FAIR DEALING: CRITICISM, REVIEW AND NEWSPAPER SUMMARIES

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A DEFENSE TO COPYRIGHT INFRINGEMENT

Paragraphs 27(2)(a) to 27(2)(m), as completed by subsection 27(6) of the *Copyright Act* (R.S.C. 1985, c.10), (the Act), enumerate acts which do not constitute infringement of copyright. Other exceptions are also found elsewhere in the Act, such as under sections 28, 28.01, and 64.1, and subsection 64(2).

It is not the purpose of this work to make an exhaustive review of all these defenses but rather to concentrate on one of the aspects of the fair dealing exception, that which relates to the purposes of criticism, review or newspaper summary, as provided by paragraph 27(2) (a.1).

As was stated by Fox, "(p)atents and copyrights rest on the theory that the result of the original labour of the author or inventor are, both on the ground of justice and public policy, to be protected against piracy".[1] As a result of these notions, the onus of showing that a reproached act falls under one of the stated exceptions falls upon the defendant.[2]

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[1] 1.Fox (Harold George), *The Canadian Law of Copyright and Industrial Designs* 2nd ed. (Toronto, Carswell, 1967), at p.3.

[2]. *Sillitoe v. McGraw-Hill Book Company (U.K.) Ltd.*(1982), (1983) 9 F.S.R. 545 (Ch. D.) Davis J., at p. 558.

As derogations to the general principle of statutory protection of copyright, it is submitted that the exceptions provided in subsection 27(2) should be interpreted restrictively:[3]

Although it is most often associated to literary works, the fair dealing exception is also applicable to artistic, dramatic, literary and musical work, as well as to the mechanical contrivences referred to in subsection 5(3) of the Act.

A. THE NATURE OF FAIR DEALING

Fair dealing is completely unrelated to the existance of consent or authorization on behalf of the owner of the copyright. It constitutes a defense to an infringement action, therefore, even though the behaviour has all the required elements to constitute infringement, the fair dealing exceptions allows one to escape liability in the specific circumstances enumerated by the act if the dealing in question was in fact fair.

The *Copyright Act* does not provide us with a definition of what exactly is implied by "fair dealing". Whether a defendant's dealing with a work falls into one of the five aforesaid categories of purposes (i.e. private study, research, criticism, review or newspaper summary), and whether it was "fair", is left to judicial interpretation upon the facts of each case. By taking this approach the legislator has avoided the difficult task of having to arrive at a definition which would likely be either too rigid to apply to the multitude of scenarios which are bound to arise, or too accomodating to be effective. The courts are given the freedom to tailor their decisions to the facts which are placed before them without having to work their way around an impractical definition.

The courts have determined that the factors which are relevant to determining the fairness of the dealing include the length of the excerpts which have been apropriated from the work, the relative importance of the excerpts in relation to the critic's or journalist's own comments, the use made of the work, and the nature of the use, be it criticism, review or summary.

While the taking of a substantial part of a work does not automatically exclude the possibility of recourse to the defense of fair dealing, it is a very revealing factor. Since substantiality as to both quantity and quality must be considered,

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3.Coté (PierreAndré), *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Blais, 1992), at pp. 415-416.

even a very short excerpt may not qualify as a fair dealing if it consists of the "vital" part of the initial work.[4]

The bearing of substantiality on the fair dealing defense is summarized by Laddie as follows (footnote references omitted):

> For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances, the taking of an excessive amount would negate fair dealing. So, if the defense alleged is fair dealing for the purposes of criticism of the work, the taking of large amount of the work and the addition of brief critical notes would not presage a successful defense, and vice versa. On the other hand, there can exist circumstances where it would be proper to quote the entire work, particularly if it is a short one. Perhaps the most important factor to be taken into account is whether the alleged fair dealing is in fact competing with or rivalling the copyright work.[5]

As to unpublished work, Laddie wrote (footnotes omitted):

> The Courts have been reluctant to accept something involving the publication of an unpublished work as fair dealing, unless the copyright work has had some significant private circulation, but the fact that it was unpublished does not necessarily destroy the defense; so, in one case (i.e. *Fraser* v. *Evans* (1969) 1 Q.B. 349 (C.A.)), where the defendants proposed to print short extracts from a confidential report for the purpose of reporting current events in the newspaper, the Court declined to prejudge whether that would be fair dealing and refused to grant an interlocutory injunction. And the point has much less force where it is a dramatic or musical work which is being criticized if, although unpublished, it has been performed in public.[6]

One British authority argues that "(t)he Act nowhere prohibits the copying of the full text of a work from being a fair dealing in it, although it would have been

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4. *Johnstone v. Bernard Jones Publications,(*1938), (1938) I Ch. 599 (Ch. D.) Morton J., at p. 603, and *Landbroke (Football) Ltd. v. William Hill (Football) Ltd.* (1962), (1980) R.P.C. 539, Denning J. (C.A.).

5.New Era Publications International APS v. Key-PorterBooks Ltd. (1987), 18 C.I.P.R. (3d) 569 (F.C.T.D.- Interlocutory) Cullen J., at p. 568.

6.Laddie, (Hugh) et al, The Modern Law of Copyright (London,Butterworths, 1980), at No. 2.110.

easy for Parliament to do so. Accordingly, it is clear that, if the circumstances are fair, the reproduction of an entire book can constitute a fair dealing ..."[7]

"Fair dealing" should be distinguished from "fair use". This latter expression, broader in scope, is found under section l07 of the United States Copyright Act, l976. Even though the criteria of fairness referred to in section 107 are appealing, they should only, but with caution, be imported into Canadian law. Also of interest is l990's Bill C-316 entitled "An Act to Amended the Copyright Act" (fair use), which sought to amend paragraphs 27(2)(a) and (d) in order to better define "fair dealing", therein referred to as "fair use", which was later withdrawn.

Fair dealing is ultimately a matter of impression[8]. The dealing, it is submitted, must be fair for one of the purposes expressed in section 27(2)(a.1)and not for some other purposes. The Act provides what seems to be an exhaustive list of purposes. The list being an exhaustive one implies that, as opposed to its U.S. counterpart, the Act limits the situations in which the fair dealing defense may be used to those found under paragraphs 27(2)(a) and (a.1).

B. CATEGORIES OF PURPOSES

i) Criticism & Review:

> It would seem that the word "review" in the sense in which it is to be understood is cognate with the word "criticism". It may be said that one is the process and the other is the result of the critical application of mental faculties.[9]

Fair dealing for purpose of review "requires as a minimum some dealing with the work other than simply condensing it into on abridged version and reproducing it under the author's name"[10]

The purpose of "criticism" is not limited to criticism of the style or manner of expression of a work, but can extend to the ideas or theories contained therein[11]. The fair dealing defense is equally available to one who criticizes the work itself as it is to one who criticizes the subject matter of the work. Based on this interpretation of the Act, one is free to make use of excerpts of a work in

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7.Phillips (Jeremy) et al, *Whale on Copyright* 4th ed. (London, Sweet & Maxwell, 1993), at p. 79.

8.*New Era Publications International APS v. Key-PorterBooks Ltd.* (1987), 18 C.I.P.R. (3d) 569 (F.C.T.D.- Interlocutory) Cullen J., at p. 568.

9 .ibid.

10 *The Queen v. James Lorimer & Co. Ltd.,* 77 C.P.R. (2d) 262 at 272.

11.*Hubbard v. Vosper* (1971), (1972) 2 W.L.R. 389 (C.A.) Denning J., at p. 394.

order to criticize the views expressed by the author as well as the manner in which these views are expressed. Therefore, by virtue of the fair dealing exception provided for the purpose of criticism, one can reproduce excerpts from the writings of an author in order to ctiticize both his poor mastery of the English language and the moronic views which are the subject of the work.

Criticism, as a purpose within the context of the Act, is not confined to literary criticism[12]. As mentioned above, the fair dealing defence is available in cases of copyright infringement pertaining to all varieties of works, as defined by the Act, even though history has demonstrated that the vast majority of cases in which the defence is considered are regarding literary works.

Subsection 30(l) of the U.K. Act provides that the quoted works need not necessarily be the work under criticism; use of the expression "any work" in the Canadian statute may also be conducive to such an interpretation. Although such a reading of the Act has not yet been the subject of final judicial determination before the Canadian courts, it is foreseable that a situation in which two works are juxtaposed in order that one be subjected to criticism would be considered to fall withhin the scope of the defense.

"Fair dealing", with respect to criticism, is a question of fact. In this respect, Drone wrote:

> Whether the limits of lawful quotation have been exceeded is a question governed [13]by the circumstances of each case. It is to be determined not by the intention of the critic or reviewer, but by the character of its publication and the purpose which it serves. The controlling inquiries will be, whether the extracts are of such extent, importance, or value that the publication complained of will supersede to an injurious extent the original work. Is a material and valuable part of the contents of the original communicated by the compilation? Will the latter tend to diminish the sale of the former, by reason of being wholly or partly a substitute? If so, the results of the original author's labour are appropriated to his injury, and his rights are invaded.[14]

To reproduce in totality an article from a literary journal for the purpose of reviewing it was held not to be fair dealing.[15] The Court perceived the dealing as being excessive, and therefore unfair for the purpose of review in the given

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12. *Sillitoe v. McGraw-Hill Book Co. (U.K.) Ltd.*, Op cit. No. 40 at p. 559.

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14.Drone, (Eaton S.), *A Treaty on the Law of Property in Intellectual Productions in Great Britain and the United States* (Boston, Little, Brown & Co. 1879) at p. 388.

15. *Zamacois v. Douville* (1943), (1944) Ex. C.R. 208 (Ex. Ct.) Angers J..

case, because the defendant had reproduced the entire work without the authorization of the author. To say that this decision is to be interpreted as being the standard which is to be applied across the board would be inacurate, but it does represent the dominant view as expressed by Canadian courts.

ii) Newspaper Summaries:

The fair dealing provision of paragraph 27(2)(a.1) applicable to newspaper summaries is not affected by the requirements of paragraph 27(2)(e) which reads as follows:

> The Publication in a newspaper of a report or lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except while the building is being used for public worship, in a position near the lecturer, but nothing in this paragraph affects the provisions in paragraph (a) (sic), as to newspaper summaries.

Amazingly, it would appear that while the report of a public lecture in a newspaper would be forbidden under the circumstances setforth in paragraph 27(2)(e), the publication of a summary of the said lecture would be allowed under paragraph 27(2)(a.1). Moreover, the report in a newspaper of a particular speech (i.e. address of a political nature) will not, in view of section 28, constitute infringement of the copyright that may subsist in such a speech.

In order to decide which of paragraphs 27(2)(a.1) or 27(2)(e) to apply, the court would have to identify the work as being either a summary or a report. According to the Canadian edition of the *Webster's Encyclopedic Dictionary*, a report, in this context, is defined as a "a formal account of what has been said seen or done", and a summary is "a short statement of the essential points of a matter".[16] Based on these definitions, the essential difference between these two terms is the thoroughness of the account of the lecture. Therefore, a relatively thorough account would likely constitute a report, and as a result be subject to paragraph 27(2)(e), while a less thorough account would fall under the heading of summary and be subject to paragraph 27(2)(a.1). It goes without saying that it will be up to the courts to make this distinction.

A factor which further complicates matters is discovered by comparing the French and English texts of paragraphs 27(2)(a.1) and 27(2)(e), and section 28: one notes that the words "review" and "report" have both been translated by the single expression "compte rendu" in the French text. What is perplexing about this situation is that while the use of two different terms in the English text implies that a distinction was intended, the use of a single term in the French text implies

the exact opposite. The logical explanation for this contradiction is likely a poor translation of the original English text.

Another factor worthy of note is that the fair dealing provision regarding newspaper summaries is nolonger found under paragraph (a), as is still stated at paragraph 27(2)(e), but rather under the new paragraph (a.1). There appears to have been an oversight on behalf of the drafters of the latest amendments to the Act with regards to making the appropriate changes to paragraph 27(2)(e) in order that it reflect the recent severence of what was paragraph (a) into what are now paragraphs (a) and (a.1).

C. RECENT CHANGES

Up until the begining of 1994,save for grammatical changes, the "fair dealing" provision of paragraph 27(2)(a) had remained essentially the same since its introduction in the *Copyright Act*, 1921, where it was adopted as a mere duplication of paragraph 2(1)(i) of the *United Kingdom Act*, 1911. As a result of the coming into force of the *North American Free Trade Agreement* (NAFTA), the Canadian legislator has had to amend the Act as part of its overall plan to live up to its obligations under NAFTA. One such amendment consists of having seperated into two paragraphs the five fair dealing purposes which were all found under paragraph 27(2)(a) prior to 1994. The newly amended paragraphs (a) and (a.1) read as follows:

> (2) The following acts do not constitute an infringement of copyright:
> a) any fair dealing with any work for the purposes of **private study** or **research**;
> (a.1) any fair dealing with any work for the purposes of **criticism**, **review** or **newspaper summary**, *if*
> (i) *the source, and*
> (ii) *the author's name, if given in the source, are mentioned;*

The objective behind these changes appears to have been the addition of conditions to the fair dealing defenses related only to the purposes of criticism, review and newspaper summary without having them apply to the purposes of private study or research. It is only logical that the additional requirements relating to acknowledgement only be made to apply to the purposes which, by their very nature, imply a communication of the reproduced excerpts to the public, which is not, as such, the case with private study or research.

The Act's new acknowledgement requirements share certain similarities to the notion of "sufficient acknowledgement" found in the U.K. Act and defined at section 178 which reads as follows:

> 178. In this Part-
> (...)
> "Sufficient acknowledgement" means an acknowledgement identifying the work in question by its title or other description, and identifying the author unless-
> (a) in the case of a published work, it is published anonymously;
> (b) in the case of an unpublished work, it is not posible for a person to ascertain the identity of the author by reasonable inquiry;

The success of the fair dealing defenses of both Acts are conditional on the existence of a sufficient degree of acknowledgement. What appears to be the distinguishing factor between the two statutes is the nature of the acknowledgement each requires. While the Canadian *Copyright Act* requires that the "source" and the author's name be provided, its British counterpart requires that the "work" be identified and that the author's name be provided, where practicable.

What remains to be seen is the manner in which the courts shall interpret the term "source", found at paragraph 27(2)(a.1) of the Act.. According to the Canadian edition of the *Webster's Encyclopedic Dictionary*, source, in this context, is defined as "the place or thing from which, or person because of whom, something begins or arises". If the dealing in question pertains to an excerpt from a larger work, it is evident that the whole of the work constitutes the "source". But if the defense is also applicable to reproductions of entire works, as is the case according to certain authors, then the question as to what exactly constitutes the "source" is unclear, for the source of a work is normally not the work itself. To give such a sense to the word "source" would be to distort its true meaning. The U.K. Act's terminology is more accomodating in this respect for it can be interpreted clearly in either situation. The work which is to be granted acknowledgement will always be the work which is the object of the dealing, be it the entire work or simply an excerpt from the whole.

On the other hand, the presence of the term "source" in paragraph 27(2)(a.1) of the Act, and its apparent incompatability with fair dealing in relation to entire works, can be interpreted in either of two ways: as an indication that reproductions of entire works are not meant to be covered by the fair dealing defense or as a simple oversight on the part of the paragraph's drafters who did not envisage such an implication. As discussed earlier, the prior is that which is more consistent with the *Zamacois* v. *Douville* decision[17], which appears to reflect the position most often adopted by Canadian courts. If the drafters employed the term "source" in order to prohibit fair dealing with regards to entire works, this prohibition would only be applicable to the purposes found under

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[17] ibid.

paragraph 27(2)(a.1), and thereby implying that such dealing, with regards to the purposes enumerated under paragraph 27(2)(a), is permissable.

Paragraph 27(2)(d) also makes reference to the acknowledgement of "the source from which passages are taken". Under this paragraph, there is no obligtation to give the author's name. However, it is suggested that a fair interpretation of the word "source" in paragraph 27(2)(d) should include the name of the author and title, or any other useful description of the work.

CONCLUSION

There are three elements which must be shown by the defendant in order to benefit from the defense of fair dealing under paragraph 27(2)(a.1) and they are the following: (i) that the dealing is for the purpose of either criticism, review or newspaper summary; (ii) that the dealing is "fair" with regards to the purpose in question; and (iii) that the appropriate acknowledgements are made.

ENDNOTES

1. Fox (Harold George), *The Canadian Law of Copyright and Industrial Designs* 2nd ed. (Toronto, Carswell, 1967), at p.3.

2. *Sillitoe* v. *McGraw-Hill Book Company (U.K.) Ltd.* (1982), (1983) 9 F.S.R. 545 (Ch. D.) Davis J., at p. 558.

3. Côté (Pierre-André), *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Blais, 1992), at p. 415-416.

4. *Johnstone* v. *Bernard Jones Publications*, (1938), (1938) 1 Ch. 599 (Ch. D.) Morton J., at p. 603, and Landbroke (Football) Ltd. v. William Hill (Football) Ltd. (1962), (1980) R.P.C. 539, Denning J. (C.A.).

5. Laddie, (Hugh) et al, *The Modern Law of Copyright* (London, Butterworths, 1980), at No. 2.110.

6. Ibid.

7. Phillips (Jeremy) et al, *Whale on Copyright* 4th ed. (London, Sweet & Maxwell, 1993), at p. 79.

8. *New Era Publications International APS* v. *Key-PorterBooks Ltd.* (1987), 18 C.I.P.R. (3d) 569 (F.C.T.D. Interlocutory) Cullen J., at p. 568.

9. *De Garis* v. *Neville.Jeffress Pidler Pty Ltd.* (1990), 95 A.L.R. 625 (F.C. Austr.) Beaumont J., at p. 628-629, 630-631:

10. *The Queen* v. *James Lorimer & Co. Ltd.*, 77 C.P.R. (2d) 262, at 272.

11. *Hubbard* v. *Vosper* (1971), (1972) 2 W.L.R. 389 (C.A.) Denning J., at p. 394.

12. *Sillitoe* v. *McGraw-Hill Book Co. (U.K.) Ltd.*, Opcit. No. 40 at p. 559.

13. Drone, (Eaton S.), *A Treaty on the Law of Property in Intellectual Productions in Great Britain and the United States* (Boston, Little, Brown & Co. 1879) at p. 388.

14. *Zamacois* v. *Douville* (1943), (1944) Ex. C.R. 208 (Ex. C.C.) Angers J.

15. *Webster Dictionary, New Lexicon Webster's Encyclopedic Dictionary of the English Language: Canadian Edition* (Lexicon, Publications Inc. New York).

16. See note 15.

17. See note 14.