What is Fair Dealing?
Copyright Lecture

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Fair Dealing

• What is Fair Dealing?

• How is Fair Dealing Defined?

• *CCH* and the Six Fair Dealing Criteria
What is Fair Dealing?

• The right, when fair and reasonable, to copy a substantial portion of a copyrighted work without permission from, or payment to the owner

• “...an integral part of the Copyright Act...any act falling within the fair dealing exception will not be an infringement of copyright.”
  (CCH: Para. 48)

• “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.”
  (CCH: Para. 48)
How is Fair Dealing Defined?

• The Copyright Act does not define fair dealing or what is considered fair

• Fair dealing has been clarified through judicial decisions and courts cases
CCH and the Fair Dealing Criteria

• Historically, fair dealing has been interpreted restrictively by the courts

• This changed in 2004 when the Supreme Court of Canada provided clarification and expanded the scope of fair dealing in *CCH Ltd. v. LSUC*

• Established six criteria to help copyright users assess and evaluate the fairness of their dealings
CCH and the Fair Dealing Criteria

• “...the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing...In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.”

(CCH: Para. 60)

1. Purpose of the Dealing
2. Character of the Dealing
3. Amount of the Dealing
4. Alternatives to the Dealing
5. Nature of the Work
6. Effect of the Dealing on the Work
Purpose of the Dealing

- Fair dealing for the purpose of research, private study, education, parody, satire, review, criticism, and news reporting does not infringe copyright.

(Copyright Act: S29, 29.1, 29.2)

- “...these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”

(CCH: Para. 54)
Purpose of the Dealing

• Fair dealing for the purposes of research, private study, education, parody, satire, review, criticism, and news reporting do not infringe copyright.

(Copyright Act: S29, 29.1, 29.2)

• Copying must fall within one of these broad categories

• If copying does fall within one of the categories, proceed to consider the remaining criteria

• Analyze fairness of the dealing in the remaining criteria
Character of the Dealing

• “If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing.”

(\textit{CCH: Para. 55})

• “It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of a dealing is fair.”

(\textit{CCH: Para. 55})
Amount of the Dealing

- Consider the portion being copied in relation to the entire work

- No set quantitative amount for determining how much of a work can be copied exists

- Exercise individual judgment to determine whether the amount copied is fair and reasonable
Amount of the Dealing

- “The quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work.”
  
  *CCH: Para. 56*

- “Since fair dealing is a “user’s” right, the “amount of the dealing” factor should be assessed based on the individual use, not the amount of the dealing in the aggregate...”

  *SOCAN: Para. 41*
Alternatives to the Dealing

• Consider this criterion a test of necessity:
  • Is it necessary to copy this particular copyrighted work?
  • Is it necessary to copy this amount?
  • Does a non-copyrighted alternative exist?
Nature of the Work

• Consider the amenability of the work being copied to fair dealing

• It may not be fair to reproduce a confidential work the owner never intended to release publicly

• It may be fair to reproduce excerpts from a published work or an unpublished work
Effect of the Dealing on the Work

- Consider whether the copy will harm the market of the original work.

- “If the reproduced work is likely to compete with the market of the original work, this may suggest the dealing is not fair. Although...an important factor, it is neither the only factor nor the most important factor...”

(CCH: Para. 59)

- In *Alberta (Education) v. Access Copyright*, the Supreme Court dismissed the claim that copying short excerpts in schools for educational purposes had a negative effect on the market of the original work.
Fair Dealing: Points to Take Away

• Fair dealing is flexible and open to individual interpretation

• Work through the six CCH criteria on a case-by-case basis to assess whether copying is fair

• Our past practices and present actions can help shape what is fair

• Consult the Queen’s University Library fair dealing evaluator if you need help applying the six criteria
References


References


References


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