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VOLUME/TOME 47 (2022)
No. 1

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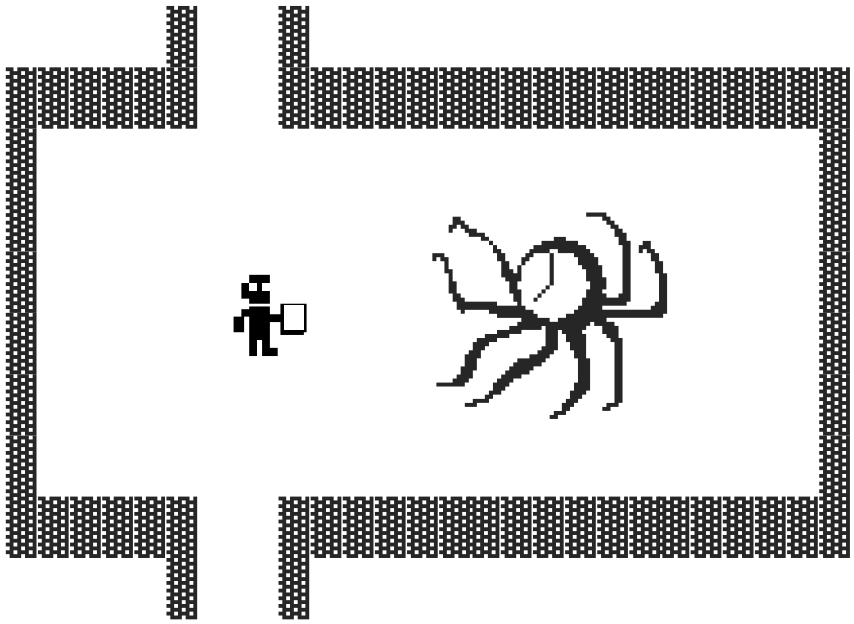

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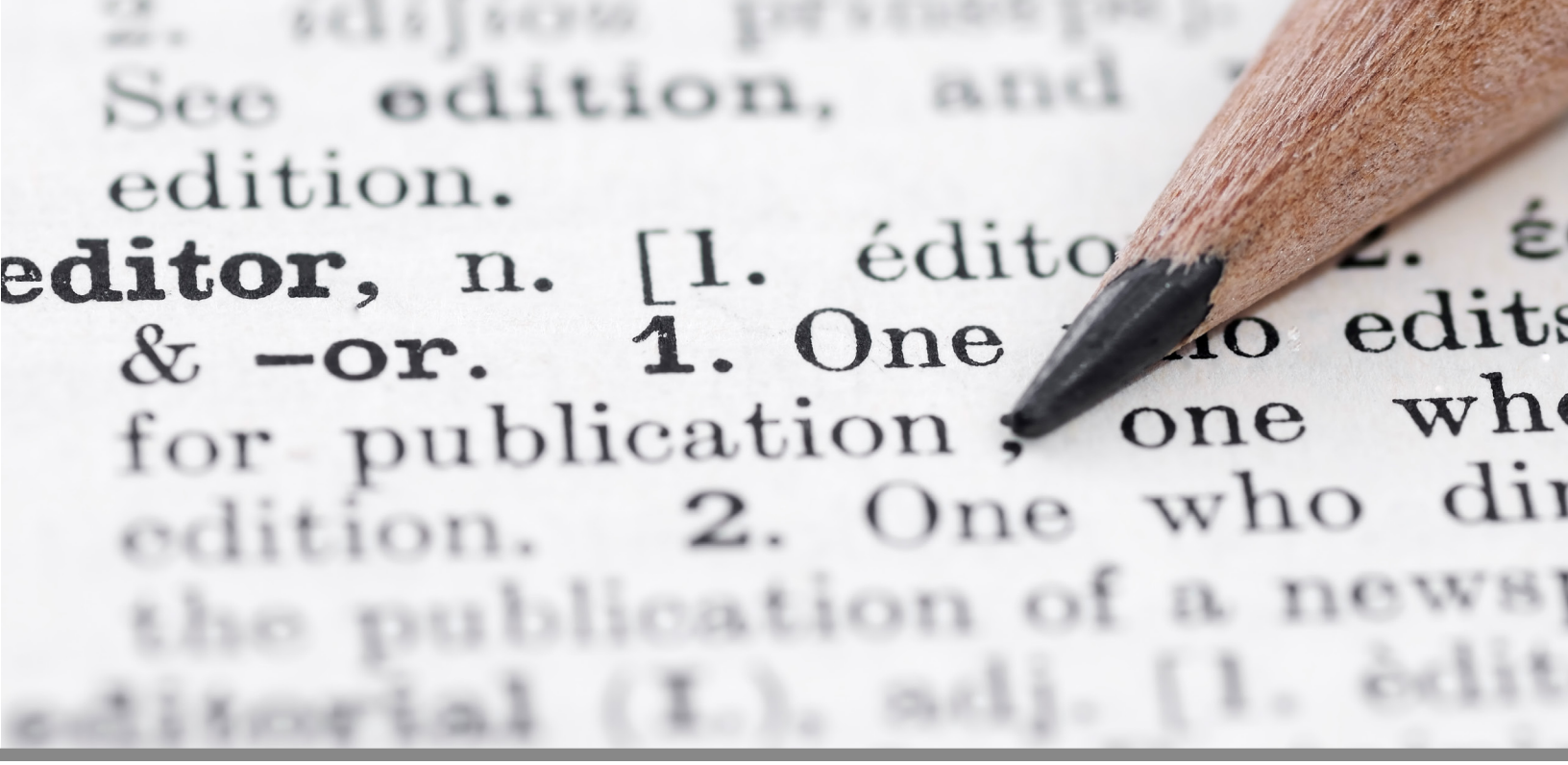
**CITED AS Can L Libr Rev**

*Canadian Law Library Review* is published three times a year by the Canadian Association of Law Libraries.

**CITÉ Rev can bibl dr**

*Revue canadienne des bibliothèques de droit* est publiée trois fois par année par l'Association canadienne des bibliothèques de droit.




# IIII From the Editor / De la rédactrice

Happy 2022! I'm back from my short leave of absence. Thanks to Susan and Alisa for taking over while I was away.

This is the first of three *CLLR* issues for the year, reflecting our decision to cut back from publishing the usual four per year. This change will lighten the workload of our editorial board, especially my own as editor.

Speaking of the *CLLR* editorship, we're still looking for someone to take my place on the masthead. Think you have what it takes? Drop me a line and I'll tell you more about the position.

I'd like to take a moment to thank Janet Macdonald, our long-time indexer, for her hard work and dedication over the years. She's stepping down after decades of service to *CLLR*—longer than anyone else on the masthead. She's done an amazing job indexing our issues every year, and I've relied on her cumulative indexes many times for my personal research. Thank you, Janet. You'll be missed.

This issue's feature article, "On the Intersection of Artificial Intelligence and Copyright Law," is a discussion about who owns the copyright—if anyone—to works created by machines. Author Bradley Budden, an articling student at McInnes Cooper's St. John's office, explores the arguments for and against copyright protection for works created by AI. I hope you find it as interesting as I did.

In my last letter, way back in May 2021, I was still waiting on my first vaccine. Now, most of us are double- and triple-vaxxed. Thanks, science! Unfortunately, COVID isn't giving up easily. We've seen a few variants emerge since March 2020, and now, as our hospitals and healthcare workers are still struggling under the weight of Omicron, the new, more contagious sub variant (BA.2) is spreading across the country. The virus is running rampant, and I went from not knowing anyone personally who contracted it to having several family members test positive in a few short weeks.

Also running rampant is the other plague that has gone hand-in-hand with COVID: misinformation. As I'm writing this on February 4, Ottawa is under siege from a small group of truckers and their supporters who claim to be protesting pandemic restrictions but are also spreading hate, false information about vaccines, and dangerous conspiracy theories. I lived in Ottawa ten years ago, and if you'd told me that someday there would be confederate flags and swastikas flying at Parliament Hill, held by people demanding our government dissolve and hand control over to them, I wouldn't have believed you. I'm not sure how this occupation will end—by the time you read this, I'll probably know the answer—but I worry it won't be peaceful.

Our job is to vet information and determine its authority. Now more than ever, our work is vital. As legal information professionals, we might not encounter misinformation on the job, but we can use our skills to fight back against its spread outside of the office. Simply sharing links to credible sources like CanLII or Charterpedia with loved ones can make a difference, albeit a small one.

We're also unlikely to face attacks on intellectual freedom in a legal information environment, but that doesn't mean we're not part of that fight. Censorship is anathema to our profession. We may not be on the front lines like our

counterparts in public and school libraries, but access to information is still an important part of who we are.

Sadly, our colleagues in American public and school libraries are under attack, and some could even face jail time for allowing minors to borrow books deemed "inappropriate." Certain groups are pushing for books on LGBTQ issues, race, and the Holocaust to be banned from schools in several states. A notable example is Art Spiegelman's Pulitzer prize-winning graphic novel *Maus*, which was recently banned in Tennessee—which is also where controversial Pastor Greg Locke, known for spreading COVID misinformation, recently organized a mass burning of books he considered "demonic."

We can't assume that this kind of censorship won't happen here. The current occupation of Ottawa alone shows that what we often think of as "American problems" aren't stopped at the border. We often speak of access to justice, and access to (factual) information and intellectual freedom are access to justice issues. Who's to say what's next? What other misinformation will lead to violence? What ideas will make someone uncomfortable once all the novels are burned?

**EDITOR**
**NIKKI TANNER**

Bonne année 2022! De retour de mon congé de courte durée, je tiens à remercier Susan et Alisa qui ont pris la relève pendant mon absence.

Voici le premier des trois numéros de la *RCBD* pour l'année à la suite de notre décision de réduire le nombre de parutions qui étaient auparavant de quatre numéros. Ce changement permettra d'alléger la charge de travail de notre comité de rédaction, notamment mon travail comme rédactrice en chef.

En parlant de la rédaction de la *RCBD*, nous sommes toujours à la recherche d'une personne pour prendre ma place à la tête de l'équipe. Vous pensez avoir ce qu'il faut? Écrivez-moi et je vous donnerai plus de détails sur le poste.

J'aimerais en profiter pour remercier Janet Macdonald, notre indexeuse de longue date, pour son excellent travail et son dévouement au fil des nombreuses années. Elle quitte son poste après plusieurs décennies de services rendus à la *RCBD*, et ce plus longtemps que toute autre personne au sein de l'équipe. Elle a accompli un travail remarquable en indexant nos numéros chaque année, et j'ai souvent utilisé ses index cumulatifs pour mes travaux de recherches personnelles. Merci Janet! Tu vas nous manquer.

Dans ce numéro, l'article de fond *On the Intersection of Artificial Intelligence and Copyright Law* aborde la question de savoir qui détient le droit d'auteur — s'il en existe un — dans le cadre d'œuvres créées par des machines. Bradley Budden, l'auteur et un stagiaire en droit au cabinet d'avocats McInnes Cooper de St. John's, analyse les arguments pour ou contre la protection du droit d'auteur dans les œuvres produites par l'intelligence artificielle. J'espère que vous trouverez cet article aussi intéressant que je l'ai trouvé.

Dans mon dernier mot en mai 2021, j'attendais toujours mon premier vaccin. Aujourd'hui, la plupart d'entre nous sont doublement et triplement vaccinés. Merci, la science! Malheureusement, la COVID-19 n'abandonne pas la partie. Depuis 2020, quelques variants ont émergé, et maintenant, alors que nos hôpitaux et nos travailleurs de la santé luttent toujours contre l'effet Omicron, un nouveau sous-variant (BA.2) plus contagieux se propage partout au pays. Le virus est omniprésent. Je suis passée du stade à ne connaître personne dans mon entourage qui l'avait contracté au stade d'avoir plusieurs membres de ma famille qui ont été déclarés positifs en quelques semaines.

L'autre fléau qui va de pair avec la COVID-19 est également très répandu : la désinformation. Au moment où j'écris ces lignes, le 4 février, la ville d'Ottawa est assiégée par un petit groupe de camionneurs et leurs partisans qui prétendent protester contre les restrictions liées à la pandémie, mais qui répandent aussi la haine, de fausses informations sur les vaccins et de dangereuses théories du complot. J'ai vécu à Ottawa il y a dix ans, et si vous m'aviez dit qu'un jour des drapeaux confédérés et des croix gammées flotteraient sur la Colline du Parlement, brandis par des gens qui réclament la dissolution du gouvernement et que ce dernier leur cède le contrôle, je ne vous aurais pas cru. Je ne sais pas comment cette occupation va se terminer — je connaîtrai sans doute la réponse au moment où vous lirez ces lignes — mais je crains que ce ne soit pas pacifique.

Notre travail consiste à vérifier l'information et à déterminer la source. Et notre travail est plus important que jamais. En tant que professionnels de l'information juridique, nous ne sommes pas forcément confrontés à la désinformation dans le cadre de notre travail, mais nous pouvons utiliser nos compétences pour lutter contre sa propagation en dehors du bureau. Le simple fait de partager des liens vers des sources crédibles comme CanLII ou Chartepédia avec votre entourage peut faire une différence, même si c'est très modeste.

Il est également peu probable que nous soyons confrontés à des attaques contre la liberté intellectuelle dans un milieu d'information juridique, mais cela ne veut pas dire que nous ne faisons pas partie de ce combat. La censure va à l'encontre de notre profession. Même si nous ne sommes pas aux premières lignes comme nos homologues des bibliothèques publiques et scolaires, l'accès à l'information reste un élément important de notre identité.

Malheureusement, nos collègues des bibliothèques publiques et scolaires aux États-Unis font l'objet d'attaques, et certains pourraient même être condamnés à une peine de prison pour avoir permis à des mineurs d'emprunter des livres jugés « inappropriés ». Certains groupes font pression pour que les ouvrages sur les questions relatives à la communauté LGBTQ, à la race et à l'Holocauste soient interdits dans

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# IIII President's Message / Le mot de la présidente

Data, technology, legal information, artificial intelligence, information equity and justice, emerging issues in copyright law and knowledge generation, protection, and dissemination. It's inspiring to see the range of interesting and nuanced scholarship, public participation, and commentary from law librarians and legal information workers, our members, on challenging issues in these and other realms.

These scholarly contributions, commentary, presentations, courses, and other contributions—which I'll subsume in the phrase *knowledge generation*—are found in a range of venues: blog posts, books, webinars, the courts, and articles right here in *CLLR*. It is not easy to make or find time to produce scholarship, access venues for our voices, and generate new knowledge. But it's essential that, as a community, we develop ways to do so: individually, collaboratively, or collectively.

The perspectives of legal information and law library communities add unique value to discussions about issues that we deal with regularly. They present implications of societal decisions for our communities. They highlight lacunae in law, policy, industry, or information equity, which we observe from first-hand experience.

A book about legal data, written from the perspective of a law librarian, contributes a different facet of knowledge than would such a book written by a data scientist. A Supreme Court of Canada submission about the implications of interpretations of a *Copyright Act* definition about internet communication presents a different perspective than would be available if only the voices of streaming platforms or entertainment rights collectives are shared. Course content on critical legal information literacy or algorithmic literacy enriches law school curriculum beyond doctrine, or law firm professional education beyond practice updates. And perspectives on equity or inequity in public access to legal information broadens discussions of access to justice in tangible and measurable ways that strengthen ameliorative efforts.

Colleagues, I hope you will continue to inspire me, each other, and our broader communities with your creative work and unique voices. I learn from you, and you are generating knowledge that stimulates further thought and advances justice.

**PRESIDENT**
**KIM NAYYER**

Les données, la technologie, l'information juridique, l'intelligence artificielle, l'équité et la justice en matière d'information, les questions émergentes en matière de droit d'auteur de même que la création, la protection et la diffusion du savoir. Il est inspirant de voir l'éventail de connaissances intéressantes et nuancées, la participation du public et les commentaires des bibliothécaires de droit et des travailleurs de l'information juridique, nos membres, sur les questions préoccupantes dans ces domaines et d'autres sphères.

Ces contributions universitaires, ces commentaires, ces présentations, ces cours et autres contributions — que je regrouperai sous l'expression « création du savoir » — se retrouvent dans différents lieux : billets de blogue, livres, webinaires, tribunaux et articles ici même dans la *RCBD*. Il n'est pas facile de trouver ou de prendre le temps de produire des travaux de recherche, d'accéder à des lieux d'expression et de générer de nouvelles connaissances. Cependant, en tant que communauté, il est indispensable que nous développions des moyens de le faire de manière individuelle, en collaboration ou collectivement.

Les points de vue des communautés de l'information juridique et des bibliothèques de droit apportent une contribution unique aux discussions sur les problèmes que nous avons à affronter régulièrement. Ils présentent les enjeux de décisions de société pour nos communautés. Ils font ressortir les lacunes en matière de droit, de politique, d'industrie ou d'équité de l'information, que nous observons de première main.

Un livre sur les données juridiques qui écrit du point de vue d'une bibliothécaire de droit nous fera découvrir une nouvelle facette du savoir contrairement à un ouvrage écrit par un scientifique de données. Un rapport de la Cour suprême du Canada sur les conséquences de l'interprétation d'une définition de la *Loi sur le droit d'auteur* concernant les communications sur l'Internet présente un éclairage différent du message qui serait communiqué par les plateformes de diffusion en continu ou les organismes de gestion des droits de divertissement. Le contenu des cours sur les connaissances juridiques fondamentales ou sur les algorithmes permet d'enrichir le programme des facultés de droit au-delà de la doctrine, ou la formation professionnelle dans les cabinets d'avocats au-delà des mises à jour sur la pratique. Et les points de vue sur l'équité ou l'iniquité de l'accès public aux informations juridiques contribuent à élargir les discussions sur l'accès à la justice de manière tangible et mesurable, ce qui renforce les efforts d'amélioration.

Chers et chères collègues, j'espère que vous continuerez à m'inspirer, à vous inspirer mutuellement et à inspirer l'ensemble des communautés par votre travail créatif et vos voix uniques. J'apprends de vous, et vous créez du savoir qui stimule la réflexion et fait avancer la justice.

**PRÉSIDENTE**
**KIM NAYYER**

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les écoles de plusieurs États. Un exemple notable est le roman graphique *Maus* d'Art Spiegelman, lauréat du prix Pulitzer, qui a récemment été interdit au Tennessee — qui est également l'État où le controversé pasteur Greg Locke, connu pour avoir diffusé des informations erronées sur la COVID-19, a récemment organisé un feu de joie pour brûler les livres qu'il jugeait « démoniaques ».

Nous ne pouvons pas tenir pour acquis que ce genre de censure ne se produira pas ici. L'occupation d'Ottawa montre à elle seule que ce que nous considérons souvent comme des « problèmes américains » ne s'arrête pas à la frontière. Nous parlons souvent d'accès à la justice, et l'accès à l'information (factuelle) et la liberté intellectuelle sont des questions d'accès à la justice. Qui peut prédire l'avenir? Quelles autres fausses informations conduiront à la violence? Quelles idées mettront quelqu'un mal à l'aise une fois que tous les romans auront été brûlés?

**RÉDACTRICE**
**NIKKI TANNER**

# On the Intersection of Artificial Intelligence and Copyright Law

By Bradley Budden[1]


## ABSTRACT

*Discussions on the intersection of artificial intelligence (AI) and intellectual property law have scrutinized how the Canadian copyright regime governs works generated through AI. However, this conversation almost entirely excludes an analysis of the philosophical justifications that underpin the regime. Without taking these into consideration, the conversation is merely scratching the surface of a much bigger discussion.*

*This paper analyzes each philosophical justification through a hybrid lens, whereby a holistic approach weighs and balances the philosophical arguments for and against copyright protection. Ultimately, this paper concludes that these justifications do not support providing copyright protection for works generated through AI and proposes amendments to the* Copyright Act *that eliminate protection for such works.*

## SOMMAIRE

*Les discussions sur l'intersection de l'intelligence artificielle (IA) et du droit de la propriété intellectuelle ont examiné de près la façon dont le régime canadien du droit d'auteur régit les œuvres générées par l'IA. Cependant, cette conversation exclut presque entièrement une analyse des justifications philosophiques qui sous-tendent le régime. Sans tenir compte de ces justifications, la conversation ne fait qu'effleurer la surface d'une discussion beaucoup plus vaste.*

*Cet article analyse chaque justification philosophique à travers une lentille hybride, dans laquelle une approche holistique pèse et équilibre les arguments philosophiques pour et contre la protection du droit d'auteur. En fin de compte, cet article conclut que ces justifications ne soutiennent pas la protection du droit d'auteur pour les œuvres générées par l'IA et propose des amendements à la* Loi sur le droit d'auteur *qui éliminent la protection de ces œuvres.*


## Introduction

Research into automated technology has yielded self-learning software with seemingly incomprehensible potential. This self-learning technology is commonly referred to as artificial intelligence (AI). The term was first coined by technological pioneer John McCarthy in 1956.[2] Professor McCarthy defined AI as "the science and engineering of making intelligent machines, especially intelligent computer

[1] Bradley Budden is an articling student at McInnes Cooper, currently working out of the St. John's, Newfoundland and Labrador, office. He received a Juris Doctor degree from the Schulich School of Law at Dalhousie University in 2021. Budden wrote this article to fulfill the major paper requirement for Intellectual Property Law II.

[2] Chris Smith, "The History of Artificial Intelligence" (2006) at 4, online (pdf): *University of Washington* <courses.cs.washington.edu/courses/csep590/06au/projects/history-ai.pdf>.

programs."[3] Although there are many definitions, most describe AI as performing tasks that normally require human intelligence, such as decision making, speech recognition, translation, and visual perception.[4]

Machines are able to display human-like intelligence without explicit programming through an approach called machine learning, which is considered a subfield of AI.[5] More specifically, machine learning is the process of using data and information as inputs and repeatedly running them through specific algorithms, so the machines learn from the data.[6] This paper uses the term AI to refer to any technology that produces outputs using the inputs of data and information in a manner that resembles an artificial, human-like intelligence.

Operators of AI now have the capability to create works that have traditionally been protected by Canadian copyright law when the author/creator of such work was human. Due to emerging and readily available computer processing power, operators of AI can now mass produce traditionally copyrightable works. It has become common practice to use AI to create music,[7] art,[8] and literary works.[9] One example of an AI-created work is "Edmond de Belamy," a painting by Obvious, an art collective based in Paris.[10] Also referred to as "The Portrait of Edmond Belamy," this work is the product of a machine learning computer program that used a "data set of 15,000 portraits painted between the 14th and 20th Centuries."[11] At auction, this painting sold for US$432,000.[12]

A potential market competition issue stems from this influx of machine-created works. AI is expensive to procure, both in terms of money and workhours to develop the software. As a result, AI is most commonly available to large companies and high net-worth individuals. If AI-generated works are granted copyright protection, the market could become over-saturated by these works, pushing out smaller-scale authors/creators.

Canadian law does not explicitly state whether AI-generated works are copyright protected. Most literature interpreting this issue focuses on using the author/creator doctrine to determine whether the work has a sufficient author/creator to be granted protection. However, the problem should be solved by taking a deeper dive into the justifications behind the copyright regime. The ultimate question is: do the philosophical justifications that underpin Canadian copyright law support providing copyright protection to works created by AI?

I will answer this question by analyzing recommendations by scholars, notes by national and international organizations, and, most notably, the justifications underpinning Canadian copyright law. First, I consider the current Canadian legal framework for copyright protection as it pertains to AI-generated works. The global conversation regarding the intersection of AI and copyright is then considered for greater insight into how other countries and international organizations have assessed the issue. Next, I provide an analysis of the philosophical justifications for copyright law, followed by a recommendation for a legal framework to align the law with these justifications.

Although other nations' interpretations are considered, the recommendations provided in this paper have been developed strictly for Canadian law. This paper also does not cover other areas of intellectual property (IP), such as patents or trademarks. The intersection of AI and patents is a similarly complex issue and would not be adequately analyzed within the constraints of this paper.

## The Conversation on AI & Copyright Law

Canadian law provides owners of copyright with time-limited monopolies over the exploitation of a work. This section describes the framework established in the *Copyright Act*[13] and weaves the concept of AI throughout to illustrate the ambiguity of the current regime when it comes to assessing whether AI-generated works can be granted copyright protection.

For a work to be protected under the *Copyright Act*, it must first be a copyrightable work.[14] The most common of these are musical, artistic, literary, and dramatic works.[15] There are no provisions within the *Copyright Act* that explicitly bar AI-generated work from being considered copyrightable subject matter. Due to a lack of case law or statutory explanation, there is no apparent reason at this point in the framework for someone to conclude that an AI-generated musical work, for

[3] John McCarthy, "What is AI? Basic Questions" (last visited April 2021), online: *Stanford University* <jmc.stanford.edu/artificial-intelligence/what-is-ai/index.html>.

[4] See e.g. *The Oxford Dictionary of Phrase and Fable* (online) (Oxford University Press, 2006) *sub verbo* "artificial intelligence"; *Merriam-Webster* (online) *sub verbo* "artificial intelligence".

[5] Sumit Das et al, "Applications of Artificial Intelligence in Machine Learning: Review and Prospect" (2015) 115:9 Intl J of Computer Applications 31.

[6] D Jakhar & I Kaur, "Artificial Intelligence, Machine Learning and Deep Learning: Definitions and Differences" (2019) 45:1 Clinical & Experimental Dermatology 131.

[7] See e.g. "The Artificial Intelligence Composing Emotional Soundtrack Music" (last visited April 2021), online: *AIVA* <www.aiva.ai>.

[8] See e.g. "Creative Tools to Generate AI Art" (last visited April 2021), online: *AIArtists.org* <aiartists.org/ai-generated-art-tools>.

[9] See e.g. Marta Torres Briegas, "Artificial Intelligence Has Made Its Way to Literature" (6 November 2018), online: *BBVA* <www.bbva.com/en/artificial-intelligence-made-way-literature>.

[10] "Portrait by AI Program Sells for $432,000", *BBC News* (25 October 2018), online: <www.bbc.com/news/technology-45980863> [*BBC*]; "Edmond De Belamy" (last visited 11 February 2022), online: *Obvious AI & Art* <obvious-art.com/portfolio/edmond-de-belamy>.

[11] *BBC*, *ibid*.

[12] *Ibid*.

[13] RSC 1985, c C-42.

[14] *Ibid*, ss 5(1), 2.

[15] *Ibid*, s 2.

example, is not copyrightable.

The next steps of the framework can be considered together since they are both relatively simplistic hurdles. This stage of the analysis requires the AI-generated work to be fixed on a tangible medium and be more than a mere idea or expression.[16] There are no apparent distinctions that would cause AI-generated works to be considered mere ideas or expressions; a work created by AI is fixed in the same manner as a work created by a human.

Finally, for a work to be copyrightable, it must be original.[17] Originality requires that the creator has exercised sufficient skill and judgment to bring about the work. This originality component, coupled with the author/creator doctrine, is where most of the current literature on AI and copyright presides. The following section analyzes the author/creator doctrine by tracing the discussion from its historical root to the present time to illustrate why it is inadequate for AI and why the conversation should focus instead on the justifications underpinning the Canadian copyright regime.

*The Author/Creator Doctrine*

The discussion of whether machine-created works can receive copyright protection has been litigious and debated ever since the Supreme Court of the United States ("SCOTUS") addressed the issue in 1884 ("the camera case").[18] When faced with the question of whether copyright law protects photographs created through a camera, SCOTUS posited that the photographs represented "original intellectual conceptions of the author,"[19] and therefore fell within the bounds of copyright protection. However, the discussion was laden with ambiguity. The defendant in the camera case provided a persuasive argument that photographs are "the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture."[20] In response, SCOTUS agreed that an "ordinary production of a photograph" would not be capable of copyright, but further stated that the photograph in question was a product of the plaintiff's own "mental conception."[21] Today, cameras are everywhere, and the technology required to take a photograph is far from revolutionary. However, the defendant's argument is even more relevant today in the context of AI than it was in the late 1800s in relation to photographs. The question can be phrased as follows: once programmers develop the algorithms and supply the datasets, are machine-generated outputs the creation of a novel intellectual operation or mere generations using the previously created algorithms?

In the wake of the camera case, the United States Copyright Office has actively attempted to interpret copyright legislation in relation to emerging technology. In 1965, the Copyright Office rejected an application for a musical composition created by a digital computer, acknowledging that difficult copyright questions would arise along with emerging technology, but focusing on whether the musical composition was a work of human authorship.[22] In 1973, the Copyright Office stated that works must have a "certain minimal amount of original authorship," which must stem from a "human agent."[23] This required degree of human authorship has continued until recent time; however, the standard of human origin is not clear. Are works created by AI deemed to have a human origin simply by virtue of the source code having been written by humans? If that is the case, it appears as though works created by AI would be protected by copyright in the United States.

Nevertheless, there remains ambiguity on the topic. The U.S. Copyright Office provides an example of a non-copyrightable work in which a machine weaves fabric with no discernible pattern.[24] If AI were to create the exact same work, would the work be considered to have a human origin? Likely, the human coder would not be able to predict the pattern without themselves conducting the exact analysis the AI conducted, and therefore it appears the pattern would not be discernible to the coder. Does it matter that the pattern would be discernible to the AI but not the coder? These questions, which have lingered since machines first began producing works, evidence why the author/creator doctrine is not a suitable analysis for determining whether AI-generated works should be granted copyright protection.

A further example is illustrated through the popular "monkey selfie case."[25] In 2011, David Slater placed his camera on a tripod while attempting to photograph a troop of monkeys. The monkeys played with the camera and captured photographs of themselves. Slater realized the images were of poor quality, and subsequently adjusted the settings on the camera in hope of capturing higher quality images. The monkeys once again played with the camera, this time capturing higher resolution images. One of those pictures was a selfie ("the monkey selfie") taken by a monkey named Naruto. A copyright dispute arose between Slater and Naruto (represented by People for the Ethical Treatment of Animals (PETA)) when Slater published a book in California that featured a copy of the monkey selfie.

[16] See *DRG Inc v Datafile Ltd* (1987), [1988] 2 FC 243 at para 29, 1987 CarswellNat 765.

[17] *Copyright Act*, *supra* note 13.

[18] *Burrow-Giles Lithographic Co v Sarony,* 111 US 53 at 58, 59 (1884).

[19] *Ibid* at 58.

[20] *Ibid* at 59.

[21] *Ibid* at 60.

[22] Christian E Mammen & Carrie Richey, "AI and IP: Are Creativity and Inventorship Inherently Human Activities?" (2020) 14 FIU L Rev 275 at 278.

[23] *Ibid* at 279, citing United States Copyright Office, *Compendium of Copyright Office Practices*, revised ed (Washington, DC: Library of Congress, 1973) §2.8.3.

[24] *Ibid* at 280, citing United States Copyright Office, *Compendium of US Copyright Office Practices*, 3rd ed (Washington, DC: Library of Congress, 2017) §313.2.

[25] *Naruto v Slater*, 2016 WL 362231 (ND Cal).

The photo was also made freely available on Wikipedia, which claimed that the monkey selfie was not captured by an author capable of claiming copyright protection and was therefore in the public domain. PETA pursued a claim in California court, arguing that Naruto was the creator of the image, since he captured the picture through purposeful and voluntary action.[26] Slater argued that his conduct of following the monkey troop, placing the camera in the proper position, and adjusting the camera settings qualified him to be the rightful creator of the image. The trial judge dismissed the action, stating that animals do not have standing in California court, and therefore PETA could not pursue an action on behalf of Naruto.[27] In 2018, the Court of Appeals for the Ninth Circuit affirmed that animals cannot hold copyright, and therefore Naruto was not a valid author.[28]

Although copyright in the monkey selfie case revolved around the issue of whether an animal can be a recognized author, the case is nevertheless relevant to the application of copyright to AI because it demonstrates that the judiciary currently seeks to use the author/creator doctrine to answer issues regarding works not wholly created by humans. Without a change in the legislation, or zealous advocacy inside and outside of the courts, the ambiguous author/creator doctrine will continue to be the determining factor in the analysis.

*International Discussions on AI & the Author/Creator Doctrine*

In 2017, the World Intellectual Property Organization (WIPO) created the Conversation on Intellectual Property and Artificial Intelligence ("the Conversation"), with the objective of providing member states with an opportunity to exchange views on various topics regarding AI.[29] WIPO conducted three meetings, focusing on the impact of AI on IP systems, IP policies, IP rights management, and international cooperation on IP matters. WIPO intended to yield a better understanding of the potential of AI in enhancing IP administration, a formulation of the right questions for continued discussion, and an identification of issues that needed the urgent attention of member states.[30] Unfortunately, the scope of the Conversation did not include proposing any action.

The panelists at the Conversation did not spend a considerable amount of time discussing the justifications for current copyright regimes, but instead focused on the author/creator doctrine and whether AI could be considered an author/creator. One panelist brought forward the idea that no existing copyright regime could cover AI-generated outputs without doctrinal inconsistencies or imbalances between human-created and AI-generated works.[31] AI technology is still in flux and rapidly expanding. As such, it was impossible for current copyright regimes to have been developed to correctly foresee the extent that outputs from emerging technologies could reach.

The panelists ventured into discussions on whether AI could be a sufficient author, but not into deep enough waters to reach the underlying justifications of the copyright regime. While trying to solve the problem by applying the current authorship framework is a step in the right direction, it does not achieve the end goal. The optimal way to answer the problem is to first ask: why do we have copyright law? Do the justifications for copyright law support providing copyright protection to AI-generated works?

## Philosophical Justifications Underpinning Canadian Copyright Law

The priorities, scope, and limitations of the copyright regime are informed by the theoretical lens through which we view the purpose of the system.[32] The purpose of copyright law in Canada is to balance public and private interests; in other words, to provide rights for both creators and users. In *Keatley Surveying Ltd v Teranet Inc*, Justice Abella stated that all provisions of the *Copyright Act* must be interpreted with this balance in mind.[33] This statement should apply equally to the development of an IP framework and to interpretation of the current framework. This means that the proper way to develop the IP framework to handle AI-generated works is to consider all philosophical justifications underpinning the copyright regime, through which all the private and public interests will be balanced.

Purwandoko and Imanullah state that there are generally four dominant philosophical justifications for any decision: utilitarian theory, labour theory, personality theory, and social-planning/distributive justice theory.[34] The following sections consider each justification. In addition to the above justifications, I analyze a fifth theory, the theory of law and economics, which is considered an extension of utilitarianism.

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[26] *Ibid*.

[27] *Ibid*.

[28] *Naruto v Slater*, 888 F (3d) 418 (9th Cir 2018). The parties agreed to settle outside of court, but the appeals court thought the issue was of such importance that it declined to dismiss the appeal.

[29] "WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI): Background Note" (2019) at para 9, online (pdf): *WIPO* <www.wipo.int/edocs/mdocs/globalinfra/en/wipo_ip_ai_ge_19/wipo_ip_ai_ge_19_inf2.pdf>.

[30] *Ibid* at para 11.

[31] *Ibid*.

[32] Lucie Guibault et al, *Canadian Intellectual Property Law* (Dalhousie University, 2020), online: *Dalhousie Libraries Digital Editions* <digitaleditions.library.dal.ca/cdn-ip-law> [Guibault].

[33] 2019 SCC 43.

[34] Prasetyo Hadi Purwandoko & M Najib Imanullah, "Application of Natural Law Theory (The Natural Right) to Protect the Intellectual Property" (2017) 6:1 Yustisia Jurnal Hukum 134.

*Utilitarian Theory*

The utilitarian theory used to justify IP stems from the philosophical theories of Mill and Bentham.[35] Generally, utilitarianism seeks a legal structure such that the greatest happiness is produced for the greatest number of people by creating incentives and disincentives to shape behaviour in a way to produce socially beneficial results.[36] For a work to benefit society under utilitarianism, it must be both non-rivalrous and non-excludable. Rival goods are classified as those goods that, when used, prevent others from using them concurrently.[37] Excluded goods are those that can be protected in a way such that only certain people can enjoy them.[38] Utilitarian theory is integrated in copyright frameworks by providing time-limited monopolies over works that benefit society. These monopolies are considered an incentive to innovate because, in return for producing a work beneficial to society, the copyright holder maintains exclusive control of and royalties from the work during that period. Literary, musical, and artistic works have traditionally been held to be non-rivalrous, non-excludable, and beneficial to society by enriching knowledge and the human experience.

In terms of societal benefit, AI-generated works provide a similar, if not equal, value as traditionally copyrightable works because the difference between human- and AI-generated works can be non-existent. Therefore, the simple fact that a work was created by AI should not cause the work to become rivalrous or excludable. However, a problem arises when examining the purpose of copyright, which, according to utilitarianism, is to provide an incentive to innovate in a manner to maximize societal benefit. A machine does not need an incentive to innovate or to generate works; therefore, strictly applying utilitarianism could be said to support AI-generated works becoming part of the public domain.

However, if utilitarian theory is more loosely applied, one may ask if the incentive to innovate is more properly directed toward the creators of the AI itself. If AI-generated works were to be given copyright protection, this might incentivize people to further create innovative technologies to produce works that benefit society. This is true based simply on the economic returns the developers of AI would receive if the work could garner copyright protection.

Nevertheless, this does not answer the full utilitarianism question, which is whether a greater portion of society benefits from AI-generated works being granted copyright protection. The incentive to develop AI comes at the expense of potentially forcing smaller-scale creators out of their markets—creators who could have benefitted from producing societally beneficial works if not for mass production of AI-generated works.

Weighing these pros and cons does not clearly provide that a greater portion of society would benefit from providing copyright protection to AI-generated works. Although creating the works through AI may be more time efficient, the adverse effect on creators in the respective markets counteracts that benefit. The fact that owners and beneficiaries of AI are likely big companies or high net-worth individuals further reduces the beneficial aspect of generating works through AI because it concentrates the benefits into the hands of a small segment of the population. Taking the totality of these arguments into account, utilitarianism does not appear to clearly support granting copyright protection to AI-generated works.

*Law and Economics Theory*

Law and economics theory promotes the production and distribution of scientific and cultural goods by way of utilitarian laws designed to promote economic efficiency.[39] Like the broader utilitarian theory, law and economics aims to maximize total social welfare; however, it aims to do so through a strictly economic perspective.[40] This approach considers IP as an intangible market product. If "free rider" users can easily copy IP without rewarding the creators, then creators are disincentivized to create, invent, and share the products of their intellectual labour.[41] The idea of preventing free riding by providing economic incentive is what separates law and economics from a broad utilitarian theory. In terms of copyright law, the economic approach suggests that granting creators a private interest in their work provides them with a strictly economic incentive to produce and distribute works that provide value to society.

Law and economics theorists would likely support the idea of providing AI-generated works with copyright protection. As previously detailed, AI-generated works are considered to have societal benefit by enriching knowledge and human experience. The main argument against providing AI-generated works copyright protection through utilitarianism is the adverse effect of forcing smaller-scale creators out of the market. However, the law and economics approach considers only the economic efficiency of the circumstances. Since AI-generated works can be mass-produced in a time- and cost-efficient manner, law and economics theorists would postulate that the economic societal benefit of AI justifies providing a time-limited monopoly over AI-generated work.

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[35] Guibault, *supra* note 32.

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.*

[39] Shlomit Yanisky-Ravid, "The Hidden Though Flourishing Justification of Intellectual Property Laws: Distributive Justice, National versus International Approaches" (2017) 21:1 Lewis & Clark L Rev 1 at 7 [Yanisky-Ravid].

[40] *Ibid.*

[41] Mark A Lemley, "Property, Intellectual Property, and Free Riding" (2005) 83 Tex L Rev 1031.

*Natural Rights/Personality Theory*

The theory of natural rights, otherwise known as Kant and Hegel's "personality theory," focuses on the bond between a creator and their work.[42] Personality theory operates on the basis that copyright is justified due to the protection it provides creators to control how their work is used, portrayed, or monetized.[43] This theory justifies copyright by positing that private rights most optimally ensure that individual creators can exercise their free will.[44] It posits that one cannot become a person and express free will through work without the institution of private property by way of copyright.[45] Canadian copyright law evidences the importance of personality theory through the incorporation of moral rights in the *Copyright Act*.[46] These moral rights provide creators with control over their work, regardless of any protection in economic terms. By preserving the creator's integrity over their work, Canada has recognized the importance of incorporating personality theory into the copyright regime.

Where, then, do AI-generated works fall within personality theory reasoning? There are two creators to consider for AI-generated works. The first creator is the AI itself. Although AI has human-like intelligence, there is no indication that AI can have a bond with its work. Nor does AI have free will. As such, personality theory does not support providing copyright protection based solely on the personality of the AI. However, the question is not as easily answered when considering those who program the software as creators. If a painter were to program a machine to throw paint at a canvas in a calculated pattern, personality theory could reasonably posit that the painter has a connection with the resultant artwork since it is a direct representation of the design the painter desired to create. The fact that a machine was used as an intermediary does not immediately dismiss the painter from claiming the work is a direct expression of their free will. Notwithstanding that simplified example, AI-generated works do not as easily fall under personality theory. Often, the programmers who created the AI do not know what the output will be. They may understand their programming, the datasets being used as inputs, and what type of output will be created, but they likely do not know what the final product will look like. The creators may have a bond with the AI, and personality theory provides that the creators should have copyright protection over its source code. However, the ambiguity that looms over the AI-generated work suggests that personality theory does not apply between creators and their AI-generated works, and therefore does not support copyright protection for those works.

*Labour Theory*

Labour theory is one of the dominant justifications underpinning Anglo-American copyright regimes.[47] Modern copyright labour theory stems from Locke's original theory of labour that was developed as a means to counteract feudalism.[48] The premise of labour theory is that an individual should be given the reward of private property rights for their labour.[49] Pertaining to copyright, labour theory argues that an individual should be given a private interest in works created through their intellectual labour. The idea of labour theory revolves around the usage and expansion of works in the so-called "common"—a "theoretical source of raw materials which is unowned."[50] When an individual provides sufficient contribution to the common, labour theory provides that the individual should be rewarded with personal rights to that work. However, Locke found that the functionality of labour theory is contingent upon the concepts of sufficiency and waste.[51] That is, the creator can only have rights in works that they can reasonably use.

Applying labour theory to AI brings forward two issues. First, who is the individual, group of individuals, or business who should be given a private interest in the work created by AI? The Canadian copyright doctrine of joint-authorship provides that multiple individuals can be rewarded with a private interest in a single work.[52] It is therefore within the bounds of labour theory for an individual or group of individuals to be rewarded for a software-produced work if they applied enough intellectual labour to create the work. Coding, especially coding of an extremely complicated software such as AI, is not a trivial task, and the creators need to apply vast intellectual labour to create an AI-generated output. Therefore, creators clearly provide enough intellectual labour to meet any threshold for entitlement.

The second and most critical issue is whether AI-generated works leave enough room in the common for others to use. AI-generated works can be mass-produced, potentially resulting in a limited amount of the common for small-scale creators to work within. This directly contradicts labour theory due to the potential detriment that AI-generated works could have on the common. As such, if the copyright regime were solely underpinned by labour theory, it appears as though AI-generated works should not justifiably be granted copyright protection.

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[42] Guibault, *supra* note 32.

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.*

[46] *Copyright Act*, *supra* note 13, s 14.1(1).

[47] Guibault, *supra* note 32.

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.*

[51] *Ibid.*

[52] *Copyright Act*, *supra* note 13, s 2.

*Distributive Justice Theory*

Distributive justice theory is based upon philosopher John Rawls's theory of justice, and it is considered a theory of mutual equality.[53] Distributive justice provides that the allocation and re-allocation of social resources among individuals or groups should be based on the principles of justice and fairness.[54] In terms of copyright, application of distributive justice theory is relatively new, and concrete arguments regarding the justification and implementation of the copyright regime are not yet fully developed. However, scholars have argued that copyright is an appropriate tool for the collection and distribution of social resources.[55]

Providing copyright protection to AI-generated works simultaneously aligns and misaligns with distributive justice theory. The mass-production of AI-generated works has the potential to provide society with a source of vast resources that could be used for educational and societal enrichment. However, this benefit is not guaranteed due to their limited availability. In distributive justice terminology, if the operators of AI choose to price their works out of the average consumer's price range, the resources will be considered as waste during the distribution stage, which counteracts the justification of copyright under distributive justice. Another misalignment comes into focus when considering the potential for smaller-scale creators to be pushed out of the market. Since AI is likely in the hands of large companies and high net-worth individuals, the collective wealth will decrease, while the wealth of big companies and high net-worth individuals will increase. This is a direct contradiction to the principles of justice and fairness. As such, it appears as though distributive justice theory does not justify copyright protection for AI-generated works.

## Assessment of Philosophical Justifications

The optimal way to assess the question of extending copyright protection to AI-generated works is through a hybrid lens that considers all philosophical justifications. This hybrid lens is holistic, takes into account all policy considerations, and makes a reasonable assessment of what is just. Under this lens, no single justification can be given priority over all others. However, based on the strength of the respective arguments, some justifications carry more weight as part of the assessment. More neutral arguments are not considered as heavily as arguments that either strongly support or oppose providing copyright protection for AI-generated works. The balance of this section assesses the conclusions for each of the justifications discussed above and provides a reasonably defensible argument as to why the philosophical justifications underpinning the Canadian copyright regime collectively do not support providing copyright protection for AI-generated works.

Utilitarian theory opposes providing copyright protection for AI-generated works based on the potential adverse effects that the protection would cause to current market participants. When weighing the time-efficient benefit of AI-generated works against the adverse effect to market participants, the argument against AI-generated works is not overwhelming. Under the right circumstances, AI-generated work can provide a benefit to society, especially when the incentive to innovate is directed toward the developers of AI. Therefore, utilitarian theory marginally opposes providing copyright protection to AI-generated works.

Law and economics, on the other hand, strongly supports providing copyright protection because of AI's potential to increase the economic efficiency of the market. The economic approach is not focused on the adverse social effect to market participants, but rather the overall economic efficiency.

Natural rights/personality theory, labour theory, and distributive justice theory do not support providing copyright protection to AI-generated works. The lack of a bond between the developers of AI and the AI-generated output leads personality theory to marginally land on the side of not supporting copyright protection; its argument does not provide strong reasoning and is therefore apportioned a small degree of weight in the assessment. Because AI has the potential to usurp so much of the common, labour theory does not support justifying copyright protection for AI-generated works. However, the consumption of such a large portion of the common is the only hurdle for AI in respect to labour theory, and therefore labour theory is also apportioned a small degree of weight in the assessment. Distributive justice strongly opposes providing copyright protection for AI-generated works due to the potential for unequal distribution of benefits among different socioeconomic groups, contradicting the principles of justice and fairness.

When all the justifications are considered, it is evident that there are stronger arguments against providing copyright protection to AI-generated works than those supporting copyright protection. As such, the philosophical justifications that underpin the Canadian copyright regime do not support granting copyright protection for AI-generated works. The following section provides a recommended framework to align the governance of AI-generated works with these principles.

## Proposed Framework for Works Generated by AI

It has been evidenced that the philosophical justifications that underpin the Canadian copyright regime do not support providing copyright protection to AI-generated works. However, the question remains: what is the optimal structure of a copyright framework to exclude AI-generated works from copyright protection? This section develops such a framework and applies it to real life situations to illustrate the practicality of governing AI.

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[53] Yanisky-Ravid, *supra* note 39 at 15.

[54] *Ibid* at 10.

[55] *Ibid* at 26.

As previously discussed, the domestic and international conversation revolves around whether AI can be considered an adequate author/creator. However, the results of these conversations have not created a tangible answer because there are strong arguments both supporting and opposing AI as an author. The fact that the philosophical justifications do not support AI-generated works being granted copyright protection does not necessarily preclude AI from being recognized as an author. That is a separate question that requires a similar in-depth analysis. Therefore, an interpretation of the author/creator doctrine would not be an optimal framework to govern AI.

A more efficient framework would be to preclude AI-generated works from the definition of "work" in the *Copyright Act*.[56] By focusing on the work itself, the ambiguity regarding the author/creator doctrine does not come into consideration. The following amendments should be made to the *Copyright Act* to exclude the provision of copyright protection to AI-generated works:

**Recommendation A:** Section 2 of the *Copyright Act* should be amended to include the following definition:

> "AI-generated work" is a computer-generated work that has been produced through a series of mechanisms requiring human-like intelligence, whereby the mechanisms use data and information as inputs, and create an output by continuously re-learning the dataset, information, and work produced by the machine.

**Recommendation B:** The definition of "every original literary, dramatic, musical and artistic work"[57] should be amended. The new definition should be as follows:

> every original literary, dramatic, musical and artistic work includes original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science, **but does not include "AI-generated work"**.

The proposed amendments maintain copyright protection for works created by direct programming. The goal of amending the *Copyright Act* is not to remove copyright protection for all works created through software generation, but only to remove the protection for works created by AI. Two examples can be analyzed to illustrate the functionality of the proposed amendments.

In the first example, Group A develops AI to create a poem similar to works by Robert Frost. The AI achieves the goal by analyzing Frost's works, developing its own poem, continuously comparing its own poem to works created by Frost, editing its poem, and ultimately creating a work that the AI cannot differentiate from the works of Frost. These poems fall squarely under the proposed definition of "AI-generated work" in Recommendation A. The AI produces poems through a series of human intelligence-like mechanisms, using Frost's works as inputs, and develops poems as outputs by continuously re-learning the works of Frost. Therefore, Recommendation B would provide that the AI-generated poems are not an original literary work and therefore would not be granted copyright protection.

A second example illustrates how an object-oriented output would maintain copyright protection for human creators. A programmer develops code for a series of machines to orient pieces of furniture in readily predictable patterns in an empty room, and these machines subsequently capture a photograph of each pattern using a camera. The proposed definition of AI-generated work in Recommendation A would not include the photographs captured through this scenario, since the output was not generated by continuously re-learning the dataset, thus removing the human-like intelligence component of the action. As such, the photographs would still fall under the definition of an original artistic work in Recommendation B.

## Conclusion

This paper has outlined the problematic nature of the current copyright regime as it applies to AI. It has provided sound reasoning as to why both domestic legislators and international organizations should consider the philosophical justifications that underpin the copyright regime to solve the issue of the intersection of artificial intelligence and intellectual property law. Direct application of the philosophical justifications yields the conclusion that the *Copyright Act* should be amended to explicitly exclude AI-generated work from copyright protection.

[56] *Copyright Act*, *supra* note 13, s 2.

[57] *Ibid*.

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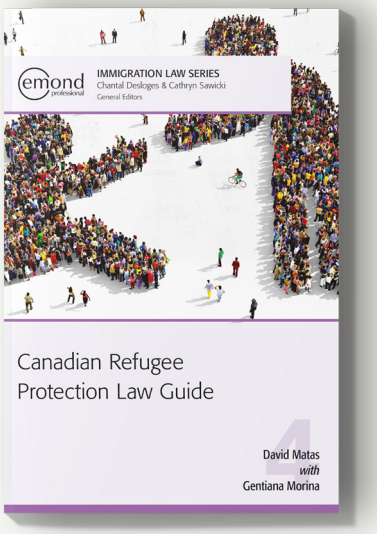


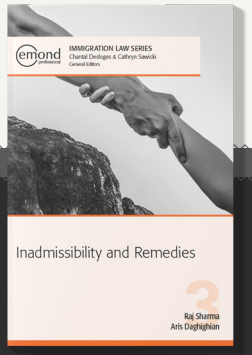


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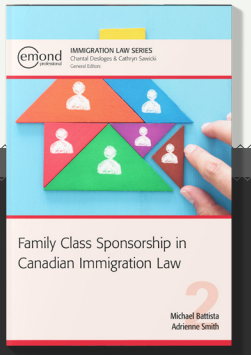


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# IIII Reviews / Recensions

Edited by Elizabeth Bruton and Dominique Garingan

***Advanced Introduction to Law and Artificial Intelligence.* By Woodrow Barfield & Ugo Pagallo. Cheltenham, U.K.: Edward Elgar, 2020. xiv, 194 p. Includes table of contents, introduction, and index. ISBN 978-1-78990-514-4 (softcover) $25.95; ISBN 978-1-78990-512-0 (hardcover) $120.00.**

*Advanced Introduction to Law and Artificial Intelligence* by Woodrow Barfield and Ugo Pagallo is, as of this writing, one of 16 titles in the Edward Elgar *Advanced Introductions: Law* series. The *Advanced Introduction* series is designed to "pinpoint essential principles of a particular field" and "offer insights that stimulate critical thinking,"[1] and its titles are intended to serve as textbooks for upper-year undergraduate or graduate courses.

The book comprises 11 chapters. Chapter 1 sets the stage with key definitions. Chapters 2–10 cover the impact of artificial intelligence (AI) on human rights law; constitutional law; legal personality; data protection; tort law; criminal law; copyright law; patent law; and business law, antitrust, and trade secrets. Finally, Chapter 11 looks ahead to future developments in the law, not only as AI becomes more embedded into society but also as it becomes more autonomous. The last chapter also briefly introduces other relevant areas of law that were not explored in this short text, but on which AI has an important impact: administrative law, financial regulations, health law, the laws of war, workplace-related law, and body- and technology-related issues.

Having had recommended other titles in this series, I had high hopes for this text, particularly considering my teaching and research interests. Unfortunately, the book did not live up to my expectations. For one, it is not well edited. The writing is uneven and flows poorly, with some chapters significantly weaker than others (and indeed, the criticisms laid out below do not apply to all chapters equally). In particularly problematic chapters, notably chapters 2 and 3 on human rights and constitutional law, respectively, several paragraphs are pasted with minimal context, reflection, or discussion. In several chapters, headings and subheadings seem arbitrary, with no logical structure to the chapter or section. Last—and again, only in these more problematic chapters—content is repeated between chapters without acknowledgement and/or reference to where the material is more substantially discussed. For instance, the concept of narrow versus general AI is defined briefly in footnote 34 of the chapter on constitutional law, whereas a more effective footnote would have referred the reader back to section 2.1 of the introductory chapter, which explains the concepts in greater detail. A weak index and a lack of a table of cases exacerbates this problem.

The series is advertised as "accessible yet rigorous." However, in some places, particularly at the beginning when dealing with more scientific matters, the material is dense, even for someone whose main research interests centre around AI. Laying out all the definitions at the start is overwhelming and could easily deter a reader from continuing to read the text.

[1] "Elgar Advanced Introductions Series" (last visited 8 February 2022), online: *Edward Elgar Publishing* <www.e-elgar.com/shop/usd/book-series/law-academic/elgar-advanced-introductions-series.html>.

By contrast, I found that some legal issues and concepts are explained for beginners, despite the text being an "Advanced Introduction" title targeted toward upper-year law courses or even legal practitioners.

The biggest disappointment, however, is the dearth of examples and references in specific chapters. While this may in part reflect the concise nature of the text, at a certain point, references cannot be omitted. For instance, when one sees the phrase "as noted by law scholars," one would expect to see a fairly detailed "See" reference, and not a citation to a single article. Instead, these weaker chapters rely heavily on only a handful of scholarly references, and at times the authority of some of these references is questionable. Given the brevity of the text, it would benefit from more substantial footnotes to allow the reader to complete their research.

While the *Advanced Introduction* series generally offers a multi-jurisdictional and cross-jurisdictional approach to their legal topics, this title is very Euro- and U.S.-centric, with minor references to foreign law outside these jurisdictions in the chapters on copyright law and patent law, and in the final chapter about future developments in the law. This, despite the introductory text highlighting the "worldwide interest to regulate AI" and stating that the book will "present the law which relates to AI found at the level of state, Federal, and international jurisdictions" (p. viii). For the authors, this is essential.

Unfortunately, the problems identified above prevent me from recommending its purchase by most law libraries, despite its extremely reasonable price. This title would, however, do well on the bookshelves of a university library, where it can be consulted by users in the social sciences and engineering, as well as law students. While I do not see this textbook as being the primary textbook for a course on AI and the law, it could serve as an optional recommended text. I would recommend the following chapters:

- Chapter 4: Legal Personality and Artificial Intelligence
- Chapter 5: Issues of Data Protection
- Chapter 6: Tort Law Approaches
- Chapter 7: Criminal Law
- Chapter 8: Copyright Law

Lastly, with little jurisprudence in Canada relating to AI, lawyers may consult this book to see how the courts in the U.S. and in Europe have treated AI in relation to various areas of substantive law. However, given limited collection budgets in law firms, there are other titles available that are worth investing in first.

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***The CanLII Manual to British Columbia Civil Litigation: A User-Friendly Guide.*** **Edited by John Fiddick & Cameron Wardell. Ottawa: Canadian Legal Information Institute (CanLII), 2020 CanLIIDocs 630. Includes table of contents, glossary, appendices, and hyperlinks. Online: <canlii.org/en/commentary/doc/2020CanLIIDocs630> [https://perma.cc/25HZ-RR4S].**

*The CanLII Manual to British Columbia Civil Litigation* is an open-access text freely available on CanLII, primarily designed for those unfamiliar with the British Columbia justice system. John Fiddick, Director at Whitelaw Twining, and Cameron Wardell, Partner at Mathews Dinsdale, coordinated and edited contributions by numerous lawyers and legal professionals. The manual also includes the Law Courts Center's *Guide to Civil Procedure at the Supreme Court of British Columbia*, which was prepared by a team of volunteer paralegals and legal professionals led by Dom Bautista of the Amici Curiae Friendship Society of British Columbia. A grant from the Law Foundation of British Columbia funded the project.

The text's subtitle states that it's a "user-friendly guide," which is apt. In addition to providing brief overviews for various areas of law, the manual guides the reader through all the necessary steps for initiating and completing a civil litigation action. All relevant references are explained and hyperlinked within the text.

The text contains useful introductions to broad areas of the law. It has a series of nine "pathfinders" directing to administrative law, criminal law, employment law, family law, human rights law, personal injury law, residential tenancy law, wills and estates, and workers compensation law. For example, the administrative law pathfinder explains what boards and tribunals do in British Columbia and outlines the process for appealing administrative decisions to the B.C. Supreme Court. The text provides links to individual board and tribunal websites and checklists of things to consider before filing an appeal. Court resources, such as contacts and forms, as well as links to other external resources, such as Disability Alliance B.C. and the Community Legal Assistance Society, are informative and useful.

Part 3 explains that "access to information is access to justice." That is the intended purpose and ethos of the publication. In British Columbia, a foundational institution that supports this purpose is the Amici Curiae Friendship Society, which is supported by volunteer paralegals, lawyers, students, and other legal professionals. The Amici Curiae Friendship Society contributed its volunteer resources to the development of this manual.

Step by step, the text explains the costs of litigation and the time limitations for various actions. The section on pleadings explains what this means: the opportunity for "telling my story." Beginning with a Notice of Civil Claim, it walks through the necessary elements of its preparation with pragmatism. For example, the section on the style of cause includes a clear example; the discussion on statement of facts advises drafters to leave out personal feelings; and the part on relief sought explains how awards are characterized: general, special, costs, and what the Court believes is fair to grant. Various authors also point out that case law is useful when considering what relief to ask for and that CanLII is freely available and easy to use. All resources, such as court forms and relevant legislation, are linked.

In addition to providing detailed instructions, checklists, links to forms, and other resources throughout the litigation process leading to trial, the text also outlines other means of reaching agreements outside of the formal trial process. This section offers valuable advice on how to conduct oneself in the courtroom, that litigants may bring a "McKenzie friend," and how counsel may bring up testimonies and witnesses. The text provides clear explanations of courtroom terminology, including "hearsay," "irrelevant," and "speculation." Procedures after trial are also explained in detail.

The text contains additional material, such as a glossary, as well as discussions on factors to consider in the administration of justice, such as cultural diversity and gender identity. Also provided are a procedural checklist for self-represented litigants; numerous appendices, including a guide for calculating timelines; and valuable annotations for and links to the B.C. *Supreme Court Civil Rules* (BC Reg 168/2009) and the B.C. *Court of Appeal Rules* (BC Reg 297/2001), with links and citations to cases that have considered these rules.

Informative and innovative, this resource is a manifestation of the mandate "access to information is access to justice."

REVIEWED BY
**MARY HEMMINGS**
*Law Librarian and Instructor*
*Faculty of Law, Thompson Rivers University*

***Cold Case North: The Search for James Brady and Absolom Halkett*. By Michael Nest, Deanna Reder & Eric Bell. Regina: University of Regina Press, 2020. 311 p. Includes illustrations, maps. ISBN 9780889777491 (softcover) $24.95; 9780889777545 (hardcover) $89.00.**

In June of 1967, James Brady and Absolom Halkett disappeared in the bush in Northern Saskatchewan. The official conclusion of the RCMP investigation was that these two Indigenous men got lost and perished, but those who knew Brady and Halkett did not believe this to be true. For years, rumours swirled that "secret mining interests and foul play" (p. 18) were at the core of their disappearance. *Cold Case North: The Search for James Brady and Absolom Halkett* is the gripping story of a recent attempt to crack this 50-year-old case.

James Brady and Absolom Halkett were seasonal prospectors and skilled bushmen, as well as respected leaders in their communities. James Brady was a well-known member of the "Famous Five" who helped to establish the Metis Association of Alberta, and Absolom Halkett was a band councillor for the Lac La Ronge Indian Band. In 1967, they were hired by a mining company to investigate a potential claim at Middle Foster Lake near the town of La Ronge, Saskatchewan. Nine days after their drop-off in the bush, their camp was discovered deserted, and both men were nowhere to be found.

Frank Tomkins, whose father was a close friend and political ally of Brady, was one of many people from the La Ronge community who believed Brady and Halkett were victims of foul play. He was angry that the RCMP had ignored leads brought forward by the community and dismissed the possibility of wrongdoing. Haunted for his whole life by this misjustice, Tomkins enlisted his niece, Deanna Reder, an associate professor in the English and Indigenous Studies departments at Simon Fraser University, to follow up on these leads and investigate the true cause of Brady and Halkett's disappearance. Unable to perform the task herself due to her work obligations at the university, Reder sought the help of award-winning freelance researcher and author Michael Nest, along with Eric Bell, a member of the Lac La Ronge Indian Band and owner of the La Ronge Emergency Medical Services, to help with the investigation.

*Cold Case North* documents the story of this small but skilled team's search for new evidence to solve the mystery and to understand the actions of the RCMP during their 1967 investigation. Michael Nest, whose prior experience includes researching and writing about corruption in the mining industry, led the team's research efforts. His research is extensive and thorough. Librarians and archivists will appreciate his accounts of visiting numerous libraries, archives, court registries, and government offices in search of primary documents and other sources that could offer clues. He also interviews numerous people from the La Ronge community who were involved in the original search and investigation and/or knew Brady and Halkett.

Through his extensive research, Nest finds compelling evidence that the RCMP's original search and investigation was marred by racial prejudice, false assumptions, and investigative incompetence. In addition, relying on local knowledge and information, he rediscovers a forgotten clue originally found by an Indigenous tracker not long after Brady and Halkett's disappearance. This clue spurs the authors to take on an ambitious project that, without telling more and spoiling the ending of the story, leads to an incredible discovery.

This book makes several contributions to the existing literature about the disappearance of Brady and Halkett. It represents the first time in decades that new clues have been uncovered in what is otherwise considered to be a cold case. Additionally, by showing how racial prejudices likely biased the RCMP's original search and investigation, this book serves as a keen reminder of the need for our institutions of crime and justice to do so much better when it comes to serving Canada's Indigenous communities.

In addition to making important contributions to the literature, *Cold Case North* is also an eminently readable story. Nest effectively builds tension from one chapter to the next, making the book hard to put down. He is a compassionate writer, who is skilled at telling vivid and personal stories that bring life to the characters who populate the text. In addition, his haunting descriptions of the Northern Saskatchewan landscape add a wonderful atmospheric quality to the story. It is no surprise that *Cold Case North* was shortlisted in 2020 for the Crime Writers of Canada Best Nonfiction Crime Book, as well as the American Book Fest's International Book Award.

I recommend *Cold Case North* to those who are interested in social justice and Indigenous communities, police searches and investigations, and the secretive Canadian mining

industry. In addition, since the book explores these topics in an engaging and accessible way, it would fit in well with both academic and public library collections.

REVIEWED BY
**LESLIE TAYLOR**
*Research and Instruction Librarian*
*Lederman Law Library, Queen's University*

***Constitutional Pariah:* Reference re Senate Reform *and the Future of Parliament*. By Emmett Macfarlane. Vancouver: UBC Press, 2021. x, 216 p. Includes notes, selected bibliography, index of cases, and index. ISBN 9780774866224 (paperback) $27.95; ISBN 9780774866217 (hardcover) $75.00; ISBN 9780774866248 (EPUB) $27.95; ISBN 9780774866231 (PDF) $27.95.**

For anyone interested in finding a book that provides in-depth information about the Canadian Senate, *Constitutional Pariah* will meet those needs. Centered around the 2014 Supreme Court of Canada decision *Reference re Senate Reform* (2014 SCC 32), this book goes beyond a simple discussion of the decision itself and sets the context through a study of the past, present, and future of the Senate. The author provides the reader with a clear understanding of this critique by contributing details about previous efforts to reform the Senate. This context allows readers to form their own opinions about the decision.

In Chapter 1, Macfarlane provides the institutional background and history of the Senate. In particular, he attempts to explain how the Constitutional framers regarded the overall role of the Senate and how well these original intentions have been fulfilled. At times, the Senate is tasked with providing a "sober second thought," while at other times its role is seen as providing regional or minority representation.

Chapter 2 provides further context through a brief history of Senate reform efforts, including attempts to make the Senate into a "house" of the provinces or an elected body, and discussions about abolishing the Senate altogether. The author points out how these diverse reform efforts only solve certain problems and leave others unresolved.

Moving the story into more current times, Chapter 3 describes Senate reform within the Stephen Harper administration. Contemporary readers will be familiar with more recent news stories concerning the Conservative government's attempts to reform the Senate through legislation, as well as the Senate expense scandal. This is a good review for those already familiar with the historical context while providing details necessary for others to better understand the lead up to the decision central to the book.

Chapter 4 moves beyond the historical context into the straightforward analysis and critique of the Supreme Court of Canada's ruling. Of all the chapters, this one does require some legal and Constitutional knowledge to fully understand the arguments presented. Macfarlane calls the court's decision "simplistic and incomplete" and suggests that the decision introduces uncertainty into the future of Constitutional amendments.

In Chapter 5, the author moves the discussion of Senate reform beyond the title decision and into the present by looking into recent (informal) changes to the appointment process for senators as well as attempts to remove party affiliation from the equation. Macfarlane uses interviews conducted with senators, senate staff, and public servants and looks at the passage of two recent bills (Bill C-45, legalizing cannabis, and Bill S-3, amending the *Indian Act*) to evaluate the effectiveness of these changes on the work of the Senate.

In Chapter 6, the author picks up the Constitutional amendments thread from Chapter 4 and discusses the impact of the *Senate Reform* decision on the likelihood of future amendments. Macfarlane posits that this decision obscures "the dividing line between the various amending procedures" (p. 137), with the possible result of discouraging future attempts to make amendments to the Constitution. This foresight is a fitting way to wind up a discussion that began by reviewing the past to explain the present.

*Constitutional Pariah* will certainly appeal more to a reader with a good knowledge of Constitutional law. However, that is not essential. The average reader, who may have followed *Senate reform* or the recent Senate expense scandal in the news, will also find value in this book since it provides additional details that are not too steeped in legal rhetoric. Macfarlane lets the topic bloom out around the Supreme Court's decision and, in the end, leaves the reader with an excellent grounding in all things Senate.

REVIEWED BY
**EMILY BENTON**
*Research Librarian (Law)*
*University of Ottawa*

***Cross-Examination: The Pinpoint Method*. By Kyla Lee. Toronto: LexisNexis, 2021. 135 p. Includes table of contents and index. ISBN 9780433514329 (softcover) $150.00.**

*Cross-Examination: The Pinpoint Method*, written by criminal defense lawyer Kyla Lee, is a practical and engaging guide to a method of cross-examination developed by the author over the course of her career. Throughout the volume, Lee paints a picture of the technique with a metaphor of a needle and thread making a quilt.

The book begins with a detailed chapter on preparation that will pique the interest of list makers and note takers. Lee emphasizes the importance of preparation of both the ins and outs of one's case, as well as the physical preparation of lists and binders and the order in which to present the information. As thorough as I found this chapter, I did find some specific details missing. For example, the author mentions an unnamed web-based application that searches social media comments and suggests that online court filing databases can be useful for a lawyer's preparation. While it is understandable that there is constant change in technology, specific names or an overview of these tools would be helpful, as inquiring legal librarians would like to know.

Additionally, given that lawyers cross-examine witnesses from a variety of fields, there was no deep discussion on how

to prepare for cross-examination in an unfamiliar subject area other than brief mentions to do the research to familiarize oneself. As stated on her website, the author was trained in the operation of the breathalyzer used by police in British Columbia, so touching on her own experience and providing ideas on how lawyers can seek out such knowledge would have been helpful.

The only chapter to take on a more academic tone was Chapter 2, "Dancing on the Head of a Pin: Ethics in Cross-Examination," which was interesting to read in light of recent sexual assault trial controversies. Lee goes into detail, and the amount of information and nuance that goes into questioning witnesses is at times dizzying. Subsequent chapters cover the cross-examination technique itself and get into the nitty-gritty of questioning. From setting up your witnesses to structuring and organizing the order of your questions, the topics covered are numerous.

If there's one thing this book teaches about the state of legal education, it's that knowledge of psychology would certainly be valuable. Taking on the persona of a bumbling oaf to get a witness's guard down, pitting witnesses against each other, and carefully selecting your words to avoid unintentional signals are just a few of the techniques mentioned. Chapter 5, "Pricking Yourself: Handling Difficult Witnesses," was captivating. The author shares tips on how to manage the "if you say so" witness, the "I don't remember" witness, and even the over-talkers that frequently plague female lawyers. Lee is well versed not only in understanding the typical behaviours of witnesses but also in how to respond to one's advantage.

One critique I have about the book is that, with all the material packed into a slim volume, a visual break in the format, such as a more focused introduction and a listed summary at the end of each chapter, would help readers better absorb the information. Despite some of the above critical comments, the book was well written, engaging, and an enjoyable read on a skill that is critical to the success of any litigator.

*Cross-Examination: The Pinpoint Method* would be a welcome addition to a courthouse, public, or law school library's collection. It would also be of use to any lawyer who wants to brush up on or expand their cross-examination skills. While it comes from the perspective of a defense lawyer, a potential expert witness or police officer who routinely provides evidence would gain a lot of insight into the tricks of the trade.

REVIEWED BY
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***Growing a Law Practice During COVID-19*. By Gary Mitchell. Toronto: LexisNexis, 2021. xxi, 150 p. Includes bibliographic references and index. ISBN 9780433515661 (softcover) $100.00.**

At first glance, one might assume that *Growing a Law Practice During COVID-19* has a limited shelf life and is only relevant during the pandemic. However, a second glance inside the cover and a review of its contents show that this text has a lot of valuable information for lawyers and their legal practices now and in the future.

Author Gary Mitchell has previously published two books intended to help lawyers develop and improve their legal practices as businesses: *Raindance: The Business Development Guidebook for Lawyers* (2012) and *Raindance II: A Blueprint for Growing Your Practice* (2014). He also writes the column "The Coach" for LexisNexis's *The Lawyer's Daily* and has been a business coach focusing on lawyers for 30 years. In many ways, *Growing a Law Practice During COVID-19* is an updated edition of his *Raindance* texts.

The purpose of the text is to provide a complete set of strategies and specific steps for lawyers, most of whom are experienced in the law but may lack experience with the business side of running a legal practice. It is aimed at the growth and improvement of the business aspects of practice and is written for all legal practitioners, regardless of their years of experience.

There are 12 chapters in total. The first four focus on foundational advice, including guidance on how to effectively work from home. The next three chapters focus on business management, followed by two on employee management. The last two chapters are aimed at career management for legal practitioners, both for themselves and for members of their firms.

The text is very accessible, written in plain language, and does not have to be read in a linear fashion. In fact, Mitchell strongly encourages readers to focus on the areas that have the most relevance to their personal situation. However, readers seeking to work on improving their legal practice might want to read the chapters on business management (chapters 4–7) in chronological order to take full advantage of the tips and exercises recommended by the author.

The skills and techniques presented within the text are applicable at any time in a law firm's growth as a business. The current pandemic has prompted many lawyers to struggle to find ways to keep their practices afloat, which is why Mitchell wrote the text at this time: to encourage lawyers to focus on their practices as businesses and keep themselves relevant and solvent during the crisis.

The accessibility of the writing, first-hand knowledge of the issues, and real-world focus of the content make *Growing a Law Practice During COVID-19* an excellent addition to any law firm, courthouse, or law society library collection. Lawyers who are either a partner in a law firm or are considering owning a law firm will find the text of value. Some extra care may be required when cataloguing this item to encourage members not to consider the title as "dated" or of a limited-time value. This text is well worth it for legal practitioners to invest time and effort in applying the content.

REVIEWED BY
**JENNY THORNHILL**
*Law Librarian*
*Law Society of Newfoundland & Labrador Law Library*

***Guthrie's Guide to Better Legal Writing.* By Neil Guthrie. 2nd ed. Toronto: Irwin Law, 2021. xviii, 281 p. Includes bibliographic references and index. ISBN 9781552215692 (softcover) $60.00; ISBN 9781552216279 (EPUB) $60.00; ISBN 9781552215708 (PDF) $60.00.**

The second edition of *Guthrie's Guide to Better Legal Writing* is Neil Guthrie's revised anthology of email queries and blog posts.[2] The scope of the book is in its title: it offers practical tips and advice to legal writers. Guthrie's definition of "legal writing" addresses written communication between lawyers, law students, and the layperson, although legal drafting is addressed intermittently. The book is not intended to be a comprehensive review of grammar and punctuation. Instead, it has an approximate agenda that is enhanced by the author's personal narrative.

The author follows their own advice as outlined in the suggestions for choosing a writing topic (p. 2):

- *They write about something they practice and know*. Guthrie has taught legal research and writing at the Faculty of Law, University of Toronto; has helped develop the legal research and writing curriculum for the Law Practice Program at Ryerson University; and is director of professional development, research, and knowledge management at Aird & Berlis LLP.
- *They recycle old work*. This is the second edition of *Guthrie's Guide to Better Legal Writing*.
- *They ensure pieces can be published in more than one place, with minor adjustments*. Both editions of the book expand on a collection of emails that evolved into a continuing blog series on slaw.ca.
- *They get their writing in front of the right audience*. According to WorldCat, the second edition is already available in most academic law libraries across Canada.

There are minor edits made throughout the book to correct content and update examples and bibliographic references. The organization of the chapters has not changed from the first edition:

- Chapter One: Get Writing!
- Chapter Two: Words Used and Abused
- Chapter Three: Grammar and Punctuation
- Chapter Four: Your Queries Answered

Notable additions include a section addressing terminology specific to equity-seeking groups; new miscellaneous things that annoy the author; new queries sent in by readers of the author's blog, including some timely linguistic issues related to COVID-19; and an updated recommended resources list.

The book is designed to be a practical reference tool used during the writing process. The detailed table of contents and index make it easy to quickly locate relevant information. There are two tables that are useful to those who frequently communicate using the English language. The first has examples of misused phrases and how to simplify them (e.g., "with the exception of" can usually be shortened to "except"). The second explains the correct meaning and proper application of commonly misused words (e.g., adverse, avert, advert, averse). These tables address vernacular deficiencies that have infiltrated the way we speak and write.

The tone of this book might be interpreted as curmudgeonly due to the many cheeky rants about personal preferences. (*Cheeky* and *curmudgeonly* are an homage to the author's obvious affinity for British English.) For instance, writing samples are followed with such phrases as "Wrong, so wrong," or "Oh Lord, no!" Some readers may feel as though they are being scolded. However, the author's intention is to improve plain language written communication, and the rants and exclamations are like a splash of water on the reader's face as they sift through dry content. It is a welcome shift from more formal publications on the topic. The author makes simplifying writing entertaining through snappy stories and sentiments, such as shopping for lightbulbs in mid-1970s Bulgaria and multiple mentions of drinking Negronis. Reading about the minutiae of legal writing can be tedious and time consuming, but if you appreciate sardonic humour, Guthrie's tone makes the topic enjoyable.

There are many formal books and online resources that cover the topic of legal writing. Guthrie's niche is that this guide resembles a "choose your own adventure" book. It is highly practical but does not need to be read sequentially. It reads like a long-form FAQ, likely because its content was inspired by emails asking distinctive legal writing questions about terminology, grammar, and punctuation. Acknowledging that readers may be seeking information outside the scope of the guide, Guthrie includes a list of legal writing sources as a final personal recommendation.

The value of this book reaches beyond the discipline of law. Students from all academic disciplines could benefit from the lessons on how to simplify their writing. It would be an asset to the bookshelves (or digital collections—it is available as a PDF!) of legal professionals of all ages as a friendly reminder to reconsider their "turgid, pedantic, Latin-filled, jargon-ridden, misspelt, ungrammatical, and inelegant writing" (p. xiii). I would recommend *Guthrie's Guide to Better Legal Writing* to anyone who wants to improve their plain language writing while having a laugh at the same time.

REVIEWED BY
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[2] See Nicholas Jobidon, Book Review of *Guthrie's Guide to Better Legal Writing*, 1st ed by Neil Guthrie, (2018) 43:3 Can L Libr Rev 27.

***The Law of Property.* By Robert Chambers. Toronto: Irwin Law, 2021. 356 p. Includes table of contents, table of cases, table of legislation, and index. ISBN 9781552215630 (softcover) $65.00; ISBN 9781552216255 (EPUB) $65.00; ISBN 9781552215647 (PDF) $65.00.**

*The Law of Property*, written by Robert Chambers, a professor at the Faculty of Law at Thompson Rivers University, is an addition to Irwin Law's *Essentials of Canadian Law* series. While only 293 pages in length, the book covers a variety of property law and property law-related concepts. It includes references to the law in every common law province in Canada but does not include references to the civil law of property in Quebec. References to both common law and equity concepts are explored. As noted by the author, the book "is intended to provide an accessible and enjoyable introduction to the law of property that will help the reader understand the subject as a whole and its finer details" (p. xvii). There are nine chapters in total, and the book "builds in complexity (and length)" (p. xviii). Consequently, the author recommends reading the book in order.

In Chapter 1, the author begins by examining what property law is. Chapter 2 focuses on ownership and possession, key concepts that must be understood before delving into different property rights. Chapter 3 discusses title to land, and Chapter 4 is an overview of equity and trusts. The author then explores different types of property rights: Chapter 5 is on co-ownership, Chapter 6 on security interests, and Chapter 7 on other interests in land. Chambers wraps up the text by considering sources of rights and competing rights in chapters 8 and 9.

The book is useful for providing an overall survey of concepts touching on and included in property law. If you did not know anything about property law as a new law student or have not reviewed property law concepts since law school, this is a good place to start. Chambers keeps the discussion brief on each concept and does not confuse the reader with complicated and challenging summaries of a concept. Even if this book is not read in order, it is a helpful reference guide on the many issues respecting property law. The table of contents is quite detailed and easy to peruse for narrowing in on a particular topic.

What the book does not do is give a comprehensive, in-depth look at any specific topic. For example, it is gratifying to see a discussion on Aboriginal title. However, to fully understand the rights of Indigenous persons, a reader would need to review more in-depth texts and cases. The author does a commendable job of touching on the historical origins of property rights, but the book does not explain in detail how some concepts came to be. For example, in reference to fixtures, Chambers states that when goods are attached to land, they become fixtures, in which case they are no longer goods. This may be a tricky distinction for a new law student, but given the brevity of the book, no discussion is included on why this distinction between goods and fixtures is made at law.

Chambers strives to flesh out the fundamental concepts of property law and notes in the first chapter that the book is meant to be accessible to law students and laypeople; however, I cannot fully agree that it will be understood by laypeople. When reviewing the material, the reader realizes how broad the area of property law is and how deep the historical roots are. For laypeople, the sheer breadth and complexity of the concepts may be daunting. I do agree that the volume would be useful as an introductory overview of property law for law students. Other readers who may find it helpful include lawyers who do not practice exclusively in property law, such as litigators who need a refresher on the law in that area.

*The Law of Property* is a good place to start when trying to understand the concepts of property law. The book is well structured and includes useful tables of cases and legislation. It is an excellent reference guide, although readers would need to seek out more comprehensive texts for a deeper exploration of any particular property law matter. An in-depth treatise is not the point of the book, however, as Chambers's goal is to provide an accessible and enjoyable introduction to property law. In my opinion, he achieves that goal. I recommend this book for law firm, courthouse, and academic law libraries, and the personal libraries of lawyers.

REVIEWED BY
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***On Crime, Society, and Responsibility in the Work of Nicola Lacey*. Edited by Iyiola Solanke. Oxford, U.K.: Oxford University Press, 2021. 288 p. Includes bibliographic references and index. ISBN 9780198852681 (hardcover) $99.00.**

Nicola Lacey is School Professor of Law, Gender and Social Policy at the London School of Economics and Political Science. A highly accomplished academic, Lacey's impressive body of work spans "legal theory, legal history, feminist theory, political economy, criminal law, criminal justice and more" (p. 2). Her recent work on the development of ideas of criminal responsibility has generated interdisciplinary research with global reach across academia and amongst practitioners who wish to challenge "historically dominant conceptions of criminal responsibility" (p. 11).

A collection of essays gathered within the framework of a Festschrift—a book honouring a respected person—this volume serves as a comprehensive reference manual for those interested in deepening their understanding of highly relevant, cross-disciplinary issues within justice, society, and the political-economic institutions shaping policies and institutions. Consisting of 10 chapters contributed by distinguished international scholars in law and legal philosophy, the volume comprises three parts with the express purpose of engaging with the honouree's work: "interrogating and furthering aspects of Lacey's scholarship on categorizations, characterizations and the ethics of responsibility, or indeed intellectual methods—her encouragement to think across disciplines, time and space and her refusal to adopt the traditional method of conceptual analysis in criminal law" (p. 7).

In Part I, *Meta Approaches to Criminal Responsibility*, two essays explore the relationship between the individual and the State through examining the mechanisms by which governments seek to create social order within criminal justice. In her book *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press, 2016), Lacey offers an analysis on "the close intersection between those dominant paradigms of responsibility and the wider institutional conditions within which they are applied" (p. 11). One can look to the recent decision in *R v Morris* (2021 ONCA 680), which concerns anti-Black racism and sentencing, to connect with the importance of this type of discourse in this moment in time.

Part II contains four essays on the topic of *Gender and Ethics in Criminal Responsibility*. With each approaching the crime of rape, the papers engage with Lacey's work from feminist legal, philosophical, and psychoanalytical perspectives. In "Responsibility and Explanations of Rape," author Hanna Pickard examines rape culture norms and considers the question, "Why do men rape—and why does our society so reliably fail to hold them to account for doing so?" (p. 105).

The final four essays in Part III, *Criminal Responsibility in Political and Historical Context*, open with a discussion of the use of comparative jurisprudence as an "analytical device to advance critical thinking on responsibility for crime" (p. 6). An historical examination of informed discussions of crime, punishment, and criminal responsibility reveals "the connection between criminal responsibility and broader ideas about 'civilization' and 'progress' which themselves reflected power relations between states" (p. 6). The last two essays explore Lacey's recent work on the political economy in the context of penal practices (incarceration versus rehabilitation). Here, Lacey "draws on the work of political scientists Peter Hall and David Soskice which argues that 'political-economic forces at the macrolevel are mediated not only by cultural filters, but also by economic, political and social institutions' " (p. 195).

In the words of Ngaire Naffine, Bonython Professor of Law at the University of Adelaide, Lacey's significant and groundbreaking work ultimately "endeavours to makes us see and think and feel differently about the society we live in. Her work has been dedicated to the pursuit of social and legal justice" (p. 55).

With extensive footnotes, a thorough bibliography, and a complete list of Lacey's contributions, this slim volume is tightly woven with engaging, relevant, and thought-provoking scholarship. A worthy addition to academic collections as well as appellate court libraries, this title will be enjoyed by those who wish to examine criminal responsibility and justice under a cross-disciplinary and comparative lens.

**REVIEWED BY**
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***Search and Seizure.*** **By Nader Hasan et al. Toronto: Emond, 2021. xxix, 729 p. Includes table of cases and index. ISBN 978-1-77255-635-3 (softcover) $159.00.**

*Search and Seizure*, volume 14 of the Emond *Criminal Law Series*, is a prodigious and comprehensive guide to a particularly significant area of criminal law.

The common law and case consideration reveal that search and seizure are pivotal elements of the criminal justice system. The foreword notes that these concepts are at the heart of that system. The authors, who bring academic, Crown counsel, and defence experience to this project, have assembled an impressive amount of pertinent detail for examination.

In 17 chapters, this publication carefully reviews all aspects of the Canadian law of search and seizure. The authors begin with a basic consideration of fundamental principles relevant to this topic and the significant legislation represented by section 8 of the *Charter of Rights and Freedoms*. While it is useful to explore the basic principles that go toward articulating what is involved in search and seizure, the technological world has rotated to a point where we may wish to reframe the phrase to read: "seizure and search." With the ever-expanding complexity and encryption of modern digital tools, it is more likely that government authorities, especially the police, will be required to lawfully seize equipment (e.g., laptop computers, cellular phones, and digital devices) well before they are able to conduct permissible, complete, and effective searches of that equipment.

The authors are quick to bring into sharp focus the overarching importance of a person's "reasonable expectation of privacy" and the idea that this expectation is crowned when considering where a person resides (i.e., one's home is one's castle). However, this expectation is not absolute, and the remainder of the text explores the ways and means by which authorities can properly encroach on the three categories of privacy acknowledged in Canadian law: territorial, personal, and informational.

The case law that flows from incidents involving search and seizure is endlessly fascinating. They involve the most egregious efforts to elude arrest for drugs and controlled substances, as well as the highly complex seizure and search of complex documents, such as digital records, to uncover sophisticated institutional crime. We recall the sight of a phalanx of Ontario Provincial Police officers executing an extensive search of the Toronto headquarters of the Church of Scientology in March 1982. More than 250,000 documents were removed under the terms of a search warrant that was preceded by an application of more than 1,000 pages. The authors take this bewildering range of cases into account and provide succinct commentary on key elements of each item under review.

Moving from the building blocks of the warrant application process and the all-important "Information to Obtain" (ITO) elements, the authors incorporate aspects that deal with forms and templates that may assist, but not supplant, the requirement to create a standalone warrant application. The availability of "telewarrants" as another technological tool to facilitate the search and seizure enterprise is highlighted. Next is a substantial presentation on the specific details of section 487 of the *Criminal Code*, which represents the bedrock of the

search warrant provision. Interestingly, the first *Criminal Code* (1892) incorporated search warrant provisions.

This work takes the reader through every aspect of managing warrants and illustrates them with relevant and recent case law. From the process for seeking authorization of general warrants and commonly deployed techniques used under such warrants, the authors are thorough in their efforts. They then move to enumerate special *Criminal Code* and other federal statutory search powers. These include those relating to proceeds of crime, medical records, weapons searches, hate crimes, DNA warrants, the *Controlled Drugs and Substances Act*, the *Income Tax Act*, the *Excise Act*, the *Customs Act*, and the *Canadian Security Intelligence Service Act*.

One aspect of this publication is the clarity of expression in the presentation of information. The chapter dealing with regulatory searches and seizures states:

> Governmental regulation in the name of the public interest and the pursuit of public welfare is a hallmark of modern social existence. We interact with each other and with our surroundings, through myriad professional and personal activities that can cause physical, psychological, economic, or environmental harm. To prevent, combat, or redress that harm, we rely on our federal, provincial, and municipal governments to make regulations and to enforce those regulations (p. 294).

This is most eloquently stated and expresses a wealth of insight that is valuable and valid. It certainly speaks to the vital challenge that rests at the core of efforts to maintain collective community standards while supporting and sustaining individual liberties and self-interest. The authors offer several cases for consideration that exhibit the delicacy of the balance between those two aspects of life in what may be called post-modern, post-industrial society.

Chapter 10 deals with computer searches, and this is likely of particular interest to many law librarians. There is some mention of the metaphysical debate over whether a computer is a place or a thing. One may offer that this is a moot point insofar as it could effectively be argued that a computer is simultaneously both things. However, the details in this section are fascinating and relevant to the whole process of securing authorization for search warrants.

Warrantless searches are taken into consideration along with the proper manner for executing a warrant. Again, the authors are thorough and thoughtful in their presentation. They move to an exploration of law offices and media outlets as special venues for the use of search warrants. The following chapter addresses the use of wiretaps and the legislative scheme that supports this investigative technique. Some consideration is given to outlining the requirements on state authorities for post-seizure reporting, detention, and the return of seized property. Chapter 16 presents a step-by-step approach to the pre-trial *Charter* motion, known as a "*Garofoli* review" designed to challenge a search warrant. The authors also look at the exclusion of evidence under section 24(2) of the *Charter* and provide a useful analysis of the available criteria for such an exclusion.

Throughout this publication, the authors have incorporated many highlighted areas, titled *Practice Points*, that are designed to appeal to those who will be using this resource as a tool for court. Accordingly, this publication has considerable value for those learning about the state of search and seizure in Canada. It is also an asset for the practicing lawyer seeking to stay abreast of case law in this complex area.

REVIEWED BY
**PAUL F. MCKENNA**
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***Smart Contracts: Technological, Business and Legal Perspectives*. Edited by Marcelo Corrales Compagnucci, Mark Fenwick & Stefan Wrbka. Oxford, U.K.: Hart Publishing, 2021. 204 p. ISBN 9781509937028 (hardcover) $150.95; ISBN 9781509937035 (PDF) $135.85; ISBN 9781509937042 (EPUB) $135.85.**

Smart contracts have been the subject of much interest in recent years. While the precise definition of "smart contracts" varies, this book starts off by defining them as "self-executed, autonomous agreements in the form of computer code posted on a blockchain" (p. 1), analogous to vending machines. As one chapter notes, "they change the nature of the contract itself" (p. 16).

The book consists of eight chapters exploring such areas as data provision and privacy laws, the sharing of healthcare data, and unfair contract terms, and it concludes with a discussion of the future of smart contracts. Since each chapter is written by a different author or authors, there is a certain amount of repetition when it comes to subjects addressing what smart contracts and blockchain are, although the slants do vary. The consensus seems to be that "smart contract" is a bit of a misnomer since smart contracts are generally neither smart nor really contracts.

Smart contracts, the book informs us, have many advantages over traditional arrangements: they use a decentralized infrastructure; they need to be "executed exactly as written," allowing the parties to minimize risk; and "they make enforcement unavoidable" (p. 16). In theory, smart contracts should be cheaper and more efficient than traditional contracts, reducing the need for government intervention and lessening the need for dispute resolution. The Internet of Things has made smart contracts more viable. For example, if the owner of a car stops making car payments, the lender can disable the car remotely. The authors do display a certain skepticism about the benefits—Chapter 6 even has a section titled "The Alleged Benefits of Smart Contracts." Of the various arguments made for smart contracts, I found the most persuasive to be that smart contracts can remedy the power imbalance between individual consumers and larger companies by building in an automated resolution process.

While smart contracts should lessen the need for dispute resolution, Chapter 1 notes that "litigation—like nature—will

find a way" (p. 33). References to *Jurassic Park* are greatly appreciated in a book about how technology may not work as intended.

There is ample discussion of the problems with smart contracts, including the issue that "some contractual terms cannot be expressed through formal logic" (p. 26–27), the lack of flexibility (they can't take into account changes in circumstances, even those that render a contract illegal), and the difficulty of determining whether contractual provisions have been fulfilled (how do you assess "best efforts"?). Smart contracts may also be more expensive to implement than regular contracts due to programming costs. An entire chapter is devoted to addressing data privacy issues arising from the *European General Data Protection Regulation* (GDPR). The GDPR has a broad definition of "processing" that is "likely to apply to many blockchain-based transactions that have little or no connection to Europe" (p. 81–82). Security issues are also of concern and include "transaction-dependency, timestamp dependency, mishandled exception, criminal activities, re-entrancy, and untrustworthy data feeds" (p. 96).

Given all the challenges highlighted, the question remains as to what needs to be done to make smart contracts work. Chapter 2 considers whether the regulation of security markets could be used as a model for the regulation of smart contracts. In Chapter 6, Stefan Wrbka makes several suggestions, including using regulatory sandboxes and consumer legislation. As noted more than once in the book, smart documents may result in greater government intervention through regulation, contrary to what is intended.

The book has a definite European slant, as evidenced in the lengthy discussion in Chapter 4 of smart contracts in the context of the GDPR and the European Commission's *Unfair Contract Terms Directive*. The author does take pains to point out that although the GDPR is European legislation, it has legal implications worldwide.

*Smart Contracts* includes extensive references, with many citations inclusive of helpful URLs. Given its more academic focus, this book would be of more interest to an academic library. It is not, however, practical enough for a law firm library.

**REVIEWED BY**
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# IIII Bibliographic Notes / Chronique bibliographique

By Nancy Feeney

**Rebecca Crootof, " 'Cyborg Justice' and the Risk of Technological-Legal Lock-In" (2019) 119:7 Colum L Rev Forum 233, online: *Columbia Law Review* <columbialawreview.org/content/cyborg-justice-and-the-risk-of-technological-legal-lock-in>.**

Reliance on artificially intelligent (AI) tools in adjudicatory processes is proliferating in many ways; for example, automated systems are used to issue traffic citations, resolve customer complaints, and apply for compensation or benefits. While these uses arguably streamline processes and offer predictable and uniform outcomes, Rebecca Crootof, Assistant Professor of Law at the University of Richmond School of Law and Affiliated Fellow at Yale Law School's Information Society Project, cautions against the use of AI agents in the common law judicial process.

In Part I of her paper, Crootof concedes that the use of AI in the judicial process might be more economical and increase the predictability and impartiality of decisions; however, she believes it is impossible to create an algorithm capable of applying "legal rules in accordance with changing social mores." Human beings and machine systems differ in how they process information and reach conclusions. Humans are sensitive to context and can flexibly apply legal rules, while machines are not able to balance social values very well. Human judges give reasons for their decisions; the same is not true of AI judges, and it can be difficult, if not impossible, to obtain an explanation for an AI decision.

In Part II, Crootof addresses the obvious suggestion of creating a hybrid judicial system, which she refers to as cyborg justice, to incorporate the best aspects of each system. She argues that a hybrid would magnify the drawbacks of both, counteracting any benefits. The human adjudicator might become merely the figurehead of the process, if there is an overreliance on the decisions made by AI, due to "automation bias." Alternatively, if the human judges overly mistrust the algorithms, more unpredictability may result. Crootof argues that trust develops over time, with experience; adding experimentation to situations where civil liberties are at stake is not something she recommends.

An additional drawback to cyborg justice is discussed in Part III: technological-legal lock in, which Crootof describes as an algorithmic permanency discouraging legal evolution and growth. The law changes over time to accommodate shifting social norms; however, as laws and policies are translated into algorithms, they become immutable. Additionally, the coding of AI systems is hidden, thus difficult to change or adapt. The human judges involved might be inclined to over-trust the AI processes, perpetuating the built-in biases and historical priorities, leading to decisions inconsistent with evolving social norms.

Crootof does not believe a true cyborg justice system is tenable. Value balancing and norm incorporation, both distinctive human traits, will always be necessary to maintain and allow for the evolution of the common law.

**Karen Coyle, "Digitization Wars, Redux" (1 March 2021), online (blog): *Coyle's InFormation* <kcoyle.blogspot.com/2021/03/digitization-wars-redux.html>.**

As remote services expand and become the new normal, librarians and researchers are grappling with whether books

should be digitized for limited lending purposes. Controlled digital lending, developed by the Internet Archive in early 2020, is the lending of digitized copies of physical books within a library's collection. The digital copy is linked, one-on-one, to its physical version. If the digital copy is on loan, the physical copy is not available to any user. Authors and publishers are not fully supportive of this practice. In fact, the Internet Archive's Controlled Digital Lending service is currently the subject of a high-profile copyright infringement lawsuit in the Southern District of New York. Karen Coyle, a librarian with extensive experience developing library technology, briefly explains the genesis of the lawsuit, describes the context within which the controversy arose, and uses its framework to probe interesting questions about the future of digital lending.

**Holly Else, "Giant, Free Index to World's Research Papers Released Online" (26 October 2021), online: *Nature* <nature.com/articles/d41586-021-02895-8>.**

Carl Malamud, an American technologist and the founder of Public.Resource.org, recently released *The General Index*, an online catalogue of words and phrases contained in more than 100 million journal articles, including many paywalled papers. Malamud asserts that no copyright has been infringed, as the index does not contain the full text of any articles. The index is free to use, but since it is not a database, users must download its files (five terabytes compressed, 38 terabytes expanded!) and develop their own searching programs. The article describes the potential uses for such an index, as well as prospective challenges Malamud might face by putting this collection out into the world.

***Legal Skies* (2019–), online (podcast): *Law Society of Saskatchewan* <lawsociety.sk.ca/news-media-and-publications/podcasts>.**

Created by the Law Society of Saskatchewan, the *Legal Skies* podcast has recently completed its third season. Episodes have included a conversation about CanLII's AI-generated subject classification project with Alan Kilpatrick, Co-director of Legal Resources at the Law Society of Saskatchewan, and Sarah Sutherland, President and CEO of CanLII (episode S3E4). Using the Law Society's digest database, which includes 40 years of case law data, the project developed a machine learning tool and deployed it across CanLII's Saskatchewan case law database. The tags enable users to quickly identify a case's subject matter, making their research more efficient. The team hopes to apply the subject matter classification tags to other jurisdictions soon. Other episodes cover access to justice issues, practical lawyering skills, and blockchain law. The podcast is available on all popular podcast services.

**Phoebe Judge, *Criminal* (2014–), online (podcast): <thisiscriminal.com>.**

Winner of multiple Webby Awards, *Criminal*'s tagline describes it perfectly: "Stories of people who've done wrong, been wronged, or gotten caught somewhere in the middle." Phoebe Judge, the host of the podcast, is a gifted storyteller who focuses on the emotional, intellectual, and philosophical aspects of cases. Recent episodes include an incredibly personal interview with Sister Helen Prejean, a vocal opponent of the death penalty, whose book *Dead Man Walking* was adapted into a film starring Susan Sarandon and Sean Penn (episode 156: "Sister Helen"). Another episode (169: "Masquerade") details the decades-long mystery of a real-life treasure hunt created by British author Kit Williams with clues hidden in his bestselling 1979 children's book *Masquerade*. Episodes are released every other Friday and are available on all popular podcast services.

***Window Swap* (last visited 31 January 2022), online: <window-swap.com>.**

If the latest iteration of the pandemic has relegated you to your home and intensified feelings of cabin fever, adjust your view with Window Swap. Through user-submitted videos, Window Swap allows visitors to look through someone else's window for a pleasant and relaxing change of scenery. It's a great way to chase away those winter blues!


# IIII Local and Regional Updates / Mise à jour locale et régionale

By Josée Viel

**Here is a quick look at what has been happening in the law library community across the country.**

### Ontario Courthouse Libraries Association (OCLA)

Hello and happy New Year to our friends across Canada. As of this submission, Ontario is yet again in a modified shutdown, so a good number of our courthouse libraries are closed to in-person service, while others stay open. It continues to be a frustrating time, but one where the support networks of organizations such as OCLA and CALL/ACBD make a world of difference.

We are entering 2022 with the excitement of some restored funding from the Law Society of Ontario and upcoming enhancements to the library collections that will be implemented as a result. As some of you may know, the central corporation in charge of the management of law society funding for libraries has undergone significant changes since 2020, and we are looking forward to the progress that can be made this year.

And speaking of 2022 excitement: many OCLA members are hopeful that the CALL/ACBD conference will proceed as planned in Montreal this spring. Edmonton 2019 feels like an entire lifetime ago, so an in-person conference will be very exciting for those of us who are able to attend.

Finally, we'd like to share some great news regarding two of our members.

First, Jennie Clarke of the Durham Region Law Association in Oshawa, Ontario, was recently awarded the Luminary Award for outstanding library service from the Federation of Ontario Law Associations (FOLA). Congratulations, Jennie!

Second, Mary-Jo Petsche, executive director of the Welland County Law Association in Welland, Ontario; member-at-large for OCLA; and long-time CALL/ACBD member, is in the running for second vice president of CALL/ACBD in the upcoming election. Good luck, Mary-Jo!

We wish you all good health and hope to see you again in May!

SUBMITTED BY
**JENNIFER WALKER**
*Chair, OCLA*

# CALL/ACBD Research Grant

The Committee to Promote Research and CALL/ACBD invite members to apply for the CALL/ACBD Research Grant. The application deadline is February 28, 2022.

The CALL/ACBD Research Grant was established in 1996 to provide members with financial assistance to carry out research in areas of interest to members and to the association. Please refer to our Committee page for a copy of the application form and to view our collection of past research projects.

The Committee is excited to receive proposals and we encourage members to apply or to contact us to discuss a project you are interested in. Members who previously applied but were not awarded funding are welcome to reapply.

Co-Chairs, CALL/ACBD Committee to Promote Research:

Leslie Taylor (leslie.taylor@queensu.ca) & Christine Brown (christine.brown@ualberta.ca)

CALL ACBD
CANADIAN ASSOCIATION OF LAW LIBRARIES
ASSOCIATION CANADIENNE DES BIBLIOTHÈQUES DE DROIT


# IIII News from Further Afield / Nouvelles de l'étranger

## Notes from the U.K.: London Calling

**By Jackie Fishleigh***

### The COVID Crisis Enters Its Third Year

I am writing this on the 4th January as we await the latest No. 10 Downing Street briefing from our newly honoured COVID gurus: Sir Chris Whitty, Sir Patrick Vallance, and our hapless and (some would say) hopeless PM, Boris Johnson.

At the start of the pandemic, I thought it would dominate 2020 and start to recede and fade out by the end of 2021. Oh dear! How wrong I was. Over the festive period many of us spent a lot of more time than usual at a popular and safe destination called Outdoors.

### Happy New Year!

That said, there are still reasons for us in the U.K. and the Commonwealth to be cheerful!

The Queen celebrates her platinum jubilee with a four-day bank holiday on 2nd June! Fingers crossed there will be a spectacular pageant and street parties. Seventy years on the throne and still popular, she is a marvel at 95.

The Commonwealth Games start in Birmingham, where I did my first degree, on 28th July.

As an avid sports fan who sometimes gets up in the middle of our night to watch the Australian Open tennis, it will be very handy to have the Games in our time zone, hopefully with our media broadcasting it freely, unlike the limited TV access we had to the Tokyo Olympics last year.

Apparently the Games were originally due to be held in Durban, South Africa. The host city contract was in place, but in 2017 Durban pulled out, as the South African government had never agreed to backing it because of financial constraints. Birmingham stood ready and willing to take over.

Hopefully these occasions will bring people together. Both the Pope in his Urbi et Orbi and Daniel Barenboim at the New Year concert in Vienna spoke strikingly about fragmentation and disconnection from global issues and the sense of isolation COVID has brought to so many.

### Barbados: The World's Newest Republic

Meanwhile, in a dramatic move, Barbados has become a republic.

Three women were in the spotlight on the big day: Prime Minister Mia Mottley; the newly sworn in President, Dame Sandra Mason; and from the world of entertainment, new official "national hero," singer Rihanna.

Barbadian poet and playwright Winston Farrell summed up the moment thus: "Full stop this colonial page. Some have grown stupid under the Union Jack, lost in the castles of their skin."

Sir Hilary Beckles, Vice-chancellor of the University of the West Indies, said that having the Queen as head of his country "cuts into your dignity as a citizen … It reduces you psychologically in terms of being a citizen of your own nation."

I am surprised he accepted a knighthood.

Prince Charles, who was invited to speak at the "transition ceremony," coped admirably with an awkward situation, I thought, although others regarded him as a ghost from the past. He apologised for past wrongs by acknowledging the appalling history of slavery and made a dignified departure. His mother sent a message wishing the Barbadians the very best for their future.

Lingering questions remain as to whether Jamaica will follow Barbados. Or Grenada, Antigua, or even Canada? And whether Barbados will now leave the Commonwealth.

Citing the Windrush scandal, where rightful British citizens were thrown out randomly if they did not have "correct" paperwork (which in many cases never existed), and the Black Lives Matter movement, which called out the greedy self-serving exploitation of the poor, hard-working Caribbean people, British journalist and former barrister Afua Hirsch, who is of Ghanaian heritage, cuttingly described the Commonwealth as "a vessel of former colonies with the former imperial master at its helm … Empire 2.0."

When I visited the Docklands Museum some years ago, I was saddened to see the extent to which London was founded on the ill-gotten gains of slavery. The same is true of Bristol and Liverpool.

Perhaps the richer countries of the Commonwealth should be financially supporting Durban in hosting the first Commonwealth Games in Africa.

### House Sold & Stripped of Furniture—Unbeknownst to the Owner

According to the BBC, once he was alerted by neighbours, the Reverend Mike Hall drove to his home in Luton only to find it inhabited by a new "owner." A BBC investigation found Mr. Hall's identity had been stolen and used to sell the house and bank the proceeds. At first, the police indicated that this was not a case of fraud but have since started an investigation.

Mr. Hall, who was away working in North Wales, said his neighbours alerted him that someone was living in his house. The new owner paid £131,000 for the house, and technically they legally owned it.

The Land Registry paid out a total of £3.5m in compensation for fraud last year, according to the BBC report. In December, the Fraud Advisory Panel, HM [Her Majesty's] Land Registry, and the Law Society of England and Wales issued a guide to help homeowners avoid property title fraud.

### Who Should Pay to Remove Cladding?

Almost five years after dangerous cladding was found to be the main cause of the Grenfell Tower fire in 2017 that left 72 dead, Michael Gove, the Secretary of State for Levelling Up, has given the housebuilding industry a deadline of early March this year to fully fund a plan of action. If not, legislation will be passed to force the sector to pay for a solution. He spoke passionately about how "it is neither fair nor decent that innocent leaseholders, many of whom have worked hard and made sacrifices to get a foot on the housing ladder, should be landed with bills they cannot afford, to fix problems which they did not cause."

The Grenfell fire in London was the worst U.K. residential fire since the Second World War.

As the owner of a flat in a block that has some of the offending cladding, I welcome this news, although it has taken far too long and may not be enough.

An unfair and unworkable loan scheme for repairs has been the only source of funding until now, but the new plans to raise £4 billion from property developers will also present difficulties as, according to the *Financial Times*, "there is no register of which buildings have fire safety problems, where they are, who built them or who owns them."

### Jersey Approves the Principle of Legalising Assisted Dying

We visited Jersey, the largest of the Channel Islands, in November. It is only a half-hour flight from London, and the U.K. is in a Common Travel Area with Jersey, which makes COVID restrictions relatively light. We were all set to visit a longstanding friend of mine who has lived on the island for over 20 years. Sadly, my friend, a former law librarian turned gardener, tested positive the morning we were due to meet her.

The Bailiwick of Jersey is a self-governing Crown Dependency near the coast of northwest France but is not part of the U.K. nor an E.U. member. However, Jersey is a "territory for which the United Kingdom is responsible," rather than a sovereign state.

I was quite shocked by its decision on euthanasia.

It should be emphasised that although it seems hugely significant, it is only the start of a process that could eventually see assisted dying legalised in the island.

Detailed work will now start to establish how the safety of vulnerable people can be assured as the top priority. At least two more separate votes will be required before the law can be changed. Those who oppose it will continue campaigning.

### *Come from Away* in London

Ending on a lighter note, my partner Rob and I are looking forward to seeing the Canadian musical *Come from Away* later this week at the Phoenix Theatre in the West End of London.

It is nearly 10 years since this show was first produced at Sheridan College in Oakville, Ontario, and five years since it opened on Broadway. Its themes of kindness and the triumph of humanity over hate will be as relevant as ever.

With very best wishes,

Jackie

## Letter from Australia

**By Margaret Hutchison****

### Vaccines, Omicron & Back to the Office

Well, we were out of lockdown before in early December (except for high-risk areas such as hospitals and public transport), and somehow the ACT population has been over 100 per cent vaccinated and over 98 per cent double-vaxxed, but now…

Until the Delta variation arrived, it was a "strollout" of vaccinations, rather than a rollout. Strollout, by the way, is the *Macquarie Dictionary* word of the year. This was written in November, but Omicron has arrived now in January, and we're all desperately searching for RATs (rapid antigen tests), booking in for our booster shots, or just waiting until we catch it.

Most federal government departments had returned to the office full time, though ACT Chief Minister Andrew Barr had said in the Legislative Assembly on 2 December 2021 that "the world has changed" and hybrid working was the future for ACT public servants, which of course did not go down well with the many cafés in the city and town centres. But now with Omicron, it's back to WFH if you wish to.

The High Court of Australia finished the December sittings remotely, but from next year staff will all be back in the building full time, subject to Omicron. I was quite disappointed when a colleague said in an online meeting that from January, we'd both be back in the building. It brought it home to me how much I enjoyed working from home.

### Return to Work—and a Flooded Library!

Me with some of our *Commonwealth Law Reports*, which will be written off.

Though to come back after the Christmas break to the results of a flood was not the return to work that we envisaged. A hot water service from a floor above leaked over the Christmas period and eventually seeped through the concrete and dripped over the books, soaked into the carpet, and then worked through to the Bar Library floor below and dripped on law reports there. We have spent the past week moving volumes and volumes of the U.S. *National Reporter System* onto trolleys and then into mobile cages for storage. We won't lose many volumes, really—mostly *Commonwealth Law Reports* from the Bar Library—but everything is replaceable, and we'll do without our carpet for several months.

Our "art installation" of *National Reporter* and *Commonwealth Law Reports* volumes being dried out with dehumidifiers and fans.

They look pretty good!

## ALLA 2021 Conference

To look back at what's happened since the last time I wrote, the Australian Law Librarians Association (ALLA) conference was held virtually in September. It was successful and even made a profit! We decided in July to change to online from a physical conference, as it was looking more likely that lockdowns would continue or expand. Most speakers were happy to move to an online presentation, either live or pre-recorded. I learnt how to record myself on my iPad, trying to avoid the background noise of the phantom trumpet player several hundred metres away, who started to play the theme from *Chariots of Fire* just at that time. Never been heard since or before!

Speakers included the ACT Chief Justice who opened the conference, followed by Justice Stephen Gageler of the High Court giving a fascinating talk on an early colonial case. Other widely praised speakers included Belinda Lawson, the librarian at the ACT's Alexander Maconochie Centre (the ACT's prison) speaking on human rights; Dr. Heather Roberts, an academic from the Australian National University speaking on judicial biography; and Meredith Leigh, First Parliamentary Counsel on the Australian Federal Register of Legislation.

Next year's conference is in Hobart, 24–26 August. It could be a bit cold and fresh, but there will be a warm welcome if anyone ventures very south.

## Federal Election

In political matters, a federal election must be held by late May next year, so whatever legislation has been introduced in a bill at present may not make it through both houses before the election is called. I keep hearing the election will be in March, but the government has slated a federal budget for 29 March 2022, so it might be early May.

### *Social Media (Anti-Trolling) Bill*

In September 2021, the High Court held that media outlets were responsible for third-party comments on their Facebook pages. This case arose from the treatment of a young man named Dylan Voller (*Fairfax Media Publications v Voller*, [2021] HCA 27) in the Northern Territory's youth detention system, which sparked a Royal Commission after images of his treatment and punishment were revealed by the ABC's *Four Corners* program.

Each of the media outlets involved in this case maintained a Facebook page on which they posted content relating to news stories and provided hyperlinks to those stories on their website. After posting content relating to news stories referring to Mr. Voller, some third-party Facebook users responded with comments that were alleged to be defamatory (trolling) of Mr. Voller.

Mr. Voller sued the media outlets for defamation, but the question arose as to whether the outlets were actually the publishers of the material. The High Court found that by running the Facebook pages, the media groups participated in communicating any defamatory material posted by third parties and were therefore responsible for the comments.

As a result of this case, the Federal Government has developed the *Social Media (Anti-Trolling) Bill 2021*.

At present, any person who maintains a social media page may be a "publisher" of defamatory comments posted by third parties. This means that they may be liable in defamation, even if they are not aware of the defamatory material and do not intend its publication.

Liability concerns may restrain free speech, as people who administer social media accounts may censor comments or disable functionalities due to a fear of being held liable in defamation for content that they did not post. The potential liability risks affect all Australian individuals and businesses who maintain a social media page.

In some cases, the *Voller* decision may have contributed to decisions to limit the ability for the public to interact with social media posts about news and current events. For example, after the *Voller* decision was handed down, the U.S. news network CNN blocked access to its Facebook pages in Australia.

The draft bill makes clear that page owners are not "publishers" for defamatory material posted on their pages by third parties. In practice, this means a person who maintains or administers a page on a social media service will be protected from defamation liability.

As mentioned in its Explanatory Paper,

> The Bill empowers users to unmask anonymous users who post defamatory material in two ways:
>
> - through a complaints mechanism that allows the user to raise concerns about the defamatory post with the provider [Facebook, etc.] and, with consent, obtain the contact details of the originator, and
>
> - through an 'end-user information disclosure order' from a court.

Under either mechanism, the contact details to be provided are the originator's name, email address, and phone number. These details will allow the complainant to serve court documents and confirm the validity of the details.

If a social media service provider is deemed to be the publisher of the defamatory comment, it can be granted immunity from the defamation action if it has complied with an appropriate complaints scheme and an end-user information disclosure order and has provided the originator's contact details to the complainant.

This is assuming that the social media service providers that meet certain thresholds ensure there is a nominated Australian entity that can access information about comments made in Australia, and that they will sign up for any complaints scheme.

The draft bill is open for comment until 21 January 2022, but its progress is very dependent on the timing of the election.

### *Religious Discrimination Bill 2021*

Another bill, *very* dependent on the election timing, is the *Religious Discrimination Bill 2021*. This bill has its origin in the same-sex marriage debate in 2017. Conservatives who opposed that reform pushed for a review into religious freedom. The Australian Government appointed an Expert Panel into Religious Freedom, chaired by the Hon. Philip Ruddock, to examine whether Australian law adequately protects the human right to freedom of religion. The panel's report, *Religious Freedom Review*, was presented to the former prime minister, the Hon. Malcolm Turnbull, on 18 May 2018.

This collection of three bills has been bubbling away through a Law Reform Commission investigation; two public exposure draft processes, receiving approximately 13,000 written submissions; and roundtables with more than 90 stakeholders from key interest groups, including religious, legal, LGBTIQ+, and community groups.

It was to be introduced to the House of Representatives in early December but was dropped after rebellion from moderate Liberal members who wanted more time to examine the bill. It's unlikely to pass before the election, given the remaining eight weeks of sittings and probable inquiries from parliamentary committees. If it gets through the House of Representatives, it's more than likely to be stuck in the Senate when the election is called.

### *Come From Away* in Sydney

To end on a happier note, I finally managed to see *Come from Away* in Sydney in November. It has been postponed from 4th July to 9th September (which I'm half glad to have avoided, given it was the 20th anniversary night), then early November to finally late November. Fabulous show! The accents were excellent, given most of the cast were Australian, and it was to transfer to Canberra in February, then to Auckland and Wellington in New Zealand, but it's just been postponed to June 2023!

Until next time,

Margaret Hutchison

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## The U.S. Legal Landscape: News from Across the Border

**By Sarah Reis*****

Happy New Year! I am writing this letter at the start of 2022 during the first week of our spring semester. My law school has strived to offer a primarily in-person experience for students this academic year. While we managed to make it through the fall semester without much issue, the Omicron surge has necessitated starting the first two weeks of the spring semester remotely.

I teach my Foreign, Comparative, and International Legal Research class during the spring semester. I am looking forward to getting to know a new cohort of students over the next few months. My roster has a nice mix of JD students and international LLM students. Last year, the international LLM student population was very limited in size due to visa issues and because most of our classes were offered only in remote format for the entire year. I am thrilled that we have our usual number of LLM students again this year because I missed having several of them in my class.

### ABA & Law Schools

The ABA Section of Legal Education and Admissions to the Bar voted to allow ABA-accredited law schools to accept GRE scores in lieu of LSAT scores from applicants. This change went into effect in November. The top three law schools—Harvard, Yale, and Stanford—all indicate that they will accept scores from either or both tests for applications to their JD programs for fall 2022.

Data collected from law schools through ABA Standard 509 Information Reports indicate that there was an 11.8 percent increase in the number of students who started their 1L year during the fall 2021 term compared to the fall 2020 term. Total JD enrolment is also up—an increase of 2.6 percent. However, enrolment in non-JD programs, such as LLM, masters, and certificate programs, decreased by approximately 1.2 percent.

According to data from the Law School Admission Council, current year law school applicants are down 5.2 percent compared to one year ago, though compared to two years ago, it is up 18.5 percent.

### Bar Exam

During the fall, jurisdictions announced that they were switching back to in-person bar exams starting with the February 2022 exam, which is held in most states from February 22–23. In mid-January, the National Conference of Bar Examiners (NCBE) indicated that if COVID prevents a jurisdiction from holding the bar exam in February, then NCBE exam materials will be made available for make-up dates in late March, but remote testing is not an option for jurisdictions that use NCBE exam materials due to deadlines from the software provider. NCBE exam materials include the Multistate Bar Examination (MBE), a six-hour multiple choice exam containing 200 questions.

Nevada became the first state to announce that they will be administering their bar exam remotely. Nevada's February bar exam will consist of Nevada essay questions and Nevada Performance Test questions with no MBE.

### SCOTUS

The Supreme Court began hearing cases for the new term on October 4, 2021, as a new term traditionally begins on the first Monday in October. The Supreme Court resumed hearing in-person oral arguments for the first time since COVID forced oral arguments to shift to virtual format in spring 2020.

Significant cases that have already been argued and for which we await opinions include an abortion case that puts *Roe v Wade* at risk (oral arguments were on December 1), a Second Amendment case involving concealed carry regulations (oral arguments were on November 3), and a

case addressing aid for religious schools (oral arguments were on December 8). The conservative majority on the Court will likely result in outcomes that will roll back women's rights, weaken gun control measures, and trample the separation of church and state, so I can't say I am looking forward to the opinions.

Many fear that the Supreme Court will use *Dobbs v Jackson Women's Health Organization* as an opportunity to overturn *Roe v Wade*, which recognized the constitutional right to abortion, and *Planned Parenthood v Casey*, which reaffirmed that right. The question presented in *Dobbs v Jackson Women's Health Organization* is "whether all pre-viability prohibitions on elective abortions are unconstitutional." During oral arguments, it seemed like the majority of the Supreme Court is inclined to overturn those precedents.

The issue in *New York State Rifle & Pistol Association Inc v Bruen* is whether New York's denial of petitioners' applications for concealed-carry licenses violated the Second Amendment. New York's gun permit law requires applicants to demonstrate "proper cause" to carry a weapon in public for self-defense. During oral arguments, the conservative majority appeared inclined to rule that New York's gun control measures are unconstitutional, signaling that the Supreme Court may strike down or limit New York's restrictive gun laws.

During oral argument for *Carson v Makin*, a case addressing religious school aid, the Supreme Court seemed in favor of requiring public funding to pay tuition for children to attend private religious schools.

On January 13, in the midst of the Omicron surge that is causing major worker shortages across the country, the Supreme Court blocked a vaccine mandate for large businesses that had been put forth by the Biden Administration but agreed to allow a vaccine mandate for healthcare workers to take effect. A decision like this is incredibly disheartening because it feels like it is yet another setback toward eventually reaching the end of the pandemic in this country. According to the CDC Covid Data Tracker, as of mid-January, 74.9 percent of the U.S. population has received at least one dose of the vaccine, but only 62.9 percent are fully vaccinated (which is defined as two doses of the two-dose mRNA series or one dose of a single-dose vaccine), and just 38.1 percent have received a booster dose.

The Presidential Commission on the Supreme Court of the United States approved a final report in December that summarizes their study of proposals to reform the Supreme Court. The commission supported public access to proceedings through audio or video streaming of oral arguments as well as the adoption of an advisory code of conduct for the Justices but did not take a position on the merits of imposing non-renewable term limits for Justices or expanding the size of the Supreme Court.

## Courts & Trials

The National Center for State Courts conducted a State of the State Courts survey in October 2021 to assess public opinion about courts. Key findings included that a majority would like to see remote hearings continue and that public trust and confidence across all institutions of government is down. Only 64 percent of respondents said they either have a great deal of confidence or some confidence in state courts. That percentage was 76 back in 2018. Confidence levels are slightly lower for federal courts and the U.S. Supreme Court at 60 and 63 percent, respectively.

In mid-January, the judiciary urged Congress to defer action on pending legislation pertaining to the federal courts' case management and electronic case files system in a letter sent to Chairman Hank Johnson, as well as in letters sent to House Majority Leader Steny Hoyer and Senate Majority Leader Chuck Schumer. The *Open Courts Act* (S 2614 and HR 5844) would modernize the court records system and eliminate PACER fees, thereby providing the public with free access to federal court filings. However, the judiciary claims that these "free PACER" bills are "budgetarily infeasible" and would adversely affect efforts to modernize the online system.

On November 19, a jury in the Kenosha County Circuit Court found Kyle Rittenhouse not guilty on all counts in his murder trial. Rittenhouse, armed with an AR-15-style rifle, killed two protesters and wounded a third during an August 2020 protest that was being held because a white police officer shot a Black man, Jacob Blake, in the back and left him partially paralyzed. The "not guilty" verdict was devastating because it is yet another setback in the fight for racial equality in this country and further highlights inequality in our justice system.

On November 24, in another closely watched trial, the jury found three white men in Georgia guilty on multiple murder counts for killing Ahmaud Arbery. These murderers chased down and killed Arbery, an unarmed Black man, in February 2020, which was caught on video. On January 7, the three men were sentenced to life in prison.

## U.S. Legal Research

The Office of the Federal Register and the U.S. Government Publishing Office launched a new website for the Electronic Code of Federal Regulations (eCFR) in late September. The CFR is the codification of the federal government's regulations and rules published in the Federal Register. The new website improves usability and readability along with higher quality images. Some of the new features include showing which sections have been recently updated, comparing versions of text, and linking references.

Digitized volumes from the U.S. Congressional Serial Set collection are now available on govinfo.gov, the website that provides free public access to official publications from the U.S. federal government. The serial set compiles all numbered House and Senate reports and documents, which are valuable legislative history materials. In this initial release, selected volumes from the 69th Congress (1925–27), 82nd Congress (1951–53), and various 19th century Congresses have been made available. Remaining volumes will be released over the next decade.

The National Conference of State Legislatures (NCSL) provides access to various bill tracking databases as well as

"50 State Surveys" that compare state laws or regulations on various topics, such as police use of body-worn cameras and medical marijuana laws. In early October, the NCSL announced that a Statewide Prescription Drug State Bill Tracking Database covering 2015–present is now available, which can assist users with finding passed, pending, and failed legislation on topics such as access, clinical trials and right to try, and pharmaceutical pricing.

The availability of state legislative history resources and materials varies widely depending on the state. Some states, such as Massachusetts, have fantastic digital repositories that provide easy access to digitized historical bills, legislative documents, and House and Senate Journals, while other states have very few legislative history materials available online. The Arizona Memory Project announced in October that it has digitized the Arizona Administrative Code (1974–present) and Arizona Legislative Bill Files (1991–96), which will make conducting historical legal research in Arizona easier.

### Libraries & Book Publishers

Public and school libraries across the country have recently faced numerous attempts to challenge or ban books, including legal threats made against librarians and library staff.

In Wyoming, community members who had been challenging books in the Campbell County Public Library's collection submitted a report to the Campbell County Sheriff's Office in September, which claimed that the library board and library director violated Wyoming Statute 6-2-318 and alleged that the library was disseminating obscene material for minors. The books at issue discussed reproduction, sex, and LGBTQIA+ issues. Fortunately, the Weston County Attorney indicated that he will not pursue charges against the library staff after reviewing the books at issue and case law.

Meanwhile, in Oklahoma, a Republican lawmaker introduced a bill in December that would allow parents to challenge books in public schools and collect a minimum of $10,000 for each day that the challenged book remains on library shelves. This proposed bill would prohibit school libraries from including books addressing gender identity, sexual orientation, and sex in their collections. Under this proposed bill, if a school employee does not remove a book within 30 days upon receiving a removal request, the employee would also be dismissed and prohibited from being employed by another school for two years.

In recognition of financial challenges faced by libraries to make eBooks available to patrons due to "exorbitant costs and burdensome restrictions" imposed by eBook licensing agreements, Sen. Ron Wyden (D-Oregon) and Rep. Anna Eshoo (D-California) are seeking answers from both major book publishers and eBook aggregators and platforms as part of their inquiry into this problem.

The U.S. Department of Justice sued to block the $2.175 billion merger of Penguin Random House and Simon & Schuster in early November. The merger would turn the "Big Five" (Penguin Random House, Hachette, Harper Collins, Simon & Schuster, and Macmillan) to the "Big Four." The Justice Department noted that the merger would give Penguin Random House "unprecedented control over this important industry" and that stopping the merger would "prevent further consolidation in an industry that has a history of collusion."

The Association of American Publishers (AAP) filed a lawsuit in December to prevent Maryland's eBook law from taking effect on January 1. Maryland's law requires any publisher that offers to license electronic literary products to consumers to also offer to license the products to public libraries on reasonable terms. The New York legislature also passed a similar bill in June, but the New York Governor vetoed the legislation in late December. A hearing on AAP's motion for a preliminary injunction is scheduled for early February.

### Copyright

U.S. copyright law prohibits circumvention of technological protection measures, such as bypassing an encryption system to watch a copyrighted DVD on a particular device or removing DRM on an eBook. However, as copyrighted works increasingly shift to digital format, these access control measures impose frustrating limitations and restrictions on the use of lawfully owned copyrighted works. On October 27, the Librarian of Congress issued new exemptions to these anti-circumvention laws, which will help support research activities.

The *Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act)* became law in late December 2020, which directed the Copyright Office to establish a Copyright Claims Board by the end of 2021 to resolve small copyright claims. A small copyright claim is a dispute with a monetary value of less than $30,000. According to the Register of Copyrights, the new tribunal will begin hearing cases this spring.

To end this letter on a positive note, on January 1, thousands of copyrighted works from 1926 entered the public domain, along with approximately 400,000 sound recordings from before 1923. A few well-known works that recently entered the public domain include A. A. Milne's *Winnie-the-Pooh*, Ernest Hemingway's *The Sun Also Rises*, and Felix Salten's *Bambi*. All sound recordings prior to 1923 had their copyrights expire on January 1, in accordance with the *Music Modernization Act of 2018*, so all of those sound recordings can now be freely used and reused.

Until next time!

Sarah

** Jackie Fishleigh, Library and Information Manager, Payne Hicks Beach.*
***Margaret Hutchison, Manager of Technical Services and Collection Development, High Court of Australia.*
****Sarah Reis, Foreign & International Law Librarian, Pritzker Legal Research Center, Northwestern Pritzker School of Law, Chicago, IL.*

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*Canadian Law Library Review/Revue canadienne des bibliothèques de droit*, the official publication of the Canadian Association of Law Libraries, publishes news, developments, articles, reports, and reviews of interest to its members. Surveys and statistical reviews prepared by the Association's Committees and Special Interest Groups, regional items and the proceedings of the Association's annual conference are also published.

Contributions are invited from all CALL members and others in the library and legal communities. Bibliographic information on relevant publications, especially government documents and material not widely publicized, is requested. Items may be in English or French. Full length articles should be submitted to the Features Editor and book reviews to the Book Review Editor. All other items should be sent directly to the Editor. Prior to publication, all submissions are subject to review and editing by members of the Editorial Board or independent subject specialists; the final decision to publish rests with the Editorial Board. If requested, articles will undergo independent peer review. Items will be chosen on their relevance to the field of law librarianship. For copies of the Style Guide please consult the CALL website at callacbd.ca.

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*Canadian Law Library Review* is published by:

*Revue canadienne des bibliothèques de droit* est publiée par:

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