

No shades required: the shadowy lines of fair dealing determinations

Background image
(<http://www.treknews.net/wp-content/uploads/2017/05/star-trek-tng-d-ata-phaser.jpg>) removed due to copyright restrictions.

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Fair Dealing

Research, private study, etc.

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

R.S., 1985, c. C-42, s. 29; R.S., 1985, c. 10 (4th Supp.), s. 7; 1994, c. 47, s. 61; 1997, c. 24, s. 18; 2012, c. 20, s. 21.

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Criticism or review

exclusive distributor means, in relation to a book, a person who

(a) has, before or after the coming into force of this definition, been appointed in writing, by the owner or exclusive licensee of the copyright in the book in Canada, as

(i) the only distributor of the book in Canada or any part of Canada, or

(ii) the only distributor of the book in Canada or any part of Canada in respect of a particular sector of the market, and

(b) meets the criteria established by regulations made under section 2.6,

and, for greater certainty, if there are no regulations made under section 2.6, then no person qualifies under this definition as an "exclusive distributor"; (*distributeur exclusif*)

Her Majesty's Realms and Territories [Repealed, 1997, c. 24, s. 1]

infringing means

(a) in relation to a work in which copyright subsists, any copy, including any colourable imitation, made or dealt with in contravention of this Act,

(b) in relation to a performer's performance in respect of which copyright subsists, any fixation or copy of a fixation of it made or dealt with in contravention of this Act

(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.

1997, c. 24, s. 18.

Fair dealing provision

<https://laws-lois.justice.gc.ca/eng/acts/C-42/>



If life was fair, I'd have everything, because I work so hard.



If life was fair, I'd have everything, because I'm such a good person.



<https://oliveremberton.com/>

Humans are complicated. Fair is subjective.

Star Trek's Prime Directive:

As the right of each sentient species to live in accordance with its normal cultural evolution is considered sacred, no Starfleet personnel may interfere with the normal and healthy development of alien life and culture.

Starfleet personnel may not violate this Prime Directive, even to save their lives and/or their ship... This directive takes precedence over any and all other considerations, and carries with it the highest moral obligation.

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

Perhaps the best-known “bright line” in science fiction fandom.

Embedded video removed due to copyright restrictions.

<https://www.youtube.com/watch?v=4mH-L6UCCAE>

**The law helps prevent us from descending into chaos.
Legal tests can help the judiciary determine how.**

Bright line / clearly defined rule characteristics:

- Predictable/consistent/efficient (pro)
- (relative) Objectivity (pro)
- Limits future judicial consideration (con)
- Narrow understanding of multi-factor scenarios (con)

Bright lines for fair dealing?

Suggest a fair dealing bright line that would serve the public interest.

Ideas to help you get started:

- anything under/over x% of a work is always fair dealing
- if the use is non-commercial it is always fair dealing
- use for the purpose of [insert listed purpose] is always fair dealing when...
- education as a purpose can only ever be relied on when X

Suggest a fair dealing bright line that would serve the public interest.

Top

Fair dealing precept: Using others' works should be ok when the **benefits to society** outweigh the interests of the rights holders.

Practical challenge: How is fairness of the dealing determined?

Star Trek's The Measure of a Man (Sentient Being):

In this episode, the rights of the [android](#) officer Lt. Commander [Data](#) ([Brent Spiner](#)) are threatened by a scientist who wishes to dismantle him in order to produce replicas of him. Captain [Jean-Luc Picard](#) ([Patrick Stewart](#)) fights in a [Starfleet](#) court for Data's right of self-determination in order not to be declared mere property of Starfleet, while Commander [William Riker](#) ([Jonathan Frakes](#)) is forced to oppose his views.

[https://en.wikipedia.org/wiki/The_Measure_of_a_Man_\(Star_Trek:_The_Next_Generation\)](https://en.wikipedia.org/wiki/The_Measure_of_a_Man_(Star_Trek:_The_Next_Generation))

The court assess multiple criteria to determine if an android is entitled to human rights.

Embedded video removed due to copyright restrictions.

<https://youtu.be/WjCytqku18M>

**The law helps prevent us from descending into chaos.
Legal tests can help the judiciary determine how.**

It is impossible to define what is "fair dealing."

It must be a question of degree. 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. **But, after all is said and done, it must be a matter of impression.** As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be fair dealing.

[Hubbard v Vosper, \[1972\] 2 QB 84](#) (Lord Denning)

Fun fact: Chief Justice Beverley McLachlin leaned on the work of Federal Court of Appeals Judge Linden to separate the fair dealing test into six factors (in CCH v. LSUC).

Fair dealing factors provided by the Supreme Court of Canada in CCH v. LSUC. [2004 SCC 13](#)

- *The Purpose of the Dealing*
- *The Character of the Dealing*
- *The Amount of the Dealing*
- *The Nature of the Work*
- *Alternatives to the Dealing*
- *Effect of the Dealing on the Work*

Note: “**dealing**” refers to use being assessed (reproduction, modification, etc.) and “**work**” refers to the original book, song, image, etc.

Balancing test example:

- SCC framework (two-step test); six factors

Balancing test characteristics:

- Inconsistent application (con)
- Factors can be incommensurable / subjective weighting by judges (con)
- Amenable to use in various scenarios, including unforeseen scenarios (pro)

Libraries lending ebooks they create from print books: controlled digital lending (CDL)

- Libraries digitize a copyright-protected print book obtained for their print collection.
- The ebook is then loaned out via a controlled system.
- Loan controls include duration and use of the ebook (i.e., does not allow for redistribution or further copying).
- “Owned-to-loaned” ratio respected (if a library has a single print copy, they can only loan a single digital copy and the original print book is made inaccessible to library users).

Is CDL by libraries a fair practice?

YES

Library lending is a common practice, supported by the principle of exhaustion, aka US “first sale doctrine.” The rights holder’s power to control the use and distribution of a legally obtained copy is terminated or “exhausted,” allowing for the owner to sell, lend, or give away that copy without payment or permission.

(source: <https://controldigitalending.org/statement>)

NO

Eric Enno Tamm, Chair of [TWUC](#), calls it “an outrageous trespass on the rights of authors.”

The [UK’s Society of Authors](#) is asking for help to “tackle e-book piracy.”

TWUC Executive Director John Degen states that “the harm this does to the e-book market, and to genuine library sales, is incalculable.”

(source: Sheppard, [Controlled Digital Lending](#), Feb. 6, 2019)

Is CDL by libraries fair dealing?

employing the SCC framework with CCH language [and
some updates]

Case specifics:

21st Century Academic Library digitizes its (purchased) copy of a single-edition textbook printed in 2000 and makes the resulting ebook available via its CDL program. The print copy is made uncirculating and transferred to off-site storage.

Historically, the print textbook has only been used occasionally, when a student selects one of ten listed research essay topics in a fourth year anthropology class.

The textbook has been out of print for many years but is available as an ebook via a licence agreement. The annual cost for the ebook licence is much higher (\$1000) than other ebook licences for similar academic works (~\$100-\$300). The original print textbook sold for \$75 and it is usually possible to find used print copies from resellers for between \$10-\$100.

First step of the fair dealing test: Purpose (broadly interpreted)

Which statutory purpose is satisfied when CDL is used by 21st Century Academic Library?

Listed purposes, section 29, [Copyright Act](#):

research, private study, education, satire,
parody, criticism or review, news reporting



Second step of the fair dealing test: Assessment and balancing/weighing of six factors (criteria)

- *The Purpose of the Dealing*
- *The Character of the Dealing*
- *The Amount of the Dealing*
- *The Nature of the Work*
- *Alternatives to the Dealing*
- *Effect of the Dealing on the Work*

2nd step assessment: Purpose of the dealing

What is the user's [reader or library?] real motive in using the copyright-protected work?

Listed purposes [not restricted to these, though]:

research, private study, education, parody, satire, criticism
or review, news reporting



2nd step assessment: Character of the dealing

Multiple copies widely distributed will tend to be unfair.

A single copy used for a specific legitimate purposes will tend to be fair.

If a copy of the work is destroyed [unavailable] after it is used this might tend towards fairness.



2nd step assessment: Amount of the dealing

Should be considered but is not determinative.

The amount taken may be more or less fair depending on purpose.

Is copying the entire work fair given 21st Century Academic Library's purpose of lending the ebook?

Is the amount of the dealing in this case fair or not fair?

Fair

Not
fair

2nd step assessment: Alternatives to the dealing

If there is a non-copyrighted equivalent of the work that could have been used, this should be considered.

It may also be useful to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose.

Does the prohibitive nature of the library ebook licence mean that there was no alternative available to 21st Century Academic Library?

Do the alternatives to the work in this case lean the determination towards fair or not fair?

Fair

Not
fair

2nd step assessment: Nature of the work

Although not determinative, reproducing non-confidential, unpublished works might tend towards fairness.

[In US jurisprudence, published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred.]

What was the rights holder's intention for how the work should be distributed or made available?

Does the nature of the work lean the determination towards fair or not fair?

Fair

Not
fair

2nd step assessment: Effect of the dealing on the work

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

Will the availability of a library ebook via CDL change the market for the original work?

Does the effect on the work lean the determination towards fair or not fair?

Fair

Not
fair

Balancing/weighing the factors and making a determination:

- *The Purpose of the Dealing*
- *The Character of the Dealing*
- *The Amount of the Dealing*
- *The Nature of the Work*
- *Alternatives to the Dealing*
- *Effect of the Dealing on the Work*

How fair is CDL for this case?



Order the factors from highest to lowest in weight for your determination.

Effect of the dealing on
the work

Alternatives to the dealing

Nature of the work

Purpose of the dealing

Amount of the dealing

Character of the dealing

Uncertainty can be stressful.

What are your coping strategies?

Questions?

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