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## Fair Dealing

### Introduction

Fair Dealing is the right, within limits, to reproduce a substantial amount of a copyrighted work without permission from, or payment to, the copyright owner. Its purpose is to facilitate creativity and free expression by ensuring reasonable access to existing knowledge while at the same time protecting the interests of copyright owners.

It is important that academic staff know their fair dealing rights and exercise them to the fullest extent. It is equally important that universities and colleges codify robust fair dealing practices in institutional policy. Such guidelines are necessary because the *Copyright Act* does not contain a simple formula that sets out exactly what may or may not be copied without permission or payment. Rather, fair dealing requires the exercise of judgement. This advisory, drawing on jurisprudence from the Supreme Court of Canada, offers direction in the exercise of this judgement and a framework for codifying institutional fair dealing policies.

### Legislative Framework and Judicial Interpretation

The *Copyright Act* lists fair dealing's permitted purposes, but does not actually define what it is:

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

Section 29.1 - "Fair dealing for the purpose of **criticism** or **review** does not infringe copyright [if attribution is provided] ..."

Section 29.2 - "Fair dealing for the pur-

pose of **news reporting** does not infringe copyright [if attribution is provided] ..."

In the absence of a statutory definition, the task of giving meaning to fair dealing falls to the courts and to the users of copyrighted material. For many years the prevailing judicial view was that fair dealing was only a narrow defence against a charge of copyright infringement. This began to change in 2002 with the Supreme Court of Canada decision in *Théberge v. Galerie d'Art du Petit Champlain Inc.* In *Théberge* the Court held that the proper balance in copyright:

"... lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them." [para 31]

The judges emphasized that:

"...excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization." [para 32]

In 2004 the Supreme Court directly addressed fair dealing in *CCH Canadian Ltd. v. Law Society of Upper Canada*. The ruling dealt primarily with the Law Society library's practice of delivering copies of case



law, legal articles and other research material to lawyers. The Court found that this practice constituted fair dealing, not copyright infringement. In reaching this conclusion the Court urged an expansive understanding of the rights of the users of copyrighted material:

“The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.” [para 48]

The Court also held that:

- the specific fair dealing categories (research, private study, criticism, review, news reporting) should be given a broad and liberal interpretation;
- even though a library does not itself engage in research or private study, for the purposes of reproducing a work it may stand in the shoes of a patron who is engaging in research and private study; and
- existing “custom and practice” can help determine if the reproduction of a work constitutes fair dealing.

With respect to “custom and practice”, the Court placed heavy emphasis on the fact that the library had codified its fair dealing practices into a written policy. This “Access to the Law Policy”:

- limited the copying service to a defined community (“lawyers, articling students, the judiciary and other authorized researchers”);
- required that the copying be for the fair dealing purposes set out in the *Copyright Act* (research, review, private study and criticism) and an additional purpose (use in court, tribunal and government proceedings);

- indicated the permissible amount of copying was determined by the exercise of judgement: “Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.”; and
- noted that the service was provided on a not for profit, cost-recovery basis.

## Determining Fair Dealing

Whether or not copying constitutes fair dealing depends on the facts of each case. To assist in this determination the Court in the *CCH* decision set down six criteria that allow educators, librarians and students to conduct their own analysis of whether their use of a work is fair. These criteria are:

**1. The Purpose of the Use** – To constitute fair dealing the use in question must fall within the following categories:

- research;
- private study;
- criticism;
- review; or
- news reporting.

The Court instructs that these purposes are to be broadly interpreted. Research includes work done both for profit and not for profit. Criticism goes beyond the academic or literary sense of the word and should be interpreted to include critical political commentary, controversial viewpoints, and even parody when undertaken with a genuine intent to criticize the parodied work. Similarly, “review” should mean more than the discussion of artistic merit. It should also capture

the review and disclosure of facts and events. “News reporting” can extend beyond the work of the traditional print, radio and television media to encompass community and organizational newsletters and web logs. In addition to the coverage of current events, “news reporting” could also mean the documentation of the broad sweep of natural and human history.

If the “purpose” hurdle is cleared, a cumulative weighing of the next five criteria determines the existence of fair dealing.

**2. The Character of the Dealing** – Here the court touches on two sub-criteria to assess how the work is dealt with - the number of copies made and existing custom and practice. According to the court:

“If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing.” [para 55]

With respect to “custom and practice” the court notes that if the copying at issue conforms to an existing practice in a “trade or industry” (or, by analogy, the academic community), it is more likely to be fair.

**3. The Amount of the Dealing** – The *CCH* decision offers no mechanical formula for determining how much of a work can be copied fairly; it provides parameters that allow the public to exercise judgement. In doing so, the Court is clear that fair dealing encompasses the copying of substantial amounts of a work:

“If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement.” [para 56]

In fact, the Justices observe “It may be possible to deal fairly with a whole work” [para 56]. The Court is clear that the exercise of judgement is determinative:

“The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.” [para 56]

**4. Alternatives to the Dealing** – Here the Court proposes a necessity test:

“If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court. I agree with the Court of Appeal that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.” [para 57]

Copying an article or a chapter for the purposes of research or private study would pass this necessity test in most instances.

**5. The Nature of the Work** – The Court again identifies two narrow sub-criteria: whether a work has been published and whether it is confidential:

“The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been

published, the dealing may be more fair in that its reproduction with acknowledgment could lead to a wider public dissemination of the work — one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.” [para 58]

By analogy, the nature of academic work - published to disseminate ideas, often with no motive of direct financial gain - may favour a fair dealing analysis of its use.

#### **6. The Effect of the Dealing on the Work** – The Court raises the issue of economic competition:

“Finally, the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.” [para 59]

In the academic environment the reproduction of multiple copies of core course texts (a novel, for example) would tend to undermine the commercial market for the work and thus probably not constitute fair dealing. In contrast reproducing single copies of portions of supplemental material for research, private study, criticism or review likely would meet the fair dealing test. The reproduction for these same purposes of an entire article from an academic journal or a chapter from a book would as well

The Court concludes:

“... the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.” [para 60]

### Fair Dealing in Practice

The advancement of knowledge depends on the free and open exchange of information. This truth is so strongly understood within academic culture that a belief in an amorphous “public interest” or “educational” right to reproduce works without permission or payment is commonplace among academic staff. Faculty routinely distribute copies of their own work, notwithstanding that they may have transferred copyright to a publisher. Liberal copying is also done of the works of others, for research, private study, criticism, review and classroom use. When academic staff do assert their copyright, it is often to protect academic freedom, scholarly integrity and open communication rather than for personal economic gain.

This behaviour constitutes an ill-defined but robust custom of educational fair dealing. While it has served the advancement of knowledge well, it is now under pressure from copyright licensing agencies, publishers and the entertainment industry; each eager to see all uses of works regulated and monetized. The challenge for academic staff is to protect the open exchange of information. This can be achieved by molding existing practices of sharing to fit within the fair dealing parameters set out by the Supreme

Court of Canada in the *CCH* decision.

At an individual level, this means understanding that it is legal to copy substantial amounts of a work without seeking permission from, or providing payment to, the copyright owner when:

- the purpose of the copying falls within the broad categories of research, private study, criticism, review or news reporting; and
- it is fair to do so given the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the original work; and the effect of the dealing on the work.

To assist academic staff a Fair Dealing Checklist is attached as Appendix A.

At the institutional level, the Supreme Court in *CCH* is clear that a library, for the purposes of reproducing a work, may stand in the shoes of a patron who is engaging in research and private study. This analysis logically extends to permitting a classroom professor to fair deal (copy) on behalf of his or her students. However, the prudent course of action is to encourage the institution as a whole to fulfill this role. This can be done by promulgating specific fair dealing policies for library reserves and interlibrary loans (including electronic material) as well as broad institutional fair dealing guidelines similar to the Great Library's.

An example of an Institutional Fair Dealing Policy is attached as Appendix B.

## The Legislative Agenda

The Supreme Court of Canada has given fair dealing real meaning and power and it is important that academic staff take advantage of the Court's rulings. To solidify a robust understanding of fair dealing it is also

necessary to push for the enshrinement of the *CCH* analysis in the *Copyright Act*. Legislative clarification is needed in four particular areas:

**1. Scope** – Fair dealing currently covers five purposes: research, private study, criticism, review and news reporting. This list needs to be expanded to encompass additional instances of copying that would pass the *CCH* test but do not fall specifically within the enumerated grounds. For example, more explicit rights are needed for artists to engage in parody and collage; for teachers to display and reproduce material in the classroom; for computer scientists to engage in reverse engineering; and for the public at large to copy material into different formats to facilitate time-shifting and device interoperability.

Rather than creating a long list of new “purposes” for fair dealing, this simple amendment to the *Act* would achieve this result:

“Fair dealing for purposes **such as** research, private study, criticism, review or news reporting does not infringe copyright.”

The inclusion of the words “such as” would indicate that the categories are not rigid, limited and exclusive, but are understood to be broad enough to cover all legitimate uses.

**2. Definition** – As noted, the *Act* does not actually define fair dealing. To introduce clarity, the legislation should be amended to provide a definition:

“Fair dealing is the user right to reproduce a substantial amount of a work without permission or payment as determined by factors such as: the purpose of the use; the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the original work; and the effect of the dealing on the work.”

**3. Statutory Damages** – The *Copyright Act* entitles copyright owners to recover money from anyone who infringes their copyright. The actual amount lost through infringement is often small so the *Act* gives the owner the right to claim an award of statutory damages ranging between \$500 and \$20,000 for each work infringed. The existence of this significant penalty encourages individuals and institutions to be extremely cautious in exercising user rights, especially a right such as fair dealing that is not explicitly defined in the *Act*.

In order for fair dealing and other user rights to be meaningful a simple amendment to the *Act* is needed to restrict the availability of statutory damages:

“Statutory damages shall not be available in any case where an infringer acted with a good faith belief that their actions with respect to a work are justified by fair dealing or other limitations.”

**4. Fair Dealing in Digital Works** – To achieve its purpose, fair dealing must apply equally to works in paper and digital format. Specifically, the *Copyright Act* must not prohibit the circumvention of measures that “lock down” (by encryption or otherwise) digital works unless the purpose of the circumvention is infringement. In other words, any new provision in the *Act* that prohibits circumvention must be carefully targeted against infringement (for example, commercial piracy) and must not prohibit circumvention to allow fair dealing and other user rights. Finally, the *Act* must not ban devices or services that facilitate circumvention, as they may be essential to exercise fair dealing rights.

## Conclusion

Fair dealing is the right, within limits, to reproduce a substantial amount of a copy-

righted work without permission from, or payment to, the copyright owner. Its purpose is to facilitate creativity and free expression by ensuring existing knowledge is not placed beyond reasonable access while at the same time protecting the interests of copyright owners.

Parliament and the courts have created this broad and important right and entrusted its proper exercise to the good judgement of the public. Theoretically, fair dealing could have been legislated as a precise formula with crisp boundaries, but this is not the way the law has developed. The limits of the practice are imprecise and will always be subject to dispute. Rather than retreating from this grant of discretion, the education community must fully accept it and define for itself, within the parameters set by Parliament and the courts, what is fair.

This means that academic staff must know their fair dealing rights and exercise them to the fullest extent. It is equally important that universities and colleges codify robust fair dealing practices in institutional policy. Such guidelines can inform the actions of academic staff and will signal to the courts and Parliament the “custom and practice” of fair dealing at universities and colleges.

Finally it is incumbent upon academic staff, as individuals and through their associations, to participate in the process of copyright reform. In particular, Parliament must hear from the education community on the issue of fair dealing. A robust information commons, where ideas and information are readily accessible, is fundamental to the scholarly process, free expression and to Canada’s wider social, cultural and economic development. Advocating for a balanced *Copyright Act* that enshrines the robust practice of fair dealing will help ensure the health of this commons and thereby serve the public interest. ■

## Appendix A

### A Fair Dealing Checklist for Academic Staff

Fair dealing is the right, within limits, to reproduce a substantial amount of a copyrighted work without permission from, or payment to, the copyright owner. Its purpose is to facilitate creativity and free expression by ensuring reasonable access to existing knowledge while at the same time protecting the interests of copyright owners.

There is no simple formula that sets out exactly what may or may not be copied without permission or payment. Rather, fair dealing requires the exercise of judgement. The following questions offer direction in the exercise of this judgement.

#### 1. Is the work protected by copyright?

Material in the public domain (including facts, ideas and works in which the term of copyright has expired) can automatically be used without permission or payment. It is not necessary to conduct a fair dealing analysis before copying such material.

#### 2. If the work is protected by copyright, has its owner given implicit or explicit consent to make reasonable use of it?

If the work is under copyright but is presented for public use with minimal restrictions then reproducing it is reasonable if the reproduction is consistent with the owner's presentation of the content. For example, reproduction of a work for not-for-profit educational purposes would be acceptable if that was the reason the owner originally made it available. Large scale commercial re-distribution of the same material would be unacceptable. Examples of material presented for public use with minimal restrictions include open access publications, works covered by a Creative Commons license and much of the material

lawfully posted on the internet. In some instances explicit consent to reproduce this material is present, such as when work posted on the internet is amenable to routine browser commands such as "print", "save", "copy" and "send".

**3. Are there alternatives to fair dealing in a copyrighted work?** Rather than fair dealing in a work it may be possible to simply provide an internet link to it. It is also unnecessary to fair deal in a work if your institution has paid for a license to reproduce it (although beware of paying for a license to engage in copying that would fall under fair dealing).

**4. Are you copying a small portion of the work?** Section 3. (1) of the *Copyright Act* provides:

"For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof ..."

This means a fair dealing analysis is only necessary when the amount to be reproduced is substantial. Insubstantial amounts of a work may automatically be used without permission or payment.

#### 5. Does the copying fall within the *Copyright Act's* listed fair dealing purposes?

To constitute fair dealing the purpose of the copying must be (as broadly construed) research, private study, criticism, review or news reporting. If the use falls within these categories then a cumulative weighing of steps six through ten determines if the copying is fair.

#### 6. Is the character of the dealing fair?

Making multiple copies of a work in a way that stands out from traditional academic practice has the appearance of unfairness.

The reproduction of fewer copies for a specific legitimate purpose in conformity with existing practice is more likely to be fair, especially when the distribution of the copy is limited to a defined audience (for example posted on a restricted access web site). Charging a copying fee to recover costs, rather than in expectation of a profit, would also suggest fairness.

**7. Is the amount of the dealing fair?** The portion of a work copied (up to and including the entire work) will be more or less fair depending on the purpose. For research or private study it may be essential to copy an entire academic article or an entire chapter of a book. However, if a work of literature is copied for the purpose of criticism, it may not be fair to include a full copy of the work in the critique. As a practical matter some works, such as a photograph or short poem, can only be reproduced in their entirety and the question of whether copying the entire work is fair will depend on the circumstance. Academic practices encourage proper citation and judicious use of direct quotes.

**8. Is it necessary to reproduce the work?** To qualify as fair dealing the copying must be reasonably necessary to achieve its ultimate purpose. For example, if a critique would be equally effective if it did not reproduce in full the subject of the critique, this may weigh against a finding of fairness. The existence of a non-copyrighted equivalent of the work that could be used instead of the copyrighted work would also weigh against a finding of fairness.

**9. Is the nature of the work conducive to fair dealing?** A work that the owner had no intention of distributing, such as confidential material, would be harder to fair deal. An academic work - published to disseminate ideas, often with no motive of direct financial

gain - may favour a fair dealing analysis of its use.

**10. What is the effect of the dealing on the work?** If the reproduced material is likely to compete with the market of the original work, this may suggest that the dealing is not fair. However, although the economic effect of the dealing on the copyright owner is an important consideration, it is neither the only factor nor the most important factor in deciding if the dealing is fair.

## Fair Dealing in Specific Situations

The ten steps outlined above provide the basis for academic staff to conduct their own fair dealing analysis. In specific situations they would apply as follows:

- Fair Dealing in Research - The reproduction for purposes of research of single copies of single items (such as an article from a journal or a chapter from a book) from a larger source would strongly tend to be fair. Copying an entire book or journal volume would be less so as such action would unreasonably undermine the commercial market for the work.
- Fair Dealing in Scholarly Publication - The reproduction within an article or monograph of substantial quotations, images, tables (with attribution) would constitute fair dealing for the purposes of review and criticism. It would be more difficult to justify the reproduction of larger works in their entirety within the publication. As noted above, academic practices encourage proper citation and judicious use of direct quotes.
- Fair Dealing in the Classroom - The reproduction of a copy of a work for criticism and review in the classroom would tend to be fair. In particular the transformative use of a work by students

in a project would meet the criteria. The simple presentation by a teacher of an “off the shelf” lesson plan probably would not; nor would the performance of a work to raise funds or to entertain students.

### Some Additional Questions

- If you are thinking of copying someone else’s work, would you be displeased with the copying if the work was yours? If you would, this might suggest unfairness.
- Does the copying depart radically from the custom and practice of your colleagues? If it does this would tend to suggest unfairness.
- Is the purpose of the copying simply to avoid developing your own lesson plan or presentation in order to save time and effort? This would tend not to be fair.
- Is the copying necessary to facilitate access to content for research and critical review? This would tend to be fair.
- What are the economic implications? If the copying would undermine a legitimate business model or cause the future production of similar works to cease it would tend not to be fair.

## Appendix B

### The Law Society of Canada - Great Library Access to the Law Policy

The Law Society of Upper Canada, with the assistance of the resources of the Great Library, supports the administration of justice and the rule of law in the Province of Ontario. The Great Library’s comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers.

Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, may be provided to users of the Great Library.

This service supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian *Copyright Act*.

### Guidelines to Access

1. The Access to the Law service provides single copies for specific purposes, identified in advance to library staff.
2. The specific purposes are research, review, private study and criticism, as well as use in court, tribunal and government proceedings. Any doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.
3. The individual must identify him/herself and the purpose at the time of making the request. A request form will be completed by library staff, based on information provided by the requesting party.
4. As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.
5. This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.

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