



2009

Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations

Barry Sookman

Dan Glover

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohrlp>

Citation Information

Sookman, Barry and Glover, Dan. "Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations." *Osgoode Hall Review of Law and Policy* 2.2 (2014): 139-168.
<http://digitalcommons.osgoode.yorku.ca/ohrlp/vol2/iss2/4>



This work is licensed under a [Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Unported License](http://creativecommons.org/licenses/by-nc-nd/3.0/).

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Review of Law and Policy by an authorized administrator of Osgoode Digital Commons.

WHY CANADA SHOULD NOT ADOPT FAIR USE*

A JOINT SUBMISSION* TO THE COPYRIGHT CONSULTATIONS

This submission addresses the issue of fair use, in both the traditional sense, and in the sense of an expanded and more flexible fair dealing regime. Fair use should not be adopted as it leads to uncertainty, expensive litigation, and leaves important public policy decisions to be made by courts instead of Parliament. Further, fair use would reduce revenues available to creators, (which, in turn would reduce the capacity of creators to innovate), while potentially undermining legitimate collective licensing models. Fair use may also be inconsistent with Canada's international treaty obligations. Finally, in light of international experience rejecting the adoption of fair use it would be imprudent for Canada to do so.

1. INTRODUCTION

This paper is jointly submitted by over fifty prominent Canadian organizations, who represent hundreds of thousands of artists, choreographers, composers, directors, educators, illustrators, journalists, makers, musicians, performers, photographers, playwrights, producers, publishers, song writers, videographers, and writers working in Canada.¹ We submit this paper because we believe Canada should not adopt a new fair use provision.

It is universally acknowledged that protections for copyright should not be absolute. There are circumstances dictated by justifiable policy considerations where exceptions and limitations to

* © 2009 Barry Sookman and Dan Glover of McCarthy Tétrault. The research assistance of David Deutsch and Ryan Prescott of McCarthy Tétrault is gratefully acknowledged. This paper is a revised version of the Copyright Consultation Submission of September 15, 2009.

* Written by Barry Sookman and Dan Glover of McCarthy Tétrault. For a full list of the signatory organizations, as of October 23, 2009, see Appendix A.

¹ More information on the mandates and activities of the signatory organizations can be obtained via the websites listed in Appendix A.

copyright are warranted.² The Supreme Court has ruled that exceptions to copyright, including the fair dealing provision, are an integral part of the *Copyright Act*.³

In the latest round of copyright consultations, advocates of copyright liberalization have made calls to replace Canada's longstanding fair dealing provisions with a general fair use provision.⁴ Alternatively, these advocates have argued that the fair dealing provisions enumerated in the *Copyright Act*, such as the "research or private study" and the "criticism or review" provisions, should be treated as merely "illustrative" examples of allowable exceptions. The most common proposal to achieve this result is to insert the term "such as" into the current fair dealing provisions. This "expanded fair dealing" proposal would have a similar effect to implementing a fair

² Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (2001) [["Section 92 Report"](#)] at 7, stating "access to culture and the dissemination of information remain important public policy objectives for Canadians. Limitations and exceptions to copyright protection strive to balance the rights of copyright owners with the access considerations of certain users"; Also see EC, "Green Paper: Copyright in the Knowledge Economy", COM(2008) 466 final (16 July 2008) ([the "UE Green Paper"] at 4; U.K., UK Intellectual Property Office, [Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions](#) (Newport: Concept House 2008) ["Taking Forward Gowers"] at para. 26, rejecting an earlier possibility raised by the 2006 [Gowers Review of Intellectual Property](#), at 4.68-4.71; Austl., Commonwealth, Attorney-General, *Copyright Amendment Bill 2006: Explanatory Memorandum* at 3 ["Explanatory Memorandum"]; N.Z., [Digital Technology and the Copyright Act 1994: Internal Working Paper](#) (online: <<http://www.med.govt.nz/upload/2429/working.pdf>>, July 2002) ["Internal Working Paper"] at para. 241.

³ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at para. 46 [CCH].

⁴ See Michael Geist, "[Designing A Copyright Law That's Built To Last](#)" *Toronto Star* (17 August 2009), online: Toronto Star <<http://www.thestar.com/sciencetech/article/682006>>; Jeremy de Beer, "[Respect and Reality Are Keys to Reform](#)" *National Post* (6 August 2009), online: <<http://www.jeremydebeer.ca>>; Laura J. Murray, [Ottawa Roundtable](#) (31 August 2009), online: FairCopyright.ca <<http://www.faircopyright.ca/?p=217>> as examples of the "fair use" or "expanded fair dealing" provisions being sought by user interest groups. Of position papers filed to date in the 2009 process, that of the [Canadian Internet Policy and Public Interest Clinic](#), affiliated with the University of Ottawa, is representative of the amendments sought.

use provision, as it would create an open-ended system allowing users to argue that any given purpose is “fair”.⁵

These proposed amendments are not needed. Canada already has broad and flexible fair dealing provisions. Pro-reform advocates have acknowledged that the Supreme Court of Canada’s landmark fair dealing decision in *CCH* “instantly ranks as one of the strongest pro-user rights decisions from any high court in the world.”⁷

Moreover, these proposals would go in precisely the wrong direction. At a time when most stakeholders are calling for greater certainty and clarity in Canadian copyright law, these proposals to replace the specific fair dealing provisions that Parliament has established with broad, open-ended “user rights” would leave copyright owners and users guessing where copyright ends and “user rights” begin.

The fair use model is not a panacea for solving difficult problems resulting from digitization and the internet. “Fair use” has been described as an “astonishingly bad” system amounting to little more than “the right to hire a lawyer”.⁸ Fair use and/or expanded fair dealing systems are models that many of our trading partners including the United Kingdom, the European Union, Australia and New Zealand have expressly rejected. So did Canada when it last considered introducing an expanded fair dealing or fair use provision into Canadian law. In fact, of the 164 countries that are members of the *Berne Convention*, only four have implemented it.⁹

Far from solving copyright problems, adopting fair use would only exacerbate them. Its drawbacks are numerous. Fair use would lead to uncertainty, expensive litigation and leave important public

⁵ Jeremy de Beer and Michael Geist, “[Developing Canada’s Intellectual Property Agenda](#)” in Jean Daudelin & Daniel Schwanen eds., *Canada Among Nations* (Montreal: McGill-Queen’s University Press, 2007) 157 at 177.

⁶ *CCH*, *supra* note 3.

⁷ Michael Geist, “[Low-tech case has high-tech impact](#)” *Toronto Star* (22 March 2004), online: < http://www.michaelgeist.ca/resc/html_bkup/mar222004.html >.

⁸ Lawrence Lessig, *Free Culture* (New York: The Penguin Press, 2004) at 187 [Lessig]. He is not alone among U.S. prominent reformists in concluding that fair use is a broken system. See Section 2(c) below.

⁹The World Intellectual Property Organization “[Berne Contracting Parties](#)”, online: The World Intellectual Property Organization <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15>. The only fair use regimes are the United States, Israel, Singapore, and the Philippines.

policy decisions to be made by courts instead of Parliament. It would reduce revenues available to the Canadian creative industries; revenues which are vital to their indigenous growth. It would undermine legitimate licensing models including collective licensing of copyrights.

By expanding what can be done without infringement, fair use could also significantly undercut the existing private copying levy as well as prospects for extending that levy to new media such as Digital Audio Recording Devices (DARs) and to content other than music. It would leave uncertain what uses of works are permissible in a variety of other settings as well, such as uses in libraries and educational institutions.

Creating an expanded fair dealing or fair use model could also put Canada off-side its treaty obligations, which require that exceptions comply with the three-step-test.¹⁰

The Government should not amend the Act to introduce a fair use or expanded fair dealing model into Canada. At the very least, it should not do so without further detailed consideration of its potential adverse effects.¹¹

2. INTERNATIONAL STANDARDS FOR EXCEPTIONS AND LIMITATIONS

The dominant approach worldwide in creating exceptions and limitations to copyright is a closed approach that identifies specific special uses of works that do not infringe copyright. By contrast, under the open-ended fair use model, any reproductions or other uses

¹⁰ Under the *Berne Convention*, *TRIPS* and *NAFTA*, Canada agreed to confine limitations or exceptions to certain special cases that do not conflict with a normal exploitation of a right or unreasonably prejudice the legitimate interests of authors or right holders. See section 4(b) below. [Berne Convention for the Protection of Literary and Artistic Works](#), Sept. 9, 1886; revised July 24, 1971 and amended 1979, 1 B.D.I.E.L. 715 [*Berne Convention*]; [Agreement on Trade-Related Aspects of Intellectual Property Rights](#), 15 April 1994, 33 I.L.M. 1197 [*TRIPS*]; [North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States](#), 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

¹¹ In this paper we sometimes refer to “fair use” without referring to an expanded fair dealing model. Unless the context suggests otherwise the terms fair use and “expanded fair dealing” are used interchangeably.

of a work can theoretically not be infringing if they are found by a court to be “fair”. This model has been rejected or not adopted in almost every country or jurisdiction that has considered it, including recently in Australia, the United Kingdom, New Zealand, and the European Union.

A. THE COMMONWEALTH

While a number of major Commonwealth countries have considered the possibility of changing their long-established fair dealing systems to a fair use approach, each has rejected doing so in favour of incremental reforms achieved by way of targeted exceptions. In rejecting fair use, Australia, the United Kingdom and New Zealand have identified international treaty compliance, the introduction of uncertainty into longstanding relationships and the other reasons set out below for doing so.

i. Australia

Australia thoroughly debated and then rejected pressures to introduce a fair use or expanded fair dealing model. The 2005 government issues paper “Fair Use and Other Copyright Exceptions” (the “Issues Paper”) sought public consultation on a copyright exceptions reform, including an expanded fair use right.¹² The Issues Paper depicted the fair use system as an international anomaly and noted the following drawbacks of the system:

- Any attempt to list the uses that qualify as a fair use is extremely difficult as the distinction between fair use and infringement can be unclear and not easily defined.

¹² Austl., Commonwealth, Attorney-General, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (online: <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf)>, 2005) at 14.1-14.15.

-
-
- The open-ended fair use exception is broader in scope than the Australian fair dealing exceptions, which are restricted to specific purposes.
 - There are no clear-cut rules for distinguishing between infringement and a fair use. The only way to get a definitive answer on whether a particular use is a fair use is to have it resolved in a court.
 - Outcomes in fair use disputes can be hard to predict. Applying the statutory principles can be difficult for the courts. Fair use cases have been characterised by decisions in lower courts that have been overturned in courts of appeal and reversed again in the United States Supreme Court.
 - Copyright owners may vigorously oppose fair use claims to ensure that the doctrine does not expand by increments.
 - Defending a fair use claim in court can be expensive. The defendants in many of the fair use cases that are fought out in the courts are corporations with considerable financial resources.¹³

In a position paper considering the Issues Paper, the Intellectual Property Research Institute of Australia identified additional drawbacks to fair use, including:

- *Overclaiming and overcaution:* uncertainty may lead to overcaution, with users seeking permission even where they almost certainly do not need it.
- *Reaction of courts:* U.S. courts are generally far more inclined to get into 'policy debates' than Australian courts, creating uncertainty about how courts in Australia would react to a fair use doctrine until case law develops.
- *Would it fix the problem?* It is unclear whether fair use would cover all the problems identified with the Australian law of copyright exceptions. Because fair use is a court-determined and court-developed doctrine in the U.S., it is often unclear whether

¹³ *Ibid.* at 7.9, 7.12.

particular uses would be allowed even in the U.S. – let alone in Australia if a fair use defence were introduced.¹⁴

The Issues Paper also identified the further risk that converting to a fair use model could cause considerable disruption to existing business and licensing arrangements. It warned that:

If the Government were to consider amendments it may not be an appropriate solution to simply ‘replace’ the fair dealing exceptions or ‘add on’ an open ended fair use provision. The relationship of such a provision to other exceptions and statutory licences in the *Copyright Act* would [*sic*] be carefully considered to avoid problems arising from any overlap and consequent disruption to existing business and licensing arrangements.¹⁵

Following the release of the Issues Paper, the government rejected both the fair use and expanded fair dealing systems in favour of enacting a number of detailed and specific exceptions designed with particular institutions and purposes in mind. In so deciding, the government noted that:

The present system of exceptions and statutory licences that apply to specific uses of copyright material [...] has been maintained for many years because it gives copyright owners and copyright users reasonable certainty as to the scope of acts that do not infringe copyright.¹⁶

By contrast, it stated that adopting the specific exception method would:

Restore credibility to the Act by better reflecting public opinion and practices. It is consistent with current policy in providing specific exceptions that give certainty for copyright owners and users with respect to the scope of permitted acts.¹⁷

An extended fair dealing model was considered less desirable, as:

¹⁴ Kimberlee Weatherall, “[Fair use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia](#)” (Background paper to oral presentation, SNAPSHOT 3 20 May 2005), [online: <<http://www.ipria.org/publications/occasional%20papers/Occasional%20Paper%203.0.5.pdf>> at 8-9.

¹⁵ *Ibid.* at 13.6.

¹⁶ Explanatory Memorandum *supra* note 2 at 7.

¹⁷ *Ibid.* at 9.

This approach may add to the complexity of the Act. There would be some uncertainty for copyright owners until case law developed. Until the scope was interpreted by the courts, there may be disruption to existing licensing arrangements. Similarly, a user considering relying on this exception would need to weigh the legal risk of possible litigation.¹⁸

Australia also rejected the fair use and expanded fair dealing models based on concerns that they do not comply with the three-step-test mandated by the *Berne Convention* and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“*TRIPS*”).¹⁹ It concluded that adopting either system “is not consistent with treaty obligations to include such general uses in a flexible exception.”²⁰

ii. United Kingdom

The United Kingdom also considered moving to a fair use or expanded fair dealing model. The 1981 consultative document *Reform of the Law Relating to Copyright, Designs and Performers’ Protection* specifically rejected a proposal to do so.²¹ The government’s reasons remain valid today:

The Government is appreciative of the Whitford desire to simplify the law where possible. However, for the reasons indicated above, it does not feel that there is a convincing case for amending ... along the lines suggested and, in view of the difficulties already experienced by copyright owners in protecting their rights, the Government does not feel it

¹⁸ *Ibid.* at 10.

¹⁹ *Ibid.* at 7-8. Sam Ricketson also praises the predictability of the Australian exceptions and compulsory licenses, noting that “the very detail and precision of these provisions makes them more transparent and easier to analyze.” Ricketson WIPO at 73.

²⁰ *Ibid.* at 10.

²¹ Although the Whitford Report recommended the general exception, it conceded that it was vulnerable to “dangers of producing uncertainty and misuse”. See: U.K., The Honourable Mr. Justice Whitford, *Copyright and designs law: report of the Committee to Consider the Law of Copyright and Designs* (London: HMSO, 1977). *Report of the Committee to Consider the Law of Copyright and Designs* (1977), at para. 675.

would be justified in making an amendment which might result in further encroachments into the basic copyright.²²

The issue was canvassed again in the UK very recently. In the 2008 report *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions*, the UK government rejected moving to an open-ended fair use model favouring instead adopting specific exceptions thought to be desirable in UK law.²³

In refusing to adopt fair use, the government pointed to the need for certainty in the law and to ensure that UK treaty obligations could be met:

Identifying where the boundaries should lie is critical in ensuring that our copyright system remains fit for today's world. A system of strong rights, accompanied by limited exceptions, will provide a framework that is valued by and protects right holders and is both understood and respected by users.

We also need to comply with the international legal framework ... [and] also need to ensure that copyright law does not place unnecessary administrative burdens on business and can be understood and is respected by the general public.²⁴

iii. New Zealand

In its recent comprehensive copyright review, New Zealand also specifically considered and rejected a fair use regime. The government's Internal Working Paper identified some significant problems with fair use, including:

- the fragility of New Zealand's small marketplace could be adversely impacted by such a broad exception;
- the problem that fair use may not comply with the three-step test;

²² U.K., Secretary of State, *Reform of the Law Relating to Copyright, Designs and Performers' Protection* by Dept. of Trade and Industry (London: HMSO, July 1981) at 45-46.

²³Taking Forward Gowers, *supra* note 2.

²⁴ *Ibid.*, at 1, 6.

-
-
- the need to preserve a balance between copyright owners and users; and
 - the uncertainty and unpredictability associated with fair use.²⁵

The New Zealand government stated that no compelling reason had been presented to adopt any of the fair dealing/fair use international models raised (including fair use) and described its existing closed fair dealing system as technologically neutral and able to adapt to the digital environment with only minor changes.²⁶

B. EUROPEAN UNION

The European Union has implemented a closed model for exceptions and limitations.²⁷ The exceptions and limitations mandated by various directives were the result of painstaking consultation processes lasting from 1995 to 2001.²⁸

In the lead up to the passage of the Information Society Directive, the 1996 Follow Up Paper concluded that the most desirable approach was to “set out closely defined fair use exceptions/limitations to the exclusive right destined to accommodate the interests of users or the public at large.”²⁹

Eight years after the passage of the Directive, Europe is continuing along the same path. In the current EU Green Paper process, the Commission has not revisited the question of whether closed exceptions are warranted. Rather, it is refining existing

²⁵ Internal Working Paper, *supra* note 2, at paras. 18, 246-497; [Digital Technology and the Copyright Act 1994: A Discussion Paper](#) (July 2001) (“A Discussion Paper”) at paras. 192-194; 260.

²⁶ *Ibid.*, at para. 264; N.Z., [Digital Technology and the Copyright Act 1994: Position Paper](#) (December 2002) at paras. 160-61. Also see the New Zealand Government’s [archive page](#) for all studies on copyright reform.

²⁷ Bernt Hugenholtz, Mireille Van Eechoud, Stef Van Gompel, Guibault, Lucie *et al.*, “The Recasting of Copyright & Related Rights for the Knowledge Economy” Final Report (November 2006) at 61. The exceptions and limitations appear in four of the eight copyright-related directives: the Computer Programs Directive, the Rental Right Directive, the Database Directive and the Information Society Directive.

²⁸ EC, [Communication on Copyright and Related Rights in the Information Society](#) (1996: IP/96/1042).

²⁹ *Ibid.*

exceptions and considering whether further specific exceptions should be created.³⁰

The Information Society Directive sets out twenty-one specific situations that may give rise to an exception or limitation in a member state.³¹ The targeted nature of these provisions is seen as essential to compliance with the Berne/TRIPs three-step test,³² which is also codified in the Directive itself.³³

C. THE UNITED STATES

The United States has a significant history of using the fair use model. In that country, there is a significant, and well-respected, group of individuals who are of the opinion that fair use has become ungainly and costly, and has led to significant uncertainty for both rights holders and users. Its “flexibility” has proven the converse of the certainty and clarity normally sought in a general law.

³⁰ [EU Green Paper](#), *supra* note 2, at 4-20.

³¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Art. 5 [the “[Information Society Directive](#)“]. Only one of the exceptions is mandatory, with the remaining twenty exceptions and limitations to be considered by each member on a case-by-case basis.

³² Institute for Information Law, University of Amsterdam, “Final Report: Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society”, February 2007 [“[Implementation Study](#)”] at 57, noting that the Czech Republic, France, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Portugal and Slovakia have incorporated the test into substantive law and that the test was referred to and applied by courts in Austria, Belgium, Finland, and the Netherlands; also see Kristin Friberg, [The Swedish Implementation of the InfoSoc Directive](#) (MA Thesis, Jönköping University International Business School, 2006) [unpublished] at 23-24, concluding that the specific language of the private use limitation in Art. 5(2b) of the Directive was necessary to ensure compliance with the three-step test, and Sam Ricketson, “WIPO Study on Limitations and Exceptions of Copyright in the Digital Environment”, [SCCR/9/7](#) (June 2003) [[Ricketson, "WIPO"](#)] at 70, concluding that Art. 5 of the Directive is “at the other end of the spectrum” from the U.S. in terms of three-step compliance.”

³³ The [Information Society Directive](#), *ibid.*, Art. 5.5.

One academic stated “[t]he doctrine seems ill-defined at best, and empty at worst.”³⁴ Another wrote “fair use has become too many things to too many people to be much specific value to anyone.”³⁵

Some of the problems with the fair use model were highlighted by Lawrence Lessig, one of the popular advocates for U.S. copyright reform. In his book *Free Culture*, he stated that fair use amounted to little more than “the right to hire a lawyer”.³⁶ He explained:

And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad—in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law.

Judges and lawyers can tell themselves that fair use provides adequate ‘breathing room’ between regulation by the law and the access the law should allow. But it is a measure of how out of touch our legal system has become that anyone actually believes this. The rules that publishers impose upon writers, the rules that film distributors impose upon filmmakers, the rules that newspapers impose upon journalists— these are the real laws governing creativity. And these rules have little relationship to the ‘law’ with which judges comfort themselves.³⁷

Many other U.S. scholars have also concluded that there are significant problems with the fair use model.³⁸

³⁴ Darren Hudson Hick, “Mystery and Misdirection: Some Problems of Fair Use and Users’ Rights” (2009) 56 *Journal of the Copyright Society of the U.S.A.* 485 at 500.

³⁵ Michael J. Madison, “Rewriting Fair Use and the Future of Copyright Reform” (2005-06) 39 *Cardozo Arts & Ent. L.J.* 391.

³⁶ Lessig, *supra* note 8, at 187. Apart from the direct costs to litigants, the high transaction costs incurred by rights holders in a fair use system would be passed indirectly to consumers in the form of higher prices.

³⁷ *Ibid.* Apart from the direct costs to litigants, the high transaction costs incurred by rights holders in a fair use system would be passed indirectly to consumers in the form of higher prices.

³⁸ See Rebecca Tushnet, “[Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It](#)” (2004) 114 *Yale L.J.* 535 at 554, concluding that flexible, fair use requires case-by-case application and provides “no predictability for a

While Canadian advocates of fair use describe the United States as a bastion of flexibility, such a characterization risks inaccuracy to the extent that it treats exceptions and limitations as part of a single unified program. Rather, as scholars have pointed out:

[B]efore a fair use defence is adopted as a model for change it is important to consider the context in which the fair use defence operates at present in the United States. This in turn requires an appreciation not only of practical arrangements and the specific environments in which the fair use defence operates, but also consideration of certain aspects of US legal culture.

[...]

In order to understand how the fair use defence operates in practice in the United States it is important to appreciate that a complex web of understandings, agreements and policy statements support the legislative provisions.³⁹

Criticisms of fair use were summarized in a study by Professor Giuseppina D'Agostino of Osgoode Hall Law School. This study, which was commissioned by the Department of Canadian Heritage, highlighted major problems with fair use:

publisher curious to know what it can do outside the barest minimum of quotation of literary works." Also see Neil Netanel, *Copyright's Paradox* (New York: Oxford University Press, 2008) at 16. This view is shared by the scholar David Nimmer, who calls "fair use" a "fairy tale" whose complexities have required four separate visits to the Supreme Court, and yet have resulted in a system whose "upshot would be the same ... had Congress instituted a dartboard rather than the particular four fair use factors embodied in the Copyright Act": David Nimmer, "Fairest of them All' and Other Fairy Tales of Fair Use" (2003) 66 *Law and Contemporary Problems* 263 at 280 [Nimmer]; Gideon Parchomovsky et al "[Fair Use Harbors](#)" (2007) 93 *Virginia Law Review* 1483 at 1484-1486: "Fair use is at once the most important and most 'troublesome' doctrine in copyright law...the case law is characterized by widely divergent interpretations of fair use, divided courts, and frequent reversals. The state of affairs has prompted a leading commentator to conclude that the doctrine of fair use is impervious to generalization and that attempts to drive its meaning from careful analysis of specific cases are futile."

³⁹ Robert Burrell and Alison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: UK; New York: Cambridge University Press, 2005) at 268 ("Burrell and Coleman"), including among these supports guidelines and agreements that were reached only after protracted negotiations, prominent cases, and out-of-court settlements, which "might prove impossible to replicate" in another jurisdiction. Also see Giuseppina D'Agostino, [Healing Fair Dealing](#), CLPE Research Paper 28/2007, at 2 [D'Agostino, "Healing Fair Dealing"], noting the critical importance in the U.S. of negotiated industry-specific guidelines in affecting fair use review by the courts.

[S]ome remarks must be made on the burgeoning body of scholarship, studies and reports criticizing US fair use. Fair use is said to be “ill, though hardly dead yet.” Many have called on Congress to clarify fair use. There has been no shortage of solutions proposed. But to date Congress has resisted changing fair use. The courts have also failed to simplify fair use by attempting to establish bright-line presumptions (1) that commercial uses are unfair, (2) favouring plaintiff’s unpublished works, and (3) more recently, that works must be transformative to constitute fair use. Moreover, it is increasingly expensive to mount litigation to clarify the scope of use and some users may be risk-averse to begin with. The American Intellectual Property Law Association estimates the average cost to defend a copyright case to be just under one million US dollars.

Although fair use’s attention to context is certainly salutary, “it is so case-specific that it offers precious little to artists, educators, journalists, Internet speakers, other[s]” who want to use the copyrighted work. Google’s digitization project of large library collections is a recent sign that in the digital age, issues of fair use have taken on urgency.⁴⁰

The same study found that the fair use doctrine is not the “panacea approach” some have made it out to be, and noted that of the few other jurisdictions to adopt the U.S. model, Singapore is suffering considerable growing pains, as “its courts are reluctant to consider US fair use cases causing much disorder”.⁴¹ The study concluded that adopting U.S. law without further study would be inadvisable, as:

This approach would cause more perplexity than currently exists. One must be very careful when importing legal devices from other jurisdictions.⁴²

⁴⁰ Giuseppina D’Agostino, “[Fair Dealing After CCH](#)” report prepared for the Department of Heritage, June 2007, at 33-34 [D’Agostino, “After CCH”]; Also see Jennifer Urban and Laura Quilter, “[Efficient Process or ‘Chilling Effects?’](#)” (online: <<http://static.chillingeffects.org/Urban-Quilter-512-summary.pdf>>) noting at 12-13 the “notorious” difficulty of defining a line for fair use and examining the difficulty of making such a claim in the notice-and-takedown context.

⁴¹ D’Agostino, “After CCH” *supra* note 40 at 40-41.

⁴² *Ibid.*

3. CANADA HAS ALREADY THOROUGHLY STUDIED AND REJECTED A FAIR USE SYSTEM

In 1985, the Sub-Committee on the Revision of Copyright specifically rejected replacing fair dealing with an open-ended expanded fair dealing or fair use system. It did so for two reasons. First, it concluded that Canada's fair dealing regime worked well and did not need such a major overhaul:

This scheme of inquiry in connection with fair dealing has worked well. There has been very little litigation in Canada on this issue. Indeed, there has not been a great deal of litigation in any of the Commonwealth countries which have a similar provision. This alone is a good reason not to alter drastically the existing fair dealing provision. Submissions to the Sub-Committee attributed the success of the existing fair dealing scheme to the sequential tests used in applying the provision: infringement must first be established and then the dealing must be fair and for one of the enumerated purposes.

The Sub-Committee is of the view that this scheme should be retained. It settles many potential lawsuits at an early stage.⁴³

Second, the Sub-Committee looked closely at the U.S. system and concluded that it would not be advisable to import this "substantially wider" concept to Canada:

The wider approach in the United States has given rise to much litigation there, and has caused the issue to be raised as a matter of course in all copyright actions. It has created rather than curtailed the uncertainty surrounding the concept.⁴⁴

In the 1986 Government Response to the Report of the Sub-Committee, the government of Canada specifically agreed that "the present fair dealing provisions should not be replaced by the substantially wider 'fair use' concept".⁴⁵

⁴³ Canada, Sub-Committee on the Revision of Copyright, *A Charter of Rights for Creators*, (October 1985) at 64.

⁴⁴ *Ibid.*, at 63-66.

⁴⁵ *Government Response to the Report of the Sub-Committee on the Revision of Copyright*, February 1986, at 12-13.

4. IMPORTING FAIR USE INTO CANADA WOULD RISK ADVERSE
CONSEQUENCES

A. FAIR USE WOULD UNDERMINE LONGSTANDING MADE-IN
CANADA COPYRIGHT MODELS

In Canada, exceptions and limitations in the *Act* do not exist in a vacuum. The *Act* contains a set of interconnected provisions which operate together to achieve the policy objectives behind copyright. A shift to fair use could substantially undermine important provisions in the *Act*.

For example, collective administration of copyright has a long history in Canada and is essential for compensating copyright holders for their creative efforts and investments. As Normand Tamaro observes:

Collective administration can serve to offset the difficulty of protecting copyright in a world of ever-expanding means of communication. The copyright owner loses a certain amount of control over the communication of his work, but gains profits through the increased collecting power of the associations. More often than not, collective administration is the only effective way to exploit one's copyright.⁴⁶

At present, there are more than three-dozen collective societies operating in Canada. These entities benefit consumers by providing an easy way for them to obtain access to works or other subject matter. Collective licensing also produces royalties for Canadian composers, authors, and other creators.⁴⁷ However, royalties can only be imposed on activities for which a licence from a copyright holder is required. If an open-ended fair use system were established, it would undoubtedly be relied upon by users to eliminate or reduce the scope of royalties that must be paid in private negotiations and in

⁴⁶ Normand Tamaro, *2008 Annotated Copyright Act* (Toronto, ON: Thomson Canada Limited, 2007) at 768.

⁴⁷ See, for example, Minister of Public Works and Government Services, "[The Canadian Music Industry: 2006 Economic Profile](https://www.pch.gc.ca/pgm/fmusc-cmusf/pubs/prfl/index-eng.cfm)", online: Canadian Heritage <<https://www.pch.gc.ca/pgm/fmusc-cmusf/pubs/prfl/index-eng.cfm>> Part III.

proceedings before the Copyright Board.⁴⁸ It would make collective licensing more difficult and expensive as users would continually be able to raise new potential reasons not to pay based on the vague purpose of fair use. Further, licensing would become more difficult as users and right holders would be uncertain about what is covered by a collective licence.

The *Act* also contains specific exemptions that reflect a delicate balance between the stakeholder interests that could be adversely affected by fair use. For example, the private copying regime provides a levy on audio recording media to compensate rights holders in musical works and sound recordings for the copying of their music onto such media.⁴⁹ A levy is only exigible on uses of music that would otherwise constitute an infringement and require a licence. A new fair use provision could arguably exempt much of the copying for which royalties are currently paid to Canadian rights holders.⁵⁰

There have been many requests to expand the levy to include new media, such as DARs, and for new types of works.⁵¹ However, if

⁴⁸ In the *Reprographic Reproductions (Educational Institutions 2005-09)* (26 June, 2009), Copyright Board of Canada Decision, online: <<http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf>> case, the Copyright Board refused to extend fair dealing for research to educational uses. This would certainly be challenged if fair dealing were expanded.

⁴⁹ The courts have held that the levy was created to support creators and cultural industries by striking a balance between the rights of creators and those of users and to overcome difficulty in enforcing rights of reproduction connected to private use: *Canadian Private Copying Collective v. Canadian Storage Media Alliance* (2004), 36 C.P.R. (4th) 289 (F.C.A.) at para. 51; *Canadian Private Copying Collective v. Cano Tech Inc.*, [2006] 3 F.C.R. 581 at paras. 4-6 (F.C.T.D.).

⁵⁰ In promulgating the levy system in the 1997 copyright reforms, the government recognized that one reason for instituting a levy was the interrelationship between private copying and fair dealing, thus meriting a levy to substitute for uncertain and wasteful litigation.
<http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/16_96-06-18/heri16_blk101.html> before Senate Committee on Canadian Heritage on Bill C-32, Tuesday, June 18, 1996, at 1120-35.

⁵¹ For example, at the current [Halifax](#) roundtable, the Canadian Private Copying Collective, American Federation of Musicians, and ACTRA sought to expand the levy to other media and works. “Halifax – Round Table and Public Hearings on Copyright” (10 August, 2009) <<http://www.ic.gc.ca/eic/site/008.nsf/eng/00893.html>. Similarly, at the current [Vancouver](#) roundtable, the Writers Guild requested that the private copying levy be expanded to other media and other copyright subject matter, and the

fair use was introduced into the *Act*, it could significantly reduce the need for an expanded private copying exception and undermine any prospect of expanding the private copying regime.

The *Copyright Act* contains many detailed exceptions such as those for educational institutions, libraries, archives and individuals with perceptual disabilities. Many new exceptions were also proposed in Bill C-60⁵² and Bill C-61.⁵³ A new fair use provision could be interpreted by the courts as an independent basis for determining acceptable uses in all of these contexts.⁵⁴ This could result in costly litigation to determine the scope of permissible uses in these important sectors. In that situation these vital policy considerations would be determined by the courts and not by Parliament.

Another potentially adverse effect of making a wholesale change to the fair use system would be the uncertain effect on the vast number of contracts entered into between creators, rights holders and users respecting copyright. As the Heritage Study noted, it is:

Thus important to assess how the role of contract is embedded in the Canadian Copyright Act and how it is deployed in practice to promote and temper the desired results—presumably the objectives of balance where the interests of creators, users, rights holders and the general public are considered.⁵⁵

Advocates of enacting a fair use model for Canada assume that this model would privilege purely personal uses, and that this would be in the public interest. However, privileging purely personal uses could undermine the importance of the values currently protected by fair dealing, values which serve a much greater public purpose than

Canadian Film and Television Production Association requested that an ISP levy be imposed to the extent ISPs participate as broadcasters. “Vancouver – Round Table and Public Hearings on Copyright” (20 July, 2009) <<http://www.ic.gc.ca/eic/site/008.nsf/eng/00060.html>>.

⁵² *Bill C-60, An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005.

⁵³ *Bill C-61, An Act to Amend the Copyright Act*, 2nd Sess., 39th Parl., 2007-2008.

⁵⁴ *CCH*, *supra* note 3 at para. 49. where the Supreme Court held that the fair dealing exception for research was not constrained by the specific exceptions in the Act covering libraries.

⁵⁵ D’Agostino, “After CCH”, *supra* note 40 at 7. Fair use is regarded as an affirmative defense under U.S. law which the putative infringer has the burden of carrying. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994). In *CCH* the Supreme Court called the fair dealing defence a “user right”.

personal uses of copyrights. There is a distinction between uses that serve a public purpose and purely personal uses. Certain exemptions under the current fair dealing law further the public interest in the dissemination of works, through criticism, review, research and private study. To the extent that specific exemptions are needed to deal with access problems resulting from digitization or the Internet, it would be preferable to create specific exceptions to address them rather than distorting fair dealing doctrines to accommodate purely personal uses of copyright materials.⁵⁶

B. FAIR USE CANNOT BE TRANSPLANTED INTO CANADA WITHOUT CREATING SIGNIFICANT UNCERTAINTY

Those who argue in favour of adopting fair use seem to assume that this system can effectively and easily be transplanted into Canadian law. What they fail to recognize or address is that the doctrine was codified into American law after more than 150 years of judicial interpretation that gave the doctrine meaning and boundaries.⁵⁷ Adopting fair use into a legal system that lacks this backdrop would result in confusion, and unpredictable applications, which would inhibit both users and creators from understanding what is permissible, and what is not.⁵⁸ A broad exception with unclear boundaries could also hamper effective enforcement against infringement, because violators would always attempt to argue that their acts were “fair”.

⁵⁶ See Melissa de Zwart, “[Fair use? Fair dealing?](#)”, Faculty of Law, Monash University, Research Paper No. 2006/09, December 7, 2007 at 32.

⁵⁷ The common-law doctrine of fair use in the United States is considered to originate in <http://www.faculty.piercelaw.edu/redfield/library/Pdf/case-folsom.marsh.pdf> 9 F.Cas. 342, an 1841 decision by Justice Joseph Story. The doctrine as developed by the courts was codified in s. 107 of the 1976 revisions to the U.S. Copyright Code.

⁵⁸ *Supra* note 56, at 33. In commenting on a proposal to enact a fair use regime in Australia, Zwart states: “The adoption or application of fair use laws without full consideration of what they bring to enhance existing Australian law is short-sighted. Copyright law is complicated enough; it does not need to be complicated further by grafting on laws from another copyright context. It is time to carefully consider amendments we actually need to our fair dealing law, especially in areas such as parody, to ensure that it continues to protect the interests and values of copyright owners and users in the 21st Century.”

Moreover, Canada's copyright law is considerably different from U.S. copyright law.⁵⁹ It is also based on a different constitutional footing,⁶⁰ and operates within a much different cultural setting. Canada has a hybrid, dual-language market that combines a common law copyright tradition inherited from England with a *droit d'auteur* civil law tradition inherited from France.⁶¹ Given all these factors, it is very uncertain that Canadian courts would simply adopt all of the principles derived from the U.S. cases or that specific cases would be decided in the same way as they were in the U.S. In fact, there is good reason to think they would be decided differently.⁶²

⁵⁹ See *CCH*, *supra* note 3 at para. 22, where the Supreme Court stated that "U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation".

⁶⁰ D'Agostino, *supra* note 40, noting at 51 that even if Canada could selectively incorporate U.S. precedents into a Canadian setting, this approach could not import constitutional values. Similarly, Burrell and Coleman suggest at 269 that the fair use defence in the United States is closely bound up with constitutional guarantees of free speech, privacy, freedom from regulation, and free competition and that "it is beholden on us to think carefully about how a fair use defence would be likely to operate in a legal environment in which the principles that underpin and reinforce the fair use defence in the United States do not enjoy the same prominence".

⁶¹ See *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336 at paras. 12-16, 63-64 (majority), 116 (dissent), discussing the dual antecedents of Canadian copyright law. Also see Information Highway Advisory Council, *Copyright and the Information Highway* (1994), at 26, where the Parliamentary Sub-Committee rejected the importation of the U.S. fair use system in part because "The Canadian Act is based on very different principles [than the U.S. Act]: the recognition of the property of authors in their creation and the recognition of works as an extension of the personality of their authors."

⁶² Canada and the United States have already diverged on the fairness factors. Compare, for example, *CCH* with the influential 2nd Circuit case *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (1994). In *American Geophysical*, the majority considered the availability of a licence to be relevant in concluding that the photocopying by Texaco of eight articles was not fair. In *CCH*, the Supreme Court came to the exact opposite conclusion at para. 70. Canadian courts also diverged in the weight assigned to the various fairness factors. Consider for example, the weight to be given to the effect of the dealing on the market for the work. In *CCH*, the Supreme Court said at para. 59 that "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." By contrast, in the case of *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 at 566 (1985), the U.S. Supreme Court called this "the single most important element of fair use." While other courts have suggested that no one factor should enjoy primacy, they have still identified this factor as "important" in comparison to

Even if Canada was able to import all facets of the U.S. system, without modification, scholars such as Nimmer suggest that no clear direction would be ascertainable from the U.S. example, with the statutory fair use factors providing no correlation whatsoever with the prospects of success in any given case.⁶³

The Heritage Study enumerates the dangers of simply importing the fair use model to Canada without contemplating the unanticipated effects that might ensue:

Some commentators have championed that Canada adopt US fair use. This would entail “cherry-picking” from the US cadre of copyright laws and taking from it its fair use provision. There are problems with this approach. First, as noted from eminent US studies, fair use is “ill” and not the panacea approach that many, perhaps in Canada, proclaim. Because fair use is ill, it has by necessity engendered many fix-it approaches, some by the courts themselves attempting to impose bright-lines (eg presumptions on commercial uses) and by industry players attempting to institute best practices. 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?⁶⁴

"the nature of the work" and "the amount and substantiality of the portion used": *American Geophysical* at para. 83.

⁶³ Nimmer, *supra* note 38 at 267-81, assessing the analysis of sixty fair use cases from 1994 to 2002, finding no statistical correlations, and concluding that the s. 107 statutory test succeeded only in “injecting ... a high degree of subjectivity and imprecision into each factor and their cumulative application.”

⁶⁴ D’Agostino, “After CCH” *supra* note 40, at 40-41. Her view is echoed by Neil Netanel, who writes, “a legal rule or doctrine often operates quite differently, or carries very different symbolic content, when transplanted from the source to the host jurisdiction. Even if a rule is transplanted word-for-word, it may effectively be modified in substance or simply rendered irrelevant in the host country”: “Asserting Copyright’s Democratic Principles in the Global Arena” (1998) 51 *Vanderbilt L. R.* 217 at 274.

C. THE PROPOSED REFORMS RISK VIOLATING CANADA'S
INTERNATIONAL TREATY OBLIGATIONS

Independent from the policy considerations raised in this paper, there is a risk that adopting a fair use system would violate Canada's obligation to enact its copyright legislation in harmony with its international treaty obligations.⁶⁵ Under the three-step test imposed by the *Berne Convention* and the *TRIPS Agreement*, Canada agreed to confine limitations or exceptions to (i) certain special cases, (ii) that do not conflict with a normal exploitation of rights, or (iii) unreasonably prejudice the legitimate interests of authors or right holders.⁶⁶ Each condition of the three-step test must be given a distinct meaning and treated as a separate and independent requirement.⁶⁷

The first step of the test requires that (a) the scope of the exception must be "known and particularized" in order to guarantee a sufficient degree of legal certainty;⁶⁸ and (b) the exception or limitation must involve "special" circumstances.⁶⁹ A WTO panel considering the legitimacy of a U.S. copyright provision concluded

⁶⁵ Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Vol. I, 2d ed. (Oxford; New York: Oxford University Press, 2006) at para. 10.31-10.34; Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford; New York: Oxford University Press, 2002) at §3.16 [Ficsor]; *Opinion of the Council of Copyright Experts*, No. Sz]SzT 17/06 of May 11, 2006 (Hungary) ["Hungarian Opinion"], paras. 8-10; *Remuneration of Private Copying in Australia* ["*Aust. Report*"] at 570-71, 582; Barry Sookman, "[The SAC Proposal for the Monetization of the File Sharing of Music in Canada](#)" (2008) 1 Osgoode Hall Rev. L. Pol'y 101 at 109-129 [Sookman, "SAC Proposal"].

⁶⁶ Article 9(2) *Berne Convention*; Part II, Article 13 *TRIPS*; Ricketson, *ibid.*, at paras. 13.11-13.25. Under NAFTA, Canada agreed to extend application of the three-step test to sound recordings.

⁶⁷ *Report of the Panel on United States – Section 110(5) of the US Copyright Act*, (2000), WTO Doc. WT/DS160/ ["WTO Decision"], at para. 6.97; *Report of the Panel on Canada - Patent Protection of Pharmaceutical Products*, (2000), WTO Doc. WT/DS114/R ["WTO Patent Decision"], at para 7, 7.21; Ficsor, *supra* note 65, at 91-92; WTO Decision, para. 6.74; Martin Senftleben, *Copyright, Limitations and the Three-Step Test* (The Hague, New York: Kluwer Law International, 2004) at para. 4.3; Ricketson, *supra* note 66, at paras. 13.11-13.25.

⁶⁸ WTO Decision, *ibid.*, at para. 6.108.

⁶⁹ *Ibid.*, at para. 6.109.

that this step requires any exception or limitation to have “a narrow scope as well as an exceptional or distinctive objective”.⁷⁰

The second step of the test requires that the exception or limitation not conflict with the normal exploitation of the work, including “those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.”⁷¹

The final step of the test requires that the exception or limitation does not unreasonably prejudice the legitimate interests of the author (*Berne*) or right holder (*TRIPS*). The term “legitimate interests” is considered to encompass both economic and non-economic interests; the term “unreasonably prejudice” is thought to refer to disproportionate harm, damage or injury to such interests.⁷²

Many authorities have reviewed the fair use system for compliance with the three-step test and have expressed the opinion that it is non-compliant.⁷³ Writing for the WIPO Standing Committee

⁷⁰ *Ibid.*, at para. 6.112.

⁷¹ *Ibid.*, at para. 6.180; Ricketson, “WIPO” *supra* note 32 at 24.

⁷² Ricketson, “WIPO”, *ibid.*, at 27.

⁷³ See Herman C. Jehoram, “Restrictions on Copyright and their Abuse” (2005) 27 E.I.P.R. 359, stating at 360 that “[t]he open American ‘fair use’ system in fact violates the Berne Convention with its specific restrictions which serve to guarantee the rights of authors and the interests of users by providing them with legal certainty”, and Burrell and Coleman, *supra* note 40, at 270, citing numerous other studies concluding that the fair use regime is not TRIPS-compliant. Some academics have taken a different view and express the opinion that the U.S. fair use system can be interpreted in such a way to be in compliance with the three-step test. See, for example Senftleben, *supra* note 68, at 162, arguing that the U.S. system is a “special case”, and Gerald Dworkin, “Copyright, the Public Interest and Freedom of Speech” in Jonathan Griffiths and Uma Suthersanen, eds., *Copyright and Free Speech: Comparative and International Analyses* (Oxford; New York: Oxford University Press, 2005) at 162, suggesting that the United States also *seems* to believe that fair use and the three-step test are compatible, but concluding that the issue will go to a WTO panel. The question of whether the United States has ever tested its fair use regime to Berne also remains a matter of debate. When the United States acceded to Berne in 1988, both the House and the Senate took the position that Berne was not self-executing, meaning that the application of the treaty to the United States was limited to that in the implementing legislation: U.S., “[House Statement on the Berne Convention Implementation Act of 1988](#)”, Congressional Record (Daily Ed.), October 12, 1988 at PAGE H10095. Respected scholars have concluded that since none of the acts of legislation implementing Berne or TRIPS alters fair use, the United States may have relied on the international law principle to allow it to “reserve matters relating to fair use to the sovereign control of the United States.” In the American context,

on Copyright and Related Rights in 2003, the well-respected Australian copyright scholar Sam Ricketson concluded that the “open-ended, formulaic provisions” contained in s. 107 of the U.S. *Copyright Act* were vulnerable to the three-step test. While it “was quite possible that any specific judicial application of Section 107 will comply with the three-step test as a matter of fact”, he concluded that:

The real problem, however, is with a provision that is framed in such a general and open-ended way. At the very least, it is suggested that the statutory formulation here raises issues with respect to unspecified purposes (the first step) and with respect to the legitimate interests of the author (third step).⁷⁴

As noted above, several governments including Australia, New Zealand and the UK have cited international treaty obligations as one of the reasons for not adopting a fair use system.⁷⁵

this option may have been the only feasible outcome to avoid the chaos that would have resulted from a wholesale conversion of the fair use standard to a foreign model: Dan L. Burk, Julie E. Cohen, “[Fair Use Infrastructures for Rights Management Systems](#)” (2001) 15 *Harvard Journal of Law & Technology* 41 at 77; Burrell and Coleman, *supra* note 40, at 271, reviewing articles raising doubts about U.S. compliance with the three-step test but noting the “realpolitik view that given US dominance in international copyright matters it is highly unlikely that the Dispute Settlement Body of the WTO would ever declare the US fair use provision to be incompatible with TRIPS”.

⁷⁴ Ricketson, “WIPO”, *supra* note 32, at 67-69. Although Ricketson focuses on the first and third steps, there remains an argument that s. 107 of the U.S. Act violates the second step as well. If each step of the test must be treated as a separate and independent requirement, language directing the courts to consider, among other factors, “the effect of the use upon the potential market for, or value of, the copyrighted work,” would seem to fall short of the international standard, particularly since a review of the case law shows that court findings on this factor correlated with the eventual result in only fifty percent of cases. Nimmer, *supra* note 39, at 268, 280. Interestingly, even in the few cases in which all four factors appeared to line up in the same direction, either fair or unfair, they still had no predictive value: 282-84.

⁷⁵ In its [Explanatory Memorandum](#), *supra* note 2 at 7-8, Australia stated that “it is necessary that any amendments to the Act comply with international copyright treaties”, including the three-step test. In 2008, the UK government declined a recommendation that it develop a fair use model, stating as a rationale that “We ... need to comply with the international legal framework”: [Taking Forward the Gowers Review](#), *supra* note 2, at 1, 6. Also see the New Zealand documents Internal Working Paper *supra* note 2 at 61 and [A Discussion Paper](#) *supra* note 25 at paras. 192-194, each discussing international obligations.

Professor Daniel Gervais has suggested that the *CCH* decision brings Canada “dangerously close to a violation of the TRIPs Agreement and its ‘three-step test’ against which all copyright exceptions can now be measured”.⁷⁶ To rewrite our *Act* to expand it even further to include fair use could place Canada at a greater risk of violating these international obligations.

D. CANADA HAS AND SHOULD CONTINUE ADDING EXCEPTIONS TO ADDRESS SPECIFIC SPECIAL CIRCUMSTANCES IN ACCORDANCE WITH THE THREE-STEP TEST

In past consultation processes, Canada has taken the path of adopting exceptions and other limitations to the exclusive rights of copyright owners only where:

- there is a demonstrated public policy need for access to copyright protected materials and the market has not met or is unable to meet that demand; or
- it would defeat an important public policy objective to require the user to obtain authorization prior to use.⁷⁷

While not all exceptions proposed in previous copyright reforms have been perfect, the alternative of leaving these policy decisions to individual litigants and the courts would seem a far less effective, less democratic and less principled way to approach copyright reform. A fair use system would not permit policy decisions to be made in advance with appropriate consultation. It is designed to create guidelines for behaviour only after individual issues are tried in the courts. Given the length of time it would take to achieve a body of law that is specific enough to guide the decisions of users and right holders, it is questionable whether it could offer any objective guidance. Further, the U.S. experience has shown that even decided

⁷⁶ Daniel Gervais, “[The Purpose of Copyright Law in Canada](#)” (2005) 2:2 UOLTJ 315 at 322; D’Agostino, “After CCH” *supra* note 40 noting at 7 that “should the courts apply *CCH* expansively, this may trigger international scrutiny of the legislation”.

⁷⁷ Canadian studies that discuss these criteria include Economic Council of Canada, *Report on Intellectual and Industrial Property* (1971) at 133; A.A. Keyes, C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada, 1977) at 12-16, 144-46; *Supra* note 43, at 63-64.

cases are not necessarily predictive of future outcomes, as facts specific to new cases have often dictated inconsistent results.⁷⁸

E. EFFECTS ON THE CANADIAN CULTURAL MARKETPLACE

In reform processes elsewhere, governments have recognized the critical importance of designing a copyright system that takes into account the realities of the size and geographical or cultural isolation of their marketplace. For countries like Canada, which have a relatively small population, overbroad exceptions and limitations can have adverse effects on the ability to earn adequate remuneration from creative endeavours.⁷⁹ This general concern is even further magnified for specific cultural marketplaces such as the Province of Quebec,⁸⁰ First Nations and Métis communities.

5. CONCLUSION

In the government's call for submissions in the current copyright consultations, it stressed four major themes by which any future law would be measured. First, based on Canadian values and interests, copyright changes should be made in order to withstand the test of time. Second, our copyright framework needs to be updated to foster and take advantage of the multiplication of digital platforms, which has opened new markets, enabled new business models, and created new opportunities. Third, the new framework must

⁷⁸ Nimmer, *supra* note 38.

⁷⁹ [Internal Working Paper](#) *supra* note 2, at paras. 18, 248-49. This point was also made by the European Publishers Council in the 2008 [EU Green Paper](#) process, *supra* note 30, with the EPC [warning](#) that "overbroad exceptions would lead to ever weaker offerings of versatile 'good quality' content."

⁸⁰ As Christopher M. Jones notes in "[Quebec Song: Strategies in the Cultural Marketplace](#)" (2001) 31 *Quebec Studies* 50, "The lack of penetration in the French market is due to a variety of factors. The simplest to identify is the high cost of "breaking" an artist on foreign soil (i.e. attaining a market presence which becomes financially self-sustaining in that territory). These costs include transportation, technical tour support and promotional expense if touring artists are to have any impact, as well as promotion of recordings for radio play, and in-store sales promotion. ... The limited size of the Quebec market does not allow for any but the brightest stars to accumulate the necessary war chests on their own."

strengthen Canada's global competitive position and allow us to attract investments and high-paying jobs to Canada. Last, any changes must best position Canada as a leader in the global, digital economy.⁸¹ The government has also stressed the need for amendments to copyright to be based on international standards and norms and clear, predictable and fair rules to support creativity and innovation.⁸²

Adopting fair use or an expanded fair dealing model would be a transposition of a foreign doctrine into our Canadian legal system, despite the fact that our legal system lacks the institutional arrangements necessary for this doctrine. It could, in fact, undermine the Canadian values and interests already reflected in the *Act's* many exceptions and specific statutory regimes. There is also no reason to think that adopting a fair use system would enable the difficult task of recalibrating copyright law to adapt to ever changing technologies in order to withstand the test of time.⁸³

Our copyright framework needs to be updated to take advantage of new markets and new opportunities in a way that strengthens Canada's global competitive position, that allows Canada to attract investments, and that positions Canada as a leader in the world-wide digital economy. However, "fair use" would not accomplish these objectives.

Fair use has been rejected by almost all our trading partners. The U.S. is the sole exception to this, where the doctrine was given a special status and meaning upon its adoption. Our trading partners rejected the doctrine for good reasons, and these reasons went well beyond the legitimate concern that fair use is not compliant with the three-step-test. Its enactment in Canada would result in unclear and unpredictable protection for creative products that would discourage investment. All stakeholders would be compelled to spend considerable money to clarify what is legal and what is not. Fair use would undermine present and future revenue streams including

⁸¹ "Consultation Questions", Online: Copyright Consultations <<http://copyright.econsultation.ca>>.

⁸² Canada, "[Reforming the Copyright Act – Backgrounder](#)" *Copyright Reform Process 2008* (June 2008); [Preamble to Bill C-61](#) "to adopt coordinated approaches to copyright protection based on internationally recognized norms".

⁸³ *Supra* note 57, at 33 arguing that fair use does not accommodate new technology any better than fair dealing in terms of balancing the rights, of owners and users.

revenues associated with collective licensing and private copying levies;all at a time when our creative industries need help the most.

If new exceptions and limitations are warranted, Canada should take the road chosen overwhelmingly throughout the world. It should make a careful, focussed study of the needs of Canadians for access to works that the market has not met or is unable to meet and decide on the best policy vehicles for meeting those needs. Where required, new exceptions should be based on the three-step test mandated by the treaties and conventions Canada has agreed to honour.

For all of the above reasons, Canada should not adopt a fair use model.

Appendix A – Supporting Organizations

Access Copyright, The Canadian Copyright Licensing Agency - www.accesscopyright.ca

l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) - www.adisq.com

American Federation of Musicians (AFM) - www.afm.org

ARTISTI (Société de gestion de l'Union des Artistes) - www.uniondesartistes.com/index_artisti.aspx

Association des journalistes indépendants du Québec - www.ajiq.qc.ca

Association des professionnels des arts de la scène du Québec (APASQ) – www.apasq.org

Association of Canadian Publishers (ACP) - www.publishers.ca

Association of Canadian University Presses (ACUP) - www.acup.ca

Book Publishers Association of Alberta (BPAA) - www.bookpublishers.ab.ca

Canadian Actors' Equity Association (CAEA) - www.caea.com

Canadian Artists' Representation (CARFAC) - www.carfac.ca

Canadian Artists Representation Copyright Collective (CARCC) – www.carcc.ca

Canadian Association of Photographers and Illustrators in Communications (CAPIC) - www.capic.org

Canadian Authors Association (CAA) - www.canauthors.org

Canadian Copyright Institute – www.canadiancopyrightinstitute.ca

Canadian Educational Resources Council (CERC) - www.cerc-ca.org

Canadian Freelance Union (CFU) - www.cfunion.ca

Canadian Music Centre (CMC) - www.musiccentre.ca

Canadian Music Publishers Association (CMPA) - www.musicpublishercanada.ca

Canadian Photographers Coalition

Canadian Publishers' Council (CPC) - www.pubcouncil.ca

Canadian Private Copying Collective (CPCC) - www.cpcc.ca

Canadian Society of Children's Authors, Illustrators and Performers (CANSCAIP) - www.canscaip.org

Crime Writers of Canada (CWC) - www.crimewriterscanada.com

Directors Guild of Canada (DGC) - www.dgc.ca

Federation of BC Writers – www.bcwriters.com

Guild of Canadian Film Composers (GCFC) - www.gcfc.ca

L'Union des artistes - www.uniondesartistes.com

L'Union des écrivains et écrivains québécois (UNEQ) - www.uneq.qc.ca

La Société Professionnelle des auteurs et des compositeurs du Québec (CPACQ)

Le Centre de musique canadienne au Québec - www.cmcquebec.ca

Magazines Canada - www.cmpa.ca

Neighbouring Rights Collective of Canada (NRCC) - www.nrcc.ca
Organization of Book Publishers of Ontario (OBPO) - www.ontariobooks.ca
Playwrights' Guild of Canada - www.playwrightsguild.ca
Professional Photographers of Canada - www.ppoc.ca
Professional Writers Association of Canada (PWAC) - www.pwac.ca
Regroupement des artistes en arts visuels du Québec (RAAV) - www.raav.org
Saskatchewan Publishers Group - <http://www.saskpublishers.sk.ca>
Saskatchewan Writers Guild (SWG) - www.skwriter.com
Society of Composers, Authors and Music Publishers of Canada (SOCAN) -
www.socan.ca
Société des Auteurs de Radio, Télévision et Cinéma (SARTEC) -
www.sartec.qc.ca
Société de développement des périodiques culturels québécois (SODEP) -
www.sodep.qc.ca
Société québécoise de gestion collective des droits de reproduction (Copibec)
www.copibec.qc.ca
Society for Reproduction Rights of Authors, Composers and Publishers in
Canada (SODRAC) - www.sodrac.ca
Société de gestion collective des droits des producteurs de phonogrammes et
de vidéogrammes du Québec (SOPROQ) - www.soproq.org
Songwriters Association of Canada (SAC) - www.songwriters.ca
The Creators' Copyright Coalition - www.creatorscopyright.ca
The Writers' Union of Canada (TWUC) - www.writersunion.ca
Writers' Federation of Nova Scotia - www.writers.ns.ca
Writers Guild of Canada - www.writersguildofcanada.com