The Copyright Pentalogy

Geist, Michael

Published by University of Ottawa Press


For additional information about this book
https://muse.jhu.edu/book/22904

For content related to this chapter
https://muse.jhu.edu/related_content?type=book&id=833348
The breadth and scope of copyright limitations and exceptions has emerged as a major policy issue around the world. Some narrow limitations on copyright holders’ rights, such as quotation, remain uncontroversial, yet more expansive, flexible exceptions have generated fierce debate. Virtually all domestic copyright laws include some limitations and exceptions to the exclusive rights otherwise granted to copyright holders, typically achieved through the adoption of one of two models.

One approach is a “fair use” model, which is widely viewed as the most flexible limitation and exception on the copyright holders’ rights, given its potential applicability to any circumstance or use. As further discussed below, fair use models, which have been implemented in countries such as the United States, Israel and the Philippines, provide an open-ended exception in which any use may qualify as a fair use provided that it meets criteria designed to establish reasonable limits. Those criteria, which seek to adhere to international copyright laws found in the Berne Convention, are either statute-based or developed through case law.

The alternative approach is the “fair dealing” model, commonly
found in Commonwealth countries such as the United Kingdom, Canada and Australia. Fair dealing also incorporates fairness criteria to assure reasonable use of works, yet the key difference between fair use and fair dealing lies in the circumscribed purposes found under fair dealing. Unlike the open-ended fair use model, fair dealing models typically identify specific categories or purposes for which fair dealing is permitted. The model creates a two-stage analysis: first, whether the intended use qualifies for one of the permitted purposes, and second, whether the use itself meets the fairness criteria. By contrast, fair use raises only the second-stage analysis, since there are no statutory limitations on permitted purposes.

Given the need for a two-stage analysis and the prospect that some uses may fall outside of fair dealing by failing to qualify for one of the circumscribed purposes, some fair dealing countries have begun to consider whether to adopt fair use provisions or expand their fair dealing criteria. For example, Israeli copyright reform enacted in 2007 resulted in an open-ended fair dealing provision designed to mirror the flexibility found under fair use. Moreover, countries such as the United Kingdom, Australia and Ireland have conducted public consultations that emphasized the scope and flexibility of their fair dealing rules.

Fair dealing has also occupied a prominent position in Canada’s copyright reform debate. After the Supreme Court of Canada (the Court) characterized fair dealing as a “users’ right” that required a large and liberal interpretation in the landmark *CCH Canadian Ltd. v Law Society of Upper Canada* decision [*CCH*], Canadian copyright scholars began to consider the benefits of expanding the fair dealing clause that, at the time, was limited to five purposes: research, private study, criticism, news reporting, and review. Many argued that a flexible provision in which the list of enumerated purposes would be illustrative rather than exhaustive would be more consistent with the Court’s vision of fair dealing as a user’s right. However, the introduction of Bill C-32 (later Bill C-11) dashed hopes that statutory reform would establish a flexible fair dealing provision, as the government chose instead to add several additional purposes (education, satire and parody), but declined to open the provision to allow a court to identify new purposes in appropriate circumstances.
Ironically, weeks after Bill C-11 received royal assent in June 2012, the Court released the “copyright pentalogy”, in which fair dealing featured prominently in several of the cases. As further discussed below, the Court’s strong support for fair dealing may have done more than simply reaffirm fair dealing as a user’s right. The Court’s fair dealing analysis, when coupled with Bill C-11’s statutory reforms, may have effectively turned the Canadian fair dealing clause into a fair use provision.

While Canadian copyright law still involves the two-stage analysis, the first stage has become so easy to meet that Canada appears to be inching closer to fair use. Indeed, the breadth of the fair dealing purposes is now so wide—eight purposes covering most imaginable uses—that future Canadian fair dealing analyses are likely to involve only a perfunctory assessment of the first-stage purposes test together with a far more rigorous analysis (what the Court in *SOCAN v Bell Canada* [*Bell*] described as “heavy-hitting”) in the second-stage, six-factor assessment.

This chapter will examine the emergence of a Canadian “fair use” provision. Part I will review the fair use and fair dealing models, and will examine the current analysis of fair dealing as reflected in the recent Supreme Court cases. Part II will argue that the approach adopted by the Court, together with Bill C-11’s statutory reforms, supports the notion that the current Canadian fair dealing regime now more closely resembles a flexible, open-ended fair use model.

I: The Law of Fair Use and Fair Dealing

Exceptions and limitations within copyright law, whether described as fair dealing, fair use, fair practice, or simply enumerated exceptions, enjoy widespread acceptance. The Berne Convention’s Article 10 includes a specific, though somewhat limited, fair “practice” provision that focuses primarily on quotation, educational use and attribution. The Article provides that:

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that
justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author, if it appears thereon. In addition to this fair practice provision, Article 9 of the Berne Convention features the infamous three-step test, which simultaneously opens the door to broader exceptions and limitations within national copyright law and restricts the ability for countries to implement such exceptions. After establishing an exclusive right of reproduction for literary and artistic works in Article 9(1), Article 9(2) provides that “it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” This three-step test—certain special cases, no conflict with the normal exploitation of the work, and no unreasonable prejudice of the legitimate interests of the author—is generally viewed as setting the outer framework for national exceptions.

i. Fair Use Models

The fair use approach for limitations and exceptions is most closely associated with the United States. The US fair use provision is found in Section 107 of the Copyright Act, which provides that:
The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.¹³

A detailed analysis of the fair use provision is beyond the scope of this chapter; however, it bears noting that what distinguishes the US provision is its inherent flexibility. Unlike the typical fair dealing provision, which features an exhaustive list of purposes, the US provision points to criticism, comment, news reporting, teaching, scholarship and research as illustrative fair use purposes, leaving open the possibility of the identification of additional purposes through case law.

The US fair use doctrine has been applied to a wide range of activities that fall outside the boundaries of the specifically enumerated purposes. In those instances, US courts have engaged in an analysis of the four factors identified in Section 107.¹⁴

Notwithstanding (or perhaps as a result of) its flexibility, the US fair use provision has drawn criticism from both sides of the copyright spectrum. Cary Sherman, the former President of the Recording Industry Association of America, has argued that the Consumer Electronics Association has “twisted and contorted ‘fair
use’ beyond its true intent, turning it into a free pass for those who simply don’t want to pay for creative works.” On the other side of the issue, Harvard law professor Lawrence Lessig has characterized fair use as the right to retain a lawyer, lamenting the need to “either pay a lawyer to defend your fair use rights or pay a lawyer to track down permissions so you don’t have to rely upon fair use rights.”

Lessig’s perspective finds support in Will Fair Use Survive? Free Expression in the Age of Copyright Control, a 2005 report by Marjorie Heins and Tricia Beckles. The report concludes that artists, writers, historians and filmmakers are “burdened by a ‘clearance culture’ that ignores fair use and forces them to seek permission (which may be denied) and pay high license fees in order to use even small amounts of copyrighted or trademarked material.”

While US fair use is often painted as a confusing and unpredictable doctrine, a 2007 study by Barton Beebe, a New York University law professor, suggests that the majority of US courts clearly identify the basis for their fair use analysis. Beebe examined 271 reported federal court opinions that made substantial use of the four-factor fair use test from 1978 through to 2005 to discover how the test operates practically. He found that 65 percent of the opinions identified whether a specific factor favoured the finding of fair use.

The fair use approach may be most closely associated with the US, but it is found in many other countries around the world. Several have adopted a fair use principle and codified a non-exhaustive list of criteria to determine whether the use is fair. For example, Article 19 of the Israel Copyright Act, 2007 provides that

(a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.

(b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following:

The purpose and character of the use;

The character of the work used;
The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;

The impact of the use on the value of the work and its potential market.\textsuperscript{21}

Taiwan’s \textit{Copyright Act}, 2007 features a similar fair use provision at Article 65:\textsuperscript{22}

Fair use of a work shall not constitute infringement on economic rights in the work.

In determining whether the exploitation of a work complies with the provisions of Articles 44 through 63, or other conditions of fair use, all circumstances shall be taken into account, and in particular the following facts shall be noted as the basis for determination:

1. The purposes and nature of the exploitation, including whether such exploitation is of a commercial nature or is for nonprofit educational purposes.

2. The nature of the work.

3. The amount and substantiality of the portion exploited in relation to the work as a whole.

4. Effect of the exploitation on the work’s current and potential market value.

The Philippines copyright law of 1997 also contains specific fair use language:\textsuperscript{23}

185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:
(a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes;

(b) The nature of the copyrighted work;

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(d) The effect of the use upon the potential market for or value of the copyrighted work.

While these “fair use countries” refer to their exception as fair use, some countries have retained fair dealing language, yet established the flexibility that is the hallmark of fair use. For example, Singapore’s fair dealing provision—with two narrow exceptions—permits the application of fair dealing for any purpose. Article 35(1) stipulates:

Subject to this section, a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for any purpose other than a purpose referred to in section 36 or 37 shall not constitute an infringement of the copyright in the work.\(^{24}\)

The provision also includes five factors to be considered in assessing whether the dealing is fair.

Malaysia has also retained fair dealing language, but in 2012 adopted a more flexible approach to the purposes covered by the provision. As amended, section 13(2) of its Copyright Act provides,

Notwithstanding subsection (1), the right of control under that subsection does not include the right to control –

(a) the doing of any of the acts referred to in subsection (1) by way of fair dealing including for purposes of research, private study, criticism, review or the reporting of news or current events:

Provided that it is accompanied by an acknowledgement of the title of the work and its authorship, except that
no acknowledgement is required in connection with the reporting of news or current events by means of a sound recording, film or broadcast.²⁵

Flexible fair use exceptions have been adopted by a growing number of jurisdictions. In each instance, the provision identifies either fair use or fair dealing purposes, but leaves open the possibility of expanding the list through judicial interpretation.

ii. Fair Dealing

Unlike the flexible fair use model, fair dealing is typically characterized by its more limited scope. The primary limitation comes from the requirement that the dealing qualify for at least one of a series of enumerated purposes. Therefore, while fair use is open-ended, the statutory framework for fair dealing often involves a closed list of purposes.

For example, the United Kingdom’s fair dealing provision identifies research, private study, criticism, review and reporting current events as the enumerated purposes.²⁶ The enumerated purposes in the Australian fair dealing provisions are research, private study, criticism, parody, satire, reporting news, or a legal practitioner, registered patent attorney or registered trademarks attorney giving professional advice.²⁷

Canadian copyright law currently includes a fair dealing exception as well as specific exceptions for certain classes of works and certain users. Section 29 of the Act provides that “fair dealing for the purpose of research or private study does not infringe copyright.”²⁸ Section 29.1 adds that

Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer’s performance,
(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.\textsuperscript{29}

Section 29.2 includes a similar exception for news reporting.\textsuperscript{30}

As part of Bill C-11, the copyright reform bill that received royal assent in June 2012, the Canadian government added three additional purposes to the law: parody, satire and education.\textsuperscript{31}

Until relatively recently, the Canadian fair dealing provisions were viewed as fairly restrictive, both with regard to the limited number of purposes that statutorily qualify for fair dealing as well as in the way that the Canadian courts interpreted the provision. Indeed, prior to 2002, the leading pronouncement on copyright law from Canada’s highest court came in Bishop v Stevens, a 1990 decision that involved the recording of a song without permission.\textsuperscript{32} In that case, McLachlin J (as she then was) suggested that since the Copyright Act was based on UK law, it was adopted with a single object: “namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical.”\textsuperscript{33}

That singular focus was evident in Michelin v CAW Canada, a 1997 case involving a suit against a union’s distribution of leaflets during a labour dispute that included the image of the Michelin man logo.\textsuperscript{34} The union argued that the use of the logo was a parody and thus qualified as criticism under the fair dealing exception. The Federal Court rejected that argument, emphasizing the need to strictly interpret the fair dealing provision, while maintaining that parody was not an enumerated exception within the Copyright Act and that further, it was not synonymous with criticism.

The Bishop and Michelin perspective remained firm for ten years—including throughout the 1997 Copyright Act reform process—until the Court shifted its view in Théberge v Galerie d’Art du Petit Champlain inc., a 2002 decision that featured explicit support for a copyright balance and due consideration for copyright’s effect on innovation.\textsuperscript{35} The case involved a challenge by Claude Théberge, a Quebec painter with an international reputation, against an art gallery that purchased posters of Théberge’s work and proceeded to transfer the images from paper to canvas. The gallery’s technology was state of the art—it used a process that lifted the ink off the poster
and transferred it to the canvas. The gallery did not actually create any new images or reproductions of the work, since the poster paper was left blank after the process was complete. Théberge was nevertheless outraged—he believed he had sold paper posters, not canvas-based reproductions—and he proceeded to sue in Quebec court, requesting an injunction to stop the transfers, as well as the seizure of the existing canvas-backed images.

Although the Quebec Court of Appeal ruled in favour of the seizure, the majority of the Court overturned that decision, finding that the images were merely transferred from one medium to another and were not reproduced contrary to the *Copyright Act*. Writing for the majority of the Court, Binnie J stated that

> [T]he proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature…. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.\(^{36}\)

Binnie J also emphasized the dangers of copyright that veers too far toward copyright creators at the expense of both the public and the innovation process. He noted that “[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”\(^{37}\)

Although critics of the *Théberge* decision suggested that it reflected a divide between common and civil law perspectives on copyright, those views were put to rest two years later in *CCH*, in which a unanimous Court strongly affirmed its support for a balanced approach to copyright law, and in the process breathed new life into the *Copyright Act*’s fair dealing provision.\(^{38}\)

The case involved a dispute between the Law Society of Upper Canada and several legal publishers. The Law Society, which maintains the Great Library, a leading law library in Toronto, provided the profession with two methods of copying cases and other legal materials. First, it ran a service whereby lawyers could request a copy
of a particular case or article. Second, it maintained several stand-alone photocopiers that could be used by library patrons. The legal publishers objected to the Law Society’s copying practices and sued for copyright infringement. They maintained that the materials being copied were entitled to copyright protection and that the Law Society was authorizing others to infringe on their copyright.

The Law Society emerged victorious on most counts in this regard, as the Court ruled that the Society had neither infringed the publishers’ copyright nor authorized others to do so. In its decision, the Court provided a detailed discussion of the fair dealing exception, concluding that the exception should be granted a large and liberal interpretation. In fact, the Court remarkably fashioned exceptions to copyright infringement as new copyright rights—users’ rights—that must be balanced against the rights of copyright owners and creators:

Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.

Having characterized fair dealing as a user’s right that must not be interpreted restrictively, the Court then illustrated the appropriate application of a fair dealing analysis:

The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. “Research”
must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts.\textsuperscript{42}

The importance of the \textit{CCH} decision to the application of the fair dealing provision cannot be overstated. In a single decision, the Court elevated fair dealing from a limited exception that was viewed as largely ineffectual to a user right that must not be interpreted restrictively and cannot be unduly constrained. While the \textit{Copyright Act} provides copyright holders with a large basket of rights, the \textit{CCH} decision provided a powerful reminder that those rights are not absolute. Just as patent law balances the rights of patentees with the broad societal interests, so too copyright constrains the rights of copyright holders in favour of public access to works.

In assessing the Law Society’s fair dealing arguments, the Chief Justice relied heavily on the six factors enumerated by Linden JA in the earlier Federal Court of Appeal decision. While these factors were not viewed as a strict test, the Court emphasized their value in gauging the fairness of the dealing. The six factors are:

1. \textit{The purpose of the dealing} – The Court explained that “allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”\textsuperscript{43}

2. \textit{The character of the dealing} – One should ask whether a single copy or multiple copies were made. It may be relevant to look at industry standards.\textsuperscript{44}

3. \textit{The amount of the dealing} – “Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness.” The extent of the copying may be different according to the use. In some cases even quoting the entire work may be fair dealing.\textsuperscript{45}
4. **Alternatives to the dealing** – Was a “non-copyrighted equivalent of the work” available? 

5. **The nature of the work** – “[I]f a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work—one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.”

6. **Effect of the dealing on the work** – Will copying the work affect the market of original work? “Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.”

It is noteworthy that the Linden six-factor test was itself influenced by *Hubbard v Vosper*, a United Kingdom decision authored by Lord Denning. In *Hubbard*, Lord Denning explained that fairness would be determined by reference to the specific facts of the case, which he proceeded to assess on the basis of factors later adopted in the *CCH* decision. Lord Denning added that he did not view the factors as exhaustive and that others may and should be examined by the court.

The *CCH* decision generated considerable debate over the scope of the fair dealing provision, culminating in the latest round of Supreme Court decisions, which were viewed as an opportunity to clarify the scope of the provision. In those decisions, the Court reaffirmed that fair dealing is a user’s right that must be interpreted in a broad and liberal manner. When combined with the recent Bill C-11 reforms, the Court took a big step toward blurring the divide between fair use and fair dealing, effectively turning the Canadian fair dealing provision into a fair use provision in which virtually all purposes engage the second-stage fair dealing analysis.
II: How Fair Dealing Became Fair Use

i. Where Fair Dealing in Canada Stands Now

The Court’s copyright pentalogy addressed a range of copyright issues, but fair dealing assumed a central role in two cases. In *Alberta (Education)*, the Court addressed the use of fair dealing within education, arriving at several conclusions that expanded both the breadth of education-related purposes as well how such uses should be analyzed within the six-factor test.

For example, the Court assessed the scope of the “private study” purpose, arriving at a broad definition that rejected both spatial limitations and the requirement for isolation. Writing for the majority, Abella J concluded that: “[T]he word ‘private’ in ‘private study’ should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude.”

The scope of the research purpose was also given a large and liberal interpretation in *SOCAN v Bell Canada [Bell]*, the other major fair dealing case that considered whether song previews on services such as iTunes qualify as research for fair dealing purposes. Once again, Abella J adopted a strong stand in favour of fair dealing. After reiterating that fair dealing is a user’s right, Abella J argued for a very broad approach to the fair dealing research category:

Limiting research to creative purposes would also run counter to the ordinary meaning of “research”, which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. It is true that research can be for the purpose of reaching new conclusions, but this should be seen as only one, not the primary component of the definitional framework.

The *Alberta (Education)* and *Bell* decisions not only articulate an expansive approach to the enumerated purposes under fair dealing, but also provide guidance on the broad and liberal interpretation of
the six-factor test that is used to determine whether the dealing is fair. First, the Court reaffirmed that fair dealing is a user’s right, not a rhetorical device, removing any doubt that its previous references to user’s rights were a statement of law. The Court states in *Bell*:

> CCH confirmed that users’ rights are an essential part of furthering the public interest objectives of the *Copyright Act*. One of the tools employed to achieve the proper balance between protection and access in the *Act* is the concept of fair dealing, which allows users to engage in some activities that might otherwise amount to copyright infringement. In order to maintain the proper balance between these interests, the fair dealing provision “must not be interpreted restrictively.”

Second, the Court firmly entrenched the six-factor analysis as the test for determining whether a particular use or dealing is fair. Building on *CCH*, the Court’s guidance on the six-factor test provides the following:

1. **Purpose of the Dealing**

   The purpose of the dealing involves two issues: whether there is a qualifying purpose, and whose purpose should be considered. As noted above, the Court adopted a broad approach for the research and private study purposes. Moreover, the second issue of whose purposes should be considered was critically important in the *Alberta (Education)* case, with the Court concluding that the purpose of the student (who engages in research or private study) is relevant even when the copying is completed by (or under the instruction of) the teacher:

   Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of “instruction”; they are there to facilitate the students’ research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and
rely on the guidance of their teachers. They study what they are told to study, and the teacher’s purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.\footnote{53}

2. Character of the Dealing

In \textit{CCH}, the Court stated the following about the character of the dealing:

In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness.\footnote{54}

The Court provided a good example of how this factor is applied in \textit{Bell}:

SOCAN’s argument was based on the fact that consumers accessed, on average, 10 times the number of previews as full-length musical works. However, no copy existed after the preview was heard. The previews were streamed, not downloaded. Users did not get a permanent copy, and once the preview was heard, the file was automatically deleted from the user’s computer. The fact that each file was automatically deleted meant that copies could not be duplicated or further disseminated by users.\footnote{55}
3. **Amount of the Dealing**

The Court in both *Bell* and *Alberta (Education)* confirmed that the amount of the dealing refers to the individual copy, not the aggregate amount being copied. This will be significant for education, since it means that the total amount being copied by a teacher, school, school board or all educational institutions is irrelevant for the purposes of the amount of the dealing analysis. In *Bell*, the Court stated:

> Since fair dealing is a “user’s” right, the “amount of the dealing” factor should be assessed based on the individual use, not the amount of the dealing in the aggregate. The appropriate measure under this factor is therefore, as the Board noted, the proportion of the excerpt used in relation to the whole work.\(^{56}\)

The aggregate approach may also have an impact on widespread Internet-based uses, where the total amount being copied by the Internet community will not be considered within the context of the amount of the dealing. As Abella J warns: “[G]iven the ease and magnitude with which digital works are disseminated over the Internet, focusing on the ‘aggregate’ amount of the dealing in cases involving digital works could well lead to disproportionate findings of unfairness when compared with non-digital works.”\(^{57}\)

4. **Alternatives to the Dealing**

In *CCH*, the Court described alternatives to the dealing as follows: “Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court.”\(^{58}\)

In the *CCH* case, the Court determined that the availability of a licence is not a relevant alternative in deciding whether a dealing is fair. And in *Alberta (Education)*, the Court ruled that purchasing books was not a viable alternative, given the costly nature of purchasing books for all students simply to access shorter excerpts.
5. **Nature of the Work**

The Court in *CCH* described the nature of the work in the following manner:

The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work—one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.\(^{39}\)

The Court’s analysis in *Bell* showed that musical works for purchase meet this standard:

SOCAN does not dispute the desirability of the sale and dissemination of musical works, but argues that since these works are easily purchased and disseminated without the use of previews, previews are of no additional benefit to promoting further dissemination. But the fact that a musical work is widely available does not necessarily correlate to whether it is widely disseminated. Unless a potential consumer can locate and identify a work he or she wants to buy, the work will not be disseminated.\(^{40}\)

6. **Effect of the Dealing on the Work**

The Court in *CCH* emphasized that the effect of the dealing on the work is an important factor, but is not the most important factor:

[T]he effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright law.
owner is an important factor, it is neither the only factor
nor the most important factor that a court must consider
in deciding if the dealing is fair.61

The Court in Alberta (Education) discussed the need for actual
evidence of economic harm in order to demonstrate a negative effect,
noting that “other than the bald fact of a decline in sales over 20
years, there is no evidence from Access Copyright demonstrating
any link between photocopying short excerpts and the decline in
textbook sales.”62

### ii. The Shift from Fair Dealing to Fair Use

Fair dealing in Canada still requires a two-stage analysis, yet the
cumulative effect of legislative reform and the Supreme Court
decisions is that the first stage has become so easy to meet that Canada
has a fair use provision in everything but name only. Conventional
fair use may require only a single test to determine fairness, but the
Canadian fair dealing/fair use hybrid comes close by ensuring that
virtually all uses will meet the purposes standard and proceed to the
second-stage, six-factor analysis described above.

There are three developments responsible for this shift. First,
as noted above, the number of fair dealing purposes has grown as
Bill C-11 added education, parody and satire to the current list of
research, private study, news reporting, criticism and review. This
list is quite broad, as many uses are likely to fit within one of the
purposes. While a restrictive interpretation of these purposes would
have created significant limitations on its applicability, the expansive
approach articulated by the Court means that the existing purposes
are increasingly likely to capture a broader range of activities.

The research purpose alone is likely to extend to uses far beyond
more constrained scientific research, as the Court has ruled that
research need not be structured or formalized. Rather, “piecemeal,
informal, exploratory, or confirmatory” research all qualifies as
research for fair dealing purposes.63 Indeed, with the inclusion of
consumer research and “personal interest” within the definition,
fair dealing research covers common commercial activities as well,
opening the door to greater business reliance on the research purpose within fair dealing.

If the use in question is still not covered by the expansive approach to research, the broadening of the private study purpose should further expand the allowable purposes. The Court has removed the need for a structured or isolated environment for private study, thereby opening the door to a wide range of activities that can be characterized as study.

Canadian courts will also give broad interpretations to the remaining fair dealing purposes, including criticism, review, news reporting, parody, satire and education. For example, in *Warman v Fournier*, a 2012 Federal Court of Canada decision, the court acknowledged the need for a broad approach to the news reporting purpose. At issue was the reproduction on an Internet chat site of several paragraphs from opinion pieces published in the *National Post* newspaper. The court ruled that the copying was insubstantial and did not raise infringement concerns. In the alternative, it concluded that posting news reports on an Internet site could itself be regarded as news reporting:

The SCC stated in *CCH*, at paragraph 51, that the fair dealing purposes (in that case, research) “must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.” Applying this large and liberal interpretation to news reporting, I find that the respondents’ dealing in respect of the Kay Work falls within this purpose. They posted the excerpts of the Kay Work on Free Dominion to promulgate the facts recounted in that article. Thus, the first criterion for fair dealing is met. The news reporting exception also requires that the source and author be mentioned, which is also satisfied in this case.

The new education purpose must also be granted a wide berth. The government specifically rejected requests to establish a narrow definition of education within its copyright reform package. By leaving the term undefined, courts are free to follow the Court’s lead and adopt an expansive approach to education that extends far
beyond accredited educational institutions. Rather, consistent with a research purpose that includes personal interest, the education purpose may well include personal education initiatives and efforts to become better informed about any issue of interest.

Second, having adopted an expansive approach to the fair dealing purposes (and the government having added new purposes that will be subject to a similar expansive analysis), the Court added another wrinkle to the fair dealing test, stating that the first part involves a low threshold: “In mandating a generous interpretation of the fair dealing purposes, including ‘research,’ the Court in CCH created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair.”

Note that the CCH decision never describes the first-stage purposes test as having a low threshold, though a broad and liberal interpretation may lead to that conclusion, as it ensures that the user’s right of fair dealing will benefit from a full analysis of whether the use is fair. In that sense, the Court is right that the “heavy hitting” is done in wading through the six-factor analysis to determine whether the dealing is fair, which is consistent with a fair use approach. The signal from the Court is unmistakable: consistent with the exercise of a user’s right, potential fair dealing uses are best assessed through a full fairness analysis. By confirming a low threshold for the first-stage purposes test, the Court has ensured that virtually all purposes will pass the first stage and be considered on the basis of the fairness of the use, not the intended purpose (which is itself only one of the six factors in the second-stage test).

Third, the Court has opened the door to considering the copying purposes of not only the actual copier, but the intended recipient as well. This approach started in the CCH case, but was expanded considerably in the Alberta (Education) and song previews cases, adding further flexibility to the fair dealing provision by requiring courts to undergo more extensive analysis of the purposes of the copier and recipient or beneficiary.

For example, in the Alberta (Education) case, the teacher is technically making the copy on behalf of the student; however, the Court found that their purposes are inseparable, noting that “[t]he teacher/copier therefore shares a symbiotic purpose with the student/
user who is engaging in research or private study.” The Canadian Publishers’ Council, which intervened in the case, addressed this specific issue before the Court:

Accepting the test proposed by the Appellants that their purposes are the purposes of their students would hollow out the intended closed categories of allowable purposes in the Act. It would subject all unauthorized copying for others that might be for their research, private study, criticism, review or news reporting purposes into an allowable purpose for the copier, greatly expanding the scope of the fair dealing exception. It would require courts to ignore a copier’s actual purposes and pay regard only to the possible allowable purposes of another person. Thus the fair dealing provision would shelter intermediaries who act on their own initiative and do not themselves have an allowable purpose.

A similar expansion arose in the song previews case, where Apple makes previews available for the purposes of their customers’ research. The Canadian Recording Industry Association warned against this issue in their intervention in the case:

Even if it is accepted that Services are entitled to rely on the “research” purpose of consumers, the Services only purpose in dealing with Previews is not to facilitate that research. The Services also use Previews for their own economic benefit in marketing the sale of downloads of sound recordings and that is their predominate [sic] purpose for using Previews. The Services are not therefore in a relationship with consumers comparable to the very special relationship between the Law Society’s Great Library and library patrons.

The majority of the Court obviously rejected this view and has now rendered three decisions where the intermediary copier stands in the shoes of the beneficiary—CCH (library copying for patron), Alberta (Education) (teacher copying for student), and Bell (Apple making song previews for customers). This flexibility will be used
by others to argue that their copying is conducted on behalf of a permitted purpose of the recipient, creating a very open approach to the first-stage purposes test.

While the first-stage fair dealing test should now be very easy to meet, Canadian fair dealing resembles US fair use in another way—it is not a free-for-all, since merely meeting the first-stage test only opens the door to the full fairness analysis. This is consistent with a balanced copyright system that addresses both creator rights and user rights, since the analysis focuses on whether the use of or dealing with a work is fair, not whether it fits within one of the fair dealing categories or purposes.

Conclusion

As the debate over Canadian copyright reform captured increasing attention over the past decade, fair dealing moved from little more than an afterthought to one of the core issues, occupying a prominent role in legislative debates and within landmark cases at the Supreme Court of Canada. While the Canadian copyright community was divided over whether emulating the US fair use provision was the best course of action, the confluence of the Court articulating fair dealing as a users’ right in CCH, the expansion of the purposes of fair dealing in Bill C-11, and the fair dealing analysis in the copyright pentalogy has rendered much of the debate moot. Canada may remain a fair dealing country from a strict statutory perspective, but its approach points the way to a hybrid fair dealing/fair use model in which the two-stage analysis of fair dealing purpose (stage one) and fairness analysis (stage two) bears close resemblance to an open-ended fair use system, given that virtually all uses will meet the purposes standard and proceed to the second-stage, six-factor analysis.

The Canadian model may emerge as a preferred approach for many fair dealing countries grappling with policy pressures to increase copyright flexibilities but simultaneously facing concerns over compliance with international norms and the value of domestic legal certainty. First, the Canadian fair dealing approach is unlikely to raise significant concerns with regard to its consistency with the Berne Convention, since compliance with the three-step test would
involve fact-specific analysis of how the Canadian courts applied the fair dealing provision that still features a closed list of identifiable purposes. Second, the uncertainty that might follow from the shift from fair dealing to fair use has been minimized, since Canadian case law has gradually evolved to support for a more flexible approach. This enhances legal certainty by grounding fair dealing analysis in the detailed guidance provided by the Court.

The Court’s emphasis on the need for balance between creators’ rights and users’ rights laid the foundation for a shift away from a two-stage fair dealing test toward a single analysis based on fairness of the use of a copyrighted work. By elevating fair dealing to a users’ right, it made little sense for the law to premise the exercise of those rights on fitting within a small number of narrowly defined purposes. The core of fair dealing is fairness – fairness to the copyright owner in setting limits on the use of their work without permission and fairness to users to ensure that fair dealing rights can be exercised without unnecessarily restrictive limitations. In the aftermath of years of public debate and landmark jurisprudence, Canada now has a fair use provision in everything but name only, with analysis rightly focused on whether the use of or dealing with a work is fair, not whether it fits within one of the fair dealing categories or purposes.

1 My thanks to Bat Chen Stilmann-Hirsch and Diana Marina Cooper for their exceptional research and editorial assistance. This article benefited from financial support from the Social Sciences and Humanities Research Council of Canada and the Canada Research Chair program. Any errors or omissions remain the sole responsibility of the author.

2 Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment (Geneva: WIPO, 2003); Raquel Xalabarder, WIPO Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel (Geneva: WIPO, 2009); Attorney-General’s Department, Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age Issues Paper (Canberra: Attorney-General’s Department, 2005) [Australian Fair Use Issues Paper]; Australian Law Reform Commission, Copyright and the Digital Economy

3 Israel Copyright Act, 5768-2007, 2007 LSI 34 (2007), s 19 [Israel Copyright Act].


10 Berne Convention for the Protection of Literary and Artistic Works, 9 September

“(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.”

11 Ibid.


13 U.S. Copyright Act, 1976, 17 USC, 90 Stat 2541.

14 The four criteria were originally established in Folsom v Marsh, and later codified in the Copyright Act. In Folsom v Marsh, Story J explained that “we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” Folsom v Marsh 9 F Cas 342 (CCD Mass 1841).


Ibid.
30 Ibid.
33 Ibid at para 58.
36 Ibid at para 31.
37 Ibid at para 32.
38 CCH, supra note 5.
39 Ibid at paras 48-60.
40 Ibid at para 12.
41 Ibid at para 48 [emphasis added].
42 Ibid at para 51.
43 Ibid at para 54.
44 Ibid at para 55.
46 Ibid at para 57.
47 Ibid at para 58.
48 Ibid at para 59.
49 Hubbard v Vosper, [1972] 1 All ER 1023 (CA).
51 Bell, supra note 9 at para 22.
52 Ibid at para 11.
53 Alberta (Education), supra note 50 at para 23.
54 CCH supra note 5 at para 55.
55 Bell, supra note 9 at para 38.
56 Ibid at para 41.
57 Ibid at para 43.
58 CCH, supra note 5 at para 57.
59 Ibid at para 58.
60 Bell, supra note 9 at para 47.
61 CCH, supra note 5 at para 59.
62 Alberta (Education), supra note 50 at para 35.
Bell, supra note 9 at para 22.


Ibid at para 31.

Bell, supra note 9 at para 27.

Alberta (Education), supra note 50 at para 23.
