

Fair Dealing and Emergency Remote Teaching in Canada

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In the wake of the COVID-19 outbreak, Canadian post-secondary institutions are replacing classroom-based instruction with online teaching for the remainder of the Winter/Spring 2020 semester. Course instructors are scrambling to change their traditional courses to online formats on very short notice in the middle of the term. Many courses already have an online presence facilitated by the use of course management systems. But the sudden need to use online systems raises special challenges for other courses.

As instructors grapple with the mechanics of making this unanticipated conversion, most attention is focused on how to use technological tools to accomplish this transition. Less attention is being given to copyright issues. We are worried that without some affirmative intervention in the form of copyright training, opportunities to take advantage of Canada's broad fair-dealing rights may be missed.

This article explains how copyright law applies to online course materials. We hope it will assist instructors, librarians, teaching assistants, students and administrators working in Canadian colleges and universities.

We agree with the conclusions reached by a group of U.S. copyright experts in the *Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching and Research*.² They found that copyright law is “well equipped to provide the flexibility necessary for the vast majority of remote learning needed at this time.”³ We believe their primary conclusion about the applicability of fair-use also applies to its Canadian counterpart, fair-dealing.⁴

First, we will outline the differences and similarities between Canadian fair-dealing and U.S. fair-use. We will then apply the fair-dealing requirements to the current circumstances. In closing, we make suggestions for minimizing risk and offer some ideas that should be considered in the longer-term.

I. Fair-Use and Fair-Dealing: Similarities and Differences

Fair-dealing in Canada and fair-use in the United States are very similar in purpose. Both are meant to be a flexible user's right that allows the use of copyrighted works without the permission of the copyright owner in certain circumstances. Yet there are two differences to keep in mind. First, fair-dealing is limited to certain enumerated categories, while fair-use adopts a non-exclusive approach. Second, different criteria come into play when determining whether the use or dealing is fair under the circumstances.

The underlying policy justification motivating copyright law in the U.S. is entrenched in the constitutional mandate “to promote the Progress of Science and the useful Arts.”⁵ This is an explicitly utilitarian purpose: the exclusive rights granted to owners are not the ultimate ends, but rather a means to the broader ends of promoting progress in science and the arts.⁶

This explicit purpose is not similarly entrenched in the Canadian Constitution. Rather, copyright law in Canada seeks to balance creator's and users' rights through the *Copyright Act*, legislation such as the addition in 2012 of "education" to the *Act* as an enumerated fair-dealing category, and judicial decisions like the Supreme Court of Canada's recognition of fair dealing as a user right integral to the *Act* in the landmark case of *CCH v Law Society of Upper Canada* (2004).⁷

The *Copyright Act* covers fair dealing in section 29, which states: "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright."⁸ The Supreme Court has emphasized the public interest aspect of this section, finding that "dissemination of works is also one of the *Act's* purposes, which means that dissemination too, with or without creativity, is in the public interest."⁹ The Court has subsequently reiterated that since 2002, "jurisprudence has sought to calibrate the appropriate balance between creators' rights and users' rights."¹⁰

The *CCH* case is the most significant case in Canadian copyright history. It marked a fundamental shift in how we think about the rights of owners and users in copyrighted works. Since the case was decided, the Supreme Court has not only clarified, but extended, the importance of users' rights. The case arose when publishers objected to a library's practice of copying and sending documents to their law firm patrons for a fee. The publishers initially won, when the Trial Division denied the library's fair-dealing claim on the basis that the defense of fair-dealing should be strictly construed.¹¹

On appeal, the Federal Court of Appeal (FCA) disagreed with the trial court's ruling and held that fair-dealing should be given a broad interpretation. They found that the library's actions constituted research and that the dealing was fair.¹² In reaching this conclusion, the FCA laid out six criteria (shown in Figure 2). These criteria are not part of the *Copyright Act*, but they were ultimately adopted by the Supreme Court. In its decision, the Supreme Court emphasized that "These allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights" (*CCH*, para 54). The Court stated that

"As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption" (*CCH*, para 49).

In addition, the Supreme Court emphasized that

"the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act*¹³ than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright" (*CCH*, para 48).¹⁴

The broad public interest language calling for the balancing of interests adopted by the Supreme Court in *CCH* was not a surprise. It had been foreshadowed two years earlier in the Court's decision in *Théberge v. Galerie d'Art du Petit Champlain Inc.*¹⁵ In *Théberge*, the majority decision emphasized that copyright should provide "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.”¹⁶

It is important to note that *CCH* was decided in 2004, well before the 2012 amendments to the *Copyright Act* that specifically added “education” to the enumerated purposes. At first glance, then, it may seem that fair-dealing in Canada and fair-use in the United States have converged in the last two decades. Indeed, it has been suggested that fair-dealing has actually surpassed fair-use and provides a greater degree of protection for users’ rights.¹⁷

Despite these similarities, however, there are differences between the Canadian and U.S. law that affect this analysis. The Canadian *Copyright Act* limits fair-dealing to certain enumerated categories, while the U.S. *Act* adopts a non-exclusive approach to the scope of fair-use.¹⁸ Figure 1 compares the scope of fair-use and fair-dealing.

Figure 1: Comparing Scope of U.S. Fair-Use and Canadian Fair-Dealing	
US Subject Matter Fair-Use	Canadian Fair-Dealing Categories
for purposes <i>such as</i> (s 107) <ul style="list-style-type: none"> • criticism, • comment, • news reporting, • teaching (including multiple copies for classroom use), • scholarship, • research 	for purposes of: <ul style="list-style-type: none"> • research (s 29) • private study (s 29) • parody (added to s 29 in 2012) • satire (added to s 29 in 2012) • education (added to s 29 in 2012) • criticism (s. 29.1 with attributions) • review (s. 29.1 with attributions) • news-reporting (s. 29.2 with attributions)

Since the *Copyright Act* was amended in 2012 to include “education” in section 29, the more important difference for universities and libraries is the criteria used to determine whether a use or dealing is fair.

The U.S. *Act* lists four fair-use factors that should be taken into account. In contrast, the Canadian *Act* does not specify the fair-dealing factors. Rather, they were developed through the case law. Figure 2 compares the four statutory fair-use factors and the six fair dealing factors adopted in the *CCH* case.

Figure 2: Comparing the fairness criteria: U.S. Fair-Use and Canadian Fair-Dealing	
US Fair-Use Factors	Canadian Fair-Dealing Factors
<p>the factors to be considered shall include</p> <p>(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;</p> <p>(2) the nature of the copyrighted work;</p> <p>(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and</p> <p>(4) the effect of the use upon the potential market for or value of the copyrighted work</p> <p>U.S. Copyright Act section 107</p>	<p>1) purpose of the dealing</p> <p>2) character of the dealing</p> <p>3) amount of the dealing</p> <p>4) alternatives to the dealing</p> <p>5) nature of the work</p> <p>6) effect of the dealing on the work</p> <p><i>CCH v Law Society of Upper Canada</i> 2004 SCC 13</p>

When it ruled on the *CCH* case, the Federal Court of Appeal recognized that it could find guidance in looking at the U.S. experience: "Importantly, the distinction between Canadian and American law regarding allowable purposes has limited bearing on a discussion of the factors that influence whether dealing is fair."¹⁹

We will now turn to a discussion of how to apply Canada’s six fair-dealing criteria.

II. Applying the Fair-Dealing Requirements to Current Challenges

Canadian fair-dealing involves a two pronged analysis.

The first prong looks to whether the use comes within one of the fair-dealing categories stated in the *Act*: research, private study, education, parody, satire, criticism, review and news reporting. Creating online course materials clearly falls within the “education” category so that will not be an issue.

The second prong applies the six fair-dealing factors to the particular use in question. This part of the analysis looks at whether the use is fair under all of the circumstances. As discussed earlier, the *Copyright Act* does not list these criteria. Rather, a six part test was adopted by the Supreme Court in its 2004 *CCH v Law Society* ruling.

Both U.S. and Canadian courts seek to balance the factors, theoretically not weighing one factor more heavily than the others. The University of Western Ontario publishes its copyright policy online at “Copyright @ Western.”²⁰ This site posits that “Since it is a statutory requirement, only the purpose for copying must be considered and satisfied. Of the fairness

factors outlined by the Supreme Court, one does not supersede the others in importance when conducting a fair dealing analysis.”

In other words, the factors must be balanced holistically based on the particular facts and circumstances. We will now consider each of the six factors in turn, with particular reference to the current creation of digital course materials in response to the COVID-19 crisis.

Factor One: Purpose of the Dealing

While the U.S. and Canadian tests share several factors, the Canadian test is more nuanced. Canada splits the U.S. factor “purpose and character” into two parts and considers and considers each separately. The Supreme Court ruling in the *CCH* case explains that “In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the *Copyright Act*” (*CCH*, para 54). Education clearly meets this standard.

Copyright @ Western points out that

“This fairness factor relates to the specific circumstances surrounding the copy and an analysis that considers the fairness of the goal for which the permitted activity took place...The Supreme Court’s ruling refers to making objective assessment of the “real purpose or motive” behind using the copyrighted work.”

Certainly, the extreme and extraordinary circumstances surrounding Covid-19 would weigh heavily here. The public interest goals in supporting both public interest and social distancing goals are indisputable.

The US test combines purpose and character. “The ‘heart of the fair use inquiry’ lies in the first factor – the purpose and character of the use. Even under normal circumstances, courts favor educational uses because of their broad public benefits. While there are no fair use cases squarely addressing copying to help minimize a public health crisis, the other wide variety of public benefits cited by courts leads us to believe that this purpose would weigh extremely heavily in favor of fair use.”²¹

Factor Two: Character of the Dealing

As to the second factor, the Supreme Court’s *CCH* decision states that, “In assessing the character of a dealing, courts must examine how the works were dealt with” (*CCH*, para 55). A single copy is considered to be more fair than many multiple copies, and a work that was destroyed after its use for a specific purpose would also be more fair. Courts should also consider the general practice of such uses in the context of the trade or industry. Copyright @ Western interprets this factor as follows:

“This fairness factor focuses on what is actually being done with the copies. Considering how the reproductions are distributed, to whom and in what way are central questions that impact the character of the dealing.”²²

Again, the extraordinary circumstances of the current migration to online course materials favors fair dealing in evaluating this factor.

Factor Three: Amount of the Dealing

The Supreme Court of Canada has held that while the quantity of the copying helps to determine fairness, it isn't determinative in and of itself. The general rule of thumb is to take no more of a work than is necessary to achieve the purpose. The Court states that

“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” (*CCH*, para 56).

Clearly, the extraordinary events of Covid-19 create new necessities of purpose. “For copies made to support rapid adoption of remote teaching, users should be thoughtful about this factor, but not agonize over it: a use can be fair as long as it reproduces what is reasonable to serve the purpose.”²³

So in many situations, it is not feasible to use less than the entirety of a work, for example, an article or a photograph. In others, such as an entire book, percentage guidelines are appropriate as a general rule of thumb.²⁴

Factor three of the U.S. test also examines the amount and substantiality of the work used. This factor is seen as flexible and situation-specific. It is not a mechanical application of a rule such as “no more than 10%” or “1 chapter.” The question is whether “the quantity and value of the materials used ... are reasonable in relation to the purpose of the copying.”²⁵

An additional consideration regarding the interpretation of the third factor in Canada is how the baseline for the amount used is calculated. This issue arose in *SOCAN v Bell*²⁶ and *Alberta (Education) v Access Copyright*.²⁷ These cases addressed the issue of whether to use the aggregate amount of the usage or the individual amount. *SOCAN* and *Access Copyright* argued for the aggregate amount, as this would have favored their contention that the amount being used was very high. The fair-dealing claimants (*Bell*, the other Internet Service Providers and the schools) wanted the court to look at the amount being used in each individual case, a much lower volume.

In both cases the Supreme Court of Canada ruled that the lower amount reflecting individual usage should be used. This individual approach works in favor of finding fair-dealing as it keeps the control localized in the hands of the end-user who is best able to make reasonable assessments under this factor.²⁸ The Court's language is very instructive and should give some comfort to fair dealing claimants:

Since fair dealing is a “user's” right, the “amount of the dealing” factor should be assessed based on the individual use, not the amount of the dealing in the aggregate. The appropriate measure under this factor is therefore, as the Board noted, the proportion of the excerpt used in relation to the whole work. That, it seems to me, is consistent with the Court's approach in *CCH*, where it considered the Great Library's dealings by looking at its practices as they related to specific works requested by individual patrons, not at the total number of patrons or pages requested. The “amount of the dealing” factor should therefore be assessed by

looking at how each dealing occurs on an individual level, not on the aggregate use (*SOCAN v Bell*, para 41).

Factor Four: Alternatives to the Dealing

The fourth factor, whether there are alternatives to the dealing, is unique to Canadian law. Writing for the unanimous court in the *CCH* case, McLachlin, C.J. explained that

“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” (*CCH*, para 57).

Given the extreme nature of the situation and the rapidity with which instructors must go online with their courses, it is likely that most materials will be core materials needed to finish courses quickly, making a use more necessary to achieve that purpose.

It would not be reasonable to expect students to purchase additional materials in the middle of a semester. It must also be stressed that the availability of a license does not negate a use being fair. In fact, the Court in *CCH* went even further and said the availability of a license is not even relevant to a fair-dealing determination:

“The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person’s decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner’s monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act*’s balance between owner’s rights and user’s interests.” (*CCH*, para 70.)

In the current emergency circumstances and with the time constraints to moving material online, alternatives may be more difficult or impossible to find in order to meet the needs of our communities.

Factor Five: Nature of the Work

This factor considers the impact of whether the work was published or unpublished, confidential or non-confidential. It is worth noting that *CCH* differs from U.S. law in that it favors the use of unpublished works as “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” (*CCH*, para 58).

The second factor of the U.S. four-factor test, the nature of the work, “has rarely played a significant role in the determination of a fair use dispute.”²⁹ The circumstances surrounding the reorganization of course materials in light of the Covid-19 emergency would not change this consideration.

Factor Six: Effect of the Dealing on the Work

The sixth Canadian factor “the effect of the dealing on the work” aligns with the fourth factor in the U.S. “the effect of the use upon the potential market for or value of the copyrighted work.”

This factor “requires a balancing of the benefit the public will derive if the use is permitted” versus “the personal gain the copyright owner will receive if the use is denied.”³⁰ *CCH* elaborates that “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*, para 59).

Further guidance on the application of this sixth factor is given in *Alberta (Education) v Access Copyright* and in *SOCAN v Bell* where the court clarified that demonstrable harm needs to be shown in order to turn this factor against the fair dealing claimant. Making generalizations about lost-sales due to copying will not suffice. And recall that the SCC has stated that “The availability of a license is not relevant to deciding whether a dealing has been fair” (*CCH*, para 70).

Weighing the Six Fair-Dealing Factors

The Supreme Court of Canada has been very clear that each factor must be weighed according to the particular circumstances of any use. No one factor is necessarily to be given any greater weight than the others and the holistic analysis is very dependent on the particular facts and circumstances of the case.

Based on previous cases, and based on the unusual and exigent circumstances necessitated by the response to the COVID-19 outbreak, fair-dealing warrants an exceptionally broad interpretation in the current environment.

III. Mitigating Risk and Looking Ahead to the Future

Nonetheless, a few general principles should be followed by way of exercising good faith and mitigating risk.

First, course materials for which fair dealing will be claimed should be posted on course management sites that limit access to currently enrolled students, rather than posting on the open Internet. Copyright @ Western recommends that even under ordinary circumstances, copies of course readings should be posted on OWL, the university’s secure learning management system. This reduces the risk of infringement since access can be restricted to students in a specific class.

Second, materials that are already licensed should be used wherever possible. Existing licenses include the vast resources available through the library collection, where a link can readily be posted to the material. While in the U.S., it is considered prudent to check to see if other

licenses are available, the Canadian rule is much more supportive of fair-dealing even if a license is available.³¹

Third, materials that are in the public domain should be used whenever possible.³²

Finally, educational institutions should have well established, readily available and easy to understand copyright policies, including an explicit treatment of fair dealing. In reaching its decision in the *CCH* case, the Court relied on the Great Library's access policy in finding that fair-dealing could be established,³³ and adherence to a carefully crafted policy will bolster fair dealing claims.³⁴

The U.S. *Public Statement* encourages campuses to think about the longer-term needs this crisis has presented:

“While fair use is absolutely appropriate to support the heightened demands presented by this emergency, if time periods extend further, campuses will need to investigate and adopt solutions tailored for the long-term.”³⁵

This need to consider longer-range solutions is also present in Canada, and would include the following:

- (1) Conduct regular review of campus copyright/fair-dealing policies;
- (2) Promote broad copyright literacy training across the campus community;
- (3) Create more open education resources [OERs] as alternatives to textbooks, course-packs and other copyright-restricted materials;
- (4) Avoid unnecessary licenses that restrict user's rights, cause unwarranted expenses and risk the security and privacy of campus course management systems.³⁶
- (5) Work to conform vendor licenses that purport to restrict the rights of end users with the broad fair dealing rights that exist under current copyright law.³⁷

IV. Conclusion

In reviewing the similarities between Canadian fair-dealing and U.S. fair-use, along with the broad interpretation of users' rights under Canadian case law, we conclude that the circumstances of the current emergency justify a broad construction of fair-dealing.

We agree with the *Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching and Research*, which states that:

“While there are no fair use cases squarely addressing copying to help minimize a public health crisis, the other wide variety of public benefits cited by Courts leads us to believe that this purpose would weigh extremely heavily in favor of fair use.

... The benefit to the public in providing remote coursework is obvious when it enables teaching to continue in the face of social distancing measures or quarantine, or when access to physical library materials is impossible.” (at p. 2).

This benefit is just as applicable in Canada. We encourage everyone involved in the redesign of course materials to make full use of the flexibility that is afforded by fair-dealing.

Appendix 1: Fair-Use and Fair Dealing Provisions

17 United States Code, section 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes **such as** criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered **shall include**—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. [emphasis added]

Canadian Copyright Act Fair Dealing Provisions

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

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.

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.

Notes

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² This statement, dated March 13, 2020, was signed and endorsed by a large group of academic copyright experts and was posted at <https://tinyurl.com/tvnty3a> [*Public Statement*].

³ *Public Statement*, at p. 1.

⁴ The full text of the 17 U.S.C. section 107 (fair-use), and sections 29, 29.1 and 29.2 of the Canadian Copyright Act (fair-dealing) are reproduced in Appendix 1.

⁵ U.S. Constitution, Article 1, sec 8, clause 8 provides that Congress has the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Courts favor uses where the purpose is to benefit the public, even when that benefit is not “direct or tangible.”

⁶ A utilitarian emphasis on learning as the ultimate goal was reflected in the Statute of Anne, the first modern Copyright Act (1709 8 Anne c.21). It’s long title was “*An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.*”

⁷ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 [*CCH*].

⁸ Section 29, 29.1 and 29.2 of the Act are reproduced in Appendix 1

⁹ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, at para 21, [2012] 2 S.C.R. 326 [*SOCAN v Bell*]

¹⁰ *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43 [*Keatley*] at para 44.

¹¹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 1999 CanLII 7479 (FC), [2000] 2 FC 451.

¹² *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187 (CanLII), [2002] 4 FC 213

¹³ R.S.C., 1985, c. C-42. [*the Act*].

¹⁴ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 [*CCH*].

¹⁵ 2002 SCC 34 (CanLII), [2002] 2 S.C.R. 336.

¹⁶ 2002 SCC 34 (CanLII), [2002] 2 S.C.R. 336, at para. 30 [*Theberge*]. While the case did not involve fair-dealing, and while it was a split decision, the policy language in *Theberge* foreshadowed the unanimous decision in *CCH* to come two years later.

¹⁷ See David Vaver. See also Lisa Di Valentino “Comparison of Fair Dealing and Fair Use in Education Post-Pentology” (September 3, 2013). Available at SSRN: <https://ssrn.com/abstract=2320219> or <http://dx.doi.org/10.2139/ssrn.2320219> (comparing Canadian and U.S. cases and legislation with respect to fair dealing and fair use)

¹⁸ Section 107 uses the term “such as” as an indication of the open-ended nature of the section.

¹⁹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187 (CanLII), [2002] 4 FC 213 at para 148.

²⁰ University of Western Ontario, Copyright @ Western (11/08/2018) “Copyright Fair Dealing Analysis.” https://copyright.uwo.ca/fair_dealing_analysis/index.html

²¹ *Public Statement* at p. 2. See also *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) which weighted factor one heavily in the fairness analysis due to public interest in providing copies for disabled persons.

²² *Copyright @ Western*

²³ *Public Statement* at 2.

²⁴ *Copyright @ Western*

²⁵ *Public Statement* citing *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), rev'd sub nom. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014) and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) at 2.

²⁶ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (CanLII), [2012] 2 SCR 326 [*SOCAN v Bell*].

²⁷ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (CanLII), [2012] 2 SCR 345. [*Alberta v Access Copyright*].

²⁸ See Samuel Trosow, “SCC Decisions Provide Clear Guidance on Fair Dealing Policies” (July 14, 2012) available online at <https://samtrosow.wordpress.com/2012/07/14/scc-decisions-provide-clear-guidance-on-fair-dealing-policies/> (discussing the *SOCAN v Bell* and *Alberta (Education) v Access Copyright* cases which upheld CCH and clarified several of the application of several of the fair-dealing factors from a user’s rights perspective).

²⁹ *Authors Guild*, 804 F.3d 202 (2d Cir. 2015).

³⁰ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

³¹ 2004 SCC 13, at para 70.

³² Canada has had a clear advantage over the U.S. in this regard given that the general term of copyright has been consistent since the Act came into effect in 1924. Section 6 provides simply that “The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.”

³³ “Persons or institutions relying on the [s. 29](#) fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.” 2004 SCC 13, at para 63.

³⁴ For a good example, see Copyright @ Western at <https://copyright.uwo.ca/>. These materials include a broad range of copyright issues, including a thorough treatment of fair dealing. They are presented in an accessible and understandable manner and are supplemented with the availability of additional assistance where needed.

³⁵ *Public Statement* at p. 3.

³⁶ See “Objections to the Proposed Access Copyright Post-Secondary Tariff and its Progeny Licenses: A Working Paper” (Samuel Trosow, Scott Armstrong & Brent Harasym, 14 August 2012) <http://ir.lib.uwo.ca/fimspub/24/>

³⁷ See Lisa Di Valentino, “Conflict between Contract Law and Copyright Law in Canada: Do Licence Agreements Trump Users’ Rights?” available online at <<http://ssrn.com/abstract=2396028>>.