

FAIR DEALING UNDER THE CANADIAN COPYRIGHT ACT

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The Canadian *Copyright Act* (R.S.C. 1985, c. C-42) contains numerous exceptions to the exclusive rights of copyright owners, amongst which are the "fair dealing" provisions of sections 29, 29.1 and 29.2.

Section 29 establishes that any fair dealing with any work for the purposes of i) research or ii) private study does not constitute infringement. Section 29.1 establishes that, under certain circumstances, any fair dealing for the purposes of i) criticism or ii) review doesn't infringe copyright. In order for these exceptions to be applicable, some specific elements must be mentioned. Depending on the circumstances, those elements are the following : the source and the name of the author, the performer, the maker or the broadcaster. Finally, section 29.2 states that fair dealing for the purpose of news reporting does not infringe copyright if the same elements (s.29.1) are mentioned. These five categories are exhaustive.

Fair dealing does not depend upon the consent or authorization of the owner of the copyright. Therefore, it constitutes a defense to an infringement action, even though the behavior demonstrates all the elements of infringement. The fair dealing exceptions allow one to escape liability in the specific circumstances enumerated by the Act if the dealing in question was in fact fair

Fair dealing is not defined in the *Copyright Act*. Whether a defendant's dealing with a work falls into one of the five aforesaid categories (*i.e.*, private study, research, criticism, review or news reporting), and whether it is "fair", is left to judicial interpretation, upon the facts of each case. However, because of the absence of a concrete definition of fair dealing, this task could be very tedious for a court.

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The courts have determined that the factors relevant to determining the fairness of the dealing include i) the length of the excerpts which have been appropriated from the work (objective factor), ii) the relative importance of the excerpts in relation to the critic's or journalist's own comments (subjective factor), iii) the use made of the work and iv) the nature of the use, be it criticism, review or summary. As a matter of interest, the American legislation sets out at its section 107 a list of determined factors to take into consideration in the assessment of the fairness of the use, which facilitate its interpretation and its definition.

For the fair dealing exception to come into operation, the court must first determine that an infringing activity occurred. Then, the onus of showing that the activity falls under the stated exceptions will fall upon the defendant. Finally, as fair dealing is a derogation to the general principle of statutory protection of copyright, such an exception will be interpreted restrictively.

For instance, the "private study" exception will not include the appropriation of a work for general educational purposes or for use by students. Moreover, the *Copyright Act* allows for the use of excerpts of a work of which the researcher or the writer is not the copyright owner. But, the Act will not permit the publication of those excerpts with the results of the research or the private study.

Fair dealing for purpose of "review" will require as a minimum some dealing with the work other than simply condensing it into an abbreviated version and reproducing it under the author's name.

The fair dealing defense in matters of criticism is available when criticizing either the work or its subject matter : one can reproduce, for example, excerpts from the writings of an author in order to criticize both his poor mastery of the English language and the moronic views which are the subject of the work... The fact that apart from criticism there could be another purpose (for instance, education), will not deprive a defendant from this defense, although it would appear that a substantial measure of criticism is necessary and not merely incidental: criticism must remain the main purpose. Contrary to the situation in other countries, the United States for instance, parody is not, as such, considered as a form of criticism in Canada.

The Canadian concept of "fair dealing" should be distinguished from the American concept of "fair use" as the latter expression is broader in scope and the former restricted to the purposes mentioned in the *Copyright Act*.

Initially published as part of the *World survey of fair use and fair dealing* at (1995), 54 *Managing Intellectual Property* 40 and subsequently updated to take into account the new provisions of the *Canadian Copyright Act*.

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