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Educational Copying – the “Very Antithesis of Fair Dealing” or Within Copyright’s “Breathing Space”? Part 3: Principles and Practices

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Educational Copying – the “Very Antithesis of Fair Dealing” or Within Copyright’s “Breathing Space”? Part 3: Principles and Practices

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Abstract

This article is the last in a three-part series investigating the kinds of uses of copyrighted textual works that educational institutions may make without permission or fee payment in five common-law countries. The principal concern is educational or classroom copying (unpaid educational uses providing students with access to learning materials such as course readings) and the extent to which such uses may be permissible under the provisions of statutory users’ rights (copyright exceptions and limitations).

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 3: Judicial Opinions

Introduction

This article is the last in a three-part series investigating the kinds of uses of copyrighted textual works that educational institutions may make without authorization or fee payment in five common-law countries. The principal concern is educational or classroom copying (educational uses providing students with access to learning materials such as course readings) and the extent to which such uses may be permissible under the provisions of statutory users’ rights (copyright exceptions and limitations). Part 1 (Graham, 2025) looked at justifications for copyright and then compared basic mechanisms of copyright, including statutory users’ rights, as presented in the copyright laws of Australia, Copyright Act 1968 (ACA); Canada, Copyright Act 1985 (CCA); New Zealand, Copyright Act 1994 (NZCA); the United Kingdom, Copyright, Designs and Patents Act 1988 (UKCDPA); and the United States, Copyright Act of 1976 (USCA). Part 2 (Graham, 2026) surveyed selected case law from the five jurisdictions to examine how the judiciary has interpreted the applicability of statutory users’ rights to classroom copying and other unauthorized (unlicensed or unpaid) uses of copyrighted materials.

Although provisions for unauthorized but lawful uses of protected works are today usually codified in statutory law, the doctrine of fair dealing/fair use was originally developed by the judiciary (Band & Gerafi, 2013; Burrell, 2001). It is therefore fitting in Part 3 to more closely examine the reasons for decisions in the educational copying cases discussed in Part 2, with an eye toward identifying and evaluating the analytical grounds on which courts and tribunals have ruled on matters involving the fairness of unpaid uses and the boundaries separating permitted from infringing classroom copying. This article explores the extent to which general principles suitable for assessing the fairness of unauthorized copying can be derived from premises arising in the judicial opinions, only some of which address this issue squarely. The exploration is organized under three themes: approaches to fairness evaluation, application of fairness factors, and third-party assistance. The discussion section reflects on what may distinguish common from contested grounds within judicial rulings in educational copying cases. It surveys stakeholder views on copyright’s imbalances vis-à-vis encouragement of human rights such as learning and freedom of expression, and considers possible paths toward achieving better balance between owners’ interests and the public interest in an inclusive and progressive society in which classroom copying flourishes as a robust, fair, and lawful practice for all educators and learners.

Approaches to Evaluating Fairness

Within the jurisdictions of interest in this study, how has the judiciary approached the evaluation of the fairness of unlicensed uses and to what extent can general analytical principles be discerned in their rulings? In cases involving claims of fair dealing or fair use for educational copying, the courts have generally addressed procedural aspects of assessing fairness in a similar manner. But at times they have adopted divergent approaches on other matters, including statutory interpretation and the role of copyright's balance.

Procedural Matters

Procedurally, fair dealing in Australia, Canada, New Zealand, and the United Kingdom is assessed within a multi-step analytical framework (*CCH Canadian Ltd v Law Society of Upper Canada*, 2004, para. 50; D'Agostino, 2008; *Haines v Copyright Agency Ltd*, 1982, p. 555; *Hubbard v Vosper*, 1971; *Longman Group Ltd v Carrington Technical Institute Board of Governors*, 1990, para. 6.1). The first step seeks to identify an authentic connection between the dealing and an allowed purpose. In Canadian copyright law, this is an easy bar to meet for educational copying, as education, research, private study, and criticism or review are among the enumerated fair dealing purposes in the CCA, and because the fair dealing purpose must be interpreted largely and liberally "to ensure that users' rights are not unduly constrained" (*CCH*, 2004, para. 51). The second step involving the "analytical heavy-hitting" (*Society of Composers, Authors and Music Publishers of Canada [SOCAN] v. Bell Canada*, 2012, para. 27) evaluates the extent to which the unauthorized copying is fair, this being comparable to the (one-step) analytical process required for assessing claims of fair use under the USCA. A third step involves source attribution when statutorily required for certain fair dealing purposes (e.g., criticism or review in the ACA, CCA, NZCA, and UKCDPA).

Fair dealing and fair use are judicially determined areas of copyright law that avoid bright-line delineations. Fair use claims in the United States are assessed case-by-case under the four statutory fairness factors, alongside consideration of copyright's purposes (*Campbell v. Acuff-Rose Music, Inc.*, 1994, pp. 577–578). In a similar manner, the fairness of a dealing in the other four jurisdictions is assessed using factors such as the amount and value of the dealing, and the effect of the dealing on the market for the source work, each of which may be more or less relevant depending on the facts of a particular case, with all factors considered together to assess the overall fairness of a dealing (*CCH*, 2004, paras. 60, 73; Handler & Rolph, 2003, 385–389; *Hubbard v Vosper*, 1972, paras. 15–20; *Longman*, 1990, para. 6.1). U.S. courts have disallowed quantitative, formulaic approaches to weighing fairness factors (*Cambridge University Press v. Patton*, 2014, pp. 83–84),

insisting instead on a qualitative, holistic approach that takes into account the purposes served by copyright (*Cambridge University Press v. Albert*, 2018, p. 22).

The procedural approaches followed by courts to assess fair dealing and fair use claims are thus guided by similar analytical principles requiring consideration of the relevant facts of each case individually, weighing of fairness under relevant fairness factors, and determining the overall fairness of a dealing or use in a holistic manner in light of the purposes of copyright. These principles accord with the approach taken in a leading U.K. case that acknowledged the impossibility of defining fair dealing but identified its broad parameters to include a “question of degree” and “a matter of impression” rooted in “the tribunal of fact” (*Hubbard v. Vosper*, 1971, para. 15).

Interpretational Approach

The plaintiff publishers in *Longman* (1990, para. 5.6) urged the New Zealand High Court to apply a strict interpretation of copyright exceptions on the basis that “they are defences in situations where otherwise there would be infringement,” whereas the technical institute defendant contended that a liberal interpretation was required, due to “the public interest in the availability and dissemination of knowledge and . . . the educational rights and requirements of New Zealanders.” In the end, the Court elected to adopt an approach that was neither strict nor liberal. But its casting of a “liberal” approach as one that favours “educational users who seek to be freed from the bounds of copyright protection” (*Longman*, 1990, para. 5.10) perhaps belies what the Canadian Supreme Court termed an “author-centric” view (*SOCAN v. Bell*, 2012). In fact, “owner-centric” may be more apt, given that authors usually transfer their copyrights to publishers and other corporate entities who then become the rights owners (Knopf, 1999, p. 125; Litman, 2018, p. 554). Twelve years later, the opposing parties in *Copyright Licensing Ltd v University of Auckland* (2002) submitted the same competing pleadings advanced in *Longman* about interpretational approach. The High Court’s adherence to the same approach it took in *Longman* would seem to indicate the enduring strength of the traditional owner-centric view of copyright.

The Supreme Court of Canada chose to adopt a strikingly different interpretational approach when it made the following determination:

The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively. As Professor Vaver . . . has explained: ‘User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.’ (*CCH*, 2004, para. 48)

Referring to the law society's claim of fair dealing in support of the research purposes of its members, the Court further ruled that "'research' must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained" (*CCH*, 2004, para 51). And in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, the Court confirmed its interpretational approach to assessing fair dealing claims was intentionally different from that of other jurisdictions: "courts in the U.K. have tended to take a more restrictive approach to determining the 'purpose' of the dealing than does *CCH*" (2012, para. 19).

The limited case law on educational copying and fair dealing or fair use suggests judicial approaches aiming to favour neither strict nor liberal interpretations may nevertheless be freighted with the bounds of traditional conceptions that, in effect, privilege copyright owners' exclusive rights and tend to regard "any benefit the public might derive from the copyright system [as] merely a fortunate by-product of private entitlement" (Craig, 2011, p. 73). More recent liberal interpretational approaches have followed a different path in construing copyright to be "remedial legislation" (Vaver, 2000, as cited in *CCH*, 2004) that calls for substantive balancing of copyright's public and private interests.

An analytical principle might be extracted from the more recent interpretational approaches that foregrounds copyright's remedial nature and questions strict adherence to past practice and precedents if they no longer seem fit for purpose. According to Burrell (2001, p. 381), in the United Kingdom "it is the judiciary as much as Parliament that has been responsible for the development of an overly restrictive approach to the copyright exceptions," a contention that may also be applicable in Australia and New Zealand, which have tended to follow the broad direction in which U.K. copyright law has developed. Principled judicial consideration of whether rigid adherence to past practice and precedents serves to balance just rewards for creators with fair public access to and use of creative works today would arguably help to ensure that the adopted interpretational approach bolsters the effectiveness of copyright as a public policy tool.

Copyright's Balance

CCH (2004) is the first Supreme Court of Canada ruling to consider a fair dealing claim through the lens of the copyright balance articulated in *Théberge v Galerie d'Art du Petit Champlain Inc.* (2002). Across the five jurisdictions, courts and tribunals before and after *Théberge* have referenced the idea of balance in cases involving fair dealing or fair use claims (e.g. *Cambridge*, 2014, p. 4; *Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002, para. 39), but realization of a "different balance" that places the public interest in making copyrighted works "readily available for genuine educational pursuits" (*Longman*, 1990, paras. 5.6, 5.3) on an

equitable footing with copyright owners' exclusive rights as of yet seems to remain relatively uncommon outside of judicial decisions arising in North America.

The seeming inability of statutory users' rights to play a substantive balancing role in some of the educational copying cases considered here is perhaps due to legislative decisions to address the issue of balance via policy levers other than exceptions to infringement, as noted above. Or in some jurisdictions, the manner and temporally distant era in which copyright's balance was shaped may today render interpretation of fair dealing as a positive users' right (Craig, 2021; Vaver, 2013) to be exceedingly challenging due to entrenched owner-centric structures and precedents. In any case, in the absence of statutory language ambiguities and statutory amendments specifically designed to recalibrate copyright's balance (e.g., Canada's 2012 Copyright Modernization Act), the judiciary may view its remit to be limited to interpretation of the text of legislation only, as did the New Zealand High Court in *Auckland* (2002).

At the same time, member countries are obligated to uphold the balance called for in international agreements involving intellectual property rights. One example is the WIPO Copyright Treaty preamble (1996, note 10), referencing "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention." Another is the World Trade Organization's TRIPS agreement, which presents the protection of intellectual property rights as a means to promote technological innovation "to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations" (Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994, art. 7). All five countries are signatories to both of these agreements, and to the International Covenant on Economic, Social and Cultural Rights (United Nations General Assembly, 1966). The Covenant recognizes universal human rights to education, to participate in cultural life, to enjoy benefits of scientific progress, and to benefit from moral and economic interests arising from authoring creative works (arts. 12, 15). As the right to benefit from one's own creative works is notably listed after other more fundamental rights such as education, interpretation of domestic copyright law should uphold commitments and principles enshrined in international economic and social agreements that obligate a balanced reading of copyright's monopoly in order to protect the universal public interest in accessing and using creative works.

The public interest in a properly balanced copyright scheme thus amounts to more than mere rhetoric. But statutory language is biased against the ability of users' rights to adequately counterbalance owners' rights in the copyright scheme. As noted by Vaver (2013, p. 109), "balancing rights against exceptions starts off with the scales biased towards rights and against exceptions," whereas true balancing of

owners' and users' interests is more likely to occur when we place comparable entities on the weigh-scales. In addition to weighing like entities, copyright's balance may be more readily realized if conceptualized as reciprocity between equally deserving parties in the manner posited by the Eleventh Circuit: "in a sense, the grant to an author of copyright in a work is predicated upon a reciprocal grant to the public by the work's author of an implied license for fair use of the work" (*Cambridge*, 2014, p. 50). Owners' and users' rights in copyright law may be more easily maintained on an equitable playing field if the reciprocity required to achieve a fair and balanced copyright system in theory (that is, as laid out in statutory law) is fully embraced by the judiciary, whose decisions impact the practices of both users of copyrighted materials and owners of copyright in those materials.

Application of Fairness Factors

How have judicial analyses of fairness factors addressed the purposes of copyright and the need for a substantive balance between public and private interests? Copyright statutes offer a small number of factors commonly used to assess claims of fair dealing or fair use: the purpose, character, amount, and market effective of the dealing or use, and nature of the copied work (Graham, 2025). In jurisdictions where fairness factors are not statutorily specified (Graham, 2026), case law offers similar factors as well as additional factors such as alternatives to the dealing, as suggested by the Supreme Court of Canada in *CCH* (2004). A further example in the ACA and NZCA is whether the work could have been obtained in a reasonable time at an ordinary commercial price (Graham, 2025). Some of the rulings examined in this study arose from questions posed by copyright collectives and universities who together sought guidance on the kinds of educational copying that may and may not qualify as fair dealing, while others are trial or appeal decisions involving fair dealing or fair use claims. It is nonetheless reasonable to assume that judicial views on what to consider in weighing fairness factors and how to weigh them can be useful, whether or not an actual claim of fair dealing or fair use was at issue.

Purpose Factor: Whose Purpose?

Court and tribunal deliberations on the fairness of unauthorized classroom copying have frequently paid close attention to the question of whose purpose is relevant. The resulting answers have sometimes differed widely. In *Longman* (1990, para. 6.3), the High Court of New Zealand determined the relevant purpose of the disputed coursepack copying to be that of the teacher and technical institute: "the dealing with the copyright works . . . is that by the tutor and the CTI not any dealings by the students. The dealing was . . . for the purpose of teacher use in the course. Student use was incidental to that use."

In a later case (*Auckland*, 2002), the New Zealand High Court arrived at essentially the same conclusion regarding the universities' proposed fair dealings for criticism or review purposes although the rationale was more complicated. The relevant purpose was held to be that of the person who copied the course readings because, in the Court's view, the copying had to be genuinely done by, or for, the person carrying out the criticism or review. As there was no suggestion that the disputed copying was a response to requests from particular students, the Court reasoned the real purpose of the copying had to be that of the copier—the teacher who made or ordered the copies. U.S. District Court rulings in *Basic Books, Inc. v. Kinko's Graphics Corp.* (1991) and *Princeton University Press v. Michigan Document Services* (1996) also held the purpose of the copying to be that of the copier—the copy shop—who produced the coursepacks containing unlicensed copies. In these rulings, the relevant purpose was held to belong to the party responsible for operating the copying device.

Instead of judging the purpose from the perspective of the copier, the Supreme Court of Canada held that proper recognition of fair dealing as a users' right requires assessment of the purpose from the perspective of the ultimate user in the first step of a fair dealing analysis (*Alberta*, 2012). The copier's purpose could be relevant in the second step if, for example, a copier had a motive for copying that was substantively different than that of the ultimate user. And in *York University v. The Canadian Copyright Licensing Agency* (2021), the Canadian Supreme Court reaffirmed the importance of identifying whose purpose is relevant when it criticized the lower courts' focus on the institutional perspective instead of the purpose of the students who were the intended users of the copied works.

Both of these rulings from the Canadian Supreme Court on whose purpose is relevant can be read as standing for the analytical principle that the purpose of the ultimate user of the copied material should be considered first when a multi-step fairness analysis is required, on the basis that statutory users' rights demand a large and liberal interpretation. Applications of this principle in educational copying cases have given rise to judicial conclusions that are markedly different from that of traditional owner-centric approaches (*Alberta*, 2012; *York*, 2021). Such outcomes resulting from careful consideration of whose purpose is relevant are readily recognizable as reflections of copyright's inherent need to balance private and public interests.

Purpose Factor: Separate or Unified?

Courts have not infrequently viewed teachers and students to have separate purposes in using copied materials. This distinction has been highly consequential when the ascribed purpose of teachers' educational copying is not only taken to be distinctly different from the purpose of students who use the copied works but is

also perceived not to fall within the language of statutorily allowed purposes. In such circumstances, courts have invariably been unable to see the educational copying as engaging a fair dealing purpose, which, in turn, has tilted the purpose factor toward unfair dealing (e.g., *Auckland*, 2002; *Haines*, 1982; *Longman*, 1990).

But the Supreme Court of Canada rejected the proposition that a substantive difference exists between teachers' purpose in making copies for student use and students' research or private study purposes on the basis that such an approach drives an "artificial wedge" between their unified purpose of furthering students' learning (*Alberta*, 2012, para. 24). The Court explained that when students are learning new curricular content, they generally lack sufficient knowledge to be able to identify and request information sources needed for their research and study. Since teachers make classroom copies because they are responsible for ensuring students have access to appropriate curricular materials, in the Court's view, "instruction and research/private study are, in the school context, tautological" (*Alberta*, 2012, para. 23).

Any doubts on whether the principle of unified teacher-student purposes applies to university-level copying of course readings should have been allayed by the affirmation of the Supreme Court in *York* (2021, para. 103) that "the purpose of copying conducted by university teachers for student use is for the student's education." The decades-old but arguably non-intuitive proposition that teachers and students have substantively different purposes in using classroom copies is, again, perhaps understandable only upon acknowledging the strength and tenacity of the bounds of traditional owner-centric views of copyright.

Purpose Factor: Commerciality?

In cases involving readings copied for students enrolled in a course, some courts have assessed the purpose of the use as tilting toward unfairness when the copying is perceived to be for commercial gain and toward fairness when the copying is for nonprofit instructional use. Indeed, this was the approach adopted in *Basic Books* (1991) and *Princeton* (1996) where U.S. District Courts found the copy shops' profit motive to reflect a purpose and character weighing strongly against fair use. But the three dissenting opinions in *Princeton* (1996, paras. 66, 79, 121) saw the purpose of the disputed copying as "a service . . . that promoted scholarship and higher education," since, in their view, the copy shop's alleged commercial use was "based on the number of pages copied, not the content of those pages," which meant the copy shop "did not 'exploit the copied material without paying the customary price,'" as was the case in *Harper & Row v. Nation Enterprises* (1985). Moreover, the Canadian Supreme Court has asserted the fair dealing purpose of research is "not limited to non-commercial or private contexts" (*CCH*, 2004, para. 51). In *Cambridge University Press v. Becker* (2012), the District Court found the

educational purpose and the non-commercial character of the university's copying to strongly favour fair use.

The traditional presumption that a commercial use will always weigh against fairness under the purpose or character factor sits uneasily as an analytical principle, since doing so could unduly prejudice a claim of fair dealing or fair use when the use is shown to involve "reasonable safeguards" (*SOCAN v. Bell*, 2012, para. 36) and to advance copyright's primary goals. As well, the premise that exploiting a work without paying the "customary price" will generally disfavour fairness seems ill-suited as an analytical principle for copying done for educational, research, or study purposes, since a price established by custom between willing sellers and buyers may not serve the public interest if only well-resourced schools or well-off students are able to afford customary prices charged for educational copying. Such an inegalitarian result would be conspicuously inconsistent with the international covenant that recognizes the universal human rights to education and to enjoy benefits of scientific progress such as access to scholarly publications (United Nations General Assembly, 1966).

Less controversially, the Australian Federal Court disagreed with the copyright collective plaintiff that a public university's coursepack copying was "for a financial profit," dismissing the collective's claim that making and selling the coursepacks was disallowed under the statutory education licence (*Copyright Agency Ltd v Victoria University of Technology*, 1994). The U.S. District Court in *Cambridge* (2012) also held the purpose and character factor to weigh strongly in favour of the defendants because the university was a nonprofit educational institution, and the disputed copying was for nonprofit educational purposes. Considered together, these rulings suggest an analytical principle that unauthorized copying for nonprofit educational purposes by nonprofit educational institutions will tend to favour fairness, as such use contexts do not involve the complicating factor of commercial intent and clearly promote the public interest in encouraging learning by providing students with access to creative and educational works.

Purpose Factor: Immediacy, Legitimacy, Genuineness, Geography?

Courts have considered the purpose factor from several other angles in weighing the fairness of unpaid copying. In its deliberations on the meaning of restricting fair dealing for research or private study to one copy "on any one occasion" (NZCA, s. 43(4)), the High Court of New Zealand confirmed this provision to contemplate an individual making their own copies or asking someone else to make copies on their behalf for research or private study. The Court nonetheless declined to accept the proposition that the provision can apply to copies made by a university on behalf of students because the "immediacy of the relationship between the copying and the purpose would be lost" (*Auckland*, 2002, para. 59). The

analytical principle implied by this concern—that a temporally-bound relationship must be maintained between an act of copying and the purpose for copying in order for fair dealing to be applicable—is an opaque and therefore unconvincing basis for assessing the fairness of the copying, however. This difficulty remains when “one occasion” is understood to involve copying by a third party on behalf of an entire class of students for the purpose of research or private study as was proposed by the universities, since each student is entitled to exercise fair dealing for allowed purposes.

In *Longman* (1990, para. 6.4), the High Court of New Zealand inferred the purpose of the coursepack copying 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.” Characterizing the purpose of the copying as enabling the instructor to “avoid” carrying out their teaching responsibilities seems to impugn the legitimacy of the instructor’s motivations, since it implies the instructor unprofessionally or unethically aimed to cut corners or free-ride on others’ labour. Attempting to evaluate the legitimacy of the purpose of unauthorized copying may be, at best, questionable as an analytical principle for assessing fair dealing or fair use claims.

A more fertile neighbouring ground on which the judiciary has assessed the fairness of an unpaid use is the extent to which an asserted purpose cloaks an ulterior motive or is genuine. The Supreme Court of Canada did not agree with the Copyright Board and the copyright collective plaintiff that students’ research and private study purposes were ultimately distinct from teachers’ instructional purposes. But from cases cited by the collective in support of that view, the Court extracted an analytical principle: “these cases, . . . to the extent that they are germane . . . stand for the . . . principle that copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purposes of the ultimate user” (*Alberta*, 2012, para. 21). Here, the Court was willing to consider the possibility that the purpose of a copier may be substantively different from the genuine purpose of the ultimate user when evidence credibly demonstrates the intent of the copier is to hide their true purpose “behind the shield of the user’s allowable purpose” as a means of pursuing a separate purpose that weighs against fair dealing (*Alberta*, 2012, para. 22).

The Supreme Court of Canada also considered but discarded as unsuitable the proposition that geography—the physical configuration or location of a dealing—is relevant in weighing the purpose of a dealing. Disagreeing with the Federal Court of Appeal and the Copyright Board that “private study” excludes use by students in a group or class setting, the Supreme Court held that “focusing on the geography of classroom instruction rather than on the concept of studying . . . artificially separate[s] the teachers’ instruction from the students’ studying” (*Alberta*, 2012,

para. 27). This judicial determination suggests an analytical principle that understands the fair dealing purpose of private study to encompass studying and learning by a student in diverse contexts, including individual and group study, as befits the large and liberal interpretation of the users' right of fair dealing mandated by *CCH* (2004, para.51).

Thus, the immediacy, legitimacy, and geography of the disputed copying have not been widely adopted by the judiciary as considerations that weigh against the fairness of unauthorized uses. On the other hand, courts may consider the genuineness of a copier's purpose if ulterior motives are suspected.

Character Factor: Transformativeness, Spontaneity, Aggregate Size?

Following Leval (1990) and the U.S. Supreme Court (*Campbell*, 1994), under the purpose and character factor, U.S. courts consider the extent to which an unauthorized use is transformative in the sense that the use transforms what is copied into something that has new value or produces a new use (e.g., *Basic Books*, 1991; *Cambridge*, 2012; *Princeton*, 1996). But the concept of transformative use is not necessarily accepted in other jurisdictions as a relevant consideration in fairness assessments. The Supreme Court of Canada, for example, has to date declined to adopt this concept as a fairness factor:

even if [transformative use] were a requirement under American law, this Court has previously cautioned against the automatic portability of American copyright concepts into the Canadian arena, given the 'fundamental differences' in the respective legislative schemes . . . This caution has resonance in the fair dealing context (*SOCAN v. Bell*, 2012, para. 25).

The concept of transformative use also lacks common currency in Australian, New Zealand, and U.K. copyright law, although it has been proposed as a useful addition (e.g., Gowers, 2006; Johnson, 2019; Pappalardo & Fitzgerald, 2015).

The High Court of New Zealand saw fit to consider prior negotiations between the Book Publishers Association (BPA) and educational institutions who sought to reach agreement on the kinds and amounts of copying that may be fair dealings (*Longman*, 1990). At one stage of those negotiations, BPA expressed a willingness to view multiple copies for class use as fair dealing as long as the copying was "at the instance and inspiration of an individual teacher and not directed by a head of department or the governing body" (*Longman*, 1990, para. 5.17). The High Court said the character of the institute's copying failed to come close to that "high water mark," as the disputed coursepack was not "a multi-copy of a copyright work made spontaneously by a teacher for a specific class at a particular time of which no compilation was made" (*Longman*, 1990, 5.18, 5.20). The lack of a substantiating

rationale for considering classroom copying that has a spontaneous character to favour fairness does not commend it as a useful analytical principle.

As for the size of an unpaid use, when a disputed use is large in terms of aggregate amount used, the character factor might intuitively be assumed to weigh against fairness. The Supreme Court of Canada warned against allowing the aggregate size of dealings to cloud a proper fairness evaluation, however: “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” (*York*, 2021, para. 105). The Court’s note of caution suggests an analytical principle that the institutional size of a user who claims fair dealing or fair use should not be presumed to influence the fairness of an unauthorized use with regard to the character of the dealing or use, since “large-scale organized dealings” are not inherently unfair (*Alberta*, 2012, para. 29; *SOCAN v. Bell*, 2012, para. 43).

Amount Factor: How Much, How Valuable?

Court rulings on the broad issue of how much unpaid use is fair have established the amount factor to encompass quantitative and qualitative assessments of the fairness of how much is used as a proportion of the entire source work (*Campbell*, 1994, pp. 586–587; *CCH*, 2004, para. 56; *Hubbard v Vosper*, 1971, para. 15; *Longman*, 1990, para. 6.1) although in *Universities UK Ltd v Copyright Licensing Agency Ltd* (2002, para. 34), the Copyright Tribunal primarily considered the amount factor quantitatively during its royalty rate-setting deliberations. The fairness of the amount used may be influenced by the purpose of the dealing, and it is possible to deal fairly with an entire work (*CCH*, 2004, para. 56). As for the fairness of repeated copying (e.g., the total number of pages copied from a source for more than one class or for many students in one class), the Canadian Supreme Court has repeatedly insisted that the extent of aggregate copying is properly assessed under the character factor rather than the amount factor (*Alberta*, 2012, paras. 28–29; *SOCAN v. Bell*, 2012, paras. 41–42; *York*, 2021, para. 104).

When assessing a fair use claim, the amount and substantiality factor focuses on the reasonableness of the quantity and quality or value of what is copied in relation to the whole source work (*Campbell*, 1994, pp. 586–587; *CCH*, 2004, para. 56). The substantiality of unpaid classroom copying reflects the degree to which a use involves the “heart of the book” or a “critical part” (*Cambridge*, 2012, p. 67). In the U.S. District Court’s second reanalysis of 48 infringement claims on remand, the 12 claims found to disfavour fair use under the amount and substantiality factor included three that were assessed to constitute the heart of the source work, one of which was quantitatively small at less than 7% of the book (*Cambridge University Press v. Becker*, 2020, p. 85). This finding, along with the teachings of the U.S. and

Canadian Supreme Courts, suggest an analytical principle that regards both “how large” and “how valuable” to be important aspects to consider in an assessment of the fairness of the amount factor for an unpaid use.

Fair use analyses under the amount and substantiality factor also consider whether the purpose and character of the copying is relevant to how much copying is permissible, and if the amount used should influence the weighting of the market effect factor in terms of the extent to which the use competes in the same market as the original or in potential licensing markets (*Campbell*, 1994). In the United States, the Eleventh Circuit held that analyses of the third fairness factor should not consider the “price of the unpaid use” on the basis that doing so could tilt most analyses toward fairness even when large amounts are copied, the concern being that marginal costs of granting digital licensing will always approach zero and be unaffected by the number of licensed uses (*Cambridge*, 2018, pp. 22–24). But even assuming this were the case, it is unclear that consideration of digital licensing costs in analyses of the amount factor would necessarily obstruct the achievement of copyright’s purpose or be inherently unfair to copyright owners if appropriately weighted in the assessment of overall fairness. As the Eleventh Circuit’s ruling on this issue perhaps reflects a presumption that licensing revenue is an owners’ right that normally should be protected, always barring consideration of “the price of the unpaid use” may be unsuitable as a general principle for assessing fairness under the amount factor.

The amount and substantiality analyses in earlier U.S. coursepack copying cases (*Basic Books*, 1991; *Princeton*, 1996) accepted the propositions that the mere fact of professors’ selection of the copied excerpts indicated qualitatively significant uses and that the *Classroom Guidelines* (*Cambridge*, 2014, p. 22, note 12) were relevant and appropriate sources to consider in assessing the quantity used. But these two conclusions have not been followed in evaluations of the amount factor in more recent cases involving educational copying (e.g., *Cambridge*, 2012; *Cambridge*, 2014). This may signal a general commitment to the principal that “how much” is taken is to be assessed qualitatively and quantitatively on the understanding that some unpaid educational uses can be, on balance, fair, and therefore capable of equitably advancing the purposes of copyright.

Nature of the Work Factor: Public Interest, Expressiveness, Expected Rewards?

Within the cases considered in this study, the nature of the copied work has tended to be lightly weighted in judicial assessments of whether educational copying is fair dealing or fair use. The nature of works typically used as course materials may nonetheless deserve significantly greater weight in fairness analyses of unpaid educational uses. The Canadian Supreme Court suggested that copying an

unpublished work that is not confidential may tilt toward fairness if the result is wider access to the work, since dissemination of works is a key goal of copyright (*CCH*, 2004, para. 58). The Court also found the nature of copied judicial opinions and works needed for legal research to weigh in favour of fair dealing because of the public interest in having unconstrained access to legal materials (*CCH*, 2004, para., 71).

For fair use claims, the nature of the work factor has been assessed in terms of the extent to which the copied work is creative or expressive, given that a purpose of copyright is to encourage production of creative works. The U.S. Supreme Court established the principle that unpaid copying of “less expressive” works may be more fair, as they are not the principal kinds of works that copyright is intended to protect (*Campbell*, 1994, p. 586). But in its second reanalysis of 48 nonfiction infringement claims on remand, the U.S. District Court in *Cambridge* (2020, pp. 142, 156) found only two claims to favour fair use under the second factor on the basis that the copied excerpts reflected few author opinions or experiences or were not particularly evaluative or analytical in nature. For the majority of the 48 analyzed claims, the nature of the work was found to be neutral because the copied excerpts contained, at most, moderate amounts of opinion, or a mix of subjective and objective content; 12 claims were found to weigh against fairness under this factor because author opinion or analysis were viewed to be dominant (*Cambridge*, 2020).

Canadian and U.S. case law thus offer differing grounds for assessing the fairness of unauthorized use in terms of the nature of the work used. In the leading Canadian case (*CCH*, 2004, para.71), the nature of the copied works supported a finding of fair dealing due to the public interest in having access that was “not unjustifiably restrained” to case law and other works needed for legal research. If fairness relating to the public interest in access to legal works can be extended to scholarly works in other fields such as those represented in postsecondary course readings, most, if not all, of the infringement claims in the most recent U.S. educational copying case (*Cambridge*, 2020) would likely favour fair use under the second factor, as all of the excerpts were selected by professors from scholarly publications for their relevance to instructional objectives in subject areas deemed important to include in university curricula.

In contrast, the Eleventh Circuit’s instruction to assess the fairness of “evaluative, analytical, or subjectively descriptive material that surpasses . . . bare facts . . . or derives from the author’s experiences or opinions” as neutral, if not unfair, under the second factor (*Cambridge*, 2014, p. 81) led the U.S. District Court to find only two infringement claims favouring fair use for lack of much expressive content. The Eleventh Circuit’s approach to the nature of the work factor, in effect, leans toward treating classroom copying of scholarly works in certain disciplines as

presumptively unfair, since academic works in some humanities and social sciences rarely constitute bare objective facts stripped of authorial opinions, evaluations, and personal knowledge, as is suggested by results of the District Court's reanalyses in *Cambridge* (2020). Had the disputed readings in the *Cambridge* case been drawn, for instance, from mathematics or chemistry sources, fairness analyses under the nature of the work factor might have been quite different, since scholarly writing in these disciplines, compared to those in the humanities and social sciences, may be less expressive and may focus on objective facts, theorems and other phenomena that typically are not copyrightable.

Consider as well, that the academic nature of the copied works in the U.S. coursepack and electronic reserves cases (e.g., *Basic Books*, 1991; *Cambridge*, 2012) was neither as strongly expressive nor as highly commercial in nature in comparison to the highly creative and commercial nature of the musical work at issue in *Campbell* (1994), which the U.S. Supreme Court suggested was closer to the heart of what copyright is intended to protect. Under an approach that accounts for the degree of authors' expectations of economic reward, assessing an infringement claim under the nature of the work factor would tend to disfavour fairness for works authored chiefly for economic gain or under contract or as a work made for hire. Conversely, such an approach would tend to favour fairness for scholarly works authored mainly for non-economic rewards such as a desire to disseminate novel research findings, to make progress along a research or academic career path, or to contribute to the development of knowledge within a particular field of endeavour.

The Supreme Court of Canada's approach to the nature of the work factor in respect of scholarly and research-based works is thus perhaps more readily adaptable as a principle for determining fairness of unpaid copying than that of the U.S. Eleventh Circuit. According greater weight to the nature of scholarly works on the basis of their tremendous potential to advance student learning and benefit human progress and low authorial expectations of economic rewards comes well within a fair and equitable balancing of copyright owners' rights and the public interest in access to scholarly and educational works. When a scholarly work is used without authorization, an analytical principle that favours fairness under the nature of the work factor may be supported by two facts unless it can be shown that one or both are inapplicable: academic authors are generally motivated to produce scholarly works for non-economic rewards (e.g., Burrell & Coleman, 2009, pp. 113–114; *Cambridge*, 2012, pp. 81–82; Franki, 1976, para. 1.18) and markets for licensed excerpts are usually neither the only nor the primary markets for scholarly monographs and anthologies (*Cambridge*, 2012, pp. 82–86). Applied to scholarly works written primarily for purposes other than financial gain, such a principle would promote the dissemination of works that encourage learning and human progress and would yield broad societal benefits such as a more informed citizenry

that likely outweigh potential dilution of copyright's objective of encouraging the production of creative works.

Alternatives to the Dealing Factor: Availability of Substitutes or Licensing?

Within the statutes and cases considered in this study, only Canadian case law suggests that alternatives to the dealing may be a relevant consideration in assessing the fairness of unauthorized uses. In the view of the Supreme Court, it may be less fair to copy from a protected work if a non-copyrighted alternative is available that could be used instead, or if the dealing is not "reasonably necessary to achieve the ultimate purpose" (*Alberta*, 2012, para. 31; *CCH*, 2004, para. 57). Taking only what is needed to address the ultimate user's need or purpose is arguably a reasonable and prudent principle to follow for anyone wishing to engage in fair dealing or fair use. At the same time, in higher education settings, suitable non-copyrighted alternatives to a particular scholarly or creative work may, in many cases, be scarce.

More consequential is the determination of the Canadian Supreme Court that the availability of licensing is not relevant to assessing the fairness of unauthorized dealings. The Court reasoned that allowing a copyright owner to offer licensing for certain uses of a work and then to invoke as proof of unfair dealing the fact that a user did not acquire a licence would bestow an unfair monopoly on the rights owner that conflicts with copyright's required balance between owners' and users' rights (*CCH*, 2004, para. 70). This rationale is noteworthy not least because it suggests a principle for analyzing fairness on grounds that have produced divergent conclusions in U.S. fair use cases under the market effect factor. An example is the Sixth Circuit's recognition of the problem of circular reasoning in *Princeton* (1996, para. 26, footnote 4) regarding an owner's right to offer licensing and also to claim infringement against a user who does not obtain a licence. The Sixth Circuit addressed this problem by citing with approval a ruling in another case involving unpaid copying of journal articles that were circulated to employees of a commercial entity:

It is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use. The vice of circular reasoning arises only if the availability of payment is conclusive against fair use. (*American Geophysical Union v. Texaco*, 1995, p. 931)

The Eleventh Circuit also approved of the circularity-evading rationale of *American Geophysical* (1995) above, holding that "the ability to license does not demand a finding against fair use" and further, that publishers could not "head off a

defense of fair use by complaining that every potential licensing opportunity represents a potential market” (*Cambridge*, 2014, pp. 95, 998). The extent to which the Eleventh Circuit escaped circularity with respect to the availability of licensing is discussed in the Market Effect Factor: Licensing Market? subsection, below. While there is wide acceptance of the analytical principle that circular reasoning must be avoided, suffice it to say here that as a potential consideration in fairness analyses, courts have ruled on the relevance of available licensing for unpaid copying in decidedly different ways.

Market Effect Factor: Market Substitution?

Courts have tended to find unfairness when unpaid copying is shown to harm or usurp the copyright owner’s place in the market for the source work, key issues being actual or potential market substitution and harm to the value of the owners’ copyrights (USCA, s. 107). In *Longman* (1990, para. 6.7) the High Court of New Zealand said the institute’s coursepack “may not have been produced to compete commercially with the copyright works [but] did . . . compete factually.” The U.S. District Court in *Basic Books* (1991, p. 1532) appeared to be of a similar mind when it found the copy shop’s unlicensed copying of book chapters for inclusion in coursepacks to be unfair because it perceived the copies to “compete in the same market as the copyrighted work.” The Australian Federal Court impliedly shared the same view when it stated that the director of education’s memorandum interpreting how fair dealing applied to educational copying was a document “in which a person in a position of high authority purports to state the law, and to counsel action, to a very large number of subordinates in such a way that breaches of the rights of the plaintiffs will almost certainly occur” (*Haines*, 1982, p. 560).

The judiciary has not always shared the view of copyright owners that unauthorized copying of excerpts competes in owners’ existing or potential markets. In a case factually comparable to *Basic Books* (1991), dissenting judges in *Princeton* (1996) disagreed that the university’s coursepacks competed in the publishers’ market for their books, with one judge suggesting that the market for the unlicensed copying was created not by the publishers, but by the professors who selected the readings for inclusion in the coursepacks (*Princeton*, 1996, paras. 156–157). In *Alberta* (2012, para. 36), the Canadian Supreme Court found it “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.” The U.K. Copyright Tribunal was similarly “wholly unpersuaded by the evidence that course packs are in fact, in the main, a substitute for textbooks” (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002, para. 84). Publishers have generally failed to provide credible evidence that unpaid educational copying has harmed their potential book markets, as other factors have

likely contributed to lower book sales (*Alberta*, 2012, para. 33). Requiring clear and credible evidence of undue market harm caused by unlicensed dealings or use may thus serve as a useful analytical principle for evaluating the fairness of unpaid copying under the market effect factor.

Market Effect Factor: Licensing Market?

Fairness assessments of educational copying in terms of its effect on the potential market or value of the copied works in U.S. case law have more recently centred on the availability of a licensing market for excerpts. An earlier focus on whether disputed copying, if it became widespread, would substantially damage the potential market for the work or its derivatives (*Campbell*, 1994, p. 591), has subsequently broadened to include whether a reasonably priced, ready market for licensing exists, which “Congress has implicitly suggested . . . should be recognized in appropriate cases as part of the potential market for or value of the copyrighted work” (*Princeton*, 1996). The Eleventh Circuit further refined the fairness analysis for unpaid copying of excerpts under the market effect factor by clarifying that the market it was primarily concerned with was not that of the original works or their derivatives, but instead a licensing market that permits the publishers’ works to be used “in a particular way” (*Cambridge*, 2014, p. 98). Presumably an example of a “particular way” is using digital excerpts as course readings.

According to the Eleventh Circuit, the absence of a licensing market for excerpts implies a publisher’s rational decision not to create that particular market after assessing the likely value to be negligible (*Cambridge*, 2014, p. 98). In such cases, unpaid uses will favour fair use under the market effect factor. But the flip side of this logic demands recognition that a publisher wishing to receive licensing revenue whenever excerpts of their works are used may decide to create the relevant market by systematically registering all of their works for excerpt licensing with the CCC or by offering the same through other permissions offices. It is a publisher’s prerogative to offer licensing for use of their copyrighted works, and indeed, doing so on a systematic basis is a rational decision if the goal is to extract the greatest monetary value from their interests in a work as the copyright owner or exclusive licensee. In fact, for each of the source works containing the 17 infringement claims for which no digital licensing option existed in 2009 (*Cambridge*, 2020), pay-per-use licensing is now available through the CCC.¹

It is thus difficult to be comforted by the idea that some space is reserved for unpaid educational copying as envisioned by the Eleventh Circuit, since the existence or absence of that space is under the complete control of copyright owners who can choose to create and occupy licensing markets. It is true that some

¹ In June 2023, the author verified that the CCC’s Marketplace platform offers licensing to higher education institutions permitting posting of excerpts on electronic reserves systems for the 17 books.

of the infringement claims in *Cambridge* (2020) for which licensing was available were found to be fair use, but only when publishers' sales records indicated very low demand for excerpts from those works. On this basis, classroom copying of excerpts may be fair use under a heavily weighted market effect factor only when the excerpt is not in high demand within academe, a scenario inescapably reminiscent of an inegalitarian and haphazard "by-product of private entitlement" (Craig, 2011, p. 73).

Despite the intention to side-step the danger of circular reasoning arising when the availability of licensing is deemed to be relevant to assessments of the fairness of unpaid use (*Cambridge*, 2014, p. 98), the Eleventh Circuit's approach to the market effect factor ultimately fails to avoid circularity and therefore seems unsuited for service as an analytical principle in fairness analyses. The fact that a publisher or rights owner can choose to make all of its works available for licensing solidifies the owner-centric status quo in which copyright owners' exclusive rights more often than not seem to outweigh the public interest in ensuring at least some access to protected works is permissible for purposes that are broadly beneficial to society as a whole.

Market Effect Factor: Licensing Fee Rates?

Another aspect of the market effect factor that the judiciary has had occasion to address is whether licensing fee rates for coursepack copying should be higher than the rates for other kinds of copying permitted under blanket licensing. When obliged to operate under a blanket licensing regime, universities have sought to negotiate flat licensing fee rates since the purpose and use contexts of educational copying are essentially the same, regardless of who initiates the copying, how many users are involved, and the form or mode in which the copying is disseminated. Tribunals have tended to view the matter differently. The Australian Copyright Tribunal determined a higher remuneration rate for coursepacks was justified because "universities are saved some of the expense of keeping multiple sets of books in their libraries" and the more "permanent" nature of coursepacks made them more valuable than "throw-away" class handouts (*Copyright Agency Ltd v University of Adelaide*, 1999, paras. 24, 26). For its part, the U.K. Copyright Tribunal agreed with the universities that coursepack copying should be folded into the blanket licence for higher education institutions, but was also persuaded that simplification of the licence should come at the cost of a substantial increase to the payable royalty rate for coursepack copying to offset the copyright collective's loss of a separate coursepack licensing market (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002).

The extent to which these reasons for differentiated fee rates serve as useful principles for determining fair licensing or remuneration rates seems doubtful. In

general, universities have never been able to stock their libraries with class sets of course texts. Moreover, neither the permanence of a copy nor the idea that simplifying an administrative system must come at a cost to educational users appear to be tied to evidence showing unfairness or that they represent barriers to achieving the objective of maintaining equilibrium between social and economic interests in the scheme of copyright. The Supreme Court of Canada rejected the suggestion that relying on fair dealing unfairly allows an institution to save on blanket licensing expenses, noting that “funds ‘saved’ by proper exercise of the fair dealing right go to the University’s core objective of education, not to some ulterior commercial purpose” (*York*, 2021, para. 103).

Summary: Fairness Factors in the Five Jurisdictions

As judicial analyses of the fairness of unauthorized classroom copying across the five jurisdictions are unevenly available, it is instructive to review what court and tribunals in each jurisdiction have expressed about commonly considered factors.

Purpose

Australia. In Australia’s single court case that examined whether educational copying can be fair dealing, the Federal Court said the ACA distinguishes between research or study purposes and the institutional activity of making copies for teaching purposes. The Court held fair dealing to be inapplicable to classroom copying for purposes of research or study because the ACA’s statutory education license provisions were expressly enacted to cover “making copies for teaching purposes” (*Haines*, 1982). But in a test case on whether the statutory license covered coursepack copying, the Court ruled that universities do not have a commercial purpose and therefore do not infringe copyright when coursepack fees charged to students include amounts to recoup production costs (*Copyright Agency Ltd v Victoria University of Technology*, 1994). The Australian judiciary has thus determined fair dealing for research or study to be inapplicable to classroom copying.

Canada. The Supreme Court closely examined the purpose factor in two cases addressing the applicability of fair dealing to educational copying. Since fair dealing is a users’ right, the Court reasoned that the relevant purpose in the first step of a fairness analysis belongs to the intended ultimate user of the copied extract (*Alberta*, 2012; *York*, 2021). The Court viewed teachers and students to have unified rather than separate purposes vis-à-vis classroom copying due to the shared goal of student learning. The Court deemed the genuineness of a copier’s purpose to be relevant if they tried to cloak an ulterior purpose under the ultimate user’s allowed fair dealing purpose but said the geography of a use is not a relevant aspect of

evaluating the purpose of a dealing (*Alberta*, 2012). In other copyright cases, the Court affirmed fair dealing for research purposes is not limited to non-commercial uses (*CCH*, 2004; *SOCAN v Bell*, 2012). These Supreme Court rulings suggest the purpose of classroom copying will often favour fair dealing.

New Zealand. In the *Longman* (1990) test case, the High Court viewed the institute's copying for "the purpose of teacher use in the course" to be separate from student use, which was "incidental to that use" (*Longman*, 1990). By framing the copying as enabling instructors "to avoid" preparing teaching materials themselves, the Court cast doubt on the legitimacy of the copier's purpose (*Longman*, 1990). Responding to a joint application on whether some copying by universities could be fair dealings outside of the blanket licensing scheme, the High Court said the relevant purpose was that of the party doing the copying (*Auckland*, 2002). The Court held that the NZCA's fair dealing provision permitting the making of one copy of a work "on any one occasion" for research or study purposes could not apply to classroom copying due to the risk of losing the "immediacy of the relationship between the copying and the purpose" (*Auckland*, 2002). As the Court held that the institutional copier's purpose was to make readings available for students to copy themselves which is not a statutory fair dealing purpose, copying by New Zealand universities on behalf of students is understood not to be fair dealing for research or study purposes (*Auckland*, 2002).

United Kingdom. In the single case involving educational copying, the issue of whether fair dealing could apply to multiple copies for course use was a relatively small part of the questions to be resolved by the Copyright Tribunal (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002). The universities argued that much of their copying under the blanket license qualified as fair dealing, thus meriting a reduction in the payable royalties. Addressing the fair dealing question with little examination of fairness factors, the Tribunal held that because the UKCDPA's fair dealing provisions for research and private study purposes are for personal uses, they normally do not apply to making multiple copies for others (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002). The Tribunal also noted the absence of general statutory fair dealing provisions for purposes of instruction or tuition (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002).² Fair dealing for research or study purposes is therefore understood to be inapplicable to classroom copying by U.K. educational institutions.

United States. Of the five jurisdictions, the United States has the most extensive history of case law addressing whether classroom copying qualifies as fair use. In two early coursepack cases the District Courts held the purpose of the

² A new "illustration for instruction" fair dealing provision was later added to the UKCDPA in 2014, but it is intended to cover only minor uses such as reproducing "a few lines of poetry" (Intellectual Property Office, 2014).

disputed copying to be that of the instructor who ordered the coursepacks, but the commercial purpose of the copy shops that produced the coursepacks was deemed to be presumptively unfair (*Basic Books*, 1991; *Princeton*, 1996). But in a more recent electronic reserves case involving multiple hearings and appeals, the District Court found the purpose to favour fairness due to the educational, non-commercial nature of the copying (*Cambridge*, 2012). Building on two further reassessments on remand, the District Court's final assessment of the purpose and character factor remained in favour of fair use due to the university's nonprofit educational purpose (*Cambridge*, 2020). Judicial analyses in the electronic reserves case have clearly established that a U.S. institution's non-commercial educational purpose will normally favour fair use.

Character

Australia. In *Haines* 1982, the Federal Court viewed the proposed approach to educational fair dealing in the memorandum issued to school principals to be completely incongruent with the legislative purpose for instituting the ACA's statutory education license. The Court considered the character of the proposed dealings to be misaligned with the provisions of the ACA to the extent that the "wrongful nature" of statements in the memorandum could only be properly remedied by ordering the withdrawal and destruction of the entire document (*Haines*, 1982).

Canada. The Supreme Court has repeatedly insisted that the fairness of unauthorized copying in terms of the aggregate amount copied is properly assessed as an aspect of the character of the dealing (*Alberta*, 2012; *SOCAN v. Bell*, 2012; *York*, 2021). The Court established that "large-scale organized" copying is not inherently unfair (*SOCAN v. Bell*, 2012) and that, in a university context, the character of a dealing must be evaluated carefully so as not to disadvantage larger institutions whose aggregate copying will usually be considerably larger than that of smaller institutions (*York*, 2021).

New Zealand. The High Court considered the character of the disputed coursepack copying to fall far short of what was earlier proposed in a failed attempt to reach agreement between publishers and educational institutions on the bounds of educational fair dealing. Had agreement been reached, the parties would have viewed multiple copies for classroom use to be fair dealing on condition that the character of the copying was spontaneous and not part of a compilation, neither of which was met by the institute's coursepacks (*Longman*, 1990).

United Kingdom. Because the matters at issue in *Universities UK Ltd v Copyright Licensing Agency Ltd* (2002) did not squarely address whether classroom copying generally can qualify as fair dealing (the existence of the UKCDPA's provisions for blanket licensing was taken to mean multiple copies for students

required payment of royalties), the Tribunal was not required to conduct an analysis of the fairness of unpaid educational copying. The Tribunal's ruling thus did not consider or comment on the character of educational copying outside of licensing schemes.

United States. All of the coursepack and electronic reserves rulings to date have followed the Supreme Court's endorsement of transformative use as a relevant factor when evaluating the character of an unpaid use (*Campbell*, 1994). The character of the coursepack copying produced by copy shops in *Basic Books* (1991) and *Princeton* (1996) were assessed as nontransformative and commercial, therefore weighing against fairness. In the electronic reserves case, even though the university's copying was viewed as nontransformative and served the same function as the original works, the District Court's opinions continued to view the purpose and character factor to favour fair use because the purpose was educational and non-commercial (*Cambridge*, 2020). Transformative use is generally not used as a fairness factor in the other four jurisdictions.

Amount

Australia. The Federal Court acknowledged that deciding what is fair dealing is not a simple matter of tallying the amount of copying, as the facts of each case must be examined (*Haines*, 1982). The Court ruled that the school administrator's memo to school principals was wrong to say that the ACA's section 40 fair dealing provision allowed for the same amount and type of copying as the Act's new statutory licensing provisions, since such an approach defeated the purpose of enacting the new provisions (*Haines*, 1982).

Canada. The Supreme Court decisions in *Alberta* (2012) and *York* (2021) applied the Court's own prior guidance on how to evaluate the amount factor. Following the leading U.K. fair dealing ruling (*Hubbard v. Vosper*, 1971), in *CCH* (2004), the Court held the amount and importance of what was copied to be relevant factors, with the quantity and quality used being a potentially useful but non-determinative factor in evaluating the fairness of the dealing. The Court further stated that it is possible to deal fairly with an entire work (*CCH*, 2004).

New Zealand. The High Court rejected the institute's argument that copying up to 10% of a work for research or private study was an established practice of educational institutions not because this amount was deemed to be inappropriate, but on the grounds that the disputed copying was not for the purpose of research or private study (*Longman*, 1990). On this basis, the Court found "it impossible to answer" the amount question that asked if the disputed copying "was of a reasonable proportion" of the source works (*Longman*, 1990).

United Kingdom. In *Universities UK Ltd v Copyright Licensing Agency Ltd* (2002), the main questions before the Copyright Tribunal did not call for a full fair

dealing analysis as the UKCDPA's section 130 licensing provisions require only quantitative consideration of "the proportion of the work to be copied." The Tribunal nonetheless observed that even when "very small percentage amounts of any work" are copied, the UKCDPA provides no "defence for educational establishments if a licensing scheme is available" (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002).

United States. The Supreme Court established that the amount factor should be assessed on the quantity and quality of what is used in light of the purpose and character of the use and whether the use could serve as a market substitute for the original work (*Campbell*, 1994). The substantiality of the use requires an evaluation of the extent to which it represents "the heart" of the work (*Campbell*, 1994). Opinions in the subsequent educational fair use cases have followed this approach to assessing the amount and substantiality of unpaid uses (*Cambridge*, 2012; *Cambridge*, 2014; *Cambridge*, 2016; *Cambridge*, 2018; *Cambridge*, 2020; *Princeton*, 1996). Additionally, the Eleventh Circuit held that "the price of the unpaid use" should not be considered when assessing the amount factor, as such an approach would favour fair use even when large amounts are used nontransformatively (*Cambridge*, 2018).

Nature of the work

Australia. Judicial reasonings in the cases considered here have given scant consideration to the nature of the work as a fairness factor.

Canada. The Supreme Court suggested that dealings with an unpublished work may be more fair if there is a public interest in disseminating the work and less fair if the work was confidential in nature (*CCH*, 2004). The Court's rationale that dealings with works necessary for legal research was more fair due to the public interest in access to such materials (*CCH*, 2004) could possibly be extended to works of a similar nature in other fields and disciplines.

New Zealand. Judicial reasonings in the cases considered here have given scant consideration to the nature of the work as a fairness factor.

United Kingdom. Judicial reasonings in the cases considered here have given scant consideration to the nature of the work as a fairness factor.

United States. The Supreme Court ruled that uses of "less expressive" works are more fair because the nature of such works is less closely aligned with the more expressive works that copyright is designed to encourage and protect (*Campbell*, 1994). The trial and appeal courts in the electronic reserves case applied this principle by assessing the extent to which each allegedly infringing use reflected subjective opinions or experiences of the author or were evaluative or analytical in nature (*Cambridge*, 2020).

Alternatives

Canada. Alternatives to a dealing has been considered as a factor in assessing fairness of an unauthorized use only in Canada. The Supreme Court said a dealing may be less fair if the user's purpose could be reasonably achieved by using a non-copyright work instead (*CCH, 2004*). More importantly, the Court ruled the availability of a license is not relevant to assessing the fairness of a dealing, since the rights holder's monopoly over the work would otherwise be expanded to an extent that upsets the balance between public and private interests in the scheme of copyright (*CCH, 2004*).

Market Effect

Australia. The Federal Court in *Haines* (1982) did not explicitly address the market effect of implementing the disputed school administrator's memorandum, which interpreted how fair dealing applied to educational copying. Concern about harm to the publishers' licensing market was nonetheless implicit in the Court's statement that the memorandum purported to advise school principals on lawful educational copying that, if followed, would "almost certainly" infringe the publishers' copyrights (*Haines, 1982*). As well, the Australian Copyright Tribunal justified a higher remuneration rate for coursepack copying on the basis that greater value should be accorded to coursepacks because they saved universities the expense of acquiring class sets of textbooks and they have a more "permanent" nature, as compared to the "throw-away" quality of class handouts (*Adelaide, 1999*).

Canada. The Supreme Court of Canada noted that while the effect of a dealing on the market for a work is important to consider, it is neither the only nor the most important factor in a properly conducted fairness analysis (*CCH, 2004*). Furthermore, the Court declined to accept the publishers' contention that unlicensed classroom copying competes with their textbook markets because the copying at issue consisted only of short excerpts and no evidence was submitted to the Copyright Board to substantiate their market effect claims (*Alberta, 2012*). The Court also rejected the complaint that educators' reliance on fair dealing allows them to save on licensing expenses by observing that any "savings" arising out of fair dealing are used to further institutions' overall educational purpose rather than an ulterior commercial purpose (*York, 2021*).

New Zealand. The Hight Court expressed the view that the disputed copying in *Longman* (1990) competed in the same market as some of the textbooks that were the source of excerpts compiled in the coursepacks. The Court asserted that even though the coursepacks were not produced commercially, they did "compete factually" with the publishers' works (*Longman, 1990*).

United Kingdom. The Copyright Tribunal was strongly skeptical that coursepack copying represented market substitution for the publishers' textbooks,

in the main because the blanket license for higher education institutions already covered multiple copying of excerpts (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002). The Tribunal was also unconvinced that students would purchase entire textbooks or journals if individual chapters and articles were unavailable in a coursepack. But the Tribunal was persuaded that a higher remuneration rate for coursepack copying should be allowed because merging that copying into a single blanket license that covered other educational copying would be a new convenience to the universities and would reduce the copyright collective's formerly separate coursepack licensing market (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 2002).

United States. The fairness analyses in the *Basic Books* (1991) and *Princeton* (1996) opinions viewed the market effect factor to weigh against fairness, due primarily to the commercial nature of the copying and the perception of market substitution. The latest ruling in the electronic reserves case on how to assess the market effect factor in the context of classroom copying suggested the primary market of concern was the licensing market allowing copyright-protected works to be used "in a particular way" (*Cambridge*, 2014). The Eleventh Circuit ruled that classroom copying of an excerpt will strongly weigh against fair use when licensing is available but may be fair use when there is low demand for use of the excerpt (*Cambridge*, 2014). On the whole, judicial attempts to avoid circularity in explanations of how the existence of a licensing market can be a valid consideration in assessing the fairness of unpaid uses have been less than convincing.

Third-Party Assistance

In what ways might third parties assist students to use their statutory users' rights for purposes such as education, research, and study? In *Auckland* (2002), New Zealand universities argued that educational institutions should be permitted to help students to exercise their statutorily allowed fair dealing purposes by copying on behalf of students. The High Court of New Zealand articulated three reasons for determining fair dealing for purposes of criticism or review to be inapplicable to multiple copies made by universities for student use: it believed the copies would not be subjected to actual criticism or review, it did not accept that genuine criticism or review of the copies could occur unless specifically requested by a student, and its presumption that students would not individually request copies to be made was unchallenged by the universities (*Auckland*, 2002, paras. 36–37). In terms of analytic fairness principles, this ruling provides relatively thin grounds. In declining to accept the universities' submissions that "a person could copy as agent for another person" and that "copying will usually be for the purposes of criticism or review, that being one of the functions of a university" (*Auckland*, 2002, para. 30), the Court merely pointed to dictionary definitions of "criticism" and "review" and to other

NZCA provisions, none of which directly addressed classroom copying of entire book chapters and journal articles.

In the K–12 classroom copying case, the Supreme Court of Canada adopted the opposite view that teachers’ copying on behalf of students was fair dealing, reasoning that whether or not students specifically requested the copies, their statutorily allowed purpose in using the copies remained the same—engagement in research and private study (*Alberta*, 2012, para. 25). The Court noted that “nowhere in CCH did the Court suggest that the lawyer had to ‘request’ the photocopies of legal works . . . before those copies could be said to be for the purpose of ‘research’” (*Alberta*, 2012, para. 24). In addition, the Court’s assertion that “there is no doubt, as York argued, that guidelines are important to an educational institution’s ability to actualize fair dealing for its students” implies an enabling role belonging to universities to “actualize” students’ right of fair dealing in a third-party capacity (*York*, 2021, para. 85).

Since the copyright laws of the countries of interest in this study do not directly address whether a third party may assist another party in their exercise of an applicable statutory users’ right, it is instructive to consider two U.S. cases that probed whether it is permissible for a third party to assist a user in exercising their rights granted under a Creative Commons (CC) license. After releasing its K–12 curriculum materials for public use under a CC licence allowing non-commercial uses, a nonprofit publisher filed infringement suits against two commercial copy shops for unauthorized copying of its publicly licensed materials, the copying having been requested by public schools who wished to use the materials for non-commercial instructional purposes (*Great Minds v. Fedex Office*, 2017; *Great Minds v. Office Depot*, 2018). On appeal, the District Court rulings dismissing the infringement claims were upheld in both cases. Because the CC licence granted by the publisher did not specifically prohibit involvement of a for-profit third party, the copy shops were found not to infringe the publisher’s copyrights by assisting the schools to make non-commercial uses of the publisher’s materials (*Great Minds v. FedEx Office and Print Services Inc.*, 2018; *Great Minds v. Office Depot*, 2019).

The two contexts are, of course, not parallel, as CC licensing falls within contract law which, in the United States and Canada, for example, is a state or provincial matter, respectively, whereas copyright is a matter primarily addressed in national legislation. But in general, the classroom copying cases and the *Great Minds* cases both involved educational uses that were potentially statutorily permissible or were permitted by licence, and the contested issue in both contexts was whether a (commercial or non-commercial) third party can assist another party to engage in those unpaid uses. The appeal courts in the *Great Minds* cases determined that absent clear licence language to the contrary, licensees may use third-party services to help them engage in non-commercial uses permitted under

the CC licence, and doing so does not turn the third party into a licensee that is bound by the licence terms (*Great Minds v. Fedex Office*, 2018, p. 2; *Great Minds v. Office Depot*, 2019, p. 9).

The core idea that the absence of contractual language specifically barring a third party from assisting another party to engage in a licensed act may perhaps be adaptable to the context of statutory users' rights. That is, in the absence of statutory language specifically barring a third party from assisting individuals to engage in statutory users' rights such as fair dealing or fair use, it is reasonable and just for a non-profit university to help students to engage in statutorily allowed activities as long as they are, on the whole, demonstrably fair. Non-profit institutional facilitation of students' access to their statutory users' rights promotes fundamental human rights in a manner that advances the public interest in encouraging learning without unduly harming creators' interests.

Discussion

A deeper dive into reasons underpinning the rulings in educational copying cases surfaced broad comparability in how the judiciary has addressed procedural matters as well as several areas of stark divergence in interpretational approach and premises underlying fairness evaluations. In the cases reviewed here, procedures for assessing fair dealing and fair use claims followed a common approach. Determining whether an unpaid use is fair dealing or fair use typically involves a case-by-case analysis of relevant facts that weighs fairness under a set of commonly considered factors, eschews bright-line rules and formulaic tallying up of points, and draws conclusions holistically as an overall impression of the extent to which the use is fair and advances copyright's purposes. But strongly congruent approaches and premises are much less frequently observable in analytical aspects of judicial deliberations in the educational copying cases. This section takes stock of what may distinguish common from contested aspects of judicial opinions. It then considers stakeholder perceptions on the extent to which statutory and case law adequately balance copyright's public-interest purposes, and ways in which perceived imbalances might be alleviated to promote and protect the overarching public interest in encouraging learning and human progress.

Copyright's Predominant Purpose?

The high degree of similarity in how the judiciary attends to procedural aspects of fairness analyses is unsurprising, since all five countries are common law jurisdictions, but a comparable level of similarity is mostly absent in analytical and situation-dependent aspects of determining the fairness of unauthorized uses. At different times and in variant contexts involving educational copying cases, courts and tribunals have delivered markedly divergent responses to pivotal issues that

include whether a strict or liberal interpretational approach is appropriate; how copyright's theoretical balance might be achieved in practice; under fairness factors, what should be assessed, and how; whether a hierarchy exists within commonly assessed fairness factors; whether the availability of licensing is relevant to fairness analyses; and whether a third party may assist another party to exercise their statutory users' rights. Much of the variance seems to hinge on whether the predominant purpose of copyright is understood fundamentally to serve interests that are private and economic or interests that are public and social.

If we imagine the analytical stances evidenced in the educational copying decisions to lie along a continuum, anchored at the more populated and established end are conceptions of copyright as a monolithic system equipped chiefly to protect traditional owner-centric rights. Ebbing and flowing at the other, comparatively less occupied, end are more dynamic views of copyright evoking an ecosystem³ in which owners' and users' needs and interests are symbiotically interdependent. The stakeholders in this ecosystem—which include creators, copyright owners, users, copyright collectives, publishers, cultural institutions such as libraries and archives, research funders, institutional administrators, lawyers, judges, legal scholars, and legislators—all have multiple, situation-dependent aims and roles.

The characterization of an educational institution's coursepack copying as “the very antithesis of fair dealing” (*Longman*, 1990, para. 6.7) is a traditional take on copyright as a system in which “what users do are just exceptions carved out of owner's rights—little user islands in a far from pacific ocean of owner rights” (Vaver, 2013, p. 109). Conversely, framing copyright 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” (*Théberge*, 2002, para. 30) evokes an ecosystem in which intertwined activities of users and creators and other stakeholders are in tension and are all important to maintain in equilibrium.

From an ecosystem perspective, it may be more apt to reverse the island/ocean metaphor to see “owner's rights as little islands of exclusion, exceptions in an ocean of free expression and public access,” (Vaver, 2013, p. 109) organized by a copyright scheme that itself is a carve-out from the public domain. In turn, the public domain is the pre-existing realm of ideas and other materials that are collectively a prerequisite for copyright, as they enable “the rest of the system to work by leaving the raw material of authorship available for authors to use” (Litman, 1990, p. 968). A divide is noticeable within the rulings reviewed in this article, vis-à-vis the perceived purpose of copyright. Some rulings reflect alignment with copyright's public policy goal of encouraging learning and facilitating human

³ Compared with “system,” “ecosystem” better captures the breadth of interests and activities constantly at play in the copyright scheme.

progress (Statute of Anne, 1710; U.S. Const. art. I, § 8, cl. 8), while others suggest the presumption of an overriding centrality of private rights in the copyright scheme.

Stakeholder Perceptions of (Im)Balance

To what extent have judicial reasonings produced rulings that have substantively advanced the public interest in encouraging learning and human progress, while also ensuring the grant of copyright continues to incentivize creative works? Although the educational copying cases reviewed here suggest that a shift away from owner-centric approaches is developing, it is too early to know if this shift will eventually percolate across broader regions of the global copyright ecosystem. What is certain is that in all five jurisdictions, educators, legal scholars, the judiciary, and others who recognize both owners' and users' rights to be integral to the scheme of copyright are becoming increasingly concerned about inequities in the copyright scheme. Left uncorrected, these inequities threaten to greatly diminish the ability of the public domain (Litman, 1990; *Théberge*, 2002, para. 32) to support rich creativity, learning, and other essential forms of free expression and freedom of information.

In jurisdictions where case law has affirmed the need for licensing for educational copying, scholars, educators, and judges have voiced doubts about the extent to which copyright is currently balanced. Prompted by concerns that the scheme of copyright "is becoming incrementally more constraining," Australian legal scholars Giblin and Weatherall (2017, p. 2) organized a collective thought experiment undertaken by scholars from around the world to reimagine copyright as an entirely new system designed to genuinely advance the public interest in fair and plentiful (and lawful) production of and access to creative and informative works. Universities New Zealand responded to a government-led public consultation on copyright reform by raising concerns that "traditional objectives are no longer sufficient in the digital age to redress the balance between the rights of the copyright owner and the rights of users to access and use the fruits of our culture" (Johnson, 2019). In a commentary on "the over-sensitivity of the legislature to the interests of copyright owners," a renowned U.K. judge compared U.S. fair use to U.K. exceptions to infringement, tellingly finding the latter to be wanting:

Rigidity is the rule. It is as if every tiny exception to the grasp of the copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls. This approach also assumes that Parliament can foresee, and therefore legislate for, all possible circumstances in which allowing copyright to be enforced would be unjustified. (Laddie, 1996, pp. 256, 258)

Burrell (2001, p. 388) observed that “over a longer period it is possible to detect a pattern of judges failing to take adequate account of the interests of users” in U.K. copyright cases, but cautioned against framing copyright reform as only a legislative matter, “since without a change in attitudes any new defence may soon become as inflexible as the current arrangements.”

Concerns about copyright’s balance also abound in jurisdictions where case law has determined some kinds of educational copying to be permissible. Rejecting owner-centric rhetoric that casts all unauthorized uses as unfair uses, Boon (2014, p. 59) suggested that the “fair compensation” demands of Canadian literary works collectives “puts the private profit of individuals and corporations before the needs of educators, students, and society as a whole—and . . . this is, in fact, unfair.” Soar (2014, p. 155) described how digital media-making activities designed to help postsecondary students build professional portfolios are hampered by uncertainties regarding the applicability of fair dealing due to “the conservative and self-protective undercurrents of educational administrations” and worries about “the boundaries of what is ‘allowed’ (i.e., according to university regulations, or in law, or via rumour and anecdote).” Witness testimony gathered during a statutory review of the CCA revealed opposing views on the issue of balance. For some, the 2012 addition of education as a statutory fair dealing purpose created imbalance due to “a significant loss of revenues to publishers, creators and others,” while proponents of statutory users’ rights asserted that “existing fair dealing guidelines reflect Canadian law and established practices, and regulate the implementation of fair dealing in education rather than encouraging abuses” (Canada, Parliament, House of Commons. Standing Committee on Industry, Science and Technology, 2019, pp. 55, 60).

The state of copyright’s balance in the United States has also been a topic of vigorous debate. Ten years before the educational copying infringement suit was launched against Georgia State University, Bartow (1998, p. 211) decried the dramatically diminished scope of educational fair use resulting from the coursepack cases (*Basic Books*, 1991; *Princeton*, 1996) because it left the education system vulnerable to potentially entrenched inequality should copyright matters be allowed “to dictate the breadth and width of the range of ideas that students are exposed to.” Despite the Eleventh Circuit’s confirmation of the public interest-facing purposes of copyright, refusal to sanction the non-legislative *Classroom Guidelines*, and use of a “more nuanced and balanced approach to market inquiry” (Butler, 2015, p. 525), in the end its fair use analytical framework (*Cambridge*, 2014; *Cambridge*, 2018) failed to afford normative guidance for users desiring to engage in educational fair use without undue risk and uncertainty. Elkin-Koren and Fischman-Afori (2015, pp. 10–11) questioned the actual availability of educational fair use for universities, given the Eleventh Circuit’s rigid “‘no rules’ approach” requiring a case-by-case fact-

intensive inquiry disallowing all forms of benchmarking, grouping of like cases, and adoption of industry best practices. These barred techniques are examples of tools that could help make fairness analyses operationally feasible and less risky for educators who wish to exercise educational fair use. The paradoxical result is that without meaningful guidelines, “fair use may stifle the very creative activity it seeks to foster” (Elkin-Koren & Fischman-Afori, 2015, p. 12).

Thus, signs of moving away from owner-centric approaches notwithstanding (e.g., *SOCAN v. Bell*, 2012), the public interest in a copyright scheme capable of “nurturing authorship” within an extensive, healthy public domain (Litman, 1990, p. 969) seems destined to be perennially short-changed if substantive rebalancing fails to materialize. Across the five jurisdictions, users’ rights generally remain relegated to the sidelines of the copyright ecosystem, mere stray crumbs that have fallen from a table commanded by “private entitlement” (Craig, 2011, p. 73), although recent case law has created some breathing room for unpaid educational uses that are lawful in the United States and Canada.

A User-Oriented Fairness Test?

The foregoing suggests the ability of statutory and case law to promote the predominantly social purpose of copyright on an equal footing (e.g., Craig, 2005; Craig, 2010; Elmahjub & Suzor, 2017; Sims, 2016; Vaver, 2013) with copyright’s economic purpose is dubious if we understand the latter (incentivizing the production and dissemination of creative works through just rewards to creators) to be the mechanism by which the former (the ultimate end of encouraging learning and human progress through access to and dissemination of creative work) is achieved. On a practical level, if users’ rights are the primary means of counterbalancing owners’ rights in order to achieve the purposes of copyright law, the test to determine whether an unpaid use qualifies as the statutory users’ right of fair dealing or fair use must be one that users can learn to apply with reasonable confidence and rely on in their creative practices.

But case law suggests the determination of the fairness of unauthorized uses can be a significant challenge for the judiciary, let alone users who are not legal experts. For Burrell and Coleman (2009, p. 119), the main difficulty presented by the test of fairness is that “it fails to provide potential defendants with any certainty as to the amount that can safely be copied . . . [which] causes real problems for institutional users.” The District Court in *Cambridge* (2012, p. 338) bluntly declared “the truth is that fair use principles are notoriously difficult to apply,” while the Eleventh Circuit acknowledged that “new, more efficient means of delivery for copyrighted works cause copyright owners and consumers to struggle to define the appropriate boundaries of copyright protection in the new digital marketplace” (*Cambridge*, 2014, p. 3). Courts have struggled as well. One example is the Georgia

State University electronic reserves case launched in 2008, which took five court hearings (Burtle, 2022) yielding multiple judicial opinions and orders totaling about 1,000 pages to reach a final decision on remand 12 years later (*Cambridge*, 2020).

In addition to uncertainty about how much may be safely copied, aspects of fairness assessments are inherently subjective, such as impressionistic determinations of whether a work is “evaluative, analytical or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author's experiences or opinions” (*Cambridge*, 2014, pp. 110–111) and whether an excerpt is the “heart of the book” (*Cambridge*, 2012, p. 67). Beyond subjective aspects of the test of fairness and uncertain outcomes, the amount of time needed for proper fairness assessments can be prohibitive (Elkin-Koren & Fischman-Afori, 2015, p. 11) and some of the facts required for a full analysis are beyond the reach of an educator wishing to rely on fair use. Under a market effect factor that was heavily weighted when licensing was readily available and the purpose of the unpaid use overlapped one of the purposes for marketing the source work, the District Court’s fairness assessment considered book sales net revenue and permission sales totals, both of which are normally unavailable to the public (e.g., *Cambridge*, 2020, p. 18). If educators and other users are unable to evaluate with reasonable ease and confidence whether a proposed unauthorized use is likely to be statutorily allowed, can fair use and fair dealing truly be users’ rights?

Toward Accessible Users’ Rights

The need for copyright reform is widely recognized (e.g., Bently et al., 2010; Burrell, 2021; Handler & Hudson, 2021; Samuelson et al., 2010; Canada, Parliament, House of Commons. Standing Committee on Industry, Science and Technology, 2019). At the same time, it must also be acknowledged that there are limits to what can be reasonably addressed by the copyright scheme. Government ministers responsible for oversight of the first statutory review of the CCA observed that while “market disruption” has often been the impetus for copyright reform,

... the Copyright Act itself might not be the most effective tool to address all of the concerns stemming from recent disruptions. For example, issues like the integrity of content metadata, better tracking and information of copyright activity, simpler licensing systems, and the importance of transparency for all players in the system, may reach beyond the scope of the legislation itself. (Bains & Joly, 2017)

In a similar vein, Litman (1990, p. 969) cautioned that copyright’s purpose of “nurturing authorship” is not necessarily the same as “nurturing authors,” if authors (or copyright owners) demand rewards or controls over their works that threaten

to diminish the creativity of others by shrinking the public domain on which all creators depend.

Turning to ways in which statutory users' rights might be made more accessible to users, legal scholars and advisors offer a range of suggestions involving copyright reforms of various kinds. Examples include statutorily exempting nonprofit classroom copying from copyright protection and persuading the judiciary to relax the required case-by-case test to make fair use easier to establish (Bartow, 1998); convincing the courts to refine the fair use doctrine to find a middle ground between the uncertainty and flexibility of fair use as a statutory legal standard and the certainty and rigidity of a rule-bound doctrine (Elkin-Koren & Fischman-Afori, 2017); amending copyright law to establish "research publications" as works that are subject to a statutory educational licence but must be published on an open access basis (Willinsky, 2022); and recasting copyright as an access right, as befits its social purpose and human rights connections, by obligating legislators to impose legal duties on copyright owners and provide enforceable legal rights for users (Geiger, 2017).

Other suggestions for improving copyright's balance by bringing users' rights within reach of students, teachers, and ordinary citizens focus instead on actions of authors and user communities. Academic authors, for instance, can strive to include the right to allow nonprofit educational use of their own works of authorship in author publishing agreements (Bartow, 1998, pp. 229–230; Scholarly Publishing and Academic Resources Coalition, 2007). For others, guidelines can assist members of user communities to carry out their responsibilities and activities in copyright-aware ways (e.g., Canadian Association of University Teachers, 2013; Millett, 2013; Universities Canada, 2012). The judiciary has lent support to copyright guidelines or policies by acknowledging that they "are important to an educational institution's ability to actualize fair dealing for its students" (*York*, 2021, para. 85) and that they "significantly reduced the unlicensed copying of Plaintiffs' works (and, by inference, the works of other publishers)" (*Cambridge*, 2012, p. 38). But when created by legal experts or in conjunction with copyright owners, guidelines can be unsatisfactory if they artificially limit the range of statutorily allowed uses or inadequately support the full scope of educators' pedagogical or scholarly needs (e.g., Bartow, 1998, pp. 219–220; Crews, 2001). In addition, guidelines created without active involvement of the users whose practices they are intended to guide may be infrequently used for lack of user buy-in and appreciation of the underlying issues and objectives at play.

Best practices in using statutory users' rights offer another path toward translating abstract and abstruse users' rights into practical tools that can help scholars of all levels and types to use copyrighted materials confidently and knowledgeably in their own learning, teaching and creative practices. Best practices

codes use a grassroots process through which a scholarly or professional community identifies ways in which it perceives copyright to be an impediment to carrying out their educational or creative work and then develops informed articulations of the kinds of uses they genuinely believe to be fair unpaid uses of copyrighted materials. This approach was first explored with U.S. documentary filmmakers (Association of Independent Video and Filmmakers et al., 2005) in a process led by Aufderheide and Jaszi (2018) who have since worked with a wide variety of scholars and professionals, including media literacy educators, academic librarians, and communication scholars to build codes of best practices in fair use (Center for Media & Social Impact, 2021). At the core of the best practices approach is the belief that “with the right information and education, people can and should make their own decisions about their creative and cultural choices” (Aufderheide & Jaszi, 2018, p. xiii). Such codes give agency to people who are not legal experts to exercise their lawful rights to pursue activities that advance the purposes for which copyright was created in the first place.

Elkin-Koren and Fischman-Afori (2015, p. 13) endorse best practices as a more reasonable and practical approach to cultivate knowledgeable, widespread, systematic engagement with educational fair use than the no-rules, case-by-case approach insisted on by the Eleventh Circuit (*Cambridge*, 2014; *Cambridge*, 2018). Arguing that risks must be minimized for users wishing to exercise their statutory users’ rights in order for copyright to serve its foundational purposes, these legal scholars (2015, p. 41) propose a “pragmatist” approach to fair use in which reasonable compliance with a robust fair use best practices code provides a type of safe harbour for common uses covered in the code, thereby potentially limiting user liability and allowing fair use to develop as a norm along a continuum. At one end of the continuum is “strict compliance with standards determined only in retrospect and zero tolerance for fair use errors” and toward the opposite end are community norms that develop with the adoption of best practices codes, which can be used by the judiciary as benchmarks of users’ reasonable conduct justifying the safe harbour outlined in the code (Elkin-Koren & Fischman-Afori, 2015, p. 45).

The logic of the pragmatist perspective proposed by Elkin-Koren and Fischman-Afori (2015, pp. 41–42) tells us that since it is against the public interest if fair use becomes “a legal trap that hinders copyright goals,” codes of best practices can “turn the fair use open-norm into a workable framework for everyday uses.” Like guidelines, best practices codes are vetted by legal experts and aim to help users understand the parameters of statutory users’ rights and how those rights may be applicable to particular kinds of desired uses. But because codes are created with the active involvement of members of user communities who are invited to share their personal experiences and practices and learn about the parameters and range of possible applications of statutory users’ rights, participants have

opportunities to become invested in the code development process, which strengthens the likelihood of widespread code adoption and endorsement by professional societies.

Community-derived best practices codes are not without their critics. Suggested drawbacks of this approach include the possibilities that code adopters could acquire a false sense of security since infringement suits may still arise, that artificially circumscribing the actual upper limits of statutory users' rights could create too much space for misapplications of users' rights, and that best practices codes could overvalue users' interests since copyright owners' perspectives are not sought or included (Lehrburger, 2016; Rothman, 2009). Such concerns notwithstanding, a collaborative process in which scholars develop codes of fair practices for applying users' rights to classroom copying, with appropriate guidance, holds promise of stronger and wider success as a means of rebalancing copyright. It could do so by making users' rights accessible within a more realistic timeframe when compared to the arguably more arduous and tenuous paths of statutory reform and judicial expansion or reform of copyright's foundational doctrine of fair dealing/fair use.

Conclusion

This article series set out to explore the statutory and case law bases for classroom copying practices in the higher education sector of five highly developed common law countries. The primary goal was to understand whether and when educational copying may qualify as a statutorily permitted use—a user's right—and for what reasons, which often circled back to the fundamental issue of the purpose of copyright law. While present-day articulations of copyright's purpose can vary widely, a common thread is the idea that copyright is the economic right of creators to control uses of their works. Less well-known and less often celebrated is the fact that copyright's purpose is historically rooted and remains grounded today in the public interest in encouraging learning and promoting human progress.

Across the five jurisdictions, uneven attention to both halves of the copyright scheme's core (social and economic) objectives has created differences in the extent to which learning and human progress are encouraged by allowing certain educational uses such as classroom copying of course readings to be covered by statutory users' rights. Educational copying in three jurisdictions—Australia, New Zealand, and the United Kingdom—is currently subject to a “customary price” (*Harper & Row*, 1985) under blanket collective licensing regimes established in the 1980s and 1990s, while another jurisdiction—the United States—having a strong tradition of statutorily permitted classroom copying has never been under a blanket collective licensing regime. The fifth jurisdiction, Canada, has experienced both approaches: a sector-wide blanket collective licensing regime existed for about 20

years, after which a series of court decisions established that classroom copying can qualify as a statutory users' right and that participation in collective licensing is not mandatory.

How might we understand why fair dealing in some jurisdictions does not apply to classroom copying of course readings, while in others, the possibility exists that fair dealing or fair use may apply if the use can be shown to be, on the whole, fair and to promote copyright's purposes? There is no simple explanation, but since the copyright laws of all five countries emerged from a common source, have developed in roughly the same direction, and include similar owners' rights and users' rights, one possibility is that the differences are largely due to variant judicial interpretations of the law. Another possibility is that in some jurisdictions, lawmakers have tried to make copyright law more certain (e.g., Department of Infrastructure, Transport, Regional Development and Communications, Australia, 2021, p. 5) by including more specificity about users' rights, which, in turn, creates more rigidity in the law (Laddie, 1996). A third possibility is that rigid statutory provisions and owner-centric judicial rulings have both played a role. The observation of D'Agostino (2008, pp. 315–316) that “no fair use-fair dealing framework is perfect, and a court's decision will be influenced by its understanding of copyright law's objectives, especially in light of evolving user practices” lends support for the third perspective.

Where statutory users' rights can apply to educational copying, how might their inherent flexibility and uncertainty be reconciled with the fact that if high uncertainty deters users from exercising those rights, the ability of users' rights to advance the purposes of copyright is deeply compromised? The challenge is finding and maintaining an equitable balance between the certainty of finely specified law that more often than not sees unpaid uses as unfair uses, and the flexibility of fair dealing/fair use as a judge-made doctrine that creates breathing space for copyright's social and economic purposes along with higher uncertainty that may have a “chilling effect” on potential users (Elkin-Koren & Fischman-Afori, 2015, p. 4). There is no shortage of suggested reforms to recalibrate the copyright scheme, but the process of amending legislation can be arduous and fraught with competing claims about needed changes that are dominated by the voices and reach of the most powerful stakeholders. Courts have endorsed users' rights guidelines, but potential drawbacks of guidelines include an overly narrow portrayal of applicable uses, poor coverage of the most common activities users engage in that involve use of copyrighted materials, and low levels of user adoption.

Creating codes of best practices is perhaps the most promising approach to encouraging informed take-up of statutory users' rights by educators who wish to engage in classroom copying. The goals of guidelines and best practices are similar, but the latter seems well-positioned to avoid several drawbacks of the former. The

process of developing a code may be more time-consuming than creating guidelines, but since user community members are directly involved, the resulting code will reflect common, highly relevant use scenarios. And because the code is developed by and for users rather than legal experts or copyright owners, the danger of undue risk aversion is minimized while the likelihood of code adoption is maximized, given that members who actively participate in the development process have opportunities to become invested in the code.

In the end, does it matter if copyright law permits some unpaid educational uses of copyrighted materials, such as making certain course readings available to enrolled students? Given the primarily public interest-facing purposes of copyright and the universally accepted basic human rights to education and freedom of expression, it is critically important for fair dealing and fair use to be robustly applicable to educational copying. Exercised regularly and carefully, with due attention to the social and economic objectives of copyright, fairly using creative works for educational, research, and study purposes meaningfully contributes to achieving “the overarching aim of the ‘social function of law’ in general [which] is to maintain social order by achieving a workable balance between opposing interests” (Geiger, 2017, p. 77). At the same time, achieving a workable balance requires all stakeholders in the copyright ecosystem to recognize that our interests are not always in opposition, since “we have a shared interest in encouraging and supporting creativity; in recognising the rights and interests of creators, in a rich and accessible culture, and in technological and economic progress” (Giblin & Weatherall, 2017, p. 18). Copyright’s breathing space must provide robust accommodation for educational copying because learning and freedom of expression will always be hallmarks of human progress, creativity, and a fair society.

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