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Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?

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1 INTRODUCTION

Eleven decades ago, on December 16, 1911, the Imperial Copyright Act of 1911 received royal assent, codifying fair dealing for the first time, and thus explicitly recognizing it, in the imperial copyright legislation.¹ Ten years later, the same fair dealing provision would appear in the Canadian Copyright Act and would remain the basis of the current fair dealing provisions. Tragically, what was supposed to be an exercise in the codification of a dynamic and evolving common law principle, usually referred to as “fair use,” ended up – with a few notable exceptions – in a hundred years of solitude and stagnation.² Misinterpreting the 1911 Act, some courts and commentators in the UK and other Commonwealth countries adopted a narrow and restrictive view of fair dealing. Meanwhile, in the United States, fair use, the same common law concept that English and American courts developed, remained uncoded for most of the twentieth century. When the United States finally codified fair use in 1976, Congress left no doubt that the codification would not alter its common law basis and ought not hinder its flexibility and adaptability. Thus, toward the end of the twentieth century, a noticeable split in Anglo-American copyright law emerged: an open, flexible, and general fair use regime in the United States, and a seemingly rigid and restrictive fair dealing tradition in the Commonwealth countries.³

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¹ Australia enacted a short-lived fair dealing provision in the Copyright Act 1905 (Cth) s 28 (Austl.) providing that “a book shall not be infringed by a person making an abridgement or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making fair extracts from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purposes of criticism, review, or refutation, or in the ordinary course of reporting scientific information.” This provision was apparently taken from the failed UK Copyright Bill 1900, H.L. Bill [295]. The 1905 Act was replaced with Australia’s Copyright Act 1912 which adopted the UK’s 1911 Act. See Alexandra Sims, *Strangling Their Creation: The Courts’ Treatment of Fair Dealing in Copyright Law since 1911*, 2010 INTELL. PROP. Q. 192, 192–224.

² See Sims, *supra* note 1.

³ According to Sean Flynn and Michael Palmedo, fair use is open, flexible, and general in the following sense: *open*, since the user right can be applied to an open, as opposed to a defined (a.k.a. closed), list of purposes, uses, works, or users; *flexible*, since the user right is applied through a flexible proportionality test that balances the interests of the rights holder with those of the user and general public; and *general*, since the exception promotes uniform application by applying a single flexible test to a group of multiple uses or purposes. See SEAN FLYNN & MICHAEL PALMEDO, *THE USER RIGHTS DATABASE: MEASURING THE IMPACT OF COPYRIGHT BALANCE* (2017).

However, at the turn of the twenty-first century, fair dealing was reborn in Canada. In 2004, the Supreme Court of Canada heard *CCH v. Law Society of Upper Canada*,⁴ its first-ever case involving fair dealing, and unanimously declared that fair dealing is a users' right, which is as integral to copyright law as the rights of copyright owners and therefore should be given large and liberal interpretation.⁵ Eight years later, the Court rejected attempts to roll back its historic 2014 decision and handed down two judgments reaffirming its holdings from *CCH* and clarifying that they were applicable to a wider range of activities.⁶ In doing so, the court corrected a century-long misconception of fair dealing, reunited it with its historical roots, and brought it closer to its American counterpart. Moving in the same direction, and shortly before the Supreme Court handed down its judgments, the Parliament of Canada passed the Copyright Modernization Act, which explicitly recognized education, parody, and satire as purposes that could qualify as fair dealing⁷ (as well as a series of other specific exceptions, addressing issues such as user-generated content, copying for private purposes, time-shifting or temporary copying).⁸

Still, both the Court and Parliament stopped short of explicitly adopting an open-ended approach to fair dealing, seemingly unable to decide whether Canada is better off clinging to a burdensome colonial British past or embracing an imperfect (North) American present. This chapter shows, however, that this dilemma is false: while fair dealing has ossified under current British law,⁹ the colonial copyright past that Canada inherited is not quite as burdensome as it is commonly perceived to be.

The chapter will recount the history of fair use and fair dealing and show that, contrary to conventional wisdom, the enactment of the Imperial Copyright Act of 1911 – and subsequently the enactment of the Canadian Copyright Act of 1921 – was not designed to cause any major alteration in the common law of fair dealing, and the explicit recognition of five enumerated purposes in the (then) newly enacted fair dealing provision was not intended to limit the principle of fair dealing exclusively to those five purposes. Moreover, despite abundant contemporary literature that highlights a seeming dichotomy between the open-ended US-style fair use, and the supposedly close-ended fair dealing,¹⁰ this dichotomy is false.

Canada is now poised to fully embrace an open-ended fair dealing, and there are very good reasons for doing that. This was indeed one of the major recommendation in the report of a parliamentary committee that reviewed the Copyright Act in 2019.¹¹ While amending the

⁴ See *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 (Can.).

⁵ See *id.* paras. 48, 51.

⁶ See *Soc'y of Composers, Authors and Music Publishers of Can. v. Bell Can.*, [2012] 2 S.C.R. 326 (Can.); *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345 (Can.).

⁷ See Copyright Act, R.S.C. 1985, c C-42, § 29 (Can.).

⁸ See *id.* §§ 29.21, 29.22, 29.23, 30.71.

⁹ Since this chapter focuses on Canada, I will leave the question of whether fair dealing has been irrevocably ossified in the UK to others.

¹⁰ See, e.g., DAVID VAVER, *INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENTS, TRADE-MARKS* 234 (2d ed. 2011); Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1068 (2011); Louis Grilli et al., *Fair Dealing or Fare Stealing?: Implications of Canadian Copyright Law Reform on the Online Classroom*, 7 CAN. J. L. TECH. 267 (2010); Giuseppina D'Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309, 314 (2008); David Bradshaw, *Fair Dealing As a Defence to Copyright Infringement in UK Law: An Historical Excursion from 1802 to the Clockwork Orange Case 1993*, 10 DENNING L.J. 67, 73 (1995). Until recently, I echoed this view, too. See Ariel Katz, *What Can Canada Learn from Israel about Copyright Reform?*, U. OF TORONTO L. SCH. FAC. BLOG (Dec. 10, 2007), http://web.archive.org/web/20071210161010/http://utorontolaw.typepad.com/faculty_blog/2007/12/what-can-canada.html.

¹¹ Committee Report No. 16: Statutory Review of the Copyright Act, Report of the Standing Committee on Industry, Science and Technology (Ottawa, ON: House of Commons of Canada, 2019) at 69.

Copyright Act to that effect could add a welcome clarity, strictly speaking, no legislative change is required, because, as the rest of this chapter demonstrates, we have had an open, flexible, and general fair dealing/use all along.

2 THE FAIR USE VS. FAIR DEALING MYTH

According to conventional wisdom, a fundamental difference exists between the American fair use doctrine and the Canadian (or Commonwealth) fair dealing doctrine. American fair use can apply potentially to any purpose. This conventional wisdom rests principally on the language of section 107 of the US 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.”¹² The words “such as” clarify the illustrative nature of the enumerated purposes, ensuring that fair use could apply to other purposes as well. In contrast, sections 29 and 29.1 of the Canadian Copyright Act (like other descendants of the 1911 UK Copyright Act) do not contain the magic words “such as.” Therefore, the argument goes, the list of enumerated purposes is exhaustive,¹³ and accordingly, “[d]ealings for other purposes are not covered by the exception, even if they would otherwise be fair.”¹⁴

In addition to this statutory difference, several other arguments are sometimes invoked to prove the supposed fundamental distinction between fair use and fair dealing: that “fair use” is an American concept, developed by American courts, and therefore is alien to the legal traditions of the British Commonwealth, where the doctrine is called “fair dealing”;¹⁵ and that the distinct histories and origins of Commonwealth and American copyright laws, including differences in their constitutional foundations, reflect disparate conceptions of copyright and hence justify, or at least explain, differences in substantive rules concerning fair dealing or fair use.¹⁶ Lastly, it is sometimes suggested that the terms “dealing” versus “use” in themselves signify such fundamental differences.

This conventional wisdom is flawed. As the rest of this chapter shows, fair use is not an American invention. The concept of fair use originated in the English courts and continued to develop during the nineteenth century by English and American judges who mutually influenced and cross-referenced each other. Its first codification in the UK 1911 Copyright Act was not meant to limit its application to the five enumerated purposes. While some courts assumed that the list was exhaustive, and judicial dicta and commentary supporting this proposition can easily be found, the proposition that the list of allowable purposes is exhaustive has never been the *ratio* of any decided and reported case.¹⁷

Why the UK Parliament chose the term “dealing,” as opposed to “use,” remains a mystery.¹⁸ However, the legislative history indicates that in codifying the doctrine, the UK Parliament did not intend to change the nature of the doctrine or narrow its potential scope. It is also telling that when the Parliament of Canada enacted the same provision ten years later, the English version used the term “fair dealing,” while the French version, which is equally authoritative, referred to

¹² Copyright Act, 17 U.S.C. § 107 (2012).

¹³ See, *supra* note 10.

¹⁴ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2009] C.B.D. No. 6, para. 77 (Can.), *rev'd*, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345 (Can.).

¹⁵ See, e.g., D'Agostino, *supra* note 10, at 359.

¹⁶ See Barry Sookman & Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultation*, 2 OSGOODE HALL REV. L. POL'Y 139, 158 (2009).

¹⁷ The closest case is *Hawkes & Son (London), Ltd. v. Paramount Film Service, Ltd.* [1934] 1 Ch. 593 (CA) (Eng.).

¹⁸ See Bradshaw, *supra* note 10, at 72.

“fair dealing” as “utilisation équitable,”¹⁹ as it still does. One would be hard-pressed to find any difference between “utilisation” and “use.”²⁰

The arguments that the distinct histories and origins of Commonwealth and American copyright laws, as well as differences in their constitutional foundations, reflect disparate conceptions of copyright and hence justify, or at least explain, differences in substantive rules, are equally misconceived.²¹ This historical account is inaccurate, as the copyright acts of both countries are descendants of the Statute of Anne and the jurisprudential developments that followed in Britain and the US.

Attributing differences in the area of fair dealing to differences in the constitutional foundations is equally flawed. The US Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,”²² and this clause is generally understood to impose some limitations on congressional legislative power in this area.²³ In contrast, the argument goes, the Constitution Act, 1867 gives the Parliament of Canada exclusive jurisdiction over Patents of Invention and Discovery and over Copyrights,²⁴ but mentions no substantive limitation on the content of such laws.

However, the lack of language similar to that of the US Constitution does not necessarily imply any differences in how copyright (and patent) laws were conceived when those constitutional documents were drafted. Indeed, the notion that copyright and patent laws should promote the progress of science and the useful arts was not invented by the framers of the US Constitution, but rather reflected the common conception of the era. It is easy to see that the title of the Statute of Anne, the first copyright statute, contained the three elements found in the American Constitutional clause. The Statute of Anne’s long title was “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.” Both combine a public policy goal (compare “for the encouragement of learning” and “to promote the Progress of Science”) to be achieved by granting private exclusive rights (compare “by vesting the copies of printed books in the authors or purchasers of such copies” and “by securing . . . to Authors exclusive Right to their . . . Writings”) and a duration limitation (compare “during the times therein mentioned” and “for limited Times”).²⁵

¹⁹ See Copyright Act 1921, 11–12 Geo. V, c 24, § 16(1)(i) (Can.).

²⁰ Indeed, elsewhere in the French version of the Act, the word “utilization” is used where the English Act uses the word “use.” See, e.g., *id.* § 16(1)(ii).

²¹ See, e.g., *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 (Can.). In that case, Justice Estey noted (not in the context of fair dealing) that “United States court decisions, even where the factual situations are similar, must be scrutinized very carefully because of some fundamental differences in copyright concepts which have been adopted in the legislation of that country. The United States statutes have not been based upon the international copyright treaties of the 19th and 20th centuries, being the Berne Convention of 1886 and the Rome Copyright Convention of 1928, as the United States of America did not become signatories thereto.” While it is true that when that decision was written the US was not a member of the Berne Convention, the suggestion that this fact demonstrates fundamental differences in copyright concepts ignores the history of the legislation. International treaties may explain some differences and later developments, but those treaties have not altered the fundamental concepts and key doctrines.

²² U.S. CONST. art. I, § 8, cl. 8.

²³ There is no consensus, however, about the nature and scope of those limitations. See, e.g., Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329 (2011). See also Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771 (2005).

²⁴ See Constitution Act 1867, 30 & 31 Vict., c 3, §§ 91(22), 91(23) (UK).

²⁵ Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427, 1445 (2010). Bracha also describes how the first US Copyright Act, enacted in 1790, was a mere copy of the Statute of Anne, and had the same title. See also Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFFALO INTELL. PROP. L.J. 3, 36 (2001) (noting that the term “science” in 1790 had a broader meaning than today and was synonymous with “knowledge” or “learning”).

“Progress” was a buzzword in the eighteenth century and reflected the contemporaneous ideals of the Enlightenment.²⁶ While the US Constitution might be considered as one of the highlights of the Enlightenment, those ideals were not invented by the framers and did not originate in the American colonies. Those ideas were prevalent in Britain, and it is not surprising that they would also appear in contemporaneous English judicial decisions.

In 1785 (four years before the adoption of the US Constitution), Lord Mansfield warned that:

We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.²⁷

Indeed, in *Cary v. Kearsley* from 1802, considered to be the first pronouncement of fair use, Lord Ellenborough tied fair use to the notion of progress of science and the public interest when he wrote the following:

That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may *fairly adopt* part of the work of another: he may so make use of another’s labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken *used fairly* with that view, and without what I may term the *animus furandi*?²⁸

Thus, when Justice Souter of the US Supreme Court explained that “[f]rom 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 . . .’”²⁹ his historical account of fair use was as accurate with respect to American law as it was true to English and Canadian law, notwithstanding the absence of explicit “progress” language in the Canadian written or the British unwritten constitutions.

Likewise, the notion that copyrights, like patents for inventions, were limited grants of statutory exclusive rights, justified in the name of the public interest, was common to both jurisdictions, and evolved in corresponding steps in Britain and the US. This meaning harks back at least to *Darcy v. Allen* from 1603³⁰ and the Statute of Monopolies from 1624.³¹ As Oren Bracha writes, “By the end of the eighteenth century, the principle of limited duration of monopolies had been a staple of English political thought for two centuries.”³²

What prompted the framers of the US Constitution in 1789 to include the specific language in clause 8 is not entirely clear, and what their precise intention was is equally obscure. However, the lack of similar language in the Canadian Constitution Act provides very poor evidence for fundamental differences in the conception of copyright between the two countries.

Similarly, arguments that American fair use reflects the First Amendment protection of free speech overstate the point inasmuch as they suggest that open, flexible, and general fair use is

²⁶ See Birnhack, *supra* note 24.

²⁷ *Sayre v. Moore* (1782) 102 Eng. Rep. 139 (KB). Cf. *Théberge v. Galerie d’Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336 (Can.), para 32 (stating that “[e]xcessive control by holders of copyrights and other forms of intellectual property 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”).

²⁸ *Cary v. Kearsley* (1802) 170 Eng. Rep. 679, 680 (emphasis added).

²⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

³⁰ See *Darcy v. Allen* (1603) 11 Co. Rep. 84 b (Eng.).

³¹ See Statute of Monopolies 1624, 21 Jac I, c. 3 (Eng.).

³² Bracha, *supra* note 24, at 1450.

a uniquely American invention. The US Supreme Court recently described fair use (and the idea/expression dichotomy) as “built-in First Amendment accommodations” within the Copyright Act.³³ This could mean that that courts must construe and apply fair use in line with First Amendment strictures,³⁴ and that Congress may not expand or extend copyright protection in a way that avoids or diminishes these doctrines.³⁵ However, this recent “constitutionalization” of US fair use tells very little about the doctrine’s historical development and how it compares to fair dealing. It might be true that in the absence of entrenched constitutional protection for freedom of expression (e.g., in Canada before the Charter of Rights and Freedoms, in the UK before the Human Rights Act, or in Australia) courts and legislators may not be constitutionally *bound* to recognize similar “free speech accommodations.” However, the lack of such a constitutional imperative only means that Parliament could choose to enact copyright law that does not accommodate free speech. It does not imply that Parliament chose to override free speech or was oblivious to its importance.

In sum, the claim that differences between American fair use and Canadian fair dealing arise from different constitutional structures reflecting divergent ideological views about copyright does not have any historic support.

3 THE HISTORY OF FAIR DEALING

A Common Law Origins

Fair use and fair dealing were not born by statute. The concept of fair use developed as judge-made law, first by English and then by American judges, who mutually influenced and cross-referenced each other.³⁶ The prehistory of fair use and fair dealing has been documented by several scholars³⁷ and need not be repeated here fully, but a few highlights are worth mentioning.

First, as Bill Patry writes, “unlike Athena, the doctrine of fair use did not spring forth fully formed.”³⁸ Its scope and contours developed gradually, although “the basic foundation and rationale were established [by English judges] remarkably early.”³⁹ By 1841, when the doctrine made its full appearance in the United States in *Folsom v. Marsh*,⁴⁰ American courts already had a developed body of English case law to draw upon. During the nineteenth century, fair use was a broad concept that encompassed several issues that today would often be treated separately, such as copying of non-protectable facts and ideas as distinct from protectable expressions,⁴¹ the copying of nonsubstantial parts of protected expressions,⁴² as well as the permissible copying of substantial parts of protected expressions. While current doctrine tends to treat these issues as

³³ See *Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

³⁴ See Neil W. Netanel, *First Amendment Constraints on Copyright after Golan v. Holder: Melvin B. Nimmer Memorial Lecture*, 60 UCLA L. REV. 1082, 1105 (2013).

³⁵ See *id.* at 1103.

³⁶ See, e.g., *Scott v. Stanford* (1867) L.R. 3 Eq. 718, 722 (quoting Justice Story’s famous formulation of fair use in American law from *Folsom v. Marsh* 9 F. Cas. 342 (C.C.D. Mass. 1841)), and noting that “[t]he general principles guiding the court in cases of this description could hardly be found better stated” than in that case).

³⁷ See, e.g., Matthew Sag, *The Pre-History of Fair Use*, 76 BROOKLYN L. REV. 1371 (2011); Alexandra Sims, *Appellations of Piracy: Fair Dealing’s Prehistory*, 2011 INTELL. PROP. Q. 3 (2011); WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995).

³⁸ PATRY, *supra* note 36, at 3.

³⁹ *Id.*

⁴⁰ See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

⁴¹ See E. J. MACGILLIVRAY, *THE COPYRIGHT ACT, 1911*, ANNOTATED 29 (1912).

⁴² See *Chatterton v. Cave* [1878] 3 AC 483 (HL) 492.

conceptually distinct, and confine fair dealing to the third, the three are not entirely separate. The tests used for determining “substantiality” involve similar questions to those that are asked in determining “fairness,”⁴³ and whether the work is mainly factual or expressive may influence the outcome of the fairness analysis.⁴⁴

Second, the common terminology in English copyright law prior to 1911 was often “fair use,”⁴⁵ just like the American terminology, but it was also common to use the term “fair” as an adjective to describe specific activities, such as “fair quotation,”⁴⁶ “fair criticism,” “fair refutation,”⁴⁷ and, in the earlier cases, “fair abridgement.”⁴⁸ Sometimes courts would not use the term “fair” but its synonyms, such as “bona fide imitations, translations and abridgements.”⁴⁹ The switch to “fair dealing” in Commonwealth jurisdictions seems to simply follow a terminology adopted when the doctrine was codified in 1911 in the UK, but, as will be discussed in greater detail below, there is no evidence that the switch from “use” to “dealing” was intended to reflect any change in the law or its direction.

Third, the English judges who created fair use should not necessarily be seen as champions of users’ rights and the public interest, reining in overly expansive copyrights – as might be seen through contemporary spectacles. Rather, recognizing fair use allowed judges to actively expand the scope of copyright protection, beyond the original exclusive right to print or reprint books.⁵⁰

Still, even before the Supreme Court of Canada declared in *CCH* that fair dealing is a “users’ right,”⁵¹ courts and commentators often referred to the ability to use another’s work without permission as a users’ right and employed the term “the right of fair user.”⁵² Similarly, the connection between fair use, the scope of protection, and the public interest was not invented in Canada’s *CCH* case, or in the US, but had been recognized two centuries earlier in England. For example, as already noted, in *Cary v. Kearsley*, decided in 1802, Lord Ellenborough explained that:

[A] man may fairly adopt part of the work of another: he may so make use of another’s labours for the promotion of science, and the benefit of the public; but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*?

Then, after further elaboration, he put the question for the jury to consider as:

[W]hether what so taken or supposed to be transmitted from the plaintiff’s book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter – or taken colourable, merely with a view to steal the copy-right of the plaintiff?⁵³

And by the end of the nineteenth century, in the famous *Hanfstaengl v. Empire Palace* case, the Court of Appeal described copyright as “a monopoly restraining the public from doing that

⁴³ See *VAVER*, *supra* note 10, at 187–88.

⁴⁴ See *Cambridge University Press v. Becker*, 863 F. Supp. 2d. 1190, 1225 (N.D. Ga. 2012).

⁴⁵ *Lewis v. Fullarton* (1839) 48 Eng. Rep. 1080. See also *Bradshaw*, *supra* note 10, at 68.

⁴⁶ *Wilkins v. Aikin* (1810) 34 Eng. Rep. 163, 164.

⁴⁷ *Lord Perceval v. Phipps* (1813) 2 V. & B. 19 (Eng.).

⁴⁸ *Gyles v. Wilcox* (1740) 26 Eng. Rep. 489, 490.

⁴⁹ *Millar v. Taylor* (1769) 98 Eng. Rep. 201, 205. See generally Saul Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. 43, 48 (1955).

⁵⁰ See ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT (2005).

⁵¹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, paras. 12–13 (Can.).

⁵² J. M. EASTON, THE LAW OF COPYRIGHT IN WORKS IN LITERATURE, ART, ARCHITECTURE, PHOTOGRAPHY, MUSIC AND THE DRAMA BY THE LATE WALTER ARTHUR COPINGER 144 (5th ed. 1915).

⁵³ *Cary v. Kearsley* (1802) 170 Eng. Rep. 679, 680.

which, apart from the monopoly, it would be perfectly lawful for them to do.” The court explained that the “monopoly is itself right and just, and is granted for the purpose of preventing persons from *unfairly* availing themselves of the work of others . . .”⁵⁴ The court recognized the need to limit the scope of copyright lest it be turned into an “instrument of oppression and extortion” and explained that on the basis of such considerations courts recognized various limitations on the scope of copyright, before concluding that infringement occurs only if one “copies more than is fair, so that his copy may be used as a substitute for the original.”⁵⁵ The House of Lords affirmed the decision. In his judgment, Lord Macnaghten similarly described the case as one “in which there has been no unfair use and no copying of anything which the artist can claim as his.”⁵⁶

Therefore, to the extent the *CCH* may be seen as revolutionary, it is only revolutionary when viewed through a very narrow historical perspective, but viewing it with a longer historical gaze suggests that if *CCH* departed from earlier case law, it only brought back the law to its historical path.

B The Codification of Fair Use

Fair use remained a common-law principle in the UK until the enactment of the Copyright Act, 1911, which for the first time included a statutory fair dealing provision. Section 2(1)(i) of the 1911 Act provided that “Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary” shall not constitute an infringement of copyright. It was supplemented by additional, specifically tailored exceptions. The same provision would appear a decade later in Canada, where its language would remain unchanged until 1993.⁵⁷ In the US, the doctrine remained uncoded until 1976.

Consistent with the view that section 2(1)(i) of the 1911 Act only codified an already existing principle, courts in the UK continued to understand copyright as a right that did not extend to exclude others from making fair use of a work and to describe infringement as the making of only an *unfair use* of the work.

In *Francis, Day, & Hunter v. Feldman & Co.*,⁵⁸ a case from 1914, the plaintiff was the copyright owner in a popular song, which had been met by what was described as an answer or reply song. Justice Neville noted that while “it is clear that an answer need not necessarily be an infringement of the words of the original song . . . a song may well be an answer and yet an infringement of the original work”; what needs to be considered is “whether fair use has been made of the expression of ideas in the plaintiffs’ song, or whether that use has been excessive and such as to amount to a colourable imitation of the original song.”⁵⁹ Applying this test, Justice Neville concluded that the defendant’s song was merely a colourable imitation of the plaintiff’s song and

⁵⁴ *Hanfstaengl v. Empire Palace* [1894] 3 Ch. 109 (CA) 128 (Eng.), *aff’d*, *Franz Hanfstaengl v. H. R. Baines & Co.* (1895) AC 20 (HL).

⁵⁵ *Id.*

⁵⁶ *Hanfstaengl v. Baines* (1895) AC at 30.

⁵⁷ North American Free Trade Agreement Implementation Act, S.C. 1993, c 44, § 64(1) (Can.) (adding an attribution requirement to criticism, review and newspaper summary). In 1997, “newspaper summary” was replaced with the wider “news reporting”, the phrase “private study or research” was modified to “research or private study” (apparently to preempt an interpretation that would limit research to private settings), and the reference to “work” was deleted to expand fair dealing to sound recordings, performers’ performances and communication signals. See An Act to amend the Copyright Act, S.C. 1997, c 24, § 18(1) (Can.).

⁵⁸ See *Francis, Day, & Hunter v. Feldman & Co.* [1914] 111 LT 521 (CA) (Eng.).

⁵⁹ *Id.* at 523.

held in favour of the plaintiff. Although there was no verbatim copying, he described the defendant's song as "an obvious attempt . . . to catch the particular expression of ideas that appear in the first song . . ." In his view, the many words from the first song that were put in the defendants' song, including their context and collocation, showed "that what was aimed at really was a copying of the plaintiffs' song, with such alterations as, in the author's opinion, would exonerate him from a charge of infringing the copyright."⁶⁰ The Court of Appeal did not take issue with the test for infringement yet disagreed with its application. It reversed the decision and held that there had been no colourable imitation of the song, and therefore no infringement of the plaintiffs' copyright by the defendants.⁶¹

Four years later, the court in *Educational Company of Ireland v. Fallon Brothers and Getz*⁶² approached the issue of infringement in the same way. One of the defendants, Professor Getz, wrote a book for school use, assigned the copyright to the plaintiffs, and agreed not to publish any similar work during the subsistence of the agreement. He subsequently wrote a similar book on the same topic, adopting the same system, repeating the same kind of lessons, intended practically for the same class of pupils, and which the other defendants published and sold at a low price.

The defendants argued that there was no copyright in the plaintiff's work because it lacked sufficient originality as it was merely a compilation of existing and common materials. The court noted that under the 1911 Act, copyright could clearly subsist in an original compilation of non-original materials and explained that the test for infringement is "whether the author of the later work has made an unfair use of the prior work."⁶³ The court then held that infringement took place because the second book substantially reproduced everything of value in the earlier book; it was merely a substitute for the first, calculated to supersede it and harm its market.⁶⁴

These cases are noteworthy for several reasons. First, the fairness analysis seems to center around the question of whether the defendant created merely a substitute – a colourable imitation – of the plaintiff's work, in which case the use would be unfair, or whether it has done something sufficiently different, which does not merely supersede the plaintiff's work, in which case it would be fair. This analysis echoes the focus on whether the use is transformative or merely substitutive, which has become the crux of American fair use doctrine in recent years.⁶⁵

Second, although the cases were decided under the 1911 Act and interpret some of its provisions, none of them refer to the newly enacted statutory "fair dealing" provision. Rather, they revolve around fair use (or lack thereof) as an underlying principle, applying the same tests from the pre-1911 case law.

Third, like the US fair use jurisprudence, the decisions focused on fairness and were not preoccupied with determining whether the purpose of the defendant's use fell under any of the enumerated purposes in the fair dealing provision (which were not even mentioned).

These decisions indicate that the enactment of section 2(1)(i) of the 1911 Act was not perceived as introducing any change in the law of fair use or in the understanding of what constitutes infringement. As I discuss below, this view was common among commentators at the time and the one that emerges from the legislative history.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Educational Company of Ireland v. Fallon Brothers and Getz* [1919] 1 IR 62 (Ch.) (Ir.).

⁶³ *Id.* at 68.

⁶⁴ *Id.* at 68, 71.

⁶⁵ See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d. 202 (2d Cir. 2015).

Nevertheless, as noted above, contemporary conventional wisdom holds that the enactment of the 1911 Act was meant to create an exhaustive list of allowable purposes. However, this view is biased by hindsight. It confuses a narrow and erroneous *subsequent* interpretation of the 1911 Act with the *intended* effect of the 1911 codification, and it also wrongly deduces, from the inclusion by US Congress of the explicit words “such as,” that their absence from the UK 1911 legislation *necessarily* reflects Parliament’s desire to limit fair dealing only to the enumerated purposes. As I explain below, a small number of early English courts misinterpreted Parliament’s intent, adopting a restrictive but erroneous view of fair dealing, a view which has never been seriously challenged. Moreover, the legislative history of section 107 in the US indicates that the decision of Congress to add the words “such as” reflects a lesson learned from the failed earlier British attempt at codification.⁶⁶

C Fair Dealing’s Decline

A few early cases have set the law of fair dealing in the UK and the Commonwealth on a restrictive trajectory from which it has not yet recovered. Of these cases, *University of London Press*, *British Oxygen*, and *Hawkes and Son* are particularly noteworthy: the first, not for what it had held, but for how its holding was later misinterpreted, and the other two for their holding and reasoning. Overall, with some exceptions, these decisions misconstrued Parliament’s intent and set the tone for a castrated version of fair dealing: first by confining fair dealing to the list of enumerated purposes and then by construing them narrowly.

i University of London Press

*University of London Press Ltd v. University Tutorial Press Ltd.*⁶⁷ was one of the first reported cases decided under the 1911 Act, and the first case involving the newly enacted fair dealing provision. This, perhaps, explains its enduring influence, despite being only a trial level decision. The outcome of the case does not seem to be particularly controversial or revolutionary – not in retrospect, and probably also not at the time it was decided – but some of its dicta and the misinterpretation of some of its holdings have turned it into an important milestone in the takeover of an owner-centric view of copyright in UK law.

The defendants published a book entitled *London Matriculation Directory*, which contained several matriculation papers copied from a prior publication of the plaintiff, a subsidiary of the University of London, that were written by examiners hired by the university. The defendants’ publication also included “answers to the questions in [some of] the papers . . .; and it also comprise[d] a short criticism of the construction of the various papers, . . . intended for the guidance of future examiners rather than for the edification of possible students.”⁶⁸ The court found that both publishers recognized that students and teachers derived significant utility from samples of previous examination questions, and to satisfy that demand, both publishers had

⁶⁶ The Latman Study, one of the preliminary studies that led to the enactment of section 107, reviewed previous attempts to codify fair use since the passage of the US Copyright Act of 1909. Some proposals explicitly suggested adopting the UK provision. One of them, from 1940, proposed a provision protecting “fair dealing” for “the purpose of private study, research, review or newspaper summary.” The entire section was deleted after the Joint Committee on Materials for Research, apparently considering “the position of the scholar more favorable under the case law, convinced all other interested groups except the book publishers that the attempt to codify the doctrine of fair use had been unsuccessful.” Allen Latman, Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, 86th Cong, Study 14: Fair Use of Copyrighted Works 21 (Comm. Print 1960).

⁶⁷ See *Univ. of London Press Ltd. v. Univ. Tutorial Press Ltd.*, [1916] 2 Ch. 601 (Eng.).

⁶⁸ *Id.* at 613.

decided to compete in that market. Even though the defendants' publication was not identical to the plaintiffs' and added its own content, copying a significant amount from one publication for the purpose of publishing a competing publication would hardly make an easy case for fair dealing, either today or a century ago. MacGillivray, who acted as co-counsel for the defendants, probably recognized that fair dealing would be an uphill battle and focused most of its defense on other issues. Fair dealing was the last line of defense, pleaded in the alternative, should other arguments fail.

Justice Peterson's judgment reflected the same view of the importance of the issues. He devoted only one paragraph to the fair dealing argument, which he easily dismissed without much elaboration. After describing how both publishers sought to compete in the same market, how there was very little in the defendants' work that could be seen as criticism, and how the partial answers provided by the defendant to some of the questions provided relatively little added value, he concluded that:

It could not be contended that *the mere republication* of a copyright work was a "fair dealing" because it was intended for purposes of private study; *nor, if an author produced a book of questions for the use of students, could another person with impunity republish the book with the answers to the questions.* Neither case would, in my judgment, come within the description of "fair dealing." In the present case the paper on more advanced mathematics has been taken without any attempt at providing solutions for the questions, and the only way in which the defendants have dealt with this paper is by appropriating it, except that there are eleven lines of criticism of it, dividing the questions into easy, troublesome, and difficult questions. To the questions in the other two papers answers are provided. *Both publications are intended for educational purposes and for the use of students,* and in my judgment the defendants have failed to bring themselves within the protection of s. 2, sub-s. 1 (i.), of the Act.⁶⁹

When read in context, it is clear that *University of London* only stands for the unremarkable proposition that the *mere* republication of a work, by a competing publisher, without adding anything substantial, does not make a credible fair dealing case – a proposition that, on the reported facts of the case, does not seem to be highly controversial.⁷⁰

Contrary to a persistent, self-perpetuating, yet erroneous reading of the judgment, Justice Peterson did not hold that the term "private study" applied only to copying made by students for their own private use. In fact, he accepted that the defendant's book had been intended for "private study," and that like the plaintiff's book, it was intended for "educational purposes and for the use of students." While the phrase "private study" might seem somewhat enigmatic today, there was nothing remarkable in accepting the argument that the books, the defendant's and the plaintiff's alike, were intended for "private study." At the time, it was common for publishers of educational books to describe and promote them as suitable for private study.⁷¹

Nor did Justice Peterson rule that fair dealing could not apply to other purposes, beyond those explicitly mentioned in the Act (a question that was not before him and need not have been). The question in the case was whether the dealing, although for private study, was fair. He rejected the fair dealing defense on the basis that the dealing was not fair, not on the basis that

⁶⁹ *Id.* at 613–14.

⁷⁰ This was also the conclusion in *Educational Company of Ireland v. Fallon Brothers and Getz* [1919] 1 IR 62 (Ch.) (Ir.), which involved a similar type of dispute.

⁷¹ See, e.g., HERMANN LANGE, *LANGE'S NEW GERMAN METHOD ADAPTED FOR CLASS TEACHING AND PRIVATE STUDY: IN FOUR VOLUMES* (1876); ALFRED HIX WELSH, *ESSENTIALS OF ENGLISH FOR SCHOOLS, COLLEGES, AND PRIVATE STUDY* (1884); WILLIAM BENJAMIN SMITH, *ELEMENTARY CO-ORDINATE GEOMETRY FOR COLLEGIATE USE AND PRIVATE STUDY* (1886).

the defendant's purpose did not amount to "private study" or that its educational purpose was not specifically mentioned in the Act.

Nevertheless, for almost a century, this case has been misinterpreted, and was frequently cited as an authority supporting the very propositions that it does not stand for. The first misinterpreter seems to be F. E. Skone James, who, as the editor of the sixth edition of *Copinger*, cited *University of London* as authority for the proposition that private study "only covers the case of a student copying out a book for his own use, but not the circulation of copies among other students."⁷² And until the Supreme Court of Canada's ruling in *Alberta (Education)*, Canadian courts repeated this error.

For example, the Federal Court of Appeals (FCA) in *CCH* posited that "British courts have held that use in an educational institution was not for the purpose of private study," but despite the reference to "British courts" in plural, provided a single reference, *University of London Press*.⁷³ The FCA further added that "the Court in *University of London Press*, *supra* interpreted private study as not including educational purposes, and therefore did not allow professors to claim an exemption based upon their students' purposes."⁷⁴ But *University of London* did not make any of those holdings. It did not deal with "professors [claiming] an exemption" or with "use in an education institution" but rather with two competing commercial publishers. Therefore, it did not hold and could not have held that "use in an educational institution was not for the purpose of private study."

The Copyright Board in *Alberta (Education)* repeated the same errors. It stated "[a]lmost a century ago, British courts established a dichotomy between private study and teacher-student classroom interaction" and concluded that "[i]t therefore seems impossible that a copy made by a teacher for his or her class can be for the purpose of private study . . ."⁷⁵ Like the FCA, it referred to "British courts" in plural while citing only *University of London*, and in a similar erroneous fashion suggested that *University of London* was a case about a classroom setting.

On appeal, the FCA endorsed the Copyright Board's interpretation. But ultimately, the Supreme Court declined to repeat these errors and noted that the *University of London* had very little bearing on the meaning of "private study" and does "not stand for the proposition that 'research' and 'private study' are inconsistent with instructional purposes."⁷⁶

⁷² F. E. SKONE JAMES, *COPINGER ON THE LAW OF COPYRIGHT* 123 (6th ed. 1927).

⁷³ See *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2002] 4 F.C.R. 213, para. 129 (Can. C.A.).

⁷⁴ *Id.* para. 130.

⁷⁵ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2009] C.B.D. No. 6, para. 90 (Can.).

⁷⁶ *Id.* para. 21. This interpretation of *University of London* was one of the key arguments in the Intervener Factum that the Centre for Innovation Law and Policy filed in *Alberta (Education)* and of which I was one of the coauthors, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345 (Can.) (Factum of the Intervener, The Centre for Innovation Law and Policy ("CILP")). In that Factum we also included two earlier decisions in which private study and instruction were considered as complementary or even synonymous rather than contradictory. In *Caird v. Sime* [1878] 12 App. Cas. 326 (HL), the House of Lords held that a university professor had not forfeited his right of first publication of his lectures by delivering them to his students in the classroom. The majority reasoned that the professor's duty as a teacher was not to address the public at large, but "to give personal instruction to the individuals composing his audience." The court held that the professor's lectures were "private, inasmuch as the author [did] not by their delivery communicate his ideas and language to the public at large." Similarly, in *Dickens v. Hawksley* [1935] Ch. 267 (Eng.), the terms "instruction" and "private study" were used interchangeably by different judges, and were distinguished from "public" and "publication." The case involved a dispute between heirs of Charles Dickens over the copyright in his unpublished manuscript about the life of Jesus Christ. Justice Bennett described the manuscript as "written for the *instruction* of the author's children and . . . not intended by him for publication." On appeal, Lord Maugham described the work as one "written by the author *not for publication but* for the benefit of his family, and . . . for their *private* study." *Id.* at 301 (emphasis added).

ii *British Oxygen*

*British Oxygen v. Liquid Air*⁷⁷ involved two competitors: the plaintiff, who manufactured and sold oxygen gas, and the defendant, who manufactured equipment for producing oxygen gas. Both were competing for the same customers. To persuade a customer not to buy the defendant's equipment, the plaintiff offered that customer a deep discount conditional on a long-term exclusivity commitment. The details of the offer were communicated in a letter sent to the customer. The defendant obtained the letter from that customer, reproduced twelve copies, and sent one of them to a firm of stockbrokers on the London Stock Exchange, together with a letter complaining about the plaintiff's competitive tactics. The plaintiff filed a lawsuit claiming copyright infringement.

The defendant challenged the copyrightability of such a letter, but argued that if such a letter was a literary work within the meaning of the 1911 Act, then its reproduction was permitted as fair dealing for the purpose of criticism. The defendant also relied on earlier cases that found that a person was entitled to publish a letter when it was necessary to protect his character.

Justice Romer rejected all those arguments. He indicated that he was in agreement with the plaintiff's view that "criticism" within the meaning of the Act meant criticism of the work as such but thought that he did not have to actually decide this matter because fair dealing simply could not apply to criticizing an unpublished literary work. Subjecting an unpublished literary work to public criticism, review, or newspaper summary, without the consent of the copyright owner, would be, in his mind, "manifestly unfair." He further doubted that the right to publish a letter to vindicate one's good name survived the passage of the 1911 Act and held that in any event that defense was inapplicable.

iii *Hawkes & Son*

Hawkes & Son involved the unauthorized use by Paramount Film of twenty seconds of the musical work "Colonel Bogey" (which lasted four minutes in total) in a newsreel reporting the opening of the Royal Hospital School by the Prince of Wales.⁷⁸ At trial level, the defendants argued that the part copied was not substantial and that in any event fair dealing applied because "[t]hese news films are in effect a pictorial form of newspaper. The case comes within . . . fair dealing for the purposes of private study, research, criticism, review, or newspaper summary . . . The sound film is an audible and pictorial newspaper summary."⁷⁹ Justice Eve, the trial judge, held that no substantial part of the work had been reproduced, and that if he was wrong about that then "the acts of the two defendants constitute a fair dealing with the work . . . it is impossible that what has been done can inflict any substantial injury on the plaintiffs' monopoly, or invade any market of the plaintiffs, actual or problematic."⁸⁰

The Court of Appeals reversed. On appeal, the defendant's lawyers conceded that the part taken was substantial but maintained that fair dealing applied. They emphasized that the reproduction was made for the sole purpose of indicating what happened when the Prince of Wales opened the school, and maintained, based on the case law prior to 1911, that the purpose of the reproduction had always been "of vital importance for the purpose of ascertaining whether there has been an infringement."⁸¹ MacGillivray, who acted as co-counsel for the defendant,

⁷⁷ See *British Oxygen v. Liquid Air* [1925] 1 Ch. 383 (Eng.).

⁷⁸ See *Hawkes & Son (London), Ltd. v. Paramount Film Service, Ltd.* [1934] 1 Ch. 593 (CA) (Eng.).

⁷⁹ *Id.* at 595.

⁸⁰ *Id.* at 598.

⁸¹ *Id.* at 600.

must have been familiar with the legislative history, and his argument that “the matters specified in the proviso to s. 2, sub-s. 1, are merely examples of ‘fair dealing’”⁸² is entirely consistent with that history.⁸³

However, Lord Hanworth MR decided “simply to look at the statute” and to interpret it according to its purpose, which in his view was “the necessity for the protection of authors whether of musical or of literary compositions.”⁸⁴ In interpreting the Act as if that was its only purpose, he adopted a very strong owner-centric view of copyright, ignored its public interest goals, and dismissed the relevance of any consideration of whether the defendant’s actions caused any harm to the plaintiff.⁸⁵ Remarkably, the authority he relied on to support these propositions was the same paragraph from *Hanfstaengl v. Empire Palace*, where the court described copyright’s purpose as preventing persons from *unfairly* availing themselves of the work of others, and noted that infringement occurs only if one “copies more than is fair, so that his copy may be used as a substitute for the original.”⁸⁶ In an extremely narrow interpretation of the statute, he held that “the collocation of the words ‘criticism, review, or newspaper summary’ clearly points to the review or to notices of books which appear in newspapers, and not to anything of the nature that was done in the present case.”⁸⁷ This holding was a clear departure from pre-1911 case law, which did not limit “review” to those narrow settings, and recognized that “criticism” did not apply solely to criticism of the copied work, but could extend to criticizing the views contained in it.⁸⁸

Lord Slesser agreed and added a few interesting remarks. While he acknowledged that the notion of “substantial part” appeared in the statute for the first time in 1911, he emphasized the continuity with the pre-1911 case law and the fact that Parliament explicitly codified what had already been decided by the courts under the previous legislation.⁸⁹ However, when considering the defense of fair dealing, he chose to ignore any similar continuity with the previous case law. He took the view that “this [fair dealing] proviso must be dealt with strictly, and when it says ‘newspaper summary’ it means newspaper summary and nothing else.”⁹⁰

Lord Romer, despite showing some sympathy to the defendants, who caused no harm to the plaintiffs, was equally dismissive of their legal arguments. He joined the view that the plaintiffs’ harm – or lack thereof – was irrelevant because the plaintiffs were simply asking the court to enforce their legal rights. The plaintiffs were entitled to have their rights enforced, regardless of the interests of the defendant or of the audience.⁹¹

The strong proprietary and owner-centric language used by the judges makes it difficult to speculate whether the outcome of *Hawkes & Son* would have been different under an explicitly open-ended fair dealing provision, or one that used a different term from “newspaper summary.” In any event, while the owner-centric legacy of *Hawkes & Son* continued to burden Commonwealth

⁸² *Id.* at 599.

⁸³ See *infra* Part IV.B.

⁸⁴ See *Hawkes & Son (London), Ltd. v. Paramount Film Service, Ltd.* [1934] 1 Ch. 593 (CA) 602–3 (Eng.).

⁸⁵ See *id.* at 603. Cf. *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326, paras. 9–10 (Can.) (acknowledging the shift in the court’s approach, away from an “author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace” to focusing “instead on the importance copyright plays in promoting the public interest, and emphasiz[ing] that the dissemination of artistic works is central to developing a robustly cultured and intellectual public domain.”).

⁸⁶ See *Hanfstaengl v. Empire Palace* [1894] 3 Ch. 109 (CA) 128 (Eng.).

⁸⁷ *Hawkes & Son* [1934] 1 Ch. at 604.

⁸⁸ See Sims, *supra* note 1, at 197–99.

⁸⁹ See *Hawkes & Son* [1934] 1 Ch. at 603–8.

⁹⁰ *Id.* at 608.

⁹¹ *Id.*

law for many years, some of its harsh consequences were relieved through legislative change. In 1956, the UK changed the term “newspaper summary” to “reporting current events”⁹² – Canada would do the same in 1997, by replacing “newspaper summary” with “news reporting.”⁹³ Subsequent amendments in both countries also exempted “incidental inclusion.”⁹⁴

Not all cases followed the same restrictive, owner-centric, approach to fair dealing. Even before the Supreme Court of Canada declared in 2004 that fair dealing is a users’ right and should be given large and liberal interpretation,⁹⁵ some courts, on occasion, approached fair dealing in a more liberal way. For example, in *Hubbard v. Vosper*, Lord Denning MR declined to interpret fair dealing as narrowly as the plaintiff suggested, and did not follow an earlier case suggesting that “criticism” was limited to “criticism of the work as such” or that fair dealing could not apply to criticizing unpublished works.⁹⁶ Moreover, his canonical statement that “[i]t is impossible to define what is ‘fair dealing’”⁹⁷ reflects a vision of flexibility and common law adjudication rather than one that sees courts as strictly bound by the confines of the statutory provision. A year later, the holding in *Hubbard v. Vosper* led the court to recognize that a common law “public interest” defense may “override the rights of the individual (including copyright), which would otherwise prevail and which the law is also concerned to protect.”⁹⁸

Nevertheless, it appears that the restrictive view articulated in *Hawkes & Son*, according to which fair dealing was confined to the explicitly enumerated purposes, has never been challenged, and accordingly courts did not have the opportunity to thoroughly consider it. When courts found a dealing fair, they also found that it fell within one of the enumerated purposes, and when they rejected the defense, they characterized the dealing as unfair, even if it was for an enumerated purpose. But there is no reported case where a court found that a defendant’s dealing with a work was fair but nonetheless infringing solely because the purpose was not specifically enumerated. Until such a reasoning becomes the *ratio decidendi* of a Supreme Court ruling, the exhaustiveness of the list of enumerated purposes remains an open one.

4 INTERPRETING THE 1911 ACT

Recall that not too long before the UK Parliament enacted the 1911 Act, the House of Lords affirmed the Court of Appeal’s decision in *Hanfstaengl v. Empire Palace*, which had stated copyright’s purpose as only preventing persons from *unfairly* availing themselves of the work of others, and noted that infringement would occur only if a defendant “copies more than is fair, so that his copy may be used as a substitute for the original.”⁹⁹ The crucial question, therefore, is what was Parliament’s intent when it enacted the fair dealing provision in 1911? Did Parliament intend to replace the common law doctrine with an exhaustive statutory regime but without changing its scope, or did it contemplate a limited statutory regime that coexists with the common law? Did Parliament intend to amend the common law of fair use or fair dealing by confining the doctrine to the five enumerated purposes or was Parliament’s intention merely to clarify that the doctrine existed without restraining courts’ power to continue developing it?

⁹² Copyright Act 1956, 4 & 5 Eliz. 2, c. 74, § 6(3) (UK).

⁹³ An Act to amend the Copyright Act, S.C. 1997, c 24, § 18(1) (Can.).

⁹⁴ Copyright, Designs and Patents Act 1988, c. 48, § 31 (UK); Copyright Act, R.S.C. 1985, c C-42, § 30.7 (Can.).

⁹⁵ See *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, paras. 48, 51 (Can.).

⁹⁶ *Hubbard v. Vosper* [1972] 2 QB 84, 94 (Eng.).

⁹⁷ *Id.*

⁹⁸ *Beloff v. Pressdram Ltd.*, [1973] F.S.R. 33 (Ch.) 38 (Eng.).

⁹⁹ *Hanfstaengl v. Empire Palace* [1894] 3 Ch. 109 (CA) 128 (Eng.), *aff’d*, *Franz Hanfstaengl v. H. R. Baines & Co.* (1895) AC 20 (HL) (Eng.).

While a plain reading of the statutory language might support the interpretation that Parliament replaced and restricted the common law doctrine, other principles of statutory interpretation, including the legislative history, indicate that the replace-and-restrict interpretation is the least likely one.

This part begins with discussing the restrictive interpretation, largely based on the supposed plain meaning of the fair dealing provision, and then proceeds to refute it.

A The Restrictive Interpretation

i *Expressio unius*

The strongest support for the interpretation that the fair dealing clause in section 2 of the UK 1911 Act¹⁰⁰ (and its subsequent iterations in the Canadian legislation) confines fair dealing to the five enumerated purposes and excludes all other purposes is implied exclusion, based on an inference from the Act's language. Arguably, if Parliament intended to allow courts to apply fair dealing to other, non-enumerated purposes, it would have said so. Parliament could have added the words "such as" (as the US Congress did in 1976) or could have used similar drafting techniques to clarify that the enumerated purposes are illustrative rather than exhaustive. In other words, *expressio unius est exclusio alterius*: "to express or include one thing implies the exclusion of the other."¹⁰¹

While *expressio unius* is helpful in determining a text's linguistic meaning, it does not necessarily ascertain its legal meaning.¹⁰² As Aharon Barak writes:

[L]ogic governs the scope of this canon [of interpretation]. If I say that people are mortal, you should not infer that animals live forever. Even when it is possible to infer "no" from "yes," that choice does not necessarily become the text's legal meaning. Perhaps the "yes" itself is included merely as a precaution, to remove doubt (*ex abundanti cautela*); perhaps it is only an example; perhaps it reflects sloppy writing.¹⁰³

Therefore, "[l]ike the other presumptions relied on in textual analysis, implied exclusion is merely a presumption and can be rebutted."¹⁰⁴

In 1929, the Supreme Court of Canada noted that:

The maxim, *expressio unius est exclusio alterius*, enunciates a principle which has its application in the construction of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur; that there may be inadvertence; that sometimes unnecessary expressions are introduced, *ex abundanti cautela*, by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not to be of universal application.¹⁰⁵

One of the cases that the Court relied on, *McLaughlin v. Westgarth*,¹⁰⁶ is particularly noteworthy because it was decided by the Privy Council in 1906, five years before the passage

¹⁰⁰ See Copyright Act 1911, 1 & 2 Geo. 5, c. 46, § 2(1)(i) (UK).

¹⁰¹ See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 8 (2005).

¹⁰² *Id.*

¹⁰³ *Id.* at 108–9.

¹⁰⁴ RUTH SULLIVAN, *STATUTORY INTERPRETATION* 193 (2d ed. 2007).

¹⁰⁵ *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, 70–71 (Can.).

¹⁰⁶ See *McLaughlin v. Westgarth* [1906] UKPC 33 (appeal taken from Austl.).

of the 1911 Act. In delivering the judgment of the Privy Council, Lord Halsbury observed that modern statutes might often be drafted “with great particularity and minuteness.”¹⁰⁷ Unfortunately, he explained, this mode of drafting encourages “any body of persons, seeing a possibility of liability on their part, [to] apply to Parliament to have special provisions inserted for their protection.”¹⁰⁸ Parliament often complies with such application, which, in turn, leads the plaintiffs to argue “that anybody who is not included in the enumeration of the particular persons so inserted must be taken to be excluded by the operation of the statute from protection just because they are not included and others are.”¹⁰⁹ He held that “[t]he doctrine applicable to all such cases is that a great many things are put into a statute *ex abundanti cautela*, and it is not to be assumed that any body not specifically included is for that reason alone excluded from the protection of the statute.”¹¹⁰

Moreover, he further noted that “[t]heir Lordships, however, state this general position rather in view of the construction of statutes in general than as being specially relevant to this particular case.”¹¹¹ This holding, therefore, serves as a backdrop against which the Act passed five years later should be evaluated. It provided a clear directive from the highest court that the exemption of one class of persons from liability should not, without something more, be interpreted as denying protection from all others not specifically exempted.

Therefore, if there were any presumption that the express enumeration of specific purposes in the fair dealing clause excludes all others, it can be easily rebutted in the present context. Moreover, as the proceeding analysis shows, there is no evidence in the legislative history to support the *expressio unius* interpretation. It instead reflects Barak’s three possibilities: some of the purposes may have been included to remove doubt; all of them, read together, stand in synecdochically for a variety of permissible uses; and in retrospect, the omission of “such as” reflects sloppy writing.

ii Two Notes on Plain Meaning

Even though the *expressio unius* interpretation assumes that the statute’s meaning is clear, it must be noted that the meaning of the fair dealing provision is not as clear as those who adhere to this view pretend it to be. The notion that fair dealing applies only to certain allowable purposes implies that “[d]ealings for other purposes are not covered by the exception, *even if they would otherwise be fair*.”¹¹² Accordingly, proponents of this view call upon us to assume that in enacting the words “[a]ny fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary. . . shall not constitute an infringement of copyright,” the UK Parliament in 1911 (and Canada’s in 1921) intended that any dealing with a work for any other purpose, even though the dealing may otherwise qualify as fair, would still constitute an infringement of copyright.

While grammatically plausible, this interpretation is paradoxical. The adjective “fair” usually stands for something that is “just or appropriate under the circumstances.”¹¹³ It would seem rather peculiar for a legislator to adopt a provision that intentionally holds unlawful dealings that

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2009] C.B.D. No. 6, para. 77 (emphasis added).

¹¹³ *Fair*, OXFORDDICTIONARIES.COM, <https://en.oxforddictionaries.com/definition/fair> (last accessed Dec. 21, 2018).

would be “just or appropriate under the circumstances.” Why would a legislator wish to outlaw acts that would be just or appropriate? Wouldn’t such legislation be unjust and inappropriate? If the intent had really been to confine the exception only to the five enumerated purposes while excluding all others, and further limit it to the subset of those dealings (those that are both within these enumerated purposes and that are fair), it would have been open to say so directly. For example, Parliament could have provided that “it shall not constitute an infringement of copyright to deal with any work for the sole purposes of private study, research, criticism, review, or newspaper summary, and provided that any such dealing is fair.” Such a provision would have indeed clarified that the exception of fairness could apply only to one of the enumerated purposes and to no other purpose.

Moreover, the closed-list view of fair dealing commits the logical error of confusing the conditional (If P, then Q) with the biconditional (If P and only if P, then Q). A biconditional statement or rule includes both a conditional statement (If P, then Q) and its inverse (If Not-P, then Not-Q).¹¹⁴ But the conditional “If P, then Q” should not be mistaken for including its inverse (the biconditional). The statement “if it’s raining, then the sky is gray” is a true statement, but it does not mean that the sky is gray only if it’s raining (or that if it’s not raining then the sky isn’t gray). After all, the sky may be gray even when it’s not raining.

Or consider the legal meaning of a rule such as “no dogs allowed in restaurant”, whose scope might vary depending on the mischief that the rule was intended to address. If the purpose of the rule was to prevent the potential disruption caused by dogs that enter the restaurant, then the rule might be interpreted as not applying to seeing-eye dogs that are trained to be well behaved.¹¹⁵ Thus understood, the rule might even be interpreted as applying to other potentially disrupting animals even if they are not dogs. However, if the “no dogs allowed” rule was promulgated because the restaurant specifically seeks to serve customers with severe allergies to dogs, then the rule should be interpreted as preventing the entry of a seeing-eye dog, while permitting the entry of any non-dog animal.

Legislated texts are imperfect, and their legal meaning cannot be based solely on their textual meaning; they should be aided by resort to the legislative history and other interpretative principles, which are discussed below.

B Legislative History of the 1911 Act

“The legislative evolution and history of a provision may often be important parts of the context to be examined as part of the modern approach to statutory interpretation.”¹¹⁶ Understanding the meaning of fair dealing also requires understanding the law that existed prior to 1911 and what changes, if any, the 1911 Act intended to effect.¹¹⁷ The Copyright Act of 1911 was “[a]n Act to amend and consolidate the Law relating to Copyright.” As early as 1878, consolidation of the law was recommended by a Royal Commission, which found the existing law “wholly destitute of any sort of arrangement, incomplete, often obscure, and, even when intelligible upon long study, so ill-expressed that no one who did not give such study to it could expect to understand it.”¹¹⁸

¹¹⁴ See Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1803 (2013).

¹¹⁵ *Id.*

¹¹⁶ Canada (Canadian Human Rights Commission) v. Canada (Attorney-General), [2011] 3 S.C.R. 471, para 43 (Can.).

¹¹⁷ See FRANCIS BENNION, STATUTORY INTERPRETATION 458 (3d ed. 1997) (“The interpreter cannot judge soundly what mischief an enactment is intended to remedy unless he or she knows the previous state of the law, the defects found to exist in that law, and the facts that caused the legislator to pass the Act in question.”).

¹¹⁸ ROYAL COMMISSION ON COPYRIGHT, REPORT OF THE ROYAL COMMISSION ON COPYRIGHT, 1878, XXIV, C.2036, para. 7 (UK).

Some additional amendments were also required in order to comply with the Berne Convention for the Protection of Literary and Artistic Works signed in 1908.

In addition to extending the term of copyright protection, its application to new subject matter, and the abolition of mandatory registration, the new Act broadened the definition of what copyright was, expanded the definition of what constituted infringement, and enlarged the scope of remedies that might be available to the plaintiff under the Act, in comparison to what was contained in the Copyright Act, 1842. Many of those changes were not entirely revolutionary and reflected developments already recognized in the case law. Still, their explicit recognition in the new statute removed any doubt that the rights and remedies were considerably broader than those explicitly stated in the 1842 Act. This fact helps us understand the motivation for legislating a fair dealing provision instead of continuing to rely on judge-made fair use rulings.

Indeed, a simple explanation might be that since the 1911 Act was mainly a project of consolidation of different acts and codification of different common law rules, it seemed prudent not to leave fair use without any statutory basis. Even though the Royal Commission in 1878 recommended against legislating a specific fair use provision and preferred letting the court continue to apply the doctrine on a case-by-case basis,¹¹⁹ it is possible that the drafters of the 1911 Act had a different view and thought that their ambitious project of codification and consolidation would be incomplete without mentioning the doctrine in the statute.¹²⁰

Another explanation is a possible concern that if the Act recognized only the expansion of the copyright but remained silent about limitations to those expanded rights, courts might have interpreted that as a signal that Parliament had decided to abolish fair use.¹²¹

Of course, Parliament could have achieved this result by simply stating that any fair dealing with any work does not constitute infringement, without specifying particular purpose. This, however, might have been considered too vague, and it would make sense to give some illustration.

Alternatively, the purpose of specifying the five categories might have extended beyond removing doubts that fair dealing applied to the purposes already recognized in the case law, but also to ensure that it applied to those who lacked solid grounding in the case law. In particular, the addition of “research,” “newspaper summary,” and “private study” categories that had no direct precedent in the case law can support this explanation.¹²²

¹¹⁹ See *id.* para. 67.

¹²⁰ Interestingly, in 1909, the US Congress consciously decided to leave the determination of fair use entirely to the courts and the Act of 1909 remained, like its predecessors, entirely silent on this issue. See Latman, *supra* note 65.

¹²¹ MacGillivray, in his 1912 commentary, offered an explanation along those lines:

“The protection granted under the general definition of copyright in sect. 1 is so absolutely prohibitive of any use in the nature of a reproduction of the whole or any part of the author’s work, that it is necessary to introduce the exceptions specified in sub-section (i) [of s 2]. It would hardly have been safe to have left it entirely to the Court to say what exceptions should or should not be admitted upon the analogy of the case law decided under the Copyright Act, 1842.” MACGILLIVRAY, *supra* note 40, at 27.

See also Ariel Katz, *Fair Use 2.0: The Rebirth of Fair Dealing in Canada*, in *THE COPYRIGHT PENTAGONY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW* 93, 122 (Michael Geist ed., 2013).

¹²² Although commentators such as MacGillivray noted that “[t]he liberty of fair dealing by way of research [was] probably intended to express the whole of the existing case law on the meaning of fair use,” MACGILLIVRAY, *supra* note 40, at 28 there does not seem to be prior case law dealing with research as such, possibly because reproduction for the purpose of research that did not involve publication or distribution was not a reason for concern and might not have even been actionable under the previous Act. “Newspaper summary” did not appear in the bill, but was added in committee, and “private study” might have been added to overrule, or at least narrow the scope of, the holding in *Novello v. Sudlow* and its progeny. See also Katz, *supra* note 120, at 122, and the references therein.

By contrast, it is theoretically possible that by specifying the five enumerated categories, Parliament intended to abolish the common law on fair use, and replace it with a limited statutory fair dealing provision that applies only to those categories, and further prevents the courts from recognizing additional ones. This view has been accepted lately as conventional wisdom, although it is the least likely of all explanations. As we shall see below, there is no evidence supporting this explanation, and sufficient evidence to reject it.

i The Legislative Record

While the legislative record may not be rich enough to unequivocally determine Parliament's intent in 1911, it contains enough to refute the claim that the codification of fair dealing was intended to confine it to the five enumerated purposes or impose a limit on the common law doctrine. In fact, the record contains sufficient evidence to the contrary.

When the bill was introduced to the House of Commons, Mr. Buxton, the president of the Board of Trade (the ministry responsible for drafting the legislation), surveyed the main changes in the proposed Act.¹²³ If the bill contemplated major reform with respect to fair dealing, it would have been expected that such change was mentioned, but it was not. Nor did Viscount Haldane, who introduced the bill to the House of Lords, mention any contemplated change with respect to fair dealing. In fact, in objecting to a motion "to confine to literary and dramatic works the doctrine of fair dealing which has been laid down by the Courts, and not to extend it to pictures,"¹²⁴ Viscount Haldane emphasized the judge-made nature of the doctrine of fair dealing and stated:

All we propose to do is to declare that for the future the principle of fair dealing which the Courts have established is to be the law of the Code. . . . The principle of fair dealing is a principle which the Courts have applied with the greatest care. . . . All that is done here is to make a plain declaration of what the law is and to put all copyright works under the same wording.¹²⁵

This statement proves illuminating in several respects. First, it recognizes fair dealing as a *principle*, and shows that the purpose was to codify a *general principle*, applicable to a wide range of circumstances, as opposed to legislating specific rules that articulate specific exceptions, tailored to specific circumstances. Second, it clarifies that there was no motivation to effect any change in the nature of that principle, only to declare its existence. Third, it shows that there was no concern that the application of this principle by the courts had caused any mischief and that legislation was required to limit their discretion. Instead, the statement evinces trust in the way courts have applied the principle and confidence in their continued ability to do the same in the future.

The parliamentary debates provide additional evidence. One of the debates concerned the status of copyright in written letters. One Member of Parliament proposed adding an explicit exception permitting the publication of private letters in the public interest, or to protect the recipient's reputation.¹²⁶ He was concerned that the new bill might be interpreted as taking away a right previously recognized by the courts.¹²⁷ The Solicitor General opposed the amendment on the basis that there was no need for an explicit exception because the courts could be trusted

¹²³ See 23 Parl Deb HC (5th ser.) (1911) cols. 2587–663 (UK).

¹²⁴ 10 Parl Deb HL (5th ser.) (1911) col. 117 (UK).

¹²⁵ *Id.*

¹²⁶ See 28 Parl Deb HC (1911) col. 1951–56 (UK).

¹²⁷ See *id.*

not to enjoin or not to award damages against a person who published a letter when the publication was justified.¹²⁸ The subsequent withdrawal of the proposed amendment confirms that Parliament did not consider the fair dealing clause as preventing courts from finding certain uses to be fair, even if not mentioned explicitly.¹²⁹

It appears, therefore, that section 2(1)(i) was meant to codify the *principle* of fair dealing, without restricting or limiting courts' ability to apply, adapt, and adjust it according to the circumstances of particular cases. By specifying instances of dealings and subjecting them to an overarching principle of fair dealing, Parliament intended to guarantee the continued vitality of the doctrine. As Isabella Alexander writes, rather than to restrict, the five enumerated purposes "were intended to be understood synecdochically as standing in for a variety of permissible uses."¹³⁰

ii Additional Extrinsic Evidence

In addition to the legislative record, other contemporaneous extrinsic aids support the view that the 1911 Act was not meant to restrict fair dealing and confine it to the five enumerated purposes. Several commentaries followed the enactment of the 1911 Act. All of them offer a general overview of the 1911 Act, survey the motivations for enacting it, and discuss the main changes relative to earlier law. None of them mentions fair dealing as a major change compared to previous law. All of them, when discussing the various provisions of the 1911 Act, including the issue of infringement, refer to earlier case law, thus clearly indicating that they did not regard the 1911 Act as a revolution, but as an evolution of a previous body of statutory rules and common law interpretation.

Reporting on the legislative process in the fall of 1911, the *Law Times* noted that the bill, which was expected to be approved soon, on the one hand would widen the type of acts that could constitute infringement, but on the other hand "expressly seeks to exclude from the penalties of infringement fair dealing with a work by way of newspaper summary or research [and other exceptions]."¹³¹ In other words, the fair dealing proviso was added to make explicit a limitation on liability which otherwise might be implied.

In the same vein, MacGillivray suggested that the fair dealing proviso was simply added out of abundance of caution.¹³² Similarly, J. M. Easton, the author of the fourth and fifth editions of *Copinger on Copyright*, the leading treatise on copyright, noted that "[a]ny fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary is also *expressly permitted* by the Act,"¹³³ but wondered why it was even necessary to include an explicit fair dealing provision for the enumerated purposes, because "fair dealing for other purposes has always been . . . permitted and, presumably, it was not intended to cut down the rights of fair use previously enjoyed under the old law."¹³⁴ Further, when introducing section 2(1), which contained six exceptions (fair dealing in section 2(1)(i) and five additional ones), Easton described all of these "six acts [as] examples of what might be considered 'fair dealing' with the original work."¹³⁵

¹²⁸ See *id.* at the reply of Solicitor General Sir J. Simon.

¹²⁹ Yet *British Oxygen* shows that not all judges interpreted the Act in that manner.

¹³⁰ ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 284 (2010).

¹³¹ *Legislation and Jurisprudence*, 131 LAW TIMES 569, 581 (1911).

¹³² See MACGILLIVRAY, *supra* note 40.

¹³³ EASTON, *supra* note 51, at 144.

¹³⁴ *Id.*

¹³⁵ *Id.* at 134.

Richardson's general observation about the 1911 Act is also consistent with Easton's. He noted that "parts of the law which are practically judge-made such as the questions as to infringement by a new work other than an exact copy have remained to any great extent unaltered."¹³⁶ Then, in discussing what constitutes an infringement, he summed up explaining that "[c]opyright then consists in the right to prevent an unfair use of the work."¹³⁷

Likewise, L. C. F. Oldfield's commentary did not seem to read section 2(1)(i) as limiting the common law of fair use. In his introduction, he stated that when an Act of Parliament has received judicial construction, and a later Act *in pari materia* uses the same words, it is presumed that those words retain their meaning, unless there was indication to the contrary.¹³⁸ His discussion of fair dealing reveals that he did not see anything in the 1911 Act suggesting alteration of the law on fair use. He explained that "[w]hat is fair dealing with a work depends upon the circumstances of each particular case," and quoted a paragraph from an American case, which he regarded as giving "an excellent summary of the law."¹³⁹ Tellingly, he wrote that "[i]t is submitted that the present Act does not alter the law with respect to abridgements, and that if *bona fide* and original, although made without the original author's consent, they are not infringements."¹⁴⁰ The fact that abridgement was not mentioned in section 2(1)(i) did not bother him.

Robertson's commentary discusses fair dealing rather briefly, noting that "[t]his exception is couched in very wide terms, and its limits are not easy to define."¹⁴¹ He appears to be one of the few commentators that did consider the new Act to have somewhat limited the doctrine of fair dealing. At one point he stated that reproduction allowed under the fair dealing provision "must not be dealt with for any other purpose than one of those specified in the proviso"¹⁴² but failed to notice that the conclusion was inconsistent with other statements that he made.¹⁴³

¹³⁶ J. B. RICHARDSON, *THE LAW OF COPYRIGHT* xi (1913).

¹³⁷ *Id.* at 99. *See also id.* at 112 ("[c]opyright may be infringed by making an unfair use of an earlier work in composing a new one. The question as to what constitutes a fair use of an earlier work is by no means easy to answer; it varies with the nature of the subject. and it has also varied with the same subject from time to time."). Richardson mentioned "fair dealing" twice, in both cases to emphasize that the fair dealing provision did not effect a change in the law. *Id.* at 37, 137. In discussing whether making a private copy of an artistic work constituted infringement, he noted that "[p]robably the true view was that where a single person made sketches for his own private amusement and not for sale or gratuitous distribution, this did not constitute an invasion of copyright; but where the copies were made for sale or gratuitous distribution it was illegal, as this might interfere with the commercial value of the prints. Under The Copyright Act, 1911, it is expressly provided that any fair dealing with a copyright work for the purpose of private study or research is permissible. Thus, it would seem that the copying of an artistic work by a student in the course of study would now be legitimate; but if the copy was made for any other purpose, it would be an infringement of copyright." *Id.* at 137. While the last statement might seem to endorse the *expressio unius* view, this was not the issue that Richardson discussed.

¹³⁸ *See* L. C. F. OLDFIELD, *THE LAW OF COPYRIGHT* 6 (1912).

¹³⁹ *Id.* at 57 ("As a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication; but cases frequently arise in which, though there is some injury, yet equity will not interpose by injunction to prevent the further use, as where the amount copied is small and of little value, if there is no proof of bad motive, or where there is well-founded doubt as to the legal title, or where there has been long acquiescence in the infringement, or culpable laches and negligence in seeking redress, especially if it appear that the delay has misled the respondent.") (citing *Lawrence v. Dana*, 4 Cliff. 1, 83 (1869)).

¹⁴⁰ *Id.* at 58.

¹⁴¹ GEORGE STUART ROBERTSON, *THE LAW OF COPYRIGHT* 107 (1912).

¹⁴² *Id.* at 119–20.

¹⁴³ For example, in the immediately preceding paragraph he explained that "fair dealing for [the enumerated] purposes . . . covers the cases, which have caused some difficulty in the minds of judges, where a reproduction of an artistic work is made by hand for the purpose of private study or amusement." *Id.* "Amusement," which he claims to be covered by the proviso, is actually not specified in it. In discussing abridgements, he conceded that the issue was unsettled, and suggested that "whether there is likelihood of competition between the infringing work and the work infringed [would be] an important factor in deciding whether a fair use has been made of the latter or not," without

In sum, if by enacting the fair dealing provision Parliament had intended to modify the existing doctrine of fair use by confining it to five enumerated categories exclusively, most of the contemporaneous commentators failed to notice that intention. The parliamentary debates do not support this view either. In Canada, the debates in 1921 do not contain any meaningful discussion of fair dealing.

The view that Parliament had intended to restrict fair dealing to the five enumerated purposes began appearing later. In 1927, the sixth edition of *Copinger* was published by a new publisher. This edition was no longer authored by Easton, but penned by F. E. Skone James. The sixth edition's view about the scope of fair dealing was entirely different and considerably more restrictive. In Skone James's view, the principle embodied in section 2(1)(i) limited "the right to fair use to purposes which in their nature are likely to differ from those of the works from which extracts are taken." He regarded the enumeration of the five purposes as a "limitation of purposes in regard to which the defence of fair dealing can be set up," claiming that the new provision "has probably not altered the law, but it has prevented any attempt to extend the defence to new purposes."¹⁴⁴ Skone James provided no authority to support this restrictive interpretation and failed inexplicably to acknowledge that a contrary view was expressed in the previous edition. Perhaps it was the status of *Copinger* as the leading treatise on copyright that entrenched the restrictive view of fair dealing.

A leading Canadian treatise has witnessed a similar inexplicable reversal of view on fair dealing. Writing in 1944, Harold Fox, in his first treatise on Canadian copyright law, took it for granted that a statutory fair dealing coexisted with a common law fair use.¹⁴⁵ In numerous other places, he referred to fair use, relying indiscriminately on pre-1911 English and American cases.¹⁴⁶ Nowhere did he suggest that the UK 1911 Act or the Canadian 1921 Act rendered the common law concepts of fair use obsolete or that by enacting the fair dealing provision, Parliament intended to enact a more limited fair use regime than that found in the United States. His view was that the statutory fair dealing allowed only the enumerated purposes, and that "[t]hose terms will no doubt be construed strictly."¹⁴⁷ But "[a]t the same time it would seem that the 'substantiality' of the amount copied is still a test for infringement and that the court still has jurisdiction notwithstanding [the fair dealing provision] to hold that a substantial part of the work has not been taken where the part or parts taken can be justified as fair use or fair quotation."¹⁴⁸ Thus, the statutory fair dealing would apply even when substantial part was taken, and "affords additional protection to defendants," that is, even beyond what might be permitted as fair use.¹⁴⁹ While his view of what the common law of fair use had permitted might be restrictive, the crucial point is that he viewed the statutory right as expanding upon it. Fox's second edition from 1967 repeats the same view.¹⁵⁰

suggesting the fair use was limited to the five enumerated purposes, or noticing that abridgment is not among them. *Id.* at 106. In discussing parodies, he noted the difficulty that they might present but added that "[i]t has never been suggested, for instance, that the brilliant parody of *Tannhäuser* was a breach of copyright," without noticing that "parody" is not mentioned in § 2(1)(i), or without arguing that it is a form of criticism. *Id.* at 112.

¹⁴⁴ SKONE JAMES, *supra* note 71, at 122.

¹⁴⁵ See HAROLD G. FOX, *THE CANADIAN LAW OF COPYRIGHT* 423–25 (1st ed. 1944).

¹⁴⁶ See *id.* at 348–65.

¹⁴⁷ *Id.* at 346. Fox did not offer support for the notion that those terms would be construed strictly, and elsewhere in the book he actually suggested that the term criticism should be given "its broadest sense as meaning a critical use of the material for the promotion of the art or science to which it pertains." *Id.* at 430.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 425.

¹⁵⁰ See HAROLD G. FOX, *THE CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS* (2d ed. 1967).

Fox died in 1969. The third edition of his treatise, by John McKeown, was published in 2000.¹⁵¹ The discussion in the previous editions of the pre-1911 case law on fair use all but disappeared. When discussing what constitutes infringement, McKeown concluded that the approach taken to “fair use” by the courts prior to 1911 was, “[i]n light of subsequent cases and the current provisions of the Act . . . no longer appropriate.”¹⁵² McKeown did not refer to any specific subsequent cases or any current provision of the Act to support this proposition. Moreover, he failed to address Fox’s account of fair use or provide reasons for his different view of the relevance of pre-1911 cases.

In any event, most recent and present discussions about copyright and about copyright reform in Canada and other Commonwealth jurisdictions have taken it for granted that fair dealing cannot apply beyond the enumerated purposes. This assumption was shared both by those advocating replacing the current fair dealing regime with a non-exhaustive provision as well as by their opponents. Proposals to amend the Act in this direction never came to fruition,¹⁵³ and the preferred approach in all recent rounds of copyright reform was to specify additional exceptions.¹⁵⁴

It would be tempting to say that Parliament did not adopt those proposals for reform because it correctly recognized that the existing provisions were never intended to be exhaustive and reform was unnecessary. But this would be inaccurate. The truth is that while Parliament recognized a need to expand the exceptions, it chose not to open up the fair dealing provision. But even if this choice reflects the way that recent Parliaments interpreted the existing provision, this perception does not change the meaning of the original provisions. Parliament enacts laws, but it does not interpret them,¹⁵⁵ and any subsequent amendment in a statute cannot be deemed to be or to involve any declaration as to the previous state of the law or that the law under that enactment was different from the law as it is under the enactment as amended.¹⁵⁶

C Additional Principles of Statutory Interpretation

i The Mischief Rule

The mischief rule, traced back to *Heydon’s Case* of 1584, instructs courts to discern and consider the following: (1) what was the common law prior to the enactment of the statute; (2) what was the mischief and defect for which the common law did not provide; (3) the remedy that Parliament proscribed for that mischief; and (4) “[t]he true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy.”¹⁵⁷

¹⁵¹ See JOHN S. MCKEOWN, *FOX CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS* (3rd ed. 2000).

¹⁵² *Id.* at 439. Later in the same text, he referred to the same case law and added “[a]t the time these cases were decided there were no express exceptions from infringement in the relevant legislation and the concept was linked to whether a substantial part of a work had been taken. This was a common law equitable doctrine which was referred to as ‘fair use’ or ‘fair dealing.’ Cases dealing with this doctrine must be applied with care.” *Id.* at 546.

¹⁵³ See, e.g., BARRY TORNO, *FAIR DEALING: THE NEED FOR CONCEPTUAL CLARITY ON THE ROAD TO COPYRIGHT REVISION* 71 (1981); JUDY EROLA ET AL., *FROM GUTENBERG TO TELIDON: A WHITE PAPER ON COPYRIGHT: PROPOSALS FOR THE REVISION OF THE CANADIAN COPYRIGHT ACT* 39–40 (1984).

¹⁵⁴ See Sookman & Glover, *supra* note 15, at 153.

¹⁵⁵ See BARAK, *supra* note 101, at 348–49. It should also be noted that even though the current provision is not identical to the original fair dealing provision from 1921, the changes have been minor, and, with the exception of the insignificant attribution requirements that were added in 1993, all other changes expanded the scope of fair dealing.

¹⁵⁶ See Interpretation Act, R.S.C. 1985, c L-21 (Can.).

¹⁵⁷ SULLIVAN, *supra* note 103, at 201 (citing *Heydon’s Case* (1584) 76 Eng. Rep. 637, 638).

However, as the previous discussion makes clear, there is no indication that the way courts handled the doctrine was considered to be a mischief. There is no indication that legislation was required to remedy such mischief by limiting courts' discretion with regard to the purposes to which fair dealing might apply. Therefore, if Parliament did not consider the existing doctrine of fair use to cause any mischief, there is no reason to presume that Parliament had intended to restrict its application.

ii Presumption That an Enactment Does Not Change Existing Law without Clear Indication

The conclusion that Parliament had no intention to prevent the application of fair dealing to other purposes is further supported by the “presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices” unless it expresses its “intentions to do so with irresistible clearness, failing which the law remains undisturbed.”¹⁵⁸

As Sullivan writes, “despite the constitutional primacy of the legislature. . . it is presumed that the legislature does not intend to change the common law, to introduce exceptions to general principles (which often originate in the common law), to interfere with common law rights and freedoms, or to take away the jurisdiction of common law courts.”¹⁵⁹

Recall that in *Hanfstaengl*, decided not long before the 1911 Act, the House of Lords affirmed the decision of the Court of Appeal which described copyright as “a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do” and that its scope is limited to “preventing persons from *unfairly* availing themselves of the work of others . . .”¹⁶⁰ This formulation is significant for two reasons: first, because it affirms that copyright itself entails derogation from the common law rights of individuals, and second, because it limits the scope of copyright to preventing only unfair uses of works.

Accordingly, while Parliament, by enacting copyright legislation, restricted the common law right to use works for any purpose, the legislation did not take away the right of any member of the public to engage in fair use of works, and this forms the common law backdrop against which the provisions of the 1911 Act (and any subsequent legislation) have to be assessed.¹⁶¹ In other words, interpreting the 1911 Act as limiting the right of fair use recognized prior to its passage would require the interpreter to find an irresistibly clear expression of such a legislative intent. As noted above, the legislative record and other extrinsic evidence do not support such a finding.

The principle that abrogation of common law rights and principles requires explicit language was well recognized at the time of the enactment of the 1911 Act.¹⁶² Indeed, the drafters of the Act applied this principle. When they intended to abrogate existing common law rights, they made their intention explicit. For example, section 31 of the 1911 Act was titled “Abrogation of common law rights.” This provision was meant to settle once and for all the uncertainty with respect to whether there existed a “common law copyright” independent of the statute. At the

¹⁵⁸ *Parry Sound (District) Social Services Administration Board v. OPSEU*, [2003] 2 S.C.R. 157, para. 39 (Can.) (citing *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, 614 (Can.)).

¹⁵⁹ SULLIVAN, *supra* note 103, at 314.

¹⁶⁰ *Hanfstaengl v. Empire Palace* [1894] 3 Ch. 109 (CA) 128 (Eng.) (italics added).

¹⁶¹ Cf. Ariel Katz, *Intellectual Property, Antitrust, and the Rule of Law: Between Private Power and State Power*, 17 THEORETICAL INQUIRIES IN L. 633, 681–707 (2016) (discussing how the understanding of copyright as a legal monopoly restricting the common law rights of individuals has shaped doctrines such as exhaustion and contributory liability).

¹⁶² See, e.g., WILLIAM FEILDEN CRAIES, A TREATISE ON STATUTE LAW 301–3 (1911).

same time Parliament clarified “that the abrogation of common law rights only applie[d] to the common law proprietary right”¹⁶³ but did not affect other common law causes of action.¹⁶⁴

While section 31 explicitly abrogated some common law rights, section 6(1) of the 1911 Act explicitly invited courts to resort to the common law when deciding the proper remedy when infringement has been found.¹⁶⁵ Notably, neither section 31 nor section 6(1) limited any common law rights of users or any common law defense that might be applicable. If Parliament was interested in restricting users’ rights or limiting the common law defenses that may be applicable to them, it would have done that explicitly.

Moreover, the choice of the terms “fair” or “fair dealing” also indicates the legislative intent to maintain continuity with the pre-enactment case law. Notably, in the 1937 case of *Johnstone v. Bernard Jones*, both parties agreed that while the case had to be decided according to the statutory provision, the previous case law on what constituted “fair use” was relevant and helpful.¹⁶⁶

iii Avoiding Absurd Consequences

Among other considerations, the legal interpreter is directed to avoid an interpretation that produces absurd consequences.¹⁶⁷ “[A]n interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment.”¹⁶⁸

A few examples will suffice to show that the view that the list of enumerated purposes is exhaustive leads to such absurd consequences. Consider, for example, the common – and indeed indispensable – practice in judicial proceedings whereby litigants make several copies of the authorities they rely on and submit them to the court and to all other parties. There is no explicit provision in the Copyright Act that permits this action, and the making of such copies does not easily fit any of the enumerated fair dealing provisions. Interestingly, the current UK legislation includes explicit provisions that permit the making of such copies,¹⁶⁹ but they did not exist in 1911, and cannot be found in the Canadian Act. Yet, in *CCH* the Supreme Court did not hesitate to endorse the Great Library’s policy, a policy which explicitly permitted the making of copies “required for the purposes of research, review, private study and criticism, *as well as use in court, tribunal and government proceedings*”¹⁷⁰ and concluded that “the Law Society’s dealings with the publishers’ works satisfy the fair dealing defence.”¹⁷¹ Even though Parliament never explicitly exempted this activity, the Court effectively recognized an additional implied fair dealing exception for this purpose, and rightly so. Doing otherwise would be utterly absurd.

Or consider time-shifting. In 1984, the US Supreme Court ruled, in the landmark *Sony v. Universal* case, that it was fair use – and therefore not an infringement of copyright – for individuals to use a video cassette recorder to tape television shows in order to view them at a later time. At the end of the majority opinion, after providing a detailed doctrinal analysis, Justice Stevens wrote the following epilogue: “One may search the Copyright Act in vain for any sign

¹⁶³ MACGILLIVRAY, *supra* note 40, at 159–60.

¹⁶⁴ See *id.*

¹⁶⁵ See Copyright Act 1911, 1 & 2 Geo. 5 c. 46, § 34(1) (UK).

¹⁶⁶ *Johnstone v. Bernard Jones Publications* (1937) 1 Ch. 599, 602 (Eng.).

¹⁶⁷ See *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, para. 27 (Can.).

¹⁶⁸ *Id.*

¹⁶⁹ See Copyright, Designs and Patents Act 1988, c. 48 (UK).

¹⁷⁰ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 (Can.).

¹⁷¹ *Id.* para 73.

that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home.”¹⁷²

Should we assume that because time-shifting was explicitly recognized as non-infringing only in 2012,¹⁷³ the elected representatives of millions of Canadians who have watched television every day and have taped TV shows for the better part of the prior three decades have made it unlawful to videotape TV shows?

And what about a person who made two copies of a TV show: to begin watching one at home, and continue watching it on an iPad at the gym? The new time-shifting exception in section 29.23(c) covers only the making of one reproduction. Does the second one necessarily make that person an infringer? Such a result seems plainly absurd.

Or consider section 29.4, permitting common classroom activities, such as writing a poem on a blackboard or incorporating an image into an overhead presentation. This provision was enacted in 1997, meaning that until that year, there was no explicit provision permitting those activities. While PowerPoint presentations did not exist in 1911, chalk, blackboards, and poems clearly did. It would be absurd to think that for the better part of the twentieth century, writing a poem on a blackboard in a classroom required the permission of the copyright owner, and that Parliament intended this result, but changed its mind in 1997.

Moreover, the notion that fair dealing applies only to certain allowable purposes implies that other purposes, even if they would otherwise be fair, are not covered by fair dealing. This means that, in 1911, when Parliament provided that “[a]ny fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary . . . shall not constitute an infringement of copyright,” it meant that dealings with works for other purposes may still be regarded as fair, but nonetheless shall constitute an infringement of copyright. As noted above, this is a paradoxical result.¹⁷⁴

Finally, and more generally, the notion that Parliament intended to exclude the possibility of applying fair dealing to non-enumerated purposes necessarily means one of the following two alternative assumptions is true: one, that Parliament believed that it had canvassed the entire universe of uses that were known at the time of the enactment, as well as those that might be known and possible sometime in the future, and concluded that only the five (and now eight) enumerated purposes were capable of qualifying as fair dealing; or two, that Parliament was aware it could not foresee all potential future uses, but still decided in advance that no matter what those uses might be they ought to be categorically excluded.

The first alternative is inconsistent with the “basic assumption that the legislature is a competent institution acting in the public interest.”¹⁷⁵ No competent legislature could believe that it could foresee all types of future uses and predetermine that they could not possibly be fair. Indeed, “if an item which on the application of the *expressio unius* principle would be excluded is of a class which came into existence only after the passing of the enactment, it is probably right to disregard the principle as an aid to construction.”¹⁷⁶

The absurdity of the alternative assumption necessarily points to the conclusion that fair dealing must be a flexible standard for it to achieve its purposes of balancing the public interest with the rights of authors. Fair dealing has a purpose: to allow the unauthorized use of works in a

¹⁷² Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

¹⁷³ See Copyright Act, R.S.C., 1985, c L-42, § 29.23 (Can.).

¹⁷⁴ See *supra* Part IV.A.2.

¹⁷⁵ SULLIVAN, *supra* note 103, at 211.

¹⁷⁶ F. A. R. BENNION, BENNION ON STATUTE LAW 202 (3d ed, 1990) (citing A-G for Northern Ireland’s Reference (No 1 of 1975) [1977] AC 105 (HL) 132).

manner that promotes the public interest in the encouragement and dissemination of works of the arts and intellect, when the dealing does not seriously undermine the copyright owner's opportunity to obtain a just reward.¹⁷⁷

Yet, even though it is possible to identify the *principle* that fair dealing stands for, articulating a precise legal *rule* that implements it is notoriously difficult, if not impossible. The Royal Commission on Copyright, whose 1878 report was one of the bases for the enactment of the Copyright Act, 1911, stated that “no principle which we can lay down, or which could be defined by the Legislature, could govern all cases that occur” and that ultimately these can be decided only on a case-by-case basis by “the proper tribunals.”¹⁷⁸ Almost a century later, the US Congress House Committee reached a similar conclusion, noting that “since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”¹⁷⁹ Lord Denning, in *Hubbard v. Vosper*,¹⁸⁰ the Supreme Court of Canada, in *CCH Canadian*, made similar observations, as did the US Supreme Court in *Campbell*.¹⁸¹

Similarly, at the international level, attempts to draft a precise rule regarding limitations and exceptions to copyright proved futile, and resulted in the intentionally vague three-step test, such as the one incorporated in the Berne Convention.¹⁸²

Once the central role that fair dealing plays in calibrating the rights of owners with the rights of users and the public interest is recognized, the view that fair dealing applies only to the explicitly enumerated purposes becomes tenuous, because it requires one to believe that those specific purposes encompass the entire universe of dealings that could justify using a work without getting the copyright owner's permission. If the purpose of the Copyright Act is to encourage future innovation and creativity, fair dealing must be flexible and unlimited with respect to the purposes to which it could apply, otherwise this purpose would be undermined. Rule makers cannot foresee all the types of future uses that justify exemption, and inevitably, a system that relies exclusively on *ex ante* proscribed rules will be tailored to allow only the interests of existing users who had enough political clout to lobby for an exemption.¹⁸³ By definition, however, truly new innovations in technology or in cultural expression, those that do not yet exist and may not even be thought of, have no one advocating for them.¹⁸⁴ Without a possibility of relying on a flexible fair dealing standard, the law might prevent these innovations from ever being created. A system that permits only the uses that were able to bargain their way at the legislative negotiation table but excludes all others is doomed to cultural and technological stagnation. While a flexible fair dealing does not guarantee that all socially beneficial uses will be permitted, at least it allows the new uses, those that were not even thought of, or that had no one lobbying for them during the legislative process, to have their day in court and argue,

¹⁷⁷ See *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336 (Can.). See also *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d. 282, 293 (S.D.N.Y. 2013) (finding that Google Books project was fair use because it “provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders.”).

¹⁷⁸ ROYAL COMMISSION ON COPYRIGHT, *supra* note 117, para. 67.

¹⁷⁹ H.R. Rep. No. 94-1476, at 65 (1976).

¹⁸⁰ See *Hubbard v. Vosper* [1972] 2 QB 84, 94 (Eng.).

¹⁸¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹⁸² See MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 50-1 (2004).

¹⁸³ See Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 241 (2012).

¹⁸⁴ See Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1375 (2005).

“we’re fair!” It allows innovators to use their scarce resources on recruiting the most talented developers before they need to hire the lobbyists.¹⁸⁵

Leaving room to individual litigants and the courts to apply fair dealing to circumstances unforeseen by Parliament is not a “far less effective, less democratic and less principled way to approach copyright reform”¹⁸⁶ than the alternative. Quite the contrary: it is more effective, more democratic, and more principled, because it enables policymaking based on evidence and arguments that are inherently incapable of having a voice in the legislative process.¹⁸⁷ It is a feature, not a bug.

Moreover, specific rule-based exceptions, whose main advantage is the certainty that they are purported to promote, are vulnerable to rigidity. Without an overarching principle to guide them, their application tends to “hinge on arcane debates over taxonomy[, making them] perennially uncertain.”¹⁸⁸ In contrast, an open, flexible, and general fair dealing avoids this rigidity, and increases certainty over time, as the contours of owners’ and users’ rights in unforeseen circumstances are determined through litigation,¹⁸⁹ and subsequent legislative amendments when necessary.

5 CONCLUSION

When fair dealing was codified a century ago, there was no intention to restrict or limit its application, adaptation, and adjustment by the courts. Parliament sought to codify a principle, a flexible *standard*, not precise rules. Unfortunately, the English courts in a series of early post-codification cases failed to recognize this point, and so sentenced fair dealing to a hundred years of stagnation. Fortunately, at the turn of the twenty-first century the Supreme Court of Canada declined to follow that restrictive path. Parliament’s decision to explicitly recognize additional purposes and add specific exceptions moves Canadian law in the same direction. The Court’s rulings and Parliament’s action have entrenched fair dealing and provided a necessary correction that allows fair dealing to resume the role it was always supposed to play. But if conventional wisdom is correct, some uses, present or future, are still categorically excluded. This is not a recipe for progress. In a legal environment that outlaws novel ways of using, reusing, and disseminating works outright, fewer new forms of expression will emerge.

However, there is no serious indication that this is what Parliament intended when it legislated fair dealing, and there are very good reasons to challenge the view that it did have such intentions. “All we propose,” declared Viscount Haldane before the House of Lords in 1911, “is to declare that for the future the principle of fair dealing which the courts have established is to be the law of the Code.”¹⁹⁰ All I propose is that we follow that law.

Open, flexible, and general fair dealing is here. It always has been.

¹⁸⁵ See Ariel Katz, *Where Will the Next Google Come From?*, ARIEL KATZ BLOG (Mar. 14, 2011), <http://arielkatz.org/archives/1000>.

¹⁸⁶ Sookman & Glover, *supra* note 15, at 163.

¹⁸⁷ See DiCola & Sag, *supra* note 184, at 241.

¹⁸⁸ Matthew Sag, *Fair Use in the Internet Age* (draft manuscript, on file with the author).

¹⁸⁹ See *id.* See also Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161 (2017).

¹⁹⁰ 10 Parl Deb HL (5th ser.) (1911) col. 117 (UK).