

Strengthening Canadian User Rights through Shared Understanding:

Adapting the Codes of Best Practices in Fair Use for Canada

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Introduction

Canadian fair dealing is, in many ways, one of the most flexible and strong copyright exceptions in the world. The courts have determined that a restrictive interpretation of fair dealing would upset the balance between rights of creators and rights of users, and the education sector across Canada applies guidelines (for example, the [Universities Canada Guidelines](#)) that have enabled the widespread use of fair dealing for the provision of course materials. Yet, for many other activities and purposes, the scope and application of fair dealing is unclear. As a result, many Canadian communities of practice avoid using the exception, reinforcing permission culture or even stopping some projects in their tracks. Canada would thus benefit from a robust framework of fair dealing codes of best practice that are similar to those in place in the United States.

In this paper, we argue that while fair dealing is not a carbon copy of fair use, it is similar enough that many of the principles and limitations set out in the many codes of best practices in fair use published in the United States would be applicable in the Canadian context. In addition, we argue that collaborating with Canadian communities of practice to help build a network of new or adapted codes of best practices in fair dealing is an effective and necessary strategy to help break down the fear and uncertainty surrounding the application of fair dealing to specific situations that are not addressed by institutional policies. We also suggest that the best place to start is with adapting the most recent code, the *Code of Best Practices in Fair Use for Software Preservation*, as the need for clarity on such applications was raised during our preliminary consultations with the software preservation community in Canada.

The case for adapting fair use codes of best practice

The inspiration behind this paper comes from the book *Reclaiming Fair Use: How to Put Balance Back in Copyright*. In this book, Patricia Aufderheide and Peter Jaszi speak to both the flexibility of the fair use doctrine in the US, and the power behind the development of a series of fair use codes of best practices for several different communities of practice. These statements “have helped demystify fair use for specific user groups without unduly limiting the flexibility that gives the fair use doctrine its strength and have helped lawyers and gatekeepers understand important user norms. In doing so, they have proven to be a powerful tool for many who depend on fair use” (Falzone & Urban, 2009, 338).

Before outlining the benefits of the codes and demonstrating how they enable communities to leverage their fair use rights, it is important to first understand what fair use is and how it compares to the similar fair dealing exception in Canada. Fair use is found in [Section 107](#) of the United States *Copyright Act*, which states that the “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.” Fair dealing which is found in [Section 29](#) of the Canadian *Copyright Act* (the ‘Act’) similarly permits the use of a copyright-protected work without permission or payment as long as the use falls within one of the listed purposes in the *Act*, and the dealing is fair. The most important difference between fair use and fair dealing is that the list of purposes available for fair use are illustrative, while the purposes for fair dealing are exhaustive, meaning that, in theory, fair use is more flexible and is applicable to a wider variety of situations than fair dealing.

Aufderheide and Jaszi clearly articulate the importance of fair use as a user right in the second chapter of their book, in that:

Everyone in the United States, in any medium, has the right of fair use—although most people don’t know it. Fair use is an exemption that applies to all of a copyright owner’s monopoly rights, including the owners’ right to control adaptation, distribution, and performance. It is a bold demonstration of the need to share culture in order to get more of it. (Aufderheide & Jaszi, 2018, p. 49)

Through a synopsis of the history of fair use in both practical situations and in the courtroom, they paint a picture of an exception that has become the most flexible and adaptable in the world. According to Aufderheide and Jaszi, “Fair use has been embraced by judges, public interest organizations, creator organizations and individuals alike. Fair use can be a banner to gain equality of status for possibility, creativity, innovation and the liberation of imagination within copyright” (Aufderheide & Jaszi, 2018, p. 129). They also outline the process behind the development of codes of best practice in fair use, which have “set standards, created interest in fair use, and inspired others to set their own standards” (Aufderheide & Jaszi, 2018, p. 177).

Using the story of how filmmakers organized their community to create the first statement of best practice, the authors describe a robust process where documentary filmmakers pioneered a new approach to changing copyright policy.

Documentary filmmakers:

...educated themselves about the law, claimed their own right to interpret fair use as citizens and creators, and worked together to clarify their common understandings of their work. They also changed their understanding of who

they were. They were not only creators, but also users, of culture. They learned to value the selection and repurposing of culture as a creative act, and they learned to accept that other people would sometimes be able to use their work without paying or getting permission because those people too would be creating something new (Aufderheide & Jaszi, 2018, p. 197).

Aufderheide and Jaszi go on to describe the growth of similar codes in several different communities of practice, including teachers, dance historians, online video makers, libraries, various scholarly communities, and journalists. Finally, they describe the process that communities can take in designing their own codes, built by the community of practice that they are designed to serve and also vetted by lawyers and/or legal scholars. A code is then launched and serves not only to encourage or educate members of the community, but it can also result in the growth in use of the exception. As Aufderheide and Jaszi say, “this is a basic lesson of codes of best practices in fair use: Practice makes practices. When people use their rights, their rights are stronger, and more people can use them. Changing practice is not something that happens because a document is created; it happens when enough people use that tool to change their behavior, and tell someone else” (Aufderheide & Jaszi, 2018, p. 272).

After reading this book, it is easy to be envious of both fair use and the various codes of best practice that are in use in communities of practice across the US. Aufderheide and Jaszi do address the international application of the fair use codes in “Chapter 11: The International Environment”. In this chapter, the Canadian context is featured in the section that covers the fair dealing approach common in British Commonwealth nations and other former British colonies. Aufderheide and Jaszi state that “advocacy by legal experts including David Vaver, Michael Geist, Ariel Katz, Howard Knopf, and Laura Murray help persuade the courts there—and particularly the Supreme Court—to apply fair dealing with an emphasis on interpretive openness and technological neutrality” (Aufderheide & Jaszi, 2018, p. 297).

In the book “The Copyright Pentalogy” published in 2013, two of the authors listed as advocates by Aufderheide and Jaszi – Michael Geist and Ariel Katz – make the case that fair dealing is a flexible exception that has more similarities to the fair use doctrine than to the more restrictive fair dealing exceptions in other commonwealth countries. In the chapter “Fair Use 2.0: The Rebirth of Fair Dealing in Canada”, Katz summarized guidance from the Supreme court in the *CCH Canadian Ltd. v. Law Society of Upper Canada* case [CCH], where the court “unanimously declared that fair dealing is a user’s right, which is as integral to copyright law as the rights of owners and therefore should be given large and liberal interpretation” (Aufderheide & Jaszi, 2018, p. 297). Katz makes the case, through a thorough synopsis of the history of fair dealing, that fair dealing is a flexible and broad exception that is moving in the

direction of fair use, even if it cannot quite reach the ambitions of fair use because “some uses, present or future, are still categorically excluded” (Geist, 2013, p. 139).

In the subsequent chapter in “The Copyright Pentalogy”, Geist follows Katz’s arguments with a synopsis of the 6 factor fairness criteria, as set out in the CCH case, and then argues that, while fair dealing does still require a two-step analysis, “the first stage has become so easy to meet that Canada has a fair use provision in everything but name only. Conventional fair use may require only a single test to determine fairness, but the Canadian fair dealing/fair use hybrid comes close by ensuring that virtually all uses will meet the purposes standard and proceed to the second stage, six-factor analysis” (Geist, 2013, p. 177).

Even with an exception in fair dealing that is similar in practice to fair use, an illustrative list of purposes would be a major upgrade for Canadian copyright users. In fact, both the legal and the library community have advocated effectively for legislative change that would make the list of fair dealing purposes illustrative rather than exhaustive. This advocacy was clearly effective, as this was included as recommendation 18 of the recent Statutory Review of the Copyright Act report by the INDU committee. In their observations in the report, the committee notes that acting on this recommendation:

...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 (Canada Parliament House of Commons Standing Committee on Industry, 2019, p. 69).

The flexibility provided through open ended exceptions like fair use/fair dealing are essential in preserving balance in copyright between the rights of both the creators and users of copyrighted works. There are a wide variety of benefits attached to open ended exceptions. Frequently, exceptions that address specific situations are hamstrung by onerous, impractical, or impossible requirements, and quickly gather dust. Jessica Litman’s classic account of the bargaining leading up to the passage of the Digital Millennium Copyright Act (DMCA) found that in the end, the bill’s “laundry list of narrow exceptions..discourage[d] the inference that the classic general exceptions and privileges apply.” The DMCA’s narrow exceptions were the product of what Litman described as what “a variety of private parties were able to extract from each other,” the result being “a lot of rent-seeking at the expense of...the public at large.”(Litman, 2006) There are a number of Canadian examples of such exceptions. For one, the inter-library loan library exception in the *Copyright Act* (The Act) is so

problematic that the majority of Canadian academic libraries instead use fair dealing to enable inter-library-loan services, rather than the exception that was explicitly designed for this purpose (Tiessen, 2012). Another example is the exception designed for distance education, which includes deletion requirements that are so onerous that most higher educational institutions have avoided using this exception in many situations where it should have applied.

In the article “Demystifying Fair Use”, Falzone and Urban highlight other features that make the fair use doctrine superior to specific exceptions. Importantly, they state that “had fair use been reduced to a laundry list of exemptions, it would lack the ability to adapt to new technologies and new modes of expression. The adaptability is critical given the role fair use plays in copyright policy as one of a suite of limitations that prevents copyright law from stifling the very creativity it was designed to encourage” (Falzone & Urban, 2009, p. 338). Falzone and Urban go on to highlight one of the weaknesses of fair use, that uncertainty and perceived unpredictability of the application of fair use in specific situations, combined with the significant cost of litigation, may cause risk aversion which “leads to self-censorship and other failure of the balancing system in copyright; it squelches the creativity copyright is intended to incentivize” (Falzone & Urban, 2009, p. 340). As a result, there is somewhat of a paradox: fair use’s flexibility allows it to be potentially applied in any set of circumstances. However, this open-endedness creates uncertainty. Narrow exceptions do provide certainty, but often to only very narrow or impracticable activities, and are usually the result of a bargaining process which strays from copyright law’s public interest purpose. The fair use codes are an effort to resolve this problem.

Continuing the development of fair dealing through the adaptation of codes of best practice is a clear path forward for user communities, enabling them to strengthen user rights and to deal fairly with copyrighted works with more certainty. Even with a marginally more limited exception like fair dealing, it is easy to see how the fair use codes of best practice could apply in Canada. As the activities undertaken by the communities covered by the codes are similar in both the US and Canada, it is not necessary to start from scratch. A simple addendum to the US documents that provides Canadian legal context is a reasonable path forward for Canada, allowing us to build on the incredible work done in the United States. In addition, while there are currently no codes of best practice for fair dealing, this does not mean that fair dealing is not being used. The Canadian educational community has adopted an approach to fair dealing that provides standardized guidelines for dealing fairly with copyrighted works in education. While these guidelines will be examined by the Supreme Court of Canada as part of the York University v. Canadian Copyright Licensing Agency (“Access Copyright”) appeal, the development and widespread use of these guidelines in education does show that there is an established need for guidance on the application of this exception, a need that would start to be met as US

codes are adapted or addendums are created. Pending the results of this litigation in the Supreme Court of Canada, it may be that a process informed by a community of practice with consultation and support from legal specialists and scholars is the best path forward for many sectors in Canada.

The typical code contains a few standard elements which have been developed and refined over time. The template generally presents the application of fair use as a deliberative process, rather than a formula or mathematical calculation. A code will identify various common scenarios or activities that members of a particular community of practice have identified as friction points with copyright law and which as a result suffer from copyright chill due to uncertainty over the lawful applicability of fair use. The codes then provide qualitative principles and limitations for practitioners to consider when assessing whether a particular copying activity is in keeping with a reasonable interpretation of fair use in a particular factual scenario.

Some have criticized the codes for being too narrow in their identification of relevant communities of practice. These criticisms argue that practice community groupings have not always included rightsholder representatives or perspectives, presuming incorrectly that copyright policy should only result from negotiations between “users” on one hand and “rights holders” on the other (the horse-trading model Litman decried in her study of the DMCA). Others argue the Codes are too optimistic about the chances that judges will view these “unrepresentative customary practices” as relevant when they are making a determination of infringement (Rothman, 2009, p. 372). Nevertheless, the codes serve to identify the areas where copyright law is burdensome to legitimate, good-faith work, and provide a framework for considering whether fair use is the appropriate means to overcome these burdens. Canadian copyright law has shifted, making fair dealing not only a defence in litigation, but a user’s right – and so, worries about judges’ possible views of the codes may be overwrought.

Why start with software preservation

So far in this paper, we have made the case that Canadian organizations such as CARL and its member libraries, as well as other library organizations and institutions across the country, should continue to move together towards and advocate for a flexible approach to interpreting fair dealing, and that adapting and developing codes of best practices for fair dealing in order to address common copyright inflection points within various communities of practice is an important way that this user’s right can continue to be further asserted. If we assume for now that all agree that such an approach is the right one, the next question is, where to start?

This paper's second proposition is that a good place to start mapping fair use best practices onto fair dealing is with the most recently developed code, the *Code of Best Practices in Fair Use for Software Preservation*, which was released in September 2018 and revised in 2019 (Center for Media & Social Impact, 2019).

The development of the software preservation code began with a process of ethnographic research directed at the members of the Software Preservation Network (SPN), a membership organization of 20 or so institutions who work together to develop shared approaches and technologies to preserve and make available software for researchers. These initial snowball interviews were followed by the facilitation of deliberative, in-person consultations with community members, focused on developing consensus about shared copyright-related problems and approaches to the deployment of fair use on the field. Edge cases where consensus could not be reached, such as games or other expressive works where fair use may not apply in the same way or be generalizable across all works, were excluded (Butler et al., 2019). The final results of this process were summarized, circulated back to the community and finally reviewed by a panel of legal authorities in order to make sure that the fair use boundaries established by the community were consistent with existing law (Aufderheide et al., 2018)(Aufderheide & Jaszi, 2018). The work was funded by the Sloan Foundation.

One reason to begin with this particular code is its manageable scale – compared to some of the other communities of practice that codes have emerged from, the software preservation community is relatively small, and the ethnographic research already included some Canadian institutional input. This long process undertaken in the US in developing this Code would be difficult and, we posit, unnecessary to replicate fully in Canada. What might make more sense would be to ask the community to examine if and when the scenarios and activities identified in the US codes are common to Canada, and whether there are any other common or recurring scenarios that are unique to Canada that require special attention.

As part of our outreach to determine if there was an appetite for a fair dealing code for software preservation in Canada, we conducted a preliminary series of interviews with Canada-based software preservationists, who all agreed that copyright, licensing culture, and uncertainty about the scope of the application of fair dealing to software and other born-digital objects were significant barriers to software preservation activities across the country (J. Whyte & S. Marks, personal communication, May 17, 2019).

Another reason to begin the process of developing Canadian codes with software preservation is that the fair dealing case for it is strong and largely uncontroversial. Our interviewees all told us that their work in digital preservation, and more

specifically in software preservation, implicates copyright law very strongly. Digital artifacts and the tools needed to access them by their nature are copying intensive and the lack of clarity around the scope of fair dealing as it applies to the preservation and provision of access to these objects and tools has hindered the fundamental, purposive work of ensuring the longevity of and access to valuable cultural objects (J. Durno, personal communication, May 3, 2019).

The protections provided by copyright are meant to incentivize the continuing commercial availability and distribution of works. Whether this is actually what happens in reality is for another paper, but for software, this dynamic is particularly absent. As formats and technologies change, the commercial incentives in many types of software lead to replacement and obsolescence rather than the persistence of software as commercially available works. Software companies are notoriously bad at preserving even their own products. In their ethnographic research and consultations with the software preservation community, Butler et al. found that the “lack of incentives for preservation in the marketplace” (Butler et al., 2019, p. 12) placed the types of preservation activities and uses that the community engaged in “at the heart” of fair use’s balancing of the distinct purposes of the software publisher and those of a preservationist/researcher.

Our interviewees also identified the international compatibility of legal regimes as a barrier to their work (T. Walsh, personal communication, May 9, 2019). Software preservation increasingly involves emulated and networked approaches to making software available, leveraging shared collections and technologies in order to ease the burden to collect everything in every collection. Software interdependence means that there is often the possibility of one collecting institution needing to access software held at another institution to access their own files or to allow a version of software that they hold to run. When one institution is Canadian, interviewees expressed uncertainty about whether they could safely engage in such collaborative collection building if preservation activities were designed and implemented with the application of fair use. They were not sure if fair dealing might allow these activities in Canada, even if they were clearly fair use in the United States.

The adaption of the code to the Canadian legal context will likely have to grapple with a few important legal issues, so the code development process will need to include a legal advisory board or panel to review the addendum. The US code focuses immediately on software preservation as a transformative use and argues that preservation is “at the heart” of fair use. Canadian fair dealing jurisprudence has so far not created an equivalent transformative use doctrine in Canada; the Supreme Court of Canada has actually taken pains to emphasize that transformativeness is not a requirement for fairness in the first step of a fair dealing analysis, even in commercial contexts. Of course, the “[analytical heavy-hitting](#)” of weighing the fairness of the use

might still incorporate a consideration of transformativeness (*SOCAN v. Bell*, 2012). Indeed, giving a clear definition to the broad notion of “fairness” for purposes of copyright law was the impetus for the creation of the “transformative use” concept in a law review article by then-district court Judge Pierre N. Leval (Leval, 1991). Another important issue to be resolved is the status of preservation vis-à-vis fair dealing’s exhaustive list of purposes. If given a very large and liberal interpretation from the perspective of the end-user, preservation for the purposes of research could pass the first-step test of fair dealing. However, if not then it is then likely that software preservationists in Canada will need to employ fair dealing alongside narrower exceptions, such as 30.1, the “Management and maintenance of collections” exception, particularly under its subsection (c) , which allows for the preservation of a copyrighted work if “the original is currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable” (Copyright Act, 2020). Identifying these legislative and doctrinal differences and contextualizing the common use cases within them would likely form the bulk of a proposed Canadian adaptation.

Over the coming months, we will, through CARL, continue work on the Canadian adaptation of the *Code of Best Practices in Fair Use for Software Preservation*. We hope that this will be the first in a series of adaptations. Canada is lucky to have supportive user communities, enthusiastic legal scholars and experts willing to engage in this work, a library community that is committed to fully exercising the rights of users of copyrighted materials, and a legal framework that is conducive to the adaptation of these codes. This work will result in more certainty for many user groups in the application of fair dealing and will be a significant step forward for the use and application of fair dealing in areas where it may have been used in a limited fashion, if at all. Like fair use, fair dealing is a user’s right, and all individuals should have tools at their disposal to help them utilize it.

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