I: Introduction

Approximately ten years ago, the Supreme Court of Canada gently opened the door to a more nuanced discussion of copyright. In Théberge v Galeries du Petit Champlain inc. [Théberge] (2002), the majority opinion declared: “The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.... [The proper balance] lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.”² A 5-4 decision, these words might have passed into history as nothing more than a minor aberration from mainstream copyright thought. Copyright policy makers of the day were fretting over the phenomenon of file sharing, spurred on by multinational entertainment corporations gripped by a fury worthy of Dodgsonian imagination.³ Yet, as the past decade has illustrated, Théberge marked the start of a shift in Canadian copyright policy, away from the maximalist tendencies evident at the turn of the century to broader recognition that copyright be maintained as a limited right, and that those limits be robust in order to ensure that creativity continues.
Meanwhile, some 9,000 kilometres away, another country was also resisting the trend toward absolute copyright. In fact, Israel’s effort to mitigate the excesses of copyright predates that of Canada. Guidance came from the Israeli Supreme Court, with those Justices also introducing the issue slowly. While unable to excuse a commercial, satirical use of copyrighted work in 1993, the Court introduced the importance of flexibility with respect to copyright’s exceptions. The seed planted then flowered in 2007 when, with a nod to an earlier developing nation, Israel adopted fair use into its domestic law. Canada did not follow Israel’s inclination to an open-ended exception, but expanded the purposes of fair dealing in 2012.

However, the fact remains that both countries are swimming against the global tide. Through the ever-widening scope of trade agreements, the importance of future creativity is diminished by the greater focus placed upon protecting existing assets. This makes the Canadian and Israeli legal developments all the more important—both countries add to diversity within the international community. But a more tolerant law cannot achieve balance on its own. Fulfilling the law’s potential requires achieving a wider understanding of what lies at the heart of the exception: fairness of use. Without such understanding, individuals, industries and institutions are timid to engage with the exception. And when the exception is not used, copyright becomes absolute by default.

The two countries make for an intriguing study. To a layman, the duo could not have been more unlikely a pair. On closer inspection, though, there are similarities. While Canada and Israel are not identical in terms of cultural substance, they resemble one other in cultural structure. By structure I refer to the role of British Imperialism in shaping the two nations, the diverse social milieu that later followed, and the presence of more than one system of law within the borders. And although both nations later came under closer influence of the United States, each country avoided obliging all American wishes in terms of domestic copyright amendment.

Then again, similarities only take one so far. Currently, the two Courts show differing (but complementary) trajectories via the
principles of fair use. These differences may also be explained by recourse to culture; *culture* famously decreed by Raymond Williams as one of the most complicated words in the English language. In its ideal state, fair use is entirely an outcome of culture—it is shaped by the collective distinctiveness of each nation. Decisions of fair use should be guided by the principles and customs shared within a nation.

Fair use is an imperfect instrument—in and of itself it cannot guarantee legitimate conduct in the hands of others. Yet in a world of increasingly aggressive copyright control, fair use is the last independent space where some unauthorized uses of copyrighted material may occur. Such uses are foundational to the pursuit of creativity; whether one is the struggling author or engineer, reliance on other works is inescapable. The manner in which works will influence future efforts cannot be easily delineated and then championed—sometimes all a fair use enthusiast can do is remind readers of Sir Isaac Newton's observation of “standing on the shoulders of giants,” or, when feeling a little donnish, quote from T.S. Eliot: “Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different. The good poet welds his theft into a whole of feeling which is unique, utterly different from that from which it was torn…”

If Israel and Canada are indeed seeking the benefits allowed via a flexible exception, it will be many years before success or failure is definitively pronounced. This chapter can only set the stage from where to examine their journeys into fairness of use. Section II situates the backdrop of fair use in the American context; of particular importance is the mid–twentieth century discussion on the merits of flexibility which preceded the coding of the exception into law. Israel and Canada enter in Section III via their Supreme Courts, as each Court sought to overcome the rigidity of fair dealing as it existed in the late twentieth and early twenty-first centuries, respectively. Section IV takes a look at the more recent guidance from each Supreme Court, and Section V concludes by considering the potential for each country to make the best of its own cultural approaches to exceptions.
II: Fair Use: A Complicated Youth

Fair use is best known by its American representation:

…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.”

Generally speaking, this language is credited to *Folsom v Marsh* (1841)—a case concerning two biographies of George Washington. Presiding Justice Story offered what would lead to the four factors of fair use as codified in 1976: “In short, 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.” This multi-faceted approach to analysis emphasizes that questions of unauthorized use must be handled with care; there would be no easy answers. But flexibility of language was prized in the mid-twentieth century; it offered greater potential for creativity to be sheltered.

In 1958, at the behest of the Subcommittee on Patents, Trademarks, and Copyrights, Alan Latman authored a study concerning fair use and raised two questions: (i) should fair use should be codified into
law; and (ii) if so, to what detail. His work was circulated to an advisory panel of nine copyright experts; eight argued that fair use should not be codified with any attempt at specificity. Consensus was that the doctrine was developed by the courts, and courts should remain responsible for the scope of the doctrine. It may not have been easy for the judiciary to interpret fair use, but panel members pointed out that interpretation was necessary in other areas of law as well. Ralph S. Brown, a staunch advocate of the rights of the individual, illustrated both ends of the argument:

The dominant impression that emerges from Mr. Latman’s helpful study is that a statutory definition of fair use is inordinately difficult. Since I, for one, regard a liberal concept of fair use as essential to our American concept of copyright, it seems in one sense an abdication of responsibility to ignore the subject in the statute. Yet the history of statutory attempts in this country, and the examples from abroad, suggest great difficulties in specifying the scope of fair use for particular situations. On the other hand, a general statutory recognition of fair use seems to add nothing to the present law as a guide for the courts. There will always be new situations and new uses arising, so that a detailed statute, even if it gave some present guidance to the courts, would be certain to fall behind the times.

It is unsurprising, then, that when the law was codified, fair use was framed in general terms. An instructional guide prepared within the Copyright Office of the Library of Congress gives additional explanation:

Section 107 is somewhat vague since it would be difficult to prescribe precise rules to cover all situations. … Section 107 makes it clear that the factors a court shall consider shall “include” [the four factors]. … [T]he terms “including” and “such as” are illustrative and not limitative. The legislative reports state that section 107 as drafted is intended to restate the present judicial doctrine; it is not intended to change, narrow or enlarge it in any way.
In 1985, Brown reiterated his view of fair use as essential to the American concept of copyright; one cannot but wonder if he feared a narrowing of fair use’s scope:

The Supreme Court has repeatedly emphasized its understanding of the policy that flows from the Constitution: the primary public interest lies in increasing and spreading knowledge, not in rewards to authors and publishers. … Copyright must remain a body of law with fairly definite limits. Copyright has expanded to accommodate any number of changes in the ways that human communications are created and transmitted. It is a successful way of recognizing rights in expressive people, freeing them from dependence on the bounty of a feared ruler or a capricious patron. Congress has limited authors’ rights, however, so that the use to which readers put writings is not tyrannized. It is significant that the most comprehensive limit on copyright is called fair use.  

In his article, Brown makes reference to the famed Sony decision of fair use lore as well a publication that suggested fair use be evaluated with an eye to resolving market failure. At that time, Sony appeared a triumph for private copying and media development, but remarks by the American Supreme Court gave the issue of commerciality too much prominence in assessments of fair use. Barton Beebe’s study of fair use case law pinpoints those remarks as the moment when fair use ran “off the rails,” leading to an era of overt emphasis upon commerciality. Despite the wishes of the drafters of the 1976 language, fair dealing’s scope was narrowed. Further damaging was the onset of mechanistic application of the four-factor analysis. Fortunately, Beebe’s overall assessment of the contemporary progress of fair use in the United States is optimistic. American fair use is enjoying better days; scholarship substantiates the robustness of the multi-faceted inquiry and illustrates modest patterns of predictability.

Yet while there is new appreciation for flexibility in systems of copyright, experts remind us that fair use cannot be summarily imported into another jurisdiction. Canadian and Israeli aspirations
to flexible exceptions are viable because the principle has enjoyed a period of domestic incubation. Key cases illustrate that the impetus to a more flexible exception came from the Supreme Courts of both countries; the Courts sought a modest, step-by-step broadening of fair dealing in support of socially desirable purposes.

III: Fair Use: Eastern and Northern Incubation

i. 1993: David Geva v Walt Disney Corporation

In 1993, the Supreme Court of Israel explored the question of fair dealing via the work of the late artist David Geva. In his work, *The Duck Book*, Geva had created a character known as Moby Duck, modelled upon Donald Duck but embellished with “the Tembel hat and a curl on the forehead, typical Israeli features.” The work as a whole was a critique of Israeli society, with the principles of freedom of expression lying at the heart of Geva's petition.

Geva argued that if the court deemed his work to be an infringement of copyright, then the exceptions to copyright would excuse his invocation of Donald Duck. He felt that his use of Disney’s character was in a manner consistent with the American treatment of fair use. Although his case was not a personal success, the proceedings marked two significant developments for exceptions in Israel: i) the establishment of a multi-faceted inquiry when considering unauthorized uses of copyrighted work; and ii) the recognition of parody and satire as legitimate purposes for exception. These developments shaped, and were shaped by, a transition in jurisprudential reliance from English law and authority to American guidance. But this cultural transition was not taking place in a vacuum; Israel had a newly enacted Basic Law of Human Dignity encompassing the protection of property, but not an explicit right of freedom of expression, to accommodate as well.

The Court was careful to give freedom of expression its due, but observed:

> We must remember that even basic principles, including the freedom of speech, retract in light of enacted laws. The instructions of the law will be interpreted in light of the basic principles in an attempt to express those
principles, but this will be the case only as long as the interpretation corresponds to the actual purposes and language of the law. As such, also the principle of freedom of speech is limited to the boundaries of enacted copyrights laws.\textsuperscript{35}

The presiding copyright law was the Israeli Copyright Act of 1911 (as set via the British Copyright Act of 1911) and contained a very brief fair dealing allowance: “any fair dealing of a work for the purpose of private study, research, criticism, review, or newspaper summary.”\textsuperscript{36} In discussion concerning the structure of the exception came this observation:

\begin{quote}
[T]he American arrangement is much more advanced and is, when compared to the 1911 law, a more desired arrangement. … It seems that the American legislator preferred to create a flexible arrangement, one that enables maximal consideration in the circumstances of each and every case.\textsuperscript{37}
\end{quote}

Recognizing the common heritage between the language of Israeli fair dealing and American fair use,\textsuperscript{38} the Court adopted the American four-factor analysis. With the framework of inquiry established, Geva’s first challenge was to be admitted to the realm of permitted categories. To provide Geva this opportunity required overturning a lower court’s view that criticism must refer in a negative capacity to the object copied and that general social criticism could not draw on the exception:

\begin{quote}
It seems that the term “criticism” for the purposes of article 2(1)(1) should be interpreted in a broad sense. The freedom of speech and creativity, while they cannot change the law per se, do influence, as was mentioned above, the shaping of the law through means of interpretation. Therefore, it is recommended to accept a broad interpretation and to include critiques in the form of parody and satire in the category of artistic criticism.\textsuperscript{39}
\end{quote}

And future decisions were positioned for a broader scope of inquiry, with reassurance offered to would-be plaintiffs that the
mention of genre is hardly sufficient for an action to be deemed fair dealing:

   Indeed, the question whether something is a satire or a parody (which is in fact a form of satire) is significant with respect to the issue of the fairness of the use. … I don't see a need to differentiate between the two at the stage in which the purpose of the use is being examined. … At any rate, even if we say that the exception of “fair dealing” can take place in a situation of a critical parody or satire, we still need to examine each and every case and decide to which category the allegedly infringing work falls into. Naturally, not every comic use of a protected work will fall into the exception category.\(^{40}\)

With criticism expanded, the manner by which Disney’s work had been used was explored via the four-factor framework of American fair use. Here, the first condition affected the outcome. The American framework of fair use was not imported in isolation; American case law, complete with its shortcomings, came too. The first factor’s consideration of purpose and character, with its bifurcation along commercial and non-profit lines, coupled with prevailing American Supreme Court tendencies to disfavour commercial uses, led to the denial of fair use as a whole.\(^{41}\)

*Geva* was a product of its time; while extolling the virtues of American fair use, the Justices brought with it the American biases of the late twentieth century. That these biases coincided with Israel’s newly created constitutional protection of property explains the emphasis upon the property right of copyright by the Court.\(^{42}\) Despite this, *Geva* still opened the door to broader interpretation, as there was some discomfort with the idea that commerciality might become the blind arbiter of fair use:

   The use may be found to be fair in light of its purpose and character, even if those are commercial oriented, given that the use is found to promote important social values…. This is a product of our modern world, in which most of the activities that promote social values cannot be disconnected from financial motives.
Prohibiting any commercial use of a protected work will discourage activities that society would have liked to encourage.43

Perhaps looking for a way out of this conundrum, the Court offered some encouragement, again by drawing from a recently decided (and denied) instance of fair use by an American court:

Where courts have considered transformative, productive, non-superseding secondary use of the type that were favored in the historical development of fair use, they have attached little importance to the presence of profit motivation. Courts have recognized that most instructive publishing activity involves profit motivation.44

The consequence of Geva was that Israel’s copyright landscape was seeded to better serve subsequent creative development. After fair use reached formal codification into Israel’s copyright law, Neil Netanel would write: “Israel’s new copyright statute essentially completes the move from fair dealing to fair use that the Israeli Supreme Court had already initiated in 1993 in its ruling in Geva v Walt Disney Co.”45 Noting that American jurisprudence had seen two distinct strains of fair use interpretation emerge—fair use as merely a means of resolving market failure in a regime of licensing, and fair use as means of enabling expressive diversity—Netanel speculates that, with Geva’s approving nod to American cases that favoured transformative uses of copyrighted works, “Israeli courts should be considerably more receptive to the expressive diversity approach to fair use than to the market approach.”46 But Geva is not the complete story behind Israel’s good footing today. The potential for transformative use was strengthened through the famed Charlie Chaplin case.

ii. 2000: Mifal Hapais v The Roy Export Establishment47

The circumstances of the Charlie Chaplin case began in 1993, when the Israeli national lottery released an advertising campaign featuring Charlie Chaplin’s character “Little Tramp.” The character was used in memorabilia provided to the public, newspaper advertisements and
television commercials that contained scenes from Chaplin’s movies.

Fair dealing was not the primary argument of the lottery corporation. It first argued the following: a fictional character cannot be the object of copyright; even if copyright existed, the ownership was suspect, as certain diplomatic procedures had not been carried out; the original airing of the movies predates the existence of Israel itself and thus a 1953 agreement to protect American copyright should not be applicable; and the amount used was insubstantial and therefore not a violation of copyright.48 If infringement was still deemed to have occurred, fair dealing was the refuge:

The appellants claim that even if their actions infringed on the copyrights of the respondents, their actions should be considered as fair use, as their usage was intended for “criticism” purposes…. They base their claim on the fact that the [lottery corporation] does not operate for commercial purposes, but rather for different public causes in the fields of education, sports and welfare. Moreover, the appellants believe that the commercials are a form of parody or satire, since they use the Chaplin character, which “is a cultural symbol of poverty, in order to make fun of that cultural symbol and to place it in absurd light.”49

The Supreme Court, sitting as the Court of Appeal, began by acknowledging the merit of a broad interpretation of fair use:

[The exception to the law] is extremely important, and there is justification to interpret it in a broad manner. When protecting the original work we should also note that too much protection can halt the progression and development of culture and society, which essentially progresses out of past achievements. A certain breakthrough or progression that serves society as a whole, by its nature occurs through the creative achievements of individuals who lead the way. Thus, there are situations in which the public interest justifies limiting the scope of copyright protection. Such is the case of the fair dealing doctrine.50
Priority fell upon the consideration of fairness, but the lottery corporation promptly failed at the first factor of analysis. Again, the division between commercial and non-profit was stark:

[The] appellant used Chaplin's creations for advertisement purposes, in order to increase the revenues from the lottery raffle it conducts. Using a protected work in commercial advertisements does not constitute one of the [allowed] purposes, which include “criticism”, “parody” or “satire”. … Even if the appellants incorporated as part of their commercials, elements of “parody” or “satire”, these elements served, at the most, as means to an end, and were not the main purpose of the commercials.\footnote{51}

Although denying the claim of fair use in this instance, the Court offered an even more liberal interpretation of “criticism” by acknowledging the role of prior works as inspiration for something new:

We should thus take into consideration that certain artistic genres may perceive the original creation as a form of inspiration, and as it being a part of a wider, critical discourse, which includes additional creators. Through such perception, the use made of a protected work—as a base for a new, original creation, can be considered, under the appropriate circumstances, to be “fair use” for the purpose of “criticism”. This is so provided that the use made with the original work will be examined in light of the fairness of that use.\footnote{52}

Tony Greenman, a prominent Israeli attorney, writes that the broadening of interpretation of criticism precipitated more flexible interpretation by lower courts:

While the fair use discourse in the Donald Duck and Charlie Chaplin cases provided little comfort to the defendants at bar, those cases were followed by a number of lower court judgments, actually accepting by then the fair dealing (by then, sometimes called “fair use”) defense for the first time.\footnote{53}
Within a few years of the Israeli Supreme Court’s expansion of criticism, the Canadian Supreme Court would take similar steps with another purpose within fair dealing and take the opportunity to introduce a multi-faceted framework of inquiry to examine the fairness of use.

iii. 2004: CCH Canadian v Law Society of Upper Canada

As noted at the outset of this chapter, Canada’s journey began in 2002 via Théberge. Fair dealing was not at issue then. This case concerned a novel means of literally transforming legitimately purchased reproductions of art. The court was divided on what signals reproduction (and thus a breach of copyright); was reproduction the outcome of increasing the number of works, or was reproduction a new fixation of an old work? In the course of their deliberation, the majority opinion presciently saw what lay ahead for Canada:

Excessive 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. This is reflected in the exceptions to copyright infringement…which seek to protect the public domain in traditional ways such as fair dealing….

Two years later, fair dealing was a prominent issue for the Court. The Great Library of the Law Society of Upper Canada routinely assisted patrons with research by reproducing, upon request, single copies of material related to legal matters. The copies were conveyed in print or via facsimile. Legal publishers protested, claiming infringement, but the Supreme Court declared fair dealing on the part of the library.

Writing for a unanimous Court, McLachlin CJ stated:

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.58

According to its critics, the decision marked nothing less than the collapse of copyright protection for creators. The language of user’s rights was seized upon and condemned, even though the Chief Justice had indicated that a procedural illustration of fairness was essential to the right.59

As in Geva, CCH only addressed one element of fair dealing, in this case, research. Like its Israeli counterpart, the Canadian Court used the opportunity to give this socially desirable activity a better foothold of safety: “Research must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”60 Regarding how to determine fair dealing, CCH resulted in an even broader framework by which to examine unauthorized use. Decisions concerning fair dealing should include inquiry as to the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives for the dealing, the nature of the work, and the effect of the dealing on the work, all with the added proviso that the framework itself must be flexible.61

And the entry point demarking fairness of use in Canada came with a more precise safeguard against overt emphasis upon commerciality: “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.”62 Leaving nothing to chance, the Chief Justice emphasized that the presence of a licensing scheme did not render fair dealing inert:
If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner’s monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act’s balance between owner’s rights and user’s interests.63

Without any explicit citation, one cannot be sure of the source of such concern, but these words appear to be aimed in rebuttal to the narrowing of fair use in the United States, as brought on by the aftermath of American Geophysical v Texaco, Inc. The Second Circuit Court of Appeal had affirmed the district court decision and emphasized that the presence of a means of licensing was reason to deny fair use.64 Given Canada’s pre-existing and far-reaching system of collective licensing,65 fair dealing was at risk to be written out of existence, not by legislative amendment but simply by contract. The guidance from the Court preserves fair dealing for all Canadians, be they individuals or institutions.

Following these efforts by the Supreme Courts of Israel and Canada to overcome the rigidity of fair dealing, both countries were positioned to make better use of the exception in the manner offered by their Justices. Since then, legislative change also broadened the exception in both countries.66 Which invites this question: is each country capitalizing upon their opportunities—has the dialogue of fairness become sufficiently robust such that engagement with exceptions is successful?

This is a large question, and many factors play into it. Investigation of the fuller body of case law is necessary, as is a more comprehensive examination of public, professional and institutional approaches to the exceptions; that is to say, how are people, corporations, schools and libraries responding to the opportunity provided? And where does each country sit with respect to international cooperation on matters of exceptions? But for the purposes described herein, focus upon the views of Supreme Court Justices in each country continues to be instructive—comparing recent decisions against their initial judicial history reveals opportunities available and challenges yet to overcome.
IV: Fairness of Use: A Recent Snapshot

Since fair use’s introduction into Israeli law, and up to the time of this writing, fair use has appeared twice before the Supreme Court of Israel. One occasion was with brevity, the other with some notoriety. While two recent cases of fair dealing heard by the Supreme Court of Canada occurred before Canadian amendment of its copyright law, these cases were part of an unprecedented hearing of five cases in two days and thus bear scrutiny.

i. 2011: The Hebrew University of Jerusalem v Schocken Publishing House Ltd.

This dispute involved four entities: a publisher, a student club, a political party and a university. Enabled in part by contributions from the political party, the club habitually sold copies of various books at healthy discounts. A district court held the university as liable for contributory infringement; in its appeal, the university introduced a claim of fair use.

The Supreme Court, sitting as the Court of Appeal, deemed the university not guilty of contributory infringement. With infringement set aside, there was no need to analyze fair use. Nevertheless, the Court probed the juxtaposition of universities and fair use:

[O]nce we decided that the university is exempt of contributory infringement liability, we do not need to examine the applicability of the fair use defense with respect to the university….

It should be mentioned that indeed with respect to educational institutions there is significant value to the application of defenses, and this is in order to enable the institutions to fulfill their important role of enriching public knowledge and distributing it as well as educating the future generation of creators. …

Without setting anything in stone, the fair use defense might permit, under certain circumstances, higher
education institutes to make certain use of protected works for the purpose of education or research. This would allow them to fulfill their important social role. …

However, this is not the case before us. First and foremost, the distribution of the readers in this case was conducted by a student group that has specific interests, of which some are political. … This case does not involve the usage of a specific part of a protected work for educational purposes during a class or for an exam. Rather this case involves the copying of an entire book for the purpose of promoting a certain student group. Under such circumstances there is no place to apply the fair use defense.  

Here the Court acknowledges that distribution (without stipulating a need of transformation) is a viable activity of fair use in the context of education. Even more helpful is the specific language that the institutions will necessarily distribute works when educating future creators. The separation and legitimacy of the distributor could offer much in the future. In any event, the brief excursion into fair use reads as a Court inviting post-secondary institutions to engage with fair use. The next appearance of fair use at the Israeli Supreme Court induced a far more complex discussion.

ii. 2012: The Football Association Premier League Ltd. v Anonymous

At issue was a website that provided streaming coverage of sports matches without charge. The proprietor was not shy about his activity:

Hi all! I have created this site, as my personal aim, to be able to watch LIVE football/soccer, basketball matches etc, without having to pay a cent! Now you can enjoy this too. With LiveFooty, you can watch all the interesting sporting events FREE.

The copyright holders claimed infringement and sought the identity of the website proprietor. In a controversial decision, a district court judge stated that streaming was not a violation under
the existing language of copyright, and held that the proprietor’s conduct was fair use. 23 The support of fair use was extensive; the Judge invoked not only the property rights of the Universal Declaration of Human Rights, but also the right of access contained within that same instrument. Users’ rights were declared with recourse to CCH and the sense of community that arises through sport was emphasized together with the role of copyright in a democratic society. 24

This position was untenable at appeal. The Supreme Court, sitting as the Court of Appeal, refused the argument that streaming was not a protected right under copyright, stating that streaming fell within the ambit of broadcasting, which is a protected right. 25 Infringement was the outcome, with commerciality prominent in the discussion. 26 Interestingly, though, the Court offered that “even if the use done by sports fans is fair use, that will not mean that the activities of the owner of the site are permissible.” 27 The fact that end uses are separate from intermediate distribution again bodes well for the future.

But the most troubling aspect was with the very premise of users’ rights:

It should be clarified that this is a defense which is granted to users, in the appropriate cases. … [T]here are those who reckon that the permitted uses pursuant to the new law should be categorized as rights, per se, of the users, in the sense that the uses might serve as affirmative claims, as opposed to claims of defense. I am unable to accept that argument. The language of the Law does not contain a clear indication that the legislature sought to alter the existing balance and to turn the defenses into rights. Even if a use is permitted, in that it allows users “freedom”, that is not indicative of the existence of a right. 28

The Court continued, emphatic that there was no reason to refashion the defense of fair use into a right, that the purposes set to be achieved by fair use (to empower the public sphere and to support the production of new works from existing works) can still be achieved by a defense. 29 The matter was laid to rest with these words: “The fair use defense, therefore, constitutes a defense claim, and as such,
the burden of proof lies on the defendant [who] seeks to bring up the claim.”

From a Canadian point of view, users’ rights and a procedural illustration of fairness (said another way, proof) are not incompatible. Unfortunately, invoking the language of users’ rights without the broader explanation of its usage by the Canadian Supreme Court gave users’ rights the appearance of unlimited exercise. Fortunately, the rejection of fair use came with yet another reminder that creative pursuits have a claim to fair use:

If the use is productive use, which rests on the previous (protected) work, but for the purpose of producing a new work or expression, of a different nature and purpose to those of the original product, there is a greater tendency to recognize fair use. The concept is that it is easier to recognize transformative use as being “fair”, since it achieves the purpose of the permit—encouraging creativity and enriching the cumulative reservoir of knowledge in society.

The Israeli Court has not been offered the ideal in adjudication of fairness of use under the 2007 law. Neither the wayward student club nor the thrifty sporting enthusiast suggested a principled setting in which to uphold fair use. With a better roster of cases, the Canadian Supreme Court has been able to further establish fair dealing in Canada as a meaningful users’ right, to be applied with the care that is due from an exception to copyright.

iii. 2012: Society of Composers, Authors and Music Publishers of Canada v Bell Canada

In conjunction with the growth of legitimate online music distribution, a performing rights music society in Canada continued to look for new means of revenue generation. Curiously, though, this took the form of desiring compensation for the use of music file previews as used to facilitate sales of the music itself. The Copyright Board denied the argument, situating the use of previews as research in the hands of consumers, and in keeping with fair dealing. The Board’s decision was upheld by the Federal Court of Appeal. Undaunted,
the society sought leave to appeal to the Supreme Court. The Court
unanimously upheld the earlier decisions and took the opportunity to
probe the nature of research. In doing so, fair dealing is recognizable
now as a shelter to all Canadians engaged with inquiry, not just those
performing scholarly undertakings:

It is true that an important goal of fair dealing is
to allow users to employ copyrighted works in a
way that helps them engage in their own acts of
authorship and creativity.... But that does not argue
for permitting only creative purposes to qualify as
"research".... To do so would ignore the fact that
the dissemination of works is also one of the Act's
purposes, which means that dissemination too, with
or without creativity, is in the public interest. It would
also ignore that "private study", a concept that has no
intrinsic relationship with creativity, was also expressly
included as an allowable purpose in [fair dealing].
Since "research" and "private study" both qualify as fair
dealing purposes...we should not interpret the term
"research" more restrictively than "private study".

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.86

While the Court acknowledged the American emphasis upon
transformation, it also offered a reminder that transformation was
not essential:

In urging the Court to narrow the definition of
"research" as requiring the creation of something new,
SOCAN relied on American jurisprudence which looks to the requirement of a “transformative” purpose before the use is seen as fair. … Although [application of the four factors of fair use] includes whether the use is transformative, it is not at all clear that a transformative use is “absolutely necessary” for a finding of fair use: Campbell v Acuff-Rose Music, Inc., 510 U.S. 569 (1994), at p. 579. 87

The Court supported the earlier assessments of fairness of use, 88 but what is most compelling is the continued instruction that the party under consideration is the end user:

In CCH, the Great Library was the provider, offering a photocopying service to lawyers requesting copies of legal materials. The Court did not focus its inquiry on the library’s perspective, but on that of the ultimate user, the lawyers, whose purpose was legal research…. Similarly, in considering whether previews are for the purpose of “research” under the first step of CCH, the Board properly considered them from the perspective of the user or consumer’s purpose. And from that perspective, consumers used the previews for the purpose of conducting research to identify which music to purchase, purchases which trigger dissemination of musical works and compensation for their creators, both of which are outcomes the Act seeks to encourage. 89

This emphasis upon the final destination of disseminated material lay at the heart of another fair dealing decision.

iv. 2012: Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright) 80

This case involves the practice of reproducing copyrighted materials in schools across Canada. In 2004, an educational rights society applied for an increase of its royalties based on the volume and content of the material copied in schools across Canada. As there was some dispute regarding the method of data gathering, the society submitted
a proposed tariff to the Copyright Board. At issue was a particular category of reproduction, namely the use of supplemental material (short excerpts) of copyrighted material, photocopied by teachers and used to enhance the understanding of core material taught through required textbooks. While in the music previews case the Board had placed emphasis upon the end user, the consumer, in this situation it focused upon the intermediate distributor, the teachers, and found their conduct was not fair dealing. The Board's decision was supported by the Federal Court of Appeal. Educational institutions sought leave to appeal the question of fair dealing to the Supreme Court and gained a majority opinion favouring fair dealing.

The society endeavoured to keep the focus upon the conduct of the teachers and claimed the purpose of the reproduction was instructional and thus outside the purposes offered by fair dealing. But the Justices took exception to the reliance by the society on analogies to defeated cases concerning course packs or study guides:

> These “course pack” cases involved copiers with demonstrably ulterior—i.e. commercial — motives. They invoked the allowable purposes of “research” or “private study”, in effect, in order to appropriate their customers’ or students’ purposes as their own and escape liability for copyright infringement. These cases, then, to the extent that they are germane, do not stand for the proposition that “research” and “private study” are inconsistent with instructional purposes, but for the principle that copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purposes of the ultimate user.91

As a consequence of this reasoning, the society’s wish to focus on the teachers’ actions brought more than perhaps the society bargained for:

> 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.\textsuperscript{22}

And earlier efforts to recast institutional education as non-private study were firmly rejected:

Nor, with respect, do I accept the statement made by the Board and endorsed by the Federal Court of Appeal, relying on University of London Press, that the photocopies made by teachers were made for an unfair purpose—“non-private study”—since they were used by students as a group in class, and not “privately”.

As discussed above, the holding was simply that the publisher could not hide behind the students’ research or private study purposes to disguise a separate unfair purpose—in that case, a commercial one. The court did not hold that students in a classroom setting could never be said to be engaged in “private study”. With respect, the 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. By focusing on the geography of classroom instruction rather than on the concept of studying, the Board again artificially separated the teachers’ instruction from the students’ studying.\textsuperscript{23}

With the purpose of the teachers’ copying firmly sheltered under fair dealing, the analysis of fairness began. Eschewing suggestions to look at the amount copied in aggregate, the Justices indicated that consideration more correctly falls upon the proportion of the work copied in comparison to that work.\textsuperscript{24} And that condition had already been met by the premises of the case itself. To a proposed alternative
that schools purchase sufficient copies of all the supplemental materials came this response:

[B]uying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. First, the schools have already purchased originals that are kept in the class or library, from which the teachers make copies. The teacher merely facilitates wider access to this limited number of texts by making copies available to all students who need them. In addition, purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board’s finding that teachers only photocopy short excerpts to complement existing textbooks. Under the Board’s approach, schools would be required to buy sufficient copies for every student of every text, magazine and newspaper in Access Copyright’s repertoire that is relied on by a teacher. This is a demonstrably unrealistic outcome. Copying short excerpts, as a result, is reasonably necessary to achieve the ultimate purpose of the students’ research and private study.  

Finally, no credence was given to the plaintiff’s insistence that such copying had caused textbook markets to decline, not because the Court advocates interference in legitimate markets but rather because of the society’s absence of logic:

[T]here was no evidence that this decline was linked to photocopying done by teachers. Moreover, it noted that there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning.
V: Looking Ahead

In terms of the case law reviewed, Canada’s dialogue on fairness of use seems more robust. Following its Supreme Court’s first treatment of the concept, a broader application of fair dealing without explicit restriction by way of commerciality was immediately available. In contrast, the Israeli Court’s introduction of American fair use made commerciality a prominent issue. Yet Canada’s later amendment of copyright would confine fair dealing to a closed set of permissible categories, while Israel has achieved the Holy Grail of exceptions: an open-ended list of possibilities. This despite the fact that the Israeli cases credited with expanding fair dealing were losses.97

Recent history appears glorious for Canada—two wins at the highest court in the land, whereas the Israeli counterpart continues in a doggedly conservative approach to fair use. But on the issue of commerciality the Courts are of similar mindset. In Alberta (Education), the Canadian Supreme Court emphasized that commercial motives could not be shielded by using “their customers’ or students’ purposes as their own.” The Court takes great care when considering the intersection of the purpose against the amount copied and the effect on markets; this suggests that a Schocken-like case in Canada would meet with equal disapproval.

In any event, comparison across the countries is not necessary; the pertinent concern is how each country is faring in terms of its own progression. In Canada, the connective tissue from 2004 to 2012 is the advancement of personal knowledge, whether experienced through formal education and research or through informal personal activity. Dissemination of copyrighted works as it supports such development was sheltered then and given added support now. The early focus began with the end user, and that, too, has received further confirmation. The Israeli Court has only recently identified the distinction between a provider of material and an end user of that material. However, the Court appears receptive to a specific realm of end users: those situated in institutions of higher learning. How this will progress, if it will progress, remains to be seen. For now, it is an indication of a widening of the discussion of fairness to support fair use to purposes that are easily seen as beneficial to society as a whole.
The fact that the Israeli Court has been more conservative in its approach to fairness of use is undeniable. But it is explicable. The starting point in 1993 came with American emphasis upon the property rights inherent to the system of copyright, at a time when property was touted as the linchpin of Israel’s arrangement of rights. Even so, the Court remained faithful to the importance of transformative uses. And if the Israeli Court only follows the previous American path, that does not close the door on fair use in Israel, it only delays better engagement. But with the Court’s willingness to borrow from other jurisdictions, perhaps the examples set within Canada might be of assistance.

The Israeli Court has had a negative run with its case law, reduced to telling citizens what cannot be done, whereas the Canadian counterpart enjoyed the positive action of indicating what can be done. Fortunately, both countries are advancing in their respective journeys in cultivating a better understanding of fairness of use and thus approach better engagement with their exceptions. There should be no expectation that the end destinations, or even the journeys themselves, will be the same. Shaping conceptions of fairness relies on each country’s individual cultural instincts. To look for uniformity in the development of exceptions is as unreasonable as imposing uniformity in the scope of rights. What is critical is that, within distinct countries, the principle of exceptions exists in actual practice.

At this stage, all that can be said is that both courts have been consistent in keeping an element of creativity alive through their dialogues of fairness of use. Dissemination toward education and research in Canada is on strong footing; transformation in aid of creativity is welcome in Israel. Taken together, dissemination and transformation form the two sides of creativity as per the guiding principles of both Newton and Eliot.

There is something oddly romantic about better copyright interpretation for the Information Age emanating from regions that have been dismissed—one, in its infancy, as a few acres of snow, and the other, in its genesis, as much of it barren mountain and part of it waterless. A noted Canadian scholar of the early twentieth century, Harold Innis (1894–1952), might say this is not fictional romance but the nonfictional continuation of a well-established pattern of
intellectual development. He argued that ingenuity flourished in the margins—those areas away from the centre of an empire. Ingenuity is not limited to the arts and sciences, but is equally necessary in interpretation of law if a civil society is to avoid the perils that follow stagnancy of thought.

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1 I wish to thank Ariel Katz for bringing Israeli copyright development to my attention and Michael Birnhack for the guidance so generously provided from afar. Ricki Newman was an invaluable research assistant; I am indebted to her. I am grateful to the Azrieli Foundation for an award of an Azrieli Postdoctoral Fellowship to pursue my interest in Israeli copyright development. Thanks must also go to the anonymous reviewers whose remarks improved this chapter immeasurably, and to Michael Geist for his engagement with my chapter and support of my work.


3 The proposed policies had a distinct off with their heads approach. Pamela Samuelson describes the American wish list for copyright in the information age: “...that copyright owners would have considerably stronger rights than ever before, and so that the rights of users of protected works would largely be confined to those they had specifically contracted and paid for.” See Pamela Samuelson, “The US Digital Agenda at WIPO” (1996–1997) 37 Va J Int’l L 369 at 372.


5 “(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: (1) The purpose and character of the use; (2) The character of the work used; (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole; (4) The impact of the use on the value of the work and its potential market. (c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use”; see Copyright Act [Isr.], 5768-2007, 2007 LSI 34 (2007) at § 19. The exception was modelled on American Fair use; see infra note 11.

6 Parody, satire and education were added to the previously allowed purposes; the first exception of fair dealing now reads as: “Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright”. See Copyright Act, RSC 1985, c C-42, s 29 <http://laws.justice.gc.ca/en/C-42/>. Subsequent sections extend fair dealing to criticism, review and news reporting with conditions of attribution (ibid at ss 29.1, 29.2).
In September 2012, the United States began consideration of Canada as a participant in the Trans-Pacific Partnership Agreement. The International Intellectual Property Alliance (IIPA), an influential American lobbying group, presented some concerns about Canada's intellectual property standards, including: “In particular, we note that the new Canadian copyright reform legislation has significantly expanded the exceptions to copyright protection in current law, and added many new ones. The compatibility of several of these new or expanded exceptions with the well-established '3-step test' for acceptable limitations on exclusive rights (see TRIPS Article 13; WCT Article 10; WPPT Article 16) is subject to serious question.” See International Intellectual Property Alliance, *Testimony of the IIPA on Canada's Participation in Proposed TPP Agreement* at 2 (4 September 2012) <http://www.iipa.com/pdf/2012_Sep04_IIPA_Request_to_Appear_and_Testimony_on_Canada_TPP.pdf>. This same group also expressed displeasure to Israel for its adoption of fair use, insisting that Israel's exception must conform to the international three-step test as found in the Berne Convention. At that time the Israeli government responded with: “Neither Berne, nor TRIPS, requires that the exact language of a treaty general principle be copied verbatim into national legislation. Indeed, if that were the case then the IIPA would also have to claim that Section 107 “Fair Use” of the U.S. *Copyright Act* is in violation of Berne Article 9 (2). Israel's new fair use section (section 19) follows Section 107 of the U.S. Act and is virtually identical therewith.” See 2009 Submission of the Government of Israel to the United States Trade Representative with Respect to the 2009 “Special 301 Review” 2 at 13 (March 2009) <http://www.justice.gov.il/NR/rdonlyres/BD753811-E87A-4AB2-8ADD-DC9423DFC794/13684/2009special301submission.pdf>. Nevertheless, scrutiny continues; the World Trade Organization held a review of Israel's trade policies and practices; the adoption of fair use was duly noted: “the manner in which the 2007 Act is drafted 'could support the interpretation that fair use is a permitted use and not merely a defence’”; see Thiru Balasubramaniam, “World Trade Organization Policy Review of Israel covers new developments on fair use, data exclusivity and parallel importations” infojustice.org (5 November 2012) <http://infojustice.org/archives/27655>.

Canada is a bi-jural nation, predominantly governed under common law, but with civil code addressing private matters in the Province of Quebec. This arrangement dates to the ceding of Quebec to Britain following the Seven Years War; see *The Quebec Act* (1774), 14 Geo III c 83. In that same Act, the British Crown sought to provide some security for native communities by demarking their territories, much to the dismay of the colonists in what would later become the United States. Israel is better described as multi-jural, as several legal systems are recognized within its borders. Most public matters are guided by common law, but some private matters are determined through religious systems of law, each complete with courts that “utilize particularistic values and procedures derived from its own religious tradition”; see Martin Edelman, *Courts, Politics, and Culture in Israel* (Charlottesville: University Press of Virginia, 1994) at 3. Similar to Canada's experience, protection of the original inhabitants was declared by Britain in its administration of Mandate Palestine (ibid at 121)—the lasting value of Britain's declarations of protection is debatable in both countries. And, albeit for different reasons, both Israel and Canada encouraged immigration in their early days of nation building. While the stability of co-existence within the diverse populations is not equitable between Canada and
In the case of Israel, it must be emphasized that Canada's stability is not easily understood even by Canadians; Governor General David Johnston has remarked, “The great gift of this nation is that we respect diversity and somehow we’ve been able to make a nation out of diversity...”; see James Bradshaw, “The Governor-General on health-care, diversity and candid talks with Harper”, *The Globe and Mail* (23 December 2011) <http://www.theglobeandmail.com/news/politics/the-governor-general-on-health-care-diversity-and-candid-talks-with-harper/article4181969/>.

A fuller story concerning American pressures upon both Canada and Israel is described in Meera Nair, *Canada and Israel: Fairness of Use*, PIJIP Research Paper no 2012-04 American University, Washington College of Law, Washington, DC <http://digitalcommons.wcl.american.edu/research/>.

This situation is not without some irony; in the darker days of fair use a prominent intellectual property scholar convincingly argued that fair use only broadened copyright's scope; see Lyman Ray Patterson, “The Worst Intellectual Property Opinion Ever Written: Folsom v Marsh and its Legacy” (1998) 5 J Marshall Rev Intell Prop L 431. So it seems only befitting that as fair use matures, judiciaries move away from an overtly rigid interpretation of fair use and focus instead on a more flexible examination of fairness of use.


*Folsom, supra* note 13 at 348.


*Ibid* at 39-44; see also Patry, *supra* note 13 at 262.


Ralph S Brown, “Eligibility for Copyright Protection: A Search for Principled Standards” (1985) 70 Minn L Rev 579 at 607-08 [emphasis in original].

*Sony Corp. of Am. v Universal City Studios, Inc.*, 464 US 417 (1984) [Sony].

When addressing the fourth factor of fair use, Justice Stevens wrote: “Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, non-commercial uses are a different matter”; see *Sony*, *supra* note 22 at 451. The fourth factor makes no reference to the commerciality of the use. William Patry has also commented upon the peculiaritiy of the situation: “Most basic is the seldom-noted fact that since the use before the Court was non-commercial, the statement is pure dictum. It was made in passing, without any explanation of what such a presumption might mean or how it was to be applied”; see Patry *supra* note 13 at 430.

Barton Beebe, “An Empirical Study of U.S. Copyright Fair Use Opinions: 1978–2005” (2008) 156:3 U Pa L Rev 549 at 596. Beebe illustrates later efforts by the Court to retreat from this unfortunate position but notes that the Court would not explicitly rescind the language of *Sony* (*ibid* at 600-02).

“[C]ourts often acknowledged that the four-factor test should not be applied formulaically; … [yet] after an initial period of flexibility, judges shifted in the late 1980s toward a rhetorically quite formal and explicit treatment of the section 107 factors” (*ibid* at 561-62).

“Where the non-leading cases declined to follow the leading cases, they repeatedly—and systematically—did so in ways that expanded the scope of the fair use defense” (*ibid* at 622).


Michael Birnhack, “Mandatory Copyright: From Pre-Palestine to Israel, 1910–2007,” in *A Shifting Empire: 100 Years of the Copyright Act 1911*, Uma Suthersanen & Ysolde Gendreau, eds. (Cheltenham: Edward Elgar, 2013) 84 at 109.

*Ibid* at 105.

“There shall be no violation of the property of a person”; The State of Israel, Israeli Basic Law: Human Dignity and Liberty (Israel: The Knesset, 1992) <http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm>. Freedom of expression is not explicitly listed in the Basic Law but is considered a basic principle encompassed by the protection of dignity. The adoption of this constitutional-like instrument was heralded as a mark of progress and pride by a formidable member of the Israeli judiciary: “In March 1992, two new Basic Laws were passed [Freedom of Occupation and Human Dignity and Liberty]. Under these new Basic Laws, several human
rights—among them Dignity, Liberty, Mobility, Privacy, Property—have acquired a constitutional force above the regular statutes. … We joined the democratic, enlightened nations in which human rights are awarded a constitutional force above regular statutes” see Aharon Barak, “The Constitutionalization of the Israeli Legal System as the Result of its Basic Laws” (1997) 31 Israel L Rev 3 at 3.

25 Geva, supra note 4 at 266.


27 Geva, supra note 4 at 271.

28 “[T]he arrangement in article 107 of the American Law—forms in a sense a codification of common law principles. This fact illuminates the similarity between the two lists of purposes…. In light of the common source of both laws, it seems that we can learn from the American law for the circumstances before us” (ibid at 271).

29 Ibid at 274.

30 Ibid at 275. Furthermore, the Court acknowledged an ongoing American debate as to the viability for satire to seek shelter under fair use and sought to pre-empt such future difficulty: “[W]hen the original creator is not severely wronged it is reasonable to classify also satirical uses as fair—based on the considerations as a whole” (ibid at 284).

31 Ibid at 277-79. Beebe illustrates that the mistaken precedent set by *Sony* was continually reinforced through the American Supreme Court, even when the Court attempted to undo its early damage; see Beebe, supra note 25 at 596-602.

32 In addition to invoking the property protection inscribed in the Basic Laws, the Court cited protection of intellectual property in the Universal Declaration of Human Rights together with constitutional protection offered to intellectual property in the United States; see Geva, supra note 4 at 266-67.

33 Ibid at 278.

34 *American Geophysical Union v Texaco, Inc.*, 802 F Supp 1 at 16 (SDNY 1992), cited in Geva, supra note 4 at 278. In 1978, publishers in the United States formed the Copyright Clearance Center and began marketing licences for photocopy reproduction in workplace settings. Lawsuits followed shortly thereafter. “Regular reward notices began appearing in periodicals, offering monetary compensation to those who could furnish conclusive evidence of unauthorized copying. And, in 1985, numerous CCC-member scientific and technical journal publishers sued Texaco, a company that purchased a CCC photocopy licence but, according to the CCC, had failed to accurately report the extent of its photocopying”; see Nicole B. Cásarez, “Deconstructing the Fair Use Doctrine: The Cost of Personal and Workplace Copying after American Geophysical Union v Texaco, Inc.” (1996) 6:2 Fordham Intell Prop Media & Ent LJ 640 at 644. The meaning of “transformative use” has received differing interpretation in American case law, ranging from added creativity to use for a different purpose (ibid at 681). Israeli legal scholars deem that the Court’s decision in Geva “includes putting a work to a new use or context”; see Michael Birnhack & Niva Elkin-Koren, “Limitations and Exceptions to Copyright in Israel”, infojustice.org (April 2012) at n 11 (<http://infojustice.org/wp-content/uploads/2012/05/Israel-v-May-2012.pdf>).

Ibid.


Ibid at 583.

Ibid at 596.

Ibid.

Ibid at 597.

Ibid.


Théberge, supra note 2 at para 38

Ibid at para 32.

The fact that the library had well-established, balanced guidance for handling such requests played an integral part in the decision; see CCH, supra note 54 at paras 61-63.

Ibid at para 48.


CCH, supra note 54 at para 51.


CCH, supra note 54 at para 59.

Ibid at para 70.

“Despite Texaco’s claims to the contrary, it is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier”; see American Geophysical Union v Texaco, Inc., 60 F (3d) 913 (2d Cir 1994) at 931-32. Unfortunately, instead of attempting further appeal, Texaco opted to settle; as a consequence, the licensing regime instituted by the Copyright Clearance Center of the United States was aggressively promoted; see Cásarez, supra note 44 at 649.

In the late twentieth century, the Canadian government embarked on a series of copyright reforms, prompted by an advisory council’s recommendation to

66 Supra notes 5 and 6.


69 The Court sought to inject a dose of realism into any suggestion that universities are monitors of copyright compliance among students. Using a three-part assessment, the university was found not liable through the third condition of substantial and essential contribution. “The university did not actively promote the infringement. It was not proven that the university induced students to perform the infringing actions, or that it implemented measures to encourage them to do so… the university's contribution is manifested in an oversight, which is allegedly based on the university's ability to control and monitor the activities of the student groups. Except that in this case this is not sufficient grounds for establishing the university's liability for the infringement. Many student groups operate in the university, each of which can at any given moment conduct a copyright infringement. Copyright infringements can also occur on behalf of private students that might operate independently. Under such circumstances, it is doubted that the university can effectively control the activities of all the students and can actually prevent the infringements that take place in the campus” (ibid at para 28).

70 Ibid at paras 30-31.


72 Ibid at para 2 [emphasis in original].


74 Ibid at paras 7a-7b.

75 Football Association, C9183/09, supra note 71 at para 14.

76 Ibid at paras 20-22.

77 Ibid at para 20.
Following the Supreme Court’s decision, a prominent Israeli IP blogger wrote: “I think if we concerned ourselves with human rights like security, health, freedom of expression and property, and didn’t cheapen the concept of rights to include the right to watch live football without paying for it, the world would be a [fairer] place.” Michael Factor, “UK Premier League Obtains Partial Win on Appeal of Israel Decision”, The IP Factor Blog <http://blog.ipfactor.co.il/2012/05/14/uk-premier-league-obtains-partial-win-on-appeal-of-israel-decision-2/>.

The manner by which cases reach the Supreme Court Justices differs; in Canada the Supreme Court must grant leave to appeal, with approximately 10 percent of the requests made being granted, whereas in Israel, all trial court decisions have an automatic right of appeal. See Suzie Navot, The Constitutional Law of Israel (Netherlands: Kluwer Law International, 2007) at 139.


Bell, supra note 84 at paras 21-22.

Ibid at paras 23-24. Beebe’s study also dispels the myth that transformation is the fundamental principle of fair use; see Beebe, supra note 25 at 603-05.

Bell, supra note 84 at paras 31-48.

Ibid at paras 29-30.


Ibid at paras 20-21.

Ibid at para 23.

Ibid at paras 26-27.

Ibid at para 29.

Ibid at para 32.

Ibid at para 33.

Ibid at para 33.

Even in this regard, the Israeli development resembles that of American fair use; Folsom was a loss for its defendant. All the American people received at the time was a dialogue of the merits of limited copyright. Yet from such dialogue came what is touted today as a vital component of American creative success.

In 1993, a year after the enactment of the Basic Law of Human Dignity and Liberty, Justice Barak described property rights as “the cornerstone of the liberal
regime and guarantees the existence of other rights”; cited in Menachem Mautner, Law and the Culture of Israel (Oxford: Oxford University Press, 2011) at 152. To an outside observer, the emphasis upon property rights in Israel seems an inevitable corollary to the premise that underlies the founding of the Jewish state.

99 Michael Birnhack describes the layering of jurisdictions that have shaped Israeli copyright law; see Birnhack, supra note 32. An inquiry of originality stands out: “The case cited no less than 17 Israeli cases, 16 American cases, 18 English cases, 1 German case, 1 Hong Kong case, 1 New Zealand case and 3 Jewish law sources” (ibid at 106).

100 Even though Voltaire would later revise his opinion of Canada, his disparaging assessment was immortalized in Candide; see Thomas Thorner & Thor Frohn-Nielsen, eds, A Few Acres of Snow: Documents in Pre-Confederation Canadian History (Toronto: University of Toronto Press, 2009) at xiii. In 1915, Herbert Samuel presented a memorandum The Future of Palestine [CAB 37/123/43] to the British Cabinet supporting the establishment of a homeland for Jewish people in Palestine <http://en.wikisource.org/wiki/The_Future_of_Palestine>.

101 Harold Innis, Empire and Communications (Toronto: Dundurn Press, 2007).