

1 *Introduction*

This article is concerned with the relationship between freedom of expression and copyright law and, more fundamentally, with what this relationship – its conflicts, tensions, and attempted resolutions – can reveal to us about the nature of the copyright interest. Freedom of expression protects an individual's right to express herself without limitations imposed upon the content of her speech, while copyright law prevents an individual from expressing herself through another's copyrightable expression. In the American context, this apparent insonance led Melville Nimmer to ask, 'Is not [the Copyright Act] precisely a "law" ... which abridges the 'freedom of speech' and 'of the press' in that it punishes expressions by speech and press when such expression consists of the unauthorized use of material protected by copyright?'¹ With this question in mind, it would not seem far-fetched to suggest that an absolutist conception of the right of free expression could render the Copyright Act unconstitutional. But then, as Nimmer takes care to point out, the 'reconciliation of the irreconcilable, the merger of antitheses ... are the great problems of the law.'² When irreconcilable assertions are embodied in competing individual rights, reconciliation tends to be proffered in the language of 'balance,' 'compromise,' or 'trump.' These words embody the analytic tools by which the interface between copyright protection and the right of freedom expression has typically been shaped and defined. In the discussion that follows, I hope to show that these words are inadequate tools for the task.

Having locked potentially antagonistic rights into 'logic-tight compartments,'³ Canadian courts have been surprisingly successful at maintain

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1 Melville Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?' (1970) 17 U.C.L.A.L.Rev. 1180 at 1181 [Nimmer, 'Does Copyright Abridge?'].

2 Jerome Frank, *Law and the Modern Mind* (New York: Coward-McCann, 1949) at 30, cited in *ibid.* at 1180.

3 Frank, *ibid.*, cited in Nimmer, 'Does Copyright Abridge,' *supra* note 1: '[We] maintain, side by side as it were, beliefs which are inherently incompatible ... We seem to keep

ing the separation of freedom of expression considerations and copyright law. However, given the nature of the copyright interest, there are necessarily moments where both copyright and the right of free expression are irrefutably at play, and apparently in conflict. In such instances, this neatly compartmentalized understanding leads to an overly simplistic resolution: one concern is temporarily given precedence over the other (balance), forced to give up ground (compromise), or made to give way completely (trump). The characterization of copyright as a species of private property entitlement tends to afford it moral and legal primacy. This causes free expression concerns to give way to private copyright control and, I will argue, thereby shifts copyright law further from the justificatory foundations upon which it stands.

My purpose in this article is to show that the characterization of copyright and freedom of expression as individual rights vested in the liberal subject undermines the importance of both sets of interests and ultimately restricts the communicative activity that both copyright and freedom of expression are intended to further. The social values that lie at the core of the copyright system are the same as those affirmed by our belief in the guarantee of freedom of expression: the value that we attach to communication, to interaction between members of society, and to participation in a social dialogue. The key to understanding the relationship between freedom of expression and copyright is to see them both in light of their mutual goal: that of maximizing cultural flows and channels of communication between members of society. To ensure the effectiveness and legitimacy of copyright, it must therefore embrace the values of freedom of expression, for these values are its own. Premised upon this assertion, my argument will be that a vision of copyright as a private, proprietary entitlement capable of trumping free expression interests disrupts the internal coherence of the copyright system. Rather than purporting to reconcile the irreconcilable, then, copyright policy should concern itself with fostering the human, creative capacities that it is intended to encourage. To the extent that it does so, no antitheses require resolution.

In Part II of this article, I describe the conflict that exists at the level of individual rights between freedom of expression, as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms,⁴ and the rights granted to authors of original works pursuant to the Copyright Act.⁵ The discus-

these antagonistic beliefs apart by putting them in "logic-tight compartments." Nimmer goes on to note that "[n]owhere is this phenomenon better illustrated than in the ... failure to perceive that views of copyright and the first amendment, held "side by side" may, in fact, be contradictory.'

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [Charter].

⁵ R.S.C. 1985, c. C-42 [Copyright Act].

sion provides an overview of the way in which the Canadian courts have defined freedom of expression and have approached its relationship to intellectual property. In Part III, I examine the approach taken in the case of *C^{ie} Générale des Etablissements Michelin – Michelin & C^{ie} v. CAW-Canada*,⁶ where the court's vision of the nature and purpose of copyright led to a conclusion that contravened both the goals of the copyright system and the principles of free expression. My discussion criticizes the court's reliance upon analogy with physical property and private property rights and its invocation of the form/content divide. In Part IV, I examine the principles of freedom of expression in terms of communication and community, and in Part V, I make the argument that the social values informing freedom of expression are the same as those embodied by the copyright system. Part VI argues that if we are to explain copyright in terms of the encouragement of authorship, the rights granted to authors under that system ought not be characterized as individual private property entitlements.

II *Copyright v. freedom of expression in Canada*

At their most basic level, copyright laws allow individuals to call upon the state to prevent someone from speaking or expressing themselves in a particular way. By giving the copyright holder a monopoly over the use of the copyrighted work, copyright law creates private interests ostensibly hostile to the freedom-of-expression interests of other members of the public. On the one hand, individual A has the right to express herself freely, while on the other hand, individual B has the right to prevent A from using expression substantially similar to B's copyrighted expression. Section 2(b) of the Charter constitutionally guarantees freedom of expression, while the Copyright Act creates an exclusionary interest over the expression of an idea fixed in a tangible form. Put in this way, the question is not whether the Copyright Act is constitutionally questionable but, rather, how can it be anything but? Sunny Handa has explained the freedom-of-expression challenge for Canadian copyright law thus:

One would think that the place of copyright in the context of freedom of expression would be a precarious one. After all, copyright broadly targets expression and provides that exclusive rights of expression be given to creators. Once a work is created, one cannot repeat it without paying some royalty. In fact, the right to repeat it need not be given; it may be withheld whereupon one may not repeat the expression. Framed in this way, copyright laws appear to offend freedom of expression rules. Yet no real challenges have been brought.⁷

⁶ (1996), 71 C.P.R. (3d) 348 (F.C.T.D.) [*Michelin*].

⁷ Sunny Handa, *Copyright Law in Canada* (Markham, ON: Butterworths, 2002) at 95.

No doubt there are many reasons for the paucity of constitutional scrutiny of the Copyright Act – not least the economic and political strength of those who favour expansive copyright protection, together with the intuitive appeal of basic copyright doctrine and its accompanying rhetoric. Another contributing factor has been the largely unchallenged assumption, among policy makers and commentators alike, that the copyright system sufficiently respects freedom-of-expression values by virtue of internal mechanisms such as the originality requirement, the idea/expression dichotomy, and the fair dealing defence.⁸ But whatever explanations are available, legislative and judicial complacency about the constitutionality of copyright regulation cannot be explained on the basis that copyright protection does not touch upon matters of fundamental constitutional significance, for it is overwhelmingly clear that it must; copyright deals exclusively with the manipulation of expression.⁹

A THE GUARANTEE OF FREEDOM OF EXPRESSION

Section 2(b) of the Charter guarantees to everyone the ‘freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.’¹⁰ Legal scholarship and jurisprudence almost invariably invoke three broad justifications for free expression principles. Perhaps the most prevalent justification recognizes the right of free expression of opinion and of criticism as ‘essential to the working of a parliamentary democracy such as ours.’¹¹ The most renowned advocate of this ‘democratic’ interpretation of free speech principles was Alexander Meiklejohn,¹² who argued that the right to free speech followed by deduction from the notion of democratic self-government: the legitimacy of democratic institutions derives from their nature

as representative of the interests of the political citizenry, and so it is axiomatic that people have had the opportunity to formulate and express their views to those who purport to represent them.¹³ A second explanation often given for the freedom of expression is the search for truth, for ‘steadily advancing enlightenment, for which the widest range of controversy is the *sine qua non*’;¹⁴ as John Stuart Mill argued, the freedom can be understood in a utilitarian sense as the key to the unrestricted exchange of ideas from which the truth is most likely to emerge.¹⁵ A third rationale frequently posited for the guarantee of freedom of expression is its role as a means of achieving personal fulfilment. This approach makes free speech the end in itself, allowing individuals to achieve their full potential without government interference in any individual’s development of his own personality and integrity. In essence, this justification is grounded in the liberal notion of autonomy, which makes freedom of speech a requirement of state neutrality. This argument from autonomy, put in Rawlsian terms, posits freedom of speech as a ‘primary good’: whatever else one wants, it is rational to want freedom of speech because it is part of a framework that enables individuals to pursue whatever is their conception of the ‘good life.’¹⁶

The significance of how we choose to understand and rationalize our commitment to freedom of expression will become apparent in the course of the discussion that follows. For the moment, it will suffice to note that the Supreme Court of Canada has seemingly endorsed all three

13 Rand J. also articulated a powerful democratic interpretation of free expression principles in *Saumar v. Quebec (City of)*, [1953] 2 S.C.R. 299 at 330: ‘[G]overnment rest[s] ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under licence, its basic condition is destroyed: the government as licensor becomes disjoined from the citizenry.’

14 *Ibid.*

15 See John Stuart Mill, *On Liberty* (Harmondsworth, UK: Penguin, 1982). In the case of *Red Lion Broadcasting v. FCC*, 395 U.S. 367 at 390 (1969), the US Supreme Court rationalized free speech as the means by which to ‘preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’ This principle alone, however, is not a convincing explanation for free speech, as it cannot explain the protection accorded to fraudulent statements that can, by their nature, only hinder the ‘search for truth’; in *R. v. Lucas*, [1998] 1 S.C.R. 439, the Supreme Court of Canada confirmed that deliberate falsehoods are protected by s. 2(b) of the Charter.

16 See John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971). For an interesting discussion of this and other manifestations of the argument from autonomy, see Richard Moon, ‘The Scope of Freedom of Expression’ (1985) 23 Osgoode Hall L.J. 331 at 340–6 [Moon, ‘Freedom of Expression’]. Moon asserts that a general right to free speech does itself advance one conception of the good life and constrain others, favouring speech over silence, interaction over isolation. In other words, the protection of freedom of expression ‘favours those conceptions of the good that involve communication, open discussion and social intercourse’ (*ibid.* at 344).

8 This notion is addressed from a Canadian perspective by Ysolde Gendreau, ‘Copyright and Freedom of Expression in Canada’ in Paul Torremans, ed., *Copyright and Human Rights* (The Hague: Kluwer Law International, 2004) 21 [Gendreau, ‘Copyright and Freedom’]. It is also widely agreed that copyright has a certain role to play in furthering free expression. See, e.g., Gillian Davies, *Copyright and the Public Interest* (London: Sweet & Maxwell, 2002) at 354: ‘Copyright ... serves the public interest in freedom of expression. By enabling the creator to derive a financial reward from his work, his artistic independence and right to create and publish according to his own wish and conscience is assured.’ See also *ibid.* at 257.

9 This is the description of copyright employed by David Fewer in his discussion of ‘the expression paradox’ in ‘Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada’ (1997) 55 U.T.Fac.L.Rev. 175 at 177 [Fewer, ‘Constitutionalizing’].

10 *Supra* note 4 at s. 2(b).

11 *Switzman v. Elbing*, [1957] S.C.R. 285 at 369, *per* Rand J.

12 Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Oxford University Press, 1965). See also Alexander Meiklejohn, ‘The First Amendment Is an Absolute’ [1961] Sup.Ct.Rev. 245 at 255–7.

