

**Analysis Exercise
Fair Dealing Analysis Workshop (22 Feb 2017)**

Dr. XXX is working at the university as a post-doctoral fellow in a research position with no teaching responsibilities. However, Dr. XXX is looking for a faculty position that will include teaching, and, to assist her prospects, she has developed an online course that she would like to make freely available on the internet. This course, she hopes, will reveal her instructional abilities to prospective employers and thus assist her in getting a job. The online course is not intended to be accompanied by any additional texts or materials.

Most of the content of the online course is the original work of Dr. XXX, but there are three items of third-party content included. Dr. XXX has requested your assistance in helping her determining whether each of the three items described below can be included in her online course under fair dealing. She acknowledges that you will not be providing legal advice.

For each of the three items (A, B and C) below:

- 1. Consider the purposes of fair dealing to determine whether the item falls under one of those purposes and identify the purpose(s).**
- 2. Apply the *CCH* six-factor analysis to determine whether the proposed use qualifies as fair dealing. Consider each of the factors and identify which of the six factors (or additional factors) are relevant to the determination. If the use would not qualify as fair dealing, recommend how the use might be modified to make the dealing fair. (For part 2, assume the item meets the threshold in part 1)**

- A. Dr. XXX has included the full 4-page summary from the end of each of the 10 chapters of a leading textbook in the field. The textbook, which is 420 pages in length, is still in print and available for purchase. The course also includes a discussion of the key elements of the chapter summaries, and does not always agree with the conclusions drawn in those summaries. The rationale for including this material is to provide students with a good sense of the current thinking in the field – in the words of textbook author, a strong proponent of that thinking, rather than through a restatement or paraphrase – as a point of comparison with some of the new and different thinking that Dr. XXX is presenting in her course.

- B. Dr. XXX has included a visualization that represents data in a new and original way. The source of data visualization, which is the centerpiece of the journal article in which it appears, has been attributed appropriately and the visualization is discussed in detail in the online course. Dr. XXX sees this visualization as the best vehicle for communicating an important point in her course. The visualization was obtained from an online academic journal that is available only to subscribers. Dr. XXX is not a subscriber to this journal, but she was provided with a lawful copy of the article by a colleague who is a subscriber. The subscriber agreement does not allow for the re-use of any content of the journal without the written consent of the publisher, which has not been sought.
- C. Dr. XXX has included a photo of a laboratory experiment. The experiment is very expensive to conduct, and the photo was very tricky to stage, so there are no comparable options for accurately showing the phenomenon photographed. The phenomenon itself, the experiment that produced it, and the difficulties in taking the photograph are all discussed in detail in the course. Dr. XXX sees this photograph as the best vehicle for communicating an important point in her course. Dr. XXX has a lawful copy of the photograph, and the source of the photograph is appropriately attributed. The photograph is available for license for use in an online course, but only as part of a bundle that includes eight photographs. This is the only photo from the bundle that would be used. The market for the photo bundle is very limited given that it is highly specialized and technical in nature, and there are no real alternative sources. Dr. XXX has deemed the licence fee too expensive to be practical for her purposes.

Purposes

The purposes for which Fair Dealing is applicable are outlined as follows in the *Copyright Act*:

Fair Dealing

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:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

News reporting

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

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

Factors

Excerpted from *CCH v. LAW SOCIETY OF UPPER CANADA* [2004] 1 S.C.R. 339.

[53] At the Court of Appeal, Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard, supra*, as well as the doctrine of fair use in the United States, he 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.

(i) The 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: see ss. 29, 29.1 and 29.2 of the *Copyright Act*. 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. See McKeown, *supra*, at p. 23-6. See also *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Ch. D.). Moreover, as the Court of Appeal explained, 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.

(ii) The 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. For example, in *Sillitoe v. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch. D.), the importers and distributors of “study notes” that incorporated large passages from published works attempted to claim that the copies were fair dealings because they were for the purpose of criticism. The court reviewed the ways in which copied works were customarily dealt with in literary criticism textbooks to help it conclude that the study notes were not fair dealings for the purpose of criticism.

(iii) The 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. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs: see Vaver, *supra*, at p. 191. 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.

(iv) 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.

(v) The 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. See *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch. D.), at p. 264.

(vi) 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. See, for example, *Pro Sieben Media AG v. Carlton UK Television Ltd.*, [1999] F.S.R. 610 (C.A.), *per* Robert Walker L.J.

[60] To conclude, the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.