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## The Arithmetic of Fair Dealing at the Supreme Court of Canada

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## The Arithmetic of Fair Dealing at the Supreme Court of Canada

GIUSEPPINA D'AGOSTINO<sup>1</sup>

In the 2012 Supreme Court of Canada copyright cases, the Court found an opportunity to redefine the law of fair dealing in Canada. While the Court acknowledged that fair dealing is a question of fact, and thereby properly adjudicated by triers of fact like the Copyright Board of Canada, the Court stepped in to revisit the facts all over again. When compared to its common law counterparts like the UK and the US, Canada stands alone in its willingness to rehear fair dealing cases, which are a matter of first impression.<sup>2</sup> I argue that while it is salutary to re-emphasize the existence of users' rights as per *CCH v Law Society of Upper Canada* [*CCH*], and indeed that these rights are here to stay, it cannot be beneficial for the Court to reinterpret the facts, which is the job of courts and tribunals of first instance, or to make policy, which is the job of government; here, unfortunately, the Court indulged in both. In its reasoning, the Supreme Court of Canada showcases rigid reliance on *CCH*'s six-factor framework and elevates the framework to the level of law.<sup>3</sup> Ironically, in doing so, the Supreme Court of Canada is actually going against the spirit and the benefit that *CCH* created for copyright law in Canada and, more specifically, for fair dealing.

## Fair Dealing and the Copyright Pentalogy

The Supreme Court of Canada released five copyright cases, commonly referred to as the copyright pentalogy, on the same day in July 2012, setting abuzz all circles in the legal community and beyond. Many fundamental copyright issues were raised: delineating the scope of various rights and the overlapping nature of rights in the *Copyright Act*, technological neutrality, questions of payment and, more broadly, appropriate standards of review, as each of these cases originated from the Federal Court of Appeal's judicial review of the Copyright Board of Canada decisions. Among the five cases, two dealt squarely with the doctrine of fair dealing: within certain limits, what a user can do with a substantial part of a copyright work without permission of the owner.<sup>4</sup>

In Canada, the doctrine of fair dealing is statutorily entrenched in the *Copyright Act*. As a result of the recently enacted *Copyright Modernization Act*, there are now five allowable purposes for fair dealing: (1) research or private study (s. 29); (2) criticism or review (s. 29.1); (3) news reporting (s. 29.2); (4) parody or satire (s. 29); and (5) education (s. 29).<sup>5</sup> Fair dealing is a question of fact and a matter of first impression.<sup>6</sup> The onus is on the defendant to prove that the dealing (1) fits within one of the enumerated allowable purposes; (2) is “fair”; and (3) for “criticism or review” and “news reporting”, sufficient acknowledgement is given. In *CCH*, a unanimous Supreme Court of Canada ruled that fair dealing, alongside the other exceptions in the *Copyright Act*, “must not be interpreted restrictively”<sup>7</sup> and that more or less six factors may be used when assessing fairness.<sup>8</sup> In that case, the Law Society of Upper Canada did not infringe copyright, because its Great Library request-based reproduction services fell squarely within the allowances of the fair dealing doctrine. Lawyers carrying on the business of law for profit were held to be conducting non-infringing research. Research should be accorded a “large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”<sup>9</sup>

In *SOCAN v Bell [Bell]*, Abella J for a unanimous court agreed with the Board that song previews provided by Internet service providers for consumers constituted fair dealing for the purposes

of research and thus were not subject to a tariff. Consistent with the spirit of *CCH*, the term “research” should be given a “large and liberal interpretation”. For the Court, it would be far too restrictive to limit “research” to its ordinary meaning, as it 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 be undertaken for no purpose except personal interest.”<sup>10</sup>

On the other hand, *Alberta (Education)* was a heavily contentious case, with a 5-4 split decision over the appropriate deference afforded to the Board and the interpretation of fair dealing. At issue was whether copies made at the teacher’s initiative in Kindergarten to Grade 12 classrooms and provided to students with instructions to read the material were made for the allowable purpose of research or private study.<sup>11</sup> While the matter was sent back to the Copyright Board for reconsideration, the Board later ruled that the copying at issue was fair dealing.<sup>12</sup> For Abella J’s majority, the Board misinterpreted the six fair dealing factors. For Rothstein J’s dissent, the six factors are not statutory enactments; fair dealing is a question of fact, and deference should be accorded to the Board. In both cases, the Court seized the opportunity to clarify the interpretive framework set out in *CCH*.<sup>13</sup>

In *Bell*, Abella J clarified that a generous, “low-threshold” interpretation should occur for the first part of the test, with respect to determining the allowable purposes, “so that the analytical heavy-hitting is done in determining whether the dealing was fair.”<sup>14</sup> While the Court is quite liberal in the first part of the test—some would say too liberal<sup>15</sup>—it is ironically rigid in the fairness analysis.

What follows is a discussion of the Court’s enthusiasm to rehear facts when it does not agree with the outcome, in specific reference to (1) an emerging user perspective test the Court used for determining both the allowable purpose to warrant fair dealing and the first fairness factor (i.e. the purpose of the dealing), and (2) the Court’s general approach to determine fairness: by methodically examining each of the six fairness factors proposed in *CCH*. I will tackle the latter first, as I find this development the most troubling.

### (1) Six Factors Sequence

In every decision since *CCH*, the courts have embraced a wholesale, mechanistic and absolutist adoption of the six factors. As a result, each factor is interpreted each and every time and in the same sequence. As Rothstein J rightly points out in the dissent of *Alberta (Education)*, these are not statutory requirements.<sup>16</sup> As set out in *CCH*, and as I previously argued, *CCH* endorsed certain factors that may be *more or less relevant* in future fair dealing cases. Here it is particularly important to revisit Linden JA's initial pronouncement of the interpretive fairness framework later endorsed by the Supreme Court of Canada in *CCH*:

Assessing these observations in combination with the American and British factors, I have compiled a list of factors that *should* influence the fairness of the Law Society's dealings with the Publishers' works on behalf of patrons of the Great Library. Importantly, *the elements of fairness are malleable and must be tailored to each unique circumstance. None of the factors are conclusive or binding, and additional considerations may well apply uniquely in the Canadian context.* However, the following factors are usually among the non-exhaustive list of considerations: (1) the purpose of the dealing; (2) the nature of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work in question; and (6) the effect of the dealing on that work.<sup>17</sup>

Significantly, *CCH* also acknowledged that other considerations or unnamed factors could be used to assess the fairness of a dealing. The six factors emerged as indicia for that particular case, for those particular facts,<sup>18</sup> drawing from the UK and US approaches.<sup>19</sup> Yet, since then, each case involving fair dealing has proceeded to showcase a scrupulous and exclusive adherence to these six factors.

Ironically, this six-factor absolutism all started with the Copyright Board. Shortly after *CCH* was decided, in *Tariff 22.A* the Board considered the doctrine of fair dealing even though it was not pleaded by the parties. The Board acknowledged that, “[a]lthough none of the parties addressed the legal issue directly, we must deal with it”<sup>20</sup> to

ascertain whether the way in which services deal with previews was in fact a protected act under the *Copyright Act*.<sup>21</sup> The Board found that streaming a musical preview with a view to deciding whether to purchase a download or CD constituted “research.”<sup>22</sup> As I previously argued, “[t]he Board thus embraced the liberal lead of *CCH* and systematically applied its six fair dealing factors.”<sup>23</sup> Since then, parties on either side (and here the Board or the Court is not alone in its unequivocal embrace) have argued fair dealing cases based on the six factors.

Finally, before the Supreme Court of Canada, in *Bell*, the Court acknowledged that fairness is a question of fact and similarly proceeded to mechanically consider each of the six factors:

(1) *Purpose of the dealing*: as discussed more fully later, the Court adopted an (end) user perspective test: the purpose of providing previews is primarily to facilitate research by consumers.<sup>24</sup> Interestingly, similar to *CCH*, under this factor, the Court examined the Internet service provider’s behaviour and acknowledged that the Internet service provider put “reasonable safeguards in place to ensure that the users’ dealing in previews was in fact for this purpose: the previews were streamed, short, and often of lesser quality than the musical work itself. These safeguards prevented the previews from replacing the work while still fulfilling a research function.”<sup>25</sup>

(2) *Character of the dealing*: The Court played down the *CCH* observation that a particular dealing must be unfair if multiple copies of works are being widely distributed. It noted that if the use of the work was “for a specific legitimate purpose, or if the copy no longer existed after it was used, this would favour a finding of fairness.”<sup>26</sup> In this case, each file was automatically deleted and so could not be duplicated or disseminated by users.<sup>27</sup>

(3) *Amount of the dealing*: Referring to the quantity of the work taken, and agreeing with the Board, the Court ruled that the correct interpretation is the length

of each preview compared to the length of the work (and not, as SOCAN argued, the aggregate number of previews streamed by consumers).<sup>28</sup> Importantly, the Court noted that the character of the dealing (factor no. 2) considers the aggregate of the dissemination already: that is, whether multiple copies of works are being widely distributed. As a result, considering the number of previews streamed under “amount of the dealing” (factor no. 3) would “deprive that factor of any utility in the analysis, and would erase consideration of the proportion of the excerpt of the entire work.”<sup>29</sup> Also, the Court continued, “given the ease and magnitude with which digital works are disseminated over the Internet”, focusing on the number of previews streamed would lead to disproportionate and unfair findings when compared to non-digital works and would go against the “goal of technological neutrality.”<sup>30</sup> In passing, it is unclear how technological neutrality can be seen to support the Court’s position, as the goal of “media neutrality” in *Robertson* was said not to override in any way authors’ rights.<sup>31</sup> Here again, the Court focused on the ease of dissemination of works and had a user focus.

(4) *Alternatives to the dealing*: A dealing may be less fair if there is a non-copyright protected equivalent that could have been used, or if the dealing was not reasonably necessary to achieve the ultimate purpose. While SOCAN argued that there were other methods available (e.g., advertising with album artwork, textual descriptions and return policies for buying the wrong work), the Court agreed with the Board that “[l]istening to a preview probably is the most practical, most economical and safest way for users to ensure that they purchase what they wish.”<sup>32</sup> In other words, “short, low-quality streamed previews are reasonably necessary to help consumers decide what to purchase.”<sup>33</sup>

(5) *Nature of the work*: This factor examines whether the work is one that should be widely disseminated. Here the Court pointed out that just because the previews were widely available does not mean that they were widely disseminated; if consumers are unable to locate and identify the work they wish to purchase, the work will not be disseminated.<sup>34</sup>

(6) *The effect of the dealing on the work*: This point evaluates whether the dealing adversely affects or competes with the work. Here the Court harkened back to the observation in factor no. 5: because of their short duration and lower quality, previews are not in competition with downloads of the work itself. For the Court, there was the opposite effect, as previews increase the sale and therefore the dissemination of musical works, “thereby generating remuneration to their creators.”<sup>35</sup>

In sum, the Court was satisfied with the Board’s balancing of the purposes of the Act. Practically, consumers should not need to pay for previews as their free access encourages creation and dissemination of works while ensuring that creators are fairly rewarded. Ultimately, while the Court was satisfied by the Board’s application of *CCH* in finding fair dealing in *Bell*, it was not in *Alberta (Education)*; in fact, the outcome was quite different.

### **Dangers Regarding the Six-factor Sequence: Double Counting**

The *Alberta (Education)* case illustrates a danger in the Court’s unique judicial adherence to *CCH* and its willingness to rehear facts. In *Alberta (Education)*, Abella J had “concerns over how the Board applied several of those factors.”<sup>36</sup> Among the various problems with the Board’s application of the *CCH* factors (e.g., purpose of the dealing factor [factor no. 1], which Abella J found problematic because it hinges on the user perspective),<sup>37</sup> she took great pains to go through the six factors, which I will not repeat here. As an example, she indicated that the Board misinterpreted the factors and drew the wrong conclusions

under the “character of the dealing” and the “amount of the dealing.” Significantly, for Abella J, this double counting was an error of law that rendered the Board decision unreasonable. The majority found problematic that the “quantification of the total amount of pages copied” should be considered under “character of the dealing” and not under the “amount of the dealing.” As a result of this analytical framework, by the time the Board assessed the “amount of the dealing” factor (factor no. 3), it had already considered the quantification of the dissemination: “[i]n reapplying this same quantitative concern when assessing the ‘amount of the dealing’, it conflated the two factors, which had the effect of erasing proportionality from the fairness analysis.”<sup>38</sup> In short, the “amount of the dealing factor” is not a quantitative assessment based on aggregate use, but an examination of the proportionality of the amount copied to the whole of the work. Aggregate use or quantification of the total amount of pages copied should be considered under the “character of the dealing”.

It is not at all clear how the Board erased proportionality from the fairness analysis when it made findings of fact that teachers copied “short excerpts”, and that these short excerpts were repeatedly copied by the same “class set” of books over a period of time.<sup>39</sup> Based on the extensive evidence advanced by the parties, the Board concluded that this repeated copying tended to make the dealing more unfair. At what exact point in Abella J’s six-factor sequence these facts were found should not be seen to invalidate a relative assessment of factors that are not themselves the law, nor render a decision unreasonable; nor should any one factor be interpreted as more important than another. In essence, Abella J’s point-by-point analysis is perplexing. Why would it be necessary to ensure that factor x be examined under y? The importance is that it is examined. Why be mechanistic to the point of rendering a decision unreasonable? After all, it was the same court that posited that fair dealing warrants a large and liberal interpretation. As Rothstein J indicates, the appellants themselves did not dispute the Board’s findings of fact<sup>40</sup> and its conclusions were derived independently through an analysis that considered all aspects of the dealing. As a result, “unless it is shown that the Board’s conclusion of fact that the books from the ‘class sets’ will be subject to ‘numerous requests’ was unreasonable, then the Board’s decision

should not be disturbed.”<sup>41</sup> Consequently, what we see is that undue rigidity in interpreting the six factors, sequentially, in the same order, further muddles the state of the Canadian law of fair dealing.

What may be more consistent with *CCH* and its large and liberal interpretation of fair dealing can be seen in other case law. For instance, the court in *Warman v Fournier* (2012)<sup>42</sup> found fair dealing in the context of news reporting. Free dominion, an online political discussion forum, posted an article first published in the *National Post*. Among the works in question was an excerpt of an eleven-paragraph article that consisted of the headline, three complete paragraphs and part of a fourth paragraph.<sup>43</sup> Rennie J for the Federal Court found fair dealing for the purposes of news reporting, pursuant to s 29.2 of the *Copyright Act*. The Federal Court applied *CCH* and adopted a “large and liberal interpretation” of the use of the excerpt to constitute news reporting as it promulgated the facts in the article.<sup>44</sup> The Federal Court noted that *CCH* “sets out important guiding principles in applying the fair dealing exception.”<sup>45</sup> As a result, the Court did not undertake a mechanistic interpretation of each of the six factors, as “*CCH* set out several factors that *may be relevant* in determining whether the dealing is fair...”<sup>46</sup>

The Federal Court liberally referred to the factors and noted that an application of some factors militated toward a finding of fair dealing. It noted the purpose of the dealing to be satisfied, the amount to be limited and the nature of the work to favour fair dealing. Here the Federal Court acknowledged that the article was not currently published, and this finding supported fair dealing, as one of the purposes of copyright law is to promote wider dissemination of works.<sup>47</sup> On the other hand, the Federal Court asserted that some factors weighed less strongly in favour of a finding of fair dealing (e.g., “alternative to the dealing”, as a summary could have been provided instead, and “character of the dealing”, as the excerpts were widely distributed on the Internet). On balance, while some factors were not well satisfied, the reproduction constituted fair dealing.<sup>48</sup> Whether the court was correct in finding fair dealing is not my purpose here; rather, I want to point out that the Federal Court’s approach in *Warman* was more flexible and true to the large and liberal interpretation that *CCH* intended compared to the Supreme Court’s analysis in *Alberta (Education)*.

Of interest is that in *Warman*, the Federal Court also interpreted the doctrine of substantial part. While the test is also fact based and factor based, the Court found that no substantial part of the work in question was copied and noted that “most of the factors are not directly relevant in this case given the circumstances”.<sup>49</sup> Like fair dealing, substantial part is a question of fact and involves a qualitative rather than quantitative analysis. There is no reason why the same liberal approach used in another long-standing copyright doctrine cannot also be used to interpret the factor framework set out in *CCH*.

*Warman* is currently being appealed in a post-pentalogy, post-*Copyright Modernization Act* environment. How the Federal Court of Appeal interprets *CCH* will be important and telling of whether the Supreme Court of Canada’s mechanical interpretation as seen in *Bell* and *Alberta (Education)* will prevail, or whether *CCH*’s more flexible framework will be followed.

### **Some Observations on the Six Factors**

There may be various reasons to explain why the courts (and parties, too) adhere to a six-factor approach. For instance, an explanation may be that the need to address calls for more flexibility is still seen as required in fair dealing and, at the same time, there is a starvation for more certainty. Perhaps there is still a lingering view that the US fair use model with enumerated factors is the panacea;<sup>50</sup> however, as I have already argued at length, fair use continues to confound common law jurisdictions, and after *CCH*, Canada boasted the most flexible approach compared to the US and the UK.<sup>51</sup> It is doubtful that achieving clarity by treating the six factors as law, and ultimately reinterrogating the facts considered in their application, is salutary. Indeed, as illustrated by the recent cases, it leads to more complexity, ambiguity and, ironically, rigidity. It is also unfortunate that no new factors have been considered. Note that in the US, where the fair use factors are statutorily entrenched, the courts also consider others.<sup>52</sup> For example, in *Basic Books v Kinko’s Graphics Corp.*,<sup>53</sup> the United States Court for the Southern District of New York ruled that uses of copyright material for educational purposes by Kinko’s, a commercial enterprise, were not fair use. In making its assessment, the Court

found that most of the factors weighed against fair use and considered two other factors: “monopolistic and competitive practices” (along with necessity) and “industry practices and institutional policies”.<sup>54</sup> In Canada, previous fair dealing cases before *CCH* had weighed other factors, such as motive (i.e. good or bad faith). In *Boudreau v Lin*, no fair dealing was found for private study with regard to substantial use of portions of a student’s work in a professor’s paper. The court zeroed in on the fraudulent nature of the dealing. The defendant, a professor at the University of Ottawa, had “actively” deleted the student’s name from the paper, replaced it with his own, along with that of an associate, presented the paper at a conference without credit, and sold copies of the paper to other students.<sup>55</sup> Because of the defendant’s underhanded conduct, the court mandated that fair dealing be “restrictively interpreted.”<sup>56</sup> As previously argued, it will be important to see the extent to which future cases account for bad faith. In *CCH*, the Great Library’s closely enforced Access Policy cast the defendant in a positive light. It is noteworthy that UK courts account for bad faith as well.<sup>57</sup> While the 2012 Canadian pentalogy cases did not consider this factor, it does seem appropriate that courts closely read the evidence and assess the good or bad faith conduct of the defendant. The very notion of fairness in fair dealing is antithetical to underhanded behaviour. Fair dealing should not be used to shield such conduct. At the same time, it is appropriate that good faith conduct, as is clear in the Great Library’s prudent practices, should weigh in favour of fairness or, at the very least, militate against harsher damages.<sup>58</sup> Of course it is possible that good or bad faith can be accounted for in one of the six factors (i.e. purpose of the dealing or character of the dealing factors.)<sup>59</sup> My point here is that it is less significant whether bad faith is treated as a separate factor or under an existing factor; it is important that, if relevant, bad faith should be considered in fair dealing cases when assessing fairness and, ultimately, damages.

Parties pleading fair dealing, and courts ultimately deciding those cases, should exercise flexibility when interpreting fair dealing: raise factors germane to the case and assess evidence to support them. Whether there are six factors, or seven factors, or four factors should not be the driving preoccupation. And whether one piece of evidence is considered at the wrong part of the equation should be seen with a more flexible lens.

## User Perspective for Allowable Purpose and Purpose of the Dealing

A type of user-perspective test has surfaced from the recent Canadian copyright cases. In *CCH*, while it was clear that users' rights count, it was unclear whose perspective should carry more weight.<sup>60</sup> *CCH* noted that an "objective test" should be adopted to assess the users' real purpose or motive in using the copyright work (factor no. 1). The recent Supreme Court of Canada cases clarify that it is the *end user's perspective* that counts. In *Bell*, it was the consumer's, not the Internet service provider's,<sup>61</sup> and in *Alberta (Education)*, it was the students', not entirely the teachers', and certainly not the copyright holders' perspective that counted.<sup>62</sup>

In *Bell*, the Court emphasized that the perspective of the end user should be the primary driver of the first part of the fair dealing analysis and for the allowable purpose factor.<sup>63</sup> The consumer ultimately triggers meeting copyright's objectives: "consumers used 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."<sup>64</sup> The Court's privileging of the end user is important, as it signals its need to restore what it perceives as persistent inequities in the copyright system, where consumers are seen to be gouged.<sup>65</sup> Here Rothstein J's remarks in an IP Osgoode public lecture after the pentalogy are apt: "Judges don't like double-dipping. And if they think someone is double-dipping, they will go into contortions to preclude it."<sup>66</sup> So, however meritorious the double-dipping claim (i.e. someone seen to be paying twice, or someone seems to be earning twice for the same thing), decision makers may well disregard other relevant arguments. In *ESAC*, statutory interpretation questions were trumped by double-dipping claims.<sup>67</sup> In the context of the *Alberta (Education)* and *Bell* cases, similar pro-user, pro-consumer principles may well have informed the majority's findings of fair dealing in favour of students and consumers.

For Abella J, *CCH* focused its investigation on the ultimate user, the lawyers, whose purpose was legal research, and not on the librarian's purpose.<sup>68</sup> Without the librarians, it would have been

impossible for the lawyers to access the materials. Librarians were seen as integral to the research process as enablers.<sup>69</sup> The librarians “don’t profit from this service.”<sup>70</sup> In *Bell*, more problematic is the provider’s purpose (i.e. Bell, Apple, Rogers, Shaw and Telus), as its scope is less altruistic than a librarian’s. Yet, applying the end user perspective and, indeed, a relatively low threshold, allows entry into the enumerated allowable grounds of fair dealing, and into the second part of the test on fairness. The second part of the test, and in particular factor one, the purpose of the dealing, also adopts a user-perspective test. The purpose of providing previews is primarily to facilitate research purposes of the consumers.<sup>71</sup> Here, the Internet service provider’s safeguards could be seen as akin to the librarian’s gatekeeping role in *CCH*.<sup>72</sup> The Court examined the Internet service provider’s behaviour and acknowledged that it put “reasonable safeguards” in place to ensure that the users’ dealing in previews was in fact for research, as “the previews were streamed, short, and often of lesser quality than the musical work itself.”<sup>73</sup> Consequently, these safeguards prevented the previews from replacing the work while still fulfilling a research function.<sup>74</sup>

By contrast, the *Alberta (Education)* case was more controversial. While there was no disagreement that the first step of the dealing was for the allowable ground of research or private study,<sup>75</sup> the end-user perspective as it related to the first factor caused disagreement.

Abella J, for the majority, stated that the teachers and students have a symbiotic purpose: teachers are there to facilitate the students’ research and private study.<sup>76</sup> Teachers have no ulterior motive when providing copies to students, nor do teachers make these for their own use. For Abella J, the Board drove an “artificial wedge” in distinguishing between copies made by the teacher at the request of a student, and copies made by the teacher on their own initiative.<sup>77</sup> In the end, distinguishing between these types of copies is irrelevant to the ultimate end user, the student engaging in research and private study.

Rothstein J, on the other hand, stated that the Board made no reviewable error and that the Court should not slip into a more intrusive correctness review. The Board’s “detailed and extensive analysis and decision were intelligible, transparent and justifiable.”<sup>78</sup> In other words, Abella J seized on “a few arguable statements or

intermediate findings.”<sup>79</sup> For Rothstein J, the Board made a reasonable factual conclusion and appropriately considered that the “teacher’s purpose was relevant and predominant on the facts in this case.”<sup>80</sup> The teacher’s purpose was to instruct and educate the students, “the essence of the job of teaching.”<sup>81</sup> Consequently, the teacher’s role in selecting and photocopying excerpts is for their own use and is “significantly different than the role of the Great Library Staff in *CCH*, which was completely passive.”<sup>82</sup> But for the patron requests at the Great Library, there would be no copies. Ultimately, the copying in *Alberta (Education)* mainly served the teacher’s purpose of teaching, and this was a “realistic assessment of classroom teaching.”

In *Alberta (Education)*, there is a distinction as the majority sees the end user as the ultimate perspective; where there are other users in between (e.g., teachers), those users serve a symbiotic purpose with the end user. For the dissent, one cannot be at the Supreme Court to rehear the facts, especially where the issues are “fact-based, as in the case of a fair dealing analysis.”<sup>83</sup> The Board already observed the teacher’s role in the copying as the predominant perspective and as triers of fact they were in the best position to do so.

In the result, when both fair dealing cases are considered together, the end-user perspective counts (certainly in *Bell*). But the question remains: Who is the end user? And when is there a predominant user? Can the purpose of the in-between users, such as Internet service providers, teachers and librarians, be subsumed in the end users as a symbiotic purpose, such as consumers, students and lawyers? The dissent didn’t think so in *Alberta (Education)*, yet in *Bell*, there was one end user. Curiously, Abella J disregards various common law precedents, as they stand 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.”<sup>84</sup> Similarly, Rothstein J suggests that the predominant purpose is the way to resolve this: when the in-between user is copying to fulfill their own distinct ends.<sup>85</sup> Ultimately, whether one looks at the end user or predominant user, the answer needs to be one grounded in fact, as opposed to policy.

## Policy Making at the Supreme Court of Canada

When compared to Canada's common law counterparts, such as the UK and the US, Canada stands alone in its enthusiasm to rehear fair dealing cases, which are a matter of first impression.<sup>86</sup> So while the Court acknowledged that fair dealing is a question of fact and thereby properly adjudicated by the lower courts (or, in this case, expert tribunals like the Copyright Board of Canada), the Court steps in to revisit the facts. This Canadian interventionism is set against other higher courts that rarely rehear fair dealing cases. In fact, over the last twenty years, the UK House of Lords, the Australian High Court and the Supreme Court of New Zealand have heard no fair dealing cases, the US Supreme Court has heard two fair use cases<sup>87</sup> and Canada has now heard three fair dealing cases<sup>88</sup> and has noted its importance in copyright law in another.<sup>89</sup> It seems that when common law courts outside of Canada do hear fair dealing cases, they are contained to their role of judicial interpretation and do not overreach into law and policy making.<sup>90</sup>

What seems to be at the core of the Court's approach in the six-factored fair dealing evaluation and the end-user perspective test is its ongoing preoccupation with users. The outcome in these cases is seen in *Alberta (Education)*, where Rothstein J would like the Court to confine itself to its role to interpret the law, while the majority prefers to disregard evidence-based analysis that already occurred at the Copyright Board, and to reinterpret the facts so as to fit its own view of the law and policy. In *Alberta (Education)*, the Court seems to favour a worldview of open, accessible and free collaboration and commerce where the end users, the students, are centre stage. Abella J intimates that creative content, the raw materials that can stimulate learning, creative thinking and, ultimately, the economy, should not be "locked away" in tariffs, burdened by additional fees, but should be given the widest possible access.<sup>91</sup> It seems the majority wants to encourage dissemination from the ground up. The cases thus prioritize the rights of the individual and everyday user, who would likely have been most affected by the tariffs.

This development continues to be expected. As I have argued in *Healing Fair Dealing*, because of the increasing expanse of owner's rights (more works subject to copyright protection, and subject to different types of intellectually property rights), longer terms of protections and more grounds of (criminal) liability, there has been a push back to create more rights for users.<sup>92</sup> The recent *Copyright Modernization Act* consultations and accompanying commentary in the online, terrestrial and media space is evidence of this push. The need to support user rights is equally unsurprising. As David Vaver has recently argued:

It may not just be the *Charter* that is affecting how the Supreme Court views copyright today. International human rights law may be playing its part too. ... For when Justice Abella spoke of achieving a “proper balance between protection and access”, she was partly reflecting how international human rights law treats IP.<sup>93</sup>

Vaver notes that while Rothstein J dissented in *Alberta (Education)*, in *Bell*, Abella J spoke for a unanimous court.<sup>94</sup> And so, all the judges shared her position on at least some fundamental aspects of the role of copyright law in a modern society.

Another development that continues, and this one is unfortunate, is that creators are still the castaways in the copyright balance. Since *Théberge*, courts have come to see promoting the public interest as against rewarding the creators.<sup>95</sup> So while the Court is correct to state that there has been a shift in its preoccupation toward users, as confirmed in *CCH*, I would hesitate to endorse its view that Canada had an author-centric view to begin with.<sup>96</sup> In fact, authors have been the rhetorical stand-ins for *owners* since the onset of copyright law.<sup>97</sup> In reality, with little adequate copyright protection, contract law governs authors' rights, and they typically transfer their rights to new owners (i.e. publishers and others) who give little in return.<sup>98</sup> As a result, what we continue to see in the jurisprudence is a welcome pronouncement of users' rights and a lack of consideration of authors (and the unsatisfactory realities they also face), who are also integral to the balancing formula for copyright and an essential part in furthering the public interest. What may be more accurate to

reflect in the literature and case law is a need to limit less the author's and more the owner's rights.<sup>99</sup> Unfortunately, in *Bell*, Abella J suggests that in privileging the user, copyright law's objectives are met, as more buying will lead to more purchases and compensation to creators.<sup>100</sup> What the Court assumes will happen (i.e. compensation for creators) is a stretch for a number of reasons not limited to consumers actually buying the music, nor to creators ultimately receiving compensation from the current configuration of copyright management.

### Parting Thoughts

Because of the copyright pentalogy, what we now have is, ironically, a fair dealing framework that is far more rigid than before. While fair dealing is said to be a matter of fact and impression and was to have been given a large and liberal interpretation per *CCH*, assessing fairness has now become arithmetic. In addition, the Court has sent the message that parties must avoid double counting or their case will be found to be unreasonable. What would be unfortunate and counter *CCH* is that if each of the six factors was not considered in future cases, or if fewer factors were considered, it would likely create grounds for appeal. If Parliament wanted each of the fair dealing factors to be considered as law, it would have said so in the copyright amendments.<sup>101</sup> If Parliament wanted to ensure that a Berne three-step analysis be included in section 29 of the *Copyright Act* or if it wanted to indicate that one fair dealing factor had priority over the others, it would have said so as well.<sup>102</sup> Its reticence can be taken as agreement that *CCH*'s large and liberal interpretation with its *more or less* six factors is sufficiently clear and is the correct framework.

Rather, Parliament found it important to expand on the enumerated categories for fair dealing, no doubt encouraged by *CCH*'s existing large and liberal interpretive framework. Parody and satire are obvious additions, but it is in the new category of education that future controversy will reside.<sup>103</sup> This amendment, coupled with the *Alberta (Education)* decision and the general bent of a pro-user Supreme Court of Canada, makes for a weary time for authors and owners, as they are at the "front end" of the copyright system rather than the "end user" end. I don't think anyone now has doubts that

users have rights. Like no other commonwealth court, Canada's Supreme Court has proclaimed that message loud and clear. The message that I hope the Court considers as well is that other players are also an integral part of the copyright balance. Ultimately, a way forward may be to go back to the ruling and spirit of *CCH* and weigh with approval Rothstein J's dissent.

Increasing certainty in fair dealing is important; it is a long-standing preoccupation for all parties, not to mention the courts. But increased certainty will not happen in computing the optimal interpretive equation or by mechanically interpreting a specific set of factors.<sup>104</sup> What may be more useful is to appreciate that Canada now boasts the legal tools to attain a large and liberal fair dealing interpretive framework. This flexible framework recognizes that there is no one-size-fits-all six-factor approach and that a more nuanced approach may be necessary depending on the types of uses at issue, over time.

For instance, in a similar vein, Pamela Samuelson in the US argues for a more thoughtful and less rigid approach to deciding fair use cases. She suggests "unbundling fair uses" into "policy-relevant clusters."<sup>105</sup> The goal is to provide "courts with a more useful and nuanced toolkit for dealing with the plethora of plausible fair uses than can be achieved merely by focusing on the four factors set forth in the statute."<sup>106</sup> She also notes that, "given the considerable overlap among these uses...it makes little sense to organize fair use case law around each of these six uses."<sup>107</sup> Indeed, one of the goals of her work is "to embolden courts to consider additional factors, especially those of particular salience in certain policy clusters."<sup>108</sup>

Parties and, ultimately, courts would do well to work within the current large and liberal fair dealing framework, as more complex uses of works will continue to arise. Aspiring toward a rigid interpretive structure will do little to achieve the balance sought by the Court in *CCH*, or meet the larger objectives copyright seeks.

And above all, to ensure that more meaningful clarity is attained, as I argued elsewhere and as was endorsed in *CCH*, it is salutary for various groups to come together and fashion user guidelines.<sup>109</sup> For instance, Patricia Aufderheide and Peter Jaszi recommend putting the balance back into copyright by "making a code of best practices in fair

use.”<sup>110</sup> The same strategy can be applied to reach similar codes for specific sectors of Canada’s copyright communities that comport with fair dealing.<sup>111</sup> Artists, musicians, writers and other creators (who are often on both sides of the issues as creators and users) and other individuals do not have the resources necessary to go to the court to obtain clarity.<sup>112</sup> In this way, protracted litigation may be avoided and equally important access to justice issues addressed.




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<sup>1</sup> The author would like to thank Osgoode JD students Benjamin Farrow and Mekhala Chaubal for their research assistance.

<sup>2</sup> *Hubbard v Vosper*, [1972] 2 QB 84 at para 94 (CA) [*Hubbard*], cited with approval in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 52, [2004] 1 SCR 339 <<http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>> [*CCH*].

<sup>3</sup> *CCH*, *supra* note 2 at paras 53-60.

<sup>4</sup> Giuseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use” SSRN (2008), 53 McGill LJ 309 <<http://ssrn.com/abstract=1014404>> [D’Agostino, “Healing Fair Dealing”].

<sup>5</sup> *Copyright Act*, RSC 1985 c C-42 <<http://laws.justice.gc.ca/en/C-42/>>; *Copyright Modernization Act*, SC 2012 c 20 <[http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012\\_20/page-1.html](http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012_20/page-1.html)> (parody or satire and education were recent additions).

<sup>6</sup> *Hubbard*, *supra* note 2 at para 94.

<sup>7</sup> *CCH*, *supra* note 2 at para 48.

<sup>8</sup> *Ibid* at paras 53-60.

<sup>9</sup> *Ibid* at para 51.

<sup>10</sup> *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at para 22, [2012] 2 SCR 326 <<http://canlii.ca/t/fs0vf>> [*Bell*].

<sup>11</sup> *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 <<http://canlii.ca/t/fs0v5>> [*Alberta (Education)*].

<sup>12</sup> *Re: Access Copyright - Elementary and Secondary School Tariff (2005-2009)* (19 September 2012) (CB) <<http://www.iposgoode.ca/wp-content/uploads/2012/09/Access-Copyright-Ruling-Sept-19-2012.pdf>>.

<sup>13</sup> *Alberta (Education)*, *supra* note 11.

<sup>14</sup> *Bell*, *supra* note 10 at para 27.

<sup>15</sup> Casey Chisick, “Thoughts on SOCAN v Bell” (Remarks delivered at the IP Osgoode & Osgoode Professional Development (OPD) Copyright Teleseminar, September 13, 2012).

<sup>16</sup> *Alberta (Education)*, *supra* note 11 at para 39.

<sup>17</sup> *CCH Canadian Ltd. v Law Society of Upper Canada*, 2002 FCA 187 at para 150, 212 DLR (4th) 385, 18 CPR (4th) 161, 224 FTR 111 <<http://www.canlii.org/en/ca/fca/doc/2002/2002fca187/2002fca187.html>> [*CCH (CA)*], *aff’d CCH*, *supra* note 2 [emphasis added].

<sup>18</sup> *CCH (CA)*, *supra* note 17 at para 150.

<sup>19</sup> *CCH*, *supra* note 2 at para 53; Giuseppina D’Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Northampton, MA: Edward Elgar Publishing, 2010) at 320 [D’Agostino, *Copyright, Contracts, Creators*].

<sup>20</sup> *Re: Collective Administration of Performing Rights and of Communication Rights*, [2007] CBD No 7 at para 102, 61 CPR (4th) 353 <<http://www.cb-cda.gc.ca/decisions/2007/20071018-m-e.pdf>> [*Re: Collective*].

<sup>21</sup> Giuseppina D’Agostino, “Copyright Exceptions and Limitations and Copyright Board of Canada” in Association Littéraire & Artistique Internationale (ALAI) Canada, ed, *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Cowansville, QC: Yvon Blais, 2011); see also D’Agostino, *Copyright, Contracts, Creators*, *supra* note 19 at 333-35 (in earlier decisions, the Board made *obiter dicta* statements on the potential applicability of the fair dealing doctrine to licensing issues and the need for further clarification).

<sup>22</sup> See D’Agostino, *Copyright, Contracts, Creators*, *supra* note 19 at 333-35 (discussion of the Board’s application of fair dealing).

<sup>23</sup> *Ibid* at 334-35 (discussion of the Board’s comments on the potential applicability of fair dealing in earlier decisions such as *Re Media Monitoring (2000-2005)*, [2005] CBD No 4 <<http://www.cb-cda.gc.ca/decisions/mm29032005-b.pdf>>, and the dissent in *Re Breakthrough Films & Television 2004-UO-TI-33*, [2005] CBD No 15 <<http://www.cb-cda.gc.ca/unlocatable/156r-b.pdf>>).

<sup>24</sup> *Bell*, *supra* note 10 at para 34.

<sup>25</sup> *Ibid* at para 35.

<sup>26</sup> *Ibid* at para 37.

<sup>27</sup> *Ibid* at para 38.

<sup>28</sup> *Ibid* at para 41.

<sup>29</sup> *Ibid* at para 42.

<sup>30</sup> *Ibid* at para 43, citing *Robertson v Thomson Corp*, 2006 SCC 43 at para 49, [2006] 2 SCR 363 <<http://canlii.ca/t/1pqw1>> [*Robertson*].

<sup>31</sup> *Robertson*, *ibid* at para 49 (“Media neutrality is not a license to override the rights of authors—it exists to protect the rights of authors and others as technology evolves.” Unfortunately, it seems that the majority in *Robertson* became the dissent in *Entertainment Software Association v Society of Composers, Authors and Music*

*Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231 <<http://canlii.ca/t/fs0v7>> [ESA], one of the pentalogy cases. In *ESA*, Abella J's dissent in *Robertson* on media neutrality came back with a vengeance on technological neutrality to eviscerate s 3 bundle of rights). See D'Agostino, *Copyright, Contracts, Creators*, *supra* note 19 at 145-46 (on media neutrality in *Tasini*) and *Robertson* discussion at 153.

<sup>32</sup> *Bell*, *supra* note 10 at para 46, citing *Re: Collective*, *supra* note 20 at para 114.

<sup>33</sup> *Bell*, *supra* note 10 at para 46.

<sup>34</sup> *Ibid* at para 47.

<sup>35</sup> *Ibid* at para 48.

<sup>36</sup> *Alberta (Education)*, *supra* note 11 at para 14.

<sup>37</sup> See discussion *infra*.

<sup>38</sup> *Alberta (Education)*, *supra* note 11 at para 30.

<sup>39</sup> *Statement Of Royalties To Be Collected By Access Copyright For The Reprographic Reproduction, In Canada, Of Works In Its Repertoire (Educational Institutions – 2005-2009)*, [2009] CBD No 6 at paras 102-04 <<http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf>> (It is “more than likely that class sets will be subject to ‘numerous requests for [...] the same [...] series’”).

<sup>40</sup> *Alberta (Education)*, *supra* note 11 at para 54, citing *Re: Collective*, *supra* note 20 at para 50.

<sup>41</sup> *Alberta (Education)*, *supra* note 11 at para 54.

<sup>42</sup> *Warman v Fournier*, 2012 FC 803, [2012] FCJ No 851 <<http://canlii.ca/t/fs2s2>> [*Warman*] (Subject to appeal as at 24 September 2012. See initial commentary in Michael Geist, “All the News That’s Fit to Post and Link: Federal Court Clears Up Legal Risks”, *The Toronto Star* (30 June 2012) <<http://www.thestar.com/business/article/1219975--all-the-news-that-s-fit-to-post-and-link-federal-court-clears-up-legal-risks>>).

<sup>43</sup> Initially, the website had posted the entire article, but after the *Post* complained, only an excerpt was posted.

<sup>44</sup> *Warman*, *supra* note 42 at para 31.

<sup>45</sup> *Ibid* at para 30.

<sup>46</sup> *Ibid* at para 32, citing *CCH*, *supra* note 2 at para 53 [emphasis added]; see also D'Agostino, “Healing Fair Dealing”, *supra* note 4.

<sup>47</sup> Albeit, in terms of the nature of the work, I have argued elsewhere that this interpretation is problematic. See *Healing Fair Dealing*, *supra* note 4 at 323, 347.

<sup>48</sup> *Warman*, *supra* note 42 at para 34.

<sup>49</sup> *Ibid* at para 26 (dealing with the five-factor test for substantial part described in *U & R Tax Services Ltd v H & R Block Canada Inc*, [1995] FCJ No 962 at para 35).

<sup>50</sup> 17 USC § 107 (2000); see also discussion of the section in D'Agostino, *Copyright, Contracts, Creators*, *supra* note 19 at 314, 344-56.

<sup>51</sup> *Ibid* at 356-57.

<sup>52</sup> *Ibid* at 346-51.

<sup>53</sup> 758 F Supp 1522 (SDNY 1991).

<sup>54</sup> *Ibid* at 1535-38.

<sup>55</sup> (1997), 75 CPR (3d) 1 (Ont Sup Ct) <<http://canlii.ca/t/1w8pw>> [*Boudreau*] (discussed in D'Agostino, *Copyright, Contracts, Creators, supra* note 19 at 335-336).

<sup>56</sup> *Ibid*.

<sup>57</sup> See *Hyde Park Residence Ltd v Yelland & Others*, [2000] EWCA Civ 37 at para 36 and *Pro Sieben Media AG v Carlton UK Television Ltd*, [1998] EWCA Civ 2001, [1999] 1 WLR 605 at 614.

<sup>58</sup> Various copyright decisions when assessing damages will turn to some consideration of good or bad faith. For instance, in *Century 21 Canada Ltd. Partnership v Rogers Communications Inc*, 2011 BCSC 1196 at para 253, 96 CPR (4th) 1 <<http://canlii.ca/t/fn00h>>, the court considered the defendant's "bad faith" better dealt with in assessing damages than under "character of the dealing", which is concerned with use of the work, not how it was obtained. See also Simon Frankel & Matt Kellogg, "Bad Faith and Fair Use" SSRN (September 2012) <<http://ssrn.com/abstract=2165468>> at 2-3, arguing that while "the 'bad faith' inquiry has made increasingly frequent and prominent appearances in fair use decisions", doing so is "poor law and poor practice". Though the authors do seem to favour the need to consider bad faith in assessing damages as doing so is consistent with "copyright's economic bargain." See also *ibid* at 8-9.

<sup>59</sup> See *Boudreau, supra* note 55 at para 50, which could be read post-*CCH* to consider bad faith in the fairness analysis.

<sup>60</sup> See D'Agostino, *Copyright, Contracts, Creators, supra* note 19 at 321.

<sup>61</sup> *Bell, supra* note 10 at paras 28-30.

<sup>62</sup> *Alberta (Education), supra* note 11 at paras 22-23.

<sup>63</sup> *Bell, supra* note 10 at paras 8, 29, 34. (The consumer's perspective was seen as akin to the lawyer's perspective in *CCH*, and not the library's perspective, whose purpose was legal research.)

<sup>64</sup> *Ibid* at para 30.

<sup>65</sup> See Michael Geist, "Supreme Court of Canada Stands Up For Fair Dealing in Stunning Sweep of Cases", Michael Geist Blog (12 July 2012) <<http://www.michaelgeist.ca/content/view/6588/125/>>.

<sup>66</sup> M Rothstein, "Reflections on the Supreme Court of Canada's 2012 Copyright Decisions" (Remarks delivered at the IP Osgoode speaker series, Osgoode Hall Law School, 27 November 2012), *Intell Prop J* [forthcoming in 2013]. Rothstein was speaking in the context of *ESA, supra* note 31 at para 43, where the court held that downloads of video games containing a musical work were not "communications" under the *Copyright Act*. For the majority, consumers should not have had to pay twice for the hard copy of the game and then again on the Internet.

<sup>67</sup> *Ibid* at 9.

<sup>68</sup> *Bell, supra* note 10 at para 29.

<sup>69</sup> *CCH, supra* note 2 at para 64 (Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to con-

duct the research required to carry on the practice of law.).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Bell*, *supra* note 10 at para 34.

<sup>72</sup> *Ibid* at para 35.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Alberta (Education)*, *supra* note 11 at para 14.

<sup>76</sup> *Ibid* at para 23.

<sup>77</sup> *Ibid* at para 24.

<sup>78</sup> *Ibid* at para 60.

<sup>79</sup> *Ibid* at para 59.

<sup>80</sup> *Ibid* at para 42.

<sup>81</sup> *Ibid* at para 43.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid* at para 59.

<sup>84</sup> *Ibid* at para 21. Of note is that Abella J does not consider *Boudreau*, *supra* note 55.

<sup>85</sup> *Ibid* at para 45.

<sup>86</sup> *Hubbard*, *supra* note 2 at para 94.

<sup>87</sup> *Metro-Goldwyn-Mayer Studios, Inc, et al v Grokster, Ltd, et al*, 545 US 913, 380 F 3d 1154 (2005) <<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=04-480>>; *Luther R Campbell aka Luke Skyywalker, et al, Petitioners v Acuff-Rose Music, Incorporated*, 510 US 569, 114 S Ct 1164 (1994) <<http://www.law.cornell.edu/supct/html/92-1292.ZS.html>> (see discussion of transformative use, parody and fair use at 2); *Eric Eldred, et al v John Ashcroft, Attorney General*, 537 US 186, 123 S Ct 769 (2003) <<http://www.law.cornell.edu/supct/html/01-618.ZS.html>>; see also *Quality King Distributors, Inc, Petitioner v Lanza Research International, Inc*, 523 US 135 at 10, 22 <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=523&page=135>> (the importance of the fair use defence).

<sup>88</sup> *CCH*, *supra* note 2; *Bell*, *supra* note 10; *Alberta (Education)*, *supra* note 11.

<sup>89</sup> *Euro-Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37 at paras 77-79, [2007] 3 SCR 20 <<http://canlii.ca/t/1s72h>> (where the SCC revisits *CCH* and notes that “fair dealing is an essential part of copyright protection, and...is constitutive of the idea of the wrong in copyright law.”); *CCH*, *supra* note 2.

<sup>90</sup> The recent UK High Court case of *Newspaper Licensing Agency Ltd v Meltwater Holding BV*, [2010] EWHC 3099 (Ch) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/newspaper-licensing-agency-ltd-others-v-meltwater-holding-bv.pdf>> is a demonstration of the EWHC’s attempt to clarify the existing principles of fair dealing as they stand in UK law. The court considered the common law test for fair dealing and consistent with past precedent, ruled that commercial uses are not allowed under fair dealing.

While the high courts of Australia and New Zealand have not recently ruled on fair dealing, The Australian Law Reform Commission is currently reviewing copyright exceptions (among the questions are whether it should adopt a fair use model). For discussion see Australian Law Reform Commission, *Copyright and the Digital Economy* (Issues Paper 42) (Sydney: Australian Law Reform Commission, 2012) <[http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole\\_ip\\_42\\_4.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_ip_42_4.pdf)> at 62-79 [ALRC Report]. For New Zealand, see the discussion on copyright exceptions in the context of the Trans-Pacific Partnership <<http://www.citizen.org/documents/NewzealandproposedIPChaptertext.pdf>>, explored in James Love, “Leak of TPP text on copyright Limitations and Exceptions” (3 August 2012) <<http://keionline.org/node/1516>>.

<sup>91</sup> See *Alberta (Education)*, *supra* note 11 at para 32 (“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 demonstrably an unrealistic outcome”).

<sup>92</sup> D’Agostino, “Healing Fair Dealing”, *supra* note 4 at 312-13.

<sup>93</sup> David Vaver, “User Rights” (Paper delivered at “Copyright in 2012 – A Panel Discussion on New Judicial Developments and Other Copyright Topics and Themes” for the Toronto Computer Lawyers Group, Toronto, 25 October 2012) [unpublished, copy on file with author].

<sup>94</sup> *Ibid.*

<sup>95</sup> See *Bell*, *supra* note 10 at para 8; D’Agostino, “Healing Fair Dealing”, *supra* note 4 (cited with approval in *Bell*, *supra* note 10 at para 26); D’Agostino, *Copyright, Contracts, Creators*, *supra* note 19.

<sup>96</sup> See *Bell*, *supra* note 10 at paras 9-11.

<sup>97</sup> See D’Agostino, *Copyright, Contracts, Creators*, *supra* note 19 (and, in particular, chapters 2 and 3: “Historically, the author appeared to be both a pawn for the booksellers and for the draftsmen, and less the object of social policy”).

<sup>98</sup> *Ibid.*; see also *Robertson*, *supra* note 30; see also *New York Times Co v Tasini*, 533 US 483 (2001) <<http://www.law.cornell.edu/supct/html/00-201.ZS.html>>.

<sup>99</sup> *Bell*, *supra* note 10 at para 9, citing with approval Carys J Craig, “Locke, Labour and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law” SSRN (2002), 28 Queen’s LJ 1 at 14-15 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2078157](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078157)>.

<sup>100</sup> *Bell*, *supra* note 10 at paras 30, 48 (see discussion above and at para 48 in particular).

<sup>101</sup> During the committee hearings on C-11 (and earlier on C-32), arguments were heard on both sides: to legislate the six factors (e.g., Trosow, Geist) and not to legislate the six factors (D’Agostino).

<sup>102</sup> See Jean Bouchard’s testimony to the Legislative Committee on Bill C-11, 41st Parl, 1st Sess (28 February 2012) <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5405461&Language=E&Mode=1&Parl=41&Ses=1#Int-6743633>>.

<sup>103</sup> In support of this predicament, see the US, where Samuelson states: “Sharply divergent views on fair use exist in the educational and research use case law, and it is in this cluster that fair use are least predictable.” Pamela Samuelson, “Unbundling Fair Uses” SSRN (8 January 2009) <<http://ssrn.com/abstract=1323834>> at 6 [Samuelson].

<sup>104</sup> See discussion in D’Agostino, *Copyright, Contracts, Creators*, *supra* note 19 at 314 where many leading scholars have lamented the lack of clarity in US fair use, which features four-statutory based factors in assessing fairness.

<sup>105</sup> Samuelson, *supra* note 103 at 5 (arguing that three main policies underpin Sec 107’s six non-exhaustive list of allowable fair uses: “promoting free speech and expression interests of subsequent authors and the public, the ongoing progress of authorship, and learning”).

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid* at 73.

<sup>109</sup> See D’Agostino, “Healing Fair Dealing”, *supra* note 4; D’Agostino, *Copyright, Contracts, Creators*, *supra* note 19.

<sup>110</sup> Patricia Aufderheide & Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (Chicago: University of Chicago Press, 2011) at 128.

<sup>111</sup> See examples in D’Agostino, *Copyright, Contracts, Creators*, *supra* note 19 at 361–62 for Canada, and Aufderheide & Jaszi, *supra* note 110.

<sup>112</sup> See *ALRC Report*, *supra* note 90 at 77, pointing out access to justice issues, among a list of reasons to consider when determining the viability of adopting a US fair use model for Australia.