

**Introducing Dynamic Fair Dealing:  
Creating Canadian Digital Culture  
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**SLIDE: ‘INTRODUCING...’**

**A Manifesto for a Robust Culture of Fair Dealing Online**

**SLIDE: ‘A MANIFESTO’**

This project began with a call for the papers that acted as a manifesto. We envisioned this as a call to arms for academics, artists and activists to defend Canada’s emerging digital culture. This manifesto posed a series of queries, declarations and provocations: given the legal, social and practical contours of cultural life in a digital era, how can we collectively ensure that digital technologies best serve the creative and social needs of Canadians? To answer this question, we need to understand the activities and aspirations that animate the work that Canadians actually *do* in digital environments. We are all aware that networked digital technologies provide significant tools and unique opportunities for democratically transforming cultural life. Nonetheless, the progressive possibilities of such technologies are not inherent, but shaped by their social regulation. Thus our manifesto:

The process of “dealing” itself – that is, the dynamic, complex, contingent and shifting set of relationships and practices characteristic of the space between digital cultural creation and regimes of law and social regulation – has eluded the attention of scholars for too long. This is not surprising, given characterizations of the fair dealing provisions in Canada’s *Copyright Act* as “poorly applied and underused”. Dealing with cultural goods and conducting social negotiations about their propriety shapes the quality and experience of digital culture in Canada. What constitutes “fairness” within digital networks is constantly and contextually evolving. Critics, activists, librarians, scholars, creators and citizen groups everywhere are embroiled in complex debates over intellectual property rights. Many believe that as forms and exercises of power, these activities are illegitimate, excessive, or simply out of step with the realities of contemporary cultural expression in digital environments. In short, despite the

capacity for collaborative creation that digital technology affords, and despite the commitment by all levels of government to use this capacity to make Canadian cultural content more accessible, intellectual property laws in Canada pose unnecessarily punitive prospects for potential liability.

The rights created under copyright law often obstruct what they are traditionally designed to enable: fair access to cultural expressions, with the aim of encouraging innovation and creativity for social benefit. They operate as a constant threat, exerting a chilling effect on Canadian cultural exchange. They do not adequately serve the needs of Canadian creators, the cultural industries, or everyday users of cultural goods in digital contexts. Many creators, educators, and researchers experience the *Copyright Act* as obstructing rather than facilitating the access to protected works necessary to enable learning, creativity, cultural productivity, scholarship, critical conversation and expressive collaboration.

If we really want to encourage democratic, dialogic, pluralist and polyvocal forms of cultural practice in digital environments. We must explore the potentials and limits of existing practices while developing new forms of knowledge, negotiation and techniques that articulate and honour the rights of both creators and users of cultural content. To ensure the viability of these new practices, we must insist upon the protection and elaboration of a robust and vibrant public domain. To do so, it is necessary to assert the primacy of fair dealing as a human capability, an individual responsibility, and a citizen's right. Fair dealing cannot be a limited default category based on the assumption that any digitization of protected material is a reproduction and thus an infringement, because this deprives us of the critical capacity for digital literacy. We seek instead to define, assert and defend fair dealing as the affirmative practice in which we engage when we actively encounter, critically consider, and transform cultural content online. Moreover, we need to find ways of using such practices to drive conversations about the cultural worlds we envision and aspire to and the cultural policy reform we need to get there.

(END OF MANIFESTO) When we issued this manifesto, we received a wealth of responses. The volume includes chapters written by forty-one scholars, activists, and creative practitioners with experiences in many different fields and genres.

## **SLIDE: ‘DYNAMIC FAIR DEALING’**

The essays place particular emphasis on practices of what we call *dynamic fair dealing* – emergent approaches to the creation, circulation and management of digital cultural objects that challenge traditional paradigms of intellectual property or pose alternatives to them. To achieve a balance between owners’ and users’ rights, is a challenge we must meet while still accommodating the opportunities for collaboration, copying, sharing and creative reuse which digital media affords Canadians – opportunities that many people now perceive as fundamental rights.

## **SLIDE: ‘METHODOLOGIES’**

One of our tasks was to provide significant grassroots case studies— empirical evidence of successful cultural practices and alternative models. In order to best inform and educate critics, policy-makers and custodians of cultural content, we would rather proceed by way of example than by abstract theory or polemic. Our approach is explicitly micro-political, focused on building progressive cultural policy from the bottom up.

## **SLIDE: ‘THE TASKS OF THE ANTHOLOGY’**

Rather than accept shouting matches between consumers and the cultural industries as the norm, we explore the possibilities of new arrangements that redefine interests in the very activities of digital use, modification, attribution, criticism, review, and reporting (fair dealing, in short) that networked communications enable.

## **SLIDE: ‘FAIR DEALING AND COPYRIGHT LAW’**

The adjective “dynamic” emphasizes that fair dealing is a dialogic, performative and continuous activity. Canadian law reform is rapidly accelerating, with far too little public input and with little empirical evidence to inform the direction of policy development. As artists, librarians, writers, publishers, students, scholars, historians, activists, consumers and simply as citizens, Canadians need to have their interests considered, their practices documented and their aspirations voiced. We should share the social and technological

practices and innovations we have designed to meet our needs in digital environments. Moreover, we should explore the prospects and limits of such practices so that we can improve on them and more widely disseminate them. Our ultimate goal is to contribute to the creation of a dynamic and dialogic Canadian cultural heritage in new media environments.

### **SLIDE: ‘THE EXISTING FAIR DEALING LEGISLATION’**

The contributions come together as an interdisciplinary conversation about the opportunities and constraints that intellectual property laws pose for cultural activities in digital environments. *Dynamic Fair Dealing* provides a wide range of critical perspectives on what it means and what it should mean to deal fairly. Rather than treat fair dealing as an abstract legal concept, we reframe it as a practice in which all participants in digital cultural exchange necessarily engage during the course of their daily activities. What the contributions to this book share is the conviction that if we want to bring intellectual property laws back into step with the everyday norms and practices of cultural production, then copyright reform is necessary and inevitable, if far from simple and self-evident. Accordingly, this volume provides an inclusive, interdisciplinary venue for a discussion of how everyday practices are relevant to IP reform as a matter of cultural policy.

Although lawyers and legal scholars are well represented, we have juxtaposed their voices with those of scholars in communications, cultural policy, publishing, literature, film studies, information management and pedagogy, anthropology, computer science and software design as well as digital production and design and activists in the cultural sector.

Given the American dominance of news media, Canadians are accustomed to critiques of copyright that have their origins in the United States. Such criticisms presuppose the American constitutional tradition, which, in terms of the limits it poses to copyright’s reach, privileges freedom of speech. The nature and consequences of the potential conflict between freedom of speech and the copyright power is the subject of great and important concern, with respect to the overreach of corporate copyright and trademark holders into the public realm of expressive freedoms. The issue has also surfaced and attracted critical attention in Europe, the United Kingdom and South Africa but the Canadian tradition of considering the intersection of intellectual property and freedom of expression is far less developed.

From Gaines' *Contested Culture*, my own *The Cultural Life of Intellectual Properties* and Lessig's renowned *Free Culture*, the obstacles that copyright and the more general legal terrain of intellectual property poses to creativity, cultural critique and democratic dialogue are well catalogued. So are the opportunities and limits that the American doctrine of fair use poses to culturally expressive activities. The concept of fair use is widely deemed to be in dire need of reconceptualisation and reform in the digital era. Critical thinkers and activists have arguably founded initiatives such as Creative Commons, Open Source and the Access to Knowledge (A2K) movement, precisely to stimulate civil society practices of cultural policy-making in the absence of government activity to serve public needs.

### **SLIDE: 'LIMITATIONS OF THE EXISTING FAIR DEALING LEGISLATION'**

The common law concept of fair dealing, has received far less critical academic attention than the American fair use doctrine. Fair use is a broad and general category, whereas fair dealing exceptions are narrowly defined and precisely enumerated activities. However, fair dealing's enumerated activities are generally considered too static to encompass continuing social and technological changes in the ways that Canadians use culture and knowledge online. Despite the integral nature of fair dealing in serving public interests it has become a narrow exception to copyright rules, that is restrictively applied which is encumbered with the assumption that use of another's work without permission is *de facto* unfair.

### **SLIDE: 'STARTING AN INTERDISCIPLINARY CONVERSATION'**

Canadian fair dealing has been largely neglected as a subject of critical scholarship, subjected to far less public inquiry and received less policy scrutiny than warranted. Rapid transformations in the ways in which culture is used and generated through digital technology suggests that strictly defined fair dealing exceptions will continue to privilege legal rights holders while disregarding public benefits. This volume explains why this is the case and what might be done about it. In this way, we make a specifically Canadian contribution to one of the major reform efforts currently pursued by the A2K movement: the rebalancing of copyright regimes (through the formulation of an international legal instrument to create minimum mandatory limitations and exceptions to copyright powers), which, we believe, must put issues of access into wider frameworks of cultural context, political economy and human rights principles.

## **Theory in Action: The Artmob Project**

### **SLIDE: ‘THEORY IN ACTION: ARTMOB ’**

This volume extends the theories that my co-editor Darren Wershler and I have been dealing with in a practical manner through Artmob, an open source arts content management system designed to enable arts administrators to digitally share Canadian cultural activities and engage creators and users in dialogue about the creation, meaning, value and use of cultural material. Artmob, is supported by a *Canada Foundation for Innovation Leaders Opportunity Fund* Infrastructure Grant as well as *Social Science and Humanities Research Council* grants.

In line with the contributions to *Dynamic Fair Dealing*, Artmob is driven by the belief that:

- Canadians have a right to digitally access publicly-funded cultural projects;
- cultural institutions have a responsibility to make their materials available to scholars, researchers, and the general public;
- the successful creation of digital archives requires a foundation of trust between rights holders, educators, cultural institutions, arts organizations and the general public.

### **SLIDE ‘CBC RADIO: CONTRARIANS’**

Our contributor Kyle Asquith illustrates this concern with issues of access, focusing on publicly funded cultural works that are withheld from public access, considering Jesse Brown’s successful CBC Radio One show *The Contrarians*. Although the CBC hosts freely accessible episodes of many of its shows on its website, this one was never available online. As the show’s original creator, Brown wanted to share these episodes with the online public, and consequently attempted to host free digital copies as a series of MP3 files on his personal website. The CBC insisted that he had no right to do so. In the course of this dispute, it became evident that despite its national public service mandate, the CBC outsources its IP monitoring to an American corporation, (which thereby polices Canadian use of Canadian public culture at the Canadian taxpayer’s expense!) The result is that content paid for by Canadian tax dollars is unavailable to Canadians. While the individual interviews Brown sought to make accessible comprise a very small portion of the

CBC's output, the policy precedent that this incident sets is an obvious matter of democratic concern. Asquith calls for the use of public licensing schemes by public institutions such as the CBC as part of a more clearly developed principle of user's rights in Canadian law and culture generally. Artmob is driven by similar principles.

As the example of the thwarted hosting of *The Contrarians* MP3 files illustrates, technological innovations are not necessarily useful to members of the public unless they are paired with clear policies that render their use open and democratic. In *Always Already New* (2006), media historian Lisa Gitelman argues that a medium consists of more than technology itself; it also includes the relationship of that technology to the protocols that shape the ways in which we perceive and make use of it. But protocols develop from knowledge and practice and may then be solidified into technologies.

Artmob is an attempt to provide practical education about copyright in the digital environment. We seek to use cultural archives to:

- Foreground and increase awareness of creators' rights;
- Foster dialogue between rights holders and the public;
- Give rights holders greater power to manage online reproductions of works;
- Help website administrators understand the multiple works embedded in the content they put on line (nested works and layering of rights within works).

## **SLIDES FROM OLD POWERPOINT: THE COMEDY OF ERRORS**

Our project strives to develop technological means to make hard-to-find Canadian cultural resources available online. A vast amount of culturally significant, publicly funded works that are of use and interest to researchers and the public are not online. Institutions and arts organizations that set out to create digital archives or collections of cultural resources are faced with an array of uncertainties, challenges and grey areas that make it difficult to even begin digitizing their collections, nonetheless posting them.

Such collections of historical theatre programs, posters, and promotional photographs, for instance, are of great interest and value to researchers, but these are extremely difficult to clear. Programs contain many individual advertisements, photographs, illustrations, costume designs, and texts. Each individual work may

require the negotiation of licenses with a series of difficult to locate rights holders.

## **SLIDE ‘WHAT PROBLEMS ARE WE TRYING TO SOLVE’**

We believe there are technological solutions for mitigating risks, engaging rights holders and arts communities, while generating dialogue about works and the conditions of their production. An arts content management system may enable archive administrators and users to deal fairly with cultural works. They can be designed to assist administrators to locate rights holders, and to enable owners to assert their rights, and for visitors to negotiate new uses in conversation. Digital archives can be created in such a way that rights can be asserted and negotiated between creators, owners and users in digital conversation. Technology enables communication; why not use it for these purposes?

## **SLIDE ‘FAIR USE BUTTON’**

For instance, one of the factors that will determine how open or closed the future of publishing will be is the software that we use to manage digital publishing. Social scientists Arthur Sale, Marc Couture, Eloy Rodrigues, Leslie Carr and Stevan Harnad believe that if something isn't part of our digital desktop, it is often too easy to ignore, and that an invisible opportunity to access information often seems like no opportunity at all. Their contribution describes a tool that helps to instantiate fair dealing practices directly into the fabric of the digital media interface: a software button that allows readers of digital documents to request the author email the text to them for individual research purposes under the provisions of fair dealing. (Martin will provide further examples in the following presentation)

There is a danger that the scope of Canadian cultural heritage will be shaped primarily by the economic interests of the cultural industries rather than by the interests of creators, arts communities and scholars. Dominant licensing systems like Access Copyright should not define the scope of online collections. Nor should they undermine the value of special collections to the communities of cultural creators whose achievements they celebrate. The history of creative collaborations these materials record is Canadian cultural history; lack of access to this publicly funded heritage violates our cultural rights.

It is in no one's interests, least of all artists, to have work that is wholly invisible to online audiences. Once a

work is online, new opportunities emerge to license those works for new purposes. Digital communications enable new negotiations and collaborations. Potential licensees can more easily contact creators and communicate with them if the work is displayed on sites with contact information clearly available; artists can communicate their desires through creative commons licenses, users can communicate their needs to creators. New forms of fair dealing, dealing fairly that is, may thus emerge in dialogue.

Providing rights holders with a clear means for asserting their rights in a digital archive alleviates concerns that arise with respect to orphan works. If a composite work has been cleared in part (because we know some of the rights holders), and is being provided to the public for uses that fit within fair dealing, cultural institutions may feel more comfortable assuming the risk, knowing that rights holders can easily contact them. This approach emphasizes trust between rights holders and users.

#### **SLIDE ‘DESIGNING OUR TECHNOLOGY’**

In short, we have used technology to help solve the problems that copyright has posed to creating rich online archives of Canadian cultural content. We do so by enabling digital technology to do what it does best, support communicative relationships to better enable creative collaborations in the service of the arts, entertainment, research, teaching and learning.

#### **SLIDE ‘KING & QUEEN 2006’**

**(use to explain/setup the different buttons)**

#### **SLIDE ‘LEARN MORE’**

As we designed and developed ARTMOB to respect the range of copyright interests reflected in the cultural materials hosted in our partners archives we learned something important. Most, if not all, cultural works are created collaboratively. Our partners want to host cultural material that reflects the social life of arts production in this country and thus to document, and share our cultural history, and to invite others to reflect upon it (and their place in it).

#### **SLIDE ‘KNOW MORE’**

Artmob involves the development of innovative software that creates new interfaces to enable institutions to easily identify both works and rights-holders (and others considered worthy of credit in distinctive fields of cultural production) and to make such attribution information available. When such information is incomplete, or where it turns out to be incorrect, the system enables interested Internet users to provide archive administrators with further context about a work's creation. In this way, not only do we potentially gain a more accurate understanding of the field of actors who hold rights in works, but we learn far more about the social and historical conditions under which works have been created we use the dialogic capacities of digital technology to augment our understanding of our cultural heritage.

### **SLIDE 'DO MORE'**

Users are thus encouraged to “do more” with cultural resources. We don't always know what that might involve. Where such uses require licenses, the system has a clear communication process for indicating the licensing terms and tools that facilitate requests for new licenses. This enables users to propose a use and request an appropriate license. This gives confirmed rights holders the ability to respond to specific scenarios (and also to assert their moral rights when they want to). Facilitating licensing dialogue enables new creative collaborations between artists (which affixed license, such Creative Commons, for instance, does not necessarily do).

### **SLIDE 'ARTMOB, FINAL'**

Artmob is structured to invite and enable users to engage in online news reporting (Tweeting, blogging), criticism (links) and review (curation tools). It encourages those who want to put digitally archived works to new purposes to negotiate directly with archivists and rights holders. In so doing, new and innovative licenses for the use of cultural work may be forged and shared. In short, the very use of the architecture of publicly available digital cultural archives incorporates and encourages practices of dynamic fair dealing. The Artmob project is still in its infancy, and the public launch of its open source software is pending as this book goes to press. The essays in the volume explain how and why we consider such a new and dynamic approach to fair dealing in digital environments to be long overdue.

Together, *Dynamic Fair Dealing* and the Artmob Project represent new ways of critically thinking about and

employing fair dealing concepts in the digital environment. Our goal is to foreground the possibilities facilitated by digital technologies and to forestall intellectual property-related limitations.

At the very least, we hope to have shown how fundamental intellectual property is, not merely to the economy but to the Canadian public interest and how important fair dealing is in our cultural life and heritage. In the longer term, we hope that the inherent tendency of digital technologies to facilitate copying, sharing, and cultural exchange will be embraced as a positive quality. This may also encourage a principled return to copyright law's original purpose of enabling learning, creativity, scholarship, critical conversation and expressive collaboration, while at the same time furthering cultural policy objectives and supporting cultural rights. In such a world, the practice of fair dealing would be considered a fundamental cultural right rather than a mere exemption to the economic privileges of others.

We have tried speak to the difficulties that face cultural practitioners, researchers, educators, citizens and activists in today's prohibitive culture of licenses and permissions. Taken individually, the contributions in *Dynamic Fair Dealing* may appear to paint dire pictures of the current status of digital cultural production and creativity. Everyone has a story of woe. As a whole, however, they point to a shared conviction that our collective desires to create, to share and to learn by fairly engaging the wealth of expression and the communication channels available to us is sufficiently powerful to challenge and change the status quo. If the legal difficulties we face when dealing fairly are real ones, we nonetheless see robust traditions of cultural exchange, collaboration and intercultural dialogue emerging – we are in fact forging a dynamic and evolving digital cultural heritage. Whether these practices avoid the law, challenge it, work in its shadow, or ultimately succeed in shaping it, they suggest that the future of fair dealing is already at hand. The Canadian cultural landscape depends upon this field of dynamic practice.