FAIR DEALING AND DOCUMENTARIES – IS IT FAIR?

ABSTRACT

In an attempt to strike a fair balance between rights of copyright holders and the public interest in the dissemination of intellectual works, the copyright law has established exceptions to the exclusive rights granted to creators. However, doubts concerning the applicability of these exceptions have raised discussions about whether the use of copyrighted materials in documentaries qualifies as a fair dealing or other exception to copyright, uncertainties that lead producers to use only duly authorized materials in order to avoid possible claims. This thesis analyzes the copyright exceptions set out in the Canadian law and their applicability to protected materials inserted in documentaries. This thesis suggests that the legislation should be modified in order to help producers to identify situations in which those exceptions would be applicable to protected materials included in documentaries and to avoid over protective copyright rights that may restrain the production and dissemination of documentary films.
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Introduction

The continuing growth of the film industry and the changes brought by recent technological advances to the way creative content is produced and distributed have brought out a number of copyright issues concerning audiovisual works. The easy access to all kinds of materials and the possibility of reproducing them effortlessly seem to conflict with the exclusive rights granted to copyright holders.

All over the world, courts and legislative bodies have been trying to find a balance between the exclusive rights granted to copyright holders and the users’ rights by establishing limitations and exceptions to copyright rights. However, sometimes it is not possible to precisely determine whether or not a certain use qualifies as a copyright exception and thus whether or not the authorization of the copyright holder is required in order to use a material protected by copyright. Such questions are left to the courts, which provide the respective answers on a case by case basis.

Nevertheless, since the courts have not faced all possible situations regarding copyright exceptions, and probably they never will, many questions remain unanswered, affecting, on one hand, owners of copyrighted materials and, on the other hand, users that rely in preexisting materials, such as archival footage, music and photographs, to create new ones. Since these preexisting materials are essential tools for documentary producers who wish to tell a real story or portray factual situations, documentary films are the scenario of a great number of uncertainties regarding copyright exceptions. As stated by Lawrence Lessig:

Documentaries in particular are property of a special kind. The copyright and contract claims that burden these compilations of
creativity are impossibly complex. [...] [T]hey typically also include quotations, in the sense of film clips. So just as a book about Franklin Delano Roosevelt by Jonathan Alter might have quotes from famous people talking about its subject, a film about civil rights produced in the 1960s would include quotations – clips from news stations – from famous people of the time talking about the issue of the day. Unlike a book, however, these quotations are in film [...].

In particular situations, documentary producers can rely on legal exceptions to use materials protected by copyright in their works without any authorization from the right holders. However, doubts about the scope and applicability of those exceptions normally lead producers to obtain the relevant authorizations in order to avoid eventual claims. The remote possibility of a lawsuit that may hinder or delay the production or distribution of a film is a risk that producers are not willing to take.

Costs related to copyright releases, which include costs to locate copyright holders, to negotiate and to obtain the respective rights, can be extremely high depending on the number of protected materials to be included in the film and, sometimes, such costs may undermine the viability of producing a documentary.

In a recent “road show” organized by the Documentary Organization of Canada (“DocOrg”), a panel composed of a producer/director, a distributor and a manager of television programming discussed the application of the fair dealing provisions in materials included in documentary films. According to one of the panelists, he normally does not even consider the fair dealing provisions while producing a documentary film, including because

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of the requirements of insurance companies.² He would rather try to obtain the authorizations from copyright holders related to the materials to be included in a film, and only include duly authorized materials, than take the risk of facing a lawsuit.

Doubts related to whether or not copyright releases must be obtained in order to reproduce certain protected works do not exclusively concern documentaries, but reflect general uncertainties arising from the exceptions set out in the copyright legislation. There are, nevertheless, specific characteristics of documentary films that justify the numerous recent discussions on whether or not the so-called “quotations”, as mentioned by Lessig, as well as other forms of use of materials protected by copyright in documentary films, can fall within one of the fair dealing categories or other exceptions to the exclusive rights granted to copyright holders.

Documentary films are often used as a way to report real facts, retell historical events and present other subjects of the public interest. Although fictional movies can also reproduce a real story, the use of actors, scenographic places and adapted dialogues do not offer spectators the real picture, but a more attractive and artistic version of the truth, in which the real events are replaced by reconstruction.³ The fictional film “Schindler’s List”, for example, “is not the story as told by Oscar Schindler himself or by the people he saved but an imaginative, allegorical representation of his story as told by Steven Spielberg, even though it is heavily based on historical facts”.⁴

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² According to the panelists, most insurance companies require that all authorizations be obtained in order to issue an Errors and Omissions Insurance (“E&O”). Distributors and broadcasters, on the other hand, require the E&O insurance as a condition to distribute/broadcast a film.
The purpose of this thesis is to analyze the fair dealing provisions and other copyright exceptions set out in the Canadian copyright legislation when applicable to documentaries. This thesis will first examine the concept of public interest when related to copyright and the exceptions and limitations established in order to balance the exclusive rights granted to copyright holders and other rights of the public interest. Then, this thesis will present the exceptions to copyright set forth in the Canadian Copyright Act\(^5\) (hereinafter the “Copyright Act”) that can be applied to protected materials inserted in documentaries. After a brief description of documentary films and their main characteristics, this thesis will analyze how courts have interpreted the fair dealing provisions and how they can benefit documentary producers. Emphasis will be given to the fair dealing categories of review, criticism and news reporting.

I will suggest that the current Canadian legislation leaves film producers with numerous doubts about the scope and applicability of the fair dealing provisions. Neither of the fair dealing categories is defined by the Copyright Act, which gives rise to different interpretations. In addition, even if a certain use clearly falls within one of the fair dealing categories, it will still be subject to the fairness test, which can lead to different and sometimes unpredictable results. Therefore, only in few occasions documentary producers can completely rely on the fair dealing provisions to include materials protected by copyright in documentary films.

I will suggest a few modifications to the legislation that could help producers, as well as authors, to identify situations in which the exceptions to copyright would be applicable. Moreover, in view of the undeniable importance of some documentary films to

\(^5\) Copyright Act, R.S.C., 1985, c. C-42, online: Department of Justice – Canada <http://laws.justice.gc.ca> [Copyright Act].
the public interest, I will suggest that modifications to the law be made in order to expressly include documentary films in the scope of some of those exceptions.

However, the proposed modifications also present their own ambiguities and will not solve the problems arising out of the uncertainties related to the exceptions to copyrights. Nevertheless, they can help producers and copyright holders to elucidate some doubts about the applicability of the fair dealing provisions and other exceptions to copyrights to documentary films.
1. Limitations and Exceptions to Copyright

Limitations and exceptions to copyright were established in order to balance the exclusive rights granted to copyright holders and public interests or, as noted by Senfteuben, “privileged free uses which create breathing space for socially-valuable ends”\(^6\). Defining and identifying public interests or “socially-valuable ends” and determining whether or not, and to what extent, they should prevail over private rights is a difficult task that requires more than objective tests.\(^7\) Davies helps to understand the notion of public interest, by asserting that:

Inherent in the noble motive of the public good is the notion that, in certain circumstances, the needs of the majority override those of the individual, and that the citizen should relinquish any thoughts of self-interest in favour of the common good of society as a whole.\(^8\)

Copyright impacts on a number of aspects and interests that involve the society as a whole. Although in \textit{CCH Canadian Limited v. LSUC}\(^9\) (hereinafter “CCH”), the Supreme Court of Canada seemed to relate the public interest with the rights of the users of copyrightable materials\(^10\), it is true that protecting the private rights of copyright holders and rewarding creators are also in the public interest.\(^11\) The protection given to authors by

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\(^8\) \textit{Ibid}.


copyright is not simply based on the fact that they create original works, but on the benefits resulting from this protection to the public. Compensation may stimulate creation and foster the availability of new works to the public. However, the private and public interests in rewarding creators shall be balanced with other rights and interests of the society. The right of freedom of expression, a fundamental right that comprises the public’s right to receive and to transmit information, may be particularly affected by the exclusive rights granted by copyright law.

The society’s interest in the wide dissemination of intellectual works, which is frequently mentioned as an important element to be considered in the balance between authors’ and users’ rights, can be considered a natural consequence of the right to freedom of expression, which involves “not only the concerns of the communicator who wants to impart information […] but also those of recipients of information”.

As mentioned by Senftleben, the notion that freedom of expression encompasses the rights to receive and transmit information is reflected in international legal instruments, such as the European Convention for the Protection of Human Rights and Fundamental

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12 Sookman, supra note 11 at 25.


14 See Stewart, supra note 11 at 79 para 4.50; and Scassa, “Interests”, supra note 10 at 56.

15 See Senftleben, supra note 6 at 23.


17 Senftleben, supra note 6 at 24-25.
Freedoms (“ECHR”) and The Universal Declaration of Human Rights (“UDHR”). Article 10(1) of the ECHR sets out that freedom of expression “shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”. With similar language, Article 19 of the UDHR also expressly sets out that freedom of expression includes the right to “seek, receive and impart information”.

Some of the aforementioned international documents that expressly protect the right to freedom of expression also recognize some intellectual property rights, which indicates that freedom of expression and intellectual property rights, including copyrights, do not exclude each other. However, under certain circumstances, these rights may conflict with each other, and when there is a conflict a balance is required.

It is important to point out that, if on one hand copyright protection may encourage individuals to create and make their works available to the public, it may also have a negative impact on the creation of new works. Users of copyrightable materials may also be creators when they use such materials in a transformative way, producing new intellectual works. Since one of the goals of copyright is fostering creation, the interest in the creation

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20 Article 27(2) of the UDHR sets out that “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.
22 See David Vaver, Copyright Law (Toronto: Irwin Law, 2000) at 10; and Wendy J. Gordon, “On the Economics of Copyright, Restitution, and ‘Fair Use’: Systemic Versus Case-by-Case Responses to
of works derived from preexisting ones should also be taken into consideration for purposes of balancing interests.

In this regard, Scassa states that “[t]he public interest in the encouragement of creation and the wide dissemination of works presumably serves the interests of further creation and the growth of knowledge and culture”. Excessive protection may hinder the production of works that are created based on existing ones and, therefore, negatively impact on the development of knowledge and culture.

In an attempt to strike a fair balance between all these rights and interests, copyright law in different countries has established exceptions and limitations to the exclusive rights granted to copyright holders. In this regard and taking into consideration the specific characteristics of each country, international treaties left to domestic legislators the freedom to determine the copyright protection to be given to certain types of intellectual property works and/or to be given in specific situations.

The balance between the rights conferred to copyright holders and the interest of users and the society as a whole may present different results depending on the approach adopted by the relevant countries to justify the exclusive rights granted to authors and the

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23 Scassa, “Interests”, supra note 10 at 56.
weight given to each side of the balance. Common law countries usually give more weight to economic and social arguments to determine this balance while civil law countries adopt more frequently the natural law argument.26

In Théberge v. Galerie d'Art27 (“Théberge”), the Supreme Court of Canada noted that the Copyright Act aims to strike 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”.28 In CCH, the Chief Justice referred to the decision in Théberge and reiterate that the courts should balance those two goals.29 The Supreme Court of Canada also observed, in Théberge, that a proper balance should take into consideration the limited nature of the creator’s rights30 and that excessive control by copyright holders would hinder creative innovation and the proper utilization of the relevant work.31 These arguments are reflected in the exceptions and limitations to copyrights set out in the Canadian legislation and can help to interpret such exceptions and limitations.32

Copyright protection can be limited in different ways, including by (i) time33; (ii) forms of expression (e.g: fixation in some material form can be required34); (iii) subject-

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26 Davies, supra note 7 at 17.
28 Ibid at para 30.
29 CCH, supra note 9 at para 10.
30 Théberge supra note 27 at para 31.
31 Ibid at para 32.
33 See Berne Convention, Article 7 and TRIPS Agreement, Article 12.
34 See Berne Convention, Article 2(2).
matter, by restricting the subject of protection and/or by establishing permitted uses of subject matters that may be considered more important to the public interest than others; and (iv) the purposes of reproduction.

The Copyright Act only protects the whole or substantial parts of intellectual works which are fixed in a material form. This protection is also limited in time and normally ceases after 50 (fifty) years counted as of the calendar year following the author’s death. Moreover, the Copyright Act restricts the protected subject matter to original literary, dramatic, musical and artistic works, terms that are defined in its Section 2.

The Copyright Act also limits the exclusive rights granted to copyright holders by establishing a number of situations in which the reproduction and use of a substantial part of a copyrightable material will not be considered an infringement to copyright. These exceptions were referred by Vaver as “users’ rights,” term that was also used by the Supreme Court of Canada in CCH. These exceptions are set out in Sections 29 to 32.2 of the Copyright Act.

Sections 29 to 29.2 refer to the fair dealing exceptions, which permit the use of protected materials for the purposes expressly set out therein. Sections 29.4 to 30.5 refer to permitted uses specifically applied to educational institutions, libraries, archives and

35 See TRIPS Agreement, Article 9(2).
36 See Berne Convention, Article 2(4).
37 See Copyright Act, s 3(1).
38 Copyright Act, s 6. In specific cases the term of copyright protection will be counted differently. See Copyright Act, ss 6 - 12.
39 Copyright Act, s 5(1).
40 Vaver, supra note 22 at 170.
41 CCH supra note 9 at para 48.
museums, and Section 30.6 refer to computer programs. Another exception is provided for in Section 30.7 of the Copyright Act, which sets out that it is not an infringement to copyright to include a work in another one, provided that such an inclusion is incidental and not deliberate. Other exceptions and limitations are established in Sections 30.8 to 32.2, in order to guarantee that the exclusive rights granted to copyright holders do not prevail over the public interest in the dissemination of their works.

This thesis will focus on those exceptions set out in the Canadian Copyright Act that are relevant to determine whether or not and in which situations the authorization of copyright holders is required for the inclusion of materials protected by copyright in documentary films, particularly the fair dealing provisions.

### 1.1 Fair Dealing

The fair dealing exceptions set out in the Copyright Act permit the reproduction of copyrightable materials without the authorization of the copyright holder for the following purposes:

1. research or private study\(^{42}\);
2. criticism or review, provided that the source and the name of the author, performer, maker or broadcaster, as applicable, are mentioned\(^{43}\); and
3. news reporting, provided that the source and the name of the author,

\(^{42}\) *Copyright Act*, s 29.

\(^{43}\) *Copyright Act*, s 29(1).
performer, maker or broadcaster, as applicable, are mentioned.\(^4^4\)

If approved by the Canadian Parliament, Bill C-32\(^4^5\) will amend Section 29 of the Copyright Act to include the following fair dealing categories: education, parody and satire.

The fair dealing exceptions apply only to the reproduction of the whole or substantial parts of protected works since, according to Section 3(1) of the Copyright Act, the exclusive rights granted to copyright holders do not protect unsubstantial parts of the respective intellectual creations.\(^4^6\) As confirmed by the Supreme Court of Canada in CCH, “[i]f the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement”.\(^4^7\)

The fair dealing exceptions are only applicable if an intellectual work or any substantial part thereof is reproduced for one of the purposes expressly set out in Items (i) to (iii) above and provided that such a reproduction is deemed to be fair.\(^4^8\) Doubts regarding the applicability of these exceptions are a consequence of the difficulty in determining the exact scope of each one of the fair dealing categories as well as the meaning of a “fair practice”.

In the case of Hubbard v. Vosper\(^4^9\) (hereinafter “Hubbard”), which was brought

\(^4^4\) *Copyright Act*, s 29(2).


\(^4^6\) Section 3(1) of the Copyright Act sets out that for the purpose of the Copyright Act “‘copyright’, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof […]” (emphasis added).

\(^4^7\) *CCH*, supra note 9 at para 56.

\(^4^8\) See *CCH*, supra note 9 at para 50.

\(^4^9\) Hubbard and Another v. Vosper and Another, [1972] 2 Q.B. 84 (available on LexisNexis) [Hubbard].
before the Court of Appeal of England, Lord Denning M.R. observed that “[i]t is impossible to define what is ‘fair dealing’. It must be a question of degree”. He stated that a number of factors should be considered to determine the existence of fair dealing, including the purpose of the dealing (e.g.: comment, criticism or review) and its proportions (long or short extracts). Nevertheless, according to him, at the end “it must be a matter of impression […][and] [t]he tribunal of fact must decide”. His decision suggests that it is not possible to determine a definite and inflexible test to be equally applied in different situations.

Despite the limited number of fair dealing categories, neither of those categories is defined in the Copyright Act and their meaning may vary depending on the interpretation given to them. For example, in Hubbard, Lord Denning M.R. made some important observations related to the definition of “criticism”. According to him:

A literary work consists, not only of the literary style, but also of the thoughts underlying it, as expressed in the words. Under the defence of “fair dealing” both can be criticised. Mr. Vosper is entitled to criticise not only the literary style, but also the doctrine or philosophy of Mr. Hubbard as expounded in the books.

The interpretation of the word “criticism” given by Lord Denning M.R. for the purposes of applying the fair dealing defence elucidated some doubts that might have been raised in an earlier decision given in the case of British Oxygen Co. Ltd. v. Liquid Air Ltd., according to which the word “criticism” referred to “a criticism of the work as such”.

50 Ibid.
51 Ibid.
52 Ibid.
53 Oxygen Co. Ltd. v. Liquid Air Ltd. [1925] Ch. 383, 393, cited in Hubbard, supra note 49.
54 Ibid.
In *Michelin v. CAW*, given the defendants’ argument that parody was a form of criticism, the Federal Court of Canada stated that “exceptions to copyright infringement should be strictly interpreted; parody should not be read in as a form of criticism to constitute a new exception under paragraph 27(2)(a.1)”\(^{56}\). This decision reflects the restrictive approach to the fair dealing provisions that was predominant in the Canadian Courts for a long time.\(^{57}\)

According to Scassa, the restrictive interpretation of the fair dealing provisions is the result of the way the exceptions were structured in the legislation: “by framing the defence narrowly, it [the structure of the defence] invites a more restrictive approach to interpretation”.\(^{58}\) Although such structure remains the same in the Copyright Act, the decision of the Supreme Court in CCH has changed the fair dealing law in Canada, by refusing the restrictive interpretation traditionally applied by the Canadian Courts.\(^{59}\)

In CCH, the Supreme Court of Canada emphasized the need for a balanced approach:\(^{60}\):

> In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it [the fair dealing exception] must not be

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\(^{56}\) *Ibid* at para 2.


\(^{60}\) de Beer, supra note 59 at 24.
interpreted restrictively.\textsuperscript{61} [...] “Research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts.\textsuperscript{62}

Therefore, according to the decision in \textit{CCH}, the fact that the dealing has commercial or non-commercial purposes is not a determinative factor, but just one of the aspects to be considered in order to establish whether or not certain dealing can be considered to be fair.\textsuperscript{63} Following the decision granted by the Court of Appeal, the Supreme Court of Canada recognized the following list of factors to be considered in order to determine whether or not the dealing is fair\textsuperscript{64}:

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.\textsuperscript{65}

Although the fair dealing list remains limited and the dealing still must fall within one of those specific categories set out in the Copyright Act, de Beer observes that such categories “are now defined reasonably rather than restrictively. And a flexible, open-ended

\textsuperscript{61} \textit{CCH}, supra note 9 at para 48.
\textsuperscript{62} \textit{Ibid} at para 51.
\textsuperscript{63} \textit{Ibid} at para 54.
\textsuperscript{64} \textit{Ibid} at para 53.
\textsuperscript{65} \textit{Ibid}.
list of fairness factors now provides guidance on how a court is likely to rule in any particular case”.

In a decision granted by the Copyright Board of Canada regarding Socan’s Tariff 22.A, which addresses the communication of music to the public over the Internet or by means of similar transmission facilities, one of the issues under analysis was whether or not the availability of music previews could be considered fair dealing for the purposes of “research”, as set out in Section 29 of the Copyright Act. The Copyright Board referred to the decision in CCH and pointed out that the Supreme Court of Canada has introduced a “large and liberal interpretation” to the word “research”. Based on that, the Board also adopted a less restrictive interpretation, giving an extremely broad definition to the word “research”:

Planning the purchase of a download or CD involves searching, investigation: identifying sites that offer those products, selecting one, finding out whether the track is available […] and so on. Listening to previews assists in this investigation. If copying a court decision with a view to advising a client or principal is a dealing “for the purpose of research” within the meaning of section 29, so is streaming a preview with a view to deciding whether or not to purchase a download or CD.

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66 de Beer, supra note 59 at 22.
68 Society of Authors, Composers and Music Publishers of Canada.
69 Tariff no. 22, Canada Gazette Part I (November 24, 2007), online: Socan <http://www.socan.ca>.
71 Ibid at para 84.
72 Ibid at para 104.
73 Ibid at para 109.
The aforementioned decision was upheld by the Federal Court of Appeal\textsuperscript{74}, which agreed with the interpretation of the word “research” adopted by the Copyright Board\textsuperscript{75} and the Board’s decision regarding the applicability of the fair dealing defence to music previews.\textsuperscript{76} The case is currently before the Supreme Court of Canada, which granted Socan’s application for leave to appeal.\textsuperscript{77}

In a decision regarding Access Copyright\textsuperscript{78} tariff for educational institutions\textsuperscript{79}, the Copyright Board adopted a more restrictive approach. It decided that copies made by a teacher to be distributed to his or her students can not be considered a dealing for the purposes of private study.\textsuperscript{80} Moreover, regarding “criticism” the Board stated that “a copy is not made for the purpose of criticism unless it is incorporated into the criticism itself”.\textsuperscript{81}

When deciding whether the dealing was fair, the Board concluded that copies “made by a teacher with instructions to read the material”, even when requested by a student, or “made at the teacher's initiative for a group of students” are not cases of fair dealing.\textsuperscript{82}

\textsuperscript{75} Ibid at para 23.
\textsuperscript{76} Ibid at para 31.
\textsuperscript{78} The Canadian Copyright Licensing Agency.
\textsuperscript{80} Ibid at para 90.
\textsuperscript{81} Ibid at para 91.
\textsuperscript{82} Ibid at para 118.
The Federal Court of Appeal agreed with the Board’s conclusions that the definition of “private study” would not include the distribution of copies by a teacher to his or her class and/or the situations in which the students are instructed to read the materials. This case is also currently before the Supreme Court of Canada.

Moreover, in the decision granted by the British Columbia Supreme Court in Canwest v. Horizon, the decision in CCH was not even mentioned. Revealing a restrictive approach, the court followed the interpretation given in Michelin v. CAW, according to which parody is not a form of criticism and does not constitute a defence to infringement of copyright because it is not, according to the Copyright Act, one of the fair dealing categories.

In view of the aforementioned decisions, it is not very clear whether or not and to what extent the decision in CCH will be applied to future cases.

Nevertheless, even if applied to future cases, the flexibility adopted by the Supreme Court of Canada in CCH regarding the interpretation of the fair dealing provisions will not solve the uncertainties regarding the scope of each of such exceptions and the

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84 Ibid at para 37 - 38.
85 Ibid at para 46.
definition of a fairness practice, including when applicable to documentary films.

Flexibility may not be the answer documentarians are looking for. The United States fair use doctrine is an example of how flexibility in interpreting exceptions to copyright can, on one hand, benefit users of works protected by copyright but, on the other hand, increase uncertainties in determining whether or not a specific use is permitted. The United States Copyright Act\(^ {90}\) sets out a non-exhaustive list of fair use categories and four factors to be considered in determining whether or not any particular case can be considered a fair use.\(^ {91}\) These factors are (a) the purpose and character of the use; (b) the nature of the work being used; (c) the amount and substantiality of the portion used in relation to the entire work; and (d) the effects of the use upon the potential market for or value of the work being used.\(^ {92}\) Although there is no limitation regarding the fair use categories and only four aspects to be considered to determine whether certain use is fair, they did not provide much guidance to users.\(^ {93}\) Guidelines were developed by representatives of educators, authors, and publishers to help interpret the fair use provisions when applied to classroom copying in non-for-profit educational institutions.\(^ {94}\) However, even the guidelines “still raise their own questions and pose their own problems for application”.\(^ {95}\)

The lack of more precise and predictable rules regarding fair use or fair dealing, which are the cause of uncertainties associated with this subject, is the result of the difficulty


\(^{91}\) *US Copyright Act*, §107.

\(^{92}\) *US Copyright Act*, §107.


\(^{94}\) *Ibid* at 6.

\(^{95}\) *Ibid* at 7.
in anticipating all possible controversies regarding copyright, difficulty that can be explained by the “wide variety of parties and factual circumstances”96 as well as the “dynamic and diverse environment”97 involving copyright.

Nevertheless, Gordon suggests that it is “unclear whether an equitable, nonformal lack of definiteness is desirable or undesirable”.98 If on one hand, the uncertainties resulting from the lack of defined rules can frustrate desirable behavior99; on the other hand uncertain rules may lead the parties to “bargain more efficiently” then defined ones.100

Van Houweling observes that "the uncertainty produced by copyright’s vague ad hoc standards is especially costly to at least some of the entities regulated by copyright and to the society that loses the benefits of legal but nonetheless stifled activities in the arts, scholarship, technology, and education".101 Such uncertainties are one of the reasons that lead producers, and other users of copyrighted works, to adopt a more conservative behavior and avoid using copyrighted materials without the respective right holders’ authorization, even before a possible case of exception to copyright.102

Therefore, although it is impracticable to predict all possible situations and establish precise and definite rules regarding exceptions to copyright, it is also undeniable

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97 Ibid at 8.
98 Ibid at 21.
99 Ibid at 21. According to Gordon the lack of defined rules could “chill desirable behavior, because potential actors do not know as clearly as they would under formal rules what behavior is permissible and what is impermissible”.
101 Van Houweling supra note 96 at 8.
102 See Van Houweling, Ibid, at 5-6.
that the current system and the uncertainties derived therefrom have a negative effect on the
development and creation of new works and, consequently, on dissemination of information.

1.2 Other Exceptions

Besides the fair dealing provisions, other exceptions set out in the Copyright Act are especially relevant for the production of documentary films, such as those provided for in Sections 30.7 and 32.2(1)(b).103

Section 30.7 sets out that it is not an infringement of copyright to include a protected work in another work provided that such an inclusion is made incidentally and not deliberately. Note that in order to be protected under this exception, besides the work being included “incidentally”, which can be easily demonstrated, the inclusion must also be made “not deliberately”, which seems to refer to the intention of the user in having or not the protected work reproduced in the new work. Therefore, the words “not deliberately” seem to considerably limit the exception set out in this Section. For example: if during an interview for a documentary a third party is playing music nearby and, coincidentally, the song being performed relates somehow to the person being interviewed or to the documentary being produced. There is no doubt that the music was included incidentally. However, it is difficult to determine whether or not the inclusion of that song could be avoided or was deliberately included or maintained by the filmmaker to make the interview more appealing.

Section 32.2(1)(b) allows any person to reproduce, “in a […] cinematographic work: (i) an architectural work, provided the copy is not in the nature of an architectural

103 de Beer, supra note 59 at 19.
drawing or plan, or (ii) a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building”. Since documentary films mainly portray real or factual situations, the shooting of a street or neighborhood may include sculptures, drawings or other artworks that are situated in public places.
2. Fair Dealing and Documentary Films

As noted by de Beer, “Documentary filmmakers are especially and uniquely impacted by the norms of fair dealing, because they are, by definition, simultaneously users and creators of copyrighted content”. On one hand, producers wish to guarantee their exclusive rights over their films, as copyright holders; on the other hand, as users, they want to protect their right to have access to preexisting materials, such as images and sounds.

Before analyzing how the fair dealing provisions and other exceptions to copyright can be applied to copyrightable materials inserted in documentary films, it is crucial to analyze the characteristics of this kind of audiovisual work that make it distinct from other similar productions, such as fictional films and television news reporting. Why should we give special attention to documentary films when dealing with copyright limitations and exceptions?

Many documentary producers whom I worked with in Brazil enquired why their works could not be classified as journalistic works and, consequently, benefit from the same copyright exception applicable to news reporting. In order to answer this question and whether or not a documentary may fall within one of the other fair dealing categories, such as news reporting, criticism and review, it is necessary to understand what a documentary film is.

Nichols presents a definition of documentary that helps to differentiate this genre of audiovisual works from fictional movies:

104 Ibid at 17.
Documentary film speaks about situations and events involving real people (social actors) who present themselves to us as themselves in stories that convey a plausible proposal about, or perspective on, the lives, situations, and events portrayed. The distinct point of view of the filmmaker shapes this story into a way of seeing the historical world directly rather than into a fictional allegory.106

As pointed out by the author of the definition above, there are many different types of documentary films, which portray the historical world in different forms.107 Therefore, a general description such as the one reproduced above fails to point out those differences108 and might not be applicable to each and all of those types of documentaries. Differentiating the various types of documentaries is relevant to determine how important the dissemination of a certain documentary can be for the public interest.

Nevertheless, regardless of the type of documentary, in order to portray real situations, especially historical facts, documentary producers usually need to use preexisting materials, such as excerpts from preexisting literary works, other films or TV shows, news footage, still photographs, sound recordings and paintings.109 Unlike fictional movies, where the story can be adapted and unavailable materials can be easily replaced, documentary producers usually rely on specific images that may be essential to depict the truth.110

In pursuing authorizations from the respective right holders in order to use preexisting materials in documentary movies, producers may face a number of obstacles,

106 Nichols, supra note 4 at 14.
107 Ibid at 15.
108 Ibid.
110 See Knopf, ibid, at 5.
such as difficulties in finding the real copyright holder, denial from the copyright holder to
provide the material or grant the authorization, as well as high prices charged for the
requested copyright licenses. Those obstacles may be a determining factor for producers in
deciding whether or not to produce a documentary film. A 2005 survey carried out by
Kirwan Cox for DocOrg showed that the amounts expended with copyright authorizations for
many documentary films represented up to 27% of their budget.111 As a consequence of the
high costs associated with the clearance of archival footage and music, filmmakers are
avoiding to produce documentaries that require the inclusion of a great number of those
materials.112

However, are those authorizations really required? According to Knopf, copyright problems faced by producers partially result from the “clearance culture” developed in the film industry, which lead producers to pay “exorbitant sums to rights holders for uses that often should not require permission in order to satisfy the providers of errors and omissions (“E and O”) insurance”.113 The errors and omissions insurance, commonly referred to as the “E and O”, is an insurance offered to producers and other participants of the film industry which coverage includes “legal liability and defence against copyright infringement, unauthorized use of titles, format, ideas, characters, […] [as well as]

112 See Cox, ibid.
113 See Knopf, supra note 109 at 6. Knopf explains that the expression “clearance culture” is frequently used in the USA and was used in the following study: Pat Aufderheide and Peter Jaszi, “Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers”, online: (November, 2004) <http://www.centerforsocialmedia.org/>.
libel, slander [and] defamation of character”.

Usually, providers of the E and O insurance want to make sure that the risks of a liability claim have been minimized as much as possible and do not provide the insurance unless the respective beneficiaries demonstrate that all necessary authorizations (or the authorizations that are deemed to be necessary by those providers) were obtained. Normally, the opinion of a lawyer regarding the film’s chain of title is also required to support the application for the insurance. The need for an E and O insurance is often imposed by distributors or exhibitors, who require the insurance as a condition to distribute or exhibit a film. Therefore, unless it is unquestionable that no authorization is necessary (e.g.: the relevant work is in the public domain), due to the requirements of the E and O insurance providers, producers will normally use in their films only materials which had been duly released by the copyright holders, regardless of whether or not there might be a case of fair dealing or any other exception to copyright.

Knopf also suggests that “excessively cautious lawyers” contribute to this clearance culture to the extent that they usually recommend that authorizations be obtained in order to avoid potential claims, including against themselves. However, is not the lawyers’ duty to warn their clients about all possible risks? Ultimately, the clients are the ones that must decide whether or not they are willing to assume those risks and it seems that documentary producers are not, regardless of how remote the risks might be. Moreover, this “clearance culture” would not continue in practice if the law was clear enough about the application of the fair dealing provisions and other exceptions to copyright related to documentary films. Knopf admits that “the current copyright system in Canada is on balance


115 See Knopf, supra note 109 at 6.
more problematic than beneficial to Canadian documentarians”.116

DocOrg has released the “Copyright and Fair Dealing Guidelines for Documentary Filmmakers”117 ("DocOrg Guidelines") to assist documentary producers in determining whether or not a material can be used without the authorization of the copyright owner based on the fair dealing provisions and other limitations and exceptions set out in the Copyright Act. Although such a Guide gives an overview of the fair dealing provisions and how it should supposedly be applicable to documentary films, it does not address some important issues regarding the specific characteristics of documentaries and, therefore, still leaves producers with innumerable doubts about the applicability of the fair dealing provisions. The lack of a more precise guidance about this matter may be explained by the fact that the law itself is not clear in this regard.

Documentary producers face difficulties in asserting whether or not the inclusion of a certain material protected by copyright in a documentary can be qualified as one of the categories of fair dealing. Also, even if the use of a certain copyrightable material could be clearly identified as one of the fair dealing categories, determining the fairness of a certain use requires an analysis that does not provide producers with much certainty about its possible results. It is important to mention that the doubts resulting from the fairness test is not particular to documentary films.

This part will focus on the difficulties in determining whether or not the inclusion of protected materials in documentary films can be qualified as one of the following fair

116 Knopf, ibid, at 7.
dealing categories: criticism, review and news reporting, which are the categories that relate the most to the purpose of documentaries.

### 2.1 Review and Criticism

Review and criticism are fair dealing categories that may encompass a great number of uses depending on the definition given to these words. Archival materials, such as footages, photographs and even music, might be subject to review and criticism. However, in documentary films criticism and review are frequently addressed to the content of those materials, rather than to the material itself. For example: documentaries about a famous musician might show pictures of his concerts in order to criticize his music, but not the picture itself or the ideas reflected in that picture.

According to the Oxford Dictionary\(^\text{118}\) “review” means: “a report on or evaluation of a subject or past events” or “critical appraisal of a book, play, film, etc. published in a newspaper or magazine”.\(^\text{119}\) Criticism is defined by the same dictionary as “the expression of disapproval of someone or something on the basis of perceived faults or mistakes” or “the analysis and judgement of the merits and faults of a literary or artistic work” or “the scholarly investigation of literary or historical texts to determine their origin or intended form”.\(^\text{120}\)

The Copyright Act used both words without defining them. It is not clear whether or not this categories of fair dealing refer to reviewing and criticizing the work itself (e.g.: the

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\(^{119}\) Other definitions of review are provided for by Oxford Dictionary, which are not mentioned herein because they do not apply for the purposes of the subject matter of this work.

\(^{120}\) Oxford Dictionary, supra note 118.
evaluation of a book) or to its content (e.g.: review the events that are portrayed in a photograph or a footage). Vaver states that both terms “involve analyzing and judging merit or quality” and that “‘review’ may also include surveying past events or facts”.

This assertion suggests that fair dealing would be also applicable when the object of “review”, such as past events, is merely the content of the work protected by copyright.

It is important to point out that archival photographs and footage are commonly used in documentaries only for purposes of illustration. For example, a documentary about a famous singer that displays a number of pictures of her just for purposes of illustrating different moments of her life, without any reference to the quality of the picture or to that specific idea or moment portrayed in the picture. It is not clear whether Vaver intended to include this kind of use in his definition of “review”.

Nevertheless, as pointed out above, in Hubbard, Denning M.R. established that “criticism” applies not only to the work itself, but also to the “doctrine or philosophy” described in the work. In Hager v. ECW Press Ltd., the plaintiff, who wrote a book about well known Aboriginal Canadians, which contained a chapter about the famous singer Shania Twain, claimed that the defendants have incorporated passages of her book in a new book about the same singer. The Federal Court of Canada – Trial Division – made important considerations regarding the meaning of criticism and review:

[F]or the criticism or review to occur there need to be excerpts from and references to the works being criticized or reviewed. Also, when

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122 Hubbard, supra note 49.
123 Hager v. ECW Press Ltd., [1999] 2 FC 287 1998 CanLII 9115 (FC) (available on CanLII) [Hager]
criticizing or reviewing any given work it may be necessary to use quotes from others for comparative purposes.\textsuperscript{124}

Moreover, the Court confirmed the understanding about the meaning of “criticism” established by the jurisprudence, according to which the object of criticism may be not only the work itself but also the ideas reflected in the work.\textsuperscript{125} It concluded that the use of quotations and paraphrases from the plaintiff’s book in this case was not “for the purpose of criticizing either the text or the ideas” in the plaintiff’s book.\textsuperscript{126}

Therefore, it seems that even if there was criticism in the new book, the fair dealing defense would not be applicable if the subject of the criticism was neither the previous book nor its content. Therefore, it can be concluded that the use of a work to criticize only its subject (e.g. the person in a photograph) without referring to that specific work or the idea portrayed in that work would not be deemed a fair dealing for purposes of criticism.

In \textit{Allen vs. Toronto Star}\textsuperscript{127}, the defendant reproduced the cover of a magazine containing a picture of Sheila Copps to illustrate an article about her published in the newspaper. The picture was taken by the plaintiff for the magazine and he was not asked permission by the defendant to use the picture in the newspaper. The trial judge determined that the defendant infringed the copyright in the photograph owned by the plaintiff.\textsuperscript{128}

\begin{footnotes}
\item[\textsuperscript{124}]\textit{Ibid} at para 56.
\item[\textsuperscript{125}]\textit{Ibid} at para 58.
\item[\textsuperscript{126}]\textit{Ibid} at para 59.
\item[\textsuperscript{127}]\textit{Allen v. Toronto Star Newspapers Ltd.}, [1995] O.J. No. 3473. (available on LexisNexis) [\textit{Allen 1995}].
\item[\textsuperscript{128}]\textit{Ibid} at para 36.
\end{footnotes}
Toronto Star appealed and one of its arguments was that the use of the photograph did not infringe copyright because it was a case of fair dealing. The Divisional Court decided in favor of Toronto Star and determined that the fair dealing defence was applicable. The Court made two important assertions related to the dealing in question. First, it stated that the use of the photograph by Toronto Star “was related to then current news, the leadership aspirations of Ms. Copps”, and by comparing that picture to a recent one (which portrays Ms. Copps in a “more traditional political appearance”), the newspaper was able to show the changes in Ms. Copps’s image, which was the subject of the article in which both photographs were inserted. Second, the Court pointed out the way the photograph was used by Toronto Star – in a reduced form, without color and without any special prominence in the newspaper – indicated that the newspaper aimed to “aid in the presentation of a news story and not to gain an unfair commercial or competitive advantage over Allen or Saturday Night”.

In this case, the Court found that there was a relation between the new article and the ideas portrayed in the photographs. The article’s subject was the change in Ms. Copps’s image and each of those pictures reflected Ms. Copps’s style in different periods, and it seems that the intention of each of those pictures was exactly to reflect her image. The pictures were used to illustrate that change and not simply the person portrayed in that picture with no relation with the subject matter being published.

130 Ibid at para 8(2).
131 Ibid at para 44.
132 Ibid at para 37.
133 Ibid at para 38.
However, this was not the only argument presented by the Court to justify the application of fair dealing. As noted above, the Court added that the purpose of the dealing was not to compete with the plaintiff or the magazine in which the photographs were firstly published.

In this regard and assuming that documentaries normally aim to exhibit high quality images, the decision in Allen vs. Toronto Star leaves documentary producers with one question: if the photographs were published in the original size, color and prominence, would it still be a case of fair dealing? Based on the aforementioned decision, it seems that the purpose of the dealing would be an important aspect to be considered in this case. If the purpose was, for instance, only to support criticism regarding the content of the reproduced work, or to illustrate the news being reported, and not to use the reproduced work as a substitute for the original one, then the dealing would likely be fair. However, it is not easy to predict whether or not or under which circumstances a copied work, when reproduced in the same size, color and prominence of the original one, would be able to compete with the original and/or affect its market, even when these are not the purposes of the dealing.

2.2 News Reporting

The issues involving the applicability of the “review” and “criticism” categories to documentary films are not much different from those related to other works, and they refer to specific situations within a documentary work and not necessarily to the documentary as a whole.

However, are documentaries, as a category of audiovisual works, particularly
affected by the fair dealing categories? In other words, the question is whether or not a
documentary, by its nature and its importance to the public interest, might be qualified as one
of the fair dealing categories. Documentaries are frequently compared to news reporting,
since they normally portray real people in real situations. However, based on the Canadian
law, could a documentary be considered a form of news reporting for the purposes of the fair
dealing defence? Even if documentaries can not be classified as news reporting, shouldn’t
they receive the same treatment given to news reporting, as they are equally important to the
public interest?

Given the different types of documentaries, we cannot affirm that all of them
reveal a public interest in their dissemination that could justify a possible limitation or
exception to the rights granted to copyright holders. For example, a film that portrays the
personal life of an artist, simply to satisfy the curiosity of his or her fans, with no relation
whatsoever to his or her art, might not be considered as important to the public interest as a
documentary that tells the story of the World Wars.

In the decision granted in the case of Grant v. Torstar Corp.\textsuperscript{134}, regarding an
allegedly defamatory article published in the Toronto Star newspaper, the Supreme Court of
Canada presented important considerations about the definition of public interest:

\begin{quote}
[T]he public interest is not synonymous with what interests the public. The
public's appetite for information on a given subject -- say, the private lives
of well-known people -- is not on its own sufficient to render an essentially
private matter public for the purposes of defamation law.\textsuperscript{135} […] [M]ere
\end{quote}

LexisNexis) [*Grant*].

\textsuperscript{135} *Ibid* at para 102.
curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.  

Although those considerations were made for the purposes of applying defamation law, the same concept could also be applied for purposes of determining whether or not certain dealing is fair concerning documentary films. Despite the fact that it still allows different interpretations, the statement set out above could be used as a guide to determine whether or not a documentary film could be compared to journalistic content and benefit from the fair dealing category of “news reporting”. It is important to point out that the Supreme Court of Canada recognized that matters of public interest may be communicated in different ways and not only by journalists, statement that support the idea that some documentaries can be used as a way of news reporting. Scassa also observes that “in an era in which almost anyone can participate in collecting and disseminating information without the need for membership, employment or affiliation with a media outlet or a guild, the concept of journalistic purposes has become dissociated from a particular vocation”.  

This chapter will refer to those documentaries which, by its social, educational or historical values, would be presumably considered a work of public interest. 

The Canadian Copyright Act does not provide any definition of news reporting or whether or not documentaries could be considered a form of news reporting. According to the Oxford Dictionary the word “news” means: “newly received or noteworthy information, 

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136 Ibid at para 105.  
137 Ibid at para 96.  
especially about recent events”. It seems that, by using the term “news reporting”, the Copyright Act refers to the activities carry out by the press, whereby the society is periodically informed about current events. However, Section 29.6(1) of the Copyright Act gives rise to some doubts about this assertion, by stating that:

(1) Subject to subsection (2) and section 29.9, it is not an infringement of copyright for an educational institution or a person acting under its authority to (a) make, at the time of its communication to the public by telecommunication, a single copy of a news program or a news commentary program, excluding documentaries, for the purposes of performing the copy for the students of the educational institution for educational or training purposes; […] (emphasis added)

The provisions set out in this Section suggest that a documentary film might be considered a news program or a news commentary program. However, documentaries usually resort to incidents of the past, even when their purpose is to inform, criticize or comment on current events. That is the reason why archival materials are so important for documentary producers and the cause of a number of uncertainties concerning documentaries and copyrights. The question is whether or not those references to past occurrences would also be qualified as news reporting.

Regarding the reproduction of materials protected by copyright for purposes of reporting current events, the Berne Convention sets out that:

[I]t shall be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

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139 Oxford Dictionary, supra note 118.
140 Berne Convention, Article 10bis(2).
The above mentioned provisions refer to incidental uses, which were reflected in the Copyright Act in Section 30.7. Although the Article reproduced above expressly includes “cinematography” as one of the forms of reporting, it refers exclusively to “current events”. It seems that it intentionally omitted any reference to historical facts or past events. The Guide to the Berne Convention provides some guidance concerning the application of Article 10bis(2) of the Berne Convention by stating that:

It often happens that, during the reporting of current events by film or broadcast, protected works are seen or heard. Their appearance is fortuitous and subsidiary to the report itself. [...] The work must be seen or heard during the event itself; the subsequent addition of music to the film or broadcast would not be allowed [...]141 (emphasis added)

Additionally, the Guide to the Berne Convention states that “[…] the notion of current events must exclude films or broadcasts dealing only with the past”142 (emphasis added). Although the Berne Convention when dealing with news reporting refer to current events, and not past events, the provisions set out in the Guide to the Berne Convention suggest that the incidental exception could also be applicable to films dealing with the past, but not only with the past. Therefore, a documentary that resorts to past situations to portray or explain current events could be protected by the exception set out in this Article. Nevertheless, it is important to point out that in any case, the provisions in question refer only to works incidentally captured in a shooting, photograph or any other form of communication, but not to the copyrights in the shooting or in the photograph itself neither to

142 *Ibid* at 63.
any copyrightable material intentionally filmed or photographed.

Moreover, given the diversity of themes and formats of documentary films, they cannot be described in general as vehicles of news reporting. In this regard, it is worth mentioning a recent decision granted by the United States Court of Appeals for the Second Circuit, in Manhattan, in the case of Chevron v Berlinger\textsuperscript{143}, which stated that Mr. Joe Berlinger, a documentary producer, could not invoke journalists’ privileges with regard to a documentary which production was requested by certain companies to tell their story, because he fail to show that the documentary was the result of “independent reporting and commentary”.\textsuperscript{144} The Court stated that:

> The privilege is designed to support the press in its valuable public service of seeking out and revealing truthful information. An undertaking to publish matter in order to promote the interests of another, regardless of justification, does not serve the same public interest, regardless of whether the resultant work may prove to be one of high quality.\textsuperscript{145}

Although this decision does not refer to copyrights, it shows a different aspect of a documentary film, which describes current events from the perspective of one of the parties involved. Particularities of each type of documentary must be considered when evaluating its relevance to the public interest. Documentaries, like audiovisual works in general, are frequently produced with financial resources received from third parties, including the respective distributors or broadcasters. Increasingly, investors and other financial participants have being requiring approval rights in consideration for the investment made.

\textsuperscript{143} \textit{Chevron Corp. v. Berlinger} [2011] 629 F.3d 297 C.A.2 (N.Y.) (Available on Westlaw) \textit{[Chevron]}.

\textsuperscript{144} \textit{Ibid}.

\textsuperscript{145} \textit{Ibid} at para 13.
In this regard, Sounders points out an important characteristic of documentary films which, according to him, distinct documentaries from news programming: the lack of “an absolute ethical and moral obligation to strive, where reasonably possible, for complete fairness and objectivity”.\textsuperscript{146} He observers that some documentaries produced by Michael Moore, for example, have raised a lot of criticisms about the way he would present his materials, with “numerous temporal infidelities and his apparent lack of regard for sticking to the absolute facts”, for purposes of exploring polemical situations and, also, defending his point of view.\textsuperscript{147} Although Michael Moore’s documentaries, such as Bowling for Columbine (2002) and Fahrenheit 9/11 (2004), dealt with then current events of public interest, the way the events were organized and presented is an important aspect to be considered in order to determine the relevance of these films to the public interest.

On the other hand, it could also be argued that there is no guarantee that news reporting carried out by the press is free from third parties’ influence and completely impartial and objective. It is noticeable that certain events are frequently reported in different ways by the various broadcasters, newspapers and/or journalists.

Therefore, the definition of news reporting should be based on a reasonable balance of rights and interests involved in the content being communicated and not on the format or means by which the communication is made.\textsuperscript{148}

Notwithstanding the above, given the diversity involving documentary films, they

\textsuperscript{146} Saunders, supra note 3 at 18.
\textsuperscript{147} Ibid at 20-21.
\textsuperscript{148} See Scassa, “Journalistic Purposes”, supra note 138, for a discussion about the problems in determining which information would fall within “journalistic purposes” exceptions in Canadian data protection statutes, in view of the changes in the way information is disseminated nowadays. She suggests that a reasonable balance of interests should be applied in order to determine what should be understood by “journalistic purpose”.
could not, as a whole category, be deemed journalistic works or fair dealings for purposes of news reporting in accordance with the current legislation. Nevertheless, some documentary works might include reporting of current events and, in this case, that specific part of a documentary work might be considered a fair dealing for purposes of news reporting.

2.3 The Fairness Test

Although CCH has established six objective aspects to be observed in determining whether or not certain dealing is fair, the results of this six-step test may vary considerably from one case to another. All the six aspects will not even be necessarily considered in every situation related to the fair dealing exception[149], and the weight given to each of such aspects may vary, depending on the particularities of each case. In Allen vs. Toronto Star, Sedgwick J. observed that “the test of fair dealing is essentially purposive. It is not simply a mechanical test of measurement of the extent of copying involved”[150]. In CCH, the Supreme Court of Canada agreed with the Court of Appeal that although “research” was not “limited to non-commercial or private contexts”[151], when it is “done for commercial purposes may not be as fair as research done for charitable purposes”[152]. Therefore, different approaches may be applicable before different situations.

When analyzing the character of the dealing in CCH, the Supreme Court of Canada pointed out that “[i]t may be relevant to consider the custom or practice in a

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[149] See CCH, supra note 9 at para 53.
[151] CCH, supra note 9 at para 51.
[152] Ibid at para 54.
particular trade or industry to determine whether or not the character of the dealing is fair”.\textsuperscript{153} It is difficult to imagine how this assertion would be applicable to documentary films, since the practice in the film industry has shown, as already mentioned in this thesis, that producers would rather obtain all the authorizations instead of relying on the fair dealing categories.

According to CCH, “[a]lternatives to dealing with the infringed work may affect the determination of fairness”.\textsuperscript{154} “Alternatives to the dealing” is another aspect that might be interpreted in a variety of ways and might considerably affect documentary productions. For example, if a similar work is offered for free, would it be an alternative to using a protected work without authorization? The quality of footage of one film, for example, may be argued as a distinctive aspect from other non-protected works available in the market?

As stated by the Supreme Court, it would be useful to determine “whether the dealing was reasonably necessary to achieve the ultimate purpose”.\textsuperscript{155} The word “reasonably” permits different interpretations. How can a producer determine if a certain picture illustrating a past event, for example, is “reasonably necessary” to review or report that event? Would this picture be unnecessary if the portrayed object or event could be described with words? How many images are reasonably necessary to report an event: one, two, ten?

Another important aspect to be mentioned is the “effect of the dealing”. According to the decision in CCH, “[i]f the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair”.\textsuperscript{156} However, it is not clear what the expression “likely to compete” used in CCH really means and how it

\textsuperscript{153} Ibid at para 55.
\textsuperscript{154} Ibid at para 57.
\textsuperscript{155} Ibid at para 57.
\textsuperscript{156} Ibid at para 59.
would be applied in different situations. Consider, for instance, a photographer who spends money and effort in obtaining high quality photographs in locations of difficult access and has his or her photographs included in a documentary. The use of the photographs, even if it is for one of the purposes included in the fair dealing list, may interfere with the negotiation of such photographs with third parties, which might not be interested in obtaining such photographs once they were included in a documentary. Although the “availability of a licence is not relevant to deciding whether a dealing has been fair”\(^\text{157}\), assuming that the photographer depends on the revenues obtained from licensing or selling his photographs to survive, in this case, would the documentary containing the pictures be considered a competitive market? It seems that, in certain cases, it can be really difficult for a user, or even for a copyright holder, to evaluate whether or not the use of a protected material in a new work would compete with that material’s original market.

\(^{157}\) *Ibid* at para 70
3. **Is it fair?**

There are a few situations where documentary producers are able to rely on the fair dealing exceptions to insert materials protected by copyright in documentary films. When criticism or review is addressed to the work itself (e.g. to the technical quality of a photograph, the structure of a book’s text or a film’s screenplay), there is no doubt that the reproduction of that work would fall within the categories of criticism or review, as applicable. However, it is important to verify if the use of the work in question is fair, based on the six-step test developed by the Supreme Court of Canada in CCH, which include the following aspects:

(i) the amount of the work reproduced, since the reproduction of large passages of books, for example, for purposes of criticism or review are likely to be unfair;\(^{158}\)

(ii) whether it was really necessary to reproduce the work protected by copyright for the purposes of criticizing or reviewing it or the same result would have been reached without reproducing the work.\(^{159}\) In addition, whether there were other works, not protected by copyright, which could have been used alternatively. In this case, the dealing may be considered to be unfair;\(^{160}\)

(iii) whether the work to be reproduced has already been published or whether it was confidential. If it was confidential, this fact can contribute to qualify the dealing as unfair;\(^{161}\) and

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\(^{158}\) See *CCH*, supra note 9 at para 55 – 56.

\(^{159}\) *Ibid* at para 57.

\(^{160}\) *Ibid*.

\(^{161}\) *Ibid* at para 58.
(iv) whether using the work for purposes of criticism or review may negatively affect the market of the original work, which may suggest that the dealing is not fair.\textsuperscript{162}

Based on the provisions set out in the Copyright Act, it is not possible to affirm that the report of real events or historical facts in documentaries falls within the category of news reporting set out in Section 29.2. Producers that are not willing to take the risk to face a lawsuit or even a non-judicial claim resulting from an incorrect interpretation of this fair dealing category, may choose to be in the safe side by obtaining all relevant copyright authorizations.

In the event a work is incidentally included in a footage and provided that such work has absolutely nothing to do with the subject of the film, its inclusion could not be avoided and it does not make any difference to or incorporate any value to the film, the exception set out in Section 30.7 of the Copyright Act may be applicable. However, whether or not the relevant work may add value to the footage might be subject to different interpretations.

Accordingly, a detailed analysis would be required for each protected work included in a documentary in order to determine whether the use of that work may possibly fall within one of the fair dealing categories or other exceptions to copyright and, also, whether it would be deemed to be fair in accordance with the Canadian legislation. An important issue to be raised is whether the time and costs (e.g.: attorney fees) necessary for carrying out such analyses might be comparable to the costs and time consumed in obtaining

\textsuperscript{162} Ibid at para 59.
the relevant authorizations, keeping in mind that by obtaining the authorizations, the risk of a lawsuit is significantly minimized.
4. Bill C-32 – Changes

Although the changes proposed by Bill C-32 do not directly address documentaries and do not help elucidating doubts regarding the applicability of the fair dealing provisions and other exceptions to copyright to documentary films, some of these changes may impact on this kind of production.

Bill C-32 amends Section 29 of the Copyright Act to include the following fair dealing categories: education, parody and satire. The inclusion of parody and satire will positively impact on documentary productions that use humor to tell a story.

Section 29.21 of Bill C-32 includes a new exception to copyright, which permit the use of a preexisting work, provided that it has already been made available to the public, to create a new work and disseminate it for non-commercial purposes. Depending on the meaning to be given to the term “non-commercial purposes”, which is not defined in Bill C-32, this Section might have a significant impact on the production of documentaries. In the case the expression “non-commercial purposes” refers to activities that do not intend to generate revenue, a documentary film produced for free distribution, for example, or made available on the Internet, with no financial compensation, could be considered a “non-commercial user-generated content” and benefit from the exception set out in Section 29.21. Again, the law leaves potential beneficiaries of exceptions to copyright with doubts about their application.

Unlike the fair dealing provisions, the non-commercial user-generated content exception has its own “fairness test” set forth in the Copyright Act. According to Section 29.21(1)(d), such exception will only apply if the use or dissemination of the new work “does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential
exploitation of the existing work […] or on an existing or potential market for it, including that the new work […] is not a substitute for the existing one”. Although the expression “exploitation or potential exploitation” and “existing or potential market” might give rise to different interpretations, at least the Section has already established a limited list of aspects to be considered in order to determine whether or not the exception set out in Section 29.21 would be applied.

A negative aspect of Bill C-32 concerning the production of documentaries is the protection given to technological protection measures (“TPM”), introduced by Section 41 of the Bill. Producers fear that, if this Section is approved and become law, much content used to produce “world-class films in Canada” might become inaccessible.\(^\text{163}\) TPMs may hinder users to access protected materials even when they are legally authorized to reproduce them (e.g.: cases in which fair dealing exceptions are applied). Moreover, by denying access to protected materials, TPM’s will negatively impact on the dissemination of information. Materials that could be possibly used in documentaries which content might be of the public interest would not even be known by producers.

\(^{163}\) de Beer, supra note 59 at 24.
5. **Conclusion**

In view of the different forms of representing facts and/or real events, documentaries as a genre can not be qualified as one of the fair dealing categories set out in the Copyright Act. On the other hand, a documentary film may encompass situations whereby the producer can use materials protected by copyright without the authorization of the copyright holder.

However, the lack of a precise definition of each of the fair dealing categories gives rise to uncertainties regarding their scope and their applicability to documentaries. Even with the adoption of a less restrictive approach, as introduced by the Supreme Court of Canada in CCH, it is not possible to affirm that each category will include all possible interpretations given to the relevant term. The analysis of court decisions where the fair dealing exceptions were argued to justify the use of copyrightable materials revealed limitations to the meaning of some of those categories, such as “criticism” and “review”, and it is not possible to assure whether or not such limitations will be applied after CCH.

Only future decisions dealing specifically with each one of those categories, and their respective definitions, could provide more guidance with regard to their scope, including when related to documentary films. As mentioned by de Beer, litigation would be one of the ways “to clarify the scope of fair dealing”, helping documentary producers to solve their problems concerning copyright.\(^\text{164}\)

The so called “clearance culture” is not the result of over concerned lawyers, but

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\(^\text{164}\) *Ibid* at 24 – 25.
of the uncertainties raised by the current legislation, which seems to protect documentarians under fair dealing exceptions only in specific and limited situations. In view of the uncertainties involving this issue it is understandable why producers usually opt to include in their films only materials duly authorized by the respective copyright holders, increasing the costs of production. As a consequence, and taking into consideration that documentary films are not usually high profitable productions, the current law might represent a disincentive for producers, investors and other participants to venture to produce these kind of works.

On the other hand, since “bargaining may be more efficient under a blurry balancing test than under a certain rule”\textsuperscript{165}, it could be argued that the uncertainties regarding the copyright exceptions could give documentary producers better conditions to negotiate good prices for copyright licenses before the possibility, even if remote, of the application of the fair dealing defence.

However, “[i]ndependent documentary filmmakers are at an obvious disadvantage negotiating with commercial copyright sources” and the costs with copyright releases are still extremely high proportionally to documentary budgets.\textsuperscript{166} Moreover, not only license costs can hinder producers from using protected materials in documentaries, but also licenses’ time limitations, difficulties in locating copyright holders and even the refusal by the rights holders to grant the relevant licenses. Even larger organizations, such as the National Film Board of Canada, may need to take films out of the market because of copyright costs, since many copyright licenses are granted for a limited period of time and often by the time of renewal, the revenues resulting from the distribution of the relevant film


\textsuperscript{166} See Cox, supra note 111 at 2.
may not be enough to cover the respective copyright expenses.\footnote{Cox, supra note 111 at 2.} In the aforementioned survey carried out by Kirwan Cox for DocOrg, 52\% (fifty-two percent) of the respondents affirmed that they had been forced to accept licenses for limited periods in order to clear copyright materials and 18\% (eighteen percent) of the respondents said that they had been required to withdraw one of their films from public circulation because of the assertion of copyright license renewals.\footnote{Ibid at 4.} Moreover, 88\% (eighty-eight percent) of the respondents stated that they have had trouble finding affordable archival materials.\footnote{Ibid.}

The production and dissemination of documentaries which, among others, report current or past events, portray, review or criticize historical facts, as well as cultural, artistic or scientific matters, are undeniably of the public interest, and although documentary films can not be certainly characterized as a form of news reporting, in some cases they may have a similar function or may be as important as the works resulting from journalistic activities. The public interest in this kind of works justifies modifications to the legislation to avoid over protective rights that would restrain the production and disseminations of documentaries.

Uncertainties concerning the current fair dealing list could be minimized by the definition of each of such categories. The scope of “review” and “criticism” should be extended to include references to the content of the protected works being reproduced. In view of the public interest in the report of historical facts, the definition of “news report” should expressly include the reporting of current and/or past events and “documentaries” should be included as a form of news reporting, provided that they depict subjects of the
public interest and remains faithful to the factual truth.

Although the concept of public interest developed by the Supreme Court of Canada in *Grant v. Torstar Corp.*, as mentioned above, can give rise to different interpretations, it could be used as a guide to determine whether or not a documentary could be compared to journalistic content and benefit from the “news reporting” fair dealing category.

Once established that the subject in question was in the public interest, it would be necessary to determine whether or not the facts had been truly portrayed. However, the truth might not be necessarily what is published in the newspapers and other journalistic means of communication. In addition, the purpose of a documentary may be exactly to reveal the truth that is not reported by the press. Michael Chanan observes that “[d]ocumentary has a power, if not directly to reveal the invisible, nonetheless to speak of things that orthodoxy and conservatism, power and authority, would rather we didn’t know and didn’t think about. And this is exactly why we need it”. 170

Since it might be impracticable to define “truth”, the concept of “responsible journalism” also developed by the Supreme Court of Canada in *Grant v. Torstar Corp.* could be used to help differentiate documentaries that truly intend to inform or report matters of the public interest, from those that aim to manipulate the facts to create attractive products or serve the interests of particulars.

The Supreme Court of Canada pointed out that “[f]reedom does not negate

responsibility” and, based on the decision granted by the Ontario Court of Appeal in *Cusson v. Quan*\(^{172}\), it established that a responsible communication is the one which represents a matter of public interest and is made responsibly.\(^{173}\) By “made responsibly” the Court meant that the person responsible for the communication is “diligent in trying to verify the allegation(s), having regard to all the relevant circumstances”.\(^{174}\) The Court also established a non-exhaustive list\(^{175}\) of aspects to be considered in order to determine whether or not “a defamatory communication on a matter of public interest was responsibly made”.\(^{176}\) These aspects are: the seriousness of the allegation\(^{177}\); the public importance of the matter\(^{178}\); the urgency of the matter\(^{179}\); the status and reliability of the source\(^{180}\); whether the plaintiff's side of the story was sought and accurately reported\(^{181}\); whether the inclusion of the defamatory statement was justifiable\(^{182}\); whether the defamatory statement's public interest lay in the fact that it was made rather than its truth.\(^{183}\)

Although the aforementioned test was developed for purposes of determining whether or not a defamatory communication was responsibly made, this test could also be adapted

\(^{171}\) *Grant* supra note 134 at para 53.


\(^{173}\) *Grant* supra note 134 at para 98.

\(^{174}\) *Ibid*.

\(^{175}\) *Ibid* at para 122.

\(^{176}\) *Ibid* at para 110.

\(^{177}\) *Ibid* at para 111.

\(^{178}\) *Ibid* at para 112.

\(^{179}\) *Ibid* at para 113.

\(^{180}\) *Ibid* at para 114.

\(^{181}\) *Ibid* at para 116.

\(^{182}\) *Ibid* at para 118.

\(^{183}\) *Ibid* at para 119.
and used to determine whether or not the facts in a documentary were responsibly reported and, therefore, could fall within the news reporting category for the purposes of the fair dealing defence. Therefore, the “news reporting” exception should be defined taking into consideration the relevance of the subject matter to be reported to the public interest and how responsibly it was communicated, regardless of the form of or the person or vehicle responsible for the communication.

Improving definitions may solve part of the problem. The fairness test established in CCH does not provide much guidance to producers in connection with the fairness aspect of a certain use under one of the fair dealing categories. The test’s result may vary considerably from one case to the other considering the characteristics of the applicable market and the weight given to each of such aspects by the courts.

In the case of a documentary film that include a considerable number of protected materials, the filmmaker would have to submit them to a detailed analysis in order to determine whether or not the reproduction of those materials could qualify as a fair dealing and, in most cases, it would be impossible to have a faultless prediction.

Nevertheless, it is important to point out that the fairness test is a reasonable way to establish the balance between the exclusive rights granted to creators and users’ rights. Therefore, additional solutions should be pursued in this case. One option would be modifying enforcement provisions regarding copyright in order to give producers at least an estimate of the consequences that may arise out of a good faith use of copyright materials based on the fair dealing provisions which afterwards the courts consider not to be fair. The good faith aspect, however, may bring more doubts than certainty to this matter.

Although the proposed modifications may provide guidance to copyright holders,
filmmakers and even the courts about the application of the fair dealing provisions and other exceptions to copyrights to documentaries, they also present their own ambiguities and do not resolve the uncertainties related to those exceptions. Given the unlimited situations and controversies that might involve those exceptions, it is impossible to predict all of them and translate them into law. Perhaps only the courts will be able to provide the answers documentary producers are looking for. Meanwhile, the question is whether documentarians are willing to postpone their projects and take their cases to the courts or whether they would rather remain on the safe side and continue to use only protected works that have been duly authorized by the copyright holders.
BIBLIOGRAPHY

Legislation


Jurisprudence


Collective Administration of Performing Rights and of Communication Rights (Re) Copyright Act, subsection 68(3) File: Public Performance of Musical Works Statement of Royalties


Oxygen Co. Ltd. v. Liquid Air Ltd. [1925] Ch. 383, 393.


Secondary Materials


Davies, Gillian. Copyright and the Public Interest, 2d ed (London, UK: Sweet & Maxwell, 2002).


