FAIR DEALING: THE NEED FOR CONCEPTUAL CLARITY ON THE ROAD TO COPYRIGHT REVISION

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(A) Introduction

Section 17(2) of the Canadian Copyright Act[1] provides that "any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary" does not constitute an infringement of copyright.

This Article provides certain information with respect to the penumbra surrounding the doctrine of fair dealing, but it, like the balance of the Act, is remarkable for its failure to establish, reveal or, in any manner, provide a measure of insight into the core of the issue, the meaning of the term "fair dealing". Section 17(2) does tell us that whatever the meaning of the term, the doctrine does not have universal application to all activities, but rather, is restricted to the five activities, or purposes, prescribed. Section 17(2) further reveals that not all dealings with works protected by copyright, even where same are for one of the enumerated purposes are axiomatically "fair" dealings. This, however, is the extent of the information with respect to this

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1 R.S.C. 1970, C. 30.

* The cartoon appearing on the preceeding page, originally captioned "What is 'fair use'?", is by Bion Smalley and is reproduced with the kind permission of the American Library Association.

doctrine provided by the Act.

The "flesh" of this semantic skeleton has been supplied over the years via diverse pronouncements by the Courts. However, it has been principally the Courts of the countries of the Commonwealth, whose respective copyright legislations have contained comparable fair dealing provisions, and to a degree the Courts of the United States vis-à-vis the similar[2] judicially-established doctrine of "fair use", which have provided Canadians with whatever understanding of the term "fair dealing" prevails today.

It would appear that since its enactment in 1924, the Act has given rise to but one court case to which the issue of fair dealing has been of significant import, Zamacois v. Douville & Marchand.[3]

However, even in the Zamacois case, the defendants' claim of fair dealing in respect of plaintiffs' work was only one of three major issues addressed by the Exchequer Court.

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[2] The similarities and differences between the doctrines of "fair dealing" and "fair use" are highlighted at page 19.

[3] 2 C.P.R. (1943), p. 270.

Further, the sole pronouncement by the Court with respect to fair dealing was based neither on earlier Canadian nor Anglo-American judicial pronouncements, nor on the views of similarly situated legal scholars, but rather, on the views expressed by the authors of a text book on French copyright law,[4] rendering its precedential value of questionable force.

The pronouncement by the Court, whatever its diminished precedential weight, could have been of greater value had it provided further detail about what fair dealing is, rather than stating, as it did, what fair dealing is not. The Court simply stated:

> "The right to quote is permitted by the Court; to refuse this would in effect suppress the right of literary criticism. However, a critic cannot, without being guilty of infringement, reproduce in full, without the author's permission, the work which he criticizes.[5] Even if the indication of the name of the author and the source may, in certain cases, indicate good faith on the part of the infringer, it is nevertheless infringement."

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[4] Huard and Mach, Répertoire de legislation, de doctrine et de jurisprudence en matière de propriété literaire et artistique, 1909 ed.

[5] Supra, note 3, at 302 and 304.

The preceding passage constitutes the entire body of Canadian case law on fair dealing. One would be quite mistaken, however, to conclude from the absence of even a semblance of a body of Canadian case law or legal commentary[6] that the doctrine of fair dealing has limited application or impact; rather, its potential import seems to bear an inverse relationship to the existing volume of analysis of the doctrine. Indeed, an eminent American jurist, Mr. Justice Learned Hand, was prompted to comment that the parallel doctrine of fair use was "the most troublesome in the whole law of copyright"[7] and the Economic Council of Canada went so far as to describe fair dealing as "the most important"[8] exemption from copyright.

The authors of the Report of the Economic Council of Canada on Copyright, penned in 1971, at a time when Canada and the rest of the world were on the threshhold of a technological

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[6] The writings of Professor Victor Nabhan, professor a la faculté de droit, Université Laval, represent the most extensive, perhaps the only significant, body of legal literature on the subject of fair dealing to date. See Nabhan, "La Photocopie et le droit d'auteur au Canada, "Revue Internationale du Droit d'Auteur, Jan., 1979, Vol. 99 at p. 3; Vinke, Côté & Nabhan, "Problèmes de droit d'auteur en éducation," infra, note 21; Nabhan, "Quelques aspects des problèmes juridiques posés par la vidéoproduction: l'affaire Betamax et ses répercussions au Canada," La revue canadienne du droit d'auteur, Vol. I, 1980.

[7] Dellar v. Samuel Goldwyn Inc., 107 F. 2d 661 (2d Cir. 1939).

[8] Economic Council of Canada, Report on Intellectual and Industrial Property, Jan. 1971, at p. 41.

explosion which would prove to have dramatic importance to those touched by matters of copyright, were keenly aware of the nascent importance of the fair dealing doctrine vis-à-vis the burgeoning reproduction technologies. The Report advised:

> "The 'fair dealing' provisions are mostly concerned with various uses related to news reporting and private study. The specific details depend on the type of work covered, and their complexity has caused a great amount of confusion in specific cases. Problems with these are growing rapidly in conjunction with the expanded use of new technologies for secondary multiplication of copyrighted works, by devices such as photocopiers and tape recorders.
>
> What is happening in practice is that an increasingly unreasonable burden is being thrown on the consciences and amateur legal expertise of such people as librarians[9] and copying-machine operators, the vast majority of whom doubtless have no great penchant for the role of law-breaker ... as the law stands, there is a growing enforcement problem, largely left to persons without special legal knowledge whose efforts are at best likely to produce a very uneven and therefore discriminatory result."[10]

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[9] See for example, M.L. Parker, "Photocopying in University Libraries and the Canadian Law of Copyright", Canadian Library Association, occasional paper No. 77, April, 1969, Economic Council of Canada. See also Note 159 infra.

[10] Supra, note 8, at 133.

However, the E.C.C. Report also revealed, albeit unwittingly, an equally disconcerting trend[11] which would prove to be of comparable importance to the problem directly addressed by the Report. As concern continued to grow over the capacity of new technologies (initially reprographic, and more recently audio/visual) to impact on the ability of copyright owners to control access to their works, the theretofore multifaceted doctrine of fair dealing began to be perceived through an increasingly narrower focus: "dealing" or "use" viewed solely in terms of reproduction, and "reproduction", in turn, viewed solely in terms of its realization via specific technological means.

In a most compelling and perceptive work, "Exemptions and Fair Use in Copyright", author Leon Seltzer commented upon the form in which the fair use and exemption sections of the new United States Copyright Act[12] were cast inappropriately

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[11] This trend has continued unabated; see, for example, the Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, October-December 1975, Chapter II; the background chapter on fair use which, except for one paragraph, dealt solely with the question of educational exemptions; see also the "Statement of the Special Libraries Association for presentation at the Copyright Office Public Hearing on the effects of 17 U.S.C. 108, January 19, 1980, Chicago." At p. 3 of the Statement can be found the following observation with respect to the library exemption provisions of the new U.S. Copyright Act:

> "Section 108 has expanded the examples of fair use which are now specifically lawful, such as copies made of unpublished works for preservation, and of published works for replacement, including entire out of print works not reasonably available."

[12] Copyright Act of 1976, 17 U.S.C.

and unsuccessfuly as a reflection of Congressional preoccupation with the impact of the new technologies. One passage by Seltzer, though somewhat lengthy, merits reproduction in full, as it concisely isolates and examines the path which Congress should have followed and where it lost sight of the necessary overview of the issues and, thus, provides Canadian legislators with the opportunity to benefit from the author's analysis and to avoid the same pitfalls.

> "The principal reason for Congress' failure really to define fair use, to order the factors (i.e. the four specified criteria to be used in determining whether a use is "fair"), in some coherent way, or to draw a clearer line, between fair use and exempted uses, as the legislative history of its gestation makes clear ... is the disorienting impact of photocopying and phonorecording technology. The advent of such technology, introducing a new and unsettling dimension into the whole copyright scheme, required of Congress a reexamination of fundamental copyright principles, a careful analysis in general terms of the internal dynamics of the copyright mechanism, the making of distinctions among the various elements to be considered, and the ordering of these considerations on a coherent way. What was needed was a sharpening of the concept of fair use, a narrowing of the definition so that it could with more precision be applied to cases by the courts, to whom the problem was expressly returned. Instead, almost the entire attention of Congress with respect to fair use was devoted to one aspect of the technical problem of photocopying, and the complex issues having in general to do with fair use were focused solely on the resolution of a single case - educational copying of copyrighted works.

> That is, instead of facing squarely the primary question "What do we mean by fair use?" or the secondary question "How does the advent of the new technologies affect the conceptualization, and therefore, the application of the fair use doctrine?" Congress dealt with fair use on a tertiary level: "How do we fashion a fair-use statute so as to solve, by means of a compromise, a particular and expressly formulated exemption from copyright, the photocopying reproduction of copyrighted works for educational purposes?"
>
> The consequences was an utter dilution, by all parties to the public debate, of the notion of fair use, which more often than not came to be used merely to mean free use in the context of a discussion of a particular 'exemption' from copyright. In the process, the line between fair use and possible exempted use was systematically obscured."[13]

Seltzer sets for himself a two-fold task as the object of the balance of his treatise; to disentangle exempted-use notions from fair-use notions and to fashion a general but lean statement of the fair use rationale from which courts might apply equitable principles to particular cases. The exploration of these same two issues is precisely what is required at this important time in the revision of Canadian copyright legislation and an attempt to satisfactorily address these questions, together with a brief exploration of Canada's international obligations as they touch upon these questions, will constitute the focus of this paper.

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13 Leon Seltzer, "Exemptions and Fair Use in Copyright", Harvard Press, 1977, at p. 21.

(B) The Relationship Between Infringement and Fair Dealing: "Substantiality"

(i) An Overview

The Copyright Act is structured so as to provide the owner of copyright with a bundle of exclusive rights in respect of the exploitation of the work protected by such copyright. It is this bundle of rights which constitute the owner's copyright. The Act further establishes that infringement of the owner's copyright occurs when "... any person who, without the consent of the owner of the copyright, does anything that, by this Act, only the owner of the copyright has the right to do".[14]

As noted, S. 17(2) of the Act provides that any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary does not constitute an infringement of copyright. Thus, the Act establishes that which would otherwise constitute an act of infringement is permissible. Thus, wheresoever one's dealing with a protected work is a "fair dealing", such fair dealing presently constitutes a defence to an action for copyright infringement.

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[14] Supra, note 1, S. 17(1).

It is thus necessary, first and foremost, to establish the scope of the bundle of rights in order to be able to ascertain whether the behaviour contemplated, or complained of, would, in the absence of S. 17(2), constitute an act of infringement.

The sources of the rights which comprise "the bundle" are Sections 3(1), 17(4) and 17(5) of the Act. Section 3(1) provides copyright holders with the sole right to publish, produce, reproduce and publicly perform[15] a work or any substantial part of a work in any material form and the right to authorize same by any third party.[16] The Section cites as examples of these broad classes of rights: (a) production, reproduction, performance or publication of any translation of a work; (b) conversion of a dramatic work into a non-dramatic

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[15] The term "perform" is used here to include the deliverance in public of a lecture.

[16] In 1972, the Copyright Act was amended to specifically limit the scope of copyright protection for sound recordings (i.e. mechanical contrivances by means of which sounds may be mechanically reproduced) to "the sole right to reproduce any such contrivance or any substantial part thereof in any material form" S. 4(3) repealed and new subsections (3) and (4) substituted by R.S.C. 1970, c. 4 (2nd Supp.), S. 1.

work; (c) conversion of a non-dramatic work or an artistic work into a dramatic work by public performance or otherwise; (d) making a mechanical contrivance (e.g. record, audio/video tape, film) of a literary, dramatic or musical work; (e) public presentation of a cinematographic work (i.e. film or videotape);[17] (f) broadcasting a literary, dramatic, musical, artistic or cinematographic work.

Section 17(4) and (5) establish certain further rights of copyright owners differentiated from the rights established by S. 3(1) by the treatment accorded to the former under the Act. The principle conceptual underpinning for this difference in treatment would appear to arise from the fact that the forms of exploitation enumerated in Sections 17(4) and (5) are all in a sense, removed from the inner core of copyright protection and represent what are perceived to be "secondary" forms of dealing with protected works, i.e. forms of exploitation further

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[17] For a more complete discussion of: (a) the status of video tapes as a species of cinematographic works and (b) the meaning and importance of the term "original character" as used in S. 3(1)(e) vis-à-vis cinematographic productions, see B. D. Torno "Ownership of Copyright in Canada", paper prepared for the Federal Government Interdepartmental Copyright Committee, May 22, 1980, at pp. 41-45, and pp. 48-55.

along the channels of commercial distribution, which channels stem from, indeed are dependent upon, those activities which constitute the core of protection, viz. the rights established by S. 3(1).[18]

Acts of infringement of the rights provided for by ss. 17(4) and (5) are generally characterized as acts of "indirect infringement" (as distinct from the direct infringement of the rights of S. 3(1)), in so far as the former do not, in themselves, give rise to infringing articles or infringing performances, but rather, constitute acts done in relation to infringing articles or performances.

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[18] S. 17(4) provides that:

"Copyright in a work shall also be deemed to be infringed by any person who

(a) sells or lets for hire, or by way of trade exposes or offers for sale or hire;

(b) distributes either for the purposes of trade, or to such an extent as to affect prejudicially the owner of the copyright;

(c) by way of trade exhibits in public; or

(d) imports for sale or hire into Canada;

any work that to his knowledge infringes copyright or would infringe copyright if it had been made in Canada."

S. 17(5) provides that:

"Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright."

As a result of the confluence of (a) the special nature of the further rights granted to copyright owners under Sections 17(4) and (5) and (b) the five specified purposes in respect which the unauthorized dealing with a protected work may be permitted under fair dealing, it is most improbable that the defense of fair dealing could ever be presently sustained where one of these further rights was exercised by a third party without the copyright owner's authorization. As noted, all of the rights established by Sections 17(4) and (5) are restricted to specific forms of commercial exploitation of protected works. None of these forms of commercial exploitation lend themselves very readily to falling within the purview of private study, research, criticism, review or newspaper summary; i.e. only under the most attenuated circumstances could one, for instance, import copies of a work for the purpose of sale or hire and also claim that such activity was being carried out for the purposes of say, private study or criticism. This does not, of course, preclude subsequent commercial dealing with those protected portions of works which have been incorporated into works of criticism, review, etc.; indeed, their value to society lies in their broadest possible dissemination.

Thus, for the purposes of consideration of the bundle of rights which constitute copyright vis-à-vis fair dealing, we shall look only to Section 3(1). As the rights which comprise

the bundle are restricted in their application to the exploitation of a work in its entirety or a "substantial part" thereof, the unauthorized taking of less than a substantial part will not constitute an act of infringement, and, thus the need to raise any defense (including fair dealing) in respect thereof is obviated; i.e., non-substantial copying is lawful use. What then constitutes a "substantial part" of a work?

Before embarking on an examination of the concept of substantiality, three caveats must be noted. First, whether or not there is a "substantial" similarity (howsoever that term is defined and applied) between the work of the plaintiff and that of the defendant, there is no infringement unless there has been copying on the part of the defendant; i.e., there must be a causal connection between the work in which copyright subsists and the alleged infringing work.

> "There must be some copying whether it is direct or indirect conscious or subconscious. A person who, for example, reproduces, publishes or publicly performs a work which is substantially similar to another work in which copyright subsists will not commit any infringing act in relation to the latter work if the former work has been independently created. In contrast to patent law, the law of copyright does not give to the copyright owner any right to restrain others from dealing as they wish with works or other subjects which have been independently made. If two authors produce independently the same result copyright may subsist

> in each work as a separate subject matter of copyright."[19]

Second, (and that which this study will reveal to be of greatest importance), the search for substantiality is said to presently arise twice in two distinct contexts, when one is concerned with fair dealing as a defense to a claim of infringement.

> "The copying or use must first be sufficiently substantial to constitute infringement. It may then be appropriate to consider (... together with several other factors to be considered) whether the use, although prima facie an infringing use, is nevertheless not too substantial to constitute a fair dealing ..."[20]

Third, it must be remembered that the statutory defense of fair dealing appeared only for the first time in Commonwealth legislation in the 1911 U.K. Copyright Act. Prior to this time, the Courts throughout the Commonwealth had developed a common law equitable doctrine of "fair use", in a sense, broader in scope than its successor legislative counterpart. Thus, those

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[19] Lahore, infra note 20, at p. 198.
For a discussion of conscious and unconcious copying, see, for example, Francis Day and Hunter Ltd. v. Bron [1963] Ch. 587. For an examination of direct and indirect copying, see, for example, Ex parte B eal (1868) LR 3 2B 387, Hanfstaengl v. Empire Palace [1894] 3 Ch. 69 & Purefoy Engineering Co. Ltd. v. Sykes Boxall & Co. Ltd. (1955) 72 RPC 89. For further discussion of the issue of copying, see also Underwriters Survey Bureau Limited et al v. American Home Fire Insurance Company & Central Fire Office Inc. (1939) Ex. C.R. 296; Seeks v. Wells (P.C.) (1933) 1 D.L.R. 353; Collins v. Rosenthal, (1974) 14 C.P.R. (2d) 143; Emmett v. Meigs, (1921) 56 D.L.R. 63.

[20] James Lahore, Intellectual Property Law in Australia: Copyright, (Butterworths, 1977), at 198. See also the decision of Morton, J. in Johnstone v. Bernard Jones Publications, Ltd. and Beauchamp [1938] 1 Ch. 599 at 603.

cases which dealt with fair use/fair dealing prior to 1911 must be read with caution.[21]

In many of the pre-1911 cases, there was no distinction drawn between fair use/fair dealing and insubstantial copying, i.e. the courts in essence, combined the two tier substantiality enquiry described above into a single concern with substantiality and then equated a finding of insubstantial copying with a finding of fair use. Witness the language of a decision of the House of Lords in the 1878 case of Chatterton v. Cave:

> "If the quantity taken be neither substantial nor material, if, as it has been expressed by some judges, a "fair use" only be made of the publication no wrong is done and no action can be brought."[22]

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[21] In the pre-1911 cases, the terms "fair dealing", "fair use" and "fair quotation" were often used interchangeably. However, while there are many similarities between the pre-1911 and post-1911 doctrines in terms of the matters to be considered by the courts, the pre-1911 doctrine was not constrained by the five enumerated "purposes" found in the 1911 U.K. Act and the present Canadian Act and, therefore, use of the term fair dealing in pre-1911 cases should not be confused with the legislative definition established in the 1911 U.K. Act and other Commonwealth statutes modeled thereon. For a more detailed discussion of pre-1911 "fair use", see C. Vinke, P. Côté and V. Nabhan, Problèmes de droit d'auteur en éducation, Editeur officiel, Quebec, 1977, at pp. 46-49.

[22] (1878) 3 App. Cases 483, per Lord O'Hagan.

In response to the legislative enactment of the fair dealing provisions of the 1911 U.K. Act and the 1924 Canadian Act, the courts moved away from axiomatically equating insubstantial copying with fair use.[23] However, there can be seen a parallel tendency, in much of the case law to combine the first tier enquiry re substantiality (i.e. is the taking so substantial as to constitute infringement?) with the second tier enquiry re substantiality vis-à-vis fair dealing (i.e. given that the taking is sufficiently substantial to constitute an infringement, what is the amount and substantiality of the portion used in relation to the copyrighted work

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[23] Witness the following extract from the decision of Lord Hanworth M.R. in Hawkes & Son (London) Limited v. Paramount Film Service Limited (1934) 1 Ch. 593 at p. 604.

> "Having considered and heard this film, I am quite satisfied that the quantum that is taken is substantial ... . Then I turn also to see what is the justification the defendants can rely upon. First, they say that under S. 2 subsection 1: "the following acts shall not constitute an infringement of copyright: (i) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary."

as a whole?).[24] It is suggested that this tendency, whether intended or unwitting, was a sound development and, as one of the elements of a reconstituted doctrine of fair dealing, as proposed later herein, should be reflected in a revised Copyright Act.

Insofar as the criteria which have evolved with respect to each enquiry have been virtually the same, the two enquiries have become simply two ways of posing the same question at two different times. This view is echoed by Professor Melville Nimmer, in his treatise on Copyright,[25] commenting upon the parallel situation in the United States.

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[24] Witness the following extract from the decision of Morton J. in Johnstone v. Bernard Jones Publications, Ltd. & Beauchamp (1939) 1 Ch. 599 at p. 603, commenting on the earlier cited Hawkes & Son case:

> "In that case, the Court took the view that the defendant had reproduced a substantial part of the plaintiff's work, but went on to consider whether the (fair dealing) proviso applied. It seems to me that this consideration would have been unnecessary if the mere fact that a substantial part had been taken rendered it impossible to bring the proviso into operation. I may add, however, that the substantiality of the part reproduced is, in my view, an element which the Court will take into consideration in arriving at a conclusion whether what has been done is a fair dealing or not."

[25] Melville Nimmer, Nimmer on Copyright, (Mathew Bender, 1979).

While the doctrine of fair use in the United States, as codified in the recently amended Copyright Act,[26] is somewhat broader than the fair dealing doctrine of the Canadian Act (insofar as its application is not restricted to the five stated "purposes" found in the Canadian Act),[27] the tests or factors which have evolved under the Canadian/Commonwealth doctrine to be applied to determine whether a use or dealing is "fair" closely parallel the four stipulated "fair use factors" under the S. 107 of U.S. Act.[28] The third factor listed is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole". With respect to this

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[26] Supra, note 12, S. 107.

[27] In this regard, Professor Victor Nabhan has commented "Les buts sont énumérés de façon limitative par la loi canadienne. Ils sont au nombre de cinq, étude privée, recherche, critique, compte rendu, ou préparation d'un résumé dans les journaux. Toute utilisation, quelque justifiable qu'elle paraisse aux yeux de juge, qui n'est pas inspirée par l'un de ces cinq buts, ne pourrait valoir à son auteur le bénéfice de cette défense. C'est là une différence fondamentale avec le droit américain, où le contenu du "fair use" se caractérise par une plus grande élasticité, en raison de la discrétion confiée au juge dans l'appréciation de ce concept et son application à des cas nouveaux. Et cette grande latitude dont disposait le juge américain dans l'appréciation de "fair use" a été expressément consacrée par la nouvelle loi américaine." Nabhan, supra, note 6, "Quelques aspects des problèmes juridiques posés par la vidéoreproduction: ..." at 17.

[28] S. 107 does not define "fair use", rather it provides two exemplary, not exhaustive, lists of (a) the purposes which are the most appropriate for a finding of fair use (criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research) and (b) "the factors to be considered" when "determining whether the use made of a work in any particular case is a fair use". The four factors are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount of substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect of the use upon the potential market for or value of the copyrighted work.

factor, Professor Nimmer comments:

> "This (factor) may be regarded as relating to the question of substantial similarity rather than whether the use is fair."[28(a)]

The following examination of the doctrine of substantiality reveals that the inherent conceptual weakness of the two/tiered approach to substantiality is, perhaps, the principal reason for the court's continuing problems with the application of the doctrines of substantiality and fair dealing.

The continued, and seemingly unavoidable, interweaving of fair dealing and substantiality elements and criteria demonstrates persuasively the need to rethink the presently accepted dogma in this confused corner of copyright and, if necessary, to posit a new approach; an approach which will more appropriately reflect the fundamental design of the copyright scheme, and one which, hopefully, will provide greater ease of application for creators, users and the courts alike.

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29 Nimmer, supra, footnote 25, at pp. 13-53. The "substantial similarity" to which Nimmer refers is the U.S. counterpart of the first tier enquiry in Canada to determine if the part of the work which has been taken is "substantial"; i.e. unless the part taken is substantial (in the U.S., unless there is substantial similarity between the two works) ... there is no infringement.

Thus, the focus of the following discussion will be not upon the tier at which the enquiry with respect to substantiality should be carried out, but rather upon the essential elements of the doctrine itself. However, to demonstrate even further the present tangled web of relationships between infringement, substantiality and fair dealing, one further point merits mention. While, as noted, both in Commonwealth countries and in the United States the enquiry with respect to substantiality is only one of several factors to be considered when determining if there has been a fair dealing, it is also the case that many of the criteria applied to ascertain such substantiality find separate expression as the further factors to be considered vis-à-vis the broader concept of fair dealing. By way of example, one of the principal factors to be considered when determining whether a dealing has been fair, in addition to the substantiality of the part taken, is "the effect of the use upon the potential market or value of the copyrighted work - is the use competitive or noncompetitive?".[30] Witness the following

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[30] Lahore, supra, note 20, p. 247.

extract from the decision of Lord Denning in Hubbard v. Vosper:

> "You must consider first the number and extent of the quotations and extracts ... . Then you must consider the use made of them .... If they are used to convey the same information as the author, for a rival purpose, that may be unfair."[31]

Witness, however, the following passage from Professor James Lahore's work "Intellectual Property in Australia: Copyright", discussing the ostensibly distinct concept of substantiality:

> "Other factors which the courts have taken into account in determining whether the defendant has taken a substantial part in quality of the plaintiff's work are whether what is taken is so important that sales of the plaintiff's work might be affected or whether the defendant is seeking to take an unfair advantage of the plaintiff's work and skill. In Blackie & Sons Ltd. v. Lothian Book Publishing Co. Pty Ltd. (1921) CLR 396, the plaintiff published an annotated edition of Henry V in "The Warwich Shakespeare" series. The defendant published a similar work in which parts of the introduction and notes of the plaintiff's work were copied. In holding that there was infringement, Starke J. emphasized that the books were in direct competition with each other ... and that, in the circumstances, it was the special duty of the defendant and its editor to avoid the appropriation of the labour and research of the plaintiff's editor."[32]

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[31] Hubbard v. Vosper 2 Q.B. 84 at p. 94.

[32] Lahore, supra, note 20, at 199-200. See also Weatherly & Sons v. International House Agency & Exchange Ltd. (1910) 2 Ch. 297.

A further factor to be considered when determining whether a particular dealing has been "fair" is "the purpose and character of the use".[33] Consider, however, the following passage from Nimmer on Copyright, wherein the author is discussing not fair use, but rather, the doctrine of substantiality where there is "fragmented literal similarity"[34] between two works:

> "At what point does such fragmented similarity become substantial so as to constitute the borrowing an infringement? In any given case this question cannot be answered without a consideration of the purpose for which the defendant's work will be used. This aspect of the matter is considered in an ensuing section, dealing with the doctrine of fair use. However, the defense of fair use is often invoked without reference to the particular use employed by the defendant, and merely as an alternative label for similarity which is not infringing because it is not substantial. This terminology is unfortunate since the meaning of "fair use" is thereby rendered confusingly ambiguous. It may simply mean an insubstantial similarity regardless of defendant's

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[33] Lahore, supra, note 20, at 247.
As noted, an essential element of the doctrine of fair dealing, as set forth in S. 17(2) of the Act, are the five stated purposes in respect of which a dealing must be carried out if it is to be considered fair (i.e. private study, research, criticism review or newspaper summary). The fair use section of the U.S. Act (S. 107) does not contain a comparable finite list of purposes, but rather, sets forth an exemplary list of the types of purposes in respect of which a finding of fair use is most appropriate; these are very similar to the five purposes of the Canadian Act and include "criticism, comment, news reporting, teaching ..., scholarship or research". The U.S. Act then compliments this list by providing that one of fair factors to be considered is "the purposes and character of the use, providing whether such use is of a commercial nature or is for nonprofit educational purposes".

[34] Infra, note 37.

> use, or it may mean substantial similarity which would constitute an infringement but for the particular purpose and use of the resulting work by the defendant. Hence, we will here consider certain cases which purport to turn on the doctrine of fair use, but actually simply determine whether in the given instance there is substantial similarity between the two works."[35]

Thus, it becomes apparent that in exploring the doctrine of substantiality one is, to a considerable degree, coming to grips with many important elements of fair dealing as well. Perhaps the single most important result which emerges from such an exploration, one which has implications which transcend both substantiality and fair dealing and which go to the very heart of copyright law, is the recognition that the most cited "truism" regarding copyright, i.e. "copyright does not protect ideas, but rather only their form of expression",[36] is so misleading as to border on the realm of "trite but untrue".

This result stems from the judicial development of the doctrine of substantiality and in particular those cases where there has been non-literal, i.e. non-verbatim, reproduction of

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[35] Nimmer, supra, note 25, at 13-28.

[36] Lindley, L.J. in Hollinrake v. Truswell [1894] 3 Ch. 420 at 427. "Copyright, however, does not extend to ideas, or schemes or systems or methods, it is confined to their expression, and if their expression is not copied, the copyright is not infringed".

a work.[37]

The following passages reveal something of the courts' efforts to protect something more than the mere form of expression of a work via the medium of the doctrine of substantiality.

> "It is, of course, essential to any protection of literary property, ... that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.[38]

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[37] i.e., that which Professor Nimmer has called "comprehensive non-literal similarity":"...a similarity not just as to a particular line or paragraph or other minor segment, but where the fundamental essence or structure of one work is duplicated in another"; as distinct from that which Nimmer has called "fragmented literal similarity": "... where there is a literal similarity though not necessarily completely word for word) between plaintiff's and defendant's work. ... that is, the fundamental substance, or skeleton or overall scheme of the plaintiff's work has not been copied. No more than a line, or a paragraph, or a page or chapter of the copyrighted work has been appropriated". At what point does such fragmented similarity become substantial so as to constitute the borrowing an infringement?". Nimmer, supra, note 25, at pp. 13-16, 13-27, 13-28.

[38] "Balanced against this principle is the countervailing consideration that copyright does not protect against the borrowing of abstract ideas contained in the copyrighted work. To grant property status to a mere idea would permit withdrawing the idea from the stock of materials which would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation." Ibid, at 13-17.

"The problem, then, is one of line drawing. Somewhere between the one extreme of no similarity and the other of complete and literal similarity lies the line marking off the boundaries of "substantial similarity". Judge Learned Hand has said that this line "wherever it is drawn will seem arbitrary ... ." Ibid, at 13-15.

> That has never been the law, but, as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, as was recently well said by a distinguished judge, the decisions cannot help much in a new case."[39]

In Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., Lord Evershed advised:

> "It is not in doubt that what amounts in any case to substantial reproduction ... cannot be defined in precise terms and must be a matter of fact and degree".[40]

In the Ladbroke case, Lord Reid stated: "... and if he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken".[41]

In the case of Joy Music Ltd. v. Sunday Pictorial Newspaper (1920) Ltd., one finds the following passages from the court's decision.

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39 Judge Learned Hand, Nichols v. Universal Pictures Corp. (1930) 45 F. 2d 119 at 121.

40 (1964) 1 W.L.R. 273, at 283.

41 Ibid, at 276.

> "... it is quite clear that the question of substantiality is not determined solely by any process of arithmetic. It would not be right merely to say that the whole of the original copyright consisted of so many tones, the lines which appear in the alleged infringed copy were few and, therefore, not a substantial part. One has really to look to a large extent - I will not say at the primary "idea" because idea cannot be subject of copyright - but at the essential feature of the work, which is alleged to have been subject to copyright."[42]

The three most prevalent and troublesome types of cases where the issue is one of comprehensive non-literal similarity are firstly, those cases where that which has been taken are literary and dramatic incidents and devices; secondly, those cases where the complaint relates to the lifting of literary and dramatic characters and, thirdly, parodies, satires and burlesques.[43]

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[42] (1960) 2 W.L.R. 645 at p. 649.

[43] While the treatment of the issue of parodies, satires and burlesques in the three principal Commonwealth legal texts on copyright law may be found within the discussion of the issue of "substantiality", the treatment of his same issue in the principal American text is to be found within the discussion of "fair use" (Lahore, Intellectual Property in Australia, pp. 214-215; Copinger & Skone, James on Copyright (U.K.), p. 189; Fox, The Canadian Law of Copyright and Industrial Designs, pp. 360-361; Nimmer on Copyright (U.S.), pp. 13-59, 13-61). It is suggested that this differentiation may be principally attributable to the fact that it is most unlikely that burlesque and parody could find shelter under any of the five fair dealing "purposes" provided for in all Commonwealth legislation. The U.S. doctrine of fair use, not being similarly restricted, is sufficiently flexible to encompass such socially desirable endeavours under its broad umbrella. Indeed, Lahore views even the principal American parody and burlesque cases as having been decided more truly on the basis of substantiality (i.e. is there a case of prima facie infringement?) than on the basis of fair use. It

(ii) Literary and Dramatic Incidents and Devices

As noted earlier, S. 3(1) of the Canadian Copyright Act provides copyright owners with, inter alia, the sole right to reproduce a work in any material form and to publicly perform such work. Subsumed within these broad classes of rights are the rights to (a) produce, reproduce, perform or publish any translation of a work, (b) convert a dramatic work into a non-dramatic work, (c) convert a non-dramatic work into a dramatic work, and (d) make an audio record, audio/video tape or disc or film of a literary, dramatic or musical work.

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footnote 43 cont'd.

appears that the phenomenon of the unification of the two tiers of substantiality may partly explain this apparent conceptual disparity. Witness the following passage from an article by Stephen Fried on "Fair Use and the New Act":

> "The amount of the copyrighted work that is used in the parody can be decisive (... with respect to a finding of fair use) in these cases. See, e.g., Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964); Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), aff'd sub. nom., Columbia Broadcasting Sys. Inc., v. Loew's Inc., 356 U.S. 43 (1958). Looking at the amount of the copyright work that is used also serves another purpose; if there is not a substantial taking from the copyright material to begin with, there can be no infringement in any event." S. Fried, "Fair Use and the New Act", New York Law School Law Review, Vol. XXII, No. 3, 1977, 497 at 501.

Therefore, it becomes necessary to consider the scope of copyright protection in cases where the work is recast in a different medium and the copying relates not so much to the language of the first work, but rather to its plots, themes, situations and character development; i.e., those elements which lie somewhere within that which is widely regarded as the nether world between the two philosophical abstracts of "idea" and "expression".[44]

In 1918, in the United States, in Frankel v. Irwin, the Court held that infringement may result from the taking of the plot, as well as the language, of a protected work:

> "Plagiarism of incident is less well known, and more difficult of detection. It is doubtful whether incidents per se can become copyrightable literary property, but it does not take many of them, nor much causal connection thereof, to make what will pass for a plot, or scene, and the action of a play; and that a scene has literary quality and can be copyrighted, and piracy may consist in appropriating the action of a play without any of the words, is well settled."[45]

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[44] For incisive discussion of this subject, see Robert Libott "Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World", ASCAP Copyright Law Symposium, No. 21, p. 30, Columbia University Press, 1976. See also Benjamin Kaplan's "An Unhurried View of Copyright", Chapter Two, Plagiarism Reexamined, Infra note 69.

[45] 34 F.2d, 142 at 143.

Indeed, this view had already been expressed by an English court, shortly after the enactment of the Imperial Copyright Act of 1911 when Cozens-Hardy M.R. held in Corelli v. Gray that: "The result of the new Act was to give protection not merely to the form of words in a novel but to the situations contained in it."[46]

Lahore characterizes the essence of the issue most adroitly when he advises that: "The dramatic copyright cases ... and the statutory provisions as to reproduction and adaptation clearly refer to the protection of the "ideas" of the author, if by "ideas" one means the dramatic structure situations, incidents, character development and story line. On the other hand, there is a point at which what the author is in fact claiming is protection for a general "idea" of plot or theme which the courts will not recognize".[47]

What is widely regarded as one of the best efforts to provide some guidance in this area to all those called upon to walk along what will always remain the shrouded path between idea and expression

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46 (1913) 30 T.L.R. 116 at 117.
See also Sutton Vane v. Famous Players Co. Ltd. (1928-35) Macq Cop Cas 6; Dagnall v. British and Dominions Film Corp. Ltd. (1928-35) Macq Cop Cas 391; Holland v. Vivian Van Damm Productions Ltd. (1936-45) Macq Cop Cas 69; Kelly v. Cinema Houses Ltd. (1928-35) Macq Cop Cas 362; Harman Pictures NV v. Osborne [1967] 1 W.L.R. 723.

47 Lahore, supra, note 20, at 221.

is the "abstractions test" developed by Judge Learned Hand in Nichols v. Universal Pictures Corp.[48] which addressed the claim by the author of the play "Abie's Irish Rose" that the defendant's motion picture "The Cohens and the Kellys" infringed the copyright in the play. Judge Hand stated:

> "Upon any work and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use."

However, as Professor Nimmer points out, while the abstractions test is most helpful, it does not indicate precisely where in any given work the level of abstraction is such as to cross the line from expression to idea. Professor Nimmer believes that the "patten test" suggested by Professor Zechareah Chafee[49] when applied to Judge Hand's abstractions

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[48] 15 F.2d 119 (2d Cir. 1930). The Court held that there was no infringement insofar as "the only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren, and a reconciliation".

[49] "No doubt the line does lie somewhere between the author's idea and the precise form in which he wrote it down. I like to say that the protection covers the "pattern" of the work ... the sequence of events, and the development of the interplay of the characters". Chafee, "Reflections on the Law of Copyright", 45 Colum. L. Review 503, 513 (1945).

test does increases the level of specificity as far as it appears possible to do so and, thus, provides what is probably, under all the circumstances, the optimum analytical tool which it is possible to generate for the purposes of tackling this Herculean problem.

> "Hand's suggestion that a number of different patterns at different levels of abstraction will fit any work must be combined with Chafee's suggestion that the operative pattern for purposes of determining substantial similarity is one that is in some degree abstract (omitting dialogue, minor incidents, possibly setting, etc.) but is nevertheless sufficiently concrete so as to contain an expression of the sequence of events and the interplay of the major characters."[50]

(iii) Literary and Dramatic Characters

While the scope of copyright protection for the physical characteristics of characters developed as artistic works is relatively easily quantifiable,[51] where the development of these

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[50] Nimmer, supra, note 25, at 13-19.

[51] While exact reproduction of the physical characteristics would be clearly infringement, even where the taking relates only to certain elements of those characteristics (e.g. physiognomy or style of dress), the search for substantiality is rendered considerably less difficult due to the relative ease with which such elements may be identified. In King Features Syndicate Inc. v. O & M Kleeman Ltd. (1941) AC 417, the House of Lords held that copyright in the comic strip character "Popeye the Sailor" was infringed by the defendant's dolls and broaches shaped in the figure of Popeye, notwithstanding the fact that neither the dolls nor broaches reproduced any one drawing, but rather reproduced the principal characteristics of the Popeye figure common to all of the drawings.

characteristics, together with the other elements which constitute a character (e.g. emotional and psychological profiles), evolves via the medium of the written word, the problems inherent in establishing the scope of protection are comparable to those in respect of dramatic incidents and devices.

The most widely recognized effort to provide a useful framework when addressing the scope of protection for literary and dramatic characters was that supplied by Judge Hand in the Nichols-Universal case:

> "If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he has cast, a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amourous of his mistress. These would be no more than Shakespeare's "ideas" in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."[52]

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[52] Nichols v. Universal Pictures Corp., supra note 48, at 121; see also the decision in Kelly v. Cinema Houses Ltd. (1928-35) Macq Cop Cas 362 at 368, where Maugham, J. suggests that the key to protection of characters lies in the development of the characters as part of the matrix of the story.

(iv) Parodies and Burlesques

As noted earlier, in the United States, parodies and burlesques have been treated generally within the context of fair use (i.e. prima facie infringement possibly excused), whereas in Commonwealth countries, the degree to which a parody or burlesque infringes another work has been addressed as a matter of substantiality (is there prima facie infringement?). While the terms burlesque, satire, and parody are often used interchangeably, it is suggested that burlesque and satire are more appropriately considered synonyms for one type of work and parody for a related, but different, type of work. In a recent American decision[53] involving a musical comedy version of "Gone with the Wind" entitled "Scarlett Fever", the Court adopted the definitions of "parody" and "satire" propounded in the earlier case of Dallas Cowboys Cheerleaders v. Pussycat Cinema.[54]

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[53] Metro Goldwyn Mayer Inc. v. Showcase Atlanta Cooperative Productions Inc., 203 U.S.P.Q. 822 (N.D. Ga. 1979).

[54] 467 F. Supp. 366 (S.D.N.Y. 1979).

> "A parody is a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule. A satire is a work which holds up the vices or shortcomings of an individual or institution to ridicule or derision, usually with an intent to stimulate change; the use of wit, irony or sarcasm for the purpose of exposing and discrediting vice or folly."

One commentator has suggested a somewhat more incisive characterization:

> "Parody is the imitation of the substance and style of the particular work of an author transferred to a trivial or nonsensical subject, whereas burlesque is an imitation distorting or mocking the original work by comic extremes."[55]

The parody and burlesque cases in both the U.K. and the U.S. present the most troublesome and perhaps the least satisfactory attempts to come to grips with the concept of substantiality or at least to present the concept in some cohesive framework (and in the U.S. cases, to allign that framework with the doctrine of fair use).

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[55] Lahore, supra, note 20, at 215.
See also the discussion by Seltzer, where the author suggests that a good parody not only does not give rise to a fair use question, but may not even constitute a copyright case; in a good parody there is no copying of either word or theme, the parodied work being merely a point of departure. Supra note 13, at 43.

Lahore has expressed the view that much of the difficulty which the courts have experienced in developing a consistent approach to these cases results from their failure to distinguish parody from burlesque. While this element may have played a part, it is submitted that the far more important factor has been the failure, once again, to delineate and order the various "substantiality" criteria and to apply them in a consistent manner. In both the best known U.K. cases[56] and American cases,[57] it appears that the same two related factors were determinative of the result, and yet in the Commonwealth cases, these factors were presented as key to a determination of substantial similarity, while in the American cases, they were addressed as crucial to a determination of fair use; revealing once again the interrelationship of these two concepts based upon the commonality of underlying criteria. The key factors (criteria) to which I refer are "the purpose and character of the use" and "the effect of the use upon the potential market for or value of the copyrighted work".[58]

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[56] See Hanfstaengl v. Empire Palace (1894) 3 Ch. 109; Francis Day & Hunter v. Fledman & Co. (1914) 2 Ch. 728; Glyn v. Weston Feature Film Co. (1916) 1 Ch. 261; Joy Music Ltd. v. Sunday Pictorial Newspaper Ltd. (1960) 2 W.L.R. 645.

[57] See discussion at footnote 59.

[58] "where ... the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper." Berlin v. E.C. Publications, Inc. 329 F. 2d 541 (1964), at 545.

Professor Nimmer posits a valuable analytical framework within which to view both the Commonwealth and American parody and burlesque cases, and which serves, in addition, to further illuminate the concept of "substantiality" (both when applied to determine prima facie infringement or when seeking to excuse same on the grounds of fair dealing or fair use). He further suggests that a study of the fair use cases reveals that "effect upon the plaintiff's potential market"[59] emerges as the most important and, indeed, central fair use factor, even where this is not the stated rationale; but also cautions that this factor like all the other fair use factors can be understood only in the context of the functional test which he sets forth:

> "... regardless of medium (i.e. whether or not plaintiff's and defendant's works are in the same or different media), ... if ... the defendant's work, although containing substantially similar material, performs a different function than that of plaintiff's, the defense of fair use may be invoked.
>
> This distinction appears sharply in comparing Leo Feist, Inc. v. Song Parodies, Inc. with Berlin v. E.C. Publications, Inc. In both cases, defendants published lyrics which constituted parodies of the plaintiffs' lyrics. Yet, while the defendants were held to have infringed in Song Parodies, the defendants prevailed in Berlin. The distinction ... was that in Song Parodies defendants' lyrics were published in a song sheet magazine, thus, "meeting the

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[59] It will be recalled that this question also constitutes one of the principal tests which have been applied to determine if a taking has been sufficiently substantial to constitute infringement. See discussion at notes 30-32.

> same demand on the same market" as that of the plantiffs', while in Berlin the defendants' lyrics were published in a humour magazine and constituted a satirical version having "neither the intent nor the effect of fulfilling the demand for the original."[60]

While in the preceeding cases, the ability to distinguish between formats (i.e. song sheet vs. humour magazine) facilitated employment of a functional analysis, even where both the plaintiffs' work and the defendants' work are presented in the same format (i.e. live dramatic presentation upon the stage), the value of such analysis remains. As a parody or burlesque more and more closely tracks the work which it purports to lampoon, the functional distinction between the two works becomes increasingly less apparent. A viewing of the "burlesque" serves to so thoroughly familiarize the viewer with the underlying work that it may well obviate his wish to see the original. This functional analysis, indeed, seems to provide the most meaningful, equitable and readily applicable guide through the maze of substantiality and fair dealing and provides a valuable orientation when, as shall be done later herein, we address the crucial question of the treatment of reprography within fair dealing.

(v) A Rule of Reason

The preceeding lengthy discussion of "substantiality" and its importance to an understanding of both infringement and

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[60] Nimmer, supra, note 25, at 13-56.

fair dealing has focused on the three most recondite areas affected by the confluence of these three concepts. As in the case of literary and dramatic devices and characters, parodies and burlesques, and artistic works, where it was seen that the concept of substantiality had been interpreted and applied in differing ways in order to meet the exigencies of the particular contexts, comparable judicial glosses have evolved to come to grips with many other specific areas: (a) Compilations (e.g. guide books, dictionaries, directories) and text books;[61] (b) Legal and Business Forms;[62] (c) Selections (e.g. anthologies and annotated editions);[63] (d) Maps;[64] (e) Abridgements;[65] (f) Tables (e.g. football tables, income

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61 See, for example: Kelly v. Morris (1866) L.R. 1 Eq. 697; Morris v. Wright (1870) 5 Ch. App. 279; John Fairfax and Sons Pty Ltd. v. Australia Consolidated Press Ltd. (1960) SR (NSW) 413; Beauchemin v. Cadieux (1901) 31 S.C.R. 370; Stevenson v. Crook et al. (1938) 4 D.L.R. 294.

62 See, for example, Real Estate Institute of N.S.W. v. Wood (1923) 23 SR (NSW) 349.

63 See, for example: Moffat & Paige Ltd. v. G. Gill & Sons Ltd. & Marshall (1902) 86 L.T. 465; Cambridge University Press v. University Tutorial Press Ltd. (1928) 45 R.P.C. 335.

64 See, for example, Kelly v. Morris 1866 L.R. 1 Eq. 696; Sands & McDougall Pty Ltd. v. Robinson 1917 23 C.L.R. 49.

65 See, for example: MacMillan & Co. Ltd. v. K & J Cooper (1923) 93 LJPC 113; Sweet v. Benning (1855); 16 C.B. 459; Valcarenghi v. Gramophone Co. Ltd. (1931) Macq. Cop. Cas. 301.

tax tables);[66] (g) News, Facts, Historical Events;[67] (h) Musical Works.[68] Further, Professor Kaplan has suggested that the concepts of infringement and fair use must be seen in the light of their development from the time of the Statute of Anne in 1710 during "great environmental changes - social and economic changes, changes in the literary and artistic outlook".

> "An indulgent attitude toward using other people's works seemed increasingly out of keeping with the realities of the market. The business of publishing and distributing books had become bigger, more competitive, more impersonal; the stakes were higher, the risks more serious. In this atmosphere, there would be greater anxiety about marking out metes and bounds of literary ownership and courts might be expected to respond to arguments about protection of investment.
>
> Literary criticism became less friendly to imitation. From the classical writers, as expounded by critics of the Italian and French Renaissance, the Elizabethans had received the notion that artistic excellence lay in imitating the best works of the past, not in attempting free invention. The classical doctrine of imitation, ... persisted long after Elizabethan times; and it is not hard to find a correspondence between (Lord) Mansfield's narrow view of plagiarism (in the

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66 See, for example, Underwriters Survey Bureau and Collins v. Rosenthal cases, supra, note 19.

67 See, for example: Poznanski v. London Film Production Ltd. (1936-45) Macq. Cop. Cas. 107; Harman Pictures NV v. Osborne (1967) 1 W.L.R. 723; Deeks v. Wells (1933) 1 D.L.R. 353.

68 See, for example: Francis Day & Hunter Ltd. v. Bron (1963) 2 W.L.R. 868, Austin v. Columbia Graphaphone Co. Ltd. (1917-23) Macq. Cop. Cas 398; Canadian Performing Right Society v. Canadian National Exhibition, 4 D.L.R. 154.

> case of Sayre v. Moore, 102 Eng. Report 139 (K.B. 1785) and the definition that was supplied, although for a different purpose, by the classical teaching.
>
> Now Edward Young and those who followed spoke for original as against imitative genius, for innovation as desirable in itself. The literary here is one who, having little learning or disdaining whatever learning or disdaining whatever learning he has, takes a fresh look at nature and feeds his art direct from that source. In placing a high value on originality, the new literary criticism, I suggest, tended to justify strong protection of intellectual structures in some respect "new", to encourage a more suspicious search for appropriations even of the less obvious types, and to condemn these more roundly when found."[69]

It becomes readily apparent from the preceeding discussion that the concept of substantiality, like that of fair dealing (insofar as the latter doctrine presently is predicated to such an extensive degree upon the search for substantial similarity between the plaintiffs' and defendants' works) must, of necessity, remain a flexible, equitable rule of reason. While the temptation and the desire to add "certainty" to the law in this area (for instance, by placing quantitative limits on the amount of a work which may be taken before such taking is considered

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[69] Benjamin Kaplan, "An Unhurried View of Copyright," Columbia University Press at 22-24.

substantial) remains everpresent, to incorporate such measures into the doctrine of fair dealing would serve the interests of neither copyright owners nor users.[70]

To provide that only the taking of a work in its entirety constitutes infringement would open the floodgates of unauthorized dealings with protected works to the serious detriment of copyright owners. To provide that the taking of so many lines or so many pages of work was permissible, would fail to address many important situations. How much of an artistic work could be used?; only the face but not the body of a portrait?; only 5 out of 30 lines and 2 out of 10 colours in a Mondrian abstract? What elements of a literary or dramatic work could be used; the theme but not the setting?; one of the characters but not three? Secondly, and more importantly, such limitations may unnecessarily restrict the use of society's storehouse of accummulated literary and artistic works to the detriment of the general welfare in many situations where there would be at best a marginal, if any, commensurate benefit bestowed upon the copyright owner; i.e. such taking would prejudice neither the owners' moral rights nor his appropriately expected economic reward.

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[70] If such measures are to be incorporated into the Copyright Act, it is suggested it must be done within the context of specific legislative exemptions. For a discussion of the differences between fair dealing and exemptions, see pp. 90-92.

The concept of an author's "appropriately expected economic reward" constitutes one of the two elements in Leon Seltzer's "dual risk" approach to fair use analysis and will be explored in greater detail later in Section E of the paper "Fair Dealing Reconsidered".

(C) The Elements of Fair Dealing As Presently Constituted

(i) The Nature of the Taking

It has been noted earlier in this paper that fair dealing, as presently constituted, serves as one of several statutorily created defenses to a claim of infringement. It has been also noted that: (a) the doctrine does not have universal application, being restricted to the five "purposes" prescribed by S. 17(2); and (b) not all dealings with works protected by copyright, even where same are for one of the five purposes, are axiomatically "fair" dealings.

The discussion in Section B of the paper, in the course of its exploration of the relationship between fair dealing, infringement, and substantiality provided a review of the criteria to be considered when determining whether a dealing with a protected work for one of the five requisite purposes is "fair" dealing. In this connection, notice should also be taken of a number of circumstances which are believed by many to necessarily protect any dealings with protected works under the umbrella of fair dealing. It will be evident from earlier discussion that certain of these circumstances may play some part in a finding with respect to fair dealings; by the same token, no one of these factors alone would be

determinative, and in some cases even relevant, to such a finding.

The fact that distribution of copies is without charge is not sufficient to result in such distribution not constituting an infringement of copyright,[71] nor will the small amount of damage suffered deprive the author of the right to an action in infringement.[72] Furthermore, "although indicating the name of the author and the source may show good faith on the part of the infringer, it will not be sufficient to dispose of the infringement".[73]

On the other hand, omission of the name of the author does not necessarily prevent the reproduction of a section of a work for the purpose of criticism from being considered a fair dealing.[74]

Finally, it should be noted that the custom of tolerating certain taking in some fields cannot be relied on to ensure that a court will hold that such taking is not an

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71 Warne v. Seebohm (1888) 39 Ch. 73.

72 Weatherly & Sons v. International Horse Agency & Exchange, Ltd. [1910] 2 Ch. 297, 305.

73 Zamacois v. Douville (1944) Ex. C.R. 208, 234.
Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302.

74 Johnstone v. Bernard Jones Publications Ltd., (1938) Ch. 599, 606.

infringement. An action may be successfully brought in spite of the existence of such custom.[75]

In addition to the factors which have heretofore been considered, there are two facets of the doctrine of fair dealing which, for varying reasons, have assumed the status of fundamental or underlying "principles". These two elements and the appropriateness of such status must now be addressed.

The first of these principles is that "a critic cannot, without being guilty of infringement, reproduce in full, without the author's permission, the work which he criticizes".[76]

The preceeding passage from the 1943 Canadian case of Zamacois v. Douville & Marchand, constitutes the sole basis for this principle. The question of the degree of precedential weight to be attributed to this case has been raised earlier herein. Further, in the intervening thirty-seven years, this

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75 Supra, note 73, at 258.
See also Walter v. Steinkopff (1892) 3 Ch. 489, 499, where North, J. held: "The plea of the existence of such custom, or habit, or practice of copying ... can no more be supported when challenged than the highway man's plea of the custom of Hounslow Heath. It has often been relied upon as a defense in such cases, but always has been repudiated by the Courts."

76 Supra, note 3.

view has never been commented upon nor reaffirmed by another Canadian Court. The position that irrespective of all other considerations, there are no circumstances under which reproduction of a work in its entirety can ever constitute fair dealing: (a) does not necessarily arise from the language of the statute itself; (b) has found no expression elsewhere in Commonwealth case law or commentary; and (c) establishes inappropriately rigid parameters upon what is universally acknowledged to be a flexible rule of reason.

It might very well be the case that, upon a proper application of fair dealing considerations, the situations within which a finding of fair dealing will prevail where there has been the taking of a work in its entirety will be very few indeed. However, to preclude such a possibility ab initio is to unnecessarily fetter the dynamic nature of fair dealing.

In what is widely regarded as one of the most incisive Commonwealth explorations of fair dealing, Lord Justice Megaw of the British Court of Appeal stated in the 1971 case of Hubbard et al v. Vosper et al:[77]

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[77] [1972] 2 Q.B. 84.
It should be noted that on Feb. 9, 1972, the Appeal Committee of the House of Lord dismissed a petition for leave to appeal.

> "It is then said that the passages which have been taken from these various works ... are so substantial, quantitatively so great in relation to the respective works from which the citations are taken, that they fall outside the scope of 'fair dealing'. To my mind, this question of substantiality is a question of degree. It may well be that it does not prevent the quotation of a work from being within the fair dealing subsection even though the quotation may be of every single word of the work. Let me give an example. Suppose there is on a tombstone in a churchyard an epitaph consisting of a dozen or of 20 words. A parishioner of the church thinks that this sort of epitaph is out of place on a tombstone. He writes a letter to the parish magazine setting out the words of the epitaph. Could it be suggested that that citation is so substantial, consisting of 100 per cent of the "work" in question, that it must necessarily be outside the scope of the fair dealing provision? To my mind, it could not validly be so suggested."[78]

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[78] Ibid, at 101.
In a similar manner, in the American case of Williams & Wilkins Co. v. United States, 487 F. 2d 1345 (1973) where an equally divided Supreme Court affirmed the decision of the Court of Claims (420 U.S. 376 (1975)) that the photocopying of journal articles for research workers by the National Library of Medicine and the National Institute of Health was not infringement; Judge Davis of the Court of Claims stated at p. 1353:

> "It has sometimes been suggested that the copying of an entire copyrighted work, any such work, cannot ever be 'fair use', but this is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice. There is, in short, no inflexible rule excluding an entire copyrighted work from the area of 'fair use'. Instead, the extent of the copying is one important factor, but only one to be taken into account, along with several others."

It is submitted that the preceeding statements in the Hubbard v. Vosper and Williams & Wilkins cases are, indeed, consonant with the fundamental nature of the doctrine of fair dealing and that, in order to overcome the lingering effects of the decision in the Zamacois case, a revised Copyright Act should specify that there is no limitation to the application of the doctrine such as that suggested in the Zamacois case.

The second "principle" is that fair dealing is not, and should not, be applicable to unpublished works. The Keyes/Brunet Report[79] perpetuates this view by stating without reservation that, vis-à-vis fair dealing, "only published works can be so dealt with".[80]

The Report cites in support of this proposition the view expressed by Romer, J. in the 1925 English case of British Oxygen Co. v. Liquid Air, Ltd.[81] However, upon reading the actual decision of Mr. Justice Romer, one is reminded of the view expressed by Davis, J. in the Williams & Wilkins case regarding the proposition that fair use can never apply to the taking of a work in its entirety. Judge Davis suggested that

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[79] Copyright in Canada. Proposals for a Revision of the Law, A.A. Keyes & C. Brunet, Consumer and Corporate Affairs Canada, April 1977.

[80] Ibid, at 148.

[81] [1925] 1 Ch. 383.

that was (as is the Keyes/Brunet statement) "an overbroad generalization".

Mr. Justice Romer stated:

> "... the Act no doubt extends to unpublished as well as published works and, accordingly, this permission of criticism (... i.e. fair dealing), would seem at first sight to extend to unpublished literary works. The permission was no doubt necessary in the case of unpublished dramatic and musical works, inasmuch as performance in public of such works is not publication for the purposes of the Act. But it would be manifestly unfair that an unpublished literary work should, without the consent of the author, be the subject of public criticism, review or newspaper summary. Any such dealing with an unpublished literary work would not, therefore, in my opinion, be a 'fair dealing' with the work."[82]

Certain of the distinctions drawn by Mr. Justice Romer and the issues raised thereby become clearer upon reviewing the statutory definition of "publication" and the case law which has developed with respect to same. Section 3(2) of the Copyright Act provides, in part, that:

> "... 'publication', in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery

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[82] Ibid, at 393.

> in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art ..."[83]

While it has been held that: "a paper is published when and where it is offered to the public by the publisher"[84] (and, thus, there need not be an issuance for sale but rather may be gratuitous).[85] It has also been held, on the other hand, that neither the presentation of copies to individuals nor the sending of advance copies to the press for review, nor the presentation of a technical or business report to the members of a corporation or syndicate[86] constitutes publication. Similarly, the private circulation among friends on conditions imposed by the author[87] has been held not to be publication.

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[83] This definition is derived from the definition of "published works" in Art. 4(4) of the Rome Text of the Berne Convention. While Canada need not apply this definition to the works of its nationals, such definition would be required in respect of the works of foreign nationals. The problems of having two different definitions of "publication" in the same Act would outweigh any benefits which might be derived from same.

[84] McFarlane v. Hulton [1899] 1 Ch. 884.

[85] White v. Geroch (1819), 2 B & Ald 298; Novello v. Sudlow (1852), 12 C.B. 177.

[86] Kenrick v. Danube, Collieries & Minerals Co. Ltd. (1891), 39 W.R. 473.

[87] Caird v. Sime (1887), 12 App. Cas., 334; Prince Albert v. Strange (1849), 2 De. G. & S. 652.

Thus, two points will be appreciated: first, that the concept of "publication" vis-à-vis literary works must be understood in terms of the quite specific definition which has evolved regarding same and, second, as the decision of Rohmer, J. makes clear, the doctrine of fair dealing presently does apply to two broad classes of "unpublished" works, i.e. dramatic and musical works. Furthermore, the recent decision in the Hubbard v. Vosper case suggests that fair dealing may apply even to certain literary works which have not been published.

In this case, Lord Justice Megaw stated, commenting upon Rohmer, J.'s dicta vis-à-vis the inapplicability of fair dealing to unpublished literary works:

> "I am afraid I cannot go all the way with those words of Rohmer, J. Although a literary work may not be published to the world at large, it may, however, be circulated to such a wide circle that it is "fair dealing" to criticize it publicly in a newspaper, or elsewhere. This happens sometimes when a company sends a circular to the whole body of shareholders. It may be of such general interest that it is quite legitimate for a newspaper to make quotations from it, and to criticize them - or review them - without thereby being guilty of infringing copyright."[88]

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[88] Supra, note 77, at 94-95.

Having looked at the present status of the application of the doctrine of fair dealing to unpublished works, one must turn to the more important question of whether fair dealing should apply to unpublished works.

Firstly, as the preceeding discussion reveals, were one inclined to restrict the applicability of the doctrine, it would be inappropriate to use the rather limited concept of publication as the critical factor. As Rohmer, J. points out, musical and dramatic works which have not been "published", in the technical sense, may still be subject to fair dealing, presumably, if they have been performed in public.

The distinction between distribution of copies and performance in public in Anglo-American copyright law arose during the period prior to the present Commonwealth and American statutes when only published works were protected by statutory copyright and unpublished works were protected by common law copyright. The rationale was that this distinction was necessary in order to preserve common law rights after mere performance due to the absence of statutory protection for performing rights in unpublished works. When unpublished dramatic and musical works received statutory protection under Commonwealth and American legislation, the raison d'être for this delineation ceased to exist.

> "It is apparent that the rationale suggested ... for the basic doctrine of publication and for its application where tangible copies are not distributed to public[89] does not justify the rule that performance is not publication. If acts of exploitation of a work constitute publication, and if the indicia of exploitation is the realization of significant economic benefits, then it would seem that performance should constitute publication. It is obvious that performance of a work may bring its author a most substantial pecuniary reward."[90]

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89 "... it has been suggested that upon an author receiving the rewards that flow from the exploitation of his work, he must make his treaty with the public by subjecting his work to the limited monopoly of statutory copyright. It would seem that there is justification for limiting the author's absolute property right in his work only where the dissemination of the work may result in a significant economic benefit to the author. Only such dissemination should be regarded as exploitation in the above sense. With the exception of public performance of musical and dramatic works, the right merely to view a work does not ordinarily result in a significant benefit to the author. It would seem proper to conclude that (putting to one side for the moment the problem of dissemination by performance) no publication should occur unless the public obtain a possessory right in tangible copies of the work for only then are significant economic rewards attainable." Nimmer, supra, note 25, at 4-39.

90 Ibid, at 4-44.

While the arguments advanced by Professor Nimmer are directed towards the question of an appropriate definition of publications, they also serve to suggest what might be an appropriate demarcation line for the application of fair dealing, in the context of the "published/unpublished" issue.

It is submitted that fair dealing should be applicable to the following works in the following cases: (A) all classes of works - when, with the consent of the copyright owner, the original or tangible copies (including phonorecords)[91] of a work are sold, leased, loaned, given away or otherwise made available to the general public or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not in fact occur; or

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[91] Article VI of the Geneva Text of the U.C.C. provides that: "publication as used in the Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived". Such provision does not necessarily preclude phonorecords from constituting "copies" of say, a musical work, rather it merely stipulates that their distribution will not constitute publication, not being copies "from which (the work) can be read or otherwise visually perceived". As noted the definition of publication in the present Canadian Act refers only to the distribution of "copies". Such definition, similarly, does not necessarily preclude phonorecords from being considered copies but rather if construed, in the light of our U.C.C. obligations, merely prohibits distribution of this species of copies from constituting publication in Canada of non-Canadian convention works. Indeed, Copinger & Skone James on Copyright in commenting upon the provisions of the Imperial Act of 1911, drawn at a time which antedated the U.C.C. by half a century, and thus in no way affected by its provisions, state:

(B) musical, literary and dramatic works - when, with the consent of the copyright owner, such works are performed in public or sound recording or motion picture adaptations thereof are performed in public (including broadcasting or diffusion of same); or (C) sound recording and motion pictures - when, with the consent of the copyright owner, such works are performed in public (including the broadcasting or diffusion of same).

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footnote 91 cont'd.

> " It was submitted in previous editions of this work that, under the Act of 1911 the issue to the public of records or mechanical contrivances by which a musical work may be performed in public did constitute a publication of the music since such contrivances constituted just as much a fixed and permanent record of the music as publication of a musical score..." C.P. Skone James, Copinger & Skone James on Copyright 11th Ed., Sweet & Maxwell, 1971, at 27.

See however, Canusa Records Inc., et al v. Blue Crest Music et al 30 C.P.R. 2d 11, at 14 where the Federal Court of Appeal held that the term "copies" as used in S. 21 of the Act, (which provides copyright owners with a confiscatory right to seize infringing copies) did not include contrivances ie. records & tapes. Chief Justice Jackett predicated his argument on the definition of "musical work" in S. 2 of the Act which refers to "any combination of melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or reproduced". While the merits of this opinion may be debatable (insofar as it suggests that a copy of a musical work must, itself fulfill all of the requirements of a musical work), further exploration is not necessary, as the within recommendation to equate copies with phonorecords is consistent with the recommendations of an earlier paper in the series of Copyright Revision Studies to delete the the requirement of written notation from the definition of musical works. See M. Berthiaume & J. Keon "The Mechanical Reproduction of Musical Works in Canada", Consumer and Corporate Affairs Canada, Ottawa, August 17, 1979. See also the discussion of the history of the Canadian Act's definition of "musical works" in Copinger & Skone James, Law of Copyright, 8th Ed., 1948 at 65

Recommendation (B) raises an issue which has traditionally been cast in terms of whether the publication of a derivative work (eg. a motion picture) should constitute publication of a pre-existing work (eg. a book or screenplay) upon which the derivative work is based.

In the light of the preceeding discussion regarding performance as publication, it seems that a more meaningful approach would be one which focuses upon consideration of the degree to which exploitation of an authorized derivative work serves to benefit the owner of copyright in the underlying work so that it would be inappropriate that the doctrine of fair dealing should not be applicable to the underlying work.

Skone James expresses the view, without citing any case law in support, that:

> "upon the whole, it is thought that "... publication of a derivative work would not be publication of the original"[92]

However, Skone James also advises that the U.K. Copyright Act of 1956 (as does the Canadian Act) uses the word "copy" in relation to both infringement and publication thus suggesting that insofar as a derivative work, in addition

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92 Skone James, supra, note 43, at 25.

to being a protected work in its own right, may be a copy of an original work, that therefore distribution of copies of the former will serve as a publication of the latter.

A second Commonwealth commentator, Professor Lahore, expresses the view that in certain circumstances publication of a derivative work will indeed constitute a publication of an underlying work:

> " It is also possible that the publication of an adaptation of a work, that is, a dramatization, a fictionalization, a translation, or a version in pictures, of a literary work in non-dramatic or dramatic form, as the case may be, or an arrangement or transcription of a musical work, could constitute a publication of the original unpublished work, provided of course that the adaptation was authorized. However this will not usually be the result. Whether or not an adaptation is a reproduction of the work adapted so as to infringe the exclusive reproduction right, or constitute a publication of that work if the adaptation is supplied to the public, is a question which depends upon the nature of the adaptation. A photograph of a painting is a separate subject-matter of copyright but it may also be a reproduction or a copy of the painting and therefore an infringement of any copyright which subsists in the painting. It may also be a publication of the painting to distribute the photographs"[93]

Lahore concludes his comments by suggesting that, in order for a work to constitute a "copy" for purposes of

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[93] Lahore, supra note 20, at 112

infringement it need only reproduce a substantial part of another work, whereas this qualification does not appear to apply vis-à-vis supplying "copies" to the public for purposes of publication, and therefore "a reproduction for the purposes of publication implies an exact copy even if this is the two or three dimensional form"[94]

Professor Nimmer does not share Professor Lahore's view that a derivative work must be an exact copy of an underlying work in order for publication of the former to work a publication of the latter and adopts a more expansive position:

> " Since a derivative work by definition to some extent incorporates a copy of the pre-existing work, publication of the former necessarily constitutes publication of the copied portion of the latter. If only the broad outlines or other fragmentary portion of the pre-existing work is copied and published in the derivative work, then only to that extent is the pre-existing work published. The rule that a publication of a derivative work constitutes a publication of the pre-existing work is seen most clearly when the derivative work and the pre-existing work are published in the same medium.
>
> Is the above rule equally applicable when the pre-existing work is produced in one medium and the derivative work in another? On principle the answer should be "yes" since a pre-existing work is no less copied and published if the derivative work is in the same or a different medium". [95]

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[94] Ibid, at 112.

[95] Nimmer, supra note 25 at 4-58,59.

Professor Nimmer cites numerous examples where such a finding was implicit in the decisions of U.S. courts, including those cases in which it was held that publication of a derivative sound recording was a publication of the recorded pre-existing musical work. Such a finding is consonant with the earlier mentioned passage from Copinger & Skone James vis-à-vis sound recordings under the Imperial Act of 1911. He concludes his discussion of this matter by citing the following passage from the "Monty Python" case [96], where the Court did not address this issue specifically, but did express a view which couches the issue in the same terms as that suggested at the outset of the discussion of this matter:

> "Once the scriptwriter obtains the economic benefit of the recording and the broadcast, he has obtained all that his common law copyright was intended to secure for him; thus it would not be unfair to find that publication of the derivative work divested the underlying script of its common law protection"[97]

The position adopted by Professor Nimmer, and echoed by the Court in the Monty Python case, is the most consonant with a policy which recognizes that while the present definition of publication, and the consequential published/unpublished dilineation, may well be meaningful for a

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96 Gilliam v. American Broadcasting Corp., 538, F. 2d, 14

97 Id, at 17.

host of purposes (eg. criteria for application of international conventions, starting point for term of protection, etc.), it does not serve as the most appropriate factor to be considered vis-à-vis the application of the doctrine of fair dealing. It is in this light, therefore, that the recommendations appearing on page 55 hereof are offered.

(ii) The Purpose of the Taking

Presently, there are five, and only five, purposes for which a work, or a substantial part thereof, may be taken and the taking may find shelter under the defense of fair dealing: private study, research, criticism, review and newspaper summary.

As is the case in many other facets of fair dealing, where there is either little case law or commentary or where same exists it is often times more confusing than illuminating, so too with respect to the five purposes. For example, notwithstanding their less than self-evident meaning given their potentially broad scope, Copinger & Skone James on Copyright commences its "discussion" of the meaning to be ascribed to the terms "research" "criticism" and "review"

as follows:

> "The meanings of the expressions "research", "criticism", and "review" seem to require no further consideration".[98]

The British Court of Appeals has expressed the opinion that the scope of these "purposes" is to be construed strictly rather than broadly. In Hawkes & Son (London) Ltd. v. Paramount Film Service, Ltd.[99] the defendant film company shot a newsreel which captured the opening of a school by the Prince of Wales. Part of the film showed a march pass by the school band playing a portion of a musical work entitled the "Colonel Bogey" march, the copyright in which was held by the plaintiff. In response to the plaintiffs suit for infringement, the defendant claimed that its use was fair dealing and fell under the heading of "newspaper summary". The defendant sought to have the court construe this term broadly, in that the film served the same function as the newspaper summary, the difference between the two cases being simply a question of medium. The court

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98 Skone James, supra note 43, at 197

99 (1934) 1Ch 593

refused to be moved by this argument and held that newspaper summary could not be construed to include a film.

> " The only material part of the proviso here would be "any fair dealing with any work for the purposes of newspaper summary". It is impossible to say that this reproduction in a film of sound can be a newspaper summary. I think this proviso must be dealt with strictly, and when it says "newspaper summary", it means newspaper summary and nothing else. Now here is neither a summary nor a newspaper, and it is impossible, I think, to hold that this case comes within that protection"[100]

The Hawkes & Son case was decided under the Imperial Act of 1911, the language of which regarding fair dealing was the same as the present Canadian Act. However, in response to technological developments and in recognition of the arbitrary limitation imposed by the reference to "newspaper" summary, the British Act of 1956 expanded the privilege to encompass not only newspaper summary, but equally the reporting of current events via film and by radio and television broadcast. In Canada, however, with respect to newspaper summary, the present law would be that contained within the decision of the Court in the Hawkes & Son case.

While it is recognized that there may be differences between a critique and a review, where the Courts have

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100 Id, per Lord Justice Slesser at 608.

addressed the meaning to be ascribed to each (& the occasions are very few) there has been a strong tendency to treat these two terms synonomously.[101] A review may simply present a précis of a pre-existing work without commenting critically upon its merits. However, the term "review" has come to be as strongly associated with the concept of scrutiny as is the term criticism; in this context one speaks of a film review, or a television review, or a literary review, etc.

Presumably then, both a criticism and a review must use the passages which they take from protected works as illustrations to support the views of the critic or reviewer with respect to such works. Works which, under the guise of criticism, publish considerable portions of a protected work with relatively little criticism thereon may be denied the assylum of fair dealing. The courts must decide each case

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101 The tendency to equate the two terms and a confirmation of the sparsity of judicial treatment of same may be found in the opening statements of Lord Denning in the 1972 case Hubbard v. Vosper case.

> "The question is, therefore, whether Mr. Vosper's treatment of Mr. Hubbard's books was a "fair dealing" with them "for the purposes of criticism or review". There is very little in our law books to help on this".

Supra note 31, at 93.

upon its merits regarding, inter alia, the proportion of criticism to work criticized. Thus, it has been found that publication of a work consisting of a short essay of thirty-four pages on English poetry, followed by a 758-page selection of poems by various authors, was not defensible on the grounds of fair dealing.[102]

Similarly, the Court held in University of London Press, Limited v. University Tutorial Press, Limited[103] that the defendant infringed the copyright in plaintiffs published literary work, comprised of an aggregation of mathematics exam papers, when the former published a volume containing many of the same papers, answers to the questions in certain of the papers, and a short criticism of the construction of the various papers.

Finally, the Courts have stated that a criticism may comment upon both the literary style of a work and its subject matter, ie the ideas and theories which it presents.[104]

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102 Campbell v. Scott (1842) 11 Sim 31.

103 (1916) 2 Ch 601.

104 Supra, note 31 at 97.

Private study and research appear to differ from newspaper summary, criticism and review in an important way. The last three categories allow copying to enable the copied portions of a protected work to appear in a second author's work, whereas private study and research appear to allow the copying of a protected work for its own sake. In other words, one can copy portions of a work not to criticize the work nor to include it in one's own work, but rather simply to have a copy of same if having such copy facilitates one's research or private study.

In the past when such copying was carried out by hand, it was generally perceived that such copying, while competing with the copied work itself, insofar as it served the same function as the original, (as distinct from copies made for review, criticism or newspaper summary, which served a different function) could be accommodated within the copyright scheme as it did not affect the economic exploitation of a work in any meaningful way. The degree to which the advent of reprography has affected this relationship is taken up in the last section of this paper.

The present scope of fair dealing for purposes of private study or research in the light of reprographic

technologies raises two particularly interesting questions. First, is a researcher or student required to make a copy himself or may a third party make the copy on his behalf? Vincke, Côté & Nabhan are of the view that the key consideration is the party who initiates the duplication for the purpose of private study or research, and not the agent who carries out the act of duplication. They cite in support of their well reasoned argument,[105] the opinion offered by R.A. Barker in his work "Photocopying Practices in the United Kingdom":

> "It may be doubted however, whether the Courts would hold today that a student or a research worker necessarily has to "copy out" the work or such part or parts, as he needs himself. If the use is "fair", it is not unreasonable to suppose that the means by which the single copy required is produced for the particular purpose and person concerned may be irrelevant".[106]

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105 "A notre avis, l'appréciation de la destination d'une photocopie doit se faire par rapport à la personne qui a pris l'initiative de la commander et non par rapport à la personne qui l'a techniquement produite. Aussi, nous estimons qu'il faut reconnaître à la reproduction de l'oeuvre sont caractère d'étude privée ou de recherche, si tel est l'objectif poursuivi par la personne qui a désiré l'obtenir et quand bien même elle serait le produit d'une machine manipulée par un tiers".
Vinke, Côté, & Nabhan, supra, note 21, at 54.

106 R.A. Baker, Photocopying Practices in the United Kingdom, Faber & Faber, London, 1970, at 20. See also Dietz, Copyright Law in the European Community, where the author, in commenting upon provisions in the various E.E.C. copyright statutes regarding reproduction for personal use, advises:

> "It is not contrary to this provision that the making of the reproduction even by third parties is allowed or should be allowed, because the initiative lies here with the party ordering it", Supra, note 73, at 154.

The second question arises from the present practice of many teachers of photocopying portions of (and sometimes entire) works for distribution to their students, whether as individual copies or as part of a compilation. (eg. the "instant textbook"). While such copies are for the purposes of the study of the individual students, do such practices constitute fair dealing for purpose of "private study or research"?

Vinke, Côté & Nabhan answer this question in the negative. Their argument is predicated on the application of the principle developed when they addressed the preceeding question (ie. the "purpose" of a copy must be determined with respect to the person who initiates the copy). While their case is well reasoned, sound in principle, and supported by the case law,[107] their analysis does not address the question of what, if any, differences are there between "private study" and "research"? They equate the two terms, apply their suggested principle

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[107] In University of London Press Limited v. University Tutorial Press Limited, Peterson J. held that:

> "It could not be contended that the mere republication of a copyright work was "fair dealing", because it was intended for private study"

supra note 103, at 613.

In the 1962 American case of Wihtol v. Crow (309 F. 2d 777) defendant school teacher made an arrangement of plaintiff's copyrighted song and reproduced 48 copies of the song for his students on the schools duplicating machine. The defendant alleged that his activities should be considered as fair use in so far as he had acted "for the furtherance of music education, the advancement of music appreciation and education of my students and choirs involved". The District Court held

and come to the conclusion that such activities by teachers do not fall within the scope of private study. While their argument is probably correct, it is possible that the term "research" lends itself to broader construction than that which is appropriate for "private study", and this may provide somewhat more lattitude for some photocopying initiated by parties other than those for whom copies are made. Until such time as a Court is called upon to decide this question, the permissible scope of such activities, if any, remains unquantified.

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footnote 107 cont'd

for the defendant; the Court of Appeals reversed the decision and declared that the defendant's acts constituted infringement. The Appeal Court stated, in part:

> " The implications of the District Court's doctrine of fair use are, of course, not limited to these particular plaintiffs. Other copyrighted music, textbooks, maps and all types of other teaching materials will likewise be stripped of copyright protection provided only that the unauthorized duplications are made on the individual schools' own duplicating machines for distribution only to their own students. The collective result of such a rule would be to carve educational materials outside the ambit of copyright protection. This would not only be devastating for those who labor in the field of educational writing, but would indeed be a most serious blow to education itself".

(D) International Considerations

In the field of copyright, Canada adheres to the two major international conventions, namely the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") and the Universal Copyright Convention ("U.C.C."). The Berne Convention was signed in Berne on September 9, 1886 and since that date has been revised numerous times including those revisions at Berlin in 1908, at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971. Canada has acceded to the Rome Text but has not acceded to any later Texts. The U.C.C. was adopted in Geneva in 1952 and has been revised once, in Paris, in 1971. Canada has acceded only to the 1952 Text.

Thus, constraints and obligations imposed upon Canada by virtue of its membership to the Berne and Universal Copyright Conventions may be determined by examining the Rome and Geneva Texts respectively of these conventions, although preceeding and succeeding texts may be useful both in understanding the Rome and Geneva Texts, and in exhibiting trends in the development of international copyright law.

Neither the Rome nor the Geneva Text confers general right of reproduction upon authors.

Article I of the Rome Text of the Berne Convention provides that countries to which the Convention applies constitute a Union for the protection of the rights of authors over their literary and artistic works. Articles 8 through 14 contain the provisions constituting the "Convention minima", i.e. those forms of protection which each signatory country undertakes to provide in its domestic legislation. These are the right of translation, the right of authorizing the reproduction of works published in newspapers or periodicals, the right of authorizing the presentation and performance of dramatic, dramatico-musical and musical works, the right of authorizing radiodiffusion, the right of authorizing adaptations of literary and artistic works, the right of authorizing (a) adaptation of musical works to records and tapes and (b) the public performance of these works by means of such records and tapes, the right of authorizing the reproduction, adaptation and public presentation of works by cinematography.

Article I of the Geneva Text of the U.C.C. requires

only that the member states provide "adequate and effective protection" for works to which the Convention applies. The only specific minima pertain to term of protection and the right of translation.

The Study Group which prepared the draft Text of the Stockholm Revision of the Berne Convention expressed the view that the presence of the specifically enumerated forms of reproduction must be understood to mean that these rights, in the aggregate, constituted the full scope of the authors' rights vis-à-vis reproduction and thus, there was no general "right of reproduction". This view is affirmed in the World Intellectual Property Organization's Guide to the Berne Convention:

> "Oddly enough, this right (... of reproduction) which is the very essence of copyright, did not appear in the Convention as one of the minima until as late as Stockholm (1967). Though the right was recognized in principle, by all member countries, the problem was to find a formula broad enough to cover all reasonable exceptions but not so wide as to make the right illusory".[108]

The reference in the preceeding passage to "all reasonable exceptions" is most important; it indicates that

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108 Claude Masouyé, Director of Copyright and Public Information WIPO, (World Intellectual Property Organization, Geneva, 1978) at p. 54

even when the members of the Berne Union were seeking to establish a general right of reproduction there was a shared recognition that such a right, could not be all inclusive, but rather, would have to be rendered subject to a range of reservations and exceptions which, like copyright, served the public interest.[109]

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109 The Rome Text (as had all preceeding, and as have all succeeding texts) contains a number of these reservations and exceptions; see for example Articles 2bis(1) and (2), 9(2), 10, 11bis(2), 13(2)

Thus, the framers of the Stockholm Text while providing to authors under Article 9(1) "the exclusive right of authorizing the reproduction in any manner or form" those literary and artistic works protected by the Convention, added the following provision in Article 9(2)

> "It 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"

The Stockholm Text contains further specific exceptions including that found in Article 10(1):

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries".

In his treatise Copyright Law in the European Community[110] Dr. Adolph Dietz points out that the copyright legislation of all members of the E.C.C. (as that of all Commonwealth countries and the United States) has always contained a variety of exceptions and reservations to the exclusive rights of authors and that further, successive revisions to the Berne Convention have expanded and enshrined the scope and legitimacy of such exceptions:[111]

> "Copyright is not only limited in time ... but it is also already subject during the protection period to certain limitations "whereby the legal sphere of the individual is demarcated in relation to the requirements of the community" and "which are conditioned by the requirements of intellectual life" (Ulmer). Copyright, furthermore has a somewhat strained relationship with the information needs of modern society and with the basic right of freedom of information. On top of this, there is the idea of protection of the individuals' private sphere, which must be safeguarded as far as possible against intervention or control by

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110 Sijthoff & Noordhoff, Alphen ann den Ryn- The Netherlands,1978.

111 Article IVbis(1) of the 1971 Paris Text of the U.C.C. similarly provides a general right of reproduction, made subject, however, to provisions of Article IV bis(2). "However, any Contracting State, may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights mentioned in paragraph 1 of this Article. Any state whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exceptions has been made".

> the state or social groups.[112] Considerations from all these fields have always had the effect of depriving the author of the possibility of keeping a check on certain utilizations of his work in the private sphere, in the sphere of science and teaching, in the sphere of press and radio reporting and also in the sphere of certain public performances. As a rule this has happened and still does happen owing to the fact that the copyright laws state that a more or less large number of precisely defined acts of utilization are permissible or free (witness for instance the formulation of the Danish, German and Italian laws, or that it is said of these actions that they do not constitute infringements of copyright (as in the British, Irish and Dutch formulation) or cannot be forbidden by the author (as for instance the French formulation)"[113]

Using the Copyright Act of the Federal Republic of Germany as a model, Professor Dietz enumerates ten different areas where there are identical or comparable

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112 The struggle to balance and accommodate these often times conflicting interests has been characterized elsewhere in the following manner:

> "The copyright scheme requires the accomodation of two distinct sets of opposed principles, one having to do with access, the other having to do with economic costs. With respect to access, the tension is between, on the one hand, the general principle of the greatest possible dissemination of knowledge, and on the other, the copyright-scheme restrictions on access to works of the intellect. With respect to cost, the tension is between, on the one hand, the general principle of the maximum freedom of competition, and on the other the kind of monopoly -like economic restrictions intrinsic to the copyright design. The success of a legislature in fashioning a copyright statute will necessarily depend on how clearly the interplay of these tensions within the copyright scheme is understood". Seltzer, supra note 13, at 3

113 Dietz, supra note 110, at 13

arrangements regarding limitations in the copyright statutes of most of the member countries of E.C.C. [114] In all of the E.C.C. countries, save for the U.K. and Ireland, each of these limitations is set out as a specific provisions addressed to a particular subject, whereas in the U.K. and Irish statutes certain of these areas are similarly directly addressed as specific exemptions, while others arise indirectly in so far as they fall within the scope of the doctrine of fair dealing. For instance, of the enumerated list set forth in footnote 114, the following areas are dealt with to varying degrees via fair dealing in the British and Irish Statutes: (1) public speeches, (2) taking over of newspaper articles and radio commentaries without need for permission (3) freedom of visual and sound reporting, (4) freedom of quotation, (5) reproduction

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114 (a) Utilization in the interests of administration of justice and public safety; (b) Sound or video recording of school broadcasts for educational purposes; (c) Public speeches; (d) Collections for use in churches and schools or for educational purposes; (e) Taking-over of newspaper articles and radio commentaries without need for permission; (f) Freedom of visual and sound reporting; (g) Freedom of quotation; (h) Freedom of public communications in certain cases; (i) Reproduction for personal and other own use; (j) Ephemeral recordings by broadcasting organizations.

The earlier comments of Dietz, augmented by a necessary recognition of the scope and variety of the foregoing enumeration, should serve to lay to rest the widely held, but erroneous, belief that European systems of copyright do not, like Anglo-American systems, feel the need to accomodate the interests of both creators and users. Indeed, many European copyright statutes have as many, if not more, exceptions to the exclusive rights of copyright owners than does the present Canadian statute.

for personal and other own use.

Two principle observations arise from the preceeding analysis. Firstly, while certain measures contained in the successive revisions of two international Conventions (and the attendant revisions of the domestic legislation of many signatory countries), have provided greater levels of protection, there have been an equal, if not greater, number of measures which have provided for broad reservations and exceptions to the exclusive rights of copyright owners. Secondly, insofar as the areas of exemption are broader under both of the most recent texts of the Conventions than they are within the Rome and Geneva Texts, it would appear that the present doctrine of fair dealing as established by the Canadian Copyright Act and as developed by Commonwealth case law, cuts a broad swath across both the protected and exempted realms of reproduction specifically established in the Rome Text and possibly required under the Geneva Text. Thus, it is quite probable that certain activities which fall within the scope of fair dealing, as presently established, are not in accord with the provisions of the Rome Text of the Berne Convention.

It is anticipated that the proposed changes to the doctrine of fair dealing set forth later herein, in addition to serving Canada's national interest, will serve to ameliorate any lacunae which may subsist in the international arena.

(E) Fair Dealing Reconsidered[115]

(i) A New Definition of Fair Dealing: "Fair Use"

Author Leon Seltzer comments appropriately at the commencement of his exploration of fair use and exemptions under U.S. copyright law that these concepts can be addressed meaningfully only when viewed in the light of the "nature of the copyright scheme"; ie., the purpose which the scheme is designed to serve and the mechanism adopted to serve this purpose. To the extent that the U.S. and Canadian statutes share common purposes and mechanisms, Seltzer's analysis will be equally applicable and valuable for our purposes herein.

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115 The lucid and imaginative analysis of Leon Seltzer in his treatise "Exemptions and Fair Use in Copyright" serves as a beacon illuminating, what appears to be, the most viable, most meaningfully defined pathway out of the tangled web of conceptual confusion surrounding the substantiality/fair dealing/infringement matrix explored earlier in Section B. It is impossible to do justice to Seltzer's thesis without quoting at length from certain passages in his work. The reader can only benefit and, I trust that the author will view such taking in the complimentary light in which it is intended.

The U.S. Constitution provides that the federal government is to have power

> "To promote the progress of science[116] and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries"[117]

An examination of this constitutional provision reveals the following elements, which are either expressly stated or arise by necessary implication:

> "- products of the intellect are to be especially encouraged;
> - the way to do this is to give authors a monetary incentive;
> - there is something about printed materials that prevents our relying on the ordinary workings of the marketplace to ensure their production and distribution at appropriate levels;
> - the economic incentive for the author shall consist in a grant of the exclusive right to make copies of his work;
> - such controls smach of monopoly;
> - a monopoly is inherently against the public interest, because it

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116 The term "science" is used in its older meaning as knowledge of all kinds. For further discussion and references on this point see Nimmer, supra note 25, at 1-28.

117 U.S. Const., Art. I, Sec. 8, Cl. 8.

denies free access to the work or adds to its cost, or both;
- on this account it is to be limited in time; and
- this limitation is sufficient to avoid imposing excessive costs, either of price or of access, on the public"[118]

Seltzer suggests that the following central elements may be distilled from the foregoing enumeration:

"(1) The purpose of copyright is to benefit society
(2) The mechanism by which this purpose is achieved is to be economic
(3) Society's instrument in achieving this purpose is to be the author[119]

It must be noted that this is not Seltzer's view alone; the Supreme Court of the United States has fully endorsed this view. In the case of Mazer v Stein,[120] the Court stated:

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors".[121]

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118 Seltzer, supra note 13, at 8.

119 Ibid, at 8.

120 347 U.S. 201 (1954)

121 Ibid, at 219.

The Court has also stated:

> "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts. The immediate effect of our copyright law is to secure a fair return for an author's creative labour, but the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good".[122]

Is Canada's Copyright Act predicated on the same scheme as that of the United States? Both the U.S. Act and the Canadian Act (indeed all Commonwealth copyright statutes) are lineal descendants of the 1710 British Statute of Anne. The Economic Council of Canada, in its 1971 Report on Intellectual and Industrial Property, stated:

> "Notwithstanding subsequent statutory amendments and a rich jurisprudence (in Britain and the United States, at least), the basic features of the Statute of Anne remain at the heart of British, American and Canadian copyright law today".[123]

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122 Twentieth Century Music Corp. v. Aiken, 422 US 151, at 156 (1975).

123 Economic Council of Canada, Report on Intellectual and Industrial Property, 1971, at 129.

Seltzer confirms the views of the E.C.C. that the essential structure of the U.S. copyright scheme is derived from the Statute of Anne.

> "The first express statement of the present copyright scheme appears in the Statute of Anne, which however complicated the history of its gestation, and however diverse the competing factors in its establishment of public policy, nevertheless is explicit about copyright's purpose and means: "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". That this was the model for the United States approach is clear from the parallel wording of the purpose clause of the first federal copyright act passed by the Congress in 1791: "An Act for the encouraging of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times mentioned therein".[124]

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124 Seltzer, supra note 13 at 9.
This view has similarly been expressed by Barbara Ringer, former U.S. Register of Copyrights:

> "Our law derives from a statute that was enacted under Queen Anne in 1710".

"Our Copyright Law - Present Status and Proposals for Change" in "Copyright: The Librarian and the Law" edited by G.J. Lukac, Bureau of Library and Information Science Research, Rutgers University Graduate School of Library Service New Brunswick, N.J. 1972, 15, at 18.

In his article, "Canadian Copyright: Natural Property or Mere Monopoly", Professor Jack Roberts is led to conclude, after a lengthy exploration of the roots of Canadian copyright law, that, like the American law,

> "... Canadian copyright is most appropriately regarded as a limited bundle of monopoly rights offered by the state in order to persuade creators to make their works available to the public. It is not a right of property entitling the creator to compensation for every conceivable use thereof".[125]

The common purpose and design of Canadian and American copyright law requires of both, as earlier noted, the accommodation of two distinct sets of opposed principles, one having to do with access, the other, with economic costs.

> "With respect to access, the tension is between on the one hand the general principle of the freest possible dissemination of knowledge, and on the other, the copyright scheme restrictions on access to works of the intellect. With respect to cost, the tension is between on the one hand the general

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125 40 C.P.R. (2d) 33 at 36.

> principle of the maximum freedom of competition, and on the other the kind of monopoly-like economic restrictions intrinsic to the copyright design".[126]

Seltzer suggests that the copyright scheme's reliance on the author as the instrument of the scheme's workings has served historically as the crucial mechanism by which the scheme has attempted to accommodate such tensions internally.

> "... the coherence of any approach to the question of exceptions to copyright controls, whether as fair use or as statutory exceptions, depends on absolute clarity about the role of the author as the "instrument" in furthering the purposes of the scheme. The common error of classifying the author's interests or society's as "primary" or "secondary", thereby characterizing them as somehow opposed, has often confused analysis, particularly when what is at issue is the conceptualization of the scheme with respect to cause and effect. If the copyright scheme "itself" is to be considered in the public interest, such categorizations blur the fundamental issues usually in question.
>
> Insofar as new exceptions simply accommodate the role of the author-as-instrument to the changes in technology, the essential reliance on the workings of the copyright scheme is increased, and therefore insofar as the mechanism is itself valid its efficiency is increased. On the other hand,

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126 Supra, note 75.

> insofar as the exceptions dilute the controlling role of the author, the reliance on the internal workings of the copyright scheme itself is lessened, and other mechanisms might arguably be seen to be looked to for solutions".[127]

At the outset of this paper it was noted that the present doctrine of fair dealing, established for the first time in the 1911 U.K. Imperial Copyright Act, replaced the pre-1911 equitable doctrine of "fair use" under which copying not sufficiently substantial to constitute infringement was held to be fair use.

The 1911 statute provided that fair dealing was thereafter to be regarded as a defense to a claim of infringement; ie. copying so substantial as to infringe could be excused if found to be fair dealing. The exploration of the actual relationship between substantiality, infringement and fair dealing revealed that the new doctrine of fair dealing had proven to be an unwieldy, inarticulate, "puppet king" and that the "eminence grise" had remained, throughout, the doctrine of substantiality.

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127. Ibid, at 12, 13.

The proposal which Seltzer offers for a reconstituted American fair use, if adopted in this country, would result in a return for Canada to a modified version of its own pre-1911 doctrine of fair use, one within which, it is submitted, the appropriate relationship between infringement, substantiality, and fair use prevailed.

Seltzer's comments on the success of the fair use provisions of S 107 of the new U.S. Act serve as ironic commentary upon the recommendation by the many parties who submitted briefs in response to the Keyes/Brunet Report[128] urging that Canada should model its fair dealing provisions after S 107.

> "If the purpose of a statutory definition of fair use is to articulate a coherent rationale for public policy, and to establish or to refine a standard that will help courts in dealing with particular determinations of what they have long agreed, along with Judge Learned Hand, are "the most troublesome in the whole law of copyright", then the treatment of the issue in the new Copyright Act is very nearly a total loss.

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128 See for example the briefs of the Association of Canadian University Presses; the Association of Canadian Publishers; Ontario Educational Communications Authority. See also "Statement of the Association of American Publishers, Inc. On the "Report of the Register of Copyrights on the Effect of 17 U.S.C. S. 108 on the Rights of Creators and the Needs of Users of Works Reproduced by Certain Libraries and Archives". Jan. 19, 1980, at p. 1.

> "We believe that the codification of the doctrine of fair use in S 107 and the provisions for additional library copying privileges in S 108 appear to have failed to accomplish the Congressional purpose...".

> The section has three serious defects. First, it does not attempt a definition of fair use at all.[129] Second, by not providing the slightest guidance in the ordering of priorities in the application of the four "factors to be considered"[130] it has not only said nothing not obvious about fair use, but, worse, implied that there is no general order of priority deriving from the copyright scheme. Third, by listing along with universally acknowledged examples of fair use (criticism, comment, and news reporting) those expansive and ambiguous uses (teaching, scholarship, research) that have raised issues having to do with significant exemptions from copyright, expressly dealt with as such in various ways in the statute, it thoroughly muddies the distinction between fair use and exempted uses".[131]

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129 While many people share the perception that the new U.S. Act has provided a definition of fair use, unlike the Canadian provisions vis-à-vis fair dealing, the fact remains that S 107 of the U.S. Act does not provide a definition of fair use. Professor Nimmer:

> "Strictly speaking, S. 107 does not attempt to define "fair use". Rather it lists "the factors to be considered" for the purpose of "determining whether the use made of a work in any particular case is a fair use".

Nimmer, supra note 25, at 13 - 50.

130 "In addition, S. 107 gives no guidance as to the relative weight to be ascribed to each of the listed factors".

Id, at 13 - 51. See also Fried, supra note 43 at 207.

131 Seltzer, supra note 13 at 18, 19.

The discussion in the preceeding pages of this Section of the Paper has addressed several related issues:

(1) The copyright scheme's need to balance two sets of opposed principles (access and costs).

(2) The scheme's reliance on the author-qua-instrument of the scheme's workings as the mechanism by which the scheme attempts to accommodate the two principles.

(3) The recognition that both the present doctrine of fair dealing and that of fair use, do not accord with the common underlying scheme of the Canadian and American copyright acts insofar as both: (1) purport to treat the doctrine of "substantiality" merely as one of a number of equal fair use/dealing factors (2) result in a perception of fair use/dealing, first as a defense to infringement to be raised only after a prima facie case of infringement has been established, and, second, as an entity akin to an exemption, comparable to that, for instance, for the print handicapped.

(4) The failure of the doctrines of fair use and fair dealing to provide a comprehensible, workable tool for use by the public and the courts alike.

Seltzer proposes a doctrine of fair use which seeks to overcome these deficiencies insofar as it:

(a) respects and reflects the nature of the copyright scheme as earlier described, whereas the present U.S. doctrine of fair use and our own doctrine of fair dealing do not,

(b) results in a doctrine which has conceptual integrity (no mystical tiers upon tiers and elements within elements) and therefore one which should be easier to understand and hopefully, easier to apply,

(c) recognizes the importance of and requires the courts to pay due consideration to the question of fairness to the first author at the threshhold enquiry regarding substantiality,

(d) brings our Copyright Act considerably closer to conformity with our international obligations.[132]

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132 Refer to discussion at pp. 77 & 105.

Just prior to looking at these proposals, one further facet of the copyright scheme requires elucidation; the fundamental difference between fair use/dealing and exemptions Seltzer points out that the copyright scheme is itself not fundamentally concerned with the internal reallocation of costs between creators and users once a work is brought within its scope, and, insofar as fair use is an integral part of that design, neither is it.[133] He further points out that such concern lies within the province of legislative bodies, and such reallocation results when legislators decide not to rely on the internal workings of the scheme and choose, instead, to establish exemptions.

> "With fair use we were concerned with drawing the line between protected uses and a use that the copyright scheme itself contemplates as not within the appropriately expected economic reward of the scheme.[134]

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133 This position is predicated upon a view of fair use as use which is not infringing rather than use which although infringing is excused; the former being the pre-1911 Commonwealth doctrine of "fair use"; the latter being the post-1911 Commonwealth doctrine of "fair dealing" and the post-1976 American doctrine of "fair use".

134 see discussion infra at pp. 92-94.

With exemptions we are concerned with what is on the protected side of that line. - uses which are fully and properly within the copyright scheme but which should, for reasons of public policy, be declared exempt from the copyright control of the author.

In making this determination in a particular instance, Congress must deal simultaneously with two primary principles: the integrity of the copyright scheme, to which the public interest has on the whole been entrusted; and the strength of the call by other constitutional interests on modifying the internal dynamics of the copyright scheme. That is, just as initially a risk was taken in relying on copyright, so a risk will be taken when the scheme is significantly modified. What considerations ought Congress to take into account in deciding when to depart from the copyright scheme? It is clear that if the fundamental reliance on the exclusive-rights mechanism of the design is to be relaxed it must be either for technical reasons, which would nevertheless leave the underlying incentive effect essentially intact; or for reasons of public policy deriving from the legislative view that the cost to society of exclusive author control is too great - that either the cost or the degree of control of access by the author, or both, is unacceptable.

Having first come to a decision that there are appropriate copyright interests, whether of cost or of access, to be reallocated, Congress has two ways of dealing with an exception from the scheme:

> (1) either by altogether exempting certain uses from payment or permission, thereby concluding that no further reliance on the copyright scheme incentives is either needed or warranted; or (2) by substituting statutory for author controls of access and price (compulsory licensing) reaffirming the essential reliance on the copyright-scheme monetary incentives".[135]

The preceeding description of the difference between fair use and exemptions underlines the fact that the copyright scheme is not concerned with the allocation of costs; rather, it is concerned with whether there is to be a cost at all; (ie should a particular use of a work give rise to an obligation to pay for same?) It is this facet of the scheme which Seltzer argues is the critical element which dictates the appropriate conceptualization of fair use and which suggests the appropriate formulation of a fair use definition.

> "Fair use, ... has to do with whether a particular cost-free use is one both foreseen by the author and contemplated by the Constitution.
>
> It is clear, of course, that no one - least of all the author - means the phrase ... author's exclusive rights ... literally. What the author fashions out of his intellect and sensibilities he "expects" to be used by other minds and other sensibilities. That is why he does it. He hopes that people will recite his poems, that other thinkers will cite his work and rely on it, that students will learn from him, that the world will take note of what he has wrought, and that the private reader will copy out his words and sing his songs. And for such use he expects neither to be asked nor to be paid.

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135 Seltzer, supra note 13 at 49.

> But somewhere shortly beyond that he has economic expectations appropriately deriving from what society offered him in the copyright scheme. Similarly, society does not intend that the "exclusive right" language shall bar appropriate use of his work by others in the furtherance of progress of knowledge and the arts. It is at the junction of these two sets of expectations - about costs and about access - that the question of fair use arises.
>
> Accordingly, the court's notion of fairness in the use of copyrighted materials will proceed from this dual perspective about "normal expectations": the author expects that the copyright scheme itself will sometimes require use of his work necessary in the public interest for which he will not be paid, and society expects that the copyright scheme will either allow such use without reducing the author's incentive or impose no excessive burdens on the public when use is controlled.
>
> ... the determination of fair use in a particular instance will decide whether the author's expectation of economic reward was or was not appropriate, and such a determination ought to coincide with a simultaneous judgement about whether society's expectations of denial of access was or was not appropriate".[136]

Such a conceptualization of fair use as that set out above has also been advanced by Walter L. Pforzheimer in his article "Historical Perspective on Copyright Law and Fair Use".[137] Pforzheimer argued that: "... fair use is the use, without the copyright owner's consent, of such portion of a copyrighted publication as a copyright proprietor might reasonably

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136 Ibid, at 29, 30.

137 Reprography and Copyright Law, ed. L.H. Hattery and G.P. Bush, American Institute of Biological Sciences, 1964, at 18. Walter Pforzheimer is the founder of the Pforzheimer Collection of Copyright Law at Yale Law School.

expect might be so utilized, given the type and nature of the publication in question; and would not be such a qualitative and quantitative taking as to constitute an infringement within normal judicial concepts of that term".[138] Similarly, Professor Ralph Shaw has suggested that: "the differentiation between fair use and infringement is fundamentally a problem of balancing what the author must dedicate to society in return for his statutory copyright - which varies according to the work involved - against undue appropriation of what society has promised the author in terms of protection of his exclusive right ... fair use is all use dedicated to the public by the nature of statutory copyright".[139] Finally, notice should also be taken of the comparable view expressed by Professor Alan Latman in his study "Fair Use of Copyrighted Works", prepared as one of the series of studies commissioned by the U.S. Copyright Office in preparation for the revision of the U.S. Act:

> "... it is believed that for purposes of analysis, the criteria of fair use may conveniently be distilled even further, without danger of oversimplification. In fact, the tests may perhaps be summarized by: importance of the material copied or performed <u>from the point of view of the reasonable copyright owner. In other words, would the reasonable copyright owner have consented to the use</u>?"

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138 Ibid, at 30.

139 Ralph Shaw, Literary Property in the United States, Scarecrow Press, Washington, 1950.

Seltzer concludes that the dual risk conceptualization which he advances, and with which Pforzheimer and Shaw concur, leads to the following formulation of the first part of a fair use definition:

> "Fair use is that use that is necessary for the furtherance of knowledge, literature and the arts and does not deprive the creator of the work of an appropriately expected economic reward".[140]

There will be those undoubtedly who will feel that this formulation is a radical departure from the the law of fair use/fair dealing which presently prevails and is therefore somehow suspect and that, further, it suffers from its own inexactitude. With respect to the first concern, the proposal differs significantly from the present law of fair use/fair dealing only in one regard; it posits a theory of fair usage where such usage is equated unequivocably with insubstantial copying.

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140 It will recalled that Professor Nimmer advised that: "... the actual decisions bearing upon fair use, if not always their stated rationale, can best be explained by looking to the central question of whether the defendant's work tends to diminish or prejudice the potential sale of the plaintiff's work". (Supra at note 59).

Seltzer builds a bridge to Professor Nimmer's formulation when he suggests that where there is copying of a work so substantial as to materially reduce the demand for the original it is usually the case that the "normal expectations" of the author have been disappointed.

In terms of the criteria to be considered, however, Seltzer quite correctly points out that there is nothing novel about his formulation; indeed, it closely parallels the kinds of economic considerations obliquely raised in most fair use/dealing cases. Rather than expressing these considerations in an oblique manner, the foregoing definition addresses them squarely; and, thus, makes explicit the basic economic risk arising from the copyright scheme and the controlling relationship between the two essential criteria which underly that risk.

While Seltzer's view is that "there is no way of avoiding the danger of the expansiveness of a term like "necessary" and no qualification of the word can help,"[141] one must ask what real value is served by the inclusion of the entire clause in which the term "necessary" appears. The language is so expansive, that ostensibly, there would be very few, if any, uses which would not, in some manner, further knowledge, literature and the arts. Further there is the potential that this language could serve as an instrument of oppression and censorship by allowing the courts to rule on the merit or "value" of a given work. Such a situation would be at odds with one of the fundamental principals underlying our copyright system; ie., the availability of copyright protection for all works of all designated classes so long as

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141 Seltzer, supra note 13 at 31.

they originate with the author and are "fixed" in some form, irrespective of artistic merit or quality. This first part of Seltzer's formulation seems to owe much to the introductory language of the U.S. Constitutional Clause on Copyright, ie. "To promote the progress of science and the useful arts..." However, it has recently been held that this language does not require that each work protected by copyright in fact promote science or the useful arts, only that Congress shall be promoting these ends by its copyright legislation,[142] thus rendering the value of this clause in a definition of fair use even more questionable.

For all of the reasons cited above, it is suggested that the first part of the definition of fair use should eliminate the reference to "use that is necessary for the furtherance of knowledge, literature and the arts", and provide instead that:

> "Fair use is that use of a protected work that does not deprive the owner of the copyright[143] in such work of an appropriately expected economic reward."

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142 Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F 2d 852.

143 It appears that Seltzer uses the term "author" throughout his work to designate the copyright owner; for, afterall, it is only the expectations of the copyright owner which are material. However, as a result of either statutory law or a disposition of the copyright by the author, there may be many situations where the author never was, or no longer is the copyright owner. The reference to "copyright owner" clarifies this point.

With respect to the possible suggestion that the phrase "appropriately expected economic reward" suffers from a potentially problematic lack of precision, Seltzer is forthright in his response.

> "It is of course clear that the key phrase in the suggestion proposed here is "an appropriately expected economic reward". Under such a formulation, it would be the task of the court to decide, bearing in mind the dual risk embodied in copyright, whether the author from his initial position ought, in view of the intellectual nature of his work and of the consequent need for others to "use" it, to have expected "both" to control the sort of subsequent use in question "and" to have been paid for it. If the answer is no, the courts would find the use fair and within the copyright scheme. If the answer were yes, the courts would protect the author's copyright interest and defer to Congress on the question of whether a reallocation of costs requires an exemption from copyright".
>
> "Have we thus merely begged the question? Not if notice considerations have any use in the formulation of a statute: such a definition in the law would give appropriate notice to the creator of the work and to the second user alike of the normal relationship between the two elements that the copyright scheme holds in tension. And perhaps more important when it is applied to particular cases, a definition that makes that relationship explicit is the necessary bedrock for the ordering of the separate factors that courts must consider in reaching particular judgements".[144]

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144 Seltzer, supra note 13, at 32.

While the test to be applied by the courts which arises from the proposed formulation will certainly serve to shape the actual expectations of authors and users alike, it must be clearly understood that in the final analysis the test is an abstraction, comparable to many others found elsewhere in the law, such as the "reasonable man test", ie. what would a reasonable man have done under the circumstances?

The "appropriate expectations" of an owner of copyright will be a judicially established standard varying from case to case as factual situations differ and may not fully coincide with any given owner's expectations, as reasonable as they appear to that owner. No definition of fair use can accomplish anything more. The strength of this definition, however, is that it provides the courts with, what are believed to be, the most appropriate guidelines and most cogent concerns when called upon to address these questions. Thus, the "appropriate expectations" of

a copyright owner, and therefore what is a fair use, will vary from time to time under the influence of previous court decisions, legislative action, and technical and economic change; however, more importantly, the standard and rationale will remain constant.

The final element in the development of a new fair use/dealing formulation is the establishment of the appropriate factors to be considered by a court when deciding whether a particular use is fair and the weight to be ascribed to each factor as reflected in a ranking of same.

In the same manner that the copyright scheme itself suggested an appropriate formulation for the definition of fair use, the definition of fair use suggests an appropriate priorization of the factors to be considered, which, save for one major qualification, are the factors set forth in S. 107 of the U.S. Act.[145] Seltzer suggests that "any definition of fair use that does not begin with the author's perspective and proceed to what from his initial position he ought appropriately to expect ends up either reasoning in circles or begging the fundamental question".

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145 (1) the purpose and character of the use;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used;
(4) the effect upon the plaintiff's potential market.

The qualification pertains to the presence of the term "substantiality" in factor #3 and is addressed more fully at pp. 101-103.

146 Seltzer, supra note 13 at 34.

A perspective colored appropriately by an initial concern for the first author's risk leads to a natural ordering of factors:

> "... the nature of (... the first author's risk) must color his expectations about how it will be used by the second author, and the "purpose" and "character" of the use must in turn color the second author's expectations, which embodies society's. The first author will know, for example, that for an informational work such as a biography or compilation, there will be expectations different from those attendant on a piece of music or a work of fiction.
>
> "The nature of the copyrighted work" will govern the normal expectations of both society and the first author, and on the appropriateness of those expectations will depend both on the second author's sense of what use he can make of the first author's work and a court's determination, on society's behalf, of whether he was right. That is the essential fairness question: fairness turns on perspective, and this order of things, which begins with fairness to the particular first work and proceeds to the point of view of the general scheme, establishes that perspective".[147]

As the fourth factor presently enumerated in S 107, "the effect upon the plaintiff's potential market", is incorporated, in essence, into the very fabric of the proposed formulation, it would be redundant to cite it again as one of the factors to be considered in applying the test arising from that formulation. This leaves only the third factor listed in S 107, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole".

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147 Seltzer, supra note 13 at 33, 34.

Professor Nimmer's characterization of this factor fully reflects the arguments advanced throughout this paper as to the artifice and resulting confusion surrounding the concept of substantiality under the Commonwealth doctrine of fair dealing and the post 1976 American doctrine of fair use. Professor Nimmer states simply that this factor... "raises an issue which may be regarded as relating to the question of substantial similarity rather than whether the use is fair".[148] This unassuming pronouncement does not do justice, however, to the significance of the "double tier" of substantiality in terms of the conceptual confusion which it engenders and the difficulties of application which result. On this most important point Seltzer's comments border on the profound:

> "...this wording in fact tries too hard, losing accuracy and making for both a redundancy and a begging of a question. A formulation that identifies a factor to be considered in the same neutral mode as the other factors would omit the word "substantiality": "the amount of the portion used in relation to the copyrighted work as a whole". It is a consideration of that relationship, along with others, that might result in a finding of substantiality - but substantiality itself is the ultimate fact to be found. That is, if a use is substantial it cannot be fair use. A substantial taking is the definition of "infringement". Any excusing of a substantial taking must be an

148 Nimmer, supra note 25, at 13-53.

> exemption from copyright. Accordingly a more accurate statement of the "factor" to be considered would simply be "the extent of the use". That serves as well the interest of leanness in the definition, not always perceived or kept separate in analysis, between three different uses of "substantiality", namely (1) substantiality of the degree of similarity (ie. the question of whether there has in fact been copying, (2) substantiality of the copying (ie. the question of whether there has in fact been copying) (3) the substantiality of the economic deprivation of the first author (ie. the question of the appropriately expected economic reward)."[149]

Thus, with the addition of the priorized list of factors to be considered, the full definition of fair use would be as follows: "Fair use is that use of a protected work that does not deprive the owner of the copyright in such work of an appropriately expected economic reward. In determining whether the use made of a work in a particular case deprives the owner of the copyright in the work of such a reward, account should be taken first of the nature of the copyrighted work and then of the purpose, character, and extent of the use".[150]

It is recommended that the foregoing definition of fair use be adopted in a revised Canadian copyright statute.

It is recognized that this definition provides neither an "exhaustive" list of second author purposes as under the present Canadian Act nor an "exemplary" list of comparable purposes as under the present American Act.

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149 Seltzer, supra note 13 at 35.

150 A necessary corollary to adoption of this definition is the removal of reference to "substantial part" from the provisions of S. 3(1).

It appears that not one of the nine copyright specialists asked by the U.S. Copyright Office to comment on the appropriate statutory approach to fair use recommended listing any examples at all. Professor Nimmer expressed the view that statutory recognition of the doctrine of fair use "should be in general terms, and should not attempt any specific enumeration of particular instances of fair use".[151] Seltzer advises that: "the listing of examples ... raises more questions than it answers, obscuring the very distinction among the three sorts of uses a fair use definition out to make clearer - (1) normal expectations of reward, (2) wholly accepted free use and access, and (3) the areas at the margin that cause difficulty in fair use adjudication".[152]

The accuracy of Seltzer's comment is fully borne out upon a perusal of the submissions made in response to the Keyes-Brunet Report. A digest of comments contained in the briefs submitted in response to the Report,[153] revealed that the briefs by one research institute, one university and one educational association urged inclusion of a specific teaching exemption. Further, three briefs by universities sought an exemption for classroom use akin to that provided for in S. 107 of the U.S. Act (the very confusion that

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151 Nimmer, supra note 25 at

152 Seltzer, supra note 13 at 32; see also discussion at note 131.

153 B. Torno and A. MacLeod, "Digest of Comments Contained in Briefs Submitted In Response To: "Copyright In Canada: Proposals For A Revision of the Law", unpublished document, prepared for Bureau of Intellectual Property, C.C.A.C., July 1979, at 30.

Seltzer decries). Moreover, one librarian's brief and one brief by an education association proposed a definition of fair dealing which would specially exempt from infringement the making of single copies for private research or study. The confusion between fair use and exemptions evident in all of these briefs stands as eloquent testimony to the wisdom of not including any "examples" in a definition of fair use.

(ii) Towards International Reconciliation

It will be recalled that in the section of the paper addressing "International Considerations" it was suggested that it is probable that certain activities which fall within the scope of fair dealing, as presently constituted, may not be in accord with the provisions of the Rome Text of the Berne Convention. The proposed definition of fair use reflects, what, is submitted, is an internationally acceptable construction of the term "exclusive", as that term is used in the context of the enumerated "exclusive rights" provided to authors in the Rome Text. Insofar as a holding of fair use by the courts will represent a finding that there has been no infringement, (because the author has not been deprived of his appropriately expected economic reward) rather than a finding that there has been an infringement which should be excused, the proposal clearly

reflects the concepts underlying the qualifying paragraph attached to Art 9(1) of the Stockholm Text in which a general right of reproduction was established for the first time.

The qualifying paragraph, Art 9(2), provides:

> "It 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".

(iii) Reprographic and Audio/Video Technologies: Intrinsic Use and Fair Use

One final and most important issue merits examination; the degree to which the proposed doctrine of fair use is compatible with the particular kind of use of protected works made possible by the new reproduction technologies (reprographic and audio/visual), that which Dietz calls "unverifiable mass utilization".[154]

The particular kind of use to which reference is made is use of a work for its intrinsic purpose, ie. use which results in the creation of a copy of a work which serves the same function or purpose as the original. At the conclusion of the discussion of the relationship between infringement and fair dealing in

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154 Dietz, supra note 110 at 115.

Section B, reference was made to the functional test which lay at the heart of a great number of decisions in fair use cases.

> "regardless of medium (ie whether or not plaintiff's and defendant's works are in the same or different media), ... if ... the defendant's work, although containing substantially similar material, performs a different function than that of plaintiff's, the defense of fair use may be invoked".[155]

The necessary corollary to this principle is the converse: ie., regardless of medium, where defendant's work performs the same function as that of plaintiff's, the defense of fair use may not be invoked. Professor Nimmer concurs: "If both the plaintiff's and defendant's works are used for the same purpose, then under the functional test the defense of fair use should not be available".[156]

Of the five present fair dealing "purposes", three (criticism, review, and newspaper summary) contemplate use by a second author of a portion of a first author's work for the purpose of incorporating the latter's work into the work of the former. The remaining two purposes, (private study and

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155 Supra, note 60.

156 Nimmer, supra note 25, at 13-57.

research) often regarded as, in essence, the same purpose, appear to be the only case(s) which allow copying even where the copier is not a "second author"; ie. the copier simply wishes to have a copy of the work for the purpose of facilitating his studies - the same purpose as that served by the original. The parallels with the doctrine of fair use in the United States may be seen upon reading the 1961 Report of the Register of Copyrights which listed examples of the kinds of uses considered permissible under fair use.

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157 See discussion supra, at p. 66.

158 -"Quotation of excerpts in a review or criticism for purposes of illustration or comment

- Quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations
- Use in a parody of some of the content of the work parodied
- Summary of an address or article, with brief quotations, in a news report
- Reproduction by a library of a portion of a work to replace part of a damaged copy
- Reproduction by a teacher or student of a small part of a work to illustrate a lesson
- Reproduction of a work in legislative or judicial proceedings or reports
- Incidental or fortuitous reproduction, in a newsreel or broadcast, of a work located at the scene of an event being reported"

Report of the Register of Copyrights, Copyright Law Revision, House Committee on the Judiciary, 87th Cong., 1st Sess. p5 (Comm. Print 1961).

Commenting upon the shared characteristics of these examples and the significance of this commonality to fair use, Leon Seltzer notes:

> "... aside from the rather special case of repairing a damaged copy, only one of the eight examples - reproduction of material to illustrate a lesson - has to do with the copying of a copyrighted work "for its own sake", and even that is narrowly defined. The list, casual or studied as it may be, reflects what in fact the subject matter of fair use has in the history of its adjudication consisted in; it has always had to do with use by a second author of a first author's work. Fair use has not heretofore had to do with the mere reproduction of a work to use it for its intrinsic purpose - to make what might be called the "ordinary use" of it. When copies are made for the work's "ordinary" purposes, ordinary "infringement" has customarily been triggered, not notions of fair use.
>
> There would appear, then, to have heretofore been a tacit distinction between the kind of infringement that has to do with the "unfair use" of a prior work in a later work and the kind of infringement that has simply to do with the making of multiplying of an existing work. But there is a point at which the separate uses made by such a distinction meet, and it is there that the seed of conceptual confusion is to be found. That point is the copying traditionally by hand (and later by typewriter), by a private reader, scholar, writer or teacher, of a work for the copier's own private use. It is this "copying for private use" that is at the crossroads of traditional fair use notions and the intrinsic - use questions posed by photocopying. According to Professor Nimmer, there has never been a "reported case on the question of whether a single handwritten copy of all or substantially all of a protected work made the copier's own private use is an infringement or fair use. Yet it is precisely, here where there has

> heretofore been no question disturbing of either the basic rationale or the dynamics of the copyright scheme, that the disorienting question posed by photocopying has arisen. The reason, it is clear, is that of all uses traditionally accepted as "fair", this one alone has to do with copying for its own sake".[159]

The same "disorienting question" is also posed by audio/video recording technology, to an equal if not a greater degree. Both reprographic and audio/video recorders have allowed more and more individuals and institutions to make technically acceptable reproductions of protected works, with differing shares of protected works in the total quantity of material reproduced. In the case of video and audio recorders, while the absolute amount of reproduction may not be presently as great, the portion of any protected work copied is likely to be even greater than is the case with respect to certain classes of reprographic reproduction. Certainly, in the home taping context, that which is copied by audio/video recorders more often than not is one or more works in their entirety.

With respect to photocopying in libraries, educational institutions and research institutions, the tendency is extremely high to copy works in their entirety. In administration, industry and the professions there may be somewhat less copying of complete works.

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159 Seltzer, supra note 13, at 25,26.

The definition of fair use developed above is predicated upon the concept of a second author's incorporation of a portion (perhaps, under very few circumstances, even all) of copyrighted work into his own work.

Reprographic copiers and audio/video recorders make possible and have given rise to a world in which, in many circumstances, works in their entirety, not portions of works, are being reproduced not for inclusion in a second author's work but simply to serve as a substitute for an authorized copy of the first author's work.

> "So long as the author could, because of technological constraints, control the reproduction of his work for its own sake, his expectations of economic reward and society's view of the appropriateness of his expectations when his work was reproduced pretty much coincided: reproduction either had to trigger infringement or to be seen as so minimal as not to raise fundamental questions. So far as notions of fair use are concerned, then, the central question with respect to ubiquitous photocopying (... and phonorecording...) has to do with the shape of the basic dual risk.
>
> Again, questions of access and of cost are at issue, but a coherent approach turns initially on making a distinction between two kinds of "access". The traditional fair use notion has had to do with the sort of access that the mind of a user has to a copyrighted work: the work is instantly accessible on sight or hearing, and the question is what the second user would or should be allowed to "do" with it - or, more accurately, what

> the creator of the work ought to have expected him freely to do with it. Use for photocopying and phonorecording involves a different sort of access: the possibility - and the capability - of instant reproduction of the work in the same mode and for the same purpose the original was in the first place acquired. With the first sort of access and use we can deal under notions of fair use, even when it involves photocopying, for appropriate expectations of economic reward are essentially unchanged. The second kind of access and use triggers question of reallocation of costs, however, and insofar as a use is of that sort, it is appropriately dealt with as an exemption from the normal workings of the copyright scheme".[160]

The 1977 Report of the Committee to Consider the Law on Copyright and Designs, in the U.K. (the "Whitford Report") recommended that all photocopying be taken outside of the realm of fair dealing upon the introduction of blanket licensing schemes and that audio/video recording equipment be subjected to a levy for the benefit of copyright owners. In the course of its discussion of photocopying the Report expressed the opinion that: "It may be one thing to allow a research worker to copy, by hand, part or even the whole of a work in a library, but if, to avoid the labour, he is content to pay for a photocopy the price paid we think ought to include not only the true cost of the photocopy but also a

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160 Seltzer, supra note 13, at 37,38.

royalty element for the copyright owner. In the case of works available on the market it is scarcely "fair dealing" to get, even for private study, a cheap copy with no return to the author".[161]

The preceeding discussion strongly suggests that it is simply no longer appropriate to maintain the "private use equals fair use" orientation which has shaped the copyright law to date (appropriate as it may have been prior to the advent of the new technologies).

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161 "Copyright and Designs Law", Report of the Committee to conder the Law on Copyright and Designs, 1977, Cmnd 6732, at 72.

In an article by Irwin Karp, attorney for the Author's League of America, entitled "Copyright the Author's View", Mr. Karp argued forcefully.

> "Every copy of a book that is bought at a book-store is used by the customer in a manner that constitutes fair use. He takes it home and reads it, puts it on the shelf; he refers to it, enjoys it, or learns from it or studies it. That's not the problem. The problem is that if he went to the book store and said, "I'm going to use the book for fair use, and the book seller said, "Fine, why bother to pay the publisher a royalty; here I'll run off a copy for you", the author could sue for infringement and win. The ultimate use of copies by a customer of a library or book store - is a fair use. It is the making of the copy, that's the problem. That's where the author makes his living. In "Copyright: The Librarian and the Law", supra note 124, 37, at 13.

This view was expressed emphatically by Chief Judge Cowan in his minority dissent in the landmark "Williams and Wilkins" case in the United States, in which it was held that the systematic, free and wide distribution by centralized government duplication services of copies of entire articles in specialized journals was fair use.[162]

Judge Cowan stated:

> "Defendant ... contends that traditionally, scholars have made handwritten copies of copyrighted works for use in research or other scholarly pursuits; ... that the photocopying here in suit is essentially a substitute for handcopying by the scholars themselves. Professor Nimmer discusses the point succinctly, and his language can hardly be improved upon:
>
> > "It may be argued that library reproduction is merely a more modern and efficient version of the time - honoured practice of scholars in making handwritten copies of copyrighted works, for their own private use. In evaluating this argument several factors must be considered. In the first place, the drudgery of making handwritten copies probably means that such copies in most instances are not of the complete work, and the quantitative insignificance of the selected passages are such as generally not to amount to

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162 187 F 2d 1345, (1973).

This case was overruled by Congress when the new Copyright Act was enacted insofar as that which the court called fair use the new Act specifically characterized as an exemption under S 108. The decision was rendered by the Court of Claims split 4 to 3 and sustained on appeal to the Supreme Court when that body split evenly 4 to 4; 420 US 376. Professor Nimmer has expressed the view that the decision of the majority in the Court of Claims appears to him to be "seriously in error, with implications that might well justify its description by one of the dissenting judges as "the Dred Scott decision of copyright law". Nimmer, supra note 25 at 13-74.

a "substantial" similarity. Secondly, there would appear to be a qualitative difference between each individual scholar performing the task of reproduction for himself, and a library or other institution performing the task on a wholesale basis for all scholars. If the latter is fair use, then must not the same be said for a non-profit publishing house that distributes to scholars unauthorized copies of scientific and educational works on a national or international basis? Finally it is by no means clear that the underlying premise of the above argument is valid.

There is no reported case on the question of whether a single handwritten copy of all or substantially all of a protected work made for the copier's own private use is an infringement or fair use. If such a case were to arise the force of custom might impel a court to rule for the defendant on the ground of fair use. Such a result, however, could not be reconciled with the rationale for fair use suggested above since the handwritten copy would serve the same function as the protected work, and would tend to reduce the exploitation value of such. Moreover, if such conduct is defensible then is it not equally a fair use for the copier to use his own photocopying or other duplicating device to achieve the same result?" [163]

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163 Ibid, at 1381.

See also B. Varmer "Phoduplication of Copyrighted Material by Libraries", Studies On Copyright. Fred B. Rothman and Co. 1963, 815, at 828 and "Project, New Technology and the Law of Copyright: Reprography and Computers", 15 U.C.L.A. L. Rev. 431, at 951 (1968); See as well G.A. Ferguson, "Photocopying: An Australian View of the Problem, Scholarly Publishing, Oct. 1976, at 23; Patricia Whitesone, "Photocopying in Libraries: The Librarians Speak", Knowledge Industries Publications, Inc, White Plains N.Y., 1977; "Copyright and Photocopying: Papers on Problems and Solutions, Design for a Clearinghouse, and a Bibliography", ed. L.B. Heilprin, College of Library and Information Services. University

The conclusion reached by Dr. Adolph Dietz in his discussion of reproduction for personal use in the European Economic Community serves as the natural culmination of the arguments raised by Judge Cowan, Professor Nimmer and many other commentators. Dr. Dietz advises that "... the legislator can no longer confine himself in future, in making rules regarding reproduction in the private sphere, to limiting this sphere to a greater or lesser extent in order to protect the author against possible prejudice. Instead, in view of technological development, the decisive question today is to distinguish according to the method or the technical aids with which, even in the purely personal sphere, the reproduction is carried out".[164]

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163 (cont'd)

of Maryland, 1977; Treece, "Library Photocopying", 24 U.C.L.A. 1. Rev. 1025 (1977); Charles Finke "The Copyright Act of 1976: Home Use of Audiovisual Recording and Presentation Systems" Vol 58, 1979, at 467; Carey Ramos "The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law Stanford Law Revision, Vol 31, 1979, at 243. J. Keon, "Audio and Video Home Taping: Impact on Copyright Payments" unpublished paper prepared for the Canadian Governments' Interdepartmental Copyright Committee; CCAC, Ottawa, Oct. 1980; Taddéo Celloya, "Sonic and Visual Reproduction for Personal Use, Review Internationale du Droit D'Ateur; Vol 99, Jan 79 at 76, Vol. 100, April 79 at 3, Vol. 101, July 79 at 44; See also B. Stuart-Stubbs, "Purchasing and Copying Practices at Canadian University Libraries", Canadian Association of College and University Libraries, Ottawa, 1971. F. Gotzen "Reprography and the Berne Convention (Stockholm - Paris Version) Copyright, Oct. 1978

164 Dietz, supra not 110, at 153.

In addition to the reasons raised above for the excision of certain modes of reproduction from the doctrine of fair use, Leon Seltzer points out further matters to be considered in this regard. He advises that there are three discrete problems which arise from photoduplication technology which were addressed by the new U.S. Copyright Act, and that all were resolved in the same way, by means of exceptions to the author's exclusive right to control the making and selling of copies. These exceptions have been characterized as either fair use exceptions or as limited statutory exemptions whose economic effects were defined as undisturbing of copyright scheme dynamics. Each of these three problems is also applicable, in varying degrees, to audio/video recording. Seltzer lists the three problems in an order which he characterizes as "increasingly integral to the functioning of the copyright scheme.

> "(1) the accommodation of competing public policy of nearly constitutional dimensions, namely, the spontaneous requirements of education in a classroom context;
>
> (2) the accommodation of the technical workings of part of the copyright scheme distribution mechanism, namely the functioning of libraries and library systems; and
>
> (3) the accommodation of the ultimate requirements of the individual user, whose capability of making copies for himself constitutes what is exactly coextensive with the market outcome of the copyright scheme itself, namely, the user's acquiring a copy of the copyrighted work". [165]

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165 Seltzer, supra note 13 at 113.

Seltzer points out that these three problems share an additional common attribute as well, "the unlikelihood that the relied upon distinctions can be made, or if they can, that they would be made, and, in either case, that the scheme is administrable, and concludes that "in these circumstances the self-policing dynamics of copyright are in danger, and accordingly so are public policies that rely on them".[166]

In such circumstances, it is suggested by Seltzer that legislators have but two options which are consistent with permitting the freest possible access to copyrighted works by means of photocopying, (the case being equally compelling for audio/video recording),[167] and which would not be inimical to the doctrine of fair use; either to expand the exemption for such copying and recording thus leaving a reduced area subject to author's exclusive rights, or to require an accounting, and where appropriate compensation to authors via compulsory or voluntary licenses or via equipment levies, in respect of all photocopying

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166 Ibid, at page 116, 117.

With respect to photocopying Seltzer points out that: " ... the "purpose" tests for both individuals and copying agencies are unclear; the guidelines for individuals to make fair use distinctions imprecise; the distinctions among "noncommercial" libraries, other libraries; and other copying agencies untenable; the noninstitutional controls nonexistent; the responsibility for policing impermissible uses diffuse; the sanction mechanism incompatible with the transient nature of the copying; the administrative burden on the courts too broad".

167 It may be more precise to state that, the case is at least equally compelling vis-à-vis "home taping", i.e. recording for personal, non-commercial use.

of protected works.[168]

Seltzer suggests there are but two options; as noted Professor Liebowitz offers what appears to be a third option vis-à-vis reprography i.e. retention of the status quo. Whatever the strengths or weaknesses of Liebowitz's analysis and attendant recommendations, it is suggested that, for all the reasons cited above, retention of the status quo is simply not compatible with the doctrine of fair use herein proposed vis-à-vis either reprography or audio/video recording where works are being copied or recorded in their entirety for their "intrinsic" purpose. It is submitted that the most valuable approach to addressing the issue of "intrinsic use" is one which views Seltzer's two "options" not necessarily as mutually exclusive alternative but rather as collocation of options from which may be constructed the most appropriate ameliorative measures. For example, it would be inappropriate to legitimize all audio/video taping as a result of the imposition of a blank tape levy, notwithstanding that, as the table below reveals,

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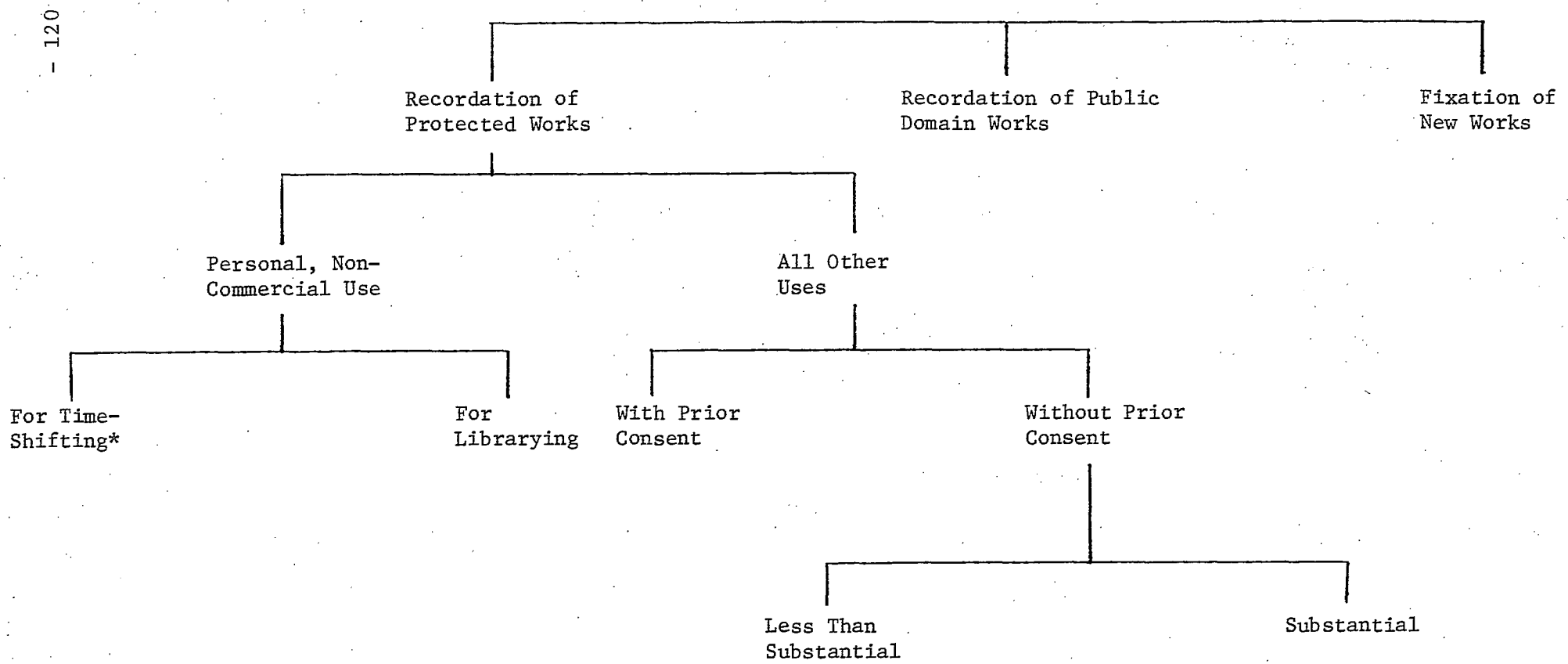
168 Professor S. J. Liebowitz argues in favour of what in essence is a third option vis-à-vis photocopying; retention of the status quo (i.e., no special provisions in respect of photocopying). This position is predicated on the case which Liebowitz makes that publishers charge institutions higher subscription prices for journals, which appear to be the principal works being copied. This escalated price, Liebowitz argues, constitutes an appropriate level of remuneration to copyright owners in respect of all photocopying of such journals by the institutions themselves and by parties having access to the collections of such institutions (e.g. libraries). See S.J. Liebowitz, "The Impact of Reprography on the Copyright System", unpublished paper prepared for the Canadian Government's Interdepartmental Copyright Committee, CCAC, Ottawa, March, 1980.

PRINICPLE TYPES OF
AUDIO/VIDEO RECORDING ACTIVITIES



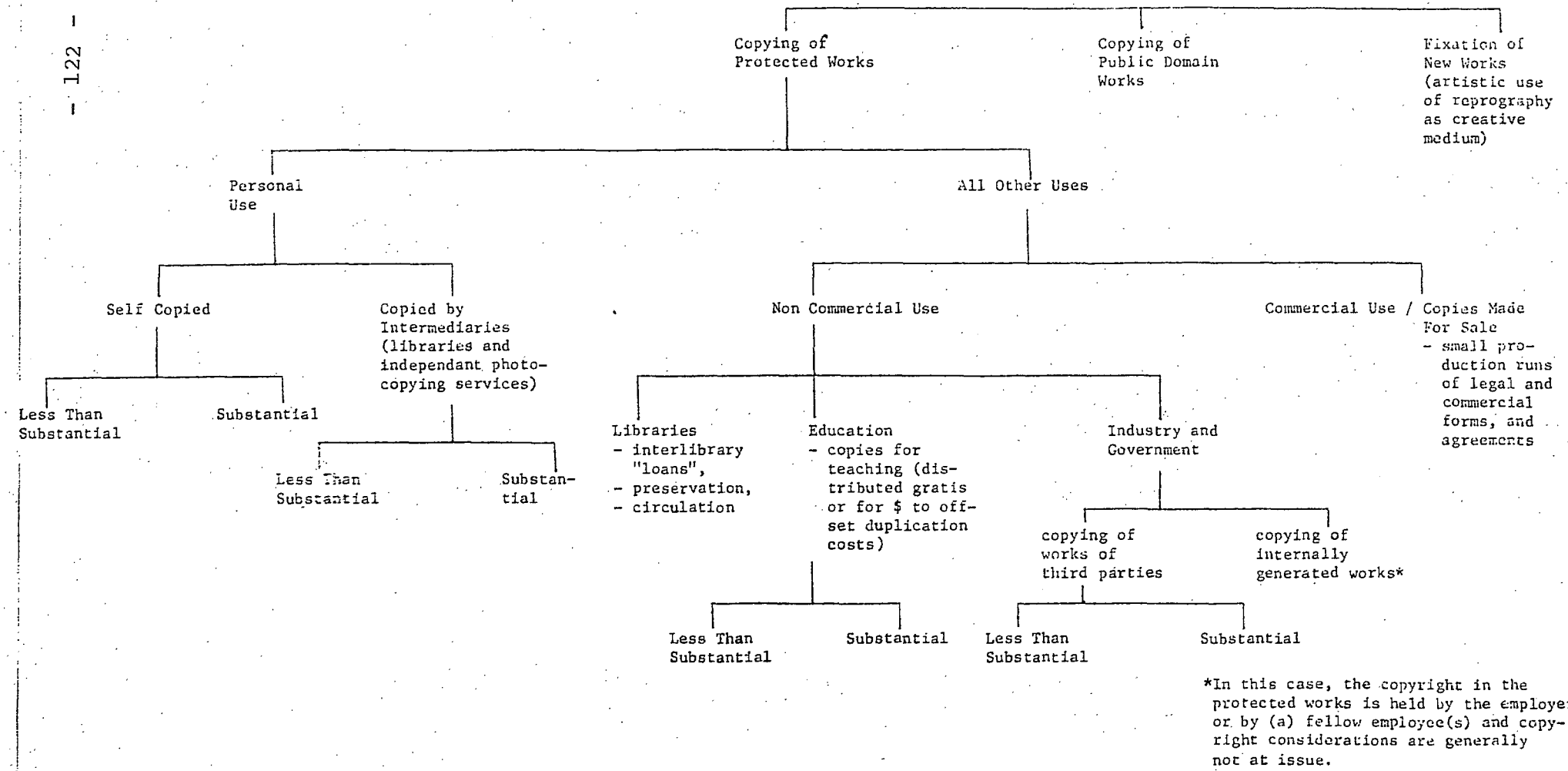
*Applicable principally in respect of video taping

the reach of the levy would extend far beyond the specific unauthorized activity the levy is designed to redress. The levy has been raised as the only practical compensatory mechanism in respect of personal, non-commercial recording for librarying purposes. Yet, unless technological distinctions can be made with the desired degree of specificity and certainty, a blank tape levy will effect a far broader range of users. It is appropriate to legitimize home taping by virtue of the imposition of the levy, i.e. to allow unfettered home taping without any further compensation to or the authorization of copyright owners. However, it would be completely inequitable to copyright owners to structure the Act so that in effect a compulsory licence would arise whereby, by virtue of payment of the levy, all commercial use of protected works would be rendered permissible without the leave of, or any further payment to copyright owners.

Thus all audio/video taping for personal use should be taken outside the realm of fair use and legitimized, irrespective of the substantiability of the taking, while all other uses should be subject to the doctrine of fair use. If the taking is fair use, i.e. is less than substantial, the authorization of the copyright owner will not be required. If the taking is substantial and unauthorized, it will constitute infringement.

While there are many contexts, in which photocopying occurs (as the chart on the following page reveals), the

PRINCIPLE TYPES OF PHOTOCOPYING ACTIVITIES



*In this case, the copyright in the protected works is held by the employer or by (a) fellow employee(s) and copyright considerations are generally not at issue.

situations in which most of the copying takes place, the purpose for which the great majority of the copying is undertaken (i.e. intrinsic use), the inability of copyright owners to detect when copying of their works is taking place, and the fact that in most of these contexts "substantial" parts of works are being copied, renders photocopying in general comparable to that portion of the audio/video taping universe represented by "home taping". All of these factors, magnified by the sheer volume of copying now taking place,[169] calls for a comprehensive approach to photocopying vis-à-vis fair use comparable to that suggested for home taping, (i.e. some form of blanket licensing, either statutory or voluntary, or the imposition of an equipment levy), the introduction of which would similarly serve to legitimize all photocopying, or at least the copying of those works the authors of which are represented by a collective. This would have the effect, as in the case of home taping, of displacing the application of the doctrine of fair use to photocopying.

Seltzer couches his conclusions in this regard most emphatically:

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169 In the United States, "nearly 177 billion photocopies will be made on our 2 million Xeroxes and other brands of photocopiers this year, or about 750 for every man, woman and child (data adapted from studies by Dataquest Inc., authoritative market analysts for the copy machine industry)". Ralph Keyes, "Home, Home on the Xerox", New York Magazine, November 17, 1980, page 60.

> "The basic rationale of the Copyright Act ... compels the conclusion that the only coherent statutory solution to the photocopying problem is as complete an accountability as possible of all such copying. Such a solution does not mean that all photocopying would incur copyright costs: part of the aggregate copying could be made cost free whether access is accomplished in a compulsory licensing mode or a voluntary licensing mode. But what it does mean is that the essential requirement of easy access to copies of copyrighted works posed by the enormous force of ubiquitous photocopying would be met, and that the internal logic of the copyright scheme would be undisturbed".[170]

It is recognized that in a country such as Canada which is a net importer of "cultural goods", that as a result of our international obligations, accountability schemes such as those proposed would result in the greater portion of revenues collected leaving the country. If this factor is viewed as paramount and/or it appears that collection costs will be disproportionate, there are two alternatives which may be adopted which, whatever their other merits, are consistent with a Copyright Act predicated on a doctrine of fair use as herein proposed: (1) rather than establish accountability schemes under copyright, impose a levy on equipment

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[170] Seltzer, supra note 13 at 118, 119.

For a discussion of a proposed voluntary photocopying licensing scheme which attempts to discern between protected works which are part of the scheme and works which are outside the license established by the scheme see David Catterns "The Americans, Baby" by Moorehouse: "An Australian Story of Copyright and New Technology", 23 Bull Cr. Soc 123, at 230.

(eg. photocopying machines, vtr's, etc,) or on blank tapes (audio and video), the funds arising from which would be made available only to Canadians and nationals of countries which offer reciprocal benefits to Canadians. The case made by those who argue that such a levy constitutes a breach of the spirit, if not the letter of the international Conventions to which Canada adheres would have to be addressed.

(2) establish statutory exemptions which allow specific kinds of photocopying and audio/video recording; in essence, the first of the two options mentioned above.

(F) Summary of Recommendations

(1) The present doctrine of fair dealing, wherein a defendant may raise fair dealing as a defense upon the establishment of a prima facie case of infringement, should be abolished.

(2) A new doctrine of "fair use" should be established wherein a finding of fair use represents a finding that the copying complained of is not "substantial", and therefore is non-infringing.

(3) Fair use should be defined as

> "that use of a protected work that does not deprive the owner of the copyright in such work of an appropriately expected economic reward. In determining whether the use made of a work in a particular case deprives the owner of the copyright in the work of such a reward, account should be taken first of the nature of the copyrighted work, and then of the purpose, character, and extent of the use".

(4) Fair use should be applicable to the following works in the following circumstances:

(a) All Classes of Works - when, with the consent of the copyright owner, the original or tangible copies (including phonorecords) of a work are sold, leased, loaned, given away or otherwise made

available to the general public or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not in fact occur; or

(B) Musical, Literary and Dramatic Works - when, with the consent of the copyright owner, such works are performed in public or sound recording or motion picture adaptations thereof are performed in public (including broadcasting of diffusion of same); or

(C) Sound Recordings and Motion Pictures - when, with the consent of the copyright owner, such works are performed in public (including the broadcasting or diffusion of same)

(5)(a) The introduction of a levy on blank audio/video tape should serve to legitimize all "home taping" for personal use without the need for the authorization of, or further payment to copyright owners, thus eliminating the application of doctrine of fair use in this context.

(5)(b) Fair use should be applicable in respect of all other forms of audio/video recordation of protected works, and thus unauthorized reproduction of a substantial part of a protected work should constitute infringement.

(6) A comprehensive approach to photocopying vis-à-vis fair use, comparable to that suggested for home taping (i.e. some form of blanket licensing, either statutory or voluntary, or the imposition of an equipment levy), should be introduced. The introduction of such a scheme should similarly serve to legitimize all photocopying, or at least the copying of those works the authors of which are represented by a collective. This would have the effect, as in the case of home taping, of displacing the application of fair use to photocopying.