

Fair Dealing Myths & Facts



**fair dealing
week**

Many myths persist about fair dealing, an essential right that allows the use of copyrighted material without permission from the copyright holder under certain circumstances. We debunk some of the most common fair dealing myths here.



Myth: Fair dealing is a defense, or minor exception, not a right.

Fact: Fair dealing is a user's right.

The Supreme Court of Canada recognizes fair dealing as a user's right in CCH (para 12)¹: "the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence...The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."



Myth: Where a specific limitation or exception exists under copyright law, fair dealing does not apply.

Fact: Fair dealing is a right that exists in addition to specific exceptions.

While specific exceptions provide certainty for particular activities or apply where fair dealing does not, the fair dealing doctrine remains an important right, that is "always available" (CCH, para 49).



Myth: Copyright's primary purpose is rewarding authors and not promoting the public benefit.

Fact: The Government of Canada clearly states on the "*History of Copyright in Canada*" website that the objective of Canadian copyright laws and regulations are "to ensure that the rights of creators and other rights-holders are recognized and protected; and to promote access to copyrighted works."²

The Supreme Court of Canada has made it clear that user's rights are equally important parts of the Copyright Act. The CCH decision (para 48)¹, quotes Professor Vaver³, "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."



Myth: There is no guidance on fair dealing.

Fact: Numerous court decisions and best practices provide ample guidance.

A number of court decisions^{1/4} provide direction on fair dealing; in particular, CCH (para 60)¹ provides six factors with which to determine the fairness of an intended use. The Fair Dealing guidelines or policies adopted by your institution are a good place to start⁵. These guidelines provide the best practices of your institutional community.

1. CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13.

2. Government of Canada. (n.d.). *History of Copyright in Canada*. Retrieved from: <http://canada.pch.gc.ca/eng/1454685408763>

3. Vaver, D. (2000). *Copyright Law*. Toronto: Irwin Law, pp. 171-191.

4. Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36, [2012] 2 S.C.R. 326; Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37, [2012] 2 S.C.R. 345

5. For numerous examples, see the Canadian Association of Research Libraries, "University Copyright Guides," accessed February 21, 2017, <http://www.carl-abrc.ca/influencing-policy/copyright-2/university-copyright-guides/>.

Myth: Fair dealing is only permitted where the use is non-commercial.

Fact: Courts have upheld fair dealing for commercial entities and commercial uses.



The commercial nature of the use is only one factor for the court to consider. The Supreme Court of Canada CCH decision states (para 54)¹, and the SOCAN v Bell Canada decision (para 36)⁶ reiterates “while research done for commercial reasons may be less fair than research done for non-commercial purposes, the dealing may nonetheless be fair if there are ‘reasonable safeguards’ in place...”

Myth: Fair dealing specifies the amount you can copy.

Fact: The Copyright Act does not tie fair dealing to any specific amount. The amount of the dealing is one of the six factors that are used to evaluate fairness.

As stated in CCH (para 56)¹, “the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work...there might be no other way to criticize or review certain types of works such as photographs...The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision.



Myth: Fair dealing is a Canadian exception that breaks from international law and practice.

Fact: Fair dealing or fair use is a doctrine widely incorporated around the world.

The concept of fair dealing or fair use is not unusual or an outlier; fair dealing or fair use exists in more than 40 countries. Both doctrines allow the use of copyrighted materials without permission from the copyright holder under certain circumstances.



Myth: Fair dealing prohibits any uses that have an effect on the market.

Fact: Fair dealing considers a number of factors, including but not limited to the effect of the dealing on the work.

The CCH decision (para 59)¹ states, “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.”



Myth: Fair dealing is a new idea.

Fact: Fair dealing has a long history; it was originally included in the Copyright Act in 1921.

The Copyright Act codified fair dealing in 1921, as section 16.1 (i), “Provided that the following acts shall not constitute an infringement of copyright:(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary.” The purposes of education, parody and satire were added in 2012, in the changes introduced by the Copyright Modernization Act.

6. Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36, [2012] 2 S.C.R. 326

