



FAIR DEALING IN CANADA By Samantha Kernahan

This document provides information on the basis for and scope of fair dealing in Canada.

Fair dealing, as an exception to copyright infringement, is a user right. It stands in opposition to several exclusive rights granted to owners of copyright by Canada's *Copyright Act*. However, fair dealing is not an absolute concept. It must be interpreted in accordance with an analytical framework provided at law.

The information provided in this document is intended to assist educators applying the concept of fair dealing so as to avoid claims of copyright infringement.

Attached to this document is a 'quick reference' chart containing some key points on the scope of fair dealing.

A. FAIR DEALING: COMMON LAW BASIS

On July 12, 2012, the Supreme Court of Canada released five rulings applicable to copyright. Two of these decisions, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*.¹ ("Access Copyright") and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*² ("Bell Music"), were on the subject on fair dealing.

However, neither the *Access Copyright* decision nor the *Bell Music* decision can be understood without reference to the Supreme Court of Canada's seminal decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*³ ("CCH").

Facts in CCH

The Law Society of Upper Canada operates the Great Library at Toronto's Osgoode Hall Law School. As a service to its patrons, the Great Library offers photocopying of legal materials by self-service copiers as well as copying on request followed by delivery of the copied materials to patrons by courier, mail, or fax.

CCH claimed that the services offered by the Great Library amounted to copyright infringement of the legal materials published by CCH. The Supreme Court of Canada was required to decide whether Great Library's dealings with the published works were 'fair dealings' within the scope of s. 29, the fair dealing exception to copyright infringement provided by the *Copyright Act*⁴.

¹ 2012 SCC 37.

² 2012 SCC 36.

³ 2004 SCC 13.

⁴ Section 29 of Canada's recently amended *Copyright Act*, RSC 1985, c C-42, provided:

Fair Dealing

Research or private study

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



Legal Analysis In CCH

A unanimous Supreme Court of Canada held that the services offered by the Great Library fell within the doctrine of fair dealing for the purpose of research or private study. As such, the copying did not amount to copyright infringement.

Importantly, the Court found that Section 29 and the other exceptions in the *Act* are users' rights that "must not be interpreted restrictively"⁵. Instead they should be given a "large and liberal interpretation in order to ensure that users' rights are not unduly constrained".⁶ On the facts at hand, the term "research" was defined broadly so as not to be limited to non-commercial or private contexts.

The Court established an analytical framework to assess whether copying of works subject to copyright protection amounts to fair dealing. The analysis is made up of two parts:

First, it is necessary for the purpose of the dealing to be for research or private study; and

Second, it is necessary for the dealing to be fair.

The Court provided six "fairness factors" for the second part of the analysis. Each of these factors must be applied and assessed in light of the facts of a particular instance of copying:

(a) Purpose of the dealing

The question regarding purpose of the dealing under Step 2 is not the same question as under Step 1. At this point, it is necessary to examine the motivation of the copier to determine whether such person may have a separate motive from the user. A separate motive may be more or less fair, such as commercial profit.⁷

(b) Amount of the dealing

This question examines the overall proportion of reproduction to the entire work. The higher the percentage of reproduction, the more likely that the dealing is unfair.⁸

(c) Character of the dealing

This factor seeks to quantify the total number of copies made. It is a cumulative assessment of aggregate number of copies made over a time span. The more copies made over a length of time (as opposed to a small number of copies made for a particular and limited circumstance) the more likely that the dealing is unfair.⁹

⁵ *CCH*, at para. 48.

⁶ *CCH*, at para. 51.

⁷ *CCH*, at para. 54.

⁸ *CCH*, at para. 56.

⁹ *CCH*, at para. 55.



(d) Nature of the work at issue

This question examines whether the work at issue is unpublished, whether it was intended to be confidential or some other condition of the work itself that would suggest fairness if dealt with by a person other than the copyright owner.¹⁰

(e) Alternatives to the dealing

Is there an equivalent work that is not protected by copyright? Is the dealing reasonably necessary to achieve the ultimate purpose, for instance research or private study? Could such activities nevertheless take place in a meaningful way without the dealing?¹¹

(f) Effect of the dealing on the work

If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is unfair. However, this is not the only factor nor the most important factor to be assessed in the fairness analysis.¹²

Where each of the fairness factors are satisfied on the facts of a particular matter and the underlying purpose of the copying is for an allowable purpose, the fair dealing exception to copyright infringement is likely to apply.

Facts in Access Copyright

The Supreme Court of Canada's recent majority decision in *Access Copyright* deals with the doctrine of fair dealing as it applies to copying of learning materials for kindergarten to grade twelve students.

The key question before the Court was whether copies made at a teacher's initiative with instructions to students that they read the materials fell within the fair dealing exception to copyright infringement. The facts under examination were that teachers would photocopy short excerpts from textbooks and distribute those copies to students as a complement to the main textbook the students used.

Legal Analysis in Access Copyright

There was no debate on the facts that the copies were made for the allowable purpose of research or private study under the first part of the analytical framework.

The majority of the Court (5 of the 9 judges) then applied all six of the fairness factors under the second part of the analytical framework to find that the teachers' dealings were fair.

¹⁰ *CCH*, para. 58.

¹¹ *CCH*, para. 57.

¹² *CCH*, para. 59.



Importantly, the majority of the Court found that a teacher does not have a separate or ulterior purpose from students when making copies of readings. A teacher's purpose in making such copies is co-existent with students' purposes of research or private study. Moreover, "instruction and research/private study are, in the school context, tautological"¹³

The majority's specific reference to the "school context" is pivotal when considering the impact of their decision. A fair purpose on the part of the teacher was found under the second part of the analytical framework due in large part to the kindergarten to grade twelve educational model. In other words, it was relied on by the majority of the Court that kindergarten to grade twelve students do not purchase course packs nor pay fees directly associated with copied materials. Had there been circumstances suggesting a fee-based dimension to the teachers' copying, the teachers' purpose under the second part of the fair dealing analysis would not likely have aligned with that of the students.

Upon application of the five remaining fairness factors, the majority of the Court concluded that the teachers' dealings with the materials subject to copyright protection were fair.

Facts in Bell Music

In the *Bell Music* decision, the Court closely examined the nature of the song previews when it determined that the reproductions at issue were fair.

On the facts, the Court found that the song previews were temporary digital files that could not be further duplicated or disseminated.¹⁴ The song previews were simply short excerpts of the entire song actually for sale and were often of lesser quality than the song for sale.¹⁵ The Court also found that there is no alternative to the dealing on the facts of the matter given the unique opportunity for a user to assess what a musical work sounds like prior to online purchase.¹⁶ The nature of the copyright-protected musical work did not suggest that its dealing would result in unfair consequences. In fact, without an opportunity to locate and identify a musical work worthy of purchase, such works may not be disseminated at all.¹⁷ Finally, the effect of the dealing on the copyright-protected musical works tended towards increased sales and dissemination.¹⁸

Legal Analysis in Bell Music

The Court simply applied the fair dealing analytical framework to the facts at issue. In the result, the purpose of the song previews was for the research or private study of those who downloaded the previews. Upon application of the six fairness factors, the song previews were found to be fair and therefore did not constitute copyright infringement.

¹³ *Access Copyright*, at para. 23.

¹⁴ *Bell Music*, at para. 4.

¹⁵ *Bell Music*, at para. 35.

¹⁶ *Bell Music*, at para. 46.

¹⁷ *Bell Music*, at para. 47.

¹⁸ *Bell Music*, at para. 48.



B. FAIR DEALING: STATUTORY BASIS

1. Canada's Copyright Act

Canada's former *Copyright Act*¹⁹ provided the following:

Fair Dealing

Research or private study

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

Bill C-11, the *Copyright Modernization Act*²⁰, effected many changes to Canada's *Copyright Act*. The *Copyright Modernization Act* received royal assent on June 29, 2012 and the majority of its provisions were proclaimed in force on November 7, 2012. Importantly, Section 29 has been amended to provide the following:

Fair Dealing

29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.²¹

Moreover, the amended fair dealing provision of the *Copyright Modernization Act* codifies the term "education" as an allowable fair dealing purpose. While the Supreme Court of Canada's majority decision in *Access Copyright* did not rely on the text Bill C-11 when coming to its conclusion on the co-existent purposes between teachers and students, the legislative changes further support the shift towards user rights in the educational context.

The concept of "education" within fair dealing has been so far understood in accordance with traditional models of educational delivery. The recent *Access Copyright* decision endorsed the singularity of purpose amongst teachers and students when kindergarten to grade twelve students are engaged in classroom-based learning. Post-secondary educational delivery shares many features with the kindergarten to grade twelve model and is considered to fall within the allowable fair dealing purpose of "education". However, it is possible that models outside of our current understanding of educational delivery may in future qualify as circumstances in which fair dealing can occur.

C. STATUTORY DAMAGES FOR COPYRIGHT INFRINGEMENT

In general, the quantum of damages upon a finding of copyright infringement may include an award from the court as well as an accounting of profits derived from the infringing activity. However, under the former *Copyright Act*, an aggrieved copyright owner may have also have elected to receive

¹⁹ RSC 1985, c C-42.

²⁰ S.C. 2012, c. 20.

²¹ S.C. 2012, c. 20.



statutory damages between \$500 and \$20,000 without requiring an accounting of profits²². The Court was required to consider all of the surrounding circumstances when deciding on a statutory damages award that was just.

However, due to the amendments effected by the *Copyright Modernization Act*, current statutory damages provisions allow for a distinction between commercial and non-commercial purposes underlying copyright infringement. In brief, an aggrieved copyright owner may still seek an award of damages as well as an accounting of profits. However, where the copyright infringement is for non-commercial purposes, a court may grant damages up to \$5,000 for such infringement²³

The award of damages is a fact-specific analysis that depends on the unique circumstances of each matter.

D. FAIR DEALING AND COPYRIGHT LICENSES

A license is a form of permission granted by a rights-holder (“licensor”) to enable an identified person (“licensee”) to use the rights at issue. A licensee does not acquire any rights of use beyond those that are stated in the license.

A license is a form of agreement between parties that may be enforced under civil law.

A copyright license is a common form of agreement that permits a licensee to use materials subject to copyright protection without engaging in what would otherwise constitute copyright infringement. Fees or *royalties* to use the materials subject to copyright protection are commonly levied by the licensor.

A copyright license stands apart from the fair dealing exception to copyright infringement provided by the *Copyright Act*. That is, a person may be a licensee under a copyright license but that person does not necessarily forfeit his/her fair dealing rights provided by statute. Much depends on the particular wording of the license (assuming validity of the license) and all of the applicable circumstances.

As a general principle, a person would not seek a license to use material protected by copyright if that person was able use the material under the fair dealing exception provided by the *Copyright Act*.

It is clear, however, that permissible use under the fair dealing exception must fall within the limits of the analytical framework as provided by the Supreme Court of Canada in *CCH*. If use of material subject to copyright protection is not for an allowable purpose and does not align with the six fairness factors, a copyright license may permit use that would otherwise amount to infringement.

²² RSC 1985, c C-42, Section 38.1.

²³ Bill C-11, Section 46(1).



The particular circumstances of each matter would need to be examined to determine whether non-infringing use of copyright may be made under fair dealing or only by permission expressed as a license.



QUICK REFERENCE ON FAIR DEALING

KEY POINTS FOR CONSIDERATION	LEGAL COMMENTARY
Historically, K – 12 teachers’ copying of materials subject to copyright protection for in-class handouts was not considered to fall within allowable fair dealing purposes of research or private study	The <i>Access Copyright</i> decision found that K – 12 teachers have a symbiotic purpose with their students when making class handouts. Teachers’ purposes are co-existent with students’ research or private study in the K – 12 context.
In the post-secondary educational context, required readings are often associated with fee-based course packs. Because fair dealing in part depends on there being no commercial motive on the part of the copier, required readings have consistently been considered to fall outside of the ambit of fair dealing.	The <i>Access Copyright</i> decision endorsed the distinction between copying with no motive of commercial gain (one key fairness factor) and copying where an ulterior motive such as profit takes the copying outside of allowable purposes of research or private study. This analysis applies regardless of whether the copying is for required or supplementary readings.
Copying of materials for course packs and library reserve may constitute fair dealing.	The result depends on the application of the <i>CCH</i> analytical framework and all of the surrounding circumstances.
Two of the fairness factors include the proportion of the copying to the overall work (the “amount of the dealing”) as well as the aggregate amount of the copying (the “character of the dealing”).	Persons engaged in copying of materials subject to copyright protection need to be keenly aware of these two fairness factors. Adherence to copying percentages offered by the Association of Universities and Colleges of Canada (“AUCC”) Fair Dealing Guidelines are the best guidelines available at present.
Fair dealing applies to works subject to copyright protection but one factor in the fairness of the dealing is the nature of the underlying work.	If a work has not yet been published, dealing with it may not be fair.
Fair dealing requires the copier to take reasonable steps to control the dissemination of works so dealt with.	Destruction of copies or digital files after use may be required to satisfy the fair dealing analysis.
Historically, different rules applied to paper copies over digital copies in the context of copyright infringement.	The <i>Copyright Modernization Act</i> seeks to achieve technological neutrality in the context of copyright protection and infringement. The full impact of the changes has yet to be understood.