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Educational Copying – the “Very Antithesis of Fair Dealing” or Within Copyright’s “Breathing Space”? Part 1: Statutory Provisions

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Abstract

This article is part of a three-part series that seeks an understanding of circumstances in which educational institutions may engage in educational copying (making unauthorized multiple copies of course readings for student use) in five common law countries: Australia, Canada, New Zealand, the United Kingdom, and the United States. Part 1 considers copyright’s purpose and justifications and then surveys the parameters of copyright law—including users’ rights (copyright exceptions or limitations)—and licensing arrangements as presented in the copyright statutes of the five countries.

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Introduction

In the early 1980s, an instructor at a New Zealand postsecondary institution compiled a set of readings excerpted from books and other sources and wrote short explanations to link the readings. The institution reproduced the compilation, now often called a coursepack or course reader, and made it available to students enrolled in the instructor’s technical drawing course. As permission to copy had not been obtained, an infringement suit was filed in 1984 by publishers who owned copyrights in the books containing the excerpts. The hearing that eventually took place before the High Court of New Zealand was understood to be

a test case . . . [to] seek clarification as to the extent to which multiple copies of parts of literary and artistic works in which copyright is held can be made by teachers for the purpose of compiling teaching materials for classroom use. (*Longman Group Ltd v. Carrington Technical Institute*, 1990, para. 1.1)

The suit sought to resolve two main issues: Did extracts from copyright-protected works in the compilation reproduce a substantial part of those works and, if substantial parts were reproduced, did any statutory exceptions to copyright infringement apply?

At the heart of the *Longman* case are questions about the nature, extent, and limits of copyright owners’ rights, which in turn begs the question of the underlying purpose or goals that justify the existence of copyright in the first place. When faced with issues of copyright’s public policy or legal implications, lawmakers and the judiciary are reasonably expected to take full account of such fundamental matters. But too often they are seemingly overlooked, inadequately examined, or presumed to be subsidiary to an overriding singular concern for copyright owners’ economic rights, leaving our intellectual and cultural environment vulnerable to a debilitatingly imbalanced copyright scheme (e.g., Craig, 2002; Litman, 2010; Patry, 2009; Wu, 2021). Such a vexed landscape of copyright has deeply consequential implications for the original statutory purpose of copyright—the encouragement of learning (Statute of Anne, 1710). Neglecting encouragement of learning or allowing it to be systematically diminished by market imperatives and powerful private interests endangers the public interest in societally beneficial public goods such as an educated citizenry and advancement of fundamental human rights such as freedom of expression, the right to education, and the right to benefit from scientific progress (United Nations, 1948, 1966).

Concerns about the copyright implications of educational copying practices emerged with the proliferation of photocopiers that began in the 1960s, enabling teachers to easily make multiple copies of works for student use. This study refers to copying or distributing materials for students enrolled in educational programs as *classroom* or *educational copying*. Rapid advances in the capacity of copying devices and the emergence of desktop publishing in the ensuing 20 to 30 years enabled institutions to produce instructor-curated coursepacks of the kind at issue in *Longman* (1990). Recognizing an attractive new revenue stream and desiring to avoid displacement of their book sales, publishers and copyright collectives were keen to collect permission fees for materials reproduced in such compilations (Knopf, 1999). Educators contended, however, that at least some classroom copying was statutorily permissible. That debate remains a live issue today in many quarters, although the central focus has shifted from physical copies to digital uses of protected works.

Over the decades since the High Court of New Zealand pronounced the coursepack copying in *Longman* (1990) to be “the very antithesis of fair dealing,” the issue of whether room exists for educational copying within copyright’s “breathing space” of unauthorized but fair uses (*Campbell v. Acuff-Rose*, 1994) has been tested in various court and tribunal proceedings within the broader context of a continuously evolving global copyright scheme. This three-part series of articles explores when and why educational copying today may be permissible or infringing by considering the provisions of copyright law, judicial rulings, and educational copying practices in Australia, Canada, New Zealand, the United Kingdom, and the United States. These five jurisdictions share several substantive similarities (with some exceptions) that include a common primary language and legal systems based mainly in the common law (World Factbook, 2024), broadly similar educational systems (Organisation for Economic Co-operation and Development [OECD], 2014), and categorization as countries that enjoy “very high human development” (United Nations Development Programme, 2022).

Broad commonalities notwithstanding, notable distinctions exist within the educational copying environments of these countries and in the outcomes of disputes implicating the core matters at issue in *Longman* (1990). These distinctions raise questions about the degree of comparability in copyright law and the basis for those differences. On the one hand, divergent judicial rulings across different countries on the kinds of copying requiring permission are unsurprising since copyright is territorial and disagreement in interpretations of copyright doctrines is not unusual even within the courts of a single jurisdiction (Leval, 1990). On the other hand, a significant level of shared understanding is required, given that most countries, including the five of interest here, are contracting parties to international agreements such as the Berne Convention for the Protection of Literary and Artistic Works (1886); the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights: Annex 1C, commonly referred to as TRIPS (World Trade Organization [WTO], 1994); and the World Intellectual Property Organization’s (WIPO’s) Copyright Treaty (1996). Each of these agreements obligates member countries to enact copyright legislation to meet specified goals and standards of protection for creative works and to extend the same rights available domestically to citizens of other member countries under the doctrine of national treatment.

The impetus for this extended inquiry arose from the author’s curiosity about whether substantial agreement exists across the five countries on the purpose of copyright law, what kinds of acts copyright owners are entitled to control, what kinds of educational copying are allowable without authorization or fee payment, and what a properly functioning copyright scheme should look like. This study seeks an understanding of circumstances in which educational institutions may or may not make multiple unauthorized copies of course readings for student use. It is guided by the following questions:

- What are the main provisions of copyright law and case law teachings pertaining to classroom copying by educational institutions in Australia, Canada, New Zealand, the United Kingdom, and the United States?
- To what extent and on what bases may statutory exceptions and limitations to copyright (users’ rights) be applicable to unpaid copying or distribution of course readings?
- What premises or principles appear to underpin judicial determinations of the applicability or inapplicability of users’ rights to classroom copying?
- To what extent do stakeholders view copyright to be balanced, and, for those who perceive shortcomings, how might better balance be achieved?

This article, Part 1 of the series, begins with a brief look at reasons or justifications for the state grant of copyright. It then surveys the foundational elements of copyright as presented in the copyright law of the five countries and identifies components most often implicated in disputes about whether permission is required for educational copying. Part 2 will identify key issues and rulings arising in selected legal proceedings that have examined the permissibility of unauthorized uses of copyright-protected works in the five jurisdictions. Part 3 will further canvass the judicial rulings reviewed in Part 2 to explore the extent to which their underlying premises and principles clarify the role of statutory users' rights vis-à-vis educational copying in realizing and maintaining a substantive equilibrium between the social and economic purposes of copyright law.

Scope and Historical Interconnections

This article examines how statutory copyright provisions in Australia, Canada, New Zealand, the United Kingdom, and the United States compare with each other with respect to unlicensed copying for instructional purposes by educational institutions. As each country's copyright law exists within its own unique legal framework and the range of subject matter, rights, and remedies they cover is broad, this survey is confined to provisions relating primarily to materials commonly used as postsecondary course readings—written, graphic, or notated content generally comprising literary, dramatic, musical, or artistic works—as presented in the copyright statutes of Australia (Copyright Act 1968 [Cth], hereafter ACA), Canada (Copyright Act, R.S.C. 1985, c C-42, hereafter CCA), New Zealand (Copyright Act 1994, hereafter NZCA), the United Kingdom (Copyright, Designs and Patents Act 1988, c. 48, hereafter UKCDPA) and the United States (Copyright Act of 1976, 17 U.S.C., hereafter USCA).

Similarities in the provisions and language of the ACA, CCA, NZCA, and UKCDPA can be traced back to the enactment of close copies of the United Kingdom's 1911 copyright statute by Australia, Canada, and New Zealand in the first quarter of the 20th century (Davison et al., 2012; Frankel, 2011; Vaver, 2011). In addition, strong correlations between the NZCA and the copyright section of the UKCDPA are due to New Zealand's adoption of the latter as a model for the NZCA in 1994 (Sims, 2007, p. 287). The principal areas of concern in this article are the purpose and justifications for copyright law, basic parameters of copyright, and statutory provisions for copyright licensing arrangements.

Purpose and Justifications

All five copyright laws have historical roots in Great Britain's Statute of Anne, which came into force in 1710 (Murray & Trosow, 2013). Generally recognized as the world's first copyright law, the full title of the Statute of Anne is "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." Aiming to prevent printing or publishing of books "without the consent of the authors or proprietors" and to encourage "learned men to compose and write useful books," the Act initially granted 14 years of protection for new publications and 21 years of protection for books already published (Statute of Anne, 1710). Although the current copyright laws of all five countries lack an explicit purpose statement, the basis of American copyright is anchored in the U.S. Constitution as the power vested in Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (U.S. Const. art. I, § 8, cl. 8). Citing this constitutional provision, the U.S. Supreme Court

affirmed that “the primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts’” (*Feist Publications, Inc. v. Rural Telephone Service Co.*, 1991, p. 349). The grant of copyright is thus justified in both of these state-crafted 18th-century instruments by identifying encouragement of learning and promotion of human progress as the public policy goal, and by specifying time-limited copyright protection for authors as a means of achieving that goal.

For the four jurisdictions lacking constitutional justification for copyright, case law and government reports shed light on how to understand the evolution of copyright law’s modern-day purpose. In a late 19th-century copyright judgement, the U.K. Court of Appeal said the copyright “monopoly is . . . granted for the purpose of preventing persons from unfairly availing themselves of the work of others, whether that work be scientific, literary, or artistic” but also warned that copyright owners’ rights must not be allowed to become “instruments of oppression and extortion” (*Hanfstaengl v. Empire Palace*, 1894), implying a need for exceptions to owners’ rights to limit their monopoly. Three quarters of a century later, the report of a U.K. government-commissioned copyright review committee situated the justification for copyright protection in the idea of “fair play,” explaining that an author

is not entitled to a monopoly in the writing of [works] . . . but the law has long recognised that he has an interest not merely in the manuscript, the words on paper which he produces, but in the skill and labour involved in his choice of words and the exact way in which he expresses his ideas by the words he chooses. (Whitford, 1977, p. 3)

The committee supported the “generally held view that the balance between the rights of the copyright owner . . . and the exceptions in favour of copyright users . . . is about right,” opining that abrupt changes to the balance were unnecessary (Whitford, 1977, p. 4). Over the subsequent decade, the U.K. government issued three discussion papers on copyright reform, but it was the recommendations of the Whitford report that formed the basis of amendments to U.K. copyright law that were eventually enacted in 1988 as the UKCDPA (Arnold, 2015, pp. 118–119). More recent government-commissioned reviews of U.K. intellectual property law have confirmed copyright’s “utilitarian purpose of encouraging literary efforts” (Gowers, 2006, p. 15) and its role, shared with other forms of intellectual property rights, to “incentivise innovation through the offer of a time-limited return on innovative investment” (Hargreaves, 2011, p. 11).

The High Court of Australia characterized the justification for copyright in Australia as: the “social contract” envisaged by the Statute of Anne, and still underlying the present [Copyright] Act . . . [through which] an author could obtain a monopoly, limited in time, in return for making a work available to the reading public. (*IceTV Pty v Nine Network Australia Pty Ltd.*, 2009, para. 25)

A more recent discussion paper released by the Australian government on a proposed bill to amend the ACA explained the goal of copyright law is to balance and provide certainty about competing interests:

The [Copyright] Act seeks to balance the rights of copyright owners to manage and protect their content with the public interest to access that content. It is also important that the Act gives creators, copyright owners and users certainty about the scope of rights and the permissible use of copyright material. (Australia Department of Infrastructure, Transport, Regional Development and Communications, 2021, p. 5)

The Supreme Court of Canada invoked an instrumental balance as well, when it articulated the purpose of the CCA to be “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 v. Galerie d'Art du Petit Champlain Inc.*, 2002, para. 30). Two years later, the Court further explained how this purposive balance is intended to work:

when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others. (*CCH Canadian Ltd v. Law Society of Upper Canada*, 2004, para. 23)

The Canadian Parliament also confirmed the dual nature of copyright's purpose in the preamble to a major set of CCA amendments: “the exclusive rights in the Copyright Act provide rightsholders with recognition, remuneration and the ability to assert their rights, and some limitations on those rights exist to further enhance users' access to copyright works or other subject-matter” (Copyright Modernization Act, 2012). More recently, the Supreme Court noted that “a proper balance” between public access to creative works and just rewards for their creation “ensures that creators' rights are recognized, but authorial control is not privileged over the public interest” (*York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021, para. 93).

Acknowledging “close parallels” to exist between the NZCA and the copyright section of the UKCDPA, the Supreme Court of New Zealand stated the purpose of copyright “is to recognize and protect the skill and labour of the author of the copyright work” (*Henkel KGAA v. Holdfast New Zealand Limited*, 2006, paras. 35, 41). Some 12 years later, the Ministry of Business, Innovation and Employment (2018, p. 11) circulated an issue paper as part of a public consultation on desirable changes to the NZCA. The paper addressed the question, “Why do we give people copyright in their works?” in the following way:

In . . . New Zealand we take a “utilitarian” or “economic” approach when developing our copyright law. Under this approach (which countries like the United Kingdom, Australia, Canada and the United States also take) copyright is primarily intended to incentivise the creation and dissemination of works that would not otherwise be created or disseminated. (Ministry of Business, Innovation and Employment, 2018, p. 11)

The issue paper also identified the “copyright paradox”—wherein the aim of incentivizing the production and distribution of creative works for public use is undercut by copyright owners' statutory rights to limit public access to those works—as the reason why careful delineation of copyright's subject matter, a limited term of copyright, and infringement exceptions are important elements of the copyright scheme (Ministry of Business, Innovation and Employment, 2018, p. 12)

In general, then, across all five countries, statutory and case law and documents issued or commissioned by legislators together present copyright's purpose as fostering the creation and dissemination of creative works in order to promote the public interest in encouraging learning and human progress. Copyright's incentivizing purpose, which is realized by granting authors a time-limited monopoly to control uses of their works, is a means to achieving copyright's ultimate objective of encouraging learning and human progress through public access to and dissemination of creative works. Exceptions and limitations counterbalance authors' monopoly to ensure the ultimate ends of copyright are met. Equilibrium is therefore needed between the rights of the users of protected

works and the owners of copyright in those works to ensure the copyright scheme remains fair to users and owners and advances the purposes for which it was created.

Copyright Parameters

This section surveys basic mechanisms shaping the statutory rights provided in copyright legislation and how those rights may be exercised and enforced. Because copyright is a form of intellectual property, the copyright scheme and its component parts are inherently abstract and thus naturally susceptible to many variant interpretations. Due to this study's interest in readings that are copied or disseminated to students for teaching and learning purposes, most of the discussed provisions pertain to literary works. For completeness, however, the Subject Matter subsection describes the full spectrum of materials protected by copyright law in all five jurisdictions.

Subject Matter

The five copyright statutes of interest protect original expressions of ideas but not ideas alone, although only the USCA, in § 102(b), states this explicitly:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Each statute refers to “works” that must be “original” in order for copyright to subsist (ACA, s. 32; CCA, s. 5(1); NZCA, s. 14(1); UKCDPA, s. 1(1)(a); USCA, § 102(a)). The meaning of an “original” work is not defined in any of the statutes or the Berne Convention, but case law recognizes two requirements—that a work must originate independently from its author as more than a mere copy (*University of London Press v. University Tutorial Press Ltd.*, 1916), and that a basic amount of intellectual effort must be evident, whether as mere labour, or creativity, or a middle ground requiring the exercise of human skill and judgement (*CCH Canadian Ltd v. Law Society of Upper Canada*, 2004, paras. 15–16). Judge and Gervais (2009) compare how originality has been interpreted by courts in various jurisdictions including the five considered in this study, and Lindsay (2012) discusses how originality has been understood in Australian copyright law before and after the *IceTV* (2009) case.

Across all five copyright statutes, four forms of protected works are common to all: literary, dramatic, musical, and artistic (ACA, s. 32; CCA, s. 5(1); NZCA, s. 14(1)(a), UKCDPA, s. 1(1)(a), USCA, § 102(a)(1)–(3), (5)), all of which are considered to be “literary and artistic” works in the Berne Convention (1886, art. 2). The USCA's open-ended list of categories of “works of authorship” (§ 102) does not name “artistic works,” but they are subsumed in category 5, comprising “pictorial, graphic and sculptural works,” which are defined as “two-dimensional and three-dimensional works of fine, graphic, and applied art” (§ 101). The NZCA (ss. 14(1)(b)–(d)) and UKCDPA (ss. 1(1)(b)–(c)) also protect sound recordings, films, and communication works and broadcasts as distinct forms of works. Finally, the typographical layout of a published edition of a literary, dramatic, musical, or artistic work, which consists of “the particular way a work is laid out” (Millett, 2013, p. 53), is protected in the ACA (s. 92), NZCA (s. 14(1)(e)) and UKCDPA (s. 1(1)(c)).

Thus, the subject matter in which copyright subsists in all five countries includes literary, dramatic, musical, and artistic works, and the ACA, NZCA, and UKCDPA additionally protect the typographical layout of a published edition of a literary, dramatic, musical, or artistic work. As these

are the forms of subject matter most likely to be reproduced as course readings by postsecondary institutions, they represent the subset of copyrightable material of primary interest in this study, and for convenience, and are hereafter referred to generally as *textual works*.

Despite strong commonalities in the forms of works protected by all five statutes, the subject matter of copyright is articulated in variant ways, two of which are noted here to highlight some differences in terminology. The first pertains to the four statutes whose modern form was founded in the Copyright Act 1911, 1 & 2 Geo. 5, c. 46 (Eng.), each of which provides that copyright subsists in the whole of a specified subject matter or “a substantial part” thereof (ACA, s. 14(1)(b)); CCA ss. 3(1), 15(1), 18(1), 21(1); NZCA s. 29(2)(a); UKCDPA, s. 16(3)(a)). The USCA makes no such distinction, but in practice, U.S. courts normally apply a “de minimis” rule to deny protection of works or portions of works that are exceedingly small (e.g., Samuels, 1988, p. 438), which achieves a similar end. In Australia, Canada, New Zealand, and the United Kingdom, a preliminary aspect of assessing whether a particular use of copyright-protected material is infringing therefore entails determining whether what is copied represents a substantial part of the whole work (Vaver, 2011, pp. 181–189).

A second variation is discernable in the terms used to identify the subject matter of copyright. Under the NZCA, UKCDPA, and USCA, all subject matter in which copyright subsists is a “work” in one form or another, whereas the ACA and CCA distinguish between a “work” and “other” subject matter. Under the ACA (ss. 89(1), 90(1), 91, 92(1)), copyrightable subject matter other than a work includes sound recordings, cinematograph films, broadcasts, and published editions of works. Of the CCA’s three categories of protected subject matter other than works, two are shared with the ACA: sound recordings and broadcasts (CCA, ss. 18, 21). The CCA (s. 15) alone recognizes performers’ performances as a third category of other copyrightable subject matter. Statutory rights in performers’ performances, broadcasts, and sound recordings are sometimes called “neighbouring rights,” as their subject matter lacks authors who produce “works” (Vaver, 2011, p. 63).

Notwithstanding this study’s chief interest in textual works, it is worth noting briefly that protection of performers’ performances differs across the five statutes. The Australian, New Zealand, and U.K. statutes protect performers’ live and recorded performances, but instead of copyrights, these rights are called “performers’ protection” (ACA, ss. 248A–248V), “performers’ rights” (NZCA, ss. 169–204), and “a performer’s rights” (UKCDPA, ss. 182–184). U.S. copyright law does not grant rights to performers in their performances, but actions that fix a live musical performance or make it available to the public without performer consent are subject to the same remedies available for copyright infringement (USCA, § 1101(a)). Of the countries considered in this study, only Australia, Canada, and the United Kingdom are parties to the main international convention for the protection of performers’ performances (WIPO Rome Convention, 1961).

Cinematographic works (films) are also categorized in a unique manner in the CCA. The other four statutes recognize films (“cinematograph films” in the ACA, “motion pictures” in the USCA) as a distinct category of protected works, whereas cinematographic work in the CCA (s. 2) is subsumed under “dramatic work,” which includes “(a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise, (b) any cinematographic work, and (c) any compilation of dramatic works.” “Dramatic works” in the CCA therefore comprises written dramatic works as well as dramatic and nondramatic films.

Fixation

In addition to being original, a work must be fixed in a material form to attract copyright in all five countries, fixation being a discretionary matter for Berne Convention member states (1886, art. 2). The fixation requirement is established indirectly in the ACA (s. 22(1)) through a provision stating that the time at which a literary, dramatic, musical, or artistic work is “made” refers to when it was “first reduced to writing or to some other material form.” Additionally, a literary work is defined as including “a table, or compilation, expressed in words, figures or symbols” (ACA, s. 10), again implying that a literary work must be fixed in writing or notation to be protected by Australian copyright law.

The Canadian copyright statute, too, lacks an explicit fixation requirement. But definitions of three kinds of subject matter in the CCA (s. 2) mention ways in which they may be fixed: computer program, defined as “a set of instructions or statements, expressed, fixed, embodied or stored in any manner”; dramatic work, which “includes (a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise”; and sound recording, or “a recording, fixed in any material form.” The fixation requirement in Canada was established by case law: “for copyright to subsist in a ‘work’ it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance” (*Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, 1954, p. 394).

Fixation is explicitly required in the other three statutes. The NZCA (s. 15(1)) and UKCDPA (s. 3(2)) state that copyright does not subsist in a work unless “it is recorded, in writing or otherwise,” and the USCA (§ 102) requires original works of authorship to be “fixed in any tangible medium of expression.” Only the USCA (§ 101) further specifies under the definition of “fixed” that fixation must occur “by or under the authority of the author.”

Initial Owners

In all five jurisdictions, the initial owner of copyright in a literary, dramatic, musical, or artistic work is the author, and ownership is automatic upon creating a work with no need for formalities such as registration, in keeping with the Berne Convention (1886, art. 5). The copyright laws provide that if an employee and their employer have made no agreement to the contrary, the owner of copyright in a work created in the course of employment is the employer (ACA, s. 35(4); CCA, s. 13(3); NZCA, s. 21(2); UKCDPA, s. 11(2); USCA, § 201(b)). While the originator of a work created in the course of employment is regarded as the author in the ACA, CCA, NZCA, and UKCDPA, the employer is taken to be the author in the USCA. Furthermore, in the USCA (§ 201(b)), a work created in the course of employment is a “work made for hire” and any agreement stating otherwise must be in writing signed by all parties. A work for hire includes a work deemed to be a specially ordered or commissioned work (an example being “instructional text”) if it is expressly designated as a work made for hire in a written agreement signed by all parties (USCA, § 101).

For forms of works other than literary, artistic, musical, and dramatic, the ACA, CCA, NZCA, and UKCDPA provide that copyright is initially owned by various categories of creators or entities, whereas the USCA refers to all owners of copyright as authors, no matter the form of the protected work. For published editions (ACA, s. 100) and typographical editions of published works (NZCA, s. 5(2)(d); UKCDPA, s. 9(2)(d)), the initial copyright owner is the publisher. This category of protected subject matter may be implicated in a coursepack produced in Australia, New

Zealand, or the United Kingdom if the copied materials reproduce substantial parts of the originality in the published editions (ACA) or typographical editions (NZCA and UKCDPA) of published works.

Duration

The term of copyright in the Berne Convention (1886, art. 7)—the life of an author plus 50 years after death—is a minimum term that member countries may choose to exceed. For literary, dramatic, musical, and artistic works, the ACA (ss. 33(2), 34(1)) and UKCDPA (ss. 12(2)–(3)) protect copyright for a term of life plus 70 years after death when the author is known, and for 70 years after the year in which a work was made or first published when the author is unknown. For jointly authored works, all five statutes base the copyright term on year of death of the last surviving author, in line with the Berne Convention (1886, art. 7bis). For subject matter other than the kinds of textual works forming this study's focus, copyright generally lasts 20 to 70 years after the year of creation or the creator's death.

The term of copyright in the United States for a work created after 1977 (USCA, §§ 302(a), 302(c)) is also 70 years after the author's death, but the term of protection for anonymous and pseudonymous works and works made for hire is 95 years from the year of first publication or 120 years from the year of creation, whichever expires first. The duration of copyright for works created before 1978 is addressed within the USCA at §§ 303–304. In Canada, an amendment to the CCA came into force on December 30, 2022, (Governor General in Council, 2022) that extended the general term of protection by 20 years to life plus 70 years (CCA, s. 6) but did not revive copyright in works that were already in the public domain. Extension of Canada's general term of copyright was a requirement of a renegotiated trilateral free trade agreement by North American countries (Canada–United States–Mexico Agreement, 2018).

Of the five countries considered in this study, at the time of this writing, only New Zealand continues to maintain the Berne Convention's minimum general term of protection of life plus 50 years for works of known authorship and 50 years after a work is first made for works of unknown authorship (NZCA, s. 22). Pressure continues to be exerted on New Zealand by its trading partners, however, to follow suit and extend the basic term of copyright in the NZCA to 70 years (Directorate-General for Trade, 2022; Sachdeva, 2022) even though the extent to which term extension furthers copyright's goal of making more creative works available is questionable (e.g., Buccafusco & Heald, 2013; Heald, 2014; Flynn et al., 2019). Tools have been developed to assist in the determination of whether a work is protected by copyright or is in the public domain within the five jurisdictions (e.g., Australian Libraries and Archive Copyright Coalition, 2019; Cornell University Library, 2023; DigitalNZ, 2025; National Archives, 2015; University of Alberta Copyright Office, 2024).

Authors' and Owners' Rights

Copyright is a bundle of statutory rights granted to the author of an original work to control various acts regarding the work such as reproduction, translation, adaptation, public performance, and communication to the public (Berne Convention, 1886, arts. 8–9, 11–12) and to assign or license these economic rights to others. Copyright law also grants moral rights to an author of a copyright-protected work, which generally include rights to the integrity of the work, to be known as the author, and to object to actions in relation to the work that harm the author's honor or reputation (Berne Convention, 1886, art. 6bis). Moral rights in the ACA (ss. 189–195ANB), CCA (ss.

14.1–14.2, 17.1–17.2), NZCA ss. 94–110), and UKCDPA (ss. 77–89) have the same duration as copyright and may not be assigned, although they may be waived. U.S. copyright law does not contain a general moral rights provision, but authors of works of visual art have rights of attribution and integrity (USCA, § 106A).

The CCA describes copyright owners' economic rights in a unique manner. An introductory paragraph (s. 3(1)) states that copyright in relation to a work or a substantial part of the work means the sole right to produce or reproduce it, perform it in public, and publish it for the first time. The immediately following subparagraphs enumerate 10 additional sole rights included in the meaning of copyright (ss. 3(1)(a)–(j)), including the sole right to communicate a work to the public by telecommunication. In a case involving whether downloading a file from the internet is a communication of the work to the public, the Entertainment Software Association (ESA) also sought to establish whether copyright consists of the three rights in the introductory paragraph and the additional distinct rights in each of the enumerated subparagraphs, or whether the separate enumerations merely illustrate the three rights in the introductory paragraph. The Supreme Court of Canada ruled that the latter view is correct (*Society of Composers, Authors and Music Publishers of Canada [SOCAN] v. ESA*, 2012).

The copyrights granted to authors are set out in the other four statutes by way of a single closed enumeration of rights (ACA, ss. 31(a)–(d); NZCA, ss. 16(1)(a)–(i); UKCDPA, ss. 16(1)(a)–(e); USCA §§ 106(1)–(4)). When educational institutions copy course readings and make them available to students, the copyrights most often implicated include reproduction of a work and communicating a work to the public. The right to reproduce is called the right to “copy” in the NZCA and UKCDPA. In the United States, the right to communicate a work to the public (USCA, § 106(5)) is included in the right to publicly display copyright-protected works. To “display” a work means to show a copy . . . either directly or by means of a film, slide, television image, or any other device or process, or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially. (USCA, § 101)

In turn, to perform or display a work “publicly” means, in part, to communicate or display it to the public using “any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times” (USCA, § 101).

All five statutes provide six categories of economic rights in respect to copyright-protected works: the rights to reproduce, publish, communicate to the public, publicly perform, rent, and adapt. A seventh right to authorize such acts is included in the enumeration of rights belonging to copyright owners in the CCA, NZCA, and USCA. The authorization right is provided in a separate provision of the ACA (s. 13(2)) pertaining to “acts comprised in copyright,” and the UKCDPA (s. 16(2)) indirectly references an authorization right in a provision stating that “copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.”

Users' Rights

The Berne Convention gives member states the option to allow unauthorized reproduction and other uses of protected material in national legislation under certain conditions (1886, art. 9), which all five countries have chosen to do. Statutorily allowed unauthorized use of copyright-protected works is variously referred to as “acts not constituting infringements of copyright” (ACA,

ss. 40–53, 65–73, 200–200AB), “exceptions to infringement” (CCA, ss. 29–32.3), “acts permitted in relation to copyright works” (NZCA, ss. 40–93, 175–192A; UKCDPA, ss. 28–76), and “limitations on exclusive rights” (USCA, § 107). Following the suggestion of the Supreme Court of Canada that infringement exceptions are better understood as “users’ rights” (*Alberta (Education) v. Canadian Copyright Licensing Agency*, 2012, para. 22; *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004, para. 12; *SOCAN v. Bell Canada*, 2012, para. 11; *SOCAN v. ESA*, 2022, para. 5; *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021, para. 94), this study adopts the term *users’ right* to refer to any statutory provision permitting use of protected works without authorization from the rightsholder and without payment of fees. At the same time, it must be acknowledged that adopting users’ rights language runs the risk of counterintuitively reinforcing the tendency within the copyright scheme to privilege owners’ rights in ways that discount the public interest in encouraging societally beneficial learning and human progress through creative practices (Craig, 2017). That risk is arguably worth taking, however, to position users’ rights on the same footing as private owners’ rights since both are integral to the proper functioning of the copyright scheme. Summarized here are statutory users’ rights that may be relevant to copying by educational institutions.

Users’ rights with the potential to cover educational copying generally belong to one of two groupings: fair dealing or fair use, and other users’ rights designed specifically for educational institutions. The Berne Convention (1886, art. 9) accommodates users’ rights under the provision known informally as the three-step test:

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

An almost identical provision is included in the TRIPS agreement (WTO, 1994, art. 9). A strict reading may raise concerns that “certain special cases” might rarely apply to classroom copying as a common educational practice, but in general, fair dealing and fair use provisions of national copyright laws are understood to be consistent with the three-step test of international copyright law under flexible interpretations of its nonspecific, abstract criteria (Geiger et al., 2014).

The meaning and scope of fair dealing and fair use as well as assessments of their similarities and differences have been the subject of numerous scholarly discussions (e. g., Burrell & Coleman, 2009; D’Agostino, 2008; Katz, 2021; Nair, 2010). The copyright laws of Australia (ACA, ss. 40–41, 41A, 42–43), Canada (CCA, ss. 29, 29.1–29.2), New Zealand (NZCA, ss. 42–43), and the United Kingdom (UKCDPA, ss. 29(1), 29(1C), 30(1), 30(1ZA), 30(2), 30A(1), 32) all contain fair dealing provisions comprising closed lists of allowable purposes for unauthorized uses of protected subject matter if the dealing is fair. Katz (2021, p. 113) notes, however, that “the proposition that the list of allowable [fair dealing] purposes is exhaustive has never been the *ratio* of any decided and reported case.” In contrast, the fair use provision of the USCA (§ 107) lays out users’ rights in an open-ended manner permitting any use of a protected work as long as it is fair.

Fair Dealing

Australia’s copyright statute provides that certain uses of protected works may be allowed if they pertain to one or more of eight fair dealing purposes: research, study, criticism, review, parody, satire, reporting news, and professional advice offered by specific kinds of professionals (ACA,

ss. 40–43). The fair dealing provision for research or study purposes includes an open-ended list of factors in s. 40(2) that must be considered in determining whether a dealing is fair, and s. 40(5) specifies a quantified “reasonable portion” requirement that must be observed for dealings with works other than periodical articles. As well, ss. 40(3)–(4) provide that copying one article in a periodical publication for research or study is taken to be fair dealing for research or study purposes without needing to consider the factors in s. 40(2), but the latter does not apply if the researcher reproduces another article from the publication for different research or a different course. Fair dealings for purposes of criticism, review, and reporting news in print media are subject to an attribution requirement in ss. 41–42.

The Canadian copyright statute also contains eight allowable fair dealing purposes (CCA, ss. 29–29.2), seven of which overlap with those allowed in the ACA—research, private study, criticism, review, news reporting, parody, and satire; the eighth is education. In contrast to the ACA, NZCA, and UKCDPA, the fair dealing provisions of the CCA are not accompanied by specified fairness factors to consider or any conditions, save an attribution requirement applicable to fair dealing for criticism, review, and news reporting purposes (ss. 29.1–29.2). The fair dealing provisions of the CCA are brief and, aside from the attribution requirement for three purposes, simply state that any dealing for an allowed purpose that is fair “does not infringe copyright” (ss. 29–29.2).

New Zealand’s copyright statute contains five fair dealing purposes, all of which are also specified in the ACA, CCA, and UKCDPA: criticism, review, reporting current events (excluding photographs used in print media), research, and private study (NZCA, ss. 42–43). Each of the allowable purposes of fair dealing with a work is circumscribed by at least one condition or limitation. Only attribution is required for fair dealing for purposes of criticism, review, or reporting current events in print media (ss. 42(1), 42(3)), but research and private study purposes are subject to five fairness factors that must be considered, and a condition that making more than one copy of the same work on any one occasion is disallowed (ss. 43(3)–43(4)).

The copyright law of the United Kingdom provides 10 fair dealing purposes applicable to works, five of which are also available in the ACA, CCA, and NZCA: research, private study, criticism, review, and reporting current events (UKCDPA, ss. 29, 30). Fair dealing with a work for research purposes must be accompanied by attribution where practicable (ss. 29(1), 29(1B)). The limitation to noncommercial research purposes was a requirement of the Information Society Directive of the European Union, (Harbottle et al., 2020, p. 790). Fair dealing for research or private study does not cover “copying by a person other than the researcher or student himself,” for example, if the copying is done by library staff and involves anything not permitted in s. 42A (making more than one copy) or if the copier knows or believes the copying will result in copies provided to more than one person at the same time for the same purpose (s. 29(3)). According to Burrell and Coleman (2009, p. 117), the intent of the latter stipulation is to exclude classroom copying from the ambit of the exception for research and private study. Fair dealing for research and private study purposes is also inapplicable to certain activities involving the use of computer programs (ss. 29(4)–29(4A)). Fair dealing for the purpose of criticism or review requires attribution where practicable and requires that the copied work has been made available to the public (s. 30(1)). Fair dealing for news reporting purposes may not include photographs and requires attribution only where practicable when reporting is via sound recording, film, or broadcasting (s. 30(2)–30(3)).

The UKCDPA (ss. 30, 30A, 32) also allows fair dealing for quotation, caricature, parody, pastiche, and illustration for instruction. Caricature, parody, and pastiche are the only fair dealing pur-

poses not accompanied by conditions or limitations in the UKCDPA but are generally inapplicable to educational copying. Quoting from a work is non-infringing if the work has been made available to the public, the use is fair dealing, no more is used than required for the purpose, and attribution is provided where practicable (s. 30(1ZA)). Dealing with a work for the purpose of illustration for instruction may be fair if the purpose is noncommercial, no other purpose is involved, and the dealing is by a person giving or receiving instruction and is accompanied by attribution where practicable (s. 32). For all purposes allowed in the UKCDPA except criticism, review, and reporting current news, fair dealing may not be overridden by contract (ss. 29(4B), 30(4), 30A(2), 32(3)).

Fair Dealing and Classroom Copying?

The fair dealing provisions of the ACA, CCA, NZCA, and UKCDPA contain five fair dealing purposes that are common to all four statutes:

- research (subject to conditions in the ACA, NZCA, and UKCDPA),
- study (“private study” in the CCA, NZCA, and UKCDPA; subject to conditions in the ACA, NZCA, and UKCDPA),
- criticism (with attribution requirement; the UKCDPA further requires that the work has been made available to the public),
- review (with attribution requirement; the UKCDPA further requires that the work has been made available to the public), and
- reporting news (“news reporting” in the CCA, “reporting current events” in the NZCA and UKCDPA; excludes photographs in the NZCA and UKCDPA; with attribution requirement; attribution required by the ACA and NZCA only for reporting in print media and not required by the UKCDPA for non-print media when impracticable).

Of the fair dealing purposes in the copyright laws of interest in this study, research, study, education, and illustration for instruction seem most closely related to educators’ probable purposes in engaging in classroom copying. Criticism or review may also be applicable in certain circumstances, such as lessons involving materials copied in order to critique their content. A key question is whether fair dealing and users’ rights for educational institutions can accommodate educational copying. Answers afforded by the ACA, CCA, NZCA, and UKCDPA themselves, are at best, inconclusive.

The fair dealing provisions of the ACA and CCA for purposes such as research and study seem to be potentially applicable to classroom copying as they include no specific bar against making multiple copies. In contrast, fair dealing for research or private study purposes in the NZCA (s. 43(4)) is limited to no more than one copy of the same work on any one occasion and in the UKCDPA (s. 29(3)(b)) to no more than one person receiving a copy if the copying is by someone other than the researcher or student. The extent to which these restrictions on multiple copying exclude classroom copying seems not entirely clear.

The UKCDPA includes no explicit limitations on fair dealing for the purpose of illustration for instruction. Guidance issued by the U.K. government nonetheless asserts only “minor uses, such as displaying a few lines of poetry” are covered and that the provision does not “remove the need for educational establishments to hold licences for use that is not ‘fair dealing,’ for instance, photocopying material to distribute to students” (U.K. Intellectual Property Office, 2014). This appears to limit the applicability of this provision to copying that falls far short of the usual length of chapters and articles used as course readings. The CCA’s fair dealing provision for the purpose of education also

appears to accommodate instructional purposes but is not limited by statutory conditions.

The fair dealing provisions of the ACA, CCA, NZCA, and UKCDPA for purposes of criticism and review, with attribution, seem potentially applicable to making multiple copies for student use in a classroom or course setting. The only additional stipulation is the requirement in the UKCDPA that the source work has been made available to the public.

Fair Use Provisions

The fair use provision in the USCA is presented in an open-ended manner:

The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. (§ 107)

The intentionally uncircumscribed nature of allowable fair uses and purposes is established by the terms “including” and “such as,” with the latter defined in the USCA as illustrative and not limitative (§ 101). Moreover, the fair use provision specifies “teaching (including multiple copies for classroom use), scholarship, or research” (§ 107) within its examples of purposes that may fall within fair use. The fair use provision in U.S. copyright law therefore specifically contemplates the potential for multiple copies for students in a class to constitute fair use, subject to the outcome of a proper analysis of the fairness of a proposed use, which must include consideration of the four factors laid out in § 107.

That U.S. fair use is intended to accommodate at least some classroom copying seems reasonably clear, but unsurprisingly, publishers and the education sector have disagreed on the fairness of specific unauthorized uses in particular contexts. Education and illustration for instruction are relatively recent additions to the CCA and UKCDPA, respectively, as an allowable fair dealing purpose (Copyright Modernization Act, 2012; U.K. Intellectual Property Office, 2014), but like fair use, the question of whether fair dealing can apply to readings made available to all students enrolled in a course is not addressed specifically in the statutes. As the lawfulness of particular uses or dealings are matters for judicial determination, selected cases involving fair use and fair dealing claims are examined in Part 2 of this series.

Statutory Fairness Factors

The first step in determining whether a dealing with a copyright-protected work infringes copyright under the ACA, CCA, NZCA, and UKCDPA is to assess whether the dealing qualifies as a statutorily enumerated fair dealing purpose. When an allowed purpose is identified, a second step is to evaluate the fairness of the dealing (D’Agostino, 2008, pp. 318–319). Sufficient attribution is also statutorily required for some allowed purposes (e.g., criticism or review). Under the USCA, determining whether use of a protected work is a fair use is determined in one step that assesses the fairness of the use.

The ACA, NZCA, and USCA include factors that must be taken into account in fairness analyses. The fairness factors specified in the ACA (s. 40(2)) for fair dealing for research or study purposes and in the fair use provision of the USCA (§ 107) are presented as open-ended lists, whereas the list of factors in the NZCA (s. 43(3)) for research or private study purposes is closed. Four factors are common to all three lists: purpose of the use, nature of the copied work, amount and substantiality of the part used in relation to the whole work, and effect of the use on the work’s

potential market or value. In addition, the character of the use is a fairness factor in the ACA and USCA, and whether the work could have been obtained in a reasonable time at an ordinary commercial price is a fairness factor in the ACA and NZCA. The USCA further specifies that matters to be considered under the purpose and character of use factors include whether the use is commercial in nature or is for nonprofit educational purposes. Similar factors established by case law for assessing the fairness of unauthorized dealings under the fair dealing provisions of the CCA and UKCDPA are discussed in Part 2.

Fair Amounts

Only the ACA mentions a quantitative limit to the amount of a work that may be fair dealing. The limit, called a “reasonable portion,” applies to dealings with literary, dramatic, or musical works, or adaptations of works in those forms contained in published editions, for purposes of research or study (ACA, s. 40(5); see also ss. 10(2), 10(2A), 10(2B), 10(2C)). The ACA (s. 40(5)) deems a reasonable portion of an eligible work in print format to be 10% of the number of pages or one chapter, and for an eligible work in electronic format, 10% of the number of words or one chapter.

Users’ Rights for Educational Institutions

In addition to fair dealing or fair use provisions, the five copyright laws contain other users’ rights pertaining specifically to educational institutions. Summarized here are statutory provisions that educators may use for providing students with access to materials needed for instruction and learning.

Anthologies. The four statutes with historical roots in the 1911 U.K. Copyright Act provide that inclusion of a short passage from a protected work in a collection (i.e., anthology or compilation) is not infringing. Three main conditions must be met: the protected work was not published for use by educational institutions, the collection comprises mostly public domain materials, and the collection is for use in educational institutions and is labeled as such in its title and any advertisements. Among other conditions, attribution is required and no more than two passages from protected works by the same author may be used in anthologies published by the same publisher in any 5-year period (ACA, s. 44; CCA, s. 30; NZCA, s. 46; UKCDPA, s. 33). Thus, the relevance of these provisions to the course-related copying of interest in this study is doubtful, in large part due to the requirement that such anthologies must predominantly comprise materials in the public domain and to the administrative burden of complying with the limit on the number of extracts used per author in a 5-year period.

Multiple Copies for Teaching. In U.S. copyright law, making multiple copies of a work for classroom use is specifically contemplated as a use that may be fair and therefore non-infringing (USCA, § 107). In Australian copyright law, the s. 200AB provision of the ACA entitled “Use of Works and Other Subject-Matter for Certain Purposes” contains two subsections that also seem relevant to classroom uses of protected materials. One subsection, s. 200AB(1), states the conditions of the Berne Convention’s three-step test for a “special case” of a non-infringing use of protected materials. Another subsection, s. 200AB(3), entitled “Use by Body Administering Educational Institution,” provides that s. 200AB(1) may be applicable if the purpose of a use is instructional

and “not made partly for the purpose of . . . obtaining a commercial advantage or profit.” Classroom copying would seem to fit, but for the limitation that the provision “does not apply if under another provision the use does not, or might not, infringe copyright” (ACA, s. 200AB). Research on the extent to which educational institutions rely on the provisions of s. 200AB suggests those provisions have “failed to become a meaningful part of institutional copyright practices, and that this state of affairs shows little prospect for change” (Hudson, 2013, p. 204). In the end, the s. 200AB provisions appear to be ill-suited to cover educational copying due to the existence of the statutory education license provisions discussed below, in the Licensing Arrangements section.

The NZCA (ss. 44(3)–44(4)) allows educational institutions to make non-infringing multiple copies of parts of literary, dramatic, or musical works or of the typographical arrangement of published editions for educational purposes if no fees are charged. Such copying is limited, however, to no more than 3% or three pages, or 50% for works consisting of three or fewer pages, and the institution may not make further copies from the same work under the provision for 14 days. Given that book chapters and articles selected for use in postsecondary courses are typically much longer than three pages, s. 44 seems unlikely to be applicable to postsecondary course readings in most cases.

The UKCDPA (s. 36) has a provision similar to that of the NZCA for copying extracts from works by educational establishments. Conditions of the UKCDPA provision include reproduction only for noncommercial instructional purposes, an attribution requirement when practicable, and limitation of the copying to no more than 5% of a work in any 12-month period. But broadcasts and stand-alone artistic works are excluded, and more importantly for educational copying, the provision is unavailable if the desired copying is covered by a license authorizing the copying, which is usually the case, as we shall see in the Licensing Arrangements section.

Examinations and Tests. Copying of protected works by educational institutions for examination or testing purposes is explicitly considered to be non-infringing under the ACA (s. 200(1)(b)), CCA (s. 29.4(2)), NZCA (s. 49), and UKCDPA (s. 32(2)). Despite the lack of an equivalent provision, the USCA seems capable of accommodating examination uses of protected works under fair use, given that teaching, mentioned in § 107, is widely understood to encompass learning assessment, which can take many forms, including examinations and tests. But in all five jurisdictions, statutory users’ rights permitting copying for examination or testing seem unlikely to be applicable to course readings, since most readings are assigned for educational purposes that extend beyond the narrow confines of examinations and tests.

Works Available on the Internet. The copyright statutes of two countries contain provisions for educational use of materials available on the internet. The CCA (s. 30.04) provides that an educational institution does not infringe copyright when it copies protected material available through the internet and communicates it to or shares it with students, along with source attribution. The provision is not available if the material is protected by a technological protection device, if the website or item itself contains a clearly visible notice prohibiting the desired use, or if the institution knew or should have known the item was made available on the internet without the copyright owner’s consent.

Under the NZCA (s. 44A), an educational institution does not infringe copyright when it stores pages from works made available “on a website or other electronic retrieval system” if the storage is for educational purposes, the stored work is displayed under a separate header or frame along with

attribution and the institution's name and date of storage, and access to the material is restricted to authenticated users. The use becomes infringing, however, if the institution fails to delete the pages within a reasonable period after they are no longer relevant to the course for which they were stored. Thus, the CCA and NZCA permit classroom copying of non-infringing materials made available on the internet, which could include materials used as course readings, as long as certain statutory conditions are met.

Communicating Works to Students. Finally, all five statutes provide for non-infringing communication of copyright-protected works by educational institutions in order to display or perform the works to students. Under the ACA (s. 28(7)), communication of a work by an educational institution is not a communication to the public when the purpose is to facilitate the work being seen by students in a class while providing nonprofit instruction. Since the provision applies only to artistic works, however, its relevance to communicating textual works as course readings appears modest at best.

The CCA (s. 30.01) provides that an educational institution may communicate a lesson for educational purposes to students enrolled in a course without infringing copyright. As this provision itself does not authorize uses of protected works, a copyright-protected work included in a communicated lesson must qualify as a permitted use under another CCA provision or applicable license; otherwise, permission must be obtained from the copyright owner.

Under the NZCA, non-infringing multiple copies of very small excerpts made by an educational institution for educational purposes (ss. 44(3)–44(4)) noted above in the Multiple Copies for Teaching subsection may also be communicated to students who receive a lesson relating to the copied work (s. 44(4A)). The UKCDPA (ss. 36(2)–(3)) offers a comparable provision for communicating non-infringing extracts to students, with restrictions: the communication purpose must be instructional and noncommercial, and the provision applies to a communication received outside of the institution only if made by means of a secure network accessible solely by the institution's staff and students.

The USCA (§ 110(2)) permits nonprofit educational institutions to transmit a display of a protected work to students as part of a regular class session in an amount typical of the amount that would be displayed in a live classroom setting. Since no limits are placed on the forms of works that may be displayed and a face-to-face class might conceivably include display of a book chapter or journal article, in certain circumstances it may be lawful to communicate textual works to students under this provision if, among other considerations, the use genuinely typifies a use that would occur in a live instructional setting. In practice, the provision is understood to be inapplicable to course readings intended largely for individual scholarly use by students, however (Smith, 2014, p. 103).

Across the five copyright statutes, then, provisions for communicating works to students do not authorize educational institutions to copy or distribute copyright-protected works, or they allow only very small or narrowly defined uses that generally seem insufficient to cover the kinds of materials typically used as course readings. If educational institutions wish to communicate protected material to students electronically, it may be necessary to first ascertain whether permission is needed to copy the material for student use.

Summary of Statutory Parameters

Across the five jurisdictions of interest in this study, commonalities in the parameters of copy-

right law are strongest in terms of basic mechanisms such as delineation of the traditional subject matter of copyright protection (literary, musical, dramatic, and artistic works) and provisions for copyright ownership, duration of protection, and authors' rights, all of which are elements stipulated by the Berne Convention. The scope and nature of copyright parameters becomes more complex, varied, and less definitive in the area of limits or exceptions to copyright owners' rights, which demarcate the space within copyright's landscape where users' rights reside. The optional nature of users' rights in national copyright legislation (Berne Convention, 1886, art. 9) perhaps partly explains the wider divergence in how such rights have been implemented in different jurisdictions.

Regarding the main concern of this study—whether and when statutory users' rights may be applicable to educational copying—only the USCA appears to offer a clear affirmative answer to the first question, given that the § 107 fair use provision explicitly contemplates the possibility of “teaching (including multiple copies for classroom use)” being fair use, subject to a proper analysis of whether the use is fair. As Part 2 of this article series examines selected judicial opinions to seek more detailed answers to both questions, for now, suffice it to note that “education has been called ‘one of the clearest examples of a strong public interest in limiting copyright protection’” (Australian Law Reform Commission, 2013, p. 312), and that a copyright review committee recently refused to endorse a proposal to “limit educational fair dealing to cases where access to a work is not ‘commercially available’” on the basis that doing so could diminish “flexibility in the educational market by favouring blanket over transactional licensing” (Canada Standing Committee on Industry Science and Technology, 2019, p. 64).

Licensing Arrangements

The copyright laws of each of the five countries specify ways in which authors and copyright owners may exercise their rights in copyright-protected subject matter, including assigning ownership and licensing some or all of their copyrights (ACA, s. 196; CCA, s. 13(4); NZCA, ss. 111, 113–114; UKCDPA, s. 90; USCA, §§ 201–205). While the author is usually the initial owner of copyright in a work, commercial publishers normally require an author to assign or exclusively license all economic rights in their work to the publisher (Knopf, 1999, p. 125; Litman, 2018, p. 554). The copyright owner of a commercially published work is therefore most often the publisher. Some authors may prefer to manage their economic rights in commercial works independently, including permissions and copyright enforcement. But authors and rightsholders may find it more productive and convenient to exercise their rights through collective licensing, a “process by which a group of copyright owners join together to offer a single license covering multiple copyrights from different owners in lieu of requiring licensees to enter into separate licenses with each owner for that owner's works” (Broussard, 2009, p. 22).

A copyright license permits a licensee to do acts that otherwise would infringe copyright in the material covered by the license. Educational institutions that frequently rely on copying from protected works may prefer to work with organizations that offer collective licensing when permission is not otherwise covered by applicable statutory provisions, preexisting licenses obtained directly from rights owners, or other readily available permission sources. Since collective licensing in some circumstances may verge on an owners' permissions monopoly, to ensure hospitable conditions for collective licensing, some countries provide oversight mechanisms for licensing arrangements through copyright legislation and legislated immunity from competition laws. In Canada, for example, few copyright collectives existed before enabling amendments to the CCA were passed in 1988 (Knopf, 1999, pp. 113–115).

The following subsection outlines statutory provisions for three broad aspects of licensing arrangements: organizations that manage economic rights on behalf of groups of copyright owners, licensing schemes covering pools of protected works from many different authors, and bodies that oversee legislation-supported licensing arrangements.

Copyright Collectives

The statutes examined in this study variously refer to an organization that manages licensing and economic rights in protected works for multiple copyright owners as a *collecting society* (ACA), *collective society* (CCA), *licensing body* (NZCA; UKCDPA), and *rights society* (USCA). While other related designations include *copyright society* (Torremans, 2010), *collective management organization* (Gervais, 2001), *collective rights organization* (Band & Butler, 2013), *copyright licensing agency* (Crews, 2008), and *reprographic rights organization* (Bouchard, 2010), for convenience this study adopts the term *copyright collective* (e.g., Lunney, 2010; Wilkinson, 2010) when referring generally to all such organizations. The purpose of copyright collectives is to “make the copyright system more effective and efficient, promote the dissemination of works . . . enlarge the choice of works made available to the public. . . and in principle operate for the benefit of the public” (Harbottle et al., 2020, p. 2440).

Although some collectives may not perform all of these functions, the principal functions of copyright collectives are normally

to license the use of the copyrights they manage; to monitor that use in order to enforce the conditions upon which the license has been granted; and to collect and distribute the royalties payable as the result of licensed use. (Harbottle et al., 2020, p. 2438)

A copyright collective may additionally enter into reciprocal agreements with other collectives that operate in different jurisdictions to license each other’s repertoires of works (Gervais, 2010). Processes for establishing copyright collectives and determining how they operate are generally not subject to legislative oversight, but in some countries, copyright law regulates certain activities of copyright collectives pertaining to licensing.

The ACA (ss. 113V–113ZC) lays out rules for declaring a body to be a statutorily recognized collecting society and identifies required reporting, but its definition of *collecting society* (s. 2) does not specify what it is or does. A collective society in the CCA (s. 2) is a body that, among other things, administers remuneration rights under the Act, operates a licensing scheme for uses of a repertoire of works of more than one author, and collects and distributes royalties. In the NZCA (s. 2) and UKCDPA (s. 116(2)), a licensing body is a society or group of persons that negotiates and grants copyright licenses covering works of more than one author. In the UKCDPA, a collecting society can also be a society that manages the right to equitable remuneration of more than one author or performer (e.g., s. 93B(7)). The USCA does not provide rules governing copyright collectives or licensing and mentions only one kind of copyright collective—a performing rights society (§ 513)—which plays no role in licensing uses of textual works.

Licensing Schemes

The ACA (s. 136(1)), CCA (s. 2), NZCA (s. 2), and UKCDPA (s. 116(1)) contain provisions for collective licensing of pools of works from multiple authors under a *licensing scheme* (*license scheme*, in the ACA). In these three statutes, licensing scheme is defined similarly as any scheme setting out classes of uses of a repertoire of works of more than one author that the scheme operator is willing to license along with applicable royalties, terms, and conditions. Licensing schemes

generally permit certain uses of copyright-protected material by a specified class of users without owner permission, subject to payment of equitable remuneration or a specified tariff or royalty amount. A license that permits certain uses for the entire repertoire owned by a rightsholder or managed by a copyright collective is often referred to as a *blanket license*.

Licensing schemes can be either voluntary or statutory (Copyright Licensing Agency, n.d.). Under the voluntary schemes presented in the CCA, NZCA, and UKCDPA, copyright owners have the option of licensing or declining to license their works collectively. Owners can choose to engage in collective licensing by joining a collective that operates or participates in collective licensing of specified categories of copyright-protected subject matter. The ACA's statutory licensing scheme is compulsory in the sense that copyright owners in Australia have no choice but to allow educational uses of their works in exchange for equitable remuneration payable by educational institutions (Marks, 1986, p. 223). The statutory license scheme notwithstanding, Australian copyright owners are free to enter into voluntary licenses with educational institutions (s. 113T), which means the parties may choose to amend a statutory license voluntarily (Davison et al., 2012, p. 261).

Australia

The ACA's statutory license scheme for educational institutions in Part IV A, Division 4 (ss. 113N–113U) allows an educational institution to copy or communicate certain protected material if the institution agrees to pay equitable remuneration to a collecting society. An amendment that simplified the statutory license for educational institutions came into force in December 2017 (Australian Skills Quality Authority, 2018). The statutory license covers copying and communicating works and broadcasts by educational institutions for educational purposes (ACA, s. 113P). The deemed meaning of “educational purposes” of an educational institution is specified in s. 10(1A). Use of protected material under the statutory license must be solely for the nonprofit educational purposes of an educational institution, and a remuneration notice must be in force (s. 113Q). When an educational institution wishes to use protected works under the statutory license provisions, it must first send a written remuneration notice to the collecting society that manages the relevant rights for eligible owners of copyright in the works (s. 113Q(4)). A remuneration notice is a promise to pay equitable remuneration (s. 113R) for licensed copying or communicating and to assist the society to collect and distribute the remuneration. The equitable remuneration amount is either agreed to by the collecting society and educational institution or is determined by the Copyright Tribunal (s. 113R(1)). All Australian universities hold a blanket educational copying license negotiated by Universities Australia and Copyright Agency Limited, a collecting society for text and images (Universities Australia, n.d.).

Canada

Provisions in the CCA relevant to collective licensing that covers the reproduction of textual works are subject to what is known as the general regime (Bouchard, 2010). Amended in 2018 to make the collective licensing process more efficient (Innovation, Science and Economic Development Canada, 2018), the general regime provides two ways in which a collective society can establish the essential components of a licensing scheme: by either filing a proposed tariff with the Copyright Board (s. 67(1)) or negotiating license agreements with users (s. 67(3)). A tariff proposed by a collective society is certified by the Board through a process that must consider any filed objections and may result in alterations to the proposed royalties, terms, or conditions as the Board deems necessary (s. 70). The question of whether an approved tariff is automatically applicable to all users

who copy or communicate works covered by the tariff was answered in the negative by the Supreme Court of Canada (*York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021), relying in significant part on research by Katz (2015a, 2015b) on the “mandatory tariff” theory.

If a collective society and a user agree to a license agreement and either party files a copy of the agreement with the Copyright Board within 15 days of its conclusion, s. 45 of the Competition Act does not apply to the agreement’s rates, terms, or conditions (CCA, ss. 76(2)–76(3)). The Commissioner of Competition is entitled to have access to the voluntarily filed agreements and may ask the Board to examine an agreement if it is considered to be contrary to the public interest (CCA, ss. 76(4)–76(5)). Since 2015, very few Canadian public postsecondary institutions have chosen to acquire a blanket copying license from Access Copyright, a literary works collective society (Copyright Board of Canada, n.d.).

New Zealand

Following the approach taken in the UKCDPA, the NZCA allows certain kinds of licensing scheme disputes to be referred to the Copyright Tribunal. One type of dispute involves disagreements about the terms of a licensing scheme proposed by a licensing body (NZCA, s. 149). Either the operator of the proposed scheme or an organization representing users wishing to obtain licenses under the proposed scheme may make the reference. If the Tribunal entertains such a reference, it will make an order either confirming or varying the proposed scheme and will determine the period in which the order is to be in force.

In addition, the NZCA provides an implied indemnity when the licensing schemes or licenses granted by licensing bodies for photocopying or scanning textual works do not specify the works covered (s. 167). In such cases, the indemnity protects licensees against infringement liability in the event that copying thought to be within the licensed repertoire is later found not to be covered. All New Zealand universities hold an annual blanket copying license negotiated by Universities New Zealand and Copyright Licensing New Zealand (n.d.), a licensing body for print materials (Johnson, 2020).

United Kingdom

The UKCDPA presents provisions for copyright licensing in ss. 116–144 and sets out parameters for the composition and operation of the Copyright Tribunal in ss. 145–152. Matters relating to licensing schemes that may be referred to the Copyright Tribunal include the terms of a licensing scheme proposed to be operated by a licensing body (s. 118). Unlike the corresponding provision in the NZCA, the UKCDPA provision considers only references made by an organization representing users who wish to obtain licenses of the kind the proposed scheme would supply. Under both statutes, users or user groups may initiate proposals for licensing schemes that are alternatives to existing schemes, as long as the Tribunal consents to entertain the proposed scheme (Torremans, 2010, p. 270).

Licensees are accorded an implied indemnity against infringement liability when a collective license or license scheme for reproduction of textual works fails to specify the licensed repertoire in enough detail to enable licensees to determine whether or not a particular work is covered (s. 136). The Secretary of State may order that a licensing scheme or license for copying by educational institutions be extended to cover certain excluded works (s. 137), but the required process for obtaining such an order appears to render the provision “a tool that is not designed to be used” (Torremans, 2010, p. 270). The Secretary of State may investigate whether a new licensing scheme is required to

meet the instructional copying needs of educators, which can result in the creation of a royalty-free statutory license (ss. 140–141). However, the practical utility of the provision may be to incentivize owners to provide needed educational licensing voluntarily without government intervention (Torremans, 2010, pp. 271–272). All U.K. higher education institutions hold a triennially renewed blanket copying license negotiated by Universities U.K.’s Copyright Negotiation and Advisory Committee and Copyright Licensing Agency (Ingrey, 2019; Secker et al., 2019).

United States

The USCA does not regulate copyright collectives. It is nonetheless worth noting a structural difference that exists between the licensing schemes for textual works employed by copyright collectives in Australia, Canada, New Zealand, and the United Kingdom, described above, and the scheme used by the Copyright Clearance Center (CCC), a large copyright collective operating in the United States. Schemes governed by the ACA, CCA, NZCA, and UKCDPA, whether voluntary or not, are blanket licenses offered “on a take-it-or-leave-it basis with respect to the society’s entire repertoire; societies do not license the use of a part only of their repertoire” (Harbottle et al., 2020, p. 2439). As a blanket license imposes uniform fee rates, terms, and conditions on the entire repertoire, different rates, terms, or conditions are generally unavailable for individual copyright owners or particular works in the repertoire, although rates may vary for different classes of users or covered works.

In contrast, copyright owners who use the CCC’s services are free to determine the royalty rate, terms, and conditions for works they choose to make available for pay-per-use licensing. They may also elect to include their works under an annual CCC blanket license for educational institutions and businesses at fee rates set by the CCC (Lunney, 2010, p. 370). The CCC operates as a copyright collective to manage permissions transactions, but anticompetitiveness may be minimized, as rights owners can independently set preferred licensing terms and rates (Lunney, 2010, p. 341). The CCC’s voluntary annual blanket license for higher education institutions currently covers works from about 1,700 publishers; the number of institutions who choose to purchase this license is unstated (Copyright Clearance Center, 2023).

Licensing Oversight Bodies

Each of the four statutes containing provisions for collective licensing of textual works designates a body to supervise the processes related to those arrangements. The designated body in the ACA, NZCA, and UKCDPA is the Copyright Tribunal and in the CCA, the Copyright Board. This subsection briefly describes each tribunal or board and the powers they may exercise to adjudicate relationships between copyright collectives and educational institutions involving licensing arrangements.

Australia

Members of the Copyright Tribunal of Australia must be or have been a judge, and the president must be a federal judge (ACA, ss. 138–140). The tribunal is not bound by rules of evidence in its proceedings, which are to be conducted “with as little formality and with as much expedition” as the ACA and circumstances permit (s. 164). Acting only by reference or application, the Tribunal’s powers include declaring a body to be a collecting society or revoking such a declaration and making determinations when relevant parties disagree or seek guidance on matters relating to the Part IV A, Division 4 statutory license scheme for educational institutions (s. 153A). The tribunal may

make determinations on issues such as the kinds of copying and communicating allowed under the statutory license, the amount of equitable remuneration payable by an educational institution when a remuneration notice is in force, and details of how a collecting society may enter the premises of an educational institution to review its compliance with a remuneration notice or with a relevant agreement between the parties (ss. 113P–113S).

Canada

The Canadian Copyright Board consists of up to five members appointed by the Governor in Council, including a chair and vice chair, the former necessarily being a current or retired judge (s. 66). Like the ACA's tribunal, the board is expected to carry out its duties "as informally and expeditiously as the circumstances and considerations of fairness permit" (s. 66.502). The Copyright Board also has the power to assign a case manager to assist with its proceedings (s. 66.504), and its powers, rights and privileges are the same as that of a superior court with respect to matters within its remit, such as calling witnesses (s. 66.7). Powers of the board include certifying proposed tariffs and examining filed licensing agreements, which may involve altering royalties, terms, or conditions (e.g., s. 66.52, s. 70), and fixing royalty amounts for a license where the parties have been unable to agree (s. 71). To fix royalty and levy rates that are fair and equitable, the board must consider what a willing buyer and willing seller would have agreed upon in a competitive, open market and what is in the public interest (s. 66.501).

New Zealand

The New Zealand Copyright Tribunal consists of at least three members appointed by the Governor General, including a High Court barrister or solicitor with at least seven years of practice serving as chair (NZCA, s. 206). The tribunal's powers include resolving disagreements between licensing scheme operators and users claiming to need a license (ss. 150–151) and determining whether a license application should be granted in cases involving a relevant licensing scheme and a scheme operator unwilling to grant a license to the applicant (s. 153). For references or applications pertaining to licenses for reprographic copying of a textual work, the tribunal must consider the extent of availability of the work, the proportion of the work to be copied, and the nature of intended uses of the copies (s. 162).

United Kingdom

The U.K. Copyright Tribunal consists of a chairperson and two deputy chairs appointed by the Lord Chancellor and two to eight other members appointed by the Secretary of State (UKCDPA, s. 145). The chair and deputy chair must meet eligibility conditions that include five years' standing as a solicitor or advocate or a past judicial appointment. The purview of the tribunal includes making determinations in references and applications involving licensing schemes or licenses (ss. 149(a)–(d), (f)). In determining a reference or application pertaining to licensed reprographic copying of a published textual work, the tribunal must take into account the extent of availability of the published work at issue, the proportion of the work to be copied, and the nature of the intended use of the copy (s. 130).

United States

Although the USCA does not regulate copyright collectives or the licensed copying of textual works, it provides a means of adjudicating statutory licensing of other forms of protected works

such as transmission to the public of a performance of a sound recording (§ 112(e)). Three full-time copyright royalty judges are appointed by the Librarian of Congress, in consultation with the Register of Copyrights, to determine or adjust royalty rates and terms and, when required, to determine the distribution of royalty fees (§ 801).

Discussion and Conclusion

While some scholars perceive a lack of consensus on the nature of copyright or its historical purposes (e.g., Lauriat, 2018), others, including state departments and courts within the jurisdictions of interest in this study, understand the primary purpose of the copyright scheme to be clearly established as the promotion of the public interest in encouraging the production and dissemination of creative works. This utilitarian view stands in contrast with the perspective that copyright arises from authors' "natural rights" to works of their own intellectual creation, one that has been denied within common law jurisdictions (e.g., *Feist Publications, Inc. v. Rural Telephone Service Co.*, 1991; Ministry of Business Innovation and Employment, 2018).

In any case, similarities in the purpose and provisions of the copyright laws of Australia, Canada, New Zealand, the United Kingdom, and the United States suggest that copyright today serves two interconnected interests that must be in balance. On one side are copyright owners' time-limited monopoly rights, purportedly needed to incentivize creation and provide public access to new works. In a counterbalancing role are statutory users' rights, ostensibly designed to promote the public interest in accessing creative works and advancing learning and human progress.

As one might expect of Berne Convention member states, most of the basic mechanisms of copyright function similarly in the five countries, with only minor differences, including the kinds of protectable subject matter, a fixation requirement, and the parameters governing initial owners and owners' copyrights. All of the countries except New Zealand have enacted a general term of copyright that is 20 years longer than the Berne Convention minimum of life plus 50 years, although New Zealand is being pressured to extend its term of copyright in a similar manner.

At the same time, the copyright laws of the five countries reflect significant differences in the applicability of statutory users' rights to unpaid educational copying, statutory provisions for licensing arrangements, and the role played by copyright collectives (or lack thereof) in adjudicating disputes between copyright owners or copyright collectives and users wishing to make lawful uses of textual works for educational purposes. The second article of this three-part series will review relevant court and tribunal rulings from the five countries that involve educational copying and the applicability of users' rights.

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