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User Rights in Canadian Copyright Law

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It is very kind of you to invite me to talk about User Rights at the Association's Copyright Symposium. In ancient times, symposia were occasions to discuss and debate matters of great moment, to the accompaniment of copious food, wine, and revelry. Zoom of course limits the conduct of this symposium but I hope participants will take the ancient precedent to heart at their end of their internet connection. Sometimes a symposium would wait until the hunt for a wild boar was over before starting. I hope that was not the motive behind your organizers hunting me down for this talk. I shall try to avoid being the bore of your event.

Over today and tomorrow you will discuss how user rights do and should work. I'll try to set the stage by talking about where these rights now stand in Canada and how they got there. I'll concentrate on fair dealing but first I'll say a few words about the right to use unsubstantial parts of a work. This is not usually thought of as a user right, but it can be viewed that way, and it can be as important as fair dealing.

So what are user rights? We may define them as the rights that anyone has to use a copyright-protected work without interference from the copyright owner. Canada has been in the forefront of treating them as user rights instead of relegating them to the category of mere "exceptions or limitations" to copyright (from now on referred to as just "exceptions"). This shift in approach has had a major impact on how copyright disputes are being resolved in Canada today. It is also gaining adherents and interest well beyond Canada, for example Europe. And when I spoke to the Copyright Society of the USA in November 2021, the

subject they wanted me to talk on was user rights.[1] They had heard that something was happening up in Canada other than pipelines and moose; what that was and how it might affect them, they wanted to know.

Fair dealing is the most discussed user right because it cuts across all of copyright: not just literary work but also music, art, drama, movies, sound recordings, broadcasts, and performers' rights. It overlays the specific user rights conferred by copyright legislation on particular classes of work and user: the rights of non-profit libraries and archives to serve their patrons, of course, but other rights too, such as those of schools and universities to educate their students; of access rights for people who cannot see or hear well; or at all; of charities to further their aims; of places of worship to use music in their services; and so on. Some activities that just fall outside one of these specific user rights may yet qualify as a fair dealing, which functions as a sort of back-stop to these rights and also to what may be permitted under any licence taken from a copyright owner.

Before discussing fair dealing, I want to say something about the right of users to copy or otherwise use, for any purpose they like, a *non-substantial* part of a copyright-protected work — by which I mean to include all copyright matter, including sound recordings, broadcasting, and performer's rights. Let's call this the "minor use right", although it has no formal name. It is not referred to as a positive right in the *Copyright Act,* but is deducible from the right the *Act* gives copyright owners to prevent people from taking only a "substantial part" of their work.[2] The flip side must be that users are entitled to use parts of a work that are not substantial — whether they do so fairly or not does not matter. One need not rely on fair dealing if a substantial part of a work has not been copied or used: copyright has simply not been infringed and you need no defence — which is what fair dealing is.

[1] See D. Vaver, "User Rights: Fair Use and Beyond" 69:1 Jo Copyright Soc'y USA — (2022), on which part of this paper draws.

[2] *Copyright Act*, RSC 1985, ch. C-30, s. 3(1) ("*Act*").

Go to any social media site and you see the minor use right being exercised all the time, as people take bits of text, audio, or video from anywhere and tweet, re-tweet, and forward them without worry. And for the most part these uses are tolerated, either because copyright owners do not know or care, or because even if they did, they have no right to stop the use because it is a minor use and beyond their power to complain of. What uses qualify as "minor" or "non-substantial" is therefore critical.

I want to say something about this right because of a decision earlier this year in a suit the CBC brought against the Conservative Party of Canada.[4] The CBC said the Conservatives' use of sound bites in their attack ads on Justin Trudeau and the Liberals during the 2019 federal election campaign infringed the CBC's copyright in its film of the Leaders' Debate, *The National,* and their *Power and Politics* program. The Conservatives had used clips from other broadcasters too but only the CBC seemed bothered. But it lost the case: the court said that the ads and tweets were all fair dealings for the purpose of criticism. With that, I have no quarrel. What is odd is that the judge should have thought that short clips — two of which comprised a single sentence in a 5-second long clip — were each a "substantial part" of the CBC's copyright in the first place.

I think the judge was wrong: the Conservatives should have won the case because they were just making a non-substantial use — a minor use — of copyright material. The clips were used for what the people in them were saying: that had nothing to do with the CBC. It hadn't scripted the speeches; it had just recorded them. Whatever copyright lay in the candidates' expression was owned by the candidates, not the CBC; but the candidates were not complaining. The clips could therefore not be a substantial part of the CBC's copyright. That copyright protected only what skill the CBC had used to make the films as cinematographic works — the skill of a cinematographer.[5] I doubt that what the Conservatives took was even a "part" of that work, let alone a "substantial" part — it was what the Supreme Court of Canada once called a mere "particle" whose taking could not affect the value of the work as

[4] *CBC v Conservative Party of Canada* 2021 FC 425.

[5] *Act*, s. 2, definitions of "cinematographic work" & "dramatic work".

a whole.[6] Had the case been appealed on this point, the appeal should have succeeded. After all, the Court of Appeal just 3 years earlier had accepted that a page or two copied from an 80-page book was not the taking of a substantial part of it.[7] And the book was the original expression of an author, not the production of a mere recorder.

Decisions like the *CBC* case are part of a worrisome trend worldwide to bring ever smaller bits of a work within a copyright owner's control. Just because something has been taken does not make it a substantial part.[8] If two pages in eight are not a substantial part of a book, clearly not every sentence in it is either. Otherwise it is hard to see how compilations like the *Oxford Dictionary of Quotations* could ever include quotes from any post-WWII authors — but of course it does, without complaint.

So let me now turn to fair dealing (*utilisation équitable*). The fair dealing provision has been in the Canadian *Copyright Act* for literally the last century, since 1921. It was copied into the laws of most Commonwealth countries from the UK's *Copyright Act* of 1911, although it has everywhere been much tinkered with since, to cope with new technologies and practices. The US counterpart of fair dealing is "fair use". It is both similar to and different from fair dealing. (I'll use "fair dealing" to refer to the law of Canada or other Commonwealth countries, "fair use" to refer to US law.)

There are three main differences between Canadian and American concepts here. They are seen immediately the statutes are compared.

First, the US *Copyright Act* lists what factors to consider when deciding whether a use is fair.[9] Canada's *Act* does not. Instead Canadian judges have compiled their own list: you must

[6] *Cinar Corp v Robinson* 2013 SCC 73 at [25]; also *Chatterton v Cave* (1878), 3 AC 483, 492 (HL).

[7] *Canadian Copyright Licensing Agency (Access Copyright) v Canada* 2018 FCA 58 at [127]-[8].

[8] David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks,* 2nd ed (Toronto: Irwin Law, 2011), 182-5.

[9] 17 USC § 107.

consider (1) the purpose of the dealing; (2) its character; (3) its amount; (4) what alternatives to it exist; (5) the nature of the work; and (6) the effect of the dealing on the work.[10] These factors resemble those in the US, and further ones may also be taken into account in either country, depending on the facts of the case. The weight each factor gets and how it is applied may, however, differ. One cannot assume that what is decided to be a fair use in the US will automatically be a fair dealing in Canada, or *vice versa*.

Second, if something is copied in Canada for the purpose of criticism, review, and news reporting, its source must be acknowledged; otherwise the dealing will categorically not be fair.[11] No such requirement for acknowledgment appears among the US fair use factors, and whether one acknowledges there or not rarely matters.

Third, what can fairly be done with copyright-protected material is also much the same in both countries. I have already mentioned three fair dealing purposes in the Canadian *Act* — criticism, review, and news reporting — but there are five more: research, private study, education, parody, and satire.[12] The US lists three of these — research, criticism, and news reporting — and some more, but the big difference is that the US purposes are only illustrative, and any other purpose can qualify. In Canada, only the eight purposes mentioned are acceptable: nothing else is.

Some say that the fact that Canada's list of purposes is closed does not matter: Canadian judges have interpreted them so broadly that almost anything that qualifies in the US qualifies here too. That is wrong. Just as we cannot assume that how the US looks at fairness is the same way Canada does, we similarly cannot assume that Canada's limited fair dealing purposes equate to US unlimited fair use purposes. Words have meaning: adding finite quantities X, Y, and Z together does not get you to infinity in either mathematics or law.

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[10] *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13 at [50] [*CCH*].

[11] *Act*, ss. 29.1 & 29.2.

[12] *Ibid*, ss. 29, 29.1, 29.2.

Take the US case decided in 2021 where Oracle sued Google for copyright infringement. Google had copied a sizeable chunk of Oracle's Java computer code which its engineers used to create apps for Google's Android smartphone. Google did not manage to negotiate a licence to use the code, but the US Supreme Court said it need not have bothered. The judges said it was a fair use to "reimplement a Java user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program".[13] Transformation is not a stated purpose in Canada's fair dealing provisions and, however much you pull and stretch the language of the eight purposes, none fits what Google did. Had the case been litigated in Canada, Google would have needed to be as creative in finding a means to avoid infringement as it was in producing the Android platform.

Artificial intelligence programs that mine the internet for data are also a case in point. The copying they do may be a fair use in the US since the data are transformed into useful new content and applications that do not compete with the source works, thereby furthering copyright's purpose.[14] Data and text mining have been called "new forms of research" in the US[15] and may perhaps qualify as such for fair dealing purposes in Canada. The point is however far from clear-cut and an amendment to the *Act* that enacts a specific data and text mining right would be desirable.

Fair dealing comes up quite frequently in Canadian litigation, as well as elsewhere. If you've followed the continuing soap opera that is the British royal family, you will know that fair dealing was a defence run by the tabloid sued by Meghan Markle, the Duchess of Sussex, for infringing her copyright in a letter she had sent her feckless father. The tabloid said it was just

[13] *Google LLC v Oracle America Inc* 593 US — (2021), by Breyer J. Consider also *National Rifle Assn of America v Handgun Control Federation of Ohio* 15 F 3d 559 (6th Cir 1994), where an anti-gun lobby group's copying of the NRA's list of politicians for the group's opposing purposes was held fair use. "Politics" is not an allowable purpose in Canada: could the use here qualify as "research" or "criticism", generously interpreted?

[14] Eg, Matthew Sag, "The New Legal Landscape for Text Mining and Machine Learning" (2019) 66 Jo Cop Soc'y USA 291 (2019); T R Beard, G Ford, & M Stern, :Fair Use in the Digital Age" (2018) 65 Jo Cop Soc'y USA 1, 9.

[15] *Authors Guild v Google Inc* 804 F 3d 202 (2d Cir 2015), cert den (USSC, Apr 18 2016).

fairly "reporting current events" — a permitted purpose in Britain — by setting the record straight on an earlier report in *People Magazine. People* had called the letter — which it did not quote from — an olive branch from Meghan. In fact, Meghan's letter told her father off for blabbing to the press and asked him to stop. So, of course, dad sent the letter to one of the many anti-Meghan British tabloids, which reproduced half of it under the usual lurid headlines. Meghan won her case. The British courts agreed that the tabloid could correct the record on the state of relations between Meghan and her father, but it didn't need to cite half the letter to do that — just a few choice extracts would have done.[16] Canada's fair dealing defence for "news reporting" looks wider than its UK counterpart "current events", but whether the tabloid would have fared any better in Canada is an open question.

Let us now look at how fair dealing and other activities that can freely occur with copyright-protected works came to be talked of as user rights. The word "right" here is used in its common meaning of "entitlement", like the right to vote. Why does calling these things "user rights" rather than "exceptions and limitations" matter at all? Why fight over a label? Doesn't a rose by any other name smell as sweet? Well no: not everyone likes the smell of roses, and some would like them even less if they were called "stink weeds." Words matter; and nowhere more than in law. They orient how courts, lawyers, and the public think about a subject.

The fact is that those who talk of "exceptions" rather than "rights" — let us call them Exceptionalists — are really claiming that copyright's natural order is one where all uses are or should be within the copyright holder's control, and that any departure from that position must indeed be exceptional: an abnormality, an aberration. From there, it is a short step for Exceptionalists to start calling copyright "property" and drawing implications from that usage. We see this move in the assertion that became the underlying theme of a report on copyright reform that a Canadian House of Commons sub-committee produced in 1985: "'ownership is ownership is ownership'", they said; "the copyright owner owns the

[16] *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWCA Civ 1810 at [102].

intellectual works in the same sense as a landowner owns land."[18] From there the slide is easy into saying that anyone who does anything a copyright owner does not like is "taking" their property. Maybe the taking is not unconstitutional — after all, property was deliberately not included as a protected right in the *Charter of Rights & Freedoms* — but at least it should be considered exceptional: to be closely confined, and interpreted as narrowly and grudgingly as possible.

In truth the sub-committee was just talking baloney — historically, descriptively, and normatively. True, copyright is like land in one sense: you can sell it or license it or bequeath it in your will. But how can you be tossed off a copyright, the way you can be tossed off land? Can you lease a copyright for 999 years? If I dig up and carry off your garden and throw it in the sea, it's gone: you don't have it any more. What's the equivalent with copyright? There isn't any: if I infringe your copyright, you still have it; and my infringement may even make your rights more valuable.

Which goes to show there is ownership and ownership: what works for goods or land mostly does not carry over to copyright, or any other intellectual property, for that matter.

The sub-committee members would probably have agreed with how the judge in the *CBC* case thought a 5-second 1-sentence clip was a substantial part of a film's copyright; but I am willing to give large odds that not one of them thought of asking Gertrude Stein's estate for consent to riff off "a rose is a rose is a rose" by their "'ownership is ownership is ownership'" platitude ("a substantial part" of a "substantial part"?). I am willing to give even larger odds that none of them would have paid a cent had the estate asked for money.

The big problem Exceptionalists face is that copyright is a social institution, not a natural right. Copyright did not exist at common law: it had to have a statute passed to create it, and how the statute reads has changed radically over time. The Parliament that passed the first

[18] House of Commons, Standing Committee on Communications & Culture, Report of the Sub-Committee on the Revision of Copyright: *A Charter of Rights for Creators* (Ottawa: Supply & Services, 1985), 9.

copyright law in England in the reign of Queen Anne would not recognize the copyright law that sits on the books of either Britain or Canada in the the reign of Elizabeth II. Before copyright came along, people could do whatever they wished with published work: copyright became a fetter on those rights. Was not copyright the exception, and freedom the rule? Did not copyrights stop at the point that user rights started? Can copyright not be viewed as an island in a sea of user rights: the land stops where the sea begins? Why should either expanse be treated any other way than equally?

Such indeed was copyright's history up to the early 20th century. Users had plenty of rights because copyright owners had so few. If I staged *Oliver Twist* as a play, Dickens had no right to come to me and say "Please sir, I want some", let alone "some more." Dickens was not owed the gruel of royalties at all, for 19th century copyright laws in Britain and North America did not include the right to dramatise novels. In those simple times, when *tableaux vivants* were a common form of entertainment at fairs and exhibitions, I could stage a *tableau vivant* of Manet's *A Bar at the Folies Bergères* without bothering to ask the artist or pay him a cent. Artists had no right to prevent their work from being copied from two dimensions into three, or from three into two, for that matter.

Of course things have moved on since then. Dramatization and three-dimensional reproduction rights were brought under the copyright owner's control by legislation in the 20th century. The shift in thinking is exemplified in a US case where a painting appeared in the background of the set of an HBO sitcom for a total of 26.75 seconds. That, a US appeals court said, was a substantial taking, infringed the painter's copyright, and was likely no fair use either.[19] The result might well be the same in in Canada since the specific user right that allows artistic works to be included "incidentally" in a film excludes "deliberate" inclusions:[20] and anyway is a shot that lingers too long on a background picture merely "incidental"? So unless a character in the sitcom turned round and said "What a wonderful (or horrible)

[19] *Faith Ringgold v Black Entertainment TV Inc* 126 F 3d 70 (2d Cir 1997).

[20] *Act*, s 30.7.

painting!" (criticism), the copying, if found substantial, would not seem to qualify as fair dealing, since set decoration is not a stated purpose.

Copyright's island thus has grown and the sea of user rights has shrunk; yet no reason exists why sea and island should switch character. Yet switch they did for much of the 20th century in Canada, the UK, and elsewhere: copyright became the sea and user rights the island enclosed by it.[21] A shift towards expanding the island and treating fair dealing generously nevertheless started in Britain around the final quarter of the 20th century. Thus a television documentary was free to use quite a number of clips from the *The Clockwork Orange* movie — 8% of the film in total — to criticize its withdrawal from British cinemas.[23] Another documentary could use clips from an earlier television program to criticize the scourge of checkbook journalism.[24] Such cases reflected what an Ontario judge had recognized as long ago as 1951: that copyright legislation is "designed as much for the protection of the public as for the protection of copyright-owners, and calls for a fair construction — fair not only from the standpoint of copyright-owners but also from the standpoint of the public."[25]

Copyright law has always sought to balance owners' and users' interests. Without users, what is the point of copyright law at all? Copyright users are just as important as copyright owners and authors. They therefore deserve equal treatment — and that means balancing right against right, not right against exception. Right against exception starts the balance off with a big foot on one side of the scales.

It would take another fifty years for other Canadian judges to recognize these truisms. At the time British courts were taking a liberal view of fair dealing and free speech rights, the

[21] Eg *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593, 608 (CA) (fair dealing construed "strictly").

[23] *Time Warner Entertainment Co v Channel Four TV Corp plc* [1994] EMLR 1 (CA)

[24] *Pro Sieben v Carlton TV Ltd* [1999] 1 WLR 605, 614 (CA) ("criticism or review" and "reporting current events" are "expressions of wide and indefinite scope … which should be interpreted liberally".

[25] *CAPAC Ltd v Associated Broadcasting Co Ltd* [1951] OR 101 (SC) (Schroeder J), rev'd on other grounds [1952] OR 322 (CA), affd [1954] 1 WLR 1484, [1955] 2 DLR 452 (PC).

Supreme Court of Canada was saying in 1990 that copyright had but a "single object, namely, the benefit of authors of all kinds."[28] And the lower courts were taking it at its word. As late as 1996 we see the Federal Court of Canada still talking the language of "ownership is ownership is ownership". Instead of reading what the *Copyright Act* said — that fair dealing is not an infringement of copyright — and going on to say that it should therefore be "fairly" interpreted, the judge called fair dealing an "exception to copyright infringement" which should therefore be "strictly interpreted."[29] That occurred in a case where the Michelin Tire Company sued a union that was trying to organize labour at a Michelin plant in Nova Scotia. The company said the leaflets the union was distributing to workers infringed the copyright in the well-known "Michelin man" logo, by picturing him with a foot raised, ready to stomp on a worker's head. The union said it was criticizing Michelin's anti-union stance through parody, and this was fair dealing. But no, said the judge: the very idea that parody could be criticism was "radical";[35] US cases saying that parody was criticism and could be fair use were irrelevant in Canada; and anyway the union's criticism had not acknowledged the source of the logo — as if this could not be discerned elsewhere from the leaflet, and as if Michelin had lost something by not having "Source: the Michelin Tire Co" stuck alongside its well-known logo. And just for good measure, the judge went on to say that copyright was property and the union's right of free expression under the *Charter of Rights & Freedoms* did not justify trespass on copyright any more than it justified trespass on Michelin's land[36] — leading to the bizarre result that a right that is unprotected under the *Charter of Rights & Freedoms* (copyright) is treated as more important than one that is (freedom of expression).

The *Michelin* case was not appealed but almost everything said there about copyright, fair dealing, property, and the *Charter* was probably wrong when it was decided, and is certainly wrong now. It took just a decade and two Supreme Court cases to deflate *Michelin*. The first,

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[28] *Bishop v Stevens* [1990] 2 SCR 467, 478-9, quoting from English precedent.

[29] *Cie Générale Établissements Michelin v. CAW-Canada* [1996] FCJ No 1685 at [63].

[35] Parody was not specifically included as a fair dealing purpose in Canada until 2012.

[36] *Michelin,* n 29 at [101].

in 2002, was *Théberge v. Galerie d'Art du Petit Champlain Inc.*[37] It dealt indirectly with user rights by deciding that an artist's right to prevent reproduction of a poster of his could not stop a gallery from using a chemical process to lift the image physically off the poster and transfer it to canvas, leaving the poster blank. Users could do what they liked with tangible property they owned, unless the *Copyright Act* clearly stopped them. But it didn't — because *re*-production implies producing at least one additional copy. Along the way, the Court set out some basic principles that have been cited in virtually every major copyright case in Canada since:

> 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 (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).
>
> The proper balance … lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.
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> 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.[38]

These ideas were put into practice in *CCH Ltd v Law Society of Upper Canada* in 2004.[40] Law book publishers wanted royalties for the photocopying of books bought for law firm libraries. The lawyers said "no", so the publishers, supported by a copying collective, sued the Law Society of Upper Canada, now renamed the Law Society of Ontario, for copyright

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[37] *Théberge v Galérie d'Art du Petit Champlain Inc* 2002 SCC 34.

[38] *Ibid* at [30]-[32].

[40] *CCH*, n 11.

infringement. The publishers said that anytime anyone on library premises photocopied a case from one of the library's law reports, or a case summary from a digest, or a passage from a treatise, they were guilty of infringing the publishers' copyrights. So too was any librarian who copied for a book-less lawyer in rural Ontario who could not afford to drive the few hundred miles needed to Toronto every time they had to nail down a point of law. The Law Society was said to be equally at fault for letting its patrons photocopy and its librarians transmit photocopies by fax, even though the Society's guidelines restricted copying to research or other statutory purposes, and notices by its photocopy machines warned against infringement.

The Society said the activities were all fair dealing for purposes of research; that any copying by librarians anyway fell within the statutory user right allowing library photocopying; and that, if any patrons had infringed, the Society was not liable since it had not "authorized" infringement.[41]

A major problem with fair dealing is knowing when a dealing is "fair". Courts have said that definition is impossible.[42] Parliament has thus passed the task of doing the impossible to the Copyright Board and the courts because Parliament cannot itself micro-manage practices that evolve over time in response to developments in new copying and distribution technologies.

A few years ago a British judge, tasked with having to divide matrimonial property on the breakdown of a relationship, asked himself how to do that "fairly". He admitted that fairness was an "elusive concept" — "an instinctive response to a given set of facts" — but continued:

> Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising

[41] Authorization is a right reserved to the copyright owner under the closing words of s. 3(1) of the *Act*.

[42] *CCH*, n 11 at [52], quoting from *Hubbard v Vosper* [1972] 2 QB 84 (CA).

> therefore that … there can be different views on the requirements of fairness in any particular case.

There must nevertheless be "general consistency from one case to another": "[o]therwise, the law would, in truth, be but the 'lawless science' of 'a codeless myriad of precedent' and 'a wilderness of single instances' of which Lord Tennyson wrote in his poem *Aylmers Field*." [43]

The trial court in 1999 in the *CCH* case did not bother with such musings. Instead, staying consistent with the *Michelin* case, it construed the fair dealing exception "strictly" and found for the publishers. The Federal Court of Appeal in 2002, while disagreeing with the judge's approach and saying that fair dealing was indeed a "user right" that should be liberally construed,[44] nevertheless let the trial judge's conclusion stand.

Had the case stopped with the Court of Appeal, libraries and other users throughout Canada would have been in big trouble. But the Supreme Court unanimously reversed the lower courts and found for the Law Society. It said fair dealing was established and so too was the library photocopying right, if needed. The Society had its copyright and monitoring practices endorsed.

On user rights and fair dealing, Chief Justice McLachlin said this:

> 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. As Professor Vaver … has

[43] *JL v SL* [2015] EWHC 360 (Fam) at [13] & [16], quoting from UK and Australian case law.

[44] *CCH Canadian Ltd v Law Society of Upper Canada* 2002 FCA 187 at [126], citing D. Vaver, *Copyright Law* (Toronto: Irwin Law 2000), 170-1.

> explained…: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."[47]

On how the statutory purposes were to be interpreted, the Chief Justice said:

> "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. … Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.[48]

Of course, as often happens, technology gave the copyright owners the last laugh. The publishers put their legal material online and so acquired a new income stream that more than compensated them for any lost photocopying royalties. And yesterday's owners can easily become today's users; so that when the publishers were sued by the lawyers for putting pleadings and written briefs online without getting their consent, what defence finally caused the case to settle? Fair dealing for purposes of legal research, of course.[49]

The Supreme Court has not strayed from the *CCH* case. Rather, it has built on and expanded it in three later cases — two decided in 2012 and one decided in 2021. In the first case, SOCAN wanted online providers such as iTunes to pay for the snippets of music they streamed for users browsing on-line for recordings they might buy. Again the Court was unanimous, although this time Justice Abella wrote the judgment. She agreed with the lower tribunals that users were doing "research" and that iTunes' facilitation of it was a fair

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[47] *CCH*, n 11 at [48].

[48] *Ibid* at [51].

[49] *Waldman v Thomson Reuters Canada Ltd* 2014 ONSC 1288 at [92] approved in 2016 ONSC 2622 at [28] (DC) although the refusal to approve the class action settlement was reversed .

dealing.[50] In the second case, Access Copyright wanted schools to pay for photocopying short excerpts from books for the use of their students. The Copyright Board decided the copying was not fair dealing and set a royalty rate. The Supreme Court was not unanimous this time.[51] Some judges thought the Copyright Board had done nothing wrong and, being an expert tribunal, it should have the final say on fair dealing. Justice Abella for the court majority disagreed: she thought the Board had misinterpreted "research and private study" and had also not properly weighed the fair dealing factors. She told the Board to reconsider, which it later did by saying the Court had effectively endorsed the schools' practice.

So what can we deduce from these and other fair dealing cases?

First, the purposes of fair dealing should be interpreted liberally. In the *iTunes Case* this meant democratizing "research" to extend beyond what lawyers or scholars do to what ordinary members of the public when they are shopping around for products or services. Transformation of the source work was not required. In the *Schools Case,* a liberal interpretation included photocopying done for the purpose of the student's research or private study, whoever did the copying – student or teacher – and whether the research or study actually occurred in a private study or in a classroom.

Second, since fair dealing was a user right, the fairness of any dealing should be looked at as much, if not more, from the user's perspective than the copyright owner's. In the *iTunes Case*, a 30-second low grade excerpt was fair enough for the user's purpose to decide whether they liked the music enough to purchase it or look for something else. Apple merely facilitated the purpose; it made nothing off the snippets themselves, only from any final sale, which of course would benefit the copyright owner. It didn't matter that the user might listen to the excerpt more than once; the snippet did not substitute for the whole record or compete with it.

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[50] *SOCAN v Bell Canada* 2012 SCC 36.

[51] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37 (5:4 decision).

In the *Schools Case*, the excerpt each student got was fair when compared with the source work. The total amount of copying done by the institution was relevant only when one asked how the dealing affected the work. The copyright owners could show no lost sales: the excerpts came from a variety of works; they supplemented the assigned textbooks; and nobody suggested that each student should buy a whole book for just the page or two the teacher wanted read.

The case Access Copyright brought against York University, decided earlier this year, hammered this message home.[52] The question was whether the university's guidelines for producing coursepacks and other student material complied with fair dealing for the purposes of education. The guidelines were those developed by the Association of Universities and Colleges of Canada in light of the *CCH* and *iTunes* cases. They allowed the copying of short extracts for coursepacks, class handouts, or their internal electronic classrooms. Short extracts were further defined: up to 10% of a work; a single chapter from a book; a single article from a journal; a single artistic work from a collection; an entire newspaper article or page; a poem or music score from a compilation; or an entire dictionary or encyclopaedia entry. Instructor discretion was required: only what was required for the purpose could be taken.

The Copyright Board and the lower courts all said the guidelines were too generous and did not amount to fair dealing. The Supreme Court did not reach a final decision on the point. It needed the copyright owners as parties to do that. Having Access Copyright there was not good enough because it held only a non-exclusive licence from the owners, not the transfer or exclusive licence it would have needed to sue in its own name. But Justice Abella, again for a unanimous Court, did say the lower tribunals had got it all wrong by virtually ignoring the students' perspective as users. That was flatly contrary to the *Schools* photocopying case.[53] Justice Abella summarized matters by saying that:

[52] The University respected my academic freedom by not contacting me at any time in relation to this case.

[53] *York University v. Canadian Copyright Licensing Agency (Access Copyright)* 2021 SCC 32 at [103] & [105].

> modern fair dealing doctrine reflects [the Court's] more general "move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace" … Fair dealing is "[o]ne of the tools employed to achieve the proper balance between protection and access in the Act" … [I]ncreasing public access to and dissemination of artistic and intellectual works, which enrich society and often provide users with the tools and inspiration to generate works of their own, is a primary goal of copyright. [54]

We can deduce six further principles from this and other case law:

(1) The longer a work and the more that is taken, the less likely will the dealing be fair, especially where it undercuts the copyright owner's market. Fair dealing can however apply to whole works: how else can *haiku* or a photograph be criticized or reviewed? Also, if the ultimate dealing is fair, you may be initially able to take a whole work temporarily to use as the raw material for the ultimate work: if the latter is found to be a fair dealing, the taking of the whole can shelter under its umbrella.[55]

(2) A fairly operated practice may qualify as fair dealing if most uses are fair, even where some fall short.[56]

(3) Fair dealing can apply even to commercial uses from which the user profits: otherwise newspapers, biographers, or documentary film makers could not function.

(4) The dealing must be fair in relation to its purpose and medium. A fair selection copied for research may be unfair if copied into published criticism; extracts that are unfair in length for a newspaper may be fair if used in a television news film.

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[54] *Ibid* at [90] & [92].

[55] *Pro Sieben*, n 24 at 618-9.

[56] *CCH*, n 11 at [63]–[4] & [67]–[8].

(5) Dealings for mixed or multiple purposes are acceptable: criticism remains criticism even if its aim is also or mainly to amuse. The overall purpose is judged objectively: a user's sincere belief that they are criticizing is less important than whether the activity is in fact part of an exercise in criticism.

(6) Where a published work is involved, fair dealing is concerned with the purpose of the use, not how the source work was acquired. Even with unpublished works, how they were acquired is much less important than how they are used. The fact that the copy emanated from behind a paywall or involved circumventing a digital lock (TPM) does not bar the defence,[57] any more than obtaining documents illegally does: otherwise the publication of the equivalent of the Pentagon Papers could never have been occurred in Canada. Some unpublished work deserves wide circulation, at least if its source is acknowledged.[58] That the source of the dealing is a surreptitious copy of secret documents is a factor to consider but does not prevent the dealing from being fair.

One unresolved issue is whether user rights may be diminished or waived by contract or licence. The *Act* says nothing about this. In principle, however, the existence of a right may imply a corresponding duty that others honour it.60 The right may also be unable to be cut down if doing so would contravene the policy of the *Act*.[61] The That policy has been stated by the Supreme Court for the last two decades: user rights are an "essential part" of copyright protection;"[62] the *Act*'s "central" goal is not only disseminating original work but also

[57] *1395804 Ontario Ltd (Blacklock's Reporter) v Canada (A-G)* 2016 FC 1255.

[58] *CCH,* n 11 at [58].

[60] Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" 23 Yale LJ 16 (1913).

[61] On unwaivability elsewhere, see *Royal Trust v Potash* [1986] 2 SCR 351 (mortgage repayment); *Johnson v Moreton* [1980] AC 37 (HL) (tenancy security); *Davies v Davies* (1919) 26 CLR 348 (Aust) (alimony).

[62] *Euro-Excellence Inc v. Kraft Canada Inc* 2007 SCC 37 at [79], by Bastarache J.

"developing a robustly cultured and intellectual public domain;"[63] and, most recently, a "primary goal" of copyright is to increase "public access to and dissemination of artistic and intellectual works, which enrich society and often provide users with the tools and inspiration to generate works of their own."[64] How can contracts — often "created" by the click of a mouse — undermine or dispense with user rights consistently with these policies?

I conclude with something I told the Toronto Association of Law Librarians a while ago:

> Most law librarians sometime have had (or will have) the experience of trying to figure out for themselves what 'fair dealing' means in a particular instance. They soon hit a mental brick wall and go to some lawyer or self-proclaimed copyright expert to find what light they can shed on the subject.
>
> The exercise is a bit like the apocryphal occasion [in the early 20th century] where the smart-mouth English lawyer F.E. Smith (later Lord Chancellor Birkenhead) was arguing an appeal before a judge of moderate ability. The judge was having difficulty understanding the subtleties of Smith's argument. Finally when Smith had finished and sat down, the judge said to him: "Well, Mr Smith, having heard your argument, I am not one bit the wiser now than I was when you started." Smith stood up and, fixing the judge with his iciest smile, replied, "No doubt, my Lord, but at least a great deal better informed." That's pretty close to the state of mind of anyone who has tried to give or receive advice on what amounts to fair dealing, except they end up being *neither* wiser *nor* better informed than when they started.[67]

It's 27 years since I gave that talk, but I think we can say that today we are better informed and perhaps wiser about fair dealing and other user rights than we were then.

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[63] *Bell Canada*, n 50 at [10]-[1].

[64] *York University*, n 53 at [92].

[67] David Vaver, "Copyright Inside the Law Library" (1995) 53 The Advocate 355, 359.