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# *Copyright's Constitution*

**User Rights and the  
'Deprivation of Property'  
Misdiagnosis**

**(Or Lessons from the South African  
Constitutional Debacle over the  
*Copyright Amendment Bill*)**

# Introduction and Roadmap



Carys Craig



Bitá Amani



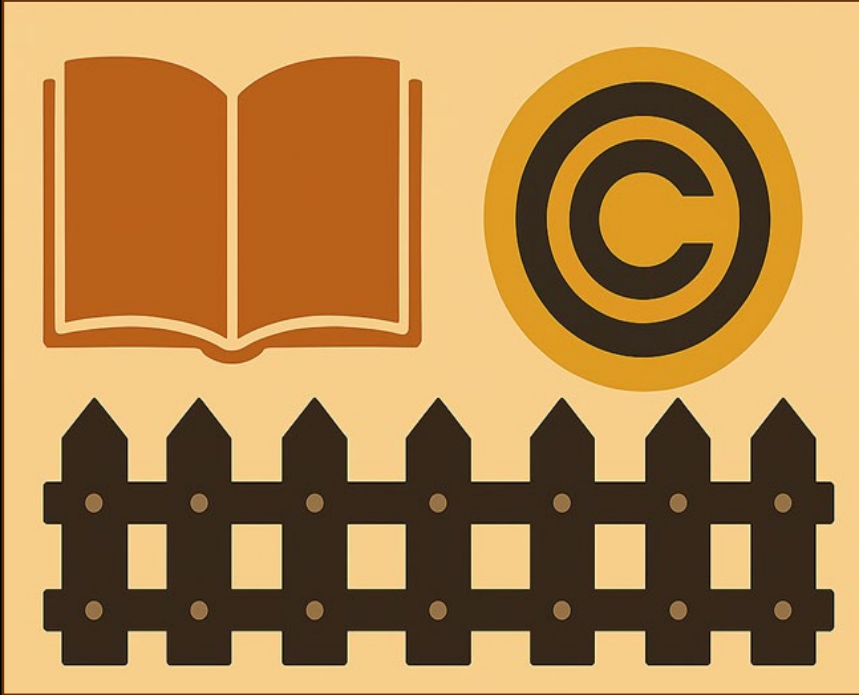
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1. The Property Question and Why it Matters
2. South Africa's Copyright Reform Debacle – A Case in Point
3. Explaining the 'Deprivation of Property' Misdiagnosis
4. Beyond the Property Frame: Economic, Social & Cultural Relations
5. Conclusion: Upholding Copyright's Constitution



# Is Copyright a “Property Right?”

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And Why Does it Matter?

To say that copyright is “property,” although a fundamentally unhistorical statement, would not be baldly misdescriptive if one were prepared to acknowledge that there is property *and* property, with few if any legal consequences extending uniformly to all species and that in practice the lively questions are likely to be whether certain consequences ought to attach to a given piece of so-called property in certain circumstances ... .

But characterization in grand terms then seems of little value: we may as well go directly to the policies activating or justifying the particular determinations

B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 74 (1967)

An Unhurried View  
of COPYRIGHT

BENJAMIN KAPLAN



COLUMBIA UNIVERSITY PRESS  
NEW YORK AND LONDON



“In choosing a legal category perhaps the most important starting point of inquiry is what the presumptions are, what will require justification, what norms will have to be argued against, what values will be taken as given . . .

[W]e need legal tools that will not divert our energies (and skew our perceptions) by requiring us to rebut presumptions that were never appropriate in the first place.”

Jennifer Nedelsky, “Property in Potential Life? A Relational Approach to Choosing Legal Categories” (1993) 6 Can. J. L. & Jur. 343 at 354

# Private Property and the Limits of American Constitutionalism



*The Madisonian Framework and Its Legacy*  
Jennifer Nedelsky



# The Copyright Amendment Bill (CAB): What it is and what it does

## Stated objectives:

- Amend the **apartheid-era** Copyright Act to bring it into the constitutional era
- Align with **digital/tech** developments
- Cater for people with disabilities, impoverished artists, researchers, educators, the creative industry

## Amendments include:

- **New hybrid Fair Use/Dealing** framework for users
  - Specific L&Es for education, GLAM institutions, people with disabilities (visual + other)
  - PLUS Fair use as a subordinate catch-all clause
- Provisions to limit contractual override of L&Es
- Strengthening authors' rights v. owners (**re-sale royalty; reversion**)
- Provisions regulating CMOs for the first time

# CAB's route to the Constitutional Court

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- CAB was introduced into Parliament in 2017, passed in 2019
- The President did not sign the Bill into law; sent it back to Parliament in 2020 with six 'constitutional reservations'
- Parliament addressed these and passed amended Bill in 2024
- President again refused to sign the Bill, referring it to Constitutional Court
- In parallel proceeding (*Blind SA*) ConCourt held the CRA discriminated against people with disabilities and read CAB's disability provisions into law
- Court to rule on **whether Bill permits an 'arbitrary deprivation of property'** (s. 25, SA Bill of Rights) due to:
  - Retrospective effect of fair + equitable remuneration for authors
  - **New exceptions for users - fair use**, educational institutions, GLAM
- The ConCourt heard the matter in May 2025 → ruling pending

## SCAN THE QR CODE

to find a potted history of how we got here and to read the court papers in the *Ex Parte President CAB* case

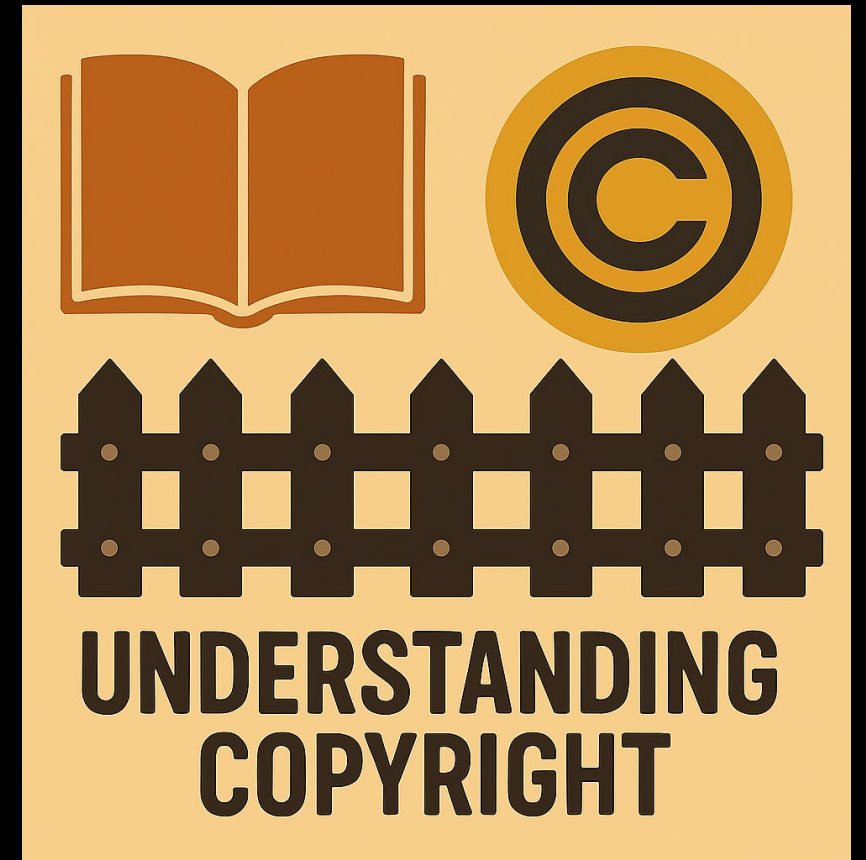


# The Deprivation of Property 'Misdiagnosis'

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*"We argue that, exacerbated by the "property" label, three fundamental misunderstandings about the object, subject, and scope of copyright culminate in the perception of an "arbitrary deprivation of property" problem that does not in fact exist."*

1. Copyright's Object
2. Copyright's Subject
3. Copyright's Scope





# i. Copyright's Object: Confusing the Physical Analogue

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- Intangibles of the mind: Nonrivalrous / non-excludable
- Reification, thingification – critical theory objections
- ©'s “thing” seems immutable, predetermined, fixed, stable
- The “object” is prioritized over the relations it governs

*Legal categories should not “divert our energies (and skew our perceptions) by requiring us to rebut presumptions that were never appropriate in the first place.” (Nedelsky)*



## ii. Copyright's Subject: Discounting the Public Domain

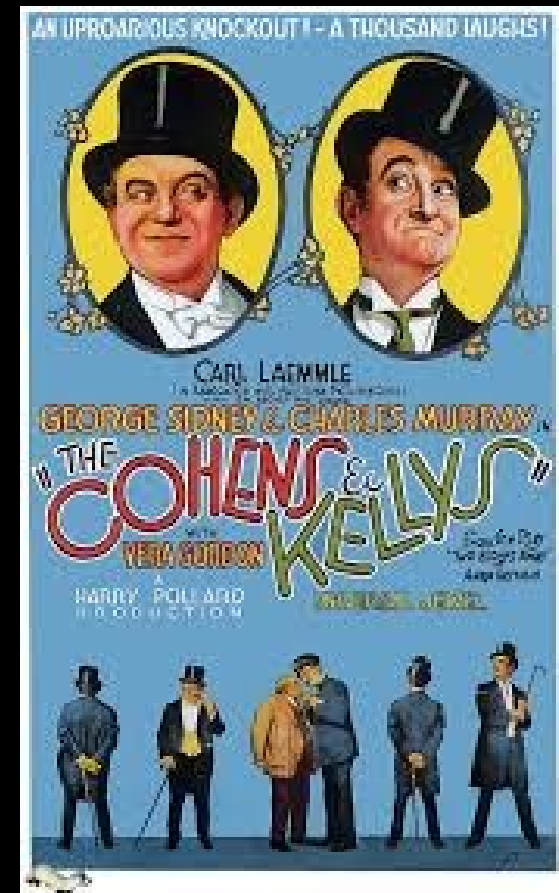


- Jessica Litman, *The Public Domain* -

*“The public domain permits the rest of the system to work... [It] makes it possible to tolerate the imprecision of these property grants... [It] free[s] copyright from the burden of deciding questions of ownership that it has no capacity to answer.”*

- Justice Learned Hand, *Nichols v Universal Pictures* (1930) -

*“her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain ... [T]he line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it”*

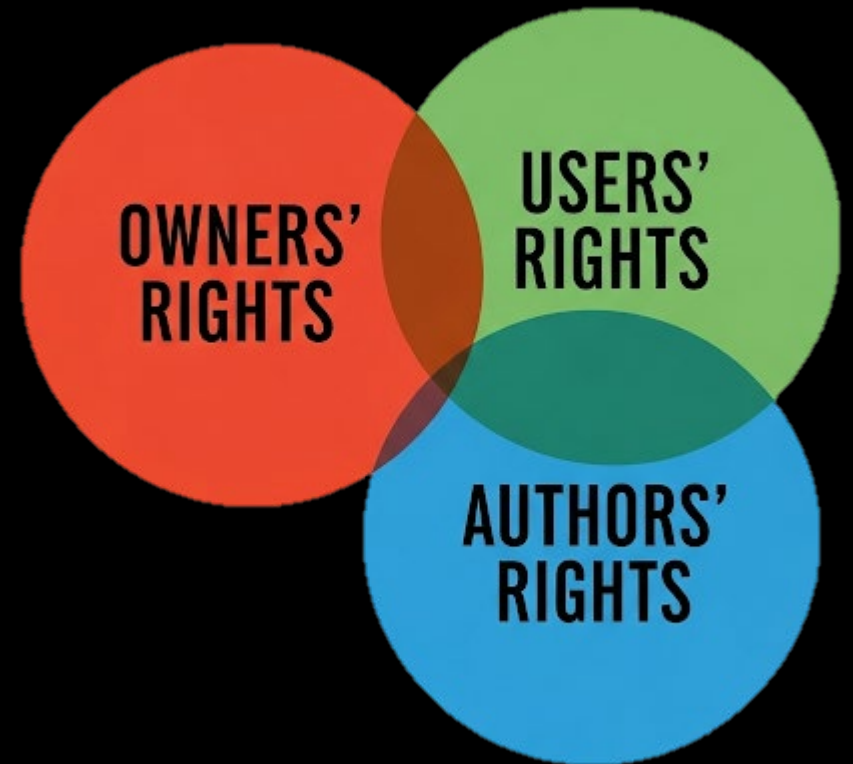


### iii. Copyright's Scope: Confining Copyright to Owners' Rights

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- Copyright as property - focuses on owners' rights; but user rights are integral to the copyright scheme.
- Supreme Court of Canada on "Users' Rights"  
e.g., *York U v Access Copyright* (2023):

*"Ultimately, owners' rights and the public interest should not conflict with one another... Creators' rights and users' rights are mutually supportive of copyright's ends."*





# Copyright's Constitution

## (What Constitutes 'Copyright'?)

- Property frame can obscure or distort **critical features of copyright law**
- Lift 'property' label to see **©'s alignment with other Constitutional values**
- Shift focus from property (private control) to **economic & social relations**
- Copyright as a **balancing exercise** (of rights internal and external to © law)
- Balance requires **continual recalibration** – contextual, dynamic not static





## Outside the Property Frame: Refocusing on Economic and Social Relations

### Article 15, ICESCR

The States Parties to the Covenant recognize the right of everyone:

- (a) To **take part in cultural life**;
- (b) To **enjoy the benefits of scientific progress** and its applications;
- (c) To benefit from the **protection of the moral and material interests** resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties...to achieve the full realization of this right shall include those necessary for the **conservation**, the **development** and the **diffusion** of science and culture.

3. The States Parties to the present Covenant undertake to respect the **freedom indispensable for scientific research and creative activity**.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and **co-operation** in the scientific and cultural fields.

→ Note: GENERAL COMMENT No. 17 (2005)

# Conclusion:

## Lessons from South Africa

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“This work seeks to **correct the misdiagnosis of the constitutional issue** in the President’s reference to the Constitutional Court.

More than that, it offers a larger **critique of the pull towards property fundamentalism** that threatens to obstruct essential copyright reform efforts in South Africa and beyond.”



# COPYRIGHT'S CONSTITUTION

# Thank You!

## Questions & Comments?

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