UNFORGIVING FAIR DEALING: PAST TIME FOR CANADIAN COPYRIGHT REFORM

by CARYS J. CRAIG[1]

Section 107 of the U.S. Copyright Act of 1976 has by now proved its worth as a flexible, open, and general exception to exclusive copyright control. Enacted fifty years ago, it successfully codified the dynamic judge-made principle of "fair use" without crystallizing it into rigid form. It thereby preserved essential breathing space in an expanding copyright system for productive, innovative, and socially beneficial downstream uses of protected works. The United Kingdom's 1911 codification of fair dealing, in contrast, crystallized and constricted the principle's evolution, to the detriment of creators, users, and the public in that jurisdiction—and, by imperial extension, its colonies. Over the past quarter of a century, the Supreme Court of Canada has made valiant efforts to breathe new life into the unforgiving fair dealing defense that was Canada's colonial inheritance, but this hybrid reimagining remains vulnerable and demands constant vigilance to sustain in the face of relentless economic and political pressures. As the United States celebrates the fiftieth anniversary of its principled and prescient codification of fair use, this article explains why it is time for Canada to stop forgiving fair dealing for its flaws and finally follow suit.

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INTRODUCTION

When copyright overprotects owners, it can do more harm than good. Extended too far, the exclusive rights of copyright owners can unduly prohibit socially valuable uses of expressive works and so undermine the objectives of the copyright system—obstructing rather than promoting progress and restricting rather than encouraging the creation and dissemination of works of the arts and intellect. If overprotection of copyright is a problem, the fair use doctrine offers something of a solution, shielding users of copyrighted works from liability where their productive but unauthorized use is nonetheless "fair." In doing so, it can "avoid rigid application of the copyright statute when . . . it would stifle the very creativity which that law is designed to foster."[2] As this suggests, fair use is not properly understood as an exception to copyright; it does not derogate from copyright norms but rather confirms them.

The United States famously codified the fair use doctrine—as developed through common law jurisprudence—in Section 107 of the 1976 Copyright Act.[3] Fifty years later, this codification has proved itself to be a worthy cause for celebration in the context of a copyright system explicitly aimed at "promot[ing] the Progress of Science and useful Arts."[4] In particular, the flexibility built into the Section 107 formulation has allowed fair use to adapt to embrace transformative uses of protected works as technologies have evolved. From videorecording to digital archiving, and from programming interfaces to text and data mining ("TDM") processes, that flexible formula has—at least so far—quite effectively "future-proofed" fair use.[5]

The United States was, however, far from the first jurisdiction to attempt to codify fair use. The original fair use codification took place sixty-five years earlier, with the passage of the United Kingdom's 1911 Copyright Act, also known as the Imperial Copyright Act. That Act included a provision giving statutory form to the judicially developed fair use doctrine, stating that "any fair dealing" with works for certain specified purposes—"private study, research, criticism, review, or newspaper summary"—would not constitute infringement.[6] The provision was subsequently transplanted across the Commonwealth, including in Canada, which enacted it almost

[2] Google LLC v. Oracle Am., Inc., 593 U.S. 1, 18 (2021) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)); Iowa State Univ. Rsch. Found., Inc. v. ABC, 621 F.2d 57, 60 (2d Cir. 1980).
[3] 17 U.S.C. § 101.
[4] U.S. CONST. art. I, § 8, cl. 8.
[5] *See, e.g.*, *Google*, 593 U.S. 1; Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984); Kadrey v. Meta Platforms, Inc., 788 F. Supp. 3d 1026 (N.D. Cal. 2025); Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007 (N.D. Cal. 2025); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014); U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 3: GENERATIVE AI TRAINING (2025).
[6] Copyright, Designs and Patents Act 1988, c. 48, §§ 29–30 (UK).

word-for-word in the first Dominion Copyright Act of 1921.[7]

Fair use, albeit under its new moniker of fair dealing, was and is every bit as essential to a well-functioning copyright system in these Commonwealth jurisdictions as in the United States. Unfortunately, the Anglo-Canadian codification was constrained by its textual formulation, with the flexible fair use doctrine quickly crystallizing into a more rigid and narrow form. In scientific terms, crystallization is the process by which a liquid solution turns into a solid. In copyright terms, when fair use crystallizes into solid form, it similarly ceases to be a solution—by which I mean it can no longer reliably solve the problems presented by copyright's overreach. Rather than a cause for celebration, then, codified fair dealing and its colonial offspring became an ongoing cause for concern.

With over a century of jurisprudence, consultation, and commentary now behind us in Canada—and half a century of U.S. experience with codified fair use for comparison—the time has come for Canada (and, by extension, other fair dealing jurisdictions) to consider (once again) whether the U.S. version of fair use or something like it should finally replace the Imperial formulation of fair dealing. In this Article, I insist (once again) that it should.[8] I also aim to persuade readers that the policy stars are newly aligned to make this statutory fair dealing reform more feasible than ever before.

Part I briefly reviews well-covered ground, describing the process by which Section 107 came to be, emphasizing its shared origins in UK jurisprudence. It then compares this history and evolution with that of the fair dealing defense, as concretized in the narrow provisions of the UK Copyright Act 1911 and, subsequently, by inflexible judicial interpretations throughout the twentieth century. Part II shifts our focus to Canada, describing the hostile reception of fair dealing in Canadian courts, the hesitation around statutory reform, and the doctrine's judicial reinvigoration by the Supreme Court of Canada over the past twenty-five years. Part III explains why this reinterpretation of fair dealing and user rights remains insufficient to solve the problems posed, or at least exacerbated, by their statutory rigidity. There is no need, and no good reason, to forgive and forget the cumbersome constraints that fair dealing continues to impose. Moreover, after many false starts, this may finally be the moment for fair dealing reform due to the "perfect storm" of technological disruption, shifting strategic alliances, and the sudden dismantling of traditional international trade relations.

The Article concludes with a concrete proposal for reform. Fifty years after the

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[7] Copyright Act, S.C. 1921, c 24 (Can.).

[8] *See, e.g.*, Carys Craig, Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law 155–202 (2011); Carys Craig, *Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks*, 33 Am. U. Int'l L. Rev. 1 (2017); Carys J. Craig, *Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32*, *in* From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda (Michael Geist ed., 2010) [hereinafter Craig, *Locking Out*]; Carys J. Craig, *The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform*, *in* In the Public Interest: The Future of Canadian Copyright Law (Michael Geist ed. 2005) [hereinafter Craig, *Changing Face*]; Carys Jane Craig, Fair Dealing and the Purposes of Copyright Protection: An Analysis of Fair Dealing in the Copyright Law of the U.K. and Canada (Aug. 2000) (LL.M. thesis, Queen's University), https://nlc-bnc.ca/obj/s4/f2/dsk3/ftp04/mq55897.pdf.

enactment of Section 107 of the 1976 U.S. Copyright Act, and over 100 years since the importation of the United Kingdom's unforgiving fair dealing doctrine into Canada, it may finally be time for flexible fair use to spread its wings and fly north.

I. THE ORIGINS AND EVOLUTION OF FAIR USE AND FAIR DEALING

This Part offers a glance back at the emergence of the fair use doctrine in common-law copyright tradition, primarily to emphasize the shared historical and conceptual origins of U.S. fair use and UK fair dealing. Identifying 1911 as the fair use fork-in-the-road, it then charts the divergence of these two doctrines. As key developments in the case law demonstrate, and as several copyright historians have previously observed,[9] the United Kingdom's 1911 codification essentially froze fair dealing. The 1976 U.S. Copyright Act, in contrast, demonstrated the possibility, and importance, of codifying flexibility into formal law.

A. A Shared History: Fair Use in Common Law

The first modern copyright law, the English Statute of Anne (1710),[10] contained no exceptions or defenses. However, the judiciary quickly concluded as a matter of principle that there are circumstances in which the unauthorized reproduction of a protected work can be justified. The introduction and development of a fair use doctrine largely took place in the UK courts of law and equity over the hundred years between 1740 and 1840, gradually culminating in "a relatively cohesive set of principles."[11] Matthew Sag has called this line of British case law "the 'prehistory' of the American fair use doctrine," and there is indeed significant continuity between them.[12]

The first fair use cases involved "abridgements" of published books, which "captured the essence of the original in a reduced form."[13] In *Gyles v. Wilcox*,[14] Lord Chancellor Hardwicke found that "a real and fair abridgement" should avoid liability where "the invention, learning, and judgement of the [abridgement's] author is shewn," such that it is more than just a "colourful imitation," but rather a new and useful work.[15] In the 1752

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[9] RONAN DEAZLEY, MARTIN KRETSCHMER & LIONEL BENTLY, PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT (2010); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985); Ariel Katz, *Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?*, *in* THE CAMBRIDGE HANDBOOK OF COPYRIGHT LIMITATIONS AND EXCEPTIONS 111 (Shyamkrishna Balganesh, Ng-Loy Wee Loon & Haochen Sun eds., 2021) [hereinafter CAMBRIDGE HANDBOOK]. Portions of this Part have previously been published in CRAIG, *supra* note 8.

[10] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Ann. c. 19 (1709) (Eng.).

[11] PATRY, *supra* note 9, at 3.

[12] Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1373 (2011).

[13] PATRY, *supra* note 9, at 17 n.55.

[14] Gyles v. Wilcox, 2 Atk. 141, 143 (Ch. 1740) (Eng.).

[15] PATRY, *supra* note 9, at 6–7 ("Where books are colourably shortened only, they are undoubtedly . . . a mere evasion of the statute, and cannot be called an abridgement. But this

case of *Tonson v. Walker*,[16] Hardwicke refused to find fair abridgment where only minimal additions had been made, concluding that this was not a new work but a "mere evasion" of the Act.[17] The critical consideration, then, was whether the second work was a genuinely productive use of the first.

The cases of *Dodsley v. Kinnersley*[18] and *Macklin v. Richardson*[19] went some way toward establishing the relevance and impact of the use of a copyrighted work for the purpose of review, as well as the relevance of the effect of such use on the market for the original work. In *Dodsley*, the court found that a published extract of Samuel Johnson's work in a magazine did not constitute an infringement; previously published extracts had not affected the market for or value of the original and so "could not tend to prejudice the plaintiffs."[20] In *Macklin*, however, the court held that a magazine's publication of the first act of a play was not an abridgement as such and would be of "great injury" to the plaintiff.[21] As William Patry observes, this implicitly provided the basis for the principle—still central to fairness assessments today—that a review "may not supplant the market for the work itself."[22]

In the 1802 case of *Cary v. Kearsley*,[23] Lord Ellenborough's ruling was the first to recognize the concept of fair use as distinguished from fair abridgement:[24] rather than merely reducing an original author's work, the second author had made "use of another's labour for the promotion of science and the benefit of the public."[25] Ellenborough identified the issue as being "whether what is so taken . . . from the plaintiff's book, was fairly done with the view of compiling a useful book for the benefit of the public . . . —or taken colourably, merely with a view to steal the copyright of the plaintiff."[26] If a work were taken in bad faith, *animo furandi*, the defendant would be deprived of the fair use defense. This condition—which requires a finding of good faith and productive use—is also very much alive in modern fair use litigation.[27]

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must not be carried so far as to restrain persons from making a real and fair abridgement, for abridgements may with great propriety be called a new book, . . . and in many cases are extremely useful. . . . If I should extend the rule so far as to restrain all abridgements, it would be of mischievous consequence . . . ." (citing *Gyles*, 2 Atk. 141 (Hardwicke, L.J.))).

[16] Tonson v. Walker [1752] 3 Swans. 672 (Eng.).

[17] *Id*. at 667, 680. The issue was described as "whether the alterations make it a new work, or are intended evasively to colour a new edition."

[18] Dodsley v. Kinnersley [1761] Amb. 403 (No. 212) (Eng.).

[19] Macklin v. Richardson [1770] Amb. 694 (No. 341) (Eng.).

[20] *Dodsley* [1761] Amb. at 405–06.

[21] *Macklin* [1770] Amb. at 696.

[22] Patry, *supra* note 9, at 9.

[23] Cary v. Kearsley [1802] 4 Esp. 168 (Eng.).

[24] *See* Patry, *supra* note 9, at 17 ("[W]hile fair abridgement rested upon capturing the essence of the original in a reduced form, this 'communication of the same knowledge' was flatly prohibited by fair use."). This observation supports my suggestion that the principal concern of the court was not with the effort expended by the secondary author, but rather with the contribution to the public knowledge made by the second author's work.

[25] *Cary* [1802] 4 Esp. at 170.

[26] *Id*. at 171.

[27] Patry, *supra* note 9, at 11 (citing, inter alia, Iowa State Univ. Rsch. Found., Inc. v. ABC,

By early nineteenth century, then, the fair use defense already resembled its modern form.[28] Indeed, the much-quoted explanation offered in *Cary* for requiring such flexibility in the enforcement of an author's exclusive right continues to provide the normative "promotion of progress" rationale for recognizing fair use: "[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles on science."[29]

The term "fair use" first appeared in the case of *Lewis v. Fullarton*[30] in 1839, where Lord Langdale rejected the defendant's plea on the basis that he had expended "no other labour . . . than in copying the Plaintiff's work."[31] As such, it merely communicated "the same knowledge" as the original and so conferred no advantage on the public.[32] One might say, in today's parlance, that the use was merely substitutive, not transformative.

Although the judicial development of fair use was somewhat piecemeal, these early cases support the suggestion that fair uses were noninfringing because they involved "originality on the part of the . . . user as manifested in a new work that also promoted the progress of science and thereby benefited the public."[33] While recognizing the authorial effort expended in the creation of the new work, the importance of allowing the second work was typically attributed to its "newness," and so to the public benefit it would serve.[34] The animating inquiries that informed these early cases are therefore remarkably similar to the fairness considerations subsequently enshrined in Section 107 of the 1976 U.S. Copyright Act.[35]

As Matthew Sag has explained, from a U.S. perspective, the importance of this fair

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621 F.2d 57, 62 (2d Cir. 1980): "ABC's conduct in the instant case is not irrelevant to the fairness of its use.").

[28] *See* Bell v. Whitehead [1839] 8 L.J. (N.S.) (Ch.) 141 (Eng.) (establishing the availability of fair use in respect of extracts for the purposes of criticism); Bramwell v. Halcomb [1836] 3 My. & Cr. (Ch.) 737 (Eng.) (addressing the quantity of taking that fair use could accommodate); Mawman v. Tegg [1826] 2 Russ. (Ch.) 385 [393] (Eng.); Whittingham v. Wooler [1817] 2 Swans. 428 (Eng.); Wilkins v. Aitkin [1810] 17 Ves. Jun. (Ch.) 422 (Eng.). For a full overview of these cases, *see* Patry, *supra* note 9, at 12–16.

[29] *Cary* [1802] 4 Esp. at 171.

[30] Lewis v. Fullarton [1839] 2 Beav. 6 (Eng.).

[31] *Id*. at 9.

[32] Roworth v. Wilkes [1807] 1 Camp. 94 [98] (Eng.) (Ellenborough, L.J.) ("A review will not in general serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property.").

[33] Patry, *supra* note 9, at 17.

[34] *See* Kathy Bowrey, *On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating "the Humble Grey Which Emerges as the Result of Long Controversy," in* The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver 45 (Lionel Bently, Giuseppina D'Agostino & Catherine Ng eds., 2010) ("With fair use there was more involved than simply equating 'originality' with the plaintiff's effort and protecting that contribution. A finding of 'piracy' was reserved for the cases where there was no public interest being served by the defendant's taking.").

[35] *See* Sag, *supra* note 12, at 1393–1409 (reviewing the early UK cases to demonstrate their attention to a case-by-case analysis, the amount copied, market effect, and transformative nature of the use).

use prehistory lies in demonstrating "the gradual coevolution of copyright and fair use" and so "mak[ing] plain" the sometimes forgotten fact that "copyright owners' rights have been subject to and defined by the public's fair use rights since the beginnings of statutory copyright."[36] From the Anglo-Canadian perspective, however, an added layer of importance lies in recalling that, contrary to what some would now have us believe, "fair use is not an American invention."[37] Rather, it originated in UK courts and was developed gradually over the nineteenth century by British and American judges "who mutually influenced and cross-referenced each other."[38] In sum, fair use was always an integral part of the modern copyright system, and so in Canada, there is nothing alien about it.

B. The Fork-in-the-Road: Codification v. Crystallization

1. The U.S. Development and Codification of Fair Use

The U.S. fair use story can be picked up quite seamlessly, both chronologically and conceptually, from where the prior section left off. The version of fair use codified in 1976 is almost always traced back, within the American context, to the 1841 decision of *Folsom v. Marsh*.[39] Citing UK fair abridgment cases with approval, Justice Story observed that "a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism."[40] Rejecting the defendant's pleas, however, he ruled that the mere selection of essential parts of the original work to bring it "into a smaller compass" was not "a fair and bona fide abridgment" but would rather supersede and substitute for the original. In the statement widely hailed as providing the foundations for the modern U.S. fair use doctrine,[41] Justice Story explained:

> In short, we must often, in deciding questions of this sort, look to the *nature and objects* of the selections made, the *quantity and value* of the materials used, and the degree in which the use may *prejudice the sale, or diminish the profits*, or supersede the objects, of the original work.[42]

As eventually codified in Section 107 of the 1976 U.S. Copyright Act, the fair use

[36] *Id.* at 1410.
[37] Katz, *supra* note 9, at 113.
[38] *Id.*
[39] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (concerning the unauthorized reproduction of certain writings of George Washington extracted from a multi-volume compilation). *See, e.g.*, Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 127 [hereinafter Yu, *Global Paradigm*].
[40] *Folsom*, 9 F. Cas. at 344.
[41] *See, e.g.*, Bruce E. Boydon, *The Surprisingly Confused History of Fair Use: Is It a Limit or a Defense or Both?*, MARQ. UNIV. L. SCH. FAC. BLOG (Oct. 9, 2022), https://law.marquette.edu/facultyblog/2022/10/the-surprisingly-confused-history-of-fair-use-is-it-a-limit-or-a-defense-or-both ("*Folsom v. Marsh* is the source of what eventually gets codified as the four fair use factors in 17 U.S.C. § 107.").
[42] *Folsom*, 9 F. Cas. at 348 (emphasis added).

doctrine now provides:

> [T]he fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[43]

While the jurisprudential lineage of the fairness factors as codified looks apparent on its face, a few caveats are important here. First, it is arguable that the foundational and formative role of *Folsom* has been either overstated or misapprehended. As Michael Carroll and Peter Jaszi explain, the case "exists as both *Folsom*-as-decided and as *Folsom*-as-symbol."[44] Not only is the case merely one in a much longer trajectory, when viewed against the historical background of the UK cases, but scholars have also contested its widely celebrated role in the evolution of fair use, representing it instead as a case about the substantiality of use or, in Oren Bracha's framing, even "a vehicle for a radical enlargement of the scope of copyright protection."[45] At the same time as *Folsom* limited the owner's ability to prevent fair uses, it expanded their control beyond the exclusive right to make verbatim copies of books; downstream copying became presumptively infringing unless it could be shown to be fair. A similar observation can be made regarding the British judges for whom the recognition of fair use simultaneously permitted the expansion of copyright's presumed reach.[46]

Further, the path from *Folsom* to Section 107 was in fact neither direct nor inevitable; it required a certain reinterpretation of the case to recast fair use as a distinct doctrine justifying substantial uses that would otherwise be infringing. This process began in mid-twentieth-century commentary, gathered force in the legislative lead-up to 1976 (and its jurisprudential off-shoots), and found its ultimate expression in the U.S. Supreme Court case of *Campbell v. Acuff Rose Music, Inc.*, which explicitly "rooted transformative use in the rich soil of *Folsom*."[47] In that landmark case, which grounded

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[43] 17 U.S.C. § 107.
[44] Michael Carroll & Peter Jaszi, *The Triumph of Three Big Ideas in Fair Use Jurisprudence*, 99 TUL. L. REV. 453, 470 n.102 (2024).
[45] Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 230 (2008).
[46] *See* ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT (2005).
[47] Carroll & Jaszi, *supra* note 44, at 494; *see also id.* at 470–96 (helpfully identifying and charting this progression through the authorities, legislative process, and post-1976 Supreme Court case law).

fair use in copyright's constitutional purpose,[48] Justice Souter quoted the passage from *Folsom* reproduced above and observed: "Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story's summary is discernible."[49] He went on to explain that, in enacting Section 107, Congress intended "'to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the common-law tradition of fair use adjudication."[50]

The well-documented legislative history of Section 107 confirms the intent to preserve the flexible common-law fair use doctrine as developed by courts.[51] As explained in the House Report, "the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute."[52] Rather than providing a specific definition of fair use, the legislative aim was thus to set out in statute the criteria evolved by the courts, which "though in no case definitive or determinative, provide some gauge for balancing the equities."[53]

For our purposes, two points bear emphasis. First, as explained above, *Folsom* was but one example of the steady evolution of a fair use doctrine across the common-law copyright system, which was already well underway. Second, although the cohesive concept of a fair use defense as such came later, by articulating the need for a case-by-case, multifactorial analysis to determine whether a use was fair, *Folsom* offered the grounding for a more comprehensive and "flexible way of engaging in a contextual comparison than the English fair abridgement precedents had offered."[54] Whatever its original contribution "as-decided," then, *Folsom* still stands as a symbol of the emergence of the modern fair use doctrine as a context-sensitive balancing test that offers breathing space to copyright users; but it also stands as a signpost marking what was once the common ground on which both the U.S. fair use doctrine and the UK fair dealing defense were built.

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[48] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'" (quoting U.S. CONST. art. I, § 8, cl. 8)); *see* Katz, *supra* note 9, at 115 (noting that Justice Souter's "historical account of fair use [in *Campbell*] was as accurate with respect to American law as it was true to English and Canadian law").

[49] *Campbell*, 510 U.S. at 576.

[50] *Id.* (citing H.R. REP. NO. 94-1476, at 66 (1976); S. REP. NO. 94-473, at 62 (1975)).

[51] *See* Peter Mennell, *The Making of the Copyright Act of 1976: Part I*, 41 BERKELEY TECH. L.J. (forthcoming 2026) ("Fair Use . . . should be expressly affirmed in the statute." (citing STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961))). When originally proposed in the Registrar's Report, the four factors were drawn from Alan Latman's study, STAFF OF H. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 14: FAIR USE OF COPYRIGHTED WORKS 7–14 (Comm. Print 1960), with the intent of synthesizing the key factors animating the fair use cases. Mennell, *supra*, at 20. *But see* Carroll & Jaszi, *supra* note 44, at 474–79 (concluding that Section 107 is "not a mere restatement of the common law").

[52] H.R. REP. NO. 94-1476, at 24 (1976).

[53] *Id.*

[54] Carroll & Jaszi, *supra* note 44, at 470.

If Section 107 of the 1976 Copyright Act now enjoys a retrospective appearance of inevitability—sustained by "*Folsom*-as-symbol"—Jonathan Band reminds us that there was nothing inevitable about it.[55] It was originally a matter of contention whether fair use should be given any statutory presence at all. Even once its explicit inclusion was clear, various iterations of the proposed provision offered different rhetorical framings, conditions, categories of use, and articulations of the relevant fairness considerations.[56] What was eventually encoded, however, reflected a commitment to the principle of fair use as "an equitable rule of reason," such that "no generally applicable definition is possible, and each case raising the question must be decided on its own facts."[57]

Most importantly for flexibility and future-proofing purposes, by virtue of the words "such as," the statutory version of the fair use defense was left open-ended in its potential applicability and not limited to a closed list of permitted categories of use. The result has been a fair use defense in U.S. law that closely reflects the origins and purposes of the doctrine as it was originally conceived in eighteenth-century UK jurisprudence—that is, as an effective way to protect, on a case-by-case basis, the interests of both downstream users and the public in the creation of new works that productively build on the works of others and so serve the public interest.

Of course, from outside of the United States, the historical and political contingency of Section 107 hardly requires emphasis. Beginning from the common ground on which *Folsom* was staked, the codification of fair use in our jurisdictions took a very different path.

2. The Codification of Fair Dealing

After almost two centuries of development before the courts, the doctrine of "fair dealing" made its first statutory appearance in the UK Copyright Act 1911.[58] Section 2(1)(i) of the Act provided that any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary[59] shall not constitute an infringement of copyright. The 1911 Act did not extend to self-governing Dominions unless expressly declared to be in force by the legislature of that Dominion. In contrast to Australia, South Africa, and Newfoundland, Canada enacted its own copyright legislation in 1921, which came into force in 1924.[60] The 1921 Act was, however, substantially copied from the 1911 Act, including Section 16(1)(i), which provided, in the same terms

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[55] Jonathan Band, *The 1976 Act Could Have Been Very Different*, AUTHORS ALL. (May 15, 2026), https://www.authorsalliance.org/2026/05/15/the-1976-act-could-have-been-very-different ("[G]iven the sacred status we accord the '76 Act, there is a sense of inevitability around it. . . . In fact, there was nothing inevitable or infallible about the provisions of the '76 Act.").

[56] *See id.*; *see also* Carroll & Jaszi, *supra* note 44, at 470–96 (concluding that the Registrar's 1961 Report, which purported to retrieve the four fairness factors from the common law, was in fact their first articulation as such); Mennell, *supra* note 51, at 27–30.

[57] H.R. REP. NO. 94-1476 (1976).

[58] Copyright Act 1911, 1 & 2 Geo. 5 c. 46 (UK).

[59] The term "newspaper summary" did not extend to newsreel. Hawkes & Son (London) Ltd v. Paramount Film Serv. Ltd [1934] Ch. 593 (Eng.).

[60] Copyright Act, S.C. 1921, c 24 (Can.).

as Section 2(1)(i), that "any fair dealing for the purposes of private study, research, criticism, review, or newspaper summary" shall not constitute an infringement of copyright.

The important and shared characteristic of fair dealing thus codified—in contrast to the U.S. codification of fair use—is, of course, the seemingly closed list of specified purposes for noninfringing fair dealing. Recall that Section 107 includes, in its formulation, the crucial words "such as," thereby lending an illustrative, open-ended quality to the list of purposes ("for purposes *such as* criticism, comment, news reporting, teaching . . . , scholarship, or research"). Conventional wisdom (and much commentary and case law besides) tells us that the 1911 codification thereby turned the common-law fair use principle into a more limited "fair dealing" defense available to defendants only in respect of these enumerated categories of use.

However, as Ariel Katz has convincingly demonstrated, there is no compelling evidence to suggest that this was the intended effect.[61] On the contrary, a proper reading of the UK jurisprudence before and after 1911, the legislative history, and the text itself (according to established principles of statutory interpretation)[62] suggests that the intention here was similarly to codify and thereby preserve the judge-made principle of fair use "without restricting or limiting courts' ability to apply, adapt, and adjust it according to the circumstances of particular cases."[63] In other words, although it did quite the opposite, the legislative intent was to "guarantee the continued vitality of the doctrine."[64] The 1915 edition of Copinger's authoritative text, *The Law of Copyright*, asserted that "the cases decided under the old law may [still] be taken as guides to what will be considered fair dealing."[65] It continued:

> It is not very clear why the provision authorizing fair dealing with any work for the purposes above mentioned should have been expressly inserted in the Act, for fair dealing for other purposes has always been . . . permitted and, presumably, it was not intended to cut down the rights of fair user previously enjoyed under the old law.[66]

The 1911 Act's limited list of permitted fair dealing purposes may simply have been intended to remove any doubt about the clear and established cases specifically mentioned—or, possibly, to serve as a synecdoche for the *kinds* of fair dealings that

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[61] Katz, *supra* note 9.
[62] Although the principle of *expressio unius est exclusio alteris* (the express inclusion of one thing implies the exclusion of the other) could support the assumption that Parliament meant to replace and restrict the common law principle, specific categories might rather have been included *ex abundanti cautela* (out of an abundance of caution) to remove any doubt in these cases. *See id*. at 127 (citing in support Lord Halsbury's ruling five years prior to 1911 in *McLaughlin v. Westgarth* [1906] UKPC 33 (Eng.)).
[63] Katz, *supra* note 9, at 131.
[64] *Id.*; *see also* ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 284 (2010) (concluding that the five enumerated purposes "were intended to be understood synecdochically as standing in for a variety of permissible uses").
[65] WALTZ A. COPINGER & JAMES M. EASTON, THE LAW OF COPYRIGHT 144 (5th ed. 1915).
[66] *Id.*

would be permitted. Or it may simply have been the consequence of "sloppy writing."[67] In any event, alas, a few early English cases misinterpreted Parliament's intent, adopting an unnecessarily narrow reading of the new provision as strictly confined to the list of approved purposes, which must themselves be restrictively construed[68]—a reading that took root and persisted largely unchallenged throughout the twentieth century in a legal climate that increasingly favored owners' rights and a proprietarian copyright ethic. As part of the same process, the fair dealing test came to be treated independently of the infringement test, such that courts would determine that a use was substantial and therefore "prima facie infringing" before assessing the availability of fair dealing.[69] Such treatment had the effect of reducing fair dealing to a minimal carve-out from the increasingly extensive rights of the copyright owner; any minimally substantial use was regarded as an unauthorized incursion onto the exclusive property of the owner (pejoratively, "fair stealing"),[70] which could be excused only exceptionally in a limited number of specific circumstances.

The resulting fair dealing defense thus came to reflect little more than "a reluctant but necessary concession to users."[71] As Justice Laddie later wrote of UK copyright law:

> Rigidity is the rule. It is as if every tiny exception to the grasp of copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls. . . . [T]he drafting of the legislation bears all the hall marks of a complacent certainty that wider copyright protection is morally and economically justified.[72]

It appears that a mere handful of cases after the 1911 codification "set the law of fair dealing in the UK and the Commonwealth on a restrictive trajectory from which it has not yet recovered."[73] If the legislative drafting bears some responsibility for this unduly

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[67] Katz, *supra* note 9, at 127 (citing AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 108–09 (2005)).

[68] *See, e.g.*, Hawkes & Son (London) Ltd v. Paramount Film Serv. Ltd [1934] Ch. 593, 608 (Eng.) (Slesser, L.J.) (holding that "newspaper summary" could not extend to a newsreel: "[T]his [fair dealing] proviso must be dealt with strictly, and when it says 'newspaper summary' it means newspaper summary and nothing else."). *See also* British Oxygen v. Liquid Air [1925] 1 Ch. 383 (Eng.) (holding that fair dealing could not justify copying from an unpublished work). *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch. 601 (Eng.), is widely cited as an example of a narrow reading of "private study," although this may be a misreading of the ruling. *See* Katz, *supra* note 9, at 120–22.

[69] *See, e.g.*, *Hawkes & Son* [1934] Ch. at 602 (Hamworth, L.J.) (assessing substantial taking by asking whether the part taken "is so slender that it would be impossible to recognise it," effectively reducing the test for infringing copying to a *de minimis* threshold). *See also* Johnstone v. Bernard Jones Publ'n [1938] 1 Ch. 599 (Eng.).

[70] *See, e.g.*, Jeremy Phillips, *Fair Stealing and the Teddy Bears' Picnic*, 10 ENT. L. REV. 57 (1999).

[71] Melissa de Zwart, *A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age*, [2007] INTELL. PROP. Q. 60, 90.

[72] Sir Hugh Laddie, *Copyright: Over-Strength, Over-Regulated, Over-Rated*, 18 EUR. INTELL. PROP. REV. 253, 259 (1996).

[73] Katz, *supra* note 9, at 120.

narrow approach, it should follow, one might think, that a simple statutory amendment could go a long way to correcting that ostensible misstep. Indeed, successive government studies and committee reports in the United Kingdom and Canada (and elsewhere, for that matter)[74] have recognized this flaw over time, repeatedly recommending simple amendments to the statutory language that would reinstate the open, general, and flexible quality of the original fair use doctrine—to no avail.

The UK Whitford Committee, for example, in its *Report on the Law of Copyright and Designs 1977*, concluded that the fair dealing defense ought to be extended and not restricted to particular works, forms, or media.[75] It was proposed that a "general defence" of fair dealing should be enacted, which would be available in cases where there was no conflict with normal exploitation of the relevant work and no unreasonable prejudice to the legitimate interests of the copyright owner.[76] The recommended reform was rationalized on the following basis:

> Any sort of work is likely to be of public interest, and the freedom to comment, criticise, to discuss and to debate, ought not, in principle, to be restricted to particular forms ("criticism or review" or "reporting current events"). . . . [A] general exception in respect of "fair dealing" . . . would be sufficient to cover the interests of the press, publishers and broadcasters, reviewers and commentators. Such an exception should also cover "fair dealing" for the purposes of research or private study, and there should be no need to refer to this field expressly.[77]

Later, with the arrival of digital and network technologies, concerns about future-proofing fair dealing pointed to the same conclusion. Unfortunately, during this crucial period around the turn of the twentieth century, the European context further constrained the potential development of copyright exceptions in the United Kingdom.[78] In 2006, the *Gowers Review of Intellectual Property* called for an amendment to the EU Information Society Directive to establish an "exception for creative, transformative or

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[74] Perhaps the most notable is Australia where repeated reviews have recommended the adoption of fair use but reform efforts have largely stalled. *See* Michael Handler & Emily Hudson, *Fair Use as an Advance on Fair Dealing? Depolarising the Debate*, *in* CAMBRIDGE HANDBOOK, *supra* note 9, at 140.

[75] Gerald Dworkin, *The Whitford Report: Copyright and Designs Law*, 40 MOD. L. REV. 685 (1977).

[76] These conditions reflect the international "three-step test" permitting limitations on reproduction rights "in certain special cases," provided that they "do not conflict with a normal exploitation of the work" and "do not unreasonably prejudice the legitimate interests of the author." Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris on July 24, 1971) [hereinafter Berne Convention].

[77] Dworkin, *supra* note 75, at 676–77.

[78] European jurisdictions have traditionally had more narrow and specific exceptions for copyright infringement in lieu of general exceptions like fair dealing or fair use. This is in part, at least, attributable to a more rights-oriented rationale for protecting author's rights, though this difference is arguably overstated. *See* PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE (2016).

derivative works,"[79] which could accommodate the kind of uses that might readily be considered fair use in the United States but unlawful infringement in Europe. Five years later, the UK *Hargreaves Review* found that "[i]n the UK, exceptions have failed to keep up with technological and social change, leading to widespread consequences."[80] It went on to describe a flexible fair use exception as "the big once and for all fix of the UK,"[81] but resisted recommending its introduction because it was "unlikely to be legally feasible in Europe."[82] As things now stand post-Brexit, the restrictive EU-approved version of copyright limits and exceptions remains "surprisingly undramatically" (and disappointingly) unaltered.[83]

II. CANADA'S FAIR DEALING STORY: A TALE IN TWO PARTS (SO FAR)

Meanwhile, in Canada, the constraints imposed by the narrow statutory fair dealing provisions similarly produced regular, if not frequent, calls for reform to bring Canadian copyright law into closer alignment with U.S. fair use doctrine post-1976. There is a distinct before-and-after to the Canadian fair dealing story; a faultline marked by the critical Supreme Court case of *CCH Canadian Ltd. v. Law Society of Upper Canada* in 2004 and the "seismic shift" it brought about in the foundations of Canadian copyright law.[84] In some ways, as we will see, this moment freed Canada's fair dealing doctrine from its legislated binds, releasing it from its Imperial inheritance, and allowing it to migrate closer to the U.S. model. In this Part, however, a brief retelling pushes toward the conclusion that the migration is incomplete and statutory reform remains necessary.

A. The Statutory Story

Several Canadian examinations of the inherited fair dealing provisions have considered and recommended a move to a fair use model in Canada that would largely mimic the legislative approach taken in Section 107 of the 1976 U.S. Copyright Act.[85] On

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[79] ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 68 (2006).
[80] IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 41 (2011).
[81] *Id.* at 52.
[82] *Id*. at 5; *see also* Directive 2001/29, art. 5, 2001 O.J. (L 167) 10, 16–17 (providing an exhaustive list of limitations and exceptions). *See generally* Yu, *Global Paradigm*, *supra* note 39.
[83] *See* Jonathan Griffiths, *The (Surprisingly Undramatic) Impact of Brexit on United Kingdom Copyright Law*, 26 MEDIA & ARTS L. REV. (forthcoming 2026).
[84] Carys J. Craig, *The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest*, 2 U. OTTAWA L. & TECH. J. 425, 430 (2005).
[85] Several other examinations of Canadian copyright law touching upon the subject of fair dealing had already been conducted in the years between 1970 and 1984. *See* ECON. COUNCIL OF CAN., REPORT ON INTELLECTUAL AND INDUSTRIAL PROPERTY 133, 138–39, 140–48, 160–67 (1971); A.A. KEYES & C. BRUNET, COPYRIGHT IN CANADA: PROPOSALS FOR A REVISION OF THE LAW 144–76 (1977); D.N. MAGNUSSON & VICTOR NABAN, EXEMPTIONS UNDER THE CANADIAN COPYRIGHT ACT (1984); BARRY TORNO, FAIR DEALING: THE NEED FOR CONCEPTUAL CLARITY ON THE ROAD TO COPYRIGHT REVISION (1981); *see also* SUB-COMM. ON THE REVISION OF COPYRIGHT, STANDING COMM. ON COMMC'N & CULTURE, A CHARTER OF RIGHTS FOR CREATORS (1985) (Can.).

the heels of the new U.S. law, the 1984 White Paper, *From Gutenberg to Telidon*,[86] concluded that the lack of statutory definition in Canada's fair dealing provisions had led to confusion and misunderstanding and proposed that a new Act should

> provide both a definition of fair dealing (to be termed 'fair use') and a prioritized list of factors to be considered in determining whether a particular use of a work is a fair use. . . . "Fair use" will be defined as a use that does not conflict with the normal exploitation of the work or subject matter and does not reasonably prejudice the legitimate interests of the copyright owner.[87]

This recommendation was similar to that of the UK Whitford Committee, with both implicitly referencing the conditions of the Berne Convention's three-step test[88]—using it not as a "straight-jacket" to limit member states' ability to enact exceptions, but rather as an opportunity to accommodate the kinds of uses that ought not to be prohibited in accordance with its own logic.[89] Needless to say, however, these reports share another commonality: neither resulted in a change to the law.

In the United Kingdom, the Whitford recommendations were swiftly set aside in lieu of a narrowly drawn fair dealing exception requiring the satisfaction of a purpose-based test. In Canada, one year after the release of the White Paper, in a report tellingly entitled *A Charter of Rights for Creators*, the Sub-Committee on the Revision of Copyright of the House of Commons recommended against revising Canada's fair dealing provisions, concluding that the present formulation of the concept should simply be retained.[90] The Subcommittee spoke of the "success of the existing fair dealing scheme" and attributed that success to the "sequential scheme" of the provisions, similar to the UK scheme, which requires first that there be infringement; second, that the dealing be for one of five enumerated purposes; and only finally, that the dealing be "fair." Remarkably, as

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[86] GOV'T OF CAN., FROM GUTENBERG TO TELIDON: A WHITE PAPER ON COPYRIGHT (1984).

[87] *Id*. at 39–40. The proposed list of factors was, first, the impact of the use on the copyright owner's economic reward; second, the type of work involved and its purpose; and third, the amount and extent of the taking. *Id.* at 40. Barry Torno also recommended this revision in his report. BARRY TORNO, FAIR DEALING: THE NEED FOR CONCEPTUAL CLARITY ON THE ROAD TO COPYRIGHT REVISION (1981).

[88] Berne Convention, *supra* note 76, art. 9(2) ("[I]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.").

[89] *See* MARTIN SENFTLEBEN, COPYRIGHT LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 96 (2004) (describing Denmark's comments in World Intell. Prop. Org., *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions*, ¶ 489, WIPO Doc. CRNR/DC/102 (Aug. 26, 1997)). *See generally* Christophe Geiger, Daniel J. Gervais & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV. 581 (2014) (showing that the three-step test "can serve as a source of inspiration for national law makers seeking to institute flexible exceptions and limitations").

[90] SUB-COMM. ON THE REVISION OF COPYRIGHT, *supra* note 85, at 63–66; *see* ROBERT G. HOWELL, LINDA VINCENT & MICHAEL D. MANSON, INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS 361–63 (1999).

evidence of the success of this formulation, the Subcommittee cited the paucity of fair dealing litigation in Canada in contrast to the substantial litigation surrounding fair use in the United States, which was attributed to the "uncertainty surrounding the [U.S.] concept."[91]

It is true that there was a distinct lack of fair dealing litigation in Canada at this time. Indeed, there had never been a case in which fair dealing was successfully pled. It was not until 1997 that a Canadian court found a dealing to be fair, but even then, fair dealing was moot as the defendant's use was held not to constitute a substantial reproduction of the plaintiff's work.[92] In fact, it was not until 2004—a long eighty years after the enactment of codified fair dealing in Canada—that a court finally held that an otherwise infringing use was fair dealing and therefore lawful. This was the groundbreaking Supreme Court holding in *CCH* (discussed further below), which fundamentally changed the fate of fair dealing, user rights, and the copyright balance in Canada.[93]

Why the paucity, or indeed the practical absence, of fair dealing jurisprudence should have been construed as an indication of fair dealing's success is unclear. One suspects, however, that it had something to do with the Subcommittee's stated premise, with its absolutist approach to copyright as property: "'Ownership is Ownership is Ownership.' The copyright owner owns the intellectual works in the same sense as a landowner owns land."[94] If the lack of relevant litigation in Canada was rather, as I would suggest, the result of a statutorily restrictive fair dealing concept that so weighed against the rights of the user that it was drastically underused and its existence largely unacknowledged, then the fair dealing provisions were surely anything but successful. Clarity is hardly a virtue if it means only that an essential defense—one that is fundamental to the proper functioning of the system—is clearly unavailable or, at best, not fit to be relied upon.

Nonetheless, it took almost ninety years before there was any significant statutory reform to fair dealing in Canada. In 2012, after several false starts, Canada finally amended the fair dealing provisions to add new purposes to the enumerated list: education, parody, and satire. It declined, however, to make that expanded list nonexhaustive. Instead, a new "user-generated content" exception offered the possibility of an alternative defense for noncommercial transformative uses of protected works in specific contexts, while other specific exceptions were added for private uses, time-shifting, and back-up copies.[95] The enactment of more specific exceptions and additional purposes in a still-closed list, as opposed to turning purpose-limited fair dealing into an inclusive and flexible fair use provision, was cast by the government as an

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[91] SUB-COMM. ON THE REVISION OF COPYRIGHT, *supra* note 85, at 64.

[92] Allen v. Toronto Star Newspapers Ltd., [1997] 36 O.R. 3d 201 (Can. Ont. Gen. Div.) (finding that the reproduction of a photograph in the context of a magazine's front page was fair dealing for the purposes of news reporting); Allen v. Toronto Star Newspapers Ltd., [1995] 26 O.R. 3d 208 (Can. Ont. Gen. Div.) (holding that there was no substantial reproduction of the plaintiff's work).

[93] CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1 S.C.R. 339 (Can.).

[94] SUB-COMM. ON THE REVISION OF COPYRIGHT, *supra* note 85, at 26.

[95] Copyright Act, R.S.C. 1985, c C-42, ss 29.21–29.24 (Can.).

appropriate balance between the interests and demands of competing stakeholders.[96] However, the effect (compounded by the addition of expansive protection against circumvention of technical controls for even fair and lawful purposes)[97] was arguably to give something to users with one hand while taking it away with the other.[98]

Subsequently, the Standing Committee on Industry, Science and Technology, which conducted the mandated five-year review of the amendments, recognized the continued shortcomings of an exhaustively defined fair dealing defense and finally recommended a more wholesale shift toward the open-ended fair use defense. Specifically, it recommended "[t]hat the Government of Canada introduce legislation amending section 29 of the *Copyright Act* to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one."[99] This could be done, it had been assured, simply by adding the words "such as."[100] In its observations, the Committee explained:

> Doing so would increase the flexibility of the Act by allowing a broader range of admissible purposes to emerge from existing ones under the guidance and the supervision of the courts—for example, from criticism to quotation, from parody to pastiche, and from research to informational analysis. Such an amendment could allow new practices to fall under fair dealing, such as "reaction videos" and video game streaming. The Committee emphasizes that the purpose of a dealing is only one of many factors taken into account when determining whether this dealing is indeed fair under section 29 of the Act.[101]

This clear recommendation and convincing rationale have, unfortunately, yet to be acted upon, and there is currently no indication from the government that we should expect such reform any time soon. As I will argue in Part III, however, the time is ripe to revisit and implement this proposed revision to the Canadian Copyright Act. But first, it is important to understand the momentum behind this proposed change and its potential significance in light of the evolution of the fair dealing provisions before Canadian courts.

B. The Judicial Reimagining of User Rights

The exhaustive list of purposes contained in 1911 codification of fair dealing obstructed and stultified the continued evolution and application of fair use in Canada,

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[96] Press Release, Gov't of Can., Government of Canada Proposes Update to Copyright Law: Balanced Approach to Truly Benefit Canadians (June 12, 2008) (providing a backgrounder on reforming the Copyright Act).
[97] Copyright Act, R.S.C. 1985, c C-42, ss 41.1–41.21 (Can.).
[98] *See* Craig, *Locking Out*, *supra* note 8, at 177; *see also* Craig, *Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of "Prescriptive Parallelism*," 13 J. WORLD INTELL. PROP. 503 (2010).
[99] STANDING COMM. ON INDUS., SCI. & TECH., STATUTORY REVIEW OF THE COPYRIGHT ACT 87 (2019) (Recommendation 18).
[100] *See id.* at 67–68.
[101] *Id.* at 69.

just as it had in the United Kingdom.[102] For decades, courts were reluctant to apply the codified fair dealing defense, creating bright-line rules and insisting upon restrictive interpretations of permitted purposes to exclude uses from the benefits of fair dealing.[103] Perhaps the most egregious example, about which I have written at length elsewhere, was the case of *Cie Générale des Etablissement Michelin—Michelin & Cie. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (*Michelin*).[104] Here, the Federal Court refused to recognize that a critical depiction of the Michelin company's logo and mascot, "Bibendum," on trade union literature could qualify as fair dealing. According to the court, the use of this artistic work, pictured poised to stomp on an unsuspecting worker, was not for the purpose of criticism as such, but rather parody—which was not explicitly listed as a permitted fair dealing purpose.[105] Urged to consider the U.S. *Campbell* case, which was so important to the development of transformative use under Section 107,[106] Justice Teitelbaum explained its irrelevance:

> The American case law permitting parody as criticism under the American doctrine of "fair use" is not applicable nor terribly persuasive in the Canadian context of a different legal regime and a longstanding trend to deny parody as an exception. As well, exceptions to copyright infringement should be strictly interpreted. I am not prepared to read in parody as a form of criticism and thus create a new exception.[107]

Another example can be found in the ruling of the Federal Court Trial Division in what later became the ground-breaking *CCH* litigation. At first instance, Justice Gibson refused to regard copies of legal publications made by librarians for their patrons—that is, lawyers conducting research—to have been made for the purpose of research. The

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[102] *See* de Zwart, *supra* note 71, at 90.

[103] *See, e.g.*, Hager v. ECW Press Ltd., [1999] 2 F.C. 287, 304 (Can. Fed. Ct. Tr. Div.) (finding that a biography was not a work of research because "the use contemplated by private study and research is not one in which the copied work is communicated to the public"); Boudreau v. Lin, [1997] 150 D.L.R. 4th 324, 331 (Can. Ont. Gen. Div.) (holding that a university's copying and sale of course materials was not for the purposes of "private study" because the materials were distributed to all members of a class); B.W. Int'l Inc. v. Thomson Can. Ltd., [1996] 137 D.L.R. 4th 398, 409 (Can. Ont. Gen. Div.) (holding that the publication of a leaked work cannot be fair); R. v. James Lorimer & Co., [1984] 1 F.C. 1065, 1075 (Can. C.A.) (finding the defendant's abridgement of a government report to be unfair because the defense requires "some dealing with the work other than simply condensing it into an abridged version"); Zamacois v. Douville, [1943] 2 D.L.R. 257, 284–85 (Can. Ex. Ct.) (denying fair dealing because "a critic cannot, without being guilty of infringement, reproduce in full, without the author's permission, the work which he criticizes").

[104] Cie Generale des Etablissements Michelin—Michelin & Cie. v. Nat'l Auto., Aerospace, Transp. & Gen. Workers Union of Canada (CAW Canada), [1996] 71 C.P.R. 3d 348 (Can. Fed. Ct. Tr. Div.). *See generally* Carys J. Craig, *Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright*, 56 U. TORONTO L.J. 75 (2006).

[105] Parody was added as an enumerated purpose in 2012. The court also found that, even if the dealing had qualified, the critical portrayal of the work was "unfair."

[106] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[107] *Michelin*, [1996] 71 C.P.R. 3d 348.

impediment to that seemingly obvious conclusion was that the librarians physically making the copies for researchers were not the ones conducting the research for which those copies were made. Consistent with the jurisprudence of the time, "the fair dealing exception should be strictly construed."[108]

Only when the case reached the Federal Court of Appeal was fair dealing given a sufficiently broad reading that it could even potentially apply. Writing for the majority, Justice Linden discarded the notion that fair dealing was an exceptional defense that must therefore be narrowly applied.[109] This sudden departure from past practice was propelled by the intervening Supreme Court ruling in *Théberge v. Galerie d'Art du Petit Champlain Inc.*, which was the first in Canada to recognize that copyright's purpose was not only to protect owners, but rather to achieve 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."[110] There, the Court emphasized the "limited nature" of creator's rights and the risks that "[e]xcessive control by holders of copyright . . . may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."[111] This concern, the Court noted, was "reflected in the exceptions to copyright infringement . . . such as fair dealing."[112]

And so, it followed that when *CCH* reached the Supreme Court, it unanimously adopted Justice Linden's more balanced approach to fair dealing, famously writing:

> [T]he fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance . . . , 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 the befits remedial legislation."[113]

The purpose of "research" required "a large and liberal interpretation in order to ensure that users' rights are not unduly constrained."[114] The expanded interpretation allowed the copying activities of librarians who were facilitating others' research to come within the permitted purpose of research after all—not just as an agent of the library patrons, as the Court of Appeal had ruled, but in their own right as actors whose copying activities were "research-based and fair."[115]

As for the fairness assessment, Justice Linden had identified factors for consideration

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[108] CCH Canadian Ltd. v. L. Soc'y of Upper Can., [1999] 179 D.L.R. 4th 609 [175] (Can. Fed. Ct. Tr. Div.).
[109] CCH Canadian Ltd. v. L. Soc'y of Upper Can., [2002] 212 D.L.R. 4th 385 [126] (Can. C.A.).
[110] Théberge v. Galerie d'Art du Petit Champlain Inc., [2002] 2 S.C.R. 336 [30] (Can.).
[111] *Id.* [32].
[112] *Id.* [31]–[32].
[113] CCH Canadian Ltd. v. L. Soc'y of Upper Can., [2004] 1 S.C.R. 339 [48] (citing DAVID VAVER, COPYRIGHT LAW 171 (2000)).
[114] *CCH*, [2004] 1 S.C.R. 339 [51].
[115] *Id.* [63]–[64].

in part "by drawing on . . . the doctrine of fair use in the United States."[116] Offering a similar contextual and multifactorial test, the Court of Appeal, and later the Supreme Court, listed (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Applying these factors to the activities of librarians, their copying was finally held to be "research-based and fair."[117]

In combination, the broad interpretation of the permitted purposes together with the enumeration of this multifactor test to assess fairness brought Canada's fair dealing doctrine considerably closer to its U.S. fair use counterpart. But perhaps most importantly, by reframing what had traditionally been regarded as merely an "exception" as a positive "right" of the user, fair dealing was finally recognized as playing an integral role in the overall copyright balance.[118]

Subsequently, however, Canada's tariff-setting Copyright Board and lower courts continued to resist this principled shift. For example, in *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency*, the Copyright Board and Federal Court of Appeal still ascribed such a narrow meaning to the purpose of "research and private study" that they refused to include within it the making of multiple copies for classroom use.[119] Notably, classroom copies are a core and explicit example of "fair use" in Section 107 of the 1976 U.S. Copyright Act. Under the Canadian fair dealing provisions, however, there were two apparent obstacles to reaching this conclusion. First, classroom copies are made by teachers who are not themselves studying; their actual purpose was rather found to be "instruction," and so not a fair one. (*CCH* was distinguished because students, unlike legal researchers, do not request these copies.) Second, in a classroom setting, students' study was considered "non-private."

When *Alberta* eventually reached the Supreme Court in 2012, as part of the so-called "copyright pentalogy,"[120] the Justices reinstated the *CCH* logic, refusing to parse the purposes of end-users and those who facilitated their dealings with no alternative or ulterior motive; teachers making classroom copies do not have *separate* nonqualifying

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[116] *Id.* [53]. He also drew on the UK case of *Hubbard v. Vosper*, explaining the fairness test as developed in UK courts:

> It is impossible to define what is "fair dealing." It must be a question of degree. You must consider first the number and extent of the quotations and extracts. . . . Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. . . . But, after all is said and done, it must be a matter of impression. . . . The tribunal of fact must decide.

[1972] 2 Q.B. 84 (Denning, L.J.).

[117] *CCH*, [2004] 1 S.C.R. 339 [73].

[118] For more discussion of the significance (and some of the risks) of this rights-based frame, *see* Craig, *Globalizing User Rights*, *supra* note 8.

[119] Alberta (Minister of Educ.) v. Canadian Copyright Licensing Agency, 2010 F.C.A. 198 (Can. C.A.).

[120] *See generally* THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW (Michael Geist ed., 2013) [hereinafter COPYRIGHT PENTALOGY].

"instructional" purposes but rather share a "symbiotic purpose" with their students.[121] Moreover, when liberally construed, "private" study does not require that students view the copyrighted works "in splendid isolation."[122] Unrequested copies made for classroom use could qualify.

In another "pentalogy" case, *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, a liberal interpretation of research was sufficiently expansive to include the streaming of brief track "previews" by online music providers to their customers. Although the providers' ultimate purpose was commercial in nature, the purpose of providing previews was "primarily to facilitate the research purposes of the consumers" who were seeking to identify musical works for purchase.[123] When it was objected that this was not a transformative purpose that fosters creativity, the Court explained: "'[R]esearch' . . . can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest."[124] Recognizing the difference between the Canadian fair dealing and U.S. fair use doctrines, the Court wrote:

> Unlike the American approach of proceeding straight to the fairness assessment, we do not engage in the fairness analysis in Canada until we are satisfied that the dealing is for one of the allowable purposes enumerated in the *Copyright Act*. . . .
> In mandating a generous interpretation of the fair dealing purposes, including "research", the Court in *CCH* created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair.[125]

In reaching its conclusion, the Court recognized that "users' rights are an essential part of furthering the public interest objectives of the Copyright Act," and the concept of fair dealing is "one of the tools employed to achieve the proper balance between protection and access."[126]

Michael Geist has argued quite convincingly, but also optimistically, that the cumulative effect of adding parody, satire, and education to the list of permitted purposes, together with the Supreme Court's expansive interpretation of those purposes and low threshold for meeting them, is that "the first stage has become so easy to meet that Canada has a fair use provision in everything but name only."[127] The clear signal from the Supreme Court, he notes, is that "potential fair dealing uses are best assessed through a

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[121] Alberta (Educ.) v. Canadian Copyright Licensing Agency (Access Copyright), [2012] 2 S.C.R. 345 [23] (Can.).
[122] *Id.* [27].
[123] Soc'y of Composers, Authors & Music Publishers of Can. (SOCAN) v. Bell Can., [2012] 2 S.C.R. 326 [24] (Can.).
[124] *Id.* [22].
[125] *SOCAN*, [2012] 2 S.C.R. 326 [26]–[27].
[126] *Id.* [11].
[127] Michael Geist, *Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use*, *in* COPYRIGHT PENTALOGY, *supra* note 120, at 157, 176 [hereinafter Geist, *Fairness Found*].

full fairness analysis."[128] If this is the effect of this confluence of factors, then perhaps Geist is right: the debate in Canada over whether Canada's fair dealing provisions should be amended to replicate Section 107 of the U.S. Copyright Act is now moot—our reinterpreted fair dealing approach is essentially the same.[129]

While I would like to imagine this so, there is cause for skepticism.

III. THE FINAL PUSH FOR FAIR USE

In this Part, I offer some reasons for my ongoing misgivings about the fair dealing status quo, which combine to underscore the continued need to finally put fair use on the books. I also explain why, even after all this time has passed, there is no time like the present to do so.

A. An Ongoing Need for Statutory Reform

1. The Continuing Statutory Constraints of Fair Dealing

The first thing to emphasize is simply that the statutory constraints on fair dealing continue. What we saw in the 2012 reforms was a piecemeal expansion of Canada's narrowly constructed copyright exceptions, adding categories of potentially permitted uses that should already have been encompassed in the existing fair dealing purposes and arguably already were. (Parody and satire should always have qualified as criticism and review, while educational uses typically either involve or facilitate research and private study, properly construed). Indeed, as I argued at the time, the need to expressly add these specific exceptions spoke more to the inherent, and continuing, shortcomings of Canada's restrictive approach to fair dealing (in contrast to U.S. fair use) and its delayed development of exceptions in the digital context than it did to any fresh statutory instantiation of broad and flexible user rights.[130]

An augmented but still-closed list of categories indisputably retains the hurdle of the purpose threshold, however low it should be, and is therefore unlikely to create sufficient flexibility to seamlessly embrace the range of appropriate fair uses that may arise.[131]

Moreover, by cabining user-generated content into a separate and proviso-laden provision, the 2012 reforms effectively confined lawful transformative uses to amateur and noncommercial contexts (unless their purpose otherwise fits within fair dealing).[132] Whereas creative and transformative re-uses, whether commercial or not, are archetypal fair uses in the United States—as they were in nineteenth-century UK case law—any commercial purpose or adverse economic effect can leave them potentially unshielded from copyright's overreach in Canada. Works that use and build on existing works for

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[128] *Id.* at 178.
[129] *Id.* at 180.
[130] Craig, *Locking Out*, *supra* note 8.
[131] *Cf.* LAURA J. MURRAY & SAMUEL E. TROSOW, CANADIAN COPYRIGHT LAW: A CITIZEN'S GUIDE 204 (2007).
[132] Copyright Act, R.S.C. 1985, c C-42, ss 29.21 (Can.). *See generally* Teresa Scassa, *Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law*, *in* COPYRIGHT PENTALOGY, *supra* note 119, at 431.

aesthetic or expressive reasons that are not primarily criticism or review—for example, appropriation art or fan fiction—may be left without a defense solely on the basis that their author sells or licenses them for value.

There is, of course, another pressing example: whereas the use of works for informational analysis or TDM for training artificial intelligence ("AI") models may be a transformative use and therefore fair use in the United States,[133] in Canada such uses will likely have to fall within a permitted purpose if they are to be even eligible for a possible fair dealing defense. Although I have argued that this use could and should qualify as research, there is a clear risk in the Canadian context that the commercial or other purposes of the AI developer, in relation to the AI model and its ultimate uses or potential outputs, will subvert that assessment of purpose at the training or input stage, pushing fair dealing off the table.

Again, the way for Canada to ensure that fair, productive, and socially beneficial uses are not excluded from fair dealing at that first purpose-specific step is to adopt an open-ended fair dealing provision like Section 107 of the U.S. Copyright Act.

2. Internal Resistance to the Judicial Reframing

A second reason to doubt whether Canadian fair dealing is now essentially equivalent to fair use is the limited effectiveness of this jurisprudential interpretive shift.

We continue to see administrative bodies and lower or provincial courts apply a more stringent reading of the fair dealing provisions than the Supreme Court jurisprudence would support. This produces a reasonable and widely shared sense—among users, facilitators, and their risk-averse institutions[134]—that the broad and balanced fair dealing defense exemplified by *CCH* is available only to those whose pockets are sufficiently deep (and their purposes sufficiently pressing) to pursue their user rights all the way to the country's apex court. Indeed, it is striking that the Supreme Court repeatedly had to reiterate and reapply its reasoning as a corrective to lower courts' reluctance to find fair dealing.

A further concern is that decisions to deny fair dealing continue to focus on the purpose of the copier even where they purport to liberally construe the permitted statutory purposes at step one. Decisionmakers simply proceed to rigorously assess the users' "genuine" or "real" purpose in the fairness analysis to find that it does not qualify after all, rendering the dealing unfair. This stringent purpose assessment at the fairness stage is, I suggest, still attributable to the two-stage fair dealing test—the rationale is apparently to minimize duplication when applying the first fairness factor (the purpose of the dealing); the effect, however, has been to reproduce a restrictive approach to purpose and thereby limit the availability of the fair dealing defense.

In both respects, *York University v. Canadian Copyright Licensing Agency (Access*

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[133] *Kadrey v. Meta Platforms, Inc*., 788 F. Supp. 3d 1026 (N.D. Cal. 2025); Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007 (N.D. Cal. 2025); U.S. COPYRIGHT OFF., *supra* note 5.

[134] *See, e.g.*, Amanda Wakaruk, Jane Secker, & Chris Morrison, *Copyright Anxiety and Legal Chill in Higher Education: A Comparison of Canada and the United Kingdom (UK)*, 8 J. COPYRIGHT IN EDUC. & LIBRSHIP. (2025), https://journals.ku.edu/jcel/article/view/23058.

Copyright) is a case in point.[135] It concerned the copying practices of York University, which had refused to agree to a costly collective licensing arrangement. While the outcome turned on whether a tariff could be mandatorily imposed (it could not),[136] a restrictive approach to fair dealing tainted the lengthy litigation at every turn. All parties agreed that the purpose of the dealing was education and therefore "allowable" post-2012, but the Federal Court then turned to the University's real motivation and found that it was "primarily to obtain for free that which it had previously paid for."[137] While educating students was one goal, another was "to keep enrolment up by keeping student costs down and to use whatever savings there may be in other parts of the university's operation."[138] The Federal Court of Appeal upheld this conclusion but went further, finding that the lower court had been wrong even to consider the educational purpose in the fairness assessment.[139] It was not until the case reached the Supreme Court (at an enormous expense to the publicly funded university at which I work, I should add) that the corrective was issued.

Although the fair dealing issue was by now moot, the Court went out of its way to identify "some significant jurisprudential problems with those aspects of [the lower courts'] judgments that warrant comment."[140] Specifically, as Justice Abella explained, "[b]y anchoring the analysis in the institutional nature of the copying and York's purported commercial purpose, the nature of fair dealing as a user's right was overlooked and the fairness assessment was over before it began."[141] Correcting these errors, the Court agreed with Geist that "[t]he core of fair dealing is fairness—fairness to the copyright owner in setting limits on the use of their work without permission and fairness to users to ensure that fair dealing rights can be exercised without unnecessarily restrictive limitations."[142]

But of course, not all litigants have the will or means to pursue their user rights to the Supreme Court. In *United Airlines, Inc. v. Cooperstock*, the defendant was a university professor and dissatisfied airline customer who opted to settle his case after a disastrous ruling at the Federal Court.[143] The court had the opportunity to revisit and correct the unfortunate *Michelin* ruling in light of intervening developments—that is, *CCH*, the "pentalogy" cases, and the explicit addition of "parody" to the permitted purposes in

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[135] York Univ. v. Canadian Copyright Licensing Agency (Access Copyright), [2021] S.C.R. 734 (Can.).
[136] *Id.* [76].
[137] Canadian Copyright Licensing Agency v. York University, 2017 F.C. 669 [272] (Can. Fed. Ct.).
[138] *Id.* [273].
[139] The only palpable and overriding error was "in importing education as an 'allowable purpose' into its analysis of the 'goal' of the dealing." York Univ. v. Canadian Copyright Licensing Agency, 2020 F.C.A. 77 [240]–[241] (Can. C.A.).
[140] *York Univ.*, [2021] S.C.R. 734 [81].
[141] *Id.* [89].
[142] *Id.* [95] (quoting Geist, *Fairness Found*, *supra* note 127, at 181).
[143] United Airlines, Inc. v. Cooperstock, [2018] 1 F.C.R. 188 (Can. Fed. Ct.); *see* Carys J. Craig, *Gripe Sites and Trademark User Rights: Lessons from Canada's Cooperstock Case*, *in* CHARTING LIMITATIONS ON TRADEMARK RIGHTS (Barton Beebe & Haochen Sun eds., 2022) (critiquing the case with a focus on trademark law and free expression).

Section 29. The court refused to do so. The case similarly involved the parodic use of a corporate logo as an expressive vehicle to criticize a company (here, UNITED was turned into UNTIED), but the court once again found infringement of the company's artistic work and that fair dealing could not save the defendant. The 2012 addition of "parody" as a permitted purpose meant that the use passed the first purpose hurdle, meeting the definition borrowed from the European Court of Justice—that is, "the evocation of an existing work while exhibiting noticeable differences and the expression of mockery or humour."[144] However, Justice Phelan immediately proceeded to observe that the defendant had no genuine "intent for humour," thus employing a narrowed reading of an already narrow definition. Rather, the defendant had intended "to embarrass and punish United for its perceived wrongdoings."[145] The use was therefore not fair dealing because his "*real* purpose or motive in appropriating the copyrighted works was to defame or punish the Plaintiff, not to engage in parody."[146] It was not a parody after all! And so, it was not fair dealing.

While Canadians may celebrate the significance of *CCH* and its generous reinterpretation of the previously restrictive fair dealing provisions, it is thus important to acknowledge that decisionmakers less receptive to the concept still have plenty of scope, when applying these provisions, to deny fair dealing in light of the user's purpose—either because it is not "allowable" or because the allowable purpose is not the "real" one. Either way, and unless or until the Supreme Court says otherwise in any particular instance, a large and liberal fair dealing doctrine may seem to sit on disappearing horizon. As I have written previously, "the spirit of users' rights is undermined by a fair dealing definition restricted to specific purposes and subject to additional limitations. After all, it is the definition of fair dealing that will determine if the user is exercising a right or infringing one."[147]

Perhaps the larger point, then, is that there is and remains a fundamental and principled distinction between open-ended fair use and purpose-specific fair dealing, however broadly construed the latter is supposed to be.

Fair dealing constrains and excludes fair uses by definition; it subjects fair users to an assessment of their purpose that is, in itself, enough to preclude them from benefitting from the defense. We can insist upon conceptually recharacterizing fair dealing as a positive user right and an integral part of the copyright system in our legal imagination, but the prior purpose proviso both reflects and sustains the primacy of the copyright holder's right to exclude. The evident resistance we see to the analytical reframing and normative rehabilitation of fair dealing in Canadian courts and institutions, and among copyright owners and user communities, confirms this concern. The difference between fair dealing and fair use is not merely semantic—it is both practical and political.

3. The Precarity of Fair Dealing in the Political Push and Pull

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[144] *United Airlines*, [2018] 1 F.C.R. 188 [119] (citing Case C-201/13, Deckmyn v. Vandersteen, ECLI:EU:C:2014:2132 (Sept. 3, 2014)).
[145] *United Airlines*, [2018] 1 F.C.R. 188 [124].
[146] *Id.* [125].
[147] Craig, *Changing Face*, *supra* note 8, at 455.

This brings me to a third set of considerations underscoring the need for statutory reform to complete Canada's move to fair use. Broadly speaking, these considerations relate to the precariousness of our current "hybrid" fair dealing position, the various costs involved in safeguarding and sustaining it in the face of opposition and resistance, and the potential benefits that are lost by stopping here.

As things stand, the tension between expansive user rights and balancing rhetoric and the restrictive statutory scope for fair dealing is fueling a variety of costly and counterproductive practices and processes. Of course, there are costs associated with the reluctance of users and their intermediaries to rely upon fair dealing and with the resultant chill on beneficial uses that this produces. But there is also a cost to repeated government consultations and reports that cover the same territory and arrive at similar conclusions every few years, picking at the fair dealing provisions either directly or in connection with related policy issues. Recently, as uncertainty over the legal status of TDM and AI training has come to the fore, these costs have become increasingly apparent on both counts. There is also a cost to the attendant lobbying efforts of various (self-)interested stakeholders—efforts that, in turn, demand counterefforts by already stretched public institutions, noncommercial actors, and public interest advocates. The precarious position of an internally conflicted and externally contested fair dealing defense invites this unhappy push and pull. It is hard to fathom why we would continue to bear the costs and burdens associated with revisiting a closed list of fair dealing purposes every time lobbyists mobilize, stakes shift, or new technological uses emerge. The enactment of a flexible fair use provision would offer a principled alternative to this wasteful pattern.

I have written elsewhere about the disappointing trajectory of the Canadian government's multiple public consultations concerning fair dealing and other potential exceptions for informational analysis or TDM.[148] In short, as technological capabilities expanded and economic concerns compounded, the government's policy proposals shifted with each iterative report. Having initially recommended adoption of open fair use and a broad informational analysis exception in the first 2019 report,[149] the latest consultation paper assumes broad copyright controls and proposes limited exceptions with onerous conditions and implausible collective licensing schemes.[150]

Another example that merits attention is the fraught ongoing debate around educational fair dealing. As we have seen, *Alberta* was decided on the pre-2012 purposes as fair dealing for private study or research. Nonetheless, the committee conducting the Copyright Act review heard from numerous stakeholders alleging rampant infringement by educational institutions and requesting either the removal of "education" from fair dealing or an amendment "to clarify that fair dealing does not apply to educational

[148] *See* Carys J. Craig, *The AI-Copyright Trap*, 100 CHI.-KENT L. REV. 107, 112–17 (2025).
[149] STANDING COMM. ON INDUS., SCI. & TECH., *supra* note 99.
[150] *Consultation on Copyright in the Age of Generative Artificial Intelligence*, GOV'T CAN. (June 19, 2024), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/consultation-copyright-age-generative-artificial-intelligence.

institutions when the work is commercially available."[151] Meanwhile, higher education stakeholders typically recommended maintaining the status quo, rather than expanding fair dealing. Experts from the sector noted that "after intense advocacy efforts" leading up to 2012 and the opt-out of licensing litigated in *York University*, "it was ten years' hard work, so we rested."[152] Put differently, this apparent satisfaction with the status quo was likely a consequence of consultation and advocacy fatigue in the sector.

The Committee ultimately recommended ongoing review and government facilitation of consensus building between the educational sector and the copyright collectives "towards the future of fair dealing in Canada."[153] This was reasonably interpreted as "a warning to educational institutions," revealing the Committee's "ambivalence . . . regarding the application of fair dealing within the educational environment."[154] At the same time, a controversial parallel report of the Standing Committee on Canadian Heritage concluded that the government should indeed amend the Copyright Act to ensure that commercial availability precludes educational fair dealing.[155] In 2022, a passage in the Canadian Government's Budget Speech once again raised red flags for educational fair dealing:

> The government is committed to ensuring that the Copyright Act protects all creators and copyright holders. As such, the government will . . . work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users.[156]

Tellingly, in this political reframing, copyright's task is once again the protection of only creators and copyright holders; fairness is invoked in connection to only their remuneration, and the interests of copyright users are relegated to efficiency concerns and consigned to the marketplace.

Lobbying against Canada's fair dealing stance has not been confined to Canadian stakeholders. For example, the International Authors Forum, having intervened in the case, expressed disappointment about the Supreme Court's *York University* ruling,

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[151] STANDING COMM. ON INDUS., SCI. & TECH., *supra* note 99, at 55–65. For an excellent analysis and review of the submission, see Jennifer Zerkee, Stephanie Savage & Jentry Campbell, *Canada's Copyright Act Review: Implications for Fair Dealing and Higher Education*, 5 J. COPYRIGHT IN EDUC. & LIBRSHIP. (2022), https://journals.ku.edu/jcel/article/view/15513.

[152] *See* Zerkee, Savage & Campbell, *supra* note 151, at 15.

[153] STANDING COMM. ON INDUS., SCI. & TECH., *supra* note 99, at 65.

[154] *Id.* at 18.

[155] HOUSE OF COMMONS, SHIFTING PARADIGMS: REPORT OF THE STANDING COMMITTEE ON CANADIAN HERITAGE 43 (2019), https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf (Recommendation 18); *see also* Carys Craig, *Meanwhile, in Canada . . . a Surprisingly Sensible Copyright Review*, 42 EUR. INTELL. PROP. REV. 184 (2020) (explaining the relative significance of this report and STANDING COMM. ON INDUS., SCI. & TECH., *supra* note 99).

[156] GOV'T OF CAN., BUDGET 2022: A PLAN TO GROW OUR ECONOMY AND MAKE LIFE MORE AFFORDABLE 273 (2022).

promising to support the "fight against such unfair situations when Canadian creators are denied payment."[157] In the review of Canada's Copyright Act, the group pointed to the "ongoing and unregulated extension of the legal principle of 'fair dealing' to cover educational uses" and "call[ed] for the fair dealing principle in Canadian education to be kept in check."[158] The International Intellectual Property Alliance has repeatedly urged the U.S. government to address Canada's "urgent problems . . . including the fair-dealing exception for education."[159]

Such international lobbying efforts can produce impactful threats and protestations by foreign states and valuable trading partners—most notably, the United States. The *2026 Special 301 Report* of the U.S. Trade Representative continued to list Canada on its "watch list," explaining:

> The United States remains deeply concerned by continued stakeholder reports that broad interpretation of the fair dealing exception for the purpose of education, which was added to the copyright law in 2012, as well as the relevant case law on the subject, has significantly damaged the market for educational authors and publishers.[160]

Put another way, fair use for me but not for thee! While one might assume the hypocrisy is obvious, it is nonetheless important to recognize the economic and political vulnerability of the rights and interests that fair dealing precariously protects. If Canada is committed to a balanced copyright system, statutory reform to enact a U.S.-style fair use defense could help shore up the rights of users in a tumultuous time. Rather than leaving ourselves open to persistent nitpicking and politicking over the availability and scope of educational fair dealing, Canada should simply bring its fair dealing provision into alignment with the U.S. law of fair use.

As we look beyond the Canadian borders, a final point bears mention. In the absence of statutory fair dealing reform, Canada cannot easily provide a model for other countries to follow, nor can it support other nations attempting to migrate to a fair use system under immense economic and political pressures.[161] When it comes to international

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[157] *Statement by TWUC: Parliament Must End Canada's Copyright Crisis*, INT'L AUTHORS F. (Aug. 6, 2021), https://internationalauthors.org/news/iaf/statement-by-twuc-parliament-must-end-canadas-copyright-crisis.

[158] Letter from Int'l Authors F. to Dan Ruimy MP, Standing Comm. on Indus., Sci. & Tech. (Mar. 7, 2018), https://internationalauthors.org/wp-content/uploads/2018/03/Letter-from-IAF-to-Canada-CIST-Committee-07-03-2018.pdf.

[159] INT'L INTELL. PROP. ALL., 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 119–30 (2024).

[160] OFF. OF THE U.S. TRADE REPRESENTATIVE, 2026 SPECIAL 301 REPORT 80 (2026).

[161] Consider, for example, the uphill battle still being fought in South Africa over the constitutionality of its stalled Copyright Amendment Bill, which was poised to implement, inter alia, a flexible hybrid fair use provision and generous educational exceptions. *See Ex parte* President of the Republic of South Africa: In re Constitutionality of the Copyright Amendment Bill and the Performers' Protection Amendment Bill [2026] ZACC 26 (June 26, 2026) (S. Afr.); *see also* Sanya Samtani, *The South African Copyright Amendment Bill at the Constitutional Court: Notes from the Presidential Referral of the Bill (Part I)*, INFOJUSTICE.ORG

norm-setting, the Supreme Court of Canada's jurisprudence may be cited before foreign courts as a persuasive authority for an expansive reinterpretation of fair dealing and user rights, but its international impact is necessarily limited, and its policy implications may appear ambiguous or idiosyncratic from afar. The public benefits of flexible fair use are not, however, jurisdictionally specific.[162] To the extent that Canada is committed to supporting a fair and balanced international copyright system—one that protects owner and user rights and advances the public interest at home and around the world—it cannot afford to rest on its laurels until its statutorily restrictive fair dealing provisions are amended to provide for fair use on their face.

B. A Perfect Storm for Fair Dealing Reform?

While this change has been a long time coming—with repeated recommendations for U.S. fair use–inspired reform falling by the wayside over the past century, I want to conclude by emphasizing that now is the time! We are entering a "perfect storm" for fair dealing reform: three dynamic disturbances in the copyright environment, if you will, are coalescing—with the combined power to disrupt the ecosystem and unsettle the fair dealing status quo.

First, we have the sudden arrival and rapid rise of AI, creating a massive technological disruption that has fixed all eyes on copyright law. Astoundingly, in the context of an escalating, economically significant, and geopolitically fraught AI arms race, we are still waiting to see if an activity essential to the development of AI technologies is even lawful under copyright law. Pressing questions around the potential availability of fair use, fair dealing, or a specific TDM exception continue to be examined, debated, and litigated around the world.[163] Opinions differ widely, but it is hard

(May 27, 2025), https://infojustice.org/archives/46418 (offering a critical background for understanding the case). International lobbying and trade pressures certainly played a role in obstructing South Africa's reform efforts. *See, e.g.*, Letter from Int'l Intel. Prop. All. to Erland Herfindahl, Deputy Assistant U.S. Trade Representative for the Generalized System of Preferences (Apr. 18, 2019), https://infojustice.org/wp-content/uploads/2019/11/IIPA-South-Africa-GSP-Review-Petition-2019.pdf (requesting a review of South Africa's intellectual property practices in the 2019 Generalized System of Preferences Review).

[162] *See* Jonathan Band & Jonathan Gerafi, The Fair Use/Fair Dealing Handbook 1 (2013), http://ssrn.com/abstract=2333863. *See generally* Aditya Gupta & Sean Flynn, *Justification for an Instrument on Copyright Limitations and Exceptions* (Oct. 22, 2025), https://knowledgegov.org/justifications-for-an-instrument-on-copyright-limitations-and-exceptions.

[163] *See* Sean M. Fiil-Flynn et al., *Legal Reform to Enhance Global Text and Data Mining Research*, 378 Sci. 951–53 (2022); *see also* Sean Flynn, Luca Schirru, Michael Palmedo & Andrés Izquierdo. *Research Exceptions in Comparative Copyright* (Prog. on Info. Just. & Intell. Prop. & Tech, L. & Sec. Prog., Am. Univ. Wash. Coll. of L., Research Paper No. 75, 2022). For a comprehensive tally of copyright-AI litigation in the United States and around the world, see *Category: Map of AI Copyright Lawsuits*, ChatGPT Is Eating the World, https://chatgptiseatingtheworld.com/category/map-of-ai-copyright-lawsuits (last visited Aug. 10, 2026).

to deny that a jurisdiction's prohibitions and legal restrictions on use of copyrighted works for training purposes will have enormous implications for its role and ability to compete in the AI economy. With the United States leading the AI charge, the scope and flexibility of its transformative use doctrine looks like a vital ingredient in the recipe for AI research and innovation. Alas, fair dealing for library photocopies or kindergarten classrooms could never have attracted such attention.

Second, but relatedly, we find ourselves at a moment when the interests of some major capitalist forces are momentarily aligned with those of traditional copyright user-rights groups. This alignment is superficial, to be sure, but an eye to the political economy of copyright reveals a strategic opportunity. If powerful technology companies hope to benefit from expansive freedoms to use copyrighted works for their AI models, perhaps rather than demanding that these companies obtain permission and pay for training data—a move that could ultimately strengthen corporate control and backfire against the public interest[164]—we could instead piggyback on their self-interested efforts and harness that political power to shore up user rights and safeguard the public domain.[165]

Finally, we are witnessing massive disruptions to the global and international trade regime wrought by U.S. President Trump's tariff (and other) wars. As suggested above and evidenced by Canada's repeated inclusion on the Special 301 Watch List, U.S. objections to the expansion of fair dealing have frequently given pause to Canadian lawmakers concerned with negotiating international trade agreements that extend well beyond intellectual property to other vital industries like dairy and lumber. The United States has used similar trade pressure tactics against other nations seeking to rebalance their copyright system in ways that will support domestic interests and human rights, but perhaps not redound to the benefit of the U.S. copyright industries. While U.S. objections may once have held great weight, particularly in the lead-up to the renegotiation of an international agreement like the Canada–United States–Mexico Agreement or the United States–Mexico–Canada Agreement,[166] the new reality is that there is little point in planning around such U.S. preferences. Indeed, now would be an apt time to push

[164] *See* Craig, *The AI-Copyright Trap*, *supra* note 148.
[165] *See* Carys J. Craig, *Data Is Nothing Like Oil: Dusting Off Copyright's Originality Doctrine for the AI Age*, 57 INT'L REV. INTELL. PROP. & COMPETITION L. 435 (2026).
[166] Agreement Between the United States, the United Mexican States, and Canada, Can.–Mex.–U.S., Nov. 30, 2018, https://ustr.gov/trade-agreements/free-tradeagreements/united-states-mexico-canada-agreement/agreement-between.

back.[167] Canada should at least take advantage of this present state of flux in U.S.-Canadian relations to implement domestic copyright reforms that advance its own policy objectives.

CONCLUSION

I hope that readers will forgive me for beginning my appeal for Canadian fair dealing reform in the year 1710! I also hope that the above discussion adequately conveys the idea that fair use has been an essential part of copyright law from its inception and must continue as such. This was self-evident in the nineteenth century but was challenged in the twentieth century, by the United Kingdom's increasingly individualistic and proprietorial copyright ethic. While Canada and other Commonwealth nations had no choice but to follow suit, the United States, with an unapologetic utilitarianism rooted in the Progress Clause in its Constitution, was the exception that proved the rule—and has now provided the blueprint for modern, post-colonial copyright reform. In 1976, the United States took the extraordinary step of successfully codifying an equitable, contextual, multifactorial, and open-ended fair use doctrine in a manner that would permit its continued and principled evolution. Canada and other remaining "fair dealing" nations, for whom user rights were cabined within specific exceptions and purpose-limited fair dealing provisions, should now insist upon their freedom to follow the U.S. example. A liberal judicial reinterpretation is to be commended, of course, but its political ambiguity and precarity ensure that it falls short of what is required.

For the sake of completeness, my suggestion is that Canadian lawmakers should revise the Copyright Act to include the following, or something like it:

> 29(1) Fair use for purposes such as research, private study, education, parody, satire, criticism, review, informational analysis, and news reporting, does not infringe copyright.
> (2) In determining whether the use made in any particular case is fair, the factors to be considered shall include—
> (a) the purpose of the use,
> (b) the character of the use,
> (c) the amount of the use,
> (d) the nature of the work or other subject matter,
> (e) available alternatives to the use,[168]

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[167] *See* JEREMY DE BEER, INTELLECTUAL PROPERTY AMID TRADE TENSIONS: SCENARIOS AND STRATEGIES (2026), https://www.cigionline.org/publications/intellectual-property-amid-trade-tensions; Jeremy de Beer, *The United States' Biggest Vulnerability in the Trade War: Its Knowledge Economy*, WORLD POL. REV. (Aug. 22, 2025), https://www.worldpoliticsreview.com/us-trade-war-intellectual-property; *see also* Cory Doctorow, *Canada Shouldn't Retaliate with US Tariffs*, MEDIUM (Jan. 15, 2025), https://doctorow.medium.com/canada-shouldnt-retaliate-with-us-tariffs-a0e32042fec8; Michael Geist, *The Law Bytes Podcast, Episode 226: Richard Gold on Why Canada Should Target U.S. Patents to Help Counter Tariff Trade Pressure*, MICHAEL GEIST (Feb. 10, 2025), https://www.michaelgeist.ca/2025/02 law-bytes-podcast-episode-226.

[168] This is the only factor that is not explicitly within the Section 107 factors but is included for

(f) the effect of the use on the work or other subject matter, and
(g) the extent to which attribution was made where reasonable in the circumstances.

Following the example set by Section 107 of the 1976 U.S. Copyright Act, the proposed amendment codifies a flexible, multifactorial, and context-specific fair use test, fully shifting the analysis to the determination of fairness. The fairness factors are simply those already articulated by the Supreme Court of Canada, although they fold in, where reasonable, consideration of attribution (which is currently a requirement for fair dealing for criticism, review, and news reporting).[169] Of course, the addition of the words "such as" renders the list of purposes illustrative, rather than exhaustive. Also, in accordance with the 2019 Copyright Act Review recommendation, the proposed revision adds "informational analysis" to the now illustrative list, creating more explicit space for fair TDM activities and AI training using copyrighted works.[170]

The proposed shift to the term "fair use" is arguably semantic and unnecessary; lawmakers could consider retaining "fair dealing" if the terminology threatens to become a political dealbreaker. After all, it is the words "such as" that make the legal difference, whatever the doctrine is called.[171] However, a shift to the language of "fair use" is perhaps more accurate given the departure from a closed list of permitted purposes. It is also significant insofar as it evokes the original equitable principle developed by courts while also communicating its consistency with the current U.S. approach. One hopes that this would shield Canada from ill-founded accusations about a failure to comply with international copyright law and the three-step test, aligning it with other nations who have made this move or plan to.[172]

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consistency with the Supreme Court of Canada's jurisprudence. It requires consideration of whether "there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work," or whether "the dealing was reasonably necessary to achieve the ultimate purpose." CCH Canadian Ltd. v. L. Soc'y of Upper Can., [2004] 1 S.C.R. 339 [5] (Can.). Importantly, "[t]he availability of a licence is not relevant to deciding whether a dealing has been fair." *Id.* [70]. This is for the good reason that fair dealing requires no license.

[169] Copyright Act, R.S.C. 1985, c C-42, ss 29.1(a)–(b), 29.2(a)–(b).

[170] *See* Letter from Carys Craig et al. to Minister of Innovation, Sci. & Indus. & Minister of Canadian Heritage (Sept. 16, 2021), https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1226&context=reports (providing a joint submission of intellectual property scholars in response to the Consultation on a Modern Copyright Framework for Artificial Intelligence).

[171] *See* Yu, *Global Paradigm*, *supra* note 39, at 156 ("[T]he semantic debate on whether a jurisdiction has fair dealing or fair use is simply unhelpful. . . . [A] better approach is to focus on whether the list of copyright limitations and exceptions is open or closed."); *see also Ex parte* President of the Republic of South Africa: In re Constitutionality of the Copyright Amendment Bill and the Performers' Protection Amendment Bill [2026] ZACC 26 [114] (observing that "fair use and fair dealing are not to be seen as completely distinct simply because of their terminology"); Peter K. Yu, *Customizing Fair Use Transplants*, Laws, Mar. 2018, no. 9 (2018), http://www.mdpi.com/2075-471X/7/1/9. *See generally* Emily Hudson, Drafting Copyright Exceptions: From the Law in Books to the Law in Action (2020).

[172] *See* Niva Elkin-Koren & Neil Weinstock Netanel, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, 72 Hastings L.J. 1121 (2021); Pamela Samuelson & Kathryn Hashimoto, *Is the U.S. Fair Use Doctrine Compatible with*

Section 107 of the 1976 U.S. Copyright Act has, by now, proved its worth as a flexible, open, and general exception to exclusive copyright control. It successfully codified a dynamic principle without crystallizing it in rigid form. In doing so, it preserved essential breathing space in a copyright system that otherwise threatens to stifle productive, innovative, and socially beneficial downstream uses and, thereby, to obstruct its own policy goals. The 1911 codification of fair dealing, in contrast, crystallized and constricted its evolution, to the detriment of creators, users, and the public in the United Kingdom and, by imperial extension, its colonies. The Supreme Court of Canada has made valiant efforts to breathe new life into the unforgiving fair dealing defense that was its colonial inheritance, but this hybrid reimagining remains vulnerable and demands constant vigilance to sustain in the face of relentless economic and political pressures. As the United States celebrates fifty years since its principled and prescient codification of fair use, it is time for Canadians to stop forgiving fair dealing for its obvious flaws and finally follow suit.

Berne and TRIPS Obligations?, *in* PLURALISM OR UNIVERSALISM IN INTERNATIONAL COPYRIGHT LAW (Tatiana Eleni Synodinou ed., 2019); *see also Ex parte* President of the Republic of South Africa: In re Constitutionality of the Copyright Amendment Bill and the Performers' Protection Amendment Bill [2026] ZACC 26 [79]–[108] (dismissing arguments that fair use provisions contravene the three-step test).