





Fair Dealing/Use: How Canada fits internationally

The following graphic provides a comparison between Fair Dealing/Use in the US, Canada, Australia and the UK.

| | Allowable Purposes | Fairness Factors |
|--|---|--|
|  FAIR USE (US) | Illustrative: Criticism, comment, news reporting, teaching, scholarship, research | Statutory: Purpose and character of use, including if commercial or non-profit educational, nature of work, amount and substantiality of portion used, effect of use on potential market or value of work |
|  FAIR DEALING (CAN) | Prescribed: Research, private study, criticism or review, news reporting, education, parody, satire | Common Law: Purpose of the dealing, character of the dealing, amount of the dealing, alternatives to the dealing, nature of the work, effect of the dealing on the work |
|  FAIR DEALING (AUS) | Prescribed: Research or study, criticism or review, parody or satire, reporting news, giving professional advice, access by person with a disability | Common Law and Statutory: Purpose and character of use, nature of work or adaptation, possibility of obtaining work or adaptation within reasonable time at ordinary commercial price, effect of dealing upon potential market or value of work, amount and substantiality of part copied |
|  FAIR DEALING (UK) | Prescribed: Research and private study, criticism or review, reporting of current events, parody, caricature and pastiche, quotation | Common Law: Effect on potential market or value of work, amount and reasonableness of part copied |

Further details regarding this graphic are included on page 2.

This work is adapted from Page 13, Figure 4 (A comparison of fair use and fair dealing) from the *Copyright Modernisation Consultation Paper* created by the Australian Government Department of Communications and the Arts.

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Notes and Context

1. On Thursday, April 24, 2018, the Canadian Association of Research Libraries was asked by the INDU committee for a graphic that compares Canada to some of our trading partners. The original text of this question (from the Honourable Lloyd Longfield) was: “When we talk about the U.K. model, you have mentioned some of the differences in restrictions. Is there something we could ask for from the universities to give us some graphics around, like some Venn diagrams, or something that could show the difference between Canada, where we’re at now, where some of our trading partners are at, and some ideas of where we could be in the future?” This document is a response to this question.

2. Canadian fair dealing is more permissive than fair dealing in the UK or in Australia, but less permissive than fair use in the US. **This is partially due to the fact that the allowable purposes listed in the US Copyright Code are illustrative (i.e. uses language “such as...”) while they are prescriptive in Canada, Australia and the UK.** As we stated in our opening remarks to the Committee on April 24th, the US approach, set out in Section 107 of their Copyright Act, applies explicitly to purposes “...such as teaching (including multiple copies for classroom use), scholarship or research.” We could do well to follow their wisdom in adding the words “such as” to the purposes given in S.29 of our Act. If there were anything wrong with this American approach -- in place since 1976 -- it would have been challenged long ago in the World Trade Organization.

3. Another country that has yet another version of fair use is Israel. Like the US, Israel includes illustrative purposes (“Fair use of a work is permitted for purposes such as these: self-study, research, critique, review, news reporting, quotation, or teaching and examination by an educational institution”) combined with statutory fairness factors (“...the purpose of the use and its character; the character of the work being used; the extent of the use, in qualitative and quantitative terms, proportionate to the entire work; the impact of the use on the work’s value and potential market”). In Israel, a coalition of higher educational institutions created a code of best practices for the use of copyrighted materials. This code states that “one fifth of a book, one article from a journal or from a book containing a collection of articles, or, if the book is out of print, a copy of an entire book” constitutes fair use in higher education.

4. The criteria for determining fairness is not defined in the Canadian *Copyright Act*. The definitive fairness test is identified in the 2004 Supreme Court case *CCH v. Law Society of Upper Canada*. This landmark case also clearly articulates that “Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.”

5. Australia’s fair dealing exception is currently less permissive than Canadian fair dealing, but it is important to note that the Australian government is currently considering reforms in its Copyright Act. The Government of Australia Department of Communication and the Arts released a Copyright Modernisation Consultation Paper in March 2018 that provides a number of possible reform options that may result in a more flexible fair dealing exception or a fair use exception. The original graphic that we adapted for this comparison is included on page 13 of this report. The 2016 Intellectual Property Arrangements report by the Australia Productivity Commission, recommends that “Australia’s narrow purpose-based exceptions should be replaced with a principles-based, fair use exception, similar to the well-established system operating in the US and other countries” (pg 7). Referring to Canada as an example, it states “Rights holders also argued fair use would significantly reduce their incentives to create and invest in new works, holding up Canada as an example. Some have proclaimed that fair use will equate with ‘free use’, particularly by the education sector. But these concerns are ill-founded and premised on flawed (and self-interested) assumptions. Changes in Canada’s publishing industry had little to do with copyright exceptions (where fair dealing still prevails) and more to do with other market factors” (p. 10).