

## 7 Fair Dealing's Failures?

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### I Introduction

The previous chapter discussed Australia's experiment with homegrown 'flexible' drafting in section 200AB. But Australia, like other countries whose copyright laws derive from the Imperial Copyright Act 1911, also recognises fair dealing exceptions.<sup>1</sup> In its original statutory form in the 1911 Act, the relevant text stated that there was no infringement by any 'fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary'.<sup>2</sup> In the intervening years, fair dealing provisions have become more complex. In Australia, Canada and the United Kingdom, for example, they are longer, split across multiple provisions in the copyright statute and are more particularised.<sup>3</sup> That said, the central requirement of fairness is suggestive of a standard, and this open-ended concept, combined with the introduction of new fair dealing purposes,<sup>4</sup> raises the question of how much day-to-day fair dealing practices overlap with fair use activity in the United States.

This chapter focuses on Canadian experience in the five years following *CCH Canadian Ltd v. Law Society of Upper Canada*.<sup>5</sup> It has been suggested that this case effected a significant expansion of Canadian

<sup>1</sup> At the time of writing, the relevant provisions are found in: Australian Act ss. 40–42, 43 (2), 103A–103C, 113E; Canadian Copyright Act ss. 29, 29.1, 29.2; and CDPA ss. 29, 30, 30A, 32. Over the course of this research, new fair dealing purposes have been added in all three fair dealing jurisdictions studied.

<sup>2</sup> Copyright Act 1911, s. 2(1)(i). It appears that this provision was intended to codify the existing fair use defences that had developed at common law: see R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005), pp. 256–259. The use of the plural 'defences' is used to indicate that fair use arguments had not coalesced into a single doctrine by the time of codification.

<sup>3</sup> For instance via requirements for a sufficient acknowledgement, or that criticism and review relate to 'that or another work'.

<sup>4</sup> Since 2006, for parody (Australia, Canada, UK), satire (Australia, Canada), caricature and pastiche (UK), education (Canada, UK), quotation (UK) and assisting users with a disability (Australia).

<sup>5</sup> [2004] 1 SCR 339 ('*CCH*').

fair dealing due to the Supreme Court's explicit affirmation that exceptions are users' rights, such that terms like research 'must be given a large and liberal interpretation'.<sup>6</sup> For instance, Michael Geist, writing at the time of decision's release, said that *CCH* 'instantly ranks as one of the strongest pro-users' rights decisions from any high court in the world, showing what it means to do more than pay mere lip service to balance in copyright'.<sup>7</sup> Similarly, Teresa Scassa described the case as likely to have 'far-ranging' effect,<sup>8</sup> 'breath[ing] significant life into the [fair dealing] defence'.<sup>9</sup> That said, whilst there was consensus that *CCH* was a 'landmark' case,<sup>10</sup> there were some who questioned its reasoning and future, including whether it would constitute a temporary high-water mark in fair dealing analysis. For example, it was observed that *CCH* marked an abrupt shift in the Canadian approach to copyright exceptions,<sup>11</sup> and possibly placed Canada outside its obligations under Article 13 of TRIPS.<sup>12</sup> On the other hand, it was also suggested that without legislative transformation of fair dealing into a fully open-ended fair use exception, the vision of the Supreme Court would not be realised.<sup>13</sup>

It is not the purpose of this chapter to engage with the normative aspects of this analysis. Instead, it asks two rather different questions. The first is to consider what impact *CCH* had on cultural institution practices, bearing in mind that the facts concerned a library photocopying service, which suggests that the case might be of direct relevance to institutional decision-making. Second, it asks how doctrinal analysis of *CCH* – the law in books – compared with the law in action. In order to set the scene for this discussion, Section II describes the *CCH* decision, including why it was of interest for the empirical work in this book. Section III then explores judicial and academic responses to the case, and Section IV sets out the reported response of cultural institution

<sup>6</sup> Ibid., para. 51.

<sup>7</sup> M. Geist, 'Low-tech Case has High-tech Impact', *The Toronto Star* (22 March 2004), [www.michaelgeist.ca/resc/html\\_bkup/mar222004.html](http://www.michaelgeist.ca/resc/html_bkup/mar222004.html).

<sup>8</sup> T. Scassa, 'Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada's Decision in *CCH Canadian Limited et al v Law Society of Upper Canada*' (2004) 3 *Canadian Journal of Law & Technology* 89.

<sup>9</sup> Ibid., 94.

<sup>10</sup> P. Esmail, '*CCH Canadian Ltd v Law Society of Upper Canada: Case Comment on a Landmark Copyright Case*' (2005) 10 *Appeal* 13.

<sup>11</sup> R. Hughes, 'Evolution of the Concept of Fair Dealing in Canadian Copyright Law' (2008) 26 *Copyright Reporter* 44.

<sup>12</sup> D. Gervais, 'Canadian Copyright Law Post-*CCH*' (2004) 18 *Intellectual Property Journal* 131, 163–167. The three-step test was discussed in Chapter 1, Section III.A.

<sup>13</sup> C. Craig, 'The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform' in M. Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005).

users. Here it will be seen that despite the extremely positive reaction from scholars and *CCH* being applied in later cases, in the five years following *CCH*, the response amongst institutions was extremely muted.

The fieldwork described in this chapter therefore tends against the suggestion that *CCH* recalibrated Canadian fair dealing so that it was much closer to US fair use; in fact, at least for participating cultural institutions, it casts doubts on whether *CCH* did much to shift practices at all. This raises questions about reform options for copyright exceptions. For instance, for those supportive of the liberalisation of exceptions, it might be argued that fair dealing contains under-exploited flexibilities, and that changing the interpretative milieu around the doctrine – as the Supreme Court sought to do in *CCH* – may serve to expand fair dealing without statutory intervention. So why did cultural institutions not embrace the Supreme Court's vision? One possibility might be that the fieldwork highlights the difficulties in reframing fair dealing, such that more radical interventions, such as fair use, are superior reform options. But another is that they illustrate that the Canadian copyright environment is unsuited to exceptions drafted as standards.

This chapter is the first of two to consider Canadian fair dealing. Although it describes a muted response to *CCH*, the changeability of seemingly entrenched norms was illustrated by the subsequent fair dealing experiences of academic libraries, discussed in Chapter 8. As such, it might be said that the Canadian experience also shows that practices that seem immutable can undergo significant change. More generally, the Canadian fieldwork puts into focus the range of factors that influence the law in action. And as we will see in the next two chapters, the law in books is but one of these.

## II The Supreme Court's Vision

### *A Background*

When the *CCH* decision was handed down, preparations were underway for the first tranche of fieldwork with Australian cultural institutions.<sup>14</sup> This section starts with a brief overview of the fair dealing experiences as reported in those interviews, as they prompted the question of whether

<sup>14</sup> Discussed in E. Hudson and A. Kenyon, 'Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives' (2007) 30 *University of New South Wales Law Journal* 12; E. Hudson and A. Kenyon, 'Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions' (2007) 4 *SCRIPTed* 197.

new and more forward-leaning interpretations of fair dealing might have arisen post-*CCH* in Canada.

A statutory fair dealing exception first appeared in Australia when the federal parliament adopted wholesale, in 1912, the Copyright Act 1911.<sup>15</sup> Fair dealing was retained with some modification when the Copyright Act 1968 (Cth) came into force. At the time of the Australian fieldwork in 2004 and 2005, fair dealing covered research, study, criticism, review, news reporting and giving legal advice.<sup>16</sup> Amongst interviewees, knowledge of fair dealing was mixed, with some people familiar with a '10 per cent rule' or the existence of an exception for research and study, but others not aware of the provisions or only able to describe their contents in vague terms.<sup>17</sup> Those with greater knowledge described fair dealing as being of relatively limited assistance to cultural institutions. In so far as it was perceived to be helpful, it was reported to be invoked in two main scenarios: 'research and study being undertaken by patrons and staff' (which seemed to relate to an individual's *own* research, not the institution providing assistance or support to others); and 'some institutional lectures, public programs and publications', where the criticism and review limb was understood to permit some uses without clearing rights.<sup>18</sup>

Interviewees able to discuss fair dealing in detail made statements that seemed to accord with existing doctrinal indications. Although based on a small body of Australian case law, the tenor of these indications had often been to apply fair dealing in narrower terms than its language might require. For example, although it was only a decision of a single judge of the Federal Court of Australia, *De Garis v. Neville Jeffress Pidler Pty Ltd*<sup>19</sup> was and remains a leading case in Australian understandings of fair dealing.<sup>20</sup> The defendant ran a media monitoring business in which it supplied copies of newspaper articles to its clients for a fee. It did not

<sup>15</sup> Between 1905 and 1912, Australian copyright legislation contained a protean statutory fair use defence in s. 28 of the Copyright Act 1905 (Cth). For discussion, see Burrell and Coleman, n. 2 above, pp. 257–258.

<sup>16</sup> Hudson and Kenyon, 'Digital Access', n. 14 above, 27. These provisions were found in the Australian Copyright Act ss. 40–42, 43(2), 103A–103C.

<sup>17</sup> *Ibid.*, 28. The notion of a '10 per cent rule' comes from s. 40 of the Australian Copyright Act (fair dealing for the purpose of research or study), in which the reproduction of not more than a 'reasonable portion' is deemed to be a fair dealing. A reasonable portion has long been defined to mean, *inter alia*, 10 per cent of the number of pages. There is no general 10 per cent rule in the Australian fair dealing provisions; and nor do the deeming provisions mean that reproduction of greater than 10 per cent of the work can never be fair.

<sup>18</sup> *Ibid.* <sup>19</sup> (1990) 18 IPR 292 (Beaumont J).

<sup>20</sup> To illustrate, it is extracted three times in the discussion of copyright exceptions in K. Bowrey, M. Handler, D. Nicol and K. Weatherall, *Australian Intellectual Property Law*:

have any licensing arrangements in place to make these reproductions. In copyright infringement proceedings, one argument run by the defendant was that its activities fell within fair dealing. This defence failed, a result that may seem reasonable given the scale of copying and the possibility of market substitution. But the case was decided not on the basis of fairness but by reference to purpose. For instance, Beaumont J held that the intended use of the client was irrelevant (the relevant purpose being that of the person or entity making the copy),<sup>21</sup> and that the defendant's activities were not research but locating articles for a fee. An alternative approach, i.e., to hold that the activities were research-based but not fair, was not taken.

This focus on the defendant's purpose also characterised another leading case in Australian fair dealing jurisprudence: *TCN Channel Nine Pty Ltd v. Network Ten Pty Ltd*,<sup>22</sup> in relation to the use of extracts from Channel Nine programmes in satirical talk show, *The Panel*. Relevantly, in discussing whether any particular extract fell within fair dealing, a great deal of judicial energy was spent determining whether there was sufficient commentary for 'criticism or review', or whether any 'news' was being 'reported'. In contrast, there was very little analysis of fairness, giving the appearance that classification of the defendant's purpose was determinative of whether fair dealing applied. With the judges often split on this classification exercise, *The Panel* has been criticised for resting on ad hoc and impressionist reasoning.<sup>23</sup>

Returning to cultural institutions, the 'law in books' in Australia therefore seemed to reject both agency-style arguments and an interpretation of research that included the broader research process. The *CCH* case was therefore of interest because, on both these matters, the Supreme Court of Canada came to a very different set of conclusions. This raised the question of whether a new vision of fair dealing might

*Commentary, Law and Practice*, 2nd edition (South Melbourne: Oxford University Press, 2015), pp. 269–270, 272–273, 290–291.

<sup>21</sup> For similar reasoning, see *Sillitoe v. McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545, 558. But c.f. *Telstra Corporation Pty Ltd v. Premier Media Group Pty Ltd* (2007) 72 IPR 89, 98 (Allsop J, in denying Telstra's motion for interlocutory relief, refusing to rule out an argument that the provision of content to third parties by Premier was not a fair dealing associated with the reporting of news by those recipients). For analysis of the agency reasoning in *De Garis* and later cases, see J. McCutcheon and S. Holloway, 'Whose Fair Dealing? Third-Party Reliance on the Fair Dealing Exception for Parody or Satire' (2016) 27 *Australian Intellectual Property Journal* 54.

<sup>22</sup> Fair dealing discussed in (2001) 50 IPR 335 (Federal Court per Conti J); (2002) 190 ALR 468 (Full Court).

<sup>23</sup> M. Handler and D. Rolph, "'A Real Pea Souper': The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27 *Melbourne University Law Review* 381.

help change the doctrine's relevance not just to Canadian users but elsewhere.

### *B The CCH Litigation*

Although the Supreme Court decision in *CCH* was delivered in March 2004, it was almost eleven years earlier, in July 1993, that the plaintiffs – all publishers of legal materials – commenced proceedings against the Law Society of Upper Canada.<sup>24</sup> The publishers' complaints related to copyright infringement said to be occurring at the Great Library at Osgoode Hall (run by the Law Society) through its request-based copying service and its installation of self-serve photocopiers. These types of practices, although longstanding in libraries throughout the world, were still under a legal question mark in Canada. As seen in Chapter 4, some four years were to elapse before the passage of a reform bill that introduced libraries, archives and museums exceptions into the Copyright Act, including provisions relevant to researcher services.<sup>25</sup> There was little Canadian case law interpreting the existing exception most relevant to library photocopying: fair dealing.<sup>26</sup> Blanket photocopying licences from the recently established Canadian Copyright Licensing Agency were being negotiated with libraries,<sup>27</sup> but at that time were of little use to the Great Library as it was not until late 1996 that the major legal publishers became members.<sup>28</sup> The existence of these licences underscored the uncertainty over fair dealing and the possibility of routine infringement by libraries through their own acts of copying, and/or by authorisation.

The patrons of the Great Library were members of the Law Society and judiciary as well as other authorised researchers. From 1996, the request-based service – called the 'custom photocopying service' – was administered under an Access to the Law Policy which explicitly invoked

<sup>24</sup> The three publishers were CCH Canadian Limited, Carswell Thomson Professional Publishing and Canada Law Book Inc.

<sup>25</sup> An Act to amend the Copyright Act (S.C. 1997, c. 24) (assented to 25 April 1997).

<sup>26</sup> As discussed in Chapter 9, Section II.D, to the extent indications could be found, these preferred narrower interpretations. For instance, in the 1992 edition of Tamaro's *Annotated Copyright Act*, the discussion on exceptions commenced with the statement that '[j]urisprudence has established that these exceptions should be interpreted restrictively and the courts will not take the role of legislator in order to create any': N. Tamaro, *The Annotated Copyright Act 1992* (Toronto: Carswell, 1992), p. 271.

<sup>27</sup> See, e.g., K. Adams, 'The Library Exceptions' in H. Knopf (ed), *The New Copyright Act: Managing the Impact* (Toronto: Insight Press, 1997), p. 351.

<sup>28</sup> See, e.g., D. Marshall, 'Access to the Law: Should Copyright Play a Role?' in H. Knopf (ed), *The New Copyright Act: Managing the Impact* (Toronto: Insight Press, 1997), p. 378.

fair dealing as the basis for making and supplying reproductions.<sup>29</sup> The Policy had five limbs: (1) only single copies would be provided; (2) copies would only be supplied where required for the purpose of research, review, private study, criticism or use in court; (3) this purpose, and the identity of the requestor, had to be disclosed on a request form; (4) requests for a copy of one case, article or statutory reference would usually be fulfilled, however larger requests, for instance for greater than 5 per cent of a work, would be reviewed and could be refused; and (5) the fee charged was for cost-recovery only. Copies could either be collected from the Library, mailed to requestors or sent to them by facsimile transmission. The self-serve machines were not monitored closely by the Library but had posted near them a notice which read:

The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by users of these machines.<sup>30</sup>

The publishers alleged that the Library had made and distributed unauthorised copies of legal materials and that this infringed copyright in two ways: first, under section 27(1), by infringing their exclusive rights of reproduction and communication to the public by telecommunication; and second, under section 27(2), by running afoul of the prohibition against sale or distribution of infringing copies. They also claimed the Law Society authorised infringement of copyright through the provision of the self-serve machines. The publishers sought a number of remedies, including declarations and a permanent injunction restraining the library from reproducing works they had published. Three key issues emerged by the time the case reached the Supreme Court: (1) whether the publishers' works were original and hence capable of copyright protection; (2) the meaning of authorisation for the purposes of infringement; and (3) in relation to the custom photocopying service, whether such reproductions – if they were *prima facie* infringing – were fair dealings. This book focuses on the last of these.

The matter was first heard in the Federal Court in late 1998 and a decision handed down on 9 November 1999, just after the libraries,

<sup>29</sup> The Access to the Law Policy is reproduced in full in *CCH*, n. 5 above, para. 61. The preamble stated that the service 'supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian *Copyright Act*'. The Library stated that introduction of the Policy did not change its existing practices in relation to its photocopying service.

<sup>30</sup> *Ibid.*, para. 39.

archives and museums provisions had come into force.<sup>31</sup> Justice Gibson held that copies made by the custom photocopying service infringed copyright in some but not all of the publishers' works, there being some works that were not original and hence outside of copyright protection.<sup>32</sup> Because of this, Gibson J refused to grant the permanent injunction sought by the publishers, instead making some narrowly worded declarations.<sup>33</sup> On the self-serve photocopiers, Gibson J declined to reach a view, in part due to the lack of evidence and in part due to the possible relevance of the new sector-specific provisions.<sup>34</sup>

The Law Society ran a number of defences to the claims regarding its custom photocopying service, including that its activities were fair dealings. However, Gibson J rejected these arguments:

The copying by the defendant in the course of its custom photocopy service was done in response to requests received, directly or indirectly, from members of the defendant; it was not done for the defendant's own use in research, private study, criticism or review.<sup>35</sup> ...

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. The conclusion in *Sillitoe* quoted above has been followed in both Australia and New Zealand. I am satisfied that the fair dealing exception should be strictly construed.<sup>36</sup>

Given that the Law Society had failed to establish that its activities were within the listed purposes, no consideration of the fairness of the photocopying service was necessary. Nor did Gibson J undertake any detailed analysis of the statutory purposes, suffice to say that fair dealing 'should be strictly construed'.<sup>37</sup> The introduction of the libraries, archives and museums provisions bolstered this conclusion, as it demonstrated that library photocopying was 'a matter of public policy concern that

<sup>31</sup> *CCH Canadian Ltd v. Law Society of Upper Canada* [2000] 2 FC 451 (Federal Court of Canada) ('*CCH Federal Court*'). The libraries, archives and museums provisions came into force on 1 September 1999.

<sup>32</sup> *Ibid.*, 466–477, citing cases including *Tele-Direct (Publications) Inc v. American Business Information, Inc* [1998] 2 FC 22 and *Edutile Inc v. Automobile Protection Assn* (1997) 81 CPR (3d) 338. The items held *not* to be original were reported judicial decisions, headnotes, a case summary and a topical case index. The protected works were an annotated statutory instrument, a textbook and a monograph.

<sup>33</sup> *Ibid.*, 496. Justice Gibson made two declarations, one recognising that copyright subsists in the annotated statutory instrument, textbook and monograph, and another stating that copyright had been infringed in the textbook and monograph.

<sup>34</sup> *Ibid.*, 494–496. <sup>35</sup> *Ibid.*, 488.

<sup>36</sup> *Ibid.*, 489, citing *Sillitoe*, n. 21 above, *De Garis*, n. 19 above and *Longman Group Ltd v. Carrington Technical Institute Board of Governors* [1991] 2 NZLR 574, 584.

<sup>37</sup> *Ibid.*



warranted special attention by Parliament' and that any exception-based defence should be argued within the parameters of those provisions.<sup>38</sup> Justice Gibson was therefore unsympathetic to the view that passage of the sector-specific exceptions left fair dealing arguments intact – even though one of those provisions expressly permitted libraries to do on behalf of a patron any act they themselves could do as a fair dealing.<sup>39</sup>

The case was appealed by both the publishers and the Law Society to the Federal Court of Appeal.<sup>40</sup> The Court of Appeal concluded that certain works that had been held to be unprotected by Gibson J were in fact original,<sup>41</sup> a matter affirmed by the Supreme Court. On the alleged authorisation of infringement, the Court of Appeal found in favour of the publishers but the Supreme Court held no such authorisation was made out. Finally, the Court of Appeal and the Supreme Court took a very different approach to fair dealing than that of Gibson J at first instance. The majority in the Court of Appeal stated that Gibson J had been in error in construing fair dealing so narrowly, but ultimately declined to make broad declarations in relation to the Library's Access to the Law Policy, concluding that determinations of fairness are 'enormously complex' and 'uniquely fact-specific', and must be undertaken 'each time an infringement is alleged'.<sup>42</sup> In contrast, the Supreme Court was prepared to reach such a blanket conclusion, holding that as the Law Society could establish that its Access to the Law Policy was research-based and fair, it could take the benefit of the fair dealing exception in section 29.

The first step towards understanding the reason for these different perspectives is to compare the justifications for copyright protection advanced in each judgment. Whilst Gibson J saw copyright as existing primarily for the benefit of authors, with a possible flow-on benefit to the public,<sup>43</sup> Linden JA in the Court of Appeal construed copyright as having dual purposes: it both rewarded the author with exclusive rights *and* encouraged the dissemination of works 'for the benefit of society at large'.<sup>44</sup> His Honour observed that 'the person who sows must be

<sup>38</sup> Ibid., 490. <sup>39</sup> Canadian Copyright Act s. 30.2(1).

<sup>40</sup> *CCH Canadian Ltd v. Law Society of Upper Canada* (2002) 212 DLR (4th) 385 ('*CCH Court of Appeal*'). The majority decision was written by Linden JA with whom Sharlow JA concurred. A separate opinion was delivered by Rothstein JA.

<sup>41</sup> These being reported judicial decisions, headnotes, a case summary and a topical case index.

<sup>42</sup> *CCH Court of Appeal*, n. 40 above, 452.

<sup>43</sup> *CCH Federal Court*, n. 31 above, 464 ('[t]he object and purpose of the *Copyright Act* ... is 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').

<sup>44</sup> *CCH Court of Appeal*, n. 40 above, 407

allowed to reap what is sown, but the harvest must ensure that society is not denied some benefit from the crops'.<sup>45</sup> In Linden JA's view, the 'challenge facing this Court, and copyright law generally, is to find a fair and appropriate equilibrium that achieves both goals'.<sup>46</sup> Similar views were presented by McLachlin CJC writing the opinion of the Supreme Court. She referred with approval to the statement of Binnie J in *Théberge v. Galerie d'Art du Petit Champlain* that:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator ...

The proper balance among these and other public policy objectives lies not only in recognising the creator's rights but in giving due weight to their limited nature.<sup>47</sup>

These understandings of copyright seem to have influenced the approach to fair dealing taken by both appellate courts. For instance, Linden JA commented that fair dealing 'is one of the provisions that grants users' rights',<sup>48</sup> and took the view that there was 'no basis in law or in policy' for the trial judge's narrow reading.<sup>49</sup> In the Supreme Court, McLachlin CJC 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. As Professor Vaver ... has explained ...: 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.'<sup>50</sup>

Against this backdrop, the Supreme Court's first important doctrinal conclusion was that fair dealing 'is always available': that a library could argue fair dealing and, if these arguments failed, then invoke a sector-specific exception.<sup>51</sup> This was in contrast to the approach of Gibson J at

<sup>45</sup> Ibid. The words used by Linden JA might be said to invoke concepts typically associated with Lockean justifications for property protection. The statement that society must 'not [be] denied some benefit from the crops' may align with the enough and as good proviso. For discussion of these concepts, see, e.g., W. Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 *Yale Law Journal* 1533; H. Breakey, 'Natural Intellectual Property Rights and the Public Domain' (2010) 73 *Modern Law Review* 208.

<sup>46</sup> Ibid.

<sup>47</sup> *CCH*, n. 5 above, para. 10, quoting *Théberge v. Galerie d'Art du Petit Champlain* [2002] 2 SCR 336, paras. 30–31.

<sup>48</sup> *CCH Court of Appeal*, n. 40 above, 440. <sup>49</sup> Ibid., 441.

<sup>50</sup> *CCH*, n. 5 above, para. 48 citing D. Vaver, *Copyright Law* (Toronto: Irwin Law, 2000), p. 171.

<sup>51</sup> Ibid., para. 49.

first instance, who used the introduction of such provisions as a reason for reading down the ambit of fair dealing.

Second, the Supreme Court held that research should be defined expansively: that the term 'must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained', and that research could include activity in commercial contexts such as lawyers 'carrying on the business of law for profit'.<sup>52</sup> A similar conclusion was reached in the Court of Appeal, albeit with somewhat different reasoning. There, Linden JA noted that Parliament had elected to qualify the exemption for study (i.e., it must be 'private' study) but not research. This was said to evidence an intention that *all* research – including commercial research – could fall within fair dealing, with the commerciality of research possibly relevant to the question of whether such activity was fair.<sup>53</sup>

Third, the Law Society was able to take the protection of fair dealing even though its activities were not undertaken in pursuit of its own research but that of its patrons. Chief Justice McLachlan wrote:

Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process.<sup>54</sup>

It was also relevant to the Supreme Court's conclusions that the Library had no other purpose in providing the custom photocopying service. For instance, the fees charged to patrons were calculated on a cost-recovery basis, meaning that the service was not being provided to generate a profit.

Although the Supreme Court did not use the language of agency, its findings clearly accepted that the research endeavours of one person could be relied upon by those who assist in the research process. In coming to this view, the Court did not refer to overseas case law cited by the trial judge, such as *Sillitoe* and *De Garis*.<sup>55</sup> These cases were dealt with by Linden JA in the Court of Appeal, who reached a similar conclusion to the Supreme Court: that the Library had no purpose other than assisting the research needs of its patrons, and could 'be said to have adopted that purpose as its own'.<sup>56</sup> Justice Linden held that the overseas decisions could be distinguished from the facts before the court, first, because the defendants in those cases 'had ulterior motives and simply

<sup>52</sup> *Ibid.*, para. 51. <sup>53</sup> *CCH Court of Appeal*, n. 40 above, 442.

<sup>54</sup> *CCH*, n. 5 above, para. 64. <sup>55</sup> *Sillitoe*, n. 21 above and *De Garis*, n. 19 above.

<sup>56</sup> *CCH Court of Appeal*, n. 40 above, 443.

tried to adopt customers' or students' purposes as their own in order to escape liability', and second (and less convincingly), because 'the otherwise infringing activity was initiated by the alleged infringer, rather than the end user'.<sup>57</sup>

Fourth, the Supreme Court approved the non-exhaustive list of factors identified by Linden JA as relevant to the inquiry of whether a particular dealing was fair.<sup>58</sup>

- (1) *The purpose of the dealing.* The Supreme Court acknowledged that whilst only dealings within the closed-ended list of purposes would be fair, 'these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights'.<sup>59</sup> This was not a binary test; some allowable purposes might be more fair than others (e.g., research done for charitable purposes compared with research undertaken for commercial use).
- (2) *The character of the dealing ('how the works were dealt with')*<sup>60</sup>. The Supreme Court gave the example of the quantity and availability of copies made, noting that '[i]f multiple copies of works are being widely distributed, this will tend to be unfair', but that a 'single copy of a work ... used for a specific legitimate purpose' will be 'easier' to characterise as a fair dealing.<sup>61</sup> Industry practices may be relevant in assessing the character of the dealing.
- (3) *The amount of the dealing.* The Supreme Court held that this factor should be judged by reference to the quantity taken and its importance. Taking an entire work was not fatal to a fair dealing defence if this was necessary having regard to the work and the purpose of use.
- (4) *Alternatives to the dealing (including 'whether the dealing was reasonably necessary to achieve the ultimate purpose')*<sup>62</sup>. It was observed that analysis of fairness should consider whether a non-infringing work could have been substituted and whether it was necessary to copy the underlying work at all.
- (5) *The nature of the work.* Although not determinative, the Supreme Court accepted that dealing with published works might be fairer,

<sup>57</sup> Ibid. This argument is less persuasive as the activities challenged by the copyright owners in *De Garis* and *CCH* were broadly similar: the reproduction of materials in response to a client request. Although the service in *De Garis* was broader (as it also included identification of relevant material using criteria set by the client), it is difficult to see how the *CCH* activities could be construed as initiated by the end user but not those in *De Garis*. The services in *CCH* and *De Garis* did, however, differ in other crucial respects, e.g., the fee structure and ongoing supply of materials.

<sup>58</sup> See *CCH* (Court of Appeal), n. 40 above, 446–451; *CCH*, n. 5 above, paras. 53–60.

<sup>59</sup> *CCH*, n. 5 above, para. 54. <sup>60</sup> Ibid., para. 55. <sup>61</sup> Ibid. <sup>62</sup> Ibid., para. 57.

in particular when compared with use of a work that was confidential.

- (6) *The effect of the dealing on the work.* The Supreme Court did not attempt a detailed analysis of this factor, noting only that it included consideration of any competition with the market for the original work and that although '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'.<sup>63</sup> As noted in Chapter 5, there are challenges in determining what considerations should be relevant to any market-focused factor, including the operation of normative and empirical considerations.

Applying these factors, the Supreme Court held that the Law Society's activities were fair, as assessed by the Access to the Law Policy. For instance, the Policy placed limits on when requests would be filled, based on the user's purpose and the amount of material requested. It stated that only single copies would be provided. The nature of the copied items – legal materials – also supported fair dealing. Further, the Supreme Court concluded that there were not any *reasonable* alternatives to the dealing, noting that it would not be realistic to expect researchers to perform all their research onsite. Nor was it relevant to this factor that a licence could be obtained from the copyright owners: '[i]f a copyright owner were allowed to licence 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.'<sup>64</sup> Finally, the publishers did not introduce any evidence that the market for their works was impacted by the Great Library's photocopying service.

### III The Response from Lawyers

#### A Later Cases

By the time of the Canadian fieldwork, a number of cases had cited or applied *CCH*, in particular its dicta on originality and infringement by authorisation.<sup>65</sup> However, two cases stood out as being of particular

<sup>63</sup> Ibid., para. 59, citing *Pro Sieben Media AG v. Carlton UK Television Ltd* [1999] FSR 610.

<sup>64</sup> Ibid., para. 70.

<sup>65</sup> See, e.g., *BMG Canada Inc v. John Doe* [2004] 3 FCR 241; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* [2004] 2 SCR 427; *Robertson v. Thomson Corporation* [2006] 2 SCR 363; *Canadian*

relevance to the empirical work as they analysed elements of the Supreme Court's decision that are relevant to exceptions. The first was the decision of Bastarache J in *Euro-Excellence Inc v. Kraft Canada Inc*, in relation to the philosophy of copyright.<sup>66</sup> The second was the Copyright Board's *Tariff No. 22A* decision in relation to fair dealing.<sup>67</sup> The facts of *Euro-Excellence* and *Tariff No. 22A* were both removed from *CCH*, demonstrating the decision's potential to influence outcomes in a variety of cases. Furthermore, the reasons delivered by Bastarache J in *Euro-Excellence* evidenced a clear intention to adopt a robust if not extended approach to the reasoning in *CCH*.<sup>68</sup> These cases, in the way they treated *CCH*, seemed to confirm its status as the most important fair dealing decision to have been handed down by a Canadian court.

1 *Euro-Excellence* After *CCH* it was common for courts to refer to the 'dual purposes' of and 'balance' in copyright law.<sup>69</sup> However, one judgment was particularly significant because of its depth of analysis regarding the philosophy of copyright: the decision of Bastarache J in *Euro-Excellence*. This case related to the parallel importation into Canada, by Euro, of Côte d'Or and Toblerone chocolate bars. Kraft had contractual arrangements with the European makers, under which it was the exclusive distributor of each product. In an attempt to stop Euro's activity, the European makers registered as artistic works various logos associated with the chocolate bars, and then executed an exclusive licence in favour of Kraft in relation to use of those works in Canada. Kraft sought to use its rights under this licence to bring proceedings for secondary infringement against Euro,<sup>70</sup> on the basis that Euro had contravened section 27(2)(e) of the Copyright Act:

It is an infringement of copyright for any person to ... import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c) [namely, sale and other commercial dealings] ... a copy of a work ... that the

*Wireless Telecommunications Association v. Society of Composers, Authors and Music Publishers of Canada* [2008] 3 FCR 539.

<sup>66</sup> [2007] 3 SCR 20.

<sup>67</sup> *Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works*, *Tariff No 22A* (Internet – Online Music Services) 1996–2006, Copyright Board of Canada, 18 October 2007.

<sup>68</sup> See, e.g., Hughes, n. 11 above, 58–60.

<sup>69</sup> See, e.g., *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, n. 65 above, 448–449; *Robertson v. Thomson Corporation*, n. 65 above, para. 69 (Abella J).

<sup>70</sup> Kraft was the Canadian owner of 'Côte d'Or' and 'Toblerone' trade marks but it did not rely on those rights in the proceedings.

person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

Kraft were successful at first instance and in the Court of Appeal,<sup>71</sup> but in the Supreme Court a split bench held in favour of Euro.<sup>72</sup> Of the judges in the majority, four decided the case by reference to the words of section 27,<sup>73</sup> whilst three others, in reasons delivered by Bastarache J, grounded their decision in a purposive understanding of copyright law informed by *CCH* and *Théberge*.<sup>74</sup> Justice Bastarache referred to statements in both cases regarding the dual purposes of copyright law,<sup>75</sup> and observed that fair dealing was an 'essential part of copyright protection' because it recognises 'the limited nature of the rights of a copyright holder' and that '[n]ot every substantial reproduction of a copyrighted work counts as an infringement of copyright'.<sup>76</sup>

Justice Bastarache went further, however, by drawing from *Théberge* the proposition that to achieve balance, copyright protection should be limited to the 'legitimate economic interests' of rightsholders.<sup>77</sup> In his opinion, given copyright exists to protect 'the economic gains resulting from an exercise of skill and judgment', such protection 'cannot be leveraged to include protection of economic interests that are only tangentially related to the copyrighted work'.<sup>78</sup> In this case, the relevant copyright work was incidental to the consumer good being sold – it was a logo on the packaging of a chocolate bar. Justice Bastarache stated that paragraph (e) dealt with importation of infringing copies of 'works which are the result of skill and judgment' and not merely consumer goods that have a 'copyrighted work affixed to their wrapper'.<sup>79</sup>

<sup>71</sup> *Kraft Canada Inc v. Euro Excellence Inc* [2004] 4 FCR 410 (Federal Court per Harrington J); *Euro Excellence Inc v. Kraft Canada Inc et al* [2006] 3 FCR 91 (Federal Court of Appeal).

<sup>72</sup> Although seven judges held for Euro and two dissented (McLachlan CJ and Abella J), three of the majority judges noted that if, contrary to their opinion, section 27 was applicable, they would have agreed with the dissenting judges that its infringement had been established by Kraft (which would have generated a 5–4 decision in favour of Kraft).

<sup>73</sup> Binnie, Deschamps and Rothstein JJ, with whom Fish J agreed. They held that Euro's conduct did not contravene s. 27(2)(e) because Kraft could not establish that Euro had imported a copy of a work that 'would infringe copyright if it had been made in Canada by the person who made it'. The 'person who made it' was the European makers, and Kraft, as exclusive licensee, could not maintain an action against them.

<sup>74</sup> *Théberge*, n. 47 above. <sup>75</sup> *Euro-Excellence*, n. 66 above, 60.

<sup>76</sup> *Ibid.*, 59, referring to A. Drassinower, 'Taking User Rights Seriously' in M. Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005).

<sup>77</sup> *Ibid.*, 58. <sup>78</sup> *Ibid.*, 62.

<sup>79</sup> *Ibid.*, 63. Similar statements were made in relation to infringement by sale in paragraph (a).

Justice Bastarache's use of the language of 'legitimate economic interests' was a (controversial<sup>80</sup>) extension of the *Théberge* reasoning. In that case a number of commercial galleries created canvass posters of works by artist Claude Théberge via an ink-transfer process that lifted the image from authorised paper products. This resulted in a different type of product but did not change the number of products. Mr Théberge obtained pre-judgment seizure of canvasses, but the legality of that act depended on whether the items were infringing copies under the Copyright Act. Writing for the majority in a 4–3 decision in favour of the galleries, Binnie J held that the ink-transfer process did not infringe any 'legitimate economic interest'<sup>81</sup> as the substrate in which the intellectual property manifested (i.e., the ink) remained unaltered – it was only the backing that had changed. To hold differently would be to insert a new meaning for reproduction, because no new works (whether directly copied or otherwise) had been created.<sup>82</sup> The phrase 'legitimate economic interest' was therefore used to highlight that the applicable cause of action for modification without reproduction was under moral rights,<sup>83</sup> and to argue that extension of copyright to facts such as those in *Théberge* would create uncertainty regarding the permissible exploitation of tangible property rights in copies of artistic works.<sup>84</sup>

Justice Bastarache's decision in *Euro-Excellence* can thus be seen as an amalgam of the reasoning in *Théberge* and *CCH*. Justice Bastarache took seriously the idea of balance, using the language of 'legitimate economic interest' to act as a limit on copyright owner rights, in this case in relation to the interpretation of the secondary infringement provisions. The approach of Justice Bastarache could therefore be seen as invoking balance as an explicit 'meta-standard' by which to judge the content of copyright. Although the facts of *Euro-Excellence* were not directly relevant to cultural institutions, the case illustrated how the reasoning of *CCH* had the potential to influence judges in other cases – even those not involving exceptions or fair dealing. It therefore helped affirm the status

<sup>80</sup> For instance, Rothstein J stated that a purposive approach to statutory interpretation did not 'give judges licence to substitute their policy preferences for those of Parliament' (ibid. at 28), and considered that Bastarache J's interpretation went well beyond a permissible reading of the Copyright Act. Similarly, Abella J was critical of an approach to section 27 that, in her opinion, would be intolerably uncertain, 'inviting case-by-case judicial explorations into the uncharted area of what is "merely" incidental, "somewhat" incidental, or not incidental at all': at 73.

<sup>81</sup> *Théberge*, n. 47 above, para. 38. <sup>82</sup> Ibid., paras. 42–50.

<sup>83</sup> Ibid., paras. 59–61. Because seizure was not possible where the complaint related to moral rights, it was necessary to show infringement of the reproduction right.

<sup>84</sup> Ibid., para. 40.



of *CCH* as an extremely important case in Canadian copyright jurisprudence.

2 *Tariff No. 22A* More relevant to cultural institutions was the reasoning of the Copyright Board of Canada in its *Tariff No. 22A* decision, handed down in October 2007. The Society of Authors, Composers and Music Publishers of Canada (SOCAN) had been involved in longstanding litigation to set tariffs for the online communication of music for the period 1996 to 2006. There had already been a series of proceedings in relation to the tariff, including appeals to the Federal Court of Appeal and Supreme Court.<sup>85</sup> The matter was then returned to the Board so it could deal with some discrete questions and determine whether SOCAN's tariff should be certified. At this point, fair dealing was not amongst the issues being presented to the Board. Instead, the question of whether it was a fair dealing for the purpose of research for online music sellers to offer previews of works – i.e., short excerpts to help consumers identify and select music they wished to purchase – was undertaken on the initiative of the Board and without submissions from the parties. To the extent that fair dealing was applicable, it would bring those excerpts outside the parameters of the tariff.

The Board concluded that fair dealing applied to previews. In a decision that quoted extensively from *CCH*, it noted that 'research' is not limited to non-commercial and private activities, and that if copying legal materials for the purpose of giving legal advice is 'research', 'so is streaming a preview with a view to deciding whether or not to purchase a download or CD'.<sup>86</sup> As in *CCH*, it was not fatal that music sites were not themselves conducting research, so long as they were facilitating the research of others.<sup>87</sup> The Board then turned to the question of fairness and, applying all six fairness factors recognised in *CCH*, held that each one supported the application of fair dealing to the practices before it.<sup>88</sup> For instance, the length of extracts and their availability through streaming but not download helped ensure that an excerpt only satisfied research purposes rather than substituting for the original work. The amount of the dealing was also modest when compared with ordinary consumption of musical works (which are listened to repeatedly and *in toto*). The Board could not think of a better or even viable alternative to ensure consumers selected the correct work, the availability of a licence

<sup>85</sup> See *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* [2002] FCA 166; [2004] SCC 45.

<sup>86</sup> *Tariff No. 22A*, n. 67 above, para. 109. <sup>87</sup> *Ibid.*, para. 108.

<sup>88</sup> *Ibid.*, paras. 111–115.

being irrelevant to determinations of fairness. Finally, the Board considered that any market impact would be positive, as facilitating consumer search activity for what it characterised as ‘objects of commerce’ would support sales, to the benefit of copyright owners.

A number of observations can be made about the *Tariff No. 22A* decision. First, it detached ‘research’ from the concept of ‘private study’, at least in so far as it accepted a definition of research that included investigation that would not fall within ordinary understandings of study. As noted by the Board in its comparison between the facts before it and those in *CCH*, ‘[t]he object of the investigation [here] is different, as are the level of expertise required and the consequences of performing an inadequate search. Those are differences in degree, not differences in nature’.<sup>89</sup> Thus the Board emphasised a process of research that consumers were required to undertake to identify music they wished to purchase and held that auditioning previews was part of that investigation.

Second, by adopting this reasoning, the Board gave effect to the *CCH* directive that research be given a liberal interpretation. Not only was it accepted that ‘research’ could be connected with ordinary consumer transactions (and not just high-brow activities involving thick books with big words), but the Board’s fair dealing assessment was done by reference to the fairness and research orientation of the policies and practices of the music providers.<sup>90</sup>

Third, the *Tariff No. 22A* decision applied to audio works rather than textual materials. This was significant because much existing case law on the research limb has considered uses of literary works – examination papers, study guides, newspaper articles and the like<sup>91</sup> – leading to possible difficulties in applying dicta to other copyright works, or even to a perception that fair dealing does not apply to non-print items.

Finally, the Board held that fair dealing was applicable, even though the relevant works were being transmitted to an effectively unlimited audience of internet users, as other factors – such as the amount extracted and its lack of competition with full copies purchased for repeat listening – favoured fair dealing. Thus, even though *CCH* applied to the analogue world of library photocopying and dealt with a service dispatching point-to-point single copies, the Copyright Board did not consider fair dealing as inapplicable where copies were more broadly available. The *Tariff No. 22A* decision therefore confirmed and built on the

<sup>89</sup> *Ibid.*, para. 109.      <sup>90</sup> *Ibid.*, para. 116.

<sup>91</sup> See *University of London Press v. University Tutorial Press* [1916] 2 Ch 601, *Sillitoe*, n. 21 above and *De Garis*, n. 19 above.

precedent of *CCH*, sending a clear message that fair dealing can play a role in the online environment.

## B Academic Commentary

As noted at the outset of this chapter, the decision in *CCH* elicited a great deal of commentary: much laudatory, some equivocal, but all acknowledging its significance for understandings of copyright and the role of exceptions. Particularly for those who supported the decision's explicit users' rights language, *CCH* represented a welcome shift away from narrow, pro-owner interpretations of fair dealing. For instance, Abraham Drassinower encapsulated the views of many academics when he wrote that *CCH* 'is rightly and widely regarded as bringing forth a truly fundamental shift in the way Canadian copyright law is to be understood and practiced'.<sup>92</sup> Commentary that was openly hostile to *CCH* is more difficult to come by, although some writing hinted that the Supreme Court's rejection of fair dealing orthodoxy was unprincipled and unlikely to persevere.<sup>93</sup>

This section explores four propositions that recurred in the academic response to *CCH*. There were that: (1) the case 'changed the copyright landscape' through its users' rights language;<sup>94</sup> (2) the elucidation of the six fairness factors, and the liberal interpretation of 'research', injected much-needed flexibility and responsiveness into fair dealing; (3) *CCH* could have a significant influence on user practices, including in the cultural institution sector; and (4) Canadian fair dealing now shared much common ground with fair use from US law. Each of these is discussed in turn.

Starting with the users' rights language, a number of different terms have been used to describe statutory provisions that permit activity that would otherwise infringe copyright,<sup>95</sup> such as exceptions (the language

<sup>92</sup> Drassinower, n. 76 above, p. 462.

<sup>93</sup> For example, Justice Hughes, writing extra-judicially, described the degree to which *CCH* departed from the restrictive interpretations of fair dealing in the prevailing case law. He attributed this shift to the lack of legislative appetite to undertake a wholesale review of Canadian copyright law: Hughes, n. 11 above, 60. Although not commenting on the merits of the *CCH* approach, his analysis might cause the reader to doubt the longevity of the decision.

<sup>94</sup> L. Murray and S. Trosow, *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007), p. 74.

<sup>95</sup> See, e.g., D. Vaver, 'Canada's Intellectual Property Framework: A Comparative Overview' (2004) 17 *Intellectual Property Journal* 125, 148–149; A. Sims, 'Abundant Pest or Endangered Species? The Future of Fair Dealing in Copyright Law' (2008) 14 *New Zealand Business Law Quarterly* 231, 239–240.

used in the Canadian statute),<sup>96</sup> limitations and defences.<sup>97</sup> However, in David Vaver's book on copyright law published in 2000, these provisions were addressed under the heading 'Users' Rights'.<sup>98</sup> This text was highly influential on the decisions handed down by the Federal Court of Appeal and Supreme Court in *CCH*, both of which quoted with approval from Vaver's work.<sup>99</sup> In their guide to copyright published in 2007, Laura Murray and Samuel Trosow also used the terminology of users' rights, noting that had their book 'been written even just a few years earlier', they would have referred to 'exceptions to infringement'.<sup>100</sup>

This raises the question of the analytical significance of the phrase 'users' rights'. For instance, it might be argued that in the absence of some Hohfeldian-style significance to the term 'rights', in which copyright owners have corresponding duties,<sup>101</sup> there is no meaningful difference in styling fair dealing as a users' right as opposed to a defence, exception, limitation and so forth.<sup>102</sup> Similarly, one might speculate whether the Supreme Court's reference to users' rights was nothing more than a judicial shorthand to reiterate existing mantras on balance in copyright law.<sup>103</sup> For many commentators, however, the users' rights terminology of *CCH* was highly significant as it explained or even reconceptualised the role of exceptions in copyright law. For instance, Matthew Rimmer argued that the Supreme Court decision affirmed the

<sup>96</sup> Canadian Copyright Act ss. 29–32.2 (headed 'Exceptions').

<sup>97</sup> See, e.g., L. Harris, *Canadian Copyright Law*, 3rd edition (Toronto: McGraw Hill, 2001), pp. 126–150 (discussing 'limitations on, or exceptions from' rights of authors and copyright holders in a chapter titled 'limitations on rights'); E. Judge and D. Gervais, *Intellectual Property: The Law in Canada* (Toronto: Thomson Carswell, 2005), pp. 80–98 (using the terminology of 'exceptions' in their analysis of 'Statutory Defences').

<sup>98</sup> Vaver, n. 50. above, pp. 169–227. Vaver was not the first scholar to use the language of users' rights in relation to copyright: see, e.g., L. Patterson and S. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens: University of Georgia Press, 1991). For a recent contribution that presents a broader picture of users' rights by bringing together analysis of copyright, tangible property and contract, see P. Chapdelaine, *Copyright User Rights: Contracts and the Erosion of Property* (Oxford: Oxford University Press, 2017).

<sup>99</sup> *CCH Court of Appeal*, n. 40 above 441; *CCH*, n. 5 above, para. 48.

<sup>100</sup> Murray and Trosow, n. 94 above, p. 74.

<sup>101</sup> W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) 23 *Yale Law Journal* 16. For discussion, see, e.g., H. Breakey, 'User's Rights and the Public Domain' [2010] *Intellectual Property Quarterly* 312; Chapdelaine, n. 98 above, pp. 45–54.

<sup>102</sup> Others have argued that there is or should be a qualitative difference between, for instance, what we label as 'exceptions' and 'limitations': e.g., A. Drassinower, 'Exceptions Properly So-Called' in A. Drassinower and Y. Gendreau (eds), *Language and Copyright* (Montréal: Carswell, 2010); A. Christie, 'Maximising Permissible Exceptions to Intellectual Property Rights' in A. Kur and V. Mizaras (eds), *The Structure of Intellectual Property Law: Can One Size Fit All?* (Cheltenham: Edward Elgar, 2011).

<sup>103</sup> For a consideration (and rejection) of this view, see Gervais, n. 12 above, 155–156.

importance of exceptions for cultural institutions: that they are not 'historical accidents and contingencies' but are 'essential and necessary to promote ... education, learning and research'.<sup>104</sup> Carys Craig noted the potential for 'conflicts between owners and users to be fought on equal footing' because rights-based language legitimises and elevates the user interest.<sup>105</sup> Similarly, Daniel Gervais noted that '[w]hen reading *CCH*, one is drawn to the conclusion that the court weighted the authors' exclusive rights and the users' "right" to use the work on level plates of the proverbial scale'.<sup>106</sup> He suggested that the Supreme Court was saying that '[u]sers have a "right" to deal fairly with a protected work' in furtherance of the broader 'equilibrium' the Act is trying to achieve.<sup>107</sup> Even Normand Tamaro, who was sceptical of *CCH* if his *Annotated Copyright Act* is anything to go by,<sup>108</sup> amended the introductory remarks from previous editions to add that the 'modern' rule is that exceptions must be 'construed to their fullest extent'.<sup>109</sup>

Second, one of the recurring themes in the commentary was that *CCH* created, for the first time in Canada, an explicit but flexible framework for fair dealing analysis.<sup>110</sup> Gervais saw this as 'perhaps the area where the Court's decision, in confirming with some clarifications the Court of Appeal's approach, may have a significant impact'.<sup>111</sup> Murray and Trosow noted that in the absence of legislative reform, 'the test in *CCH* constitutes the most authoritative guide to the question of fair dealing'.<sup>112</sup> It therefore became standard for copyright treatises to include extensive discussion on the meaning of fairness following the six-factor analysis in *CCH*.<sup>113</sup>

A third theme in the academic commentary was that *CCH* may have a significant influence on the development of fair dealing practices and industry norms. Precisely how this impact would manifest was not

<sup>104</sup> M. Rimmer, 'Canadian Rhapsody: Copyright Law and Research Libraries' (2004) 35 *Australian Academic & Research Libraries* 193.

<sup>105</sup> Craig, n. 13 above, p. 454. Craig has also argued that there are risks associated with users' rights language, notably that it may be to accept that authors are granted strong, individual rights: C. Craig, 'Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks' (2017) 33 *American University International Law Review* 1.

<sup>106</sup> Gervais, n. 12 above, 156. <sup>107</sup> *Ibid.*, 157.

<sup>108</sup> The analysis of *CCH* being, in comparison with other topics, particularly heavy on editorialising.

<sup>109</sup> E.g., Normand Tamaro, 2009 *Annotated Copyright Act* (Toronto: Carswell, 2008), p. 525.

<sup>110</sup> See, e.g., Scassa, n. 8 above, 96. <sup>111</sup> Gervais, n. 12 above, 157.

<sup>112</sup> Murray and Trosow, n. 94 above, p. 81.

<sup>113</sup> See, e.g., Judge and Gervais, n. 97 above, pp. 84–85; Murray and Trosow, n. 94 above, pp. 81–85; see also *The Canadian Encyclopedic Digest (Western)*, Fourth Edition, Volume 8, Title 35, 'Copyright' (title current to November 2008), para. 279.

necessarily explored in detail, but scholars saw much promise for the decision. For instance, Drassinower's words were ripe with *CCH*'s potential: the case 'is rightly and widely regarded as bringing forth a truly fundamental shift in the way Canadian copyright law is to be understood and practiced'.<sup>114</sup> There was also the suggestion from Scassa that cultural institutions may benefit from a liberalised fair dealing provision:

The impact of *CCH Canadian* is likely to be far-ranging. ... Individual and institutional users of works are given broader latitude to make use of the works without payment to the creators. The implications of the decision may be particularly important for those who assist users in accessing works; such as libraries, schools and other public institutions.<sup>115</sup>

In Scassa's view, acceptance that fair dealing could apply to a fair and research-based copying policy was particularly significant for institutional users with document delivery services, as it alleviated the need for each individual request to be monitored closely.<sup>116</sup> Pina D'Agostino made a similar point, noting that *CCH* might open the way to other industry- or sector-specific guidelines being given judicial approval, with attendant benefits in discouraging litigation and encouraging permissible re-use of protected material.<sup>117</sup>

Finally, the perceived liberalisation of fair dealing by *CCH* led to comparative analysis,<sup>118</sup> in particular with the position in the United States. Pre-*CCH* analysis observed what Vaver termed a 'striking' contrast between US and Canadian law,<sup>119</sup> particularly by virtue of the open-ended fair use exception in the former. Following 2004, there was said to be a greater synergy between the two systems, not only in the relevant fairness factors, but the types of activities to which fair dealing and fair use might apply. This is encapsulated in the following statement of Gervais, who wrote in 2004 that there is

little doubt that with respect to fair dealing Canada's copyright legislation is now closely aligned with the United States' fair use doctrine. Canadian courts do, however, have significantly more flexibility in that, first, they do not have to apply all criteria in each case; and, second, criteria (1) and (6) are defined in a more open fashion than the corresponding US criteria. An important distinction between the two systems is that for the dealing to be fair in Canada, it must be

<sup>114</sup> Drassinower, n. 76 above, 462. <sup>115</sup> Scassa, n. 8 above, 89. <sup>116</sup> Ibid., 94.

<sup>117</sup> G. D'Agostino, 'Healing Fair Dealing? A Comparative Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use' (2008) 53 *McGill Law Journal* 309, 357.

<sup>118</sup> See, e.g., D'Agostino, *ibid.*; B. Ong, 'Fissures in the Façade of Fair Dealing: Users' Rights in Works Protected by Copyright' [2004] *Singapore Journal of Legal Studies* 150 (drawing some comparisons with fair dealing law in Singapore).

<sup>119</sup> Vaver, n. 95 above, 149.

for a designated purpose. Yet, even on this point the two systems are fairly close.<sup>120</sup>

D'Agostino's work echoed these sentiments. In her comparison of Canadian and UK fair dealing and US fair use, she concluded that in contrast with the United Kingdom, the enumerated purposes in Canadian law 'are no longer rigid', and when compared with the United States, the fairness factors were more flexible, as they provide a 'future guiding framework' for analysis and may be supplemented by other considerations.<sup>121</sup> Overall, D'Agostino considered Canada's regime 'the most user-centred'.<sup>122</sup>

#### IV The Response from Cultural Institutions

##### A Introduction

The analysis in Section III suggested that far-ranging effects might arise from the *CCH* decision. The Supreme Court's acceptance that copyright furthers dual purposes was repeated in subsequent case law, and in Bastarache J's judgment in *Euro-Excellence*, there was a particularly strong post-*CCH* statement of the policy considerations said to drive interpretation of the Canadian Copyright Act. The Supreme Court's decision was also viewed as significant because of its insistence that terms such as 'research' be read broadly, raising the possibility that fair dealing could arise in circumstances beyond those seen traditionally in the case law. An example of this occurred with the Copyright Board's *Tariff No. 22A* decision of October 2007, which applied fair dealing to consumer search activity in an online environment – circumstances very different from the world of library photocopying in *CCH*. Finally, the academic reception given to *CCH* was overwhelmingly positive, emphasising the desirability of the Supreme Court's articulation of the philosophical framework underpinning copyright, and foreseeing shifts in the way exceptions were utilised by Canadian users.

However, the institutional responses to *CCH* as described by participants in fieldwork conducted in 2008 and 2009 made it clear that the decision's reception had been extremely muted. As discussed in Section IV.B, the main reported shift in practice related to user request services at academic libraries, where fair dealing arguments were used to justify new digital delivery platforms. In public libraries already relying on fair dealing, there was additional comfort that this analysis was correct. The

<sup>120</sup> Gervais, n. 12 above, 159.

<sup>121</sup> D'Agostino, n. 117 above, 356.

<sup>122</sup> *Ibid.*, 358.

*CCH* decision also appeared to influence some universities to incorporate fair dealing into policies on electronic reserves, although at the time of the fieldwork this was only the case for a handful of institutions and was said to be highly controversial. For other public activities, including mass digitisation and online publication, reported practices were relatively consistent: fair dealing arguments were not being considered; public-domain works were preferred; and when third-party copyright works were used, this was with the permission of the copyright owner.

Section IV.B describes the reported responses to *CCH*. Its analysis is grouped around three categories of practice: (1) user request services; (2) electronic reserves; and (3) online activities.

## *B Reported Impact*

*1 User Request Services* In terms of numbers, the largest reported shift in practice following *CCH* occurred in academic libraries, where a significant number of institutions rolled out desktop delivery as part of their user request services. Prior to *CCH*, standard practice was for recipients to receive requested material in hardcopy form. Under new systems, copies were supplied electronically, for instance using a password-protected central server from which the copy could be printed, or (for the ‘wild and crazy types’<sup>123</sup>) sending the material by email. One interviewee estimated that, as at May 2008, approximately 20 to 30 per cent of university libraries had moved to desktop delivery. Amongst institutions participating in this project, a number of interviewees confirmed that digital delivery was being (or was planned to be) provided under a fair dealing analysis.<sup>124</sup> One explained:

We used to really rely on [sector-specific] exceptions ... that’s where we hooked the right for us to do something. But we’ve actually really pulled back from that, and we’re saying that [specific] exceptions [are] not the way to go, because really, anything that we’re doing should be able to be done under fair dealing. And so much more now, when we look at our strategy, it’s fair dealing.<sup>125</sup>

Another stated *CCH* was

definitely having an impact in terms of giving people a little bit more confidence that they can do some things – probably most in the document delivery theme than anything else. ... More and more institutions here, as part of pilot projects [for new interlibrary loan procedures] are now receiving digitally and passing copies along digitally, to a point where an individual can pick them up, and then our intermediary copy will disappear after a period of time. Prior to *CCH*, we had

<sup>123</sup> 117L. <sup>124</sup> E.g., 101L, 117L, 127L, 146L, 156L. Also: 144X.

<sup>125</sup> 117L.



all talked about doing that ... but there wasn't anyone who was willing to make that leap.<sup>126</sup>

It appeared that the prevailing view in Canada was that the applicable specific exceptions did not extend to the supply of copies electronically.<sup>127</sup> This analysis was clearly right for the interlibrary supply provision in section 30.2(5), which allowed institutions to do certain acts for patrons of other institutions, 'but the copy given to the patron must not be in digital form'. In contrast, section 30.2(2) provided that a library, archives or museum may make 'by reprographic reproduction' a copy of certain scholarly and newspaper articles for a user who requires that copy for research or private study. Whether digital distribution was permitted depended on the meaning of 'reprographic reproduction', a term not defined in the Act, but suggested by other sources to exclude electronic reproductions.<sup>128</sup> This was consistent with reported industry attitudes, meaning that, in general, it was not until *CCH* that academic libraries became confident that they could justify digital delivery by reference to fair dealing.

In contrast with academic libraries, copying services in public libraries seemed to be less well utilised. At the time of the fieldwork, many public libraries had self-serve photocopiers for public use and offered interlibrary loan services<sup>129</sup> (these relating to original rather than copy material).<sup>130</sup> Some libraries also maintained special collections,<sup>131</sup> some

<sup>126</sup> 127L. <sup>127</sup> E.g., 127L, 146L.

<sup>128</sup> See, e.g., J. Erola and F. Fox, *From Gutenberg to Telidon: A White Paper on Copyright* (Consumer and Corporate Affairs Canada and Department of Communications, Government of Canada, 1984), p. 40 (defining the term 'reprography' as 'the making of visually perceptible copies by any means'); Harris, n. 97 above, p. 144 (reprographic reproduction 'is generally photocopying and does not include, for example, scanning the article into a computer'); Vaver, n. 50, p. 207 (user request provisions would not apply to 'downloading [a] work from the Internet or an electronic database' as '[t]his copying is clearly not "reprographic reproduction"').

<sup>129</sup> Examples of libraries that (as at July 2009) referred to self-serve photocopiers and interlibrary loan services on their public websites: Edmonton Public Library, Alberta; Greater Victoria Public Library, British Columbia; Halifax Public Libraries, Nova Scotia; Montréal Public Libraries Network, Quebec; Newfoundland & Labrador Public Libraries; Regina Public Library, Saskatchewan; Saskatoon Public Library, Saskatchewan; Vancouver Island Regional Library, British Columbia; Waterloo Public Library, Ontario; Winnipeg Public Library, Manitoba; and Yukon Public Libraries.

<sup>130</sup> E.g., as explained by 107L.

<sup>131</sup> These were commonly collections of genealogical and local history material. Examples of libraries that (as at July 2009) referred to special collections on their public websites: Central Library branch, Regina Public Library (Prairie History Collection); Central Library branch, Greater Victoria Public Library (Local History Room); Frances Morrison Library, Saskatoon Public Library (Local History Room); Main Library branch, Waterloo Public Library (Ellis Little Local History Room); Nanaimo

of which were described as having associated copying services.<sup>132</sup> Public websites tended not to discuss the copyright aspects of these services in detail. One might speculate that blanket licences with Access Copyright and Copibec might be relevant to published print materials, and that the sector-specific exceptions would be of very limited relevance to special collections given restrictions in their application.<sup>133</sup> The fact that some websites referred to non-commercial and research-based requests being filled raised the possibility that fair dealing might be relevant.

Amongst the public library participants in the fieldwork, it was reported that materials from special collections were often copied for researchers without regard to copyright status.<sup>134</sup> This was linked with fair dealing; as one interviewee said, 'it's a little bit like allowing people to photocopy from books or any other medium'.<sup>135</sup> It was only when some form of redistribution or commercial use was anticipated that permission was required. In some instances, requestors were asked to produce evidence of clearance before the request was fulfilled, whilst in others, copies were provided subject to a disclaimer that use was at the recipient's own risk and may require a licence. Importantly for this discussion, fair dealing arguments were not reported to have changed following *CCH*. One interviewee said that the 'very conservative' practices of their institution had remained and 'I don't see it changing rapidly soon'.<sup>136</sup> For another, there was greater confidence that existing interpretations of the law were defensible:

In the few instances where situations have arisen, we're probably a little more comfortable about some of the things that we're doing, than we might have been in the past. But I certainly cannot point to any significant policy change arising from it.<sup>137</sup>

The position of the libraries that participated in this research can be contrasted with that of the museums and archives, who implemented disparate practices for their user request services. Some interviewees described procedures in which licences were more or less mandatory, even for research use.<sup>138</sup> For instance, one archivist commented that 'in

Harbourfront Library, Vancouver Island Regional Library (British Columbia North West Collection).

<sup>132</sup> Examples from the list, *ibid*: Local History Room Saskatoon Public Library; Ellis Little Local History Room, Waterloo Public Library, Ontario.

<sup>133</sup> E.g., Canadian Copyright Act s. 30.2 applies only to articles, whilst s. 30.21 relates to the copying of unpublished works deposited in archives, which under ordinary usage would seem to exclude library collections even if they have an archival quality.

<sup>134</sup> 102L, 136L, 147L. <sup>135</sup> 147L. <sup>136</sup> 125L. <sup>137</sup> 107L.

<sup>138</sup> E.g., 106A, 108G, 124A.

my experience here, fair dealing is just not used in audiovisual and visual works'.<sup>139</sup> Another archivist explained that a much more restrictive policy had been adopted for audiovisual works than print collections, because many of the former items were made by commercially active creators and were often being requested for profit-making activities, 'so the risk is higher, right off the bat'.<sup>140</sup> One of the art museums also noted that permissions were always essential; that institution had not considered that fair dealing might be available as an alternative for some requests.<sup>141</sup>

For other museums and archives, there was a degree of comfort in fulfilling researcher requests without requiring permission,<sup>142</sup> including using electronic delivery. Whilst some interviewees situated their treatment of researcher requests within the prism of fair dealing,<sup>143</sup> others did not mention these arguments.<sup>144</sup> It did not appear that *CCH* had done much to encourage recourse to fair dealing, except (for those aware of the decision) to provide greater comfort that such arguments were defensible.<sup>145</sup> Finally, certain norms did not seem to be coterminous with the law. For instance, some institutions treated similarly things such as 'research', 'private', 'personal' and 'non-commercial' use, as distinguished from 'commercial use' or 'publication', even though there was no such delineation in the Copyright Act.

Where material was requested for purposes outside research and personal use, the non-library participants either required evidence that permission had been obtained before supplying the reproduction, or fulfilled the request on the basis that the requestor was responsible for clearing any rights.<sup>146</sup> This was not dissimilar to their colleagues in libraries.

In sum, there was some common ground in US and Canadian experiences in relation to external requests outside of sector-specific exceptions. Leaving aside academic libraries, there were interviewees from both countries who reported that responsibility for clearing rights was generally placed on the requestor, but that they would fulfil requests without any evidence of clearance. For some requests, it seemed that the institution was *itself* invoking fair dealing (or for US interviewees, fair use) for their act. In others, it seemed that institutions were relying primarily on the disclaimer of copyright responsibility. Significantly for

<sup>139</sup> 124A. <sup>140</sup> 106A. <sup>141</sup> 108G.

<sup>142</sup> E.g., 103G, 104M, 106A, 115A, 126A, 130M, 135G, 137G.

<sup>143</sup> E.g., 106A, 115A, 126A, 135G. <sup>144</sup> E.g., 103G, 104M, 130M, 137G.

<sup>145</sup> For instance, 106A observed that 'there was probably not dramatic change in the activities, but from a legal perspective, I think we had more foundation for what the content is'.

<sup>146</sup> E.g., 103G, 104M, 108G, 126A, 130M, 135G, 137G, 138M.

this discussion, however, whilst some fair dealing practices overlapped with those under fair use, *CCH* did not seem to have had a significant impact on this position. The only Canadian interviewees who reported any significant change to external request practices in response to *CCH* came from academic libraries – institutions whose collections, services and patrons are arguably closest to those of the Great Library of Osgoode Hall.

## 2 *Electronic Reserves and Virtual Learning Environments (VLEs)*

As discussed in Chapter 5, many universities now use electronic reserves and VLEs rather than supplying course readings and other materials in hardcopy form. At the time of the fieldwork in 2008 and 2009, only a handful of academic libraries had amended their electronic reserves policies to refer to fair dealing. Although quantitatively small in terms numbers, this application of fair dealing was perhaps the most analytically significant post-*CCH* shift, because such a practice is a number of steps removed from a request-based copying service: it applies fair dealing in an environment in which copies are made available to multiple people; and it tests the capacity of research and private study (as understood in copyright law) to apply to aspects of teaching and instruction.

Prior to the fieldwork there were reports that whilst many Canadian universities were moving to electronic reserves, their contents were frequently limited, and ‘the single most inhibiting factor to the widespread adoption of electronic reserves in Canada is copyright clearance’.<sup>147</sup> For instance, in an email survey of universities undertaken by Joan Dalton in June 2004,<sup>148</sup> although 20 out of 28 respondents had electronic reserves, only half included links to scanned copyright materials. These were cleared under permissions negotiated individually or through Access Copyright.<sup>149</sup> For those not hosting scanned materials, the costs of licensing was cited most frequently as the reason.<sup>150</sup>

To put these findings in context, Dalton described an electronic reserves pilot study at her own institution, the Leddy Library at the University of Windsor, covering four semesters from the second half of 2002 to the first half of 2004.<sup>151</sup> Whilst the Library experienced a reasonably good clearance rate (with 84 per cent of the 189 permissions

<sup>147</sup> P. Warner, ‘Reserves, Electronic Reserves and Copyright in Canada’ (2006) 1 *Canadian Online Library and Archives Journal*.

<sup>148</sup> J. Dalton, ‘Electronic Reserves and the Copyright Challenge in Canada’ (2007) 17 *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve* 97. The email was sent to 36 libraries, thus eliciting a 77 per cent response rate: at 99.

<sup>149</sup> *Ibid.*, 99–100. <sup>150</sup> *Ibid.*, 100. <sup>151</sup> *Ibid.*, 105–109.

sought being granted<sup>152</sup>), it was also noted that during peak clearance time (which started a few weeks prior to semester, and then continued well into it), the time and resources required for clearance accounted for 70 per cent of a full time library position. By the end of these four semesters, reserves had only been constructed for twenty-nine courses, a long way from the 240 offered on average.<sup>153</sup> 'This quickly convinced us', wrote Dalton, 'that a long-term sustainable electronic reserves service could not be accomplished at this rate'.<sup>154</sup> This experience was similar to that of an institution that participated in this research, which ran its own pilot study at around the same time.<sup>155</sup> Like the Leddy Library, it sought to clear content for electronic reserves for a small number of courses. The result was that this institution decided not to roll out this approach across all courses as the costs – in terms of licence fees and the time involved in clearing rights – would have been prohibitive. The *CCH* decision did not alter this position, largely due to risk aversion: the university was not comfortable with the possibility that reliance on fair dealing might result in a lawsuit, a position it has retained over the years.

Other experiences from this research were also consistent with the study by Dalton. Interviewees reported that instead of uploading copies of articles to subject web pages, many reserves simply provided links to records in subscription databases, should that be permitted by the relevant licence. Material included in full was generally authored by faculty members, such as lecture slides and course materials. For third-party copyright, the usual approach was to insist that permission be obtained, and as noted above, only a few universities were reported to have introduced an explicit fair dealing analysis in their electronic reserves policies. Interviewees who were familiar with these policies pointed to a number of aspects that were said to keep copying within the exception. Where the desired material was available electronically, such policies would advise that a persistent URL be used instead of making a fresh copy. There were also limits on the accessibility of reserves, typically being confined to the instructor and students of a given course. One contentious matter was whether the use was for 'research', 'private study' or another recognised purpose. Some interviewees argued that the expansive interpretation of fair dealing urged by the Supreme Court was such that reserves could be seen as facilitating the research and private study of students. Nevertheless, amongst the majority of institutions, understandings of the law had not coalesced to the stage where they were comfortable in applying fair

<sup>152</sup> Ibid., 107 (Table 1).      <sup>153</sup> Ibid., 106.      <sup>154</sup> Ibid., 108.

<sup>155</sup> As an added measure to preserve the anonymity of research participants, pseudonyms will not be used for certain elements of this analysis.

dealing to electronic reserves.<sup>156</sup> As such, to the extent that other universities had considered following suit, decision-makers were said to be frightened that their institution might become ‘the test case’<sup>157</sup> for an activity considered the ‘hot button’<sup>158</sup> in Canada.

As will be seen in the Chapter 8, the hints of change in 2008 and 2009 crystallised into a significant departure from existing practices from about 2012 onwards, with many universities withdrawing from the Access Copyright blanket licence. This raised the question – addressed in further interviews and examination of publicly available sources – as to what happened to cause such a marked shift, including the role of fair dealing arguments. As will be seen in Chapter 8, these developments did not involve a renunciation of licensing as institutions still relied heavily on permissions. At the time of the first round of fieldwork, however, universities had largely continued their existing arrangements rather than roll out new, *CCH*-inspired practices.

*3 Online Activities* For online activities such as the creation of virtual exhibitions and collection databases, the practices across participating institutions were similar: exceptions were not considered relevant, and the copyright management strategy was to only use public domain materials or items for which they had rights, meaning that third-party copyright material was cleared.<sup>159</sup> There were a handful of reports of institutions hosting uncleared content,<sup>160</sup> but these were exceptional amongst participants.

Given the academic and judicial response to *CCH*, it was striking that no institutions in this study had considered the possibility of fair dealing arguments applying to public uses beyond request services and electronic reserves. Interviewees did not, for example, situate the creation of online collection databases as possibly within fair dealing. The capacity of an institution to adopt such a position would obviously depend on the extent to which the database was research-based and fair. But even here, the Copyright Board’s decision in *Tariff No. 22A* illustrated that fair dealing can apply for non-traditional forms of research undertaken in

<sup>156</sup> 127L noted that ‘[*CCH*] was a huge step forward, but when you look at where the yardsticks are for fair dealing and fair use for US ... that yardstick is way down the road, still. ... The legislation is the biggest hold back, because the interpretation is not as open as it is in the US.’

<sup>157</sup> 119L. <sup>158</sup> 117L.

<sup>159</sup> E.g., 102L, 103G, 105G, 106A, 108G, 110M, 124A, 126A, 125L, 128L, 130M, 136L, 141L, 146L, 147L, 153M.

<sup>160</sup> One example was a collection of historical ephemera that was largely orphaned. Another related to works that were in the public domain in Canada but not in the United States.

an online environment. When other fairness factors are considered, such as the nature of the underlying work, the resolution of digital reproductions and any limitations on access or re-use, there would seem to be a defensible argument that fair dealing can be applicable, using arguments modelled after US cases such as *Kelly v. Arriba Soft*,<sup>161</sup> *Bill Graham Archives*<sup>162</sup> and *Perfect 10*.<sup>163</sup>

It seemed, therefore, that existing understandings of fair dealing had only moved so far after *CCH*. There seemed to be apprehension regarding the longevity of the decision, for instance by interviewees who questioned whether exceptions may be narrowed in the future or dicta from *CCH* overturned.<sup>164</sup> Some interviewees also observed that the conservatism of their institution stood in the way of developing fair dealing arguments for broader public uses.<sup>165</sup> Institutions were said to be fearful of being sued and wanted assurance that their practices were lawful, even if individual staff were attracted to forward-leaning interpretations of exceptions. For instance, one interviewee said:

Personally, I [prefer] a more liberal interpretation of the law [where you] risk getting sued, just so you can establish the case law. But there's a great risk aversion, at the moment, both within the federal government and this institution, towards any sort of liberalisation of access through the web. Everything's got to be cut and dried, and it's quite incredible.<sup>166</sup>

Another stated:

I would say most libraries have no idea what to do with that *CCH* case. ... Most people don't want to deal with copyright at all; they want a prescriptive [answer] because they don't know. ... So we need to give people the tools to be able to make some really good decisions, and to help our users. My idea is that librarians,

<sup>161</sup> *Kelly v. Arriba Soft Corporation*, 77 F Supp 2d 1116 (CD Cal, 1999); 336 F 3d 811 (9th circuit, 2003).

<sup>162</sup> *Bill Graham Archives v. Dorling Kindersley Limited*, 386 F Supp 2d 324 (SDNY, 2005); 448 F 3d 605 (2nd circuit, 2006).

<sup>163</sup> *Perfect 10 v. Google*, 416 F Supp 2d 828 (CD Cal, 2006); appealed as *Perfect 10 v. Amazon.com*, 487 F 3d 701 (9th circuit, 2007).

<sup>164</sup> E.g., 106A ('my concern is that the creators want no exceptions anymore; so my concern is to at least maintain what we have'), 113X ('there's always the chance that [*CCH*] will be reinterpreted [or] legislation will override it, so the ultimate tool is the legislative tool, so we have a better understanding of what the exceptions are'), 141L (predicting reform of the Copyright Act to deal with *CCH*), 144X (once exceptions are opened up for legislative consideration, there is a risk they will be narrowed), 146L (people do not consider a Supreme Court decision as proper law and will only revise practices in response to legislative change).

<sup>165</sup> E.g., 107L, 108G, 119L, 123L, 125L, 136L, 144X, 146L, 148L. Interviewee 148L said that their institution was unlikely to 'push the envelope' without clarity regarding the content of the law.

<sup>166</sup> 102L.

for instance, need to take up as much room in user rights as we can. [...] And it is our right to be able to do this, so it's not threatening the creator community, it's not threatening the publishers, it's a right of a Canadian citizen, to make use of fair dealing. And that's our role: to permit that.<sup>167</sup>

Others also indicated that lack of expert knowledge was a problem:

If we had a lawyer around, if we knew more, we'd take more risks. We would be able to go a little further. There's probably things we're not doing, but we don't know about, and we don't have time to [find out ourselves].<sup>168</sup>

[Copyright is] big, it's very big. And it covers many areas and many different angles, with the exhibition, publication, library, archives, other related laws: privacy, access to information. And the reality is we're just overwhelmed with keeping up.<sup>169</sup>

In sum, when licensing was not possible, for instance because of prohibitive transaction costs or because material was orphaned, it was often the case that participating institutions simply avoided using those items on websites and other online outputs. Whilst there were some exceptions to this general trend, they were rare and seemed to be grounded primarily in pure risk management rather than fair dealing.

## V Conclusion

In Chapter 5 it was observed that fair use played a meaningful role in the reported practices of US cultural institutions. Although drafted as a standard, a number of factors appeared to give institutions comfort in relying on section 107, including interpretations in the case law. Whilst the volume of fair dealing case law in Canada was considerably lower, the Supreme Court decision in *CCH* appeared to match and even surpass many of the US decisions because it was a unanimous decision from Canada's highest court; it related directly to cultural institutions; and it contained statements urging an expansive interpretation of fair dealing. The Supreme Court's sentiments were repeated in other decisions and, in the Copyright Board's *Tariff No. 22A* decision, were applied to pre-view facilities used by online music sellers. It might therefore be hypothesised that *CCH* would encourage greater reliance on fair dealing by cultural institutions, thus unlocking the flexibility of a provision centred on fairness.

However, the 2008 and 2009 fieldwork suggested that the institutional response to *CCH* had been extremely muted. Academic analysis that lauded the decision sat in stark contrast to the actual practices of the

<sup>167</sup> 101L.

<sup>168</sup> 104M.

<sup>169</sup> 116M.



sector, which had not, by and large, been influenced by the Supreme Court's vision of fair dealing as a user's right. This raised the question of why: what had happened in Canadian cultural institutions to make their response to *CCH* so different from their US counterparts? Was this a product of the purpose-based limitations of fair dealing? Did institutions require further judicial or legislative reassurance that *CCH* was not a temporary aberration? Were there other non-legal factors that limited Canadian reliance on fair dealing even though, on a purely doctrinal analysis, it may extend much further?

The thesis of this book is that drafting, alone, does not explain the difference between US and Canadian experiences. Instead, the fieldwork also revealed numerous historical, cultural and institutional factors that influenced the decision-making of cultural institutions, with the result that fair use was a far more significant component of copyright management practices than fair dealing. If the fieldwork had stopped there, we might conclude that expanded fair dealing would be unlikely to have traction in Canada, let alone fair use. However, another lesson from the empirical work is that norms and interpretative practices are susceptible to change – and sometimes at a pace and magnitude that is highly surprising. As discussed in Chapter 8, such a change was to occur in academic libraries in Canada in the years following the main tranche of fieldwork. These developments showed the capacity for decision-making practices to change, with ramifications for the fair use panacea and the drafting of copyright exceptions.