*Part I*

# Background

# 1 Introduction

## I Overview

The central tenet of this book is that we need a new paradigm through which to view the operation and drafting of copyright exceptions. There already exists a large body of literature that has made important contributions to our understandings of the history and judicial interpretation of such provisions. This literature has also explored justifications for exceptions and the role they should play in copyright law.[1] In comparison with these well developed areas of analysis, the attention given to actual understandings of creators, copyright owners and users has been more limited, often appearing as ad hoc examples or impressionistic

[1] Some significant contributions include W. Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (1982) 82 *Columbia Law Review* 1600; L. Patterson, 'Free Speech, Copyright, and Fair Use' (1987) 40 *Vanderbilt Law Review* 1; W. Fisher III, 'Reconstructing the Fair Use Doctrine' (1988) 101 *Harvard Law Review* 1659; P. Leval, 'Toward a Fair Use Standard' (1990) 103 *Harvard Law Review* 1105; L. Weinrib, 'Fair's Fair: A Comment on the Fair Use Doctrine' (1990) 103 *Harvard Law Review* 1137; N. Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale Law Journal* 283; J. Griffiths, 'Preserving Judicial Freedom of Movement – Interpreting Fair Dealing in Copyright Law' [2000] *Intellectual Property Quarterly* 164; R. Burrell, 'Reining in Copyright Law: Is Fair Use the Answer?' [2001] *Intellectual Property Quarterly* 361; J. Hughes, 'Fair Use Across Time' (2003) 50 *UCLA Law Review* 775; D. Nimmer, '"Fairest of Them All" and Other Fairy Tales of Fair Use' (2003) 66 *Law and Contemporary Problems* 263; R. Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114 *Yale Law Journal* 535; M. Sag, 'God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine' (2005) 11 *Michigan Telecommunications and Technology Law Review* 381; G. D'Agostino, 'Healing Fair Dealing? A Comparative Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use' (2008) 53 *McGill Law Journal* 309; G. Austin, 'Four Questions about the Australian Approach to Fair Dealing Defenses to Copyright Infringement' (2010) 57 *Journal of the Copyright Society of the USA* 611; C. Geiger, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) 12 *Vanderbilt Journal of Entertainment and Technology Law* 515; P. Samuelson, 'Possible Future of Fair Use' (2015) 90 *Washington Law Review* 815; and M. Senftleben, 'The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions' (2017) 33 *American University International Law Review* 231.

descriptions of practices.[2] And yet by overlooking these understandings and practices we risk ignoring, to borrow Paul Goldstein's words, 'the submerged mass of the iceberg' in relation to the operation of exceptions.[3] Existing scholarship has paid considerable attention to the tip of the iceberg: the 'law in books'. Whether the tip is indicative of what lies beneath or is at odds with the 'law in action' has been less well elucidated.

To be clear, this is not to suggest that existing scholarship has not engaged with practical questions about copyright or how it might impact on creators, users and other stakeholders. On the contrary, copyright scholars have been highly active in debates about the adequacy of exceptions and whether they ought to be reformed.[4] However, much analysis has adopted a top-down approach in which legislation and case law is used to paint a picture of the workings of exceptions and, from that, an assessment made of the state of the law and options for change.[5] A key idea underpinning this book is that without an understanding of the practices of non-legal actors, both the descriptive and normative aspects of the resulting conclusions are open to question.

An example illustrates this point and is a focus of later chapters.[6] On 4 March 2004 the Supreme Court of Canada handed down its decision in *CCH Canadian Ltd* v. *Law Society of Upper Canada*,[7] a case brought by

[2] Exceptions include K. Crews, *Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education* (Chicago: University of Chicago Press, 1993), L. Murray, S. Piper and K. Robertson, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (New York: Oxford University Press, 2014) and M. Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (Oxford: Hart, 2016); and we should note the empirical turn in copyright research.

[3] P. Goldstein, 'Fair Use in Context' (2008) 31 *Columbia Journal of Law and the Arts* 433, 433.

[4] Including via contributions to law reform processes: e.g., R. Deazley, 'Copyright and Parody: Taking Backward the Gowers Review?' (2010) 73 *Modern Law Review* 785 (article based on submission to the Intellectual Property Office in 2010); R. Burrell, M. Handler, E. Hudson and K. Weatherall, 'ALRC Inquiry into Copyright and the Digital Economy', submission in response to Issues Paper No. 42 (14 December 2012); J. Besek, J. Ginsburg, P. Loengard and Y. Lev-Aretz, 'Copyright Exceptions in the United States for Educational Uses of Copyrighted Works', submission in response to the ALRC Issues Paper (2012); G. Hinze, P. Jaszi and M. Sag, 'The Fair Use Doctrine in the United States – A Response to the Kernochan Report', submission in response to ALRC Discussion Paper 79 (26 July 2013).

[5] A further criticism of this scholarship is that it frequently relies on a limited or cherry-picked set of materials. In response a number of scholars have sought to undertake a more systematic approach to their analysis: see especially B. Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions' (2008) 156(3) *University of Pennsylvania Law Review* 549; P. Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537; N. Netanel, 'Making Sense of Fair Use' (2011) 15 *Lewis & Clark Law Review* 715; M. Sag, 'Predicting Fair Use' (2012) 73 *Ohio State Law Journal* 47.

[6] See Chapters 7 and 8.

[7] [2004] 1 SCR 339 ('*CCH*').

a consortium of legal publishers against the Law Society as operator of the Great Library at Osgoode Hall. One aspect of the case related to a photocopying service in which the Library made and supplied copies of legal materials in response to requests by Law Society members. The publishers argued that this resulted in systematic infringement of copyright, entitling them to declaratory and injunctive relief. In a unanimous decision, the Supreme Court held that there was no infringement as the Library's activities fell within fair dealing for the purposes of research or private study.[8] Central to the reasoning was the unambiguous desire of the Court to adopt a more liberal approach to the interpretation of exceptions, as seen in the observation of McLachlin CJC that:

> The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver … has explained …: 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.'[9]

Following the Supreme Court's decision there was a flurry of academic writing, much of which lauded the Court for its statements regarding the role and conceptualisation of exceptions.[10] For instance, *CCH* was described as a 'landmark'[11] and its dicta predicted to have 'far-ranging' effects.[12] To the extent concerns were expressed about the decision, these often focused on the next stages of the liberalisation project, such as buttressing the broad understanding of fair dealing through legislative reform. For instance, Carys Craig argued that for the Supreme Court's vision to be fully realised it would be necessary to transform fair dealing into a fully open-ended exception in the style of fair use.[13]

Much of the favourable academic commentary was predicated on the idea that the Supreme Court had recalibrated fair dealing in Canada, a claim that on one level was self-evident and correct. *CCH*, a binding decision of Canada's highest court, was an unambiguous step away from

[8] Copyright Act (R.S.C. 1985, c. C-42), s. 29 (in this book 'Canadian Copyright Act').
[9] *CCH*, n. 7 above, para. 48 citing D. Vaver, *Copyright Law* (Toronto: Irwin Law, 2000), p. 171.
[10] See Chapter 7, Section III.B.
[11] P. Esmail, '*CCH Canadian Ltd v Law Society of Upper Canada:* Case Comment on a Landmark Copyright Case' (2005) 10 *Appeal* 13, 13.
[12] T. Scassa, 'Recalibrating Copyright Law? A Comment on the Supreme Court of Canada's Decision in *CCH Canadian Limited et al v Law Society of Upper Canada*' (2004) 3 *Canadian Journal of Law & Technology* 89, 89.
[13] C. Craig, 'The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform' in M. Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005).

the narrow interpretations of exceptions in the case law and copyright texts of the 1990s.[14] However, there were also reasons for questioning its supposedly transformative effects. To what extent was the favourable response of legal academics representative of the reception elsewhere? Would lawyers change the way they advised clients, and would judges sitting on lower tier courts take seriously the philosophical framework urged by the Supreme Court? Would library staff and other users even be aware of *CCH*, let alone update their practices by reference to the decision? As an empirical matter, the statement that *CCH* was groundbreaking relied on a range of assumptions about existing fair dealing interpretations and the amenability of those interpretations to change.

Chapters 7 and 8 tell the story of *CCH* and its reception in leading Canadian cultural institutions. This narrative draws not only from publicly available sources but from interviews conducted with institution staff and representatives of peak bodies. These chapters explain that during the five years following the Supreme Court's decision, a significant gap emerged between the forward-leaning interpretations of fair dealing preferred by academics and, to some extent, applied by judges, and the muted response within institutions, where awareness of the case was mixed and there were very few changes to procedures that were attributable to the decision. This was captured by the observation of one university librarian that there was a real divide between the views of academics within the university and those in the library who must 'face the music'.[15]

This book investigates why such a marked divergence arose between the law in books and the law in action, and what happened in the subsequent period to spur academic libraries to introduce meaningful changes to their fair dealing practices.[16] However, this book is about far more than the story of *CCH*. For instance, one of its key goals is to explore what the law in action means for the drafting of copyright exceptions, a question it explores using tools from the academic scholarship on standards and rules. As explained in Chapter 2, this literature makes predictions about when a legal command is better drafted so as to specify the legal consequences of particular behaviour in advance (i.e., as a rule) or using language that leaves factual determinations *and* the appropriate legal response to the judge (i.e., as a standard). Whilst there are echoes of this literature in debates about exceptions, current accounts

[14] See Chapter 9, Section II.D. [15] 141L.
[16] See Chapter 8. This process is ongoing, with the most recent development being the failure of the fair dealing defence in *Canadian Copyright Licensing Agency ("Access Copyright")* v. *York University* [2018] 2 FCR 43.

are often over-simplified and ignore the crucial role that empirical analysis has in helping to determine the better form of drafting.

Second, it is hoped that this book will add a new dimension to long-standing debates about reform to exceptions, and in particular the 'fair use panacea'.[17] As explained in Section II of this chapter, these debates often centre on the proposition that countries with a closed-list approach to exceptions – i.e., those with an exhaustive suite of specific exceptions – face ongoing problems that can only be remedied by far greater use of open-ended and 'flexible' language, with fair use often presented as the best candidate for reform. This book uses qualitative methods to explore how one constituency in the United States – leading cultural institutions – has managed copyright challenges, and how this compares with the experiences of equivalent bodies in Australia, Canada and the United Kingdom. This book therefore seeks to present an empirically grounded assessment of the operation of fair use and whether it can be replicated elsewhere. As discussed in Section III of this chapter, this book is predicated on the assumption that open-ended exceptions can be compliant with the three-step test from international copyright law. It does not, therefore, replicate the extensive work done by others that supports this proposition.

Finally, this book is a longitudinal study of the copyright management practices of leading cultural institutions in Australia, Canada, the United Kingdom and the United States. The empirical material in this book dates back to 2004, and comprises thousands of hours of fieldwork with hundreds of people. In presenting this work the goal is not to provide an up-to-the-minute account of what cultural institutions do, nor to suggest that the interviews produced a comprehensive survey of practices. Rather, this book aims to describe the decision-making processes at institutions, to explore why some practices changed but others did not, and to consider what this means for copyright exceptions. It is hoped that this analysis will be of relevance not just to copyright scholars and the cultural institution sector but to those with an interest in social norms, law and society, and legal drafting.

As seen in Chapter 5, the empirical work suggested that for participating US cultural institutions, fair use was a meaningful part of copyright practices and had been responsive to new technologies and changing ideas about how institutions should make use of online opportunities. These experiences did not accord with characterisations of fair use as uncertain and unknowable, and may lend weight to the proposition that

[17] This rubric is taken from R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005).

other jurisdictions might usefully add fair use to their suite of exceptions. However, not all experiences with 'flexible' drafting were as positive, as illustrated by Australia's bespoke section 200AB for cultural institutions and other users (Chapter 6) and, to a degree, Canada's experiences with post-*CCH* fair dealing (Chapter 7). In Chapter 9 this book nevertheless supports the introduction of fair use in other jurisdictions, for instance observing that the Australian experience cautions us not against fair use but poorly drafted standards. That said, just as standards are not inevitably superior to rules, nor is fair use the endpoint of a mature legal system. As discussed in Chapter 8, developments in Canada and the United Kingdom give us pause to consider whether under-exploited flexibility can be found in purpose-specific fair dealing exceptions, allowing for new interpretations without a major reconceptualisation of the existing legislative framework. Furthermore, even if fair use or another standard is a desirable component of copyright law, there will always be a role for rule-like exceptions, with the precise mix varying from place to place and time to time.

## II The Fair Use Panacea

As mentioned in Section I, we seem to be caught in a never-ending discussion of copyright exceptions and the respective merits of different forms of drafting.[18] The prominence of these debates would seem to be a by-product of the role that such provisions have come to play in copyright law, where they now operate as the key 'balancing' mechanism to ensure that copyright is appropriately limited, i.e., that rewards are granted to authors but not in such a way that re-use and new authorship are unduly impaired.[19] There are other ways that balance could be achieved. For instance, we might create a system where strong but short rights are granted in relation to a narrow range of subject-matter. In such a world

[18] See examples in P. Hugenholtz, 'Flexible Copyright: Can the EU Author's Rights Accommodate Fair Use' in R. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (New York: Cambridge University Press, 2017); M. Handler and E. Hudson, 'Fair Use as an Advance on Fair Dealing? Depolarising the Debate' in H. Sun, S. Balganesh and W. Ng-Loy (eds), *Comparative Aspects of Limitations and Exceptions in Copyright Law* (New York: Cambridge University Press, forthcoming).

[19] For criticism of use of the term 'balance' in copyright law, see, e.g., Burrell and Coleman, n. 17 above, pp. 187–191; C. Craig, 'Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks' (2017) 33 *American University International Law Review* 1, 44–48. For instance, Burrell and Coleman observe that such terminology can be a truism to which we all agree but without guidance as to 'how weight is to be attributed to differing interests or even as to which interests are to enjoy a place on the scales': p. 190. In addition, the language of balance can suggest that interests of different stakeholders are oppositional rather than complex and interrelated.

there would be less need for exceptions because of the channelling work done at the subsistence and duration stages. For copyright, however, there has been an incremental expansion of subject matter, duration and rights from the early eighteenth century onwards.[20] With political and legal impediments to winding back rights, exceptions have emerged as the key counterpoint to help ensure that copyright does not overreach.

Interest in exceptions is also high due to the different forms that such provisions can take, notably free or remunerated, and open-ended or limited by purpose, subject-matter and/or user. For instance, Robert Burrell and Allison Coleman have argued that, broadly speaking, two approaches to drafting can be observed:

> The first approach is to provide a small number of generally worded exceptions. The second approach is to provide a larger number of much more specific exceptions, encompassing carefully defined activities. Although no country can be said to adhere rigidly to either approach, some countries lean towards one approach rather than the other. The United States, for example, leans towards the first approach. This is because US copyright law contains a broad 'fair use' defence.[21]

Pausing here, since the passage of the Copyright Act of 1976,[22] fair use has been codified in section 107 of that statute. At the heart of section 107 is the statement that 'the fair use of a copyrighted work … is not an infringement of copyright'. Whilst section 107 contains guidance regarding when this might be the case, including via a non-exhaustive list of illustrative purposes and four factors that 'shall' be considered when determining whether a use is fair, its drafting is open-ended. In addition to fair use, the US statute contains other exceptions, many of which are highly detailed.[23] In this book, section 108 – pertaining to libraries and archives – is of particular interest.

Returning to Burrell and Coleman, they note that in contrast,

> the United Kingdom has a list of very specific exceptions, encompassing carefully defined activities. With the benefit of hindsight, it is possible to point to the Copyright Act 1911 as providing the template for this approach. … Thus Australia, Canada, India, New Zealand, Singapore and South Africa delineate

[20] For examination of the British experience, see, e.g., B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 2002).
[21] Burrell and Coleman, n. 17 above, p. 4; for similar, see S. Ricketson, 'Simplifying Copyright Law: Proposals from Down Under' (1999) 21 *European Intellectual Property Review* 537, 541.
[22] Copyright Act of 1976, 17 USC ss. 101 ff (in this book 'US Copyright Act').
[23] Ibid., ss. 108–122.

the limits of copyright protection by way of an exhaustive list of specifically defined exceptions.[24]

The countries listed in this quote are all fair dealing jurisdictions. In its usual form, fair dealing is closed-ended, applying to dealings that are fair and conducted for one of the prescribed purposes. These purposes vary between different countries, but include such things as research, study, criticism, review and news reporting. There have been changes to the legal landscape since Burrell and Coleman wrote the above passage in 2005, including that Singapore has shifted to extended fair dealing by reframing one of its fair dealing provisions as open-ended.[25] However, their general point remains valid, and in countries such as Australia, Canada and the United Kingdom, the copyright statutes are still characterised by large numbers of closed-ended exceptions. To illustrate, when introductory and explanatory provisions are excluded, there are currently almost sixty operational sections covering 'permitted acts' in the Copyright, Designs and Patents Act 1988.[26] In addition to fair dealing[27] there are exceptions covering uses by and on behalf of disabled persons;[28] uses in education, by libraries and archives, and as part of public administration;[29] and acts with computer programs and databases.[30] Many of these provisions are lengthy and contain numerous sub-parts, often focusing on narrowly framed conduct, as exemplified by exceptions covering note-taking by journalists and the copying of abstracts to scientific and technical articles.[31] This level of specificity led Justice Hugh Laddie, writing extra-judicially in 1996, to observe that in the United Kingdom,

> [r]igidity is the rule. It is as if every tiny exception to the grasp of the copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls. This approach also assumes that Parliament can foresee, and therefore legislate for, all possible circumstances in which allowing copyright to be enforced would be unjustified. Based on this approach, we now have an Act in

[24] Burrell and Coleman, n. 17 above, p. 249; for similar, see M. Spence, *Intellectual Property* (Oxford: Oxford University Press, 2007), pp. 112–115.
[25] Copyright Act 1987 (Sing.), s. 35(1) (fair dealing for the purpose of research or study amended by the Copyright (Amendment) Act 2004 (Sing.) so that it covers any purpose other than those caught by ss. 36 and 37, namely fair dealing for the purposes of criticism, review and reporting current events).
[26] In this book 'CDPA'.
[27] CDPA ss. 29 (research and private study), 30 (criticism, review, quotation and news reporting), 30A (caricature, parody or pastiche), 32 (illustration for instruction).
[28] Ibid., ss. 31A–31F.
[29] Ibid., ss. 33–36A, 40A–44B, 45–50, respectively.
[30] Ibid., ss. 50A–50D.
[31] Ibid., ss. 58, 60, respectively.