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## Fair or Free Use of Copyrighted Materials in Education and Research and the Limit of Such Use

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FAIR OR FREE USE OF COPYRIGHTED MATERIALS IN  
EDUCATION AND RESEARCH AND THE LIMIT OF SUCH USE

MUHAMMAD MASUM BILLAH & SALEH ALBARASHDI\*

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## INTRODUCTION

The concept of fair use, fair dealing, or free use of copyrighted works for education and research is incorporated in copyright laws around the world. This is to strike a balance between the private interests of copyright holders and the public interests of students and researchers to use the copyrighted materials in furthering their knowledge. While fair and free use of copyrighted materials for the purpose of study and research is favored and permitted under copyright laws almost everywhere in the world, the limit of such use is not clearly defined in these laws. This Article will attempt to determine the permissible limit for copying copyrighted materials without paying fees to or asking permission from copyright holders in light of the existing legal provisions and case law from around the world. To do so, this Article will first analyze the national and international legal provisions related to copyright exception for education and research. The Article will then analyze various conditions and factors and their relative importance to determine generally how much copying of copyrighted materials for education and research would be allowed without permission or license fees. While this Article concludes that it is impossible to clearly define the precise permissible limit of fair and free use, this Article recommends for a liberal interpretation of fair and free use exception especially when such use is for education and research.

### I. FAIR AND FREE USE OF COPYRIGHTED MATERIALS FOR EDUCATION AND RESEARCH

Fair and free use of copyrighted materials for education and research is an exception to the economic rights of copyright holders recognized both in national laws and in international conventions on copyright. In the context of education and research such use mainly involves copying of copyrighted materials without paying any fees to or getting permission from copyright holders. Even though there may be other forms of use in the context of education and research such as recitation of a passage or a poem from a book, or performance of some musical or dramatic works in a class room or in other educational settings, such uses are less controversial and rarely give rise to legal disputes. Therefore, in our analysis of fair and free uses of copyrighted material for education and research we will confine our discussion mainly to

the reproduction<sup>1</sup> of copyrighted materials (e.g., photocopying, scanning, recording both in audio or audio-visual forms, writing, etc., of copyrighted materials) without permission or license fees. The word ‘education’ in our discussion covers both teaching and private study. After this brief clarification of the scope of the paper, we will now discuss the provisions from international conventions and national legislation on the copyright exception for education and research.

A. *Fair and free use for education and research in international conventions*

The Berne Convention,<sup>2</sup> the oldest and the most widely accepted international convention on copyright,<sup>3</sup> contains the copyright exception for education and research in its article 10(2).<sup>4</sup> The provision allows the use of any literary and artistic work as illustration for the purpose of teaching. The provision, however, requires that such use be fair and that the copied part be not more than what is justified for the purpose. In addition, the name of the author, when available, and the source must be mentioned.<sup>5</sup> Also, article 10(1) of the convention allows free use of copyrighted works for quotation with the same conditions that the use must be fair and the amount copied must not be more than what is justified for the purpose.<sup>6</sup> In addition, the quotation must be from a published work. Quoting from copyrighted materials for education and research would be clearly covered by this provision. Most importantly, the convention in its article 9(2) gives the state parties the right to

1. Reproduction can occur broadly in two forms: 1) making copies (e.g., photocopying, and videotaping), and 2) making phonorecords (e.g., duplicating sound-recording and taping off the air). See *Reproduction of Copyrighted Works by Educators and Librarians*, 21 U.S. COPYRIGHT OFFICE 1, 1 (2014), <https://www.copyright.gov/circs/circ21.pdf>.

2. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention].

3. *WIPO-Administered Treaties Contracting Parties Berne Convention*, WIPO (Sept. 13, 2017), [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15) (as of September 13, 2017, there are 175 countries which ratified or acceded to the Berne Convention) [hereinafter WIPO].

4. Berne Convention, *supra* note 2, at art. 10(2) (“It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.” (emphasis added)).

5. *Id.* at art. 10(3).

6. *Id.* at art. 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.”).

permit reproduction of copyrighted works in special cases through their national legislation provided that such reproduction does not conflict with the normal exploitation of the works and does not unreasonably prejudice the legitimate interest of the author.<sup>7</sup> Reproduction for the purpose of education and research is usually one of the ‘special cases’ and is specifically included in the copyright laws of most countries.

While other international conventions on copyright do not specifically mention education and research exception, they contain a general provision for permissible exceptions modelled on article 9(2) of the Berne Convention. The general provision for exceptions is broad enough to cover any exceptions including the exception for education and research. For example, article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) allows the members of the World Trade Organization (WTO) to make copyright exceptions in special cases with the similar provisos as those in the Berne Convention i.e., the exceptions must not conflict with the normal exploitation of the works and must not unreasonably prejudice the legitimate interests of copyright holders.<sup>8</sup> Similar provisions also exist in article 10 of WIPO Copyright Treaty (“WCT”)<sup>9</sup> as well as in article 16 of WIPO Performances and Phonograms Treaty (“WPPT”).<sup>10</sup> Thus, member states to these conventions are permitted to make any exceptions to the rights of copyright holders including exception for education and research as long as the exception meets the stated conditions. These general provisions contain three conditions which are jointly known as the ‘three-step test.’ Most countries in the world including the U.S., Canada, and Oman, three countries whose copyright laws are frequently referred to in this Article, are parties to all these conventions.<sup>11</sup>

7. *Id.* at art. 9(2) (“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works [literary and artistic 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.”).

8. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

9. WIPO Copyright Treaty art. 10, Dec. 20, 1996, 36 I.L.M. 656 [hereinafter WCT].

10. WIPO Performances and Phonograms Treaty art. 16, Dec. 20, 1996, 36 I.L.M. 76 [hereinafter WPPT].

11. See WIPO, *supra* note 3 (the list of state parties to the Berne Convention); see also *WIPO-Administered Treaties Contracting Parties WIPO Copyright Treaty*, WIPO (Sept. 13, 2017), [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16) (state parties to WIPO Copyright Treaty); *WIPO-Administered Treaties Contracting Parties WIPO Performances and Phonograms Treaty*, WIPO (Sept. 13, 2017), [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=20](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=20) (the list of parties to WIPO Performances and Phonograms Treaty); *Members and Observers*, WTO (Sept. 13, 2017),

### B. National laws on educational fair and free use

Most state parties to the above conventions have copyright laws with some specific exceptions and limitations to the rights of copyright holders. These national laws on copyright specifically mention education and research in their list of copyright exceptions and limitations. For example, the relevant part of 17 U.S.C. § 107 of the U.S. Copyright Act provides, “the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, *teaching* (including multiple copies for classroom use), *scholarship*, or *research*, is not an infringement of copyright.”<sup>12</sup> Similarly, section 29 of the Canadian Copyright Act provides, “[f]air dealing for the purpose of *research*, *private study*, *education*, parody or satire does not infringe copyright.”<sup>13</sup> Article 5 of the E.C. Directive of 2001 on the Copyright in the Information Society<sup>14</sup> (“Directive”) provides a list of twenty-two exceptions, including the exceptions for the purpose of teaching and scientific research.<sup>15</sup> In addition, there is a separate exception for private use, which may also cover private study.<sup>16</sup> However, private use under the Directive is subject to fair compensation.<sup>17</sup> No such condition is attached to the teaching and research exception.<sup>18</sup> In Oman, article 20 of its Copyright and Neighboring Law allows “free use” of copyrighted materials for various purposes including teaching, research, and private study.<sup>19</sup>

Copyright laws in Canada, the U.K.,<sup>20</sup> and most other common law countries cover the exception for education and research under their “fair dealing” provision, while the American copyright law includes the exception

[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (all three states are also members of the WTO and are bound by its TRIPS Agreement).

12. Copyright Act, 17 U.S.C. § 107 (2012) (emphasis added).

13. Copyright Act, R.S.C. 1985, c. C-42, art. 29 (Can.) (emphasis added).

14. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 16–17 [hereinafter Directive].

15. *Id.* at art. 5(2)–(3); see also PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 363 (2d ed. 2010).

16. Directive, *supra* note 14, at art. 5(3).

17. *Id.* (If a user must pay the license fees for the use, the use would not fall under fair use.); see also *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 96 n.19 (1973) (The Court held that if the use is fair, the user would not have to pay the license fees).

18. See Directive, *supra* note 14, at art. 4(3)(a).

19. Royal Decree No. 65/2008 (Oman) Promulgating the Law of Copyrights and Neighboring Rights, art. 20 [hereinafter Oman Decree].

20. See Copyrights, Designs and Patents Act 1988, c. 48, ch. 3 §§ 29–30.

in its “fair use” doctrine.<sup>21</sup> In Oman, the educational exception is specifically included in the list of “free use” exceptions.<sup>22</sup> Whether we cover the educational exception under American fair use doctrine or under the fair dealing provision of Canadian copyright law, there are conditions or factors to determine the permissible extent of such use. To a large degree, these conditions or factors reflect the conditions or steps mentioned under the international conventions for copyright exceptions.

## II. THE LIMITS OF FAIR AND FREE USE OF COPYRIGHTED WORKS FOR EDUCATION AND RESEARCH

Neither national legislation nor international conventions on copyright clearly demarcate how much copying can be made from a copyrighted work for education and research without permission or license fees. In other words, these laws provide no *quantitative* limit. They do not state, for example, that 10 percent or any other specific percentage of a book or other copyrighted works can be copied for education and research or for other purposes without fees or permission.<sup>23</sup> Neither do these laws specify the permissible limit in terms of number of pages or words which could be freely copied from a copyrighted work. Instead, they provide some conditions or *qualitative* restrictions to tentatively determine the permissible limit of free use. As tentative guidelines for determination of permissible limit, the interpretation of these conditions varies from country to country, court to court, and even from commentator to commentator. Copying of similar materials for education and research may be held fair and thus free by one court but unfair and impermissible by another court in a different case with similar facts. We will examine some of the cases in this part when we take up the detailed discussion of the conditions and their relative importance. Here, we

21. For a list of fair use and fair dealing provisions in copyright laws around the world, see JONATHAN BAND & JONATHAN GERAFLI, *THE FAIR USE/FAIR DEALING HANDBOOK*, (2015) <http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>.

22. Oman Decree, *supra* note 19, at arts. 20(2)–(3).

23. However, a group of American publishers and other stakeholders adopted some guidelines for minimum permissible limit of copying for education and research within the fair use exception under U.S. Copyright Act. See Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, H.R. REP. NO. 94-1476, at 68–70 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681–83 (under the Guidelines, a professor can make multiple copies for classroom use so as long as the copying is not more than 1,000 words or 10% of the work, whichever is less, unless the work contains less than 2,500 words. However, 500 words as a minimum can always be copied. This is known as the “condition of brevity.” There are also other conditions attached for such copying such as the test of spontaneity, the test of cumulative effect, and a notice of copyright.) [hereinafter Guidelines].

will briefly mention the conditions and factors to determine the permissible limit.

A. *Conditions under international conventions*

Under article 10 of the Berne Convention, the conditions for free use of copyrighted works for both quotation and illustration in teaching are that such use must be compatible with “fair practice” and that the source of the work and the name of the author must be acknowledged.<sup>24</sup> The Convention does not define the words “fair practice.” The WIPO Guide to the Berne Convention explains the concept of “fair practice” mainly in terms of proportionality of the part taken to the actual work and to the work in which copying is made.<sup>25</sup> The concept of ‘fair practice’ also covers the issue of whether the work in which copying is made competes in the market with the copied work.<sup>26</sup> In this regard, the condition of ‘fair practice’ probably does not demand more than what is required by the three-step test with regard to the exception to the right of reproduction.<sup>27</sup> Copying for quotation and illustration in teaching could be considered ‘fair’ if such copying does not affect the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. These are the same conditions as those under the three-step test. The other condition for quotation and illustration in teaching is that the extent of copying must be ‘justified by the purpose’. This condition basically relates to the permissible amount of copying for a particular purpose, the main theme of our Article.

The three-step test under article 9(2) of the Berne Convention and other conventions on copyright related issues make the copyright exceptions subject to three conditions. Under these provisions, a state has the right to allow exceptions to copyrights under its national legislation provided that: (a) the exceptions are only for special cases; (b) such exceptions do not interfere with the normal exploitation of the work; and (c) they do not unreasonably prejudice the legitimate interests of the author.<sup>28</sup> The interpretation of the three-step test is cumulative, i.e., the combined effect of all three steps should

24. Berne Convention, *supra* note 2, at art. 10.

25. GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT 1971) 59 (1978) [hereinafter Guide to the Berne Convention].

26. *Id.*

27. SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986, 492 ¶ 9.22.2 (1987) (This view is supported by Professor Sam Ricketson. In the context of quotation, Professor Ricketson suggests that in order to determine whether the condition, “compatible with fair practice,” is satisfied, we may have to use the last two criteria of article 9(2).).

28. Berne Convention, *supra* note 2, at art. 9(2).

be considered to justify the validity of an exception to the copyrights.<sup>29</sup> It is noteworthy here that under article 9(2) of the Berne Convention the three-step test applies only with regard to exception to the author's exclusive right of reproduction.<sup>30</sup> Under the other conventions, the three-step test applies not only to the exception to the reproduction right of copyright holders but also to any exceptions to any type of copyrights.

## B. Factors/conditions in national legislation

### 1. U.S. copyright law

The educational exception or any other exception and limitation to copyright in the US is covered by the fair use doctrine under §107 of the US Copyright Act. The fair use doctrine under American copyright law is considered a model for similar doctrine in other countries.<sup>31</sup> Even though the doctrine was codified in 1976 under §107 of the US Copyright Act, its origin is usually traced to a statement of Justice Joseph Story in the 1841 decision of *Folsom v. Marsh*.<sup>32</sup> Justice Story enunciated the conditions or factors to be considered in order to determine whether free use of copyrighted materials was fair or not. The factors are “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”<sup>33</sup>

Today §107 of Copyright Act reproduces the above common-law based criteria into four non-exclusive factors for fair use. They are:

- (a) “the purpose and character of the use including whether such use is of a commercial nature or is for non-profit private study purposes;”
- (b) “the nature of the copyrighted work;”
- (c) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole;”

29. RICKETSON, *supra* note 27, at 482; *see also* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 111–13, 125–26 (2000).

30. Berne Convention, *supra* note, at art. 9(2).

31. Among such countries are Israel, the Philippines, and Taiwan. *See* Copyright Act, 5768-2007, §19, 34, (2007) (Isr.); *see also* Copyright Act, 2007-07011, § 65 (2007) (Taiwan); Intellectual Property Code, Rep. Act No. 8293, § 185.1 (1997) (Phil.); *see also* MICHAEL GEIST, COPYRIGHT PENTAGONY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 162–65 (Michael Geist ed. 2013).

32. 9 F. Cas. 342 (C.C.D. Mass. 1841).

33. *Id.* at 348.

and (d) “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>34</sup>

These factors are general and apply to any types of fair use whether for education and research or for some other purpose. The factors are non-exhaustive, and courts may consider some additional factors to decide a case.<sup>35</sup>

## 2. *Canadian copyright law*

In Canada and many other common law countries, the education and research exception are specifically mentioned under the fair dealing provision of copyright laws.<sup>36</sup> Unlike §107 of US Copyright Act, the “fair dealing” provisions of these laws do not contain a list of factors to determine the limit of use for a permissible category.<sup>37</sup> This, however, does not mean that courts in those countries do not use similar factors to decide the cases on fair dealing. For example, the Copyright Act of Canada does not contain a list of conditions or factors to determine fair dealing. Yet, the Supreme Court of Canada, in its 2004 decision of *CCH Canadian Ltd. v. Law Society of Upper Canada*, provided a list of six factors.<sup>38</sup> These factors are very similar to those of the US Copyright Act. They are: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) the nature of the work; (5) available alternatives to the dealing; and (6) the effect of the dealing on the work.<sup>39</sup> Like the factors under §107 of American Copyright Act, the factors used in Canada are also non-exhaustive.<sup>40</sup>

## 3. *Copyright law in Oman and other countries*

Section 20 of the Copyright and Neighboring Rights Law of Oman provides a list of exceptions including education and research. All these exceptions, including the one for education and research, are subject to three general conditions. They are: (a) the source of the work and the name of the author, where available, must be mentioned; (b) the use must not conflict

34. 17 U.S.C. § 107 (2012).

35. See Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 163 (1998).

36. Copyright Act, R.S.C. 1985, c. C-42, s. 29 (Can.)

37. Compare Copyright Act, R.S.C. 1985, c. C-42, s. 29 (Can.), with 17 U.S.C. § 107 (2012).

38. [2004] 1 S.C.R. 339, 342 (Can).

39. *Id.* at 366.

40. *Id.* at 369 (“In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.”).

with the normal exploitation of the work; and (c) the use must not unreasonably prejudice the legitimate interest of copyright holders.<sup>41</sup> The last two conditions are simply reproductions of the second and third conditions of the three-step test found in article 9(2) of the Berne Convention and in other copyright conventions.<sup>42</sup> There are additional conditions under Omani law for each of the free use categories. As for educational exception, the law allows free use of copyrighted works for education and teaching with the condition that such use is for clarification.<sup>43</sup> This condition is similar to the condition of “illustration” in the teaching exception under article 10(2) of the Berne Convention.<sup>44</sup> Second, the extent of the work used must be limited to an amount justified for the purpose.<sup>45</sup> Similar conditions also appear in the Berne Convention for teaching and quotation.<sup>46</sup> Third, the use must be limited to face-to-face teaching and learning.<sup>47</sup> Fourth, there must not be any direct or indirect compensation from such use.<sup>48</sup> The conditions of face-to-face teaching and of no direct and indirect monetary gain go beyond the requirements of the Berne Convention, to which Oman is a party.

The Omani law also allows public libraries and non-commercial educational and documentation centers to reproduce copyrighted works without fees or permission to facilitate the private study and research of a natural person.<sup>49</sup> This category of free use also comes with its own conditions, in addition to the general conditions mentioned above. First, there must not be any direct or indirect commercial gain from such reproduction.<sup>50</sup> Second, such reproduction must be limited to a short work or a published article.<sup>51</sup> Third, free use for private study and research is permissible only if there is no collective license arrangement available.<sup>52</sup> Here, the Omani law seems to be more restrictive than the Berne Convention, especially in case of available licensing arrangements. If such licensing arrangements are available, there cannot be any free copying by public libraries for students and researchers. In Canada, however, its Supreme Court held that availability of licenses

41. Oman Decree, *supra* note 19, at art. 20.
42. *See* Berne Convention, *supra* note 2, at art. 9(2).
43. Oman Decree, *supra* note 19, at art. 20(2).
44. *See* Berne Convention, *supra* note 2, at art. 10(2).
45. Oman Decree, *supra* note 19, at art. 20(2).
46. *See* Berne Convention, *supra* note 2, at art. 10(1)–(2).
47. Oman Decree, *supra* note 19, at art. 20(2).
48. *Id.* at art. 20(2).
49. Oman Decree, *supra* note 19, at art. 20(3)(A).
50. *Id.* at art. 20(3).
51. *Id.* at art. 20(3)(A).
52. *Id.*

should not be relevant in determining fair dealing.<sup>53</sup> Otherwise, the scope of copyright monopoly would be unreasonably widened at the expense of the copyright users' right.<sup>54</sup> While the American courts also held that the availability of licenses would not be a decisive factor in determining fair use, the availability of licenses might make a use (i.e., copying without license fees) less fair.<sup>55</sup>

The education and research exceptions appear in the copyright laws of most countries. Like the cases in the US, Canada, and Oman, in other countries the legality of such use also comes with conditions. For example, the EC Directive subjects all the exceptions listed, including the exception for teaching and scientific research, to the three-step test of the Berne Convention and TRIPS Agreement.<sup>56</sup> National legislation of some countries also include the three-step test as the general conditions to any copyright exceptions.<sup>57</sup> This is probably influenced by the TRIPS Agreement and is meant to ensure that the exceptions in national legislation do not violate a country's international obligations under the TRIPS Agreement.<sup>58</sup> For example, the Australian Copyright Act, which includes the three-step test in the provisions governing the exceptions, expressly states that the steps in the test such as "special case," "conflict with a normal exploitation," and "unreasonably prejudice to the legitimate interests," have the same meaning as that in article 13 of the TRIPS Agreement.<sup>59</sup>

### *C. Analysis of the factors and their relative importance to determine the limit of exception*

#### *1. Economic impact of use*

The Berne Convention states this factor through its second step, meaning free use must not conflict with "the normal exploitation of the work."<sup>60</sup> Also, the condition of "fair practice," in regards to the exceptions for quota-

53. CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1. S.C.R. 329, 373 (Can.).

54. *Id.* at 373–74.

55. Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1276–77 (11th Cir. 2014); *see also* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 931 (2d Cir. 1994).

56. Directive, *supra* note 14, at art. 5(5).

57. *See, e.g.*, CODE DE LA PROPRIÉTÉ INTELLECTUELLE [Intellectual Property Code] (Fr.); *Copyright Act 1968*, s. 200AB(1) (Austl.); Legge 22 aprile 1941, n. 633 (It.).

58. Ysolde Gendreau, *Intellectual Property Colloquium Series: Canada and the Three-Step Test: A Step in Which Direction?*, 15 MARQ. INTELL. PROP. L. REV. 309, 322 (2011).

59. *Copyright Act 1968*, s. 200AB(1) (Austl.).

60. Berne Convention, *supra* note 2, at art. 9(2).

tion and for illustration in teaching under article 10(1) and (2) of the convention, implies this.<sup>61</sup> The American doctrine of fair use covers the same in its fourth factor, which is, “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>62</sup> This factor is also included in other countries’ laws discussed above including the copyright laws of Oman, Canada, and Australia as well as in the EC Directive through its adoption of the three-step test.<sup>63</sup> This is one of the most important factors to determine the permissibility of a use. While any economic loss suffered by a copyright holder due to copying would not be determinative of the impermissibility of the use, large losses from copying may weigh the balance towards infringement rather than permissible limit.

Of the three conditions or steps in the three-step test, both the second and the third steps are designed to protect the interests of authors and other copyright holders. The second step is directly related to the economic interests of copyright holders (“normal exploitation of the work”). In a 2000 WTO Panel decision, “normal exploitation” was interpreted as exploitation through means which generate significant revenues for the copyright holder or means which would likely to become economically significant in the future.<sup>64</sup> In other words, the main focus of the second step is pecuniary interests of authors. The third step is broad enough to cover both pecuniary and non-pecuniary interests (“legitimate interests”). Non-pecuniary interests include the moral rights of authors such as the right to be recognized as the author and the right to object to any distortion of the work prejudicial to the honor or reputation of the author.<sup>65</sup>

While the wordings of the second step prohibit any conflict with the normal exploitation of works, the third step allows some interference with the legitimate interests of the copyright holders as long as the interference is not “unreasonable.” If we apply the steps in the same order as they appeared in the text, we can use the third step to put some reasonable limit on the economic interest of authors and copyright holders mentioned in the second step. On the other hand, if the second step is considered to have priority over the third step, the economic interests of authors and publishers would weigh more heavily than any other consideration in determining the scope of an

61. See Guide to the Berne Convention, *supra* note 25, at 58–59.

62. Copyright Act, 17 U.S.C. § 107(4) (2012).

63. See Directive, *supra* note 14, at art. 5(5).

64. Panel Report, United States—§ 110(5) of the U.S. Copyright Act, WTO Doc. WT/DS160/R (adopted June 15, 2000).

65. See Berne Convention, *supra* note 2, at art. 6(1).

exception. The legislative history of the Berne Convention indicates that the second step could be modified by the third step.<sup>66</sup> In other words, even if the economic interest of an author would be harmed by an exception, such exception would be still permissible as long as the harm is not unreasonable.

Reasonable harm implies that there may be some financial loss arising from a copyright exception. For example, copyright exception for education and research will in some cases cause the holder of copyrights to lose potential income from the exploitation of copyrighted works. When a student or researcher copies the relevant part of a book within the limit of fair use, he or she may not buy the book or pay the permission fees for copying. This, of course, would affect negatively the economic interests of the copyright holder. However, as long as the negative effect is not unreasonable, i.e., not disproportionately large, it would be ignored. For example, when a teacher makes a copy of a chapter from a textbook for the preparation of her teaching, such copying may not cause unreasonable loss of profit for the holder of copyright in the book, and thus would usually fall under the fair use/dealing. On the other hand, if every single student in the course copies the same chapter of the textbook, such copying is less likely to be covered by fair use doctrine.

Although national laws and international conventions do not indicate any hierarchy among the conditions and factors,<sup>67</sup> courts usually assign more weight to the effect of the use on the commercial exploitation of the work.<sup>68</sup> In a non-educational fair use case,<sup>69</sup> the US Supreme Court considered this factor to be the single most important factor in the determination of fair use of copyrighted works.<sup>70</sup> In the context of legal research, the Supreme Court of Canada recognized this to be an important factor, but refused to consider this as the most important factor in determining fair dealing.<sup>71</sup> If copied materials compete with the original copyrighted materials in the market, and affect the potential market for the original work, the use would be usually unfair.

66. See World Intell. Prop. Org. [WIPO], *Rep. on the Work of Main Committee in WIPO*, RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM: JUNE 11 TO JULY 14, 1967, at 1145 (1971).

67. See Bartow, *supra* note 35, at 153; see also Gendreau, *supra* note 58, at 316.

68. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

69. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994) (quoting *Harper & Row, Publishers, Inc.*, 471 U.S. at 566).

70. Bartow, *supra* note 35, at 165.

71. See *CCH Canadian Ltd. v. Law Soc'y of Upper Canada*, [2004] 1 S.C.R. 339, 368–69 (Can.).

Despite the overwhelming importance of economic impact of a use in the determination of permissible use, the absence of negative financial consequence is not automatically dispositive of fair use. Sometimes even though the holder of copyright suffers no negative economic consequence, the use can still amount to infringement because of the presence of other factors. This usually occurs in cases when copyrighted works are not exploited through commercial publishers. For example, in *Marcus v. Rowley*, where the defendant copied a substantial part (about 50 percent) of the plaintiff's booklet on cake decoration without permission or attribution, the court observed that there was no financial harm suffered by the plaintiff.<sup>72</sup> This was due to the fact that the booklet was not sold by commercial publishers or through bookstores.<sup>73</sup> The plaintiff sold few copies of the book to her own students.<sup>74</sup> The defendant copied plaintiff's work in her own booklet and distributed to her students at a different institution and without any direct financial gain.<sup>75</sup> However, the large verbatim copying together with lack of any attribution made the defendant's work infringing despite the absence of any negative financial impact on the plaintiff's booklet.<sup>76</sup> Similarly, in *Weissmann v. Freeman*, the use of copyrighted "syllabus" (a paper summarizing current research in the field) on nuclear medicine without permission and attribution was held infringing.<sup>77</sup> There was no direct financial impact on the exploitation of the work, as the author of the syllabus did not sell the work to her students.<sup>78</sup>

While courts sometimes ask copyright holders to show evidence of economic effect (i.e., decreased sale) due to alleged copying, in many cases, courts simply assume this effect to be obvious.<sup>79</sup> For example, in the US case of *Macmillan v. King*, the use of an exact outline of an economic text book by a private tutor for education was held to be infringing and not protected by fair use defense because of the outline's potential negative effect on the economic exploitation of the original text book.<sup>80</sup> The court held that there was a likelihood that some students with the outlines might decide not to buy the original textbook that they would otherwise buy.<sup>81</sup>

72. 695 F.2d 1171 (9th Cir. 1983).

73. *Id.* at 1173.

74. *Id.*

75. *Id.*

76. *Id.* at 1178–79.

77. 868 F.2d 1313 (2d Cir. 1989), *rev'g*, 684 F. Supp. 1248 (S.D.N.Y. 1988).

78. *Id.* at 1325.

79. *See CCH Canadian Ltd. v. Soc'y of Upper Can.*, [2004] 1 S.C.R. 339, 374 (Can.).

80. *Macmillan Co. v. King*, 223 F. 862 (D. Mass. 1914).

81. *Id.* at 867.

## 2. Amount of use/copying

The factor which is most relevant to the topic of our Article is the amount of a work which could be used or copied for the purpose of education and research. Both American law on fair use and Canadian law on fair dealing include this factor. The Berne Convention specifically mentions this factor in the quotation and teaching exceptions through the proviso that “their [i.e., quotations] extent does not exceed that justified by the purpose” or “the extent justified by the purpose.”<sup>82</sup> While three-step test in the Berne Convention and in other copyright conventions does not directly include this factor, the amount of copying is closely connected with the effect of the use on the financial exploitation of the work, and thus could be implied by the last two steps of the three-step test. Use of a large portion of a copyrighted work, even for a noble purpose like education and research, may affect the potential market of the work and thus may conflict with normal exploitation of the work. Such use may also unreasonably prejudice the legitimate interest (mainly the pecuniary interest) of the author.

What would be the exact permissible amount that students and researchers can copy is not clearly defined. In fact, to define such limit *quantifiably* may be very difficult, if not impossible. In other words, how much of a copyrighted material can a student or researcher copy without paying any fees or seeking permission from the copyright holders is not easy to answer. The straightforward answer to the question is that there is no *quantitative* limit. In some special cases, the entire work may be copied.<sup>83</sup> This is true especially in the case of works with very short length, i.e., an epitaph on a tombstone or short poem.<sup>84</sup> This is probably the reason why the Guidelines for fair use doctrine in the US, prepared by a group of publishers and some other stakeholders, permit multiple copying for classroom use of the *whole* or part of a work within 250 words in case of a poetic work and 500 words in case of non-poetic works as a minimum limit.<sup>85</sup>

While courts sometimes use the percentage of copying in relation with the copied work as a whole to determine infringement, there is no fixed percentage as a threshold for fair use. In addition, the same percentage may be

82. See Berne Convention, *supra* note 2, at arts. 10(1)–(2).

83. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984) (“[T]he fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.”).

84. See Hubbard v. Vosper [1972] 1 All ER 1023 (C.A.).

85. Guidelines, *supra* note 23.

fair use in one case but would amount to infringement in another case due to the presence of other factors. For example, in *New Era Publications International v. Carol Publishing Group*, copying 8% or even more from some short works of L. Ron Hubbard was held to be fair because the purpose of the use was criticism,<sup>86</sup> while the same percentage of copying from a different work (2.5 minutes from a 28-minute film) in *Iowa State University Research Foundation Inc. v. American Broadcasting Cos. Inc.*, was held to be unfair.<sup>87</sup> The latter decision was partly due to the secret copying of an unpublished work in the pretext of assessing its commercial value. In the Canadian case of *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada considered the Great Library's self-imposed limit of 5% copying from secondary legal materials for its patrons as being covered by fair dealing.<sup>88</sup> The same case also held that the practice of the library to copy one case, one journal article, or one statutory reference for individual patrons fell under the fair dealing exception.<sup>89</sup>

In some cases, the quality of the copied part would be more important than its quantity in determining the permissible limit. If the copied part is the heart of a work, copying such part may be held as infringing and beyond the limit of fair use or fair dealing exception.<sup>90</sup> However, determining which part of a work is its heart or its most critical element sometimes involves the assessment of peculiar facts of a case by individual judges. For example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the US Supreme Court held that the publication of a 300-word article by *The Nation* based on the unpublished memoir of President Ford with over 200,000 words was "essentially the heart" of the work as the article contained the reasons President Ford pardoned President Nixon.<sup>91</sup> This was a case with unique facts. The fact that the memoir was unpublished weighed heavily against Nation Enterprises. In addition, the fact that Harper & Row commissioned *Time Magazine* to publish a 7,500-word excerpt of the memoir before the publication of the book, and that *Time Magazine* cancelled the planned publication after *The Nation's* article, established the proof that the alleged article copied the

86. 904 F.2d 152 (2d Cir. 1990).

87. 621 F.2d 57, 61–62 (2d Cir. 1980).

88. [2004] 1 S.C.R. 339, 373 (Can.).

89. *Id.* at 373.

90. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991) ("A short piece which is 'the heart of' a work may not be fair use and a longer piece which is pedestrian in nature may be fair use."); *see also* Bartow, *supra* note 35, at 164–65.

91. 471 U.S. 539, 565–66 (1985).

heart of the work.<sup>92</sup> The cancellation caused Harper & Row to lose \$12,500 in fees from *Time*.<sup>93</sup> Thus, the quoted words provided a substitute at least for the planned excerpt in *Time Magazine* if not for the entire memoir. In *Basic Books, Inc. v. Kinko's Graphics Corp.*,<sup>94</sup> the court considered the copied parts of different books for the purpose of a course packet as the “critical parts” of the works mainly on the ground of their selection by the professors of the courses.<sup>95</sup>

In determining the permissible amount, courts usually look at the amount of copying made in each use or for each user instead of cumulative amount of copying made for all the users. This approach was followed in the American case of *Williams & Wilkins Co. v. United States*,<sup>96</sup> as well as the recent Canadian case of *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*.<sup>97</sup> In the first case, the court held that the right amount to look at was not the total number of journal articles the defendant library made for all physicians and medical researchers in a year but the copying the library made for each patron at each request.<sup>98</sup> As the library had self-imposed policy of copying just one journal article per issue or three journal articles per volume per request, the court held that the amount of copying was reasonable and thus covered by fair use exception.<sup>99</sup>

In addition to the amount of copying, the number of copies is also a relevant factor in determining the limit of fair use or fair dealing. Copying a specific portion of the work for one or few researchers or students may be fair and permissible, while copying the same amount for a large number of people would be unfair and thus not allowed. This is clear from the legislative history of the Berne Convention. The Report of the Main Committee I for the Stockholm Conference in 1967 states that “[i]f [photocopying] consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work . . . . If a small number of

92. *Id.* at 566–69.

93. *Id.* at 567.

94. 758 F. Supp. 1522, 1533 (S.D.N.Y. 1991).

95. This approach of the court is criticized because it would automatically make copying any part indicated by an instructor infringing. See Bartow, *supra* note 35, at 179–81.

96. *See generally*, 487 F.2d 1345 (Ct. Cl. 1973).

97. [2012] 2 S.C.R. 345, 362–63 (Can.).

98. *Williams*, 487 F.2d at 1355.

99. *Id.* at 1348.

copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.”<sup>100</sup> In the Canadian fair dealing analysis, this is included in the “character of dealing” factor.<sup>101</sup>

The consideration of multiple copying also reflects in the American Guidelines for classroom copying.<sup>102</sup> While the Guidelines allow professors to make a single copy of a chapter of a book, an article from a periodical, a short story, essay, or poem from any work used for the preparation of their teaching, the Guidelines put much more restrictive conditions on multiple copying for classroom use.<sup>103</sup> Multiple copying for classroom use must meet three conditions: the test of brevity and spontaneity, the test of cumulative effect, and a notice of copyright.<sup>104</sup> The test of brevity requires that the copying of a poetic work must not exceed 250 words.<sup>105</sup> As for any non-poetic literature (article, essay, story etc.), the copying cannot be more than 1,000 words or 10% of the work, whichever is less.<sup>106</sup> The test of spontaneity requires that the copying has to be at the instance and inspiration of a teacher and the time between such inspiration to use the work and the actual use is so close that a timely response to a request for permission is unreasonable.<sup>107</sup> The test of cumulative effect puts further restrictions based on each course, each semester, and each school.<sup>108</sup> Even if multiple copying for classroom teaching meets the above conditions, such copying cannot be done for making anthologies. Neither can such copying be substitute for the purchase of text books, nor can it be from teaching consumables (i.e., workbooks, exercises, standardized tests, test booklets, answer sheets, etc.).<sup>109</sup> It is worth repetition here that the Guidelines are usually considered as the minimum limit for fair use.

100. Guide to the Berne Convention, *supra* note 25, at 1145–46.

101. See *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2004] 1 S.C.R. 339, 367 (Can.).

102. Guidelines, *supra* note 23, at ¶ II.

103. See *id.* at ¶ I.

104. *Id.*

105. *Id.* at ¶ II.

106. *Id.*

107. See *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1537 (S.D.N.Y. 1991) (The Court held that making photocopy of permissible brief work at the beginning of a semester which would not be used until around the end of semester would not meet the test of spontaneity.).

108. The above short copy has to be only for one course per school. There cannot be more than one instance of short poem, article, story, or essay, or two instances of excerpts from the same author, or three instances from the same collective work or periodical volume per course and per semester. In total, there can be a maximum of nine instances of the above brief copy per semester per course. These restrictions on number of times do not apply to current news from any newspaper or periodicals.

109. See Guidelines, *supra* note 23, at ¶ III.

### 3. Purpose of use/copying

While the effect of the use on the economic interests of authors and the amount of copying may be the most important factors, other factors are also relevant in determining both the permissibility of a use and the extent of a permissible use. The purpose of use is another factor included both in the American fair use provision and in the analysis of Canadian fair dealing exception to determine the permissibility of a use. In general, free use of copyrighted works for the purpose of education and research is looked upon more favorably by courts and lawmakers than free use for other purposes. As the use of copyrighted works for the purpose of education and research is specifically stated as a permitted exception, we do not need to use this factor (i.e., the purpose of the use) to determine the permissibility of such use further. The first step of the Berne Convention (“special cases”) would easily cover the copyright exception for the purpose of education and research, as would the specific exception for teaching mentioned under article 10(2) of the convention. Whether we interpret the words “special cases” to mean exceptions which are clearly defined and narrowly limited in national legislation,<sup>110</sup> or exceptions which are justified by some special public policy purposes,<sup>111</sup> the exception for the purpose of education and research would be covered by the words “special cases” mentioned in first step of the three-step test.

Despite favorable treatment of education and research exception by legislatures and courts, copying for education and research does not automatically guarantee its permissibility.<sup>112</sup> Other factors such as the effect of use on financial interest of copyright holders, the amount of use, and the financial gain of an intermediary who facilitates such use for ultimate users would be also relevant.

Even when ultimate users of copied materials are students and researchers, the profit motive of the facilitator of copying would be a relevant consideration in determining fair use. This sub-factor is expressly included in §107 of US Copyright Act (“the purpose and character of the use including

110. The WTO Panel gave this interpretation to the words ‘special cases’ in one of its reports. *See* Panel Report, *supra* note 64.

111. Professor Sam Ricketson adopted this interpretation in his book. *See* RICKETSON, *supra* note 27 at 482.

112. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (“[t]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”).

whether *such use is of a commercial nature or is for nonprofit private educational purposes,*”).<sup>113</sup> Some American cases held that there would be a presumption of unfairness in case of commercial use.<sup>114</sup> Thus, while copying a limited part of a copyrighted work for the purpose of education and research would be usually permissible if done directly by the users (i.e., students or researchers) for their own use, facilitation of such use by someone else with financial motive may infringe copyright. Thus, when a photocopy shop makes copy from a work for students, such copying may not fall under educational exception as the photocopy shop’s main motive is not education but profits from such copying.<sup>115</sup> The main reason for this factor to weigh against fair use is that a profit-making entity competes in the market with the original copyright holder and thus deprives the latter of the profit from the exploitation of the work.<sup>116</sup>

Even when a teacher copies from a copyrighted work for his or her students, any direct financial gain from the sale of the copied work may tip the balance towards infringement. In *Bridge Publications, Inc. v. Vein*, when a private religious teacher made copies of some copyrighted tapes of L. Ron Hubbard’s lectures and sold to her students, the court considered her profit motive as one of the factors against fair use for education.<sup>117</sup> If, on the other hand, a teacher facilitates copying for others to use in education without any financial gain, such copying may be covered by educational exception. For example, in *Alberta (Education)*, the Supreme Court of Canada held that when teachers copied or scanned some part of a copyrighted book and distributed it to their students without any financial gain, such copying fell within the fair dealing exception for education.<sup>118</sup>

Like the case with teachers, when libraries or research institutions make copies to serve the research needs of individual patrons without any financial motive, courts are more likely to find such copying as fair use than infringement. In *CCH Canadian Ltd.*, the Supreme Court of Canada upheld the validity of the practice of Great Library at Osgoode Hall in Toronto to copy

113. Copyright Act, 17 U.S.C. § 107 (2012) (emphasis added).

114. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, at 449 (1984) (“If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair.”); see also *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1386 (6th Cir. 1996), (finding a presumption of unfairness because the use was considered commercial). In a later decision the U.S. Supreme Court confined this assumption only to cases of verbatim copying of a work in its entirety by a commercial entity. *Campbell*, 510 U.S. at 591.

115. See *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1531–32 (S.D.N.Y. 1991).

116. See *id.* at 1532.

117. 827 F. Supp. 629, 635 (S.D. Cal. 1993).

118. [2012] 2 S.C.R. 345, 355, 365 (Can.).

and to send court decisions and excerpts of legal treaties to its patrons by fax, emails, etc.<sup>119</sup> Similarly, in a pre-1976 Copyright Act American case, *Williams & Wilkins Co. v. United States*, the court found copying of articles from medical journals by a library without any profit motive for physicians and medical researchers as fair use and not copyright infringement.<sup>120</sup>

A teacher's copying part of a work for students even without any financial interest has to be within the bounds of permissible amount. Thus, in *Marcus v. Rowley*,<sup>121</sup> when a teacher copied eleven pages of a cake-decorating booklet for her course materials with no financial profit, the copying was still held to be infringing.<sup>122</sup> One reason for the decision is that the copying amounted to 50 percent of the original booklet. However, it is hard to tell whether the amount of copying in the case was the decisive factor for the infringement decision. Other factors weighing against fair and permissible use included in the case are the non-attribution in such a large verbatim copying, no attempt to seek permission from the author, and the copying being substitute for the original work.<sup>123</sup> Similarly, in *Encyclopaedia Britannica Educational Corp. v. Crooks*, the off-air videotaping of large amount of copyrighted educational programs and films by a non-profit educational institution (Board of Educational Services, Erie County, New York) mostly for later non-profit distribution among various schools in the county for classroom uses was held not to be fair use but copyright infringement.<sup>124</sup> The institution had 4,500 videotaped programs in its library in the year 1976–1977; most of these programs were copied through off-the-air recording.<sup>125</sup>

While profit motive is an important factor against fair use/dealing, it is not the decisive factor.<sup>126</sup> Some financial gain by students and researchers from their copying for education and research would not be an automatic bar to educational exception. For example, the Supreme Court of Canada held in *CCH Canadian Ltd. v. Law Society of Upper Canada* that the use of copy-

119. [2004] 1 S.C.R. 339.

120. 487 F.2d 1345, 1354 (Ct. Cl. 1973).

121. 695 F.2d 1171 (9th Cir. 1983).

122. *See id.* at 1173, 1177.

123. *See id.* at 1176. Despite the copying being substitute for the original work, the court found no negative financial impact on the market of the original work. This is because the original work was not sold by commercial publishers or bookstores. The sale of the original work was limited by its author to her own students at \$2 per copy, her profit being \$1 from each copy. The copies made by the defendant were for students from a different institution.

124. 542 F. Supp. 1156, 1159, 1170 (W.D.N.Y. 1982).

125. *Id.* at 1162.

126. *See New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J.1977).

righted materials by lawyers in their profitable practice would be still covered by research exception under Section 29 of the Canadian Copyright Act.<sup>127</sup> The court gave the word ‘research’ a broad meaning and held that research should not be confined to non-profit private research activities.<sup>128</sup> However, the permissible limit for research by commercial entity may be narrower than the limit for non-profit research.<sup>129</sup> In another case, the Supreme Court of Canada refused to confine the research exception only to educational settings and extended it to consumers’ search for product information.<sup>130</sup> The case involved the preview of copyrighted music for thirty to ninety seconds by consumers before they could make their purchase decision.<sup>131</sup> The court held that such preview fell within fair dealing exception for research.<sup>132</sup> In this regard, the Omani copyright laws’ requirement that there could be no direct or indirect financial profit seems to be unduly restrictive when it comes to copying for education and research.

#### 4. Nature of the Copied Work

Among others, the nature of copyrighted works is a factor mentioned in the U.S. Copyright Act and is also adopted by the Supreme Court of Canada in its fair dealing analysis.<sup>133</sup> The Berne Convention does not directly discuss this factor.<sup>134</sup> Under this factor, courts usually consider whether the copyrighted work is informational or creative. As there is no copyright protection for facts and information, fair use or fair dealing doctrine is more likely to cover copying of informational work for classroom use than copying from creative works for the same purpose.<sup>135</sup> However, the difficulty lies in drawing the line between informational work and creative work.<sup>136</sup> Sometimes

127. [2004] S.C.R. 339, 365 (Can.).

128. *Id.* at 342, 365.

129. *Id.* at 367 (“[R]esearch done for commercial purposes may not be as fair as research done for charitable purposes.”).

130. Soc’y of Composers, Authors and Music Publishers of Can. v. Bell Can., [2012] S.C.R. 326 (Can.).

131. *Id.* at 327–328, 336.

132. *Id.*

133. See 17 U.S.C. § 107 (2012); see also CCH Canadian Ltd. v. Law Soc’y of Upper Can., [2004] S.C.R.336, 366 (Can.).

134. However, some of the sub-factors are mentioned under the Berne Convention. For example, under article 2(8) of the Berne Convention there is no copyright in information and news. Berne Convention, *supra* note 2, at art. 2(8). Similarly, to use part of a work as quotation the work must be lawfully made available under article 10(1) of the convention. *Id.* at art. 10(1).

135. See *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 at 1532–33 (S.D.N.Y. 1991); see also Bartow, *supra* note 35, at 164.

136. See Bartow, *supra* note 35.

even courts are not sure which side of the line a work falls. For example, in *Marcus v. Rowley*, the court considered an infringed work, a book on cake-decoration, containing both informational and creative works, thus making the presence of this factor irrelevant to the case.<sup>137</sup>

With regard to the education and teaching exception, if the copyrighted works are textbooks and other materials intended for educational use, their copying is more likely to infringe copyright than would be the case with copying from works intended for general audience.<sup>138</sup> This is clearly stated in the US House of Representatives' Report of 1967 prior to the adoption of 1976 Copyright Act. According to the report, "textbooks and other material prepared primarily for the school market would be less susceptible to reproduction for classroom use than material prepared for general public distribution."<sup>139</sup> This factor is directly related to the second step of the Berne Convention, 'normal exploitation' of the work. If a chapter of a textbook is copied and that chapter is the only relevant chapter for a course, then free copying and distribution of the chapter among students would greatly affect the commercial exploitation of the work by the copyright holder. On the other hand, if a book is intended for general audience (e.g., a self-help book on cooking), copying of a chapter from that book for students in a culinary course may still leave the demand for the work unaffected in the general market.

Whether a work is published or unpublished also has some bearing in the determination of permissible use for education and other purposes. Usually, copying from an unpublished work would be more likely to be infringing than copying from a published work. In fact, the Berne Convention specifically stipulates this regarding quotation use. Copying part of a work for quotation is permissible only if it is from a lawfully published work.<sup>140</sup> The likely justification for this distinction lies in the fact that use of an unpublished work without authorization deprives the author of the right to publish her work first. This factor weighed heavily in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, where *The Nation's* unauthorized publication was from the unpublished memoir of President Ford.<sup>141</sup> Similarly, in *Bosch v. Ball-Kell*, the fact that the copyrighted syllabi and exam questions were

137. 695 F.2d 1171 (9th Cir. 1983).

138. See Bartow, *supra* note 35, at 165.

139. H.R. REP. NO. 90-83, at 34 (1967); see also *Marcus*, 695 F.2d at 1175.

140. See Berne Convention, *supra* note 2, at art. 10(1).

141. 471 U.S. 539 (1985).

unpublished was a factor weighing against fair use in addition to the lack of attribution to and permission from the author.<sup>142</sup>

### 5. Attribution

The Berne Convention requires that when part of a copyrighted work is used for quotation or for illustration in teaching, the name of the author, when available, must be mentioned.<sup>143</sup> This is also a requirement under Omani copyright law for any free use of a copyrighted work.<sup>144</sup> While this is not included in the four factors of American fair use doctrine or in the six factors of Canadian fair dealing analysis, courts use lack of attribution as an additional factor to decide against fair use or fair dealing especially when there is substantial copying without any acknowledgement of the source. For example, in *Marcus v. Rowley*, non-attribution of large verbatim copying from a booklet on cake-decoration was one of the factors used by the court to hold the copying as infringing.<sup>145</sup> Similarly, in *Weissmann v. Freeman*, where a professor of nuclear medicine used a ‘syllabus’ (i.e., summary of the current research in the field) modified by his colleague for teaching a similar course, the court considered non-attribution as one of the main factors in its holding that the use was infringing and not fair.<sup>146</sup>

While this factor is more important in determining plagiarism than copyright infringement, it occasionally becomes a secondary factor weighing against fair use. As a secondary factor, lack of attribution would not usually make an otherwise permissible use infringing. For example, quoting a sentence from a work, copyrighted or not, without attribution would be plagiarism, but would not automatically be copyright infringement. On the other hand, taking a substantial part of a copyrighted work, even with proper attribution, may be infringing but not plagiarism. In both of the aforementioned cases, *Marcus v. Rowley* and *Weissmann v. Freeman*, the copying was substantial and without attribution. Thus, the courts found the copying as infringement. Since plagiarism is not a factor for copyright infringement, the courts in the above cases did not discuss the issue of plagiarism. The issue was briefly mentioned in the factual background of *Marcus v. Rowley*, as a student of the original author refused to buy the author’s booklet, mistakenly accusing the original author of plagiarizing the defendant’s work.<sup>147</sup>

142. *Bosch v. Ball-Kell*, No. 03-1408, 2006 WL 2548053, at \*10 (C.D. Ill. Aug. 31, 2006).

143. See Berne Convention, *supra* note 2, at art. 10(1)–(2).

144. See Oman Decree, *supra* note 19, at art. 20.

145. 695 F.2d 1171 (9th Cir. 1983).

146. 868 F.2d 1313 (2d Cir. 1989), *rev’g*, 684 F. Supp. 1248 (S.D.N.Y. 1988).

147. 695 F.2d at 1173–74.

## 6. Transformation

If copying a part or the whole of a work is done for the same intrinsic purpose as that of the original work, the copying is more likely to be infringing. On the other hand, use of a copyrighted work for an unrelated purpose may be considered transformative and thus non-infringing. This factor is closely related to that of economic exploitation. Copying and using a copyrighted work for the same intrinsic purpose as that of the original work would amount to the substitution of the copyrighted work and thus deprive the copyright holder of financial benefit he would otherwise gain from selling the original work. For example, a parody of copyrighted music is a transformation from the original work and does not compete with the original.<sup>148</sup> While copying a work or part of it would usually be non-transformative, such copying in a database to facilitate search in the original works would be transformative.<sup>149</sup> The latter work does not compete with the original works and may in fact promote them.

## 7. Available Alternatives to the Dealing

This is a factor specifically adopted by the Supreme Court of Canada.<sup>150</sup> If there exists both copyrighted and non-copyrighted materials to achieve a particular purpose (e.g., education and research), then copying from copyrighted materials may be less fair. Similarly, if a specific purpose can be effectively achieved (e.g., criticism of a work) without copying and quoting a portion of the copyrighted work, then copying of such portion may not be fair.<sup>151</sup> The Supreme Court of Canada held in *CCH Canadian Ltd. v. Law Society of Upper Canada* that when students or researchers needed to consult parts of different copyrighted materials, and they could not borrow the materials from a library or were living far from the library, copying the materials for those patrons could be the only viable option for them to access the materials.<sup>152</sup>

## 8. Market Failure

Market failure is an economic argument. When negotiation for copying in the market is impossible or the cost of negotiation or market transaction

148. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

149. See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); see also *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

150. *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] S.C.R. 339, 368 (Can.).

151. *Id.*

152. *Id.* at 373.

would be very high, copying should be allowed without permission or license fees. Copying in such circumstances would be fair use and not infringement. A common example of market failure argument revolves around the absence of a licensing or permission system. If there is no licensing system or the cost of seeking permission through that system is exorbitant, then copying without permission or fee would fall under fair use. Due to the well-established licensing system and the reasonable cost of obtaining such a license in the U.S., courts there found copying by research institutions and photocopy shops without permission or license fees outside the ambit of fair use.<sup>153</sup> To some extent, this approach is problematic because the availability of a licensing system should not be a factor in determining fair use. If a particular use is fair, there is no need for a license or permission.<sup>154</sup> However, if a particular use would not be otherwise fair, the high transaction costs in obtaining permission or non-availability of a licensing system may make the use fair.<sup>155</sup>

Another form of market failure argument involves the failure of the market to internalize the positive externalities from copying by students and researchers.<sup>156</sup> While students and researchers would count their personal costs and benefits from a market transaction in which they have to pay for their copying, they would not include in their cost-benefit analysis the benefits that society would obtain from their education and research. Such benefits are external to the students and researchers who need to copy portions of copyrighted materials. In some cases, students or researchers may not enter into a market transaction simply because their personal costs are greater than the personal benefits they would derive from the transaction. However, if we include the social benefits from education and research, the transaction would be cost-effective. Yet, in such cases students and researchers would not enter into a market transaction. This market failure argument suggests that we have to allow students and researchers to use copyrighted materials in those cases either through fair use or through government subsidies for their cost.

153. See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1336 (1997); see also *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, (2d Cir. 1994), *cert. dismissed*, 116 S. Ct. 592 (1995).

154. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994) (“If the use is otherwise fair, then no permission need be sought or granted.”); see Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1, 38–48 (1997).

155. This is a probable reason Omani copyright laws stipulate the absence of collective licensing arrangement for the reproduction of a work by a library for private study or research need of an individual. Oman Decree, *supra* note 19, at art. 20(3)(a).

156. See Loren, *supra* note 154, at 48–56.

### 9. Possibility of Other Factors

Whether we use the four factors under § 107 of the U.S. Copyright Act or six factors adopted by the Supreme Court of Canada, these factors are not exhaustive.<sup>157</sup> For example, after stating the six factors mentioned above, the Supreme Court of Canada said, “In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.”<sup>158</sup> Above we have examined some of the additional factors such as transformation, market failure, and non-attribution courts sometimes use in determining the fairness of a particular use. However, most courts stick to these four or six factors in their analysis of fair use or fair dealing.<sup>159</sup>

### CONCLUSION

Despite the factors or conditions to determine the permissible limit of free use of copyrighted works for education and research, the scope of such use cannot be clearly defined. We can only make an educated guess based on the discussed criteria and decided cases. As Lord Denning said, “It is impossible to define what is ‘fair dealing’. It must be a question of degree . . . . [I]t must be a matter of impression.”<sup>160</sup> However, courts around the world should interpret these factors and conditions broadly to promote education and research, the primary goal of copyright law.<sup>161</sup>

157. See Bartow, *supra* note 35, at 160–61.

158. CCH Canadian Ltd. v. Law Soc’y of Upper Can., [2004] S.C.R. 339, 369 (Can.).

159. See Loren, *supra* note 154, at 54.

160. CCH Canadian Ltd., [2004] S.C.R. at 366 (citing Hubbard v. Vosper, [1972] 1 All ER 1023, 1027 (Gr. Brit.)).

161. See U.S. CONST., art. I, § 8, cl. 8, which gives Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” (Italics added).