COMPARING FAIR DEALING AND FAIR USE

Fair dealing has a long common law history, created by the Judiciary as a way to qualify the monopoly copyright creates on the use of a copyright-protected work. In the twentieth century, fair dealing was codified into copyright legislation in various countries including the United Kingdom when Imperial copyright was consolidated in 1911, in Canada in 1924, and in a comparable yet different form known as fair use in the United States in 1976. This article provides a comparison between the Canadian fair dealing provision and the U.S. fair use provision.

Canadian Fair Dealing Background

The fair dealing provision was introduced into Canadian copyright law in the Canadian Copyright Act, 1921. The current fair dealing provision is as follows:

29. Fair dealing for the purpose of research or private study 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.

From its origins in Canadian law, fair dealing applied to all copyright-protected works, although it is generally most associated with literary works. Fair dealing continues to apply to all works, including electronic works. Fair dealing never specifically applied to education or educational uses of copyright-protected materials, except as such uses fell within private study, research, criticism, review or newspaper summary.

Until recently, the interpretation by the Judiciary of fair dealing has been relatively narrow. On March 4, 2004, the Supreme Court of Canada (“SCC”) released its decision in CCH Canadian Ltd. v. Law Society of Upper Canada (“CCH”)¹ which, amongst other

¹ 2004 SCC 13.
issues, interpreted fair dealing to the facts in that case. The Court interpreted fair dealing more broadly than ever before when applying it to the photocopying of legal materials. The SCC stated:

The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.

The court further stated:

‘Research’ must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained, and is not limited to non-commercial or private contexts.

U.S. Fair Use Background

In the U.S., fair use is a judicially created defense originating in the mid-19th century. It was first codified in the U.S. Copyright Act of 1976. The current fair use provision is as follows:

§ 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.
Fair use is not defined but is left open for a court to decide whether a particular use might be subject to this defence on a case-by-case basis, taking into account certain factors as enumerated in the provision. This intended flexibility is the cause of much confusion and its interpretation of much debate. It is clearly the intention of the U.S. Congress to leave fair use open to interpretation and new technology based upon a court’s consideration of any particular case before it. A court must consider all four criteria set out in the Act in making its determination. These four factors are Congress’ attempt to codify common law fair use. According to Professor Leaffer²,

The factors are broadly stated, overlapping, and vague, and the legislative history provides little insight as to their meanings, what weights to give them, or how they interrelate.

Comparing Fair Dealing and Fair Use

Below are ten points comparing the Canadian fair dealing and the U.S. fair use.

1. Legislators in both Canada and the U.S. have intentionally left the interpretation of fair dealing and fair use open for courts to consider based upon the specific circumstances in each case.

2. Fair dealing and fair use both require an individual to put themselves in the position of a judge and to decide what may only ultimately ever be decided in a court of law. As such, fair dealing and fair use are both ambiguous and uncertain and do not provide clarity as to what may constitute fair dealing or fair use without going to court. Educators, librarians and others working with fair dealing and fair use have consistently been frustrated with the relevant applicable provision. In addition, there are varied and many interpretations, misinterpretations and misconceptions about fair dealing and fair use.

3. U.S. educators have Guidelines, arguably of limited use, to interpret fair use. There are no equivalent Canadian Guidelines. These U.S. guidelines are voluntary for interpreting “multiple copies for classroom use” and have been agreed upon by educator, author and publisher groups to set out the minimum threshold for fair use. These guidelines are in the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions (“the Guidelines”), which are not part of the 1976 Act but are included in the House Report.

4. The U.S. Constitution provides a backbone to the interpretation of fair use that does not exist in Canada. Section 91(23) of the British North America Act, 1867 assigns copyright as a federal power and gives the Parliament of Canada the exclusive jurisdiction to enact legislation relating to copyright. This power does not provide Parliament with an underlying purpose for making new copyright laws and likewise does not provide courts with a backbone for interpreting copyright legislation.

The U.S. Constitution, Section 8, Clause 8, specifically authorizes Congress “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.” This clause is a backbone to the interpretation of fair use, and is arguably the reason for the U.S. copyright law often tipping the balance in copyright legislation towards consumers rather than authors and owner of copyright-protected materials.

5. Fair dealing and fair use are not outright exceptions to the rights of an author of a copyright-protected work. Rather, they are both defenses to be used in a copyright infringement suit.

6. The purposes set out in the U.S. fair use and Canadian fair dealing provisions is a major difference between the two provisions. These purposes are statutorily set out as follows:

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<thead>
<tr>
<th>U.S. Fair Use s. 107</th>
<th>Canadian Fair Dealing s. 27</th>
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<tr>
<td>- criticism</td>
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<td>- comment</td>
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<td>- news reporting</td>
<td>- news reporting</td>
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<td>- teaching (including multiple classroom copies)</td>
<td>- private study</td>
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<td>- scholarship</td>
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7. The language used in sections 107 and 27 prior to the stating of these purposes varies between the two statutes and may result in different interpretations. The purposes set out in section 107 on fair use are a non-exhaustive or open-ended list and are thus only illustrative. They may be “for purposes such as criticism, comment, news reporting, teaching (including multiple copying for classroom use), scholarship, or research” [emphasis added.] The fair use wording allows for other purposes, consistent with the promotion of the progress of science, to be included through judicial interpretation, for example, fair use is flexible and may include such things as parody and pastiche. The purposes set out in section 27 on fair dealing are an exhaustive list and must be for: research, private study, criticism, review and news reporting. If the use does not fit within one of the categories, it cannot be fair dealing.

However, in CCH, the SCC stated that “these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.” This gives room for courts to interpret the purposes broadly, and one could even go so far as to argue that the list in section 27 of purposes is no longer exhaustive.

8. Under both sections 107 and 27, if the copying falls within the purposes, then the court must decide the “fairness” of that copying. Section 107 sets out the 4 factors the court must take into account when determining the fairness of the copying. Section 27 is
silent on this issue. However, the SCC in *CCH* sets out similar factors as those in s. 107 for the court to take into account when determining fairness.

Since CCH, it is arguable that Canada’s fair dealing is very similar to the U.S. fair use. However, it is arguable that Canadian courts may have more flexibility than U.S. ones in that the list of criteria to consider in the fairness is open-ended and the six criteria in the *CCH* case need not be applied in all cases (where the four statutory factors in fair use must all be applied in each case), that no one factor is determinative, and that other factors may also be relevant. It is difficult to predict the future direction of courts, and legislators, in interpreting, and legislating, fair dealing.

9. Another significant difference between fair use and fair dealing is whether a licence is available for the work in question would mean that fair dealing would not apply to that work. The *Texaco* case\(^3\) clearly states that in assessing the fourth fair use factor of the effect upon potential market or value, that it is appropriate to consider potential licensing revenues for photocopying, and that this should be for “traditional, reasonable, or likely to be developed markets”. The SCC states with respect to the availability of alternatives to the dealing “that the availability of a licence is not relevant to deciding whether a dealing has been fair”.

10. Under fair dealing, for criticism, review and news reporting, both the source of the work and the name of the author, performer, broadcaster and sound recording maker (if given in the source) must be mentioned. Under fair use, acknowledgement of the source is not necessary.

\(^3\) 60 F.3d 913 (2nd Cir. 1994).