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Meera Nair

Simon Fraser University, nair@sfu.ca

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CANADA AND ISRAEL – CULTIVATING FAIRNESS OF USE

*Meera Nair*¹

ABSTRACT

Despite global trends to expand the ambit of copyright, Canada and Israel both show promise in cultivating the principal of fairness when exercising exceptions to copyright. Their journeys were led by their highest courts; each sought to shift the dialogue of exceptions from stringent allowance to robust application. Both countries began from the rigidity of fair dealing and considered expansion into the realm of fair use. This exploration is intriguing given that both countries show an uncanny similarity in terms of the manner by which their nation states came into being, their ensuing diversity of population, the mixture of common and civil law within their copyright regimes, their position in terms of the WIPO Internet Treaties (1996), and their relations vis-à-vis the United States. At the time of this writing, the two countries are set to diverge in law but not necessarily in practice.

¹ My thanks to Ricki Newman for very professional research and translation services and to Roy Bendor for sharing his insights on Israeli culture. I am deeply grateful to Michael Birnhack for his encouragement of my work and detailed comments upon an early draft of this paper.

ABSTRACT	1
I. INTRODUCTION.....	2
II. GLOBAL COPYRIGHT.....	5
III. THE COURTS – ISRAELI AND CANADIAN	13
A. <i>David Geva v. Walt Disney Corporation</i>	13
B. <i>Mifal Hapais v. The Roy Export Establishment</i>	18
C. <i>Law Society of Upper Canada v. CCH Canadian</i>	20
D. <i>SOCAN v. CAIP</i>	23
E. <i>Al Ha’shulchan Gastronomic Media, Inc., v. Ort Israel</i>	25
IV. CHANGING THE LAW – ISRAEL AND CANADA	28
A. <i>Maple Leaves v. Stars of David</i>	32
B. <i>Fair Use v. Fair Dealing</i>	33
V. AFTERWORD	36

I. INTRODUCTION

Predictions of the death of copyright by a thousand pirate cuts found receptive ears among lobbyists and politicians in the late 20th century. As a consequence, the expansion of the breadth and depth of copyright gained international sanction. At the same time, legitimate exceptions to copyright appeared to be losing solvency. Despite this inhospitable atmosphere, two countries showed pronounced development of a noted exception to copyright, namely, fair use.²

² Fair Use is best known by its American representation which states that: “...the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” See 17 U.S.C. § 107 (2000 & Supp. IV 2004), available at http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000107----000-.html.

This anomalous behavior invites scrutiny. The two countries in question are Israel and Canada. Some might argue that while both flirted with fair use, only Israel brought it home to meet the family. Israel recognized fair use formally within its copyright law in 2007; in early 2012, Canada is poised to amend its own law, but fair use will not be a part of it. Yet, the presence or absence of a coded law is not a sufficient indicator of the success or failure of the principle of the law. The purpose of this paper is not to make such judgment, but to examine the cultivation of fairness of use in each country.

Fair use is a structural gap within the framework of copyright. Whether the impetus for the gap is one of defense or right is a matter of perspective. Setting aside the issue of legislative motives still leaves the question: what can happen in this space? Herein is the place where some unauthorized reproduction of copyrighted material may occur under certain conditions. This prosaic answer masks a vibrant function, where fair use allows copyright to achieve its mandate of protecting creativity for current and future creators. Contemporary developments in copyright have diluted the importance of future creativity and focused predominantly on current asset protection. Set against this trend, developments in Canada and Israel offer some diversity within the international copyright regime; a global uniformity, set to ever-increasing levels of copyright protection, does not need to be the stamp of our collective future.

Criticism may already be brewing over this author's stipulated purpose of copyright, that of protecting a process – creativity – across generations. The role of copyright is usually described as either: (1) a utilitarian means for encouraging creative individuals to meet a higher purpose of social wellbeing; or (2) a natural right of creative individuals. The first hails from Anglo-American common law jurisdictions, whereas the second is attributed to those of European civil law. Each can substantiate their legacy through a heritage text – common law copyright was ushered in through what is often referred to as the first modern copyright law, the *Statute of Anne* (1710), and civil law principles lay at the heart of the first international copyright treaty, the *Berne Convention for the Protection of Artistic and Literary Works* (1886).³ The difference in progression of

³ The *Statute of Anne* (1710) begins with words: “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;” Statute of Anne, 8 Anne, c. 19 (1709). Article I of the Berne Convention for the Protection of Literary and Artistic Works (1886) gives the purpose of the Union as “for the protection of the rights of authors in their literary and artistic works;” Berne Convention for the Protection of Literary and Artistic Works art. 1, Sept. 9, 1886, 102 Stat. 2853, S. Treaty Doc. No. 99-27 (1986) (revised July 24, 1971 and amended Sept. 28, 1979), available at

copyright law based on these ideologies was not wide; comparison of the development of post-revolutionary copyright law between the United States and France shows a shared commitment to public utility by the infant nations, with greater prominence accorded to private rights in both countries during the twentieth century.⁴ As leading scholars emphasize, “Whatever force [the ideological] division may once have had, its practical or intellectual force should not be overstated.”⁵ Nevertheless, these same scholars acknowledge that the ideological distinction “continues to play a role in legal discourse.”⁶

In a blunted form, each ideology suggests a battle between individual and community on a zero sum basis: one party’s gain must come at the expense of the other. Fortunately, a more cooperative resolution is not far to seek. An intersection between utilitarianism and natural rights highlights the *process* of creativity, while their union implies creativity for all time.⁷ Curiously, in terms of copyright law, both Canada and Israel share a common law foundation but reflect civil law influences.⁸

But one needs to be careful when declaring similarity in law. Legal systems are shaped by a country’s cultural make-up, *culture* being a heavily freighted term encompassing arts, economics, history, politics, and religion, to name but a few attributes. While Canada and Israel are not identical in terms of cultural substance, they resemble one other in cultural structure. No doubt that remark will also elicit some dispute; by structure this author

http://wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

⁴ See generally Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 131 (Brad Sherman and Alain Strowel eds., 1994); GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST. (1994); Carla Hesse, *The Rise of Intellectual Property, 700 B.C. – A.D. 2000: an Idea in Balance*, DAEDALUS: PROCEEDINGS OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES, Spring 2002, at 26-45.

⁵ See PAUL GOLDSTEIN AND BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT – PRINCIPLES, LAW AND PRACTICE 6 (2010).

⁶ *Id.*

⁷ More precisely, it is through fair dealing (and likewise fair use) that this resolution takes specific form and function; see Meera Nair, *Copyright and Ethics – An Innisian Exploration*, 1 GLOBAL MEDIA JOURNAL, no. 2, 2009 at 32, 33 (Canadian Edition), available at http://www.gmj.uottawa.ca/0901/v2i1_nair_abstract.html.

⁸ With its alternate name, *Le Droit d’Auteur* (meaning the rights of the author), Canadian law reflects the civil law tradition found in Continental jurisdictions. In 1931 Canada was the first common-law country to formally recognize moral rights; see Mira Sundara Rajan, COPYRIGHT AND CREATIVE FREEDOM 265 (2006). Israel too adopted a Continental flavor, first in 1953 by way of statutory name, “the phrase Zchuyot Yotsrim, which means authors’ rights,” with a formal inclusion of moral rights following in 1981; see Michael D. Birnhack, *Trading Copyright: Global Pressure on Local Culture in THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 363, 377-378 (Neil W. Netanel ed., 2009).

speaks of matters such as the role of British Imperialism in shaping both nations, the diverse social milieu that later followed, and the presence of more than one system of law within the borders.⁹ And although both nations later came under closer influence of the United States, even when subjected to not immodest American persuasion, both countries avoided obliging all American wishes in terms of domestic copyright amendment.

This paper will proceed as follows. Part Two presents a brief examination of a global development relevant to fair use and locates Canada and Israel within that trend. Part Three examines the legal mood in terms of fair-use-like-exceptions of each country in the late twentieth century and early into the new millennium. The legislative atmospheres with respect to proposed expansion of existing exceptions are examined in Part Four. As copyright debate is poised to continue *ad infinitum*, this story can never have a conclusion; however, the Afterword identifies where productive efforts may lie in terms of a potential to move beyond the cultivation of fair use to a widespread practice of fairness of use.

II. GLOBAL COPYRIGHT

This exploration begins in 1996, with the establishment by the World Intellectual Property Organization (WIPO) of *Copyright Treaty* and the *Performances and Phonograms Treaty*.¹⁰ Although much international

⁹ Canada is a bi-jural nation, operating predominantly under common law, but with civil code addressing private matters in the Province of Quebec. These arrangements date to the aftermath of the Seven Years War; with the Quebec Act, 1774, 14 Geo. 3, c. 83, Quebec was formally given to Britain. In that same Act, the British Crown sought to provide some security for native communities by demarking their territories, much to the dismay of the colonists in what would later become the United States. Israel may be better described as multi-jural, with several legal systems recognized within its borders. Most public matters are guided by common law, but some private matters are determined through religious systems of law, each complete with courts that “utilize particularistic values and procedures derived from its own religious tradition;” see MARTIN EDELMAN, *COURTS, POLITICS, AND CULTURE IN ISRAEL* 3 (1994). Similar to Canada’s experience, protection of the original inhabitants was declared by Britain in its administration of Mandate Palestine (*id.* at 121) – the lasting value of Britain’s declarations of protection is debatable in both countries. And, albeit for different reasons, both Israel and Canada encouraged immigration in their early days of nation building. While the stability of co-existence within the diverse populations is not equitable between Canada and Israel, it must be emphasized that Canada’s stability is not easily understood even by Canadians; Governor General David Johnston has remarked, “The great gift of this nation is that we respect diversity and somehow we’ve been able to make a nation out of diversity...”; see James Bradshaw, *David Johnston, unplugged*, *GLOBE AND MAIL*, December 24, 2011, at A4.

¹⁰ WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997), entered into force 6 March 2002, available at http://wipo.int/treaties/en/ip/wct/trtdocs_wo033.html [hereinafter WCT]. WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997),

copyright negotiation has happened since,¹¹ these treaties marked a pronounced shift in the balance of power allocated through copyright.

Copyright is not, nor has it ever been, a grant of absolute control. Although the scope of rights has increased steadily over the past 300 years,¹² for most of copyright's tenure the exceptions to the rights remained an exercisable option. This balance was altered in the later twentieth century when copyright holders began implementing technological protection measures upon copyrighted works. Colloquially known as digital locks, these measures obviate exceptions as individuals are willfully prevented from copying any material even when the copying is lawful, as would be the case with fair use.

Through the language of the 1996 treaties, technological protection measures gained heightened stature as objects of protection themselves. Article 11 of the *Copyright Treaty* stipulates:

Contracting Parties shall provide *adequate legal protection and effective legal remedies against the circumvention of effective technological measures* that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention....” [emphasis mine].¹³

Similar language appears as Article 18 in the *Performances and Phonograms Treaty*,¹⁴ in both cases, copyright is no longer confined to a means of controlling copying, but may operate as a means to control access.

entered into force May 20, 2002, available at http://wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [hereinafter WPT].

¹¹ The Anti-Counterfeiting Trade Agreement (ACTA), with its implication for copyrights and patents, has since appeared on the scene. However, this agreement was negotiated outside of the principle venue of international cooperation, namely the World Intellectual Property Organization; see generally Sara Bannerman, *WIPO and the ACTA Threat* INT. J. TECHNOLOGY POLICY AND LAW (forthcoming 2012). The by invitation-only means of participating has been called into question; see Kimberlee G. Weatherall, *The Anti-Counterfeiting Trade Agreement: An updated analysis* in THE SELECTED WORKS OF KIMBERLEE G WEATHERALL 11-15, available at <http://works.bepress.com/kimweatherall/19>. And, of course, aside from multipleparty agreements, the United States continues to procure bilateral trade agreements, thereby further heightening global standards of intellectual property protection. At the time of this writing (January 2012), seventeen such agreements have been established or are near completion. See *Free Trade Agreements*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Feb. 13. 2012). Note that with the exception of Canada, Mexico and Israel, all trade agreements were established in 2004 or later.

¹² As each development in media technology ushered in a viable and lucrative industry, copyright expanded accordingly; see JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* 35-69 (2001).

¹³ *WCT*, *supra* note 10 at Art. 11.

¹⁴ *WPPT*, *supra* note 10 at Art. 18.

How far access could be controlled depends on the interpretation of *adequate* and *effective*. The impetus to protect the protection measures flowed from the uncomfortable realization that although technology can provide, technology will also deny. There are no impregnable technological protection measures – it is only a matter of time before any digital lock is broken. Curiously, a plain reading of Article 11 indicates that, by virtue of being broken, a digital lock was clearly not effective; therefore, the lock is ineligible for the adequate legal protection and effective legal remedies. In other words, the provision ought to become null and void. The choice of language suggests a story and further investigation reveals discord among the characters.

Through a study of the WIPO discussions that lead to the 1996 treaties,¹⁵ it is evident that even though the United States was a leading proponent of aggressive access controls, this opinion was not universally shared. Of nineteen delegates to speak in Main Committee I:

[T]hirteen of them spoke explicitly in favor of some amendment that would reduce the scope of the protection of technological protection measures, relative to the Basic Proposal. Three others contemplated some form of clarification to avoid over-application that would interfere with legitimate uses.¹⁶

As further detailed in the minutes of the meeting, at the closing of discussion relating to the circumvention of technological protection measures, the Chairman said:

[T]here were several Delegations which considered that, in the present form, those provisions should not be included in the Treaties. There were several Delegations which supported the essence of the principles of those provisions, and both groups of Delegations offered useful advice concerning drafting in order to make them internationally acceptable.... It was stressed ... that activities which were lawful, which concerned materials in the public domain, and acts which had been authorized by the right holders, should not be made subject to those provisions.¹⁷

¹⁵ See Michael Geist, *The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements*, in FROM 'RADICAL EXTREMISM' TO 'BALANCED COPYRIGHT': CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 204, 211-221 (Michael Geist ed., 2010).

¹⁶ *Id.* at 220.

¹⁷ MAIN COMM. I, WIPO, DIPLOMATIC CONFERENCE ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS para. 54 (Summary Minutes 1997), *available at*

The negotiations that resulted in the ambiguous language of Article 11 underscore that the wording was a compromise measure, necessary to maintain flexibility as called for by the Delegates. Nations were free to exceed the minimal level of coverage, as the United States did two years later.¹⁸ Renowned intellectual property scholar David Vaver diplomatically foretold copyright's future direction when he said: "This US action may encourage the pace of ratification for other states, especially as the US will no doubt give its trading partners a friendly nudge."¹⁹

As long-time trading partners of the United States, Canada and Israel are better positioned to hold steady even when receiving a friendly nudge. Israel enjoys the status of being the first nation to enter into a bilateral trade agreement with the United States; the Israeli-US Free Trade Agreement was enacted in 1985.²⁰ Canada followed quickly, with the Canada-US Free Trade Agreement in 1989, later superseded by the North American Free Trade Agreement of 1993.²¹ These bilateral agreements required a commitment to protect American intellectual property but, as they were negotiated in the days prior to digital angst, do not contain the stringent intellectual property clauses of contemporary agreements. The Canadian and Israeli trade agreements with the United States may evolve; however, the United States has been unable to secure all its copyright wishes simply with the carrot of free trade. Hence, a stick is wielded annually by the Office of the United States Trade Representative (USTR).

Each year, the USTR examines documents and publishes their assessment of American trading partners with respect to intellectual property protection and enforcement. Under the process known as "Special 301," countries may be placed on the Watch List, Priority Watch List, or categorized as a Priority Foreign Country, in descending order of disfavor.²²

www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_102.pdf/.

¹⁸ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter DMCA].

¹⁹ David Vaver, *Internationalizing Copyright Law: Implementing the WIPO Treaties* (Oxford Intell. Prop. Research Ctr., Working Paper No. 01/99, 1998).

²⁰ Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, U.S.-Isr., Apr. 22, 1985, 25 I.L.M. 653 (1985), *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp.

²¹ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/NorthAmericanFreeTA.asp.

²² Trade Act of 1974, Pub. L. 93-618, 88 Stat. 2041 (1975). The Special 301 process required amendment to the Trade Act; *see* Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 (1998). And further amendment in 1994 allowed the

Canada and Israel began residency on the Special 301 listings in the late 1990s;²³ in 2011 came this assessment:

America's two largest trading partners, Canada and China, remain on the Priority Watch List. The report notes the failure of Canadian efforts in 2010 to enact long-awaited copyright legislation and to strengthen border enforcement.... Trading partners on the Priority Watch List present the most significant concerns regarding insufficient IPR protection or enforcement, or otherwise limited market access for persons relying on intellectual property protection. Twelve countries – China, Russia, Algeria, Argentina, Canada, Chile, India, Indonesia, Israel, Pakistan, Thailand, and Venezuela – are on the Priority Watch List. These countries will be the subject of particularly intense bilateral engagement during the coming year.²⁴

Canada's delay in ratifying the WIPO Internet Treaties is a long-standing grievance of the United States.²⁵ And while Israel amended its

USTR to deem a country's protection of intellectual property as inadequate, even if the country was TRIPs-compliant; *see* Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4939 (1994).

²³ Canada was first placed on the Special 301 Watchlist in 1995; in that same report, the USTR made the following observation: "Israel has an antiquated copyright law which, combined with poor enforcement, has led to widespread cable and software piracy. We seek rapid revision of the copyright law and improved enforcement." Press Release, Office of the U.S. Trade Rep., USTR Announces Two

Decisions: Title VII and Special 301 (Apr. 29, 1995), *available at* <http://www.cptech.org/ip/health/ustr/301-95>. Israel's residency on the Watchlist began in 1997. As the USTR archives do not extend earlier than 2007, these reports are available through KNOWLEDGE ECOLOGY INT'L, at http://keionline.org/sites/default/files/ustr_special301_1995.pdf; and <http://www.keionline.org/ustr/1997special301>.

²⁴ U.S. TRADE REPRESENTATIVE, ANNUAL SPECIAL REPORT 301, REPORT ON INTELLECTUAL PROPERTY RIGHTS (May 2, 2011), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-releases-annual-special-301-report-intellectual-p>.

²⁵ This delay was more by luck than design. Ratifying the WIPO treaties required amendment to domestic law. From 2004 to 2011, Canada was governed by three minority governments; with the constant return to the polls, planned amendments routinely died on the order paper. *See* An Act to Amend the Copyright Act, Bill C-60, 38th Parl. (53-54 Eliz. 2, 1st Sess. 2005)(Can.); *see also* An Act to amend the Copyright Act, Bill C-61, 39th Parl. (56-57 Eliz. 2, 2nd Sess. 2008) (Can.); An Act to Amend the Copyright Act, Bill C-32, 40th Parl. (59 Eliz. 2, 3rd Sess. 2010) (Can.). Nevertheless, the domestic political challenges were not sufficient excuse for American eyes. A series of diplomatic cables illustrate the extent of American effort to impress a digital-lock-friendly regime onto Canada's *Copyright Act* (and the complicity on the part of some Canadian officials); *see* Michael Geist, *Wikileaks Cables Show Massive U.S. Effort to Establish Canadian DMCA*, MICHAEL GEIST'S BLOG (Apr. 29, 2011) <http://www.michaelgeist.ca/content/view/5765/125/>

copyright law in 2007,²⁶ it did not accord any attention to the area of technological protection measures. This omission did not go unnoticed by the International Intellectual Property Alliance (IIPA). Self-described as “a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries,”²⁷ the IIPA is a regular contributor to the 301 process. Among the complaints associated with Israel’s copyright policies, the IIPA wrote:

It is highly unfortunate that the Israeli government did not take the opportunity presented by this legislation to fully implement the WIPO Internet Treaties ... by adding protection against the act of circumvention of “technological protection measures” used by creators to protect their creations, and trafficking in circumvention devices or providing circumvention services.²⁸

As censure continued by way of the 2008 Special 301 report, in 2009 the Government of Israel penned a spirited rebuttal:

Israel cannot be deemed, as in the words of the Trade Act of 1974 (Trade Act or 19 U.S.C. 2242), as a country that “denies adequate and effective protection of intellectual property rights (“IPR”) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection” when Israel is not in breach of its international IPR obligations and when Israel’s IPR regime has met with the full approval of the World Trade Organization’s 2006 Trade Policy Review.²⁹

Noting that Israel was not a member of either of the WIPO Internet Treaties and, therefore, under no obligation to implement any manner of technical protection measures or digital rights management, the Government pointed out that the “use of the Special 301 process to sanction countries for not implementing aspects of treaties to which they have no

²⁶ *Copyright Act, 5768-2007*, 2007 LSI 34 (2007).

²⁷ *About IIPA*, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, <http://www.iipa.com/aboutipa.html> (last visited Feb, 18, 2012).

²⁸ INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2008 SPECIAL 301 REPORT ISRAEL222 (2008), *available at* <http://www.iipa.com/rbc/2008/2008SPEC301ISRAEL.pdf>.

²⁹ 2009 SUBMISSION OF THE GOVERNMENT OF ISRAEL TO THE UNITED STATES TRADE REPRESENTATIVE WITH RESPECT TO THE 2009 “SPECIAL 301 REVIEW” 2 (March 2009), *available at* <http://www.justice.gov.il/NR/rdonlyres/BD753811-E87A-4AB2-8ADDDC9423DFC794/13684/2009special301submission.pdf>.

obligation seems rather unjust.”³⁰ Moreover, the usefulness of defending protection measures was called into question:

Comments received by the Ministry of Justice following a "request" for comments on the subject of TPM, indicate that many several large authors' groups vehemently oppose TPM, while other right holders groups favor TPM. The critiques and criticism of TPM both from business model perspectives and from copyright perspectives are almost endless. Indeed, many content providers are already experimenting with non-encrypted access to content and the continued commercial relevance of TPM is frequently called into question by industry and even the original promoters of the 1996 treaties. Accordingly, given the industry objections to TPM, its lack of uniform implementation worldwide and its nascent obsolescence, non implementation of TPM can not be the basis for determining that a country, as in the words of the Trade Act of 1974 (19 USC 2242) "denies adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection."³¹

But embedded within the IIPA grievances was another matter; Israel's decision to widen a copyright exception. In their 2007 amendment, Israel moved from a regime of fair dealing to something closer to American fair use.

Fair dealing is the precursor to fair use and remains current in many Commonwealth countries. Compared to fair use, fair dealing is described in very narrow terms. For instance, for a use to be eligible as fair dealing in Canada, the use must fall within a predetermined set of purposes: research, private study, criticism, review or news reporting.³² In contrast, fair use is designed with more flexible language; it allows for unanticipated uses of copyrighted material that promote future creativity and innovation. American copyright law prefaces an illustrative list of permissible uses with the words, "for purposes such as."³³ The purpose of the use is only the first step; how the material is used must also be carefully evaluated.³⁴

³⁰ *Id.* at 8.

³¹ *Id.* at 9.

³² See *Copyright Act*, R.S.C. 1985, c. C-42 (Can.), §§ 29-29.2.

³³ See Fair Use, *supra* note 2.

³⁴ The United States has codified a set of questions to guide determination of fair use, *id.*. The Israeli Supreme Court introduced the same questions into adjudication of questions of fair dealing and the Canadian Supreme Court stipulated an even more evaluative

The IIPA took Israel to task for omitting any reference to the prevailing international stipulations concerning exceptions:

[T]he Law should expressly implement the well-established Berne “three-step test” ... it should be codified [that] no exception in Israel’s law (whether fair dealing, “fair use,” or a specific exception) may be applied: other than in special cases; in a way that does not conflict with a normal exploitation of the work or unreasonably prejudices the legitimate interests of the right holder. Such a provision would provide the necessary guidance to the courts obliging judges to respect international norms in their interpretation of fair dealing (and other exceptions).³⁵

The language of “special cases” has been invoked elsewhere as a means to thwart introduction of fair use.³⁶ Yet, although the elasticity of fair use’s prefacing condition “for purposes such as” seemingly denies fair use any international legitimacy, prominent scholars argue that the three-step test has sufficient latitude to permit fair-use-like exceptions.³⁷ The IIPA complaint makes little sense, particularly as American law does not make any reference to the three-step test, something the Government of Israel adroitly pointed out:

Neither Berne, nor TRIPS, requires that the exact language of a treaty general principle be copied verbatim into national legislation. Indeed, if that were the case then the IIPA would also have to claim that Section 107 “Fair Use” of the U.S. Copyright Act is in violation of Berne Article 9(2). Israel’s new fair use section (section 19) follows Section 107 of the U.S. Act and is virtually identical therewith.³⁸

At this time, Canada is positioned to amend its copyright law. Following a public consultation in 2009, the Federal Government of Canada unveiled proposed amendments to the *Copyright Act* in June 2010.³⁹ Although the

framework; see *infra* Part III, *The Courts – Israeli and Canadian*.

³⁵ See IIPA, *supra* note 28, at 224-225.

³⁶ ACCESS COPYRIGHT ET. AL., WHY CANADA SHOULD NOT ADOPT FAIR USE: A JOINT SUBMISSION TO THE COPYRIGHT CONSULTATION 3 n. 10 (2009), available at http://www.pwac.ca/files/PDF/JOINT_SUBMISSION_FAIR_USE_final.pdf.

³⁷ P. Bernt Hugenholtz & Ruth L. Okediji, *Contours of an International Instrument on Limitations and Exceptions*, in THE DEVELOPMENT AGENDA 473, 487 (Neil Netanel ed., 2009).

³⁸ 2009 SUBMISSION OF THE GOVERNMENT OF ISRAEL, *supra* note 29, at 13.

³⁹ See Bill C-32, *supra* note 25.

2011 Canadian federal election halted the amendment process, the returning government reintroduced the amendments in September 2011.⁴⁰ Canada is not following Israel's lead, but is choosing to stay with the rigidity of fair dealing.⁴¹ Canadians may be worse off, as the bill forbids circumvention of technological protection measures except as permitted for specific clauses – fair dealing is not among them.⁴² Even though digital locks may be on their way out,⁴³ the Canadian government's actions illustrate a disappointing policy stance. By giving preeminence to a structure of copyright that offers holders the opportunity for complete control, the state has denigrated the merit of exceptions as a whole.

However, Canada is already familiar with the principles of fair use, much as Israel was prior to 2007⁴⁴ and the United States was before it adopted fair use into law.⁴⁵ Although fair dealing did not fare well in either country throughout most of the twentieth century, matters changed when each country's Supreme Court had an opportunity to address fair dealing. These decisions broadened the base and interpretation of exceptions to copyright.

III. THE COURTS – ISRAELI AND CANADIAN

A. *David Geva v. Walt Disney Corporation*⁴⁶

⁴⁰ An Act to amend the Copyright Act, Bill C-11, 41st Parl. (60 Eliz. 2, 1st Sess. 2011) (Can.).

⁴¹ Although the categories of fair dealing will be expanded to include education, parody and satire; *id.* at § 29.

⁴² *Id.* at § 41.

⁴³ Between 2007 and 2008, Sony BMG, Warner Music Group, EMI and Vivendi Universal all announced plans for offering unencumbered music files through online sales; see Catherine Holahan, *Sony BMG plans to drop DRM*, BLOOMBERG BUSINESS WEEK, Jan. 4, 2008, available at http://www.businessweek.com/technology/content/jan2008/tc2008013_398775.htm. It remains to be seen if all industries will become disenchanted with locks but American law itself has softened its stance. Greater flexibility is permitted for educational uses of copyrighted material; college and university professors may extract clips from movies encrypted on DVDs, for the purposes of criticism and review. This expands a previous allowance offered only to film and media studies professors. Creation of documentary films and noncommercial videos are also sheltered. See James Billington, *Statement of the Librarian of Congress Relating to Section 1201 Rulemaking*, U.S. COPYRIGHT OFFICE (2010), available at <http://www.copyright.gov/1201/2010/Librarian-of-Congress-1201-Statement.html>.

⁴⁴ See *infra* Part III, *The Courts – Israeli and Canadian*.

⁴⁵ A dispute concerning competing biographies of George Washington is considered the germination of the 1976 codification into American law of fair use; see *Folsom v. Marsh* 9 F. Cas. 342 (C.C.D. Mass. 1841).

⁴⁶ CA 2687/92 *Geva v. Walt Disney Company* 48(1) PD 251 [1993].

In 1993, the Supreme Court of Israel explored the question of fair dealing via the work of the late artist David Geva. In his work, *The Duck Book*, Geva had modeled a character upon Disney’s iconic figure of Donald Duck. “The Disney character appeared, under the name of Moby Duck, in a short comic strip, sporting an iconic Tembel hat (of the type worn by Kibbutzniks in many early photos from the fifties and sixties).”⁴⁷ The work as a whole was a critique of Israeli society, with the principles of freedom of expression lying at the heart of Geva’s petition.

Geva relied upon exceptions to copyright as the means by which such freedom could be upheld. He argued that his use of Disney’s character was in the manner consistent with the American regime of fair use. Although the Israeli Supreme Court ultimately denied Geva’s petition, the proceedings marked two significant developments: i) the recognition of parody and satire as legitimate purposes for exception; and ii) the establishment of a multi-faceted inquiry when considering the exception.

The presiding copyright law was the Israeli Copyright Act of 1911 (as set via the British Copyright Act of 1911) and contained a very brief fair dealing allowance: “Any fair dealing of a work for the purpose of private study, research, criticism, review, or newspaper summary.”⁴⁸ Expanding the ambit of criticism required overturning a lower court’s view that criticism must refer in a negative capacity to the object copied.⁴⁹ Writing for the Supreme Court, Justice Maltz stated:

It seems that the term “criticism” for the purposes of section 2(1)(1) should be interpreted in a broad sense. The freedom of speech and creativity, while it cannot change the [copyright] law per se, do influence, as was mentioned above, the shaping of the law through means of interpretation ... it is best to postpone the final balancing between freedom of speech and the interests of the copyrights owner until the stage in which we examine the

⁴⁷ See Tony Greenman, *Fair Use Under Israel’s New Copyright Act*, COPYRIGHT & PARTNERS, available at <http://www.tglaw.co.il/en/article.php?id=109> (last visited Feb. 18, 2012).

⁴⁸ Copyright Act, 1911, Sec. 2(1)(i) (Isr.), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=128058. (adopting the copyright law of England in 1911 that became Israeli law after the end of the British mandate in 1948).

⁴⁹ “[A]ccording to the lower court’s approach, general social criticism (provided that such criticism is manifested in the story ...) does not meet the criteria for the exception listed in article 2(1)(1). Only works that criticize the reproduced work, i.e. criticism of the D.D. character, might, according to the lower court, avail the petitioner.” The lower court refused to classify the petitioner’s usage of the D.D. character in his work as “criticism”. See *Geva*, 48(1) PD at 272.

fairness of the use.⁵⁰

The justice continued, deftly positioning future decisions for a broader scope of inquiry, yet reassuring would-be copyright complainants that the mention of genre is hardly sufficient for an action to be deemed fair dealing:

Indeed, the question whether something is a satire or a parody (which is in fact a form of satire) is significant with respect to the issue of the fairness of the use... I don't see a need to differentiate between the two at the stage in which the purpose of the use is being examined... At any rate, even if we say that the exception of "fair dealing" can take place in a situation of a critical parody or satire, we still need to examine each and every case and decide to which category the allegedly infringing work falls into. Naturally, not every comic use of a protected work will fall into the exception category.⁵¹

Having admitted parody to the realm of criticism, the court explored the manner by which Disney's work had been used. Having already recognized the common heritage between the language of Israeli fair dealing and American fair use,⁵² the court adopted the four-factor analysis from 17 USC 107 (the purpose or character of the use, the nature of the copyrighted work, the amount and substantiality of the copyrighted work, and the effect on market value of the copyrighted work) with one acute observation:

These are the main considerations, though not the only ones. Even in the United States that explicitly lists these four main factors in the law, the American courts at times refer to additional criteria [emphasis mine].⁵³

After an application of the multi-factor analysis, Geva's claim was denied. From the viewpoint of an individual artist, the judgment may not be cause for celebration. Yet, from the larger perspective of maintaining the system of copyright as supportive of creative endeavor, the justices patiently explored the nature of parody and satire and took full advantage of

⁵⁰ *Id.* at 274.

⁵¹ *Id.* at 275.

⁵² "[T]he arrangement in article 107 of the American Law – forms in a sense a codification of common law principles. This fact illuminates the similarity between the two lists of purposes. In light of the common source of both laws, it seems that we can learn from the American law for the circumstances before us. Indeed, as will be discussed later, the English judiciary brings into account similar considerations to those mentioned in the final part of article 107." *Id.* at 271.

⁵³ *Id.* at 276.

the lessons that could be drawn from American experiences and the shortcomings that could be circumvented.

Exemplary of their analysis was the treatment of the issue of commerciality. A common presumption is that if a use is for commercial activity, such use must be unfair. This would not bode well for social wellbeing, given the realities of incentive:

The use may be found to be fair in light of its purpose and character, even if those are commercially oriented, given that the use is found to promote important social values.... This is a product of our modern world, in which most of the activities that promote social values cannot be disconnected from financial motives. Prohibiting any commercial use of a protected work will discourage activities that society would have liked to encourage.⁵⁴

The Court further probed the incongruity of parody and satire with the mandate of copyright; parody and satire may rely on reproducing a work in its entirety, which would usually be condemned immediately as infringement:

[I]n order for a work to be successful, and in order for the use to produce the appropriate effect, a certain degree of similarity must exist between the available materials, even if those are taken from protected work ... Therefore, the relevant test regarding the scope of the use, was [where] “it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary [to conjure up the object of his satire].⁵⁵

Even more intriguing was the Court’s determination to broaden future application of fair dealing beyond the existing limitations of American jurisprudence. The Court acknowledged an ongoing debate as to the

⁵⁴ *Id.* at 278.

⁵⁵ *Id.* at 281. Within the next year, the American Supreme Court had also ruled on a question of parody and gave voice to that same reasoning: “When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable ... Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.” *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

viability for satire to seek shelter under fair use and removed American hurdles from Israeli concerns. Again, writing for the court, Justice Maltz stated:

As I mentioned, I don't believe that all works of satire are absolutely ineligible to receive the fair dealing defense. Furthermore, I think that the MCA Inc. decision, which stated that satires that lack any element of parody do not require use of protected works whatsoever, and thus can never be justified as fair – is an overgeneralization and it conflicts with public interest that seeks to encourage productions of satirical works (that are not parodies). It is my opinion that when the original creator is not severely wronged it is reasonable to classify also satirical uses as fair – based on the considerations as a whole.⁵⁶

The consequence of *Geva* was that Israel's copyright landscape was seeded to better serve subsequent creative development. Years later, in the wake of the formal codification of fair use into Israel's copyright law, Neil Netanel would write: "Israel's new copyright statute essentially completes the move from fair dealing to fair use that the Israeli Supreme Court had already initiated in 1993 in its ruling in *Geva v. Walt Disney Co.*"⁵⁷ Noting that American jurisprudence had seen two distinct strains of fair use interpretation emerge – fair use as merely a means of resolving market-failure in a regime of licensing and fair use as means of enabling expressive diversity – Netanel speculates that, with *Geva*'s approving nod to American cases that favored transformative uses of copyrighted works, "Israeli courts should be considerably more receptive to the expressive diversity approach to fair use than to the market approach."⁵⁸

But *Geva* alone did not secure fair use for Israel. While *Geva* gave parody and satire a foothold under the category of criticism and introduced the four factors for fair-use inquiry, it took the famed Charlie Chaplin case for fairness to become the dominant consideration in the test of fair dealing and fair use.

⁵⁶ *Geva*, 48(1) PD at 284; see also *MCA v. Wilson*, 677 F. 2d 180, 182 (2d Cir. 1981).

⁵⁷ See Neil Netanel, *Shimush Hogen Yisraeli Me-Nekudat Mabat Amerikanit [Israeli Fair Use from an American Perspective]*, in *CREATING RIGHTS: READINGS IN COPYRIGHT LAW* (Michael Birnhack and Guy Pessach eds., 2009) (Hebrew), *English abstract available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327906.

⁵⁸ *Id.*

B. *Mifal Hapais v. The Roy Export Establishment*⁵⁹

The circumstances surrounding the Charlie Chaplin case began in 1993, when the Israeli national lottery released an advertising campaign featuring Charlie Chaplin's character "Little Tramp." The character was used in memorabilia provided to the public, newspaper advertisements, and television commercials containing scenes from Chaplin's movies. Seeking to overturn an earlier ruling of infringement, the lottery corporation made their arguments in front of the Supreme Court sitting as the Court of Appeal.

Fair dealing was not the primary argument of the lottery corporation. First, they offered a number of other points: a fictional character cannot be the object of copyright; even if copyright existed, the ownership was suspect, as certain diplomatic procedures had not been carried out; the original airing of the movies predates the existence of Israel itself and, thus, a 1953 agreement to protect American copyright should not be applicable; and that the amount used was insubstantial and, therefore, not a violation of copyright.⁶⁰ Then, if infringement was still deemed to have occurred, fair dealing was the refuge:

The appellants claim that even if their actions infringed on the copyrights of the respondents, their actions should be considered as fair dealing, as their usage was intended for "criticism" purposes ... They base their claim on the fact that the [lottery corporation] does not operate for commercial purposes, but rather for different public causes in the fields of education, sports and welfare. Moreover, the appellants believe that the commercials are a form of parody or satire, since they use the Chaplin character, which "is a cultural symbol of poverty, in order to make fun of that cultural symbol and to place it in absurd light."⁶¹

Despite that the invocation of fair use reads more as a dying gasp of a terminal case, rather than a thoughtful application of the principles of limited copyright, the Court gave reasonable attention to the argument of fair use and began by acknowledging the merit of a broad interpretation of fair use:

The exception to the rule in section 2(1)(i) of the law is extremely important, and there is justification to interpret it

⁵⁹ CA 8393/96 *Mifal Hapais v. The Roy Export Establishment*, 54(1) PD 577 [2000].

⁶⁰ *Id.* at 583.

⁶¹ *Id.* at 596.

in a broad manner. When protecting the original work we should also note that too much protection can halt the progression and development of culture and society, which essentially progresses out of past achievements. A certain break-through or progression that serves society as a whole, by its nature occurs through the creative achievements of individuals who lead the way. Thus, there are situations in which the public interest justifies limiting the scope of copyrights protection. Such is the case of the fair dealing doctrine.⁶²

Although denying the claim of fair dealing in this instance, the decision as a whole was invaluable to cultivating understanding of fairness:

[T]he first test – concerning the fairness of the use, which examines the behavior of the defendant, is the main test. It seems that the second test, concerning the purpose of the use, has lesser significance. We should thus take into consideration that certain artistic genres may perceive the original creation as a form of inspiration, and as it being a part of a wider, critical discourse, which includes additional creators. Through such perception, the use made of a protected work – as a base for a new, original creation – can be considered, under the appropriate circumstances, to be fair dealing for the purpose of “criticism”⁶³

With this outright demotion of the categories of use described in fair dealing, the Court paved the way for the “for purposes such as” language of American fair use.

However, the Justice’s inclination to draw from the merits of American fair use did not preclude Israeli courts from shaping their decisions in a manner that reflected local cultural inclinations. Attribution stands out in this regard; it plays an important role in assessments of fair dealing and later fair use. In a recent study of the case law concerning the exception, it was observed that if attribution was reasonably expected but not present, the exception was denied.⁶⁴ It must be said that the cultural emphasis upon recognition for an author has yielded at least one copyright outcome of concern.⁶⁵ For the purposes of this paper, all that can be observed is that the

⁶² *Id.*

⁶³ *Id.* at 597.

⁶⁴ See Nimrod Kozlovski et al., *Fair Use in Israel*, in ACCESS TO KNOWLEDGE FOR CONSUMERS: REPORTS OF CAMPAIGNS AND RESEARCH 2008-2010 141, 150-151 (Jeremy Malcom et al. ed., 2010).

⁶⁵ In a case concerning the Dead Sea Scrolls, the deciphering and reconstruction of one of the scrolls was deemed worthy of authorship and thus a reproduction of the work was

emphasis upon attribution cannot be attributed to either British or American influence – there were no conditions of attribution in either fair dealing or fair use in the British Copyright Act (1911) or U.S. Copyright Act (1976), respectively. Israel has a personal history with attribution both inside and outside of formal copyright law.⁶⁶

As Israel was adapting its interpretation of existing law, Canada too had an opportunity to strengthen the position of parody and satire and introduce the fair use framework. However, the presiding judge opted to examine the details under a very narrow interpretation of the category of criticism.⁶⁷ It was not until fair dealing came under the consideration of the Supreme Court of Canada that the multi-faceted framework of inquiry entered Canadian jurisprudence.

*c. Law Society of Upper Canada v. CCH Canadian*⁶⁸

This case addressed a number of issues, including the nature of originality, but is best known for its handling of fair dealing. Writing for a unanimous court, Chief Justice McLaughlin stated: “In order to maintain the proper balance between the rights of a copyright owner and users’ interests, [fair dealing] must not be interpreted restrictively.... As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always

denied fair dealing when attribution was not accorded to that author. See Michael Birnhack, *The Dead Sea Scrolls Case: Who is an Author*, 23 EUR. INTELL. PROP. REV. 128 (2001). Further discussion concerning the implications of awarding authorship, and with it a means to limit access, to historical artifacts is cited in Guy Pessach, *Israeli Copyright Law, A Positive Economic Perspective*, 39 ISR. L. REV. 123, 139 (2006).

⁶⁶ In Mandate Palestine, authors held publishers’ feet to the fire on matters of attribution and integrity through a public means of “naming and shaming”; see Michael Birnhack, *Hebrew Authors and English Copyright Law in Mandate Palestine*, 12 THEORETICAL INQ. L. 201, 236 (2011). Moral rights were formally codified into Israeli law in 1981 through amendment of the 1924 Copyright Ordinance.

⁶⁷ During a labor dispute, a corporate character symbol was portrayed in an oppressive stance. The presiding judge stipulated: “I am not prepared to read in parody as a form of criticism and thus create a new exception.”; *Compagnie Générale des Établissements Michelin-Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (1996), [1997] 2 F.C.306, para. 68, available at <http://www.canlii.org/en/ca/fct/doc/1996/1996canlii3920/1996canlii3920.html>.

Regrettably, this decision continues to have influence in limiting interpretation of what constitutes criticism; see *Canwest v. Horizon*, 2008 BCSC 1609, (Can. B.C. Sup. Ct.), available at <http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1609/2008bcsc1609.html>.

⁶⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 S.C.C. 13, available at <http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>. A stepping-stone to the invigoration of fair dealing occurred two years earlier when the Supreme Court of Canada raised the subject of balance within the law; see *Théberge v. Galerie d'Art du Petit Champlain inc.* 2002 SCC 34, [2002] S.C.R. 336 para. 30, available at

available.”⁶⁹

In the hands of its critics, the decision marked nothing less than the collapse of copyright protection for creators.⁷⁰ So, it must be emphasized that the copying under scrutiny was very modest. Upon request, the Great Library of the Law Society of Upper Canada would reproduce single copies of material related to legal research and convey the material to the patron via print or facsimile. A number of legal publishers claimed this behavior was infringement, but the Supreme Court found that the library’s practices were in accordance with fair dealing.⁷¹

The decision emphasized that each analysis of fair dealing must be judged by a comprehensive examination; decisions on fair dealing should include inquiry as to the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives for the dealing, the nature of the work, and the effect of the dealing on the work.⁷² Although not explicitly mentioned, it is evident that this framework includes the four factors listed in American fair use.

This framework of inquiry was first enunciated through an appellate court’s earlier handling of this case.⁷³ The Supreme Court went further and explicitly set a bulwark against any future misconceptions of the priority of the commercial elements: “Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.”⁷⁴ And, the Chief Justice added one more detailed instruction:

<http://www.canlii.org/en/ca/scc/doc/2002/2002scc34/2002scc34.html>.

⁶⁹ See *CCH Canadian Ltd.*, 2004 S.C.C. at paras. 48-49.

⁷⁰ See Meera Nair, *Fair Dealing at a Crossroads*, in FROM RADICAL EXTREMISM TO BALANCED COPYRIGHT: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 90, 97-99 (Michael Geist ed., 2010).

⁷¹ The library had well-established guidance for handling such requests; this played an integral part in the Supreme Court’s decision. See *CCH Canadian Ltd.*, 2004 S.C.C. at paras. 61-63.

⁷² *Id.* at paras. 53-60.

⁷³ Justice Linden, writing for the Court of Appeals, stated: “I have compiled a list of factors that should influence the fairness of the Law Society’s dealings with the Publishers’ works on behalf of patrons of the Great Library. Importantly, the elements of fairness are malleable and must be tailored to each unique circumstance. None of the factors are conclusive or binding, and additional considerations may well apply uniquely in the Canadian context. However, the following factors are usually among the non-exhaustive list of considerations: (1) the purpose of the dealing; (2) the nature of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work in question; and (6) the effect of the dealing on that work.” *CCH Canadian v. Law Society*, [2002] 4 F.C. 213, 2002 F.C.A. 187 (CanLII) at para. 150, available at <http://www.canlii.org/en/ca/fca/doc/2002/2002fca187/2002fca187.html>.

⁷⁴ See *CCH Canadian Ltd.*, 2004 S.C.C. at para. 59.

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests.⁷⁵

Without an explicit citation, one cannot be sure of the source of such concern, but it is quite plausible that the Justices were aware of a development within American fair use debate. In the late 1990s, two U.S. Appeals court decisions supported the view that the ability to license a work has bearing on a decision of fair use. The premises of each case differed; in *American Geophysical Union v. Texaco, Inc.*, a number of publishers brought action against a research department that copied technical and scientific articles for reference purposes, whereas in *Princeton University Press v. Michigan Document Services Inc.* the issue was commercial production of coursepacks assembled by university faculty members.⁷⁶ But the analysis of both cases focused on the fourth factor of fair use, namely, the effect upon a material market and thus the value of a work, and pointed to the existence of a means of licensing as reason to deny fair use.⁷⁷ Given Canada's pre-existing and far-reaching system of collective licensing, the prudence of the Canadian Supreme Court leaves Canada better positioned to make more discerning analyses of fair dealing.⁷⁸

⁷⁵ *Id.* at para. 70.

⁷⁶ *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 929-31 (2d Cir. 1994), available at http://www.law.cornell.edu/copyright/cases/60_F3d_913.htm; *Princeton Univ. Press v. Mich. Document Serv., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996), available at http://www.law.cornell.edu/copyright/cases/99_F3d_1381.htm. See also Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, 21 INT'L REV. L. & ECON. 453, 455 (2002); Pamela Samuelson, *Unbundling Fair Uses*, 75 FORDHAM L. REV. 2585 (2009).

⁷⁷ Judge Newman's comments in *American Geophysical* are sobering: "Despite Texaco's claims to the contrary, it is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier;" see *American Geophysical Union*, 60 F.3d at 931-32.

⁷⁸ As was noted in *Princeton* by dissenting Judge Ryan: "The majority's logic would always yield a conclusion that the market had been harmed because any fees that a copyright holder could extract from a user if the use were found to be unfair would be 'lost' if the use were instead found to be 'fair use;'" see *Princeton Univ. Press*, 99 F.3d at

The legacy of *CCH Canadian* is that fair dealing has come much closer to fair use and, like in Israel, began by circumventing some of the growing pains endured by the United States with respect to fair use. And, although fair dealing remains a closed list of permissible categories, the Supreme Court of Canada issued one critical statement necessary for Canada to thrive in a knowledge economy: “Research must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.”⁷⁹

Having introduced the issue of balance into Canadian copyright discourse, those same justices took the earliest opportunity to further emphasize that finding balance requires heightened consideration of exceptions. Within four months, in a case concerning liability of internet service providers, the Supreme Court ensured that the expansion of telecommunications was as free from copyright concerns as possible. While fair dealing was not invoked by the defendants, the principles set by *CCH Canadian* are evident.

D. *SOCAN v. CAIP*⁸⁰

The saga of the *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* began in 1995 when representative copyright holders attempted to seek compensation from internet service providers (ISPs) for the unauthorized movement of music files through the internet. The copyright holders sought to limit the use of an existing exception for communication to the public via telecommunication. That exception, 2.4.1(b), states:

[A] person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public [emphasis mine].⁸¹

Much like the tone in *CCH Canadian*, and with direct reference to that decision, Justice Binnie emphasized that this measure was no loophole and

1407.

⁷⁹ *CCH Canadian Ltd.*, 2004 S.C.C. at para. 51.

⁸⁰ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 S.C.C. 45, available at <http://www.canlii.org/en/ca/scc/doc/2004/2004scc45/2004scc45.html> [hereinafter *SOCAN*].

⁸¹ See Copyright Act (Can.), *supra* note 32, at section 2.4 (1)(b).

set its use in recognizable practices:

[SOCAN] contends that s. 2.4(1)(b) is an exemption from liability and should be read narrowly; but this is incorrect. Under the Copyright Act, the rights of the copyright owner and the limitations on those rights should be read together to give "the fair and balanced reading that befits remedial legislation."⁸²

Section 2.4(1)(b) is not a loophole but an important element of the balance struck by the statutory copyright scheme. It finds its roots, perhaps, in the defence of innocent dissemination sometimes available to bookstores, libraries, news vendors, and the like who, generally speaking, have no actual knowledge of an alleged libel, are aware of no circumstances to put them on notice to suspect a libel, and committed no negligence in failing to find out about the libel;⁸³

When it was argued that the practice of caching was not necessary in meeting the communication function of an ISP and thus that engaging in caching invalidated the exception, Justice Binnie restored the first decision on the matter by the Copyright Board:

[T]he means "necessary" under s. 2.4(1)(b) were means that were content neutral and were necessary to maximize the economy and cost-effectiveness of the Internet "conduit." That interpretation, it seems to me, best promotes "the public interest in the encouragement and dissemination of works of the arts and intellect"⁸⁴ without depriving copyright owners of their legitimate entitlement. The creation of a "cache" copy, after all, is a serendipitous consequence of improvements in Internet technology, is content neutral, and in light of s. 2.4(1)(b) of the Act ought not to have any *legal* bearing on the communication between the content provider and the end user.⁸⁵

And despite the fact that s.2.4(1)(b) was enacted in 1989, before file-sharing appeared en masse, Justice Binnie was emphatic that Parliament had prepared for such a dispute:

⁸² See CCH Canadian, *supra* note 79, at para. 48.

⁸³ See SOCAN, 2004 S.C.C. at paras. 88-89.

⁸⁴ Théberge, *supra* note 68, at para. 30.

⁸⁵ SOCAN, *supra* note 83, at para. 115.

Nevertheless, by enacting s. 2.4(1)(b) of the Copyright Act, Parliament made a policy distinction between those who abuse the Internet to obtain “cheap music” and those who are part of the infrastructure of the Internet itself. It is clear that Parliament did not want copyright disputes between creators and users to be visited on the heads of the Internet intermediaries, whose continued expansion and development is considered vital to national economic growth.⁸⁶

Throughout the decision, the Supreme Court showed that advances in technology do not immediately confer an expansion of rights upon copyright holders – one must read the law with aim of extrapolating from accepted legitimate practices.

As Canada was resolving contemporary disputes through its existing *Copyright Act*, Israel showed similar proficiency in addressing the newly prominent concern of liability with even older legal language. Through a district court decision, a website owner was held not liable for the conduct of users that participated in forum discussions hosted at that website. The catalyst for this decision came in the form of a recipe for a chocolate cheesecake.

*E. Al Ha’shulchan Gastronomic Media, Inc., v. Ort Israel*⁸⁷

This case is a curious one; between suit and countersuit both parties claim infringement in the same behavior of the other. Al Ha’shulchan, a culinary company with an in-house publication and website, and Ort Israel, a vocational institute, both objected to the posting of works from their domain to the other’s online forum. And both entities did not hesitate to use the same arguments for defense: recipes were not eligible for copyright protection, and the host of a forum is not liable for the conduct of its participants.⁸⁸ However, Ort Israel, the recipient of the first charge of infringement, also argued fair use.⁸⁹

Judge Cohen gave due attention to the threshold of infringement—the reproduction of a work or a substantial portion thereof—with emphasis

⁸⁶ *Id.* at para. 131.

⁸⁷ CC (TA) 064045/04 Al Ha’shulchan Gastronomic Media, Inc., v. Ort Israel (May 10, 2007), Nevo Legal Database (by subscription) (Isr.).

⁸⁸ *Id.* at paras. 4-5.

⁸⁹ *Id.* para. 4(a)(2). The language of the defendant notwithstanding, the case predates Israel’s official amendment to fair use in late 2007, see Part IV. Changing the Law – Israel and Canada.

upon the qualitative aspects of a work as per precedent.⁹⁰ And in consideration of the status of a recipe, she did not rule out that possibility of protection:

Recipes might be protected and could be classified as literary works, if they have a sufficient level of creativity, and they do not merely pass over information. The legal protection does not extend to the quantities listed in the recipe. There are incidents in which a recipe can be classified as an “artistic work,” this is when the recipe includes a specific graphic design or something that is clearly new.⁹¹

While armed with the means to evaluate each offending article, Judge Cohen made clear what the principle issue was:

When forum users send messages/comments that include parts of articles/unique recipes/protected works that are taken from a different internet website and/or a magazine – are the owners of the internet website liable for such copyright infringements?⁹²

In resolving this question Ort Israel was deemed entitled to consideration of fair dealing.⁹³

Yet the four factors of fair use received scant attention. Judge Cohen did not explicitly address the purpose of the use. Instead, she began by stipulating that the aspect of profitability could not be invoked as a means to deny the fairness of the use. Given that Ort could claim some shelter in its non-profit status, these remarks seem unnecessary. But, again, it suggests an unspoken recognition of the risks posed by overt focus on commerciality; Judge Cohen took care to distance Israeli application from the more burdensome language of American fair use with its specific phrasing of “nonprofit educational institutions.”⁹⁴

In my opinion we don’t even need to examine the question whether or not Ort operates for non-profit purposes. This is so since in the specific circumstances of this case Ort acted in good faith and removed the article immediately after it

⁹⁰ *Id.* para. 9

⁹¹ *Id.* para. 10(3).

⁹² *Id.* para. 11.

⁹³ *Id.* para. 13(3).

⁹⁴ *See* Fair Use, *supra* note 2.

was notified of its publication. Therefore, even if Ort does make some profit from its different activities (not in the food sector), this does not mean that Ort cannot enjoy the fair dealing defense.⁹⁵

The focus of the analysis lay upon the conduct of all parties – the essence of fairness as emphasized in *Mifal Hapais*. In addition to Ort's conduct, it was noted that the remaining claims of infringement were brought to Ort's attention via lawsuit – hardly a good faith and productive way for Al Ha'shulchan to begin dispute resolution. Upon notice of the lawsuit, Ort removed the disputed elements from its forum. All charges of infringement against Ort were dismissed through a number of means:

- i) The article was solely a recipe without claim for copyright protection;
- ii) The amount copied could not substitute for the original article;
- iii) Although a copyrighted article was reproduced in entirety, Ort did not provide encouragement to do so;
- iv) The fair conduct of the users in providing attribution supported Ort's claim ... It was also noted that through instructions provided by Al Ha'shulchan, Ort had informed users of its food forum to identify the sources of any recipes they posted.⁹⁶

Judge Cohen further deemed that Al Ha'shulchan was equally entitled to defense as warranted by fair conduct.⁹⁷

What is striking about this decision is the protection it could offer to the time-honored custom of conversation. With copyright rooted in the act of reproduction, the inclusion of a copyrighted work in conversations transposed to electronic media invites a charge of infringement. Like the challenge posed to the Canadian Supreme Court in *SOCAN v. CAIP*, this raises the uncomfortable prospect of copyright increasing its scope, not by virtue of reasoned debate in the halls of government, but merely by technological advancement. As copying is now easily traceable, previous customs endemic to individual daily life become suspect. Granted, Judge Cohen's seeming endorsement of the withdrawal of the disputed elements that followed in the wake of Al Ha'shulchan's complaints could be abused – it invites comparison to the notice and takedown regime within the United

⁹⁵ 064045/04 Al Ha'shulchan Gastronomic Media, Inc., para. 13(8).

⁹⁶ *Id.* paras. 13-14

⁹⁷ *Id.* para. 15.

States’ *Digital Millennium Copyright Act*.⁹⁸ Yet, on balance, there is encouragement for affected parties to find accommodation by way of existing customs.

Although Judge Cohen’s discussion of commerciality lies in the realm of obiter dictum, it tempts comment. The studied effort to keep commerciality from overt consideration seems a nod to the troubles encountered in the United States.⁹⁹ And, Judge Cohen’s disregard of the four factors repeats the *CCH Canadian* guidance that the framework itself must be flexible. The usefulness of the fair use framework has been explicitly called into question by an esteemed scholar, who argued that fair use and its four-factors serve to expand copyright monopolies: “while fair use is denoted a defense, it is in fact a requirement. Thus, to use a copyrighted work a person must fulfill certain requirements to avoid infringing the work.”¹⁰⁰

The timing of the decision makes for added intrigue; Israel was on the doorstep to bring formal recognition to fair use and its four-factor analysis. Meanwhile, Canada was again planning for its own amendments.

IV. CHANGING THE LAW – ISRAEL AND CANADA

This section is, by far, the most difficult to write. Nowhere is the cultural distinction between the two countries more evident than in their legislative functioning. Not merely because of differences in process, but because the full weight of the word *culture* comes to bear on the subject. Contemporary political decisions are shaped by past interaction between state and religion, between colonies and empires, between individuals and industries. Intellectual creations are responses to the myriad of social constructs that influence an author; thus, any law purporting to shape the

⁹⁸ See DMCA, *supra* note 18; internet service providers (ISPs) may enjoy some immunity from copyright liability, provided the ISPs promptly remove (take down) suspect material when notice is provided by the copyright holder.

⁹⁹ William Patry draws attention to perhaps the most influential obiter dictum remarks in twentieth century copyright lore, the ruminations on commerciality in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). “Most basic is the seldom-noted fact that since the use before the Court was noncommercial, the statement is pure dictum. It was made in passing, without any explanation of what such a presumption might mean or how it was to be applied;” *see* WILLIAM PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 430 (2d ed., 1995). The prominence of commerciality in American fair use case law is attributable to those remarks and “explains why the “fair use doctrine has to some extent run off the rails of section 107;” *see* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions: 1978 – 2005*. 156 U. PA. L. REV. 549, 596 (2008). Perhaps, even as a magistrate decision, Judge Cohen’s remarks may carry some suasion in the years to come.

¹⁰⁰ *See* Lyman Ray Patterson, *The Worst Intellectual Property Opinion Ever Written: Folsom v. Marsh and its Legacy*, 5 J. INTELL. PROP. L. 431, 451 (1998).

production of creativity and intellectual work will have a muddled history. And when that law is copyright, the present is even grubbier.

Despite copyright's structure of purported balance between private gain and public access, the functioning and effects of copyright are far from clear. Multiple players with differing agendas make negotiation a challenge. As already noted, international concerns must be taken into consideration when drafting domestic law. Even if focused on domestic activity, to what extent would expanding the depth or breadth of copyright serve individual artists, authors and musicians, or consumers? Moving consideration away from individuals to industries, how would the idiosyncrasies of media and genre affect distribution of creative works?¹⁰¹ Are the needs of all industry sectors uniform? What is the interaction between old and new members?¹⁰² Throughout the debate, the figure of the author is deemed the beneficiary of copyright, even though the past three hundred years belie this conclusion.¹⁰³

Despite these challenges, it is possible to gauge the appetite for fair use as felt at the Israeli Knesset and the Canadian Parliament.¹⁰⁴ The prospect of fair use was shaped by each country's overall intentions for their copyright laws. In July 2005, the Government of Israel proposed amendments to copyright law;¹⁰⁵ the Government of Canada followed suit in June 2010¹⁰⁶ (and November 2011).¹⁰⁷ The opening paragraph of the preamble from each country's proposed amendments conveys two very different atmospheres:

¹⁰¹ The music industry could be the most amenable to coping with technology change; while previously musicians toured to promote album sales, reversing the business model (give away music to promote tours) is proving successful for many musical acts; see *Having a Ball*, THE ECONOMIST, Oct. 7, 2010, available at <http://www.economist.com/node/17199460#footnote1>.

¹⁰² For instance, during Canada's 2009 public consultation two very different opinions emerged on the role of digital locks in the gaming industry. The industry association argued for protection of locks whereas a smaller independent studio took the opposite position; compare Entertainment Software Association, *Submission to the 2009 Canadian Copyright Consultation* (Sept. 13, 2009), available at <http://www.ic.gc.ca/eic/site/008.nsf/eng/02705.html>; with George Geczy, BattleGoat Studios, *Copyright Consultation – Submission* (Sept. 12, 2009), available at <http://www.ic.gc.ca/eic/site/008.nsf/eng/02252.html>.

¹⁰³ According to principle, copyright secures property rights (and thus financial security) for those who wish to make a living by their creative talents. A representational figure is that of the freelance writer. Despite three hundred years of copyright development, "The socio-economic and legal state of today's freelancers has not improved dramatically from that of their seventeenth century predecessors;" see Giuseppina D'Agostino, *Copyright Treatment of Freelance Work in the Digital Era*, 19 SANTA CLARA COMPUTER AND HIGH TECH. L.J. 37, 109 (2002).

¹⁰⁴ A particular challenge for this author to comprehend Israeli political activity is the language barrier. To that end, details of the Knesset meetings were most helpful; see Kozlovski, *supra* note 64, at 166-168; Birnhack, *supra* note 8, at 389-390.

¹⁰⁵ See Draft Bill Amending the Copyright Act (No. 196), 2005, HH. (Isr.).

¹⁰⁶ See Bill C-32 *supra* note 25

¹⁰⁷ See Bill C-11 *supra* note 40.

From the Government of Israel:

The objective of the laws of Copyright is to establish an arrangement that will protect creative works while striking a balance between various interests of the public good. The balance required is mainly between the need to provide a sufficient incentive to create, which is in the form of granting general financial rights in the creations, and between the need to enable the public to use the creations for the advancement of culture and knowledge. This balance must be obtained while safeguarding the freedom of speech and freedom of creativity and while preserving free and fair competition.¹⁰⁸

From the Government of Canada:

Whereas the Copyright Act is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy.¹⁰⁹

Even allowing for stylistic latitude, there is marked difference in priority of policy. The Government of Canada emphasizes the market and economy, albeit vaguely. The Government of Israel makes two vital points: i) that the incentive offered by copyright is only that deemed “sufficient” for creative effort to unfold; and (ii) the reference to public good is given some specificity – access to knowledge, freedom of speech, and freedom of creativity.

Within this setting, the Israeli amendments proposed a structural alteration and expansion of the existing fair dealing exception (from its closed list of allowable purposes—private study, research, criticism, review or newspaper summary) to:

- (a) Fair use in a work is permitted, amongst other things, for these purposes: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.
- (b) In determining whether a use made of a work is fair within the meaning of this paragraph the factors to be considered shall include, inter alia:

¹⁰⁸ See Preamble of Draft Bill Amending the Copyright Act, note 104.

¹⁰⁹ See Bill C-32, *supra* note 25, at Preamble; *see also* Bill C-11, *supra* note 40.

- (1) The purpose and character of the use;
- (2) The character of the work used;
- (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
- (4) The impact of the use on the value of the work and its potential market.¹¹⁰

The Canadian government proposed expanding the previous fair dealing allowance (for research, private study, criticism, review and news reporting) to:

Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.¹¹¹

Some differences and similarities are apparent:

- The Israeli proposal of fair use clearly reflected the thoughts of the Israeli Supreme Court in the *Geva* decision, with respect to opening the list of possible purposes and the questions to be considered in evaluation thereof. Moreover, the language is almost identical to that of American fair use with its open-ended wording together with questions of inquiry.
- The framework of inquiry is absent in the Canadian proposal, despite the conduct of the Canadian Supreme Court in *CCH Canadian*. (Although, the multi-faceted inquiry will always form the basis of any decision of fair dealing.¹¹²)
- Parody and satire are not explicitly mentioned in the Israeli text. However, the open-ended language allows future considerations of parody and satire as fair use.
- A unifying element between the two countries is the effort to facilitate some unauthorized uses of materials in academic institutions: the Canadian text considers “education” as an allowable purpose;¹¹³ the Israeli text describes “instruction and examination by an educational institution.”

¹¹⁰ See Draft Bill Amending the Copyright Act, *supra* note 103, at § 19.

¹¹¹ See Bill C-11, *supra* note 40, at § 29.

¹¹² Canadians were reminded of this in July 2010, “The leading case interpreting this provision is *CCH Canadian Ltd. v. Law Society of Upper Canada* ... The Court then set out a two step test to determine whether a given activity qualifies as fair dealing: ‘In order to show that a dealing was fair under section 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair’ (*CCH* at paragraph 50);” see *Alberta Education v. Access Copyright*, 2010 F.C.A. 198 paras. 18-19 (2010), *available at* <http://www.canlii.org/en/ca/fca/doc/2010/2010fca198/2010fca198.html>.

¹¹³ Canada has some specific provisions for educational uses, but the usefulness of these measures is often questioned, for instance, the provision of material copied onto a dry erase board. Additionally, some exceptions are specifically tied to collective licensing

Probing the reaction to this last point yields a noted difference in the legislative atmosphere in the two countries, namely the linking of literature, copyright, and national identity. Allied to this is an unabashed inclination on the part of Israeli legislators to take American law where it serves Israeli needs, and an opposition to such action in Canada.

A. *Maple Leaves v. Stars of David*

Each time copyright amendment is proposed in Canada, copyright is held to be vital to the continuity of Canadian culture.¹¹⁴ During the recent amendment process, a coalition of writers' groups reminded the government that, until the later twentieth century, the Canadian literary landscape was largely populated by American and British writers. The rise of Canadian literary figures, both at home and abroad, is attributed to talent and government support, with "an essential factor [being] copyright legislation..."¹¹⁵ The proposed inclusion of "education" was widely condemned, with the displeasure prominently displayed through full-page advertisements in a national newspaper and a publication dedicated to parliamentary activity. Endorsed by Canada's literary elite, the plea to remove "education" and other exceptions, ended with: "Don't do it for us. Do it for *Canada*."¹¹⁶

Without having access to Israeli newspapers in their original form and of the time period preceding copyright amendment, this author cannot fully compare reaction via that medium. A literature search of some English-medium news outlets showed few articles concerning the proposed changes to copyright.¹¹⁷ The extent to which fair use drew concern from the Israeli literary community, in particular, and copyright holders, in general, was reflected only by a slight reduction in the ambit for allowable purposes. The proposed language read as: "fair use in a work, is permitted, amongst other things, for these purposes;" it was later reduced in scope to: "fair use in a

agreements. See Howard Knopf, *Copyright Collectivity in the Canadian Academic Community: An Alternative to the Status Quo?* 14 INTELL. PROP. J. 109, 116 (1999) (French).

¹¹⁴ Laura Murray, *Protecting Ourselves to Death: Canada, Copyright and the Internet*, 9 FIRST MONDAY, no. 10, 2004, available at <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1179/1099>.

¹¹⁵ WRITERS UNION OF CANADA ET AL., WRITERS ON BILL C32 2 (Nov. 9, 2010), available at <http://www.writersunion.ca/pdfs/briefcccopyright.pdf>.

¹¹⁶ THE GLOBE AND MAIL, Nov. 26, 2010, at A8 (emphasis in original).

¹¹⁷ Principal sources were HAARETZ, JERUSALEM POST and GLOBES. Notes are on file with the author.

work is permitted for purposes such as.”¹¹⁸ Although Israeli copyright holders expressed similar concerns as their Canadian counterparts – namely that educational practitioners do not understand the functioning of fair use and will simply distribute whatever works they choose¹¹⁹ – that argument did not succeed in revoking the reference to “instruction and examination.” Fair use in Israel had a capable defender in the form of its own legislative author.

B. Fair Use v. Fair Dealing

The manner in which the amendments were discussed is quite different between the two countries. For instance, in Israel, meetings are organized according to specific clauses of the bill, whereas in Canada, at any given meeting the entire bill is fair game. Israel offers open sessions, whereas in Canada only invited witnesses may attend. And a subtle, but significant, difference is the general absence, in Canada, of the author of the legal text. At the first meeting, a ministerial representative offered some clarity as to the government’s position with fair dealing,¹²⁰ but there was no ongoing explanation during the majority of the Canadian meetings.

Invariably, witnesses in both countries had their own interpretation of the law. But in Israel, any (perhaps unintentional) misrepresentation of the law was responded to during the meeting by Tamir Afori, the lawyer

¹¹⁸ *Copyright Act*, *supra* note 26, at § 19.

¹¹⁹ See the remarks of Racheli Edelman (Chair Copyrights Committee, Book Publishers Association) and Giora Landau (Educational Books Publishers Association), Economics Committee of the Knesset, Protocol 148 (Jan. 2, 2007) (Hebrew), *available at* <http://knesset.gov.il/protocols/data/html/kalkala/2007-01-02.html>.

¹²⁰ Ministerial representatives were present for the first meeting. Mr. John Connell (Associate Assistant Deputy Minister, Strategic Policy Sector, Department of Industry) said: “First, fair dealing currently is an essential part of copyright law in Canada, and this is very much recognized by the Supreme Court. There are specific purposes right now in the Copyright Act for which fair dealing exists, and it includes, for example, research, private study, criticism. The proposal is to extend it to education right now, but in a way that is not open-ended. Right now, for example, fair dealing in Canada is what permits a doctoral student to copy articles for published research, a writer to copy chapters of a borrowed book--limited uses like that. That continues to be the intent in extending fair dealing to education. There are particular Supreme Court tests that will limit this. It’s called fair dealing for a reason, and it has to be fair, so in no way is it to undermine the livelihood or the value of the creator’s work; it’s instead to permit particular constrained uses within structured educational context for purposes of education.” *See Evidence on Bill C-32 Before the Legis. Comm.*, 40th Parliament, 3rd Session 1020 (Nov. 25, 2010) (statement of John Connell, Associate Assistant Deputy Minister, Strategic Policy Sector, Department of Industry), *available at* <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4814302&Language=E&Mode=1&Parl=40&Ses=3>

responsible for the draft language. The benefit of this dialogue may not surface in a tangible way any time soon – but without such dialogue, committee members are less likely to understand the nuance of exceptions and how exception benefit society at large. Perhaps neither government needs support from committee members and witnesses; but, in the interests of devising laws such that they will be understood and upheld by ordinary individuals, a necessary first step may be to educate the representatives of the people.

To that end, Afori presented the development of fair use in Israel in context. He emphasized that current Israeli law was insufficient to protect public interests in matters such as freedom of expression and access to cultural works. That, despite the theoretical balance implied by copyright, copyright has steadily increased in one dimension only – the expansion of rights to copyright holders. He presented his view that fair use was a key element in the pursuit for balance and made specific reference to *Geva*, whereby the closed list of allowable purposes denied the possibility of fair dealing. Afori also explained the judicial emphasis upon the aspect of fairness, as developed in *Mifal Hapais*. And he made plain the lineage of fair use: “Fair Use is an American doctrine.... The Supreme Court already adopted the American doctrine with the four conditions.”¹²¹

Afori’s acknowledgement and encouragement of American law is markedly different from the Canadian position. While the framework of inquiry set through *CCH Canadian* draws liberally from American law, the government has not deigned to acknowledge that fact. One can only wonder if this is why Canadian legislators chose not to incorporate the six factors of inquiry: the multi-faceted inquiry alone could invite association to the United States. What is known is that years earlier, suggestions that Canadian law should include the Supreme Court framework, or emulate the United States with respect to fair use, were criticized by a respected member of the Canadian law community, Giuseppina D’Agostino.

Following *CCH Canadian*, the Federal Government of Canada supported a study of fair dealing by D’Agostino, wherein she concludes:

It has been suggested that government intervene and legislate the CCH factors. ...why would this be done? What Canada now has is a flexible framework to evaluate fair dealing on a case by case basis based on the ethos that users

¹²¹ See the remarks of Tamir Afori, Protocol 128 of the Economics Committee Meeting of the Knesset (Dec. 12, 2006), available at <http://knesset.gov.il/protocols/data/html/kalkala/2006-12-12-01.html> (Hebrew).

have rights.... There are problems with [adopting fair use]. First, as noted from eminent US studies, fair use is “ill” and not the panacea approach that many, perhaps in Canada, proclaim. ...Second, cherry-picking a law, likely also means taking from its jurisprudence (and neglecting other constitutive factors, such as a Constitution). Would Canadian courts apply US fair use cases? Would this application ignore the fact that property is not constitutionally entrenched in Canada? ... One must be very careful when importing legal devices from other jurisdictions.¹²²

To this day, D’Agostino’s report is the only known (publicly available) study of fair dealing/fair use published by the Federal Government of Canada.¹²³ This is regrettable because rigorous studies illustrating the resilience and capability of fair use in the United States were published in its wake.¹²⁴ D’Agostino had also encouraged Canada to develop good practices with respect to fair dealing; unfortunately, that portion of her counsel went largely unheeded. Canadians were left with a caution against fair use and an absence of encouragement with fair dealing.

D’Agostino was sought by the Committee for discussion of the proposed amendments¹²⁵ and made an intriguing suggestion:

[Y]ou could include a provision at the end of section 29 stating something like, “it is not an infringement of copyright to deal with such educational purposes in such manner as the Governor in Council may prescribe by regulation.” This would allow for a more evidence-based

¹²² See GIUSEPPINA D’AGOSTINO, FAIR DEALING AFTER CCH 40-41 (2007), available at http://epe.lacbac.gc.ca/100/200/301/pch/fair_dealing-e/CH44-128-2007E.pdf.

¹²³ See *Publications and Reports*, CANADIAN HERITAGE, <http://www.pch.gc.ca/eng/1274274702533/1274274794600> (last modified May 19, 2010). Industry Canada, through the Canadian Intellectual Property Office, has no publicly available analysis of fair dealing either; see *Copyrights*, CANADIAN INTELLECTUAL PROPERTY OFFICE, http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr00003.html (last modified Dec. 2, 2011).

¹²⁴ See Beebe, *supra* note 98; see also Samuelson, *supra* note 76; Neil Netanel, *Making Sense Out of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011).

¹²⁵ See the remarks of a Member of Parliament: “I’m not sure if there were informal discussions among some members ...I don’t disagree with Professor Geist and Mr. Sookman being here, but I think we would perhaps want to consider a third person so that we can utilize the time more effectively, if available. I’m thinking of someone from another university, perhaps Dr. D’Agostino or someone along that line.” *Evidence on Bill C-32 Before the Legis. Comm.*, 40th Parliament, 3rd Session (Nov. 29, 2010) (statement of Dan McTeague, MP for Pickering-Scarborough East), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4826973&Language=E&Mode=1&Parl=40&Ses=3>.

approach and allow government departments with expertise to helpfully collect evidence and be specific on what they need to cure by legislation, and to be nimble and flexible in making adjustments to copyright problems in the educational sector as they arise from time to time.¹²⁶

Unfortunately, D’Agostino’s continued reservations about encoding the *CCH Canadian* factors into law may be all that resonates with the government. D’Agostino made clear her concern about codification of the framework – that it could invite confusion.¹²⁷ But in light of her ongoing concerns that the proposed expansion in the area of user rights will have unintended consequences,¹²⁸ it is all the more perplexing that use of the language of the law to educate people about fair dealing is not seen as advantageous to creators.

The view that fair dealing is “free dealing” has been most emphatically articulated by copyright holders; it would now take a concerted effort, and perhaps a generation or two, to educate the public that fair dealing is an instrument laden with nuance. The presence of multiple points of inquiry, *in the law*, would serve this end. Paradoxically, Canada’s unwillingness to emulate American fair use is in keeping with its adoption of American pronouncements of digital locks. If opposition arises on either element, the government can speak of its commitment to “enhancing the protection of copyright works.”¹²⁹ It appears that the Government of Canada places all emphasis upon copyright as an instrument of protection, whereas the Government of Israel regards copyright in terms of a system of creativity.

V. AFTERWORD

The form of copyright in the digital age continues to evolve. In Israel, the importance of attribution remains prominent,¹³⁰ a framework to consider

¹²⁶ Evidence on Bill C-32 Before the Legis. Comm., 40th Parliament, 3rd Session (Dec 1, 2010), *available at* <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4839067&Language=E&Mode=1&Parl=40&Ses=3>. Israel’s language of fair use includes a similar provision, “The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use....” Copyright Act, *supra* note 26, § 19(c).

¹²⁷ *Evidence, supra* note 123.

¹²⁸ *Id.*

¹²⁹ See C-32, *supra* note 25, at Preamble; C-11, *supra* note 40, at Preamble.

¹³⁰ See Michael Factor, *Copyright in Photographs from Old Newspapers Shown in History Programs*, THE IP FACTOR (Oct. 30, 2011, 10:21 PM), <http://blog.ipfactor.co.il/2011/10/30/copyright-in-photographs-from-old-newspapers-shown-in-history-programs/>; see also Michael Factor, *Copyright in photographic images reproduced on website – fair use*, THE IP FACTOR, (Oct 6, 2011, 9:07 PM), <http://blog.ipfactor.co.il/2011/10/06/copyright-in-photographic-images-reproduced-on->

contributory copyright infringement has been set,¹³¹ and a district court decision (pending appeal) supports the streaming of live sporting entertainment through the venue of users rights,¹³² to name just a few cases. In Canada, copyright's progression is affected in large part by collective licensing agreements;¹³³ that said, in December 2011, five copyright cases were heard by the Supreme Court of Canada. Two cases, in particular, concern fair dealing and will undoubtedly shape future dealings.¹³⁴

However, returning to the goal of this paper – to examine the cultivation of fairness of use – widespread practice requires widespread awareness of *how* to consider fairness. It is of lesser importance as to whether it happens under the open-ended language of fair use or an expanded version of fair dealing. Both Canada and Israel have a legitimate tool at hand – the multi-faceted form of inquiry – to successfully move forward. The High Courts not only gave their blessings to the framework; they sought to circumvent some of the growing pains endured by the United States in its development of the fair use framework over the past 170 years. But judicial support alone

websites-fair-use/.

¹³¹ CA 5977/07 The Hebrew Univ. of Jerusalem v. Schocken Publ'g House Ltd., para. 23 [June 12, 2011]. At issue was whether an educational institution could be held liable for infringement committed by a student within a public space in the university. The Supreme Court, sitting as the Civic Court of Appeal, decided that as the university was not liable, no discussion of “the fair use defense” was required. *Id.*, para. 30. Yet the court continued: “It should be mentioned that indeed with respect to educational institutions there is significant value to the application of defenses, and this is in order to enable the institutions to fulfill their important role of enriching public knowledge and distributing it as well as educating the future generation of creators.” *Id.* The request for a further hearing was denied, see Michael Factor, *Contributory Copyright Infringement Can Be Passive*, THE IP FACTOR, (Sept. 14, 2011, 1:10 PM), <http://blog.ipfactor.co.il/2011/09/14/contributory-copyright-infringement-can-be-passive/>.

¹³² Summaries and analysis of the decision indicate that the presiding Judge Agmon-Gonen sanctioned fair use through association to user rights, public rights, and a constitutional right. “The “users' rights” advocates find support in the Canadian Supreme Court judgment in [CCH Canadian];” see Greenman, *supra* note 47; “The basis of the judge's decision rests on the public's rights and on the obligations of copyright holders to modify their business model in a manner that will not breach the public's right;” see Yoram Lichtenstein, *Israeli Judge Permits Unlicensed Sports Event Streaming*, TECHNOLOGY AND MARKETING LAW BLOG (Sept. 21, 2009), http://blog.ericgoldman.org/archives/2009/09/israeli_judge_p.htm; for a comprehensive analysis, see Kozlovski et al., *supra* note 64 at 169-174. However, not all Israeli judges share the same sentiments; see Michael Factor, *Hot off the Press*, THE IP FACTOR (Sept. 14, 2009), <http://blog.ipfactor.co.il/2011/09/14/hot-off-the-press/>.

¹³³ Ariel Katz, *Copyright Collectives Good Solution But For Which Problem?*, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY (Harry First, Rochelle Dreyfuss, and Diane Zimmerman eds., 2010).

¹³⁴ See Soc'y of Composers, Authors and Music Publishers of Can. v. Bell Can. case information, available at <http://scc-csc.gc.ca/case-dossier/cms-sgd/fac-mem-eng.aspx?cas=33800>; see also Minister of Education ex rel Province of Alberta. v. Can. Copyright Licensing Agency, available at <http://scc-csc.gc.ca/casedossier/cms-sgd/fac-mem-eng.aspx?cas=33888>.

will not achieve widespread practice; copyright law being as arcane as it is, cultivating public awareness of fair use will need concerted effort on the part of government and other institutional bodies, particularly those that have a lasting impact upon the public.

A question at this point is: why should either country choose to promote public understanding of fairness of use as set by their courts? What is the value of a modest exception for some unauthorized uses of copyrighted work? The routine argument opposing exceptions is that exceptions are a subsidy for future creators, paid for by current creators. The rebuttal, of course, is that current creators are not subsidizing future work, but instead are settling their own past debts – debts that can only be paid forward. But pithy as that statement is, it lacks weight in most political circles.

A hint of the value of fair use came via Google's contribution to a recent investigation into copyright in the United Kingdom:

Fair use is regularly referred to as the key tool by which the U.S. fosters innovation ... no country in the world can compete with the U.S. for the most innovative search technologies, social networks, video and music hosting platform, and for the sheer generation of the most jobs and wealth in the Internet domain. If one is looking for evidence of how innovation succeeds, the best way is to look at those places where innovation has succeeded.¹³⁵

Such enthusiasm may help political negotiation but could confine discussion of fair use as that of a trade mechanism, which is of use to industries but of little consequence to individuals.¹³⁶ But Google's remarks could invite a broader query surrounding American innovation: how did it begin?

Briefly, the United States' creation of wealth through intellectual development began with a conscious effort to democratize creativity by establishing an intellectual property regime that invited all to participate.

¹³⁵ GOOGLE, SUBMISSION TO THE INDEPENDENT REVIEW OF INTELLECTUAL PROPERTY AND GROWTH (March 2011), *available at* <http://www.ipo.gov.uk/ipreview-c4e-sub-google.pdf>.

¹³⁶ In 2007, the Computer and Communication Industry Association released its quantitative assessment of the contribution made by fair use to the American economy. Periodically updated, the latest report emphasizes "Notwithstanding the recessionary environment, the fair use economy remains steady when measured by value added, while the remainder of the U.S. economy contracted." See THOMAS ROGERS AND ANDREW SZAMOSSZEGI, COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 4 (2011), *available at* cianet.org. Note that these reports follow the methodological guidelines used by World Intellectual Property Organization when assessing economic

This was most evident in their patenting system, which eschewed the European model, where power was concentrated “in the hands of the elites and facilitated rent-seeking by favored producers ... [the American] patenting system exemplified one of the most democratic institutions in early society, offering secure property rights to true inventors, regardless of age, color, marital status, gender or economic standing.”¹³⁷ Mocked at first, the U.S. model was later admired, envied, and replicated.

Yet, a patenting system that rewarded all inventors of even modest achievement seemed at odds with a copyright system that denied reward to the best of the world’s authors.¹³⁸ The United States’ staunch refusal to recognize international copyright resulted in considerable international displeasure. But while many complained of American ethics, American logic was sound. The argument that the best proof of democracy was the proliferation of the world’s leading literature could not be easily denied. And it was equal to the task of countering concerns of lost identity by lack of support for domestic authors.¹³⁹ Despite the appearance that this was merely a political maneuver, policy makers had additional concerns with the application of copyright, including:

[T]he risk of unwarranted monopolies (that appropriated what belonged to the public and made it private and exclusive) was higher because cultural goods incorporated ideas that belonged to the public domain in ways that made it difficult to distinguish between the contributions of the

activities related to copyright.

¹³⁷ See B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1890-1920* 7-9 (2005).

¹³⁸ The US Copyright Act of 1790 reads as an invitation to piracy of foreign works; Section V stipulates, “That nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.” 1 Stat. 124 (1790), available at <http://www.copyright.gov/history/1790act.pdf>.

¹³⁹ Book history enthusiasts may also recall the work of Meredith McGill concerning the behavior of the reprint industry of antebellum America. Anxious to keep international copyright at bay, the reprinters argued on a larger platform than affordability: “Rather than establishing the Americanness of a book by reference to its subject matter or to the nationality of its author, copyright opponents argued that national values were instantiated in the process of a book’s production.” See MEREDITH MCGILL, *AMERICAN LITERATURE AND THE CULTURE OF REPRINTING 1834-1853*, at 94-95 (2003). An outsider cannot help but wonder if history is repeating itself, with adaptation, in Israel. This author is not suggesting that Israel has behaved imprudently in terms of international law, but instead that Israel has refrained from an explicit focus on identity and instead sought a general encouragement of the development of ideas. Israel’s successful, but little known, high-tech sector is representative of “manufacturing” in a manner befitting knowledge economies of the current century.

author and those of society in general.¹⁴⁰

The temerity of early American policies served the development of their nation state well; it aided the country's ascension from a predominantly agrarian economy, to world leader, in less than one century. But contemporary niceties of intellectual property and international trading rules today preclude any nation from adopting America's past policy stance. The equivalent temerity today is confined to a staunch defense of the existing limits to copyright's control. The egalitarian nature of the antebellum system of intellectual property can still be found in the exceptions that address *individual* need towards creative achievements as of yet unknown.

Such a statement will likely invite a further question: Is it essential to the well-being of contemporary societies that individuals be empowered to engage in legitimate creative effort? Well-heeled institutional formations – whether private industry corporations or government research institutes or middling entities taking form as public-private partnerships – have sufficient resources necessary to negotiate intellectual property licenses such that intellectual work will continue. Are individuals creating mash-ups relevant to the growth of societies? That question cannot be answered here; all that can be said is any country wishing to emulate the past policies of the United States has a difficult road ahead. Quite apart from international pressures, the ingenuity sought for by the American founders was not inhibited by any overt public consciousness of intellectual property rights.

The same cannot be said today. Copyright, and all the misconceptions that go with it, is in the air we breathe. Contemporary amateur creators are more likely to believe that copyright is absolute and that any creative effort that draws from existing work would be a violation of law. Perhaps, even under the belief of self-inflicted infringement, an amateur creator would continue undeterred. But, as it is from amateur interests that professional developments grow, cultivating awareness of the nuance of copyright and exceptions would serve future creativity well.¹⁴¹ Such awareness need not

¹⁴⁰ See KHAN, *supra* note 135, at 14.

¹⁴¹ Leading scholars in the area of fair use describe “the culture of fear and doubt,” see PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE (2011), available at http://firstsearch.oclc.org/WebZ/FSPage?pagetype=return_frameset:sessionid=fsapp4-39207-gyln0jc1-dx2rbb:entitypagenum=46:0:entityframedurl=http%3A%2F%2Fpublic.eblib.com%2FEBLPublic%2FPublicView.do%3FptID%3D729541:entityframedtitle=WorldCat:entityframedtimeout=30:entityopentitle=:entityopenauthor=:entityopennumber=: To combat that fear, these same scholars actively work towards establishing best practices for use of copyrighted material across a variety of creative disciplines. *Id.*; details also provided by the CENTER FOR SOCIAL MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (2012), available at <http://www.centerforsocialmedia.org/fair->

be confined to the specificity of a law school lecture or examination; copyright literacy can be encouraged through the educational sector as a whole.

Students' impressions of intellectual property are shaped, *in part*, by the atmosphere in which they are taught. One need only consider the acute understanding students have of plagiarism – it is instilled throughout their studies that to pass off another person's work as their own is the academic sin for which there is no redemption. Plagiarism and copyright are conceptually very similar; the first guards against appropriation without credit, while the second concerns appropriation without permission. Fair use straddles both – unauthorized appropriation guided by fair conduct.

Herein lies an opportunity for Canada and Israel to utilize their educational exceptions, found in fair use and fair dealing, beyond the immediate desire of access to knowledge. Quite apart from the potential benefit of allowing teachers to work with some degree of spontaneity as befitting intellectual activity in the digital age, bringing the dialogue of fair use into adult classrooms serves to educate adults about the nuance of copyright. Tertiary education is an appropriate venue for promoting copyright literacy.

Copyright is a limited right; both the limit and the right are to be treated with care. The vision that such a lesson can be inculcated to the masses might be dismissed as impractical or naive – such is the reader's prerogative. Yet, an inverted vision is of a society where no unauthorized uses of copyrighted material occur – not by virtue of legal prohibition, but by widespread misconception about the nature of the law. In a world dominated by the rhetoric of the knowledge economy, it is plausible that countries would do better if artificial inhibitions to creativity were removed. And in a world where claims (legitimate or otherwise)¹⁴² of copyright infringement are increasingly targeted at individuals, defense begins with knowledge of the subject.

Canada and Israel have each taken some steps towards introducing the concept of best practices, in the educational context, to their post-secondary populations.¹⁴³ It remains to be seen whether these documents will serve to

use/best-practices.

¹⁴² An egregious attack on fair use, and the graduate students who might wish to employ the exception, came from Paul Zukofsky. The son of poet Louis Zukofsky (1904 – 1978), P. Zukofsky made it clear that fair use would not be tolerated by him; see Paul Zukofsky, *Copyright Notice by PZ, Z-SITE: A COMPANION TO THE WORKS OF LOUIS ZUKOFSKY* (Sept. 17, 2009), <http://www.z-site.net/copyright-notice-by-pz/>.

¹⁴³ At the time of this writing, a set of best practices with fair use in Israeli higher education has been established, but not yet adopted. See Amira Dotan et al., *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience*, 57 J. COPYRIGHT

infuse a broader understanding of copyright and exceptions or simply be regarded as a ceiling on individual copying, with the subject of copyright itself disregarded.

SOC'Y 447 (2010). Many Canadian universities have adopted a set of guidelines prepared by the Association of Universities and Colleges of Canada; *see* ASS'N OF UNIV. AND COLL. OF CAN., FAIR DEALING POLICY (2011), *available at* <http://collections.library.ubc.ca/files/2011/03/AUCC-Fair-dealing-policy-March-2011.pdf>. The guidelines are very conservative. The Canadian Association of University Teachers has also created documentation; *see* CAN. ASS'N OF UNIV. TEACHERS, CAUT GUIDELINES FOR THE USE OF COPYRIGHTED MATERIAL (2011), *available at* http://caut.ca/uploads/Copyright_guidelines.pdf.