



**fair dealing**  
**week**

# Fair Dealing Analysis Workshop

22 February 2017

copyright.ualberta.ca



# What is Fair Dealing?

"Fair Dealing" is an important component of users' rights in Canadian copyright law, allowing for the reproduction and use of selections of copyright-protected works for certain purposes without requiring permission, provided that use/dealing is "fair".

# *Copyright Act, s. 29*

**Research, private study, etc.**

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

**Criticism or review**

**29.1** Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

[attribution of source and author]

**News reporting**

**29.2** Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

[attribution of source and author]

# *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.”

# *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

# AUCC Guidelines (2012)

## Guidelines

1. Teachers, instructors, professors and staff members in non-profit universities may communicate and reproduce, in paper or electronic form, **short excerpts** from a copyright-protected work for the purposes of research, private study, criticism, review, news reporting, education, satire or parody.



# AUCC Guidelines (cont'd)

## 4. A short excerpt means:

- (a) up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work)
- (b) one chapter from a book
- (c) a single article from a periodical
- (d) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works
- (e) an entire newspaper article or page
- (f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores
- (g) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work

provided that in each case, no more of the work is copied than is required in order to achieve the allowable purpose.

# Fair Dealing Analysis

- Purposes (*Copyright Act*)
- Factors (*CCH*)

# Sample for Analysis

Teacher wants to make a PDF copy of one book chapter (of twelve) to be made available on an LMS only to the students in her class.

# Purposes (*Copyright Act*)

- Research
- Private Study
- Education
- Parody
- Satire
- Criticism
- News Reporting

# The Six Factors (*CCH*)

- (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.**

# 1. Purpose of the Dealing

[54]“In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the Copyright Act, namely research, private study, criticism, review or news reporting. (...)

“As discussed, these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights. This said, courts should attempt to make an objective assessment of the user/defendant’s real purpose or motive in using the copyrighted work. (...)

“Moreover, ..., some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes.”

## 2. Character of the Dealing

[55]“In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair.

“If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing.

“If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness.

“It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.”

# 3. Amount of the Dealing

[56] “Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement.

“As the passage from Hubbard indicates, the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work.(...)

“The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.”



## 4. Alternatives to the Dealing

[57] “Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court.

“I agree with the Court of Appeal that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.”

## 5. Nature of the Work

[58] “The nature of the work in question should also be considered by courts assessing whether a dealing is fair.

“Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law.

“If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.”

## 6. Effect of the Dealing on the Work

[59] “Finally, the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair.

“If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair.

“Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.”

## *CCH* (2004) - 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

# Tools and Flow Charts

- Athabasca University - Fair Dealing Analysis Tool  
[http://library.athabascau.ca/services/video/fair-use/FairUse\\_Main.html](http://library.athabascau.ca/services/video/fair-use/FairUse_Main.html)
- Bow Valley College - Fair Dealing Chart  
<https://bowvalleycollege.ca/Documents/Learning%20Resource%20Services/Copyright/Fair%20Dealing%20Chart.pdf>
- Bow Valley College - Fair Dealing Analysis  
<http://bowvalleycollege.ca/Documents/Learning%20Resource%20Services/Copyright/Fair%20Dealing%20Anaylsis.pdf>
- CMEC's Copyright Decision Tool (Fair Dealing Guidelines)  
<http://copyrightdecisiontool.ca/DecisionTool/>
- Queen's University - Fair Dealing Evaluator  
<http://library.queensu.ca/help-services/copyright-fair-dealing/fair-dealing-evaluator>
- University of Alberta – Fair Dealing Analysis Flowchart  
<https://d1pbog36rugm0t.cloudfront.net/-/media/uAlberta/faculty-and-staff/copyright-office/2017-fair-dealing-analysis-flowchart---24feb2017.pdf>



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**ALBERTA**

# Thank you!

[adrian.sheppard@ualberta.ca](mailto:adrian.sheppard@ualberta.ca)

[cindy.paul@ualberta.ca](mailto:cindy.paul@ualberta.ca)

copyright.ualberta.ca