
Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use

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Given the owner-centred nature of current copyright regimes, many commentators are calling for greater consideration of user rights and, more particularly, the development of fair dealing, a legal doctrine that allows for certain uses of copyrighted material without permission of the copyright owner. Fair dealing in Canada has been criticized as weak and overly restrictive, applying only to works used for a closed list of purposes. The Supreme Court of Canada's 2004 decision in *CCH Canadian Ltd. v. Law Society of Upper Canada (CCH)*, which elevated fair dealing from a set of exceptions to a user right, has strengthened fair dealing but has also created uncertainty about its scope.

To arrive at a better understanding of Canada's current fair dealing framework, the author presents a historical analysis of Canadian fair dealing and compares Canada's regime with those of the United Kingdom and the United States. Despite *CCH*'s liberalizing effect, the doctrine remains somewhat restrictive, but it also has features that render it more capable than its U.S. and U.K. equivalents of attaining the balance of interests that copyright regimes seek. U.K. fair dealing lags behind Canada: certain criteria have emerged from the case law consonant to Canada's pre-*CCH* framework and in many ways there is now a hierarchy of factors with market considerations at the fore. The concept of U.S. fair use, which theoretically allows any type of use to be "fair" and merely provides factors to assist courts in their decision-making, presents a more effective option, though it too has weaknesses and cannot simply be transplanted into another jurisdiction. Canada should rather seek to build on the distinctive features of its fair dealing regime, such as its policy preoccupations that avoid championing owners' rights, and factors for determining fair dealing that are more flexible than those in U.S. fair use. In doing so, the author cautions against eclipsing creators (who are seldom owners) and whose treatment may have become more ambiguous after *CCH*. The author suggests several ways of improving fair dealing. These solutions are not limited to legal reforms, but also involve grassroots approaches. Copyright best practices developed by users themselves are particularly promising, having already contributed to findings of fairness in *CCH* and other cases.

Vu la nature des régimes actuels de droit d'auteur, centrés sur les intérêts des propriétaires, plusieurs auteurs réclament une meilleure prise en considération des droits des utilisateurs, plus particulièrement un développement approfondi du principe d'utilisation équitable, qui permet certaines utilisations des œuvres protégées sans la permission du titulaire du droit d'auteur. L'utilisation équitable au Canada a déjà été critiquée comme étant faible et trop restrictive, s'appliquant seulement à du matériel utilisé à certaines fins précises. La Cour suprême du Canada, avec sa décision de 2004 dans *CCH Canadian Ltd. c. Law Society of Upper Canada (CCH)*, qui a élevé l'utilisation équitable d'une série d'exceptions à un droit des utilisateurs, a renforcé l'utilisation équitable mais a aussi créé de l'incertitude quand à sa portée.

Afin d'arriver à une meilleure compréhension du régime actuel d'utilisation équitable au Canada, l'auteure présente une analyse historique du principe et compare le régime canadien à ceux du Royaume-Uni et des États-Unis. Malgré l'effet libéralisateur de *CCH*, le principe reste restrictif, bien qu'il possède aussi des caractéristiques qui le rendent mieux équipé à atteindre l'équilibre des intérêts que poursuit tout régime de droit d'auteur. L'utilisation équitable au Royaume-Uni tire de l'arrière par rapport à la situation au Canada : certains critères issus de la jurisprudence sont semblables à ceux du régime canadien d'avant *CCH* et il y a maintenant une hiérarchie de facteurs qui favorisent les considérations du marché. Le concept américain de «*fair use*», qui permet théoriquement n'importe quelle type d'utilisation et ne fournit que des facteurs pour assister les tribunaux dans leurs décisions, présente une option plus efficace, mais qui a aussi quelques faiblesses et qui ne peut simplement être transplantée au sein d'une autre juridiction. Le Canada devrait plutôt tenter de bâtir sur les caractéristiques distinctes du régime actuel d'utilisation équitable, comme certaines préoccupations qui évitent de promouvoir de façon excessive les droits des propriétaires, et sur des facteurs qui sont plus flexibles que ceux en vigueur aux États-Unis. L'auteure est prudente par sa volonté de ne pas éclipser les créateurs, qui ne sont que parfois les propriétaires de leurs œuvres et dont le traitement est devenu plus confus après *CCH*. L'auteure suggère plusieurs façons d'améliorer le régime. Ces solutions ne se limitent pas à des réformes juridiques, mais comprennent aussi des approches «populaires», c'est-à-dire des «*best practices*» développées par les usagers eux-mêmes et qui sont particulièrement prometteuses, ayant déjà contribué à déterminer qu'une utilisation est équitable dans *CCH* et plusieurs autres arrêts.

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Introduction

The copyright doctrine of fair dealing could have made its first statutory appearance as early as 1842. It was 1842 when a fair dealing facsimile was introduced for debate in Parliament in the United Kingdom. If passed, clause 15 of the bill to amend the then-existing Copyright Act would have been the United Kingdom's first fair dealing provision "allow[ing] extracts [of copyrighted works] for purposes of 'criticism', 'judgement', or 'argument'."¹ However, this provision was eventually deleted before the bill arrived to the House of Lords because it was thought to impede the "general diffusion of literature"² and to be "entirely inconsistent with the public interest."³ Today's view is much different: fair dealing is said to *advance* the general diffusion of literature and promote the public interest.⁴

This marked shift in thinking about copyright and the importance of fair dealing is understandable. Over the course of the years, there has been an expanse in copyright protection. Copyright owners have demanded more and more rights. Many scholars have tracked this expanse, pointing to more works subject to copyright protection (and subject to different types of intellectual property laws), longer terms of protection, and more grounds of (criminal) liability.⁵ The law has not been the sole culprit: courts and invariably owners themselves through private ordering have

¹ (1842) 62 Hansard's Parliamentary Debates (3rd) 890 at 890 [Debate 1842] (debated during a House Committee meeting on 20 April 1842, prior to the reporting stage of the bill). The bill received royal assent on 1 July 1842 and passed the *Copyright Act, 1842* ((U.K.), 5 & 6 Vict., c. 45), amending the predecessor *Copyright Act, 1814* ((U.K.), 54 Geo. III, c. 156). For an excellent resource on primary historical copyright material, see *Primary Sources on Copyright, 1450–1900*, online: Copyright History <www.copyrighthistory.org>.

² Debate 1842, *ibid.* at 892 (Bowring). In justification of the provision, Lord Mahon, a Member of Parliament, explained that "it was necessary to adopt some measure for the prevention of the artifices which are constantly resorted to in order to profit by extracts from popular works" (*ibid.* at 891). Curtailing piracy and allowing the author to have a remedy were advanced as reasons for enacting the provision.

³ *Ibid.* at 891 (Agliongy). This deletion should not suggest that the United Kingdom's historical copyright treatment was against the public interest. For more critical accounts of copyright history, see Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Cheltenham, U.K.: Edward Elgar, 2006).

⁴ The importance of fair dealing was acknowledged in *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004 SCC 13, [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395 [*CCH*]). A growing corpus of academics link fair dealing to the promotion of the public interest. See e.g. Carys J. Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 437 [Craig, "Changing Face"].

⁵ See e.g. David Vaver, "Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?" (2007) Case W. Res. L. Rev. 1 [forthcoming, on file with author].

fuelled this expansion.⁶ Also, authors, the supposed initial owners of copyright, have been a functional and rhetorical stand-in for owners since typically they have assigned the bulk of their rights.⁷ These developments are among those that have led some to call this expansion in copyright the “second enclosure movement”⁸ or others to observe that we live in an “infringement nation.”⁹ As a result, largely facilitated by today’s technological ease to network and communicate, there has been a push back by increasingly vocal “user” groups demanding “rights”.¹⁰ In Canada, this push has been manifested on many levels, but perhaps most forcefully against government, which has received calls for “fair” copyright reform.¹¹ With regard to reform, the focus has naturally fallen on the doctrine of fair dealing—within certain limits, what a user can do with a substantial part of a copyrighted work without permission of the owner.¹² So while copyright grants exploitation rights to owners of original works and, therefore, grounds to sue based on copyright infringement, “fair” copyright proponents argue that such rights should be balanced against user rights, and that fair dealing is the answer.¹³ Indeed, the fair dealing doctrine is “a key part of the social bargain at the heart of copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture ... and is [now] more important today than ever before.”¹⁴ Canada’s fair dealing doctrine,

⁶ See e.g. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (discussing the constitutionality of the *Copyright Term Extension Act*, Pub. L. No. 105-298, 112 Stat. 2827 (1998)); Daniel J. Gervais, “Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing” in Geist, *supra* note 4, 517 at 537 (on the “invasion of the private sphere”).

⁷ See Giuseppina D’Agostino, “Canada’s Robertson Ruling: Any Practical Significance for Copyright Treatment of Freelance Authors?” [2007] *Eur. I.P. Rev.* 66 [D’Agostino, “Robertson Ruling”]; Giuseppina D’Agostino, “Freelance Authors for Free: Globalisation of Publishing, Convergence of Copyright Contracts and Divergence of Judicial Reasoning” in Fiona Macmillan, ed., *New Directions in Copyright Law* (Cheltenham, U.K.: Edward Elgar, 2005) 166 [D’Agostino, “Freelance Authors”]; Giuseppina D’Agostino, “Copyright Treatment of Freelance Work in the Digital Era” (2002) 19 *Santa Clara Computer & High Tech. L.J.* 37 [D’Agostino, “Copyright Treatment”].

⁸ James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain” (2003) 66 *Law & Contemp. Probs.* 33.

⁹ John Tehranian, “Infringement Nation: Copyright Reform and the Law/Norm Gap” [2007] *Utah L. Rev.* 537.

¹⁰ For a Canadian example, see Fair Copyright for Canada groups currently springing up on Facebook (online: Facebook <<http://www.facebook.com/group.php?gid=6315846683>> [Fair Copyright for Canada]).

¹¹ *Ibid.*

¹² In Canada, s. 3 of the *Copyright Act* sets out the bundle of economic rights (e.g., reproduction rights) to which a copyright owner is entitled, s. 27 delineates infringement, and s. 29 fair dealing (R.S.C. 1985, c. C-42 [CCA]).

¹³ Fair Copyright for Canada, *supra* note 10.

¹⁴ Association of Independent Video and Filmmakers (ANF) *et al.*, *Documentary Filmmakers’ Statement of Best Practices in Fair Use* (18 November 2005) at 1-2, online: Center for Social Media <http://centerforsocialmedia.org/files/pdf/fair_use_final.pdf> [ANF, *Best Practices*]. ANF specifically refer to U.S. fair use but the same comments certainly hold true for fair dealing. See Craig, “Changing Face”, *supra* note 4.

along with that of other former U.K. colonies, has been seen as the weak imperial import, and not up for the job.¹⁵ Fair dealing, as found in the United Kingdom's existing copyright framework, has been widely characterized as restrictive, featuring an exhaustive list of defined exceptions.¹⁶ Its U.S. "cousin", fair use, has been seen (mainly by non-U.S. scholars) as a more robust vehicle for users.¹⁷ In contrast to the Canadian provision, which has traditionally only applied to a work used for one of a closed list of enumerated purposes, fair use allows any use of a work to be "fair" pursuant to a set of factors that aid in the decision-making process.

The envy for common law copyright reformers thus has been the U.S. fair use provision, the "fairest" of them all.¹⁸ Mainly concerned with fair dealing in the United Kingdom, Robert Burrell has ably canvassed the fair dealing–fair use commentary. Drawing from his work, onlookers to U.S. fair use can be placed into three main camps: (1) those who would like to see fair use introduced and replace fair dealing, (2) those who see its benefits but do not go as far as calling for its introduction, and (3) those who are more cautious in embracing fair use and point to some drawbacks in doing so.¹⁹

My company would be best suited in the second and third camps, since fair dealing countries might do well to become less entranced with copying U.S. fair use. As I will show, while it presents benefits, fair use is no panacea and, as Wendy Gordon has suggested, is actually "ill".²⁰ The title itself of a stimulating conference, "Fair Use: Incredibly Shrinking or Extraordinarily Expanding?,"²¹ held at Columbia Law School on 8 February 2008, captures the fair use chaos. At the conference, leading world experts advanced their own diverging views on fair use and varying hopes for fair use reform.²²

¹⁵ Canada's fair dealing provision, s. 29 of the *CCA* (*supra* note 12), followed the U.K. *Copyright Act, 1911* (*supra* note 34). See text accompanying notes 33-35. Until recently, Israel was among the last to follow the 1911 imperial model. On 19 November 2007, Israel passed the *Israel Copyright Act 2007*, of which s. 19 is a model of U.S. fair use. See Ariel Katz, "What Can Canada Learn from Israel about Copyright Reform?" (8 December 2007), online: University of Toronto Faculty of Law Faculty Blog <http://utorontolaw.typepad.com/faculty_blog/2007/12/what-can-canada.html>.

¹⁶ See Sing., (2004) 78 Hansard Parliamentary Debates 10 (Jayakumar) [Debate 2004] (S. Jayakumar, Deputy Prime Minister and Minister for Law, describing on 16 November 2004 the need to move away from Singapore's fair dealing provision based on the U.K. model as it has proven "restrictive").

¹⁷ *Ibid.* See also Craig, "Changing Face", *supra* note 4.

¹⁸ David Nimmer, "'Fairest of Them All' and Other Fairy Tales of Fair Use" (2003) 66 *Law & Contemp. Probs.* 263.

¹⁹ Robert Burrell, "Reining in Copyright Law: Is Fair Use the Answer?" [2001] *I.P.Q.* 361 at 363.

²⁰ Wendy J. Gordon, "Keynote: Fair Use: Threat or Threatened" (2004-05) 55 *Case W. Res. L. Rev.* 903 at 912.

²¹ (Kernochan Center for Law, Media & The Arts and The Columbia Journal of Law & The Arts, Columbia Law School, New York, 8 February 2008) [Columbia Law School conference] [unpublished, proceedings on file with author].

²² Paul Goldstein, Anthony Reese, Jane Ginsburg, Laura Heymann, Rebecca Tushnet, Randal Picker, Barton Beebe, Jessica Litman and Tim Wu are among the presenters who advanced distinct views on fair use reform (*ibid.*). Unfortunately no comparative looks were cast.

My aim will be to focus on Canada and comparatively study its fair dealing landscape past and present, something only sparsely done.²³ Canada presents a fascinating window into fair dealing especially in light of recent judicial developments.

In its 2004 decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada determined that, for the first time in its history, Canadian law must recognize a “user right” to carry on exceptions generally, and fair dealing in particular.²⁴ Whereas the notion of exceptions to copyright infringement had in the past been largely premised on a narrow interpretation of its scope, the Court has now raised it to the level of a general principle. It is thus important in the ongoing project of copyright-policy reform to probe the meaning of this ruling, since it will affect potential policy work on exceptions, particularly the conception and application of the notion of fair dealing.

Understanding Canada’s fair dealing framework offers an important contribution to not only its domestic policies, but wider fair dealing—fair use policy development, debates, and practice. I will observe that because of *CCH*, the Canadian common law factors relating to fair use are more flexible than those entrenched in the United States. In the United Kingdom, certain criteria have emerged from the case law that are consonant with Canada’s pre-*CCH* framework, and in many ways there is now a hierarchy of factors, with market considerations at the fore. The real differences, however, between Canada and its U.K. and U.S. counterparts ultimately lie in the policy preoccupations of their respective courts, with Canada’s top court alone concerned with championing user rights above all other rights, or at the very least with *not* championing owners’ rights above all others.

In the spirit of working toward attaining copyright balance—where the interests of users, creators, owners and the general public are considered—some potential solutions will be advanced. The main focus of this article is the applicable legislation and jurisprudence, although as will become apparent the solutions do (and should) also lie outside (and are complementary to) the realm of the law and the courts. While doing nothing does not seem to be the appropriate response, legal intervention may not be warranted either. Rather than, or at the very least together with, reforming the law, establishing fair dealing best practices is most promising. The affected parties in specific industries together can develop guidelines to help the courts make decisions on fair dealing that are both clearer and fairer. As will become obvious from the jurisprudential merry-go-round in each of the examined jurisdictions, in which some factors count more than others (some are stampeding factors, for example), no fair use–fair dealing framework is perfect, and a court’s decision will be influenced by its

²³ A significant exception is my colleague, Carys Jane Craig, whose work I refer to frequently throughout this paper and to whom I am very grateful for sharing her thesis. See Carys Jane Craig, *Fair Dealing and the Purposes of Copyright Protection* (LL.M. Thesis, Queen’s University, 2000) [unpublished] [Craig, *Fair Dealing*].

²⁴ *Supra* note 4.

understanding of copyright law's objectives, especially in light of evolving user practices. U.S. initiatives in this area can serve as fruitful sources of inspiration for Canadian fair dealing reform and *CCH* sanctions the development of such a grassroots approach. For the Supreme Court of Canada, user-generated policies and practices comporting with fair dealing continue to be important determinants to assessing fairness.

This article will proceed in four parts. Part I will examine the significance of *CCH* in rooting a user right in Canada. At this early juncture, it is useful to step back and revisit pre-*CCH* cases, which are often seen as user unfriendly, and then gaze forward into the post-*CCH* jurisprudential scene. After setting out the Canadian fair dealing legislative and jurisprudential landscape, the article will begin to explore this legal backdrop in other jurisdictions. U.K. fair dealing and U.S. fair use will be respectively examined in Parts II and III. In discussing U.S. fair use, particular attention will be paid to the flurry of criticism against it, with specific reference to the educational sector. Part IV will then compare the three jurisdictions and the article will conclude with some suggestions for reform.

While this article investigates the legislative and jurisprudential landscape of fair dealing, it recognizes that other matters, such as the role of contract and technology, may also affect fair dealing–fair use. As I have argued elsewhere, the role of contract in copyright law cannot be underestimated.²⁵ For instance, contract often trumps copyright, leaving freelance authors with fewer rights (and compensation).²⁶ On the other hand, fairer contracts may actually enhance the operation of copyright law to favour authors. Similarly, contract law can both promote and undermine the interests of users, and any party in the copyright system for that matter. If the objective of copyright law is presumably to balance the interests among the various copyright stakeholders in the public interest, then it is thus important to assess how the role of contract is embedded in the *CCA*, and how it is deployed in practice to promote and temper the desired objectives of copyright law.

The relationship between technology and fair dealing–fair use is equally material. Like contract, technology can undermine and promote the various copyright stakeholder interests. The link between technology and fair dealing–fair use and other exceptions has been specifically examined in the United States, and the findings are negative.²⁷ The *CCA* needs to be mindful of this dynamic. While each of these matters is critical and will be raised in this article where relevant, a fuller analysis of the roles of technology and contract is left for another time and place. Meriting further scrutiny are the recent Bill C-61 amendments unsuccessfully introduced in the Parliament of

²⁵ See *supra* note 7.

²⁶ *Ibid.* Where freelance authors may end up with no rights if it is found that they impliedly licensed their electronic rights found to be infringing in *Robertson v. Thomson Corp.* (2001), 15 C.P.R. (4th) 147, 109 A.C.W.S. (3d) 137 (Ont. Sup. Ct.), (2004), 72 O.R. (3rd) 481, 243 D.L.R. (4th) 257 (C.A.), 2006 SCC 43, [2006] 2 S.C.R. 363, 274 D.L.R. (4th) 138.

²⁷ See Parts III.A.2 and III.A.3.

Canada, in which contract and technological protection measures often trumped (and undermined) fair dealing and the proposed exceptions.²⁸ Equally important and beyond the scope of this analysis are the actual practices of stakeholders, including the trend toward embracing technology and promoting the goals of easy and open access. The software open-access movement and Creative Commons licensing are some models complementing certain ethics of fair dealing.²⁹

Last, because this article is limited to the domestic and comparative aspects of fair dealing, it cannot assess the international dimensions of the issue, though other scholars have begun to do so.³⁰ *CCH* is unlikely to be a cause for concern since it probably does not violate the three-step test of the *Berne Convention for the Protection of Literary and Artistic Works*.³¹ Should the courts apply *CCH* expansively, this may trigger international scrutiny of the legislation, but to date, there have been no such conflicts. On the contrary, Bernt Hugenholtz and Ruth Okediji have justified the need to establish an international instrument on limitations and exceptions to copyright, congruent with the existing international framework.³²

I. Fair Dealing in Canada

A. Legislative Context

Before analyzing the jurisprudence starting from *CCH*, it is useful to outline briefly the Canadian legislative fair dealing context. In Canada, the doctrine of fair dealing is statutorily entrenched in the *CCA*. It was first introduced in 1921³³ as a mere duplication of section 2(1)(i) of the U.K. *Copyright Act, 1911*, providing that copyright would not be infringed by “[a]ny fair dealing with any work for the

²⁸ Bill C-61, *An Act to Amend the Copyright Act*, 2d Sess., 39th Parl., 2008, cl. 31 (entitled “Technological Measures and Rights Management Information”). Bill C-61 died on the order paper on 5 September 2008, when Parliament was dissolved due to an election call by Prime Minister Stephen Harper. For commentary on Bill C-61, see Giuseppina D’Agostino, “Not all sides represented in debate on copyright bill” *Toronto Star* (19 June 2008) AA8. For a map of the flurry of commentary, see Michael Geist, “Mapping C-61 Media Coverage” (24 June 2008), online: Michael Geist <<http://www.michael-geist.ca/content/view/3122/125/>>.

²⁹ See Creative Commons, “About”, online: Creative Commons <<http://creativecommons.org/about/>>; Robert C. Denicola, “Copyright and Open Access: Reconsidering Universal Ownership of Faculty Research” (2006) 85 *Neb. L. Rev.* 351.

³⁰ See e.g. Daniel Gervais, “The Purpose of Copyright Law in Canada” (2005) 2 *University of Ottawa Law and Technology Journal* 315.

³¹ 9 September 1886, 828 U.N.T.S. 221, 168 Can. T.S. 1962 No. 13, art. 9(2) [*Berne Convention*].

³² P. Bernt Hugenholtz and Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, sponsored by Open Society Institute (OSI), Final Report (6 March 2008).

³³ *Copyright Act*, S.C. 1921, c. 24, s. 16(1)(i).

purposes of private study, research, criticism, review or newspaper summary.”³⁴ Since 1921, fair dealing has twice been amended.³⁵ The amendments distinguished between the treatment of the purposes of research and private study on the one hand, and criticism, review and news reporting on the other. For the latter, there were for the first time conditions relating to acknowledgement of the source. Section 29 of the *CCA* now states:

29. Fair dealing for the purpose of research or private study does not infringe copyright.

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

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer’s performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer’s performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

Traditionally, scholars, practitioners, and the courts construed fair dealing as a defence to copyright infringement. The defendant had to prove that (1) the action supposedly infringing copyright fit within one of the enumerated purposes (i.e.,

³⁴ (U.K.), 1 & 2 Geo. V, c. 46, s. 2(1)(i). Analyzing the history of this provision, see Burrell, *supra* note 19 at 368.

³⁵ *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, s. 64(1), entered into force 1 January 1994 as *CCA*, *supra* note 12, s. 27(2)(a); *An Act to Amend the Copyright Act*, S.C. 1997, c. 24, s. 18, entered into force 1 September 1997 as *CCA*, *ibid.*, s. 29.2 (being the current provision). For a discussion of the logic behind these amendments, which added a new burden on the defendant user, see Hugues G. Richard, “Fair dealing: Criticism, Review and Newspaper Summaries” (1994), online: Leger Robic Richard <<http://www.robic.ca/publications/Pdf/146-HGR.pdf>>.

research or private study, criticism or review, and news reporting), (2) the action was fair, and (3) in the case of the last two categories, there was acknowledgement of the source. Typically, the enumerated grounds were interpreted as exhaustive, since any purpose not falling strictly within an enumerated ground was considered an infringement.³⁶ However, as shown below, this may no longer be the case post-*CCH*.

The *CCA* also contains specific exceptions for educational institutions and libraries, archives, and museums (commonly referred to as LAMs), as well as for copying works deposited in archives and reproducing copyrighted works for persons with disabilities.³⁷ These exceptions are meant to be compliant with the *Agreement on Trade-Related Aspects of Intellectual Property Rights*,³⁸ which confines such exceptions to “certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”³⁹ Of note is that a court may rely on public-interest grounds for allowing an otherwise infringing activity, but this common law power has been rarely exercised in Canada or in the United Kingdom, where it was invented.⁴⁰

B. Analyzing CCH

1. *CCH Canadian Ltd. v. Law Society of Upper Canada*

In *CCH*, a unanimous Supreme Court of Canada ruled that 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. At issue were the single copies of reported decisions, case summaries, statutes, regulations and text selections reproduced pursuant to the Great Library Access Policy.⁴¹ The Great Library provided lawyers and other authorized persons with copies of such works to assist them with advising clients, giving opinions, preparing legal documents and arguing cases. According to the Court, section 29 of the *CCA*,

³⁶ See e.g. *Compagnie générale des établissements Michelin—Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (1996), [1997] 2 F.C. 306, 124 F.T.R. 192 (F.C.T.D.) [*Michelin*] (denying parody).

³⁷ *Supra* note 12, ss. 29.4-30.4, 32.

³⁸ Being Annex 1C to *The Final Act and Agreement Establishing the World Trade Organization*, 15 December 1993, 33 I.L.M. 81.

³⁹ *Ibid.*, art. 13. This provision incorporates art. 9(2) of the *Berne Convention*, which provides for the so-called “three-step test” (*supra* note 31).

⁴⁰ See David Vaver, “Canada’s Intellectual Property Framework: A Comparative Overview” (2004) 17 I.P.J. 125 at 149 [Vaver, “Canada’s IP Framework”]. The defence only gained judicial notice once in Canada in *R. v. James Lorimer & Co.*, in relation to Crown copyright, and was ultimately not successful ([1984] 1 F.C. 1065, 77 C.P.R. (2d) 262 (C.A.)).

⁴¹ While the issue of authorization of copyright infringement is also material, it will not be addressed.

alongside the other exceptions, “must not be interpreted restrictively.”⁴² Research should be accorded a “large and liberal interpretation in order to ensure that users’ rights are not unduly constrained” and are “not limited to non-commercial or private contexts.”⁴³ In this case, lawyers carrying on the business of law for profit were held to be conducting noninfringing research.

The Court explained that to prove a dealing was fair pursuant to section 29 of the CCA, the defendant Law Society had the onus to prove that the dealing was (1) for the purpose of either research or private study and (2) fair. These considerations are consistent with those of a traditional fair dealing test in Canada and the United Kingdom.

As the Court began its analysis of the fair dealing doctrine—in which it drew from U.K. and U.S. approaches—it endorsed certain factors that may be more or less relevant in future fair dealing cases. It also acknowledged that other unnamed factors could be used to assess the fairness of a dealing. The Court articulated and applied six factors in deciding the case: the purpose (and commercial nature) of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.

a. Purpose (and Commercial Nature) of the Dealing

As with the interpretation of enumerated grounds the Court asserted that this first criterion “should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”⁴⁴ Courts should adopt an objective test to assess the users’ real purpose or motive in using the copyrighted work. The Great Library Access Policy provided that patrons making a request must delineate an enumerated purpose for use, and where any ambiguity arises, that the matter be referred to the Reference Librarian. Significantly, the Great Library’s prudent practices were instrumental in persuading the Court to weigh heavily in favour of the purpose factor. As seen below, user practices continue to be important determinants to assessing fairness. The Court concluded that the policy provided reasonable safeguards that the materials were being used for the purpose of research and private study.

The commercial nature of the dealing is an important consideration: “research done for commercial purposes may not be *as fair* as research done for research purposes.”⁴⁵ However, as noted, the Court emphasized that “research is not limited to non-commercial or private contexts.”⁴⁶ While the Court did not clearly state that commercial research is fair dealing, it stated that it certainly can be.

⁴² *Supra* note 4 at para. 48.

⁴³ *Ibid.* at para. 51.

⁴⁴ *Ibid.* at para. 54.

⁴⁵ *Ibid.* at para. 54.

⁴⁶ *Ibid.* at para. 51.

b. The Character of the Dealing

Here the focus was on how the works were dealt with; for instance, multiple copies that are widely distributed can be unfair. The Law Society's dealing was considered fair: only single copies were made available to individual members of the legal profession.⁴⁷ Further, the Court stated that if the copy is destroyed after use, this may favour a finding of fairness. Also, the Court suggested that custom or practice in the industry can be used to assess fairness.⁴⁸ Here, the Court's reliance on custom indicates its willingness to consider the practices of the specific user communities. It is unclear whose perspective in the industry should be valued. Relying on custom can be dangerous since custom is often unilateral and often set by the party with the greater bargaining power.⁴⁹ Arguably, should the perspective of the educators or students be considered, there could be fair dealing. Alternatively, if the perspective of the right holder is valued, custom could work against users. As the Court did not expressly apply custom, it will be challenging to anticipate its applicability to future cases. Courts, of course, can (and should) rely on the existing body of case law in copyright and contract law to assess custom.⁵⁰ The custom "is implied by the custom of a locality or by the usage of a particular trade" and "must be strictly proved."⁵¹

c. The Amount of the Dealing

This factor seems to have been a weaker consideration. The logic is plain: the larger the taking, the less fair the dealing. But of course, in several circumstances, as in the case of photographs, it may be impossible to deal fairly with the work without copying the entire work. The Court noted that "for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision."⁵² This wholesale inclusion would not likely be available for the purposes of criticism or review in the case of literature. Research and private study are thus accorded wider scope under the Court's reading of fair dealing. On the amount of the dealing, the Court relied on the Great Library's Access Policy in determining that the institution would exercise discretion to ensure fair dealing.⁵³ On most occasions, only one judgment was copied and a request for more than 5 per cent of a work of

⁴⁷ *Ibid.* at para. 67.

⁴⁸ *Ibid.* at para. 55.

⁴⁹ See e.g. D'Agostino, "Robertson Ruling", *supra* note 7 (discussing the case of freelance journalists and their publishers in Canada where publishers relied on their "custom" to justify digital reproduction of the authors' works without their permission or due payment).

⁵⁰ See Giuseppina D'Agostino, "En attendant *Robertson*: Définir la possession du droit d'auteur sur les œuvres des pigistes dans les nouveaux médias" (2006) 18 C.P.I. 163 [D'Agostino, "En attendant *Robertson*"].

⁵¹ Jack Beatson, *Anson's Law of Contract*, 25th ed. (Oxford: Oxford University Press, 2002) at 151. This high standard requires that the custom be (1) "notorious", (2) "as certain as the written contract", and (3) "reasonable" (*ibid.*).

⁵² *CCH*, *supra* note 4 at para. 56.

⁵³ *Ibid.* at para. 68.

secondary materials could be refused.⁵⁴ There was no evidence that the Great Library received and supplied multiple copy requests. Once again, user practices informed the Court's reasoning.

d. Alternatives to the Dealing

A court may decide against fair dealing where (1) a noncopyrighted work was available as an alternative, and (2) the use of the copyrighted work was not "reasonably necessary to achieve the ultimate purpose."⁵⁵ For instance, if a criticism would be equally effective without reproducing the copyrighted work, this may weigh against fair dealing.⁵⁶

In *CCH*, the Court remarked that there were no alternatives to the Toronto-based Great Library's photocopying service because (1) 20 per cent of the Great Library patrons were outside Toronto, and (2) researchers were not allowed to borrow materials from the Great Library, thus justifying the need for copying.⁵⁷ The Court focused more on the ease of access to the works than on the actual availability of noncopyrighted works.

The Court posited that the availability of a licence was irrelevant to whether there were alternatives to the dealing. Accordingly, a user's failure to obtain a licence should not be interpreted as proof that the dealing was not fair. If this were the case, the owners' monopoly would be extended beyond the objective of balance in the *CCA*. As such, if a dealing clearly falls into fair dealing in the first place, that dealing should not be subject to a licence. This analysis seems consonant with several stakeholder positions within the educational community that there exists a "clear-for-fear" culture to obtain often unnecessary licences out of excessive caution.⁵⁸

⁵⁴ See *ibid.*

⁵⁵ *Ibid.* at para. 57.

⁵⁶ Compare *Hyde Park Residence Ltd. v. Yelland*, [2000] EWCA Civ 37, [2000] 3 W.L.R. 215 at para. 40 [*Hyde Park*] (finding that the publication of photographs of Lady Diana was merely gratuitous because describing any relevant portion of the photos would have sufficed).

⁵⁷ *CCH*, *supra* note 4 at para. 69.

⁵⁸ In Canada, see "Copying Internet Resources in Education", online: Council of Ministers of Education, Canada <<http://cmec.ca/copyright/copyInternet.en.stm>> ["Copying Internet Resources"]; Margaret Wilkinson, "Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries" in Geist, *supra* note 4, 331. In the United States, see William W. Fisher & William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age: A Foundational White Paper* (10 August 2006), online: The Berkman Center for Internet & Society <http://cyber.law.harvard.edu/home/uploads/823/BerkmanWhitePaper_08-10-2006.pdf> [Fisher & McGeeveran, *White Paper*]; Jennifer M. Urban & Laura Quilter, "Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act" (2006) 22 Santa Clara Computer & High Tech. L.J. 621.

e. Nature of the Work

According to the Court, “if a work is unpublished, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work.”⁵⁹ While the Court remarked that this would serve one of the goals of copyright, it is nonetheless a marked departure from previous Canadian case law. Equally, as noted below, this reasoning is contrary to the U.K. and U.S. case law.⁶⁰ The Court suggested that protecting the author and furthering wide public dissemination are two conflicting objectives. One cannot further public dissemination if the priority is to protect (and presumably reward) the author. One factor that may soften this anti-author perspective is if the work in question is confidential in nature.⁶¹ Still, the Court’s disregard for a long line of precedent without explanation (or acknowledgment) is problematic.

The Great Library easily satisfied this factor, as the works in question were essential to legal research and were subject to its Access Policy, which stated that the patron’s purpose in accessing the works must be for research, private study, criticism, review, or use in legal proceedings.⁶²

f. Effect of the Dealing on the Work

If the work in question competes for the market of the original work, it is less likely that the dealing will be found to be fair. In underscoring that the market factor “is neither the only factor nor the most important factor,”⁶³ the Court seemed to suggest that this factor is less important than the others. Interestingly, this market-substitute factor is more important in the United Kingdom.⁶⁴

No evidence was advanced to indicate any effect on the publishers’ market. Rather, the publishers continued to produce new reporter series and other legal publications during the period of the Great Library’s request-based copying. The Court acknowledged that while the Law Society had the evidentiary burden, “it lacked access to evidence about the effect of the dealing on the publishers’

⁵⁹ *Supra* note 4 at para. 58.

⁶⁰ The U.S. courts went as far as developing a presumption against fair dealing for unpublished works. See *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 at 546, 105 S. Ct. 2218 (1985) [*Harper & Row* cited to U.S.] (later overrode by *Fair Use of Unpublished Works*, Pub. L. No. 102-492, 106 Stat. 3145 (1992) (codified as amended at 17 U.S.C. § 107 (1994)). In the United Kingdom, see *Hyde Park*, *supra* note 56.

⁶¹ See e.g. *Hyde Park*, *ibid.* at para. 40. The court considered that the works were subject to an agreement: “I do not believe that a fair minded and honest person would pay for the dishonestly taken driveway stills and publish them in a newspaper knowing that they had not been published or circulated ...” (*ibid.*).

⁶² *Supra* note 4 at para. 71.

⁶³ *Ibid.* at para. 59.

⁶⁴ See e.g. *Ashdown v. Telegraph Group Ltd.*, [2001] EWCA Civ 1142, [2002] Ch. 149 [*Ashdown*] (where market substitute is the most important factor).

markets.”⁶⁵ Thus, this decision suggests that the onus may be reversed if the defendant cannot access market-impact evidence. This seems fair, as the publishers are often the more sophisticated parties in a better position to access such records. Such a reversal of onus, however, is potentially a tall order, as it may involve crystal-ball gazing.⁶⁶

2. CCH Observations: User-centric Approach

The analysis of the six factors above reveals the Court’s pro-user orientation. As will be further detailed below, this orientation is apparent in the Court’s language, its liberal interpretation of fair dealing, its elevation of the doctrine as compared to other copyright exceptions, and its underlying policy preoccupations.

a. Defence to User Right

Even before *CCH*, depending on the speaker’s perspective, various terms were used to denote fair dealing, such as “exceptions”, “exemptions”, “defences”, or “user rights”.⁶⁷ Still, whereas previous cases and most textbooks conceived of fair dealing as a defence, *CCH* construed it more as a “right” and an “integral” part of copyright law.⁶⁸

b. Expanded Purposes

CCH took a liberal approach to the enumerated purposes of the dealing, stating that they “should not be given restrictive interpretation.”⁶⁹ Hence, new purposes, including parody, could be included under the *CCA*’s enumerated grounds, especially in light of the “real purpose or motive in using the copyrighted work.”⁷⁰ Significantly, the Court’s liberal analysis of the first of the six factors, the purposes of the dealing, was similar to its approach under the first part of the test, which determined whether

⁶⁵ *Supra* note 4 at para. 72.

⁶⁶ See *infra* note 225 and accompanying text.

⁶⁷ Vaver, “Canada’s IP Framework”, *supra* note 40 at 148-49; Parveen Esmail, “*CCH Canadian Ltd. v. Law Society of Upper Canada*: Case Comment on a Landmark Copyright Case”, Case Comment, (2005) 10 Appeal 13 at 19.

⁶⁸ *Supra* note 4 at para. 48. For fair dealing as a defence pre-*CCH*, see *Allen v. Toronto Star Newspapers Ltd.* (1997), 36 O.R. (3d) 201 at 208-09, 152 D.L.R. (4th) 518 (Div. Ct.) [*Allen* cited to O.R.]; for fair dealing as an exception, see *Boudreau v. Lin* (1997), 150 D.L.R. (4th) 324 at 334, 75 C.P.R. (3d) 1 (Ont. Ct. J. (Gen. Div.)) [*Boudreau* cited to D.L.R.]. More recently, terms like “principle” have also been used. See M. Bouchard, “The Copyright Board: A Review of Some Recent Issues and Future Challenges” (Paper presented at The Law Society of Upper Canada Entertainment, Advertising & Media Law Symposium, Toronto, 27–28 April 2007) at 10 [unpublished].

⁶⁹ *CCH*, *ibid.* at para. 54.

⁷⁰ *Ibid.*

the research purposes were fair.⁷¹ The Court thereby sought to align itself here with the more flexible U.S. approach, described below, where there are no enumerated grounds, but an open list of purposes.

While Crown copyright was not at issue in the decision, *CCH* clarified that entire court decisions, typically under Crown copyright, can be copied fully and fairly. Following the same logic, this may be the case with other government works, such as statutes, reports, and press releases.

c. *Exceptions and Fair Dealing*

CCH favours parties relying on fair dealing over those who make use of other exceptions.⁷² While counsel's arguments at the onset of *CCH* in 1993 were in large part conditioned by the lack of "libraries, archives and museums" or "educational institutions" exceptions, the Court nonetheless emphasized that a user can always rely on the fair dealing doctrine first: "It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption."⁷³ The Court preferred the blessing of the fair dealing doctrine over reliance on specific exceptions. This may be because fair dealing, as construed by the Court, now allows for a more flexible framework. Irrespective, the Court made clear that all exceptions, like fair dealing, are users' rights.⁷⁴

d. *Constructing Fair Dealing—Infringement, Burden of Proof, Agency, and User Practices*

In a conventional copyright-infringement suit, the plaintiff has the burden of proof to show infringement. The burden then shifts to the defendant to advance a defence. The Court seemed to alter this progression in two ways. First, it skipped a traditional analysis of infringement. The Court's discussion of infringement was limited to authorization of infringement, a different analysis from the typical "substantial part doctrine". Having reasoned that there was no authorization, the Court proceeded immediately into a fair dealing analysis by framing fair dealing as an exception to copyright.⁷⁵

Second, the Court stated it may shift the onus of proof in two ways: (1) the defendant can rely on internal policy rather than individual practices, and (2) the plaintiff may sometimes have to show that the defendant's use negatively affected its market. Regarding (1), to establish fair dealing, the defendant need not adduce

⁷¹ *Ibid.*

⁷² *Ibid.* at para. 49.

⁷³ *Ibid.*

⁷⁴ *Ibid.* at para. 48.

⁷⁵ *Ibid.* at para. 51 ("[t]he fair dealing exception under s. 29 ...").

evidence that every use of the provided material was conducted fairly but can rely on its own general practice.⁷⁶ For instance, the Great Library's internal Access Policy—to photocopy only for purposes of research, review, private study, and criticism, with a corresponding gate-keeper role by the Reference Librarian for the copying of substantial secondary sources—was seen as sufficient to show that its own practices were research-based and fair. It did not need to prove that each of its patrons dealt fairly with the supplied materials.⁷⁷ Here it is worth asking whether it is fair for librarians to shoulder the burden of policing fair dealing. But what are the alternatives? Establishing rigid rules (e.g., copy quotas through legislation), while perhaps clearer to all parties, would be too restrictive and not entirely reflective of the realities of user experiences. Imposing a copy quota is the approach taken in Australia, where apparently no more than 10 per cent of a work can be copied.⁷⁸ And even in the undesirable quota scenario, librarians would still be in a policing role. From the perspective of *CCH*, it is helpful to vest librarians—often those with the most intimate insight into user practices—with a gate-keeping role no matter the approach, since it may allow them (and users) to better prove adherence to fair dealing practices. Similarly, it is wise to consult librarians when formulating fair dealing policies and when engaging in copyright debates generally since they are often on the front lines of evolving user practices. The Court placed much weight on such user practices throughout its reasoning, to the point that their proper adherence became the most important (unwritten) factor in finding fairness.

Regarding (2), while the Law Society had the evidentiary burden, the Court held that the plaintiff publishers, and not the defendant users, should make the case that they were negatively affected because the Law Society was unable to access evidence of the use's impact on the publishing market. The Court thus allowed the Law Society to rely again on the Great Library's general practice to establish fair dealing, rather than having to adduce evidence. The Court embraced the concept of agency.⁷⁹ As illustrated in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers* (also known as the *Tariff 22* decision),⁸⁰ knowing of the potential of end user infringement will not, absent express knowledge of end-user infringing activity, be seen as the intermediary authorizing end user infringement.

⁷⁶ *Ibid.* at para. 63.

⁷⁷ *Ibid.* at paras. 61-65.

⁷⁸ See *Copyright Act 1968* (Cth.), ss. 10(2)-(2A).

⁷⁹ See Wilkinson, *supra* note 58 at 346.

⁸⁰ *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 at paras. 126-28, 240 D.L.R. (4th) 1993 [*Tariff 22*].

e. *Cautionary Note on CCH User-centric Policy*

Any analysis of the state of copyright post-*CCH* must take into account the Supreme Court of Canada's understanding of Parliament's policy objectives. The Court reaffirmed in *CCH* its previous ruling in *Théberge* that the *CCA* has supposedly dual objectives: "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 ..."⁸¹ The Court maintained that the judiciary "should strive to maintain an appropriate balance between these two goals."⁸² It suggested that when copyright law promotes the encouragement and dissemination of works of the arts and intellect, it serves the public interest. While the Court recognized that rewarding the creator was an important part of Canada's "dualistic" copyright objectives, it implied that such reward does not promote the public interest in the same way as protecting user rights. For the Court, the chief method of promoting the public interest was to protect user rights, or at the very least not champion owners' rights above others.

CCH's user-centric expression of balance and the objectives of copyright law is further seen in its discussion of the doctrine of originality. The Court maintained that when courts lower the standard of originality, the balance tips in favour of the author/creator at the expense of a robust public domain to foster future creative innovation.⁸³ While this is plausible, more often than not, copyright assignments, and therefore the role of contract law (where the owner steps into the creator's shoes), allow for this erosion. In other words, understanding the dynamic relationship between creator and owner is also important when accounting for future innovation and a robust public domain. But it is unclear from the Court's reasoning that it appreciates fully the creator-owner distinction.

This perhaps ill-conceived copyright thinking is matched by equally ill-conceived language. The Court juxtaposed the public and the creator in grounding its objectives, but in framing the issues it stated: "This case requires this Court to interpret the scope of both *owners*' and users' rights under the *Copyright Act* ..."⁸⁴ While the Court noted the "creator" in its discussion of balancing copyright objectives, the Court matter-of-factly substituted the term "owner" in the framing of the issues. Creators and owners are not the same category of stakeholders for the purposes of copyright.⁸⁵ Their interests are often conflicting. One cannot treat them as if they were synonyms, as the Court and many commentators often do. Indeed, it is unhelpful when commentators argue that *CCH* has "shifted the focus of copyright law from the pro-author approach

⁸¹ *Supra* note 4 at para. 10, citing *Théberge v. Galerie d'Art du Petit Champlain*, 2002 SCC 34, [2002] 2 S.C.R. 336 at paras. 30-31, 210 D.L.R. (4th) 385.

⁸² *CCH*, *ibid.* at para. 10.

⁸³ *Ibid.* at para. 24.

⁸⁴ *Ibid.* at para. 13 [emphasis added].

⁸⁵ See generally D'Agostino, "Robertson Ruling", *supra* note 7; D'Agostino, "Freelance Authors", *supra* note 7; D'Agostino, "Copyright Treatment", *supra* note 7.

that had dominated in the past to a balanced approach that weighs the rights of the author against those of the user.”⁸⁶ This conflation leads commentators to state that “the law in Canada is now that the courts must balance the interests of the authors of works against the public interest.”⁸⁷ Such remarks are unfortunate copyright parlance in Canadian *CCH* commentary, and in copyright generally.⁸⁸

So while it is laudable that the Court has finally championed user rights, which were long forgotten by Canadian legislatures and the judiciary, where do creators fit in *CCH*? While the policy for creators is not central to *CCH* (perhaps because the case mainly deals with legal professionals as creators, not as musicians, freelance authors, bloggers, or other stereotypical parties in copyright proceedings), this oversight may limit future “balanced” rulings. Would the Court have reached a similar ruling if other categories of creators were at issue? *Robertson v. Thomson Corp.*,⁸⁹ dealing with freelance authors, may decide such an issue, but the new trial is yet to make its way to the courts.⁹⁰ In *CCH*, legal professionals and lawyers were creators whose works at issue were decided and shaped by judges and lawyers. The ultimate goal sought by the Great Library’s copy practices was “to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law.”⁹¹ This practice saves the cost of additional hotel bills and other travel expenses to non-Toronto lawyers and applies to self-represented litigants as well.⁹² Had the Court ruled otherwise, Toronto lawyers may have received an unfair advantage over other members of the profession. Also, it has been argued that the cost of legal services would have increased for clients had the publishers been successful (lawyers would have had to pay an additional sum for copies and would have passed on the cost to their clients).⁹³ Although the Court was

⁸⁶ Esmail, *supra* note 67 at 14.

⁸⁷ *Ibid.* at 23.

⁸⁸ But see Michael Geist, “Low-tech Case Has High-tech Impact” *The Toronto Star* (22 March 2004) D1 (interpreting *CCH* as attempting to balance user rights against those of owners and creators).

⁸⁹ 2006 SCC 43, [2006] 2 S.C.R. 363, 274 O.L.R. (4th) 138 [*Robertson*].

⁹⁰ In *Robertson*, the Court dismissed both Robertson’s appeal of a decision rejecting her motion for summary judgment and the class action as certified. A new four-week trial to commence on 29 September 2009 by Robertson against Thomson Corporation is expected to consider fair dealing, namely, whether the defence of fair dealing applies to any of the infringing acts if there is no implied licence (updated 31 July 2008).

⁹¹ *CCH*, *supra* note 4 at para. 64.

⁹² Esmail, *supra* note 67 at 23.

⁹³ Law Society of Upper Canada, “Notice to the Profession: Supreme Court of Canada Releases *CCH Canadian v. Law Society of Upper Canada* Copyright Decision” (16 March 2004). It seems that law societies had nonetheless been in discussion with Access Copyright after the Federal Court decision. The National Copyright Committee of the Federation of Law Societies of Canada “reaffirmed to CANCOPY [now Access Copyright] its willingness to continue discussions with respect to possible blanket licenses for certain copying activities by members of the legal profession” (“Federation of Law Societies of Canada Copyright Notice to the Profession” *Benchers’ Notes* 5:3 (December 1999) 6 at 8, online: The Law Society of Newfoundland & Labrador <<http://www.lawsociety.nf.ca/reports/dec1999.pdf>>). Great Library access policies remain the same.

intimately familiar with the practices and repercussions of this case, these specific factors are not easily applicable to other creative domains, where revenue from the copyrighted work is often the creator's sole source of income.⁹⁴ Consequently, when determining the fairness of the dealing in future uses, such concerns must be observed.

3. State of Judicial Play Before *CCH*

Having canvassed Canada's current user-centric and more flexible fair dealing framework, it is instructive to look back and assess how the existing framework diverges from what Canada had prior to *CCH*. In doing so, *CCH*'s advantages and limitations may come into sharper focus. Before *CCH*, the judiciary varied in its approach to fair dealing. Some courts were more restrictive and others more liberal in their reasoning. Factors like the motive of the dealing were also more pronounced, as were the policies of copyright toward non-users.

a. Restrictive Interpretation

Most commentators argue that courts pre-*CCH* had a restrictive interpretation of fair dealing.⁹⁵ Many contend that copyright law has been quite expansionist in protecting the rights of owners and creators, an assertion to which the above comments also apply as scholarship has often conflated the two parties even before *CCH*.⁹⁶

Perhaps most illustrative of this approach is *Michelin—Michelin & Cie v. CAW Canada National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*,⁹⁷ in which the Michelin tire company sued a union for copyright infringement arising from its use of the Michelin Man (Bibendum) logo

See The Law Society of Upper Canada, "Access to the Law Policy and Guidelines", online: The Law Society of Upper Canada <http://library.lsuc.on.ca/GL/services_access.htm> [Great Library Access Policy].

⁹⁴ See also William L. Hayhurst, "The Canadian Supreme Court of Copyright: 'CCH Canadian Ltd. v. Law Society of Upper Canada'" (2004) Can. Bus. L.J. 134 at 139 (being critical of *CCH*; arguing that the court's reasoning with respect to originality applied to a "rather select group" and went beyond what would have been expected for literary works). Agreeing with this position on the Court's wider stance on originality, see Teresa Scassa, "Recalibrating Copyright Law? A Comment on the Supreme Court of Canada's Decision in *CCH Canadian Limited et al. v. Law Society of Upper Canada*" (2004) 3 C.J.L.T. 89 at 90.

⁹⁵ Leslie Ellen Harris, Editorial, *Copyright & New Media Law Newsletter* 8:1 (2004).

⁹⁶ D'Agostino, "Robertson Ruling", *supra* note 7 (arguing that in the context of mainstream publishing copyright law increasingly favours right holders over authors). See also Carys J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law" (2002) 28 Queen's L.J. 1; Abraham Drassinower, "Taking User Rights Seriously" in Geist, *supra* note 4, 462; Samuel E. Trosow, "The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital" (2003) 16 Can. J.L. & Jur. 217.

⁹⁷ *Supra* note 36.

in leaflets distributed during a labour dispute. The defendants unsuccessfully argued that their use of *Bibendum* was a parody and therefore an exception to copyright infringement under fair dealing for purposes of criticism. In placing the burden of proof squarely on the defendants, the court ruled that parody was not an exception to infringement under the *CCA* or jurisprudence.⁹⁸ More pointedly, parody was not synonymous with criticism.⁹⁹ The court adamantly refused to rely on U.S. case law allowing parody under fair use.¹⁰⁰ And even if the court had followed the U.S. case law, fair dealing would still have failed since the other two requirements had not been met: (1) the author's name and the source of the work went unmentioned, and (2) there was no fair treatment.¹⁰¹ The court noted that exceptions should be strictly interpreted and that fair dealing in particular has an exhaustive set of grounds under the *CCA*.¹⁰² Accordingly, ruling otherwise would have created a new exception in the statute. In this light, *Michelin* was extremely deferential to Parliament: "If Parliament had wanted to exempt parody as a new exception under the fair dealing provision, it would have done so."¹⁰³

This case represents a clear rejection of a U.S. fair use approach that was later expressly endorsed in *CCH*. And more specifically, as later discussed, it would also appear that under *CCH* the acknowledgment requirement would be construed liberally and no longer present a hurdle. In light of *CCH*, *Michelin's* restrictive approach thus no longer seems to be good law.

b. Liberal Interpretation

Nonetheless, some pre-*CCH* jurisprudence followed a liberal interpretative approach. In *Allen v. Toronto Star Newspapers Ltd.*, a freelance photographer sued a newspaper publisher for reproducing a magazine cover containing a photograph he took on commission.¹⁰⁴ While both sides gave conflicting testimony on industry custom, the Ontario Court of Justice (General Division) ruled that the photographer only held copyright in the photo, and not in the cover, which had been created by the magazine.¹⁰⁵ The magazine did not object to the reuse of its cover and, in any event, the court found that the fair dealing defence relating to news reporting applied.

⁹⁸ *Ibid.* at para. 60.

⁹⁹ *Ibid.* at para. 61.

¹⁰⁰ *Ibid.* at para. 63.

¹⁰¹ Pursuant to the *CCA* (*supra* note 12 and accompanying text). See also *Michelin*, *supra* note 36 at para. 70 ("[t]he substantial quantity of the original work used in the leaflets and posters also casts doubt on the fairness of the defendants' treatment").

¹⁰² *Michelin*, *ibid.* at para. 65, citing *Bishop v. Stevens*, [1990] 2 S.C.R. 467 at 483-84, 72 D.L.R. (4th) 97, 31 C.P.R. (3d) 394.

¹⁰³ *Ibid.* at para. 71.

¹⁰⁴ *Allen v. Toronto Star Newspapers Ltd.* (1995), 26 O.R. (3d) 308, 129 D.L.R. (4th) 171 (Ct. J. (Gen. Div.)).

¹⁰⁵ *Ibid.*

The Ontario Court of Justice (General Division) Divisional Court overturned the trial decision, ruling that fair dealing does not apply to an entire copyrighted work. The court held that determining whether an activity constitutes fair dealing is a “purposive” exercise and not simply a mechanical test, such that “the extent of the copying is one important factor, but only one to be taken into account, along with several others.”¹⁰⁶ While the court did not schematically assess a list of factors as in *CCH*, it examined the nature and purpose of the use, which was found to include reporting current news. Also, the court considered *CCH*'s market-substitute criterion but concluded that the photograph was not used “to gain an unfair commercial or competitive advantage over [the plaintiff] Allen or [the magazine] Saturday Night.”¹⁰⁷ Moreover, as in *CCH*, the court also allowed fair dealing within a commercial context (in this case, involving a periodical publisher).

As in *CCH*, *Allen* adopted a liberal approach and made the following assessments: (1) the purpose of relaying a current event was allowed in a commercial context; (2) the nature of the work as an entire work, such as a photograph, was fair dealing; and (3) the magazine did not seek to gain a commercial advantage over the original work, and therefore, the market-substitute criterion was not satisfied.

The court's conclusion regarding the extent of the work that was copied differs from the earlier decision in *Zamacois v. Douville*,¹⁰⁸ in which the same court held that the reproduction of an entire newspaper article was not fair dealing for purposes of criticism. The defendants unsuccessfully argued that the article was (1) necessary because another article published in the same edition criticized the work and (2) of current interest on an economic or political topic. The court found that a person could not reproduce an article in full for purposes of criticism without the author's permission.¹⁰⁹ But this decision has come under much criticism, and post-*CCH*, its precedential value is weak.¹¹⁰

c. Motive

CCH did not apply motive, or at least bad motive, as a factor.¹¹¹ In previous cases such as *Boudreau v. Lin*,¹¹² no fair dealing defence was recognized for private study with regard to the substantial use of portions of a student's work in a professor's

¹⁰⁶ *Supra* note 68 at 211, citing *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1974) [*Williams & Wilkins*].

¹⁰⁷ *Ibid.* at 209.

¹⁰⁸ [1944] Ex. C.R. 208, [1943] 2 D.L.R. 257 [*Zamacois* cited to D.L.R.].

¹⁰⁹ *Ibid.*

¹¹⁰ Even before *CCH*, some have argued it was weak. See e.g. Michael F. Morgan, “Trash Talking: The Protection of Intellectual Property Rights in Computer Software” (1994) 26 *Ottawa L. Rev.* 425 (arguing that the approach in *Hubbard*, *infra* note 176, seems preferable).

¹¹¹ *Supra* note 4 at para. 54. The “real purpose or motive” was treated as a sub-factor though not applied (*ibid.*).

¹¹² *Boudreau*, *supra* note 68.

paper. In *Boudreau*, 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.¹¹³ The professor made only minor changes to the paper: he removed certain graphs and tables and replaced them with textual explanations, made minor bibliographic changes, and changed the title.¹¹⁴ Weighing this “ample evidence”, the court concluded that the “this can hardly be classified as ‘fair dealing’”¹¹⁵ and mandated that the defence be “restrictively interpreted”.¹¹⁶ Even though one of the court’s policy objectives was to prevent the appropriation of the author’s labour, the professor’s bad-faith conduct, which “blatantly” breached copyright, seemed to have weighed heavily against a finding in his favour.¹¹⁷ Besides the noted evidence, the court did not form a favourable view of the professor, as he “included specific claims as to his contribution to the Boudreau paper” in “a letter of application to the University for a promotion.”¹¹⁸ It will be interesting to see the extent to which future fair dealing cases account for bad faith. By contrast, in *CCH*, the Great Library’s closely enforced Access Policy put the defendant in a positive light. 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 favour a finding of fair dealing or, at the very least, militate against harsher damages.

d. Policy

While *CCH* featured a user-centric and policy-oriented court, previous cases were still policy-oriented but perhaps more mindful of the creator. In *Breen v. Hancock House Publishers Ltd.*,¹¹⁹ an author copied substantial portions of a thesis into a book he later published. In denying fair dealing, the court found that while the book enjoyed little commercial success, the defendant had appropriated the plaintiff’s skill, time, and talent.¹²⁰ He had made liberal use of about twenty to thirty pages of the

¹¹³ *Ibid.* at 335-36.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ “[T]he University cannot stand idly by while its professors blatantly breach copyright laws” (*ibid.*). For an interesting discussion of the role of universities in regulating the activities of its professors, especially vis-à-vis their students, see *ibid.*

¹¹⁸ *Ibid.* at 329. Also, in relation to the issue of authorship, the court found the professor’s evidence unsatisfactory and his grasp of the paper’s concepts “superficial at best” (*ibid.* at 331).

¹¹⁹ (1985), 6 C.P.R. (3d) 433, 6 C.I.P.R. 129 (F.C.T.D.) [*Breen* cited to C.P.R.].

¹²⁰ *Ibid.* at 436-37.

thesis, a qualitatively substantial portion of the original author's work.¹²¹ An interesting question here is how one could argue for the "public interest" in the context of this case. Can this creator be distinguished from the authors in *CCH* who created decisions and secondary materials? It is unclear whether, after *CCH*, the court in *Breen* would have reached a similar result. *CCH* should not be read to sanction what would arguably amount to unfair and unethical dealings.

4. Post-*CCH*: Have Courts and Tribunals Taken *CCH*'s Lead?

While there has been no judicial decision on fair dealing since *CCH*, cases addressing copyright issues generally have considered *CCH*, specifically the Supreme Court of Canada's discussion of the doctrine of originality, authorization, and general policy principles.¹²² In the *Tariff 22* decision involving the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and internet-service providers, the Court reaffirmed the need for a liberal interpretation that balances rights of owners and limitations of those rights, as "[u]ser rights are not just loopholes."¹²³

The Copyright Board of Canada very recently applied *CCH* in *Re Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works (Tariff 22.A)*¹²⁴ and in earlier decisions made *obiter dicta* statements on the potential applicability of the fair dealing doctrine to licensing issues and the need for further clarification.

a. Copyright Board Decisions

In *Tariff 22A*, which was released on 18 October 2007, one of the issues considered was whether online services that offer previews of musical works for sampling constituted fair dealing.¹²⁵ The Board applied *CCH* and found that streaming a musical preview with a view to deciding whether or not to purchase a

¹²¹ Curiously, the infringing author had assumed that academic work was in the public domain and therefore not subject to copyright protection (*ibid.* at 435).

¹²² See e.g. *R. v. Allen*, 2006 ABPC 115, 399 A.R. 245 at para. 30, 57 C.P.R. (4th) 431 (on originality); *Columbia Pictures Industries v. Gaudreault*, 2006 FCA 29, 50 C.P.R. (4th) 1 at para. 32; *Columbia Pictures Industries v. Frankl*, 2004 FC 1454, 36 C.P.R. (4th) 342 at para. 26 (on authorization). But to date no decision has applied the fair dealing doctrine.

¹²³ *CCH*, *supra* note 4 at para. 48, quoting David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 171; *Tariff 22*, *supra* note 80 at para. 88 (citing *CCH*'s use of Vaver).

¹²⁴ (2007), 61 C.P.R. (4th) 353 [*Tariff 22A*].

¹²⁵ As a matter of interest, on an examination I administered for my Intellectual Property Law course at Osgoode Hall Law School in 2007, I asked my class of 90 students whether the Board had appropriately applied *CCH*; the class was almost equally divided on the Board's decision.

download or CD constituted “research”, and that this dealing was fair for the purposes of section 29 of the *CCA*.¹²⁶

In assessing fairness, the Board applied *CCH*'s six factors: (1) the purpose of online streaming was for research as “reasonable safeguards” were in place to ensure that users’ dealings were fair (e.g., music was streamed and of a lower quality so as not to constitute a market substitute for the original); (2) the character of the dealing was fair as it both constituted and facilitated the users’ listening to an excerpt of a track to lead to an informed purchase; (3) the amount of the dealing of the streamed work was modest; (4) there were no apparent alternatives to streaming; it was the most practical, most economical, and safest way to ensure that users purchase the desired music, and as in *CCH*, the availability of a licence was irrelevant; and last, (5) and (6), the nature of the work and the effect of the dealing on the work were considered in tandem.¹²⁷ Here the Board noted that the purpose and actual use of the services were to facilitate the purchase of CDs. Offering previews encouraged purchases and in turn benefited copyright owners.

The Board added that users may not deal with the streamed works in a manner comporting with fair dealing. In this case, as long as the providers of streaming services could show “that their own practices and policies were research-based and fair,” their position should not be compromised.¹²⁸ In this decision the Board thus embraced the liberal lead of *CCH* and systematically applied its six fair dealing factors. Like *CCH*, the Board hinged its ruling on the defendant’s practices, as “reasonable safeguards” were in place. This decision thus illustrates how developing best practices comporting with fair dealing may help defendants avoid liability. Significantly though, these best practices will only make a difference if future courts endorse their use in the assessment of what is fair. And importantly, these best practices must comport with fair dealing. In contrast to *CCH*, where the libraries acted as a “check” to enforce the Great Library’s Access Policy, the same cannot be said for *Tariff 22A*. The absence of such gate-keepers in *Tariff 22A* may call into question the application of *CCH*. Here future cases may turn on what types of reasonable safeguards or best practices are required to ensure fairness.

In earlier decisions such as *Re Media Monitoring 2000-2005*,¹²⁹ the Board considered tariffs filed by the Canadian Broadcasters Rights Agency for commercial and noncommercial media monitors using its private broadcasters’ programs and communication signals. While the Board did not determine the extent to which the monitors’ use of the repertoire may constitute fair dealing, it nonetheless commented on the potential applicability of the doctrine. It maintained that “profit-driven research may constitute fair dealing” and that “the person who facilitates another person’s fair

¹²⁶ *Supra* note 124.

¹²⁷ *Ibid.* at 381-82.

¹²⁸ *Ibid.*, citing *CCH*, *supra* note 4 at para. 63.

¹²⁹ (29 March 2005), Copyright Board Decision, online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/decisions/mm29032005-b.pdf>>.

dealing may be entitled to the same protection under the *Act* as the first person.”¹³⁰ It also argued “that some monitoring activity may constitute research or the facilitation of research, some of which may in turn constitute fair dealing.”¹³¹ Accordingly, “[u]ntil subsequent judgments clarify the portent of the CCH decision, this leaves open the possibility that certain activities of media monitors may not constitute protected uses for which they would require a licence.”¹³² Although *Re Breakthrough Films & Television*¹³³ was not a fair dealing case, the dissenting opinion did comment on the scope of fair dealing. The Copyright Board of Canada found that a television production company was justified in obtaining a retroactive licence for work it had excerpted and that belonged to a copyright owner who could not be located. But the dissent argued that a retroactive licence should not have been granted since there was no copyright infringement. In clarifying the full basis of its policy considerations, the dissent stated:

While the interests of copyright owners should be protected, so should those of users, given the recent insistence of the Supreme Court of Canada in balancing the rights of the former and those of the latter. The public interest in the dissemination of works and subject-matters also should be given some attention.¹³⁴

Fostering balance in copyright, though, should not be at the expense of fostering compliance with copyright rules, since such compliance has a direct impact on licensing issues and ultimately on fair dealing. According to the Board, “Users should be encouraged to evolve toward practices where licences are sought before a work is used. The Board should not condone industry practices that view licensing copyright as an afterthought, thereby showing ... disregard for the rights of copyright owners.”¹³⁵ In other words, proper licensing is part of ensuring the copyright balance.

While retroactive licences help foster certainty, respect for copyright, and dissemination of published works, they “deprive[] the copyright owner of the right to choose between agreeing to a price and seeking compensation for the violation of copyright that has already occurred.”¹³⁶ And so, with respect to fair dealing, the Board’s work may be affected directly:

... whole areas of what are now considered to be protected uses (e.g. media monitoring) might suddenly join the realm of unprotected uses. This might have to be factored into the setting of certain tariffs, which brings us back to the

¹³⁰ *Ibid.* at 9.

¹³¹ *Ibid.* at 10.

¹³² *Ibid.* at 9.

¹³³ 2004-UO-TI-33 (10 May 2005), Copyright Board Decision, online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/unlocatable/156r-b.pdf>> [*Re Breakthrough Films & Television*].

¹³⁴ *Ibid.* at 12 [footnote omitted].

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* at 20.

already identified difficulties associated with applying concepts otherwise suited to an ex post facto decision in the exercise of an ex ante jurisdiction.¹³⁷

The decision of courts and industry to follow *CCH*'s liberal interpretation of research, which includes commercial purposes, may therefore have a direct effect on tariff-setting.

b. Note on the Educational Context

Even before *CCH*, the Council of Ministers of Education (CMEC) proposed an educational amendment to the *CCA* to permit the use of freely available internet materials.¹³⁸ While assessing this proposal is beyond the scope of this article, it is unclear whether such a provision, on its own, would alter the current law or practices with respect to the educational uses of materials. Although the proposed amendment could generate goodwill among this group of stakeholders, in the longer term, many more parties will need to come to a consensus on many more matters than the mere use of internet materials. Moreover, some scholars argue that because of *CCH*, the federal government's interventions with regard to course packs and the educational use of materials for long-distance learning, as proposed in Bill C-60, may be "at best impractical and unnecessary, and at worst unenforceable."¹³⁹ The same or worse might be said about Bill C-61.¹⁴⁰ As *CCH* stated, a LAM need not rely on its specific exceptions but can rely on fair dealing. Significantly, however, fair dealing may not excuse the mass distribution of materials.¹⁴¹ To date, these problems remain unaddressed.

The existing copyright-governance mechanisms in the educational community do not seem tenable. Among other things, academics, students, and other critics are dissatisfied with the current licensing regime.¹⁴² Apparently, very little money reaches professors or authors.¹⁴³ Indeed, CanCopy, a Canadian-based copyright-management company "had more than \$18 million in undistributed royalties, and no apparently systematic way of determining to whom this money belongs."¹⁴⁴ These types of issues

¹³⁷ Bouchard, *supra* note 68.

¹³⁸ "Copying Internet Resources", *supra* note 58; Bill C-61, *supra* note 28 (proposing cl. 30.04 which amends s. 18 of the *CCA*).

¹³⁹ Wilkinson, *supra* note 58 at 360. Bill C-60 was introduced in the House of Commons on 20 June 2005 and died on the order paper on 28 November 2005 (*An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005).

¹⁴⁰ See Emily Davies, "Bill C-61 Goes Beyond Downloading" *The Queen's Journal* 136:3 (29 July 2008), online: The Queen's Journal <<http://www.queensjournal.ca/story/2008-07-29/news/bill-c-61-goes-beyond-downloading/>>.

¹⁴¹ See Wilkinson, *supra* note 58 at 369.

¹⁴² See e.g. Howard Knopf, "Copyright Collectivity in the Canadian Academic Community: An Alternative to the Status Quo?" (1999-2000) 14 I.P.J. 109.

¹⁴³ See *ibid.* ("[f]ew such authors are believed to earn more than \$75 to \$100 a year from reprography royalties from CanCopy [now Access Copyright]").

¹⁴⁴ *Ibid.*

will continue to grate on students and other members of the educational community, from teachers and librarians to the administrators of copyright. While *CCH* has liberalized greater uses of works comporting with fair dealing (e.g., for educational purposes), agreement on any policy, law, or court decision must also be embraced (and perhaps generated) at the grassroots level, by all parties that are directly affected.

In sum, Canada's fair dealing framework is much more flexible because of *CCH*. But despite this, significant uncertainties remain, as in the educational community for instance. It is also unclear how creators will fare and to what extent motive and the nature of the work (whether published or not) will factor into future fair dealing analysis. At this stage and before proceeding to a comparative analysis of the U.K. fair dealing framework, it must be flagged that there exists a disconnect between user practices and the legal initiatives proposed to regulate them. It is here that *CCH* might provide the greatest contribution, as it promotes user-generated best practices comporting with fair dealing. Here future courts would do well to endorse such best practices to determine issues of fairness.

II. Fair Dealing in the United Kingdom

The U.K. doctrine of fair dealing that has developed in the country's courts over almost two centuries eventually made its first statutory appearance in the U.K. *Copyright Act, 1911*.¹⁴⁵ The *Copyright Act's* fair dealing provision has been the subject of pronounced academic debate. Some scholars have argued that the U.K. doctrine offers no principles or vision and that it contains too many obstacles undermining its operation; its purposes are too rigid and have been interpreted restrictively.¹⁴⁶ Others maintain that U.K. courts "have construed the specific purposes liberally."¹⁴⁷

Chapter III of the *Copyright, Designs and Patents Act 1988*¹⁴⁸ is entitled "Acts Permitted in Relation to Copyright Works". Its fair dealing provisions in sections 29 to 30 stipulate enumerated purposes similar to those in Canadian law: (1) research or private study, (2) criticism or review, and (3) reporting current events.¹⁴⁹ As in Canada, at least pre-*CCH*, the defendant must overcome three hurdles: (1) the dealing

¹⁴⁵ *Supra* note 34.

¹⁴⁶ Craig, *Fair Dealing*, *supra* note 23; Kevin Garnett *et al.*, *Copinger and Skone James on Copyright*, 15th ed. (London: Sweet & Maxwell, 2005) at 481.

¹⁴⁷ Lionel Bently & Brad Sherman, *Intellectual Property Law*, 2d ed. (Oxford: Oxford University Press, 2004) at 193.

¹⁴⁸ (U.K.), 1988, c. 48 [*CDPA*].

¹⁴⁹ *Ibid.* In addition, s. 31 of the *CDPA* permits certain instances of incidental inclusion of copyrighted work; ss. 32-36 provide for permitted uses for the purposes of education; ss. 37-44 contain rules regarding libraries and archives; ss. 45-50 concern public administration; ss. 51-53 deal with designs; ss. 54-55 deal with typefaces; s. 56 is about works in electronic form; ss. 57-75 contain miscellaneous provisions; and s. 76 ensures the effectiveness of defences with respect to adaptations (*ibid.*).

must fall into an enumerated category, (2) the dealing must be fair (in accordance with the common law criteria set out below), and (3) in the last two cases, there must be sufficient acknowledgement.¹⁵⁰

Against the conclusions of previous government studies, the recent *Gowers Review of Intellectual Property*¹⁵¹ does not recommend that fair dealing be amended.¹⁵² Rather, its recommendations follow the U.K. tradition of carving out specific exceptions. Gowers recommends adding several new exceptions, including parody and format shifting.¹⁵³ These two exceptions appear not to have attracted any controversy to date.¹⁵⁴

The U.K.'s enumerated purposes are said to be liberally construed.¹⁵⁵ By adopting an objective test, courts have made it reasonably easy to prove that a dealing fits in one of these categories. Still, this liberal construction is not consistent with *CCH*, which arguably has expanded the allowable purposes enough to render possible the future inclusion of a parody right.

¹⁵⁰ But for reporting current events by means of a sound recording, film, broadcast, or cable program, acknowledgement is not required. See *ibid.*, s. 30(3). The purported explanation for this distinction is that acknowledgements would unduly clutter reporting by these forms of media. A similar provision was contained in s. 6(3) of the *Copyright Act, 1956* ((U.K.), 4 & 5 Eliz. II, c. 74, as amended by Andrew Gowers with *The Copyright and Related Rights Regulations 2003*, S.I. 2003/2498, giving effect to EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, [2001] O.J.L. 167, art. 5(3)(c) [*Information Society Directive*]).

¹⁵¹ U.K., HM Treasury, *Gowers Review of Intellectual Property, December 2006* (London: Her Majesty's Stationery Office, 2006), online: HM Treasury <http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf> [*Gowers Review*].

¹⁵² In December 2005, the Chancellor of the Exchequer asked Andrew Gowers to lead an independent review; the one-year target was met and the U.K. Government accepted all of the recommendations the day the review was tabled in Parliament. See *ibid.* Gowers goes against previous reports, such as U.K., H.C., "Report of the Committee to Consider the Law on Copyright and Designs", Cmnd 6732 in *Sessional Papers (1976-77)* 1 ("[t]he greater the number of special cases, the greater the scope for uncertainty [regarding the applicability of the fair dealing defence] in relation to cases not specifically dealt with" at 175).

¹⁵³ *Gowers Review, ibid.* at 6, recommendations 10b (format shifting), 12 (parody).

¹⁵⁴ Interview of United Kingdom Patent Office (5 February 2007) [unpublished, transcript on file with author].

¹⁵⁵ See Bently & Sherman, *supra* note 147 at 193; *Newspaper Licensing Agency Ltd. v. Marks & Spencer Plc.*, [1999] R.P.C. 536, [1999] E.M.L.R. 369 (C.A.) [*Marks & Spencer*]; *Pro Sieben Media A.G. v. Carlton U.K. Television Ltd.* (1998), [1999] 1 W.L.R. 605 (C.A.), Walker L.J. [*Pro Sieben*]; *Ashdown, supra* note 64 at para. 64.

A. What Have the Courts Said on the Enumerated Purposes?

1. Research or Private Study

U.K. courts have claimed that research and private study must be for a noncommercial purpose.¹⁵⁶ Nonetheless, some U.K. commentators argue that a database used in market testing for a new drug or in a commercial training course would constitute research or private study.¹⁵⁷ However, it remains difficult to determine what is meant by “commercial”. Article 42 of the *Information Society Directive* mandates that one must look at the activity rather than the “organisational structure and the means of funding of the establishment ...”¹⁵⁸ One key factor seems to be that research need not be private. Other important factors include the amount taken, the availability of the work, and the effect on the market.¹⁵⁹ It is possible for an agent to photocopy works for third parties, but there are limitations if such copying results in substantial dissemination of the material.¹⁶⁰ Arguably, this is also the case in Canada under *CCH*, which allowed copying subject to a fair dealing-compliant access policy. Still, because of *CCH*, research and private study in Canada can include commercial purposes.¹⁶¹

In the United Kingdom, the application of this purpose has been criticized because it fails to reflect the importance of nontextual media, and applies in a limited fashion to computer programs.¹⁶² This purpose also does not apply to broadcasts, sound recordings, or film.¹⁶³

2. Criticism or Review

For a dealing to fit into the category of criticism or review, the work must have been previously available to the public, be a fair dealing, and have sufficient acknowledgement of its source. In *Sillitoe v. McGraw-Hill Book Company*,¹⁶⁴ no fair dealing was found in the use of original summaries incorporated into issues of *Coles Notes*. The court found that the authors of *Coles Notes* used very long extracts without sufficient acknowledgement. *Coles Notes*' inclusion of brief commentaries under only some of the reproduced summaries was not sufficient to qualify as

¹⁵⁶ See *CDPA*, *supra* note 148, s. 178 (definition omits direct or indirect commercial purpose).

¹⁵⁷ Bently & Sherman, *supra* note 147 at 198.

¹⁵⁸ *Supra* note 150, art. 42.

¹⁵⁹ See Bently & Sherman, *supra* note 147 at 198.

¹⁶⁰ See *CDPA*, *supra* note 148, s. 29(3)(b) (e.g., instructors could not make multiple copies of articles for their students).

¹⁶¹ See *CCH*, *supra* note 4 at para. 51 (“[I]awyers on the business of law for profit are conducting research within the meaning of s. 29 of the Copyright Act”).

¹⁶² See *CDPA*, *supra* note 148, s. 29(4).

¹⁶³ See *Pro Sieben*, *supra* note 155.

¹⁶⁴ [1983] Fleet Street Reports 545 (Ch.D).

criticism or review. In *Associated Newspapers Group v. News Group Ltd.*,¹⁶⁵ at issue were letters between the Duke and Duchess of Windsor that were owned exclusively by the *Daily Mail* but printed by a competing newspaper, *The Sun*. The defendant's motive had not been criticism or review, but to "attract readers".¹⁶⁶ In this case, the "death of the Duchess [did] not require the publication of the contents of the letters."¹⁶⁷ *The Sun* could simply have reported the event. As also seen below, implicit in the decision-making is the commercial nature of the dealing: the courts were conscious of the defendant's profit motive in the gratuitous use of the work.

3. Current-Events Reporting

The purpose of current-events reporting has generally been construed as news reporting, though a recent case, *Pro Sieben Media AG v. Carlton U.K. Television Ltd.*,¹⁶⁸ has given it a wider scope. *Pro Sieben* concerned the defendant U.K. broadcaster's use of a "substantial part" of a German broadcaster's television program. At issue was a thirty-second interview that Pro Sieben had purchased for its exclusive use and over which the U.K. broadcaster claimed fair dealing for criticism or review and reporting of current events. Against the first-instance ruling that the acknowledgement displayed in the extracted interview was insufficient to satisfy the acknowledgement requirement, and that its inclusion did not constitute criticism or review or the reporting of a current event,¹⁶⁹ the court found fair dealing. Lord Justice Walker held that criticism or review and reporting current events are expressions of "wide and indefinite scope" that should be interpreted "liberally".¹⁷⁰ Indeed, the outcome of a multiple pregnancy, the subject of the interview, was a current event of real interest to the public, and "[t]he volume and intensity of media interest was sufficient to bring the media coverage itself within the ambit of current events."¹⁷¹ The fact that a German television had paid 30,000 Pounds Sterling for an interview was "an event of limited and ephemeral interest, but ... [still] a current event."¹⁷²

¹⁶⁵ [1986] R.P.C. 515.

¹⁶⁶ *Ibid.* at 518.

¹⁶⁷ *Ibid.* at 519.

¹⁶⁸ *Supra* note 155 at 625. The fact that a German television station had paid £30,000 to interview a woman expecting a multiple birth was "an event of limited and ephemeral interest, but ... [still] a current event" (*ibid.*).

¹⁶⁹ If the purpose had been the reporting of current events by broadcast, s. 30(3) of the *CDPA* would have applied such that a sufficient acknowledgement need not have accompanied the derivative work (*supra* note 148).

¹⁷⁰ *Supra* note 155 at 614. The court found that the purpose was to criticize "chequebook journalism in general" and, more specifically, the treatment of the media interview (*ibid.*).

¹⁷¹ *Ibid.* at 619.

¹⁷² *Ibid.* at 619.

Broadcasters have criticized *Pro Sieben* for potentially extending the already wide applicability of the current-events purpose beyond the category of news,¹⁷³ but U.K. courts have not yet clarified the extent of its scope. The case illustrates how difficult it is to define what constitutes “current events” and that a liberal interpretation is certainly warranted. Rather than quibbling with the meaning of the purpose, certain factors might provide more bright-line rules when determining fair dealing. Besides the court’s findings that the extract used was short, and that the interviewee’s words were inaudible, the use of the extract “did not in any realistic sense represent unfair competition with Pro Sieben’s exploitation of the rights which it had acquired.”¹⁷⁴ *Pro Sieben* shows how undesirable it is to dismiss the validity of a fair dealing claim based on the enumerated purposes but must also be assessed more holistically weighing fairness.¹⁷⁵ From this perspective, it would be sound judicial practice in the United Kingdom to follow the Canadian jurisprudential example and interpret the purposes liberally so that fairness can also be considered.

B. The Dealing Must be Fair

Once a defendant proves that a work falls into an enumerated purpose, the defendant must show that the dealing was fair. *Hubbard v. Vosper*¹⁷⁶ sets out the main test for fairness. For some scholars, *Hubbard* “represents the first major judicial attempt to define the concept of ‘fairness’ with respect to the fair dealing provisions contained, at that time, in section 6 of the 1956 Copyright Act.”¹⁷⁷ Cyril Vosper, a former member of the Church of Scientology, wrote a book that relied extensively on a book written by Lafayette Ronald Hubbard, the founder of the Church. At issue was whether Vosper’s use infringed Hubbard’s copyright. In denying an application for an injunction, Lord Denning stated that whether a dealing is fair is a matter of fact and degree and all the circumstances of a particular case must be taken into account.¹⁷⁸

¹⁷³ See “Verdict Causes Stir for Broadcasters: Roger Pearson Reports on Carlton and 20/20’s Failure to Credit Pro Sieben for Interview on Chequebook Journalism” *The Lawyer* (2 February 1999) 22.

¹⁷⁴ *Supra* note 155 at 618. The court also noted that the more derivative the work, the better to justify a fair dealing defence. Also, the court found sufficient acknowledgement by the use of the logo through which the German TV station was accustomed to identifying itself. The use of the correct name was unlikely to have any particular meaning to the U.K. audience (*ibid.* at 625).

¹⁷⁵ Craig remarks that the extract “provided a useful commentary upon a matter of public concern without effecting any notable damage upon the plaintiff’s copyright or upon the wider incentive system” (*Fair Dealing, supra* note 23 at 59 [footnote omitted]). In a footnote she states, “At first instance, Laddie J. noted that the infringing program, ‘was not intended to compete with and thereby devalue the interview Pro Sieben had obtained with Ms Allwood.’” (*ibid.*, n. 70) Laddie J. also noted that the program’s editor “sincerely thought that what she was doing was for the public good” (*ibid.* at 61-62).

¹⁷⁶ (1971), [1972] 1 All E.R. 1023, [1972] 2 W.L.R. 389 (C.A.) [*Hubbard* cited to All E.R.].

¹⁷⁷ Craig, *Fair Dealing, supra* note 23 at 9.

¹⁷⁸ *Hubbard, supra* note 176 at 1027.

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be fair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.¹⁷⁹

A court must therefore weigh the extent and proportion of the work used in relation to the original work and uses made (e.g., for a rival purpose).¹⁸⁰ An entire work may also be subject to the fair dealing defence.¹⁸¹ Since the *Human Rights Act 1998*,¹⁸² courts need to be flexible and considerations of public interest are paramount.¹⁸³ While not expressly delineated in the legislation, several factors emerge from the case law that are, for the most part, consistent with the Canadian jurisprudence.¹⁸⁴

1. **Nature of the work:** if the work is unpublished, this will weigh against the defendant.¹⁸⁵ Confidential works (e.g., private letters) will weigh more against fair dealing than official reports of public importance.
2. **How the work was obtained:** if the work was leaked or stolen, its use is less likely to be fair.¹⁸⁶
3. **Amount taken:** while the least amount taken favours fair dealing, in some cases it may be fair to reproduce an entire work (e.g. if the work is short, like an epitaph).¹⁸⁷
4. **Uses made:** the more transformative the use, the more it favours fair dealing. Some have stated it pays to be long-winded: the more that has been added by the user, the better).¹⁸⁸
5. **Commercial benefit:** if the work is used for a commercial benefit, this will weigh against the defendant; one cannot derive a commercial benefit in research, unless there is some overriding element of public advantage.¹⁸⁹

¹⁷⁹ *Ibid.*

¹⁸⁰ Craig highlights that, with respect to the relevance of a "rival purpose", *British Broadcasting Corp. v. British Satellite Broadcasting Ltd.* ((1991), [1991] 3 All E.R. 833, [1992] Ch. 141) held that BSB's rivalry with the BBC did not necessarily take its actions outside the protection of the fair dealing defence (*Fair Dealing*, *supra* note 23 at 51).

¹⁸¹ See *Hubbard*, *supra* note 176 at 1031 (Megaw L.J. stating this in the context of a parish magazine reproducing a twenty-word epitaph).

¹⁸² (U.K.), 1998, c. 42.

¹⁸³ See *Ashdown*, *supra* note 64 at para. 71.

¹⁸⁴ See especially Bently & Sherman, *supra* note 147 at 192-206.

¹⁸⁵ See e.g. *Hyde Park*, *supra* note 56 (dealing with current events).

¹⁸⁶ See *Beloff v. Pressdram Ltd.* (1972), [1973] 1 All E.R. 241 at 264 (Ch.).

¹⁸⁷ *Hubbard*, *supra* note 176 at 1031.

¹⁸⁸ David Vaver, *Copyright*, vol. 2 (1998) at 522 [unpublished, archived at Osgoode Hall Law School Library].

6. **Motives for the dealing:** the courts employ an objective standard¹⁹⁰ and consider if the motive is malevolent or altruistic.¹⁹¹
7. **Consequences of the dealing:** this factor concerns the impact of the dealing on the market of the original work, especially where parties are in competition; if a new work acts as a substitute for the original, this weighs against fair dealing.¹⁹²
8. **Purpose achieved by different means:** were alternatives to the dealing available? Courts have found no fair dealing where the written word would have been just as effective as actual pictures that constituted the copyrighted works.¹⁹³

C. Hierarchy of Factors

While an open list of criteria appears to be emerging, a recent case has suggested that there is a hierarchy of criteria. In *Ashdown v. Telegraph Group Ltd.*,¹⁹⁴ a U.K. daily newspaper unsuccessfully claimed fair dealing in its publication of confidential political material concerning the pending formation of a new U.K. government. Although the Court of Appeal of England and Wales acknowledged *Pro Sieben's* liberal interpretation of “current events”¹⁹⁵ by drawing from the work of Hugh Laddie, Peter Prescott & Mary Vitoria,¹⁹⁶ the court laid out a hierarchy of factors for determining fair dealing, in the following order:

- (1) whether there was a market substitute to the dealing (if so, fair dealing will “most certainly fail”),
- (2) whether the work was published or previously exposed to the public (if not, fair dealing will fail, especially if the work was obtained by breach of confidence or some other underhanded way; here, motive is relevant),
- (3) the extent of the work taken (though a substantial part of the entire work may be allowed).¹⁹⁷

The court found that the copied extract enhanced the commercial value of the newspaper, increasing its readership loyalty. And while some of the matters covered

¹⁸⁹ See *Marks & Spencer*, *supra* note 155.

¹⁹⁰ *Hyde Park*, *supra* note 56 at para. 36.

¹⁹¹ *Pro Sieben*, *supra* note 155 at 614.

¹⁹² See *Hubbard*, *supra* note 176.

¹⁹³ See *Hyde Park*, *supra* note 56.

¹⁹⁴ *Supra* note 64. A public interest defence and freedom of expression claim were also advanced.

¹⁹⁵ Although the “issues” identified by *The Sunday Telegraph* may not themselves be “events”, the existence of those issues may help to demonstrate the continuing public interest in a meeting two years earlier. However, it might impinge upon the way in which the public would vote at the next general election. See *ibid.* at para. 64.

¹⁹⁶ *The Modern Law of Copyright and Designs*, 3d ed. (London: Butterworths, 2000) at 20.16.

¹⁹⁷ *Supra* note 64 at paras. 70-77.

in the extract had been previously disclosed in a radio interview, the extract was obtained in breach of confidence.¹⁹⁸

So although the court stated that where freedom of expression is at issue courts may need to place less weight on this hierarchy of factors and more on other factors, such as the political importance of the contents of the work,¹⁹⁹ copyright won out in the end: “We do not consider it arguable that article 10 [of the *Human Rights Act 1998*] requires that the Telegraph Group should be able to profit from this use of Mr Ashdown’s copyright without paying compensation.”²⁰⁰ In other words, market impact (which is mindful of remunerating the author) may trump freedom-of-expression claims and appears to be the most important consideration.

Market impact is the most important factor in the United Kingdom, but it is less important in post-*CCH* Canada. In the United Kingdom, market impact requires the court to be vigilant regarding the author’s right to remuneration. The published or unpublished nature of the work may yield opposite results: in Canada the use of unpublished works tends toward a finding of fairness, whereas in the United Kingdom the use of unpublished works is not fair. The extent of the work taken is treated similarly in Canada and in the United Kingdom, in that it is not a factor of paramount importance. The public interest is critical in both jurisdictions, but it is interpreted as a user right in Canada and as a human right in the United Kingdom. While embracing *CCH*’s liberal reasoning is advisable, Canadian courts and policy-makers should be mindful of the U.K. courts’ careful recognition of competing interests, for instance, as seen with the long-standing treatment of unpublished works. A common ground with *CCH* can be found in the European Union’s treatment of commercial purpose where the nature of the activity, and not the organization, is important. Ultimately, however, in both jurisdictions uncertainty still festers because decisions are case by case and left to the courts; as such, better solutions are necessary where clarification through litigation is a last resort.

III. Fair Use in the United States

A. U.S. Legislation

Against Canada’s and the U.K.’s fair dealing, U.S. fair use has been championed as the most flexible and ideal model for copyright law. In the United States section 107 of the *U.S. Copyright Code*²⁰¹ entrenches the jurisprudence accumulated up until the 1976 revision and provides that the “fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for

¹⁹⁸ *Ibid.* at paras. 72-76.

¹⁹⁹ *Ibid.* at para. 71.

²⁰⁰ *Ibid.* at para. 82.

²⁰¹ 17 U.S.C. §107 (2000).

classroom use), scholarship, or research” does not infringe copyright.²⁰² The United States offers an open list of permissible purposes (as opposed to the Canadian and U.K. statutes), and the case law has generally seen similar uses exonerated under fair use. The decision of whether a particular use is fair mandates the consideration of four statutorily entrenched factors: the purpose and character of the work, its nature, the substantiality of the use, and its effect on the potential market for or value of the copyright.

1. Four Fair Use Factors

a. *The Purpose and Character of the Use, Including Whether Such Use Is of a Commercial Nature or Is for Non-Profit Educational Purposes*

The purpose and character of the use considers whether the use is commercial or should be deemed transformative. More recently, good faith has been noted as a subfactor.²⁰³ Commercial use is but one factor and, against a flurry of case law, is no longer presumptive. In *Sony Corp. of America v. Universal City Studios*,²⁰⁴ a case concerning the use of the Betamax videotape recorder for private “time shifting” of television programs, the Supreme Court of the United States examined whether the user stood to gain from the use of copyrighted work, not whether the user had actual motive for monetary gain. In this case, time shifting was found to be a noncommercial use. The court’s *obiter dictum* statement that “every commercial use of copyrighted material is presumptively ... unfair”²⁰⁵ was later embraced by subsequent courts seeking a bright-line rule to interpret fair use cases, but was ultimately rejected in *Campbell v. Acuff-Rose Music*.²⁰⁶

Acuff-Rose, also known as the “Pretty Woman” case, concerned the parodic use of Roy Orbison’s song “Pretty Woman” by the rap group 2 Live Crew. Overruling the trial court, the United States Court of Appeals for the Sixth Circuit relied on the *Sony* presumption and found that fair use did not exonerate the rap group.²⁰⁷ However, the Supreme Court of the United States later overturned this decision, stating that the commercial nature of a work should not be dispositive. Rather, “parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.”²⁰⁸ Relying on a

²⁰² *Ibid.*, s. 107.

²⁰³ Compare *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 104 S. Ct. 774 (1984) [*Sony* cited to U.S.] (in which motive was not a factor).

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.* at 451.

²⁰⁶ 510 U.S. 569, 114 S. Ct. 1164 (1994) [*Acuff-Rose* cited to U.S.].

²⁰⁷ *Campbell v. Acuff-Rose Music*, 972 F.2d 1429 (6th Cir. 1992).

²⁰⁸ *Supra* note 206 at 581.

presumption that commercial use is unfair would have distorted fair use and would have been “suggestive of a [U.S.] judicial tendency to establish bright-line rules, evolved from in-built biases or assumptions ...”²⁰⁹ Today, in the United States, the defendant’s commercial use does not create a presumption against fair use, but it does tend to weigh in favour of the plaintiff.²¹⁰ Fair dealing pursuant to *CCH* can thus be more flexible than U.S. fair use, as the commercial nature of the use can be one consideration among others and is not a mandatory factor.

In *Rogers v. Koons*,²¹¹ the defendant, Koons, sculpted a “String of Puppies” to parody the plaintiff’s photograph of eight puppies, which had enjoyed wide commercial success. In directing the construction of the sculpture, Koons used an enlarged photocopy of the puppies. The court rejected the parody argument because Koons could have expressed the parody without directly copying Rogers’ work. Koons’ work was not commenting directly on the work itself, but rather on a general idea, so there was no need to copy. Also, the court determined that there was bad faith on the part of Koons and that the copying was for profit-making motives.²¹²

*Basic Books v. Kinko’s Graphics Corp.*²¹³ is the U.S. “course packs” case. The United States Court for the Southern District of New York ruled that uses of copyrighted material for educational purposes by a commercial enterprise were not determined to be fair use. The four factors were analyzed. The copying was nontransformative and on a commercial scale. While it remained unclear how much profit Kinko made, the court found it important that Kinko had the intention of making profits. And so, its motives were only “purportedly altruistic.”²¹⁴ This case can be contrasted with *Williams & Wilkins*, where a government department copied articles from medical journals and disseminated them to researchers and personnel who requested them. The court found that the purposes of study and research were acceptable here, as these were “socially useful objectives ... [T]his is not true of photocopy shops, which reproduce for profit.”²¹⁵ Further, government libraries had established fair use guidelines and did not charge a fee.

²⁰⁹ Craig, *Fair Dealing*, *supra* note 23 at 128.

²¹⁰ See *ibid.* at 125. This was the real intention of the court: to set up a “balancing of the fair use factors” (*ibid.*).

²¹¹ 960 F.2d 301 (2d Cir. 1992) [*Rogers*].

²¹² *Ibid.* at 309-10.

²¹³ 758 F. Supp. 1522 at 1531 (S.D.N.Y. 1991) [*Basic Books*] (“[t]he effort utilized in this case was questionable at best and the level of judgment practically non-existent”).

²¹⁴ *Ibid.* at 1532 (“[t]he ... insistence that theirs are educational concerns and not profitmaking ones boggles the mind”).

²¹⁵ *Ibid.* at 1536, quoting Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (New York: Matthew Bender, 1985–present), para. 13.05[E] at 13-93, 13-94, n. 69. *Contra American Geophysical Union v. Texaco*, 37 F.3d 881, 63 U.S.L.W. 2295 (2d Cir. 1994) (involving a class action by 82 scientific publishers against Texaco for copying its works to which it subscribed without paying royalties).

A Canadian court post-CCH could make similar decisions on allowing parody and educational uses of works by government departments. It should similarly rule against a Kinko-type operation, lacking set practices comporting with fair dealing. In the United Kingdom, parody would be prohibited outright and thus from this perspective remains restrictive.

b. The Nature of the Copyrighted Work

For this factor, courts consider whether the work is factual or fictional and whether it is published or unpublished. If there is substantial creativity, this tends to favour the owner.

*Harper & Row Publishers v. Nation Enterprises*²¹⁶ seemed to have created a presumption against fair use for unpublished works. The presumption was followed by lower courts until the United States Congress responded to the publishing industry's concerns and overruled it.²¹⁷ In *Harper & Row, The Nation*, a news magazine, published unauthorized quotations from former U.S. President Gerald Ford's unpublished memoirs. The Supreme Court of the United States analyzed the four factors and denied fair dealing. Specifically, the court reasoned that the author has the right to control the first appearance of the work as part of the right of first publication, which encompasses the choice of whether to publish at all, as well as when, where, and in what form.²¹⁸ In this case, the court found that Ford's memoirs were subject to a confidentiality agreement and that any article produced from it would need approval. Further, "The Nation's clandestine publication afforded no ... opportunity for [the author's] creative or quality control" and "contained 'a number of inaccuracies.'"²¹⁹ The court found that the unauthorized quotations "focus[ed] on the most expressive elements of the work, exceed[ing] that necessary to disseminate the facts."²²⁰ By comparison, in *Basic Books*, while the court did not find fair dealing, it noted that because the nature of the works was educational, this factor weighed in favour of the user.²²¹ The United States and United Kingdom seem consistent in their interpretation of this factor, as opposed to Canada, which favours users who disseminate unpublished works.

c. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

This factor operates on a sliding scale: the more a dealing goes beyond a *de minimis* use, the more likely it goes against fair use. Courts still focus on *what* and not

²¹⁶ *Supra* note 60 at 546.

²¹⁷ *Fair Use of Unpublished Works*, *supra* note 60.

²¹⁸ *Harper & Row*, *supra* note 60 at 562.

²¹⁹ *Ibid.* at 564.

²²⁰ *Ibid.*

²²¹ *Basic Books*, *supra* note 213 at 1533.

how much is used—quality over quantity of the taking is critical. In *Basic Books*, entire chapters were copied and meant to stand alone; therefore, the use negated both quantitative and qualitative considerations. In *Harper & Row* the court focused on quantity and quality: though insubstantial, the extracts were “the ‘heart of the book’”.²²² In *Acuff-Rose*, 2 Live Crew departed from the “heart” and produced distinctive lyrics. However, when courts find the character of the use to be appropriate, entire works may be fair use. On the whole, as in Canada and the United Kingdom, this factor appears to be the least significant in the United States.

d. The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work

Harper & Row signalled this last factor as the single most important one, especially if the use of the copyrighted work becomes widespread and undermines the author’s potential market (since for the court the purpose of copyright is also to provide an incentive to authors).²²³ Some lower courts have followed this dictum.²²⁴ Still, it is difficult for courts to anticipate the curtailment of the potential market as it can be like gazing in a crystal ball.²²⁵

In *Basic Books*, the purchase of the course packs was found to undermine the need to purchase full texts. The court also held that such purchase would impact out-of-print books whose licence fees constituted a significant source of income.²²⁶ By contrast, it is unlikely that a parody would act as a market substitute for the original, since parody and the original serve different market functions.²²⁷ But in *Rogers*, there

²²² *Harper & Row*, *supra* note 60 at 565, quoting 557 F. Supp. 1062 at 1072 (S.D.N.Y. 1983). *Acuff-Rose* found the parody factor unhelpful because the parody necessarily must go to the original’s “heart” since the “heart” of the song is what was conjured up for the purpose of parody (*supra* note 206). Examples of conjuring the “heart” include using the first line of the original’s lyrics and “characteristic opening bass riff” (*ibid.* at 586-89).

²²³ “More important, to negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work” (*Harper & Row*, *supra* note 60 at 568, quoting *Sony*, *supra* note 203 at 451 [emphasis in original]). “Isolated instances of minor infringements ... become in the aggregate a major inroad on copyright that must be prevented” (*Harper & Row*, *ibid.* at 569, quoting U.S., S. Rep. No. 94-473 (1974) at 65).

²²⁴ See e.g. *Arica Institute v. Palmer*, 970 F.2d 1067 at 1078 (2d Cir. 1992); *Los Angeles News Service v. Tullio*, 973 F.2d 791 at 798 (9th Cir. 1992); *Cable/Home Communication Corp. v. Network Productions*, 902 F.2d 829 at 845, 59 U.S.L.W. 2026 (11th Cir. 1990).

²²⁵ See *Nunez v. Caribbean Intern News Corp.*, 235 F.3d 18 (1st Cir. 2000) [*Nunez*] (determining that reprinting photographs was fair). However, it is clear that bootlegged CDs or software is unfair. See *United States v. Slater*, 348 F.3d 666 at 669 (7th Cir. 2003) (finding that there was no abuse of discretion in refusing to instruct on fair use in a criminal trial concerning unauthorized distribution of software).

²²⁶ *Basic Books*, *supra* note 213 at 1534.

²²⁷ See *Sony*, *supra* note 203 at 451. See generally *Harper & Row*, *supra* note 60 at 590-94.

was a presumption that the sculpture would harm the plaintiff's future market.²²⁸ And on an earlier motion for summary judgment in *Acuff-Rose*, the absence of evidence of the effect of the parody on the nonparody market (i.e., Orbison's market) caused the defendant to lose the case.²²⁹ Market substitution is therefore a very important factor in the United States, and the most important factor in the United Kingdom, but it is less important in Canada, where, according to *CCH*, the plaintiff bears the onus of proving market substitution.

Irrespective of the United States' statutory entrenchment of the four factors, it is still very difficult to recognize fair use and assess which, if any, factor is determinative in such identification. In other words, all four U.S. statutory criteria must be considered in each case. As *Acuff-Rose* held, there are no bright lines, few presumptions, and there must be a sensitive balancing of interests. Some argue that these criteria may enhance predictability but have reduced the flexibility available to U.S. courts;²³⁰ others contend that conventional wisdom on fair use has been wrong, as there are certain "stampeding factors" that matter more than others;²³¹ still others maintain that there is no predictability and that it is difficult to articulate what fair use is, but that there is flexibility with regard to emerging technologies.²³² Ultimately, not all factors have to be fair for the end use to be fair; similarly, some factors can be fair, but the end result may be unfair use.

2. "Other" Fair Use Factors

In *Basic Books*, the Supreme Court of the United States considered two other factors beside the four enumerated ones:

a. *Monopolistic and Competitive Practices (and Necessity)*

The defendant Kinko created a new "nationwide business" allied to the publishing industry by usurping the plaintiff's copyrights and profits.²³³ Kinko had two hundred stores across the country, and it was difficult for the plaintiff to challenge the defendant. Kinko asserted that the plaintiffs misused their copyrights

²²⁸ *Rogers*, *supra* note 211 at 312 (raising the example of a movie adaptation of a book impacting the potential market for the book's adaptation rights).

²²⁹ See *Acuff-Rose*, *supra* note 206.

²³⁰ See e.g. Carlos M. Correa, "Fair Use in the Digital Era" (Paper presented at Infoethics 2000: Ethical, Legal and Societal Challenges of Cyberspace, Paris, 13–15 November 2000) at 5, online: UNESCO <http://webworld.unesco.org/infoethics2000/documents/paper_correa.rtf>. In a footnote, Correa cites Justice Hand, who claims that the fair use doctrine has been the "most troublesome in the whole law of copyright" (*Dellar v. Samuel Goldwin Inc.*, 104 F.2d 661 (2d Cir. 1939), n. 9).

²³¹ See e.g. Barton Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005" (2007) U. Penn. L. Rev. 549 at 589.

²³² See Nimmer, *supra* note 18 at 263 (suggesting that courts first decide on the outcome, whether the use is fair or not, and then use the factors to justify this outcome).

²³³ *Supra* note 213 at 1534.

and monopolized the industry in an effort to thwart the copying market and restrain competition.²³⁴ Although Kinko advanced anecdotal evidence that there were unreasonable delays, undue response times, and high costs in obtaining copyrighted materials for the courses, the court found no clear evidence of such problems. Importantly, the court implied that had there been such evidence, this would have weighed in favour of fair use. The court seemed to leave this door open for future cases. That is, fair use may be found if the defendant is able to show that the plaintiff engaged in monopolistic practices. In *CCH*, this factor was considered, though the plaintiff had the burden of proof and failed to meet it. Put differently, if the plaintiff engages in monopolistic practices, the defendant may rely on “fair use by reason of necessity.”²³⁵ In *Basic Books*, the court observed that the defendant had not advanced evidence that an instructor would be disabled without the use of the course packs, thereby blocking the “educational process” and making the copyright in the academic materials a necessity to infringe.²³⁶ It will be challenging for a defendant such as Kinko to advance fair use by necessity without facing conflict-of-interest issues. Competition law and not copyright law might best be able to address such monopoly issues.

b. Industry Practices and Institutional Policies

While the “Classroom Guidelines” did not apply to Kinko as it was a for-profit corporation, with profit-making intent, the court noted that the defendant would have nonetheless violated the Guidelines prohibiting the use of anthologies.²³⁷ These Guidelines, created for the educational community, were the product of negotiations among key stakeholders in the community, and were “necessitated by the widespread availability of reprographic technology which eliminated much of the copyright owner’s control over the reproduction of his work.”²³⁸ The court considered *Williams & Wilkins*, where the library copying was subject to institutional policies within fair use and did not involve the payment of a fee.²³⁹ The libraries had also established rules regarding the frequency of and page limits for copying.²⁴⁰ Following institutional policies within fair dealing was also very important in *CCH*, where the Supreme Court of Canada relied heavily on the Great Library’s Access Policy for a

²³⁴ *Ibid.* at 1538.

²³⁵ *Ibid.* at 1535.

²³⁶ *Ibid.*

²³⁷ *Ibid.*; U.S., H.R., *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions* (H.R. Rep. No. 1476, 94th Congr., 2d Sess. 68) (Washington, D.C.: United States Government Printing Office, 1976) [*Classroom Copying Guidelines*].

²³⁸ *Basic Books*, *ibid.* at 1535. The key stakeholders were the Ad Hoc Committee of Educational Institutions and Organizations of Copyright Law Revision, the Authors League of America Inc., and the Association of American Publishers (*ibid.*).

²³⁹ *Ibid.* at 1536; *Williams & Wilkins*, *supra* note 106.

²⁴⁰ *Ibid.*

finding of fairness.²⁴¹ Thus, if the defendant can show adherence to policies within fair use, this factor will very likely weigh strongly in his or her favour. Significantly though, the defendant's purpose must be seen as not-for-profit.²⁴² In Canada, the defendant's purpose may be commercial, allowing the defendant greater flexibility, though increasing ambiguity for all parties.

3. Fair Use is "Ill"

Before proceeding to outline some comparative threads among the three jurisdictions, some remarks must be made on the burgeoning body of scholarship, studies, and reports criticizing U.S. fair use. Fair use is said to be "ill, though hardly dead yet."²⁴³ Peter Jaszi argues that claims of U.S. fair use superiority are often misguided, and many others have called on the United States Congress to clarify fair use.²⁴⁴ Many solutions have been proposed,²⁴⁵ but to date Congress has resisted changing fair use. The courts have also failed to simplify fair use despite attempts to establish bright-line presumptions that (1) commercial uses are unfair,²⁴⁶ (2) the plaintiff's unpublished works should be favoured,²⁴⁷ and, more recently, (3) works must be transformative to constitute fair use.²⁴⁸ Moreover, it is increasingly expensive to mount litigation to clarify the scope of use, and some users may be risk-averse to begin with. According to the American Intellectual Property Law Association, the average cost of defending a copyright case is just under one million U.S. dollars.²⁴⁹

Although fair use's attention to context is laudable, "it is so case-specific that it offers precious little ... to artists, educators, journalists, Internet speakers, and

²⁴¹ *Supra* note 4.

²⁴² Classroom and library copying are viewed more sympathetically "since they generally involve no commercial exploitation and ... [have] socially useful objectives. ... This is not true of photocopy shops, which reproduce for profit" (*Classroom Copying Guidelines*, *supra* note 237 at 1536).

²⁴³ Gordon, *supra* note 20 at 912 (arguing that overbroad contract rules and the *DMCA*, *infra* note 253, are the true threats to fair use).

²⁴⁴ Peter Jaszi, "Public Interest Exceptions in Copyright" [unpublished, on file with McGill Law Journal]; Michael Carroll, "Fixing Fair Use" (2007) 85 N.C.L. Rev. 1087.

²⁴⁵ Carroll describes some proposals at n. 37 (*ibid.*). Jessica Litman proposes an unfair competition standard for infringement (*Digital Copyright* (Amherst, N.Y.: Prometheus Books, 2001) at 166-86). Michael Madison thinks that fair use should be rewritten with more flexibility so that social practices that can benefit from fair use inform the analysis ("Rewriting Fair Use and the Future of Copyright Reform" (2005) 23 *Cardozo Arts & Ent. L.J.* 391).

²⁴⁶ *Sony*, *supra* note 203.

²⁴⁷ *Fair Use of Unpublished Works*, *supra* note 60 ("[t]he fact that a work is unpublished shall not itself bar a finding of fair use"). See also Gordon, *supra* note 20 at 910.

²⁴⁸ *Acuff-Rose*, *supra* note 206 at 579, seconding *Sony*, *supra* note 203. But see recent cases such as *Nunez*, exonerating nontransformative or exact copies of works (*supra* note 225).

²⁴⁹ Fisher & McGeeveran, *White Paper*, *supra* note 58 at 57.

other[s]” who want to use the copyrighted work.²⁵⁰ Google’s digitization project of large library collections is a recent sign that in the digital age, issues of fair use have become more urgent.²⁵¹

Jennifer Urban and Laura Quilter document the culture of anxiety that now exists as right holders aggressively attempt to thwart potential fair uses of works.²⁵² In heeding private cease-and-desist letters, online service providers frequently cull user materials in order to earn a place in the “safe harbour” zone.²⁵³ And because the material is removed privately, no court examines the validity of a takedown before it occurs. Further, a report from the Brennan Center for Justice, “Will Fair Use Survive?”, also places the blame on narrow industry “fair use guidelines” and an overzealous “clearance culture”.²⁵⁴ More recently, William W. Fisher and William McGeeveran’s *White Paper* focuses specifically on the educational sector, calling for clearer fair use rules. The study reveals that the current trend among educators is to clear for fear and unnecessarily license multiple copies of works for classroom use, a type of use typically allowed by statute.²⁵⁵ Doing so out of excessive caution when fair use would otherwise apply is harmful.²⁵⁶ The *White Paper* also documents extensively the burdensome and uneven licensing systems and arrangements to be found within schools.²⁵⁷ This critical scholarship shows what could be a flexible fair

²⁵⁰ Carroll, *supra* note 244. See also Nimmer, *supra* note 18 at 280 (“had Congress legislated a dartboard rather than the particular four fair use factors ... it appears that the upshot would be the same”).

²⁵¹ See e.g. Class Action Complaint, *Author’s Guild v. Google* (20 September 2005) (S.D.N.Y.), online: FindLaw <<http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/google/aggoog92005cmp.pdf>> (Google arguing fair use in defence).

²⁵² *Supra* note 58 at 626 (merely providing a link to content on another website may not be fair use).

²⁵³ *Digital Millennium Copyright Act of 1998*, Pub. L. No. 105-304, § 512, 112 Stat. 2860, codified as amended at 17 U.S.C. §107 (2000) [DMCA] (providing “safe harbour” from copyright infringement).

²⁵⁴ Marjorie Heins & Tricia Beckles, *Will Fair Use Survive?: Free Expression in the Age of Copyright Control: A Public Policy Report* (16 November 2005) at ii, online: Brennan Center for Justice <<http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>>.

²⁵⁵ Fisher & McGeeveran, *White Paper*, *supra* note 58 at 85-86. See also *ibid.* at 45, citing The Berkman Center for Internet & Society, *Digital Learning Legal Background Paper: The TEACH Act: The Impact of Copyright and Compromise on Digital Distance Education* at 9, n. 21 [unpublished] [Digital Learning Legal Background Paper], citing Darcy W. Hardy & Georgia Harper, *Comments of the University of Texas System* at 5, online: United States Copyright Office <<http://www.copyright.gov/disted/comments/init020.pdf>> (indicating that the university seeks licences for all copyrighted material, for lack of confidence in protections provided by fair use). Compare Edward F. Brooks, *Comments of the University of North Carolina at Chapel Hill* (5 February 1999) at 5, online: United States Copyright Office <<http://www.copyright.gov/disted/comments/init012.pdf>> (indicating that the university encourages professors to take advantage of the fair use doctrine for one-time or first uses of copyrighted material).

²⁵⁶ Fisher & McGeeveran, *White Paper*, *ibid.* at 78.

²⁵⁷ *Ibid.* at 76ff.

use framework undermined by private ordering and other laws (and cases about these laws).

What is more, there is a clear and negative interface between digital-rights management (DRM) technologies and fair use.²⁵⁸ For instance, smaller schools (such as elementary and secondary schools) in the United States that lack resources (and possibly skills) are precluded from licensing works if they do not comply with DRM requirements imposed by right holders.²⁵⁹ The implications are that content otherwise available is used less, and that schools with fewer resources are prohibited from accessing the available content. And while educators are generally averse to technological-protection measures, they may use them nonetheless to ensure the integrity of their works and attribution of their efforts, and to enforce how their works may be used. Also, educational institutions themselves, concerned with a return on investment, endorse DRM systems.²⁶⁰ As such, commercial-right holders are not the only parties responsible for limiting access to digital works.

The *White Paper* concludes that “[t]he courts’ interpretation of the [DMCA’s] anti-circumvention and anti-trafficking provisions to exclude fair use and other copyright exemptions as defences to actions under the DMCA stripped educational users of their shield against copyright infringement liability ...”²⁶¹

a. *Limits of TEACH Act*

The *Technology, Education, and Copyright Harmonization Act of 2001*,²⁶² which promised to update educational-use exemptions in light of technological developments, has not delivered. The *TEACH Act* was the product of compromise within the stakeholder community and the result of a full study conducted by Congress in 1998.²⁶³ The legislation (1) expanded the types of content that could be used, (2) allowed the digitization and short-term retention of content, and (3) eliminated a provision in the U.S. copyright legislation that required students to be physically on location.

Nonetheless, many strictures make the *TEACH Act* unworkable, unreliable, and ultimately of little value. While it deals with online learning, it is very specific on

²⁵⁸ See e.g. Stephen E. Blythe, “The U.S. Digital Millennium Copyright Act and the E.U. Copyright Directive: Comparative Impact on Fair Use Rights” (2006) 8 *Tulane Journal of Technology and Intellectual Property* 111 at 129.

²⁵⁹ Fisher & McGeeveran, *White Paper*, *supra* note 58 at 71.

²⁶⁰ *Ibid.* at 73.

²⁶¹ *Ibid.*

²⁶² U.S., Bill S. 487, *Technology, Education, and Copyright Harmonization Act of 2001*, 107th Cong., 2001 [*TEACH Act*].

²⁶³ Digital Learning Legal Background Paper, *supra* note 255.

what may be used without first obtaining permission.²⁶⁴ An educational institution must also be accredited and not for profit in order to benefit. As the *White Paper* notes, the user must employ technological protection measures (which can be costly), and the actual use of technological protection measures “may eviscerate the TEACH Act all together.”²⁶⁵ “[T]he TEACH Act failed to create the safe harbor it promised, effectively leaving educational users of digital content without legal recourse to make use of such works.”²⁶⁶ The *White Paper* recommends its revision.²⁶⁷

As the *TEACH Act* has failed to meet its objectives, fair use therefore seems to be the vehicle of choice in the distance-learning environment.²⁶⁸ Though, as explored, relying on fair use comes with some drawbacks since ambiguity for all stakeholders remains both a blessing and a limitation. Moreover, as noted earlier, fair use must also be seen within a wider backdrop, including the operation of laws like the *DMCA* and the courts’ interpretation of these laws.

b. *Reasons for Optimism: Best Practices*

The Fisher & McGoveran’s *White Paper* notes two grounds for optimism. First, it expects that “educational uses” under the fair use doctrine will be permissible.²⁶⁹ Second, there are very few decisions that apply fair use against, or even to, educational defendants who made educational use of their content. The only cases on fair use in the educational context are those that involve commercial “course pack” publishers, not teachers making nonprofit educational uses of content.²⁷⁰ A high-profile case where New York University was the defendant was settled in 1983 before any decision was reached.²⁷¹ The *White Paper* posits that “[t]his near-total absence of lawsuits against educators may suggest rightsholders have tacitly accepted that the appropriate construction of the fair-use doctrine leaves significant room for educational uses of content, or that they fear a negative public reaction if they sue educators.”²⁷² Indeed, some universities encourage professors to rely on the fair use doctrine for one-time or first uses of copyrighted material.²⁷³ But the cases provide limited comfort, and the vast majority of users (including teachers, librarians,

²⁶⁴ See Robin Fry, “Copyright Issues in E-learning” *Copyright & New Media Law Newsletter* 8:2 (2004). See also “The TEACH Tool Kit”, online: North Carolina State University Libraries <<http://www.lib.ncsu.edu/scc/legislative/teachkit/>>.

²⁶⁵ *Ibid.* at 48.

²⁶⁶ *Ibid.* at 73.

²⁶⁷ *Ibid.* at 96-97.

²⁶⁸ See “The TEACH Tool Kit”, *supra* note 264.

²⁶⁹ *Supra* note 58 at 52.

²⁷⁰ *Ibid.* at 52-53.

²⁷¹ *Ibid.* at 53.

²⁷² *Ibid.*

²⁷³ See e.g. *Comments of University of North Carolina at Chapel Hill*, *supra* note 255 at 5.

lawyers, and educational administrators) are fearful and anxious about whether their uses of content are acceptable.²⁷⁴

Some of these stakeholders are trying to clarify the scope of fair use through self-help. In particular, university and industry groups have established institutional best practices. The most successful and comprehensive initiative is a recent one from the documentary filmmakers' industry. Diverse stakeholders, from creators to producers to insurers, have developed a statement on "Best Practices in Fair Use".²⁷⁵ This 2005 document has been well received and there is evidence that other industries are following suit.²⁷⁶ Such initiatives are promising because clarification, understanding, and respect for copyright use, creation, and dissemination are best developed at the grassroots level. Parties directly involved in the industry are presumably more knowledgeable and thus in a better position to formulate best practices. As in the filmmakers' case, the insurers involved in this consensus building can then confidently "sign off" and enable a greater variety of works for the public.²⁷⁷ These best practices can thus benefit many industry stakeholders and be used as interpretive aids by judges for the benefit of the public.

While specific industries have been successful in this kind of project, attempts in the United States to agree on industry-wide guidelines for fair use have failed. The most prominent example was the Conference on Fair Use (CONFU), which met regularly throughout the 1990s.²⁷⁸ The failure of this ambitious attempt at a blanket

²⁷⁴ Fisher & McGeeveran, *White Paper*, *supra* note 24 at 53. Though a recent dispute where Oxford University Press, Cambridge University Press and Sage Publications are alleging copyright infringement against Georgia State University for the online distribution of course materials will be interesting to monitor, as Georgia State University is also claiming fair use in defence. See Andrea L. Foster, "In Lawsuit, University Asserts that Downloading Copyrighted Text is Fair Use" *The Chronicle of Higher Education* (27 June 2008), online: [The Chronicle of Higher Education <http://chronicle.com/free/2008/06/3583n.htm>](http://chronicle.com/free/2008/06/3583n.htm).

²⁷⁵ *Documentary Filmmakers' Statement of Best Practices in Fair Use*, *supra* note 14 at 9-10.

²⁷⁶ See e.g. University Agenda for Fair Use (Working Group at the University-Knowledge Beyond Authority Internet & Society Conference, Harvard University, Cambridge, Mass., 1 June 2007), online: [Internet & Society Conference 2007 <http://www.is2k7.org/working-groups>](http://www.is2k7.org/working-groups).

²⁷⁷ *Wanderlust*, released 12 July 2006, is one such successful documentary. See Lewis Hyde, "Reclaiming Fair Use for Scholars and Teachers" (Presentation at the Berkman Luncheon Series, Berkman Center for Internet & Society, Harvard University, Cambridge, Mass., 9 February 2008) online: [Harvard Law School <http://blogs.law.harvard.edu/mediaberkman/2008/02/19/lewis-hyde-on-fair-use-in-education/>](http://blogs.law.harvard.edu/mediaberkman/2008/02/19/lewis-hyde-on-fair-use-in-education/).

²⁷⁸ See Bruce A. Lehman, *The Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use* (November 1998), online: [United States Patent and Trademark Office <http://www.uspto.gov/web/offices/oom/olia/confu/confurep.pdf>](http://www.uspto.gov/web/offices/oom/olia/confu/confurep.pdf). Internationally, the International Federation of Library Associations and Institutions has also looked at the issue. See generally International Federation of Library Associations and Institutions, *Statements*, online: [International Federation of Library Associations and Institutions <http://www.ifla.org/V/cdoc/policies.htm#Statements>](http://www.ifla.org/V/cdoc/policies.htm#Statements).

approach suggests the necessity of tailor-made and culturally specific solutions to conflicts over the scope of fair use.

IV. Comparative Assessment

While Canada and the United Kingdom appear to have a rigid “fair dealing” framework, and the United States appears to have a more flexible structure in fair use, the legal outcomes in the three jurisdictions have been for the most part similar.²⁷⁹ David Vaver argues that even before *CCH*, Canadian courts applied similar criteria, the only difference being that fair use may have applied to any situation, not merely an enumerated one.²⁸⁰ Today, unlike in the United Kingdom, Canada’s enumerated grounds are no longer rigid. *CCH* has expanded Canada’s grounds and purposes, since these should not be given a restrictive interpretation. With respect to the criteria used to determine fair use or fair dealing, while the United States has a statutorily entrenched four-factor approach (with some other factors that have been considered, such as monopolistic practices and institutional policies), the court in *CCH* considered six factors, with these serving as a future guiding framework. It is expected that other unnamed factors may be considered in future cases. In other words, the Canadian factors can now be seen as more flexible than those in the United States. For the United Kingdom, criteria have emerged from the case law that are consonant with Canada’s pre-*CCH* framework, and in many ways there is now a hierarchy.

A. Hierarchy of Factors, Not Number of Factors

In comparing the three jurisdictions, each of the respective courts are more or less open to consider the same types of factors. What distinguishes them is each court’s weight placed on these factors and, consequently, its policy perspective. By interpreting certain factors to be more determinative than others, each court undertakes a “hierarchy of factors” approach. Absent clearer guidelines, and to better anticipate how a fair dealing—fair use case might be resolved it is useful to understand what weight each court places on certain factors. In this light, it helps to compare the *CCH* factors to those considered in the United States and the United Kingdom in an effort to determine which factor(s) top the hierarchy.

While the character, amount, and effect of the dealing, as well as alternatives to it (*CCH* factors 2, 3, 4, 6), are similarly considered in each jurisdiction, the weight courts ascribe to interpreting the purpose and nature of the work (*CCH* factors 1 and 5) is somewhat different.

²⁷⁹ Fair dealing—fair use was used to exonerate newspapers for using third-party photographs to illustrate a news story. See *Allen*, *supra* note 68; *Nunez*, *supra* note 225. But coursebook compilers have been liable for reproducing journal articles and book chapters. See *Basic Books*, *supra* note 213; *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 65 U.S.L.W. 2324 (6th Cir. 1996).

²⁸⁰ Vaver, “Canada’s IP Framework”, *supra* note 40 at 150.

1. Purpose (and Commercial Nature) of the Dealing

The purpose of the dealing (and its commercial nature) is the factor that seems to be most undermined in *CCH*. Yet it is the most pronounced factor in the United Kingdom, where it tops the hierarchy (indeed, commercial dealings are only allowed in the case of review and criticism), and is one of four significant factors in the United States.

2. Nature of the Work

Each jurisdiction considers the nature of the work, except that *CCH* curiously came to a different conclusion about its effect: if a work is unpublished, it weighs *in favour* of fair dealing. In the United Kingdom and the United States, if a work is unpublished, it weighs *against* fair dealing. This interpretation indicates the Canadian court's preference for users over protecting the interests of authors.

The role of other factors that were considered pre-*CCH* in Canada, and that are currently key factors in the United States and United Kingdom, is questionable. For instance, bad faith was not considered in *CCH* because there was none at issue. Still, it was not expressly highlighted as a potential factor. This silence, however, does not mean that bad faith cannot feature in future cases, as the Supreme Court of Canada noted that the fair dealing factors were more or less six.

B. Other Factors and Best Practices

The real differences between Canada, the United Kingdom, and the United States lie in the policy preoccupations held by their respective courts. In Canada, it is clear that the shift is one championing the rights of users to “balance” copyright. However, as was noted, it is unclear where the creators fit in this schema, and further, creators are repeatedly conflated with right holders. This could not be further from the realities of copyright practices. Perhaps in the United Kingdom, where commercial exploitation is at the fore of judicial concern, one can argue that right-holder interests are paramount. In the United States, the pendulum swings back and forth among the various stakeholders. At bottom, it is difficult to regulate these policy preoccupations with certainty. The most effective regulator may be the public climate (as has been the case in Canada in advancing user rights) and corresponding best practices that need to be articulated. As argued, *CCH* provides a great example of endorsing best practices which were adopted at the institutional level. In this manner, *CCH* can sanction the development and use of best practices to clarify uses both by a range of parties and the courts themselves. Indeed, the ideal would be for industry-wide, or at the very least, sector-specific guidelines, as with the *Documentary Filmmakers' Statement of Best Practices in Fair Use*. If judicially endorsed as in *CCH*, these guidelines would prove invaluable to pre-empting litigation (and thereby avoiding access-to-justice issues) and encouraging greater and trouble-free uses of copyrighted works.

Conclusions

An obvious question at this late stage is whether Canada's fair dealing is ill. While perhaps not ill, fair dealing in Canada may have the common cold, or may have been ill and is now in convalescence. So while surgery may not be necessary, some attention may be due. Because of *CCH*, Canada now has a flexible framework where the enumerated purposes and factors can be various. And when compared to the United Kingdom and the United States, Canada's regime is the most user-centred. Still, widespread uncertainty remains for all parties across the jurisdictions. That which constitutes fair dealing can still confound, and going to the courts for answers is the least desirable option. Several potential remedies, discussed below, are immediately apparent, while others, though not noted below, are (in the spirit of *CCH*) also worth considering.

A. Do Nothing?

Doing nothing would involve waiting to see other court decisions apply *CCH* and letting industry and the Canadian public muddle about trying to find their own way through allowable uses. Sanctioning this copyright convalescence does not seem to be an appropriate response. Indeed, legislative initiatives for other copyright matters are currently under serious consideration (e.g., technological-protection measures, which may affect fair dealing). Arguably, these initiatives will make copyright more expansionist than it already is. Further, there remains a high degree of uncertainty in the various copyright sectors, such as the educational sector. In the United States, the uncertainty regarding the educational fair use sector recently led to the Copyright Clearance Center's offer of blanket licences for academic institutions.²⁸¹ However, there are strong arguments to suggest that this may not be a suitable way forward.²⁸²

B. Legislate CCH Factors?

It has been suggested that Canadian government should intervene and legislate the *CCH* factors. It is not clear how this would be done, since the Court was clear about the lack of a precise number of factors. More importantly, why would this be done? Canada now has a flexible framework for evaluating fair dealing on a case-by-case basis that is firmly rooted in the idea that users have rights. This framework seems fairly clear and will be applied and adapted to future cases, in the common law

²⁸¹ Copyright Clearance Center, "Copyright Clearance Center Announces Annual Copyright License for Academia: Easy-to-Use Service Provides Pre-Approved Copyright Permissions" (22 June 2007), online: Copyright Clearance Center <<http://www.copyright.com/media/pdfs/press-release-07-06-22.pdf>>.

²⁸² Such licences could undermine the very purpose of fair use by requiring licensing for materials already freely available under statute. Poor institutions may also be disadvantaged. See James Boyle, "The Inefficiencies of Freedom" *Financial Times* (1 July 2007), online: Financial Times <<http://www.ft.com/cms/s/2125cf260c-265c-11dc-8e18-000b5df10621.html>>.

way. The enumerated purposes for fair dealing can be interpreted in the same fashion. *CCH* has set a strong precedent, and unless Parliament disagrees with any of its pronouncements, it seems inopportune to intervene at this time. Legislating *CCH* may invite even more confusion.

C. Cherry-pick Other Laws?

Some commentators suggest that Canada should adopt U.S. fair use. This would entail “cherry-picking” the fair use provision from the corpus of U.S. copyright law. There are problems with this approach. First, as noted in eminent U.S. studies, fair use is “ill” and not a panacea for Canadian copyright woes.²⁸³ Because fair use is ill, it has by necessity engendered many fix-it approaches, some by the courts themselves attempting to impose bright-line rules (for example, presumptions about commercial uses), and others by industry players attempting to institute best practices. Second, cherry-picking a law—importing a specific country’s law into another and supplanting the existing law in this case (e.g., allowing section 107 of the U.S. Copyright Code to replace section 29 of the *CCA*)—likely also means taking from its jurisprudence (and neglecting other constitutive factors, such as a constitution). Would Canadian courts apply U.S. fair use cases? Would this application ignore the fact that property is not constitutionally entrenched in Canada? Singapore has cherry-picked U.S. fair use, though it is still called fair dealing, thereby showing a reluctance to embrace fully fair use at the risk of causing undue confusion.²⁸⁴ One must be very careful when importing legal devices from other jurisdictions.

In this context, it is also useful to consider whether fair dealing necessitates clarification to encompass important (and new) uses. In the United Kingdom, Gowers recommended that the government enact a new copyright exception for parody. Before *CCH*, many scholars posited that parodies constitute infringement in Canada. In light of *CCH*’s liberal interpretation of the enumerated grounds, it may be argued that “criticism” could now encompass parody. *Michelin* no longer seems to be good law. Indeed, the protection of parody in the United States is not a foregone conclusion: parody still requires analysis of each of the four factors as well as some use of the target to be fair.²⁸⁵ Now this might also be the case in Canada, without the necessity of legislative intervention. In Canada, the issue may turn on the sufficient-acknowledgment requirement (not present for research or private study, nor required in the United States). In the United Kingdom, where the same requirement exists, courts have been flexible in overcoming this hurdle in the case of criticism, review

²⁸³ See Part III.A.3.

²⁸⁴ *Copyright Act* (Cap. 63, 2006 Rev. Ed. Sing.), s. 35(2); Debate 2004, *supra* note 16. For commentary, see Ng-Loy Wee Loon, *Law of Intellectual Property in Singapore* (Sweet & Maxwell Asia, 2008) at para. 11.3.16. I am most grateful to Peter Yu, Mary Wong and George Wei for their insights in Singapore copyright law.

²⁸⁵ *Dr. Seuss Enterprises, L.P. v. Penguin Books* upheld a preliminary injunction, ruling against fair use (109 F.3d 1394 (9th Cir. 1997)). See also Carroll, *supra* note 244.

and news reporting.²⁸⁶ This flexibility or, indeed, dispensation with the acknowledgement requirement should be more warranted for parody. In parody, the link between the original and the parodic twin is often obvious since “the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”²⁸⁷

Similarly, time shifting that comports with fair dealing criteria could now be allowed in Canada, as it has long been in the United States.²⁸⁸ In the United Kingdom, Gowers is again recommending a copyright exception, but for format shifting. Arguably, such practices are “tolerated uses”.²⁸⁹ Enacting new exceptions may be at best unnecessary and at worst dangerous since they may serve “to cut down the rights of fair user [sic] previously enjoyed under the old law.”²⁹⁰ With respect to Crown copyright, while not in dispute in the case, *CCH* clarifies that the copying of judicial decisions is permissible, and it is likely that other government works used in a similar fashion would be as well.²⁹¹ Still, both Canada and the United Kingdom give more work protection because of Crown copyright, which does not exist in the United States. There are no plans in the United Kingdom to address this issue, but it may require more consideration in both jurisdictions.

In the educational sector, clarification of law and practice is critical, even if specific amendments to fair dealing (such as adding “educational uses” as an enumerated ground) are unnecessary. One disadvantage of introducing a new law is that it may take time before the fix that is sought is achieved; indeed, the fix may never be achieved.²⁹² New practices would test the limits of the new law through litigation, thereby creating access-to-justice issues for disadvantaged parties. Thus, it does not appear that clarity can be attained in the immediate future by cherry-picking from U.S. law.

²⁸⁶ See e.g. *Pro Sieben*, *supra* note 155.

²⁸⁷ *Acuff-Rose*, *supra* note 206 at 573.

²⁸⁸ Bill C-61 proposes an exception in the *CCA* for both time-shifting (cl. 29.21 amending s. 17 of the *CCA*) and format shifting (clause 29.23 amending s. 17 of the *CCA*) (*supra* note 28).

²⁸⁹ Tim Wu, “Tolerated Use” (May 2008), Columbia Law and Economics Working Paper No. 333, online: SSRN <<http://ssrn.com/abstract=1132247>>.

²⁹⁰ Burrell, *supra* note 19 at 369, citing J.M. Easton, *The Law of Copyright in Works of Literature, Art, Architecture, Photography, Music and Drama by the Late Walter Arthur Copinger* (London: Steven & Hayens, 1915) at 144 (referring to the pointlessness of enacting fair dealing under the *Copyright Act, 1911* since user rights were already enjoyed (and perhaps more so) before the new law).

²⁹¹ But see *CCH*, *supra* note 4 at paras. 71, 88 (suggesting that while decisions themselves are not subject to copyright, decisions with headnotes and summaries are).

²⁹² Here Bill C-61 proposed some complicated revisions for the educational community. See e.g. *supra* note 28, clause 30 (amending s. 18 of the *CCA*).

D. Fair Dealing Best Practices?

Fair dealing best practices are the most promising alternative or complement to legislative reform. The parties directly affected in a specific industry can together develop these guidelines, which can ultimately bolster confidence in the use of copyrighted materials and aid in fair dealing decision making in the courts. There have already been successful guidelines or best practices generated in the United States, where stakeholders with apparently disparate interests in the documentary-film-making sector have devised fair use best practices. These guidelines can materialize on at least three different levels: (1) ideally, industry-wide (e.g., across the film industry), (2) sector-specific (e.g., documentary film makers), where both (1) and (2) are developed by a range of stakeholders with diverse interests, and (3) institutional-specific (e.g., the Great Library). The first is the most ambitious and as noted, in the United States such efforts have failed. For the others, there have, however, already been great successes. As noted earlier, stakeholders with apparently disparate interests in the documentary-film-making sector have already devised fair use best practices. This initiative has fostered wide-ranging collaboration among various creative associations, academic institutions, and industry participants. Guided by ethical principles and the experiences of the professionals that rely on fair use, the goal is to make a statement to clarify the application of fair use, “to help filmmakers use it with confidence.”²⁹³ Significantly, “documentarians are themselves copyright holders, whose businesses depend on the willingness of others to honor their claims as copyright owners.”²⁹⁴ In this way, such guidelines would not endorse “abusive application” of fair use. In Canada, the Documentary Organization of Canada proposed a similar initiative.²⁹⁵ Its goal to establish Canadian fair dealing guidelines grew out of a recommendation from a white paper entitled *The Copyright Clearance Culture and Canadian Documentaries*.²⁹⁶ This initiative, along with others, should be mirrored across other sectors, and merits full stakeholder (including government) support.²⁹⁷

²⁹³ *Documentary Filmmakers' Statement of Best Practices in Fair Use*, *supra* note 14 at 1.

²⁹⁴ *Ibid.*

²⁹⁵ See Letter from Documentary Organization of Canada to the Minister of Industry and Minister of Canadian Heritage (10 December 2008), online: Docorg <http://www.docorg.ca/pdf/FINAL_10DecLetterCopyright_DOC.pdf>. My thanks to David Fewer for alerting me of this initiative and providing me with background material.

²⁹⁶ H. Knopf, *The Copyright Clearance Culture and Canadian Documentaries* (November 2006), online: Docorg <http://www.docorg.ca/White%20Paper_HPK_Copyright&Documentaries.pdf>.

²⁹⁷ See Artmob, online: Artmob <<http://www.artmob.ca>>. Artmob was developed in 2002 and is based at York University. Among its goals is to create user-generated guidelines comporting with fair dealing based on uses of its digital archives: “Our digital infrastructure will facilitate the collection of both qualitative and quantitative data that will assist Canadian and International scholars and policymakers in addressing the technological, pedagogical, social, cultural and legal questions that publishing arts material in a publicly licensed open-source environment poses” (*ibid.*).

The interest to develop such best practices is also apparent internationally and locally, though from a common set of stakeholder interests (e.g., within universities and libraries in both Canada and the United States). In Canada, most educational institutions have devised copyright policies to deal with the use of copyrighted materials by their patrons. The Great Library in Toronto has one.²⁹⁸ Osgoode Hall Law School and York University have also developed a policy.²⁹⁹ Concordia University has a policy (which appends the *Copyright Act*) and has also struck working groups to study these issues.³⁰⁰ Indeed, libraries continue to play an important role in the negotiation, implementation, and management of licences. Staff are asked regularly to enforce and interpret copyright issues for compliance.³⁰¹ These are promising starts, but more concerted industry efforts, like those spearheaded by U.S. documentary filmmakers and, more recently, in Canada, can and should be emulated.

More parties with conflicting interests within a set sector need to come together. Such collaboration can help to clarify fair dealing uses for the creators, users, right holders, and courts, who can then rely on these standards as “soft law” when interpreting fair dealing cases. These initiatives should be encouraged to flourish and should at least help foster communication and dialogue among different parties. The benefits can be more far-reaching and consequential to future fair dealing and general copyright practices. Of course, such practices truly help on the judicial front, once courts have endorsed their use in the assessment of what is fair. Evidence of this endorsement was seen in *CCH* and constituted one of the case’s greatest contributions. Since *CCH* favours institutional users that abide by their own access policies comporting with fair dealing, a litigant’s case could be more persuasive if such policies were consistent across the industry. Albeit a tall order to promote wider collaboration, such is not implausible, especially given the persisting uncertainty. Such “self-help” guidelines merit full backing and should be developed to ensure that all parties are compliant with copyright and in healthy agreement.

E. Clarify Copyright Act? Clarify Policy Objectives?

Just as one cannot cherry-pick laws from other countries, it is difficult to cherry-pick and solve problems within the Canadian copyright system. Fair dealing cannot be addressed in a vacuum. Canada needs to stop and take stock. One must revisit the entire *CCA* and study what its objectives are and where the balance is being struck.

²⁹⁸ Great Library Access Policy, *supra* note 93.

²⁹⁹ York University, “Copyright”, online: York University <[http://www.yorku.ca/secretariat/senate/committees/lit/copyright/Copyright and You.pdf](http://www.yorku.ca/secretariat/senate/committees/lit/copyright/Copyright%20and%20You.pdf)>.

³⁰⁰ Concordia University Secretariat, “Policy on Copyright Compliance” (28 February 2001), online: <<http://secretariat.concordia.ca/policies/sg/en/SG-2.pdf>>.

³⁰¹ See Leslie Ellen Harris, Editorial, *Copyright & New Media Law Newsletter* 8:3 (2004). Of course, staff also need to be trained to understand and enforce fair dealing.

Are right holders the so-called winning parties? Whose interests is copyright law meant to serve?

As noted throughout this article, the question remains: where is the author-creator? *CCH* does not appear to provide an answer, and the Copyright Board has flagged this oversight. In the current Canadian judicial, public, and academic climate on copyright, “creators’ rights” and *droit d’auteur* seem to be terms of the past or romanticized terms that are now confined to the civilian tradition and vanishing from the Canadian common law tradition.³⁰² Creators remain subject to industry power imbalances, which are facilitated by the *CCA* (allowing freedom of contract and in practice favouring right holders) and facilitated by the courts (undermining creators, but championing another stakeholder previously ill-addressed, the users). Author-centric provisions may thus be necessary (accounting for the role of contract and moral rights) to balance liberalized fair dealing and potential future exceptions and existing right-holder-centric provisions. In this context, as an example of eschewing a fragmented fix-it approach, addressing the issue of the various types of damages available and the requisite levels of proof are other important matters that need consideration in light of the different types of infringement and infringers.

When all is said and done, if copyright balance is found, the next, equally important, question is whether the *CCA* is clear enough to communicate this balance. Are the *CCA*’s objectives embraced by the practices of stakeholders and the courts? One hindrance may be the lack of clarity in the *CCA*. Simplifying and clarifying the *CCA* was flagged as a long-term priority in the governmental report on section 92 of the *CCA*³⁰³ and should not to be forgotten in the short term.

³⁰² This was not always the case (and should not be the case). See generally D’Agostino, “En attendant *Robertson*”, *supra* note 50. See also Marian Hebb & Warren Shaffer, “Towards a Fair Deal” (Study prepared for the Creators’ Copyright Coalition and the Creators’ Rights Alliance/Alliance pour les droits des créateurs, October 2006), online: Creators’ Copyright Coalition <<http://www.creatorscopyright.ca/documents/contracts-study.pdf>>.

³⁰³ Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Industry Canada, 2002) at 46.