The proximity of the United States to Canada occasionally leads to some confusion north of the 49th parallel; in common parlance, fair use eclipses fair dealing. I cannot resist reminding others: we are Canadian; our exception is fair dealing. Yet it is only appropriate to also say that Canada has benefited greatly by American fair use. From our vantage point, we were able to appreciate the opportunity provided by flexibility in the language of exceptions, suffer the worst of fair use’s growing pains by proxy, and step ahead of such pain in our own development of exceptions.

Fair dealing entered into force in Canada in 1924, via the nation’s first (ostensibly independent) Copyright Act. Modeled upon the UK Act of 1911, “fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary” was not an infringement of copyright.  

1 Throughout most of the twentieth century, fair dealing was a largely unused section of the Copyright Act; if and when used, outcomes were usually in favor of the copyright holder.  

While fair dealing operated in this less-than-hospitable state, Canadians eyes looked longingly south of the border; fair use stood as the gold-standard of exceptions. Its flexible language appeared to shelter learning, creativity, media development, research, innovation etc. The list was endless and enviable. But closer inspection revealed that fair use had its troubles too. Through the later 20th century, and into the 21st century, the exception appeared mired in an atmosphere of overt commerciality; that exceptions were only to be relied upon as a means of addressing market-failure. That atmosphere effectively nullified the advantages of the flexible statutory language. 3 Fair use has since emerged from that distortion and is thriving. 4 Its

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1 Copyright Act, 1921 (Can.), 11 & 12 Geo. V. c. 24; see also Copyright Act, 1911 (UK), 1 & 2 Geo. V. c46.  
2 “Fair dealing was for many years all but redundant in the Canadian courts; rarely raised and cursorily rejected;” see Carys Craig, “The Changing Face of Fair Dealing,” in Michael Geist, ed., In the Public Interest: The Future of Canadian Copyright Law (Toronto: Irwin Law, 2005) 438.  
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experiences as whole offer much guidance to any country engaging with exceptions as means to balance the increased scope of power afforded to copyright owners. Canada’s fair dealing regime operates differently from fair use in the United States but seeks to uphold the same principle: the system of copyright is a set of limited rights and those limits ensure that the system lives up to its mandate to enhance creativity, disseminate knowledge and spur innovation.

Readers might know that fair dealing gained prominence in Canada in 2004, via CCH Canadian v. Law Society of Upper Canada. In a unanimous decision, the Supreme Court famously characterized fair dealing as “a user’s right” and said it should not to be interpreted restrictively.\(^5\) The language of rights was provocative; in the immediate aftermath a flurry of debate revolved around whether the court had overstepped its bounds. By comparison, almost unnoticed was the Court’s insistence that “The availability of a licence is not relevant to deciding whether a dealing has been fair.”\(^6\) That passage positioned Canada to resist placing exceptions within the confines of market-failure. Moreover, while the Court emulated the American statutory four-factor analysis of fair use, it stipulated that the framework itself was flexible and made explicit that any assessment of fair dealing is contextual.

But supportive as our Court was, and continues to be,\(^7\) fair dealing has taken time to permeate Canadian sensibilities. Other aspects of the practice of copyright in Canada, particularly that of


\(^5\) “Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. 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 CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 [CCH Canadian] para. 48.

\(^6\) “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;” ibid. at para. 70.

\(^7\) In 2012 the Supreme Court of Canada continued to emphasize that fair dealing should not be interpreted restrictively; “the cases provided an unequivocal affirmation that copyright exceptions such as fair dealing should be treated as users’ rights … [and] the Court continued its expansion of fair dealing by interpreting it in a broad and liberal manner.” See Michael Geist, “Introduction,” in ed. Michael Geist, The Copyright Pentalogy—How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law (Ottawa: University of Ottawa Press, 2013), p.iii-iv.
blanket-licensing of educational content, have only recently been re-examined with an eye to making best use, not only of fair dealing, but also the multitude of engaging material available via the Internet, Creative Commons, open access journals, and direct relationships with the publishing community. This wealth of materials does not absolve institutions from the challenge of educating their staff about appropriate use of copyrighted material—quite the contrary. Yet every person charged with the task of providing advice regarding exceptions realizes that the flexibility that is to our benefit is a challenge to explain when denied context.

To that end, an example that I have relied upon to instruct others, with some success, follows. By moving away from abstract questions, into a realm of concrete analysis, exceptional uses become clearer. The text is an excerpt from a white paper I recently authored for the Northern Alberta Institute of Technology.8

Example: Fair Use and Fair Dealing in practice
A former colleague wished to display a map in his chapter of a then-forthcoming scholarly book; however, his publisher balked at reproducing the map without permission of the copyright holder. The original book was in my colleague’s possession, thus he had the name of the author at hand. However, the author had long since passed away, no estate details were to be had, and the publishing company of that book was no longer in business.9 The publisher was uneasy about the unauthorized use of the map in the chapter, but when presented with a fair dealing / fair use analysis, the publisher agreed to its use.

As set out by the Supreme Court of Canada, fair dealing must be evaluated from a variety of perspectives. The framework offered by the Court presented six questions, with the understanding that in any given situation the nature and number of questions may vary.

i. The purpose of the dealing. The chapter was prepared under the auspices of research, allowable under Section 29 of the Copyright Act.

8 Meera Nair, Orphans at NAIT (Northern Alberta Institute of Technology Copyright Project, White Paper No. 1, 2015). On file with the NAIT Copyright Office.
ii. **The character of the dealing.** In general, a limited form of distribution is most likely to be fair. But even though the distribution of the book would not be viewed as limited, after consideration of all factors, the publisher agreed to use the map. It is a reminder that not every factor must result in a status of “fair” but that the overall assessment should lean towards fairness.

iii. **The amount of the dealing.** A general guideline is that the less of a work used, the greater the fairness. That said, some works cannot be portioned into representative segments. Maps are challenged this way, as indeed are all images. My colleague had chosen the map to set context for the chapter; as such, using the entire map was fair.

iv. **Alternatives to the dealing.** If a suitable substitute can be found with relative ease, that will influence an assessment of fairness. However, the substitute must meet with the intentions of the person who chose the work to serve a particular purpose. In the case of the map, given the time period of the subject matter, no suitable alternative was available.

v. **The nature of the work.** This could be described as the original intention of the work being used. Was it akin to an unpublished diary, or widely available? Is further dissemination of the work supportive of the overall goals of the system of copyright? The map was copied from an out-of-print book; thus its continued circulation would only give renewed life to the history it embodied. Such an outcome indicates the usage was fair.

vi. **Effect of the dealing upon the work.** By far, this is the most contentious element. Copyright holders are often quick to point out that an unlicensed use of a work is a lost license fee. However, the examination relies upon a more nuanced question: did the unauthorized use impede the expected (original) market for the work? With the original book no longer in production and very little circulation of the surviving print copies, there was no market to compete with (even if one could argue that reproduction of one map was a possible substitute for an entire book). On this factor Canada is also well served by its Supreme Court’s insistence that the presence of a license does not settle the matter.

While the rigour of the preceding analysis may be intimidating, it is not incumbent upon every person to provide an explanation in the manner of Chief Justice Beverley McLachlin. A more informal explanation can be sufficient, as was the case with the map:

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10 In *CCH Canadian*, the Chief Justice of the Supreme Court of Canada authored the (unanimous) decision.
[The map is] a sketch of the political boundaries of early 20th century Southeast Asia, with shipping routes and distances marked in. A fitting backdrop to any contemporary discussion of trade in that region. The purpose of the use melds with fair dealing’s category of research. The amount taken is reasonable—when discussing regions, it may be necessary to reproduce an entire map to convey the geographic boundaries and political nuances of the time.11

Final Thoughts
Within academic publishing of both research and instructional material, there tends to be an inclination to examine manuscripts by dissecting out the copyrighted constituent parts and evaluating those parts in isolation to the work as a whole. This dissection method might lend itself to simplicity and easy-to-follow rules, but is a disservice to the laws and courts on both sides of the border that seek to protect the inherently collaborative nature of creativity. New works, whether they be research treatises or training manuals, ought to be evaluated holistically. To the extent that we are aware of constituent parts, it should only be in recognition that they facilitate creations that are much more than the sum of their parts.

11 Note 9, above.