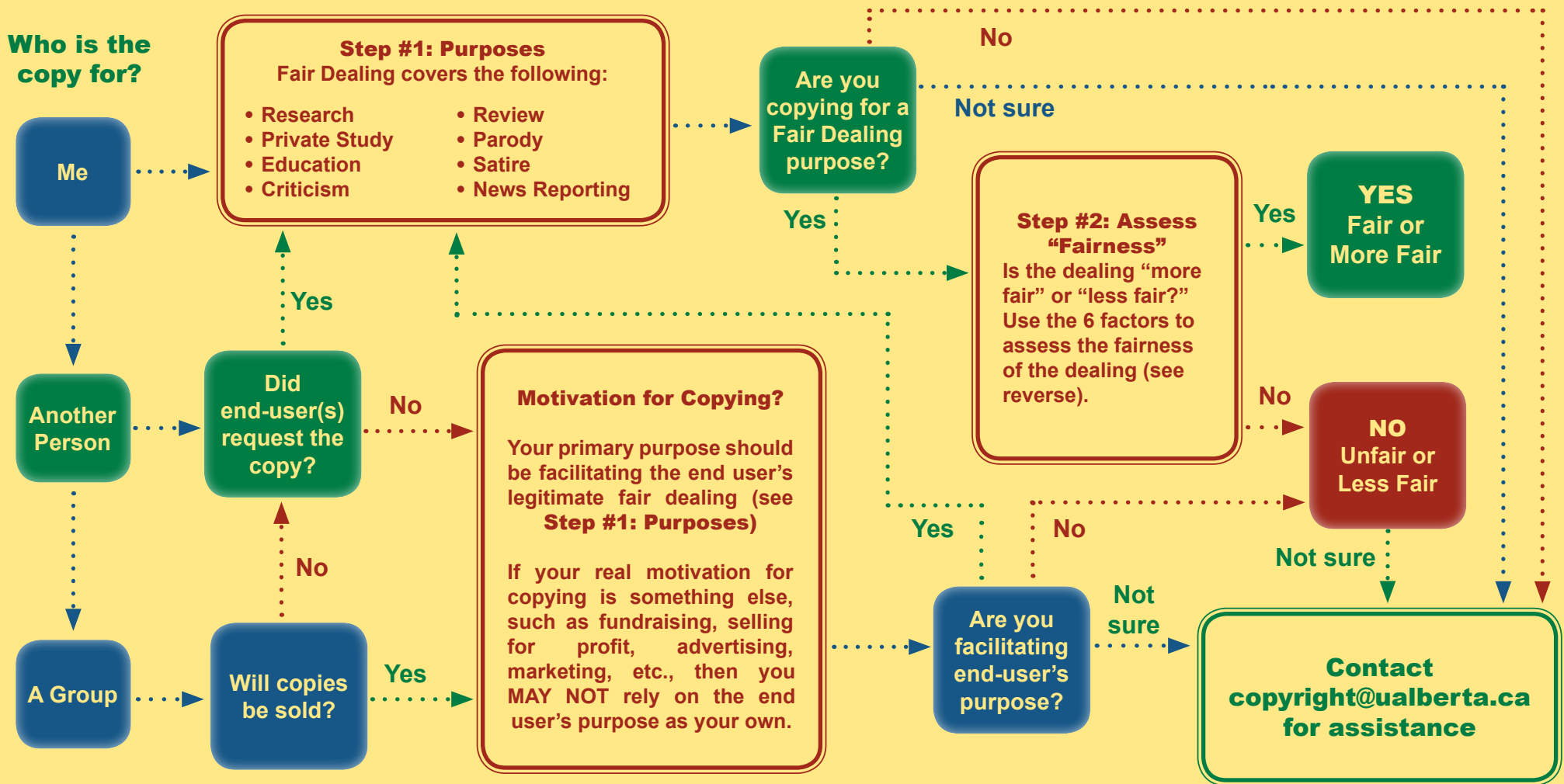


Fair Dealing Analysis Flowchart

how to conduct a Fair Dealing Analysis



Step #1: The first step considers the "purpose." The *Copyright Act* identifies a limited number of purposes that qualify under this exception. If your purpose does not qualify, contact the copyright owner for permission prior to using their work.

Step #2: The next step is to assess the "fairness" of your dealing. See reverse to assess whether your dealing is "more fair" or "less fair" based on the six factors. As long as the majority of your reasons for copying are "more fair," then you have a stronger argument for fair dealing. The majority, but not all, must be "more fair."



The Six Factors of Fair Dealing (from *CCH Canadian Ltd. v Law Society of Upper Canada*)

(i) The Purpose of the Dealing

In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the Copyright Act, namely research, private study, criticism, review or news reporting: see ss. 29, 29.1 and 29.2 of the Copyright Act. As discussed, these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights. This said, courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work. See *McKeown*, supra, at p. 23-6. See also *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Ch. D.). Moreover, as the Court of Appeal explained, some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes.

(ii) The Character of the Dealing

In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair. For example, in *Sillitoe v. McGraw-Hill Book Co.* (U.K.), [1983] F.S.R. 545 (Ch. D.), the importers and distributors of "study notes" that incorporated large passages from published works attempted to claim that the copies were fair dealings because they were for the purpose of criticism. The court reviewed the ways in which copied works were customarily dealt with in literary criticism textbooks to help it conclude that the study notes were not fair dealings for the purpose of criticism.

(iii) The Amount of the Dealing

Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If 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. As the passage from Hubbard indicates, the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. As *Vaver* points out, there might be no other way to criticize or review certain types of works such as photographs: see *Vaver*, supra, at p. 191. The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

(iv) Alternatives to the Dealing

Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court. I agree with the Court of Appeal that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.

(v) The Nature of the Work

The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair. See *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch. D.), at p. 264.

(vi) Effect of the Dealing on the Work

Finally, the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. See, for example, *Pro Sieben Media AG v. Carlton UK Television Ltd.*, [1999] F.S.R. 610 (C.A.), per Robert Walker L.J.