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• INFORMATION ON FAIR DEALING •

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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*.¹ 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 article 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)*² and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*,³ were on the subject of 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*.⁴

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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*.⁵

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 s. 29 and the other exceptions in the *Act* are users' rights that "must not be interpreted restrictively."⁶

Instead, they should be given a "large and liberal interpretation in order to ensure that users' rights are not unduly constrained."⁷ 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:

1. It is necessary for the purpose of the dealing to be for research or private study.
2. 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 the one 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, such as commercial profit, may be more or less fair.⁸

(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.⁹

(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.¹⁰

(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.¹¹

(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?¹²

(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 factor is neither the only one or the most important one to be assessed in the fairness analysis.¹³

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 12 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 textbook excerpts 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 (five of the nine 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.

Importantly, the majority of the court found that a teacher does not have a separate or ulterior purpose when making copies of readings. A teacher's purpose to make such copies is co-existent with students' purposes to do research or private study. Moreover, "instruction and research/private study are, in the school context, tautological."¹⁴

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–grade 12 educational model. In other words, it was relied on by the majority of the court that kindergarten–grade 12 students do not purchase course packs or pay fees directly associated with copied materials. Had there been circumstances suggesting a fee-based dimension to the teacher's copying, the teacher's 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.¹⁵ 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.¹⁶ 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 making an online purchase.¹⁷ 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.¹⁸ Finally, the effect of the dealing on the copyright-protected musical works tended towards increased sales and dissemination.¹⁹

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.

B. Fair Dealing: Statutory Basis

Canada's Copyright Act

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, s. 29 has been amended to provide the following:

Fair Dealing

Research, private study, etc.

29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright [emphasis added].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 of Bill C-11 when coming to its conclusion on the teachers’ and students’ coexistent purposes, 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–grade 12 students are engaged in classroom-based learning. Post-secondary educational delivery shares many features with the kindergarten–grade 12 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 had elected to receive statutory damages between \$500 and \$20,000 without requiring an accounting of profits.²² 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 infringement.²³

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

D. Fair Dealing and Copyright Licences

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

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

A copyright licence 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 licence stands apart from the fair dealing exception to copyright infringement pro-

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

As a general principle, a person would not seek a licence 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 licence may permit use that would otherwise amount to infringement.

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 licence.

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 coexistent 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 is the best guideline available at present.

<p>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.</p>	<p>If a work has not yet been published, dealing with it may not be fair.</p>
<p>Fair dealing requires the copier to take reasonable steps to control the dissemination of works so dealt with.</p>	<p>Destruction of copies or digital files after use may be required to satisfy the fair dealing analysis.</p>
<p>Historically, different rules applied to paper copies over digital copies in the context of copyright infringement.</p>	<p>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.</p>

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¹ R.S.C. 1985, c. C-42 [*Act*].
² [2012] S.C.J. No. 37 [*Access Copyright*].
³ [2012] S.C.J. No. 36 [*Bell Music*].
⁴ [2004] S.C.J. No. 12 [*CCH*].

⁵ *Supra* note 1. Section 29 of Canada’s recently amended *Copyright Act* provided:
 Fair Dealing
 Research or private study
 29. Fair dealing for the purpose of research or private study does not infringe copyright.
⁶ *CCH*, *supra* note 4 at para. 48.
⁷ *Ibid.* at para. 51.
⁸ *Ibid.* at para. 54.
⁹ *Ibid.* at para. 56.
¹⁰ *Ibid.* at para. 55.
¹¹ *Ibid.* at para. 58.
¹² *Ibid.* at para. 57.
¹³ *Ibid.* at para. 59.
¹⁴ *Access Copyright*, *supra* note 2 at para. 23.
¹⁵ *Bell Music*, *supra* note 3 at para. 4.
¹⁶ *Ibid.* at para. 35.
¹⁷ *Ibid.* at para. 46.
¹⁸ *Ibid.* at para. 47.
¹⁹ *Ibid.* at para. 48.
²⁰ SI/2012-85.
²¹ *Supra* note 1, s. 29.
²² *Ibid.*, s. 38.1.
²³ Bill C-11, s. 46(1).

**• HUMAN RIGHTS TRIBUNAL FINDS THAT
STUDENTS WITH SPECIAL NEEDS ARE ENTITLED TO
REASONABLE—NOT PERFECT—ACCOMMODATIONS •**

Melanie A Warner
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In *Schafer v. Toronto District School Board*¹ (request for reconsideration denied),² the Human Rights Tribunal (“Tribunal”) ruled that it would not second-guess a student’s Identification, Placement, and Review Committee (“IPRC”) placement. More recently, the Tribunal released another decision regarding the duty to accommodate students with special needs, also involving the Toronto District School Board (“TDSB”): *L.C. (Litigation guardian of) v. Ontario Human Rights Commission*.³ In the same vein as the *Schafer* decision, Vice Chair Sherry Liang in *L.C.* held that the issue is not whether the accommodations are what the parents wanted, whether they are the ideal accommodations, or whether other accommodations are more appropriate. The issue is simply whether the school board implemented (generally, but not necessarily as recommended by the IPRC or IEP) accommodations that met the student’s special needs.

The human rights complaint was filed by J.L.C. on behalf of her son L.C. who had autism spectrum disorder. L.C. attended a special diagnostic class in Kindergarten. In that same school year, an IPRC twice identified him as “exceptional” in many areas and determined that he should be placed in a special education class. However, L.C.’s mother wanted L.C. to attend his home school in a regular class with supports. The TDSB agreed.

Over the next few years, successive IPRCs confirmed L.C.’s identification as “exceptional,” indicating that he had both a developmental dis-

ability and autism. The IPRCs reiterated that L.C. should be placed in a special education program, however, in accordance with his mother’s wishes, L.C. remained in a regular class. When the TDSB began to insist that L.C. attend a special education program, J.L.C. appealed the placement decision to the Special Education Appeal Board (“Board”) and then to the Special Education Tribunal (“SET”). Pending the outcome of the SET appeal, L.C. remained at his home school in a regular class with supports. (The SET ultimately confirmed the decision of the IPRC to place him in a special education class.)

Notably, the allegations of discrimination cover the period of time that L.C. was in a regular classroom, during which the TDSB believed that he would have been better served in special education program. L.C. alleged that the TDSB’s programming and supports during this period fell short of its obligations under the *Human Rights Code*.⁴ His central allegation was that the TDSB failed to provide him with competent, continuous, and consistent support from a Special Needs Assistant (“SNA”). He also complained that the TDSB delayed in obtaining a dedicated computer for him, neglected to properly implement a habit (toilet) training program for him, and deprived him of an academic program by having him spend portions of his school day outside the classroom.

With respect to the SNA issue, L.C.’s IEP indicated that he needed full-time support from an SNA. Throughout his time in a regular class,

L.C. was provided with one-on-one SNA support. However, a number of different SNAs worked with him. At times, there was one individual in a full-time SNA position, and, at other times, there were two SNAs in part-time positions. The change in the SNA complement arose from a maternity leave, surplus staff, and staff turnover. In addition, because L.C. required significant assistance with toileting, it took some time to find an SNA willing to work with him on a full-time basis. Vice Chair Liang concluded there was no evidence that any of the SNAs hired to support L.C. lacked any qualifications essential to their positions. Furthermore, she concluded that L.C.'s disabilities did not require that he be provided with a single SNA throughout the school day in order to access his individual programming. In this regard, she made that point that complainants cannot necessarily expect *ideal* accommodations:

Although it may be that in an ideal world, a pupil in the complainant's position might have been better off if he had a single SNA throughout the entirety of his school day, I cannot find that not ensuring this amounted to discriminatory treatment under the Code. As the Tribunal observed in *Schafer*, the issue is not whether the accommodation provided was the ideal accommodation, or what the parents may have preferred. The issue is whether the respondent failed to reasonably accommodate a disability-related need, denying him the right to equal access to education services.

With respect to the computer issue, Vice Chair Liang noted that, in the fall of 2003 and the spring of 2004, an occupational therapist recommended certain computer equipment that would benefit L.C. However, the Board did not believe that L.C. required a dedicated computer in order to access the curriculum. Under pressure from J.L.C., the Board ultimately applied for a dedicated computer in April 2005. However, L.C. did not show independent interest in using it and required assistance to use it. Vice

Chair Liang concluded that a dedicated computer was not a necessary accommodation and that the purposes for which it was beneficial could be served by other existing methods.

With respect to habit training, L.C. was not toilet trained and wore pull-up diapers to school. In the latter part of Grade 4, J.L.C. requested that the Board assist with a habit-training program that involved L.C. attending school without a diaper. The evidence revealed that the implementation of this habit-training program was challenging for the SNAs: it required hourly trips up and down stairs to the washroom, help with dressing and undressing, and the time-consuming clean-up of frequent accidents. J.L.C. alleged that the Board did not follow the habit-training program as required. Vice Chair Liang concluded there was no evidence that the school failed to provide L.C. with necessary accommodations in this area and, in fact, made "considerable efforts" to assist him.

With respect to the amount of time that L.C. spent outside of the classroom, Vice Chair Liang noted that L.C. did leave the classroom frequently as part of his habit-training program and, at other times, when he was acting out or was overstimulated. However, she concluded that this time away from the classroom was related to L.C.'s own needs and was not due to a failure to accommodate his disabilities.

In conclusion, the Tribunal observed that the Board put considerable efforts into accommodating L.C. within a regular classroom setting, even while believing that his educational interests would be better served in a special education setting. The Tribunal also noted that, although the accommodations may not have been perfect, they were reasonable and responsive to L.C.'s needs, which is all the *Code* requires.

Together with the *Schafer* decision, the *L.C.* decision demonstrates that the Tribunal does not hold school boards and educators to a standard of perfection. In order to establish discrimination under the *Code*, the evidence must demonstrate that the accommodations provided to a student were significantly inappropriate or inadequate.

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¹ *Schafer (Litigation guardian of) v. Toronto District School Board*, [2010] O.H.R.T.D. No. 387.

² *Schafer v. Toronto District School Board*, [2010] O.H.R.T.D. No. 854.

³ [2011] O.H.R.T.D. No. 1590.

⁴ R.S.O. 1990, c. H.19 [*Code*].

⁵ *Supra* note 3 at para. 55.

• LEGISLATION UPDATE: ACCESSIBILITY STANDARDS IMPOSE OBLIGATIONS ON EMPLOYERS IN ONTARIO •

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On July 1, 2011, the Integrated Accessibility Standards came into force through Ontario Regulation 191/11. The Accessibility Standards were developed by the Ministry of Citizenship and Immigration pursuant to the powers established by the Accessibility for Ontarians with Disabilities Act, 2005.¹ The purpose of the AODA is to develop, implement, and enforce accessibility standards for Ontarians with disabilities with respect to goods, services, facilities, accommodation, building, structures, premises, and, importantly, employment.

The Accessibility Standards have broad application, effectively applying to any organization that provides goods, services, or facilities to the public or other third parties and that has at least one employee in Ontario. Such organizations are referred to in the regulation as an “obligated organization.” For example, every obligated organization shall develop, implement, and maintain policies governing how the organization achieves or will achieve compliance with the

Accessibility Standards. The dates for achieving compliance with this obligation are staggered depending on the nature and size of the organization in the following manner:

- for the Government of Ontario and the Legislative Assembly, January 1, 2012;
- for all designated public sector organizations with 50 or more employees, January 1, 2013;
- for all designated public sector organizations with fewer than 50 employees, January 1, 2014;
- for all other obligated organizations with 50 or more employees (“Large Organizations”), January 1, 2014; and
- for all other obligated organizations with at least one but fewer than 50 employees (“Small Organizations”), January 1, 2015.

Designated public sector organizations include school boards. Independent schools will fall into

the Large Organizations category of the Small Organizations category depending on the number of employees that they employ.

The Accessibility Standards require all designated public sector organizations and Large Organizations to establish, implement, maintain, and document a multiyear accessibility plan.

The plan will outline the organization's strategy to prevent and remove barriers to accessibility.

The plan will be available to the public and must be updated every five years. Large designated public sector organizations must have a plan by January 1, 2013, while small designated public sector organizations and Large Organizations must comply by January 1, 2014. Small Organizations are exempt from the requirement to develop an accessibility plan.

The Accessibility Standards require employers of an obligated organization to train their employees and volunteers on the requirements of the Accessibility Standards and on the Human Rights Code as it pertains to persons with disabilities. Training must take place as soon as practicable, but, again, compliance with this obligation is staggered depending on the nature and size of the organization from January 1, 2014, for large public sector employers to January 1, 2016, for Small Organizations.

The Accessibility Standards also create Employment Standards that apply to all obligated organizations. The Employment Standards will require these employers to

- notify their employees, all job applicants, and the public about the availability of accommodation for applicants with disabilities in their recruitment process;
- provide for suitable accommodation at the request of a job applicant;

- notify successful applicants of its policies for accommodating employees with disabilities;
- inform their employees of policies to support employees with disabilities;
- consult with the employee to provide accessible formats and communication supports for information that is needed to perform the employee's job and information that is generally available to employees in the workplace, where an employee with a disability requests it;
- provide individualized workplace emergency response information to employees who have a disability;
- develop and have in place a written process for the development of documented individual accommodation plans, which plans shall include detailed information respecting the development and review of the accommodation plan, except for Small Organizations; and
- develop and have in place a return-to-work process for employees who have been absent from work due to a disability and require disability-related accommodation in order to return to work, except for Small Organizations.

The following timelines are in place for employers to comply with the Employment Standards:

- for the Government of Ontario and the Legislative Assembly, January 1, 2013;
- for all designated public sector organizations with 50 or more employees, January 1, 2014;

- for all designated public sector organizations with fewer than 50 employees, January 1, 2015;
- for Large Organizations, January 1, 2016; and
- for Small Organizations, January 1, 2017.

Employers are also required to take into account the accessibility needs of employees with disabilities in any performance management, career development, and advancement or redeployment process in their workplaces.

Some six years in the making, the Accessibility Standards set out comprehensive guidelines for breaking down barriers faced by disabled persons. In addition to employment, the standards address the accessibility of public transportation, the sale of goods, and the provision of services and encompass myriad commercial and other activities. School boards and independent

schools will have to assess the accessibility of their buildings and other facilities in accordance with the standards. Educators will need to start thinking about developing policies and implementing the requirements now, notwithstanding the fact that the government has provided lengthy time periods for compliance. In many cases, compliance will simply be a matter of reviewing and modifying existing policies and practices. In others, compliance will require the completion of new policies and training. In all cases, schools should use the Accessibility Standards themselves as the template and guide for preparing those policies and modifying practices.

[*Editor's note:* **Robert Weir** is a partner at Borden Ladner Gervais LLP.]

¹ S.O. 2005, c. 11 [AODA].