Journal of Copyright in Education and Librarianship

ISSN 2473-8336 | journals.ku.edu/jcel

Volume 8, Issue 1 (2025)

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Swartz, M., & Shannon, M. (2025). The Fair Dealing Exception Explained: A 20-Year Retrospective. *Journal of Copyright in Education & Librarianship*. *8(1), 1-21*
https://doi.org/10.17161/jcel.v8i1.23096

The Fair Dealing Exception Explained: A 20-Year Retrospective

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Abstract

This paper is intended for library practitioners and information professionals, presenting a deep dive into the Canadian case law that relates to fair dealing, a user's right, with a particular focus on *CCH* and subsequent cases between 2004 and 2024. Readers will learn the importance of fair dealing and discover how decisions from the courts can be used to help users of copyrighted works conduct fair dealing analyses by considering the six fair dealing factors prescribed by the Supreme Court of Canada in *CCH*. This paper does not follow a typical structure expected of a research paper and is not meant to be read as a complete work. Rather, the summaries and excerpts provided below are to be used as references for those researching fair dealing or conducting fair dealing analyses. The genesis of the 2024 ABC Copyright Conference presentation, available in the ABC 2024 collection, and copies of all cases referenced in both our presentation materials and this paper are available in an open reading list.

This article received editorial review, but the authors chose to forego peer review, which was optional for submissions consisting of conference presentations.

https://doi.org/10.17161/jcel.v8i1.23096

The Fair Dealing Exception Explained: A 20-Year Retrospective

Introduction

This paper is a celebration of Canadian fair dealing on the 20th anniversary of the most important fair dealing decision in Canadian history: CCH Canadian Ltd. v. Law Society of Upper Canada (2004).

This decision is foundational for anyone working and dealing with copyright and user rights in Canada, but it holds special importance for Canadian library practitioners. *CCH* was, after all, a case that focused on the use of copyrighted materials in libraries. At issue were copies made and provided by library staff to and at the request of researchers as well as the availability of self-service photocopiers—services that are similar to those still offered by libraries across Canada today (*CCH Canadian Ltd. V. Law Society of Upper Canada*, 2004). That a

> library related case was critical in the development of user rights in Canada also highlights the important and special role that libraries continue to hold in the law and in our society as stewards of the public interest in access to knowledge and knowledge goods. (Amani & Swartz, 2017, p. 1)

As established in Théberge v. Galerie d'Art du Petit Champlain inc., (2002), which predated the *CCH* decision by just two years, "the Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (para. 30). Libraries' espoused role in the stewardship of the public interest role was celebrated in a paper written by Victoria Owen in 2011 and in a book chapter in 2022, where she describes libraries, archives and museums as operating at the "fulcrum of copyright's balance (Owen 2011, p. 808) respecting and acknowledging rightsholder rights … and simultaneously promoting users' rights in the public interest" (Owen, 2022, p. 70). Owen also established that information professionals, including library practitioners, are ideally situated to uphold the rights of users of copyrighted works and must serve a role in actively shaping copyright law in the public interest (Owen, 2022, p. 72).

While we examine only a select few cases, we hope that readers come away from this paper with a more comprehensive understanding of how fair dealing has developed and changed over the years since *CCH* was decided, and that it may be the start, for some information professionals and librarians, of a journey of advocacy for users' rights and the public interest in copyright. Readers will gain insight into how the courts conduct fair dealing analyses and better understand how the copyright policies and practices in place at their universities or workplaces and within their research disciplines or communities of practices have evolved. We hope to help counter the feelings of fear and anxiety that library practitioners and library users may feel when dealing with copyrighted materials (Wakaruk et al., 2021, p. 2).

For both of us, fair dealing has followed us throughout our careers: We graduated from library school around the same time and quickly moved into copyright-related roles in higher education. During our careers, copyright librarianship grew dramatically in Canada, and now almost every university and college in Canada has a position that is either dedicated to or partially responsible for copyright education and management (Brunet & Wakaruk, 2019). The genesis of the 2024 ABC Copyright Conference presentation, available in the ABC 2024 collection, and of this paper was a guest lecture on fair dealing that we delivered to Bita Amani's Introduction to Intellectual Property class at the Queen's University Law School. Our presentation materials and copies of all cases referenced in both our presentation and this paper are available in an open reading list.

https://doi.org/10.17161/jcel.v8i1.23096

This paper does not follow the typical structure expected of a research paper, and is not meant to be read as a complete work. Rather, the summaries and excerpts provided below are to be used as references for those researching fair dealing or conducting fair dealing analyses. They are faithful to the decisions; we do not provide additional commentary about how to apply these excerpts to your own fair dealing analyses. For individuals interested in applying these principles to their own practice, there are a variety of resources you can use, such as the CARL codes of best practice for fair dealing. We do hope that this paper will be a useful reference for anyone gaining an understanding of how fair dealing has been and continues to be interpreted and applied by Canadian courts and for anyone conducting fair dealing analyses.

What Is Fair Dealing?

Fair dealing is the most important exception in the Canadian Copyright Act, and can be considered the Canadian equivalent of the American doctrine of fair use, although there are significant differences between the two. Fair dealing has been part of Canadian copyright law since 1921, when Canada's first Copyright Act was passed and came into force.

Fair dealing permits the use of copyrighted works without permission from a copyright owner as long as a two-step test is passed. Step one of the test can be found in section 29 of the Copyright Act, where it specifies that "fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright" as long as the dealing is fair. Sections 29.1 and 29.2 allow for additional purposes (criticism, review, or news reporting) as long as the name of the author, performer, maker, or broadcaster, if given and if appropriate, are mentioned (Copyright Act, 1985).

The second part of the test is determining whether the dealing is fair. Unlike in the United States, where the criteria for determining what constitutes fair use is included directly within their legislation (17 U.S. Code § 107, 2010), the Canadian criteria are not included in the Copyright Act. Rather, our principles are entrenched in common law, with the CCH Canadian Ltd. v. Law Society of Upper Canada (2004) decision providing us with the six fair dealing factors that we are to use when conducting fair dealing analyses: the purpose of the dealing, the character of the dealing, the amount of the dealing, the availability of alternatives to the dealing, the nature of the work, and the effect of the dealing on the work. All decisions that follow CCH, in cases where fair dealing was at issue, have been heavily influenced by it.

What Are The Cases?

CCH Canadian Ltd. v. Law Society of Upper Canada *(2004)*

CCH is considered to be one of the most important copyright-related decisions in Canadian history. It details the two-part test for fair dealing, provides us with the six fair dealing factors, and is a library use case. Building on the terminology used in *Théberge v. Galerie d'Art du Petit Champlain inc.*, (2002), *CCH* establishes fair dealing as a "user's right":

> In order to maintain the proper balance between the rights of a copyright owner and users' interest, fair dealing must not be interpreted restrictively. As Professor Vaver, supra had explained at p. 171: "User rights are not just loopholes. Both owners rights and user rights should therefore be given the fair and balanced reading the befits remedial legislation." (*CCH Canadian Ltd. V. Law Society of Upper Canada*, 2004, para. 48)

At issue in *CCH* were copies made and provided by library staff to and at the request of researchers as well as the availability of self-service photocopiers—services that are similar to those still offered

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by libraries across Canada today. The key questions in this case were what constitutes an original work that is protected by copyright:

> For a work to be original, it must be more than a mere copy of another work. It need not be creative, in the sense of being novel or unique. What is required in order to attract copyright protection in the expression of an idea is an exercise of skill and judgement" (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 16).

Did the Law Society's dealings with works constitute fair dealing? Yes, they did. And is the availability of photocopiers in a library equivalent to authorizing copyright infringement? No, it is not.

The Access to the Law Policy of the Law Society's Great Library was published within the *CCH* decision. This policy governed and implemented safeguards for the Great Library's services by setting limits on the types of requests and the amount of works requested. Requests had to be for the purpose of research or private study, single copies for specific purposes could be requested, and requests in excess of 5% of a volume would be reviewed by a librarian (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 61). It is important to note that by including the policy within the decision, 5% is the only "amount" of a work that a Court has endorsed in relation to fair dealing. There is no specific amount or any mention of "10%" in the Copyright Act or anywhere else in case law.

SOCAN v. Bell Canada (2012)

Representing composers, authors, and music publishers and administering their performing and communication rights, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) proposed tariffs to the Copyright Board for the determination of royalties to be paid when musical works are communicated to the public over the internet. The Board agreed that SOCAN was entitled to collect royalties for the downloading of musical works but not for previews of those musical works, which consisted of 30- to 90-second excerpts from musical works that consumers could listen to prior to paying for a download of a musical work. In the Board's view, the use of previews was not an infringement of copyright since it was fair dealing for the purpose of research under s. 29 of the Copyright Act, and, accordingly, no royalties were required to be paid to SOCAN. The Federal Court of Appeal upheld the Board's decision, and the Supreme Court of Canada dismissed the appeal. This case focused on two key questions: Were previews provided for the purpose of research? Yes, they were. And did the consumers' use of previews constitute fair dealing? Yes, the use did constitute fair dealing for the purpose of the consumers' research.

Alberta (Education) v. Access Copyright (2012)

Representing authors and publishers of printed literary and artistic works, Access Copyright filed a proposed tariff with the Copyright Board with respect to the reproduction of works in its repertoire for use in elementary and secondary schools in all the provinces and territories other than Quebec. The Board concluded that copies made at the teachers' initiative, with instructions to students that they read the material, did not constitute fair dealing and were therefore subject to a royalty. On judicial review, the Federal Court of Appeal upheld the Copyright Board's conclusion that the copies were not fair dealing, but the Supreme Court of Canada allowed the appeal. The case focused on three key questions: Were the copies fair according to the factors set out in *CCH*? Yes, the copies were fair. Was the user the teacher (instruction) or the student (private study)? The user was the student. And did copies of excerpts contribute to a decline in textbook sales? The correla-

tion between teachers making copies of short excerpts from copyrighted works and a decline in textbook sales could not be proven with the limited evidence provided.

United Airlines, Inc. v. Cooperstock (2017)

As a commercial airline operating commercial flight services, United Airlines used, and continues to use, the domain name "united.com" and has made use of a number of trademarks in association with its services, including the "UNITED" word mark and the globe design. Jeremy Cooperstock operated untied.com, which was a play on the word "united," so as to highlight the disconnection and disorganization that he perceived within the company. Cooperstock maintained that untied.com was a consumer criticism website where visitors could find information on United Airlines and submit and read complaints. The website adopted a design similar to the design of United Airlines' website, reproducing the entirety of the United logo and the globe design, and the overall layouts of the two websites were similar. United Airlines requested that changes be made to the appearance of untied.com so as to diminish the potential for confusion in the minds of consumers. The Federal Court determined that Cooperstock infringed United Airlines' trademark and copyright. The key questions in this case were, did the website constitute fair dealing for the purpose of parody? No, but the Court considered whether the website constituted fair dealing for the purpose of criticism. And was United Airlines' copyright infringed? Yes, it was.

Wiseau Studios LLC et al. v. Richard Harper et al. (2020)

Room Full of Spoons is a documentary about the film *The Room*, which was written, directed, and produced by Tommy Wiseau, who also stars in the film. *The Room* developed cult-like status because of its horrible reviews, which inspired Wiseau's colleagues to produce *Room Full of Spoons*, which contains seven minutes of short clips accompanied by commentary and addresses the making of *The Room* as well as its reception. The colleagues attempted to negotiate a license with Wiseau but ended up proceeding without one when Wiseau demanded editorial control. The documentary was well received. Wiseau denounced the documentary and claimed copyright infringement. The key questions in this case were whether the documentary's purpose was criticism or review, or news reporting. Yes, the documentary's purpose was criticism or review. And did the use of the short clips constitute fair dealing? Yes, the use of short clips did constitute fair dealing.

York University v. Access Copyright (2021)

York University operated with an Access Copyright license from 1994 to 2010. The relationship between the two parties deteriorated during license negotiations, which resulted in Access Copyright filing a proposed tariff and then an interim tariff with the Copyright Board. York initially paid the royalties but informed Access Copyright that it would not continue as a licensee. Access Copyright sought enforcement of the interim tariff, and York counterclaimed for a declaration that any copying conducted within the scope of its fair dealing guidelines was protected by fair dealing. The trial judge found that the interim tariff was enforceable and that neither York's guidelines nor practices constituted fair dealing. The Federal Court of Appeal held that tariffs were voluntary but dismissed the fair dealing counterclaim. The Supreme Court of Canada decided that tariffs were not mandatory, dismissing Access Copyright's appeal. Rather than deciding on the legitimacy of York's fair dealing guidelines, the Supreme Court reaffirmed fair dealing as a user's right and maintained the six non-exhaustive factors that provide a framework for fair dealing analyses.

https://doi.org/10.17161/jcel.v8i1.23096

Alberta (Education) v. Access Copyright (2024)

Following the 2012 Alberta decision, in which teachers making copies to facilitate their student's private study constituted fair dealing, this case then addressed the issue of tariffs and royalty payments. Ten provinces' Ministries of Education and the school boards in Ontario paid royalties pursuant to an interim tariff from 2010 through 2012 and then opted out of licenses with Access Copyright in 2013 for the 2013–2015 period. The Ministries of Education claimed to have overpaid from 2010 to 2012 and sought refunds. Access Copyright counterclaimed that they should be entitled to keep the refund. The key questions were, were the Ministries of Education and Ontario school boards licensees after opting out in 2013? No, they were not. Were they liable for payments to Access Copyright after opting out in 2013? No, they were not. And was Access Copyright entitled to retain the 2010-2012 overpayment? No, it was not.

While this case doesn't specifically address fair dealing, it follows the Alberta fair dealing case from 2012 and acts as a closing chapter to the tariff trilogy of decisions that is Alberta (2012), York (2021), and Alberta (2024). It is also a very well-written decision and provides exceptional background information in consideration of Alberta (2012) and York (2021).

1395804 Ontario Ltd. (BR) v. Canada (Attorney General) (2024)

An official at Parks Canada purchased a Blacklock's Reporter (BR) subscription for CAN$148 in September 2013. When the subscription was purchased, only one membership level was available for selection on BR's website, and any terms and conditions were not clearly visible at the time of checkout. The official received an automated email confirming the subscription, containing a password, and noting in fine print that a manager at BR should be contacted to make arrangements for institutional licenses and bulk subscriptions. The official knew that they did not need either an institution-wide license or a bulk subscription. They maintained that their intended use was for the purpose of research: reviewing BR's articles for accuracy. When inaccurate articles were identified, they were shared among a limited number of Parks Canada officials. BR claimed that obtaining, reading, and distributing their articles constituted copyright infringement. The key questions were: Did Parks Canada infringe BR's copyright? No, they did not. Did Parks Canada's use of the articles for research purposes constitute fair dealing? Yes, it did. Can terms and conditions prevent works from being used within the scope of fair dealing? No, they cannot. The Court also held that sharing a password to access the articles did not constitute circumvention of a technological protection measure.

The Interpretation and Application of the Fair Dealing Factors

As noted above, the six fair dealing factors were prescribed by the Supreme Court of Canada in the decision regarding CCH Canadian Ltd. v. Law Society of Upper Canada (2004): the purpose of the dealing, the character of the dealing, the amount of the dealing, the availability of alternatives to the dealing, the nature of the work, and the effect of the dealing on the work. The sections that follow below trace the origin of each of the six fair dealing factors, as established by *CCH* in 2004, and their subsequent interpretation and application by Canadian courts in fair dealing–related cases over the past 20 years. The excerpts within each section are from the fair dealing–related cases that are summarized above, and they demonstrate the consideration of the facts that are unique to each case as well as the consistency of themes, such as the identification of appropriate allowable purposes, the consideration of the amount of content excerpted from a copyrighted work and the

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aggregate number of copies produced, and the consideration of implemented safeguards. By reviewing the excerpts as presented in chronological order within each fair dealing factor's section, and section by section, we hope that readers will be able to recognize the connecting threads across the decisions over the past 20 years and the repeated confirmation and reaffirmation by Canadian courts that fair dealing is a user's right.

The First Fair Dealing Factor: The Purpose of the Dealing

Established by CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes listed in the Copyright Act, namely research, private study, criticism, review or news reporting See §§29, 29.1, and 29.2 of the Copyright Act.

> As discussed, these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights. This said, courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 54)

Applied in CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum. The Law Society's custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the Copyright Act. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 64).

Furthermore, "this [Access to the Law] policy provides reasonable safeguards that the materials are being used for the purpose of research and private study" (*CCH Canadian Ltd. V. Law Society of Upper Canada*, 2004b, para. 66).

Applied in SOCAN v. Bell (2012)

> In considering whether previews are for the purpose of "research" under the first step of *CCH*, the Board properly considered them from the perspective of the user or consumer's purpose. And from that perspective, considers used the previews for the purpose of conducting research to identify which music to purchase, purchases which trigger dissemination of musical works and compensation for their creators. (*SOCAN v. Bell Canada*, 2012, para. 30)
>
> The predominant perspective in this case is that of the ultimate users of the previews, and *their* purpose in using previews to help them research and identify musical works for online purchase [emphasis original]. While the service providers sell musical downloads, the pur-

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> pose of providing *previews* is primarily to facilitate the research purposes of the consumers. (*SOCAN v. Bell Canada*, 2012, para. 34)
>
> There were reasonable safeguards in place to ensure that the users' dealing in the previews was in fact being used for this purpose: the previews were streamed, short, and often of lesser quality that the musical work itself. These safeguards prevented the previews from replacing the work while still fulfilling a research function. (*SOCAN v. Bell Canada*, 2012, para. 35)
>
> While research done for commercial reasons may be less fair than research done for non-commercial purposes, the dealing may nonetheless be fair if there are "reasonable safeguards" in place to ensure that the works are actually being used for research. (*SOCAN v. Bell Canada*, 2012, para. 36)

Applied in Alberta (Education) v. Access Copyright (2012)

According to the text of the decision for *Alberta (Education) v. Access Copyright* (2012), "Before this Court, there was generally no dispute that the first step in *CCH* was met and that the dealing – photocopying – was for the allowable purpose of research or private study" (para. 14).

> There is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of "instruction"; they are there to facilitate the students' research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological" (*Alberta (Education) v. Access Copyright*, 2012, para. 23).
>
> Photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students. The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study. (*Alberta (Education) v. Access Copyright*, 2012, para. 25)
>
> With respect, the word "private" in "private study" should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the *concept* of studying, the Board again artificially separated the teachers' instruction from the students' studying. (*Alberta (Education) v. Access Copyright*, 2012, para. 27).

Applied in United Airlines, Inc. v. Cooperstock (2017)

> The legislation is silent as to the content, meaning, or scope of "parody". Therefore, the words of the legislation must be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of

> Parliament." (*United Airlines, Inc. v. Cooperstock*, 2017, para. 110)
>
> Parody should be understood as having two basic elements: the evocation of an existing work while exhibiting noticeable differences and the expression of mockery or humour. I would also note that the fair dealing exception for the purpose of parody in s. 29 of the Copyright Act does not require a user to identify the source of the work being parodied. In addition, in my view, parody does not require that the expression of mockery or humour to be directed at the exact thing being parodied. It is possible, for example, for a parody to evoke a work such as a logo while expressing mockery of the source company, or to evoke a well-known song while expressing mockery of another entity entirely. (*United Airlines, Inc. v. Cooperstock*, 2017, para. 119)
>
> In my view, UNTIED.com falls within the definition of parody described above: it evokes existing works (the United website, the United logo, and the globe design) while showing some differences (such as content and disclaimers), and it expresses mockery (and criticism) of the plaintiff. Therefore, the first stage of the *CCH* test has been met in this case. (*United Airlines, Inc. v. Cooperstock*, 2017, para. 120)
>
> I would note that it is questionable whether the parody exception may successfully be invoked when there is confusion. Parody depends on the recipient or viewer recognizing that the work in question is a spoof – therefore, it will be difficult to establish that the true purpose of a given work is parody when it is confusingly similar to the original work. (*United Airlines, Inc. v. Cooperstock*, 2017, para. 123).
>
> As the defendant pointed out during the trial, UNTIED.com has long claimed to be a "parody" website. However, the defendant did not satisfy the Court that there was ever any intent for humour rather, the defendant's intent was to embarrass and punish United for its perceived wrongdoings. Parody must include some element of humour or mockery – if extended too far, what may be designed in jest as parody may simply become defamatory. (*United Airlines, Inc. v. Cooperstock*, 2017, para. 124)

Finally, "I find that the defendant's real purpose or motive in appropriating the copyrighted works was to defame or punish the plaintiff, not to engage in parody" (*United Airlines, Inc. v. Cooperstock*, 2017, para. 125).

Applied in Wiseau Studios, LLC et al. v. Richard Harper et al. (2020)

> The defendants rely on both s. 29.1 and s. 29.2 of the Copyright Act, submitting that the purpose of *Room Full of Spoons* is to critique and review *The Room*. The defendants also submit that the documentary constitutes news reporting as it informs viewers of facts about the film and Wiseau. The dealing is therefore for an allowable purpose under s. 29.1. In *SOCAN* 2012, at para. 27, the Supreme Court observed, "*CCH* created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair". The first step is easily met in this case. (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, p. 172)

https://doi.org/10.17161/jcel.v8i1.23096

> A documentary can be many things, and can be positive or negative about its subject. To the extent that a documentary uses copyrighted material for the purposes of criticism, review, or news reporting, then such use is for an allowable purpose under the fair dealing provisions of the Copyright Act. *Room Full of Spoons* meets each of those purposes. (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, para. 183)

> As discussed above, the purpose of the documentary and its use of the plaintiffs' material are to provide review, critique, and information about *The Room*, the phenomenon it has created, and the maker of the film, Tommy Wiseau. This is a permitted purpose. The copying was not for a commercial purpose but simply to make a documentary; the defendants had no expectation when making the documentary that they would profit from it, nor did they appropriate *The Room* to their benefit. Further, as Sharp said, a documentary commenting on another work is unlikely to be as popular as the original work. (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, para. 185)

Applied in York University v. Access Copyright (2021)

According to *York University v. Access Copyright* (2021), "It was common ground in this case that York's teachers make copies for their students for the allowable purpose of education at the first step of the analysis" (para. 97). Furthermore, "when teaching staff at a university make copies for their students' education, they are not "hid[ing] behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair"" (*York University v. Access Copyright*, 2021, para. 102).

Applied in 1395804 Ontario Ltd. (BR) v. Canada (Attorney General) (2024)

> Our Court found that the Defendant, the AGC on behalf of the Department of Finance, was entitled to the protection afforded by s. 29 of the *Act*: its use of the articles constituted fair dealing for the purpose of research, private study, education, parody or satire. Fair dealing does not infringe copyright. In the view of Barnes J, "the fair dealing protection so obviously applicable to the acknowledged facts of this case that the litigation should have never been commenced let alone carried to trial" (Supplemental Judgement and Reasons as to costs, 2016 FC 1400, at para 18). (*1395804 Ontario Ltd. (BR) v. Canada (Attorney General)*, 2024, para. 30)

Furthermore, "it is without difficulty that our Court found that the use made of the BR's articles was for the purpose of research: 'there is no question that the circulation of this news copy within the Department was done for a proper research'" (*1395804 Ontario Ltd. (BR) v. Canada (Attorney General)*, 2024, para. 36).

The Second Fair Dealing Factor: The Character of the Dealing

Established by CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> In assessing the character of a dealing, courts must examine how the works were dealt with. 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. If the copy of the work is destroyed after it is used for

> its specific intended purpose, this may also favour a finding of fairness. 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. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 55)

Applied in CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> The character of the Law Society's dealings with the publishers' works also supports a finding of fairness. Under the Access Policy, the Law Society provides single copies of works for the specific purposes allowed under the Copyright Act. There is no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession. (*CCH Canadian Ltd. V. Law Society of Upper Canada*, 2004, para. 67)

Applied in SOCAN v. Bell Canada (2012)

According to *SOCAN v. Bell Canada* (2012), "If a single copy of a work is used for a specific purpose, or if the copy no longer existed after it was used, this would favour a finding of fairness" (para. 37).

> SOCAN's argument was based on the fact that consumers accessed, on average, 10 times the number of previews as full-length musical works. However, no copy existed after the preview was heard. The previews were streamed, not downloaded. Users did not get a permanent copy, and once the preview was heard, the file was automatically deleted from the user's computer. The fact that each file was automatically deleted meant that copies could not be duplicated or further disseminated by users. (*SOCAN v. Bell Canada*, 2012, para. 38)

Applied in Alberta (Education) v. Access Copyright (2012)

> First, unlike the single patron in *CCH*, teachers do not make multiple copies of the class set for their own use, they make them for the use of the *students*. Moreover, as discussed in the companion case *SOCAN v. Bell*, the "amount" factor is not a quantitative assessment based on aggregate use, it is an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated. The quantification of the total number of pages copied, as the Court noted in *CCH*, is considered under a different factor: the "character of the dealing". (*Alberta (Education) v. Access Copyright*, 2012, para. 29)
>
> Under the "character of the dealing" factor, the Board focused its analysis on the fact that multiple copies of the *same* excerpt are made, at any one time, to be *disseminated to the whole class* (Board, at para. 100). Accordingly, on my reading of the Board's reasons, there was no double counting; the Board's conclusions of unfairness under the "character of the dealing" and the "amount of the dealing" factors were arrived at independently, taking into consideration different aspects of the dealing. (*Alberta (Education) v. Access Copyright*, 2012, para. 53)

Applied in United Airlines, Inc. v. Cooperstock (2017)

"In this case, the works were published online. They were made available to any person with Internet access and were likely widely distributed (although there was no evidence adduced as to website traffic)" (*United Airlines, Inc. v. Cooperstock*, 2017, para. 127).

https://doi.org/10.17161/jcel.v8i1.23096

Applied in Wiseau Studios, LLC et al. v. Richard Harper et al. (2020)

> In this case, the copyrighted material was almost invariably accompanied by commentary illustrating or supporting points made by the narrator or interviewees. This is a common technique in documentaries and in providing review and criticism, as confirmed by the defendants' evidence. As in *Time Warner*, use of the clips for the purpose of commentary is a character of dealing that is appropriate and supports a conclusion that the dealing was "fair". (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, para. 186)

Applied in York University v. Access Copyright (2021)

> In the educational context, instructors are facilitating the education of each of their individual students who have fair dealing rights *(Alberta (Education)*, at paras. 22–23). However, courts are not required to completely ignore the institutional nature of a university's copying practices and adopt the fiction that copies are only made for individual isolated users. When an institution is defending its copying practices, its aggregate copying is necessarily relevant, for example, to the character of the dealing and the effect of the dealing on the work. (*York University v. Access Copyright*, 2021, para. 99)
>
> And while it is true that "aggregate dissemination" is "considered under the 'character of the dealing' factor" (*SOCAN*, at para. 42; see also *CCH*, at para. 55; *Alberta (Education)*, at para. 29), as this Court cautioned in *SOCAN*, "large-scale organized dealings" are not "inherently unfair". In *SOCAN*, where copies could easily be distributed across the internet in large numbers, this Court warned that focussing on the "aggregate" amount of dealing could "lead to disproportionate findings of unfairness when compared with non-digital works". By extension, the character of the dealing factor must be carefully applied in the university context, where dealings conducted by larger universities on behalf of their students could lead to findings of unfairness when compared to smaller universities. This would be discordant with the nature of fair dealing as a user's right. (*York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021, para. 105)

Applied in 1395804 Ontario Ltd. (BR) v. Canada (Attorney General) (2024)

> What occurred here was no more than the simple act of reading by persons with an immediate interest in the material. The act of reading, by itself, is an exercise that will almost always constitute fair dealing even when it is carried out solely for personal enlightenment or entertainment. (*1395804 Ontario Ltd. (BR) v. Canada (Attorney General)*, 2024, para. 38).
>
> a) BR's website was not hacked or accessed by illicit means. A subscription was purchased; b) the subscription was used for a legitimate business reason, that is to identify articles targeting Parks Canada to seek to protect its reputation and to correct mistakes, errors, or misrepresentations in the public interest; c) the use made by Parks Canada was limited to its valid business purpose; d) the circulation of the articles was limited to persons who needed to know for business reasons linked to the Agency's core mandate; e) there was no commercial advantage either sought or obtained by Parks Canada; g) as established in the uncontradicted testimony of Mr. Frédéric Baril, there was a reasonable basis for concern between January 2013 and September 2013 about articles which contained citations seen as misleading and

> alarmist which called for the sharing with appropriate officials; h) as in the *Department of Finance* case, the Terms and Conditions were not ignored. They were not known. Justice Barnes noted: "In any event, and as noted below, those provisions did not unambiguously prohibit the circulation of Blacklock's copy for personal or non-commercial purposes"; i) this constitutes the simple act of reading by officials with an immediate interest in the articles for business related reasons. There is no evidence that this was in the nature of a frolic in territory protected by copyright. This is the very purpose of the balance that includes fair dealing; j) there is a significant public interest in reading articles with a view to protecting the public, and the press, against errors and omissions. (*1395804 Ontario Ltd. (BR) v. Canada (Attorney General)*, 2024, para. 38)

The Third Fair Dealing Factor: The Amount of the Dealing

Established by CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. 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. As the passage from *Hubbard* indicates, the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs: see Vaver, *supra*, at p. 191. 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. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004a, para. 56)

Applied in CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> The Access Policy indicates that the Great Library will exercise its discretion to ensure that the amount of the dealing with copyrighted works will be reasonable. The Access Policy states that the Great Library will typically honour requests for a copy of one case, one article, or one statutory reference. It further stipulates that the Reference Librarian will review requests for a copy of more than five percent of a secondary source and that, ultimately, such requests may be refused. This suggests that the Law Society's dealings might not be fair if a specific patron of the Great Library submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time, there is no evidence that this has occurred. (*CCH Canadian Ltd. V. Law Society of Upper Canada*, 2004a, para. 68)

Applied in SOCAN v. Bell Canada (2012)

> Since fair dealing is a "user's" right, the "amount of the dealing" factor should be assessed based on the individual use, not the amount of the dealing in the aggregate. The appropriate measure under this factor is therefore, as the Board noted, the proportion of the excerpt used in relation to the whole work. That, it seems to me, is consistent with the Court's approach in *CCH*, where it considered the Great Library's dealings by looking at its practices

> as they related to specific works requested by individual patrons, not at the total number of patrons or pages requested. The "amount of the dealing" factor should therefore be assessed by looking at how each dealing occurs on an individual level, not on the aggregate use. (*SOCAN v. Bell Canada*, 2012a, para. 41)

Applied in Alberta (Education) v. Access Copyright (2012)

> As discussed in the companion case *SOCAN v. Bell*, the "amount" factor is not a quantitative assessment based on aggregate use, it is an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated. (*Alberta (Education) v. Access Copyright*, 2012, para. 29)

Applied in United Airlines, Inc. v. Cooperstock (2017)

"The amount of the dealing is substantial. The defendant has copied the entirety of the home page of the plaintiff's website (as it then was) including colours, layout, some functionality, movement, and logos. The work is also extremely important" (*United Airlines, Inc. v. Cooperstock*, 2017, para. 129).

Applied in Wiseau Studios, LLC et al. v. Richard Harper et al. (2020)

> While the documentary's use of footage from *The Room* is not trivial, it is also not excessive. *Room Full of Spoons*, which is 109 minutes long, uses 7 minutes of footage in 69 short clips from *The Room*, which is itself 99 minutes in length. This is less than 7% of the source work and an even smaller percentage of the documentary. The longest clip is 21 seconds. (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, para. 188).
>
> While use of excerpts from *The Room* and some other materials belonging to the plaintiffs is important to conveying the messages in the documentary, such use is limited and linked to the objectives of the documentary. The purpose of the copying was not to replace *The Room*. To repeat the evidence of the plaintiffs' witness, documentary filmmaker Sunthian Sharp said he might have used more clips if he had been making the film. In my view, therefore, the amount of the plaintiffs' work is not excessive and does not support a conclusion that the fair dealing exception does not apply. (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, para. 189)

Applied in York University v. Access Copyright (2021)

"Since fair dealing is a user's right, the 'amount of the dealing' factor should be assessed based on the individual use, not the amount of the dealing in the aggregate" (*York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021, para. 104).

Applied in 1395804 Ontario Ltd. (BR) v. Canada (Attorney General) (2024)

"f) a small number of articles (15) was shared among a small number of relevant officials for the specific business reasons linked to the Agency's mandate" (*1395804 Ontario Ltd. (BR) v. Canada (Attorney General)*, 2024, para. 101).

> There was no reason to think that sharing a very limited number of articles to a limited number of officials solely interested in the content for business reasons having to do with the

> Agency's mandate and reputation could constitute somehow a violation of the *Act*. I appreciate that the intent to violate is not a constituent element of a breach, but the actions guided by fair dealing, which are for a purpose clearly recognized by copyright law, are protected from liability. Once again, fair dealing is an integral part of the *Act*: it is not merely a defence. (*1395804 Ontario Ltd. (BR) v. Canada (Attorney General)*, 2024, para. 104)

The Fourth Fair Dealing Factor: Available Alternatives to the Dealing

Established by CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> Alternatives to dealing with the infringed work may affect the determination of fairness. 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. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 57)

Applied in CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> It is not apparent that there are alternatives to the custom photocopy service employed by the Great Library. As the Court of Appeal points out, the patrons of the custom photocopying service cannot reasonably be expected to always conduct their research on-site at the Great Library. Twenty percent of the requesters live outside the Toronto area; it would be burdensome to expect them to travel to the city each time they wanted to track down a specific legal source. Moreover, because of the heavy demand for the legal collection at the Great Library, researchers are not allowed to borrow materials from the library. If researchers could not request copies of the work or make copies of the work themselves, they would be required to do all of their research and note-taking in the Great Library, something which does not seem reasonable given the volume of research that can often be required on complex legal matters. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 69)
>
> The availability of a license is not relevant to deciding whether a dealing has been fair. 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 license 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. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 70)

Applied in SOCAN v. Bell Canada (2012)

> Allowing returns is an expensive, technologically complicated, and marked-inhibiting alternative for helping consumers identify the right music. And none of the other suggested alternatives can demonstrate to a consumer what previews can, namely, what a musical work *sounds* like. The Board found that "listening to a preview probably is the most practical, most economical and safest way for users to ensure that they purchase what they wish"

> (para. 114). As a result, it concluded that short, low-quality streamed previews are reasonably necessary to help consumers research what to purchase. I agree. (*SOCAN v. Bell Canada*, 2012, para. 46)

Applied in Alberta (Education) v. Access Copyright (2012)

> In my view, buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. First, the schools have already purchased originals that are kept in the class or library, from which the teachers make copies. The teacher merely facilitates wider access to this limited number of texts by making copies available to all students who need them. In addition, purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board's finding that teachers only photocopy short excerpts to complement existing textbooks. Under the Board's approach, schools would be required to buy sufficient copies for every student of every text, magazine, and newspaper in Access Copyright's repertoire that is relied on by a teacher. This is a demonstrably unrealistic outcome. Copying short excerpts, as a result, is reasonably necessary to achieve the ultimate purpose of the students' research and private study. (*Alberta (Education) v. Access Copyright*, 2012, para. 32)

Applied in United Airlines, Inc. v. Cooperstock (2017)

> When considering parody, available alternatives to the dealing cannot be weighed too heavily. This is because although alternatives may be available, they may not be as effective in meeting the goals of parody (i.e., mocking or criticizing in a humorous manner). In this case, the appropriate question would seem to be this: would the defendant's use of alternative logos and website design be as effective in mocking and criticizing the plaintiff? In fact, the defendant acknowledged that there were alternatives to the dealing, but argued that his criticism would be less humorous and less effective if he made use of such alternatives. (*United Airlines, Inc. v. Cooperstock*, 2017, para. 132)
>
> In my view, alternatives to the current design of UNTIED.com would be effective in meeting the goals of the website. It is unclear why substantial copying of the United website or the other copyrighted works was necessary in order to meet the parodic goal or humourously criticizing the plaintiff. Parody requires humour, whereas the defendant's website was simply mean-spirited. The minimal use of certain parodic elements in the past (i.e., "fly the unfriendly skies" and the wordplay between "united" and "untied") present an example of an alternative to the current dealing. (*United Airlines, Inc. v. Cooperstock*, 2017, para. 133)

Applied in Wiseau Studios, LLC et al. v. Richard Harper et al. (2020)

"*Room Full of Spoons* is about *The Room* and Wiseau. There is no alternative to the copyrighted material to make the points that are made. As Harper stated, without the clips it would have been a different film" (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, para. 190).

Not applied in York University v. Access Copyright (2021).
Not applied in 1395804 Ontario Ltd. (BR) v. Canada (Attorney General) (2024).

https://doi.org/10.17161/jcel.v8i1.23096

The Fifth Fair Dealing Factor: The Nature of the Work

Established by CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> 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 acknowledgement 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. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 58)

Applied in CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> I agree with the Court of Appeal that the nature of the works in question – judicial decisions and other works essential to legal research – suggests that the Law Society's dealings were fair. As Linden J. A. explained, at para. 159: "It is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained". Moreover, the Access Policy puts reasonable limits on the Great Library's photocopy service. It does not allow all legal works to be copied regardless of the purpose to which they will be put. Requests for copies will be honoured only if the user intended to use the works for the purpose of research, private study, criticism, review, or use in legal proceedings. This further supports a finding that the dealings were fair. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 71)

Applied in SOCAN v. Bell Canada (2012)

> The fact that a musical work is widely available does not necessarily correlate to whether it is widely disseminated. Unless a potential consumer can locate and identify a work he or she wants to buy, the work will not be disseminated. (*SOCAN v. Bell Canada*, 2012, para. 47).

Not applied in Alberta v. Access Copyright (2012).

Applied in United Airlines, Inc. v. Cooperstock (2017)

> In *CCH*, the Supreme Court indicated that the nature of the work should be considered, giving the examples of published, unpublished, and confidential works. This factor "examines whether the work is one which should be widely disseminated" (*SOCAN*, at paragraph 47). (*United Airlines, Inc. v. Cooperstock*, 2017, para. 135)

"The United website was published online and available openly to the public, as was UNTIED.com" (*United Airlines, Inc. v. Cooperstock*, 2017, para. 136).

Applied in Wiseau Studios, LLC et al. v. Richard Harper et al. (2020)

> The material is not confidential, nor is it unpublished; quite the contrary. *The Room* has been widely available for close to two decades, plays frequently in cinemas, is available free online (and there is no evidence that Wiseau has attempted to stop such access), and has been viewed online by over one million viewers. In my view, this factor also favours the defendants. (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, para. 193)

https://doi.org/10.17161/jcel.v8i1.23096

Not applied in York University v. Access Copyright (2021).

Applied in 1395804 Ontario Ltd. (BR) v. Canada (Attorney General) (2024)

> The relevance of a paywall and of terms and conditions to applying the fair dealing provision is recognized. However, the copyright's owner must not only establish some prohibition, but it must be shown that the person involved was aware of the limitations. "All that is required is an acknowledgement at the time of acquiring access that the terms in question were read and accepted" (para. 38). That was not done and the subscriber had no reason to think a violation of the *Act* would occur by sharing articles of special interest with people affected by them. Indeed, the Terms and Conditions were found by our Court to be ambiguous which results in the drafter of the conditions to be bound to the most favourable interpretation to the user of the copy: I do not accept that [the subscriber] or the Department should be taken to be aware of Blacklock's web-based terms of use. But even if they had been aware they would have been no further ahead. Blacklock's Terms and Conditions contain a material ambiguity concerning downstream distribution. On the one hand they seemingly prohibit distribution by subscribers but, on the other, they permit it for personal, or non-commercial uses. (*1395804 Ontario Ltd. (BR) v. Canada (Attorney General)*, 2024, para. 39)

The Sixth Fair Dealing Factor: The Effect of the Dealing on the Work

Established by CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> 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 marker 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. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 59)

Applied in CCH Canadian Ltd. v. Law Society of Upper Canada (2004)

> Another consideration is that no evidence was tendered to show that the market for the publishers' works had decreased as a result of these copies having been made. Although the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers' markets. If there had been evidence that the publishers' markets had been negatively affected by the Law Society's custom photocopying service, it would have been in the publishers' interest to tender it at trial. They did not do so. The only evidence of market impact is that the publishers have continued to produce new reporter series and legal publications during the period of the custom photocopy service's operation. (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, para. 72)

Applied in SOCAN v. Bell Canada (2012)

> Because of their short duration and degraded quality, it can hardly be said that previews are in competition with downloads of the work itself. And since the effect of previews is to *increase* the sale and therefore the dissemination of copyrighted musical works thereby gen-

> erating remuneration to their creators, it cannot be said that they have a negative impact on the work. (*SOCAN v. Bell Canada*, 2012, para. 48)

Applied in Alberta v. Access Copyright (2012)

> Access Copyright pointed out that textbook sales had shrunk over 30 percent in 20 years. However, as noted by the Coalition, there was no evidence that this decline was linked to photocopying done by teachers. Moreover, it noted that there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning. (*Alberta (Education) v. Access Copyright*, 2012, para. 33)
>
> It is difficult to see how the teachers' copying competes with the market for textbooks, given the Board's finding that the teachers' copying was limited to short excerpts of complementary texts. If such photocopying did not take place, it is more likely that students would simply go without the supplementary information, or be forced to consult the single copy already owned by the school. (*Alberta (Education) v. Access Copyright*, 2012, para. 36)

Applied in United Airlines, Inc. v. Cooperstock (2017)

"In this case, it is not the effect on the market that ought to be considered, but rather the confusion caused by the similarity between UNTIED.com and the United website" (*United Airlines, Inc. v. Cooperstock*, 2017, para. 138).

> In my view, it is the substantial copying of the plaintiff's copyrighted material that is having a harmful impact, not the criticism contained on UNTIED.com. Negative commentary regarding the plaintiff abounds on the Internet. The plaintiff is not so much concerned with the informational aspect of UNTIED.com (which may lead customers to purchase tickets with other airlines) as it is with the potential that customers will believe they are interacting with the plaintiff when they are actually interacting with UNTIED.com (which may, in turn, cause customers to believe that the plaintiff is unprofessional or that it does not respond to complaints). (*United Airlines, Inc. v. Cooperstock*, 2017, para. 140)

Applied in Wiseau Studios, LLC et al. v. Richard Harper et al. (2020)

> *Room Full of Spoons* is not an alternative to *The Room* and does not replicate or replace the unique experience of attending a showing of the original work, where people dress up as characters in the film, throw footballs around, throw spoons, and shout at the screen. Watching *Room Full of Spoons* is more likely to create interest in *The Room*, than to compete with it. (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, para. 196)
>
> The fact that festivals and cinemas have been interested in playing double features of *The Room* and *Room Full of Spoons* together suggests that the films complement, rather than compete, with one another. There is no evidence that the limited screenings of the documentary have had any negative impact on *The Room*. To the extent there may be a negative impact, which is entirely speculative, it would more likely be due to the film's criticism of *The Room* and Wiseau, and the reporting of facts about him, but that does not make the dealing with his work unfair. (*Wiseau Studio, LLC et al. v. Harper et al.*, 2020, para. 197)

https://doi.org/10.17161/jcel.v8i1.23096

Applied in York University v. Access Copyright (2021)

"When an institution is defending its copying practices, its aggregate copying is necessarily relevant, for example, to the character of the dealing and the effect of the dealing on the work" (*York University v. Access Copyright*, 2021, para. 99).

Not applied in 1395804 Ontario Ltd. (BR) v. Canada (Attorney General) (2024).

Conclusion

As revealed in the excerpts above, the Supreme Court of Canada is "at the vanguard in interpreting copyright law as a balance between copyright rights and user rights," and its understanding of fair dealing is no exception" (Tawfik, 2013, p. 195). Fair dealing is "one of the tools employed to achieve the proper balance between protection and access in the *Act* (*SOCAN*, at para. 11)" (*York University v. Access Copyright*, 2021, para. 90). Flexible exceptions in the Copyright Act such as fair dealing are widely applicable to the work of library practitioners and information professionals, but they are often misunderstood and underused. We hope that this resource will help provide readers with an understanding of the common law principles used to determine whether a dealing is fair or unfair, instilling confidence in those who are conducting fair dealing analyses.

https://doi.org/10.17161/jcel.v8i1.23096

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