

Meera Nair, Canada's 2017 Copyright Review: "A Plea to the Academics."^a

What we call copyright today came into formal existence through a confluence of events unfolding in the 18th century, including but not limited to: the Industrial Revolution, changing social conditions, wider diffusion of literature, and a rethinking of the very nature of creativity. None of these elements occurred in a vacuum—each affect the others. Such currents of change cannot be neatly bracketed to a specific time period, although we can pinpoint a moment in time (1710) when copyright entered statutory law.¹

The statute served as a trade regulation, to set some order in the book market. Yet it was presented by some as a right that seemingly addressed the need for authors to control their works, in order to encourage literary activity to the benefit of all. For over 300 years, that political message has continued. While Canada's official history with statutory copyright spans half that time, the message has been even more dire. Throughout we have been told that the very fabric of our nation is perilously close to irrevocable damage—that writers will not write the stories that bind us together unless the control via copyright is strengthened.

Such rhetoric has been politically effective. Which is why thoughtful analysis is all the more critical. A calm rebuttal might spur legislators to set aside emotion and act on credible evidence. We do Canada no favours by masking the complexity inherent to matters of copyright, creativity, society and identity. But resolving complexity requires patient investigation and a willingness to step back and seek perspective. This would seem a natural fit for the professoriate, particularly those whose passion is literature and can offer a more fulsome understanding of the intricate relationship between copyright and creativity.

Copyright is deemed essential to writing; it would be appropriate to turn to the experiences and works of writers to evaluate not only the role played by copyright in a monetary sense—we can all agree that copyright has potential to bring home the bacon—but the role played by copyright in a creative sense. Is copyright the only antecedent to creative effort? What is the intersection between copyright and the creative act? Is there evidence that expanding copyright's sphere improves creativity for all our writers—those who write today and those yet to write tomorrow?

For such an exploration, the work of Margaret Atwood beckons. Her knowledge of literature, her skill across genre, and her lifetime of engagement with her field make her remarks about writing unassailable. In Ms. Atwood's incomparable work, *On Writers and Writing* (previously titled *Negotiating with the Dead*), she devotes considerable effort to a vital question: Why do writers write?

Drawing from the expressions of other writers, Ms. Atwood assembled 73 reasons for writing. Only two items refer specifically to money, but a third could allude to money:

¹ Statute of Anne (1710), the title of which begins as: "An Act for the Encouragement of Learning," http://avalon.law.yale.edu/18th_century/anne_1710.asp.

To make money so my children could have shoes.
To make money so I could sneer at the bastards who used to sneer at me.
For my children.²

To be absolutely clear; I am not belittling any writer's wish to be paid. All I am attempting here is to illustrate that a desire to write has a strong probability of being separate from a desire for money. Political messaging that draws a simple equivalence between earning money and creating literature is a disservice to literary talent and skill, and invites a ridiculous conclusion: namely that the wealthy will churn out masterpieces of literature.

Nevertheless, there are lobbyists who strive to persuade parliamentarians exactly this—that it is only a matter of money. In those hands, copyright has only one purpose: copyright ensures payment. Readers of my blog will know that I tend to refer to “the system of copyright” in order to emphasize that copyright is composed of many parts, that rights of control must be balanced against rights of use, with the system as a whole striving to enhance creativity. Happily so, this aspect of system is ably conveyed through Ms. Atwood's dialogue about her own work.

For instance, in Fall 2016 Ms. Atwood's novel *Hagseed* was released to much anticipation. This re-telling of *The Tempest* is in connection to the Hogarth Shakespeare Project—a project starring a redoubtable cast of authors, with each rendering a new story based on one from the Bard's repertoire. I particularly liked the article Ms. Atwood provided to the Guardian about the project;³ these sentences lingered with me for months:

The first thing I did when starting this project was to reread the play. Then I read it again. Then I got my hands on all the films of it that I could find, and watched them. Then I read the play again.

Please bear mind that Shakespeare's works have never been under any kind of protection. Evidently, there is still money to be made by adapting his works, or simply reprinting them, despite the fact that other filmmakers and publishers are doing the same.⁴ The insistence that protection is *essential* to profit, does not bear up.

Returning to *Hagseed*, Ms. Atwood described the project with reference to: “the usual episodes of panic and chaos.” To find her way out of the chaos:

² Margaret Atwood, *Negotiating with the Dead—A Writer on Writing* (O.W. Toad Ltd.: Cambridge, 2002) p.xix-xxii.

³ Margaret Atwood, “A perfect storm,” *The Guardian*, <https://www.theguardian.com/books/2016/sep/24/margaret-atwood-rewriting-shakespeare-tempest-hagseed>.

⁴ In 2014 (during the 450th year celebration of Shakespeare's birth), Guinness World Records offered some observations about the Bard's repertoire. (i) Shakespeare is the most successful author in terms of film adaptations; there are 420 filmed versions of his work; and (ii) Shakespeare remains the world's best-selling playwright; an estimated four billion copies of his work has been sold in the almost 400 years since his death; see <http://www.guinnessworldrecords.com/news/2014/4/william-shakespeare-turns-450-ten-stunning-great-bard-themed-world-records-56900/>. Arguably, if Shakespeare's works were still under protection, much of this revenue would not have existed.

Calm, calm, I told myself. I read the play again, this time backwards. The last three words Prospero says are “Set me free.” But free from what? In what has he been imprisoned?⁵

Ms. Atwood went on to say she started counting up the prisons and imprisonments in the book and realized that every one of the characters is constrained at some point in the play. Reading her remarks, what came to me is the way copyright is wielded to imprison or exile new works, or to constrain the lawful conduct of others with respect to existing works.

Some curtailment is inadvertent, caused by perceptions of copyright and not necessarily the wishes of a copyright owner. Popular belief has granted copyright absolute control, despite the fact that the law has not. (Nor has the law *ever* granted such control.) Copyright is a set of limited rights. Those limits exist for a reason: essentially that future creativity is highly dependent on the past. If we want writers (and others) to blossom there must be some realm of unauthorized circulation of works, or elements pertaining to works.

In this regard, one of my favorite examples is apropos for this year.⁶

Leading up to the centennial celebrations of 1967, Alec Somerville (a member of a musical group known as The Brothers in Law) wrote a Canadian version of Woody Guthrie’s song *This Land is Your Land*. Mr. Somerville’s version, titled *This Land is Whose Land?*, is either biting true, or annoyingly irreverent, depending on one’s perspective of Canadian history. But as Mr. Somerville was using the same tune, distribution of his work was quickly curtailed via a copyright claim, despite the fact that Mr. Guthrie was not the composer of the original tune.⁷

⁵ Atwood, note 3.

⁶ Meera Nair, <https://fairduty.wordpress.com/2016/04/05/celebrating-a-parody-49-years-later/>. Link to the song is included; I highly recommend listeners also read the comments posted.

⁷ *Ibid.* An article by Nick Spitzer of NPR traced the tune to *When the World’s On Fire* by the Carter Family. Mr. Somerville’s notes indicate that *My Redeemer* (a nineteenth century hymn) was the source of the tune.

"This song is a patriotic song and has been widely distributed in schools throughout Canada. The song will again be published in 1967 by the Centennial Commission in the songbook "Young Canada Sings — "Le Jeune Canada Chante", 10,000 copies of the songbook will be distributed throughout Canada.

... the use of words which are in bad taste and insulting to the Canadian public with the music of the composition "This Land is Your Land" will cause incalculable damage to the Plaintiff and destroy the meaning and acceptance of the song in the minds of the Canadian public (para. 12)."

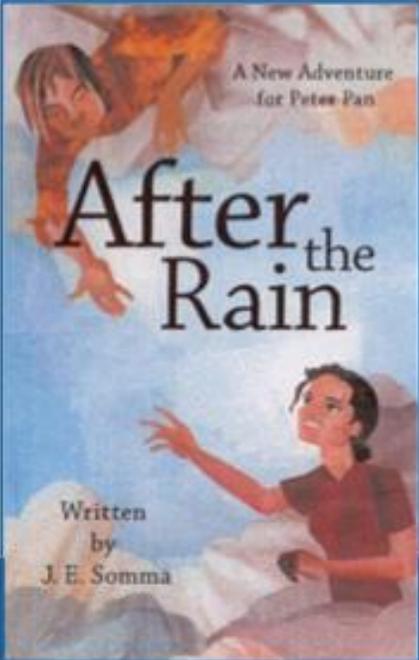
<https://fairduty.wordpress.com/2016/04/05/celebrating-a-parody-49-years-later/>

It must be noted that in keeping with the copyright law of the day, the publisher of *This Land is Whose Land?* offered payment for the use of the tune. Unfortunately, the problem was less about re-using a tune and more about eliminating the competition. The copyright owners of Mr. Guthrie's work had sanctioned the official Canadian version of *This Land is Your Land*, and expected that it would be widely enjoyed during the Centennial Year. A competing song, especially one blending parody and satire, was not to be countenanced. (Fortunately, a work like Mr. Somerville's would have a better chance of survival today, given our 2012 addition to fair dealing for protection of parody and satire.)

One of the most vital restrictions on the grant of copyright is that one cannot prevent others from building on the same idea. This is known as the idea/expression dichotomy – expressions of ideas are protected, but not the underlying idea. However, copyright owners are often quick to clamp down on new expressions that still contain kernels of protected work. Even when the foundational content was public domain material, another Canadian work ran into copyright road-blocks.

After the Rain, a sequel to Peter Pan, by Canadian writer June Emily Somma, required a pre-emptive lawsuit to achieve distribution in the United States. While J.M Barrie's work, and its characters, were in the public domain in Canada, the complexity of international copyright treaties and the American term of life+70 spelled trouble. Ms. Somma's legal quest was aided by the Center for Internet and Society at Stanford Law School; eventually her work was deemed fair use (the American version of what we call fair dealing).

Creative freedom, that's why we have the public domain, so you can't be owning something forever.⁸



"Creative freedom, that's why we have the public domain, so you can't be owning something forever."

June Emily Somma, 2002

Prevailed under Fair Use, 2005

<https://faiirduty.wordpress.com/resources/public-domain/>
<http://cyberlaw.stanford.edu/attachments/SommaPressRelease.pdf>

Despite Somma's win, I do not recall this book making a great impact on Canada's literary scene. (I might be wrong.) We should not lose sight of the fact that writing a book, a good book, even having the capacity to distribute the book, is in no way a guarantee of vast success in the book market. For a writer to be successful, there must be readers. Given Canada's small home market, this was, and continues to be, a challenge.

In the late 19th century, Walter Blackburn Harte famously raged that Canadians were only concerned about "wheat, railroads and politics."⁹ Half a century later, it seemed that literary interest had only modestly improved; returning to Ms. Atwood, she refers to an article published in 1948, titled: "Canadians can read but do they?"¹⁰ She writes: "The poet Earle Birney claimed that most Canadians had only three hardcover books in the house: the Bible, the works of William Shakespeare and Fitzgerald's the Rubaiyat of Omar Khayyam."¹¹

With respect to her own career, and those of her peers, Ms. Atwood emphasized that:

⁸ Bob Egelko, "Lawsuit seeks to eliminate copyright on Peter Pan," *SF Gate*, <http://www.sfgate.com/bayarea/article/Lawsuit-seeks-to-eliminate-copyright-on-Peter-Pan-2708750.php>. See also <http://cyberlaw.stanford.edu/attachments/SommaPressRelease.pdf>.

⁹ Quoted by Nick Mount, *When Canadian Literature Moved to New York* (University of Toronto Press: Toronto, 2005) p. 25.

¹⁰ Margaret Atwood, *Negotiating with the Dead—A Writer on Writing* (O.W. Toad Ltd.: Cambridge, 2002) p.6

¹¹ *Ibid.*

“There were few local publishers, and those few made their living from acting as agents for imported work, and from selling school texts. The Colonial mentality was still in force, meaning the Great Good Place for the arts was ... London, Paris, New York.”¹²

Those two sentences mask a complex, and maddening, history.¹³ The challenges encountered mid-twentieth century were sown one hundred years earlier. At its root, the problem stemmed from Canada’s uncomfortable position, caught as she was between British Imperialism and American capitalism. Canada was held to the strictures of Imperial copyright law, which effectively closed down any route towards developing a robust Canadian publishing industry. Meanwhile, despite the pleas of the UK authors and copyright owners, American publishers helped themselves to the best of English literature with impunity. (As a consequence they also captured the Canadian market for such work). American behavior was entirely legitimate according to American law of the day.

Charles Dickens was a leading figure in the trans-Atlantic copyright dispute; he was not prepared to go quietly into the night. In 1842, he toured the United States and made his displeasure apparent. Those remarks did not endear him to Americans. Still, Dickens persevered, dwelling on argument that is constantly spoken in Canada—the importance of a national literature. Dickens tried to persuade his American listeners to the importance of cultivating their own writers, only to receive a most unsatisfactory response:

As to telling them they will have no literature of their own, the universal answer (out of Boston) is, “We don’t want one. Why should we pay for one when we can get it for nothing? Our people don’t think of poetry, sir. Dollars, banks, and cotton are *our* books, sir.”¹⁴

Despite their disinterest, American literature took form. Even British writers could not entirely avoid that realization:

... the output of original literature of all kinds has become almost as great there as in this country [despite] competition with cheap reprints of British books ...¹⁵

It should not surprise anyone to hear that reading begets writing. More broadly speaking, reading and education contribute to the foundation necessary to produce writers. This was in large part the reason for the American disinterest in granting in the niceties of copyright. Sheltered by the absence of loyalty to Imperial copyright, and refusing to

¹² Ibid, p.67.

¹³ Meera Nair, “The Copyright Act of 1889—A Declaration of Independence,” *Canadian Historical Review* Vol. 90. Issue 1. 1-28. I have also touched on this history at my blog; see <https://fairduty.wordpress.com/2016/09/20/history-begins-with-geology/> and <https://fairduty.wordpress.com/2016/12/11/sir-john-thompson/>.

¹⁴ John Foster, *The Life of Charles Dickens*, 1892, p.122, John Forster.

¹⁵ *The Author*, Vol. 1 No. 10, February 16, 1891, Conducted by Walter Besant.

participate in an international copyright treaty, the legitimate temerity of early American policies served the development of their nation state well.¹⁶

Some writers and their representatives have tried to paint Canadian educational institutions as the modern equivalent of those renegade American publishers of the antebellum era. This is simply not so.¹⁷ Educational institutions practice fair dealing, a legitimate measure under the law, which permits some unauthorized use of copyrighted works towards education. Fair dealing does not permit wholesale appropriation of entire works.

Educational institutions, and their students, still buy books and subscribe to licensed content. They also partake of materials created expressly by the educational community for the educational community; there is a growing repertoire of open educational resources. Teachers also find quality materials on the Internet crafted by people who are well-versed in their fields and simply want to share.¹⁸ To put it plainly there is more content available and traditional educational publishers no longer enjoy a grant of monopoly. The market is evolving as markets are wont to do.

However, an anomaly in this situation is worth talking about. A vast arena of book need which has been studiously ignored by publishers: the realm of suitable material for visually disabled people.¹⁹

¹⁶ B. Zorina Khan draws a correlation between policies regarding IP during the antebellum years and the country's ascension from a predominantly agrarian economy, to world leader, in less than one century; see *The Democratization of Invention* (Cambridge University Press: Cambridge, 2005).

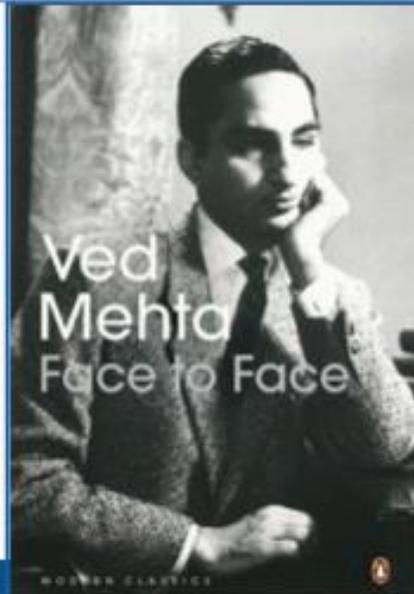
¹⁷ Meera Nair <https://fairduty.wordpress.com/2016/04/24/wrapping-copyright-in-the-maple-leaf/> or <https://fairduty.wordpress.com/2016/03/03/omitting-facts-ignoring-logic/> or <https://fairduty.wordpress.com/2016/01/18/in-defense-of-fair-dealing/>, just to name a few.

¹⁸ Meera Nair, <https://fairduty.wordpress.com/2016/11/06/what-is-canadian-content/>.

¹⁹ World Blind Union, "Over 90% of all published materials cannot be read by blind or print-disabled people, leading to a book famine;" <http://www.worldblindunion.org/English/our-work/our-priorities/Pages/right-2-read-campaign.aspx>.

"In India, one of the poorest countries the world has ever known, the lot of the blind was to beg with a walking stick in one hand and an alms bowl in the other. ... my father, a doctor, tried to ... give me an education, like his other children, so that I could become, as he used to say, a self-supporting citizen of the world."

Ved Mehta, 1934-



<https://fairduty.wordpress.com/2012/12/10/anniversaries/>

<https://fairduty.wordpress.com/2013/04/19/from-braille-to-mehta/>

My inspirational author is Ved Mehta, an Indian writer of my parent's generation. Like them, he was born during the decline of the British Raj and grew up through the emergence of an independent India (with all the bloodletting of that Imperial legacy known as Partition). That Mr. Mehta achieved acclaim in the West as a writer was remarkable; that he had been blind since age four made his story even more compelling:

In India, one of the poorest countries the world has ever known, the lot of the blind was to beg with a walking stick in one hand and an alms bowl in the other ... my father, a doctor, tried to ... give me an education, like his other children, so that I could become, as he used to say, a self-supporting citizen of the world.²⁰

Educational opportunities for blind children in India were extremely limited in the early 20th century. One possibility was to be taught to weave with rattan. When I first became aware of Mehta's work, my mother told me that his father had insisted on removing him from one such school for the blind. The reason being, when he visited his son, Dr. Mehta saw the reality of a weaver's life: calloused fingertips. His son would not be able to read Braille. Later Mehta was accepted into a high-school for the blind in the United States. He continued his studies, received a BA at Pomona College in California, did another BA at Oxford and then went on to an MA at Harvard. As a student, he became a writer for the *New Yorker*; he has been prolific writer ever since.

Mr. Mehta's story is, by far, the exception.

²⁰ Quoted in Meera Nair, <https://fairduty.wordpress.com/2013/04/19/from-braille-to-mehta/>

Given that reading is pivotal to education, the paucity of materials in accessible formats for visually disabled people creates overwhelming barriers to personal advancement.²¹ As to why there is such a shortage—to put it crassly—there are not enough wealthy blind people to make up a market. Publishers have openly acknowledged this.²²

“Over 90% of all published materials cannot be read by blind or print-disabled people, leading to a book famine.” World Blind Union

“One is reluctant to argue that blind people should be denied access to published content. It does not, however, follow that subsidizing access ought to be at the copyright-holder’s expense.” Richard Owens, 2016

Harpers Magazine, “Book Shopping” (source unknown)

[http://www.macdonaldlaurier.ca/files/pdf/MLICommentaryOwens_web.pdf/](http://www.macdonaldlaurier.ca/files/pdf/MLICommentaryOwens_web.pdf)
<http://www.worldblindunion.org/English/our-work/our-priorities/Pages/right-2-read-campaign.aspx>



Their disinterest cannot be faulted; no publisher should be forced to enter an unprofitable market. But for over thirty years, the Western publishing community impeded efforts that could have facilitated the ability of others to take on the task of adapting material into accessible formats and sharing those adaptations with other communities of visually disabled people.²³ Some progress was achieved in 2013, when a user rights treaty for the visually disabled was agreed upon,²⁴ but as commentators noted at the time, the treaty was only the first step.²⁵ Since then, some publishing communities continue to resist actual implementation of the treaty or now have the gall to suggest they should get a cut for the efforts made by other people.²⁶ This despite the fact that

²¹ Catherine Jewell, “Removing Barriers to Literacy: How the Marrakesh VIP Treaty Can Change Lives,” *WIPO Magazine*, http://www.wipo.int/wipo_magazine/en/2015/01/article_0004.html.

²² Meera Nair, <https://fairduty.wordpress.com/2012/12/10/anniversaries/>

²³ “The principal concern voiced by the publishing sector [since 1982 was] that a special provision would undermine the exclusive right of authors. But the inability of the market to meet the needs of the disabled was also evident: ‘... that the number of handicapped persons in each country was relatively small and therefore the market for materials intended for them limited.’ ...;” *ibid*.

²⁴ Meera Nair, <https://fairduty.wordpress.com/2013/06/26/wonderful-news-from-marrakesh/>.

²⁵ Meera Nair, <https://fairduty.wordpress.com/2014/06/23/after-marrakesh/>.

²⁶ Jeremy Malcom, “European Lobby forces compromise on Marrakesh Treaty,” Electronic Frontier Foundation, <https://www.eff.org/deeplinks/2017/05/european-publishing-lobby-forces-compromise-marrakesh-treaty>.

“other people” are not operating to commercial motive. These are non-profit groups, government agencies, cash-strapped libraries, or just generous individuals.

Too many people believe that copyright means the right to demand payment for each and every copy of a work. They argue that to not receive payment, means authors are subsidizing another’s reading pleasure.²⁷ This presumption of absolute power is simply wrong – in its 300+ years of existence, copyright has never functioned with absolute power.²⁸

“... if there were profit in it, blind users would not be suffering the "book famine" that results in them having access to only 1% of published books in accessible formats in poor countries, and only 7% in rich countries.” EFF, 2017



Photograph via WIPO Magazine, courtesy of Amit Bhargava, *The Guardian*

<https://www.eff.org/deeplinks/2017/05/european-publishing-lobby-forces-compromise-marrakesh-treaty>
See also Marriane Diamond, past-president of the World Blind Union: <https://www.youtube.com/watch?v=KM0UdZEnAVI>
See also http://www.wipo.int/wipo_magazine/en/2015/01/article_0004.html

Of all the possible legitimate unauthorized uses of copyrighted works, provision of materials for the visually disabled ought to be the one course of action that we can all agree on. Particularly when the shortage of suitable materials is most acute in impoverished communities in the Global South. Even if copyright existed as some would have us believe, it is at best, unbecoming—and at worst, cruel—for First World lawyers and publishers to pontificate on the sanctity of copyright to visually disabled people in the Third World who are not, nor ever will be, a market.

To be blind in a poor country is the epitome of imprisonment and constraint.

²⁷ “One is reluctant to argue that blind people should be denied access to published content. It does not, however, follow that subsidizing access ought to be at the copyright-holder’s expense;” see Richard Owen, http://www.macdonaldlaurier.ca/files/pdf/MLICommentaryOwens_web.pdf.

²⁸ Notably, the influential Second Circuit of the American appeals’ system has already indicated that serving the needs of the visually disabled is fair use; see Meera Nair, <https://fairduty.wordpress.com/2014/06/15/second-circuit-stays-on-message/>.

I hope that scholars of literature will look at the issue of copyright and exceptions to copyright through their own expertise and contribute to a discussion of these matters. Moreover, I hope scholars in general will understand the intensity of the campaign of misinformation that surrounds the use of copyrighted works in academic institutions. Leading the way is a much-talked about PricewaterhouseCoopers assessment of educational publishing in Canada; my rebuttal is here: <https://fairduty.wordpress.com/2015/08/03/with-due-respect-to-pricewaterhousecoopers>.

^a On Monday, May 29, 2017, ACCUTE and CSDH-SCHN jointly held an Open Congress panel: "Canada's 2017 copyright review: academics' perspectives." Mark A. McCutcheon (Athabasca U) chaired the panel of three presenters: Sileshi Hirko (U Ottawa) made the case for re-framing copyright's users' rights (i.e. fair dealing) according to human rights and international rights agreements; Lisa Macklem (Western U) discussed the implications of intermediary lobbying (e.g. by Access Copyright) and international trade agreements (e.g. NAFTA) for users' rights in Canadian copyright law; and Meera Nair (NAIT) showed how not only users but also authors depend on fair dealing. The panel was attended by a room full of delegates from various scholarly fields and professional associations, including those for librarians and scholarly publishers, as well as media reps. The discussion following the talks was varied and lively, on topics like how to take part in government public consulting on the copyright review, how different users' rights and intellectual property regimens intersect or conflict, and not least how to not only preserve but strengthen Canadian scholarly publishing.