law Review* 214-220, p. 218.

36 See *supra* n. 27, pp. 40-41, where it is observed that many common law jurisdictions seem "ill at ease" with the basis and rationale for moral rights, their copyright laws having been based on the "utilitarian" protection of economic interests rather than moral interests. For a detailed treatment of the operation of moral rights in France and Germany, as well as an in-depth analysis of the development of authorial moral rights in Canada, the UK, the US, and Australia, see Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (New York: OUP, 2006), particularly chapters 8 to 18.

37 The German expression "Persönlichkeitsrecht", which refers to "personality right", has been presented as a more favourable alternative translation to the French "droits moraux", since there is nothing inherently "moral" about these rights in the English sense of the term. See Mira T. Sundara Rajan, "Creative Commons: America's Moral Rights?" (2011) 21 *Fordham Intellectual Property, Media & Entertainment Law Journal* 905-969, p. 909.

38 See Joan Pattarozzi, "Can the Australian Model be applied to U.S. Moral Rights Legislation?" (2007) 15 *Cardozo Journal of International and Comparative Law* 423-460, pp. 424 and 427-8, who characterises moral rights in creative works, under a "personality" approach to copyright protection, as "inseparable extensions" of an author's personality.

39 The continental European concept of moral rights is based on the personality of the author and what one commentator terms "the romantic notions of authorship". This paradigm of moral rights recognises the special bond between the creator (author) and the creation (work). See *supra* n. 3, p. 88-89.

40 Elizabeth Adeney, "Defining the Shape of Australia's Moral Rights: A Review of the New Laws" (2001) 4 *Intellectual Property Quarterly* 291-325, p. 323.

Under the moral rights paradigm, works are considered manifestations of an author's personality and this special connection is not severed even when the economic interests (vested in copyright) have been transferred to another party, a principle that has also been recognised in the seminal Canadian case of *Théberge*.[41] Several civil law jurisdictions, including France, prohibit the alienation of moral rights, and refuse to enforce waiver agreements against the author.[42]

Canada appears to adopt a moderate approach, allowing moral rights waivers to be enforced against the author, providing, in some respects, a bridge between the common law and civil law approaches to moral rights.[43] This is attributable in part to the fact that Canada's laws have been influenced by the civil law principles of Quebec, even though it is primarily a common law country.[44]

The uncomfortable tension between moral rights and economic rights that can be observed in the Canadian copyright framework is reflective of the vastly different traditions from which they originate.[45] Despite Canada's bijural legal tradition, moral rights are occasionally perceived as a foreign object in the Act and do not appear to be as seamlessly integrated into the statutory regime as they

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41 In this respect, moral rights treat the artist's œuvre as an "extension of his or her personality", possessing a dignity which is deserving of protection." See *Théberge*, para. 15.

42 See *supra* n. 27, p. 44, where it is noted specifically that moral rights can be assigned and alienated contractually in common law jurisdictions, but such a possibility is not generally recognised in civil law countries such as France.

43 See Gerald Dworkin, "The Moral Right of the Author: Moral Rights and the Common Law Countries" (1995) 19 *Columbia-VLA Journal of Law & the Arts* 229-267, p. 243.

44 See *supra* n. 31, p. 36, who observe that the civil law system in Quebec has rendered Canada "more open to ideas and legal theories originating in Continental Europe".

45 It has been suggested that moral rights, when introduced into a common law "copyright system" from the "civilian system" show all the signs of being an imported commodity, and continue to be regarded as an outgrowth of the civilian authors' rights system. See Gendreau, *Digital Technology and Copyright*, *supra* n. 35, p. 217.

are in civil law jurisdictions.[46] The somewhat isolated nature of moral rights in the Canadian statutory scheme for copyright protection is reflected in the lack of any *express* defences to moral rights infringement. The concern here is not that Canada's *Copyright Act* lacks a set of express moral rights provisions, but rather that these provisions are not satisfactorily connected with the rest of the statute. The copyright and moral rights regimes sit alongside each other rather awkwardly, like ill-fitting appendages, under the statutory umbrella of the Canadian Act: in its definition of "copyright", section 2 refers to the economic rights that subsist in works[47] and related rights[48] (such as those relating to performances, sound recordings, and communication signals). Moral rights are defined separately in section 2 as "rights described in subsections 14.1(1) and 17.1(1)". Further, section 28 governs the infringement of moral rights generally, including the moral rights held by both authors and performers. It is noteworthy that moral rights are not classified as "copyright",[49] but are treated in a structurally distinct fashion in the Act, which is a testament to the separateness of the two regimes.

As such, at a *macroscopic* level, it appears somewhat unlikely that the general fair dealing and related defences to copyright infringement enshrined in section 29 *et seq*. of the Canadian *Copyright Act*, such as research, criticism and review, and so forth, would be capable of being extended to complaints relating to moral rights. As the wording of the Act currently stands, it is certainly plausible that an alleged moral rights infringement could fall outside the

[46] *Ibid*.
[47] See section 3 of the *Copyright Act* (1985) of Canada, c. C-42.
[48] See *ibid*., sections 15, 18, 21 and 26.
[49] See Daniel J. Gervais & Elizabeth F. Judge, *Intellectual Property: The Law in Canada* 2nd ed., (Toronto: Thomson Canada, 2011), p. 190.

protective ambit of the statutory copyright defences even if the underlying act otherwise qualifies for protection under the fair dealing or related provisions.

3 Toward a "moral" copyright regime in Canada: Fostering consistency between the statutory defences for infringement

This section seeks to develop the argument that a use which is "fair", by definition, should *not* result in actionable harm to another party. The corollary of this argument is that activities which are covered by a fair dealing defence should not trigger liability for a moral rights action under the *Copyright Act* of Canada.[50] In this vein, the statutory defences to copyright infringement should clarify the extent to which protective shelter is provided against moral rights infringement, and the specific grounds on which a user will be immunised from liability under the Act. Under an integrated regime, qualifications or limitations to the scope of a defence could be built into the statutory provision itself, so as to ensure that legally protected forms of fair dealing would be inherently respectful, within reason, of moral rights, taking into account the nature and purpose of the protected activity.

[50] It is noteworthy that, in addition to the point about moral rights made earlier, fair dealing is not listed as a defence to the circumvention of technological protection measures. See for instance section 41.1(1)(a) of the Canadian *Copyright Act*, which provides that "No person shall circumvent a technological protection measure…", and the ensuing provisions, which provide exceptions including those relating to the interoperability of computer programs and encryption research. Interestingly, however, under section 41.21(2), the Governor in Council may prescribe "additional circumstances" in which section 41.1(1)(a) does not apply, taking into account whether the anti-circumvention rule could adversely affect criticism, review, news reporting, commentary, parody, satire, teaching, scholarship, or research in respect of the work. A detailed discussion of the anti-circumvention provisions is outside the scope of this article.

Clarifying the interface between the protection of moral rights and the statutory defences (such as fair dealing) is not a purely theoretical issue. Practically speaking, the scope of protection granted by the statutory defences can have a significant impact on the exercise of basic civil liberties, such as the freedom of expression, through derivative or parodic works. In effect, the UGC exception and other users' rights provisions introduced by Canada's *Copyright Modernization Act* might be rendered inutile, or in some cases, even nugatory, if moral rights can be raised as grounds to object to the generation of such content. These personality rights could then serve as a backdoor through which authors and artists can place continuing restraints on creative expression by others, even though such expression might otherwise be protected by one or more of the statutory defences, such as the fair dealing or the UGC exception.[51] The ability to use moral rights as a weapon to stifle or limit creative expression would effectively emasculate the UGC provisions, possibly defeating the purpose for which they were enacted.[52]

On the other side of the spectrum, however, is the need to confer adequate protection to moral rights, particularly in light of the special challenges posed by the Internet and digital technology, which have radically heightened the ease with which creative content can be altered, modified and embellished.[53] From the point of the view of an author-creator, the threats posed by digital technology to the integrity of and connection to the work can be significant. The losses that a moral rights holder would suffer as a result of damage to reputation might extend beyond complaints of a personality-linked nature to include financial injury if their ability to attract custom through their work is thereby impaired by

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[51] *Supra* n. 15, p. 236.

[52] *Ibid*.

[53] See for example Gendreau, *Digital Technology and Copyright*, *supra* n. 35, p. 218.

the infringing activity. The key issue, therefore, lies in designing a fair dealing regime which accommodates and addresses moral rights concerns in a clear and transparent way, whilst elucidating the qualifications that must be satisfied in order for third party expression to be protected from both moral rights and copyright infringements.

This article seeks to offer three (related) principal arguments in favour of integrating moral rights more holistically into the Canadian copyright framework, with the longer-term goal of constructing a more coherent and "moral" statutory regime for the protection of economic and personality-based rights in respect of expressive work.

The first argument relates to the possibility of avoiding duplicity of proceedings over essentially the same act complained of. Under the current statutory framework in Canada, an author who fails in a claim for economic infringement against a party who successfully cites fair dealing may nevertheless attempt a "second bite at the cherry". If the copyright owner is also the moral rights owner (usually though not always the author if the economic rights have been assigned to another party), then a second action for moral rights infringement could potentially form the basis for a subsequent lawsuit against the same defendant. Such "duplicitous" proceedings would result in additional costs and place unnecessary burdens on resources over an impugned act for which the defendant has already been immunised from liability for a *different* cause of action under a copyright defence. Similar arguments would also be applicable to a situation where economic rights and moral rights are held by *different* parties. In the latter scenario, a second plaintiff might attempt to vindicate moral rights against the same defendant in respect of the same act of use where the claim of a first plaintiff has earlier failed on grounds of fair dealing, or similar circumstances. In short, having two uncomfortably-integrated regimes for liability would increase the complexity of copyright litigation and aggravate

the level of legal uncertainty for artists and parodists seeking to rely on statutory defences to shield their creative work and activity from potential liability.

The second advantage of a holistically integrated copyright system is a stronger assurance of balance between the protection of authors' rights and the public interest, whilst reducing the chilling effect that personality-based authorial interests would have on creative expression.[54] Since derivative works and user-generated content are, by definition, adaptations or modifications of underlying original works, they constitute a form of creative expression whose legality is highly dependent upon the scope of protection granted to moral rights, particularly the moral right of integrity. Allowing transformative uses of original work to receive protection under a more comprehensive fair dealing regime which covers both economic and moral rights infringements would play an important role in ensuring that artistic activity can continue to flourish and contribute to the intellectual and cultural advancement of society.

Third, the harmonisation of statutory defences against economic and moral rights infringements would help to promote a more doctrinally coherent copyright regime that integrates moral rights protection more seamlessly into the exclusions from liability.[55] The key advantage of an integrated copyright and moral rights regime is greater consistency in the shelter that it seeks to provide

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[54] See Albert Fang, "Let Digital Technology Lay the Moral Right of Integrity to Rest" (2011) 26 *Connecticut Journal of International Law* 457-475, pp. 457 and 475, who suggests that the moral right of integrity is swiftly becoming obsolete in the digital age – an age where available software programs have rendered art, especially digital art, "more malleable than clay". He argues against having a strong moral rights regime, which in his view would only stifle creativity and chill the modern development of art.

[55] See Gendreau, *Digital Technology and Copyright*, *supra* n. 35, p. 220, who cites arguments in support of recognising a fair dealing defence for moral rights infringement, suggesting that a practice that "establishes itself over time" would be preferable to having special provisions on moral rights for the digital environment. Having an "established practice" in place where moral rights and economic rights are integrated as part of a coherent whole would also help to guard against fragmentation of the copyright system.

to producers of derivative works. Integrating moral rights within the protective ambit offered by the fair dealing umbrella would imbue the Canadian *Copyright Act* with a stronger sense of internal compatibility, cogency and conceptual defensibility. The role of the statutory defences can also be clarified if their respective ambits are delineated with precision within the scheme of the Act. The internal consistency of statutory copyright provisions would have an additional practical advantage of communicating information more effectively to the public, thereby serving as a more useful and comprehensible guide to behaviour by users in the creative and expressive industries.

A possible counter-argument that might be raised against the integration of defences to copyright and moral rights infringement is that certain forms of use (such as parodies and user-generated content) may severely damage the original author's reputation, even though their purpose may, broadly speaking, be in the public interest. For example, a parodist citing fair dealing who replaces a cartoon character in a famous comic strip cover with a lurid or salacious representation might tarnish the wholesome character of the comic artist's original *oeuvre*. In other scenarios, famous artistic works might be modified through the addition of images bearing the likeness of politicians for the purpose of making comments (usually of a critical nature) on the politicians concerned. In a well-known Belgian case, *Deckmyn and Vrijheidsfonds v Vandersteen* ("*Deckmyn*"),[56] the cover of a comic book titled "De Wilde Weldoener" ("The Wild Benefactor") was altered by a parodist, who replaced the original image of a man (in a bowler hat and scattering money) with the face of the mayor of Ghent. The purpose of the modification was to make a political statement about the mayor's alleged wastefulness in the use of public funds. Critics of the integration

[56] Case C201/13, [2014] ECDR 21.

argument might try to suggest that moral rights target a different kind of injury to the author (as opposed to economic infringement), and that broadening the umbrella of fair dealing too far might severely compromise the interests of authors.

It is submitted, however, that the concerns outlined in the above paragraph can be overcome through a proper construction of fair dealing. It is *not* the contention of this article that moral rights and economic rights should be merged. Indeed, moral rights and economic rights target different forms of injury and it is possible for one set of rights to be infringed but not the other.[57] Rather, it is the *interface* between the statutory defences to both sets of rights that should be delineated with greater clarity. The paramount feature of an integrated approach is that the user's act must be *fair* in order to be covered by a statutory defence to copyright infringement. In considering whether a parody or other form of derivative expression falls within the ambit of a statutory defence, it is necessary to strike an equitable balance between the rights owner and the derivative user. In this regard, not all parodies or UGC would (or should) qualify for fair dealing. The nature of the parody, the amount of material that was "borrowed" from the original, and the impact of the parody on the original work are all factors that are pertinent in determining if the use is fair.[58] In particular, it

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[57] For instance, the unauthorised reproduction and dissemination of an author's work in its entirety with appropriate attribution would likely constitute economic infringement, but not moral rights infringement. Conversely, altering an artistic work or removing the author's name from the work might constitute moral rights infringement but not economic infringement if no copying of the work is done, or if the user has been assigned the economic rights to the work or is otherwise licensed to use the work for economic purposes.

[58] See *Fraser-Woodward Ltd v BBC*, [2005] FSR 36, in which Mann J outlined several requirements that must be met in order for a use to be fair, including the motives of the user, the amount of work used, and the overall / general purpose of the use. See also the recent Canadian case of *United Airlines, Inc. v Jeremy Cooperstock*, (2017) FC 616, para. [141], where it was held that parody, as an aspect of free speech, is subject to restrictions. On the facts, it was held that the questionable purpose, amount and effect of the dealing militated against a finding that the use in question was fair.

should be borne in mind that parodists who, without due cause, insert politically or religiously offensive material into the work of others or who exploit unnecessarily large amounts of the author's original content in making their statement would have significant difficulty in demonstrating that their use was fair. On the flip side of the coin, it must be borne in mind as well that simply because an author objects to a parody (or other use) of a work does not mean that the moral right of integrity has necessarily been violated. In both the UK and Canada, there is a general requirement to demonstrate that the unauthorised treatment of the work has resulted in prejudice to the honour or reputation of the aggrieved author claiming that their moral right of integrity has been infringed. This prejudice requirement has generally been interpreted strictly by courts in the UK and Canada, with several leading cases suggesting that an objective test will be applied in such cases, based on the perception of the author's standing in the community by right-thinking members of society.[59]

A further issue that should be considered is whether streamlining the statutory defences to provide protection against moral rights infringements would result in a reading down or narrowing of the fair dealing provisions. It is submitted that this need not necessarily be the case. By stipulating the specific conditions under which fair dealing is available as a defence (i.e. against both economic and moral rights claims), a properly constructed copyright regime can foster a more equitable balance of power between owners and users of protected

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[59] See for instance *Pasterfield v Denham*, [1999] FSR 168, *Confetti Records v Warner Music UK Ltd*, [2003] EMLR (35) 790, *Harrison v Harrison*, [2010] FSR 25, and *Tidy v Trustees of the National History Museum*, (1998) 39 IPR 501 in the UK. See also *Prise de Parole Inc v Guérin*, (1995) 66 CPR (3d) 257 (Federal Court Trial Division), *Boudreau v Lin*, (1997) 150 DLR (4th) 324 (Ontario Court of Justice), *Patsalas v National Ballet of Canada*, (1986) 13 CPR (3d) 522 (Ontario High Court of Justice) and *Wiseau Studio et al. v Richard Harper*, 2017 ONSC 6535 in Canada. The oft-cited Canadian case of *Snow v Eaton Centre Ltd*, (1982) 70 CPR (2d) 105 (Ontario High Court of Justice), which resulted in a finding of infringement to the moral right of integrity, was decided before the 1985 amendments to the Canadian *Copyright Act*.

content. These conditions need not necessarily require *full* or *exact* compliance with the moral right(s) in question, if the use in question is justified by strong public interest considerations. For example, the fair dealing defence for news reporting can be modified to provide protection against both economic and moral rights infringement (broadly defined), as long as reasonable efforts have been made to acknowledge the author or source of the material. This would give reporters some degree of flexibility in modifying the format of the work for the purpose of broadcasting or display.

Similarly, the parody and satire clause in section 29 of the *Copyright Act* of Canada can be re-configured as a separate statutory provision to extend its protection against moral rights claims through textual amendments such as:

> Fair dealing for the purpose of parody, satire or pastiche does not infringe copyright or *moral rights* if the use in question does not take unreasonable advantage of the work or its author, or otherwise introduce material that is contrary to public order and morality.

Such a provision would arguably be broad enough to permit creative parodic expression that might not be entirely flattering to the work (or its author), whilst at the same time ensuring that a system of checks and balances can be put in place to protect the author's work against outrageous, defamatory, untrue, outlandish or scandalous mutilations that are not justified by the parodist's intended message or purpose. In this regard, the fairness considerations that are embedded in the process of evaluating whether a derivative work is permissible can be tailored in a flexible manner to suit the specific purpose for which the user is claiming protection. This is a context-specific question: what is fair in the case of a parody (where some alteration is expected) might not be so in the case of news reporting (where what is expected is the accurate presentation of facts).

What is essential, therefore, is for fair dealing to be tempered by a requirement of reasonableness that takes into account the legitimate interests of the author, in line with the three-step test for general copyright exceptions mandated by the international conventions.[60] An integrated approach to copyright and moral rights defences would merely recognise, in a more explicit and harmonised form, the current disparate interests that are protected under different segments of the statutory copyright framework, and would not necessarily lead to more onerous evidentiary burdens on users seeking to demonstrate that their use is fair. Under a "moral" copyright regime, the statutory defences for fair dealing would accommodate *only those forms of use* that are *justified* by the public interest *and* that are respectful, *within reason*, of the author's personal interests.

The above approach is consistent with the interpretation adopted by the WTO Panel in *United States – Section 110(5) of the US Copyright Act*, where it was held that "legitimate interests", in the context of the three-part test, involves a consideration of "justifiable interests" in light of the objectives underlying the protection of exclusive rights.[61] In this vein, a parody that takes unfair advantage

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[60] Central to the process of determining whether a use, in general, is "fair", is the "three-step" test for copyright defences found in the Article 9(2) of the *Berne Convention for the Protection of Literary and Artistic Works* as well as Article 5.5 of the *Information Society Directive* (*Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001*). The three-step test has also been incorporated in a modified form into Article 13 of the TRIPS Agreement. It is important to note that the three-step test prescribes, as an overriding consideration, that the use in question must not unreasonably prejudice the legitimate interests of the author or conflict with the author's normal exploitation of the work. The idea of "balance" is therefore a central part of any attempt to interpret the scope of the fair dealing provisions within the larger context of Copyright legislation. See also Paul Torremans, *Holyoak & Torremans Intellectual Property Law* 8th ed. (New York: OUP, 2016), p. 295.

[61] See Report of the Panel, *United States – Section 110(5) of the US Copyright Act* (Panel Report, WT/DS160/R, circulated 15 June 2000), para. 6.224, where the WTO Panel expressed the view that whether an interest is "justifiable" is to be determined in light of the objectives underlying the protection of exclusive rights.

of an author's work would arguably *not* be eligible for protection under the statutory defence as it currently stands (since it fails the fairness test), and would consequently leave open the possibility of a moral rights action by the aggrieved author, provided that the author can satisfactorily demonstrate the required prejudice to their honour or reputation. Clearer coordination between the statutory defences to the two sets of rights can, however, be achieved through the incorporation of an appropriate cross-referencing provision to include protection against moral rights claims, such as a qualifying clause in each statutory defence or fair dealing provision that clearly prescribes the conditions for its availability. The mechanics of inserting cross-referencing provisions into the current statutory framework of the *Copyright Act* of Canada will be explored further in the next section.

4 Possible legislative responses to the "copyright conundrum"

In view of the normative arguments articulated in the preceding section, it is submitted that the protection of moral rights can be more effectively integrated into the copyright framework through legislative reform which seeks to bridge the gap between the statutory treatment of fair dealing and moral rights. These legislative amendments might take the form of a qualifying provision inserted into the statutory defences to copyright infringement stipulating the conditions under which the defences are available and extending their applicability to moral rights actions as well. In order to streamline the moral rights and economic rights regimes, the statutory defences should expressly clarify what types of moral rights have to be respected in order to qualify for the defence in question. That would enable the two regimes to operate in tandem within a unified framework.

Before exploring the possible strategies for ameliorating the perceived tensions between the protection of moral rights and economic rights in Canadian copyright law, it is first appropriate to examine the key statutory provisions in fuller detail. The principal sections that govern moral rights in the Canadian *Copyright Act* are sections 14.1 and 14.2 (with corresponding sections for performers in sections 17.1 and 17.2), which begin by outlining an author's right to the integrity of the work, right to be associated with the work, and the right to remain anonymous. The ensuing sections relate to issues such as waiver (section 14.1 (2), (3) and (4)) and the term of protection for moral rights (section 14.2). The above sections are silent on whether there are certain fair dealing activities which might be exonerated from liability for moral rights infringement. Interestingly, sections 64(2) and 64.1(1) of the *Copyright Act* provide, under prescribed circumstances, for the non-infringement of copyright and moral rights with respect to the application of *industrial designs* to certain useful articles or the application of useful article features that are dictated solely by the utilitarian function of the articles. Nevertheless, sections 64(2) and 64.1(1) relate more to products of industrial or commercial manufacture produced in quantities of more than fifty, or applications involving utilitarian processes, features, functions or methods of manufacture, and do not apply to works of art, music or literature in general. In short, the Act does not contain a general section which sets out a list of defences, limitations or exceptions to the moral rights adumbrated in sections 14.1 and 17.1.

It ought to be pointed out that the key moral rights provisions in Canada's *Copyright Act*, sections 14.1 and 17.1, are subject to a qualifying provision in section 28.2. However, section 28.2 does not contain a general list of defences to the infringement of moral rights, which is defined in section 28.1 as "[a]ny act or omission that is contrary to any of the moral rights" of the relevant author or performer that is done without the author or performer's consent. Rather, section

28.2 places limits on what constitutes actionable prejudice of an author or performer's honour or reputation. Except in the case of a painting, sculpture or engraving, where distortion of the work is presumed to result in prejudice, an author is required, in all other cases, to demonstrate that such prejudice has indeed occurred. Section 28.2 is silent on whether an act of fair dealing that is protected under section 29 of the *Copyright Act* could incur liability for moral rights infringement. The text, as it stands, appears to leave open the possibility that acts of fair dealing could nevertheless be found to be infringing of moral rights if the acts in question cause actionable prejudice to the author's reputation or connection with the work.

In contrast, sections 79 and 81 of the UK's *CDPA*, which respectively relate to the moral rights of attribution (right to be identified as author or director) and integrity,[62] contain a list of exceptions to moral rights, including provisions exonerating specified acts that would not infringe copyright. Hence, adapting or using a work for the purpose of reporting current events might potentially not only be exonerated from liability for economic infringement, but *also* receive protection from moral rights infringement by virtue of sections 79 and 81.[63] In addition, sections 79 and 81 exclude from the ambit of moral rights protection certain classes of work in which such rights would not vest, such as computer-generated works,[64] and works that are made for the purpose of publication in periodicals or collective works of reference.[65]

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62 For a leading UK decision on the criteria for determining prejudice to an author's reputation in the context of asserting the moral right to integrity, see the case of *Confetti Records v Warner Music UK Ltd*, [2003] EWCh 1274 (Ch).

63 It is important to note, however, that section 79(4)(a) of the CDPA expressly refers to "fair dealing" under section 30 for the purpose of reporting current events through certain media, while section 81(3) of the same Act merely refers to "any work made for the purpose of reporting current events", without explicitly mentioning fair dealing.

64 See for instance section 81(2) of the *CDPA*.

65 See section 81(4) of the *CDPA*.

This presence of an exceptions clause for moral rights in the copyright legislation of the UK stands in sharp contradistinction to the statutory framework in Canada. By setting out a number of situations where moral rights are *not* infringed, even though the underlying acts complained of might appear to interfere with the personality interests of the author, sections 79 and 81 of the UK statute furnish a structurally logical framework with which to delineate more precisely the contours of acceptable use by third parties. It is worth noting that sections 79 and 81 follow immediately from the defining provisions on moral rights (sections 77 and 78 on the right to be identified as author or director, and section 80 on the right to object to derogatory treatment of work, respectively), thereby adhering to an organisational sequence that mirrors the corresponding provisions on economic infringement and fair dealing. The inclusion of an exceptions provision for moral rights in the UK statute plays an important role in streamlining and harmonising the relationship between the economic and personality aspects of copyright material as they relate to the activities of users, as part of a holistic and coherent statutory framework for the determination of liability.

This article proposes that the UK statutory framework can provide, to some degree, useful guidance to Canada in streamlining its approaches to the protection of economic and moral rights under its copyright statute. However, the UK model is by no means a panacea. Only a relatively narrow class of fair dealing activity appears to be covered by the defences to moral rights infringement in the UK.[66] It was not until fairly recently that a transformative use exception was incorporated into the CDPA to protect works such as caricatures,

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[66] See Bently & Sherman, *Intellectual Property Law*, *supra* n. 28, p. 289.

parodies and pastiches,[67] following the recommendations of the Gowers Review[68] and the Hargreaves Review of Intellectual Property.[69] Nevertheless, even with the new addition, the cross-linkages between the moral rights provisions and the fair dealing provisions in the CDPA are somewhat inconsistent – section 79 contains a specific sub-clause which expressly refers to *fair dealing* for the purpose of reporting current events,[70] while section 81 mentions works made for reporting current events without explicitly citing fair dealing.[71] It is therefore not entirely clear whether the use in question has to be fair in order to qualify for the news reporting exception under section 81.

The situation is perhaps compounded even further by the scope of the "new" exception for parodies and caricatures[72] in the CDPA – section 30A –

[67] See section 30A(1) of the *CDPA,* added by The *Copyright and Rights in Performances (Quotation and Parody) Regulations* 2014. The new "parodies" exception in the CDPA appears to take advantage of the flexibilities and freedoms allowed by Art 5(3)(k) of the *Information Society Directive*, *supra* n. 60. The UK provision, however, contains a statutory requirement of "fairness".

[68] See recommendations 11 and 12 of the 'Gowers Review of Intellectual Property' (December 2006) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf accessed 18 June 2018.

[69] See Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth – An Independent Report by Professor Ian Hargreaves*, (May 2011), p. 49-51, particularly paragraphs 5.32 and 5.35.

[70] See section 79(4)(a) of the CDPA, which makes explicit reference to "section 30 (fair dealing for certain purposes), so far as it relates to the reporting of current events by means of a sound recording, film, broadcast or cable programme".

[71] Section 81(3) of the CDPA merely states that: "The right does not apply in relation to any work made for the purpose of reporting current events." There is no mention of the section 30 provision on fair dealing for criticism, review and news reporting.

[72] It is perhaps worthy of note that the CDPA does not provide a definition of the terms "parody", "caricature" or "pastiche". However, the meaning of the term "parody" has been considered by the European Court of Justice in the Belgian case discussed in the preceding section, *Deckmyn*, *supra* n. 56, in which the court largely endorsed the advisory opinion of Advocate-General Cruz Villalón. It agreed with the Advocate-General's view that while "parody" has a relatively broad scope of flexibility vis-à-vis its application, a successful parody (in the European context) must be shown to have both a structural component (addition of original material to a work so that the two are not confused by the public) and a

which applies only to economic rights.[73] The text of section 30A(1) reads: "Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe *copyright* in the work" (emphasis added). The limited scope of the UK parodies exception would not appear to provide any greater shelter than the equivalent fair dealing provision for parodies in the Canadian legislation. Considerable tensions remain unresolved in the UK framework – tensions that might be instructive in shaping future reform efforts to harmonise the protection of moral rights and freedom of expression in both the UK and Canada. The qualifying provisions in sections 79 and 81 of the CDPA do *not* currently provide general protective shelter from liability for moral rights infringement. Instead, they appear to apply selectively to activities such as news reporting,[74] leaving other forms of use (such as parodies, user-generated content, and criticism and review) outside the ambit of protection. This means that despite the presence of a qualifying clause for moral rights under the UK's copyright statute, there remains the possibility of a disjuncture between the defences to economic and moral rights infringement in some cases, and inadequate protection of expressive activity in other cases. An act of use that qualifies as fair under the economic rights regime may still offend one or more of the moral rights provisions in the CDPA.

An effective and streamlined approach would need to go further in order to harmonise the protection of expressive activities and uses under the economic and moral rights regimes of copyright law. Under a more harmoniously defined copyright framework, the scope of the fair dealing and other statutory defences should be extended to provide protection against infringements of both

"burlesleque" intention or functional component (which may encompass but is not necessarily limited to situations of target parodies.)

[73] See Bently & Sherman, *Intellectual Property Law*, *supra* n. 28, p. 289, note 133.

[74] See sections 79(4)(a) and 81(3) of the CDPA.

economic and moral rights, while stipulating the conditions under which such protection is available. Under such a framework, section 29 of the Canadian *Copyright Act* might be modified to read: "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright *or moral rights if the following conditions are satisfied…*", while the first line of section 29.1 could be amended to state: "Fair dealing for the purpose of criticism or review does not infringe copyright *or moral rights* if the following are mentioned…"

It ought to be re-emphasised that the conditions for invoking a specific fair dealing defence against moral rights claims might differ from provision to provision. Hence, the reporting of current events defence might merely require that the user indicate, where reasonable, the source of the copyright material, while allowing *reasonable* modifications of the material (e.g. resizing, reformatting or truncating to fit broadcasting or publishing requirements) that might otherwise form the basis for a potential moral rights complaint. Appropriate adjustments could also be made to the other statutory defences, such as the parody or satire defences, by stipulating, for instance, that the derivative work should not contain material that is contrary to public order or morality, while at the same time extending the reach of their protective ambit to encompass moral rights claims. This would allow for reasonable parodic or satirical uses of the work to be made, even if their message may not be entirely flattering to the author concerned. It is submitted that these qualifications are already embedded to some extent in the fairness analysis; however, codifying these qualifications in statutory form would play an important role in clarifying the uncertain interface between moral rights and fair dealing, and in providing guidance and coordination to authors and users on what constitutes legally permissible derivative use of a work.

Since the fair dealing provisions in the CDPA do not provide explicit protection against moral rights infringement, similar adjustments might, under an integrated approach, have to be made to the structure of section 29 and accompanying provisions in the UK. As is the case in Canada, the UK's fair dealing provisions could be expanded to include protections against both copyright *and* moral rights infringements, provided the requisite conditions for the specific purpose (e.g. news reporting or parody) are satisfied.

A harmonised copyright regime for economic and moral rights would accordingly require the fair dealing provisions and the exceptions to moral rights to be consistent in the degree of protective shelter that they provide to the expressive activities of users. In this vein, it is recommended that the UK and Canada consider adopting a more integrated and harmonised approach to copyright and moral rights exceptions. The provisions relating to fair dealing and other statutory defences to copyright infringement should, where appropriate, be amended to incorporate references to moral rights. A clarification in this regard would enhance the doctrinal consistency of the protection of rights under a more unified copyright framework, and perhaps imbue copyright law in Canada and the UK with a stronger sense of "morality" and fairness.

5 Conclusion

The exhortation that art begets more art has probably never been more pertinent than in the current digital age. The expansive reach of the Internet has rendered media and content available to a wider audience than ever before, exposing users to an almost unimaginable onslaught of images, sounds and ideas. Since creators of intellectual content are themselves also users, the opportunities for creative expression *and* the subsequent sharing of that expression through channels of digital communication have been significantly enhanced by the pervasive reach

of information networks. It is therefore no longer appropriate for intellectual property lawyers to rely rigidly on concepts and principles that were once designed for the analogue age.

This article has sought to argue that the copyright statutes of the UK and Canada are in need of a more streamlined approach in delineating the complex interface between economic rights, moral rights and users' rights. In particular, clearer guidance needs to be provided on the extent to which protected material can be used for activities such as research, parody, news reporting and criticism under the statutory provisions which offer immunity against liability for infringement. As such, an important question for policymakers to consider is whether the scope of the statutory provisions that provide shelter from copyright infringement should be extended to protect users from liability for *moral rights* infringement. Under the current copyright regimes in Canada and the UK, the statutory framework leaves open the possibility that an act which receives protection under the umbrella of the statutory defences might still offend the moral rights of authors. This seeming inconsistency can be corrected by expanding the ambit of the fair dealing and other statutory defences to protect against infringements of *both* economic and moral rights, whilst elucidating the conditions under which such protection is available. The above measures would involve amendments to the current text of the copyright statutes in Canada and the UK.

Clarifying the interface between fair dealing and moral rights infringement would constitute an important step in defining the ambit of acceptable use in Canada and the UK, and help in the construction of a more internally consistent and doctrinally sound copyright statute in each jurisdiction. Further, a streamlined approach to economic and moral rights infringement would facilitate the re-imagination and re-interpretation of copyright works by third parties and encourage vibrant discourse among authors in the creative

industries and other users in the public at large, thereby promoting a more permissive and innovative culture of creation for the new information society.