



Copyright
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Beyond the Book

A podcast series on the business of writing and publishing

Interview with Lesley Ellen Harris

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KENNEALLY: When they speak about copyright law, politicians frequently cite the impact on innovation and job creation. They also use terms like modernization and balancing act to describe the goals of copyright reform.

Welcome to Copyright Clearance Center's podcast series. I'm Christopher Kenneally for Beyond the Book.

In 2012, the Canadian Parliament passed the Copyright Modernization Act. Whether you supported or opposed the legislation depended on your perspective. The bill passed with unanimous endorsement of one party – the Conservatives – and in spite of equally unanimous objection from Liberal and New Democratic Party members.

Lawyer and copyright expert Lesley Ellen Harris has the details in the fourth edition of *Canadian Copyright Law*, an indispensable guide for publishers, writers, attorneys, and business people. She joins me now from her office in Annapolis, Maryland. Lesley Ellen Harris, welcome to Beyond the Book.

HARRIS: Thank you, Chris, and thanks for inviting me here today.

KENNEALLY: We're looking forward to a discussion with you about some of the important ways that Canadian copyright laws have changed recently and to help particularly our U.S. audience understand a bit of some of the differences – and they are important – between Canadian copyright law and American copyright law.

We'll tell people that Lesley Ellen Harris is an expert in Canadian, American, and international copyright and licensing issues. She's written four books on these topics including what we said is the latest edition of *Canadian Copyright Law*, published by Wiley. She also edits the Copyright and New Media Law newsletter. Lesley blogs frequently about copyright law and licensing at copyrightlaws.com.

So, Lesley Ellen Harris, let's start with what are some of the important ways that Canadian copyright law is different from the U.S.? Can you give us a brief rundown so people have that in their minds?

HARRIS: Sure. There's many things that differ between the two copyright statutes in the two countries. Let me just take it back a little bit so people understand how Canada works

having French Canada and English Canada, so when it comes to federal laws like the Canadian Copyright Act, we have influence from not only all political groups in Canada, but also cultural.

So we actually have a greater European influence on our copyright act, and we have provisions, for instance, the protection of moral rights or the rights that protect the reputation and honor of an author, are much stronger in Canada, even before these recent revisions, than in the U.S., for example. And that's really because of the cultural aspects of Canada and the makeup of the country.

KENNEALLY: Well, right. And the point there about *droit d'auteur* would be that it derives from French law, and what's fascinating there particularly is the very difference between common law tradition, the British law system, and what's known as the civil law tradition where code is really what matters and not case. Have I got that just about right?

HARRIS: That is a very succinct and good explanation of Legal Systems 101. What's very interesting in Canada is that most of Canada is common law, but the province of Quebec is civil, so when it comes to federal laws, they're all common, but we do incorporate – I really call it the cultural aspect of the French in our federal laws.

So it's an interesting combination. Definitely academically, it's an interesting study in looking at Canadian and U.S. copyright law, because although we share a border, our laws are actually quite different.

KENNEALLY: That's quite interesting. And so, in one aspect, it's important. There's been a lot of discussion over the last few years about the duration of copyright. In the U.S. currently, it's the life of the author or the creator and 70 years after his or her death, and in Canada, slightly different.

HARRIS: That's correct. So we have two different durations. In Canada – and these are the general durations of copyright. There are exceptions in specific cases. So in Canada, the duration is 50 years after the author dies, and in the U.S., it's 70 years after the author dies.

Now, the way that global copyright law works is you apply the law where the work is being used. So, let's say if you're in Toronto and you're photocopying – I'm making this as simple as possible, so I am using a non-digital example. If you're photocopying an article in Toronto, physically in Toronto, you apply life plus 50, whether that article is written or published by a Canadian or U.S. publisher.

However, if you have the exact same article and you're photocopying it, let's say, in New York, then you apply U.S. copyright law. So the duration in the Toronto photocopying is life plus 50, in the U.S., life plus 70, so you may or may not need permission to reproduce the exact same article depending on where you are reproducing it.



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KENNEALLY: Lesley, as I like to say about copyright law, if you're confused, you're beginning to understand the problem.

HARRIS: That's very good. I do a lot of teaching of copyright, and I always say, if you have more questions when you end the course than when you begin it, that's a really good sign because you are starting to understand it.

KENNEALLY: That means you've been paying attention.

We've got some questions here that are about your new book, which is the fourth edition of *Canadian Copyright Law* from Wiley, and a lot has happened in Canada since the last book. Tell us about some of the important ways that Canadian copyright laws have changed in the last few years.

HARRIS: Before I get to the laws themselves, I'll say, as everyone knows, what's changed probably the most is digital media, and social media, and the way we all create and use and distribute content. So within that perspective, I'll talk about some of the changes in the copyright law itself that actually just took place last year. Most of these provisions took place in November of 2012. I'm not going to go through every one and all the technicalities, because it can be very technical.

I'll start with one for photographers. Under the new law, photographers are now the first owner of copyright in their photographs, even if those photographs were commissioned. There is now provision in the Copyright Act against the removal or tampering of any digital rights management, or DRM, or any technology owned content that is there to prohibit copying. So if you remove that, that's now an offense under the Canadian Copyright Act. It's now illegal to remove or manipulate at all any copyright information on work, so the copyright notice, the name of the copyright owner.

Other new provisions. There's many new provisions for the educational use of content. Many of these relate to online use. There's a new provision for Canadians with perceptual disabilities to legally adapt acquired material.

One of the more interesting and unique provisions which does not exist in the U.S., and I'm not sure it exists anywhere else in the world, is what we call the YouTube provision, though the law doesn't actually mention YouTube. It's really for user-generated content. So now under the law, for instance, if you and your friends are dancing to a song and you post it on YouTube for noncommercial purposes, that is no longer an illegal activity using that copyright-protected music.

KENNEALLY: It might not be illegal any longer, Lesley, but it might be embarrassing.



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HARRIS: It will always be embarrassing. That's true.

KENNEALLY: But what's interesting there about those various changes is it's a bit of a mixed bag. But can you tell us – and we often talk about copyright kind of being like a pendulum. It swings from favoring the rights holders – the authors and publishers – to swinging back the other way to favoring the readers, the users of the content. Is there a sense you have of whether that pendulum has swung toward one side or the other with these changes?

HARRIS: That's a good question. It really is a mixed bag of reforms that way. I always say when there's copyright reform, whether it's a bill that people are discussing or actually amendments to the law, when it comes to copyright, generally nobody is happy. So rather than people being positive that they, let's say if they're teachers they got more exceptions or if they're creators they got more rights, generally everyone complains that they don't have enough exceptions or enough rights. So probably at the end of the day, the balance is maintained and that maybe to be a little cynical is proof of it.

KENNEALLY: So it's interesting, as I mentioned in the opening, Lesley, that there was unanimous support and unanimous opposition to this reform of copyright law in Canada. What were the arguments in favor, and what were the worries that the opponents had?

HARRIS: Some of what you're referring to is straight politics, so I'm not going to deal with that whole battle in itself. But I think the issue comes to finding the correct balance, and both creators and users really wanting the maximum they can get out of the copyright laws. So the maximum protection or the maximum free uses. There's always that tug of war when it comes to copyright law.

And once the law's in place, we then see it, of course, in the courts, because new laws have to be interpreted, and once they go to court, we'll once again see exactly what the policy behind the provisions are saying and how they're being interpreted.

KENNEALLY: Right. Well, here in the United States, the Register of Copyrights, Maria Pallante, has suggested that Congress should begin to look into copyright reform, if not actually move toward that direction, so there have been some hearings around all of that. And I wonder whether you draw any lessons from the Canadian experience for those of us here in the United States.

Would there be anything we could point to in Canadian reform that's something that we really ought to be thinking about seriously here, or have things – in only the year, I understand, that's passed since – but have things not worked out as intended and therefore this is a cautionary tale?



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HARRIS: The speed at which technology is changing, it is sometimes difficult for the law to keep up, but generally, copyright laws are written with language that is fairly flexible to encompass new technologies, and then it's up to the courts to apply the new technology or what we call the new facts or circumstances to the existing law.

Because Canada revised her law just over a year ago, of course Canada's law is going to be a little more modern than the U.S. law, which hasn't been revised, at least in whole, in quite a while, though parts of it have been revised.

So I think modernizing the language in the act is always a key point, and then trying to figure out how to modernize the language and concepts without making it stuck in time so law that is changed in 2013 makes sense 10 years from now.

KENNEALLY: A particularly hard task to work toward, given, as you say, the speed of change. I wonder whether there have been any intriguing or particularly interesting court cases, as you say, that have tested any of these laws or any other laws in Canada that you want to share with us.

HARRIS: Yes. Of course. In Canada, there are not as many court cases in general as in the U.S. It's a whole different legal system.

Probably one of the most talked-about legal cases was a Supreme Court case in 2004, and then there were actually five – which is huge for Canada – five Supreme Court cases in 2012, so it was a huge year. 2012, we had major amendments to the Copyright Act and five Supreme Court cases.

I'm just going to focus on one aspect of the cases, and that was really the expansion of what's called fair dealing in Canada, which is comparable but not exactly the same as the fair use provision in the U.S.

KENNEALLY: And for our listeners, Lesley, the fair use, or as you say, the fair dealing – they're not identical, but they're very similar – provide a certain amount of exception to the requirement that one obtain permission to reuse materials or to do something with it, so that a particular user doesn't need to go search out the copyright holder first. They know that they have, or believe they have, a right or a defense for that reuse that we call fair use.

HARRIS: Yes, that's correct, Chris, and both fair use and fair dealing are defenses. So if you use copyrighted materials, rather than there being a straight exception in the law that says you can do this and this with music or a book or images, it's a defense. So if the copyright owner comes to you, you can say, yes, I did copy your work or I did copy a portion of your work. However, it's considered fair dealing under Canadian law.

And until 2004, fair dealing in Canada was very narrow. Fair use was much broader in the U.S., but a Supreme Court decision of Canada in 2004 expanded fair dealing, and the judges in that court called fair dealing a user's right, and specifically said it should be interpreted broadly, and that it's not restricted just to non-commercial uses.

That really changed the landscape, and actually many copyright – I'll say people, because often copyright people are not lawyers but those who use and create content – thought oh, that would never hold. There's going to be another case and fair dealing will be narrowed again.

And in fact, the next Supreme Court case last year really committed to the principles in 2004, so you can't really say a Supreme Court decision isn't the law, but sometimes it's such a big change, it takes a while to really believe it. But with the cases last year, it's fairly straightforward for everyone now that fair dealing is a user's right.

One of the fact situations in one of the Supreme Court cases last year concluded in saying that previews of songs on services like iTunes is now considered fair dealing.

So you can see, it's a case by case basis, which makes fair dealing, just like in the U.S. fair use, a little difficult for the average person to interpret.

KENNEALLY: Well, indeed, and particularly for those of us on this side of the border, we have to remember that copyright law is always a matter of national treatment, and there is no such thing really as international copyright law. So what's going on in Canada, as you say, what happens when you photocopy that book in Toronto and the laws that apply are very different indeed just a few miles away in Detroit.

So does enactment reform in a country like Canada, though, a very developed, a very powerful country, economically speaking, signal that reforms are inevitable around the world, Lesley? Do you think we're going to see more of this moving forward?

HARRIS: Yes, and we are seeing more of it as we speak. As you mentioned, the head of copyright, Maria Pallante in the U.S., announced not too long ago that there will be major reforms, or her office is looking into major reforms and certainly advocating it in the U.S.

Reforms are going on in the U.K., Australia. Every time I look at my Twitter feed, there's reform going on in another country.

And I think that's normal. That is what they call the new normal for copyright. And perhaps part of that "new normal" is not necessarily re-hauling copyright acts and laws, but amending laws, because it's really hard for the technology to catch up with the laws, so by revising pieces as necessary sometimes makes sense. But again, trying to find the right policies that are technology-neutral so the law does have a shelf life are also key.



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KENNEALLY: Well, we have been chatting today with Lesley Ellen Harris. She's the author of the latest edition of *Canadian Copyright Law*, the fourth edition, published just recently by Wiley. She also blogs at copyrightlaws.com. Lesley Ellen Harris, thank you so much for joining us today on Beyond the Book.

HARRIS: Thank you, Chris. It's really been my pleasure.

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Our engineer is Jeremy Brieske of Burst Marketing. My name is Christopher Kenneally. For all of us at Copyright Clearance Center, thanks for listening to Beyond the Book.

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