

The Rebirth of Fair Dealing: From the University of London to the University of ~~Toronto~~ British Columbia (and from Oxbridge to Georgia State)

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1) Introduction

A hundred and one years ago, on December 16, 1911 the UK Copyright Act of 1911 received royal assent, and for the first time fair dealing (previously a copyright common law doctrine) became part of the imperial copyright legislation. Ten years later, the same fair dealing provision would appear in the Canadian Copyright Act of 1921 and would remain the basis of the current fair dealing provisions. Tragically, what was supposed to be an exercise in the codification of a dynamic and evolving common-law principle ended up—with a few notable exceptions—in a hundred years of solitude and stagnation. A century later, fair dealing was reborn in Canada. In July 2012 the Supreme Court of Canada clarified that it was serious when it stated in *CCH* (2004) that fair dealing is a user's right that must not be interpreted restrictively. In 2012, the Supreme Court of Canada ensured that the one-hundredth anniversary of the statutory fair dealing would not be commemorated as the Yahrzeit of Fair Dealing but celebrated as a milestone in the life of this venerable legal principle.

As befits an area of law descending from *An Act for the Encouragement of Learning*,¹ several universities were key players in this century-long process. The first player was the University of London, whose press, the plaintiff in the first copyright case that discussed the newly enacted fair dealing provision, prevailed over a competing publisher who copied one of its books. The facts of the case were quite simple, and the outcome not controversial, but as it happened, sometimes easy cases make bad law, and misinterpretation of the holding of that case and a series of *obiter dicta* were later applied uncritically set British copyright law on an unfortunate trajectory, of copyright expansion and fair dealing contraction throughout the Commonwealth.

The second university was the University of Toronto, whose Centre for Innovation Law and Policy intervened in one of the fair dealing cases heard by the Supreme Court of Canada in December 1911. CILP's factum was highly influential on the Court's ruling and helped the Court reject the sorry legacy of the University of London case. Unfortunately, the University itself was not as convinced, and less than two months after the hearing, and before the Court handed down its judgment, the University of Toronto itself expressed very little interest in exercising its fair dealing rights, and, together with the University of Western Ontario, hurried to sign a controversial licensing deal with Access Copyright.

The third university was the University of British Columbia. While some Canadian universities followed UofT's and UWO's lead, the University of British Columbia was the first Canadian university who announced that it would reject the Access Copyright deal and exercise its fair dealing rights. The Court's decisions, and the University of British Columbia's action, give hope that fair dealing will grow with exercise rather than shrink from disuse.²

Meanwhile, in another part of the former British Empire, other universities continued to play a pivotal role in shaping the future of copyright law. The presses of the universities of Oxford and Cambridge (who have a long history of colluding with the large

¹ The long title of the Statute of Anne, 8 Anne, c. 19 (1710), the first English copyright act, was *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned*.

² Peter Jazsi, ...

commercial publishers) were pursuing a copyright infringement case against Georgia State University. Together with Sage Publications, they alleged “systematic, widespread, and unauthorized copying and distribution of a vast amount of copyrighted works”.³ In May 2012, the district court dismissed the vast majority of the plaintiffs’ claims.⁴ On August 10, 2012, Judge Evans rejected the plaintiff publishers’ sweeping proposal for injunctive relief and, finding that university was the prevailing party, ordered the publishers to pay the defendants’ costs.⁵ On Sept. 10, 2012 plaintiffs filed a notice of appeal. The GSU case in the United States and the recent developments in Canada will be influential to the development of those “kissing cousins” doctrines: fair use in the United States and fair dealing in Canada.⁶

2) The fair use vs. fair dealing myth

Fair dealing was born as a judge-made law, created and developed by English and American judges, who routinely cited and cross-referenced each other. Even before *CCH*, the courts often referred to it as a user's right rather than an exception. Fair dealing remained a common-law rule in the UK until the enactment of the *Copyright Act, 1911*, which, for the first time included a statutory fair dealing provision. S. 2(1)(i) of the 1911 Act provided that: “Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary” shall not constitute an infringement of copyright. It was supplemented by additional specifically-tailored exceptions. The same provision would appear a decade later in Canada, and would remain unchanged until 1997. In the US, the doctrine remained uncodified until 1976.

Conventional wisdom holds that the enactment created an exhaustive list of allowable purposes. This view is based on the very restrictive manner in which a few early English judgments interpreted the provision, and on contrasting the 1911 Act with the US Copyright Act, which, in 1976 preceded the listed purposes with the words “such as”, making it clear that the list of considerations was not exhaustive. But this view is biased by hindsight. The interpretative convention at the turn of the 20th century was that

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⁴ The court dismissed 94 out of 99 claims of copyright infringement. Of the initial 99 claims, only 75 reached the final stages of the trial.

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⁶ Williman Patry, ... (calling fair use and fair dealing “kissing cousins”).

except where and so far as the statute is plainly intended to alter the course of the common-law statutes should be construed in conformity with the common-law rather than against it. This was the view expressed in two of the leading contemporaneous commentaries on the 1911 Act. The author of the 5th edition of *Copinger on Copyright* wondered why it was even necessary to include an explicit fair dealing provision for the enumerated purposes, because

fair dealing for other purposes has always been ... permitted and, presumably, it was not intended to cut down the rights of fair user previously enjoyed under the old law.⁷

MacGillivray suggested that it was added out of abundance of caution because

[i]t would hardly have been safe to have left it *entirely* to the Court to say what exceptions should or should not be admitted upon the analogy of the case law decided under the Copyright Act, 1842.⁸

When the Bill was introduced in the House of Lords, Viscount Haldane [stated](#):

All we propose to do is to declare that for the future the principle of fair dealing which the Courts have established is to be the law of the Code. ... The principle of fair dealing is a principle which the Courts have applied with the greatest care. ... All that is done here is to make a plain declaration of what the law is and to put all copyright works under the same wording.⁹

Recent scholarship, such as [Robert Burrell & Allison Coleman \(2005\)](#) or [Isabella Alexander \(2010\)](#) provides further evidence. It appears, therefore, that s. 2(1)(i) was meant to codify the *principle* of fair dealing, without restricting or limiting its application, adaptation and adjustment by the courts according to the circumstances of particular cases. By specifying instances of dealings (two of which—criticism and review—were well recognized by the courts, and three—private study, research, and

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newspaper summary—were new) and subjecting them to an overarching principle of fair dealing, Parliament intended to guarantee the continued vitality of the doctrine. As Isabella Alexander writes, rather than to restrict, the five enumerated purposes “were intended to be understood synecdochically as *standing in for a variety of permissible uses*.”¹⁰

Unfortunately, English courts largely misunderstood the mandate given to them by the legislation, and many decisions adopted a very narrow approach to fair dealing.¹¹ They failed to recognize that the provision stood in for a fundamental principle, and instead they treated it as a narrow exception.¹² Courts in other Commonwealth jurisdictions largely followed suit.¹³ Nevertheless, as far as I can tell, the question of whether the five enumerated purposes exhaust the instances of fair, and therefore non-infringing, dealings, has never been put squarely before the courts, let alone the highest ones.

3) *Fair dealing’s revival*

In 2004, however, the Court breathed new life into the principle of fair dealing. The *CCH* decision was the first decision in the history of the Supreme Court of Canada to focus on fair dealing, and one of the very few decisions by a highest-level court of a comparable jurisdiction ever to do so. As Abraham Drassinower [wrote](#), *CCH* affirmed “the public dimension of copyright law in the context of a history of neglect.”¹⁴ According to [Prof. Vaver](#), the Court “indicated ... that fair dealing should be interpreted liberally to fulfill free expression imperatives.”¹⁵ It acknowledged, according to [Prof. Craig](#) “the collaborative and interactive nature of cultural creativity, recognizing that copyright protected works can be copied, transformed, and shared in ways that actually further” copyright’s purpose.”¹⁶

Bill Patry further placed *CCH* in the Pantheon of common-law copyright cases when he [wrote](#):

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What Judge Leval, Chief Judge MacLachlin [sic], and the early common-law judges who created fair use understood is that copyright is a system; it is not a thing, it is not a property right. Copyright is a means to an end, the end being to encourage learning. All learning is a community experience, and one that takes place over generations, over decades, over centuries. For any system to function, it must take into account, in a meaningful, liberal way, the manner in which humanity proceeds. In the case of copyright, this means that fair use must be viewed as an integral part of the system, and not a begrudging exception to a Hobbesian state of nature where ruthless enforcement of exclusive rights as private property is the ideal.¹⁷

In *CCH* the Court reaffirmed its earlier holding in *Théberge* that the “*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.”¹⁸ Fair dealing is crucial to achieving this balance because, as the US Supreme Court explained in *Campbell v. Acuff-Rose Music*, it “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁹

4) *Fair dealing: standard vs. rule*

It follows, then, that fair dealing has a purpose. It should allow the unauthorized use of works in a manner that promotes the public interest in the encouragement and dissemination of works of the arts and intellect, when the dealing does not seriously undermine the copyright owner’s opportunity to obtain a just reward.²⁰

Yet, even though it is possible to identify the *principle* that fair dealing stands for, articulating a precise legal *rule* that implements it is notoriously difficult, if not impossible. The Royal Commission on Copyright, whose 1878 report was the basis for the enactment of the UK Copyright Act, 1911 stated that “no principle which we can lay

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²⁰ discuss “just reward”: does it equal “incentive”, is it limited to that, etc. In any event, “just reward” must mean that there is a limitation on the reward, which rejects the notion of entitlement to the “perfect curve”.

down, or which could be defined by the Legislature, could govern all cases that occur” and that ultimately they can only be decided on a case by case basis by “the proper tribunals.” Almost a century later the US Congress House Committee reached a similar conclusion, [noting](#) that “since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. Lord Denning in *Hubbard v. Vosper*, and the Court in *CCH* had similar observations.²¹

It is not surprising, therefore, that instead of precise *rules*, legislation that includes fair dealing or fair use provisions tends to adopt a flexible and adaptable [standard](#), to be implemented by courts on a case by case basis, or more often, a combination of a general governing fair dealing standard supplemented specifically proscribed rules applicable to certain circumstances that were identified in advance. Similarly, at the international level, attempts to draft a precise rule regarding limitations and exceptions to copyright proved futile, and resulted in the intentionally vague three-step test, such as the one incorporated in the Berne Convention.²²

Once the central role that fair dealing plays in calibrating the rights of owners, the rights of users, and the public interest is recognized, the view that fair dealing applies only to the explicitly enumerated purposes becomes tenuous, because it requires one to believe that those five purposes encompass the entire universe of dealings that could justify using a work without getting the copyright owner's permission. But it is easy to identify uses that do not fall into any of the enumerated purposes (or any other specific statutory exception), and that Parliament cannot have intended to be regarded as categorically infringing.

For example, in judicial proceedings parties make copies of the authorities they rely on and submit them to the courts and all other parties. There is no explicit provision in the Copyright Act that permits that, and the making of such copies does not easily fit any of the five enumerated fair dealing provisions. Interestingly, the current UK legislation

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²² Senftleben, Greiger, Gervais (manuscript, 2012).

[includes an explicit provision](#) that permits the making of such copies,²³ yet, in *CCH* the Court endorsed the Great Library’s practice of making copies for the use of lawyers in court proceedings.²⁴ Even though Parliament never explicitly exempted this activity the Court effectively created an additional implied fair dealing exception for this purpose.²⁵

Or consider time-shifting. In 1984 the US Supreme Court ruled, in the landmark [Sony v. Universal](#) case, that it was fair use—and therefore not an infringement of copyright—for individuals to use a VCR to tape TV shows in order to view them at a later time.²⁶ At the end of the majority opinion, after providing a detailed doctrinal analysis, Justice Stevens wrote the following epilogue:

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.²⁷

Should we assume, because the current *Copyright Act* contains no time-shifting exception, and because the Canadian fair dealing provisions seem less flexible than the US fair use provision, that the elected representatives of millions of Canadians have made it unlawful to videotape TV shows? Should we assume that young(er) Justin Bieber unquestionably infringed copyright because he had not cleared copyrights when he [posted on YouTube videos of himself singing others’ songs](#)? Would such a law fulfill the purpose of copyright? Do we really need a process of never-ending copyright reform with increasingly long and overly detailed but still ambiguous provisions, [such as those in Bill C-11](#), to permit these activities?

Moreover, the notion that fair dealing applies only to certain allowable purposes, implies that “[d]ealings for other purposes are not covered by the exception, even if they would otherwise be fair”. This means that when Parliament enacted in 1911 that “Any fair

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dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary” “shall not constitute an infringement of copyright” it meant that dealings with works for other purposes may still be regarded as fair, but nonetheless shall constitute an infringement of copyright. It seems somewhat paradoxical to recognize something as entirely fair, but still categorically unlawful. If the intent had been to limit the exception only to the five enumerated purposes, it would have been possible to say “it shall not constitute an infringement of copyright to deal with any work for the purposes of private study, research, criticism, review, or newspaper summary as long as that dealing is fair.”

But more importantly, the notion that if a purpose isn't explicitly enumerated, it is categorically excluded from the purview of fair dealing, is antithetical to the purpose of the *Copyright Act*, because in order to encourage future innovation and creativity fair dealing must be flexible and unlimited with respect to the purposes to which it could apply. Rule-makers cannot foresee all the types of future uses that justify exemption, and inevitably, a system that relies exclusively on *ex ante* proscribed rules will be tailored to allow only the interests of existing users who had enough political clout to lobby for an exemption.²⁸ By definition, however, truly new innovations in technology or in cultural expression, those do not yet exist and may not be even thought of, have no one advocating for them.²⁹ Without a possibility of relying on a flexible fair dealing standard, the law might prevent them from ever being created. A system that permits only the uses that were able to bargain their way at the legislative negotiation table but excludes all others is doomed to cultural and technological stagnation. While a flexible fair dealing does not guarantee that all socially beneficial uses will be permitted, at least it allows the new uses, those that were not even thought of, or that had no one lobbying for them during the legislative process, to have their day in court and argue “Hey, We’re Fair!”

5) The 2012 rulings and other developments

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6) Conclusion

When fair dealing was codified a century ago there was no intention to restrict or limit its application, adaptation and adjustment by the courts. The English courts that failed to recognize that have sentenced it to a hundred years of solitude, yet in 2004 the Supreme Court of Canada declined to follow. The Court's rulings entrench fair dealing and ensure that *CCH* will not be seen as an outlier in copyright jurisprudence. Together with *CCH* these decisions provide a necessary correction that brings fair dealing back to play the role it was always supposed to play. The Court has spoken. Now it's time for users to exercise and defend their rights. It's now up to them to determine whether future anniversaries of fair dealing will be commemorated with a Yahrzeit candle or with a big toast.

Cheers!