



Seeking the Margins—Fair Use and Copyright, Harold Innis, and Israel

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ABSTRACT (EN): This paper seeks to combine elements from the fields of law and communication to address contemporary challenges concerning the use of exceptions within the system of copyright. The debate surrounding copyright exceptions often seems intractable, with a key point of dispute being the vagueness of the language of the law. That vagueness has merit—exceptions which facilitate the pursuit of creativity must necessarily be as indeterminate as creativity itself. Returning to the work of Harold Adams Innis (1894–1952) reminds us of the value of language that invites thoughtful deliberation. Innis’ work has further relevance as a contemporary evaluation of how nation states are adopting and functioning with indeterminate language—this paper sets the stage for a long-term research study concerning Israel’s adoption of fair use into domestic copyright. Modern copyright is increasingly set by a global template, leaving little room for individuality; with recourse to Innis the author suggests that Israel has the potential to

1 Azrieli International Postdoctoral Fellow (2012–2013), Hebrew University of Jerusalem. I wish to thank the Azrieli Foundation for supporting my interest in Israel; their enabling of a postdoctoral year has set the stage for long-term research. Ricki Newman was invaluable, not merely for translation services but for being the willing sounding board throughout. Gratitude is due to Michael Birnhack and Menahem Blondheim; their help from afar was critical to moving this project from a theoretical state to an active undertaking. And thanks must go to two anonymous reviewers whose remarks improved this paper immeasurably.

adhere to twenty-first century copyright principles without compromising their own particular culture of reading and knowledge development.

RÉSUMÉ (FR): Ce texte combine des éléments de droit et de communication afin d'aborder les défis contemporains touchant à l'utilisation des exceptions en droit d'auteur. Les débats entourant les exceptions au droit d'auteur semblent souvent insolubles, mettant l'accent sur l'imprécision du langage utilisé dans la loi. Ce manque de précision comporte aussi des avantages: les exceptions qui facilitent la recherche de la créativité doivent être tout aussi imprécises que cette créativité. Le travail d'Harold Adams Innis (1894-1952) nous rappelle la valeur du langage qui invite aux réflexions judicieuses. L'œuvre d'Innis est des plus pertinentes pour évaluer de façon contemporaine comment les États-nations adoptent un langage indéterminé et comment ils fonctionnent avec ce langage. Ce texte prépare le terrain pour une étude à long terme sur l'adoption par Israël de l'usage équitable du droit d'auteur en droit interne. Le droit d'auteur moderne se bâtit de plus en plus à partir d'un modèle universel, qui laisse peu de place à l'individualité; en ayant recours à Innis, l'auteur estime qu'Israël pourrait adhérer aux principes de droit d'auteur du vingt-et-unième siècle, et ce, sans compromettre sa culture particulière du développement de la lecture et du savoir.

A. INTRODUCTION

In the late twentieth century, citing the disruptions caused by digital technology set upon worldwide networks, copyright holders pressed for greater control of copyrighted works; these arguments have only continued in intensity and force.² This paper seeks to contribute to discussion in the fields

2 The scope of control desired is illustrated in Pamela Samuelson, "The US Digital Agenda at WIPO" (1996) 37 Va. J Int'l L 369. Ongoing pressure emanates from the United States via the annual process known as "Special 301" where countries are ranked in terms of their disfavour by American judgment with respect to intellectual property control. See US Trade Representative, 2012 *Special Report 301* (Washington, DC: 2012), online: Office of the United States Trade Representative www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_o.pdf.

Furthermore, global trade negotiations have moved beyond the relative transparency of the World Intellectual Property Organization to closed-door agreements reaching for ever more stringent intellectual property control; a recent illustration being the TransPacific Partnership Agreement: see Carolina Rossini, "Professor Michael Geist on TPP and its Effects on Canadian Internet Users" (14 September 2012), online: Electronic Frontier Foundation www.eff.org/deeplinks/2012/09/professor-michael-geist-tpp-and-its-effects-canadian-users.

of communication and law by positioning the work of an early twentieth century scholar against the twentieth century challenge of *balance* in the system of copyright.

The intersection of communication and copyright is not new—Patricia Aufderheide, Kembrew McLeod, and Siva Vaidhyanathan were among the vanguard addressing the challenges and opportunities wrought when creativity and distribution are both enhanced via technology.³ But communications scholars themselves may question the guide I have chosen: Harold Adams Innis (1894–1952). Once considered the most influential man in Canadian academia,⁴ his name enters conversation only through occasional historical references in undergraduate textbooks. Innis’s legacy has become largely confined to his early works in political economy and later

3 Patricia Aufderheide, Professor of Communication at American University, founded their Center for Social Media and served as Director since its inception in 2001. She has worked tirelessly to promote fair use in documentary film production and beyond, and recently co-authored *Reclaiming Fair Use* with Professor Peter Jaszi of Washington College of Law: see Patricia Aufderheide & Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (Chicago: University of Chicago Press, 2011). Kembrew McLeod, documentarian and Associate Professor in Communication at the University of Iowa, captures with biting prose the absurdity that follows in the wake of excessive application of copyright: see Kembrew McLeod, *Freedom of Expression®: Overzealous Copyright Bozos and Other Enemies of Creativity* (New York: Doubleday, 2005). Siva Vaidhyanathan, formerly a professional journalist and now a cultural historian and media scholar, is the Robertson Professor in Media Studies at the University of Virginia. Vaidhyanathan’s early work bridged the disciplines of law and communication with deceptive ease: see Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001).

4 Innis was known not only for his scholarship, but also for his efforts to foster intellectual development in Canada: see Vincent Wheeler Bladen, “Harold Adams Innis (1953) 43:1 *American Econ Rev* 1 at 5. Innis’s efforts went beyond the academy; he served as a Royal Commissioner on three occasions. Upon Innis’s death Prime Minister Louis St. Laurent and Transport Minister Lionel Chevrier each sent a telegram of condolence to Innis’s widow Mary Quayle Innis commending Innis’s service to his nation. See Toronto, University of Toronto Archives/B72-0003/Box 005, file 17. Regard for Innis extended beyond national borders; Joseph Willits of the Rockefeller Foundation penned these words to Sidney Smith, President of University of Toronto:

... The highest purpose of the Rockefeller Foundation is to serve and to strengthen the scholars and scientists of quality who are seeking to raise the levels of intellectual processes in society. Harold Innis was one of the greatest of these. Wherever his influence extended, there was quality as a result.

(24 November 1952), see Toronto, University of Toronto Archives/B72-0003/Box 005, file 43.

works in communication; few people are aware that Innis had a lifelong interest in the study of law.⁵

Innis's writings concerning the rule of law illustrate his appreciation of the conjoining of principle and practice in early systems of law, to the benefit of individual freedom.⁶ Such freedom was central to Innis' lifetime of work and is directly relevant to the system of copyright. Copyright, deemed to be an incentive to creativity, too often impedes the individual freedom necessary to foster intellectual activity by invoking a "culture of fear and doubt."⁷ The measure that began as a trade mechanism now has a sweep-

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- 5 I am indebted to Alexander John Watson for his definitive biography of Innis. First published as a doctoral dissertation in 1981 and updated twenty-five years later to include reference to recent scholarship, Watson uncovers the pursuit of law that lay at the foundation of Innis's entire body of intellectual endeavour: see Alexander John Watson, *Marginal Man: the Dark Vision of Harold Innis* (Toronto: University of Toronto Press, 2006) [Watson, *Marginal Man* 2006]; see also Alexander John Watson, *Marginal Man: Harold Innis' Communications Work in Context* (PhD Thesis, University of Toronto, 1981) [unpublished] [Watson, *Marginal Man* 1981]. Working without recourse to Watson's work, only a handful of other scholars noted the importance of law to Innis: see William Christian, ed, *The Idea File of Harold Adams Innis* (Toronto: University of Toronto Press, 1980); see Richard Noble, "Innis' Conception of Freedom" in Charles R Acland & William J Buxton, eds, *Harold Innis in the New Century: Reflections and Refractions* (Montreal: McGill-Queen's University Press, 1999) 31; and see William Pencak, "Canada as a Semiotic Society: Harold Innis, Roberta Kevelson, and the Bias of Legal Communications" (2005) 18:2 *Int'l J Sem L* 207.
- 6 Meera Nair, "Copyright and Ethics: An Innisian Exploration" 2009 2:1 *Global Media J—Canadian Edition* 23 [Nair, "Copyright and Ethics"].
- 7 Aufderheide and Jaszi begin with close attention to the problem of thwarted cultural engagement: see Aufderheide & Jaszi, above note 3 at 1–15; ironically, copyright was described as the "engine of free expression" by the United States Supreme Court as the Court chose to suppress publication of a new work on the grounds of copyright infringement: see *Harper & Row Publishers, Inc v Nation Enterprises*, 471 US 539 at 558 (1985). The court reasoned that the marketplace ensures production of creative effort and copyright's inherent structure of protecting expression, not ideas, serves as the safeguard against censorship. Yet, this seeming safeguard has been called into question many times, for instance, see David Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55 *UT Fac L Rev* 175; see Jonathan Griffiths & Uma Suthersanen, eds, *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005); and see also Neil Weinstock Netanel, *Copyright's Paradox* (Oxford: Oxford University Press, 2008). Even if the safeguard had worked according to theory, utilizing protected expression is foundational to creativity, in particular the "imagery of commerce is a rich source for expressive activity": see Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998) at 6. In terms of private, consumer copying, despite the role such copying plays in facilitating media development, there is little assurance that such behaviour can seek shelter under fair use: see Fred von Lohmann, "Fair Use As Innovation Policy" (2008) 23:1 *Berkeley Tech LJ* 1 at 6. In terms of Canadian law, while some educational and consumer copying is protected through recent amendments,

ing ambit and intrudes on private activity. Whether such activity occurs through learning, teaching, research, journalism, the fine arts, consumption of popular culture, or a creative response within that culture, increased anxiety over copyright law denies people the benefits available from legitimate exceptions to the law.

The exception of focus here is fair use and this exploration concerns its adoption into Israeli copyright law in 2007.⁸ While fair use's antecedents lie in England, it is most often identified with judicial development in the United States.⁹ Codified in 1976, American fair use is described illustratively; a set of possible uses is listed and prefaced with the phrase “for purposes such as.”¹⁰ The elasticity of language allows some as-of-yet unimagined shelter from the charge of infringement — provided the conditions of the use are deemed fair. Fair use has endured some challenging years, often charged with being unstable and inhospitable.¹¹ Those years may also be seen as the growing pains that ensue as a legal doctrine develops, with the comforting knowledge that growth will yield to stability. Literature indicates that fair use has matured and offers some modest patterns of predictability.¹²

Fair use is recognized as central to the story of innovation in the United States¹³ — copyright's exceptions must be robust in order to create a space where individuals are free to tinker in thought. But exceptions are met with

those protections are coloured by an obedience to digital locks: see *Copyright Act*, RSC 1985, c C-42 s 41. When these measures were proposed, Ian Kerr noted there were “no countervailing provisions that would set limits or impose obligations concerning the use of locks, and certainly no provisions that prohibit particular uses of them or require them to be unlocked.” See Ian Kerr, “Digital Locks and the Automation of Virtue” in Michael Geist, ed, *From Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 247 at 297 [Geist, *From Radical Extremism*].

8 *Copyright Act*, 5768-2007, 2007 LSI 34 (2007)(Isr.) [*Israeli Copyright Act*].

9 The conceptual basis of fair use developed from English precedents concerning fair abridgment and principles of fair use were recognizable in 1839 American caselaw; nevertheless, the language of fair use as it is recognized today is often attributed to *Folsom v Marsh* 9 F Cas 342 (CCD Mass 1841), see William F Patry, *The Fair Use Privilege in Copyright Law*, 2d ed (Washington, DC: The Bureau of National Affairs, Inc, 1995) at 3–19.

10 17 USC § 107.

11 Matthew Sag, “Predicting Fair Use” (2012) 73:1 Ohio St LJ 47 at 48–51.

12 Barton Beebe, “An Empirical Study of U.S. Copyright Fair Use Opinions: 1978–2005” (2008) 156:3 U Pa L Rev 549; see also Pamela Samuelson, “Unbundling Fair Uses” (2009) 75 Fordham L Rev 2585; see also Neil Weinstock Netanel, “Making Sense Out of Fair Use” (2011) 15 Lewis and Clark L Rev 715; see also Sag, above note 11.

13 von Lohmann, above note 7; see also Ian Hargreaves, “Digital Opportunity: A Review of Intellectual Property and Growth” (May 2011), online: UK Intellectual Property Office, www.ipo.gov.uk/ipreview-finalreport.pdf.

hostility; Justice Laddie's remarks concerning UK copyright law in 1996 are apropos to the global discussion of copyright in 2012:

Rigidity is the rule. It is as if every tiny exception to the grasp of copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls.¹⁴

Closer to home, when the Canadian government solicited public opinion for copyright amendment in 2009, a coalition of rights holders took great pains to denounce fair use.¹⁵ In the face of formidable global intransigence,¹⁶ a new perspective may help. To that end, I offer Innis's paradigm for fostering creativity and Israel as contemporary illustration.

This paper endeavours to sketch the contours of a project in its infancy. Section B begins by sifting out some of Innis's work that enhances a dis-

14 Justice Laddie, "Copyright: Over-Strength, Over-Regulated, Over-Rated?" (1996) 18:5 Eur IP Rev 253 at 259.

15 "The fair use model is not a panacea for solving difficult problems resulting from digitization and the internet. 'Fair use' has been described as an 'astonishingly bad' system amounting to little more than 'the right to hire a lawyer'": see Access Copyright et al, "Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultation" (15 September 2009), online: Industry Canada www.ic.gc.ca/eic/site/008.nsf/eng/02524.html at 2; for a rebuttal, see Meera Nair, "Fair Dealing at a Crossroads" in Geist, *From Radical Extremism* above note 7 at 102–8 [Nair, "Fair Dealing at a Crossroads"].

16 Perhaps one of the most poignant illustrations is the slow pace of permitting access to works for visually impaired people. During the most recent round of negotiations, the World Intellectual Property Organization claimed progress; following meetings in early October 2012 Director General Francis Gurry praised the engagement of member states in "setting timetables for concluding negotiations on international instruments on access to copyrighted work by the visually impaired"; see "WIPO Assemblies Agree Roadmaps for New International Instruments," *World Intellectual Property Office* (9 October 2012), online: World Intellectual Property Office www.wipo.int/pressroom/en/articles/2012/article_0022.html. Left unsaid was that these negotiations began twenty years ago and current stakeholders were pressing for access for the blind to be used as leverage to increase new global enforcement norms: see Manon Ress, "Timeline: Addressing Copyright Related Barriers to Overcoming Reading Disabilities," *Knowledge Ecology International* (5 October 2009), online: Knowledge Ecology International, <http://keionline.org/timeline-reading>; see Jamie Love, "October 19 WIPO negotiations on copyright exceptions for disabilities," *Knowledge Ecology International* (20 October 2012), online: Knowledge Ecology International, <http://keionline.org/node/1571>. When the treaty was concluded in June 2013, with favorable terms for visually impaired people, it was hailed as nothing less than miraculous; see Catherine Saez, "Miracle in Marrakesh: 'Historic' Treaty For Visually Impaired Agreed," *International IP Policy* (26 June 2013), online: Intellectual Property Watch, www.ip-watch.org/2013/06/26/miracle-in-marrakesh-historic-treaty-for-visually-impaired-agreed.

cussion of copyright and balance. Then, as the essence of balance requires flexibility within the language and interpretation of law, Section C delves into Innis's explorations of language in law. Section D sets the stage for this project by examining Innis's overall thesis concerning sites of creative endeavour. Finally, since no conclusion can be drawn from work yet to be done, I consider what lies ahead.

B. CUES FROM HAROLD INNIS

Innis did not directly address the system of copyright. Yet, evidence indicates that he was aware of copyright's role in developing publishing industries, and also the political ramifications (domestic and international) of copyright in the nineteenth century.¹⁷ Innis's untimely death cut short his scholarship, but given his explorations of staple commodities and systems of communication I cannot resist musing that intellectual commodities with the attendant copyright implications would eventually have come into sharper focus for Innis. That said, it is not my aim to continue the work of Innis — such a claim would be both grandiose and absurd — but merely to consider how his writings concerning communication lend themselves to contemporary efforts to find balance in the system of copyright.

The concept of balance was dear to Innis: "I have attempted to show elsewhere that in Western civilization a stable society is dependent on an appreciation of a proper balance between the concepts of space and time."¹⁸ Space denoted an inclination to expansion, innovation, and the individual, whereas time focused on heritage, custom, and community. Innis's writings illustrate his efforts to understand and explain how elite groups within a so-

17 Copyright makes frequent appearances throughout Innis's writings, for instance: "American authors with lack of copyright protection turned to journalism . . . Publishers demand great names and great books if no copyright is involved": Harold A Innis, "Minerva's Owl" [Innis, "Minerva's Owl"] in Harold A Innis, ed, *The Bias of Communication*, 2d ed (Toronto: University of Toronto Press, 2003) at 28–29 [Innis, *Bias*]; "American copyright legislation in 1890 created a new series of rights and the literary agent emerged to interpret them . . . the absence of copyright [meant] large scale piracy of English books in the United States, and a smaller-scale piracy of American ones in England": see Harold Innis, "An Economic Approach to English Literature in the Nineteenth Century" in *Political Economy in the Modern State* (Toronto: The Ryerson Press, 1946) at 53 [Innis, *Political Economy*]; "Emerson reported the remark of an Englishman: 'As long as you do not grant us copyright, we shall have the teaching of you'": see Harold A Innis, "Technology and Public Opinion in the United States," in Innis, *Bias* above note 17 at 171.

18 Harold Innis, "Plea for Time" in Innis, *Bias*, *ibid* at 64 [footnote omitted].

ciety may exploit these inclinations of media to meet particular objectives.¹⁹ I have described elsewhere how the structure of copyright itself can be interpreted via space and time — space is represented by the grant of rights to a copyright holder to control distribution to the advantage of the individual and time is represented by the exceptions to control which sustain the creative community.²⁰ What I suggest here is to incorporate another aspect of Innis's work, namely his thoughts on empires and margins.

In his explorations of empires and communication, Innis argued that empires were sustained by the cultural activities found at its margins. Margins were those far-flung realms that received lesser attention and control from the centre of the empire, and whose inhabitants exploited that laxness by innovation and creativity, to the betterment of the very empire itself. Yet margins could not survive on their own; they needed the protection of their patron and master. I suggest applying the paradigm of margin and empire, not only in terms of geography but also in terms of legal structure. In the contemporary setting of the Information Age, if the system of copyright constitutes the empire, its own success is dependent on the preservation of its margins.²¹ Said another way, margins delineate the limits of the grant of control offered through copyright.

Of course, by its very structure, copyright has a set of explicitly defined limits: (1) copyright is not perpetual, so time eventually gives access to works; (2) the inadmissibility of copyright upon facts or other building blocks of knowledge means raw data is available to all; and (3) the distinction between idea and expression is deemed to safeguard against excessive control.²² But in order to maximize conditions for creativity, creative material must be available to seed future creativity, during the term of protection. Herein lies the necessity of marginal spaces offered through fair dealing and fair use. Like the empires of the past, these margins are not

19 Harold A Innis, *Empire and Communications* (Toronto: Dundurn Press, 2007) [Innis, *Empire*].

20 Nair, "Copyright and Ethics," above note 6.

21 My application of Innis to copyright shares some affinity with Jessica Litman's argument that copyright is dependent upon the existence of the public domain. Litman convincingly argues that it is the implicit authorization contained in the public domain that allows copyright to be spared the challenge of dissecting the contributions of the many authors that coalesce into a singly attributed creation: see Jessica Litman, *The Public Domain* (1990) 39:4 Emory LJ 965 at 969. As the public domain includes all materials unprotected by copyright, fair dealing and fair use are critical to accessing this larger body of material.

22 Nair, "Fair Dealing at a Crossroads," above note 15 at 92.

clearly delineated. But in these spaces, cultural traditions mingle, thereby enabling the creative sparks Innis would later document.

Fortunately, recent pronouncements by the Canadian Supreme Court offer encouragement for a healthy margin of copyright in Canada.²³ But more attention is due to another nation. In 2007 Israel went to the fullest extent possible with exceptions, by moving from a closed regime of fair dealing²⁴ to the open-ended exception of fair use.²⁵ Intriguingly, this returns the notion of margin to Innis's invocation in the geographic sense. Israel, as a modern developing nation located at an intersection of East and West, is well-suited as a case study in which to situate Innis's writings.

Interdisciplinary work spread across law and communication is not without challenge—the risk of pleasing neither community looms large. But the pleasure of an interdisciplinary piece is that it allows one to tell a story, with plot and subplot accepted as intermingling in less than tidy fashion. In this story, national dreams, questions of black letter law, heroic protagonists, and narration provided through Innis offer engaging non-fiction.

C. LAW AS A MEDIUM OF COMMUNICATION

Innis saw communication where others might not. His writings present *medium* as anything that influences human relationships, shapes our conceptions of time and space, and has the potential to affect civilization.²⁶ But

23 The Supreme Court remains keenly aware that copyright is a system perched upon a delicate balance: see Michael Geist, "How the Supreme Court of Canada Doubled Down on Users' Rights" (23 July 2012), online: Michael Geist www.michaelgeist.ca/content/view/6599/125/; see also *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

24 Fair dealing was not intended to be interpreted restrictively. Until its codification in the *Copyright Act 1911* [UK], fair dealing was judge-made law with a measure of elasticity embedded within. And codification need not have instilled rigidity, as "the interpretative convention at the turn of the 20th century was that except where and so far as the statute is plainly intended to alter the course of the common-law statutes should be construed in conformity with the common-law rather than against it": see Ariel Katz, "Fair Dealing's 100 Years of Solitude" (16 December 2011), online: Ariel Katz <http://arielkatz.org/2011-the-fair-dealing-year>.

25 *Israeli Copyright Act*, above note 8.

26 Robert E Babe, "Innis and the Emergence of Canadian Communication/Media Studies" (2008) 1:1 *Global Media Journal—Canadian Edition* 9 at 11; see also Catherine Frost, "How Prometheus Is Bound: Applying the Innis Method of Communications Analysis to the Internet" (2003) 28:1 *Canadian Journal of Communication* 9 at 12.

Innis does not make such a conclusion easy—his thoughts are scattered among an assortment of vast, seemingly arcane details; and he eschews a clear enunciation of his central thesis. However, this avoidance of scholarly rigour works to the advantage of new scholars. Unshackled by overt awareness of Innis’s intentions, opaque texts prompt inspiration and inquiry. One such gem is: “Law was found, not made.”²⁷

To *find* as compared with *to make* conveys a very different connotation—the former carries an air of serendipity, whereas predictability exudes from the latter. Serendipity is anathema to many copyright holders, and some copyright users, who prefer a precise set of rules to govern the use of copyrighted work.²⁸ But it is because of the imprecision of the creative process that exceptions to copyright must be similarly imprecise. No politician, researcher, artist, teacher, or individual of any kind can say with certainty what manner of exposure, what combination of input copyrighted material, may be necessary to sustain the fine arts, education, and innovation. If copyright is deemed an incentive to creativity, it must not inhibit creativity—the language of exceptions must invite broad consideration of how a work contributes to creative effort.

Innis’s writings illustrate his view that prose in general cannot be assumed to be so inviting. He is unambiguous in his appreciation for well-crafted prose that lends itself to dynamic conversation instead of stagnant edict.²⁹

27 “In France and particularly in England the weakness of the written tradition favoured the position of custom and the common law. Law was found, not made, and the implications were evident in the jury system, the King’s Court, common law, and parliament”: see Innis, “Minerva’s Owl,” above note 17 at 21. To a fair dealing enthusiast, Innis’s remark immediately brings to mind an instruction from our Supreme Court in 2004; specifically, that practices are relevant to a decision of fair dealing: see *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at paras 53–60 [CCH].

28 In 2004, the Supreme Court of Canada emphasized in *CCH*, *ibid*, the importance of a multi-faceted approach to evaluating fair dealing, called for a liberal interpretation of research, and went so far as to position fair dealing as a user’s right. Following these pronouncements, the studied denigration of fair dealing by collective licensing organizations in Canada was matched only by the disinterest in protecting fair dealing on the part of Canada’s educational community: see Nair, “Fair Dealing at a Crossroads,” above note 15 at 97–102.

29 Innis made particular reference to the power of Plato’s (written) dialogues:

Plato attempted to adapt the new medium of prose to an elaboration of the conversation of Socrates by the dialogue with its question and answer, freedom of arrangement, and inclusiveness. A well-planned conversation was aimed at discovering truth and awakening the interest and sympathy of the reader . . .

See Innis, *Empire*, above note 19 at 79.

His exploration of legal language was rooted in that of the culture of Ancient Greece;³⁰ Innis's admiration for Greek culture stemmed neither from hostility to modern technology, nor a romantic inclination to pastoral times, but from the view that Greek culture represented an inclination to justice and democracy: "the democracy of Athens was the first great instance which the world ever saw of the substitution of law for force."³¹ Playing a key role in the cultivation of this language of law was its uniquely oral culture.

Alexander Watson explains the central distinction between Greek oral culture and the oral traditions of other Eastern empires; Greek oral tradition carried the cultural mindset of developing a consensus, and not of "legitimizing oppression."³² Greek practice drew strength from what Watson terms, "their intellectual backwardness [in the employment of script]," a handicap that ensured the adoption of writing began as subordinate to the oral tradition. Innis saw the advantage this brought to a system of law:

The flexibility of law shown in the major reforms centring around the names of Dracon (621 B.C.), Solon, and Cleisthenes was possible before a written tradition had become firmly entrenched When Athens became the centre of the federation the way was opened to greater flexibility in the law through the contributions of orators to the improvement of prose from 420 to 320 B.C.³³

The constraints of written language upon law show again in Innis's work, but this time with a modern interlocutor:

Codes and statutes impose a heavy burden on language Changes in language necessitate the constant attention of the courts. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and

30 One element of Innis's work that is relatively transparent is his appreciation for the culture of Ancient Greece. Innis was keenly aware that Greek culture was the cradle of both Western and Eastern civilizations. With the Cold War looming, Innis saw that the cultural heritage of the United States and the Union of Soviet Socialist Republics originated from the Roman and Byzantium empires respectively. Each being a variant of Greek heritage, Innis hoped for rapprochement between the two superpowers by renewing the cultural traditions of their former unity. See Harold A Innis, "Reflections on Russia" in Innis, *Political Economy* above note 17 at 263–66.

31 EA Freeman, quoted in Innis, *Empire*, above note 19 at 78.

32 Watson, *Marginal Man 2006*, above note 5 at 371; see also Watson, *Marginal Man 1981*, above note 5 at 535.

33 Innis, "Minerva's Owl," above note 17 at 7–8.

may vary greatly in the colour and content according to the circumstances and times in which it may be used” (Holmes).³⁴

The reference to Oliver Wendell Holmes Jr raises a question: how did Innis view Holmes’s contribution to jurisprudence? A Civil War veteran wounded in battle, a philosopher at heart who pursued a career in law following the end of the war; there are parallels to Innis’s life. Holmes’s reputation as the Great Dissenter might also have intrigued Innis.³⁵ An enigmatic entry from Innis’s *Idea File* provides some answers: “[Oliver Wendell] Holmes — background of interest in common law — oral tradition — refusal to be bound by black letters — common law is experience.”³⁶

Holmes’s unwillingness to yield interpretation of the law to dogma may have appealed to Innis. Another interlocutor — this time for Holmes himself — appears in Innis’s notes; Innis’s invocation of Holmes comes via Max Lerner’s *The Mind and Faith of Justice Holmes*, a work combining a brief personal history of Holmes together with a selection of his speeches, essays, letters, and judicial opinions. To Lerner’s eyes, Holmes opposed the dominant strain of thought:

It was not a brilliant Court nor an enlightened one The main outlines of judicial strategy had already been laid down . . . [The] whole duty of a Supreme Court Justice lay in filling in the outlines of [due process and laissez-faire] decisions and in using constitutional law as a way of entrenching the system of economic power. Holmes refused to live up to the rules of the game so conceived. He had no intention of conscripting the legal Constitution as he saw it to the uses of the economic Constitution, any more than he would conscript it to the uses of a political program.³⁷

34 Harold A Innis, “Roman Law and the British Empire” in *Changing Concepts of Time* (Lanham: Rowman & Littlefield Publishers, 2004) at 70.

35 Holmes participated in fewer dissents than the average United States’s justice but the sincerity with which he wrote, coupled with the deference he showed to the majority, gained him both the title and the respect of the nation: see Catherine Drinker Bowen, *Yankee from Olympus: Justice Holmes and his Family* (Boston: Little Brown and Company, 1945) at 372–73. Like Holmes, Innis is described as a dissenter: see Robert E Babe, *Canadian Communication Thought: Ten Foundational Writers* (Toronto: University of Toronto Press, 2000) at 54.

36 See Christian, above note 5 at 22.

37 Max Lerner, ed, *The Mind and Faith of Justice Holmes* (New York: Modern Library, 1943) at xxxvii–xxxviii.

Holmes set interpretation of the law not merely against the events of the times, but in consideration of the future. New ideas often came to the court in shackles with the judiciary charged to decide the legality of the idea: “the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment”³⁸

That such interpretation is a necessary part of law now seems only natural. But what we take for granted today needed champions to lead the way. As with his work in political economy and communication, Innis was ahead of his time with his views on law. He might have been pleased at the twentieth century Canadian development of interpretation—reaching what is known as *purposive interpretation* where interpretation must follow in light of the broader purpose of a statute. This development was facilitated through the work of Elmer Driedger; in 1998 Iacobucci J stated:

Although much has been written about the interpretation of legislation . . . Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone . . . he states: “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”³⁹

Closer inspection of Driedger’s work reveals some reliance on the work of a contemporary of Innis’s, a prominent legal scholar by the name of James Alexander Corry:

It will be urged here, with supporting evidence, that literal interpretation of a statute by no means always reveals a clear, precise meaning for application to particular cases. It will also be urged that it needs to be supplemented, in particular circumstances and under sober safeguards, by judicial reference to the broad object and social purpose of the statute, as a guide to the intention of the legislature in cases of doubt.⁴⁰

38 Holmes in Lerner, *ibid* at 149.

39 Elmer A Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87 [*Construction of Statutes*], cited in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at para 21.

40 See *Construction of Statutes*, above note 39, Appendix 1 at 252. The Appendix is an amended version of an earlier work by JA Corry, “Administrative Law and the Interpretation of Statutes” (1936) 1 UTLJ 286. Corry went on to become principal of Queen’s University; his

The language of “sober safeguards” brings to mind CCH and its multi-faceted framework with which to judge unauthorized reproduction of copyrighted work. The Supreme Court of Canada saw fit to remove the straitjacket that had bound fair dealing through much of the twentieth century,⁴¹ yet ensured that their interpretation could not be reinterpreted as sanction for piracy. Israel too had such a moment but in an ill-fated case. In 1993, the Israeli Supreme Court, while denying a satirical use of copyrighted work as fair dealing, offered a more expansive interpretation of the category of “criticism” within their regime of fair dealing, and introduced fair use’s multi-faceted framework into Israeli copyright dialogue.⁴² Israel’s later adoption of fair use into law is credited to this judicial starting point.⁴³

D. AN OWL IN ISRAEL?

The 2007 Israeli amendments to copyright were framed with specific goals that gave prominence to advancing the public good, and included a very striking phrase, *freedom of creativity*:

The objective of the laws of Copyright is to establish an arrangement that will protect creative works while striking a balance between various interests of the public good. The balance required is mainly between the need to provide a sufficient incentive to create, which is in the form of granting general financial rights in the creations, and between the need to enable the public to use the creations for the advancement of culture and knowledge. This balance must be obtained while safeguarding the freedom of

correspondence illustrates that Innis was aware of Corry’s work and in 1951 Innis invited Corry to join the University of Toronto; see Frederick W Gibson, *Queen’s University, Volume II, 1917–1961: To Serve and Yet Be Free* (Montreal: McGill-Queen’s University Press, 1983) at 261.

41 Prior to CCH, above note 27, Canadian courts tended to evaluate fair dealing with an uncompromising rigidity, suggesting unease “with the flexibility inherent in the concept of fairness”: see Carys Craig, “The Changing Face of Fair Dealing in Canadian Copyright Law” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) at 443.

42 CA 2687/92 *Geva v Walt Disney Company*, 48(1) PD 251 (1993) [*Geva*].

43 Tony Greenman, “Fair Use Under Israel’s New Copyright Act,” online: Tony Greenman Law Offices www.tglaw.co.il/en/article.php?id=109. For a broader examination of the events leading to the adoption of fair use in Israel, see Meera Nair, “Canada and Israel: Cultivating Fairness of Use” (2012) Program on Information Justice and Intellectual Property (PIJIP) Research Paper no.2012–04, online: American University Washington College of Law, Digital Commons <http://digitalcommons.wcl.american.edu/research> [Nair, “Canada and Israel”].

speech and freedom of creativity and while preserving free and fair competition.⁴⁴

The advancement of culture and knowledge is not merely a platitude. Initial study suggests that Israel fosters a competitive, entrepreneurial atmosphere, with emphasis upon widespread social and creative well-being.⁴⁵ It is logical that a country with little in the way of natural resources should seek to cultivate its intellectual resources, namely its human capital. In such a setting, freedom of creativity is not a luxury but a necessity. Israel's creative aptitude emulates a pattern of behaviour described by Innis regarding *where* creativity is likely to flourish.

Readers of Innis may remember an essay titled "Minerva's Owl." Minerva, also known as Pallas Athena, was the patron saint of Athens. The persona of the goddess included the couplet of wisdom and the warrior. The owl, the familiar of Minerva, represents the search for knowledge but must continually return to the safety of his patron. Given as an address to the Royal Society in 1947, "Minerva's Owl" was something of an anomaly among Innis's writings. As he did not usually rely on literary devices, the metaphor invites scrutiny:

[I]n a sense the flowering of the culture comes before its collapse. Minerva's owl begins its flight in the gathering dusk not only from classical Greece, but in turn from Alexandria, from Rome, from Constantinople, from the republican cities of Italy, from France, from Holland, and from Germany In the regions to which Minerva's owl takes flight the success of organized force may permit a new enthusiasm and an intense flowering of culture incidental to the migration of scholars engaged in Herculean efforts in a declining civilization to a new area with possibilities of protection.⁴⁶

Innis's thesis is not easy to sift out; fortunately, Watson probes and then distills Innis' thoughts: "Western civilization can be renewed only by intellectual developments on a periphery that, in turn, becomes a new centre

44 Draft Bill Amending the Copyright Act (No 196), 2005, HH (Isr).

45 Dan Senor & Saul Singer, *Start-Up Nation: The Story of Israel's Economic Miracle* (New York: Twelve, 2009); Nimrod Kozlovski et al, "Fair Use in Israel" in Jeremy Malcolm, ed, *Access to Knowledge for Consumers — Reports of Campaigns and Research 2008–2010*, (Kuala Lumpur: Consumers International, 2010) 141.

46 Innis, "Minerva's Owl," above note 17 at 5.

for cultural florescence.⁴⁷ Innis did not despair over the migration of the owl; the collapse of one empire and the birth of another offer the potential for cultural renewal. Such renewal sustains civilization as a whole. Innis was not naïvely suggesting that the cultural effort of one empire would be duplicated in another, more hospitable, region. Instead, cultural traditions intermingle, creating a synergy capable of producing different avenues of thought and forms of expression. Extrapolating such ideas beyond cultural expressions in the conventional sense, to considering law as equally porous to a mingling of cultural tradition, invites consideration of how fair use took root in Israel, how it will meld with Israeli culture and, perhaps most important of all, can that undefinable entity we call *culture* be maintained in the face of pressures to conform to a global standard of copyright governance?⁴⁸

E. What Lies Ahead?

To answer such a question requires a broader understanding of Israeli culture. No small task for an outsider. But to an Innis enthusiast — the project is irresistible. Orality, margins, multi-jural systems of law, education, and nation building — these were the hallmarks of Innis's work and all resonate within Israel. There are many points of entry into a project of this magnitude; what I seek are clues to the cultural atmosphere of intellectual property. A starting point has emerged from a pattern within the judiciary.

In a study of caselaw concerning fair dealing prior to 2007, it was observed that if attribution was reasonably expected but not present, the exception was denied.⁴⁹ While this trend raised some concerns,⁵⁰ it is not

47 Watson, *Marginal Man 2006*, above note 5 at 7; see also Watson, *Marginal Man 1981*, above note 5 at 16.

48 Israel has shown some determination to maintain its autonomy on matters of copyright; see Nair, "Canada and Israel," above note 43. Whether this can continue remains to be seen. At the time of this writing, the World Trade Organization has concluded a fourth review of Israel's trade policies and practices, including its treatment of intellectual property. The expansion of fair dealing to fair use did not go unnoticed. Thirukumaran Balasubramaniam, *WTO Trade Policy Review of Israel covers new developments on fair use, data exclusivity and parallel importation* (2 November 2012), online: Knowledge Ecology International <http://keionline.org/node/1576>.

49 Kozlovski et al, above note 45 at 150–51.

50 In a case concerning the Dead Sea Scrolls, the deciphering and reconstruction of one of the scrolls was deemed worthy of authorship and, thus, a reproduction of the work was denied fair dealing when attribution was not accorded to that author: see Michael Birnhack, "The Dead Sea Scrolls Case: Who Is an Author" (2001) 23:3 *Eur IP Rev* 128 at 5–6. Further discussion concerning the implications of awarding authorship, and with it

surprising given a cultural background which emphasizes recognition of the author. However, that recognition should not be blithely attributed to notions of the Romantic author; Neil Netanel writes:

The Talmudic prohibition of plagiarism and its concomitant requirement of source attribution, moreover, aimed as much or more at ensuring that readers could assess the accuracy and force of a proffered ruling or argument than at protecting a personal right of individual authors.⁵¹

This turning on its head of a Western canonical principal is but one illustration of a non-Western cultural foundation of a law providing a fuller justification for the same law. Arguably, the very secular Platonic-like question/answer dialogue that shapes decisions and practices of fair use resembles the rabbinical tradition of inquiry. An acclaimed Israeli father-daughter team writes: “In the Jewish tradition, every reader is a proof-reader, every student a critic, and every writer, including the Author of the universe, begs a great many questions.”⁵² With such regard accorded to recipients of intellectual effort, the culture of reading, while still lacking precise definition, is clearly different. It permeates the very existence of the Israeli people; those same authors begin with a simple statement that speaks volumes: “Ours is not a bloodline but a textline.”⁵³ To that end, it seems only to be expected that a system of law whose presumed objective is to facilitate the creation and diffusion of text should reflect this distinctiveness. How this will play out may only be seen through the fullness of time and research.

a means to limit access, to historical artifacts is cited in Guy Pessach, “Israeli Copyright Law: A Positive Economic Perspective” (2006) 39:3 Isr LR 123 at 139.

51 Neil Weinstock Netanel, “*Maharam of Padua v Giustiniani: The Sixteenth-Century Origins of the Jewish Law of Copyright*” (2007) 44 :4 Houston L Rev 821 at 852 [footnote omitted].

52 Amos Oz & Fania Oz-Salzberger, *Jews and Words* (New Haven: Yale University Press, 2012) at x.

53 *Ibid* at 1.