

The Changing Face of Fair Dealing in Canadian Copyright Law:

A Proposal for Legislative Reform

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A. INTRODUCTION

The fair dealing defence performs an integral function within the copyright system: it permits substantial uses of copyright-protected works, which would otherwise be infringing, in order to ensure that copyright does not defeat its own ends. By creating the necessary “breathing space”¹ in the copyright system, the fair dealing defence acknowledges the collaborative and interactive nature of cultural creativity, recognizing that copyright-protected works can be used, copied, transformed, and shared in ways that actually further — as opposed to undermine — the purposes of the copyright system.² If copyright is to be justified as a means to en-

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- 1 In the famous Supreme Court decision of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 at para. 579, <www.law.cornell.edu/copyright/cases/510_US_569.htm>, 114 S. Ct. 1164 (1994), Justice Souter referred to the “fair use doctrine’s guarantee of breathing space within the confines of copyright.” The need for breathing space flows from “the need simultaneously to protect copyrighted material and to allow others to build upon it”: (*ibid.* at para. 575).
 - 2 In this sense, the concept of fair dealing embraces the dilemma that pervades all aspects of copyright policy-making: the need to minimally restrict the general dissemination and use of cultural products, and maximally promote both knowledge production and the distribution of authorized copies of protected works. See Economic Council of Canada, *Report on Intellectual and Industrial Property* (Ottawa: Public Works and Government Services Canada, 1971) at 31–35.

courage the creation and exchange of intellectual works for the benefit of authors and society as a whole, then a suitable fair dealing defence is an essential part of that justification.

Unfortunately, the state of Canadian jurisprudence on fair dealing has tended not to reflect the critical nature of the role that it plays. Rather, fair dealing was for many years all but redundant in the Canadian courts: rarely raised and cursorily rejected. In recent years, it has made more frequent appearances in judicial decisions, but without much more success.³ It is only in the last three years, with the appellate decisions issued in the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁴ that we have begun to see a reversal in the misfortunes of fair dealing. In *CCH*, both the Federal Court of Appeal and the Supreme Court rejected the strict construction of fair dealing that had characterized judicial decision-making, and insisted upon the integral nature of fair dealing in copyright policy.⁵ This new approach flowed from an acknowledgement of the public as an intended beneficiary of the copyright system.⁶

However, the optimism generated by these judgments should be tempered by a concern with the statutory formation of the fair dealing provisions, which continue to reflect a vision of fair dealing as a narrow exception to the copyright rules, and one that must be restrictively applied.⁷ In their current form, the Canadian fair dealing provisions have the capacity to drastically undermine the significance of the Supreme Court's recent stance on fair dealing, and to provide a route by which lower courts can avoid the policy implications of the *CCH* case. My argument is that the rigid and restrictive fair dealing provisions currently found in the

Act should be replaced with an open-ended defence similar in form to the United States' fair use defence. This statutory revision is necessary to support and cement the significance of *CCH* in the development of a robust fair dealing defence; it is therefore essential to copyright's purposes.

In Part B, I offer a brief survey of fair dealing jurisprudence in Canada, and describe how the face of fair dealing has changed with the *CCH* case. In Part C, I explore the relationship between this change and a more general shift in Canadian copyright policy away from its traditional preoccupation with authors' rights. I argue that a balance between authors and the public interest demands a broad fair dealing defence. In Part D, I conclude that a broad defence remains beyond the reach of the courts, even post-*CCH*, in light of the narrowly drafted fair dealing provisions of the Act, which must therefore be reformed.

B. FAIR DEALING IN CANADIAN COPYRIGHT LAW

1) The Fair Dealing Provisions in Context

The Canadian fair dealing provisions limit fair dealing with a copyrighted work to the purposes of research or private study,⁸ criticism or review,⁹ or news reporting.¹⁰ As such, Canada's fair dealing provisions do not provide a general, open-ended defence for any dealing that can be regarded as "fair"; the fairness of a particular dealing is relevant to infringement proceedings only if it was undertaken for at least one of these specific purposes.¹¹ In addition, where the dealing is for any purpose other than research or private study, the defence can succeed only if there has been sufficient acknowledgement of the source of the copied work.¹² There are therefore three hurdles to be met by a defendant who claims to have dealt fairly with a work: first, the purpose must be one of those listed in the Act;

3 Below part B(2).

4 2002 FCA 187, <<http://reports.fja.gc.ca/fc/2002/pub/v4/2002fc30725.html>>, [2002] 4 F.C. 213, 212 D.L.R. (4th) 385 [*CCH (FCA)* cited to F.C.]; 2004 SCC 13, <www.canlii.org/ca/cas/scc/2004/2004scc13.html>, [2004] 1 S.C.R. 339, (2002), 30 C.P.R. (4th) 1 [*CCH (SCC)* cited to S.C.R.].

5 See *CCH (FCA)*, *ibid.* at para. 126; *CCH (SCC)*, *ibid.* at para. 48; and below, part B(3).

6 See *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, <www.canlii.org/ca/cas/scc/2002/2002scc34.html>, [2002] 2 S.C.R. 336 at paras. 30–31, (2002) 210 D.L.R. (4th) 385, [*Théberge* cited to S.C.R.]; *CCH (FCA)*, above note 4, at para. 23; *CCH (SCC)*, above note 4, at para. 10; below part C(1).

7 The fairness of a defendant's dealing is relevant only if the purpose of the dealing fits within the limited purposes enumerated in the *Copyright Act* [the Act], and in the case of criticism, review, or news reporting, only if the source of the work is mentioned. *Copyright Act*, R.S.C. 1985, c. C-42, <<http://laws.justice.gc.ca/en/C-42/>>, ss. 29–29.2; see below part B(1).

8 *Ibid.*, s. 29.

9 *Ibid.*, s. 29.1.

10 *Ibid.*, s. 29.2.

11 In *CCH (FCA)*, above note 4 at para. 127, Linden J explained the significance of the closed list of purposes in the Act: "If the purpose of the dealing is not one that is expressly mentioned in the Act, this Court is powerless to apply the fair dealing exemptions."

12 Above note 7. Both ss. 29.1 & 29.2 contain the caveat: "... if the following are mentioned: the source: and if given in the source, the name of the author, in the case of a work, performer, in the case of a performer's performance, maker, in the case of a sound recording, or broadcaster, in the case of a communication signal."

second, the dealing must be fair; and finally, sufficient acknowledgement must have been given where required by the Act. Failure to overcome any one of these hurdles causes the defence to fail. This triple-tiered approach stands in contrast to the American equivalent of “fair use.” Under the US law, the purposes listed in the provision are not exhaustive,¹³ and failure to acknowledge source is not a bar to the defence. The US fair use provision is open-ended, and the overarching consideration for the courts is one of fairness; fairness is to be determined with reference to a non-exclusive list of relevant factors such as the purpose and character of the use, the nature of the protected work, the amount of the work that has been used, and the likely consequence of this use upon the market for the original.¹⁴

The Canadian legislative approach to fair dealing in copyright law may differ from that of its neighbour, but it shares its approach, most notably, with the United Kingdom. Originally, the *Canadian Copyright Act 1921* provided, in the same terms as the *British Copyright Act of 1911*, that any fair dealing for the purposes of private study, research, criticism, review, or newspaper summary would not constitute an infringement of copyright.¹⁵ This formulation of the fair dealing defence, which was repeated in Canada’s 1970 *Copyright Act*,¹⁶ was the subject of review in a 1984 Canadian White Paper.¹⁷ The White Paper proposed that a new Act should “provide both a definition of fair dealing (to be termed ‘fair use’) and a prioritized list of factors to be considered in determining whether a particular use of

a work is a fair use.”¹⁸ The proposal thus drew guidance from the US fair use provisions enacted in 1976.¹⁹

The Sub-Committee on the Revision of Copyright²⁰ advised against the proposed fair use model.²¹ It cited the success of the Canadian approach as evidenced by the paucity of litigation in Canada, particularly when contrasted against the substantial fair use litigation in the US. It would have been more appropriate to regard the rarity of fair dealing in the Canadian courts as indicative of its impotence rather than its success: the predictable result of a restrictive defence, ill-equipped to ameliorate the position of users or restrain the demands of owners. Instead, the opportunity for an expansive fair dealing defence was lost amidst fears of an increase in litigation and suspicion of a widely applicable defence to copyright infringement.

This outcome is indicative of a distinct anxiousness in Canada to avoid any significant expansion of the fair dealing provisions.²² The absence of any amendment to fair dealing in Canada’s new copyright reform bill, Bill C-60, only underscores this fact.²³ The original *Report on the Provisions and*

13 17 U.S.C. § 107 (1976), <www.copyright.gov/title17/92chap1.html#107> provides: “The fair use of a copyright work ... , for purposes such as criticism, comment, news reporting, teaching ... , scholarship, or research, is not an infringement of copyright” [emphasis added].

14 *Ibid.*: “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 the 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.”

15 *The Canadian Copyright Act 1921*, c. 24, s. 16(1)(i); compare *An Act to Amend and Consolidate the Law Relating to Copyright*, 1 & 2 Geo. V, c. 46, s. 2(1)(i).

16 11-12 Geo. V. c. 24, s. 17(2), declared as lawful “(a) Any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper study.”

17 *From Gutenberg to Telidon: A White Paper on Copyright* (Ottawa: Consumer & Corporate Affairs Canada, 1984).

18 *Ibid.* at 39–40. Barry Torno had also recommended this revision in his report, *Fair Dealing: The Need For Conceptual Clarity on the Road to Copyright Revision* (Ottawa: Corporate Revision Studies, Consumer & Corporate Affairs Canada, 1981). Factors to be considered were: the impact of the use on the copyright owner’s economic reward (such that if copying was so substantial as to materially reduce the demand for the original, the copyright owner’s interests would have been harmed); the type of work involved and its purpose (as the nature of the creation colours the owner’s expectation about how it will be used); and the amount and extent of the taking. *Ibid.* at 40.

19 Above notes 13 and 14.

20 Canada, Standing Committee on Communication and Culture, *A Charter of Rights for Creators* (Ottawa: Minister of Supply and Services, 1985). For the relevant text on fair dealing see pp. 63–66 of the report, or see Robert G. Howell, Linda Vincent, & Michael D. Manson, *Intellectual Property Law: Cases and Materials* (Toronto: Emond Montgomery, 1999) at 361–63.

21 The Sub-Committee rejected the proposal for a list of relevant factors, citing the need for flexibility, but retained the enumerated purposes in the name of certainty. Because fairness is moot in the absence of a permitted purpose, it was the desire for certainty that triumphed.

22 A further example is the withdrawal of Bill C-316, *An Act to Amend the Copyright Act*, 1990, which had represented an attempt to move towards an American “fair use” concept in Canadian copyright law. See Howell, Vincent, & Manson, above note 20 at 363; also H.G. Richards, *Concept of Infringement in the Copyright Act*, in G.F. Henderson (ed.), *Copyright and Confidential Information Law of Canada* at 215–18.

23 <www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF>.

Operation of the Copyright Act, released in May 2002, raised the possibility of amending sections 29 and 29.1 of the Act “to expand the scope of fair dealing to ensure that it does not exclude activities that are socially beneficial and that cause little prejudice to rights holders’ ability to exploit their works and other subject matter.”²⁴ But judging by the *Interim Report of the Standing Committee*, the possibility of significant reform to Canada’s fair dealing provision has fallen by the wayside; instead, there are proposals for the explicit inclusion of educational purposes in the fair dealing section²⁵ or — the Committee’s preferred option — a blanket license for use of online materials by educational institutions.²⁶ Such piecemeal amendments would be more likely to restrict present fair dealing practices than to advance the interests of users.²⁷ Against this background, the following statement, made by Justice Laddie with reference to British copyright law, should resonate with Canadians:

Rigidity is the rule. It is as if every tiny exception to the grasp of copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once, conceded, defined precisely and confined within high and immutable walls [T]he drafting of the

- 24 Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Intellectual Property Policy Directorate, 2002), <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00873e.html#B2_8> at B.2.8.
- 25 See Canada, *Interim Report on Copyright Reform: Report of the Standing Committee on Canadian Heritage* (May 2004), Part E, Option 1 (Status Report Option 40(a)): <www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/07-rap-e.htm#TOCLink_07_24>.
- 26 *Ibid.*, Option 2. A blanket licence does not create an exemption to the copyright owner’s exclusive right as such; rather, the exclusive right is restricted to an entitlement to fair compensation.
- 27 Without any explicit mention of educational purposes, one might assume that such uses are already embraced by the exception for “research and private study,” particularly in light of the Supreme Court’s ruling in *CCH (SCC)*, which found the defendant’s activities to be “research-based” because they were a necessary part of the research process. *CCH (SCC)*, above note 4 at paras. 63 & 73. With the proposed addition of a blanket license for educational institutions, licensing fees would be owed for uses that would likely have been free and fair in the absence of such a licensing scheme. The proposed licensing scheme would also leave other users of Internet materials in a difficult position. As more specific purposes are added, the potential scope of fair dealing is reduced. A 1977 report on copyright in the UK warned: “The greater the number of special cases, the greater the scope for uncertainty in relation to cases not specifically dealt with.” *The Whitford Report on the Law of Copyright and Designs 1977*, cmnd 6732 at para. 668 [*Whitford Report*].

legislation bears all the hallmarks of a complacent certainty that wider copyright protection is morally and economically justified. But is it?²⁸

2) Judicial Treatment of the Fair Dealing Defence Before CCH

The Canadian fair dealing defence is “statutorily restrictive and not easily capable of a remedial, flexible, or evolutionary interpretation.”²⁹ For a long time, the Canadian approach to fair dealing was one of single-minded reliance upon specific rules, together with a distinct unwillingness to consider the purpose of fair dealing within the larger policy aims of copyright law. The result was a lack of principled discussion about the defence, and a wide refusal to entertain it. This effectively eviscerated fair dealing;³⁰ it was bound too tightly to the strict statutory language and encumbered with an apparent, if unarticulated, sense that use of another’s work without permission was *de facto* unfair.

The tendency amongst Canadian courts was to reject the fair dealing defence by invoking (and often creating) a bright-line mechanical rule that would preclude fair dealing on the facts of the case. The use of mechanical rules is suggestive of a general judicial unease, both with the flexibility inherent in the concept of fairness, and with the notion that someone might use another’s work without permission. By automatically excluding a particular use from the protective sphere of fair dealing, a court can avoid analyzing the interests at stake or inquiring into the purposes of the copyright system. So, for example, in the case of *Zamacois v. Douville*, fair dealing was denied because “a critic cannot, without being guilty of infringement, reproduce in full, without the author’s permission, the work which he criticizes.”³¹ In *The Queen v. James Lorimer*, the defendant’s abridgement of a government report failed to benefit from fair deal-

- 28 Justice Laddie, “Copyright: Over-Strength, Over-Regulated, Over-Rated” (1996) 18(5) E.I.P.R. 253 at 259.
- 29 Howard Knopf, *Limits on the Nature and Scope of Copyright*, in G.F. Henderson, above note 22 at 257.
- 30 Compare David Fewer, “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada” (1997) 55(2) U. T. Fac. L. Rev. 175 at 207: “[T]he failure of Canadian courts to articulate a reasoned application of the fair dealing defence, combined with the barren state of pertinent jurisprudence and lack of deliberate legislative guidance, has impoverished the defence itself.”
- 31 (1943), 2 C.P.R. 270 at 302, 2 D.L.R. 257 [*Zamacois* cited to C.P.R.]. Cf. *Allen v. Toronto Star* (1997), 78 C.P.R. (3d) 115, 152 D.L.R. (4th) 518 [*Allen* cited to C.P.R.].

ing because the defence was thought to require “some dealing with the work other than simply condensing it into an abridged version.”³² In *B.W. International v. Thomson Canada, Ltd.*, it was held that the publication of a leaked work could not be fair dealing.³³

Other courts used similarly bright-line rules to exclude uses from the narrow purposes of the Act, thereby rendering fairness moot. In *Hager v. ECW Press Ltd.*, a biography was held not to be a work of “research,” because “the use contemplated by private study and research is not one in which the copied work is communicated to the public.”³⁴ In *Boudreau v. Lin*, a University’s copying and sale of course materials was found not to be for the purposes of “private study” because the materials were distributed to all members of a class.³⁵ But perhaps the most striking example of the restrictive interpretation of enumerated purposes is found in *Cie Générale des Etablissement Michélin-Michélin & Cie. v. C.A.W.–Canada*,³⁶ which held that the defendants’ parody of a corporate logo could not be included within the category of “criticism.”³⁷

32 [1984] 1 F.C. 1065, 77 C.P.R. (2d) 262 at 269 [*Lorimer* cited to F.C.]. This was notwithstanding that the history of fair dealing lies in the concept of “fair abridgement.” See *Gyles v. Wilcox* (1740), 2 Atk. 141 at 143, Lord Chancellor Harwicke: “[W]here books are colourably shortened only, they are undoubtedly within the meaning of the Act ... and cannot be called an abridgement, for abridgements may with great propriety be called a new book ... and in many cases are extremely useful If I should extend the rule so far as to restrain all abridgements, it would be of mischievous consequence” But see also William Patry, *The Fair Use Privilege in Copyright Law* (Washington, D.C.: Bureau of National Affairs, 1985) at 17, drawing a distinction between fair abridgement and fair use on the basis that the latter does not accommodate communication of the same knowledge.

33 (1996), 137 D.L.R. (4th) 398, 68 C.P.R. (3d) 289 [*B.W. International* cited to D.L.R.]. This is in line with the British case, *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch.), and the Australian case of *Australia v. John Fairfax & Sons Ltd.* (1980), 147 C.L.R. 39.

34 (1998), 85 C.P.R. (3d) 289, <<http://recueil.cmf.gc.ca/fc/1999/pub/v2/1999fc23716.html>> at para. 55, 312, 2 F.C. 287 [*Hager* cited to C.P.R.].

35 (1997), 150 D.L.R. (4th) 324, <<http://members.shaw.ca/tperrin/writelaw/boudreau.htm>> 75 C.P.R. (3d) 1 at 335 [*Boudreau* cited to D.L.R.]: “The material was distributed to all the members of the class of students. This does not qualify as ‘private study.’” This decision was in line with the British case of *Sillitoe v. McGraw-Hill Book Co.*, [1983] F.S.R. 545 (Ch.D.).

36 (1997), 71 C.P.R. (3d) 348, 2 F.C. 306 [*Michélin* cited to C.P.R.].

37 “[P]arody does not exist as a facet of ‘criticism,’ as an exception to infringement in Canadian copyright law. I do accept that parody in a generic sense can be a form of criticism; however, it is not ‘criticism’ for the purposes of the *Copyright Act* as an exception under the fair dealing heading.” *Ibid.* at 381.

It would not have required much imagination or judicial creativity to bring parody within the fair dealing provisions as a species of criticism,³⁸ yet one can understand how it came to be excluded in light of Canada’s narrowly drawn defence. Justice Teitelbaum observed that, in contrast to the U.S position, the exceptions to acts of copyright infringement are “exhaustively listed as a closed set,” and inferred from this that “[t]hey should be restrictively interpreted as exceptions.” Parody was thought to require a new exception because it did not expressly appear in the closed set of permitted purposes.³⁹

As a result of this extremely restrictive approach to fair dealing purposes, the best protection for parodists in Canada is simply to avoid substantial similarity to the original work.⁴⁰ However, the transformative value of parody and the power that it wields as a means of social critique make a strong case for its inclusion in the fair dealing defence.⁴¹ The precarious situation of parody in Canadian copyright law — particularly compared to

38 See James Zegers, “Parody and Fair Use in Canada After *Campbell v. Acuff-Rose*” (1994-95) 11 C.I.P.R. 205.

39 Above note 36 at 379. “[E]xceptions to copyright infringement should be strictly interpreted. I am not prepared to read in parody as a form of criticism and thus create a new exception.” The defendants’ position also suffered at the third hurdle of the fair dealing inquiry: the additional requirement that the source be mentioned. The implicit acknowledgement of source or allusion to the original that is characteristic of parody was held to be insufficient mention for the purposes of the Act (*ibid.* at 382–84). Also, the Court held that the parody was unfair because it held the plaintiff’s work up to ridicule (*ibid.* at 384).

40 In other words, if the parodist avoids taking a substantial part of the original work, there will be no *prima facie* infringement. This is especially worrying because the nature of parody requires that the original copyrighted work be immediately apparent to the audience of the infringing work. Moreover, the copyright owner usually has an interest in not being a target of humour and critique, making it unlikely that he will license the work at any price. For an interesting discussion of the economic efficiency of treating parody as “fair use,” see Alfred C. Yen, “When Authors Won’t Sell: Parody, Fair Use and Efficiency in Copyright Law” (1991) 62 U. Colo. L. Rev. 79. The situation may not be so dire if future courts pick up the reasoning of the Quebec Court of Appeal in *Productions Avanti Ciné-Vidéo Inc. v. Favreau* (1999), 1 C.P.R. (4th) 129, 177 D.L.R. (4th) 568, which found that “true parody” might be an acceptable defence if all the requirements of the Act are met.

41 As explained by Justice Souter in *Campbell v. Acuff-Rose Music, Inc.*, above note 1 at 579: “[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”

the room accorded to such uses in the US regime⁴² — thus exemplifies the shortcomings of a closed-purpose approach, and underscores the general inadequacy of Canada's current fair dealing defence to advance the public purposes of copyright.

This brings us to the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁴³ which concerned a photocopying service offered by the Great Library at Osgoode Hall for its patrons — members of the Law Society, the judiciary, students, and researchers. The defendant argued that the purpose of the photocopy service was research. The plaintiff responded that the relevant purpose under the Act is that of the individual or organization dealing with the work, and not the persons to whom the copies are ultimately communicated. Justice Gibson agreed:

The copying by the defendant in the course of its custom photocopy service was not for a purpose within the ambit of fair dealing notwithstanding that the ultimate use by the requester of the photocopying might itself be within the ambit of fair dealing I am satisfied that the fair dealing exception should be strictly construed.⁴⁴

This judgment was characteristic of the narrow confines within which the Canadian judiciary had drawn the fair dealing defence,⁴⁵ and underscored the potential for a restrictive construction of enumerated purposes to essentially foreclose larger considerations of fairness or public policy. Fortunately, when this ruling was appealed to the Court of Appeal, and subsequently the Supreme Court, we began to see a long overdue change in the fortunes of fair dealing.

42 Above note 1.

43 (1999), 179 D.L.R. (4th) 609, 2 C.P.R. (4th) 129 [*CCH* cited to C.P.R.].

44 *Ibid.* at para. 175.

45 One notable exception to this rule is found in *Allen*, above note 31, where the reproduction of a photograph for the purpose of illustrating a news story was held to be fair use. The reproduction — in black and white, reduced in size, and placed inside the newspaper — was regarded as an apt use of the work for the purpose of news reporting that did give the defendant any unfair commercial advantage. This was in contrast to the lower court ruling, where fair dealing had been declared “an interesting issue which ... has no application to the case at bar,” (1995), 129 D.L.R. (4th) 171, 63 C.P.R. (3d) 517 at 525. Notably, the case was decided on the law prior to the addition of the acknowledgement requirement. It is possible that the *Star's* fair dealing defence would fail on this third hurdle if it were to be decided today.

3) *CCH* and the Transformation of Fair Dealing

The real breakthrough in the *CCH* decision came with the Court of Appeal's refusal to subject the fair dealing provisions to the traditionally narrow interpretation dominant in Canadian courts. According to Justice Linden:

The Trial Judge erred in law when he stated that exceptions to infringement must be “strictly construed.” There is no basis in law or in policy for such an approach. An overly restrictive interpretation of the exemptions contained in the Act would be inconsistent with the mandate of copyright law to harmonize owners' rights with legitimate public interests.⁴⁶

Having welcomed the possibility of a more generous interpretation of section 29, the Federal Court of Appeal was able to engage in principled discussion of the defence. Rather than casting fair dealing as a limited derogation from the norms of copyright law, Justice Linden acknowledged that “user rights are not just loopholes” and are therefore deserving of a “fair and balanced reading.”⁴⁷ Thus characterized, fair dealing is not an excuse for copyright infringement — a common perspective that buttresses calls for its limited application. If a person is dealing fairly within the meaning of the Act, there is no infringing activity in need of excuse.⁴⁸

With a revised outlook on the nature and role of fair dealing, the majority rejected Justice Gibson's position that facilitating research was not research *per se*. Because the actions of the plaintiff were undertaken solely in response to its patrons' requests, it was permitted to adopt their purposes as its own.⁴⁹ The question of fairness also benefited from a more nuanced, less rigid, approach than commonly found in the Canadian jurisprudence. Rather than an *ad hoc* determination of fairness ostensibly derived from

46 *CCH (FCA)*, above note 4 at para. 126.

47 *Ibid.*, quoting David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 171.

48 “Simply put, any act falling within the fair dealing provisions is not an infringement of copyright.” *CCH (FCA)*, above note 4 at para. 126. In other words, the user is not doing something that the copyright owner has the exclusive right to do. See above note 7, s. 3(1).

49 *CCH (FCA)*, above note 4 at paras. 132–34. If a patron's purpose was research within the meaning of the Act, and the use was fair in relation to that purpose, then the Library could successfully claim to be fair dealing on their behalf. “In essence the Law Society can vicariously claim an individual end user's fair dealing exemption, and step into the shoes of its patron” (*ibid.* at para. 143, Linden J.). Cf. (*ibid.* at para. 295, Rothstein JA.).

the perceived moral equities of the case, the Court of Appeal provided a principled survey of the factors to be considered. In large part, these factors mirrored those enumerated in the US fair use provision.⁵⁰ Rather than imposing the kind of mechanical rules typical of Canadian decisions, the court stressed that the “elements of fairness are malleable” and “none of the factors are conclusive or binding.”⁵¹ However, because the fairness of each potentially infringing activity conducted on behalf of patrons would have to be considered individually, the Court found itself unable to hold that the Library’s activities amounted to fair dealing across the board.

On appeal, the Supreme Court agreed that fair dealing is an integral part of the copyright scheme,⁵² and praised Justice Linden’s list of factors as a “useful analytical framework to govern determinations of fairness in future cases.”⁵³ However, the Supreme Court went even further, holding that the practices of the Great Library constituted fair dealing:⁵⁴ an avenue open to it by virtue of its expansive reading of section 29. The Court insisted upon “a large and liberal interpretation [of “research”] in order to ensure that users’ rights are not unduly constrained.”⁵⁵ Whereas the Court of Appeal had speculated upon the fairness of every individual, potentially infringing act, the Supreme Court chose instead to approach the issue with a focus upon the defendant’s general practices and policies,⁵⁶ which it found to be “research-based and fair.”⁵⁷

50 The Court assessed the purpose, nature, and amount of the dealing, the nature of the protected work, and the likely effect of the dealing. In addition, the availability of alternatives to the dealing was considered. *Ibid.* at para. 150.

51 *Ibid.*

52 *CCH (SCC)* above note 4 at paras. 48–49.

53 *Ibid.* at para. 53.

54 *Ibid.* at para. 73.

55 *Ibid.* at para. 51. Also: “[A]llowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights” (*ibid.* at para. 54).

56 *Ibid.* at para. 63: “The language [of s. 29] is general. ‘Dealing’ connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. 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.”

57 *Ibid.* at para. 73. The Library had in place an “Access to the Law” Policy, which, according to the Court, put in place reasonable safeguards to ensure that ma-

The Supreme Court’s broad and instrumental interpretation of the fair dealing provisions, informed by a sense of fair dealing’s purpose in the copyright system, thereby permitted a non-profit institution to continue to facilitate research in the legal community. In spite of the restrictive statutory language that had impeded the defence at the Trial Division and complicated the issue before the Federal Court of Appeal, this is a perfect example of a socially useful activity that fair dealing ought to protect. Thanks to the kind of principled reasoning overwhelmingly absent from earlier fair dealing cases, it was finally able to do so.

C. FAIR DEALING AND THE PURPOSES OF COPYRIGHT

It was the reconceptualization of fair dealing as integral, not exceptional, which paved the way for the Supreme Court’s *CCH* ruling. It is important to recognize that this shift in the rationalization of fair dealing did not find support in the fair dealing provisions, but occurred in spite of them. The changing face of fair dealing is the result of a larger theoretical shift in the rationalization of copyright as a whole: a shift away from the author’s rights and towards the public interest. This connection reveals the tension that exists between Canada’s restrictive fair dealing defence and the public policy purposes espoused by the Supreme Court.

1) Drawing the Connection

The common claim that fair dealing should be subject to strict construction — a claim typical of judicial pronouncements on fair dealing prior to *CCH* — appears to flow from a conviction that fair dealing is exceptional because it is antithetical to the normative presupposition of the copyright system: namely, that the author should have exclusive control over the use of her work. The role attributed to fair dealing thus reflects wider assumptions about the nature of copyright. If we understand copyright norms to be concerned primarily with the rights of authors and owners, allowing otherwise infringing uses without requiring permission or compensation might seem incompatible with — or at least undesirable in light of — this normative foundation. It accordingly makes sense, from this perspective, to have a narrow fair dealing provision subject to restrictive interpretation and rarely applied.

materials requested were being used for the purposes of research or private study. See also *ibid.* at para. 66.

However, if we recognize that public interest resides at the heart of copyright law, fair dealing occupies a comfortable position in a larger picture; it protects the public interest and thereby furthers copyright's goals. This implies that it is not merely an exception to copyright:⁵⁸ it does not derogate from copyright norms but confirms them. Reconceiving fair dealing in this way creates room for a more expansive defence, which in turn allows the copyright system to advance the public interest and not simply guard the rights-bearing author against every unauthorized use.

2) Exemplifying the Connection

Prior to *CCH*, courts would apply fair dealing by invoking a sense of right or wrong, but would not examine “the degree to which the copyrighted work contributes to the underlying goals of copyright.”⁵⁹ However, even in the absence of an explicit connection between fair dealing and copyright policy, one can detect a clear correspondence between owner-oriented justifications of copyright law and plaintiff-friendly interpretations of fair dealing. In other words, that sense of right or wrong was informed by a commitment to the primacy of the author's right.

a) Comparing *Michélin* and *Campbell*

By way of example, let us return briefly to the *Michélin* decision. In *obiter*, Justice Teitelbaum had cause to define what he considered to be the objectives of copyright law as “[t]he protection of authors and ensuring that they are recompensed for their creative energies and works”⁶⁰ With the goal of copyright being to “protect the interests of authors and copyright holders,”⁶¹ and no mention being made of users or the public at large, it is easy to understand why the court had so little inclination to apply fair dealing generously. This version of copyright theory is typified and compounded by the characterization of copyright as a private property right like any other.⁶² The combined result is a copyright holder cast as a worthy

58 See *ibid.* at para. 48: “[T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence.”

59 Fewer, above note 30 at para. 62.

60 Above note 36 at para. 115.

61 *Ibid.* at para. 111.

62 See *ibid.* at para. 103: “[J]ust because the [copy]right is intangible, it should not be any less worthy of protection as a full property right”; and also: “The fact that the Plaintiff's copyright is registered by a state-formulated system under the aegis of the *Copyright Act* in no way diminishes the private nature of the right” (*ibid.* at para. 96).

property owner; a *Copyright Act* rationalized as protection for copyright owners; and a defendant trade union cast as unlawful trespasser. Viewed against this backdrop, a successful fair dealing defence would seem to privilege the wrongful party and undermine the owner-oriented objectives of the Act: hence the extremely limited interpretation it receives.

Compare this to the policy framework employed in the US case of *Campbell v. Acuff-Rose Music, Inc.*,⁶³ in which a rap parody of the Roy Orbison classic, “Pretty Woman,” was held to be fair use. The reasoning of the US Supreme Court flowed from its initial definition of copyright's purpose as the promotion of “the Progress of Science and useful Arts.”⁶⁴ It recognized as inherent to this purpose a tension between protecting copyrighted materials and allowing others to build upon them.⁶⁵ Against this background, the purpose and importance of the fair use doctrine was clear: “[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.”⁶⁶ From this perspective, the defendant who benefits from fair use is not a lucky trespasser but a deserving creator in his own right, and one whose creative activities further the purposes for which copyright exists: hence the Court's generous consideration of fair use.⁶⁷

b) The *CCH* Case

Similarly, the divergent justifications offered for copyright can explain why the Trial Division and the Supreme Court reached opposite conclusions in *CCH*. At the Trial Division, where a restrictive interpretation of “research” ruled out fair dealing, the court described the object and purpose of the *Copyright Act* as follows:

63 Above note 1.

64 *Ibid.* at 575, citing U.S. Const., art I, § 8, cl. 8.

65 *Ibid.* Souter J. cites in support, *Carey v. Kearsley*, 4 Esp. 168 at 170, in which Lord Ellenborough famously said: “while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science.”

66 Above note 1 at 577.

67 The transformative value of the defendant's work, the social benefit of humorous criticism, the need to conjure up the original work, and the limited market consequences of the use were all identified as reasons to permit this use. All of these aspects were present in the *Michélin* parody, but without embracing the public policy purposes of copyright beyond the owner's interests, the Court was unable to appreciate their significance.

To benefit authors, albeit that in benefiting authors, it is capable of having a substantially broader-based public benefit through the encouragement of disclosure of works for the advancement of learning or, as in this case, the wider dissemination of law.⁶⁸

It is implicit in this statement that any benefit enjoyed by the public as a result of protecting copyright is no more than an incidental by-product of the private right. This was consistent with the position of the Supreme Court in the earlier case of *Bishop v. Stevens*: “the Copyright Act ... was passed with a single object, namely, the benefit of authors of all kinds”⁶⁹ Justice Gibson’s restrictive interpretation of fair dealing thus corresponds to the identification of the sole intended beneficiary of the copyright system as the rights-bearing author.

In contrast, the Court of Appeal began its analysis with the assertion that “the purposes of Canadian copyright law are to benefit authors by granting them a monopoly for a limited time, and to simultaneously encourage the disclosure of works for the benefit of society at large”⁷⁰ This was in line with the Supreme Court’s recent ruling in *Théberge v. Galerie D’Art du Petit Champlain Inc.*,⁷¹ which presented copyright’s purpose 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.”⁷² The *Théberge* decision represented a crucial shift by the Supreme Court away from its earlier author-orientation in *Bishop* and towards the idea of copyright as a balance between authors’ interests and the public interest. In *CCH*, the Court of Appeal’s more expansive interpretation of fair dealing thus corresponds to the recognition of the public interest as central to copyright policy.

The resurrection of public interest played a similarly pivotal role in the Supreme Court’s *CCH* ruling. Affirming its position in *Théberge*, the Court’s

analysis built upon the notion of a copyright balance.⁷³ Its refusal to interpret the fair dealing purposes restrictively was declared necessary “[i]n order to maintain the proper balance between the rights of a copyright owner and users’ interests,”⁷⁴ and “to ensure that users’ rights are not unduly constrained.”⁷⁵ The Court’s focus upon the user of copyrighted material is thus a facet of its new concern with the public purposes of the *Copyright Act*.

The disparity between the rulings in *Michélin* and *Acuff-Rose*, and the trial and appellate rulings in *CCH*, underscores the connection between competing justifications for the copyright system and competing approaches to the fair dealing exceptions. An owner-oriented rationalization of the copyright system goes hand in hand with a restrictive construction of defences to copyright infringement, while a public policy-oriented approach that embraces the public interest will support more expansive exceptions. The Supreme Court has held that there is no justification in law or policy for a preoccupation with the rights of the copyright holder to the detriment of the public. It would seem to follow that the author-public balance underlying the Act — and, one would hope, the reform process — is threatened by the restrictive version of fair dealing crystallized in the narrowly drafted fair dealing provisions of the *Act*.

D. THE CHANGING FACE OF FAIR DEALING IN CANADA

The inclusion of the public as a primary beneficiary of the copyright system, and the broad reading of fair dealing that this entails, reflects an evolving role for users in copyright policy. Perhaps the most striking manifestation of this evolution is the Supreme Court’s adoption of the concept of “users’ rights.”⁷⁶ The copyright holder’s interest in excluding others from its work has always benefited from the label of “right”; consequently, when owners’ rights have appeared to conflict with users’ interests, the former have tended to prevail. Now that the abstract concept of public interest has been concretized in the form of users’ rights, its fate is not so bleak. When competing rights clash, the owner’s copyright can no longer act as trump.

73 “[T]he purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.” *CCH (SCC)* above note 4 at para. 23.

74 *Ibid.* at para. 48.

75 *Ibid.* at para. 51.

76 *CCH (FCA)*, above note 4 at para. 126, citing *Vaver*, above note 47 at 171; *CCH (SCC)*, above note 4 at para. 12.

68 *CCH*, above note 43 at para. 116.

69 [1990] 2 S.C.R. 467 at 478–79, <www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol2/texte/1990scr2_0467.txt>, 72 D.L.R. (4th) 97, McLachlin J. (as she then was) [*Bishop* cited to S.C.R.]. Quoting Maugham J., in *Performing Right Society, Ltd. v. Hammond’s Bradford Brewery Co.*, [1934] 1 Ch. 121, at 127. It is of note that the Supreme Court in *Bishop v. Stevens* interpreted exceptions to copyright restrictively in light of this single object and purpose. See below note 84.

70 *CCH (FCA)*, above note 4 at para. 23 [emphasis added].

71 *Théberge*, above note 6.

72 Justice Binnie went on to note that “[t]he proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.” *Ibid.* at paras. 30–31.

1) The Lure and Limits of Users' Rights

The term “users’ rights” is important primarily because it creates the potential for conflicts between owners and users to be fought on equal footing,⁷⁷ and lends legitimacy to the demands of users who have typically been characterized as opportunists, free riders, and scoundrels.⁷⁸ Users claiming the freedom to deal fairly with copyrighted works can now be seen to be demanding recognition of their own rights, and not simply seeking to violate or limit the rights of others. Furthermore, it is no longer defensible to equate fair dealing with “fair stealing”;⁷⁹ it is not stealing to use a thing one has the right to use. The hope is that the concept of users’ rights will pave the way to a more balanced approach to fair dealing by ensuring that the focus is not solely on the rights that the copyright owner is prevented from enjoying.

It may appear, then, that the recognition of users’ “rights” has the capacity to radically redress the imbalance that we have seen in Canadian courts’ consideration of copyright defences. Indeed, the fair dealing decisions at the Court of Appeal and Supreme Court in *CCH* — particularly when contrasted against the Trial Division ruling — may be thought to illustrate the strength of the users’ rights concept. However, while it is possible that the rights-based language could be harnessed and employed to expand protection for certain uses, there is no reason why it should be capable of accomplishing such a dramatic turnabout in Canadian copyright jurisprudence. Even if the owner has lost his trump card, clashing rights still require resolution, and there is nothing about the label of “right” alone that determines the result.

The simple proposition that fair dealing is a user’s right does not demand that the scope of fair dealing be widened. If a user’s activity does not fit within the limits of the fair dealing defence, as it is currently defined by the Act, then the user simply has no right to use. A court that is not inclined to recognize a user’s right need only hold that the use does not meet all three of the hurdles established by our fair dealing provisions,

and the whole concept of users’ rights is moot. The user only has a right to deal fairly within the present confines of the Act.⁸⁰

Claims to right, whether by owners or users, have a tendency to obfuscate the real issues underlying policy debates. We cannot simply rely upon the language of users’ rights to further users’ interests; if we want to achieve substantive change, we will have to embrace the *spirit* of users’ rights and then reconsider the scope of the fair dealing definition in light of the public interest that it reflects. The argument must be made that the spirit of users’ rights is undermined by a fair dealing definition restricted to specific purposes and subject to additional limitations. After all, it is the definition of fair dealing that will determine if the user is exercising a right or infringing one.

2) Fair Dealing and the Limits of CCH

Canadian jurisprudence reveals three distinct but related factors that have contributed to the limited reach of fair dealing in Canada: the rigidity of the fair dealing provisions in the *Copyright Act*; the judicial tendency to interpret these provisions restrictively; and the courts’ general pre-occupation with the rights of the copyright holder. In the wake of *CCH*, courts are called upon to give fair dealing a large and liberal interpretation, and to accord equal consideration to the rights of the user. Only the narrowly constructed fair dealing provisions remain an obstacle to the Supreme Court’s vision of fair dealing as an integral part of the copyright system, and as a means by which to further that system’s goals.

a) Narrow Provisions; Narrow Interpretations

Generally, narrow approaches to copyright defences are found in jurisdictions where fair dealing provisions are narrowly drawn. We need only look to the history of fair dealing in Canada for evidence of this connection, but a glance at the British or Australian jurisprudence supports the same conclusion.⁸¹ Indeed, the link between narrowly drafted provisions

77 “When reading *CCH*, one is drawn to the conclusion that the court weighted the authors’ exclusive rights and the users’ ‘right’ to use the works on level plates of the proverbial scale.” Daniel J. Gervais, “Canadian Copyright Law Post-*CCH*,” (2004) 18 I.P.J. 131 at p. 156.

78 See for example *Michélin*, above note 36 at para. 75: “To accept the Defendants’ submissions on parody [as fair dealing] would be akin to making the parody label the last refuge of the scoundrel”

79 See for example Jeremy Phillips, “Fair Stealing and the Teddy Bears’ Picnic” (1999) 10 Ent. L. Rev. 57 at 57: “To copyright owners, the defence of fair dealing is a legitimization of that which is inherently wrong, a sort of ‘fair stealing.’”

80 As Gervais explains, above note 77 at 156: “The Court posits the existence of a conflict, as it were, between the author’s exclusive right and the user’s ‘right,’ and concludes that Parliament decided on public policy grounds to halt authors’ rights at the wall of fair dealing. It bears emphasis that all fair dealing exceptions are purpose-driven (private study, research, criticism, review, and news reporting), not specific to a class of users.” Users’ rights only exist within the wall erected around the narrow confines of the fair dealing provisions.

81 British and Australian cases provide evidence of a similarly narrow approach in the context of similarly narrow provisions. See *Copyright, Designs and Patents*

and their narrow interpretation seems rather intuitive, based as it is upon simple statutory interpretation: the more numerous and specific the exceptions are, the less likely it seems that Parliament intended their broad application or their extension to unspecified activities.⁸²

In *CCH*, the Supreme Court emphasized the need for a broad interpretation of fair dealing if it is to fulfil its role in the furtherance of copyright policy, but there is a tension inherent in giving a broad interpretation to the fair dealing defence when the provisions themselves are so narrowly drawn. The US fair use provision was evidently drafted to be broad, flexible, and open to interpretation on a case-by-case basis, thereby establishing an active role for courts in shaping copyright law in the face of new challenges. Exhaustive fair dealing provisions, in contrast, lend themselves more readily to strict application of statutory provisions, and result in a judicial tendency to look to Parliament for explicit guidance whenever new challenges arise.⁸³ Whereas the US concept of fair use encourages courts to engage in a policy-driven balancing act between the competing interests at stake, the Canadian provision discourages purposive interpretation. The onus remains upon Parliament to continuously develop new exceptions in the face of new challenges; the role of the courts is still to assess whether the case at hand meets the specific demands of the fair dealing defence (whether or not the particular use furthers the goals of copyright).

Act 1988 (U.K.), c. 48, ss. 29–30 <www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm>; *Australian Copyright Act 1968* (Cth.), ss. 40–42 <<http://scaleplus.law.gov.au/html/pasteact/o/244/o/PA000570.htm>>. See also for example *Hyde Park Residence Ltd v. Yelland*, [2001] Ch. 143, [2000] E.C.D.R. 275; *Newspaper Licensing Agency Ltd v. Marks and Spencer plc*, [2001] Ch. 257 (CA), [2000] All E.R. 239; *Ashdown v. Telegraph Group Ltd*, [2002] QB 546; *de Garis v. Neville Jeffress Pidler Pty. Ltd.* (1991), 20 I.P.R. 605; *Nine Network Australia Pty Ltd v. Australian Broadcasting Corporation* (1999), 48 IPR 333; *TCN Channel Nine Pty Ltd v. Network Ten Pty Ltd* (2002), 118 FCR 417.

- 82 Justice McLachlin (as she then was) once stated: “an implied exception ... is all the more unlikely ... in light of the detailed and explicit exceptions in [the Act] providing for matters as diverse as private study, research or critical review, educational use, disclosure of information pursuant to various Federal Acts, and performance of musical works without motive or gain at an agricultural fair.” *Bishop*, above note 69 at 480–81. Justice Teitelbaum in *Michélin* cited this statement in support of his decision to exclude parody from the scope of fair dealing. Above 36 at 381.
- 83 See *Michélin*, above 36 at 381, where it was said that a broad reading of “criticism” would be “creating a new exception to the copyright infringement, a step that only Parliament would have the jurisdiction to do.”

b) The Limits of a Large and Liberal Reading

While *CCH* represents a dramatic step forward for fair dealing in Canada, the wording of the Act dilutes its potential impact. Lower courts reluctant to welcome the new role for fair dealing and the limits it places upon owners’ rights will continue to have an easy route by which to refuse the defence. Even courts that embrace the notion of a copyright balance, interpret the provisions broadly, and determine fairness even-handedly, might find themselves unable to accept the defence because of the language of the Act. No matter how large and liberal the interpretation of a defendant’s purposes, not all fair dealings will be subsumable into the specified purposes: there is a limit to how far a “users’ rights” approach can stretch the finite meanings of words like research, study, criticism, and review.

Even after *CCH*, it seems likely that American fair use can embrace uses that simply will not fit within the confines of sections 29, 29.1, and 29.2, particularly in the context of new technologies. Take, for example, the activity of “time-shifting,” where protected materials are recorded for the purpose of enjoying them at a later time. The US Supreme Court has held that the private use of video recorders to time-shift content for later viewing is a lawful fair use of copyrighted works.⁸⁴ It seems likely that a similar conclusion would be reached in the context of “space-shifting,” where protected materials are recorded onto a different device or in an alternative format.⁸⁵ In Canada, it has been held that “as interesting as the time-shifting concept may be, this does not seem to be a realistic exception to the clear language contained in our legislation.”⁸⁶ Space-shifting, outside of the private copying exemption,⁸⁷ would seem destined for the same fate.

84 *Sony Corporation v. Universal City Studios*, 464 USC 417.

85 See *RIAA v. Diamond Multimedia*, 180 F. 3d 1072, 9th Circ. 1999 at 1079: “Rio [a portable MP3 player] merely makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user’s hard drive. Such copying is a paradigmatic noncommercial personal use.”

86 *Tom Hopkins International Inc. v. Wall & Redekop Realty Ltd.* (1984), 1 C.P.R. (3d) 348 at 352–53. The issue of time- and space-shifting appears to have been an important consideration in the Issue Paper recently released by the Commonwealth Attorneys-General Department of Australia, “Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing, and other Exceptions in the Digital Age” May 2005, <www.ag.gov.au/agd/WWW/agdhome.nsf/o/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument>.

87 See *Copyright Act*, above note 7, s. 80(1), which creates an exception to infringement for the audio-recording of musical works made for private use, subject to certain limitations.

Sunny Handa has suggested that simply browsing the Internet may also fail to meet the hurdles of Canadian fair dealing because casual Internet users are unlikely to be engaged in private study, research, criticism, review, or news reporting.⁸⁸ Canadian courts concerned about the implications of finding fair dealing in an electronic context might be tempted to conclude that “if the legislature had meant to exempt browsing under fair dealing it would have done so explicitly.”⁸⁹ Meanwhile, fair browsing could easily fall within the American’s fair use defence.⁹⁰ Handa also doubts the ability of Canadian fair dealing to extend to the reverse engineering of computer programs.⁹¹ While some such uses may qualify as research or private study, courts faced with reverse engineering (especially for competitive purposes) are more likely to reason that “if reverse engineering was to be permitted under fair dealing, it would have been specifically included as one of the listed purposes.”⁹² Meanwhile, reverse engineering, if done fairly, is permissible under the American fair use doctrine.⁹³

Time-shifting, space-shifting, Internet browsing, and reverse engineering are only a few examples of areas where new technologies are upsetting copyright’s delicate balancing act. There are many other examples — making RAM copies, caching content, deep-linking, to name a few — that will continue to present challenges for copyright law, while new examples will undoubtedly emerge as digital technologies evolve. Where such uses fail to fit within traditional categories of research, study, criticism, review, or news reporting, they are beyond the reach of Canada’s fair dealing defence. The power to achieve the appropriate balance between owners’ and users’ rights in this modern digital environment is therefore beyond the reach of Canada’s courts.

Even in the context of traditional mediums, it is important to note that Canada’s rigid fair dealing provisions have the potential to obstruct copyright’s purposes. Rather than struggling to fit uses within restrictive

categories, the central concern of any fair dealing inquiry should be “to see ... whether the new work merely ‘supersede[s] the objects’ of the original creation ... or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁹⁴ Copyright law, with the help of fair dealing, should aim to encourage the creation of new expressions, meanings, and messages, even if this sometimes means permitting the use of protected expression.⁹⁵

It is in the nature of expression and cultural development that the new builds upon the old.⁹⁶ In this postmodern age, where appropriation, adaptation, and reinterpretation of existing texts is an established mode of cultural meaning-making (and the notion of true creation *ex nihilo* is generally dismissed as a relic of the romantic age) downstream uses of protected works might also reflect the kind of authorial creativity that copyright should encourage. Appropriation art, digital sampling, and other such creative uses of prior works, further the public purposes of copyright but likely fall outside the limited purposes of fair dealing. This only underscores the inherent weakness of a purpose-specific fair dealing defence tasked with preserving the appropriate balance between owners and users.⁹⁷

Finally, we should recall that in addition to requiring an enumerated purpose, the Act currently requires an acknowledgement of source. In the absence of sufficient acknowledgement, fair dealing for the purposes of criticism, review, or news reporting cannot benefit from the fair dealing defence, no matter how fair, how necessary, or how integral to copyright’s purposes. This final hurdle restricts the power of fair dealing to perform the role given to it by the Supreme Court in *CCH*. If the *Michélin* case were

88 Sunny Handa, *Copyright Law in Canada* (Markham, ON: Butterworths, 2002) at 294.

89 *Ibid.*

90 See *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

91 Handa, above note 88 at 297–98. This process involves starting with a finished program and working backwards from the object code to find the assembly language used by the programmer. See also Sunny Handa, “Reverse Engineering of Computer Programs under Canadian Copyright Law” (1995) 40 McGill L.J. 621.

92 Handa, above note 88 at 297.

93 See *Sega Enterprises Ltd. v. Accolade Inc.*, 24 U.S.P.Q.2d 1561, 977 F.2d 1510 (9th Cir. 1992); *Atari Games Corp. v. Nintendo of America Inc.*, 975 F.2d 832 (Fed. Cir. 1992).

94 Justice Souter in *Campbell v. Acuff-Rose*, above note 1 at 579.

95 As Justice Binnie wrote in *Théberge*, above note 6 at para. 32: “[E]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2, which seek to protect the public domain in traditional ways such as fair dealing.”

96 Alan L. Durham, “Copyright and Information Theory: Toward an Alternative Model of Authorship” (2004) B.Y.U.L. Rev. 69 at 94.

97 Notably, such uses have not always received a favourable outcome even in the US. See for example *Rogers v. Koons*, 960 F.2d 301 (2d Cir), cert denied 113 S. Ct. 365 (1992), in which a surrealist sculpture based upon a protected photograph was held not to be a fair use. See also the recent case of *Bridgeport Music Inc. v. Dimension Films*, in which the digital sampling of three notes was held to be infringing, <<http://fsnews.findlaw.com/cases/6th/04ao297p.html>>.

to be decided today, a court applying the lessons of *CCH* might find that the dealing is indeed “criticism” that satisfies the standard of fairness, but in the absence of an explicit acknowledgement of source, it might nonetheless reject a fair dealing defence. Again, this suggests a disconnect between the conception of fair dealing as integral to copyright’s purposes, and the fair dealing provisions as they currently exist in the *Copyright Act*.

3) Fair Dealing Reform: Realizing the Promise of *CCH*

The narrowly-drafted fair dealing provisions in the Act thus present a challenging interpretative task for Canadian courts. Not only are these provisions an obstacle and a limit to the evolution of fair dealing in Canadian copyright law and policy, but they encapsulate a vision of fair dealing — and an understanding of the purposes of copyright law — that is no longer justifiable: fair dealing should not be narrowly defined if it is not a marginal exception to the general norms of copyright; and it should not privilege the owner over the user if copyright is equally concerned with the rights of both. In light of the balance articulated in *CCH*, we need “to expand the scope of fair dealing to ensure that it does not exclude activities that are socially beneficial and that cause little prejudice to rights holders’ ability to exploit their works”⁹⁸

The only way to ensure that socially beneficial uses are not excluded is to adopt an open-ended fair dealing provision based upon the US fair use model. In the words of Britain’s Whitford Committee: “Any sort of work is likely to be of public interest, and the freedom to comment, criticize, to discuss and to debate, ought not, in principle, to be restricted to particular forms (‘criticism or review’ or ‘reporting current event’).”⁹⁹ A flexible fair use model permits courts to address new challenges in a principled manner, guided by the policy concerns underlying the law. A purpose-specific model guarantees that Parliament is always playing catch-up, with socially beneficial uses stifled along the way.

The revised fair dealing provision should list the current purposes enumerated in the Act by way of definition, but should not restrict its application to those purposes exclusively. It should also provide a non-exhaustive list of factors to be considered in determining the fairness of a use, incorporating the factors set out by the Court of Appeal and endorsed by the Supreme Court in *CCH*. The current acknowledgement requirement

should either be removed or relegated to a consideration in fairness determinations; there is no place for such mechanical rules in a flexible fair use model. The goal must be to achieve, through statutory revision, a fair dealing defence that is capable of principled application, guided by the purposes that underlie the copyright system, and responsive to the ever-changing nature of cultural creativity and exchange in the (post)modern, digital environment.

E. CONCLUSION

The Supreme Court in *CCH* established a vision of fair dealing that differed from anything previously seen in the Canadian courts. As the case progressed from Trial Division to the highest court in the land, fair dealing was transformed from a limited exception to an integral part of the copyright system; from a controversial privilege to a recognized right; from an anomaly in an owner-oriented system to an instantiation of the public-owner balance. Now is the perfect time for the legislature to acknowledge and preserve this transformation.

The Government was right to insist upon more time to consider the implications of the *CCH* ruling on fair dealing before endorsing the suggestions of the Standing Committee on Canadian Heritage.¹⁰⁰ Rather than enacting more piecemeal amendments to the rigid provisions of the Act — thereby temporarily satisfying the demands of specific interest groups, but guaranteeing that further demands ensue and wide dissatisfaction persists — the Canadian government should seize this opportunity for change. Taking its lead from the Supreme Court, it should acknowledge the centrality of fair dealing in Canadian copyright policy, and the need for a broad defence to ensure that users’ interests are not undermined. This should translate into a proposal for an open-ended fair dealing defence, amenable to principled and purposive interpretation, and flexible enough to withstand the test of time. In an era of rapid technological development, in the wake of a strong ruling from the Supreme Court of Canada, and in the midst of an expansive reform process, there could be no better time for change.

¹⁰⁰ See *Government Statement on Proposals for Copyright Reform*, above note 23: “The Government believes that it requires further public input and consideration, including with respect to the implications of recent copyright decisions by the courts (notably the recent Supreme Court of Canada decision regarding fair dealing, *CCH v. Law Society of Upper Canada*).”

⁹⁸ Above note 24.

⁹⁹ *Whitford Report*, above note 27 at para. 676.