

Review Article: Remixing Canadian Copyright Law

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An Emerging Intellectual Property Paradigm: Perspectives from Canada

Ysolde Gendreau (Ed.)

Cheltenham, UK and Northampton, MA, Edward Elgar, 2008, 318 pp., UK£79.95/
US\$145.00, ISBN 978-1847205971 hbk

Canadian Copyright: A Citizen's Guide

Laura Murray and Samuel Trosow

Toronto, *Between the Lines*, 2007, 224 pp., CDN\$24.95, ISBN 978-1-897071-30-4 pbk

RiP! A Remix Manifesto

Brett Gaylor

Eyesteel Film and the National Film Board of Canada, 2009

<http://www3.nfb.ca/webextension/rip-a-remix-manifesto/>

Introduction

In her album, *Hymns of the 49th Parallel*, the chanteuse K.D. Lang pays tribute to a series of great Canadian songwriters—such as Neil Young, Leonard Cohen, Joni Mitchell and Jane Siberry.

In a similar spirit of celebration, this review essay pays homage to a number of recent texts and films dealing with Canadian intellectual property. First, it considers Ysolde Gendreau's collection, *An Emerging Intellectual Property Paradigm: Perspectives from Canada*. Second, this essay looks at Laura Murray and Samuel Trosow's manual, *Canadian Copyright: A Citizen's Guide*. Finally, this review evaluates Brett Gaylor's documentary, *RiP! A Remix Manifesto*.

The three works share certain affinities—a spirit of scepticism about the legitimacy and the efficacy of existing networks of law, policy and bureaucracy; a populist interest in the impact of intellectual property on the everyday lives of citizens, creators and consumers; a passion for human rights; and a melioristic

desire for sensible law reform of copyright law and related regimes of intellectual property.

An Emerging Intellectual Property Paradigm

An Emerging Intellectual Property Paradigm: Perspectives from Canada is a definitive guide to the creative, cosmopolitan, cool-headed and compassionate jurisprudence of Canadian intellectual property law (pp. 295–6). It has been carefully edited and arranged by Professor Ysolde Gendreau of the Université de Montréal. This volume features some of the finest Canadian intellectual property academics—including Abraham Drassinower, Daniel Gervais, Margaret Ann Wilkinson and Myra Tawfik.

Canada has deservedly had a reputation for innovation and creativity in intellectual property law reform: wittily, one of the authors of this collection, Daniel Gervais, reflects upon why Canada has been such a productive laboratory of intellectual property policy reform and experimentation:

What is uniquely Canadian? I first should apologize for putting the question so directly. I do not ask this question to fill the reader's mind with images of the Rockies, canoes, Niagara Falls, Pier 21 in Halifax, igloos, old Quebec city or Prairie Skies ... Still, according to experts, Canadian uniqueness is a secret blend of efficiency, inexpensive clothes, and friendliness. Canadians are also law-abiding, and have a noted penchant for compromise and self-criticism. Arguably, there is no better environment to develop the best possible copyright regulatory scheme, especially with subfreezing temperatures helping cooler heads prevail (p. 197).

Canadian intellectual property law has much to teach the rest of the world about forging a 'Middle Way' between the extremes of intellectual property maximalism and free-for-all piracy and counterfeiting.

The editor, Ysolde Gendreau, discusses the distinctive identity of Canadian intellectual property law:

A case on point is Canada. The geopolitical position of that country can lead an uninformed observer to presume that Canadian intellectual property laws are even subsumed into those of its immediate neighbour. Dwarfed by an economic superpower with a population that is almost ten times its own south of the longest undefended border, Canada shares with the United States a British colonial heritage and the current lingua franca of trade. Even when it has been the first to introduce certain schemes, whether it be moral rights in copyright countries, an administrative tribunal to oversee the setting of copyright royalties, or compulsory licences for the exportation of patented drugs to developing countries, these measures have not been recognised as trail-blazing breakthroughs that were meant to be followed by other countries.

Yet, the existence of some innovative contributions do not *per se* constitute a system's identity: Canadian intellectual property law as a whole has been shaped by general considerations that are characteristic of this nation. If, on the one hand, the internalisation of foreign influences has been an inevitable component of the process, this exercise has not prevented it from finding room for home-grown approaches. The result is an almost surprising affirmation of individuality (pp. 295–6).

This volume shows that Canadian intellectual property law is an eclectic blend of British, French and American legal traditions. After a pattern of resistance and accommodation, the legal system has internalised a variety of foreign influences. This collection explores the unique innovations of Canadian intellectual property law—such as its pioneering development of moral rights; the robust Copyright Board of Canada; and the *Jean Chrétien Pledge to Africa Act* 2004 (Canada).

The volume demonstrates that, in recent years, the Supreme Court of Canada has been blessed with a number of particularly able and talented judges. The quality of the judgments has no doubt been strengthened by the presence of a number of strong personalities on the bench. Chief Justice Beverley McLachlin has been a wise and intellectually astute leader of the Supreme Court of Canada. She has played a significant role in resolving divisions within the court—most notably, in the dispute between Percy Schmeiser and Monsanto. Justice Binnie has shown a lively interest in intellectual property law—penning key judgments on copyright law, trade mark law and patent law. He has distinguished himself with his epigrammatic style; his historical depth of learning; and his somewhat combative dissenting judgments. Justice Bastarache was a vocal advocate of a Continental, European vision of Canadian intellectual property law. Justice Arbour has shown a strong conscientious interest in the implications of intellectual property for social justice and human rights.

This volume considers some of the recent battles in the Supreme Court of Canada over intellectual property rights. Abraham Drassinower considers the leading case of *CCH Canadian Limited v. The Law Society of Upper Canada*, which considered the threshold of originality, authorisation of copyright infringement, and the defence of fair dealing.¹ He hopes that the promise of this landmark ruling will be fully realised: 'It is to be hoped that the future growth of Canadian copyright jurisprudence will manage, as it were retrospectively, to seize the promise of authorship that *CCH* evokes but does not quite capture' (p. 162). As demonstrated by *CCH Canadian Limited v. The Law Society of Upper Canada*, the jurisprudence of the Supreme Court of Canada has also been distinguished by its cosmopolitan tastes. Rather than focus exclusively upon local and provincial authorities, the judges have shown a great willingness to critically engage with the authorities of superior courts. It is little wonder the jurisprudence of the Supreme Court of Canada has been cited frequently by superior courts around the world. Notably, in the battle over the Facebook application, *Scrabulous*, Indian courts followed the middle course of the Supreme Court of Canada with respect to the threshold of originality in copyright law—preferring the standard of 'skill and judgment' to the English level of 'skill and labour' or the United States threshold of a 'creative spark'.²

Looking at recent controversies over copyright tariffs, and intermediary liability,³ Margaret Ann Wilkinson considers the intersection between copyright law and personal data protection. She contends that

as intimated in the Tariff 22 decision, and consistent with Canada's international obligations, individuals confiding personal information to commercial organizations in Canada should be entitled to have those private confidences of personal information respected by the courts, whatever the civil litigation interests of third parties might be (p. 266).

In addition to consideration of copyright law, the volume explores a number of dimensions of industrial property. Looking at the dispute over Lego, Teresa Scassa explores the inter-relationship between the civil and common law traditions in

respect of trade mark law.⁴ Robert Howell considers recent controversies in the Supreme Court of Canada over well-known trade marks—most notably, involving Veuve Clicquot Ponsardin champagne and Barbie.⁵ Diane Daley examines whether Canada's treatment of geographical indications could be best described as compliant or defiant. Mark Perry charts the vacillation of the Supreme Court of Canada in respect of the patenting of life forms—contrasting the decisions in respect of the Harvard Oncomouse,⁶ and genetically modified canola.⁷ Melanie Bourassa Forcier and Jean-Frederic Morin consider the Canadian domestic and international disputes over patent law and access to essential medicines for HIV/AIDS.⁸

Surveying developments in copyright law and industrial property, Myra Tawfik investigates the convergence of various regimes of intellectual property law in Canada, and traces the fault-lines resulting from a 'case by case' and a 'law by law' approach. She observes that 'the current state of Canadian law on convergence of intellectual property rights can be characterized as disjointed—limited to judicial and legislative treatment of case specific combinations' (p. 294). Tawfik laments that 'the piecemeal approach remains mired in confusion and uncertainty' (p. 294). Tawfik suggests that 'a more concerted effort will have to be made at the policy level to delineate the contours of each form of intellectual property in a systematic way' (p. 294). She concludes that 'a good first step would be to eschew the belief that a "case by case" and "law by law" approach is sufficiently capable of resolving all the complexities, paradoxes and inconsistencies that will undoubtedly continue to present themselves' (p. 294).

Summing up, the editor, Ysolde Gendreau suggests that 'as a bilingual and bilingual country, [Canada] is a living laboratory for the mixing of different approaches' (p. 309). She notes that 'far from a sign of diffidence, Canada's minimalist attitude springs from an awareness of the multiple influences that are at play when it is deciding on the orientation of its intellectual property laws' (p. 309). Ysolde Gendreau concludes: 'As a former colony and the neighbour of a contemporary superpower, the assertion of its identity will continue to be an ongoing process' (p. 309).

Canadian Copyright: A Citizen's Guide

Another significant text is the pragmatically minded, *Canadian Copyright: A Citizen's Guide*. The first author, Laura J. Murray, is an associate professor in English literature at Queen's University in Kingston; an astute analyst of both law and cultural studies; and the webmaster of faircopyright.ca. Her co-author, Samuel Trosow, holds a joint appointment in Law, and Information and Media Studies at the University of Western Ontario. Jane Burkowski has provided accompanying witty illustrations to the guide.

Seeking to promote access to justice, Murray and Trosow seek to provide a greater community understanding of Canadian copyright law: 'Widespread knowledge of existing law can enable people to make more effective use of it—in our terms, to practise *fair copyright*' (p. 2). The authors note that, with its rapid expansion and agglomeration, copyright law has a direct, personal impact upon a wide range of citizens:

These days copyright is becoming part of just about everybody's life. That's why you are reading this book. Whether you are a parent, artist, business person, blogger, teacher, student or music fan, questions about copyright law have popped into your head or landed in your lap. You may have encountered

copy protection on a CD you bought—and after a brief tantrum, you may have wondered if it's possible or legal to disable it. You may wonder if your children's file-sharing will get them, or you, in trouble with the law. You may want to stop people from ripping off your screenplay or photograph. You may wonder whether you should read all that legalese on a software licence or a publishing contract, and whether you'd understand it if you did. You may want to know if it's okay to capture an image from somebody else's website and post it on your own. You may wish you knew how to argue with a boss, a teacher, or a lawyer who says, 'You can't do that' (p. 2).

Murray and Trosow have three audiences in mind for this text—'independent or freelance creators, amateur creators, and consumers' (p. 6). The authors note: 'While the interests of these groups are often distinct, we believe that in the larger context of corporate capitalism they have much in common' (p. 6).

Murray and Trosow have sought to promote a greater legal literacy about copyright law, policy and practice: 'This book has a strong Canadian focus because Canadians are short on practical and accurate information about what we can and can't do within the framework of our own copyright law' (p. 4). The authors lament that Canadians tend to be more familiar with the copyright law of the United States than that of their own country:

Copyright litigation in the United States is more frequent and often more notorious; US Law has moved fast and controversially in a 'maximalist' direction; 'US copyright warnings and ads preface almost every movie and DVD we watch; and US public interest watchdogs such as the Electronic Frontier Foundation are fighting back with vigour' (p. 5).

After providing an overview of the history and rationales of copyright law, Murray and Trosow provide a summary of the rules in respect of copyright subsistence, ownership and enforcement; and the rights accorded to copyright users. The authors systematically explore the copyright issues raised by particular fields of cultural endeavour—covering craft and design; digital rights management; education; film and video; journalism; libraries and museums; music; photography; the visual arts; and websites. Murray and Trosow finish off the guide with a discussion of copyright law policy.

The *Canadian Copyright: A Citizen's Guide* is enriched by interviews with Canadian authors, producers and users of copyright work. As a result, the manual has a polyphonic quality, with a diverse range of voices and opinions about copyright law. The great Canadian biographer, Professor Ira Nadel, details his struggles to locate the copyright owner of Prime Minister Pierre Trudeau's 1970 address to the nation, imposing martial law to contain the Front de Libération du Québec (Quebec Liberation Front) crisis (p. 69). The Frontier School Division in Manitoba decries the difficulties in gaining access to reproductions of public domain photographs of Paul Kane paintings of Norway House. An artist, Karl Beveridge, is quoted, demanding parity for visual artists alongside that of gallery curators and administrators (p. 171). A photographer, Colwyn Griffith, observes that he retains tight control over his limited edition prints, declaring: 'I'm not going to give the negative or the master digital file to someone over in Finland who doesn't want to pay for it' (p. 164). Matthew Rankin, a film-maker and appropriation artist, celebrates the efforts of the British artist, Banksy, to engage in culture-jamming against

Paris Hilton's record albums (p. 156). A documentary film-maker, Richard Fung, complains about the unreasonable demands of Sony in reproducing a line of text from Joni Mitchell for his work, *Sea in the Blood* (p. 130). Similar travails were experienced by the efforts of the collective L'Atelier National du Manitoba to reproduce videotapes of the Winnipeg Jets NHL Franchise in a documentary called *Death by Popcorn* (p. 129).

Murray and Trosow also explore alternative mechanisms for regulating creativity and dissemination—including Aboriginal cultural property protocols. Greg Younging, the Chair of the Indigenous Peoples' Caucus, laments: 'The intellectual property rights system was imposed on indigenous knowledge systems without the consent of indigenous nations, and the conflict is a conflict of legal regimes' (p. 190). He comments: 'It's a legal power play; it's an unjustly and immorally applied conflict between laws and sets of laws' (p. 190).

In the conclusion to the guide, Murray and Trosow contend that Canadian copyright law reform should be informed by grassroots consultation, and accommodate the needs of consumers, freelancers and independent creators:

In this highly contested, indeed volatile, climate, the success of any new legislation will depend not only on its content, but also on process: it is appropriate and productive for the government to engage in wide and open consultation, avoiding previous patterns of 'bias' and insider connections, and looking to the grassroots as well as to traditional advisers from large organizations and institutions. The discussions should include young Canadians as well as old, and should make sure to recognize the differences in interests that exist between creator and non-creator copyright holders.

Given that many Canadians now encounter copyright law in their daily lives, clarity in legislative drafting ought also to be a top priority. A new copyright bill should as much as possible be devoid of messy legalistic jargon. This is not a matter of writing style: it is about the nature of the law. Rather than rattling on for pages in endless detail, legislation is most effective when it sets out general principles that can be readily applied. This approach also makes for a law that will prove able to adapt to changing technologies, artistic practices, business models, and consumer expectations. We are not asking for vague laws that will throw more decision-making power to the courts. We are arguing for sensible, clear guidelines that can help reasonable people arrange their copyright practices (p. 203).

Murray and Trosow call for the Canadian Parliament to adopt an open-ended defence of fair use. The authors contend that 'any provisions concerning the circumvention of technological protection measures should be explicitly limited to direct acts of infringement and should be paired with consumer protection limitations' (p. 204). Furthermore, Murray and Trosow call for broad safe harbours protection of Internet service providers from actions for copyright infringement. The authors also call for greater sanctions for misuse of copyright—particularly in respect of 'frivolous claims and demands' which 'chill legitimate unauthorized uses of copyright material—and even public domain material' (p. 204). The guide-writers also insist that the Canadian Parliament should not agree to any extensions of the copyright term 'past its current period of life of the author plus another fifty years' (p. 207).

The *Canadian Copyright: A Citizen's Guide* is a great guide of practical action and policy advice for copyright activists and bewildered citizens alike.

RiP!: A Remix Manifesto

The Canadian filmmaker, Brett Gaylor, has attracted a great deal of attention with his documentary on copyright law, *RiP! A Remix Manifesto*, which was produced by Eyesteel Film and the National Film Board of Canada. The director enunciates four principles in 'A Remixer's Manifesto':

1. Culture Always Builds on The Past;
2. The Past Always Tries to Control the Future;
3. Our Future is Becoming Less Free;
4. To Build Free Societies You Must Limit the Control of the Past.

The protagonist of the film is Gregg Michael Gillis, known by the alias, Girl Talk. A virtuoso DJ and mash-up artist, Girl Talk has released several albums, including *Secret Diary* (2002), *Unstoppable* (2004), *Night Ripper* (2006) and *Feed the Animals* (2008). His work is distinguished by its remixes of dozens of samples of musical works and sound recordings; and his hyperkinetic stage performances. *Wired Magazine* bestowed a Rave Award on Girl Talk in 2007. The technology bible extolled his creative genius:

Just when it seems like mashups are played out—or playing dead, thanks to litigious record labels—along comes Girl Talk (née Gregg Gillis). For last year's album *Night Ripper*, the laptop mixologist used more than 250 samples from 167 artists. Raps by Ludacris rub up against a Boston riff, the Ying Yang Twins whisper over the Verve's 'Bittersweet Symphony'. As the album became an indie sensation, Gillis resigned himself to the inevitable cease-and-desist order. But it never materialized. 'Labels are starting to realize that something like *Night Ripper* isn't going to hurt their artists', Gillis says. 'If anything, it will promote them.' Gillis is also famous for his uninhibited live shows—on YouTube, you can watch him crowdsurfing and stripping down to his skivvies between sessions spent pounding the keyboard of his Toshiba Satellite M115 laptop. And while the 25-year-old from Pittsburgh still has a day job as a biomedical engineer, he's also remixing tracks for major-label artists and planning his next album.⁹

The *Rolling Stone* magazine was similarly impressed: '*Feed the Animals* ups the ante, implementing more than 300 samples to make an utterly virtuosic mash-up record'.¹⁰

In order to stave off the threat of lawsuits from artists, recording companies and music publishers, Girl Talk very much depends upon protection from the defence of fair use under copyright law. Nonetheless, the DJ and his family remain nervous and anxious about the possibility of litigation from copyright holders, especially with the steady growth of his fame and reputation.

The documentary features some revealing and candid interviews with copyright policy-makers. Marybeth Peters, the United States Register of Copyrights, is left flabbergasted by video footage of the mash-up techniques of Girl Talk. Bruce A. Lehman, the Clinton Administration's Under Secretary of Commerce for Intellectual

Property and Commissioner of the United States Patent and Trademark Office, expresses some doubts about the intellectual property and trade strategies of the 1990s. Arnold Schwarzenegger makes a cameo appearance, seeking to bully the Canadian Parliament into providing tougher sanctions against unauthorised camcording of cinema releases.

The documentary also features interviews with a number of key copyright activists. One of the original cartoonists who created the underground comics, the Air Pirates, discusses the lawsuit brought by the Walter Disney Corporation for copyright infringement in the 1970s.¹¹ The crusading Lawrence Lessig recounts his participation in the failed constitutional challenge against the *Sonny Bono Copyright Term Extension Act* 1998 (United States); the struggle to counter the influence of special interest groups in the United States Congress; and the development of the Creative Commons.¹² Cory Doctorow—the copyright activist, science fiction novelist and web-master of Boing Boing—is a particularly engaging interviewee.¹³ He laments about the restrictions imposed by copyright and trade mark owners, as he wanders through the corporate phantasmagoria of Disneyland. Brazil's Minister for Culture, Gilberto Gil, appears as a champion of a tropical brand of remix culture.

The documentary also displays a number of pathetic interviews with individuals—so-called 'Copyright Criminals'—who have been sued by the record industry for downloading and uploading MP files on peer-to-peer networks. Brett Gaylor editorialises in the film:

Our culture is becoming less free. In the US, copyright laws are allowing record companies to sue preachers, single moms and even dead people. My country—Canada—is being pressured to adopt this approach to intellectual property. Is yours?

Particularly touching is the plight of Jammie Thomas who was found liable for 24 acts of copyright infringement and ordered to pay \$222,000 in damages; her lawyers have gained a retrial of her case.

In addition to releasing the documentary in cinemas, the director, Brett Gaylor, has also looked to other methods to disseminate his work. The film has been released on iTunes; under a Creative Commons licence; and under a Radiohead style name-your-own-price business model. Gaylor has explained the marketing of the film:

We've gone to really great lengths to make this film as accessible as possible. It's already on the Pirate Bay, and that's great—it's another delivery format. We didn't put it there ourselves, though; we didn't need to. Had we gone that route, it's fairly likely, given the realities of the film-distribution universe, that we wouldn't have these other opportunities to get the film to people who still watch TV, rent DVDs or go to movies, which is, in fact, most people. We wanted those people to watch this movie.¹⁴

The director has shared the raw footage for the documentary on the site, opensourcecinema.org, for anyone to remix. With its form emulating its content, the documentary is an open, remixable film.

RiP! A Remix Manifesto is an entertaining documentary, full of intellectual passion and wit. There are admittedly some small flaws to the film. Although the documentary is very fine on the topic of copyright law, it is rather naïve and clumsy

when it comes to patent law. On the whole, *RiP! A Remix Manifesto* is an extraordinary piece of documentary film-making, which will bring the topic of copyright law to a broader audience.

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