Journal of Copyright in Education and Librarianship

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

Volume 9, Issue 1 (2026)

Educational Copying – the "Very Antithesis of Fair Dealing" or Within Copyright's "Breathing Space"? Part 2: Judicial Opinions

Rumi Graham, https://orcid.org/0000-0002-9798-2148

Graham, R. (2026). Educational copying – the "very antithesis of fair dealing" or within copyright's "breathing space"? Part 2: Judicial opinions. *Journal of Copyright in Education and Librarianship, 9*(1), 1-36.
https://doi.org/10.17161/jcel.v9i1.23126

Educational Copying – the "Very Antithesis of Fair Dealing" or Within Copyright's "Breathing Space"? Part 2: Judicial Opinions

Rumi Graham
University Library
University of Lethbridge

Author Note: Correspondence regarding this article should be directed to Rumi Graham, grahry@uleth.ca.

Abstract

This article is the second in a three-part series investigating whether and when educational institutions may make unlicensed uses of textual works for teaching and learning purposes in five common-law countries: Australia, Canada, New Zealand, the United Kingdom, and the United States. Part 2 focuses on case law—court and tribunal rulings—addressing the permissibility of unpaid uses of protected works in various circumstances, including copying or distributing copyrighted materials for use by multiple students as course materials (educational or classroom copying) and the applicability of statutory users' rights (copyright exceptions and limitations) to such uses.

Keywords: fair dealing, copyright exceptions and limitations, users' rights, educational copying, course readings, Australia, Canada, New Zealand, United Kingdom, United States

Educational Copying – the "Very Antithesis of Fair Dealing" or Within Copyright's "Breathing Space"? Part 2: Judicial Opinions

Introduction

This article is the second in a three-part series investigating whether and when educational institutions may make unlicensed use of textual works for teaching and learning purposes in five common-law countries: Australia, Canada, New Zealand, the United Kingdom, and the United States. Part 1 (Graham, 2025) looked at copyright's justifications and then compared basic mechanisms of copyright as presented in the copyright laws of the five countries. Part 2 shifts the focus to case law—court and tribunal rulings. It addresses the permissibility of unpaid uses of protected works in various circumstances, including copying or distributing copyrighted materials for use by multiple students as course materials (educational or classroom copying) and the applicability of statutory users' rights (copyright exceptions and limitations) to such uses.

In particular, this article considers how courts and tribunals have articulated where the boundaries are situated between unlicensed classroom copying that is permissible and copying that infringes, as well as rationales for why the boundaries should be so located. Within each of the five jurisdictions, judicial rulings in cases involving fair dealing or fair use disputes are examined to identify key facts of each case and reasons for the court or tribunal decision. Specific matters at issue in the selected cases include the legislative intent of statutory provisions, the extent to which unpaid copying is fair or unfair under various fairness factors, whether institutions must participate in collective licensing, and whether third parties may help students to engage in personal statutory users' rights. Part 3 further unpacks the rulings discussed here in terms of underlying premises and principles for deciding the permissibility of unpaid copying and considers possible paths toward more equitable balance in the copyright scheme.

Australian Cases

In addition to fair dealing provisions, Australian copyright law (ACA) contains a statutory license scheme covering educational copying of protected materials (Copyright Act 1968, 1968). Introduced in 1980 (Ricketson & Catterns, 2009) and revised most recently in 2017 (Australian Libraries Copyright Committee, 2020), the statutory education license is used by universities "to provide course-packs . . . to students, and to place copies of works on limited access reserves in university libraries," (Davison et al., 2012, p. 261) and to communicate such works to students on institutional digital platforms. A number of court and tribunal cases involving classroom copying have been heard over the past 40 years (e.g., *Copyright Agency*

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Ltd v Department of Education of New South Wales, 1985; *Copyright Agency Ltd v Charles Sturt University*, 2001; *Copyright Agency Ltd v University of Adelaide*, 2022).

Established in 1974 (Ricketson & Catterns, 2009), Copyright Agency Limited (CAL) is the declared works-collecting society for the statutory education license covering text and images. CAL has been a party to all Australian educational copying cases, including a 1982 case that addressed whether educators could use fair dealing as an alternative to the statutory license scheme. Subsequent cases have most often sought to resolve disagreements about components of the scheme itself, such as equitable remuneration amounts and methods for determining those amounts. The following three cases touch on matters relating to the kinds of copying the scheme is intended to cover, whether there is overlap between the scope of the scheme and that of users' rights under the ACA, and the character of coursepack and library reserve copying as means of providing students with access to course readings.

Haines v Copyright Agency Ltd (1982)

In *Haines v Copyright Agency Ltd* (1982), CAL and a group of copyright owners brought proceedings against the New South Wales government regarding a memo sent by its Director-General of Education to school principals. CAL disagreed with the memo's claim that the fair dealing provision in the ACA for purposes of research or study "allows for virtually the same amount and type of copying" as the statutory license for educational copying (*Haines*, 1982, p. 549). The decision of the Supreme Court of New South Wales in favour of CAL was upheld by the Federal Court of Australia, which ruled the Director-General was wrong to suggest that fair dealing was a viable alternative to the statutory license because such an approach denied the express purpose of the scheme (*Haines*, 1982, p. 555).

The Federal Court stated the purpose of the statutory education license is "to permit, but also to control, the making of multiple copies" and that "what is fair dealing is not fixed by reference to the number of copies, but is to be determined by reference to the facts of each case," which, in this instance, included the existence and effect of the statutory license (*Haines*, 1982, p. 556). The Court further affirmed that "it is important to the proper working of the sections [of the ACA] that a distinction be recognized between an institution making copies for teaching purposes and the activities of individuals concerned with research or study" (*Haines*, 1982, p. 556). This early judicial ruling on educational copying appears to have effectively narrowed the applicability in Australia of fair dealing for research or study purposes to dealings by individuals only. It also seems to foreclose the possibility that making multiple copies by an educational institution for teaching purposes could be, at the same time, a fair dealing that is principally focused on furthering the research or study purposes of its students.

Copyright Agency Ltd v Victoria University of Technology (1994)

Billed as a test case, the matter before the Federal Court of Australia in *Copyright Agency Ltd v Victoria University of Technology* (1994) was whether the statutory education license covered the common practice of universities of compiling sets of course readings and selling copies to enrolled students on a cost-recovery basis. CAL claimed the booklets of readings (coursepacks) produced by Victoria University of Technology (VUT*)* for two of its courses were infringing because they contained copies "supplied for a financial profit," which CAL alleged amounted to conducting a "business of quasi publishing," contrary to the provisions of the statutory license (*Copyright Agency Ltd v Victoria University of Technology*, 1994, p. 264). For one of the courses, VUT stated that its previous practice of placing photocopies of required readings on library reserve resulted in complaints from many students who were unable to read all of the materials. To alleviate the access problem, the course instructor gathered the readings and arranged for copies to be made available for student purchase as a coursepack (*Copyright Agency Ltd v Victoria University of Technology*, 1994, p. 271).

The Federal Court found the coursepacks did not contravene the ACA's prohibition against unauthorized uses of licensed copies since VUT's objective was not financial profit, but instead "to ensure that students enrolled in the relevant courses would be able to find and obtain copies of the materials at a price which covered costs" (*Copyright Agency Ltd v Victoria University of Technology*, 1994, p. 275). Finding that CAL had adduced no evidence to show that the coursepacks "were used for a purpose other than in connection with the relevant courses of instruction provided to them," the Court disallowed CAL's claim (p. 276). An appeal filed by CAL was dismissed (*Copyright Agency Ltd v Victoria University of Technology*, 1995). It is worth noting that had CAL prevailed, the character of coursepack production by Australian universities thereafter might have been understood to be comparable to commercial copying, and the primarily educational purpose of compiling coursepacks could perhaps have fallen into doubt.

Copyright Agency Ltd v University of Adelaide (Adelaide, 1999)

The main matter before the Copyright Tribunal of Australia in *Adelaide* (1999) was the determination of various remuneration rates under the statutory education license. Two issues arising in this proceeding were whether the coursepack equitable remuneration rate should be higher than the rate for general copying, and whether student copying of library reserve readings should be remunerated under the statutory license. On the first issue, the Tribunal found the ACA contained no requirement to maintain a single remuneration rate, noting that the legislation was based on recommendations of a 1970s copyright review committee (Franki, 1976) "which considered 'that multiple copying should not be

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carried out without remuneration to the copyright owner in any case where it represented a substantial use of his property'" (*Adelaide*, 1999, para. 6). The Tribunal justified a higher rate for coursepacks on the basis that "universities are saved some of the expense of keeping multiple sets of books in their libraries" and because coursepacks were a "fairly permanent . . . new use of the works taken" that made them more valuable than classroom handouts, the latter constituting "short-term uses of a 'throw-away' kind" (*Adelaide*, 1999, paras. 24, 26).

On the second issue, CAL claimed that copying of materials placed on library reserve was equivalent to coursepack copying and should be similarly remunerated. The Tribunal declined to decide the matter, ruling that determination of the applicability of the statutory license to closed reserve copying was a matter for court proceedings (*Adelaide*, 1999, paras. 39–40). The Tribunal suggested, however, that if CAL were to file an infringement suit and win, copying of excerpts placed on library reserve would then be subject to equitable remuneration fees under the statutory license, and if CAL were to lose, any copies made by a university to facilitate student access via library reserve might "in future attract special consideration in relation to equitable remuneration as copies having a much more permanent character than mere copies made in a university department for distribution to students" (*Adelaide*, 1999, paras. 39–40).

CAL did not initiate proceedings to determine the reserve readings issue. But after amendments to the ACA were passed in 2001, universities began to replace photocopies on reserve with electronic reserve systems because "the new legislation clarified . . . actual parameters of online activity, and brought an understanding of how the Statutory Licence . . . would allow universities to make available online for educational purposes extracts from monographs [and] journal articles" (Lean & Young, 2002, pp. 259–260). Thus, despite CAL's failed attempt to fence off student copying of reserve readings from the reach of statutory users' rights, that end was achieved in essence through the combined effects of technological developments and ACA amendments, as library reserve readings in Australia are now generally processed as electronic reserve readings, which are subject to the statutory education license.

Canadian Cases

Canadian copyright law (Copyright Act [CCA]; 1985) includes provisions for users' rights such as fair dealing and for the collective administration of copyright. The statutory fair dealing purposes of research, private study, education, criticism, and review seem potentially applicable in teaching and learning contexts, but, as noted in Part 1, the spareness of how they are stated in the CCA has necessitated heavy reliance on the courts to interpret the meaning and scope of fair dealing. Largely due to uncertainties regarding the parameters and application of fair dealing and a paucity of relevant domestic case law, for almost two decades starting in the early 1990s, Canadian public educational institutions held voluntary blanket licenses from one of two literary works collectives. Established in 1997, Copibec operates in the province of Quebec (Copibec, n.d.) and Access Copyright (AC), established in 1988, operates across the rest of Canada (Graham, 2016). A clearer picture of the role and scope of fair dealing emerged after the Supreme Court of Canada decided two copyright cases in the early 2000s that together laid out a modern fair dealing framework. The Court subsequently decided two cases involving educational copying that expanded on its foundational fair dealing rulings.

Théberge v Galerie d'Art du Petit Champlain Inc. (Théberge, 2002)

The copying at issue in *Théberge* (2002) involved neither educational institutions nor textual materials, but instead whether an art gallery infringed an artist's copyright by transferring authorized reproductions of the artist's paintings from a paper to a canvas substrate. Ruling that the artist's copyright was not infringed as no new copies resulted from the transfer process, the Supreme Court of Canada said to find otherwise "tilts the balance too far in favour of the copyright holder and insufficiently recognizes the proprietary rights of the appellants in the physical posters which they purchased" (*Théberge*, 2002, para. 28). Noting that the CCA "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," the Court held that "the proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature" (*Théberge*, 2002, paras. 30–31).

More pointedly, the Court identified exceptions to infringement as one of the in-built balancing mechanisms of the CCA:

> Excessive control by holders of copyrights . . . may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review. (*Théberge*, 2002, para. 32)

This pivotal Supreme Court decision confirmed fair dealing and other infringement exceptions as essential features of a properly functioning copyright scheme that are designed to counterbalance copyright owners' control over their works in order to protect the public domain.

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

Two years later in a landmark unanimous decision*,* the Supreme Court of Canada laid out a framework for analyzing fair dealing claims. Three commercial publishers of legal materials alleged that a law society library had made infringing copies of their works in response to patron requests. The law society counterclaimed that its library copying service qualified as fair dealing as did self-serve copying by its library patrons. Ruling in favour of the law society, the Court reinforced the integral role of fair dealing in the CCA by characterizing it as "user's right" (*CCH, 2004,* para. 48). According to the Court, "in order to maintain the proper balance between the rights of a copyright owner and users' interests, [fair dealing] must not be interpreted restrictively" (*CCH*, 2004, para. 48). The Court further emphasized that fair dealing purposes "must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained," an example of which is the Court's determination that the fair dealing purpose of research "is not limited to non-commercial or private contexts" (*CCH*, 2004, para. 51).

As the CCA does not define fair dealing, the Supreme Court delineated a two-step analytical framework to determine whether a dealing with a work is fair. The first step asks whether the dealing is for a purpose allowed in the CCA, and the second step assesses the fairness of the dealing. The Court identified six fairness factors—the purpose, character, amount, and effect of the dealing, alternatives to the dealing, and nature of the work dealt with—but noted that factors relevant to a particular case are neither restricted to nor are required to include these six (*CCH*, 2004, paras. 53–60). The fairness factors described in *CCH* are, in the main, comparable to those included in the fair dealing and fair use provisions of the ACA, New Zealand Copyright Act ([NZCA]; 1994), and United States Copyright Act of 1976 (USCA) (Graham, 2025).

The Court's explanations of three fairness factors are especially relevant to educational copying. When the amount factor is considered, the Court said:

> the quantity of the work taken will not be determinative of fairness, but can help in the determination. It may be possible to deal fairly with a whole work. . . 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. (*CCH*, 2004, para. 56)

When considering whether alternatives to a dealing are available, the Court stated:

> the availability of a licence is not relevant to deciding whether a dealing has been fair . . . 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 . . . in a manner that would not be consistent with the *Copyright Act*'s balance between owner's rights and user's interests. (*CCH*, 2004, para. 70)

And when the effect of a dealing on a work is considered, the Court noted that:

> 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. (*CCH*, 2004, para. 59)

The Court also explained two ways in which dealings can be shown to be fair:

> Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair. (*CCH*, 2004, para. 63)

The Supreme Court's interpretation of users' rights in *CCH* (2004) amplifies the principle affirmed in *Théberge* (2002) that public and private interests are both important under the CCA*.* It also bolsters the potential applicability of users' rights to educational copying in several ways. The requirement to interpret fair dealing purposes largely and liberally means copies of works made by educators for student use should easily meet step one of a fair dealing analysis in most cases. The holding that it may be fair to copy an entire work for a purpose such as research or private study suggests that, subject to a proper fairness assessment, copying an entire article or chapter for classroom use may be fair dealing. And the Court's assertion that the availability of a license has no bearing in a fair dealing analysis means classroom copying will not infringe merely because a rights holder offers licensing for the copied material.

The Court's determination that the effect of a dealing on the market for a work is neither the only nor the most important factor is key, as it means classroom copying may be fair even if it reduces the rights owner's licensing income as long as, on balance, the copying serves a greater public interest. As well, the Court's ruling that dealings can be shown to be fair either through a case-by-case fairness analysis or by showing an institution's dealings follow fair practices and policies is critically important, as it suggests an institution's guidelines that are fair and address allowed purposes can help members of its community to make meaningful use of their fair dealing rights.

Alberta (Education) v Access Copyright (Alberta, 2012)

The opinion of the Supreme Court of Canada in *Alberta* (2012) brought to a close an era of uncertainty within the Canadian educational sector regarding the applicability of fair dealing to educational copying. The case began in 2004 when the Copyright Board of Canada undertook to certify the first proposed tariff filed by Access Copyright for elementary and secondary school (K–12) copying. At issue was whether teachers' copying of short excerpts for classroom use can qualify as fair dealing. Relying on conceptions of copyright's balance and users' rights laid out in *Théberge* (2002) and *CCH* (2004), the Supreme Court overturned the Federal Court of Appeal decision (*Alberta*, 2010) that upheld the Board's determination that teachers' copying of short excerpts for classroom use was not fair dealing (Copyright Board of Canada, 2009). Importantly, at the time of the 2011 Supreme Court hearing in this case, the CCA's fair dealing purposes comprised research, private study, criticism, review, and news reporting, and thus were the only statutory purposes considered. Education, parody, and satire became new fair dealing purposes when amendments to the CCA were passed in mid-2012 (Copyright Modernization Act, 2012).

The Supreme Court was chiefly concerned with flaws in the Copyright Board's analyses of the purpose factor in assessing the fairness of the copying. In the Board's view, classroom copying that did not arise from student requests were for teachers' purpose of instruction or non-private study, which tilted the purpose factor against fair dealing on the basis that instruction and non-private study are not statutorily allowed fair dealing purposes. But the Supreme Court ruled that instead of judging the purpose from the copier's perspective, the first step in an analysis of fair dealing—a user's right—should properly take the perspective of the ultimate user. The Court said the copier's purpose may be relevant in the second step if an ulterior motive exists, such as the profit motive of commercial copy shops in the coursepack cases cited by AC. The Court held the purpose of teachers and students vis-à-vis classroom copies to be inextricably intertwined:

> 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. . . The teacher/copier therefore shares a symbiotic purpose with the student/user. . . Instruction and research/private study are, in the school context, tautological. (*Alberta*, 2012, para. 23)

The Supreme Court also found the Board had erred in other aspects of its fairness analyses (*Alberta*, 2012, paras. 29, 31, 33). For example, the Court said the Board incorrectly assessed the amount factor quantitatively based on aggregate use instead of determining whether the proportion copied was fair in relation to the whole work. As well, the Court disagreed with the contention that purchasing multiple copies of original texts for distribution to students or placement in the school library were realistic alternatives to teachers' dealings. The Court also rejected the theory advanced by AC in an "evidentiary vacuum" that declining textbook sales were causally linked to teachers' copying from those works (*Alberta*, 2012, para. 34).

After the Supreme Court remitted the case back to the Board, the K–12 tariff was redetermined at a lower royalty rate (Copyright Board of Canada, 2013). By refusing to recognize "an artificial wedge" that would otherwise create a legal divide between teachers' instructional purpose in copying excerpts for student use and students' fair dealing purposes of research and private study, the Court unequivocally affirmed what many educators had suspected since *CCH* (2004)—that the CCA permits some kinds of classroom copying when they can be shown to be, on balance, fair (*Alberta*, 2012, para. 24). It bears mention that four of the nine Supreme Court judges issued a dissent that would have dismissed the school boards' appeal on the premise that all aspects of the Board's original tariff decision were reasonable, save its assessment that the market effect factor weighed against fair dealing.

York University v Access Copyright (York, 2021)

In *York* (2021), the Supreme Court of Canada unanimously settled another key question about educational copying: whether it is mandatory for an educational institution to pay royalties under a Copyright Board-approved tariff if the institution makes copies of any works in the repertoire covered by the tariff. AC launched the suit in 2013 after a period spanning 1994 to 2010 during which York University (hereafter York) and other universities voluntarily took up AC blanket licenses. Following a breakdown in negotiations to renew a model license for universities, in March 2010, AC exercised its right under the CCA to file a proposed tariff with the Board for 2011–2013. In December 2010, AC also filed a proposed interim 2011–2013 tariff containing terms and conditions paralleling the blanket licenses set to expire at the end of the month, which the Board quickly approved in late December 2010.

York paid royalties under the interim tariff for a brief period, but withdrew from blanket licensing in July 2011 on the basis that most of its copying of materials in AC's repertoire constituted fair dealing or was covered by license agreements with parties other than AC. In the suit filed against York, AC claimed the approved interim tariff created a "mandatory legal relationship" between itself and York and other universities that use works in AC's repertoire (*York*, 2021, para. 8). York counterclaimed that the disputed copying was covered by fair dealing. Regarding AC's claim that the CCA compelled York to pay royalties under the approved tariff, the Supreme Court upheld the Federal Court of Appeal decision (*York*, 2020) that the tariff was not enforceable against York.

Agreeing with arguments made by Katz (2015a, 2015b), the Supreme Court observed that "a collective society's market power and effectiveness at achieving its goals is not guaranteed by the *Copyright Act*," nor is the CCA "designed to prop-up collectives that have become less valuable to users and/or rights-holders" (*York*, 2021, para. 64). The Court found the legislative history of the CCA showed the purpose of the Copyright Board's price-setting powers has always been to "protect users from the potential exertion of unfair market power by collective societies" (*York*, 2021, para. 67). The Court ruled that it is not mandatory to pay royalties under approved tariffs because, among other considerations, the interpretation preferred by AC would "turn tariffs into a plainly *anti*-competitive tool, boosting collective societies' power to the detriment of users," contrary to legislative intent and the language of the CCA (*York*, 2021, para. 71).

As dismissal of AC's appeal meant there was no longer a live issue between the parties, the Supreme Court determined it was inappropriate to consider York's counterclaim that its fair dealing guidelines were fair. The Court nonetheless chose to comment on the matter of guidelines in general and to point out some concerns with the lower court reasonings pertaining to fair dealing. The Court agreed with York that "guidelines are important to an educational institution's ability to actualize fair dealing for its students" because they can help users understand how the scheme of copyright works, what users' rights are, and how to exercise those rights in an educational context (*York*, 2021, para. 85). The Court declined to comment on specific aspects of York's guidelines, however.

The Supreme Court's critique of the fair dealing analyses of the lower courts centred on their analytical perspective. Their inappropriate fixation on the "institutional nature of the copying and York's purported commercial purpose" gave short shrift to the students' perspective and to fair dealing as a user's right, thereby rendering the "fairness assessment . . . over before it began" (*York*, 2021, para. 89). Renewing its commitment to eschew an earlier "author-centric" view of copyright that focused on authors' and copyright owners' exclusive rights (*York*, 2021, para. 90), the Court said both lower courts repeated the error committed by the Copyright Board in *Alberta* (2012) by assessing the second-stage purpose of the dealings only from the institutional perspective. The Court affirmed "the purpose of copying conducted by university teachers for student use is for the student's education," while recognizing that evaluating the fairness of dealings must always weigh all relevant facts (*York*, 2021, para. 103).

The Supreme Court went on to criticize the Federal Court's approach to assessing fairness in a scenario it had contemplated, involving copies of multiple parts of a work that are made available to different students such that the whole work ends up being copied in the aggregate (*Canadian Copyright Licensing Agency v York University*, 2017). By considering the amount of the dealing in terms of aggregate rather than individual uses, the lower court had failed to heed prior Supreme Court teachings that the latter approach is required in such contexts because it befits analyses of fair dealing as a user's right (*York*, 2021, para. 104). The Supreme Court also noted that assessments of the fairness of aggregate uses under the character of the dealing factor should not assume that "large-scale organized dealings" are "inherently unfair," since the volume of such uses may vary by institutional size:

> 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*, 2021, para. 105)

The Supreme Court concluded its comments on York's counterclaim by observing that the fairness of a university's fair dealing practices will hinge on the extent to which they "actualize the students' right to receive course material for educational purposes in a fair manner, consistent with the underlying balance between users' rights and creators' rights in the Act" (*York*, 2021, para. 106). Although the Supreme Court declined to address the fairness of York's guidelines, its rulings in *Alberta* (2012) and *York* (2021) left no reasonable doubt that the fair dealing provisions of the CCA can encompass classroom copying when the copying assists students to exercise their individual rights to deal fairly with protected materials and the copying can be shown to be, on balance, fair.

New Zealand Cases

Modeled on the copyright law of the United Kingdom (Frankel, 2011), the New Zealand copyright statute ([NZCA]; Copyright Act 1994) includes provisions for users' rights such as fair dealing, voluntary licensing schemes operated by copyright collectives, and oversight of licensing schemes by the Copyright Tribunal. Since 1995, all New Zealand universities have held blanket licenses with Copyright Licensing Limited (CLL), a copyright collective representing New Zealand authors and publishers of textual works (*Copyright Licensing Ltd v University of Auckland*, 2002). Established in 1988 and now operating as Copyright Licensing New Zealand, CLL is jointly owned by the Publishers Association of New Zealand and the New Zealand Society of Authors (Copyright Licensing New Zealand, n.d.).

Of the NZCA's three users' right provisions that seem potentially relevant to educational copying of articles and chapters, fair dealing for criticism or review purposes (s. 42) is the least constrained, as the only condition is sufficient acknowledgement. In contrast, the fair dealing provision for the purpose of research or private study (s. 43) and the provision allowing "copying for educational purposes" (s. 44) both prohibit making more than one copy of part or all of the same work "on any one occasion," which, at best, raises uncertainty regarding whether these provisions can apply to classroom copying of articles and chapters. The section 44 provision is also limited to very small amounts of a work. Outlined here are two cases that probed the boundaries between users' and owners' statutory rights regarding post-secondary coursepack copying, the first of which predates the current NZCA and the collective licensing regime.

Longman Group Ltd v Carrington Technical Institute (Longman, 1990)

As noted in Part 1 (Graham, 2025), *Longman* (1990) was an early test case that assessed whether copied extracts compiled into coursepacks may be covered by statutory users' rights in New Zealand copyright law. The copyright statute in force at the time was the Copyright Act 1962, under which the fair dealing provision for research or private study purposes was the equivalent of section 43 under the current NZCA (*Auckland*, 2002). The technical institute asked the High Court of New Zealand to consider, in light of the "public interest in the availability and dissemination of knowledge . . . that a different balance could be struck in New Zealand between those interests and the rights of copyright holders to enjoy the fruits of their labour." For its part, the publisher plaintiffs urged the Court to apply a strict interpretation of infringement exceptions, as "they are defences in situations where otherwise there would be infringement" (*Longman*, 1990, para. 5.6). The High Court determined that it was appropriate to consider the case "without any predisposition that [the disputed matters] are to be interpreted either strictly in favour of the copyright holder or liberally in favour of educational users who seek to be freed from the bounds of copyright protection" (*Longman*, 1990, para. 5.10).

The High Court found all copied excerpts at issue to reproduce substantial parts of copyrighted works both qualitatively and quantitatively, the latter ranging from 3–15% percent of the whole work. To determine if the coursepack fell within fair dealing, the Court considered whether the copying was for a statutorily allowed purpose; the amount, value, and use made of the copied parts; and whether the copies collectively rivalled the source works (*Longman*, 1990, para. 6.1), these being fairness factors applied in a leading U.K. copyright case involving fair dealing (*Hubbard v Vosper*, 1971).

The High Court ruled the purpose of the dealing to be teacher use, not research or private study, noting "student use was incidental to that purpose" (*Longman*, 1990, para 6.3). The Court further stated that the "effective purpose was to enable the tutor . . . to avoid the preparation of teaching materials, the use of an existing textbook or the original creation of a new one" (*Longman*, 1990, para. 6.4).

Finding that the coursepack "may not have been produced to compete commercially with the copyright works [but] did . . . compete factually," the Court said "to act as the tutor did is . . . the very antithesis of fair dealing" (*Longman*, 1990, para. 6.7).

Despite the technical institute's claim that fair dealing and other educational copying exceptions in the 1962 Act "showed . . . protection for copyright works under the Act had to be balanced with the public interest in ensuring that copyright works were readily available for genuine educational pursuits" (*Longman*, 1990, para. 5.3), the Court ruled the copying to be infringing because it did not fall within any statutory users' right. Left unexamined was the issue the defendant attempted to raise regarding the need for a substantive balance between owners' rights and the public interest in reasonable access to protected works for educational purposes.

Copyright Licensing Ltd v University of Auckland (Auckland, 2002)

In *Auckland* (2002), CLL and New Zealand universities asked the High Court to answer a set of 20 questions on the scope of acts permitted by the NZCA to clarify their applicability to coursepacks produced by universities. Questions of particular relevance to the present inquiry asked whether it may be fair dealing for criticism or review purposes if a university makes multiple copies of a work for inclusion in a coursepack; whether it may be fair dealing for a university to assemble and use a master copy of copied works in various ways for educational purposes; if a university may facilitate students' engagement with personal fair dealings; and under the NZCA's provision for educational copying, if a copy would infringe only to the extent that it exceeds the permitted limits. This case did not require the High Court to determine whether actual infringement had occurred.

Whether fair dealing for criticism or review purposes can cover copied works distributed as coursepacks turned on whose purpose is relevant. The High Court said "the copying must be done by, or for, the person undertaking the criticism or review," and that the "relevant purpose, therefore, is that of the copier" (*Auckland*, 2002, para. 35). While noting that a teacher might copy a work in order to criticize or review it in class, the Court did not "accept that it would be possible for a lecturer to genuinely copy for the purposes of review or criticism on behalf of a student unless that student had specifically requested the copy" (*Auckland*, 2002, para. 36). The Court held that "in most cases . . . the course books contain copies of material without any attempt to subject them to criticism or review" and accepted CLL's submission that "the obvious purpose of the copying is . . . to provide students with source material for the course being undertaken" (*Auckland*, 2002, para. 36). The Court inferred that "because the question refers to multiple copies there can be no suggestion that the copying has been undertaken at the specific request of a particular student" (*Auckland*, 2002, para. 37).

On whether fair dealing for criticism or review can apply to making a master copy of course materials that is then made available for students to copy, the High Court again held the relevant purpose to be that of the copier. In the Court's view, "the question answers itself," since "the copying . . . is not for the purposes of criticism or review . . . it is for purposes of making it available to students to copy themselves, or to make further copies to provide to students" (*Auckland*, 2002, paras. 48–49). Fair dealing thus was held not to apply because no statutory fair dealing purpose was perceived to be engaged.

On the parallel issue of whether fair dealing can apply to making a master copy available to students for research or private study, the Court held fair dealing to be inapplicable for the same reasons used to address the creation of a master copy for criticism or review—making a copy available for others to copy is not a statutory fair dealing purpose. The Court further noted that since the NZCA contains another provision specifically for educational copying, "it seems clear . . . that multiple copying or the production of a master copy . . . would be for educational purposes rather than for 'research or private study'" (*Auckland*, 2002, para. 60).

On the question of what is meant by restricting permitted acts to making one copy on "any one occasion" (e.g., NZCA, s. 43(4)), the High Court agreed with the universities that such provisions allow, for example, multiple students to make a personal copy of different works for research or private study purposes. The Court did not accept the universities' suggestion, however, that a university or other third party can help students engage in fair dealing by copying on behalf of students in the form of coursepacks or master copies (*Auckland*, 2002, para. 56–58). The Court ruled such assistance to be impermissible on the basis that the statutory provisions contemplate a person making their own copies or asking someone else to make copies on their behalf for an allowed purpose, whereas the

> immediacy of the relationship between the copying and the purpose would be lost if the university produced the copies . . . particularly if the copying is done at the commencement of the semester without any request from the student who later receives the copy. (*Auckland*, 2002, para. 59)

The universities argued that under section 44(3)(f) of the NZCA, which allows copying for educational purposes of up to 3% or three pages, if a copied excerpt exceeds 3%, only the portion beyond 3% would infringe. The High Court disagreed, stating that infringement occurs if all conditions in section 44(3) are not met: "It cannot be said that it is only an infringing copy to the extent that it exceeds the permitted limit. The plain words of the section do not permit such an interpretation" (*Auckland*, 2002, para. 87). The Court determined, however, that a definitive answer was inappropriate, as "the defendants may be able to successfully claim that that portion of the work which could be copied pursuant to para (f) should be excluded from consideration in the consequences following an infringement" (*Auckland*, 2002, para. 88). Under this ruling, the utility of section 44(3) seems doubtful for most course readings, as scholarly articles and chapters are rarely as brief as three pages.

At the outset, the High Court acknowledged the divergent positions of CLL and the universities regarding how restrictively or liberally the statutory exceptions should be interpreted. Notwithstanding the shift in language from "general *exceptions from protection*" in the 1962 Act to "*acts permitted* in relation to copyright works" in the 1994 Act, the Court saw fit to apply the same (purportedly neither restrictive nor liberal) interpretive approach adopted in *Longman* (1990). The Court also determined it was unnecessary to go beyond the words of the NZCA in order to interpret its provisions (*Auckland*, 2002, para. 11). As the NZCA lacks a statement of purpose, the Court's consideration of only the explicit provisions of the Act excluded other public policy issues unspecified in the NZCA but raised by the universities, such as the public interest in access to creative works and creative expression, both of which are part of copyright's social purposes and are promoted in other New Zealand legislation covering freedom of information and freedom of expression (*Auckland*, 2002, para. 21).

U.K. Cases

The copyright law of the United Kingdom, Copyright, Designs and Patents Act 1988 (UKCDPA), includes provisions for users' rights such as fair dealing and copyright licensing supervised by a Copyright Tribunal that adjudicates disputes between commercial copyright licensors and their licensees. Of three UKCDPA fair dealing purposes that nominally seem relevant to educational copying, the applicability of provisions for research or private study purposes are perhaps the most questionable, given the proviso that "copying by a person other than the researcher or student himself is not fair" if the copier knows the result will be "copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose" (s. 29(3)(b)). Fair dealing for criticism or review purposes appears to hold greater promise of applicability, as the only condition is sufficient attribution (s. 30(1)). Added to the UKCDPA in 2014, fair dealing for the sole purpose of illustration for instruction (s. 32) seems potentially applicable as well, but a government publication indicates this provision "would not permit . . . a significant amount of a textbook to be photocopied for multiple students, as doing so could displace sales of that textbook" (HM Government, 2012, p. 40).

The Copyright Licensing Agency (CLA) is a U.K. copyright collective for authors and publishers of textual works jointly established in 1982 by the Authors' Licensing and Copyright Society and the Publishers' Licensing Society (Mendis,

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2009). In the latter half of the 1980s, negotiations between CLA and the organization now known as Universities U.K. (UUK) led to the 1989 finalization of a licensing scheme in which all U.K. higher education institutions (HEIs) would acquire a CLA licensing agreement for reprographic copying (Mendis, 2009). Negotiated modifications in subsequent license renewals included an agreement to treat coursepacks separately in 1993 and the inclusion of digital scanning of print materials in 1998 (Mendis, 2009). Coursepack coping was thus excluded from the 1998 blanket license, but was subject to a separate agreement for copying cleared under CLA's Copyright Licensing Agency Rapid Clearance Service (CLARCS) (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002, para. H4). The 1998 license was the subject of a series of references made by UUK to the U.K. Copyright Tribunal involving hearings held in 2001. Two aspects of the case involved whether coursepack copying was fair dealing and whether the separate CLARCS system for coursepack copying was justified. To date, *Universities UK Ltd v Copyright Licensing Agency Ltd* (2002) is the only U.K. tribunal or court case that has specifically addressed fair dealing and classroom copying in higher education.

Universities UK Ltd v Copyright Licensing Agency Ltd (2002)

Claiming that much of the copying covered by CLA's HEI blanket license qualified as fair dealing under the UKCDPA, UUK argued that its license fee rate should be greatly reduced to be comparable to the rates granted to schools and that coursepacks should no longer be excluded (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002). To address these claims, the U.K. Copyright Tribunal first reviewed the kinds of HEI copying most likely to infringe, noting that:

> a) dealing which is both fair and for the purposes of research and private study should not be an infringement of copyright;
>
> b) the fair dealing defence of research and private study is a personal one, and will not normally extend to the making of multiple copies for others;
>
> c) there is no general defence of reprographic copying for the purposes of instruction or tuition;
>
> d) even in the case of the copying of very small percentage amounts of any work, the legislature has decided against a defence for educational establishments if a licensing scheme is available. (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002, para. 39)

These observations led the Tribunal to conclude that the absence of a statutory defence of copying for instructional purposes evidenced the will of the U.K. Parliament: "In declining to create a wide generalised defence for educational establishments, the legislature has struck a balance between the interests of copyright owners on the one hand, and the interests of education and scholarship on the other" (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002, para. 39). The Tribunal traced this perceived balance (para. 40) back to a passage in the 1977 report of the Whitford Committee that included the following:

> In view of the growth of reprography as a problem in the educational field . . . we have considered first the question whether there should be any express exceptions in favour of educational establishments at all. We feel that the fact that 'education' is a good cause is not in itself a reason for depriving copyright owners of remuneration. Nobody suggests that the makers of notebooks, compasses and rulers should supply these products to educational establishments free of charge. Although the types of material used in such places today are very different from the text books of the past . . . education is still in a large measure dependent upon the work of authors, artists and composers. (Committee to Consider the Law on Copyright and Design [Whitford Committee], 1977, pp. 68–69)

By finding the Whitford Committee's perspective on educational copying to remain appropriate 25 years later, the Tribunal appeared to accept two propositions as having continuing validity: receipt of remuneration by copyright owners holds greater societal value than benefits arising from educational copying that is unpaid or remunerated at a reduced rate, and that owners' rights in copyrighted works are comparable to owners' rights in physical property such as "notebooks, compasses and rulers." The former suggests an "author-centric" approach that some legislatures and courts have moved away from in other jurisdictions such as the United States and Canada (e.g., USCA, s.107; Copyright Modernization Act, 2012; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012; *York*, 2021). And problems raised by the latter view have been noted by many scholars, including Vaver (2011, p. 11), who observed, "to compare the rights someone has in a manuscript or a trade-mark with those he has in an automobile or a piece of land is an exercise in contrast more than anything else."

In its deliberations toward setting a fair CLA licensing remuneration rate, the Tribunal found it difficult to weigh an appropriate allowance for fair dealing and other relevant factors in a manner that avoided a purely mathematical formula. A further consideration may have been that "if [the Tribunal] performed its duty of deciding what was `reasonable' in an impressionistic way, rather than taking a view on the issues of principle on which the parties were so divided, it might spare itself the embarrassment and the parties the expense of an appeal on points of law" (Picciotto 2002, p. 443). Regarding CLA's preference to continue to control and monitor coursepack copying separately from copying under the blanket license, the

Tribunal had less difficulty in concluding that continued exclusion of coursepacks from the HEI blanket license was unreasonable. The Tribunal stated it was:

> wholly unpersuaded by the evidence that course packs are in fact, in the main, a substitute for textbooks. . . If one extract is a portion of a particular textbook, its inclusion as a part of a course pack is no more likely to take away sales of that textbook than if it had been copied under the blanket licence. (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002, para. 84)

The *Universities UK Ltd v Copyright Licensing Agency Ltd* ruling indicates the inapplicability of fair dealing to educational copying by legislative design is tied to a copyright policy approach set in the 1970s. The Whitford report accorded no special weight to education as "a good cause," and supported "the generally held view that the balance between the rights of the copyright owner . . . and the exceptions in favour of copyright users . . . is about right" (Whitford Committee, 1977, p. 4). While the Tribunal rejected CLA's petition to retain a separate system for coursepacks due to the unjustified cost of additional data gathering required by such a system, the Tribunal was persuaded that simplifying the HEI license by doing away with a separate agreement merited a substantial increase to the royalty rate for coursepack copying (*Universities UK Ltd v Copyright Licensing Agency Ltd* , 2002, para. 170). A more recent study of the value of CLA's HEI license included interviews with copyright specialists at different types of U.K. universities. Results showed that despite the addition to the UKCDPA of the new educational user's right, fair dealing for the purpose of illustration for instruction, "there is no evidence that the new provisions have led to a perception that available licences are no longer required" for classroom copying (Secker et al., 2019, p. 15).

U.S. Cases

The copyright law of the United States, Copyright Act of 1976 (USCA), includes provisions for fair use of protected works for purposes such as "teaching (including multiple copies for classroom use)" (USCA, s. 107). A blanket licensing regime for educational copying has never existed in the United States, as the USCA contains no provisions for collective licensing of textual works. Since 1978, however, the U.S.-based Copyright Clearance Center (CCC) has offered copyright management and licensing fee collection services (Lunney, 2010). Publishers and other copyright owners are free to register their works with the CCC and to set preferred licensing fees and usage terms for their works (Lunney, 2010). Academic institutions wishing to acquire permissions for educational copying through the CCC can do so via Marketplace, a pay-per-use licensing service (Copyright Clearance Center, n.d.-b) or by acquiring an annual blanket license (Copyright Clearance Center, n.d.-a).

In three infringement suits filed by publishers involving course readings copied for use by university students, all of the defendants claimed the copying was covered by fair use under the USCA. As well, the U.S. Supreme Court clarified the fair use doctrine in a 1994 precedent-setting copyright case. These four cases are summarized in chronological order.

Basic Books Inc. v. Kinko's Graphics (Basic Books, 1991)

The *Basic Books* (1991) suit was filed by eight trade and academic book publishers who alleged that in contravention of the USCA and a non-legislative document known as the *Classroom Guidelines*, their copyrights were infringed by a commercial copy shop that reproduced 12 unauthorized excerpts in coursepacks sold to students at three universities. The *Classroom Guidelines* were the product of negotiations held prior to the 1976 enactment of the USCA by representatives of educators, authors, and publishers seeking to establish agreement on permissible kinds of unauthorized educational copying (Crews, 2001; U.S. Copyright Office, 2014). Largely regarded today as being outdated and of questionable value given their divergence from the USCA's fair use provisions, the purported intent of the *Classroom Guidelines* was to establish the minimum scope for classroom copying (Bartow, 1998; U.S. Copyright Office, 2014).

In *Basic Books* (1991), fair use was one of four grounds on which the copy shop mounted its defence. Because there is usually greater scope for fair use for works that are factual rather than non-factual due to their greater public value and because, in their view, the copied works were factual in nature, the District Court found the nature of the work factor favoured fair use (*Basic Books*, 1991, p. 1533). Under the remaining three fairness factors specified in the USCA (s. 107), however, the Court found fair use to be disfavoured.

Applying prior Supreme Court teachings that commercial use is presumptively unfair (*Sony Corp. v. Universal City Studios*, 1984) and that the crux of the profit question is whether the copier stands to gain financially "without paying the customary price" (*Harper & Row v. Nation Enterprises*, 1985, p. 562), the District Court found the purpose and character factor to favour the publishers. Regarding the view espoused by Leval (1990) that transformative value or productive use is the key aspect of the first fairness factor, the District Court viewed the copying to be "mere repackaging" that was productive "only to the extent that it put an entire semester's resources in one bound volume for students" (*Basic Books*, 1991, pp. 1530–1531). Moreover, the Court viewed the nature of the copying to be commercial and therefore particularly harmful because it "competes in the same market as the copyrighted work" (*Basic Books*, 1991, p. 1532).

Under the amount and substantiality factor, the District Court inferred the copied excerpts to be qualitatively significant, "since that is the likely reason the college professors used them in their classes" and viewed them to be quantitatively substantial, as the readings ranged from 5–25% of the books, in some cases representing amounts "grossly out of line with accepted fair use principles" (*Basic Books*, 1991, pp. 1533–1534). Regarding the common view that copying from an out-of-print work may be more fair because it makes the work available, the Court was persuaded by the publishers' contrary view that such copying is less fair, "since permission fees may be the only income for authors and copyright owners" (*Basic Books*, 1991, p. 1533).

As for the fourth factor, the Court acknowledged that the "balancing of the four factors must be complete, relying solely upon no one factor" (*Basic Books*, 1991, p. 1533). At the same time, the Court appeared to support the proposition that the market effect is "undoubtedly the single most important element of fair use" by assessing this factor to weigh heavily against the copy shop because its copying was said to harm the publishers' ability to sell their books and collect permission fees, especially for out-of-print works (*Basic Books*, 1991, p. 1534).

The ultimate finding against fair use in this case seems to have been strongly influenced by the copy shop's profit motive, which the District Court said had "effectively created a new nationwide business allied to the publishing industry by usurping plaintiffs' copyrights and profits" (*Basic Books*, 1991, p. 1534). Importantly, however, the Court commented that its opinion "does not consider copying performed by students, libraries, nor on-campus copy shops, whether conducted for-profit or not" (*Basic Books*, 1991, footnote 13). The opinion thus left open the issue of whether fair use can apply to similar kinds of educational copying done without a profit motive.

Campbell v. Acuff-Rose Music, Inc. (Campbell, 1994)

The allegedly infringed work in *Campbell* (1994) was a music publisher's copyrighted song, which was adapted without permission by a rap musical group and its record company. The rap group argued its song did not infringe because it made fair use of the publisher's song through parody. The opinion of the Supreme Court of the United States began by asserting that fair use is an essential component of a properly working copyright scheme:

> From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts . . . .' For as Justice Story explained, 'in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.' (*Campbell*, 1994, p. 575, internal references omitted)

Ruling in favour of the rap group, the Court confirmed the intent of Congress was to maintain fair use as a judicially-determined area of law "not to be simplified with bright-line rules" that instead calls for "case-by-case analysis" of the four statutory fairness factors weighed together in light of the Constitution-defined purpose of copyright (*Campbell*, 1994, pp. 577–578).

According to the U.S. Supreme Court, the purpose and character factor mainly asks whether new works merely supplant the original works or alter them with "new expression, meaning, or message" to become transformative works, the kind that "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright" (*Campbell*, 1994, p. 579). But the Court also commented that "the obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution" (*Campbell*, 1994, p. 579, footnote 11). The Court noted that while transformative use is not strictly required for a use to be fair, if a new work is highly transformative, other factors that may weigh against fair use will become less significant (*Campbell*, 1994, p. 579).

In the Supreme Court's view, the nature of the work factor requires recognition that creative works are "closer to the core of intended copyright protection" than less expressive works (*Campbell*, 1994, p. 586). The Court observed, however, that in parody cases the factor may not offer much help "in separating the fair use sheep from the infringing goats," since parody, by definition, involves transforming signature parts of an existing work into a new work that humorously comments on the original (*Campbell*, 1994, p. 586).

The Court saw the amount and substantiality factor as a question of the reasonableness of the quantity and value of the part copied in relation to the entire source work, in light of the purpose of the copying. The first factor may have bearing on the amount factor, since "the extent of permissible copying varies with the purpose and character of the use," and facts relevant to an assessment of fairness under the amount factor may also be relevant to the fourth factor, since the amount used may indicate "the degree to which the [copy] may serve as a market substitute for the original or potentially licensed derivatives" (*Campbell*, 1994, pp. 586–587).

The Court said the fourth fairness factor asks whether market harm is caused by the unauthorized copying and whether the copying, if it became widespread, would substantially damage the potential market for the original work or its derivatives. The Court contrasted the presumption of market harm arising when non-transformative copying is used for commercial purposes with the absence of such a presumption associated with the rap group's transformative use, for which "market substitution is at least less certain, and market harm may not be so readily inferred," since the original and new work occurred in different markets (*Campbell*, 1994, p. 591).

Princeton University Press v. Michigan Document Services (Princeton, 1996)

The general circumstances and final outcome in *Princeton* (1996) were comparable to those in *Basic Books* (1991) despite a more complex judicial process. Three academic publishers sued a commercial copy shop for unauthorized copying of six excerpts ranging from 5–30% of their copyrighted books, which were produced as coursepacks sold to university students. The District Court's summary judgment of infringement was overturned by a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit. A subsequent majority vote of the active Sixth Circuit judges in favour of a full-court (en banc) rehearing resulted in a new majority opinion (8 of 13 judges) upholding the ruling of the District Court that the copying was not fair use. An application for leave to appeal (certiorari) was denied by the U.S. Supreme Court (*Princeton*, 1997).

The en banc Sixth Circuit's heavily market effect-weighted reasons for finding infringement for the most part echoed those of the District Court in *Basic Books* (1991). The Sixth Circuit took the position that the relative importance of the fourth factor is at least the first among equals, if not the most important factor, and accepted as proof of potential market harm the publishers' argument that they would stand to lose considerable licensing income if all copy shops were to cease paying permission fees for works reproduced in coursepacks (*Princeton*, 1996, paras. 17, 24). Emphasis was placed on the perceived commercial character of the copying, ready availability of licensing, and lack of transformative use, all of which weighed against fair use. In response to the copy shop's claim that "it is circular to assume that a copyright holder is entitled to permission fees and then to measure market loss by reference to the lost fees," the Sixth Circuit relied on case law to support the idea that "Congress has implicitly suggested that licensing fees should be recognized in appropriate cases as part of the potential market for or value of the copyrighted work" (*Princeton*, 1996, para. 26).

Different assessments of the nature of the work factor in the two cases may be due at least in part to the Supreme Court's analysis of this factor in *Campbell* (1994). Following *Campbell* (1994), the second factor in *Princeton* (1996) weighed *against* the copy shop because the copied works were perceived to contain creative expression rather than mere facts, whereas in *Basic Books* (1991) the factual nature of the copied works was the only factor that weighed *in favor* of the copy shop. As for the amount and substantiality of the copying, the Sixth Circuit said the quantity used was far beyond the safe harbour amounts in the *Classroom Guidelines* and the value of the copied works was self-evident because they had been selected by professors as required readings. The legislative history of the fair use provision was also reviewed and used as a justification for considering the *Classroom Guidelines* to be relevant despite not being law. The Sixth Circuit declined to address whether fair use would cover the copying if done by students or professors, noting this remained an open question (*Princeton*, 1996, para. 35).

Three Sixth Circuit judges wrote dissents that were joined by two other judges. Arguing that the copying easily qualified as fair use because the publishers' loss of licensing revenue failed to outweigh the public benefits of allowing the unpaid copying to occur, Chief Judge Martin suggested the majority opinion was "one of the more obvious examples of how laudable societal objectives, recognized by both the Constitution and statute, have been thwarted by a decided lack of judicial prudence" (*Princeton*, 1996, para. 64).

For Judge Merritt, the copy shop's unlicensed coursepack production was "permissible under the plain language of the copyright statute that allows 'multiple copies for classroom use'" (*Princeton*, 1996, para. 71). Judges Merritt and Ryan disagreed with the majority's focus on the copy shop's use rather than that of students who were the real users of the copies. Their dissents contended that flawed fairness analyses led the majority to conclude incorrectly that the copying was commercial in nature, overly large in terms of amount and substantiality, and insupportably harmful in terms of market effect.

Judge Ryan viewed the key question to be whether copying by a student that is fair use becomes unfair when done by a for-profit third party on behalf of the student. This dissent argued that the copy shop's use was non-commercial because it did not use the copies in the usual sense of selecting and marketing the copied works based on their meaning and significance. It viewed the majority's market effect analyses to be flawed on the basis that the copying did not compete in the publishers' market, since the market for the coursepacks was created by the professors who selected the readings for specific courses they were teaching.

Cambridge University Press v. Becker (2012-2020)

Cambridge University Press and two other academic publishers launched an infringement suit in 2008 against Georgia State University for unpaid copying of excerpts in amounts that ranged from under 2% to almost 30% of the publishers' books (*Cambridge*, 2012). The nature of the disputed copying was similar to that in *Basic Books* (1991) and *Princeton* (1996) except that the defendant was a nonprofit university rather than a commercial copy shop and the unpaid copies were distributed not as print coursepacks, but through the university's electronic reserve systems. The District Court inferred that the suit was organized by the CCC and the Association of American Publishers who jointly recruited three academic publishers to be the plaintiffs (*Cambridge*, 2012, p. 25).

After the publishers abandoned 25 of their initial 99 infringements claims mid-trial, the District Court dismissed 26 of the remaining claims because they failed to meet a prima facie case of infringement, found 43 claims met prima facie infringement but qualified as fair use, and found 5 to be successful infringement claims (*Cambridge*, 2012). On appeal, the Court of Appeals for the Eleventh Circuit reversed and remanded the District Court's 2012 opinion (*Cambridge University Press v. Patton*, 2014). The District Court reanalyzed 48 alleged infringement claims on remand, finding 4 to be infringement (*Cambridge*, 2016), but on appeal, the Eleventh Circuit found further analytical errors in the District Court's second opinion and again remanded the case (*Cambridge University Press v. Albert*, 2018). In another reanalysis of 48 allegedly infringing excerpts on remand, the District Court found 10 of the publishers' infringement claims to be successful and 38 claims to qualify as fair use (*Cambridge*, 2020a, 2020b). The following summarizes some key findings and analytical approaches in the five judicial opinions in this case.

Cambridge University Press v. Becker (2012)

In its initial opinion (*Cambridge*, 2012), the District Court held the fairness of the purpose and character factor to weigh strongly in favour of the defendants because the university was a purely nonprofit educational institution, and its use of the copied excerpts was for nonprofit educational purposes. On the nature of the copyrighted work factor, the Court found that while all works met the required creativity standard for copyright to subsist, their overall nature was informational rather than creative expression, which favoured fair use, as was the finding in *Basic Books* (1991).

Declining to use the *Classroom Guidelines* to analyze the amount and substantiality factor because they are not law, the District Court viewed the university's copying to be "mirror-image, nontransformative uses" that must therefore be quantitatively small to qualify as fair use (*Cambridge*, 2012, p. 65). The Court found the excerpts were usually a single book chapter, on average representing about 10% of the source book. In the Court's view, the commercial character of the copying in *Basic Books* (1991) and *Princeton* (1996) contrasted with the non-commercial character of the university's copying, which increased the amount of permissible copying by the university under the third factor (*Cambridge*, 2012, p. 66).

Regarding the substantiality of the excerpts, the District Court found almost none were the "heart of the book" or a "critical part," (*Cambridge*, 2012, p. 67) and was skeptical that selection by an instructor meant an excerpt was necessarily a core part of the source work. Professors' reasons for selecting the excerpts led the Court to find "all of the selections indeed did further the legitimate educational purposes of the course . . . [and] most were narrowly tailored to accomplish that purpose" (*Cambridge*, 2012, p. 71). In the end, to determine what amount was fair, the Court chose to "select a percentage of pages which reasonably limits copying and to couple that with a reasonable limit on the number of chapters which may be copied" (*Cambridge*, 2012, p. 71).

Under the market effect factor, the District Court reasoned that if a small excerpt from a book does not substitute for the whole book, actual or potential book sales will not be harmed no matter how widespread such copying might become (*Cambridge*, 2012, p. 74). Since fair use is an equitable doctrine and publishers have the right to collect licensing fees for uses of their works, the Court viewed unlicensed use to be "a powerful argument countering fair use" when licensing is readily available and reasonably priced (*Cambridge*, 2012, p. 80). The Court additionally observed that the university paid for permissions for commercially produced coursepacks, but digital licensing was generally unavailable from two of the plaintiff publishers (*Cambridge*, 2012, p. 78). The Court held the fourth factor to weigh strongly in favour of the publishers when a digital license was available for an excerpt and to weigh in favour of the university when a digital license was unavailable.

The Court introduced two proposed fairness factors beyond the four identified in the USCA—whether the university's unpaid copying would suppress authorship of new books and whether reduced permissions income would limit the publishers' ability to publish scholarly works. Analyses of the available evidence led the Court to answer both questions in the negative (*Cambridge*, 2012, pp. 82–86). Having considered all other factors, the Court returned to the third factor and determined permissible fair use amounts to be up to 10% of a work not divided into chapters or containing fewer than 10 chapters, and up to one chapter for works containing 10 or more chapters (*Cambridge*, 2012, p. 88).

Cambridge University Press v. Patton (2014)

An appeal of *Cambridge* (2012) was heard by the U.S. Court of Appeals for the Eleventh Circuit, which reversed and remanded the judgment primarily for erroneous use of an "arithmetic approach" that weighted the fairness factors equally and formulaically added them up without considering them together along with the purposes of copyright (*Cambridge*, 2014, p. 56). The Eleventh Circuit upheld the District Court's fair use finding under the first factor and found the second factor to be of little consequence, although it said the District Court had incorrectly assessed use to be fair across the board instead of finding it to be neutral, or unfair when "evaluative, analytical, or subjectively descriptive material" beyond bare facts was used (*Cambridge*, 2014, p. 81). The Eleventh Circuit relied on *Campbell* (1994) as the basis for giving the second factor little weight even though the disputed use in that case was parody rather than copying of academic texts.

The District Court's most serious error was held to be its "blanket 10-percent-or-one-chapter benchmark" used under factor three, which reflected a "hard evidentiary presumption" and "a rigid, bright-line approach" that failed to consider the amount and substantiality of each claimed infringement on a case-by-case basis (*Cambridge*, 2014, p. 83). While the District Court's application of the fourth factor was viewed to be correct, its weighting of the fourth factor was faulted for failing to recognize that the university's non-transformative use, coupled with the threat of licensing market substitution, posed potential serious market harm calling for greater weight (*Cambridge*, 2014, pp. 106–107). The Eleventh Circuit held the additional factors discussed by the District Court to properly belong under the four statutory factors.

Despite finding errors in the District Court's analyses, the Eleventh Circuit confirmed that fair use restricts the monopoly granted to authors in order to promote the societally beneficial purposes of copyright: "the fostering of learning and the creation of new works" (*Cambridge*, 2014, p. 51). The Eleventh Circuit also declined to regard the *Classroom Guidelines* as an indication of how much copying is fair use, given that the guidelines are not law and to use them would ignore the Supreme Court's teachings that fair use requires careful "balancing of interests" (*Cambridge*, 2014, p. 88).

Cambridge University Press v. Becker (2016)

Because the publishers did not dispute the finding of a lack of prima facie infringement for 26 of their claims, on remand the District Court was required to reconsider the fair use analyses for 48 infringement claims (*Cambridge*, 2016, p. 3). Its revised analytical approach was to adopt the Eleventh Circuit's "fair use model" (*Cambridge*, 2016, p. 11) to evaluate each claim under the four fairness factors, with the purpose and character factor favouring fair use in each case due to the nonprofit educational nature of the copying. The nature of the work factor was reanalyzed for each claim because the Eleventh Circuit had ruled the Court's initial decision to weight this factor in favour of fair use for all claims to be incorrect. Following the Eleventh Circuit's instructions, the Court conducted a more nuanced evaluation of the amount and substantiality factor that accounted for the nonprofit educational purpose of the copying under the first factor and effect of market substitution under the fourth factor and did not apply predefined percentage amounts. As well, the Court's reassessment of the market effect followed the instructions of the Eleventh Circuit to apply greater weight because the copying was viewed to be non-transformative and to be done for one of the purposes for which the source works were marketed, the central question being whether the unpaid copying, if it became widespread, would cause substantial harm to the publishers' licensing market for digital excerpts or to the value of the source works (*Cambridge*, 2016, p. 12).

Regarding the relative importance of each factor in light of the "nonprofit educational use of a mirror image of an excerpt," the District Court estimated that reanalysis would yield “initial, approximate respective weights of the four factors as follows: 25% for factor one, 5% for factor two, 30% for factor three, and 40% for factor four” (*Cambridge*, 2016, pp. 13–14). In the Court’s revised opinion, 43 excerpts originally held to be fair use remained fair use, but one of the excerpts held to be infringement in its first opinion was reassessed to be fair use, leaving just 4 successful claims of infringement for the publishers.

Cambridge University Press v. Albert (2018)

The Eleventh Circuit found the District Court on remand had erred in three ways: it overreached its limited mandate, which was to correct misapplications of the second and third factors and to correct errors in how it weighed the four factors; it repeated the error in its first opinion of using a mathematical approach to balance the four factors; and it incorrectly considered whether the licensing cost was excessive in cases where it found the third factor to favour fair use (*Cambridge*, 2018, pp. 15–16).

On the mandate error, the Eleventh Circuit said the District Court should not have changed any findings that the fourth factor weighed heavily against fair use when licensing for digital use was available because those findings were held to be correct in *Cambridge* (2014). As the only aspect of the fourth factor analyses in *Cambridge* (2012) that was faulted was undervaluing of the severity of market harm that could result from the university’s non-transformative copying, the Eleventh Circuit ruled that “the district court must reinstate its original findings that the fourth factor strongly disfavors fair use for the 31 excerpts for which the publishers proved the availability of digital licenses” (*Cambridge*, 2018, p. 19).

On the methodological error in how the factors were weighed together, the Eleventh Circuit said the District Court had corrected the problem of equal weighting of the factors, but had “failed to break free of its erroneous ‘arithmetic approach’” by again contemplating a quantitative rather than a qualitative balancing of the four factors (*Cambridge*, 2018, p. 20). The District Court was therefore instructed to “evaluate the four factors qualitatively, not quantitatively, and to take care to consider them holistically ‘in light of the purposes of copyright’” (*Cambridge*, 2018, p. 22).

On the error involving the cost of available licensing in analyses of the third factor, the Eleventh Circuit said in two instances the District Court incorrectly took into account whether the cost of available digital licensing was excessive. According to the Eleventh Circuit, this line of reasoning could problematically tilt most third factor analyses toward fairness, given that “it is *always* the case that a publisher’s ‘marginal cost for authorizing digital copies would be virtually nil, and would not vary no matter how many digital copies were authorized’” (*Cambridge*, 2018, p. 23).

The District Court was thus instructed to “omit any consideration of price from its analysis of the third factor” (*Cambridge*, 2018, p. 24).

Cambridge University Press v. Becker (2020a)

On remand, the District Court’s third analysis of 48 infringement claims used only the analytical approaches that had been approved or mandated by the Eleventh Circuit in *Cambridge* (2014) and *Cambridge* (2018). The Court found the purpose and character factor favoured fair use for all 48 claims. The nature of the work factor was most often assessed to be neutral (34 claims), with the remainder tilting toward unfairness (12 claims), or fairness (2 claims). In the majority of cases the amount and substantiality of copying was found to favour fair use (34 claims); the remainder disfavoured fair use (12 claims) or heavily disfavoured fair use (2 claims), with the copied excerpts representing the “heart of the work” in 3 claims.

As directed by the Eleventh Circuit, the Court assessed the market effect factor to strongly disfavour fair use each time the publishers demonstrated a ready market for licensed digital excerpts had existed in 2009 (31 claims) and to favour fair use when no evidence of an available digital market for excerpts was produced (17 claims). Of the 31 claims found to strongly disfavour fair use due to the availability of licensing, 21 were ultimately found to be fair use, in the main because licensing revenue data showed there was relatively little or no demand for excerpts of those particular works in 2009.

Discussion and Conclusion

The cases reviewed here reveal that by the early 2000s, judicial proceedings had determined unlicensed copying for educational purposes not to be eligible for coverage under any of the statutory users' rights provisions of Australian, New Zealand, and U.K. copyright law. Judicial reasons for finding classroom copying to require licensing have pointed to the existence of statutory (*Haines*, 1982) or collective (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002) licensing provisions in copyright legislation or have been founded on fairness analyses that failed to find the disputed copying to qualify as a statutorily permitted purpose (*Auckland*, 2002). As well, some judicial reasons relied on recommendations of government-commissioned copyright review committees of a bygone print-based era (Franki, 1976; Whitford Committee, 1977) that appear to reflect what has been referred to as an outdated “author-centric” view of copyright (*SOCAN v. Bell*, 2012). Author-centric reasonings hearkening back to a print-based era were also discernable in *Auckland* (2002, para. 24) when the High Court of New Zealand elected to adopt the approach to statutory interpretation used in *Longman* (1990), quoting favourably from that decision’s characterization of the defendants as “educational users who seek to be freed from the bounds of copyright protection.”

The original determination of the Copyright Board of Canada (2009) that classroom copying by K–12 teachers was for non-statutorily allowed purposes of instruction or non-private study followed the same path as Australian, New Zealand and U.K. jurisprudence on educational copying and fair dealing. When this case reached the Supreme Court of Canada, however, the lower court and tribunal rulings were overturned on the basis that the misapplication of *CCH* (2004) fairness factors rendered the Board's finding of unfair dealing to be unreasonable (*Alberta*, 2012). And while the Supreme Court declined to evaluate a university's claim that its educational copying qualified as fair dealing, the Court sharply criticized the lower courts' fairness analyses for their incorrect fixation on the perspective of the institution rather than that of the ultimate users of the copied material, thus confirming the possible applicability of fair dealing to copying or distributing course readings for student use (*York*, 2021).

How has unpaid educational copying fared under the U.S. fair use approach, in which any unauthorized use may potentially be shown to be fair under a fairness assessment that considers statutorily specified factors (USCA, s. 107)? The three U.S. educational copying cases considered here suggest that some strong dissents notwithstanding (*Princeton*, 1996), the traditional tendency to view authors' or copyright owners' statutory copyrights to be of prime importance, on the whole, remains strong. The unlicensed coursepack copying was found not to be fair use under all four factors in *Princeton* (1996) and, despite acknowledging copyright's goal of "fostering . . . learning and the creation of new works" and the careful "balancing of interests" performed by fair use (*Cambridge*, 2014, pp. 51, 88), the Eleventh Circuit insisted on greater weighting of the market effect factor due to non-transformative use and the threat of licensing market substitution, which, together were said to pose potentially serious market harm to the value of the copyrighted works. Course readings were found to be fair use only when no licensing market existed for a work or a licensing market existed but there was very little demand for licensed uses of the works (*Cambridge*, 2020a).

At different times, calls have arisen from jurisdictions with statutory fair dealing provisions (closed lists of allowed purposes) to adopt open-ended fair use instead as a more effective means of achieving the purposes of copyright (e.g., Craig, 2005; Johnson, 2019; Universities Australia, 2013; Whitford Committee, 1977). The presumption that allowing unpaid uses without enumerating permissible purposes may more easily enable equitable balancing of copyright's competing interests may be questionable, however. Burrell (2021, p. 159) found that UKCDPA amendments enacted in 2014 to significantly enhance users' rights have "had a largely unnoticed impact on the judicial politics of making decisions around copyright exceptions," due at least in part to the (pre-Brexit) requirement to interpret U.K. law in harmony with the European Union's Copyright and Information Society Directive.

10.17161/jcel.v9i1.23126

If "getting the language of the legislation right is only part of the battle" to substantively balance copyright owners' and public users' interests in creative works (Burrell, 2021, p. 172), it may be instructive to examine more closely how the judiciary has articulated its reasonings in decisions issued in educational copying cases. In Part 3 (Graham, 2026), rulings reviewed in this article are further explored with an eye to identifying underlying premises and principles for determining whether unpaid classroom copying can qualify as fair dealing or fair use. The objective will be to consider the extent to which premises and principles reflected in judicial opinions substantively advance an equitable balance between copyright's social and economic purposes, and whether options besides statutory and case law might provide practical tools for establishing better balance for individuals who wish to use copyrighted works in their various educational, creative, and cultural practices.

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