

The Connotation of “Fair”

- Just, impartial, good faith, honest, free from discrimination
 - “The defendant held the ‘Bibendum’ up to ridicule. Rather than the cuddly marshmallow creature of safety and responsibility, ‘Bibendum’ became the boss’s henchman about to stomp two workers into submission” (*Michelin FC 1997*).
- Respecting the *legitimate* interests of the copyright holder in light of competing interests underlying copyright protection (i.e. author v. user rights)
 - There are other kinds of expression or endeavors we want to encourage that might build on the borrowing or use of prior works
 - Not unfairly undercut the monopoly for the created work in proportion to that new expression or a recognized use

Supreme Court Interpretation

- A user right
 - Not a mere exception
 - Affirms the balancing of interests implied in “fair”
- Two stages
 - Does the use fit an enumerated purpose, i.e. research, private study, education, criticism or review, news reporting satire, parody?
 - Is the dealing “fair”, i.e. the six step factor analysis?

The Purpose

- Enumerated purposes interpreted broadly
 - Large and liberal interpretation: *CCH*
 - Not limited to non-commercial uses: *CCH*
 - Research “can be piecemeal, informal, exploratory, or confirmatory”: *Bell*
 - Understood holistically from end user perspective: *Bell* and *Alberta Education*
- Distinguishing a legitimate purpose from mere appropriation: (*Favreau*)

Fairness: 6 Factors to Consider

1. Purpose of the Dealing
2. Character of the Dealing
3. Amount of the Dealing
4. Alternatives to the Dealing
5. Nature of the work
6. Effect on the dealing

1. Purpose

- Real purpose or motive in using the work or dual purpose
 - Reasonable safeguards to ensure only legitimate use, e.g. photocopy of a book chapter as opposed to a digital copy better ensures against improper use
- More specific goal of the dealing, e.g. commercial v. non-commercial
 - Non commercial use is inherently more fair

2. Character of the Dealing

- Extent to which work is disseminated and whether copies are eventually destroyed
 - Some overlap with “reasonable safeguards” idea in that best efforts to be made to limit improper dissemination
 - Must be judged against purpose – it may be entirely justified to widely disseminate a portion a work for an allowable purpose, e.g. court is *Bell* silent on this factor regarding large scale previewing of music files

3. Amount of the Dealing

- Determined on an individual per-dealing basis, e.g. how much of a song is allowed to be sampled prior to purchase, and not on an aggregate basis, e.g. how many people sample music as a whole
 - Technological neutrality
- Again, to be justified against the purpose of the dealing, e.g. copying an entire article from a journal may be justified for private study purposes.

4. Alternatives to the Dealing

- Reasonableness
 - Not reasonable to require person to student an entire book when only using one chapter of it
 - Not reasonable to require people to return to old ways of doing things, e.g. sampling music in a store, when a faster more efficient means exist through the internet

5. Nature of the Work

- The black sheep of the family
- Confidential information (less fair)
 - How does this contribute to copyright goals?
- Unpublished work (more fair)
 - Right to publish is a right of the copyright holder

6. Effect of the Dealing

- Substitutability (unfair)
 - Does use compete with the original work in the marketplace
- Complementarity (fair)
 - Some uses actually increase sales, e.g. previews of songs increase purchased downloads of songs

General Trends

- Purpose threshold is low: interpreted broadly and holistically
- Fairness factors to be judged relative to the purpose made of the work
- Custom or practice in an industry or sector can be relevant and useful evidence about fairness
- Complementary uses will be more likely to be considered fair
- Employ safeguards against improper use where reasonable to do to so

Digital Fair Dealing

- Courts do not expect resort to inefficient or cumbersome alternatives to dealing
- Widespread dissemination of a work facilitated through internet communication will not work against the fairness of the dealing

Mass Digitization Projects

- Preservation of old or rare books
- To create a database of works, e.g. Google Books
- Computation, e.g. data mining / analytics

No Worries!

- Digitalized copies?
 - Each of these uses would easily qualify as a fair dealing purpose
 - Fairness? The purpose can only be achieved through the making of non-consumptive digitized copies of a whole catalogue of entire works
- Uses made of those digitalized copies?
 - Preserving books / Google books – no one is offering free copies of books for people to read (consumptive copies)
 - Computational – this use is unconnected to copyright since it performs data analysis function