

BATTLING CLEARANCE CULTURE SHOCK: COMPARING U.S. FAIR USE AND CANADIAN FAIR DEALING IN ADVANCING FREEDOM OF EXPRESSION IN NON-FICTION FILM

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I. INTRODUCTION

Any documentarian today must thread or cut her way through a thicket of legal rights associated with preexisting cultural objects that her own creative enterprise depends on.¹

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In a world where heightened commodification of knowledge is evolving alongside a viral “remix culture,”² friction between creative property owners and users has never been more glaring.³ Owners seek greater protections for their works, which have been made more accessible and vulnerable to theft by the digital revolution, while users seek greater liberties to reference and utilize third-party-owned materials in their derivative creations.⁴ The parties have become entrenched in the belief that these interests are inherently at odds with one another. The resulting legal conundrum of how to reconcile broad intellectual property ownership with freedom of expression is perhaps best illustrated by the struggles of non-fiction filmmakers against burgeoning “rights clearance cultures.”⁵

Non-fiction filmmakers are uniquely situated between the proverbial ‘rock’ of relying on the use of pre-existing works (both incidental and deliberate), and the ‘hard place’ of heavily restricted and costly access to those works.⁶ Both rights owners

of storytelling through nonfiction film.

¹ PATRICIA AUFDERHEIDE & PETER JASZI, CENTER FOR SOCIAL MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 6 (2004), available at <http://www.acsil.org/resources/rights-clearances-1/nps240.tmp.pdf>.

² See LAWRENCE LESSIG, REMIX (2008). Lessig describes the “remix culture” as one in which creators build new works that include or capture the creativity of past works. It is a “Read Write” culture that allows and encourages derivative works, as opposed to a “Read Only” culture that discourages them. *Id.* at 28.

³ See LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) [hereinafter LESSIG, FREE CULTURE], available at <http://www.free-culture.cc/freeculture.pdf>. For coverage of the ongoing monitoring of the tension between intellectual property owners and Internet users, see CHILLING EFFECTS CLEARINGHOUSE, <http://www.chillingeffects.org> (last visited Sept. 9, 2011).

⁴ LESSIG, REMIX, *supra* note 2.

⁵ KEITH AOKI, JAMES BOYLE & JENNIFER JENKINS, DUKE CENTER FOR THE STUDY OF THE PUBLIC DOMAIN, BOUND BY LAW? (TALES FROM THE PUBLIC DOMAIN) (2006), available at <http://www.law.duke.edu/cspd/comics/digital.php> (last visited Sept. 9, 2011); see also AUFDERHEIDE & JASZI, *supra* note 1; MARJORIE HEINS & TRICIA BECKLES, THE BRENNAN CENTER FOR JUSTICE – FREE EXPRESSION POLICY PROJECT, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 1 (2005), available at <http://www.fepproject.org/policyreports/fairuseflyer.html>; HOWARD KNOPF, DOCUMENTARY ORGANIZATION OF CANADA, THE COPYRIGHT CLEARANCE CULTURE AND CANADIAN DOCUMENTARIES: A WHITE PAPER ON BEHALF OF THE DOCUMENTARY ORGANIZATION OF CANADA (2006), available at http://docorg.ca/sites/docorg.ca/files/White%20Paper_HPK_Copyright&Documentaries.pdf.

⁶ SHEILA CURRAN BERNARD & KENN RABIN, ARCHIVAL STORYTELLING: A FILMMAKER’S GUIDE TO FINDING, USING, AND LICENSING THIRD-PARTY VISUALS AND MUSIC (2009); see also KNOPF, *supra* note 5.

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and so-called clearance-culture “gatekeepers” fix filmmakers in this precarious position.⁷ Fearing the litigious wrath of rights owners, the gatekeepers place the heavy burden of rights acquisition on the filmmaker.⁸ They require detailed clearance reports and expensive errors and omissions (E&O) insurance before airing, screening, or selling a work.⁹ Clearance costs can run into the hundreds of thousands of dollars, a sum that can quickly exhaust or eclipse a documentary’s entire budget.¹⁰ If filmmakers cannot locate all rights holders, get approval for use, and afford the requisite license and legal fees, they must choose between two evils: abandoning use of potentially infringing material, thereby sacrificing the authenticity and integrity of the work; or using the material, thereby risking limited distribution and litigation.¹¹

In many ways, the cost-benefit analysis that non-fiction filmmakers engage in parallels the balancing act embodied in the copyright doctrines of fair use and fair dealing, which have come to represent a user’s best line of defense against an owner’s claim to exclusive derivative rights.¹² Although many nations utilize some form of what eighteenth-century English law termed “fair abridgement,”¹³ the United States and Canada have exhibited the most zealous advocacy of fair use and fair dealing as filmmaker-friendly. Each nation has codified its chosen doctrine into its respective copyright act.¹⁴ Additionally, both have used statutes

⁷ The “gatekeepers” include production insurers, television programmers, and theatrical distributors. AUFDERHEIDE & JASZI, *supra* note 1, at 9; *see also* HEINS & BECKLES, *supra* note 5, at ii, 55.

⁸ AUFDERHEIDE & JASZI, *supra* note 1, at 9.

⁹ *Id.* at 5.

¹⁰ *Id.* at 5, 7-9; *see also* HEINS & BECKLES, *supra* note 5, at 1; Nancy Ramsey, *The Hidden Cost of Documentaries*, N.Y. TIMES, Oct. 16, 2005, <http://www.nytimes.com/2005/10/16/movies/16rams.html>.

¹¹ *See generally* AUFDERHEIDE & JASZI, *supra* note 1.

¹² HEINS & BECKLES, *supra* note 5, at 1. For the purposes of this Note, “user” will refer to a non-fiction filmmaker.

¹³ The United States, Israel, Singapore, and the Philippines employ a fair use regime. Canada and its trading partners—including the United Kingdom, the European Union, Australia, and New Zealand—use a fair dealing regime. Barry Sookman & Dan Glover, *More Fickle than Fair: Why Canada Should Not Adopt A Fair Use Regime*, LAWYERS WEEKLY (Nov. 22, 2009) [hereinafter Sookman & Glover, *More Fickle Than Fair*], available at <http://www.barrysookman.com/2009/11/22/more-fickle-than-fair-why-canada-should-not-adopt-a-fair-use-regime>.

¹⁴ For the U.S. fair use provision, see 17 U.S.C. § 107 (1976). For Canada’s fair dealing provisions, see Copyright Act, R.S.C. 1985, c. C-42, §§ 29-29.2.

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and evolving common law to create progressive industry guidelines, which aim to better educate filmmakers on the bounds of their legal rights, encourage copyright owners to choose cooperation over scare-tactics, and reinforce for courts that documentarians do in fact film in good faith.¹⁵

To date, the international documentary film community has looked primarily to U.S. fair use and U.S. industry best practices to inform its dealings in secondary uses of third-party works.¹⁶ Since codification of the fair use doctrine in the U.S. Copyright Act of 1976, there have been thousands of fair use cases,¹⁷ including a wealth of non-fiction film litigation.¹⁸ The Center for Social Media's *Documentary Filmmakers' Statement of Best Practices in Fair Use*, which was the first industry best practices guideline, has had a swift and decisively positive impact.¹⁹ In 2008, the Italian Documentaries Association (Doc IT) and the International Documentary Association (IDA) joined forces to propose the development of a European best practices model based explicitly

¹⁵ See generally *Documentary Filmmakers' Statement of Best Practices in Fair Use*, CENTER FOR SOCIAL MEDIA (Nov. 18, 2005) [hereinafter *Best Practices Statement*], available at <http://centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>; *Copyright and Fair Dealing: Guidelines for Documentary Filmmakers*, DOCUMENTARY ORGANIZATION OF CANADA (May 14, 2010) [hereinafter DOC, *Guidelines*], http://docorg.ca/sites/docorg.ca/files/Fair_Is_Fair_press_release.pdf.

¹⁶ Peter Jaszi, *Public Interest Exceptions in Copyright: A Comparative and International Perspective* (2005), http://correctingcourse.columbia.edu/paper_jaszi.pdf [hereinafter Jaszi, *Public Interest Exceptions in Copyright*] (explaining that, generally, U.S. law on copyright limitations and exceptions is regarded as superior in securing the public interest and is considered an "international gold standard" in the area). See also *Resolution on Freedom of Expression and Information in Documentaries*, ITALIAN DOCUMENTARIES ASSOCIATION & INTERNATIONAL DOCUMENTARY ASSOCIATION, paras. 12-14 (2008) [hereinafter DOC IT & IDA, *Resolution*], available at http://www.sunnysideofthedoc.com/uk/s_research_reseau.php.

¹⁷ HEINS & BECKLES, *supra* note 5, at 4.

¹⁸ Notable cases include: *Monster Commc'ns v. Turner Broad. Sys.*, 935 F. Supp. 490 (S.D.N.Y. 1996); *Hofheinz v. Discovery Commc'ns, Inc.*, No. 00 Civ. 3802(HB), 2001 WL 1111970, at *3 (S.D.N.Y. 2001); *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127 (S.D.N.Y. 2001); *Hofheinz v. A&E Television Networks, Inc.*, 146 F. Supp. 2d 442 (S.D.N.Y. 2001); and *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003).

¹⁹ Pat Aufderheide, *Fair Use Put to Good Use: 'Documentary Filmmakers' Statement' Makes Decisive Impact*, INTERNATIONAL DOCUMENTARY ASSOCIATION (Feb. 2, 2010), <http://www.documentary.org/content/fair-use-put-good-use-documentary-filmmakers-statement-makes-decisive-impact>; Jen Swanson, *Beg, Borrow, or Steal? Deciphering Fair Use for Filmmakers*, INDEPENDENT (Feb. 10, 2009), <http://www.independent-magazine.org/magazine/2009/02/fairuse>.

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on the success of U.S. fair use and best practices.²⁰ The resolution emphasized the “need in today’s market to address to what extent the US [sic] Best Practices could find an application in Europe in order to facilitate global exploitation of audiovisual works.”²¹

Although the United States has set the bar in this area of law, Canada’s current efforts to overhaul its outdated copyright system, and the Documentary Organization of Canada’s (DOC) release of its *Guidelines for Documentary Filmmakers*,²² present an intriguing basis for comparison. On June 2, 2010, the Canadian Minister of Industry introduced the Copyright Modernization Act (Bill C-32) to the House of Commons.²³ Unlike its predecessors (Bill C-60 in 2005 and Bill C-61 in 2008, both of which died before reaching second readings by Parliament), Bill C-32 made it through a second reading and went before a legislative committee that heard from over 200 witnesses between December 1, 2010 and March 24, 2011.²⁴ Although the dissolution of the fortieth Canadian Parliament on March 26, 2011 “killed” Bill C-32,²⁵ Parliament reconvened on September 19, 2011, and the House quickly tabled the bill’s reincarnation.²⁶ Now entitled Bill C-11, this version of the Copyright Modernization Act “mirrors” its precursor and “is expected to sail through the House of

²⁰ DOC IT & IDA, *Resolution*, *supra* note 16.

²¹ *Id.* at para. 14 (emphasis omitted). See also Bernardo Parella, *Fair Use in EU film documentaries*, COMMUNIA (June 10, 2008), <http://www.communia-project.eu/node/154>.

²² DOC, *Guidelines*, *supra* note 15.

²³ Michael Geist, *The Canadian Copyright Bill: Flawed but Fixable*, MICHAEL GEIST’S BLOG (June 2, 2010), <http://www.michaelgeist.ca/content/view/5080/125> [hereinafter Geist, *Flawed but Fixable*].

²⁴ See Giuseppina D’Agostino, *There is No Two Without Three: Bill C-32 is Dead*, IP OSGOODE (Mar. 26, 2011), <http://www.iposgoode.ca/2011/03/there-is-no-two-without-three-bill-c-32-is-dead>; Jessica Murphy, *New Copyright Bill to Duplicate C-32: Tories*, TORONTO SUN, May 17, 2011, <http://www.torontosun.com/2011/05/17/new-copyright-bill-to-duplicate-c32-tories>.

²⁵ See Karen Bliss, *Canadian C-32 Copyright-Reform Bill Dies (Again) With Election Call*, BILLBOARD, March 28, 2011, <http://www.billboard.biz/bbbiz/industry/global/canadian-c-32-copyright-reform-bill-dies-1005097402.story>; Michael Geist, *Another Copyright Bill Hits the Scrap Heap: Taking Stock of Canadian Digital Law and Policy Reform*, MICHAEL GEIST’S BLOG (Mar. 25, 2011), <http://www.michaelgeist.ca/content/view/5707/125>.

²⁶ Michael Geist, *Copyright is Back: Why Canada is Keeping the Flawed Digital Lock Rules*, MICHAEL GEIST’S BLOG (Sept. 29, 2011), <http://www.michaelgeist.ca/content/view/6033/125> [hereinafter Geist, *Copyright is Back*]. For the text of the latest version of the bill, see Bill C-11, An Act to Amend the Copyright Act, 1st Sess., 41st Parl., 2011, available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5144516&file=4>.

Commons” en route to passage before the end of the year.²⁷

If passed as currently written, Bill C-11’s fair dealing provisions would place Canada in a unique position. Its doctrine would present a distinctive combination of American and British influences, which can be seen as existing on two ends of a ‘fairness’ spectrum. Modernized Canadian fair dealing would reflect the flexibility and user-centric approach of the United States, but maintain elements of the categorical and owner-centric approach of the United Kingdom. Such an outcome could provide organizations like Doc IT with a valuable opportunity to see how U.S. fair use and its attendant best practices might operate in a fair dealing nation tied to Commonwealth and European sensibilities. It could also suggest an alternative basis on which other nations can proceed in the battle against the global reach of clearance cultures.

This Note compares the U.S. fair use doctrine and the newly proposed Canadian fair dealing regime as they relate to the derivative and appropriative rights of non-fiction filmmakers. It explores whether one system has more potential to arrest the spread of clearance cultures and advance freedom of expression in non-fiction film. Part II sets forth the shared English origins of the two regimes and their respective departures from these roots. Part III explores the increased commodification of knowledge, the rise of clearance cultures in the neighboring nations, and the ensuing chilling effects on free expression and creativity in documentaries. Part IV assesses the role of fair use and fair dealing in U.S. and Canadian legislative and jurisprudential responses to censorship by copyright. Part V considers the doctrines in a wider context and proposes that Canadian fair dealing and its concomitant best practices offer a stronger foundation for promoting free expression in documentaries on an international scale.

II. BACKGROUND: THE ORIGINS OF U.S. FAIR USE AND CANADIAN FAIR DEALING

A. British Beginnings

It is appropriate to begin unpacking the history of fair use and

²⁷ Michael Geist, *Geist: Why Canada’s New Copyright Bill Remains Flawed*, TORONTO STAR, Oct. 1, 2011, <http://www.thestar.com/business/article/1063099--geist-why-canada-s-new-copyright-bill-remains-flawed> [hereinafter Geist, *Bill Remains Flawed*].

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fair dealing at the passage of the world's first recognized copyright law in 1710, the British Statute of Anne: "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."²⁸ Although the statute did not explicitly apply to the American colonies, several colonies used it as a model for statutes to protect writers.²⁹ Furthermore, although the U.S. Congress enacted its own independent copyright act in 1790,³⁰ the act borrowed substantially from the Statute of Anne, and English authority dominated copyright litigation until the landmark U.S. fair use decision in *Folsom v. Marsh*³¹ in 1841.³² In Canada, English authorities denied attempts at independent Canadian copyright legislation in 1889, 1890, 1891, and 1895.³³ As a result, English law governed copyrights in Canada until the Canadian Copyright Act (CCA) took effect in 1924.³⁴

In granting authors (and their assignees) "the sole Right and Liberty of Printing" their books for limited terms,³⁵ the Statute of Anne recognized the idea of literary property and an author's right to exercise control over that property. Simultaneously, in line with the Enlightenment-era belief that such works were essential to the general spread of education and knowledge, the statute recognized the need to limit monopolies over them.³⁶ In effect, the Statute of Anne laid the enduring foundations for seeking balance between protecting private (owner) and public (user) interests, creating an economic incentive for private parties to create new works, and

²⁸ 1710, 8 Ann., c. 19 (Eng.). The Statute of Anne is especially relevant for this Note's purposes, as interpretations of the text by eighteenth and nineteenth century English courts heavily influenced the development and ensuing codification of copyright law in both the United States and Canada.

²⁹ E.g., Shubah Ghosh, *Major Acts of Congress - Copyright Act of 1790*, ENOTES.COM, <http://www.enotes.com/major-acts-congress/copyright-act> (last visited Sept. 9, 2011).

³⁰ Copyright Act of 1790, 1 Stat. 124 (1790).

³¹ 9 F. Cas. 342 (D. Mass. 1841) (No. 4901).

³² E.g., Matthew Sag, *The Pre-History of Fair Use*, 76 BROOK. L. REV. 1, 2-3 (2011), available at <http://ssrn.com/abstract=1663366>.

³³ Jay Malarenko, *Copyright Law in Canada: An Introduction to the Canadian Copyright Act*, MAPLELEAFWEB.COM, (Mar. 13, 2009, 6:59 PM), <http://www.mapleleafweb.com/features/copyright-law-canada-introduction-canadian-copyright-act>.

³⁴ *Id.*

³⁵ Statute of Anne para. 1 (setting forth an original term of fourteen years for as yet unpublished works, with a right to a single renewal if the author survived to the end of the original term, and setting forth a term of twenty-one years from the date of the statute's passage for works published prior to 1710).

³⁶ LESSIG, *FREE CULTURE*, *supra* note 3, at 86-92.

enabling the public to access and make use of those works. This quest for balance catalyzed the pre-modern³⁷ development of fair use and fair dealing and drives their modern application today.

On its face, the Statute of Anne makes no explicit mention of “fractional copying or the similarity threshold for works based on original works with minor textual differences.”³⁸ The absence of such considerations might imply that its drafters simply did not contemplate the legality of abridgements or derivative works and concerned themselves solely with wholesale reproduction of original works.³⁹ Such a narrow interpretation suggests that the statute only granted copyright a very limited scope, allowing “ample space for partial appropriation” and decidedly tipping the scale in favor of the public domain and free culture.⁴⁰ Copyright skeptics have long emphasized this narrow interpretation of the Statute of Anne as the grounds for challenging a copyright owner’s expanding exclusive rights to create derivative works.⁴¹ Ardent proponents of copyright, on the other hand, have urged a more liberal and expansive reading of the Statute of Anne, arguing that it supplemented an author’s already existing common law and natural rights, thus protecting against piracy in whole or in part.⁴²

However, as Professor Matthew Sag suggests, neither a mechanically narrow nor overly expansive conception of pre-modern copyright accurately reflects the extent to which pre-modern courts actually debated fair and unfair abridgements and their effect on the balance between owner and user rights.⁴³ In pre-modern English courts, concerns with this balance predominated over attempts to explicitly favor authors *or* the public.⁴⁴ In effect, the earliest considerations of “fair use” were

³⁷ See Sag, *supra* note 32, at 2-3 (defining the pre-history of U.S. Copyright as spanning from 1710 (the year the Statute of Anne came into being) to 1841 (the year in which Justice Story’s holding in *Folsom* initiated the fair use doctrine in the U.S.)).

³⁸ *Id.* at 11.

³⁹ *Id.*

⁴⁰ *Id.* at 13.

⁴¹ See LESSIG, FREE CULTURE, *supra* note 3, at 87-89, 139; Jonathan Zittrain, *The Copyright Cage*, LEGAL AFFAIRS (Aug. 2003), http://www.legalaffairs.org/issues/July-August-2003/feature_zittrain_julaug03.msp.

⁴² See LESSIG, FREE CULTURE, *supra* note 3, at 90-91; Diane L. Zimmerman, *The Statute of Anne and Its Progeny: Variations without a Theme*, 47 HOUS. L. REV. 965 (2010); Ronan Deazley, *The Statute of Anne and the Great Abridgement Swindle*, 47 HOUS. L. REV. 793 (2010).

⁴³ Sag, *supra* note 32, at 36.

⁴⁴ *Id.*

meant, first and foremost, to further this balance. A fair use was not solely a default public freedom limited by narrow copyright, nor was it a limited exception to a creator's default exclusive rights. Rather, it was a mechanism for balance. An extremist approach discounts that copyright and fair use co-evolved during a struggle to maintain balance between the public and private domains.⁴⁵

As early as 1739, Lord Chancellor Hardwicke weighed the merits of unauthorized abridgements and textual borrowing.⁴⁶ In *Austen v. Cave*,⁴⁷ he found that a magazine editor's reproduction of thirteen pages of text from a sixty-nine page book was excessive.⁴⁸ In the ensuing case of *Gyles v. Wilcox*,⁴⁹ which is often cited as the origin of the fair use doctrine in England, Lord Hardwicke suggested giving the Statute of Anne a "liberal construction."⁵⁰ He proposed an approach that would condemn reprints with minor alterations that were only "colorably shortened" but allowed for "real and fair" abridgements in which the "invention, learning and judgment of the author" was shown.⁵¹ He insisted that a rule restraining all abridgements would have "mischievous consequences."⁵² The dual nature of Hardwicke's decision expanded both public user rights and the scope of copyright protections, ushering in an era in which justices would weigh a multitude of factors to distinguish between a bona fide abridgement and a piratical one.⁵³

B. The Development of Fair Use in the United States

Prior to the Constitutional Convention's approval of the U.S. Constitution's Copyright Clause in 1787, and Congress's enactment of the Copyright Act of 1790, the American colonies afforded little to no protection to authors.⁵⁴ However, the lobbying of celebrated writers like Noah Webster and Thomas

⁴⁵ *See id.*

⁴⁶ *Austen v. Cave*, (1739) 22 Eng. Rep. 440.

⁴⁷ *Id.*

⁴⁸ *See Sag*, *supra* note 32, at 18.

⁴⁹ (1741) 26 Eng. Rep. 489.

⁵⁰ *Id.* at 491.

⁵¹ *Id.*; *see Sag*, *supra* note 32, at 17, 20.

⁵² *Sag*, *supra* note 32, at 20.

⁵³ *Id.* at 19-20.

⁵⁴ Zimmerman, *supra* note 42, at 981-82.

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Paine eventually convinced the Connecticut General Assembly to pass the first general colonial copyright statute, which in turn catalyzed similar statutes among the other colonies.⁵⁵ Though the subject matter of protected works varied,⁵⁶ the majority of statutes borrowed the fourteen-year original term and fourteen-year renewal term set forth in the Statute of Anne.⁵⁷ More importantly, however, state statutes, as well as the federal constitution and statutory provisions they inspired, inherited the unresolved tension that surrounded the English interpretation of the Statute of Anne—that between an author’s natural rights and general public access.⁵⁸

The language of Article I, Section 8, Clause 8 of the U.S. Constitution espouses an almost identical purpose to that expressed in the preamble of the Statute of Anne,⁵⁹ granting Congress the power, “[t]o *Promote* the *Progress* of Science and *useful Arts*, by securing, for *limited Times*, to *Authors* and *Inventors*, the *exclusive Right* to their respective *Writings* and *Discoveries*.”⁶⁰ The Copyright Act that followed only three years later reiterated this goal in its preamble.⁶¹ Though the American version uses slightly different language (and accounted for the development of patents by incorporating explicit references to science, inventors, and discoveries), it clearly endowed Congress with the power to encourage learning by granting authors limited copyright. The clause embodies the push-and-pull of the public and private interests at stake in granting creative property rights.

The administrative procedures for copyright registration and enforcement set forth in the Copyright Act, which largely tracked the provisions in the Statute of Anne, did little to alleviate

⁵⁵ Zimmerman, *supra* note 42, at 982; WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* (1995), available at <http://digital-law-online.info/patry/patry2.html>.

⁵⁶ PATRY, *supra* note 55, at 17-20. South Carolina protected only “books”; New Jersey, New York, Pennsylvania, and Virginia protected “books and pamphlets”; Maryland protected “books and writings”; Massachusetts, New Hampshire, and Rhode Island protected “books, treatises, and other literary works”; and Connecticut and Georgia more expansively protected “books, pamphlets, maps, and charts.” *Id.*

⁵⁷ PATRY, *supra* note 55, at 20.

⁵⁸ Zimmerman, *supra* note 42, at 981.

⁵⁹ PATRY, *supra* note 55, at 24; *see also* Statute of Anne pmbl.

⁶⁰ U.S. CONST. art. I, § 8, cl. 8. (emphasis added).

⁶¹ Copyright Act of 1790, 1 Stat. 124, pmbl. (providing that it was “An Act for the encouragement of learning, by securing the copies of maps, Charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.”).

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confusion regarding the tension.⁶² Furthermore, the procedures failed to clarify whether exclusive rights applied to simple reproductions alone or to derivative works, such as abridgements and translations.⁶³ There was no clear answer as to whether the public could still “reap from the doctrine and sentiments” contained in a protected work, as Justice Alston insisted in *Millar v. Taylor*,⁶⁴ or if all uses were strictly off-limits.⁶⁵

It was not until 1841, a full century after Lord Hardwicke’s decision in *Gyles*, that Justice Story offered a tangible and contemporary framework by which to judge fair abridgements and subsequent uses of copyrighted works. In his landmark decision in *Folsom v. Marsh*,⁶⁶ Justice Story referenced *Gyles* when he said:

[A] mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such a[] [fair] abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts.⁶⁷

Story went on to explain that in determining whether a work is a fair and bona fide abridgement of an original work, a court must:

[L]ook to the *nature and objects* of the selections made, the *quantity and value* of the materials used, and *the degree in which the use may prejudice* the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused . . . into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy.⁶⁸

Like his predecessor, Lord Hardwicke, Justice Story’s opinion incidentally served dual purposes. The opinion expanded public

⁶² Zimmerman, *supra* note 42, at 986-89.

⁶³ *Id.* at 989.

⁶⁴ (1769) Eng. Rep. 201, 227 (K.B.).

⁶⁵ Sag, *supra* note 32, at 14 (quoting *Millar*).

⁶⁶ 9 F. Cas. 345 (1841).

⁶⁷ *Folsom*, 9 F. Cas. at 345; Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 683 (1995) (quoting *Folsom*, 9 F. Cas. at 345); see also Lloyd L. Weinreb, *Fair Use and How It Got That Way*, 45 J. COPYRIGHT SOC’Y 634, 637-40 (1998).

⁶⁸ *Folsom*, 9 F. Cas. at 348 (emphasis added).

user rights to create derivative works *and* enlarged the scope of copyright by recognizing that derivative works were inherently valuable, i.e., that they presented a separate market over which an author might exercise control.⁶⁹ In the years following Justice Story's influential interpretation of the pre-modern abridgement doctrine, there were very few true fair use cases. "Fair use" generally referred to an initially non-infringing use as opposed to an affirmative defense.⁷⁰ However, the fallout of Justice Story's expanded scope—i.e., the gradually heightened efforts by copyright holders to assert exclusive rights in derivative works⁷¹—seemingly transformed the meaning of the term. Instead of defining a user's presumptive non-infringement and a right to create derivative works, "fair use" defined a user's narrow privilege and defense to total copyright owner control.⁷²

By the time Congress codified Justice Story's common law "ingredients"⁷³ into the Copyright Act of 1976,⁷⁴ users were in dire need of a strong foundation upon which to assert their derivative rights.⁷⁵ Section 107 provided just that, stating that: (1) the fair use of a copyrighted work for purposes "*such as* criticism, comment, news reporting, teaching . . . scholarship or research" is not infringement⁷⁶; and (2) courts will consider the following non-exhaustive list of factors in determining whether the use is fair:

- (1) [T]he purpose and character of the use, including whether

⁶⁹ Sag, *supra* note 32, at 8, 40-42; see also Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186, 229-30 (2008).

⁷⁰ Lape, *supra* note 67, at 723.

⁷¹ Sag, *supra* note 32, at 42.

⁷² *Id.* at 36, 41.

⁷³ *Folsom*, 9 F. Cas. at 348.

⁷⁴ The Act also officially granted copyright holders the exclusive right "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2). Section 101 defined "derivative work" as:

[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, *abridgement*, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101 (emphasis added).

⁷⁵ Sag, *supra* note 32, at 37-38.

⁷⁶ 17 U.S.C. § 107 (emphasis added). Note that the Act lists a set of preferred uses as opposed to fixed categories of use.

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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.⁷⁷

Since its codification, the fair use doctrine has been deemed a critical “safety valve” for free expression in the U.S. copyright system.⁷⁸ It offers a set of non-exclusive factors that give due consideration to context and enable the public to make unauthorized use of copyrighted works as a means to promote science and the useful arts (i.e., to encourage learning). The codified doctrine forces courts to reflect on the primary theoretical basis and justification for fair abridgement and the use of copyrighted works—the promotion of the general public welfare.⁷⁹ In many cases, this perception of fair use as an ‘expression preserver’ has rung true. For example, the Second Circuit found in favor of an author who wrote a scathing, unauthorized biography of L. Ron Hubbard (the founder of the Church of Scientology).⁸⁰ It also found in favor of a visual artist who appropriated a fashion advertisement into a collage painting to comment on the effects of mass media images on our appetites.⁸¹ Similarly, the U.S. Supreme Court found in favor of the rap group, 2 Live Crew, who created a raunchy parody of Roy Orbison’s classic song “Oh, Pretty Woman.”⁸²

⁷⁷ *Id.*

⁷⁸ HEINS & BECKLES, *supra* note 5, at 1; *see also* Jaszi, *Public Interest Exceptions in Copyright*, *supra* note 16, at 16-18.

⁷⁹ ALAN LATMAN, COPYRIGHT OFFICE, STUDY NO. 14: FAIR USE OF COPYRIGHTED WORKS 6-8 (1958), *reprinted in* 2 STUDIES ON COPYRIGHT 781 (Arthur Fisher Memorial ed., 1963). Latman provided a valuable summary of the justifications for fair use:

[A]s a condition of obtaining the statutory grant, the author is deemed to consent to certain reasonable uses of his copyrighted work to promote the ends of public welfare for which he was granted copyright It has often been stated that a certain degree of latitude for the users of copyrighted works is indispensable for the “Progress of Science and useful Arts” . . . [because] progress depends on a certain amount of borrowing, quotation and comment It also reflects the relevance of custom to what is reasonable.

Id. at 7.

⁸⁰ *New Era Publ’ns Int’l v. Carol Publ’g Grp.*, 904 F.2d 152 (2d Cir.1990).

⁸¹ *Blanch v. Koons*, 467 F.3d 244 (2d. Cir. 2006).

⁸² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *see also* *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001) (finding that Alice Randall’s parody

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It should be noted that not all authors, visual artists, or musicians have fared as well as those mentioned above,⁸³ and that the flexibility and judicial discretion that section 107 affords has proved both a blessing and a curse.⁸⁴ Though scholars assert that the section's preferred uses and four factors are still the best guide for assessing fairness,⁸⁵ judicial application of the objective four-factor inquiry is largely unpredictable.⁸⁶ The flexibility of the doctrine allows for the persistent underlying tension between owner and user rights to manifest in inconsistent rulings. For example, when an independent television station⁸⁷ and a television news agency⁸⁸ used thirty seconds of footage documenting the Los Angeles police beating of a civilian for the purposes of news reporting, the Ninth Circuit found both unauthorized uses unfair. However, when CourtTV used some of the same footage to promote its coverage of the trials of the officers involved in the beating, the Ninth Circuit found fair use.⁸⁹

Despite this uncertainty, the existence of high-profile, user-centric rulings, coupled with the flexibility of section 107, demonstrate a U.S. emphasis on public interests over private ones where fair use and derivative works are concerned. It is a clear departure from the more rigid and author-centric fair dealing provision in the United Kingdom's current Copyright, Designs and

novel of Margaret Mitchell's *Gone With the Wind* was a fair use).

⁸³ Harper & Row v. Nation Enters., 471 U.S. 539 (1985).

⁸⁴ HEINS & BECKLES, *supra* note 5, at 10-11.

⁸⁵ *Id.* at 11.

⁸⁶ *Id.* at 10. "Asserting fair use has always been difficult because of its unpredictability. Each case turns on its particular facts. Since the four factors are malleable and partly subjective, even a rigorous analysis of each of them doesn't necessarily predict the result." *Id.*; see also David Nimmer, *Fairest of Them All' and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 264, 280-82 (2003):

Courts tend first to make a judgment that the ultimate disposition is fair or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions . . . [B]y injecting such a high degree of subjectivity and imprecision into each factor and into their cumulative application [] Congress essentially foreordained that result in the 1976 Act . . . Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.

Id. at 280-82.

⁸⁷ L.A. News Serv. v. KCAL-TV, 108 F.3d 1119 (9th Cir. 1997).

⁸⁸ L.A. News Serv. v. Reuters Television Int'l, 149 F.3d 987 (9th Cir. 1998).

⁸⁹ L.A. News Serv. v. CBS Broad., 305 F.3d 924 (9th Cir. 2002).

Patents Act of 1988.⁹⁰ While users in the U.S. must clear the single hurdle of passing the statutory fairness test, users in the United Kingdom must clear three: (1) the dealing must fall within an enumerated category; (2) the dealing must be fair (as per common law criteria);⁹¹ and (3) there must be sufficient acknowledgement for research, criticism, review and news reporting.⁹²

C. *The Development of Fair Dealing in Canada*

Although the first incarnation of the U.S. Copyright Act drew largely from the Statute of Anne, the nation was quick to establish a copyright regime independent of its Mother Country. Its commitment to promoting progress⁹³ and the encouragement of learning⁹⁴ during the nineteenth century drove the evolution of fair use into the liberal, user-friendly doctrine that it is today. Its northern neighbor, Canada, on the other hand, was subject to British imperial copyright control until 1921,⁹⁵ and spent much of

⁹⁰ Copyright, Designs and Patents Act, 1988, c. 48, §§ 29-31 (U.K.). The Act sets forth categories of use in which fair dealing will not infringe copyright; research and private study (§ 29); criticism, review and news reporting (§ 30); and incidental inclusion of copyrighted material (§ 31). In the case of research, criticism, review and news reporting, the use must be accompanied by sufficient acknowledgement of the source (§§ 29(1), 30(2)); unless, in the case of research or news reporting, “this would be impossible for reasons of practicality or otherwise.” *Id.* §§ 29(1B), 30(3).

⁹¹ Lord Denning set out the main test for fairness in *Hubbard v. Vosper* [1972] 2 Q.B. 84 (Eng.):

It is impossible to define what is “fair dealing.” It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. Other considerations may come to mind also. But after all is said and done, it must be a matter of impression.

Id. at 94. In *Ashdown v. Tel. Grp. Ltd.* [2001] EWCA (Civ) 1142 [70], the court placed market “substitute” atop the hierarchy of factors that a court should consider. Canadian scholar Giuseppina D’Agostino suggests that “market impact” may trump freedom of expression as the most important factor in the United Kingdom. Giuseppina D’Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309, 344 (2008) [hereinafter D’Agostino, *Healing Fair Dealing?*].

⁹² D’Agostino, *Healing Fair Dealing?*, *supra* note 91, at 340-44; *see also* Copyright, Designs and Patents Act §§ 29-30.

⁹³ U.S. CONST. art. I, § 8, cl. 8.

⁹⁴ Copyright Act of 1790, 1 Stat. 124, pmbl.

⁹⁵ Pierre-Emmanuel Moysé, *Canadian Colonial Copyright: The Colony Strikes Back*, in

that time in “tumultuous negotiations [with]... the Imperial Government” over the rights to enforce its own colonial copyright laws.⁹⁶ As such, Canada was slower to explicitly acknowledge and address the importance of fair dealing to the development of its own independent copyright regime.

When Canada finally achieved the freedom to depart from British standards in 1921, it created a statute that largely mirrored the British Imperial Copyright Act of 1911.⁹⁷ Specifically, the Canadian statute copied the British fair dealing provision verbatim: “[T]he following acts shall not constitute infringement of copyright: Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary”⁹⁸ This fair dealing formulation reappeared without any modification in the Canadian Copyright Act of 1985⁹⁹ and subsisted throughout two phases of substantial reformation in 1988 and 1997.¹⁰⁰

Despite scholars’ proposals that the nation adopt a less restrictive, multi-factor approach to fair dealing, similar to that of the United States,¹⁰¹ there was “a distinct anxiousness in Canada

AN EMERGING INTELLECTUAL PROPERTY PARADIGM: PERSPECTIVES FROM CANADA 107-38 (Ysolde Gendreau ed., 2008).

⁹⁶ *Id.* at 107. Between 1832 and 1921, Canada passed several copyright bills, including: An Act for the Protection of Copy Rights (1832); An Act for the protection of Copy Rights in this Province (1841); the Copyright Act of 1872; and the Copyright Act of 1889. The latter two met with strong opposition in London. *Id.* at 109.

⁹⁷ Malarenko, *supra* note 34.

⁹⁸ Compare The Copyright Act 1921, S.C. 1921, c. C-42, § 16, and U.K. Copyright Act 1911, c. 46., Pt. 1, § 2(1)(i).

⁹⁹ Copyright Act, R.S. 1985, c. C-42, §§ 29-29.2:

§ 29 Fair Dealing for the purpose of research or private study does not infringe copyright.

§ 29.1 Fair Dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned: (a) the source; and (b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer’s performance, (iii) maker, in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal.

§ 29.2 Fair Dealing for the purpose of news reporting does not infringe copyright if the following are mentioned (a) the source; and (b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer’s performance, (iii) maker, in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal.

¹⁰⁰ Malarenko, *supra* note 34.

¹⁰¹ Carys Craig, *The Changing Face of Fair Dealing in Canadian Copyright Law*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 437, 440-41

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to avoid any significant expansion of the fair dealing provisions,” and a fear of the increased litigation it would bring.¹⁰² Parliament held firmly to the nation’s British roots by maintaining concern for protecting an *author’s* economic interests and in the Continental/French concern for protecting an *author’s* moral rights above all else.¹⁰³ In effect, the public interest remained secondary. Canadian courts followed suit, applying a bright-line mechanical rule that would preclude the fair dealing defense and any analysis of “fairness” if the use did not fit squarely within the narrow categories of the statutory provision.¹⁰⁴

It was not until the second phase of copyright reform in Canada in 1997 that fair dealing truly rose to the forefront of copyright debate and the narrow interpretation of fair dealing came into serious question. Some courts continued to exercise a restrictive approach, the best illustration of which is the Federal Court’s adamant refusal to recognize parody as a form of “criticism”¹⁰⁵ in *Michelin v. CAW Canada*.¹⁰⁶ The court explicitly rejected the expansive approach of the U.S. Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*¹⁰⁷ and emphasized that exceptions to infringement “should be strictly interpreted and that fair dealing . . . lists an exhaustive set of grounds.”¹⁰⁸ However,

(Michael Geist ed., 2005).

¹⁰² *Id.* at 440.

¹⁰³ D’Agostino, *Healing Fair Dealing?*, *supra* note 91, at 357. D’Agostino suggests that the trend of conflating the terms “creator” or “user” with “rights holder” or “owner” has seriously confused the debate over who copyright is meant to protect. A creator can be both a rights holder and a rights user. This is especially true in the case of documentary filmmakers who use preexisting material to develop new forms of original expression. It is important for the sake of clarity to distinguish this debate as one between the interests of owners and users, not between the ambiguous parties of creators and free-riders. See Giuseppina D’Agostino, *Fair Use/Fair Dealing: Which Should Give You More Comfort?*, Presentation at the Visual Resources Association 27th Annual Conference, Mar. 18, 2009, available at http://www.vraweb.org/resources/ipr/fairuse_fairdealing/index.html.

¹⁰⁴ Craig, *supra* note 101, at 443-44; see also *Zamacois v. Douville*, [1943] 2 D.L.R. 257 (Can.) (finding that fair dealing does not apply to works reproduced in full); *The Queen v. James Lorimer and Co.*, [1984] 77 C.P.R. 2d 262 (F.C.A.) (Can.) (finding that fair dealing does not apply to abridgements that do not exhibit more than mere condensation); *B.W. Intl Inc. v. Thompson Canada Ltd.*, [1996] O.J. No. 2697 (O.C.J. - Gen. Div.) (finding that fair dealing does not apply to publication of a leaked work).

¹⁰⁵ See D’Agostino, *Healing Fair Dealing?*, *supra* note 91, at 329-30; see also Craig, *supra* note 101, at 444-45.

¹⁰⁶ *Michelin v. CAW Canada*, [1997] 2 F.C. 306, 71 C.P.R. 3d 348.

¹⁰⁷ 510 U.S. 578 (1994).

¹⁰⁸ D’Agostino, *Healing Fair Dealing?*, *supra* note 91, at 330; see also *Boudreau v. Lin* [1997] 75 C.P.R. 3d 1 (Can. Ont.) (finding that a University copying and selling course

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that same year, the Canadian Federal Court of Appeal also held that the fair dealing test should not be “mechanical,” but rather a “purposive” weighing of several factors, including extent of copying, purpose of use, and whether the use constituted a market substitute for the original work.¹⁰⁹

In 2004, the Supreme Court of Canada (SCC) took an unprecedented stand on fair dealing and revealed which of the two disparate approaches it endorsed—that of liberal interpretation to achieve the best balance between competing owner and user interests:¹¹⁰

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 restrictively¹¹¹ 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.¹¹²

Thus, for the first time in Canada's copyright history, its Supreme Court held that Canadian law must recognize “user rights” in its determinations of fair dealing.¹¹³ Drawing on the

materials to an entire class of students does not constitute “private research,” so fair dealing does not apply).

¹⁰⁹ *Allen v. Toronto Star Newspapers Ltd.*, [1997] 152 D.L.R. 4th 518, para. 39 (Can. Ont. Div. Ct.).

¹¹⁰ *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] 1 S.C.R. 339 (Can.) (finding that the Law Society's dealings with published legal materials through its custom photocopy service were research-based and fair; its access policy placed appropriate limits on what would be copied, enabling librarians to ensure that copying would be done only for the stated purposes of research, criticism, review or private study); see generally D'Agostino, *Healing Fair Dealing?*, *supra* note 91; Craig, *supra* note 101; Myra Tawfik, *History in the Balance: Copyright and Access to Knowledge*, in FROM “RADICAL EXTREMISM” TO “BALANCED COPYRIGHT”: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA (Michael Geist ed., 2010).

¹¹¹ *CCH*, 1 S.C.R. 339, at para. 48 (second emphasis added).

¹¹² *Id.* quoting DAVID VAVER, *COPYRIGHT LAW* 171 (2000). In *CCH*, the Supreme Court reaffirmed its ruling in *Théberge v. Galerie d'Art du Petit Champlain*, [2002] 2 S.C.R. 336 (Can.):

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature.

CCH, 1 S.C.R. 339 (Can.) at para. 10.

¹¹³ D'Agostino, *Healing Fair Dealing?*, *supra* note 91, at 309; see also Tawfik, *supra* note 110, at 3 (noting that the Canadian approach can be distinguished from the continental European model that copyright law exists, first and foremost, to protect an

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common law fairness test set forth in *Hubbard*¹¹⁴ and the four factors codified in section 107 of the U.S. Copyright Act,¹¹⁵ the SCC defined six non-exhaustive factors to consider in cases of fair dealing: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the original work; and (6) effect of dealing on the original work.¹¹⁶ In effect, the SCC “shifted the locus of analysis away from the preeminence of the copyright interest” to the public interest.¹¹⁷ It brought the goals of the fair dealing analysis into closer alignment with those of fair use, with both doctrines dedicated to balancing owner and user interests, as opposed to favoring one over the other.

However, while the United States and Canada have come to espouse similar end-goals, their respective mechanisms for achieving those goals remain distinct. U.S. courts utilize a single fairness test to establish the presence or lack of fair use.¹¹⁸ Canada, like the United Kingdom, still follows a “triple-tiered approach” that requires a dealing to: (1) fit within a category listed in the CCA; (2) be fair (as determined by the aforementioned common law factors); and (3) give sufficient acknowledgement where required by the CCA.¹¹⁹ Failure to meet any of these requirements causes the fair dealing defense to fail. As a result, it would seem that Canadian users have a heavier burden in establishing a fair dealing defense to copyright infringement, or rather, a heavier burden in asserting their *right* to fair dealing.¹²⁰

author’s rights).

¹¹⁴ *Hubbard*, [1972] 2 Q.B. 84.

¹¹⁵ 17 U.S.C. § 107.

¹¹⁶ See *CCH*, 1 S.C.R. 339 at para. 53.

¹¹⁷ Tawfik, *supra* note 110, at 6.

¹¹⁸ 17 U.S.C. § 107.

¹¹⁹ Craig, *supra* note 101, at 399-400; see also Lesley Ellen Harris, *Comparing Fair Dealing and Fair Use*, THE COPYRIGHT AND NEW MEDIA LAW NEWSLETTER (2006 – Issue 4), available at <http://www.copyrightlaws.com/comparing-fair-dealing-and-fair-use-2>. Another difference between the two regimes is that U.S. courts are required to consider all four statutory factors in assessing fairness, while Canadian courts are not bound by the six common law fairness factors set forth in *CCH*. This could imply that U.S. users are ensured a more thorough balancing of factors and Canadian users are not. However, given the ample discretion exercised by U.S. courts in weighing the codified factors, the codification does not necessarily afford U.S. users more protection than their Canadian counterparts. It is just as feasible to argue that the flexibility of the Canadian factors, which need not be considered in every case, could work in favor of users.

¹²⁰ Craig, *supra* note 101.

III. THE RISE OF THE CLEARANCE CULTURE AND DISINCENTIVES
FOR DOCUMENTARIANSA. *Chilling Effects in the United States*

[W]e come from a tradition of “free culture” A free culture supports and protects creators and innovators. It does this directly by granting intellectual property rights. But it does so indirectly by limiting the reach of those rights, to guarantee that follow-on creators and innovators remain as free as possible from the control of the past. A free culture is not a culture without property, just as a free market is not a market in which everything is free. The opposite of a free culture is a “permission culture”—a culture in which creators get to create only with the permission of the powerful, or of creators from the past.¹²¹

The “permission culture”—explored and vilified by Professor Lawrence Lessig—is the foundation on which filmmaking’s “rights clearance culture” is built.¹²² Lessig takes care to assert that an argument for free culture is not inherently anti-copyright, but rather an argument against the extremist view that all unauthorized uses of creative property are de facto harmful piracy.¹²³

In the context of non-fiction filmmaking, this extremism has proved particularly salient and problematic for filmmakers. In order to sell or lease projects to television broadcasters or theatrical distributors (who are primarily concerned about the risk of potential lawsuits from increasingly aggressive rights-holders) filmmakers must have E&O insurance.¹²⁴ Before issuing an E&O policy, insurance companies require a detailed record of rights clearances for all visual and audio cues, whether they are subject to copyright ownership or are in the public domain.¹²⁵ If rights-

¹²¹ LESSIG, *FREE CULTURE*, *supra* note 3, at xiv.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Elaine Dutka, *No Free Samples for Documentaries: Seeking Film Clips with the Fair Use Doctrine*, N.Y. TIMES, May 28, 2006, http://www.nytimes.com/2006/05/28/movies/28dutr.html?_r=1. Errors and Omissions, which is commonly referred to as E&O insurance, is the “media version of malpractice.” *Id.*

¹²⁵ AUFDERHEIDE & JASZI, *supra* note 1, at 5; *see also* HEINS & BECKLES, *supra* note 5, at 5. *See also* AOKI ET AL., *supra* note 5 (according to leading insurance broker Dennis Reiff, “[r]ight now you cannot put anything on the air without E&O insurance. There is no cable station, broadcast station, or distribution company that will release anything without E&O Insurance.”).

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holders grant permission to use their works, filmmakers generally face exorbitant clearance or license costs that force them to make “harsh aesthetic choices, and sometimes threaten[] to derail a production.”¹²⁶

This trend towards total control of copyright in cultural property and escalating clearance costs frustrates the creative expression of documentary filmmakers who rely heavily on *cinema verité*¹²⁷—a style of ‘fly on the wall’ filming that aims to capture reality in its purest form, along with all its incidental, accidental, and background elements. For example, while filming stagehands playing checkers backstage during a performance of Wagner’s *Ring Cycle* at the San Francisco Opera, filmmaker Jon Else captured four and half seconds of an episode of *The Simpsons* playing on a small television set in the background.¹²⁸ The show’s creators gave him permission to use the “entirely unsolicited” shot in his documentary, but Fox Broadcasting Company asked for a license fee of \$10,000.¹²⁹ This cost forced Else to choose between struggling to raise the money, replacing the shot, or facing charges of infringement.¹³⁰ Unable to afford the fee and the potential penalties of noncompliance, he ultimately replaced the shot with a clip from one of his own films and sacrificed the valuable moment of juxtaposing the epic German opera with the satirical animated series.¹³¹ This oft-cited example epitomizes the challenge posed by documenting a reality composed of pop culture references. It is a challenge that is gradually changing documentary practice from one aimed at capturing raw reality into one fraught with falsifying or changing reality to minimize legal risks.¹³²

¹²⁶ AUFDERHEIDE & JASZI, *supra* note 1, at 13; *see also* Ramsey, *supra* note 10.

¹²⁷ When translated literally from French, “cinema verité” means “truth cinema.”

¹²⁸ *See* SING FASTER: THE STAGEHANDS RING CYCLE (Independent Television Service 1999).

¹²⁹ LESSIG, *FREE CULTURE*, *supra* note 3, at 95-97.

¹³⁰ *Id.*

¹³¹ *Id.*; *see also* AUFDERHEIDE & JASZI, *supra* note 1, at 13, 17. Jon Else’s clip also served to replace footage of the World Series that was being broadcast on the same television set; he knew from experience that the sports rights would be too expensive to obtain. *Id.*

¹³² *See* Ramsey, *supra* note 10. Other notable examples of documentaries with *verité* complications include: *THE FIRST YEAR* (Teachers Documentary Project 2001) (in his documentary about first year teachers, the director could not afford to clear rights for use of Led Zeppelin’s “Stairway to Heaven,” which played on a car radio in one scene, and he had to cut it); *HOOP DREAMS* (First Line Features 1994) (to keep use of the song “Happy Birthday” in a pivotal scene in his documentary following two Chicago basketball players through high-school, the filmmaker paid \$5,000); *TARNATION* (Wellspring Media Inc.

Although a filmmaker's deliberate use of archival materials might suggest an easier path to clearance than that encountered with incidental use, even intentional use presents its own set of costly disincentives.¹³³ Archival materials often figure prominently in non-fiction film and serve to "invoke the past" or "augment a filmmaker's exploration of the present."¹³⁴ If a friend, interview subject, individual collector, or small archive owns the rights to the material, they may grant permission of use to a filmmaker by signing a boilerplate "materials release," which gives the filmmaker a degree of control over rights and limitations.¹³⁵ However, if a commercial archive¹³⁶ owns the rights, filmmakers will enter one of two primary licensing agreements: a "royalty-free agreement"¹³⁷; or, (the more common and more complex) "rights managed agreement,"¹³⁸ which sets limits on the markets, geographic areas, and times during which use is authorized.¹³⁹ Once the designated term ends, a filmmaker must renew the license or shelve the project completely.

For archive-heavy documentaries, rights-management costs are daunting, but renewal costs can be debilitating. The most widely recognized victim of this system is *Eyes on the Prize*,¹⁴⁰ a

2003) (this home-made film about the director's dysfunctional family, which screened at Cannes, cost only \$218 to make, but ultimately had clearance expenses of approximately \$230,000); *MAD HOT BALLROOM* (Just One Productions 2005) (the documentary about Manhattan youths learning ballroom dancing had total music clearance costs of \$170,000 and total costs of approximately \$500,000—music licensing companies demanded \$10,000 for six seconds of a cell-phone ringtone of the theme from "Rocky," and \$5,000 for a character quoting a line from "Everybody Dance Now," a C&C Music Factory song).

¹³³ Sheila Curran Bernard defines "archival materials" as motion pictures, stills (including artwork and graphics as well as photographs), sounds and music that were created by someone other than the filmmaker. Archival audiovisual materials may include illustrative moving images, historical moving images and stills, personal moving images and stills, commercially-owned photographs, graphics, music and sound. BERNARD & RABIN, *supra* note 6, at 3.

¹³⁴ *Id.* at 2.

¹³⁵ *Id.* at 168.

¹³⁶ Getty and Corbis are the largest privately owned for-profit archives in the business. *Id.* at 8-9.

¹³⁷ A "royalty-free agreement" requires payment of a one-time flat-fee. *Id.* at 34.

¹³⁸ A "rights managed agreement" sets limits on the number of times material can be used, the markets and venues in which the project featuring the material may be released or distributed, the geographic areas in which the project may be exhibited or distributed, and the time period during which the project may be exhibited or distributed. *Id.* at 169-73.

¹³⁹ BERNARD & RABIN, *supra* note 6, at 169-70.

¹⁴⁰ *Eyes on the Prize: America's Civil Rights Years 1954-1964* (PBS television broadcast 1987); *Eyes on the Prize II: America at the Racial Crossroads 1965-1985* (PBS television

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groundbreaking two-part, fourteen-hour series documenting the history of the American civil rights movement. Since the project was roughly sixty percent archival,¹⁴¹ and mostly derived from commercial sources,¹⁴² the production company could only (and barely) afford the minimum three-year licenses for desired materials.¹⁴³ By the time the first license expired in 1993, the production company had folded, leaving no one to renew the rights.¹⁴⁴ As a result:

Eyes on the Prize cannot be broadcast on any TV venue anywhere, nor can it be sold. Whatever threadbare copies are available in universities around the country are the only ones that will ever exist. It w[ould] cost \$500,000 to re-up all the rights for this film. . . . [A] piece of landmark TV history . . . has vanished.¹⁴⁵

B. Chilling Effects in Canada

While Canadian and American copyright laws are different in many material respects, both systems result in a similar ‘clearance culture’ mentality and the consequential chill and censorship that follow.¹⁴⁶

The climate of risk-aversion in U.S. documentary filmmaking has become just as stifling in Canada. In his 2005 White Paper on behalf of the DOC, copyright lawyer Howard Knopf confirmed that the “clearance culture ethos” has filmmakers and their legal advisers exercising excessive caution.¹⁴⁷ What results is a combination of paying significant clearance costs, which can comprise up to twenty-seven percent of a film’s already low budget, and fearful self-censorship of pre-existing works, a practice

broadcast 1990).

¹⁴¹ BERNARD & RABIN, *supra* note 6, at 124.

¹⁴² AUFDERHEIDE & JASZI, *supra* note 1, at 19; *see also* Ramsey, *supra* note 10, at 2. There are 272 still photographs and 492 minutes of scenes from more than 80 archives, plus music. *Id.*

¹⁴³ *See* AUFDERHEIDE & JASZI, *supra* note 1, at 19.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (statement by Jon Else). Ramsey reported in 2005 that there is a project to re-clear rights in the film so it may be rebroadcast and distributed to the educational market. Ramsey, *supra* note 10.

¹⁴⁶ KNOPF, *supra* note 5, at 6; *see also* KIRWAN COX, CENSORSHIP BY COPYRIGHT: REPORT OF THE DOC COPYRIGHT SURVEY (Nov. 15, 2005), <http://docorg.ca/sites/docorg.ca/files/Nov15-05-Censorship%20by%20Copyright%20Survey%20Report%5B1%5D.pdf>.

¹⁴⁷ KNOPF, *supra* note 5, at 6.

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that scholars have come to term “censorship by copyright.”¹⁴⁸ In his survey of Canadian documentarians for the preparation of the White Paper, Kirwan Cox found that eighty-two percent of respondents felt that the current Canadian copyright regime discouraged the production of documentaries.¹⁴⁹ As one respondent filmmaker aptly reflected:

I don't think our current copyright laws recognize sufficiently the difference between the public and private sphere. Much media material, once out there belongs in the public sphere. As do corporate logos. They put them out there. Documentarians try to document our lives. If our lives are saturated with media, images, songs, sound bites and corporate images then that is what we must document. But if we have to pay for the use of every instance and negotiate terms of use then of course the law is stacked against the documentary maker.¹⁵⁰

Every year, both independent filmmakers and the National Film Board of Canada (NFB) are forced to withdraw films from distribution due to copyright-related expenses that are far out of proportion with documentary budgets.¹⁵¹ A particularly ironic example is the case of the NFB-produced 1983 award-winning documentary entitled *The Kid Who Couldn't Miss*,¹⁵² about World War I Canadian fighter-pilot Billy Bishop.¹⁵³ Despite complaints from the Canadian Legion and Senate that the film questioned the truth in the accomplishments of the legendary pilot, the NFB kept the film in distribution.¹⁵⁴ However, in 1998, it was forced to withdraw the film since it could not generate enough revenue to cover the license renewal expenses.¹⁵⁵ Thus, although the film did not bend to political censorship, it nonetheless fell out of distribution due to “copyright censorship.”¹⁵⁶

¹⁴⁸ COX, *supra* note 146, at 2.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 13.

¹⁵¹ *Id.* at 2.

¹⁵² See *THE KID WHO COULDN'T MISS* (National Film Board of Canada 1983).

¹⁵³ COX, *supra* note 146, at 2.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

IV. FIGHTING BACK WITH FAIRNESS

A. *Responding with Fair Use in the United States*

A documentary is, at its essence, a highly appropriative art form that depends on the “raw material of reality” and its pre-existing cultural artifacts to reflect on and offer insights into past and present society.¹⁵⁷ Fortunately, the rise of the clearance culture and the threat it poses to this form of uniquely, derivative-heavy expression has experienced significant push-back from the fair use doctrine and its advocates. Increased risk-aversion has coincided with increased dialogue concerning the pivotal role of fair use as both a defensive and offensive tool for nonfiction filmmakers. It has also developed alongside a tide of litigation in which courts have made efforts to “create a generally hospitable space for nonfiction filmmaking and related media activities.”¹⁵⁸

In conducting a fair use defense analysis for documentaries accused of infringement, U.S. federal courts generally recognize that documentaries fall within the categories listed in section 107 and are entitled to the “strong presumption” that the use is both fair and “transformative.”¹⁵⁹ Drawing on the holding in *Campbell* (which asserted the importance of permitting re-uses that add to or re-contextualize pre-existing material)¹⁶⁰ courts (the Second Circuit in particular) have come to emphasize the impact of transformation on the purpose and character of the use.¹⁶¹ The

¹⁵⁷ Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 3 UTAH L. REV. 715, 718 (2007) [hereinafter Jaszi, *Motion Pictures*].

¹⁵⁸ *Id.* at 727-28.

¹⁵⁹ *Hofheinz v. Discovery Commc'ns, Inc.*, No. 00 CIV. 3802 (HB), at *3 (S.D.N.Y. Sept. 20, 2001) (citing *New Era Publ'ns*).

¹⁶⁰ According to Justice Souter:

The central purpose of this investigation [into the first factor] is to see, in Justice Story's words, whether the new work merely “supersede[s] the objects” of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.”

Campbell, 510 U.S. at 579 (internal citations omitted). As suggested by Justice Souter, transformative use harkens back to Justice Story's assertion in *Folsom* that for an abridgement to be fair, “[t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.” *Folsom*, 9 F. Cas. at 345.

¹⁶¹ *Discovery*, 2001 WL 1111970, at *3 n.6, *4 n.7, *5.

Southern District of New York explained that “[a]lthough ‘transformativeness’ is primarily analyzed in connection with the first fair use factor, it forms the basis of the entire fair use analysis.”¹⁶²

Beginning in 1996 with *Monster Communications v. Turner Broadcasting System*,¹⁶³ there was a string of fair use cases involving claims of copyright infringement against documentary filmmakers.¹⁶⁴ In *Monster*, the producers of *When We Were Kings*¹⁶⁵ (a documentary about the “rumble in the jungle”¹⁶⁶ heavyweight title fight in Zaire between George Foreman and Muhammed Ali) sued the makers of a television documentary about Ali that used less than two minutes of historical clips from *Kings*.¹⁶⁷ In its analysis of the section 107 factors, the trial court found that: (1) a biography of a public figure “undeniably constitutes a combination of comment, criticism, scholarship and research,”¹⁶⁸ which favors fair use; (2) the nature of quoted material “as historical film footage may strengthen somewhat the hand of a fair use defendant as compared with an alleged infringer of a fanciful work or a work presented in a medium that offers a greater variety of forms of expression;”¹⁶⁹ (3) the amount used was not particularly noticeable and was not the focus of the film, so it was quantitatively small and qualitatively insubstantial; and (4) that the use would not affect either the commercial reception of the original film, nor future markets for derivative works.¹⁷⁰

Although *Monster* did not discuss transformativeness *per se*, it laid the groundwork for courts to distinguish between the *active use* of “information concerning the world in which we live,”¹⁷¹ for which there is a significant public interest that requires a higher degree of statutory protection, and less critical *passive use*. Such

¹⁶² *Discovery*, 2001 WL 1111970, at *3. See also *On Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

¹⁶³ 935 F. Supp. 490 (S.D.N.Y. 1996).

¹⁶⁴ Jaszi, *Motion Pictures*, *supra* note 157, at 722.

¹⁶⁵ *WHEN WE WERE KINGS* (Das Films 1996).

¹⁶⁶ *Monster*, 935 F. Supp. at 491.

¹⁶⁷ *Id.* at 490.

¹⁶⁸ *Id.* at 493-94, quoting *Artica Inst. Inc. v. Palmer*, 761 F. Supp. 1056, 1067 (S.D.N.Y. 1991), *aff'd* 970 F.2d 1067 (2d Cir.1992).

¹⁶⁹ *Monster*, 935 F. Supp. at 494.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* See also Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC'Y U.S.A. 133, 137-38 (2003). According to Goldstein, active use is thriving in its application to fields of cultural practice like film production. *Id.*

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passive, or non-transformative, use weighed heavily against the defendant in *Elvis Presley Enterprises, Inc. v. Passport Video*.¹⁷² In *Elvis*, owners of Elvis Presley videos, photos and songs sued Passport Video for unlicensed use of materials that made up five to ten percent of the production company's sixteen-hour video documentary about the life and times of Elvis.¹⁷³ Although some clips were very brief or were used as filler during commentary for reference purposes, many video clips of performances ran in their entirety and without interruption, suggesting that Passport merely sought direct profit from the inherent entertainment value of the material.¹⁷⁴ The Ninth Circuit found that: (1) the use was predominantly a rebroadcast for *commercial gain*; (2) some video footage could be properly characterized as "newsworthy events,"¹⁷⁵ but some were *creative in nature*; (3) clips used went to the *heart* of the original works and "using a clip over and over will likely no longer serve a biographical purpose;"¹⁷⁶ and (4) the use could *undercut the future market* for licensing.¹⁷⁷ The court approved the trial court's grant of a preliminary injunction in favor of Elvis Enterprises.¹⁷⁸

In contrast to *Elvis*, the defendants in a trilogy of cases brought by the widow of a principal producer for American National Pictures (AIP) succeeded in showing transformative uses and, ultimately, in asserting successful fair use defenses.¹⁷⁹ In 2001, Susan Nicholson Hofheinz, the copyright holder in numerous science-fiction film properties acquired through her late husband, brought suits for copyright infringement against: (1) AMC,¹⁸⁰ for use of footage in its documentary about AIP and its development of the monster film genre;¹⁸¹ (2) A&E,¹⁸² for use of footage in its documentary about the actor Peter Graves;¹⁸³ and (3) Discovery

¹⁷² *Elvis*, 349 F.3d 622; see also Jaszi, *Motion Pictures*, *supra* note 157, at 723-25.

¹⁷³ *Elvis*, 349 F.3d 622.

¹⁷⁴ *Id.* at 628-29.

¹⁷⁵ *Id.* at 629; see also *Harper & Row*, 471 U.S. at 563 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.").

¹⁷⁶ *Elvis*, 349 F.3d at 629.

¹⁷⁷ *Id.* at 631.

¹⁷⁸ *Id.*

¹⁷⁹ Jaszi, *Motion Pictures*, *supra* note 157, at 725-26.

¹⁸⁰ *Hofheinz v. AMC*, 147 F. Supp. 2d 127.

¹⁸¹ *It Conquered Hollywood! The Story of American International Pictures* (American Movie Classics 2001).

¹⁸² *Hofheinz v. A&E*, 146 F. Supp. 2d 442.

¹⁸³ *Peter Graves: Mission Accomplished* (A&E Television Networks 1997).

Communications,¹⁸⁴ for use of footage in a documentary about the history of horror films.¹⁸⁵

In the case against AMC, the court found that AMC's use of film clips and photographs of the late Nicholson aimed to "educate the viewing public of the impact . . . [he] had on the movie industry."¹⁸⁶ In effect, AMC added something to the intrinsic entertainment value of the material and even stimulated, as opposed to replacing, the market for the original.¹⁸⁷ The court also made note of the fact that the entertaining and commercial nature of a use is not dispositive.¹⁸⁸ In the case against A&E, the court largely adopted the same analysis, finding that A&E did not use twenty seconds of footage from a film trailer "to recreate the creative expression reposing in plaintiff's film, [but rather] . . . for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business."¹⁸⁹ In the final case of the trilogy, the two previous companion cases influenced the court's finding that Discovery's use of three clips from a trailer for *Invasion of the Saucermen* was intended to fortify "critical" programming, and to identify "the common themes and political contexts of alien visitation films."¹⁹⁰

Although the recent judicial trend towards allowing unauthorized (but legal) use of copyrighted works bodes well for the strength of a filmmaker's fair use defense, this is really only half the battle. In an industry where an injunction of any length is bound to irreparably damage a documentary film's commercial reception, and where damages will likely swallow its comparatively meager profits, engaging in test litigation or delaying risk

¹⁸⁴ Hofheinz v. Discovery, 2001 WL 1111970, at *31.

¹⁸⁵ *100 Years of Horror* (Discovery Communications 1996).

¹⁸⁶ Hofheinz v. AMC, 147 F. Supp. 2d 127, 137.

¹⁸⁷ *Id.* at 137.

¹⁸⁸ *Id.* at 138; *see also Campbell*, 510 U.S. at 584.

¹⁸⁹ Hofheinz v. A&E, 146 F. Supp. 2d at 446-47. The court likened the transformative-biographic-use here to that in *Monster*. *Id.* at 447.

¹⁹⁰ *Discovery*, 2001 WL 1111970, at *3-4. Justice Baer took particular issue with Hofheinz's assertion that the program was "mere entertainment and fantasy and not the kind of work contemplated by the § 107 categories." *Id.* at *4. He explained:

First, Section 107 categorizes allegedly infringing works on the basis of their relationship to the subject matter depicted—i.e., whether the allegedly infringing work aims to comment, critique, report on or research a particular subject. Section 107 does not explicitly distinguish between entertaining and serious, plausible and implausible, or weighty or frivolous commentaries . . .

Id. at *4.

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assessment until a film hits screens is almost assuredly self-destructive.¹⁹¹ It is in a documentarian's best interest to ensure that she is well-versed in the facets of fair use and how it applies to a project *before* the camera rolls, thus enabling her to effectively assert her affirmative derivative rights in pre-production clearance negotiations and to plan her filming accordingly.

Pre-litigation fair use analysis turns less on "transformativeness" than it does on the tenets of what is "reasonable" and "customary" in the "relevant practice community."¹⁹² According to Professor Michael Madison, the analysis should be considered not as a case-by-case, economically-driven approach, but as one primarily determined by context and the balance between the individual and society that lies at the roots of the doctrine:

Recovering this contextual sense requires departing from the currently accepted focus on the plaintiff's 'work of authorship' as the sole relevant cultural artifact. Instead it requires focusing on situating the work of authorship in the context of the cultural and social patterns in which plaintiffs and defendants—both named individually and implicit as groups—are embedded.¹⁹³

Madison asserts that this approach has been in the background of each major U.S. Supreme Court decision regarding the fair use doctrine, and that the question underlying each case's analysis is whether "the challenged work fits within a privileged use category, or . . . whether the invocation of fair use is merely an infringer's attempt to dress its unjustifiable appropriations in borrowed plumage."¹⁹⁴ In the case of documentary films, the question is whether the "challenged production was actually a documentary, or merely an entertainment film in disguise."¹⁹⁵

With this context and custom-driven approach in mind, and

¹⁹¹ See generally LESSIG, *FREE CULTURE*, *supra* note 3, at 107 (arguing that, given the vagueness of fair use, "few would rely upon so weak a doctrine to create."); Jaszi, *Motion Pictures*, *supra* note 157, at 729 (agreeing with Lessig that the real utility of fair use is severely limited "because fair use claims can be tested only after the fact of use and then only when a creator relying on the doctrine is able to retain legal counsel and is willing to expose himself or herself to considerable economic risk in the event that the defense fails.").

¹⁹² Jaszi, *Motion Pictures*, *supra* note 157, at 729-32.

¹⁹³ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1587-88 (2004).

¹⁹⁴ Jaszi, *Motion Pictures*, *supra* note 157, at 731.

¹⁹⁵ *Id.*

with the awareness that fair use is a “use it or lose it” right,¹⁹⁶ the Center for Social Media at American University issued the *Documentary Filmmakers’ Statement of Best Practices in Fair Use*—an accessible set of industry-based guidelines and common principles for the application of fair use in documentary filmmaking.¹⁹⁷ The *Statement* encourages filmmakers to actively invoke fair use and to act in accordance with the “basic values of fairness, proportionality, and reasonableness,”¹⁹⁸ when confronted with four common situations:

- (1) Employing copyrighted material as the object of social, political or cultural critique.
- (2) Quoting copyrighted works of popular culture to illustrate an argument or point.
- (3) Capturing copyrighted media content in the process of filming something else.
- (4) Using copyrighted material in a historical sequence.¹⁹⁹

Since its inception and release in 2005, the *Statement* has found an ever-increasing following among filmmakers and gatekeepers alike, suggesting that the best-practices model may be the most tangible means of revitalizing a more permissive and expressive culture.²⁰⁰ In 2006, three filmmakers used the *Statement* to justify inclusion of their films at the Sundance Film Festival,²⁰¹ and the *Statement* catalyzed decisions by the Independent Film Channel (IFC) and the Public Broadcasting Service (PBS) to accept the applicability of fair use to reduce clearance claims and costs.²⁰² As *Statement* co-creator Peter Jaszi asserts, the most

¹⁹⁶ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 896 (2007). Gibson’s theory is that if you are excessively cautious in your filmmaking and clearance practices, this negative reinforcement will become the norm and promote the power of gatekeepers. However, if you are more assertive of your fair use rights this will court recognition and permission. *Id.*

¹⁹⁷ *Best Practices Statement*, *supra* note 15; *see also* Jaszi, *Motion Pictures*, *supra* note 157, at 732-40.

¹⁹⁸ *Best Practices Statement*, *supra* note 15, at 6.

¹⁹⁹ *Id.* at 4-6.

²⁰⁰ Jaszi, *Motion Pictures*, *supra* note 157, at 734-36; *see also* AOKI ET AL., *supra* note 5.

²⁰¹ Jaszi, *Motion Pictures*, *supra* note 157, at 734-35. The filmmakers included: Kirby Dick for *This Film Is Not Yet Rated*, a film that used over 100 uncleared quotes from popular films in a critique of the MPAA rating system; Rickie Stern and Annie Sundberg for *The Trials of Darryl Hunt*, which relied on archival broadcast news footage to document a racially-charged death penalty case; and Byron Hurt for *Hip-Hop: Beyond Beats & Rhymes*, which used music and video to argue that the music style had come to celebrate misogynist violence. *Id.*

²⁰² *Id.* at 735.

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telling evidence that fair use is transforming from its status as a limited affirmative defense to a widely recognized user right is that insurers are beginning to cover fair use claims.²⁰³

B. Responding with Fair Dealing in Canada

As discussed previously in Part II, Canadian legal scholars, practitioners, and courts have traditionally treated fair dealing as a defense to copyright infringement that is restricted to the exhaustive, enumerated grounds of research, private study, criticism and news reporting. It is an approach that lent itself to owner-centric analyses and fostered the clearance culture in Canada:

Until recently, it was generally feared that ‘fair dealing’ in Canada was restricted to the precise ambit of the detailed list of exceptions found in the Copyright Act, some of which are incredibly narrow, specific and sometime useless to the point of absurdity²⁰⁴

However, following *CCH*'s landmark emphasis of fair dealing as a user's right,²⁰⁵ there has been a shift in consciousness concerning the purposes of the doctrine and the central role it plays in enabling documentary filmmaking. Although the Canadian shift is occurring on a much shorter timeline, it is uncannily reminiscent of the shift that occurred in the United States, and has prompted the filmmaking community to develop its own industry “best practices”²⁰⁶ and to speak out for fair dealing reform.

²⁰³ *Id.* In 2007, four of the seven insurers who offer E&O began offering to cover fair use claims. *Id.*

²⁰⁴ KNOPE, *supra* note 5, at 13.

²⁰⁵ *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339 at paras. 12, 48 (Can.).

²⁰⁶ For a discussion of how best practices may be the most promising solution to attaining copyright balance and how U.S. initiatives provide a fruitful model for Canada, see D’Agostino, *Healing Fair Dealing?*, *supra* note 91, at 305:

[S]takeholders have come together to establish best practices at the university and industry-specific levels. The most successful and comprehensive initiative is a recent one from the documentary film-makers’ industry. Diverse stakeholders from the creators to the producers to the insurers have come together and developed a statement on “Best Practices in Fair Use.” This 2005 document has been well-received and there is evidence that other industries are following suit. These initiatives are most promising since clarification, understanding and respect for copyright use, creation and dissemination will best occur at the grass-roots level.

On September 11, 2009, as part of the Government's National Consultations on Copyright Modernization,²⁰⁷ the Documentary Organization of Canada (DOC) submitted comments to the Minister of Canadian Heritage,²⁰⁸ asserting that documentarians—by the very nature of their art form—rely on fair dealing for a large portion of the content they produce and that “any alterations to the [copyright] system could dramatically affect the way this vibrant cultural industry operates.”²⁰⁹ The DOC suggested amending the current fair dealing provision to include exemptions for parody and satire, and altering the language of the provision to make the exemptions non-exhaustive, thereby maintaining consistency with the six non-exhaustive fairness factors established in *CCH*.²¹⁰

On May 14, 2010, the DOC made good on its intentions to establish a “best practices” framework, which it had referenced in its submission to the Minister,²¹¹ and released a guide entitled *Copyright and Fair Dealing – Guidelines for Documentary Filmmakers*.²¹² Drawing on the results of Kirwan Cox's clearance-culture survey,²¹³ Howard Knopf's ensuing White Paper,²¹⁴ and the structure of the U.S. *Statement of Best Practices*,²¹⁵ the DOC explained the elements of Canada's triple-tiered fair dealing test and put forth filmmaker guidelines for invoking the user-right in four classes of common dealings:

- (1) The non-deliberate filming of copyrighted material (captured during the process of filming something else);
- (2) Using copyrighted material when documenting a

²⁰⁷ *Copyright Consultations*, GOVERNMENT OF CANADA, <http://www.ic.gc.ca/eic/site/008.nsf/eng/home> (last visited Mar. 6, 2011). Following the failure of Bill C-61 (An Act to Amend the Copyright Act from 2007-2008), the Government launched a consultation process seeking Canadians' views on the appropriate nature, extent and scope of copyright reform. The public consultations took place from July 20, 2009 to September 13, 2009.

²⁰⁸ *Copyright Consultation Submission*, DOCUMENTARY ORGANIZATION OF CANADA (Sept. 11, 2009) [hereinafter DOC, *Submission*], available at http://docorg.ca/sites/docorg.ca/files/DOC_Copyright_Consultation_Submission_FINAL.pdf.

²⁰⁹ *Id.* at 1.

²¹⁰ *Id.* at 1-2.

²¹¹ *Id.* at 1.

²¹² Documentary Organization of Canada, *Fair is Fair—The Documentary Organization of Canada (DOC) Releases Guidelines to Fair Dealing Practices for Documentary Filmmakers* (May 14, 2010), http://docorg.ca/sites/docorg.ca/files/Fair_Is_Fair_press_release.pdf.

²¹³ COX, *supra* note 146.

²¹⁴ KNOPE, *supra* note 5.

²¹⁵ *Best Practices Statement*, *supra* note 15.

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- newsworthy occurrence (whether current or historical);
- (3) Using a copyrighted material for the purpose of critiquing or reviewing either the composition of the material, or the views expressed in the material; [and]
 - (4) Using a copyrighted work for the purpose of criticizing or reviewing different material.²¹⁶

Although the categories are worded and ordered differently than those in the U.S. *Statement*, they highlight the uses of third-party works that are at the core of documentary filmmaking and common among documentarians operating in a media-saturated culture. These uses, the DOC argues, require a more flexible fair dealing provision and a more liberal statutory interpretation than that of the past.²¹⁷

On June 2, 2010, the Canadian House of Commons did its first reading of and tabled Bill C-32,²¹⁸ the third in a string of proposals over the past decade to overhaul the country's outdated copyright system.²¹⁹ After a few days in debate, the bill passed through a second reading on November 5, 2010 and progressed through a series of twenty meetings that allowed private parties to speak before a legislative committee on the pros and cons of the proposed legislation.²²⁰ Parliament's dissolution on March 26,

²¹⁶ DOC, *Guidelines*, *supra* note 15.

²¹⁷ For scholarship emphasizing the need for flexible fair dealing, see Michael Geist, *Copyright Consultations Submissions*, 2 OSGOODE HALL REV. L. POL'Y 2, 59 (2009) [hereinafter Geist, *Copyright Consultations Submissions*], available at <http://ohrlp.ca/index.php/Previous-Journal/Michael-Geist-Copyright-Consultations-Submission-2009-2-Osgoode-hall-Rev.L.Pol-y.-59.html>:

The Supreme Court of Canada has already ruled that Canada's fair dealing provision must be interpreted in a broad and liberal manner. Yet the law currently includes a limited number of categories (research, private study, criticism, news reporting, and review) that renders many everyday activities illegal. The ideal remedy to address other categories such as parody, time shifting, and device shifting is to make the current list of categories illustrative rather than exhaustive. This can be best achieved by adding the words "such as" to the current provision. This would be a clean, technology-neutral approach.

Id. at 63 (internal citation omitted).

²¹⁸ Bill C-32, *The Copyright Modernization Act*, 3d Sess., 40th Parl., 2010 [Bill C-32].

²¹⁹ See Ryan J. Black, Alison Hayman, Sarah Kilpatrick, and Peter E.J. Wells, *Bill C-32 – The Copyright Modernization Act*, MCMILLAN LLP (June 4, 2010), <http://www.mcmillan.ca/93384>; see also Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005 [Bill C-60]; Bill C-61, *An Act to Amend the Copyright Act*, 2d Sess., 39th Parl., 2007-2008 [Bill C-61]. Neither Bill C-60 nor Bill C-61 proposed amendments to the fair dealing language of cl. 29, however, but neither bill passed into law.

²²⁰ Status of the Bill, Bill C-32, 3rd Sess., 40th Parl. (March 3, 2010 – March 26, 2011),

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2011 prevented Bill C-32 from passing through a third reading by the House and subsequent approval by the Senate.²²¹ However, it was the most successful modernization effort to date and its reincarnation, Bill C-11, has brought its provisions back to life and back to the legislative table.²²²

If Bill C-11 passes into law as currently written, it will extend Canada's fair dealing exceptions to copyright infringement beyond research and private study to include the use of copyrighted works for educational purposes, parody, and satire.²²³ This change, coupled with the six fair dealing factors enumerated by the Supreme Court of Canada in *CCH*,²²⁴ would seem to bring Canadian fair dealing into much closer alignment with the preferred uses and fair use factors codified in section 107 of the U.S. Copyright Act.²²⁵ Such a result is favored by fair use reform advocates like the DOC, but fiercely opposed by Professor Barry Sookman, one of the leading authorities on intellectual property law in Canada.²²⁶

LEGISINFO, <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=23&Type=0&Scope=I&query=7026&List=stat>. (last visited Mar. 6, 2011).

²²¹ See *supra* notes 24-25.

²²² Geist, *supra* notes 26-27. For updates on the bill's status, see *Bill C-11*, DIGITAL COPYRIGHT CAN. – ALL CANADIAN CITIZENS ARE “RIGHTS HOLDERS”!, <http://www.digital-copyright.ca/billc11> (last visited Oct. 8, 2011).

²²³ Bill C-11, *The Copyright Modernization Act*, at cl. 29 (“Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”) (emphasis added). *Id.*

²²⁴ *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339 (Can.).

²²⁵ 17 U.S.C. § 107.

²²⁶ Barry Sookman & Dan Glover, *Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations*, 2 OSGOODE HALL REV. L. POL’Y 139, 141 (2009) [hereinafter Sookman & Glover, *Joint Submission*], available at <http://ohrlp.ca/index.php/Previous-Journal/Sookman-and-Glover-Why-Canada-Should-Not-Adopt-Fair-Use-2009-2-Osgoode-Hall-Rev.L.Pol-y-139.html>. For a revised version of the original Joint Submission, see Barry Sookman, *Copyright Reform for Canada: What Should We Do? Copyright Consultations Submission*, 2 OSGOODE HALL REV. L. POL’Y 73, 102-104 (2009), available at <http://ohrlp.ca/index.php/Previous-Journal/Barry-Sookman-Copyright-Consultations-Submission-2009-2-Osgoode-Hall-Rev.L.Pol-y-73.html>. Sookman has repeatedly spoken out against the idea that Canada adopt a broad “fair use” regime like the one in the United States:

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

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Bill C-11's current language, however, represents less of a victory for either side of the fair dealing debate than it does a concerted effort at compromise between the two. The amended fair dealing provision expands the categories of exemptions to include "parody or satire"—as requested by the DOC—but it maintains the exhaustive (as opposed to illustrative) categories advocated by Sookman.²²⁷ In response to the introduction of Bill C-32, the DOC issued a press release expressing its dismay at the proposed amendments:

Instead of flexible fair dealing, Bill C-32 offers expanded categories of dealings. Although [the] DOC applauds the government's addition of new fair dealing exceptions such as parody and satire, the government's continued categorical approach to fair dealing is [] regrettable.... Flexible fair dealing provisions would allow for fulsome creative expression, and permit topical social commentary without forcing filmmakers to negotiate unnecessary obstacles. [The] DOC believes that with industry-based guidelines and industry-defined best practices, fair is fair.²²⁸

The frustrations elicited by the restrained amendment are compounded by the fact that lower courts have evidenced recent disloyalty and a departure from the non-exhaustive six-factor fairness test developed by the Supreme Court of Canada in *CCH*.²²⁹ The state of fair dealing is, as Canadian copyright scholar Meera Nair aptly described, at a crossroads.²³⁰ It remains to be seen whether Parliament will further accommodate the likes of Nair, Michael Geist,²³¹ and the DOC, or maintain the conservative

been described as an "astonishingly bad" system amounting to little more than "the right to hire a lawyer."

Id. (internal citation omitted). See also Sookman & Glover, *More Fickle Than Fair*, *supra* note 13; Barry Sookman, *Should Canada Adopt "fair use" as Proposed by NDP MP Charlie Angus?*, BARRYSOOKMAN.COM (Mar. 18, 2010), <http://www.barrysookman.com/2010/03/18/should-canada-adopt-fair-use-as-proposed-by-ndp-mp-charlie-angus>.

²²⁷ Sookman & Glover, *Joint Submission*, *supra* note 226.

²²⁸ Documentary Organization of Canada, *Provisions Within The New Copyright Bill Hinder Documentary Filmmaking*, DOC.ORG.CA (June 2, 2010), http://docorg.ca/sites/docorg.ca/files/Bill_C32_Fair_is_Fair.pdf.

²²⁹ For an example of a lower court ignoring the holding of *CCH*, see *Corp. Sun Media v. Syndicat canadien de la fonction publique*, 2007 QCCS 2943.

²³⁰ Meera Nair, *Fair Dealing at a Crossroads*, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA (Michael Geist ed., 2010).

²³¹ Geist, *supra* note 217, at 63. On December 1, 2010, Geist, Sookman, and D'Agostino appeared before the legislative committee. Geist reiterated that a more

stance urged by Sookman.²³²

V. PUTTING FAIRNESS IN CONTEXT

Neither fair use nor fair dealing exists in a vacuum—their implications for non-fiction filmmakers cannot be fully ascertained in isolation from related domestic and international legislation. It is within this context that the two regimes, although increasingly similar in their objectives, present different possibilities for advancing freedom of expression in the industry. It is also within this context that modernized Canadian fair dealing, although still in its formative stages, offers greater promise for cooperation among rights-owners and users, and the decline of the clearance culture on an international scale.

The unique breadth and flexibility of the U.S. fair use doctrine has elevated it to the rank of a panacea²³³ among most domestic and international non-fiction filmmakers. Where the Second Circuit and the Supreme Court have repeatedly endorsed the importance of transformative derivative uses and de-emphasized the import of their commercial nature in a fair use analysis, U.S. legal precedent supports a non-fiction filmmaker's user-rights. In addition, on July 26, 2010, the Librarian of Congress (LOC) announced that circumvention of technological protection measures (TPMs)²³⁴ to access and use short portions of motion pictures for the purpose of documentary filmmaking would not be subject to the statutory prohibition against circumventing access controls.²³⁵ This timely exemption for this class of works suggests fortification of filmmakers' derivative rights and promotes expanded use of copyrighted works for criticism, comment, and educational purposes. These judicial and legislative moves,

flexible two-stage, two-part fair dealing analysis, similar to that of U.S. fair use, would afford adequate protection for rights holders. First, the use must qualify for one of the fair dealing exceptions. Second, the use must be fair according to the six non-exhaustive *CCH* factors. He suggested that codifying the factors would ensure that judges are required to assess fairness, making fair dealing "fair for all" and not a "free for all," as Sookman suggests. *Legislative Committee on Bill C-32 (CC32-05)*, 3d Sess., 40th Parl., (Dec. 1, 2010), <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4839067&Language=E&Mode=1&Parl=40&Ses=3>.

²³² Sookman & Glover, *Joint Submission*, *supra* note 226.

²³³ *Id.*

²³⁴ A TPM is an element of what is commonly referred to as a digital rights management (DRM) system. See Geist, *Copyright Consultations Submission*, *supra* note 217, at 59-72.

²³⁵ Exemption to prohibition against circumvention, 37 C.F.R. § 201 (2010).

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combined with the groundbreaking publication of the *Statement of Best Practices*, make U.S. fair use the preferred weapon in the war against the clearance culture.

However, fair use presents its fair share of shortcomings, both domestically and abroad. For example, as discussed previously in Part II.B, the breadth and flexibility of fair use's general exceptions are condemned as often as they are praised. Prominent U.S. copyright scholars Lawrence Lessig,²³⁶ David Nimmer,²³⁷ Michael Madison,²³⁸ and Kenneth Crews²³⁹ have all spoken out about the doctrine's unpredictability and the fact that it has become "abstract 'to the point of incoherence.'"²⁴⁰ This unpredictability, combined with the recent extension of the U.S. copyright term by twenty years,²⁴¹ fuels the anxious aggression of copyright owners to protect their interests and the apprehension of filmmakers to assert theirs. Further, it perpetuates the reign of the clearance culture and undermines the pursuit of balance between private and public interests, which is the *sine qua non* of fair use.

Unpredictability is also the pressure point targeted by international copyright scholars in their assertion that the doctrine is not compliant with the three-step test mandated by international treaty obligations.²⁴² Under Article 13 of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),²⁴³ which incorporates Article 9(2) of the 1886 Berne Convention for the Protection of Literary and Artistic Works (Berne),²⁴⁴ "Members shall confine limitations and exceptions to exclusive

²³⁶ LESSIG, *FREE CULTURE*, *supra* note 3.

²³⁷ Nimmer, *supra* note 86.

²³⁸ HEINS & BECKLES, *supra* note 5, at 11.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) [hereinafter CTEA].

²⁴² Sookman & Glover, *Joint Submission*, *supra* note 226, at 2-3.

²⁴³ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

²⁴⁴ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne Convention] (the 1979 amended version does not appear in U.N.T.S. or I.L.M.). Article 9(2) of the current version provides that "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in *certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*" *Id.* (emphasis added).

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[copy]rights to *certain special cases* which *do not conflict* with a normal exploitation of the work and *do not unreasonably prejudice* the legitimate interests of the rights holder.”²⁴⁵ This provision requires that: “(1) the exception must be for a specific circumstance; (2) it must not conflict within the realm of exchange that is usually associated to the [original] work; and (3) [it] must not unreasonably detract from the author’s wellbeing.”²⁴⁶ In his study for the World Intellectual Property Organization (WIPO) in 2003, respected Australian scholar Sam Ricketson concluded that the open-ended nature of fair use, as opposed to the closed-list approach used in all but four of the 164 members of Berne,²⁴⁷ may well be non-compliant²⁴⁸:

It is quite possible that any specific judicial application of Section 107 will comply with the three-step test as a matter of fact; 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 [in section 107] raises issues with respect to unspecified purposes (the first step) and with respect to the legitimate interests of the author (third step).²⁴⁹

For filmmakers in the 160 member nations that maintain a more restrictive approach, emulating U.S. fair use and employing U.S. best practices in their work could be a risky endeavor.

Modernized Canadian fair dealing—which emphatically aligns itself with the triple-tiered fair dealing analysis of its fellow commonwealth countries and with the three-step exceptions test of its fellow Berne signatories—presents the international filmmaking community with a model that is ultimately more practical and less risky. Although ardent proponents of fair use fault Canada’s proposed fair dealing provisions for being too rigid, and criticize the continuation of its triple-tiered approach as unduly burdensome for users, there is a silver lining to these aspects of the doctrine. In practice, fair dealing should not demand more of a Canadian filmmaker than fair use does of an American one. Ultimately, to establish a strong case for fair use,

²⁴⁵ TRIPS Agreement, *supra* note 243, at art. 13 (emphasis added).

²⁴⁶ Nair, *supra* note 230, at 106.

²⁴⁷ AUFDERHEIDE & JASZI, *supra* note 1.

²⁴⁸ Nair, *supra* note 230, at 106.

²⁴⁹ SAM RICKETSON, WIPO – STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, WIPO STUDY ON LIMITATIONS AND EXCEPTIONS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT 69 (2003).

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both must take care to use copyrighted materials for a discernable analytic purpose (i.e., not solely for their entertainment value), and each must—or in the case of the United States, is well advised to—acknowledge the original creator in the credits of their work.

The fixed purposes set forth in Bill C-11's section 29 (research, personal study, education, parody or satire),²⁵⁰ section 29.1 (criticism or review), and 29.2 (news reporting), need not hamstring a Canadian documentarian's derivative uses. If the Canadian Parliament, judiciary, and filmmaking industry adopt something akin to Howard Knopf's proposed definition of "documentary"—that it "include any cinematographic work or sound recording, the purpose of which is to convey factual information and analysis relating to actual events or issues"²⁵¹—and if a documentarian's use of copyrighted materials is loyal to this accepted purpose, his use should fall within the enumerated categories and satisfy tier one of the fair dealing test. If the use then survives the six-factor fairness analysis set forth in *CCH*—which nearly mirrors those factors codified in section 107 of the U.S. Copyright Act—it will satisfy tier two of the fair dealing test. Lastly, if the filmmaker affords adequate "mention" of the source and author of the material, she will satisfy tier three.²⁵²

While the text of the modernized fair dealing provisions might appear to make few changes and accommodations to meet the needs of non-fiction filmmakers, the user-centric mindset ushered in by the Supreme Court of Canada in *CCH* is poised to re-direct judicial interpretation of section 29. Assuming that *CCH* can withstand challenges from parties who feel threatened by expanded user rights and that it will remain good law,²⁵³ a more

²⁵⁰ According to Carys Craig, section 29's inclusion of both parody and satire actually improves upon section 107, whose failure to make explicit mention of these purposes has led U.S. courts to draw problematic distinctions between the two. See Carys Craig, *Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32*, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 186 (Michael Geist ed., 2010). The Ninth Circuit has maintained a strict distinction, such that satire, which need not "mimic an original to make its point," presents a weaker fair use case than parody. *Campbell*, 510 U.S. at 580-81. For example, see also *Dr. Seuss Enters. L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

²⁵¹ KNOPF, *supra* note 5, at 3.

²⁵² DOC, *Guidelines*, *supra* note 15, at 13 (explaining that "[t]he use of credits at the end of documentary films, or onscreen captions, should satisfy this obligation. Oral attribution through voiceovers also likely fulfills this requirement."). It is worth mentioning that the purposes of private study and research do not require attribution.

²⁵³ See Michael Geist, 'Legislative Guidance' on Fair Dealing: The Plan to Reverse *CCH*?, MICHAEL GEIST'S BLOG (Aug. 27, 2010), <http://www.michaelgeist.ca/content/>

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liberal judicial stance bodes well for non-fiction filmmakers and their efforts to situate their derivative uses within the enumerated categories.

In addition to a changed perspective within the courts, several enduring Canadian statutes are in place to fortify and elevate fair dealing as a means to further freedom of expression in non-fiction film. First, unlike the United States (whose recently extended copyright term has tightened its grip on U.S. cultural artifacts),²⁵⁴ the Canadian copyright term is currently twenty years shorter, allowing for quicker passage of materials into the public domain.²⁵⁵ Second, although the *Statement of Best Practices* lists incidental use among its four classes of situations that should qualify as fair use for filmmakers,²⁵⁶ the CCA provides an explicit statutory exception for incidental capture in public places.²⁵⁷ Under section 30.7, “filmmakers may include all or part of another work in a documentary film where the inclusion is incidental and not deliberate.”²⁵⁸ In addition, section 32.2 permits “filmmakers to film Canadian buildings or publicly situated sculptures, no matter how well known they may be and no matter how prominently they might figure in the scene.”²⁵⁹ Third, where the United States has failed to enact much needed “orphan works”²⁶⁰ legislation, section 77 of the CCA “empowers the Copyright Board to issue a non-exclusive license to an applicant whose reasonable efforts to locate a copyright owner have been unsuccessful.”²⁶¹ Though foreign reports have criticized the legislation for imposing an undue

view/5276/125.

²⁵⁴ CTEA, *supra* note 241 (stating that the term of copyright is the life of the author plus seventy years).

²⁵⁵ Copyright Act, R.S.C., 1985, c. C-42, § 6 (Can.) (stating that the term of copyright is the life of the author plus fifty years).

²⁵⁶ *Best Practices Statement*, *supra* note 15, at 5 (stating that the third class of situation is “Capturing Copyrighted Media Content in the Process of Filming Something Else.”).

²⁵⁷ Copyright Act, R.S.C., 1985, c. C-42, § 30.7 (Can.).

²⁵⁸ Copyright Act, R.S.C., 1985, c. C-42, § 30.7 (Can.); *see also* DOC, *Guidelines*, *supra* note 15, at 6.

²⁵⁹ Copyright Act, R.S.C., 1985, c. C-42, § 32.2 (Can.); *see also* DOC, *Guidelines*, *supra* note 15, at 7.

²⁶⁰ The term “orphan work” is used “to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.” REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 1 (2006).

²⁶¹ JEREMY DE BEER & MARIO BOUCHARD, COPYRIGHT BOARD OF CANADA, CANADA’S “ORPHAN WORKS” REGIME: UNLOCATABLE COPYRIGHT OWNERS AND THE COPYRIGHT BOARD (2009).

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administrative burden on the Canadian Copyright Board,²⁶² the regime (in place since 1990) is arguably one of the most advanced attempts at addressing the orphan works problem.²⁶³

Critics of Bill C-32 (and now Bill C-11) have asserted that its unforgiving anti-circumvention laws will stymie any legislative and judicial progress made in expanding fair dealing.²⁶⁴ When the DOC submitted its *Copyright Consultation Submission* to the Minister of Industry, it requested more flexible fair dealing and more lenient regulations concerning circumvention of TPMs for the purposes of fair dealing.²⁶⁵ In its current form, Bill C-11 offers no exclusions for accessing content for non-infringing purposes, making the recent reprieve granted to U.S. documentarians seem like a comparatively potent advantage. However, it should be noted that while the U.S. filmmaking community fiercely advocated for and touts the anti-circumvention exemption as a significant victory,²⁶⁶ it is more a symbolic gesture than a mechanism of practical import. Although it allows documentary filmmakers to access material on encrypted DVDs without violating the Digital Millennium Copyright Act (DMCA),²⁶⁷ the exemption still requires showing “fair use” of that material, is very

²⁶² *Id.*

²⁶³ *Id.* at 7; see also Amanda N. Wilson, Case Comment, *Jet-Setting Orphan Works: The Transnational Making Available of Works of Unknown Authorship, Anonymous Works, or Lost Authors*, 23 EMORY INT'L L. REV. 783 (2009).

²⁶⁴ Even Michael Geist argues that the bill's continued “unwillingness to budge on digital locks—even as the U.S. has created new exceptions—is easily its biggest flaw,” and that it “undermines much of the attempt to strike a balance.” Geist, *Copyright is Back*, *supra* note 26. See Geist, *Bill Remains Flawed*, *supra* note 27; Geist, *Flawed but Fixable*, *supra* note 23; Rafael Ruffalo, *Copyright Reform Law Returns with Digital Locks Rule*, ITWORLDCANADA (Sept. 29, 2011), <http://www.itworldcanada.com/news/copyright-reform-law-returns-with-digital-locks-rule/144040> (last visited Oct. 12, 2011).

²⁶⁵ DOC, *Submission*, *supra* note 208, at 4.

²⁶⁶ See *Documentary Filmmakers Win Exemption from Digital Millennium Copyright Act*, INT'L DOCUMENTARY ASS'N (Jul. 26, 2010), <http://www.documentary.org/node/18929> (last visited Oct. 12, 2011); Barry Walsh, *New DMCA Ruling Hailed as a Victory for Doc-Makers*, REALSCREEN.COM (Jul. 26, 2010), <http://realscreen.com/2010/07/28/dmcaruling-20100728> (last visited Oct. 12, 2011); *EFF Wins New Legal Protections for Video Artists, Cell Phone Jailbreakers, and Unlockers*, EFF.ORG (Jul. 26, 2010), <https://www.eff.org/press/archives/2010/07/26> (last visited Oct. 12, 2011).

²⁶⁷ 37 C.F.R. § 201 (2010). Section 1201(a)(1)(A) of the Copyright Act prohibits circumventing a technological measure that effectively controls access to a copyrighted work. Without the new exemption, any documentary filmmaker who “rips” motion picture content from DVDs protected by the Content Scrambling Systems (CSS), whether for fair or unfair use, violates the United States Code.

narrowly limited to “motion pictures,”²⁶⁸ and only applies until 2012, when the Library of Congress will revisit all exemptions.²⁶⁹

VI. CONCLUSION

While non-fiction filmmakers regard the U.S. fair use doctrine as the pioneering force behind their battle against clearance cultures, and it undoubtedly remains a pivotal resource, modernized Canadian fair dealing is coming into its own as a significant asset in that undertaking. For advocates of more flexible fair dealing, like the DOC, recent developments have admittedly been found wanting. Without codification into the CCA, the user-centric groundwork laid down in *CCH* may be vulnerable to reversal. In its current formulation, which retains a closed-list of fair dealing categories and strict prohibitions against circumventing media access controls, Bill C-11 has its flaws. However, if viewed in the larger context of related domestic and international legislation and proclivities, these judicial and legislative concerns take on a less sinister character. Instead of shortcomings, they may be viewed as prudent attempts to achieve the most productive balance possible between the opposing factions in the copyright debate. In this fair dealing framework, both owners and users must make some concessions to accommodate the interests of the other side.

Ultimately, it is the balance between private and public interests that will encourage greater cooperation and fewer

²⁶⁸ 37 C.F.R. § 201. The class of exempted works is:

[L]imited to include only motion pictures rather than all audiovisual works. Because there was no evidence presented that addressed any audiovisual works other than motion pictures, there was no basis for including the somewhat broader class of audiovisual works (which includes not only motion pictures, but also works such as video games and slide presentations).

Id.

²⁶⁹ *Id.* Every three years, the Register of Copyrights conducts a rulemaking proceeding in which it seeks comments from the public regarding the adverse effects of access controls on its ability to engage in non-infringing uses of copyrighted works. The Register recommends final regulations to the Librarian of Congress, who will then announce:

[A]ny class of copyrighted works for which the Librarian has determined, pursuant to rulemaking . . . that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and [that] the [DMCA's Section 1201(a)(1)] prohibition [against circumvention] . . . shall not apply to such users with respect to such class of works for the ensuing 3-year period.

Id. (internal quotations omitted).

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adversarial confrontations between copyright owners and the non-fiction filmmakers that make use of their cultural property. Although this Note has centered its analysis on filmmakers as ‘users,’ it is equally important to recognize that once filmmakers reach the final cut on their project, they transition into the realm of ‘owners.’ It should not seem outlandish to predict that filmmakers who experience a civil and cooperative clearance process as users will foster just such an environment once they become copyright owners themselves. It is a self-reinforcing cycle that could frustrate the growth of clearance cultures and their chilling effects on creativity and freedom of expression.

From this perspective, modernized Canadian fair dealing has the potential to surpass U.S. fair use as the predominant guide for non-fiction filmmakers. Regardless of Bill C-11’s fate, the Canadian filmmaking industry appears to have seized the opportunity. In their *Resolution on Freedom of Expression and Information in Documentaries*, Doc IT and the IDA recognized the Canadian Independent Organization and the Film Board of Canada for their support in the endeavor to create a European Best Practices guide.²⁷⁰ The industry awaits a report on that project’s development, but in the meantime, the DOC has been hard at work. In its brief to the legislative committee on Bill C-32 in February,²⁷¹ the DOC reiterated its support for the bill’s foundations but urged the Committee to make revisions to achieve greater “fairness, balance, and clarity.”²⁷² In March, the organization gathered Canadian documentary and legal experts in Vancouver for a panel on the intersection between non-fiction film production, copyright and fair dealing²⁷³ — the last stop on what the DOC called the National Fair Dealing Road Show.²⁷⁴

²⁷⁰ DOC IT & IDA, *Resolution*, *supra* note 16, at 2.

²⁷¹ DOC, *A Brief for the Legislative Committee on Bill C-32’s Study of Bill C-32, An Act to Amend the Copyright Act* (Feb. 17, 2011), available at <http://docorg.ca/en/copyright-fair-dealing>.

²⁷² *Id.* at 4.

²⁷³ DOC, *Fair Dealing Hits The Road!* (Jan. 19, 2011), <http://docorg.ca/en/copyright-fair-dealing>; DOC, *DOC Fair Dealing Roadshow In Vancouver* (Mar. 2, 2011), <http://docspace.ca/event/doc-fairdealing-roadshow-in-vancouver>.

²⁷⁴ DOC, *Fair Dealing Hits The Road!*, *supra* note 273. During the 2011 Hot Docs Canadian International Film Festival in Toronto, North America’s largest documentary festival, conference and market, industry stakeholders joined to discuss the state of international documentary cinema. On May 6, 2011, Lisa Fitzgibbons, Executive Director of the DOC, and Patricia Aufderheide, Director of the Center for Social Media, appeared as panelists at *The Doc Summit: Fair Dealing and Fair Use: A Cross-Border Analysis*, a

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The DOC's engagement with the legislative process, and its comprehensive cross-Canada effort to educate filmmakers on the bounds of copyright law should inspire hope within the international documentary community—Canadian fair dealing may well prove an untapped resource for promoting freedom of expression in non-fiction film.

town hall forum on the motivations of filmmakers to avail themselves of fair use and fair dealing. For more on the festival, see HOT DOCS, <http://www.hotdocs.ca> (last visited Oct. 18, 2011).