



fair dealing
week

Copyright, the Public Interest and Fair Dealing

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What is Copyright?

- Copyright is a form of intellectual property
- Copyright protects the “original expression” of an idea rather than the idea itself

Copyright is a Creature of Statute

- Statutes, in general, are created to serve **the public interest**.
- The purpose of the *Copyright Act* is balancing the rights of creators and the rights of users for the promotion of the public interest.
- **What considerations define “the public interest” in the context of copyright law?**

The Statute of Anne (1709)

Anno Octavo

Annæ Reginae.

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.



Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the

Encouragement of Learned Men to Compose and Write useful Books: May it please Your Majesty, that it may be Enacted, and be it Enacted by the Queens most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That from and after the Tenth Day of April, One thousand seven hundred and ten, the Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books. Share or Shares thereof. or the Bookseller or Book-

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.

“For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books”

Gyles v Wilcox (1740) 26 ER 489

"I am quite of a different opinion, and that [The Statute of Anne] **ought to receive a liberal construction, for it is far from being a monopoly**, as it is intended to secure the property of books in the authors themselves, or the purchasers of the copy, as some recompense for their pains and labour in such works as may be of use to the learned world."

Lord Hartwicke

Seeking the appropriate balance

The Statute of Anne recognized the rights of authors to further the public interest

Gyles v. Wilcox established the doctrine of “fair abridgement” – recognizing the need for reasonable limits

U.S. Constitution (1787)

Copyright Clause

Empowers the United States 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.

(Article 1, Section 8, Clause 8)

The Public Interest

Statute of Anne – recognizing authors' rights to prevent unjust practices and to further learning

Gyles v. Wilcox – “fair abridgement” (reasonable limits on authors' rights) – to benefit “learned world”.

Copyright Clause – US Constitution – time limited nature of those rights – promotion of science and useful arts

Universal Declaration of Human Rights (United Nations, 1948)

Article 27.

(1) Everyone has the right **freely to participate in the cultural life of the community**, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has **the right to the protection of the moral and material interests** resulting from any scientific, literary or artistic production of which he is the author.

WIPO Copyright Treaty (1996)

Preamble

...

Emphasizing the outstanding significance of copyright protection as an **incentive for literary and artistic creation,**

Recognizing 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,

1997 Amendment to the Copyright Act (Canada)

“New copyright exceptions were introduced for **non-profit educational institutions, libraries, museums**, broadcasters, and people with disabilities, allowing them to copy copyrighted works in specific circumstances without the permission of the copyright owner or the need to pay royalties.”

https://en.wikipedia.org/wiki/Copyright_Act_of_Canada

Fair Dealing

“Fair Dealing is the right to, within limits, reproduce works without permission or payment.”

CAUT Guidelines

[http://www.caut.ca/docs/default-source/copyright/revised-caut-guidelines-for-the-use-of-copyrighted-material-\(feb-2013\).pdf](http://www.caut.ca/docs/default-source/copyright/revised-caut-guidelines-for-the-use-of-copyrighted-material-(feb-2013).pdf)

It is a “mechanism” for finding an appropriate balance of rights (to serve the public interest).

1911 Copyright Act (UK)

2. Infringement of Copyright

(1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that **the following acts shall not constitute an infringement of copyright:**

(i) **Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:**

...

(iv) **The publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists:** Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:

1921 Copyright Act (Canada)

Infringement of Copyright

16. (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that **the following acts shall not constitute an infringement of copyright:**

(i) **Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary;**

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(iv) **The publication in a collection, mainly composed of noncopyright matter, bona fide intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists:** Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged;

Hubbard v Vosper [1972] 2 Q.B. 84

“It is impossible to define what is “fair dealing.” It must be a question of degree.

... [discussion of considerations] ...

Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.

...

The tribunal of fact must decide.”

Lord Denning, M.R.

Hubbard v Vosper (cont'd)

Considerations:

- “You must consider first the **number and extent of the quotations and extracts**. Are they altogether too many and too long to be fair?
- “Then you must consider **the use made of them**. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair.
- “Next, you must consider **the proportions**. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair.
- “**Other considerations** may come to mind also.”

Théberge, [2002] 2 SCR 336

“The *Copyright Act* is usually presented as a **balance** between **promoting the public interest** in the encouragement and dissemination of works of the arts and intellect and obtaining a **just reward for the creator** (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).”

Binnie, J.

CCH [2004] 1 SCR 339

“...**the fair dealing exception** is perhaps more properly understood as an **integral part** of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright.”

McLachlin, CJC

CCH (cont'd)

“Drawing on the decision in *Hubbard, supra*, as well as the doctrine of fair use in the United States, [Linden, J.A.] proposed that the following factors be considered in assessing whether a dealing was fair: **(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.** Although these considerations will not all arise in every case of fair dealing, **this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.**”

McLachlin, CJC

Copyright Modernization Act (2012)

SUMMARY

This enactment amends the *Copyright Act* to

(a) update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards;

...

(c) permit businesses, educators and libraries to make greater use of copyright material in digital form;

(d) allow educators and students to make greater use of copyright material;

(e) permit certain uses of copyright material by consumers;

...

(h) mandate its review by Parliament every five years.

Copyright Modernization Act (cont'd)

21. Section 29 of the Act is replaced by the following:

Research, private study, etc.

29. Fair dealing for the purpose of research, private study, **education, parody or satire** does not infringe copyright.

Pentalogy (2012)

“Then, just two weeks after the new Act received Royal Assent, the Supreme Court of Canada released a "pentalogy" of copyright rulings, demonstrating its continued relevance in the copyright debate.

In these decisions, rendered under the mantra of "*balance ... between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creator*", the Court strongly endorsed user rights (fair dealing)...”

<http://www.cwilson.com/resource/newsletters/article/1026-canadas-supreme-court-delivers-5-key-copyright-decisions.html>

Educational Fair Dealing

AUCC Fair Dealing Guidelines (2012)

What counts as a “short excerpt”?

“Community of practice”

Copyright and the Public Interest

After 300 years of refinement...

Where are we now?

Access Copyright

What is educational “fair dealing”? (16 Sept 2014)

“These new policies authorize and encourage copying based on a definition of “fair dealing” that is not supported by the law.” ...

“The value of flexible content use for educators and students is without question. However, continued access to valued Canadian content is **unsustainable without a system that fairly rewards creators and publishers.**”

<https://www.accesscopyright.ca/media/bulletins/what-is-educational-fair-dealing-video/>

Access Copyright (cont'd)

Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines

(PwC Report – Jun 2015)

“Our assessment finds that, since implementation of the Fair Dealing Guidelines, the educational publishing industry has been subject to a significant negative impact.”

http://www.accesscopyright.ca/media/94983/access_copyright_report.pdf

Access Copyright (cont'd)

Canadian “fair dealing” raised at WIPO meeting (05 Jan 2016)

“Canadian content creators and publishers are **feeling the negative impact of the education sector’s interpretation of “fair dealing,”** attendees of a World Intellectual Property Organization copyright standing committee meeting were told in early December in Geneva, Switzerland.”

<https://www.accesscopyright.ca/media/news/canadian-fair-dealing-raised-at-wipo-meeting/>

International Authors Forum

“As bad as things have been, they seem to be getting worse, due to changes in the publishing industry wrought by the global digital revolution and, here **in Canada**, worse still, because **prejudicial changes to the copyright laws are draining revenues from writers’ already very thin and threadbare pockets.”**

Harry Thurston

<http://internationalauthors.org/wp-content/uploads/Copyright-Works.pdf>

Statute of Anne (1709) - reprise

Preamble

Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, **without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families:**

For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books;

Théberge (2002) - reprise

“The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.”

Binnie, J.

CCH (2004) - reprise

“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.**”

McLachlin, CJC

The Public Interest

- What is the appropriate balance between the economic rights of creators and the rights of users?
- What model leads to the greater sustainable benefit (to the overall public interest)?
- How should this determination (of “fairness”, “due weight”, “proper balance”) be made?

Review of the Act (2017)

Section 92 - Five years after the day on which this section comes into force and at the end of each subsequent period of five years, a committee of the Senate, of the House of Commons or of both Houses of Parliament is to be designated or established for the purpose of reviewing this Act.

[received Royal Assent on 29 June 2012; came into force 07 November 2012]

Thank you!

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