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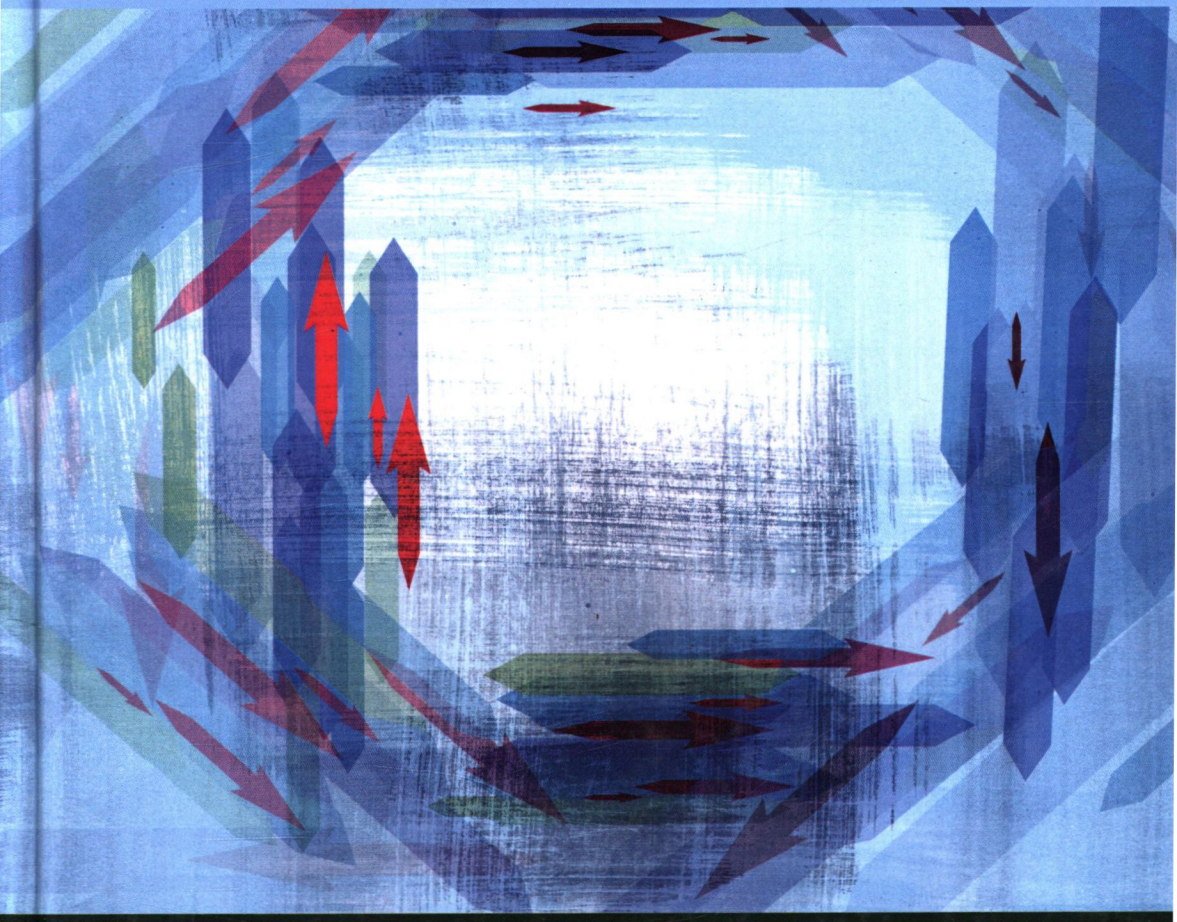
# RESEARCH HANDBOOK ON Copyright Law

Edited by
**Paul Torremans**

**SECOND EDITION**



RESEARCH HANDBOOKS IN INTELLECTUAL PROPERTY

# RESEARCH HANDBOOK ON
# Copyright Law

**SECOND EDITION**

*'Copyright is a highly specialized area of law, but impacts so many issues. So much that even those working with it full time cannot follow all developments in the field closely. This excellent resource brings the reader up-to-date regarding the state of art, and each chapter adds analytical depth and insight. Everybody with an interest in copyright will be enlightened and inspired by this rich selection of contributions on topical issues.'*
Jørgen Blomqvist, University of Copenhagen, Denmark

*'Under the expert guidance of Paul Torremans, leading international scholars offer a fascinating overview of what is happening in today's copyright world. The book feels like a springtime walk in the park of copyright, revealing blossoms of fresh insights and outbursts of new colourful touches everywhere.'*
Frank Gotzen, Emeritus Professor, KU Leuven and President ALAI

This second edition has been completely rewritten to reflect recent changes and new trends that have emerged since the popular first edition was published. Copyright law has become a fast moving area, which is reflected in the wealth and diversity of research. This comprehensive *Research Handbook* is situated at the cutting edge of current copyright research, with each chapter written by a leading author in that particular field.

The *Research Handbook* begins with an examination of fundamental questions such as the historical foundations of copyright, the basic concept of originality and the significant discussion on communication to the public. The contributors then focus on moral rights and the artist resale right. In-depth treatment of specialist topics is provided, including copyright contracts, collective management, issues surrounding streaming and sampling, cultural heritage, orphan works, search engines and the potential for a public policy exclusion. The *Research Handbook* provides global coverage while also considering specific jurisdictions and private international law.

The *Research Handbook on Copyright Law* is a rich research tool that reflects the wealth and diversity of the ongoing research in copyright. It is essential reading for students and researchers in copyright and intellectual property law, as well as practitioners and policymakers.

**Paul Torremans** is Professor of Intellectual Property Law in the School of Law at the University of Nottingham, UK.

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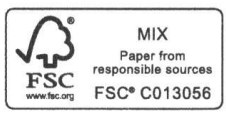


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# RESEARCH HANDBOOK ON COPYRIGHT LAW

## Second Edition

## RESEARCH HANDBOOKS IN INTELLECTUAL PROPERTY

**Series Editor:** Jeremy Phillips, *Intellectual Property Consultant, Olswang, Research Director, Intellectual Property Institute and co-founder, IPKat weblog*

Under the general editorship and direction of Jeremy Phillips comes this important new *Handbook* series of high quality, original reference works that cover the broad pillars of intellectual property law: trademark law, patent law and copyright law – as well as less developed areas, such as geographical indications, and the increasing intersection of intellectual property with other fields. Taking an international and comparative approach, these *Handbooks*, each edited by leading scholars in the respective field, will comprise specially commissioned contributions from a select cast of authors, bringing together renowned figures with up-and-coming younger authors. Each will offer a wide-ranging examination of current issues in intellectual property that is unrivalled in its blend of critical, innovative thinking and substantive analysis, and in its synthesis of contemporary research.

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Research Handbook on Copyright Law
Second Edition
*Edited by Paul Torremans*

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# Preface

This second edition of the *Research Handbook on Copyright Law* is a radical departure from the first edition. That should not come as a surprise, though. Copyright has become a fast-moving area of intellectual property law, and that is also reflected in the wealth and diversity of copyright research.

For this edition, I once again had the privilege of working with a group of excellent copyright experts from around the globe. I found their diverse perspectives on the subject to be highly enriching, and I hope the handbook manages to pass that wonderful experience on to its readers.

In terms of topics, no attempt has been made to cover the area of current copyright research exhaustively. That would have required an encyclopedia. Instead, we have tried to cover a mix of interesting topics, some of them a bit more traditional than others.

We could not escape touching on the historical foundations of copyright, its inherent tensions or the basic concept of originality. Neither could we avoid the massive discussion surrounding the right of communication to the public. But we also focus on moral rights and the artist resale right.

Copyright contracts are already less mainstream as a topic in the common law world, and from there we move on to collective management, issues surrounding streaming and sampling, cultural heritage, orphan works, search engines and the potential for a public policy exclusion. We also look at specific jurisdictions and private international law.

Taking all of that together, we hope to have provided a rich and interesting research tool that reflects the wealth and diversity of the ongoing research in the area of copyright.

*Paul Torremans*
Nottingham, 15 December 2016

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# 1. Walking the copyright tightrope

*Ysolde Gendreau*

The sight of a tightrope walker in action usually elicits feelings of awe and wonder. When she stands on one side, poised and concentrated, with a daring smile on her face, the audience also sizes up, just as she must, the vast expanse of emptiness in front of (and below!) her. Carefully, she steps on the rope and starts her trek with few, if any, props to help her maintain her balance as the call of the emptiness challenges her determination to get to the other end. A collective sigh of relief always mixes with the applause when she reaches her goal. The show can go on.

Fifteen years ago, the Supreme Court of Canada started a balancing act of another kind, albeit one that is not as life-threatening: the definition of the purpose of copyright law. Unlike US copyright law, which flows from a constitutional mandate,[1] or even British copyright law, which can claim a philosophical ancestry in the Statute of Anne of 1709,[2] no similar justification exists for Canadian copyright law. It is therefore no surprise that the comments made by the highest court of the country, comments that are meant to guide the interpretation of the Copyright Act,[3] were met with so much enthusiasm by members of the Canadian academic copyright community:[4]

> The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately,

[1] 'The Congress shall have the power ... (8) to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries', United States Constitution, art. I, § 8, c. 8.

[2] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books to the Authors or Purchasers of such Copies, during the Times therein mentioned, 1710, 8 Anne, c. 19.

[3] RSC 1985, c. C-42 (hereinafter Copyright Act).

[4] As an example, see T. Scassa, 'Interests in the Balance' in M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005), 41.

> to prevent someone other than the creator from appropriating whatever benefits may be generated) ...
>
> The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.[5]

The balancing exercise with which judges must imbue their decisions does not always pit the same copyright elements against each other. In the *Théberge* decision, where a painter was seeking to prevent the sale of canvases onto which the colours from posters and correspondence cards reproducing his works had been transferred, the author's copyright was being challenged by the property right of the owner of the posters and correspondence cards.[6] The concept of balance was further developed by the Court in its landmark decision opposing the Law Society of Upper Canada to a major legal publisher over the photocopies of their publications by and for the members of the society in its library. In its determination of the relationship between the copyright owner's rights and the users' reliance on the exception of fair dealing for the purpose of research,[7] the Court relied on its earlier iteration of the balancing act in copyright law to extend it to two other circumstances: the interpretation of the notion of originality and the relationship between copyright economic rights and exceptions. Originality must be defined so as to embody a balance between copyright owners' interests and those of the public:

> As mentioned, in *Théberge*, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. ... By way of contrast, when an author must exercise skill and judgment to ground

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[5] *Théberge v. Galerie d'art du Petit Champlain*, 2002 SCC 34, at ¶30–31.

[6] Compare the result in *Théberge* with that in the CJEU decision on a similar fact pattern in a referral by the Dutch Supreme Court: *Art & Allposters International BV v. Stichting Pictoright,* case C-419/13, 22 January 2015.

[7] Copyright Act, s. 29.

> originality in a work, there is a safeguard against the author being over-compensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.[8]

As for exceptions, it is not enough to understand that the copyright status as a protected work is itself the result of the balancing act as set out above. If an exception to copyright can come into play when a work is used, another balancing act must be achieved between the copyright owner's right and the eventual user's exception. This is where the Court expands its concept of the balance and dubs exceptions 'rights':

> Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver has explained, ... 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation'.[9]

Since this first application of the balancing exercise in the field of exceptions, the Court has persisted in relying on this approach in later cases that it heard where copyright exceptions were at stake.[10]

Another context in which the Supreme Court of Canada expanded on the need for balance in copyright law is that of the interpretation of economic rights, particularly the relationship between related prerogatives. In *Entertainment Software Association v. SOCAN*,[11] where the crux of the matter lay in the relationship between the public performance right in the opening paragraph of section 3 (1) and the right to communicate to the public by telecommunication in the ensuing enumeration of various prerogatives, the Court again invoked the need to preserve the 'traditional balance between authors and users'[12] that requires recognizing the

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[8] *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 23, at ¶23.

[9] *Ibid.*, at ¶48.

[10] *SOCAN v. Bell Canada*, 2012 SCC 36; *Alberta (Education) v. Access Copyright*, 2012 SCC 37; *CBC v. SODRAC 2003 Inc.*, 2015 SCC 57.

[11] 2012 SCC 34.

[12] *Ibid.*, at ¶8.

'limited nature of creators' rights'[13] to conclude that the right to communicate to the public by telecommunication can include streaming activities, but not downloading technology.[14] In so doing, it introduced a new requirement for the interpretation of copyright prerogatives, which seems to flow from the need to maintain balance: technological neutrality.[15] This began a chain reaction that continued in another case, whose decision was rendered on the same day, that also depended on the relationship between these two prerogatives.[16]

The culmination (so far … ) of the reliance on technological neutrality to interpret the notion of balance in copyright law has come in *CBC v. SODRAC*.[17] Now, both concepts have become 'central to Canadian copyright law',[18] and the efficiency gains obtained through new technology 'have nothing to do with the copyright holder's legitimate interests, or with the balance struck between the copyright holder and the user'.[19] Paradoxically, however, this extension of the comprehension of the balance in copyright law comes at a time when the Court seems to be backtracking from its initial terminology: throughout its decision, it refers to the copyright holders' and users' 'interests' rather than to their 'rights'.

Whether they be called rights or interests, it is increasingly clear that the Canadian Copyright Act has become a battleground of opposing claims. The adversarial nature of judicial proceedings, of course, lends itself to such an approach; but, as the Court gives an indication each time, the opposition between right holders and users is also played out in the statute itself. Multiple strains of various natures actually coexist in the Copyright Act: some are easy to identify, while others are more hidden. Both types of tensions influence one's understanding of the law, and each will be examined below.

## VISIBLE TENSIONS

An informed perusal of any copyright law should make it fairly obvious that the text often results from compromises that are reached by various

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[13] *Ibid.*, at ¶7.
[14] *Ibid.*, at ¶32–44.
[15] Ibid., at ¶5.
[16] *SOCAN v. Bell Canada*, 2012 SCC 36.
[17] *Supra*, note 10.
[18] *Ibid.*, at ¶51.
[19] *Ibid.*, at ¶182.