

Fair Dealing at a Crossroads

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A. INTRODUCTION

Shortly before his death Harold Innis wrote: “Law is apt to become anything ‘boldly asserted and plausibly maintained.’”¹ Applying these words to the present environment suggests that copyright is mere moments away from becoming a means of absolute control. While those familiar with the law are cognizant of copyright’s structure of limited rights, lay people see copyright as all-encompassing and act accordingly. Music downloading notwithstanding, perception is that copyrighted material cannot lawfully be used without permission. Judging by the proposed changes to the *Copyright Act*, perception is becoming nine-tenths of the law.

The future cost of treating copyrighted material as absolute property is difficult to assess. *Cost* must reflect the sum total of different manifestations; what will be the effect upon creativity in the arts, innovation in media, development in research, success in education, and the use of our bedrock democratic principle of freedom of expression? Intellectual effort

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1 Harold Innis, *Changing Concepts of Time* (Lanham: Rowman & Littlefield Publishers, Inc., 2004) at 52.

is collaborative; implicitly, or explicitly, each new work draws in artifacts from other works. The means by which this time-honoured process of creativity achieves legitimacy in the system of copyright is through the limits upon control as prescribed by law. Copyright is not, nor has it ever been, a grant of absolute control.

Historical exploration is often used to probe the uncertainty of the relationship between control and creativity. Researchers in humanities, law, economics, and communication have drawn correlations between the flourishing of the arts and letters to periods of little, or no, protection of intellectual work. Common to the ancient civilizations, with attention upon the Greek, Chinese, Islamic, Jewish and Christian traditions, there was “a striking absence of any notion of human ownership of ideas or their expressions.”² Eighteenth century France, in its day the epitome of culture, did not place authors at the centre of domestic copyright law.³ In a rare empirical study, the creative output of 646 European music composers born between 1650 and 1849 was studied to the conclusion that it remains unproven as to whether stronger copyright laws made an appreciable difference in income levels, and thus the creative output, of composers.⁴ Closer to our own time, popular music as it developed in mid-twentieth century America owes its genesis to unauthorized samplings from the blues tradition which itself had freely taken from West African antecedents.⁵ And, throughout the twentieth century, the means by which creative effort reached mainstream audiences was inversely linked to copyright protection—from the player piano on, new media technology thrived in the spaces uncontrolled by copyright law.⁶

Those who are inclined to the position that stronger copyright protection is necessary to further creative effort, may be interested in the thoughts of a respected and influential figure within the American justice system. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit turns to one of our native sons on this matter:

2 Carla Hesse, “The rise of intellectual property, 700B.C.–A.D.2000: an idea in balance.” (2002) 131(2) *Daedalus: Proceedings of the American Academy of Arts and Sciences*, 26 at 27.

3 Jane Ginsburg, “A Tale of Two Copyrights: Literary Property in Revolutionary France and America” in Brad Sherman & Alain Strowel, eds., *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press, 1994) at 144.

4 F.M. Scherer, *Quarter Notes and Bank Notes: The Economics of Music Composition in the Eighteenth and Nineteenth Centuries* (Princeton: Princeton University Press, 2004) at 194–96.

5 Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001) at 14–15 and 117–48.

6 Lawrence Lessig, *The Future of Ideas* (New York: Vintage Books, 2002) at 107–10; see also Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books, 2001) at 173–74.

The pervasiveness of borrowing in literature is captured in Northrop Frye's dictum that "poetry can only be made out of other poems; novels out of other novels." Frye had some tart words about copyright. He notes the challenge to the assumptions underlying the copyright law posed by "a literature which includes Chaucer, much of whose poetry is translated or paraphrased from others, Shakespeare, whose plays sometimes follow their sources almost verbatim; and Milton, who asked for nothing better than to steal as much as possible out of the Bible."⁷

While history alone cannot offer proof, it lends itself to persuasion. Throughout copyright's 300 year existence the law has operated as a system of limited rights.⁸ Canada risks its creative and innovative potential if the limitations are diluted to such an extent as to render them useless.

It may be argued that copyright's limits are intact; that its structural design remains unaltered. The idea/expression dichotomy means that while creative expressions are protected, their underlying ideas are open to all; the inadmissibility of facts and data for copyright protection implies that the basic building blocks of knowledge are equally available; and the limited term of copyright ensures that copyrighted works themselves eventually become available for unfettered use.⁹ And, depending on jurisdiction, measures like fair dealing permit some productive uses of copyrighted work.¹⁰ It is this element that is essential for copyright to meet its

7 Northrop Frye, *Anatomy of Criticism: Four Essays* (Princeton: Princeton University Press, 1957) at 95–104, quoted by William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Belknap Press, 2003) at 59–60.

8 The birth of modern copyright law is usually ascribed to the *Statute of Anne* (1710); see Litman, above note 6 at 15.

9 With respect to the presumed benefit of dividing protection between ideas and expression, Rosemary Coombe writes that "the imagery of commerce is a rich source for expressive activity. In consumer cultures, most pictures, texts, motifs [etc.] are governed, if not controlled by regimes of intellectual property." See Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998) at 6. And the copyright term most commonly used throughout the world, lifetime of the creator plus fifty years, is far beyond that of the original statute which provided protection for fourteen years, renewable for another fourteen; see Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967) at 7.

10 In Canada, individuals may engage in unauthorized reproduction of copyrighted material for the purposes of private study, research, criticism, review and news reporting, under certain conditions, including citation; see *Copyright Act*, R.S.C. 1985, c. C-42, <http://laws.justice.gc.ca/en/C-42>, ss. 29–29.2. Left unarticulated within the statute, but of importance in practice, is that the dealing must be fair. Guidance in the determination of

implicit mandate to foster creativity;¹¹ exceptions are the only means by which copyrighted material may be legitimately utilized, without authorization, *during* the term of protection.

Proponents of Bill C-32 will no doubt point to the proposed expansion of fair dealing—including categories for parody, satire and education—as evidence of recognition of the importance that copyright’s reach be limited.¹² Indeed, this could be a productive step forward. Unauthorized use of copyrighted material for parody and satire does not yet have official sanction in Canada. Further detracting from the viability of these creative forms is a Federal Court decision in 1997 which held that parody could not be sheltered under the fair dealing allowance of criticism.¹³ This decision elicited concern but continues to be influential.¹⁴ Explicitly recog-

fairness was provided by the Supreme Court of Canada in 2004, see *CCH Canadian*, below note 21.

- 11 Canadian copyright law draws, in part, from common law antecedents. Notably, both British and American laws have articulated purposes to copyright. British law is derived from the *Statute of Anne* (1710), the title of which begins with “An Act for the Encouragement of Learning. . .” (http://avalon.law.yale.edu/18th_century/anne_1710.asp). American development of copyright law takes its mandate from their constitution. Article 1, Section 1, Clause 8 begins as “To promote the progress of science and the useful arts. . .” (http://avalon.law.yale.edu/18th_century/art1.asp#1sec8). In contrast, Canadian law has no explicitly written purpose.
- 12 Bill C-32, *An Act to Amend the Copyright Act*, 3d Sess., 40th Parl., 2010, at s. 29.
- 13 A representation of Bibendum, the Michelin Man, as a figure of oppression provoked this declaration from Teitlebaum J.: “I am not prepared to read in parody as a form of criticism and thus create a new exception.” See *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 F.C.306, www.canlii.org/en/ca/fct/doc/1996/1996canlii3920/1996canlii3920.html [*Michelin*] at para 68.
- 14 In *Michelin* the property rights of the plaintiff were disproportionately enjoyed over the defendant’s right of freedom of expression; see *Michelin*, *ibid.* at para. 85–114. Jane Bailey comments that “the *Michelin* conclusion that users must justify their expression *vis-à-vis* the copyright owner’s intended use of the ‘property’ mistakenly places the property cart before the constitutional horse.” See Jane Bailey, “Deflating the Michelin Man,” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 125 at 141–42. Curious too was the imposition of an added code of conduct upon fair dealing: “even if parody were to be read in as criticism, the Defendants would have to adhere to the bundle of limitations that go with criticism, including the need to treat the copyright in a fair manner. The Defendants held the ‘Bibendum’ up to ridicule.” See *Michelin*, above note 13 at para. 75. Michael Rushton comments that with this interpretation, fair dealing was reduced “to an obligation to use the materials in an impartial way.” See Michael Rushton, “Copyright and freedom of expression: an economic analysis,” in Ruth Towse, ed., *Copyright in the Cultural Industries* (Cheltenham: Edward Elgar, 2002) 51 at 58. In light of subsequent jurisprudence Emir Aly Crowne-Mohammed determines that parody’s fortunes should have changed: “Lower courts should not feel constrained

nizing parody and satire as eligible forms of fair dealing opens a door to greater creative latitude in Canada. The merit of which may enjoy broader support than most copyright-related issues.¹⁵ But such cooperation may be for naught; Bill C-32 also stipulates strict observance of technology protection measures (TPMs) even when a use is fair dealing.¹⁶

Allied to a diminishment of fair dealing through TPMs is an existing trend where the legitimate ambit of fair dealing has been encroached upon within educational institutions. Although fair dealing's predisposition to educational activities, via the purposes of private study, research, criticism, and review, should have set the exception on firm ground in the education community, this has not been the case.¹⁷ Bill C-32's proposed inclusion of "education" as a permissible category of fair dealing drew immediate condemnation.¹⁸ The depth of the misunderstanding of copyright,

by *Michelin*, which can no longer survive in light of the clear and unanimous guidance provided by the Supreme Court in *CCH*." See Emir Aly Crowne-Mohammed, "Parody as fair dealing: a guide for lawyers and judges in Canada," (2009) *Journal of Intellectual Property Law & Practice* 4(7) 468 at 471. Yet in November 2008 a parodied version of the *Vancouver Sun* newspaper was denied the defense of fair dealing by citing *Michelin*, see *Canwest v. Horizon*, 2008 BCSC 1609, www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1609/2008bcsc1609.html at para. 14

- 15 Access Copyright, a nonprofit copyright collective representing authors and publishers, signalled support for an exception for parody during last year's public consultation on copyright; see Access Copyright, www.ic.gc.ca/eic/site/008.nsf/eng/02603.html.
- 16 Bill C-32, above note 12 at s. 41. Interestingly enough, the US Librarian of Congress recently relaxed some of their prohibitions upon circumventing technological protection measures. Included was a measure that directly benefits educational uses of copyrighted materials, the extraction of clips from movies encrypted on DVDs, for the purposes of criticism and review, circumscribed by a requirement of good faith. This expands a previous allowance offered only to film and media studies professors; now all college and university professors, together with film and media studies' students, have permission. Creation of documentary films and noncommercial videos are also sheltered. See *Statement of the Librarian of Congress Relating to Section 1201 Rulemaking* at www.copyright.gov/1201/2010/Librarian-of-Congress-1201-Statement.html.
- 17 See below section B, "Seeds of Doubt."
- 18 Bill C-32 was unveiled on 2 June 2010; the next day Access Copyright announced: "On behalf of creators and publishers Access Copyright is deeply concerned by the extension of fair dealing to cover education and the introduction of numerous other exceptions in the *Copyright Act* which undermine the ability of creators and publishers to get paid for the use of their works" (www.marketwire.com/press-release/Access-Copyright-Is-Deeply-Concerned-Governments-Lack-Support-Remuneration-Creators-1270887.htm). On 8 June 2008, the response from the Writers Union of Canada came: "This new 'fair dealing' for the purpose of education is a wholesale expropriation of writers' rights and opens the door for the education sector to copy freely from books and other copyright material without paying writers.," see http://writersunion.ca/av_pro60810.asp.

the belief that it is meant to operate as an instrument of absolute control, is illustrated by David Lewis Stein: “But to writers, this ‘fair dealing’ feels like expropriation of property. It feels like the government saying, ‘We are going to let people occupy rooms in your house and they won’t have to pay any rent.’”¹⁹

The inclusion of education merely acknowledges that some of the existing copying carried out in educational institutions is legitimate fair dealing and should not be subjected to systems of permission or payment. The benefit of the inclusion is the clarity fair dealing brings to an otherwise unwieldy law. Students, teachers and educational staff are caught in a web of institutional exceptions granted to “Educational Institutions”, “Libraries, Archives and Museums”, and, “Libraries, Archives and Museums in Educational Institutions.”²⁰ Simplifying the application of exceptions would facilitate observance of the law. This does not mean avoiding deliberate thought, quite the contrary. It is precisely because fair dealing does not sanction mass copying that any decision to copy requires careful consideration. While this may sound daunting, the Supreme Court of Canada has already provided cogent, and accessible, instruction.

In 2004, via *CCH Canadian v. Law Society of Upper Canada*, the nuance of fair dealing was made evident; our high court explained that each claim of fair dealing must stand on its own merits and must be examined holistically.²¹ Briefly, a library which had reproduced single copies of reported decisions, case summaries, and other material pertinent to legal research, at the request of patrons, was deemed to have engaged in fair dealing and thus not guilty of copyright infringement. This issue was examined from first principles by considering what the intention of the system of copyright is, and, how does fair dealing fit within the system?²²

Fair dealing is an imprecise doctrine; it permits some unauthorized reproduction of copyrighted material for certain purposes and under certain conditions. Its lack of explicit instruction is often seen as an impediment

19 David Lewis Stein, “New copyright legislation is bad news for Canadian writers,” *TheStar.Com*, 14 July 2010, www.thestar.com/opinion/editorialopinion/article/835450--new-copyright-legislation-is-bad-news-for-canadian-writers.

20 See *Copyright Act*, above note 10 at ss. 29.4–30, 30.1–30.3, and 30.4

21 *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1.S.C.R 339, 2004 SCC 13, www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html at paras. 47–73 [*CCH Canadian* cited to S.C.R.].

22 “In order to maintain the proper balance between the rights of a copyright owner and users’ interests, [fair dealing] must not be interpreted restrictively As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available.” *Ibid.* at paras. 48–49.

to its use. Through the ruling as a whole, Canadians were offered with precision what ought to be self-evident: fair dealing's merit lies in its fluidity. Fair dealing is necessarily as indeterminate as the creative process it supports. To navigate the indeterminacy, decisions of fair dealing should include inquiry from a number of perspectives: the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives for the dealing, the nature of the work, and the effect of the dealing on the work.²³

The story of *CCH Canadian* is well documented and noted for bringing attention to the vital role fair dealing plays in the pursuit of creativity.²⁴ Unfortunately, the guidance articulated through *CCH Canadian* was quickly set aside in the public eye and creators were seen to be under siege by copyright exceptions run wild.²⁵ This theme did not abate; it found new voice throughout last year's public consultation on copyright. In the face of proposals to give more flexibility to fair dealing, a prominent submission took great care to emphasize the instability of such an idea,²⁶ despite compelling evidence to the contrary.²⁷ Perhaps the greatest risk to a meaningful fair dealing provision in Canada lies in the continued insistence that fair dealing is only necessary when the market cannot meet Canadians' need for access to copyrighted work.²⁸

To the casual onlooker it appears inevitable that fair dealing must give way. Yet there is nothing inevitable about such a step — fair dealing's precarious footing is a consequence of multiple events occurring within the last six years. This paper presents that history through the dialogue that has surrounded the exception. Worth repeating is the axiom that intel-

23 *Ibid.* at paras. 53–60. The framework of exploration was set against a critical point, the library had a clearly articulated policy on reproduction of materials, which illustrated that its own practices were compliant with fair dealing; *Ibid.* at paras. 61–63.

24 To name just a few: 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(2) C.J.L.T. 89, http://cjlt.dal.ca/vol3_no2/pdfarticles/scassa.pdf; Carys 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; Michael Geist, *Our Own Creative Land: Cultural Monopoly and the Trouble with Copyright* (Toronto: University of Toronto Hart House Lecture Committee, 2006); Laura J. Murray & Samuel E. Trosow, *Canadian Copyright — A Citizen's Guide* (Toronto: Between the Lines, 2007); and Giuseppina D'Agostino, "Healing Fair Dealing — A Comparative Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use" (2008) 53(2) McGill L.J. 309 (<http://lawjournal.mcgill.ca/documents/dAgostino.pdf>).

25 See below section B. "Seeds of Doubt."

26 See below section C. "Fair Use or Not Fair Use."

27 See below section D. "Fair Use — Restoring the Reputation."

28 See below section E. "Market Expansion and Market Failure."

lectual effort requires collaboration. If future intellectual effort can only proceed via authorized collaboration, what impact will this have upon Canada's wellbeing?²⁹

B. SEEDS OF DOUBT

To better understand fair dealing as it stands now, one must be aware of its prior journey. Fair dealing entered Canadian law in 1921 and saw some interesting moments in the twentieth century;³⁰ however, for the purposes here, the journey begins in March 2004 with ruling of *CCH Canadian*. This carefully chosen starting point needs explanation; it marks a change of perspective on the part of the Ministry of Canadian Heritage with respect to the role played by exceptions to copyright. In 2002, the Director General had said:

We have recognized exceptions with regard to fair dealing and educational use, and these exceptions have been accepted by rights holders, as a general rule. Of course they don't like them, and we understand that. Nevertheless, copyright is about balancing interests between rights holders and users.³¹

29 Bearing in mind that common law copyright is depicted as an instrument which encourages creativity, by assigning limited property rights to the creators of intellectual works. The assumption is that the subsequent proliferation of creative effort benefits society as a whole. Yet doubts of the efficacy of copyright were raised early in its development. The extent of differing opinions was such that, in 1876, it became an object of study by the British Government: see *Royal Commission on Laws and Regulations Relating to Home, Colonial and Foreign Copyrights: Report, Minutes of Evidence, Appendix* (London: Eyre and Spottiswoode, 1878). Skepticism continued into the twentieth century under no less a voice than Arnold Plant: see Arnold Plant, "The Economic Aspects of Copyright in Books." (1934) 1(2) *Economica* 167 <<http://www.jstor.org/stable/2548748>>. For more recent criticism of the rationale of intellectual property see David Vaver, "Intellectual Property: The State of the Art." in David Vaver, ed., *Intellectual Property Rights: Critical Concepts in Law* (London: Routledge, 2006) vol.1; see also David K. Levine & Michele Boldrin, *Against Intellectual Monopoly* (New York: Cambridge University Press, 2008). And this year, writing for the Conference Board of Canada, Ruth Corbin observes "Stronger rights are not necessarily more effective in achieving desirable economic outcomes. The pursuit of effective rights rather than stronger rights is more likely to achieve consensus among diverse groups of stakeholders."; see Ruth Corbin, *Intellectual Property in the 21st Century* (Ottawa: The Conference Board of Canada, 2010) at 81 (www.conferenceboard.ca/temp/32eb4957-d647-4389-8953-fdf29fad937c/10-186_IPRreport_WEB.pdf).

30 Craig, above note 24 at 440-446; see also D'Agostino, above note 24 at 329-333.

31 Canada, Standing Committee on Canadian Heritage, *Evidence*, 37th Parl., 1st sess., (11 June 2002), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=525054&Language=E&Mode=1&Parl=37&Ses=1.

Whereas three weeks after *CCH Canadian* that same director had adopted a new position:

The objective, of course, is to again find the right balance in terms of the overall public interest . . . It's only when the market doesn't work, when it's impossible for rights holders to apply their licensing abilities, that we talk about an exception approach, again with a view to meeting the overall public interest.³²

Intentionally or otherwise, the impression cast was that fair dealing operates solely in response to market failure.

At that time, copyright policy in Canada was under review. Both the Canadian Heritage and Industry Ministries were involved, with committee meetings conducted through the Ministry of Canadian Heritage. Throughout the proceedings, staff and committee members openly described themselves as supporting creators' rights.³³ This perspective was capitalized upon by rights holders' representatives who invoked *CCH Canadian* as signaling open season upon Canadian creators. Although the decision explained in detail that multiple lines of inquiry are needed, and that each situation must be judged on its own merits, rights holders' representatives omitted reference to that guidance and instead warned that fair dealing posed great unfairness to their clientele:

. . . you are of course aware that the Supreme Court of Canada, in its ruling on the *Law Society of Upper Canada vs. Thompson Canada Limited*, considerably broadened the concept, or scope, of exceptions by establishing these exceptions—which were previously considered privileges—as users' rights.³⁴

. . . The Supreme Court has decided that under the existing fair dealing exemption, lawyers can copy legal writings and others can provide a reproduction and distribution service for them without the consent of the copyright owner.³⁵

32 Canada, Standing Committee on Canadian Heritage, *Evidence*, 37th Parl., 3d sess. (25 March 2004), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1268317&Language=E&Mode=1&Parl=37&Ses=3.

33 Remarks of a Member of Parliament: "I want to declare up front a bias: I'm on the side of the creators." Canada, Standing Committee on Canadian Heritage, *Evidence*, 37th Parl., 3d sess. (27 April 2004), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1329168&Language=E&Mode=1&Parl=37&Ses=3.

34 *Ibid.*

35 *Ibid.*

... I do implore you that you as legislators should not be looking at how the court has interpreted the law we now have. Please give us the law we need.³⁶

... Since the Supreme Court came down with its ruling on the *CCH* case, many of us have been wondering what the impact of the court's expanded definition of fair dealing will be ... The court has clearly taken some broad policy positions on copyright issues, but this government should not hesitate to seize back the momentum in defining that policy.³⁷

... The most recent Supreme Court judgment on copyright—and it has been discussed a great deal—exacerbated this imbalance, by allowing a generous interpretation of exceptions for users, and by making simple exceptions into rights for users, rights that are to be incorporated broadly and liberally.³⁸

It appeared that creators were no longer safe in Canada. A Member of Parliament said:

... I too have heard about the court ruling, and as a consumer of creative works, I was somewhat shocked to see that we are being taken further and further away from the concept of the creator. ... I think this sends out the wrong message to people. Now, people think that works are free of charge, that they can download compact discs from the Internet, that there is no charge with on-line downloading, and the same applies to written works.³⁹

With creators' rights perceived as threatened, the environment was not conducive to a request from a representative of the Council of Ministers of Education Canada (CMEC) for permission to use publicly available material obtained from the Internet free of charge in Canadian classrooms.⁴⁰

36 Canada, Standing Committee on Canadian Heritage, *Evidence*, 37th Parl., 3d sess. (28 April 2004), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1336967&Language=E&Mode=1&Parl=37&Ses=3.

37 Canada, Standing Committee on Canadian Heritage, *Evidence*, 37th Parl., 3d sess. (29 April 2004), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1339917&Language=E&Mode=1&Parl=37&Ses=3.

38 *Ibid.*

39 *Ibid.*

40 "We are proposing an amendment to permit the educational use of publicly available Internet materials, one that is intended to address educational needs and ultimately clarify and enhance respect for copyright ownership on the Internet": Standing Committee on Canadian Heritage (27 April 2004), above note 33.

CMEC's position was a curious one from the outset; "publicly available" should absolve any teacher or student from charges of infringement. If a copyright holder posts material on the Internet, without invoking any form of technological protection, he or she has implicitly given consent to use of the material. With consent, there is no infringement. And if a copyright holder was to argue against implicit consent, fair dealing should be given due consideration.⁴¹ CMEC could have relied upon *CCH Canadian* to reassure rights' holders of the subtlety of fair dealing, that it is not a blanket invitation for copying en masse. Yet as Laura Murray observed soon after:

Instead of invoking *CCH v. Law Society* to bolster a claim about fair dealing, [the CMEC representative] left that to . . . a coalition of Québec copyright collectives, who used the case as a warning to the government not to grant any exceptions, because the courts would defend and perhaps even broaden them.⁴²

In the years following *CCH Canadian*, Canadian education institutional representatives remained disquietly silent on the decision, focusing their efforts instead on a continuing plea for an educational exemption for use of publicly available material from the Internet. It was not until 2008 that a body representing academic practitioners showed enthusiasm for fair dealing and *CCH Canadian*:

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 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.⁴³

41 Sam Trosow provides a four-part series explicitly refuting a need for this exemption; see Sam Trosow, "Educational Use of the Internet Amendment: Is it Necessary?" (31 January 2008), <http://samtrosow.ca/content/view/27/43>.

42 Laura J. Murray, "Protecting Ourselves to Death: Canada, Copyright, and the Internet" *First Monday* (4 October 2004), (<http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1179/1099>).

43 "Fair Dealing," in CAUT, *Intellectual Property Advisory*, December 2008, No. 3 at 1, (www.caut.ca/uploads/IP-Advisory3-en.pdf).

In their advisory document the Canadian Association of University Teachers (CAUT) gave the details of *CCH Canadian* together with an explanation of the step-by-step evaluation conducted by the Supreme Court. The case's relevance to university research and teaching was identified, as was the urgency that universities in Canada take steps to preserve the free and open exchange of information as is necessary to advance knowledge: "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."⁴⁴

The reference to "existing practices" is critical as *CCH Canadian* contained a warning: "It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair."⁴⁵ Meaning, the element of fairness is contingent on what is considered customary behavior within the group affected. Academic endeavor is predicated upon the tradition of sharing. Fortunately, as educational uses of copyrighted material, particularly at the university level, routinely involve private study, research, criticism and review, and, the citation necessary for a legitimate claim of fair dealing is the backbone of academic practice, universities occupy a strong position with respect to lawful observance of fair dealing. What is missing is an articulated stance, together with widespread understanding, that utilization of copyrighted material is in accordance with the principles of fair dealing.⁴⁶

But it does not appear that Canadian universities have placed a priority upon codifying robust fair dealing practices. A study that examined policies addressing the inclusion of copyrighted material in original research found a noted absence of influence from *CCH Canadian*.⁴⁷ Although not exhaustive (the data set is a cross-section of Canadian universities), the study illustrates that fair dealing is not well understood. Some institutions have diminished the role of fair dealing, favouring instead a system of permission (and potential payment) for inclusion of material that would legitimately sit as fair dealing. Despite five years of incubation, *CCH Canadian* has not, to any appreciable degree, taken root in the Canadian university landscape.

The limited presence of fair dealing at Canadian universities was reflected in last year's public consultation. Scholarly associations, library

44 *Ibid.* at 4–5.

45 *CCH Canadian*, above note 21 at para. 55.

46 *Ibid.* at paras. 61–63.

47 Meera Nair, *From Fair Dealing to Fair Duty—the Necessary Margins of Canadian Copyright Law* (Ph.D. Dissertation, Simon Fraser University, 2009) at 148–88. [unpublished].

communities, individual academic practitioners, students, and citizens submitted thoughtful arguments to protect and expand fair dealing.⁴⁸ However, official engagement from universities themselves was modest; only six written submissions appear on the consultation website.⁴⁹ This is regrettable; fair dealing's reputational capital could have been enhanced with lasting attention from the executive branch of Canadian universities. In the face of a campaign which at best seeks to constrain fair dealing, and at worst to discredit it entirely, the reticence of universities may prove to be a missed opportunity.

C. FAIR USE OR NOT FAIR USE — THAT BECAME THE QUESTION

At the end of the consultation period, a joint submission appeared, titled *Why Canada Should Not Adopt Fair Use*.⁵⁰ Prepared by a leading Canadian law firm, and endorsed by over forty copyright representative organizations, the thrust of the argument aims at negating requests that fair dealing be amended to operate with greater flexibility. The submission of the Canadian Internet Policy and Public Interest Clinic (CIPPIC) is used as illustration of the desire to expand fair dealing. As CIPPIC writes,

the current law denies the defense to any dealing that does not fit within an enumerated category, no matter how fair. Amending the

48 All written submissions are publicly available at the consultation website, www.ic.gc.ca/eic/site/008.nsf/eng/home. It is beyond the confines of this paper to credit all those who engaged with consultation; with regret the author has limited recognition to the following: Canadian Association of Music Libraries, Archives and Documentation Centres, www.ic.gc.ca/eic/site/008.nsf/eng/02935.html; Canadian Federation for Humanities and Social Sciences, www.ic.gc.ca/eic/site/008.nsf/eng/02006.html; Ian D. Allen, www.ic.gc.ca/eic/site/008.nsf/fra/01785.html; David Gilbert, www.ic.gc.ca/eic/site/008.nsf/eng/02491.html; Sara M. Grimes, www.ic.gc.ca/eic/site/008.nsf/eng/02722.html; Darryl Moore, www.ic.gc.ca/eic/site/008.nsf/eng/02015.html; Duncan Murdoch, www.ic.gc.ca/eic/site/008.nsf/fra/01331.html. And it must be emphasized that Canadians engaged with all the challenges inherent to copyright; a noteworthy submission is that of violin maker, Gerard Ivan Samija, www.ic.gc.ca/eic/site/008.nsf/eng/02253.html.

49 Athabasca University, www.ic.gc.ca/eic/site/008.nsf/eng/02825.html; Concordia University, www.ic.gc.ca/eic/site/008.nsf/eng/02473.html; Queen's University, www.ic.gc.ca/eic/site/008.nsf/eng/02378.html; Trinity Western University, www.ic.gc.ca/eic/site/008.nsf/eng/02565.html; University of Alberta, www.ic.gc.ca/eic/site/008.nsf/eng/02651.html; University of Saskatchewan, www.ic.gc.ca/eic/site/008.nsf/eng/02858.html.

50 Access Copyright et. al., *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultation*, www.ic.gc.ca/eic/site/008.nsf/eng/02524.html.

provision to read, “. . . fair dealing for purposes including,” rather than “. . . for the purposes of,” would accommodate those practices.⁵¹

The framework offered in *CCH Canadian* resembles that prescribed in the fair use provisions of the United States; provisions which are predicated upon the language of “for purposes such as.”⁵² American law stipulates that judgments of fair use must be made by considering four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵³

By removing the specificity of purpose within fair dealing, and following the guidance provided in *CCH Canadian*, Canadian fair dealing will, in terms of the letter of the law, be closely aligned to the United States’ implementation of fair use. The joint submission gives a list of objections to fair use:

- 1) the Canadian government had already rejected such consideration;
- 2) it would reduce revenue to Canadian creative industries;
- 3) it will place Canada in a precarious position with respect to international rules concerning exceptions; and
- 4) it will introduce greater uncertainty at a time when “most stakeholders are calling for greater certainty and clarity in Canadian copyright law.”⁵⁴

For each objection raised, a nuanced explanation or rebuttal exists. Carys Craig explains the previous deliberations by the government; fair dealing was considered a success by comparing the relatively low rates of litigation in Canada to the litigious atmosphere surrounding fair use in the United States. “It would have been more appropriate to regard the rarity of fair dealing in Canadian courts as indicative of its impotence rather

51 Canadian Internet Policy and Public Interest Clinic, www.ic.gc.ca/eic/site/oo8.nsf/fra/02666.html, emphasis omitted.

52 USC 17, U.S.C. § 107 (2000 & Supp. IV 2004), www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000107----000-.html.

53 *Ibid.*

54 Access Copyright *et. al.*, above note 50.

than its success: the predictable result of a restrictive defense, ill-equipped to ameliorate the position of users or restrain the demands of owners.”⁵⁵ The claim of reduced revenues to Canadian creative industries is a disingenuous one — as if simply making fair dealing’s current list of purposes illustrative is sufficient for any use to be a lawful exception. Fulfilling the category of use is merely the first step; the multiple levels of inquiry as presented in *CCH Canadian* must still be addressed. If fair dealing remains stringently closed, it is not the current creative industries that will feel the most pain.

The value of an illustrative set of purposes is that it permits uses, which may have the hallmarks of fair dealing, the possibility of being considered so. This not only promotes future creativity, it also protects existing creative practices. A submission on behalf of appropriation artists highlights the inter-dependency of creative works:

Today many artists and creators use, reproduce, appropriate and incorporate materials found within popular culture and society. These raw materials reflect and embrace the world around us: snippets of film and TV, radio spots, advertisements, news headlines, bits of text, characters, fragments of song . . . and so on. Artists use this source material just as artists have used raw material for thousands of years. . . . The practice of appropriation is a fundamental part of many creative cultural activities. . . . Artists who use appropriation in their practice, rely on Canada’s fair dealing exception to create. Fair dealing is a narrow right, at times too narrow to support this work . . . Creators should enjoy the support of the law, and not have to work under conditions of uncertainty and fear.⁵⁶

The artists’ invocation of the theme of certainty lies in opposition to that of the joint submission. In the hands of the latter “certainty and clarity” can only be achieved by strictly curtailing fair dealing. In and of itself this is true — setting rules that limit creative behaviour will achieve certainty, albeit with an undesirable effect. As new media have historically developed in spaces outside the strictures of copyright, this point was emphasized by a coalition of telecommunications, broadcasting, retail, Internet, technology, research and security organizations. In the eyes of Bell, Google, Rogers Communication Inc., Telus, the Canadian Wireless and Telecommunications Association, and others, fair dealing should be expanded and

55 Craig, above note 24 at 441.

56 Appropriation Art Coalition, www.ic.gc.ca/eic/site/oo8.nsf/eng/o2734.html.

protected from the deleterious effects of technological protection measures.⁵⁷ To do otherwise risks “harming emerging Canadian industries and exposing Canadian businesses and consumers to unnecessary and costly litigation.”⁵⁸

The coalition also makes an interesting comment with respect to international requirements:

Given that it has now been over a decade since the WIPO treaties were finalized, Canada actually finds itself in a somewhat unique position among developed nations. Canada is able to learn from the steps taken by other nations to meet their own 1996 WIPO treaty obligations, and to do so in a much more mature online environment. Similar to other nations, Canada should take advantage of the considerable flexibility the WIPO treaties provide to meet our obligations.⁵⁹

The joint submission refrains from consideration of the flexibility available within the WIPO treaties. Attention is drawn instead to the experiences of Australia, United Kingdom, New Zealand, and the European Union; each considered and rejected adopting fair use or expanding fair dealing. Some common elements were cited in the reasons for rejection: fear of uncertainty, disruption of licensing models, and concerns over compliance with international regulations.⁶⁰ From the language employed, it would seem that international regulations are only about the rights of the copyright holder. Whereas the Preamble of the WIPO Copyright Treaty includes: “The Contracting Parties . . . [recognize] the need to maintain a balance between the rights of authors and the larger public interest, par-

57 Business Coalition for Balanced Copyright, www.ic.gc.ca/eic/site/oo8.nsf/eng/o2534.html.

58 *Ibid.*

59 *Ibid.* This same sentiment was expressed by Bruce Lehman, the principal architect of the United States’ *Digital Millennium Copyright Act* (1998), at a conference titled *Musical Myopia, Digital Dystopia: New Media and Copyright Reform*, held at McGill University in March 2007, “Canada has the benefit of the soon-to-be decade of experience of the U.S. . . . in some areas our policies have not worked out too well . . . Attempts at copyright control have not been successful; at least with regards to music” (at 12:58). Video coverage available at: <http://video.google.com/videoplay?docid=416220805662446466&hl=en#>; Michael Geist, a panelist at the same conference, writes that “In a later afternoon discussion, Lehman went further, urging Canada to think outside the box on future copyright reform. While emphasizing the need to adhere to international copyright law (i.e., Berne), he suggested that Canada was well placed to experiment with new approaches.” Michael Geist, “DMCA Architect Acknowledges Need For A New Approach” (23 March 2007), www.michaelgeist.ca/content/view/1826/125.

60 Access Copyright *et. al.*, above note 50.

ticularly education, research and access to information, as reflected in the Berne Convention.”⁶¹

The *Berne Convention for the Protection of Literary and Artistic Works* (1886) was the first international agreement on minimal standards of copyright protection.⁶² From its infancy on, the negotiation of the standards included awareness that the grant of copyright must be limited, and, member states must be permitted some latitude as to how exceptions to copyright were implemented in domestic law.⁶³ A proposal to formally introduce the allowance of exceptions came forward during the 1967 Stockholm negotiations; after much discussion the following was accepted as Article 9(2):

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.⁶⁴

This has come to be known as the Berne three-step test: (1) the exception must be for a specific circumstance; (2) it must not conflict within the realm of exchange that is usually associated to the work; and (3) must not unreasonably detract from the author’s wellbeing. The joint submission questions the adherence of United States to the *Berne Convention*: “Many authorities have reviewed the fair use system for compliance with the three-step test and have expressed the opinion that it is non-compliant.”⁶⁵ A specific complaint is issued via the words of a respected scholar Sam Ricketson: “The real problem, however, is with a provision that is framed in such a general and open-ended way.”⁶⁶

This selective invocation of Ricketson’s work does not illustrate the context in which he makes that statement. In the work cited, a study prepared for WIPO Standing Committee on Copyright and Related Rights in 2003, Ricketson examines different styles of limitations. He contrasts an open-ended provision which is guided by leading principles, with a closed-list

61 *WIPO Copyright Treaty*, World Intellectual Property Organization, 20 December 1996, <http://www.wipo.int/treaties/en/ip/wct/trtdocs_woo33.html#preamble>.

62 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, with subsequent revision, <http://www.wipo.int/treaties/en/ip/berne/trtdocs_woo01.html>.

63 Sam Ricketson. *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Centre for Commercial Law Studies, Queen Mary College, 1987) at 477.

64 *Ibid.* at 481.

65 Access Copyright *et. al.*, above note 50.

66 Sam Ricketson quoted in Access Copyright *et. al.*, above note 50.

provision. Illustrating the endpoints are Section 107 of the US *Copyright Act* (1976) and Article 5 of the EC Information Society Directive, with the Australian *Copyright Act* (1968) serving as a midpoint position.⁶⁷

Ricketson sees some merit to American fair use: “There is the obvious advantage of flexibility here: it enables new kinds of uses to be considered as they arise, without having to anticipate them legislatively.”⁶⁸ He then states that the indeterminate language surrounding the purpose of use may not comply with the first of the Berne three step tests, “although it is always possible that, in any given case, [the purposes] will find support under other provisions of Berne, such as Articles 10 and 10bis.”⁶⁹ Similarly, Ricketson has praise and concern with the EC’s Article 5: “The advantage of the extensive listing is that each exception and limitation is relatively self-contained and can be considered on its own terms. It is still possible that some of these might still fail the separate requirements of the three-step test.”⁷⁰ The Australian Act is flavoured by both approaches, containing many specifically delineated exceptions and “several broader provisions (those concerned with fair dealings of works) that reflect the more open-ended U.S. fair use formula, although these are still kept within relatively limited confines as to purpose.”⁷¹

Returning to the present concern of shaping fair dealing in more flexible terms, it remains that the United States has been party to the *Berne Convention* for more than twenty years, with its illustrative set of fair use purposes.⁷² The joint submission presents the view that the United States escapes international scrutiny by virtue of the fact that it is the United States;⁷³ if so, this is a rather damning indictment of the usefulness of

67 Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (Geneva: WIPO, 2003) at 67 (www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf).

68 *Ibid.* at 68.

69 *Ibid.* at 69. Articles 10 and 10bis of Berne offer a range of exceptions that member states can draw upon; See *Berne Convention*, above note 62.

70 Ricketson, above note 67 at 72.

71 *Ibid.* at 73. Illustrative of such a “broader provision” is the Australian fair dealing exception for study and research; see Myra Tawfik, “International Copyright Law and ‘Fair Dealing’ as a ‘User Right’” (April–June 2005) *UNESCO Copyright Bulletin*, <http://unesdoc.unesco.org/images/0014/001400/140025e.pdf> at 12–14. With reference to a more comprehensive work of Ricketson’s that expressly focused upon Australian copyright law, Tawfik notes there is only a “very fine line,” between Ricketson’s deemed status of Australian compliance and American non-compliance; *Ibid.* at 14.

72 The *Berne Convention* entered into force for the United States on 1 March 1989, see www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15.

73 Access Copyright *et. al.*, above note 50 at n.70.

our prevailing world trade body. A more reassuring indication of the value of international trade governance comes from another respected scholar, Pamela Samuelson:

The true mission of TRIPs is not to raise levels of intellectual property protection to ever higher and higher planes, as some right holders might wish, but to encourage countries to adopt intellectual property policies that promote their national interests in a way that will promote free trade and sustainable innovation on an international scale.⁷⁴

For most of its existence the United States permitted itself a flexible regime of fair use and has also been the site of extensive developments in creativity and new media.⁷⁵ To prove the correlation is not possible, but to ignore the element of correlation is unwise. In any case, the joint submission refrains from counterfactual reflection and instead concentrates on portraying fair use as dysfunctional: “Many other U.S. scholars have also concluded that there are significant problems with the fair use model.”⁷⁶ There is a degree of truth to this statement, but it invites closer scrutiny. The real question is *why* fair use has its challenges in the context of American events. If fair use has proven problematic in the United States, this does not negate the possibility that flexible fair dealing will be successful in Canada. Success or failure will be dependent on Canadian circumstances.

D. FAIR USE — RESTORING THE REPUTATION

The doctrine of fair use with its four factor analysis has attracted considerable scholarly attention. During the public consultation a key work was identified by the Canadian Copyright Institute:

It is instructive that for every one case on fair use decided in the courts in the US, there have been approximately 2.4 academic articles written on the subject (Barton Beebe, *An Empirical Study of U.S. Fair*

74 Pamela Samuelson quoted in Tawfik, above note 73 at 9. The *Trade Related Aspects of Intellectual Property Agreement* (TRIPs) established 15 April 1994 sets as its foundation the standards set by the *Berne Convention*, see Sam Ricketson and Jane Ginsburg, *International Copyright and Neighboring Rights — The Berne Convention and Beyond*, Volume 1 2d ed., (Oxford: Oxford University Press, 2005) at 157-158.

75 Lessig and Litman, above note 6.

76 *Access Copyright et. al.*, above note 50.

Use Opinions, 1978–2005, 156 U. Pa. L. Rev). This level of academic interest does not suggest a clear and predictable law.⁷⁷

This limited reference to Barton Beebe’s work is curious, given that the institute describes its purpose as “to encourage a better understanding of copyright law on the part of its members and the public, and to engage in and to foster research and reform in copyright law.”⁷⁸ Beebe’s work is a landmark empirical study of American fair use case law.⁷⁹ He begins by identifying a flaw in the existing scholarship:

Yet, remarkably, we continue to lack any systematic, comprehensive account of our fair use case law. Instead, like the “great men” approach to history, we pursue a “leading cases” (or “usual suspects”) approach to fair use. This anecdotal method, one essentially of connoisseurship, derives conventional wisdom about our case law from a limited aristocracy of hand-picked opinions appearing primarily in the U.S. Reports — or in the student casebooks. Whether these opinions have any influence on or are representative of the true state of our fair use doctrine as it is practiced in the courts remains an open, and strangely unasked, question.⁸⁰

Beebe answers this question with a content analysis of a data set consisting of all reported American opinions which drew, in a substantive way, upon fair use’s four factor analysis. The 306 opinions studied span the effective date of the 1976 codification of fair use through to January 2005. Beebe’s complete methodology is rigorous and fully disclosed,⁸¹ the criteria by which cases are assembled are broader than that of a preceding study of fair use cases.⁸²

77 Canadian Copyright Institute, www.ic.gc.ca/eic/site/008.nsf/eng/02553.html.

78 *Ibid.*

79 Barton Beebe, “An Empirical Study of U.S. Copyright Fair Use Opinions: 1978–2005,” (2008) 156(3) U. Pa. L. Rev. 549 (www.bartonbeebe.com/documents/Beebe%20-%20Empirical%20Study%20of%20FU%20Opinions.pdf).

80 *Ibid.* at 552.

81 *Ibid.* at 623.

82 A previous cross-sectional study is found in David Nimmer, ““Fairness of Them All” and Other Fairy Tales of Fair Use” (2003) 66 (1,2) Law & Contemp. Probs. 263 ([www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+263+\(WinterSpring+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+263+(WinterSpring+2003))). Nimmer studied sixty fair use opinions and concludes that courts first decide on the outcome for fair or unfair use, and then position the four factors to support that outcome. Beebe conducts a logistic regression upon Nimmer’s data set and indicates that “the only significant factor outcome was the second, going to the nature of the plaintiff’s work, and the coefficient was *negative*” (emphasis in original). See Beebe, above note 79, n.12. Nimmer’s

Beebe examines the manner in which the four factor analysis entered American law, and identifies the late 1980s as the timeframe when American courts began a trajectory of mechanical application of the four factors.⁸³ In the years following “judges rarely explicitly considered factors beyond the four listed in section 107 and, with the exception of the second factor, rarely failed to consider fewer than all four factors.”⁸⁴ While the mechanistic approach within American courts did not make for good law, it lent itself to systematic study. Beebe presents extensive summary statistics where distributions of the 306 opinions are described along multiple dimensions: time, venue (district or circuit court), posture (preliminary injunction, summary judgment, or bench trial opinion), and the nature of the copyrighted work at issue (print media dominated the case law).⁸⁵ The perception that fair use decisions are inherently unstable, and prone to reversal, is not borne out by the evidence. The rate of reversal at the circuit court level is closely in line with the overall circuit court reversal rates, and at the district court level the numbers are similarly uninteresting.⁸⁶

Beebe’s analysis of the win rates presents a high degree of favour to the plaintiffs, but he suggests an explanation:

Some defendants who are otherwise committed to defending against a copyright infringement claim on grounds such as copyrightability or substantial similarity may find it relatively inexpensive also to plead a fair use defense, even when the defense may be frivolous or at least very weak in light of the facts. Because conscientious judges will dutifully consider each of the four factors, as section 107 instructs them to do, even when the outcome of the fair use test is obvious, opinions addressing even essentially extraneous fair use defenses

own assessment of his methodology illustrates its subjectivity; see Nimmer at 267, n.27. The joint submission makes repeated reference to Nimmer’s study: i.e., “Even if Canada was able to import all facets of the U.S. system intact, scholars such as Nimmer suggest that no clear direction would be ascertainable from the U.S. example, with the statutory fair use factors providing no correlation whatsoever with the prospects of success in any given case.” See *Access Copyright et. al.*, above note 50.

83 The starting point roughly corresponds to the US Supreme Court’s 1985 ruling in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), www.law.cornell.edu/copyright/cases/471_US_539.htm. Beebe, above note 79 at 562.

84 *Ibid.* at 563–64. The Supreme Court of Canada expressly instructs that fair dealing’s multifaceted inquiry should not be held rigidly, not all questions may apply all the time and there may be questions that are not reflected in the framework; see *CCH Canadian*, above note 21 at paras. 53–60.

85 Beebe, above note 79 at 564–81.

86 *Ibid.* at 574–75.

will have come within those sampled for this study. This would drive down overall fair use win rates.⁸⁷

To resolve the problem of a frivolous fair use plea, Beebe offers a reasonable quantitative determination; that the strength or weakness of the claim of fair use would be reflected in the proportion of words in the opinion. With a frivolous claim, judges would be likely to expediently dismiss the effort. By excluding forty-two opinions which devoted less than 10 percent of the opinion to fair use, the defendant win rate of the remaining opinions rises.⁸⁸

Beebe employs regression and correlation analyses to investigate both the interaction between the four factors of judgment, and, what sub-factors may have implications for each individual factor decision. The analyses are complex and should be examined first hand; for this paper Beebe's findings on the first and fourth factors are of note. These factors draw consideration to questions of commerciality; the first factor examines the defendant's use of the work, and the fourth factor considers the effect on the plaintiff's market. Beebe shows that these two factors received a high degree of attention and were almost evenly weighted in deliberations.⁸⁹ This supports the view that American decisions of fair use have placed undue emphasis on commercial consideration.⁹⁰ But Beebe does not stop here; he questions why judges had this inclination.

Beebe's answer relies on multiple dimensions of inquiry. He begins with a prevailing concern of fair use; that judges tend to make a decision, and then adjust the four factor analysis to support the decision.⁹¹ Beebe refers to this practice as stampeding, and agrees with its existence in two cases decided by the United States' Supreme Court:

In *Sony*, the district court found that three (or perhaps four) factors favored fair use, while the Ninth Circuit found that all four factors disfavored fair use. At the Supreme Court, the five-justice majority

87 *Ibid.* at 580.

88 *Ibid.* at 580-81.

89 *Ibid.* at 582-86.

90 William Patry, *The Fair Use Privilege in Copyright Law*, 2d ed. (Washington DC: The Bureau of National Affairs, Inc., 1995) at 419-32. See also Margaret Jane Radin, "Incomplete Commodification in the Computerized World" in Niva Elkin-Koren & Neil Weinstock Netanel, eds., *The Commodification of Information* (The Hague: Kluwer Law International, 2002) at 10.

91 David Nimmer (above note 82) writes that "the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions." Quoted in Beebe, above note 79 at 589.

then found that all four factors favored fair use, while the four dissenters found that all four factors disfavored fair use. *Harper & Row* stamped back and forth in essentially the same way.⁹²

Yet after examining the fair use case law as whole, the evidence does not support the conclusion that factor outcomes are always distorted one way or the other.⁹³ And through his analysis of fair use cases which reached the United States' Supreme Court, Beebe uncovers the reasons for the overt emphasis upon commerciality which explains "why our fair use doctrine has to some extent run off the rails of section 107."⁹⁴

The prominence of commerciality, through the first and fourth factors, was set in the 1984 *Sony* decision, even though that action was inconsistent with the statutory language of the law.⁹⁵ Although the United States' Supreme Court sought to correct its mistakes, with some success in 1994,⁹⁶ lower courts continued to place undue emphasis upon commerciality:

Overall, despite the language of section 107, the commerciality inquiry and the *Sony* presumption in particular remain exceptionally tenacious memes in the fair use case law. No doubt this reflects in part their high fitness for a litigation environment pervaded with commercial expression. But it is also a consequence of the Supreme Court's repeated attempts to maintain appearances by reconstruing what it should simply have rescinded and replaced.⁹⁷

If the instability of fair use, to the degree that it exists, has its foundations in the mishandling of the commerciality elements by an obdurate high court, Canadian fear of fair use should lessen. The framework provided

92 Beebe, above note 79 at 589–90. Footnotes omitted.

93 *Ibid.* at 591–93

94 *Ibid.* at 596.

95 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), www.law.cornell.edu/copyright/cases/464_US_417.htm; see Beebe, above note 79 at 598–99. With respect to the ruminations on commerciality as found in *Sony*, William Patry makes an intriguing observation: "Most basic is the seldom-noted fact that since the use before the Court was noncommercial, the statement is pure dictum. It was made in passing, without any explanation of what such a presumption might mean or how it was to be applied." See Patry, above note 90 at 430.

96 Beebe, above note 79 at 600–1 with respect to *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). In *Campbell*, fair use is famously described as a providing "breathing space within the confines of copyright" necessary to accommodate the need of, "simultaneously [protecting] copyrighted material and [allowing] others to build upon it" (at para. 575).

97 Beebe, above note 79 at 602.

through *CCH Canadian* expressly places the element of commerciality as dependent upon context. With respect to the purpose of the dealing:

Courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work. . . . Moreover, as the Court of Appeal explained, some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes.⁹⁸

The language, "may not be," makes evident that further investigation is needed before proceeding to conclusion. In terms of considering the effect on the market, "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."⁹⁹ And to further safeguard against any tendency to elevate the element of commerciality, the Supreme Court went one degree further with:

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests.¹⁰⁰

These safeguards ought to please Canadian copyright holders. If we must draw conclusions about the American experience of fair use, their lack of holistic examination has been to the detriment of some copyright holders. While intuitively it might be expected that emphasis upon commerciality would forever bias the final outcome, this proved to be false, and, ironically, in some hands the converse became a constructed truth:

A finding that the defendant's use was for a commercial purpose (which was made in 64.4% of the opinions) did not significantly influence the outcome of the fair use test in favor of an overall finding of

98 *CCH Canadian*, above note 21 at para. 54.

99 *Ibid.* at para. 59.

100 *Ibid.* at para. 70.

no fair use. Rather, it was a finding that the defendant's use was for a *noncommercial* purpose (which was made in 15.4% of the opinions) that strongly influenced the outcome of the test in favor of an overall finding of fair use.¹⁰¹

Fortunately, Canadian courts would be hard-pressed to follow the *non sequitur* reasoning that if commerciality disallows fair use, then noncommerciality implies fair use. By the guidance expressed through *CCH Canadian*, nothing is presumptive; an evaluation of fair dealing must include multiple points of inquiry, with the added reminder that even the framework provided may require adjustment depending on the situation.¹⁰²

Beebe's overall conclusion is encouraging; his view is that Americans can trust that a population of judges over time will systematically present the way forward to better practice of the fair use doctrine:

It appears that for all of their fractiousness, judges applying fair use doctrine have done just that. Where the nonleading cases declined to follow the leading cases, they repeatedly—and systematically—did so in ways that expanded the scope of the fair use defense. To be sure, the data reveal many popular practices that impair the doctrine: courts tend to apply the factors mechanically and they sometimes make opportunistic uses of the conflicting precedent available to them. These are systematic failures that require intervention. Nevertheless, as a whole, the mass of nonleading cases has shown itself to be altogether worthy of being followed.¹⁰³

With respect to adding flexibility to fair dealing, whether it is under the name of fair use or any other, Canada is well-positioned to circumvent the growing pain experienced by the United States. A greater difficulty in moving forward with a flexible regime of fair dealing is the continued insistence that fair dealing should be subservient to market transactions of copyrighted material.

101 Beebe, above note 79 at 602 (emphasis in original). These results draw from a logistic regression model of “the outcome of the fair use test as a function of (1) a variety of factual findings made by judges in the 297 dispositive opinions, and (2) whether the opinion was written by a district or circuit court of the Second or the Ninth Circuits. The results of this model . . . correctly classified 85.1% of the 297 opinion outcomes,” *Ibid.* at 594.

102 *CCH Canadian*, above note 21 at para. 60.

103 Beebe, above note 79 at 622.

E. MARKET EXPANSION AND MARKET FAILURE

At the outset of this paper, it was claimed that a sequence of events came together to destabilize both the value of fair dealing and the guidance offered through *CCH Canadian*. Three such events have been elaborated upon: (1) the immediate reaction to *CCH Canadian* was hostile and given a platform within the government; (2) the delayed and modest engagement by Canadian educational bodies with fair dealing; and (3) a deliberate effort to paint a flexible regime of fair dealing as unstable. A fourth element exists, although it cannot be contained as a finite event. It is an ongoing campaign to expand collective management of copyright and promote licensing, particularly through digital operations.

In this regard, the activities of Access Copyright are germane. While much of their submission is the same as that of the joint submission described earlier, Access Copyright goes further and explicitly invokes the market failure perspective of fair dealing and other exceptions. In their view, exceptions are only required when “there is a demonstrated public policy need for access to copyright protected materials and the market has not met or is unable to meet that demand.”¹⁰⁴ Again, Canadians are well served by previous research. Extensive literature exists concerning the challenges wrought by the nature of exceptions within a market framework.¹⁰⁵ What Canadians may find interesting is that our experiences are mimicking a theoretical exercise proposed in the United States when Americans were contemplating the intersection of digital works and worldwide networks within the ambit of copyright. Technology presented the vision of effortless communication between copyright holders and the buying market. The seeming ease of pecuniary exchange played well to arguments for reducing or eliminating fair use.¹⁰⁶

Implicitly supporting the impetus provided by technology was a seminal paper in 1981 by Wendy Gordon, arguing that “the presence or absence of the indicia of market failure provides a previously missing rationale for predicting the outcome of fair use cases.”¹⁰⁷ However, twenty years later,

104 See Access Copyright, above note 15.

105 With focus on the discipline of Law and Economics, see Ruth Towse, Christian Handke & Paul Stepan, “The Economics of Copyright Law: A Stocktake on the Literature.” (2008) Review of Economic Research on Copyright Issues 5(1) 1, <http://ssrn.com/abstract=1227762>.

106 Ben Depoorter & Francesco Parisi, “Fair Use and Copyright Protection: A Price Theory Explanation.” (2002) *Int’l Rev. L. & Econ.* 21, 453 at 454, <http://ssrn.com/abstract=259298>.

107 Wendy J. Gordon, “Fair Use as Market Failure: A Structural and Economic Analysis of the “Betamax” Case and its Predecessors.” (1982) 82(8) *Colum. L. Rev.* 1600 at 1605, <http://www.jstor.org/stable/1122296>.

Gordon revised some aspects of her original position.¹⁰⁸ With others, Gordon credits the work of Lydia Loren who draws attention to the reality that market failure exists in two dimensions:

The market failure theory of fair use asserts that the right of fair use should exist only when a failure in the market exists. The fact that one type of market failure may have been cured through the implementation of a permission system by the copyright holder does not preclude, however, the presence of a different kind of market failure. If copyright is to remain true to its constitutionally mandated goal, courts must be willing to recognize the most important kind of market failure relevant to fair use: the inability to internalize the external benefits of certain kinds of use. This holds especially true for non-transformative uses in the context of research, scholarship and teaching.¹⁰⁹

“Inability to internalize external benefits,” may need some explanation. Externalities are unintended consequences; they may be negative, such as pollution, or positive as in this case where one work fosters future works. Speaking abstractly, in any market transaction the cost of both negative and positive externalities ought to be reflected in the pricing of the item of exchange. In the context of copyright, the positive outcome propagated by a work implies a higher value of a work. Assuming that the effects of a work could be quantified, its impact is set upon an indeterminate number of variables — the degree and frequency to which the original work contributes to future works. To compensate, the ensuing price will likely be too high for current markets to absorb the work to full efficiency. This will lead to an under-consumption of that work, which in turn means a subsequent loss of positive social benefit, and is equally a market failure.¹¹⁰

108 Wendy J. Gordon, “Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives” in Niva Elkin-Koren & Neil Weinstock Netanel, eds., *The Commodification of Information* (The Hague: Kluwer Law International, 2002) 149–92 at 152.

109 Lydia Pallas Loren, “Redefining The Market Failure Approach To Fair Use In An Era Of Copyright Permission Systems.” (1997) 5 J. Intel. Prop. L., 1 at 57–58 (<http://legacy.lclark.edu/~loren/articles/fairuse.htm>).

110 Michael Heller brings this into more conventional language, albeit through the unconventional word: underuse. *Underuse* is not a generally recognized word, whereas *overuse* is common parlance. Heller focuses on the problem that lack of productive use of resources is an inefficiency society cannot afford. “When we lack a term to describe a social condition, it is because the condition does not exist in most people’s minds . . . It is unsurprising that we have overlooked the hidden costs of fragmented ownership.”

While this category of market failure can be mitigated through fair use or fair dealing, it relies on a wider understanding of the creative process. Ben Depoorter and Francesco Parisi write: “This solution obviously begs the question of why the producers of the original work should bear the entire cost of the subsidy, rather than spreading its cost across a broader group of individuals.”¹¹¹ The answer is straightforward; the producers of an original work are *not* bearing the cost of the subsidy, in fact they are repaying the costs of their own past debts. Their creative effort is predicated upon previous generations of creative activity. Such a debt cannot be paid to the past; it can only be discharged in the future.

Regrettably, Gordon’s initial theoretical rationale was effectively followed in the United States, as shown by the emphasis upon commerciality. What Canadians must take note of was the inclination by American courts to see systems of licensing as sufficient to deny fair use.¹¹² A point that was pressed during the copyright consultations; the General Counsel for Access Copyright made a concerted effort to override fair dealing when licenses are available:

There’s one solution in our *Copyright Act* for other types of exceptions which I think is one that we could continue to use, and those are exceptions that I like to call smart exceptions. They’re exceptions that exist in the *Copyright Act* to ensure that access is provided so that the user, where there is an access need in a very specific situation where there is a justified reason that access should be provided such as in the education sector, that there is an exception in place. But that exception gets trumped when the work becomes commercially available or when a license is available.¹¹³

Given that it was the overt emphasis upon commerciality of the fair use deliberations which lead to its troubles in the United States, it would imprudent for Canada to take this step.

See Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (New York: Basic Books, 2008) at 23.

111 Depoorter and Parisi, above note 106 at 457.

112 *Ibid.* at 456; see also Loren, above, note 109 at 32048. Again, the Supreme Court of Canada has expressly refuted the proposition that licensing on its own can deny fair dealing: see above note 100.

113 See remarks made at the Gatineau Roundtable discussion, 29 July 2009, www.ic.gc.ca/eic/site/008.nsf/eng/h_04028.html.

F. CONCLUSION

In terms of Bill C-32, the issue of fair dealing seems a modest one. Debate will focus upon whether or not individuals may circumvent a technological protection measure for non-infringing purposes such as fair dealing. This is a poor compromise as it still requires that Canadians must break into a work to exercise a legitimate right. The submission of David Gilbert returns to mind: “If digital locks are necessary then so are digital locksmiths.”¹¹⁴ And yet, this scenario is the most hopeful outcome.

The greater challenge rests on encouraging Canadians to continue using fair dealing. To whatever extent fair dealing exists on paper, legal text alone cannot keep fair dealing as a meaningful component within the system of copyright. If the measure is not actively used, its merit is lost. This paper has traced the diminishment of fair dealing over the last six years — from the high point of endorsement by the Supreme Court of Canada in 2004 to its ongoing denigration.¹¹⁵ The relentless, albeit misplaced, criticism discourages use of fair dealing.

If, in practical terms, fair dealing is consigned to obscurity, future Canadians may not notice. That will be a pity; that a once viable means to foster Canadian talent and creativity was blunted through innuendo and misdirection. In that scenario, Canadian creative effort will be confined to derivative work for which the input copyright permission is easily obtained through direct-click business models. This is not tragic, but it

114 Gilbert, above note 48.

115 Access Copyright solicited active participation from its affiliates during the consultation process, by some rather inflammatory language. For instance, a newsletter sent out under the title of “Copyright Debate Takes Aim at Your Livelihood,” spoke of, “individuals who do not agree you should get fair compensation for digital and other reproductions of your works” (private email received by the author). After the consultations closed, Access Copyright continued to emphasize the great risk of expanding fair dealing, “Adding ‘such as’ [to fair dealing] can be *so* detrimental to existing business models that over 50 Canadian organizations, including Access Copyright, who represent hundreds of thousands of creators and publishers from across the country joined forces to submit a paper during the Copyright consultations that warned against expanding fair dealing” (emphasis in original). See Access Copyright, *Copyright Reform Bill This Spring?* at www.accesscopyright.ca/default.aspx?id=314. And the collective ensured that the Federal Government continued to hear their concerns during meetings this past spring, even though, as the Access Copyright General Counsel observed, copyright was not the theme of those meetings: see Canada, Standing Committee of Canadian Heritage, *Evidence*, 40th Parl., 3d sess. (20 April 2010), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4447614&Language=E&Mode=1&Parl=40&Ses=3.

will not place Canada in any position of strength in a world influenced by knowledge economies.

Chad Gaffield, President of the Social Sciences and Humanities Research Council of Canada, has alerted the government to the possibility that Canada will be left as a digital colony, and, indicated that such a possibility can be avoided:

Canada has key advantages. Thanks to broadband penetration, talented Canadians are not just seeking information, they're using it and reusing it. They are interacting with it and with others. They are seeking to manipulate and comment on it, to rework it, and to create new content. Indeed, the world is beginning to recognize a distinctly Canadian way of understanding communication and the importance of communication technologies. Let me conclude by emphasizing that we must admit that despite promising signs and the reality of our potential, Canadians are not taking full advantage of the digital opportunities, whether on our campuses, in our businesses, in our communities, or anywhere. We can and must do more. But on the path to creating the future we want, we must first cross the threshold of the imaginable.¹¹⁶

Crossing the threshold of the imaginable requires a dispassionate analysis of the role played by copyright in creative effort. Anxiety over financial returns to creators is understandable; to suggest that effectively absolute copyright protection is the only way forward is not. However, as that course of action plays well to the current population of rights holders, it is a more appetizing political decision. But good politics is not the same as good policy. And limiting Canadian policy to such narrow terms is a disservice to the many Canadians who engaged with the intricacies of copyright during last year's public consultation. While the consultation illustrated the polarity of opinion, pitting those who ask for expansive copyright against those who oppose copyright in any sense, it also encouraged Canadians to better educate themselves about the issues at hand. Many did just that and showed a credible understanding of the give and take represented within the system of copyright.¹¹⁷

116 Canada, Standing Committee of Canadian Heritage, *Evidence*, 40th Parl., 3d sess. (27 October 2009), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4181231&Language=E&Mode=1&Parl=40&Ses=2.

117 This interest could be further encouraged, a task well suited to postsecondary education. Our school system consciously fosters the practices necessary for legitimate operation of fair dealing. Children begin their educational lives with lessons in sharing; as they move

The importance of the exception cannot be overstated; not merely because of the access it can facilitate but because of what it is: the only component within the system of copyright that actively supports creativity itself. Fair dealing addresses the creative needs required prior to completion of a work, and serves as a counterbalance to the distribution rights that control the work after completion. Enough has been written to assure rights holders that fair dealing is not a thinly disguised vehicle for wholesale expropriation. A recent court decision gives added credence through practice.¹¹⁸ It now falls to the government to move this issue forward. Bill C-32 positions fair dealing at a crossroads: in one direction fair dealing receives encouragement and is actively practiced by Canadians; in another fair dealing settles quietly into the pages of law books and only historians will remember that Canada had an opportunity to introduce a more vibrant atmosphere for creative activity.

forward the importance of doing their own work is impressed upon them; in the realm of high school students are taught the formalities of citation; and through postsecondary education they prepare themselves for professional engagement with copyrighted materials. *At that stage*, explaining the concept of fair dealing as a principle of law is appropriate. Teaching Canadians students how to operate legitimately with copyright is not only an ethical obligation, but leaves them better positioned in a world which places weight upon information commodities.

118 On 23 July 2010 the Federal Court of Appeal (FCA) released their decision concerning tariffs on photocopied material for use in elementary and secondary schools; see *Alberta Education v. Access Copyright*, 2010 FCA 198, www.canlii.org/en/ca/fca/doc/2010/2010fca198/2010fca198.html. The FCA conducted a multifaceted inquiry (as instructed by *CCH Canadian*) set upon existing fair dealing categories of private study, research, criticism and review, and ruled that the majority of photocopying taking place in schools remain subject to pecuniary compensation (at paras. 36–48). This decision is significant; it recognizes that educational activity can be represented through the existing fair dealing categories and simultaneously reinforces that a category by itself does not automatically confer legitimacy upon a claim of fair dealing.