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The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the *Charter* Right to Freedom of Expression in the Context of Copyright

*Graham Reynolds**

In its post-2002 copyright jurisprudence, the Supreme Court of Canada has clarified that the Copyright Act grants a significant degree of latitude to non-copyright owning parties to express themselves using copyrighted works. This outcome is attributable neither to the SCC having interpreted provisions of the Copyright Act according to Charter values, nor to the SCC having weighed provisions of the Copyright Act against the section 2(b) right to freedom of expression. Rather, it has resulted from the SCC interpreting provisions of the Copyright Act through the lens of the purpose of copyright, as rearticulated by the SCC.

The author argues that despite the positive outcomes for the expression interests of non-copyright owning parties that have thus far resulted from the SCC's post-2002 copyright jurisprudence, relying on statutory interpretation as the sole mechanism through which to protect freedom of expression fails to adequately protect this Charter right in the context of copyright. In order to ensure that this right is adequately protected, the SCC should, where appropriate, explicitly engage with the Charter right to freedom of expression in the context of copyright.

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Introduction

Since the coming into force of the *Canadian Charter of Rights and Freedoms*¹ in 1982, the Supreme Court of Canada has engaged with the *Charter* right to freedom of expression in a wide range of contexts.² One area in which the SCC has yet to explicitly engage with the *Charter*

1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2. See e.g. *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084, 15 OR (3d) 548 (posting); *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, [2005] 3 SCR 141 [*Montréal (City)*] (using a loudspeaker at the entrance to a business and broadcasting noise onto a street); *R v Lucas*, [1998] 1 SCR 439, 157 DLR (4th) 423 (defamatory libel); *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, 73 OR (2d) 128 (advertising for dentists' services).

right to freedom of expression, however, is copyright.³ For a number of reasons, this lack of explicit engagement is noteworthy. First, the rights granted under copyright legislation permit copyright owners, in certain circumstances, to restrain or limit the expression of non-copyright owning parties, raising the question of whether certain core provisions of Canada's *Copyright Act*⁴ are consistent with the *Charter* right to freedom of expression. Second, a number of lower Canadian courts have engaged with the intersection of the *Charter* right to freedom of expression and copyright.⁵ Third, leading courts in a number of jurisdictions cited by the SCC in the context of both its copyright and its freedom of expression jurisprudence—including the Supreme Court of the United States, the Court of Appeal of England and Wales, and the European Court of Human Rights—have engaged with the intersection of freedom of expression and copyright.⁶

3. The only Supreme Court of Canada decision that addresses copyright issues in which the words “copyright” and “freedom of expression” appear together is *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 [*Rogers v SOCAN*]. In this decision, Abella J (dissenting), in discussing the correct standard of review to be taken to decisions of the Copyright Board, stated that “[i]f concurrent jurisdiction with the courts in interpreting and applying something as legally transcendent as the *Charter* does not affect the deference to which tribunals are entitled in interpreting their own mandate, surely it is hard to justify carving out copyright law for unique judicial ‘protection’.” *Ibid* at para 73.

4. RSC 1985, c C-42.

5. See e.g. *Compagnie Générale des Établissements Michelin—Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)*, [1997] 2 FCR 306, 124 FTR 192 [*Michelin* cited to FCR]. For articles that critique the approaches adopted by lower Canadian courts to the intersection of the *Charter* right to freedom of expression and copyright, see Carys J Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” (2006) 56:1 UTLJ 75 [Craig, “Dissolving Conflict”]; David Fewer, “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada” (1997) 55:2 UT Fac L Rev 175; Ysolde Gendreau, “Canadian Copyright Law and Its Charters” in Jonathan Griffiths & Uma Suthersanen, eds, *Copyright and Free Speech* (New York: Oxford University Press, 2005) 245.

6. See *Golan v Holder* (2012), 132 S Ct 873; *Ashdown v Telegraph Group Ltd* (2001), [2002] EWCA Civ 1142 [*Ashdown*]; *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International*, [2005] ZACC 7.

Despite its lack of explicit engagement with the *Charter* right to freedom of expression, the SCC, in its post-2002 copyright jurisprudence, has clarified that the *Copyright Act* grants a significant degree of latitude to non-copyright owning parties to express themselves using copyrighted works. This outcome is attributable neither to the SCC having interpreted provisions of the *Copyright Act* according to *Charter* values nor to the SCC having weighed provisions of the *Copyright Act* against the section 2(b) right to freedom of expression. Rather, it has resulted from the SCC interpreting provisions of the *Copyright Act* through the lens of the purpose of copyright, as rearticulated by the SCC. Given this result, it could be argued that any explicit engagement with freedom of expression is unnecessary and that in the context of copyright, the *Charter* right to freedom of expression is given adequate protection through the vehicle of statutory interpretation.

In this article, I argue that there are limits to the use of statutory interpretation as a mechanism through which to protect expression interests and that relying on statutory interpretation as the sole mechanism through which to protect freedom of expression in the context of copyright fails to adequately protect the *Charter* right to freedom of expression. Despite the positive outcomes for the expression interests of non-copyright owning parties that have thus far resulted from the SCC's post-2002 copyright jurisprudence, I argue that the SCC should, where appropriate, explicitly engage with the *Charter* right to freedom of expression in the context of copyright.⁷

This article will proceed as follows. In Part I, I will describe how the SCC, through the course of its post-2002 copyright jurisprudence, has rearticulated the purpose of copyright from an author-centric approach—under which the sole objective of copyright is to protect and reward copyright owners—to an approach under which the rewards granted to copyright owners can and ought to be limited by public interest considerations (including the public's interest in accessing, disseminating and using expression).

7. For greater clarity, I am not arguing that direct engagement with the *Charter* would have resulted in different outcomes in any of the SCC's post-2002 copyright decisions. Rather, I am arguing that, in certain circumstances, it may be necessary to engage directly with the *Charter* in order to ensure that freedom of expression is adequately protected in the context of copyright.

In Part II, using the fair dealing provisions of the *Copyright Act* as my case study,⁸ I will demonstrate both how the SCC has interpreted the fair dealing provisions of the *Copyright Act* in light of this purpose, and how these interpretations have resulted in a significant degree of space being preserved within which non-copyright owning parties may express themselves using copyrighted works.

In Part III, I will explore the question of why the SCC has yet to explicitly engage with the relationship between freedom of expression (a *Charter*-protected right and a *Charter* value) and copyright. I will offer three explanations.⁹ First, I will argue that, in a manner consistent with the governing approach to copyright in Canada, a primary focus of the SCC's post-2002 copyright jurisprudence has been to ensure that copyright owners are not overcompensated at the expense of the public interest—one element of which is the public interest in accessing, disseminating

8. In contrast with the intersection of the *Charter* right to freedom of expression and copyright, fair dealing is a topic that has received a significant amount of scrutiny from scholars. See e.g. Daniel J Gervais, "Canadian Copyright Law Post-CCH" (2004) 18 IPJ 131; Ariel Katz, "Fair Use 2.0: The Rebirth of Fair Dealing in Canada" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 93 [Geist, *Copyright Pentalogy*]; Myra J Tawfik, "International Copyright Law: W[h]ither User Rights?" in Michael Geist, ed, *In the Public Interest* (Toronto: Irwin Law, 2005) 66 [Geist, *Public Interest*]; Myra J Tawfik, "The Supreme Court of Canada and the 'Fair Dealing Trilogy': Elaborating a Doctrine of User Rights Under Canadian Copyright Law" (2013) 51:1 *Alta L Rev* 191 [Tawfik, "Fair Dealing"]; Gluseppina D'Agostino, "Healing Fair Dealing?: A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use" (2009) 53:2 *McGill LJ* 309; Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform" in Geist, *Public Interest*, *supra* [Craig, "Fair Dealing"]; Abraham Drassinower, "Taking User Rights Seriously" in Geist, *Public Interest*, *supra*, 462; Meera Nair, "Fair Dealing at a Crossroads" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 90; Samuel E Trosow, "Fair Dealing Practices in the Post-Secondary Education Sector after the Pentalogy" in Geist, *Copyright Pentalogy*, *supra*, 213; Rosemary J Coombe, Darren Wershler & Martin Zeilinger, eds, *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University of Toronto Press, 2014).

9. As suggested by an anonymous reviewer, a fourth explanation could also be offered. Specifically, it could be the case that lawyers, when litigating copyright cases in Canada, have not raised *Charter* issues before the court of first instance. Thus, the absence of explicit consideration by the SCC of the *Charter* right to freedom of expression, in the context of copyright, could be explained (at least in part) by the SCC's reluctance to raise constitutional questions that have not been raised by litigants in courts below

and using works of expression. Interpreted through the lens of this approach, fair dealing and other users' rights have been conceptualized as mechanisms that limit copyright owners' rights, or as tools that mediate between "protection and access", as opposed to defences, the purpose of which is to protect or promote freedom of expression.¹⁰ Conceptualized in this manner, it has not been strictly necessary for the SCC to engage with the intersection of the *Charter* right to freedom of expression and copyright.

Second, I argue that the absence of explicit engagement in the SCC's post-2002 copyright jurisprudence with the *Charter* right to freedom of expression can also be attributed, at least in part, to the SCC's conclusion that statutory provisions may only be interpreted in accordance with *Charter* values (such as freedom of expression) in limited circumstances.¹¹ This conclusion restricts the extent to which courts—including the SCC—can interpret provisions of the *Copyright Act* according to *Charter* values.

Third, I suggest that the SCC's lack of explicit engagement with the *Charter* right to freedom of expression in the context of copyright could also be interpreted as the SCC accepting that, provided the provisions of the *Copyright Act* are correctly interpreted, freedom of expression is either fully or adequately protected by mechanisms internal to the *Copyright Act*. It would therefore be unnecessary for the Court to provide additional protection for freedom of expression interests by explicitly engaging with the *Charter* right to freedom of expression.

The questions of whether, how often and in what contexts litigants and lawyers in copyright cases raise *Charter* issues is an interesting and important one, and one that I am exploring in a different article. But see *CCH Canadian Ltd v Law Society of Upper Canada*, 2002 FCA 187 at paras 170–71, [2002] 4 FCR 213 (for a copyright decision where constitutional and *Charter* values were raised by a party to the litigation (the Law Society) and were referenced in the majority judgment) [*CCH FCA*]. The SCC's subsequent decision, however, made no reference to the *Charter*, despite drawing on other aspects of the Federal Court of Appeal's majority judgment. See *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH SCC*]. Given that there is at least this one instance in which the *Charter* was raised in an appellate-level copyright decision but not mentioned by the SCC in that same decision, it is important to critically analyse the question of why the SCC has thus far not engaged with the *Charter* in its post-2002 copyright jurisprudence.

10. *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at para 11, [2012] 2 SCR 326 [*SOCAN v Bell*].

11. See *Bell ExpressVu Limited Partnership v R*, 2002 SCC 42 at paras 28–30, [2002] 2 SCR 559 [*Bell ExpressVu*].

The explanations offered above may account—at least in part—for the absence of explicit engagement by the SCC with the *Charter* right to freedom of expression in the context of its post-2002 copyright jurisprudence. However, they do not justify continued non-engagement with the *Charter* right to freedom of expression by the SCC in all contexts relating to copyright. In Part IV, I argue that relying exclusively on statutory interpretation fails to adequately protect the *Charter* right to freedom of expression in the context of copyright, and that the SCC should, where appropriate, explicitly engage with this right.

I will conclude by outlining three ways in which Canadian courts can explicitly engage with the intersection of the *Charter* right to freedom of expression and copyright, namely: by re-conceptualizing the fair dealing defence (along with other defences) as a stand-alone “freedom of expression” defence; by interpreting certain provisions of the *Copyright Act* according to *Charter* values and by considering whether certain core provisions of the *Copyright Act* unjustifiably infringe the *Charter* right to freedom of expression.

I. The SCC’s Rearticulation of the Purpose of Copyright

In 2002, in his reasons for judgment in *Théberge v Galerie d’art du Petit Champlain Inc*,¹² Binnie J departed from the view accepted by the SCC in *Bishop v Stevens*¹³ that copyright is singularly directed towards benefiting or rewarding authors (an approach referred to by Abella J as the author-centric approach to copyright)¹⁴. Instead, Binnie J stated that

[t]he *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).¹⁵

12. 2002 SCC 34 at para 30, [2002] 2 SCR 336, Binnie, Iacobucci, Major JJ and McLachlin CJC, concurring [*Théberge*].

13. [1990] 2 SCR 467, 72 DLR (4th) 97.

14. *SOCAN v Bell*, *supra* note 10 at para 9.

15. *Théberge*, *supra* note 12 (Binnie J acknowledged that his articulation of the purpose or objective of copyright “is not new” at para 30). See also *Robertson v Thomson Corp*, 15 CPR (4th) 147 at para 23, 2001 CanLII 28353 (Ont Sup Ct J); *Apple Computer Inc v Mackintosh*

Justice Binnie’s rearticulation of the purpose of copyright—invoking a public interest that can limit or act in opposition to the rights of the copyright owner—showcases his concern that a copyright system focused exclusively on protecting the rights of copyright owners might overcompensate copyright owners at the expense of the public interest.¹⁶ Justice Binnie’s description of the *Copyright Act* as balancing between rewarding creators and the public interest and his statement that “due weight” must be given to the “limited nature” of creator’s rights reinforce this view.¹⁷

In *Théberge*, Binnie J’s concern with ensuring that copyright owners are not overcompensated at the expense of the public interest is rooted in part in his concern about the impact of a successful copyright infringement lawsuit on a defendants’ ability to use their personal property (their lawfully purchased *Théberge* prints).¹⁸ However, although Binnie J’s reasons for judgment focused on the proper balance between the copyright holder’s rights and the “proprietary interest of the purchasing public”,¹⁹ the manner in which Binnie J articulated the public interest engaged by copyright—as the “public interest in the *encouragement and dissemination of works of the arts and intellect*”²⁰—suggests concern not just for the impact of copyright on a third party’s personal property, but also for the impact of copyright on expression interests.²¹

Computers Ltd (1986), [1987] 1 FCR 173, 44 DLR (4th) 74; *Sayre v Moore* (1785), 102 ER 139 (KB) Mansfield L:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

Ibid at 139.

16. *Théberge*, *supra* note 12 at para 31.

17. *Ibid*.

18. See *ibid* at paras 1–2.

19. *Ibid* at para 29.

20. *Ibid* at para 30 [emphasis added].

21. See The Honourable Ian Binnie, “Three Years Later: Making Sense of the Changes in Canadian Copyright” (Lecture delivered at the Copyright in Canada Conference, 2 October 2015), online: <mediacast.ic.utoronto.ca/20151002-CopyCon2015/index.htm#>

The argument that Binnie J’s rearticulation of the purpose of copyright suggests concern for the impact of the enforcement of copyright on the expression interests of non-copyright owning parties is reinforced by the way in which Binnie J connected “excessive control” by copyright holders to possible negative consequences for the public domain.²² As Binnie J noted:

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.²³

Thus, while Binnie J noted that *Théberge* “demonstrates the basic economic conflict between the holder of the intellectual property in a work and the owner of the tangible property that embodies the copyrighted expression”, his rearticulation of the purpose of copyright also arguably acknowledges the “basic . . . conflict between the holder of the intellectual property in a work” and those who wish to engage in expression in ways that “[embody] the copyrighted expression”.²⁴

Additionally, while Binnie J emphasized the need to ensure that copyright owners are not given “excessive control” over tangible embodiments of their works, or are not “overcompensated” at the expense of a third party’s property rights, the way in which the balance is framed in *Théberge* also leads to the conclusion that copyright owners should be given neither “excessive control” over *expression* embodying their copyrighted works nor be “overcompensated” at the expense of the public’s expression interests.²⁵ Though it would be “self-defeating to undercompensate” copyright owners, their rights are limited—and can

He indicated that one “ought not to read copyright cases in isolation”; that a major theme of the SCC’s jurisprudence over the past several decades has been an “aggressive promotion of free speech”; and that “the notion of the commons, . . . the ability of everybody to access everything in the interests of free expression and the advancement of knowledge, is a theme of the court that goes well beyond copyright law”. *Ibid.* These statements suggest that the SCC may have had freedom of expression in mind when crafting its post-2002 copyright jurisprudence.

22. *Théberge*, *supra* note 12 at para 32.

23. *Ibid.*

24. *Ibid* at para 33.

25. *Ibid* at paras 31–32.

be limited as per *Théberge*—in order to preserve the balance between guaranteeing a just or fair reward to copyright owners and promoting the public interest in the creation and dissemination of expression.²⁶

Subsequent to *Théberge*, a number of copyright cases decided by the SCC framed the “public interest” specifically as the public’s interest in accessing expression.²⁷ For instance, in *CCH Canadian Ltd v Law Society of Upper Canada* (CCH SCC), the public interest is framed as the ability of non-copyright owning parties to access, use and disseminate specific types of works of expression—namely legal resources.²⁸ As noted by McLachlin CJC, quoting Linden JA’s Federal Court of Appeal decision in *CCH Canadian Ltd v Law Society of Upper Canada* (CCH FCA): “It is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained.”²⁹

In a similar manner to CCH SCC, the public interest referred to by Abella J in her dissenting judgment in *Robertson v Thomson Corp* (McLachlin CJC and Charron J concurring) is the public interest in ensuring continued access to a specific type of work of expression—namely archived newspapers, which Abella J describes as “a primary resource for teachers, students, writers, reporters, and researchers”.³⁰

In *SOCAN v CAIP*, a decision that addresses the question of whether and to what extent tariffs could be imposed on Canadian internet service providers, Binnie J emphasized the “vital” importance of the “continued expansion and development [of internet intermediaries] . . . to national economic growth”.³¹ However, Binnie J’s articulation of the public interest in *SOCAN v CAIP*, and of the balance between the public interest and the rights of the copyright owner, can also be read in context with his statement earlier in his reasons that “[t]he capacity of the Internet to disseminate ‘works of the arts and intellect’ is one of the great innovations

26. *Ibid* at para 31.

27. See Teresa Scassa, “Interests in the Balance” in Geist, *Public Interest*, *supra* note 8, 41 (for an article that discusses the various conceptions of the public interest at play in Canadian copyright jurisprudence).

28. *Supra* note 9.

29. *Ibid* at para 71, citing CCH FCA, *supra* note 9 at para 159.

30. 2006 SCC 43 at para 70, [2006] 2 SCR 363.

31. *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at para 131, [2004] 2 SCR 427 [*SOCAN v CAIP*].

of the information age.”³² Thus, at least one element of the public interest referred to in *SOCAN v CAIP* can be seen as the public interest in facilitating the fair dissemination of expression on the internet.³³

The idea that the public interest against which the reward to copyright owners must be balanced encompasses the encouragement and dissemination of expression is reinforced in *SOCAN v Bell*.³⁴ In this decision, SOCAN submitted to the SCC that “only uses that contribute to the creative process are in the public interest”.³⁵ Justice Abella, who wrote the reasons for judgment for the Court in *SOCAN v Bell*, rejected this argument, stating that “the dissemination of works is also one of the *Act’s* purposes, which means that dissemination too, with or without creativity, is in the public interest”.³⁶ Given that the purpose of copyright involves balancing the rights of copyright owners with the public interest, under this view of the public interest, although copyright owners must not be “undercompensate[d]”, the scope of their “just reward[s]” can be determined in such a manner as to facilitate the dissemination, as well as the creation, of expression.³⁷

In *Cinar Corp v Robinson*,³⁸ the SCC further refined the purpose of copyright in Canada. Specifically, McLachlin CJC clarified, for the first time in a Canadian copyright decision, the relationship between copyright’s two objectives: rewarding authors and incentivizing the creation of new expression. Writing for the Court, McLachlin CJC stated that copyright “seeks to ensure that an author will reap the benefits of his efforts, *in order to* incentivize the creation of new works”.³⁹ The exclusive, limited economic rights provided by copyright are thus presented by the SCC as mechanisms that encourage the production and dissemination of works of the arts and intellect.

As demonstrated above, through the course of its post-2002 copyright jurisprudence, the SCC has rearticulated the purpose of copyright. Rejecting the former approach to copyright, under which the sole

32. *Ibid* at para 40.

33. *Ibid*.

34. *Supra* note 10.

35. *Ibid* at para 20.

36. *Ibid* at para 21.

37. *Théberge*, *supra* note 12 at paras 30–31.

38. 2013 SCC 73, [2013] 3 SCR 1168.

39. *Ibid* at para 23 [emphasis added].

objective of copyright is to protect and reward copyright owners, the SCC has instead articulated a conception of copyright as a mechanism through which to encourage the creation and dissemination of expression.⁴⁰

However, although the promise of limited economic rights can incentivize the creation and dissemination of expression, the exercise of those same rights can limit both the creation of new expression and the dissemination of existing expression. Given the potential impact of the enforcement of copyright on expression, in order for copyright to fulfill its purpose, care must be taken to ensure that the rewards provided by copyright for the creation of expression do not “overcompensate” copyright owners by unnecessarily impeding the further creation or dissemination of expression.⁴¹

A. Statutory Interpretation and the Purpose of Copyright

The SCC’s rearticulation of the purpose of copyright is a critically important piece of its post-2002 copyright jurisprudence. This is due to the important role played by the purpose of legislation in the context of the prevailing approach to statutory interpretation in Canada, namely the “modern approach of purposive interpretation” (the modern approach). Under the modern approach (drawn from Professor Elmer Driedger’s text *Construction of Statutes*): “[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously

40. Several commentators have described the purpose of copyright in Canada in a similar manner. See e.g. Daniel J Gervais, “The Purpose of Copyright Law in Canada” (2005) 2:2 U Ottawa L & Technology J 315 (describing the “economic purpose of copyright law [as] instrumentalist in nature, namely, to ensure the orderly production and distribution of, and access to, works of art and intellect” at 317) [Gervais, “Copyright Law”]. See also Craig, “Dissolving Conflict”, *supra* note 5 (in which Craig argues that in Canada, “copyright can be regarded as a policy tool whose purpose is to advance our common interest in the vibrant social exchange of meaning; rights for authors provide an incentive (economic, but perhaps also personal) for useful and necessary creation” at 109–10). Cf Abraham Drassinower, *What’s Wrong With Copying?* (Cambridge, Mass: Harvard University Press, 2015) (in which Drassinower provides a “rights-based account of copyright law” focused on works of authorship as communicative acts at 2–8).

41. *Théberge*, *supra* note 12 at para 31. See also Gervais, “Copyright Law”, *supra* note 40 (“[c]opyright is not there to ‘protect’ authors (or other owners of copyright), but rather to maximize the creation, production and dissemination of knowledge and access thereto. In other words, protection is not an end but a means to achieving that purpose, which implies that the level of protection must be properly calibrated” at 324).

within the scheme of the Act, the object of the Act, and the intention of Parliament”.⁴² Stéphane Beaulac and Pierre-André Côté write that “Driedger’s words [have been described by Canadian courts as] a ‘definitive formulation’ which ‘best captures or encapsulates’ the approach, even the ‘starting point’ for statutory interpretation in Canada”.⁴³

In *CCH SCC*, McLachlin CJC clarified that Courts should apply the modern approach when tasked with “interpreting the scope of the *Copyright Act*’s rights and remedies”.⁴⁴ Including McLachlin CJC’s reasons for judgment in *CCH SCC*,⁴⁵ Driedger’s modern approach to statutory interpretation has been cited in seven of the fifteen copyright decisions handed down by the SCC between 2002 and 2015.⁴⁶

II. Interpreting the *Copyright Act* in Light of the Purpose Outlined Above: The User Right of Fair Dealing

Both the SCC’s decisions to refer to defences and exceptions to copyright infringement as user rights and its application of the concept of user rights in the context of fair dealing exemplify the way in which the SCC has used statutory interpretation to prevent overcompensation of copyright owners at the expense of the public interest, in a manner consistent with the purpose of copyright as rearticulated by the SCC in

42. Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

43. Stéphane Beaulac & Pierre-André Côté, “Driedger’s ‘Modern Principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimization” (2006) 40:1 RJT 131 at 139.

44. *Supra* note 9 at para 9.

45. *Ibid.*

46. See also *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37 at paras 2, 74, [2007] 3 SCR 20; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at para 71, [2012] 2 SCR 231; *Re:Sound v Motion Picture Theatre Association of Canada*, 2012 SCC 38 at para 32, [2012] 2 SCR 376; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at paras 11–12, [2012] 3 SCR 489; *Canadian Broadcasting Corp v SONDRAC 2003 Inc*, 2015 SCC 57 at para 48, 392 DLR (4th) 1 [SONDRAC]. For an indirect reference, see *Théberge*, *supra* note 12 at para 113, Gonthier J, dissenting (in this paragraph, Gonthier J both referenced the substance of Driedger’s test as well as a paragraph of the SCC judgement in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193 in which Driedger’s modern approach is directly cited).

its post-2002 copyright jurisprudence. As I will describe, one consequence of the SCC's use of purposive interpretation in these contexts is the preservation of a significant degree of space within which non-copyright owning parties may express themselves using copyrighted works.

A. Guarding Against Overcompensating Copyright Owners Through the Characterization of Defences and Limitations to Copyright Infringement as User Rights

The first reference to the phrase “user rights” in Canadian copyright jurisprudence is found in Linden JA's reasons for judgment in the 2002 FCA decision in *CCH FCA*.⁴⁷ Justice Linden used this term when discussing Gibson J's determination in *CCH Canadian Ltd v Law Society of Upper Canada* that exceptions to copyright infringement should be “strictly construed”.⁴⁸ Justice Linden responded to this statement by indicating

[t]here is no basis in law or in policy for such an approach. An overly restrictive interpretation of the exemptions contained in the Act would be inconsistent with the mandate of copyright law to harmonize owners' rights with legitimate public interests. Instead, courts should employ the usual modern rules of purposive construction in the context. As Professor Vaver has pointed out, “User rights are not just loopholes. Both owner rights and user rights should therefore be given [a] fair and balanced reading.”⁴⁹

The characterization of defences as user rights is thus presented by Linden JA as being linked to the rearticulation, by Binnie J in *Théberge*, of the purpose of copyright. If the purpose of copyright is both to ensure that copyright owners are justly or fairly rewarded, and to encourage the public interest in the creation and dissemination of expression—and if these purposes can at times exist in tension with one another—then, in order to give effect to the purpose of copyright and to guard against overcompensating copyright owners, defences to copyright infringement

47. *Supra* note 9. See also Katz, *supra* note 8 (describing how “even before the Supreme Court of Canada declared in *CCH* that fair dealing is a ‘users’ right’, courts and commentators often referred to the ability to use another’s work without permission as a users’ right, and employed the term ‘the right of fair user’” at 102).

48. *CCH FCA*, *supra* note 9 at para 126, citing *CCH Canadian Ltd v Law Society of Upper Canada* (1999), [2000] 2 FCR 451 at para 175, 169 FTR 1.

49. *CCH FCA*, *supra* note 9 at para 126 [citations omitted].

must not be given an “overly restrictive interpretation”.⁵⁰ The parallel structure of the terms “users’ rights” and “owners’ rights” reflects the balancing process that—post-*Théberge*—must be applied by courts in evaluating copyright infringement claims.

CCH SCC was the first SCC decision in which the term “user right” was used in reference to defences and exceptions to copyright infringement.⁵¹ In her judgment for the Court, McLachlin CJC’s description of user rights evokes Binnie J’s rearticulation of copyright as a system of laws that attempts to balance between copyright owners’ rights and the public interest. Chief Justice McLachlin described “fair dealing . . . like other exceptions in the *Copyright Act*, [as] . . . a user’s right”, and she wrote that “[i]n order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.”⁵² In *SOCAN v Bell*, Abella J, writing for the Court, also linked user rights to the purpose of copyright as articulated in *Théberge*, indicating that they “are an essential part of furthering the public interest objectives of the *Copyright Act*”.⁵³

One common element of both Linden JA’s reasons for judgment in *CCH FCA* and McLachlin CJC’s reasons for judgment in *CCH SCC* is that both judgments cite David Vaver’s work in the area of user rights.⁵⁴ Vaver has engaged with the topic of user rights both in his intellectual property textbook and in his copyright law text. In *Copyright Law*, Vaver devotes an entire chapter to the topic of user rights (a chapter that might otherwise have been referred to as defences against copyright infringement, or exceptions and limitations to copyright infringement).⁵⁵ Vaver uses the term “user rights” in place of these other terms, stating that “[a]ny use that falls under a statutory exception does not infringe copyright, and so may fairly be called a ‘user right’”.⁵⁶

50. *Ibid.*

51. *Supra* note 9. Tawfik, “Fair Dealing”, *supra* note 8 (describing *CCH* as “a watershed moment in Canadian copyright law” at 195).

52. *CCH SCC*, *supra* note 9 at para 48.

53. *Supra* note 10 at para 11.

54. *CCH FCA*, *supra* note 9 at para 59, citing David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 169–71 [Vaver, *Copyright Law*]; *CCH SCC*, *supra* note 9 at para 48, citing Vaver, *supra* at 171.

55. Vaver, *Copyright Law*, *supra* note 54 at 169.

56. *Ibid* at 170.

In a manner similar to American scholars L. Ray Patterson and Stanley Lindberg's use of the term user rights, Vaver's use of this term is connected to his rejection of an approach to copyright through which owners' rights are interpreted broadly and exceptions to copyright infringement are interpreted narrowly.⁵⁷ Exemplified in *Michelin*,⁵⁸ Vaver describes this approach as

bad law and bad policy. It runs counter to decisions such as the Supreme Court's reversal of a trial judgment that equated a user benefit with the "taking" of copyright property. Moreover, the policy of copyright law has always been to balance competing owner and user interests according to both contemporary exigencies and transcendental imperatives such as free speech and free trade.⁵⁹

Vaver's use of the term user rights can thus be seen as a conscious push back against the *Michelin* approach, which was, at the time he published the book noted above, the dominant approach in Canadian copyright law. Instead, Vaver advocates for an approach to copyright in which owner rights are limited and are balanced with public interest considerations such as freedom of expression.⁶⁰ Such an approach, as described in the previous section, was adopted by Binnie J in *Théberge*.⁶¹

57. David Vaver, "Copyright Defences as User Rights" (2013) 60:4 J Copyright Society USA 661 (where Vaver also explicitly references the Patterson and Lindberg text, noting that this work "conceptualize[s] American copyright law and its interrelation with First Amendment principles as a balance between authors, publishers, and users" at 667) [Vaver, "Copyright Defences"]. Vaver in fact suggests further reading L Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens, Ga: University of Georgia Press, 1991), in Vaver, *Copyright Law*, *supra* note 54 at 227.

58. *Supra* note 5.

59. Vaver, *Copyright Law*, *supra* note 54 at 171 [footnotes omitted].

60. Teresa Scassa writes that in "characteriz[ing] statutory exceptions to infringement as 'users' rights', [the SCC] plac[es] them on a par with the rights of copyright owners, in terms of achieving the purposes of the legislation". Teresa Scassa, "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Geist, *Copyright Pentalogy*, *supra* note 8, 431 at 435 [footnotes omitted].

61. A comparison between Professor Vaver's articulation of the policy of copyright and Binnie J's articulation of the purpose of copyright in *Théberge* is informative. Both articulations focus on a "balance" between owner interests and other interests (Professor Vaver focuses on "user" interests while Binnie J focused on the "public interest";

B. Guarding Against Overcompensating Copyright Owners Through the SCC's Articulation of Fair Dealing

(i) The Scope of Fair Dealing is Informed by the Purpose of Copyright

Fair dealing is the broadest defence to copyright infringement in Canada. Set out in sections 29–29.2 of the *Copyright Act*, under fair dealing persons may use a substantial part of copyrighted works for the purposes of research, private study, education, parody, satire, criticism, review or news reporting, provided the dealing is fair and, in the cases of criticism, review and news reporting, certain attribution requirements are satisfied.⁶² As articulated in *CCH SCC*, the fair dealing analysis proceeds in two steps. First, defendants must establish that their dealing is for one of the purposes set out in the *Copyright Act*.⁶³ Second, the defendant must establish that their dealing is fair.⁶⁴ As noted by Abella J in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, “[t]he onus is on the person invoking ‘fair dealing’ to satisfy all aspects of the test”.⁶⁵ Any act that is considered fair dealing is non-infringing.

During the period in which the author-centric approach was the governing approach to copyright in Canada, defences to copyright infringement such as fair dealing were interpreted in a narrow, restrictive manner.⁶⁶ In its post-2002 copyright jurisprudence, however, the SCC has rejected this interpretation of the scope of fair dealing. As noted above, both Linden JA in *CCH FCA* and McLachlin CJC in the SCC’s decision in *CCH SCC* characterized fair dealing as a user’s right which is not to be interpreted restrictively.⁶⁷

Professor Vaver focuses on “owner” interests while Binnie J focused on “the creator”); and both articulations accept that these two interests can be in competition. One difference is that while Professor Vaver cites “free speech” as an element of the balancing process, Binnie J balances a just reward to the creator with “the public interest in the encouragement and dissemination of works of the arts and intellect”. *Théberge*, *supra* note 12 at para 30.

62. *Copyright Act*, *supra* note 4, ss 29–29.2.

63. *CCH SCC*, *supra* note 9 at para 50.

64. *Ibid.*

65. 2012 SCC 37 at para 12, [2012] 2 SCR 345 [*Alberta (Education)*].

66. See e.g. *Michelin*, *supra* note 5 at paras 63, 65.

67. *CCH FCA*, *supra* note 9 at para 126; *CCH SCC*, *supra* note 9 at para 48.

As well, in *CCH SCC*, McLachlin CJC stated that fair dealing is “an integral part of the scheme of copyright”.⁶⁸

In *CCH SCC*, McLachlin CJC clarified that “the purpose of the fair dealing exception . . . is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works”.⁶⁹ In *SOCAN v Bell*, Abella J built on this characterization of fair dealing by describing it as “[o]ne of the tools employed to achieve the proper balance between protection and access in the *Act*”.⁷⁰ Fair dealing is thus portrayed both by McLachlin CJC in *CCH SCC* and, eight years later, by Abella J in *SOCAN v Bell* as a mechanism mediating between the reward granted to copyright owners and the public interest in the encouragement and dissemination of expression—as a tool that limits the rights of copyright owners and, in so doing, facilitates access to works of expression. The application of fair dealing by the SCC ensures—in a manner consistent with the purpose of copyright as rearticulated by the SCC—that the incentive provided by copyright for the creation of expression does not “overcompensate” copyright owners by unnecessarily impeding the further creation, or the dissemination, of expression.

(ii) Fair Dealing has Been Interpreted in a Manner that Guards Against Overprotecting Copyright Owners

Through the course of its post-2002 copyright jurisprudence, the SCC’s interpretations of the fair dealing provisions of the *Copyright Act*—informed by the purpose of copyright as outlined above—have confirmed that the space within which non-copyright owning parties may exercise their expression interests is more expansive than many had previously believed. In this section, I will discuss several ways through which the SCC has interpreted the fair dealing provisions in such a manner, namely

68. *Ibid* at paras 48–49. In describing fair dealing as an integral part of copyright, McLachlin CJC’s reasons for judgment echo comments made by Leval J. Describing the American analogous defence of fair use, Leval J writes that: “[f]air use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law”. Pierre N Leval, “Toward a Fair Use Standard” (1990) 103:5 Harv L Rev 1105 at 1107.

69. *Supra* note 9 at para 63.

70. *Supra* note 10 at para 11.

by interpreting fair dealing categories broadly and by its articulation of the fairness analysis.⁷¹

a. Fair Dealing Categories Interpreted Broadly

In *CCH SCC*, McLachlin CJC indicated that “in order to ensure that users’ rights are not unduly constrained”, the categories of fair dealing (such as research, the category in question in *CCH SCC*) “must be given a *large and liberal* interpretation”.⁷² McLachlin CJC’s judgment in *CCH SCC* was the first Canadian copyright decision to use the phrase “large and liberal”.⁷³ Neither the phrase “large and liberal” nor the use of the word “integral” in reference to the importance of fair dealing to the *Copyright Act* as a whole were used by Linden JA in his reasons for judgment in *CCH FCA*.⁷⁴

Justice Abella confirmed that, as a result of the “large and liberal” interpretation to be given to categories of fair dealing post-*CCH SCC*, the first step of the fair dealing analysis has a “relatively low threshold”.⁷⁵ This conceptualization of fair dealing evokes the governing approach to the *Charter* right to freedom of expression adopted by the SCC—where the section 2(b) analysis can be seen as having a “relatively low threshold” and with the “analytical heavy-hitting” being done in the context of the section 1 analysis.⁷⁶

According to Abella J, the fairness analysis is where “the analytical heavy-hitting is done in determining whether the dealing is fair”.⁷⁷ The low threshold for fair dealing categories means that many uses of works will

71. Other ways through which the SCC has interpreted fair dealing provisions in such a manner as to limit the scope of protection granted to copyright owners, resulting in expansions in the space available for non-copyright owning parties, are by determining that parties may rely on their general practices to establish fair dealing and by determining that dealings should be analyzed from the perspective of the ultimate user.

72. *Supra* note 9 at para 51 [emphasis added].

73. *Ibid.*

74. *Supra* note 9.

75. *SOCAN v Bell*, *supra* note 10 at para 27.

76. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 986–1000, 58 DLR (4th) 577.

77. *SOCAN v Bell*, *supra* note 10 at para 27.

pass the first stage of the fair dealing analysis.⁷⁸ Geist argues that following the copyright pentalogy, “[t]he core of fair dealing is fairness—fairness to the copyright owner in setting limits on the use of their work without permission and fairness to users to ensure that fair dealing rights can be exercised without unnecessarily restrictive limitations”.⁷⁹ Maintaining a low threshold for fair dealing categories avoids overprotecting copyright owners at the expense of the public interest, in that it reduces the potential for uses that would otherwise be found to be fair to fail the fair dealing analysis on the basis of the first step.

The SCC has interpreted two fair dealing categories in its post-2002 copyright jurisprudence: research and private study. The SCC has commented on the scope of the “research” category in three decisions: *CCH SCC*, *SOCAN v Bell* and *Alberta (Education)*.⁸⁰ One question raised in *CCH SCC* was whether the fair dealing category of research should be restricted to non-commercial contexts.⁸¹ In some jurisdictions, the commercial nature of a dealing results in its exclusion from fair dealing protection.⁸² As Barton Beebe writes: “many . . . have been highly critical, even dismissive, of the commerciality inquiry, primarily on the ground that nearly all expression in our culture is produced for profit or is

78. The 2012 amendments to the *Copyright Act*, in which three additional fair dealing categories were added to section 29, further expand the range of works that will pass the first stage of the fairness analysis. Michael Geist argues that “the breadth of the fair dealing analyses are likely to involve only a perfunctory assessment of the first-stage purposes test together with a far more rigorous analysis . . . in the second-stage, six-factor assessment”. Michael Geist, “Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use” in Geist, *Copyright Pentalogy*, *supra* note 8, 157 at 159 [Geist, “Fairness Found”]. Elsewhere, Katz also challenges the view that Parliament’s codification of fair dealing was intended to restrict its application to the enumerated purposes set out in the *Copyright Act*, and writes that “the [SCC’s] rulings and Parliament’s action [in recognizing additional purposes] have . . . provided a necessary correction that allows fair dealing to resume the role it was always supposed to play”. Katz, *supra* note 8 at 140.

79. Geist, “Fairness Found”, *supra* note 78 at 181.

80. *CCH SCC*, *supra* note 9; *SOCAN v Bell*, *supra* note 10; *Alberta (Education)*, *supra* note 65.

81. *Supra* note 9 at para 51.

82. See e.g. *Copyright, Designs and Patents Act 1988* (UK), c 48 (which provides that “[f]air dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement”, s 29(1)).

otherwise income-producing in some sense”.⁸³ Excluding commercial uses of works from fair dealing would thus be inconsistent with the purpose of fair dealing, as articulated by the SCC, namely “to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works”.⁸⁴ It would also overcompensate copyright owners in a manner inconsistent with the purpose of copyright as rearticulated by the SCC by excluding uses from fair dealing consideration that might otherwise be considered fair.

In *CCH SCC*, McLachlin CJC rejected the argument that the fair dealing category of research should be restricted to non-commercial contexts.⁸⁵ In concluding that “lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*”,⁸⁶ and, more generally, that commercial uses of works are not excluded from fair dealing protection, the SCC has interpreted the scope of fair dealing in such a manner as to preserve a significant degree of space within which non-copyright owning parties may exercise their expression interests.

The SCC, in *CCH SCC*, also considered and rejected the argument that the fair dealing category of research should be limited to private contexts. Like its determination that fair dealing should not be limited to non-commercial contexts, the SCC’s determination that fair dealing should not be limited to private contexts is significant from the perspective of the scope of the expression interests of non-copyright owning parties. Determining that non-private dealings may still be fair dealings clarifies that the scope of uses of works potentially protectable under fair dealing includes those involving multiple researchers or a research community, among other uses.

The SCC further clarified the scope of the category of research in *SOCAN v Bell*. *SOCAN* had argued that the category of research should be limited to creative purposes. Justice Abella rejected this argument, stating that research “can be piecemeal, informal, exploratory, or confirmatory”, and that “[i]t can . . . be undertaken for no purpose except

83. Barton Beebe, “An Empirical Study of US Copyright Fair Use Opinions, 1978–2005” (2008) 156:3 U Pa L Rev 549 at 598. See also *Campbell v Acuff-Rose Music*, 510 US 569 at 583–84 (1994); *Authors Guild, Inc v Google, Inc*, 804 F (3d) 202 at 218–19 (2nd Cir 2015).

84. *CCH SCC*, *supra* note 9 at para 63.

85. *Ibid* at para 51.

86. *Ibid*.

personal interest”.⁸⁷ A narrow interpretation of a fair dealing category was thus again rejected in favour of one that is more expansive.

As noted above, the second fair dealing category interpreted by the SCC in its post-2002 copyright jurisprudence is private study. In a manner similar to its interpretation of the research category, the SCC has interpreted the “private study” category in a large and liberal manner. In *Alberta (Education)*, Abella J, who delivered the reasons for judgment of the majority, wrote that “the word ‘private’ in ‘private study’ should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude.”⁸⁸ By adopting an interpretation of private study that accepts that individuals may engage in private study with others, the SCC has ensured that uses that might otherwise be fair are not excluded from the ambit of fair dealing on the basis of a more restrictive interpretation of the first step of the fair dealing inquiry.

b. Fairness Analysis Interpreted in Ways that Have Ensured that Copyright Owners are not Overcompensated

The SCC has interpreted the fairness analysis in a manner consistent with the purpose of copyright, as rearticulated beginning in its 2002 decision in *Théberge*. In *CCH SCC*, McLachlin CJC affirmed the correct approach to be taken with respect to the fairness analysis.⁸⁹ In her reasons for judgment, McLachlin CJC outlined a list of factors that provide “a useful analytical framework to govern determinations of fairness in future cases”.⁹⁰ These factors had originally been articulated by Linden JA

87. *SOCAN v Bell*, *supra* note 10 at para 22.

88. *Supra* note 65 at para 27.

89. For clarification, I am endorsing neither the SCC’s fairness analysis nor the fair dealing factors set out by the SCC as mechanisms through which to protect expression interests. I am merely demonstrating how the SCC has interpreted the fairness factors in such a manner as to guard against overprotecting copyright owners at the expense of the public interest, one consequence of which has been to preserve a significant amount of space in which non-copyright owning parties may exercise their expression interests. In a future article, I will discuss the fairness factors in depth, arguing that if fair dealing is to be a mechanism that protects freedom of expression in the context of copyright, then these factors should be revisited.

90. *CCH SCC*, *supra* note 9 at para 53.

in *CCH FCA*, who arrived at this list after considering Lord Denning's decision in *Hubbard v Vosper* (as well as other UK decisions citing *Hubbard v Vosper*); the section of the US Copyright Code that sets out the doctrine of fair use; and David Vaver's discussion of fair dealing in *Copyright Law*.⁹¹ These factors are: "(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work".⁹²

Consistent with the purpose of fair dealing as articulated by McLachlin CJC in *CCH SCC* (and with the purpose of copyright more broadly), these factors have been applied in such a manner as "to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works".⁹³

The first factor set out by the SCC in *CCH SCC* is the purpose of the dealing. One way in which the SCC has applied this factor in a manner that guards against overcompensating the copyright owner at the expense of the public interest is by clarifying that commercial dealings can still satisfy the fairness analysis. This clarification ensures that dealings with an element of commerciality that would otherwise be considered "fair" are not deemed unfair due to this element alone—thus ensuring that a broad range of expressive uses remain protectable under fair dealing.

A second way in which the SCC has applied this factor in a manner that is protective of the expression interests of non-copyright owning parties is by noting that commercial dealings "may . . . be fair if there are 'reasonable safeguards' in place to ensure that the works are actually being used for research".⁹⁴ The SCC's determination that the presence of safeguards is a factor to be considered in determining whether the dealing was fair pre-empts the argument that could be made by copyright owners that although the defendant claims that the dealing is being done for a specific purpose, there is no guarantee that the dealing is being engaged in for this purpose. In both *CCH SCC* and *SOCAN v Bell*, the SCC found that safeguards were in place that "prevented the previews from replacing

91. *CCH FCA*, *supra* note 9 at paras 146–50, citing *Hubbard v Vosper* (1971), [1972] 2 QB 84 at 94 (CA), *Copyright Act of 1976*, 17 USC § 107, and Vaver, *Copyright Law*, *supra* note 54.

92. *CCH SCC*, *supra* note 9 at para 53.

93. *Ibid* at para 63.

94. *SOCAN v Bell*, *supra* note 10 at para 36, citing *CCH SCC*, *supra* note 9 at paras 54, 66.

the work while still fulfilling a research function”.⁹⁵ In *CCH SCC*, the safeguards took the form of the Access Policy, which “places appropriate limits on the type of copying that the Law Society will do”.⁹⁶ In *SOCAN v Bell*, the safeguards were said to be that “the previews were streamed, short, and often of lesser quality than the musical work itself”.⁹⁷ The key question asked by the SCC in this context is whether the safeguard limits the dealing to the fair dealing purpose argued for by the defendant.⁹⁸

In applying the “character of the dealing” factor, Abella J, in *SOCAN v Bell*, rejected the argument raised by SOCAN that this factor should tend to unfairness on the basis that “consumers accessed, on average, 10 times the number of previews as full-length musical works”.⁹⁹ Instead, Abella J focused on the fact that “[t]he previews were streamed Users did not get a permanent copy, and once the preview was heard, the file was automatically deleted from the user’s computer . . . [Meaning that] . . . copies could not be duplicated or further disseminated by users.”¹⁰⁰

In a similar manner, in *CCH SCC*, McLachlin CJC noted that the character of the dealing factor supported a finding of fairness in part on the basis that “[t]here is no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession.”¹⁰¹ In focusing on whether and the extent to which the dealing could act as a substitute for the work and on the safeguards in place to prevent this from occurring, rather than on the sheer quantity of content accessed, the SCC has interpreted this factor in a manner consistent with its rearticulated purpose of copyright.

The third fairness factor noted by McLachlin CJC is the amount of the dealing. By assessing the fairness of the dealing based on individual uses or dealings instead of use in the aggregate, the SCC has interpreted the amount of the dealing factor in a manner that preserves space for the expression interests of non-copyright owning parties, again helping to ensure that copyright owners are not overprotected at the expense of the

95. *SOCAN v Bell*, *supra* note 10 at para 35.

96. *Supra* note 9 at para 73.

97. *Supra* note 10 at para 35.

98. See *ibid.*

99. *Ibid* at para 38.

100. *Ibid.*

101. *Supra* note 9 at para 67.

public interest. Both SOCAN in *SOCAN v Bell* and Access Copyright, in *Alberta (Education)*, had argued that the “amount of the dealing in the aggregate” should be considered in evaluating this factor.¹⁰² Adopting the approach advocated for by SOCAN and Access Copyright could result in courts determining that individuals who engaged in minor dealings with a number of works—for instance, users who listen to a number of music previews on Apple’s iTunes service—would be seen as having acted “unfairly”, even if each individual dealing might be characterized as “fair” or as tending to “fairness”.

Justice Abella rejected this approach. As she noted: “[G]iven the ease and magnitude with which digital works are disseminated over the Internet, focusing on the ‘aggregate’ amount of the dealing in cases involving digital works could well lead to disproportionate findings of unfairness when compared with non-digital works”.¹⁰³ The SCC’s decision to assess fairness based on individual uses or dealings as opposed to use in the aggregate has the effect of limiting the extent to which copyright can impede the dissemination of expression in a digital environment.¹⁰⁴ Cameron Hutchison writes that to evaluate this factor based on aggregate as opposed to individual use “would have effectively tilted the balance toward an unfair dealing thus threatening the use of the internet for the benefit of all concerned”.¹⁰⁵

The next factor listed by McLachlin CJC addresses “alternatives to the dealing”. By articulating a test in which it is asked if the use is: “reasonably necessary to achieve the ultimate purpose”;¹⁰⁶ by focusing on “realistic alternatives”;¹⁰⁷ by suggesting that the existence of an alternative dealing would tend to unfairness only if it was “equally effective”;¹⁰⁸ and by rejecting the argument that the availability of a license is relevant to

102. *SOCAN v Bell*, *supra* note 10 at para 41. See also *Alberta (Education)*, *supra* note 65 at para 29.

103. *SOCAN v Bell*, *supra* note 10 at para 43.

104. As well, examining the amount of the dealing in the aggregate as opposed to assessing the amount used by the individual defendant could lead to defendants being held liable in part on the basis of the acts of other users.

105. Cameron J Hutchison, “The 2012 Supreme Court Copyright Decisions & Technological Neutrality” (2013) 46:2 UBC L Rev 589 at 606.

106. *CCH SCC*, *supra* note 9 at para 57.

107. *Alberta (Education)*, *supra* note 65 at para 32.

108. *CCH SCC*, *supra* note 9 at para 57.

the determination of fairness, the SCC has interpreted this factor in ways that guard against overcompensating copyright owners at the expense of the public interest (including the public interest in expression).

The SCC could have interpreted the “alternatives to the dealing” factor in a number of ways. For instance, it could have determined that so long as any alternatives exist to a dealing, there is no need to make use of the work and, as a result, the dealing is unfair. Such a test, which would approximate a strict necessity test in the context of copyright, was rejected by both Linden JA in *CCH FCA* and McLachlin CJC in *CCH SCC*.¹⁰⁹ In its place, Linden JA suggested that one question that could be asked is “whether the dealing was reasonably necessary to achieve the ultimate purpose”.¹¹⁰ Chief Justice McLachlin, in her reasons for judgment, agreed that this is a useful question for courts to consider. She then suggested that one instance where a dealing would not be seen as reasonably necessary would be “if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing”.¹¹¹

This choice of example suggests that “reasonably necessary” will not be a high bar to reach. It suggests, for instance, that it would be reasonably necessary to use a copyrighted work in the context of criticism if the criticism—although effective—would not be equally effective without reproducing the work. This is not to say that the dealing will be fair. This determination can only be made after a consideration of all relevant factors. However, under the approach adopted by the SCC, the dealing would not support a finding of unfairness on the basis that there were alternatives, albeit not equally effective, that could have been used.

In applying this factor in *SOCAN v Bell*, the SCC rejected the arguments made by SOCAN that other methods, such as advertising (including “album artwork, textual descriptions, and user-generated album reviews”) and return policies could adequately assist consumers

109. *CCH FCA*, *supra* note 9 at para 158; *CCH SCC*, *supra* note 9 at para 57. Mark Bartholomew and John Tehranian argue that US courts have “reduce[d] fair use to a test about *necessity*” and in so doing, have “transformed copyright into a more Blackstonian, absolute form of property”. Mark Bartholomew & John Tehranian, “An Intersystemic View of Intellectual Property and Free Speech” (2013) 81:1 *Geo Wash L Rev* 1 at 14 [emphasis in original].

110. *CCH FCA*, *supra* note 9 at para 158.

111. *CCH SCC*, *supra* note 9 at para 57. The words “equally effective” were used neither in *SOCAN v Bell*, *supra* note 10, nor in *Alberta (Education)*, *supra* note 65.

in purchasing musical works.¹¹² With respect to return policies, Abella J described this as “an expensive, technologically complicated, and market-inhibiting alternative for helping consumers identify the right music”.¹¹³ Noting that “none of [these] other suggested alternatives can demonstrate to a consumer . . . what a musical work *sounds* like”, the SCC found “short, low-quality streamed previews” to be reasonably necessary to the dealing.¹¹⁴ None of these suggested alternatives would be equally effective, in the view of the SCC.

In *Alberta (Education)*, in applying this factor, the SCC focused on whether there were “realistic alternative[s]” to the dealing.¹¹⁵ Access Copyright had argued that instead of photocopying the textbooks, the schools could have either bought books for each student or bought books to place in the library. A similar argument was made by CCH in *CCH FCA*.¹¹⁶ Justice Abella, writing for the majority of the Court in *Alberta (Education)*, rejected this approach. She noted both that “the schools have already purchased originals that are kept in the class or library”, and that “buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks”.¹¹⁷

A final way in which the SCC has interpreted this factor in a manner protective of the expression interests of non-copyright owning parties is by rejecting the argument that the availability of a licence should be considered in determining whether there is an alternative to the dealing. This issue was noted, and not explicitly rejected, by Linden JA in *CCH FCA*.¹¹⁸ Chief Justice McLachlin, on the other hand, rejected this argument in strong terms, stating: “The availability of a licence is not relevant to deciding whether a dealing has been fair.”¹¹⁹

112. *SOCAN v Bell*, *supra* note 10 at para 45.

113. *Ibid* at para 46.

114. *Ibid* [emphasis in original].

115. *Supra* note 65 at para 31.

116. *Supra* note 9 at para 156.

117. *Alberta (Education)*, *supra* note 65 at para 32.

118. *Supra* note 9 at para 156. US courts consider the loss of licensing revenue to be a relevant factor in the context of the fair use analysis. See *Bartholomew & Tehranian*, *supra* note 109 at 21.

119. *CCH SCC*, *supra* note 9 at para 70.

She tied her conclusion with respect to this issue to the copyright balance struck in *Théberge*:

If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests.¹²⁰

Chief Justice McLachlin thus linked her rejection of this argument to the need to ensure—consistent with the purpose of copyright, as articulated by the SCC—that copyright owners are not overprotected at the expense of the public interest. D'Agostino writes that this analysis is consistent with “several stakeholder positions within the educational community that there exists a ‘clear-for-fear’ culture to obtain often unnecessary licences out of excessive caution”.¹²¹

The SCC's interpretation of the factor that considers the “nature of the work” has also been interpreted in a manner protective of the public's interest in expression. In *CCH SCC*, McLachlin CJC wrote that “if a work has not been published [and was not confidential], the dealing may be more fair in that its reproduction with acknowledgment could lead to a wider public dissemination of the work—one of the goals of copyright law”.¹²² In *SOCAN v Bell*, this factor is described in a slightly different manner, as “examin[ing] whether the work is one which *should* be widely disseminated”.¹²³ This reframing, which focuses on the value that the public would gain from the dissemination of the work, is consistent with the way in which this factor was applied in *CCH SCC*, in which McLachlin CJC, citing to Linden JA's FCA judgment, noted that “[i]t is generally in the public interest that access to judicial

120. *Ibid.*

121. D'Agostino, *supra* note 8 at 322, citing Margaret A Wilkinson, “Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries” in Geist, *Public Interest*, *supra* note 8, 331. See also Jennifer M Urban & Laura Quilter, “Efficient Process or Chilling Effects?: Takedown Notices Under Section 512 of the Digital Millennium Copyright Act” (2006) 22:4 Santa Clara Comp & High Tech LJ 621 (among others).

122. *Supra* note 9 at para 58.

123. *Supra* note 10 at para 47 [emphasis added].

decisions and other legal resources not be unjustifiably restrained.”¹²⁴ In *CCH FCA*, Linden JA continued from this statement by noting that

[t]he fact that access to legal publications is in the public interest does not imply that copying such publications is always fair dealing. On the contrary, these legal works must be protected to ensure that their authors are not deprived of financial incentives to continue producing original works.¹²⁵

It is significant that in her judgment for the Court in *CCH SCC*, McLachlin CJC cited the first part of the quote from Linden JA’s judgment noted above, and not the second. Instead, McLachlin CJC indicated that “the Access Policy puts reasonable limits on the Great Library’s photocopy service”, and that “[t]his further supports a finding that the dealings were fair”.¹²⁶

Justice Abella, in applying this factor in *SOCAN v Bell*, drew a distinction between a work being widely available versus widely disseminated. She wrote: “[T]he fact that a musical work is widely available does not necessarily correlate to whether it is widely disseminated. Unless a potential consumer can locate and identify a work he or she wants to buy, the work will not be disseminated.”¹²⁷ Justice Abella’s articulation of this factor suggests that it is possible that this factor could offset other factors that support a finding of unfairness—for instance the effect of the dealing on the work—on the basis of the value of the work’s dissemination, that the dissemination of a work that is widely available but not widely disseminated could be fair.

The SCC has also adopted an approach to the final fair dealing factor—the “effect of the dealing on the work”—that guards against overcompensating the copyright owner at the expense of the public interest. The SCC has done so in three main ways: first, by adopting an approach to this factor that focuses on economic as opposed to non-economic factors; second, by adopting a more narrow scope of economic factors than has been the case in other jurisdictions; and third, by requiring the party arguing that the dealing is not fair due in part to the effect of the

124. *Supra* note 9 at para 71.

125. *Supra* note 9 at para 159.

126. *CCH SCC*, *supra* note 9 at para 71.

127. *SOCAN v Bell*, *supra* note 10 at para 47.

dealing on the work to demonstrate both negative economic impacts and a link between the dealing in question and the negative economic impacts.

One way a court could interpret this factor is by focusing on the broad effects of the dealing on the work. Such an interpretation could encompass both economic and non-economic consequences. One example of how this might be applied is found in *ATV Music Publishing of Canada Ltd v Rogers Radio Broadcasting Ltd*, a case involving a parodic version of the song “Revolution”, authored by John Lennon and Paul McCartney.¹²⁸ Justice Van Camp granted ATV Music’s application for an interlocutory injunction. In the course of her decision granting the injunction, she noted that “[i]t would be difficult ever again to listen to the original song without the words of the new song intruding.”¹²⁹ This approach, were it adopted, could result in far fewer findings of fair dealing in cases where the original work has been transformed, modified or combined with other existing or new content. For instance, applying this reasoning broadly could result in this factor supporting findings of unfairness in situations where dealings cause parties to look at works in different ways, or in situations where dealings result in impacts to the work’s integrity or to its message.

A similar argument was addressed in the American decision *Campbell v Acuff-Rose Music*.¹³⁰ This case dealt with a parodic version of the Roy Orbison song “Pretty Woman” created by 2 Live Crew. As noted by Souter J, who delivered the opinion of the US Supreme Court: “2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility”.¹³¹ In discussing whether market harms caused by parodies should impact the fair use analysis, Souter J, citing to *Fisher v Dees*, wrote that “the role of the courts is to distinguish between ‘[b]iting criticism [that merely] suppresses demand [and] copyright infringement [that] usurps it’”.¹³²

128. (1982), 35 OR (2d) 417, 134 DLR (3d) 487 (H Ct J).

129. *Ibid* at 422.

130. *Supra* note 83.

131. *Ibid* at 583.

132. *Ibid* at 592, citing to *Fisher v Dees*, 794 F (2d) 432 at 438 (9th Cir 1986).

The US Supreme Court considered only the latter as relevant in the context of the effect of the dealing factor in fair use.¹³³

Like the US Supreme Court in *Campbell v Acuff-Rose Music*, the SCC has also interpreted this factor as focusing on whether the dealing usurps demand for the work—or said differently, whether it acts as a substitute for the work. In *SOCAN v Bell*, for instance, Abella J, in applying this factor, wrote that “[b]ecause of their short duration and degraded quality, it can hardly be said that previews are in competition with downloads of the work itself”.¹³⁴ As well, Abella J noted that “since the effect of previews is to *increase* the sale and therefore the dissemination of copyrighted musical works thereby generating remuneration to their creators, it cannot be said that they have a negative impact on the work”.¹³⁵ To echo Binnie J’s judgment in *Théberge*, interpreting this factor (and the fairness analysis more broadly) in such a manner as to find that the previews in question in *SOCAN v Bell* are unfair would be to unduly burden the public’s interest in expression and thus to overcompensate copyright owners at the expense of the public interest.

The SCC, in applying this factor, has required—both in *CCH* SCC and in several decisions post-*CCH* SCC—the party arguing that the dealing was not fair to bring evidence demonstrating both negative economic impacts, and a link between the dealing in question and any negative economic impacts. For instance, in *Alberta (Education)*, Abella J (writing for the majority) noted:

In *CCH*, the Court concluded that since no evidence had been tendered by the publishers of legal works to show that the market for the works had decreased *as a result* of the copies made by the Great Library, the detrimental impact had not been demonstrated. Similarly, other than the bald fact of a decline in sales over 20 years, there is no evidence from Access Copyright demonstrating any link between photocopying short excerpts and the decline in textbook sales.¹³⁶

133. More generally, however, Bartholomew and Tehranian argue that US courts have both defined market harm broadly (including “encompass[ing] theoretical markets that a copyright holder is unlikely to enter”) and given it a prominent role to play in the fair use analysis, making it less likely that a defendant will be able to make out a fair use defence and resulting in “less deference being given to free speech interests than other intellectual property regimes”. Bartholomew & Tehranian, *supra* note 109 at 24.

134. *Supra* note 10 at para 48.

135. *Ibid* [emphasis in original].

136. *Supra* note 65 at para 35 [emphasis in original].

In making this point, Abella J also noted that “there were several other factors that were likely to have contributed to the decline in sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning”.¹³⁷

D’Agostino frames the SCC’s interpretation of this factor in *CCH SCC* as an onus shift.¹³⁸ Another way to describe the SCC’s interpretation of this factor is as a shift of the strategic burden.¹³⁹ Chief Justice McLachlin in *CCH SCC* acknowledged that

[a]lthough the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers’ markets. If there had been evidence that the publishers’ markets had been negatively affected by the Law Society’s custom photocopying service, it would have been in the publishers’ interest to tender it at trial. They did not do so.¹⁴⁰

In situations in which the plaintiffs may be best positioned to offer information relating to the economic impact of the dealing on the work, requiring the defendant to bring evidence that the dealing has had no economic impact would impose a significant burden on them.¹⁴¹ Such a requirement would narrow the ambit of the defence significantly.

Even if the plaintiff is able to establish negative economic impacts—such as a drop in sales, for instance—the SCC’s fairness jurisprudence suggests that unless this evidence can be linked to or attributed to the dealing itself, this factor will not support a finding of unfairness. The SCC’s interpretation of this factor is thus consistent with the purpose of copyright, as articulated by the SCC, under which rewards are granted to copyright owners in order to incentivize the creation of expression, and

137. *Ibid* at para 33.

138. D’Agostino, *supra* note 8 at 325.

139. As described by La Forest J in his dissenting reasons in *R v Noble*, [1997] 1 SCR 874, 146 DLR (4th) 385 [cited to SCR]. “If a case against the accused has been adduced that is capable of supporting an inference of guilt, it may be a wise strategy for the accused to testify in order to refute the case to meet; this does not involve a shift in the legal burden of proof to the accused, but rather involves a shift of a strategic burden.” *Ibid* at para 92.

140. *Supra* note 9 at para 72.

141. D’Agostino writes that “publishers are often the more sophisticated parties in a better position to access such records”. D’Agostino, *supra* note 8 at 324.

under which uses of copyrighted expression that do not impact upon this purpose should not be enjoined.

III. Accounting for the Absence of Explicit Discussion of Freedom of Expression in the Context of the SCC's Copyright Jurisprudence

In the previous Part, I described the way in which the SCC has interpreted the fair dealing provisions of the *Copyright Act* in such a manner as to preserve significant space for the expression interests of non-copyright owners. In this section, I will explore the question of why, if the SCC's post-2002 copyright jurisprudence has resulted in expanded protection for the expression interests of non-copyright owning parties, the SCC has not yet explicitly engaged with the relationship between the *Charter* right to freedom of expression and copyright.

A. Guarding Against the Overcompensation of Copyright Owners

First, the absence of explicit discussion of the *Charter* right to freedom of expression in the context of the SCC's copyright jurisprudence can be explained in part on the basis that a primary focus of the SCC's post-2002 copyright jurisprudence has been to ensure that the rewards granted to copyright owners in order to incentivize the creation of expression do not overcompensate copyright owners at the expense of the public interest (an important aspect of which is the public interest in accessing, disseminating and using expression).

Consistent with this focus, user rights (generally) and fair dealing (specifically) have been portrayed as mechanisms limiting the exclusive rights of copyright owners, as opposed to stand-alone defences through which freedom of expression is protected and promoted. As interpreted by the SCC, fair dealing is a mechanism that guards against overcompensating copyright owners in that it helps ensure that copyright users are not "unduly restricted" in their ability to use copyrighted works.¹⁴² Fair dealing, according to the SCC, is a tool that mediates between "protection and access".¹⁴³

142. *CCH SCC*, *supra* note 9 at para 63.

143. *SOCAN v Bell*, *supra* note 10 at para 11.

Interpreted in this way, fair dealing reflects and is embedded within an instrumentalist approach to copyright. In that sense, it is perhaps not surprising that although one result of the SCC's interpretation of the fair dealing provisions of the *Copyright Act*, as detailed above, has been to preserve a significant degree of space within which non-copyright owning parties may express themselves using copyrighted works, the SCC has not explicitly linked fair dealing to freedom of expression—a right that transcends instrumentalist approaches to copyright and that embodies a broader range of values (including self-fulfillment, democratic discourse and truth-finding).¹⁴⁴

B. Charter Values May Only be Used to Interpret Statutory Provisions in Limited Circumstances

Second, the absence of explicit SCC discussion of freedom of expression in the context of the SCC's post-2002 copyright jurisprudence can be explained, in part, by the SCC's conclusion in *Bell ExpressVu Limited Partnership v R* that courts should only use *Charter* values as tools through which to interpret statutory provisions in limited circumstances.¹⁴⁵ While it is a legitimate exercise of judicial authority for Canadian courts to shape or reshape the common law according to *Charter* values,¹⁴⁶ Canadian courts are more limited in their ability to interpret statutory provisions—like those of the *Copyright Act*—in light of *Charter* values.

As Iacobucci J stated in *Bell ExpressVu*:

[W]hen a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that “it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not”, it must be stressed that, to the extent this Court has recognized a “*Charter* values” interpretive principle, such

144. See e.g. *Montréal (City)*, *supra* note 2 at para 74.

145. *Bell ExpressVu*, *supra* note 11 at paras 28–30.

146. See *ibid* at para 61.

principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.¹⁴⁷

The SCC has further stated that to interpret all statutory provisions in light of *Charter* values would

wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status.¹⁴⁸

In at least one judgment, the SCC had the opportunity to reference *Charter* values in the context of its decision. In *CCH FCA*, which was heard by the FCA prior to *Bell ExpressVu* being heard by the SCC and was handed down approximately three weeks after *Bell ExpressVu* was handed down, Linden JA noted that

the Law Society's factum strongly encouraged this Court to take account of Constitutional and Charter values, such as the rule of law, equality, and access to justice, to defend its photocopying service Moreover, broadly speaking, I have implicitly considered the values advocated by the Law Society in balancing of the Publishers' rights with the public interest. To me, the Publishers' rights must also be fairly recognized in order to guarantee incentives to continue to provide original legal publications.¹⁴⁹

In her reasons for judgment in *CCH FCA*, McLachlin CJC, although she cited *Bell ExpressVu*, did not make any reference to *Charter* values (or to "values" at all). Rather, McLachlin CJC cited *Bell ExpressVu* for the proposition that "[i]n interpreting the scope of the *Copyright Act*'s rights and remedies, courts should apply the modern approach to statutory

147. *Ibid* at para 62 [citation omitted, emphasis in original]. This approach to statutory interpretation can be contrasted with that adopted by L'Heureux-Dubé J in her dissenting reasons in *Symes v Canada*, [1993] 4 SCR 695, 110 DLR (4th) 470 [cited to SCR] (in which she noted that "the respect of *Charter* values must be at the forefront of statutory interpretation" at 794).

148. *Bell ExpressVu*, *supra* note 11 at para 66.

149. *Supra* note 9 at paras 170–71 [citation omitted]. *CCH FCA* was heard on October 23–25, 2001, and the decision was handed down May 14, 2002. *Bell ExpressVu*, on the other hand, was heard on December 4, 2001 with the decision being handed down on April 26, 2002.

interpretation” under which the purpose or objective of copyright assumes a central role.¹⁵⁰

Some commentators and foreign courts have adopted an approach to the intersection of freedom of expression and copyright through which tension between freedom of expression and copyright is resolved not by relying on external constitutional analyses, but by interpreting copyright’s internal mechanisms—including fair dealing or its equivalent—according to freedom of expression values.¹⁵¹ As detailed above, however, this option is not broadly available to Canadian courts due to the conclusion reached in *Bell ExpressVu* that it is only appropriate to interpret statutory provisions in accordance with *Charter* values in limited circumstances.

150. *CCH SCC*, *supra* note 9 at para 9.

151. See e.g. *Ashdown*, *supra* note 6; Patrick Masiyakurima, “The Free Speech Benefits of Fair Dealing Defences” in Paul Torremans, ed, *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Frederick, Alphen aan de Rijn: Kluwer Law, 2008) 235. Some scholars, however, have argued that internal mechanisms alone are not sufficient to address constitutional or human rights concerns. See e.g. Eric Barendt, “Copyright and Free Speech Theory” in Jonathan Griffiths & Uma Suthersanen, eds, *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005) 11. Barendt argues that

[i]t is wrong for the courts to hold that the copyright statute *necessarily* safeguards freedom of speech, so no further consideration of the relationship of expression and copyright is required. That would be an abdication of their responsibility to determine the scope of constitutional rights, in this context the right to freedom of expression, and how far it is necessary to restrict its exercise to protect the right to copyright.

Ibid at 15 [emphasis in original]. See also Laurence R Helfer & Graeme W Austin, *Human Rights and Intellectual Property* (New York: Cambridge University Press, 2011) at 508; Michael Birnhack, “Acknowledging the Conflict Between Copyright Law and Freedom of Expression under the Human Rights Act” [2003] *Ent L Rev* 24; Christophe Geiger & Elena Izumenko, “Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression” (2014) 45:3 *Intl Rev Intellectual Property & Competition L* 316; Rebecca Tushnet, “Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation” (2000) 42:1 *Boston College L Rev* 1.

C. *The Copyright Act Fully or Adequately Protects Freedom of Expression Interests*

A third explanation for the absence of explicit SCC engagement with the *Charter* right to freedom of expression is that, in a manner consistent with lower Canadian courts, the SCC has accepted that once the provisions of the *Copyright Act* are properly and purposively interpreted, the *Copyright Act* adequately protects the *Charter* right to freedom of expression, and that it is therefore not necessary to provide additional protection for freedom of expression interests by explicitly engaging with the *Charter* right to freedom of expression.

Ysolde Gendreau, for instance, suggests that the lack of engagement by Canadian courts (including the SCC) with the *Charter* right to freedom of expression “could . . . be explained by the hypothesis that copyright law already incorporates freedom of expression values through its own mechanisms”.¹⁵² Carys Craig, as well, refers to the “largely unchallenged assumption . . . that the copyright system sufficiently respects freedom-of-expression values by virtue of internal mechanisms” as a “contributing factor” in the “paucity of constitutional scrutiny of the *Copyright Act*”.¹⁵³

Consistent with this argument, it could also be argued that the process of statutory interpretation engaged in by the SCC through the course of its post-2002 copyright jurisprudence, one result of which has been to clarify that the *Copyright Act* grants a significant degree of latitude to non-copyright owning parties to express themselves using copyrighted works, has weakened the argument that courts should give additional consideration to the constitutional validity of provisions of the *Copyright Act*. If statutory interpretation has resulted in adequate protection of freedom of expression interests, then why should further steps be taken to consider the constitutionality of copyright?

152. Ysolde Gendreau, “Copyright and Freedom of Expression in Canada” in Paul Torremans, ed, *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (New York: Kluwer Law International, 2004) 21 at 22.

153. Craig, “Dissolving Conflict”, *supra* note 5 at 78.

IV. Challenging the Absence of Explicit Discussion of Freedom of Expression in the Context of the SCC's Copyright Jurisprudence

Canadian courts, including the SCC, are “guardians of the Constitution and of individuals’ rights under it”.¹⁵⁴ In order to uphold this role, the SCC may be required to explicitly engage with the *Charter* right to freedom of expression in the context of copyright. This is not to say, however, that the SCC must abandon its purposive approach to provisions of the *Copyright Act*. Rather, both approaches can be applied in concert. The SCC can continue to interpret statutory provisions purposively, according to the modern approach, while also taking steps—where appropriate—to explicitly engage with the *Charter* right to freedom of expression in the context of copyright.

Explicitly considering the *Charter* right to freedom of expression could supplement the SCC’s existing purposive interpretations of provisions of the *Copyright Act* in a number of ways. First, the SCC could re-conceptualize fair dealing (or other user rights) not as a limit on copyright owners’ rights, but as a stand-alone defence the purpose of which is to promote or protect freedom of expression. Second, in limited circumstances, the SCC could interpret provisions of the *Copyright Act* in light of *Charter* values.¹⁵⁵ Third, the SCC could explicitly weigh provisions of the *Copyright Act* against the *Charter* right to freedom of expression. While it is beyond the scope of this article to address these proposals in detail, I mention them as possible options through which Canadian courts might begin to explicitly engage with the *Charter* right to freedom of expression in the context of copyright.

154. *Hunter v Southam Inc*, [1984] 2 SCR 145 at 169, 11 DLR (4th) 641.

155. See Fewer, *supra* note 5 (published prior to *Bell ExpressVu* being handed down, Fewer “proposes a . . . purposive approach to copyright defences . . . explicitly balancing the plaintiff’s proprietary interests with the defendant’s *Charter* considerations” at 184).

A. Fair Dealing as a Freedom of Expression Defence

As noted above, one way in which the SCC could explicitly engage with the *Charter* right to freedom of expression in the context of copyright is by exploring the extent to which fair dealing (or user rights more generally) could be reconceptualized as a stand-alone defence—the purpose of which is to promote or protect freedom of expression. Courts in several jurisdictions, including the US and the UK, have referred to fair dealing in such a manner.¹⁵⁶ As well, despite the SCC not having done so, a number of scholars have linked the SCC’s fair dealing jurisprudence to freedom of expression or to human rights more broadly.¹⁵⁷

Furthermore, the SCC’s fair dealing jurisprudence already has a connection to Canadian constitutional law embedded within it. In *CCH SCC*, McLachlin CJC described the interpretation to be given to fair dealing categories as “large and liberal”.¹⁵⁸ Canadian courts have also employed this phrase in discussing how provisions of the *Constitution Act, 1867*,¹⁵⁹ the *Constitution Act, 1982*¹⁶⁰ and the *Charter* ought to be interpreted.¹⁶¹ For instance, in *Edwards v Canada (AG)*, Lord Sankey LC noted that “[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits”, and that it is the duty of courts to give this Act “a large and liberal interpretation”.¹⁶² Given this connection, it is perhaps not out of the question that the SCC might one day reconceptualize fair dealing as a defence, the purpose of which is to promote or protect freedom of expression.

156. See *Eldred v Ashcroft*, 537 US 186 (2003) at 219–20; *Golan v Holder*, *supra* note 6 at 890; *SAS Institute Inc v World Programming Ltd*, [2010] EWHC 1829 (Ch) at para 325.

157. See e.g. Vaver, “Copyright Defences”, *supra* note 57 at 669–72; Marcelo Thompson, “Property Enforcement or Retrogressive Measure?: Copyright Reform in Canada and the Human Right of Access to Knowledge” (2007) 4 U Ottawa L & Technology J 163; Richard Peltz, “Global Warming Trend?: The Creeping Indulgence of Fair Use in International Copyright Law” (2009) 17:2 Tex Intell Prop LJ 267 at 281.

158. *Supra* note 9 at para 51.

159. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

160. *Supra* note 1.

161. See *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698; *Application under s 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 SCR 248; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3; *R v 974649 Ontario Inc*, 2001 SCC 81, [2001] 3 SCR 575.

162. [1929] UKPC 86 at 136.

B. Application of Charter Values in Limited Circumstances

In *Bell ExpressVu*, the SCC concluded that statutory provisions may only be interpreted in light of *Charter* values in limited circumstances. However, the fact that Canadian courts are limited in the extent to which they may interpret statutory provisions in light of *Charter* values does not mean that Canadian courts may not interpret *any* statutory provisions in light of *Charter* values. Drawing from Iacobucci J's judgment in *Bell ExpressVu*, the question that courts must ask, in each instance in which it is argued that statutory provisions should be interpreted according to *Charter* values, is whether the circumstances in question constitute those of "genuine ambiguity".¹⁶³

Describing "[w]hat . . . in law is an ambiguity", Iacobucci J, in *Bell ExpressVu*, cited Major J's judgment in *CanadianOxy Chemicals Ltd v Canada (AG)*, in which he noted that: "It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids".¹⁶⁴ Thus, in order to determine whether circumstances of genuine ambiguity exist, courts must first determine the intention of the statute and second, must apply the modern approach to statutory interpretation. It is only when the application of this approach results in "differing, but equally plausible, interpretations" that *Charter* values may be used as an interpretive mechanism.¹⁶⁵ Justice Abella has suggested that "where more than one interpretation of a provision is equally plausible, *Charter* values *should* be used to determine which interpretation is constitutionally compliant".¹⁶⁶

In the event that a court determines that it is appropriate to apply *Charter* values as an interpretive tool with respect to certain provisions of the *Copyright Act*, what substantive impact might this have on Canadian copyright law? In this article, I have described the impact of interpreting fair dealing through the lens of the purpose of copyright as rearticulated by the SCC. Interpreting fair dealing in accordance with the *Charter* right to freedom of expression (should it be determined that it is appropriate

163. *Supra* note 11 at para 62.

164. *Ibid* at para 29, citing *CanadianOxy Chemicals Ltd v Canada (Attorney General)*, [1999] 1 SCR 743 at 750, 171 DLR (4th) 733 [emphasis in *Bell ExpressVu*].

165. *Bell ExpressVu*, *supra* note 11 at para 62.

166. *R v Clarke*, 2014 SCC 28 at para 15, [2014] 1 SCR 612 [emphasis added].

to apply *Charter* values as an interpretive tool with respect to fair dealing) could lead to different outcomes—for instance, a different set of fairness factors articulated by courts. While a fulsome discussion of this issue is beyond the scope of this article, one factor that could be considered by courts applying *Charter* values as an interpretive tool with respect to fair dealing is whether, and the extent to which, the dealing advances the values underlying the *Charter* right to freedom of expression, “namely self-fulfilment, democratic discourse and truth finding”.¹⁶⁷

A second area in which explicitly referencing *Charter* values could substantively impact Canadian copyright law is in the administrative law context. Both the manner in which an administrative body exercises its statutory discretion and the standard of review applied to the decisions of administrative bodies differ when an administrative decision maker applies *Charter* values in the exercise of its statutory discretion versus when an administrative decision maker renders a decision in which it does not apply *Charter* values.

The leading SCC decision to address the correct approach to be taken in judicial review of decisions of administrative tribunals where *Charter* values are not at stake is *Dunsmuir v New Brunswick*.¹⁶⁸ As noted by Bastarache and LeBel JJ, who delivered the reasons for judgment for the majority, “[w]here the question is one of fact, discretion or policy, deference will usually apply automatically”;¹⁶⁹ the question is one of reasonableness.¹⁷⁰ Justices Bastarache and LeBel stated that when conducting judicial review, courts should look to whether there is “the existence of justification, transparency and intelligibility within the decision-making process” as well as to “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.¹⁷¹

The SCC first addressed the related questions of the impact of the application of *Charter* values on the decision-making processes of administrative tribunals and the standard of review of those decisions in

167. *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para 37, [2011] 1 SCR 19.

168. 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

169. *Ibid* at para 53.

170. *Ibid* at para 46.

171. *Ibid* at para 47.

the 2012 decision of *Doré v Barreau du Québec*.¹⁷² In this decision, Abella J (who delivered the reasons for judgment for the Court) wrote that

[a]n administrative decision-maker appl[ies] *Charter* values in the exercise of statutory discretion . . . [by] balanc[ing] the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives . . . Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives.¹⁷³

Similarly, the process of judicial review differs from the approach outlined above in *Dunsmuir* when the decision maker has applied *Charter* values. As noted by Abella J in *Doré*:

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play . . . If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.¹⁷⁴

The Copyright Board is the primary administrative tribunal in the context of copyright. The standard of review that should be applied to decisions of the Copyright Board was most recently addressed in *Rogers v SOCAN*.¹⁷⁵ In this decision, Rothstein J, writing for the majority, affirmed that “correctness should be the appropriate standard of review on questions of law arising on judicial review from the Copyright Board”.¹⁷⁶ Justice Rothstein also held that “the Board’s application of the correct legal principles to the facts of a particular matter should be treated with deference”.¹⁷⁷

If it is accepted that copyright engages *Charter* values such as freedom of expression, however, the question on judicial review would not simply be whether there is “existence of justification, transparency and intelligibility within the decision-making process” or “whether the decision falls within a range of possible, acceptable outcomes which are

172. 2012 SCC 12, [2012] 1 SCR 395 [*Doré*].

173. *Ibid* at paras 55–56.

174. *Ibid* at paras 57–58.

175. *Supra* note 3.

176. *Ibid* at para 15.

177. *Ibid* at para 20.

defensible in respect of the facts and law”.¹⁷⁸ Instead, the reviewing court would need to ask whether the Copyright Board has “properly balanced the relevant *Charter* value”, such as freedom of expression, with the objectives of the *Copyright Act*.¹⁷⁹ It is possible that asking this question could lead to different outcomes than under the current approach.

Thus, although courts are constrained in their ability to apply *Charter* values in the context of copyright due to *Bell ExpressVu*, they are not precluded from applying *Charter* values in all contexts. As discussed above, it is possible that the application of such an approach might have a substantive impact upon Canadian copyright jurisprudence. Such a possibility should not be discounted by Canadian courts asked to reconsider the relationship between the *Charter* right to freedom of expression and copyright.

C. Explicit Challenges to the Constitutionality of Copyright

The third explanation given above to account, at least in part, for the absence of explicit SCC engagement with the *Charter* right to freedom of expression in the context of copyright is that the SCC may have accepted that properly interpreted, the *Copyright Act* fully or adequately accommodates expression interests, and it is therefore unnecessary to explicitly engage with the *Charter* right to freedom of expression in the context of copyright. This explanation assumes that the *Charter* right to freedom of expression can be adequately protected through statutory interpretation alone. For several reasons, I argue that this assumption is flawed.

First, the ability of Canadian courts to protect expression interests through statutory interpretation is limited, whether informed by *Charter* values or not. Under the modern approach to statutory interpretation, for instance, courts’ interpretations of statutory provisions are constrained by both the structure and wording of the legislation, as well as by the purpose

178. *Dunsmuir*, *supra* note 168 at para 47.

179. *Doré*, *supra* note 172 at para 58. See Graham Reynolds, “Of Reasonableness, Fairness and the Public Interest: Judicial Review of Copyright Board Decisions in Canada’s Copyright” in Geist, *Copyright Pentalogy*, *supra* note 8 at 159. In this article I argue that the Copyright Board, in its decision in *Alberta (Education)*, interpreted fair dealing through the lens of an author-centric approach to copyright.

of the legislation.¹⁸⁰ As Rothstein J noted in the majority judgment in *SONDRAC*: “purposive construction is a tool of statutory interpretation to assist in understanding the meaning of the text. It is not a stand-alone basis for the Court to develop its own theory of what it considers appropriate policy”.¹⁸¹ Amendments to the *Copyright Act* might modify the range of interpretive possibilities open to courts, which could in turn impact the degree of protection for expression interests.¹⁸² Furthermore, as described above, the ability of Canadian courts to interpret provisions of the *Copyright Act* according to *Charter* values is also limited due to the SCC’s decision in *Bell ExpressVu*.¹⁸³

Second, in light of the SCC’s conclusion that courts may interpret provisions according to *Charter* values only in limited circumstances, relying exclusively on statutory interpretation as the sole mechanism through which to protect expression interests inappropriately insulates provisions of the *Copyright Act* from *Charter* scrutiny. The reason cited by the SCC for limiting the extent to which statutory provisions can be interpreted according to *Charter* values is that broad application of such a principle would, as noted by Charron J, “deprive the *Charter* of its more powerful purpose—the determination of the constitutional validity of the legislation”.¹⁸⁴ According to Iacobucci J, “interpret[ing] all statutes such that they conformed to the *Charter*” would strip legislatures “of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status”.¹⁸⁵

The corollary of this statement is that litigants must be able to challenge statutory provisions as unreasonable limits on their *Charter* rights. Yet under the leading Canadian case to have addressed the intersection of freedom of expression and copyright, these challenges will fail.

180. For the prevailing approach to statutory interpretation in Canada (the modern approach to statutory interpretation), see Driedger, *supra* note 42 (“the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously within the scheme of the Act, the object of the act, and the intention of Parliament” at 87).

181. *Supra* note 46 at para 55.

182. For instance, the federal government could amend the *Copyright Act* to include a provision articulating a purpose of copyright. It could also substantively amend certain provisions of the *Copyright Act*, add additional provisions or remove provisions currently part of the *Copyright Act*.

183. *Supra* note 11 at paras 28–30.

184. *R v Rodgers*, 2006 SCC 15 at para 19, [2006] 1 SCR 554.

185. *Bell ExpressVu*, *supra* note 11 at para 66.

In *Michelin*, Teitelbaum J concluded that “[t]he Charter does not confer the right to use private property—the Plaintiff’s copyright—in the service of freedom of expression”.¹⁸⁶ If it is neither possible to “interpret . . . statutes such that they conform to the *Charter*” nor to challenge the constitutional validity of statutory provisions, then the provisions limiting *Charter* rights—in this case the provisions of Canada’s *Copyright Act*—might themselves be “inflated to near absolute status”.¹⁸⁷

The SCC has yet to opine upon the approaches to the intersection of the *Charter* right to freedom of expression and copyright adopted by lower Canadian courts or to comment on whether the decisions from which these approaches are drawn are still good law. It has, however, cited *Michelin* for a different point of law, demonstrating that it is aware of this decision.¹⁸⁸ The SCC’s silence with respect to the intersection of the *Charter* right to freedom of expression and copyright could be due to a lack of opportunity to address these questions. However, among other reasons, it could also be attributed to the SCC’s acceptance of the idea that statutory interpretation, in the context of copyright, adequately or fully protects the *Charter* right to freedom of expression. To the extent that this idea underlies the SCC’s approach to the intersection of the *Charter* right to freedom of expression and copyright, I argue that it merits reconsideration.

Conclusion

In this article, relying on the fair dealing provisions of the *Copyright Act* as my case study, I have argued that one result of the SCC’s post-2002 copyright jurisprudence has been to clarify that the *Copyright Act* grants a significant degree of latitude to non-copyright owning parties to express themselves using copyrighted works. This result has been achieved without the SCC having explicitly engaged with the *Charter* right to freedom of expression and copyright. Rather, it has been achieved through the process of statutory interpretation.

I have provided several explanations for the absence of explicit discussion of the *Charter* right to freedom of expression in the context

186. *Supra* note 5 at para 85.

187. *Bell ExpressVu*, *supra* note 11 at para 66.

188. See *Théberge*, *supra* note 12 at paras 46, 73.

of the SCC's copyright decisions. First, I argued that the SCC has conceptualized fair dealing and other user rights as mechanisms that limit copyright owners' rights, as opposed to defences the purpose of which is to protect or promote freedom of expression.¹⁸⁹ Conceptualized in this manner, it has not been strictly necessary for the SCC to engage with the intersection of the *Charter* right to freedom of expression and copyright. Second, I argued that the ability of courts to interpret provisions of the *Copyright Act* in light of *Charter* values is limited by the SCC's determination in *Bell ExpressVu* that statutory provisions should only be interpreted in accordance with *Charter* values in circumstances of "genuine ambiguity".¹⁹⁰ Third, I suggested that the absence of explicit discussion of freedom of expression in the context of the SCC's post-2002 copyright jurisprudence could be interpreted as the SCC having accepted that, interpreted correctly (through the lens of the purpose of copyright, as rearticulated by the SCC), the *Copyright Act* either fully or adequately protects the *Charter* right to freedom of expression.

However, there are limits to the use of statutory interpretation as a mechanism through which to protect expression interests. Relying exclusively on statutory interpretation as the mechanism through which to protect the *Charter* right to freedom of expression in the context of copyright—particularly in light of the SCC's determination that statutory provisions may be interpreted according to *Charter* rights only in limited circumstances—fails to adequately protect this right. To the extent to which the SCC's approach to the intersection of the *Charter* right to freedom of expression and copyright is based on the assumption that the *Charter* right to freedom of expression can be adequately protected, in the context of copyright, through statutory interpretation alone, this approach must be reconsidered.

189. See *SOCAN v Bell*, *supra* note 10 at para 11.

190. See e.g. *supra* note 11 at paras 28–30.