The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, the thesis entitled:

A Balance Between Flexibility and Certainty in Fair Use: Analysis of the Compatibility of US Fair Use and Canadian Fair Dealing with Korean Copyright Law

submitted by  Hyojung Kim in partial fulfilment of the requirements for
the degree of  Master of Laws
in  Law

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Abstract

In 2011, the Korean fair use provision, based on US fair use model, was introduced into the Korean copyright system. Since its adoption in the Korean Copyright Act, however, it has not been significantly relied upon by the courts of Korea. This thesis takes the position that strong and robust fair use is necessary in order to fulfill the purpose of Korean copyright law, which is to progress culture by protecting copyright and promoting the fair use of copyright works. Fair use could serve as a tool to attain a balance between these interests. Furthermore, fair use is particularly important in the digital era to ensure the copyright system can adapt to rapid technological changes. Given this standpoint, the aim of this thesis is threefold: First, to identify the US fair use’s incompatibility with Korean copyright law as a problem of Korean fair use. Second, to explore whether another model – mainly Canada’s fair dealing defense – could be more compatible with Korean copyright law. Lastly, to provide suggestions for increasing the widespread use of fair use in Korea by enhancing legal certainty and ensuring appropriate flexibility. These suggestions will cover the revision of the legislation, the role of the Courts, and legal experts, highlighting the significant role of fair use doctrine.

To this end, this thesis will rely on the legal transplant theory. First, the process of legal transplant of US fair use into Korean copyright law will be assessed from the perspective of legal transplant theory. The thesis will argue that the failure to account for the necessary considerations during the transplantation of US fair use has resulted in a lack of balance between certainty and flexibility in Korean fair use. Second, the thesis will analyze the cultural and historical context of Canadian fair dealing to examine its compatibility with Korean copyright
law. Lastly, this thesis will offer recommendations for Korean fair use in the context of successful legal transplant.
Lay Summary

Since its adoption in the Korean Copyright Act in 2011, the Korean fair use provision has not been significantly relied upon by courts. This thesis explores the reasons behind the lack of reliance on fair use by courts. It argues that the problem of Korean fair use stems from the unsuccessful transplant of US fair use into Korean copyright law. As a consequence, this has led to an increase in legal uncertainty and unpredictability surrounding fair use. After employing a comparative study of Canadian fair dealing, this thesis argues that Canadian fair dealing would be better suited for Korean copyright law than US fair use. As well, this thesis offers suggestions for reforming Korean fair use. These suggestions aim to establish a proper balance between sufficient legal certainty and flexibility in Korean fair use. Ultimately, it ensures that fair use is widely used in Korea.
Preface

This thesis is the original, unpublished, independent work of the author, Hyojung Kim.
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Bibliography
Acknowledgements

First and foremost, I would like to express my deepest appreciation to my supervisor, Professor Graham Reynolds, for his valuable feedback and guidance on this work. Working with him has been a wonderful experience. I genuinely enjoyed every meeting with him and found them to be incredibly valuable in shaping my research and overall experience. His expertise and support have been instrumental in the completion of this thesis. Without his continuous encouragement and guidance throughout the process, this thesis would never have been accomplished.

Additionally, I would like to extend special thanks to Professor Jon Festinger as the second reader of this thesis. I am also fortunate to have had the opportunity to attend his passionate and amazing lecture throughout my program.

Lastly, I am truly grateful to my family, especially my husband, for his unconditional support and invaluable contribution throughout my journey at UBC. As both my life partner and work colleague, his continuous encouragement and feedback have been invaluable to this thesis. I am grateful for his understanding and sacrifices, without which this thesis would not have been possible.
Chapter 1: Introduction

1.1 Background Information

Generally, limitations and exceptions to copyright are used as common tools to achieve a proper balance between protecting copyright and promoting the public interest in the copyright law. While copyright law has been more harmonized than other fields through various international treaties, limitations and exceptions to copyright vary between nations depending on their copyright history, cultural values, and legal system. There are two main approaches to limitations and exceptions: a closed list of exception and open-ended exception.¹

First, a specific limitation and exception to copyright model provides a closed list of permissible exceptions. This is the approach adopted by most civil law jurisdictions.² The second approach pairs a closed list of exceptions with a broad, open-ended exception. This approach is adopted in most common law jurisdictions including the United States (fair use) and Canada (fair dealing). Fair use in the US is the most flexible and open-ended exception as it does not limit the purpose of uses.³ Courts make case-by-case analysis to determine whether the use qualifies under the fair use test factors. On the other hand, fair dealing in Commonwealth common jurisdictions

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¹ Some scholars indicate three approaches to limitations and exceptions. See e.g., Graham Greenleaf and David Lindsay “Copyright Exceptions and Limitations – Comparative Approaches,” in Public Rights: Copyright’s Public Domains (Cambridge University Press, 2018), 328 (identifying three approaches distinguishing fair use from fair dealing).


³ See e.g., Greenleaf et al., Copyright Exceptions and Limitations, 329; Samuelson, Justifications for Copyright Limitations and Exceptions, 45.
has generally narrower scope and is limited to certain specific purposes. Hence, it consists of a two-step test: purposes of uses and fairness.\(^4\)

### 1.2 Fair Use in Korea

Fair use, an open-ended exception, was introduced into the Korean Copyright Act\(^5\) in December 2011. The previous Korean Copyright Act\(^6\) had provided only specific limitations and exceptions for copyright infringement. As the following chapter reveals, however, the changed circumstances required the consideration of including flexible exceptions in Korean copyright law to maintain balance between the rights of copyright owners and interests of users. The ratification of the United States-Korea Free Trade Agreement (KORUS FTA) required Korea to amend the Korean Copyright Act to provide additional protection to copyright owners. Moreover, Korean copyright law needs flexibility to respond to new uses and technologies in the digital environment. The Korean fair use provision is mainly based on US fair use model with customization, such as the addition of the three-step test of the Berne conventions for the Protection of Literary and Artistic Works,\(^7\) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).\(^8\)

Notwithstanding, it seems unclear that fair use has been successfully relied upon in the court of Korea. There has been no explicit statutory interpretation in the Supreme Court of Korea

\(^4\) See e.g., Greenleaf et al., Copyright Exceptions and Limitations, 328; Samuelson, Justifications for Copyright Limitations and Exceptions, 26.

\(^5\) Jeojakgwonbeop [Copyright Act]. [hereinafter Korean Copyright Act].

\(^6\) Korean Copyright Act before amended in 2011.


involving fair use since it was adopted in the Korean Copyright Act. In fact, the fair use provision was even amended once in 2016 to promote more flexibility by removing illustrated purposes of use. However, this effort has not brought about a significant change in the extent to which fair use is relied upon by the courts.

1.3 Research Questions and Objectives

It seems reasonable to argue that Korea’s fair use needs a surgery at this moment, raising the following questions: Should fair use be needed in Korean copyright law? Why has fair use not been relied upon by courts in Korea? Is the current fair use model too flexible, creating too much uncertainty? What extent of flexibility is compatible with Korean copyright law? In other words, how can Korean fair use be reformed to play its expected role in copyright law? Are there other open-ended exception models to refer, such as Canada’s fair dealing model, which could help enhance legal certainty?

Ultimately, I argue in this thesis that strong and robust fair use is necessary in order to fulfill the purpose of Korean copyright law. As the following discussion reveals, since the enactment of the Korean Copyright Act, the purpose of copyright in Korea is to progress culture

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9 There are cases where the Supreme Court of Korea upholds lower court decisions on fair use defense but without explicitly addressing fair use defense (a judicial pronouncement on fair use). For a discussion of fair use case research, See Il-ho Lee, “10 Years of Fair Use Implementation in Korea and Tasks Going Forward” (PowerPoint presentation, Seoul Copyright Forum 2022, Seoul, Korea, Sep. 27, 2022). https://www.copyrighthor.kr/eng/doc/copyrightforum_pdf/2022%20Seoul%20Copyright%20Forum.pdf; See also Il-ho Lee, “Fair Use Under Korean Copyright Law – An analysis of Case Law in Copyright Law” Copyright Quarterly 36, no. 1 (2023):151-192. (Lee employed case research involving fair use defense and copyright infringement from April 2012 to Jan. 2022 through various law databases. Lee found 59 fair use cases including cases that simply mentioned “fair use” in 10 years, whereas at least 450 copyright cases every year).

by protecting copyright and promoting the fair use of copyright works.\textsuperscript{11} Fair use can serve as a tool to attain a balance between these diverse interests in copyright law. More than this, such an open-ended principle seems particularly important in the digital era to make the legal system more responsive to rapid technological change.\textsuperscript{12} Based on this argument, the aim of this thesis is threefold: First, to identify the US fair use’s compatibility with Korean copyright law as a problem of Korean fair use. Second, to explore whether other models – mainly Canada’s fair dealing defense – could be more compatible with Korean copyright law. Lastly, to provide suggestions for increasing the widespread use of fair use in Korea by enhancing legal certainty and ensuring appropriate flexibility. These suggestions will cover the revision of legislation, the role of the Courts, and legal experts, highlighting the significant role of fair use doctrine.

As this thesis explores the compatibility of foreign rules such as US fair use model and Canadian fair dealing model with Korean copyright law, the comparative law notion of legal transplants is a useful analytical tool in this thesis. In other words, legal transplant theory could provide guidance on why the current Korean fair use is not widely relied upon and what would be improved for successful legal transplants of US fair use or Canadian fair dealing. I will demonstrate the problems of Korean fair use by evaluating the process of legal transplant of US fair use to Korean copyright law. I will argue that the failure to account for the necessary considerations during the transplantation of US fair use results in a lack of balance between certainty and flexibility in Korean fair use. This could be generated by three reasons. First, US fair use would not be compatible with Korean copyright law in the context of historical and

\textsuperscript{11} Korean Copyright Act, art 1. 
\textsuperscript{12} In the European system, as well, a need for flexibility in the system of circumscribed limitations and exceptions is gradually increased. See P. Bernt Hugenholtz, “In Flexible Copyright: Can the EU author’s rights accommodate fair use?” in Copyright Law in an Age of Limitations and Exceptions, ed., Ruth L. Okediji (New York: Cambridge University Press, 2017), 276-277.
cultural context of US fair use and Korean legal condition. US fair use has evolved within the unique legal, cultural, and policy contexts of the US. Korean copyright, however, has different legal conditions and traditions. For example, Korean copyright law traditionally allowed for specific exceptions to copyright, whereby providing greater legal certainty. Furthermore, given that copyright cases in Korea often involve criminal charges, ensuring certainty in the application of law is particularly important. Second, adding the three-step test in the Berne Convention to the Korean fair use provision could create more uncertainty. The interpretation of the three-step test is vague and subject to debate. Furthermore, the compliance of US fair use with the three-step test is also a matter of discussion. Third, the unclear relationship between previous exceptions in Korean copyright law, particularly the exception for quotation, could hinder the development of Korean fair use.

More legal certainty is needed for Korean fair use, while still maintaining breadth and flexibility. I will employ comparative study of Canada’s fair dealing, which could offer a higher degree of legal certainty than US fair use due to its two-step analysis. Based on legal transplant theory, I will discuss the question of whether Canadian fair dealing is more compatible with Korean copyright law. US fair use and Canada’s fair dealing are basically originated from the same root in the British court. However, Canada’s fair dealing has been developed based on its unique legal culture and conditions, resulting in distinct features that set it apart from US fair use. Unlike US copyright law, Canadian copyright law combines elements of both the common law tradition and civil law tradition. While US fair use primarily requires a fairness test, fair dealing generally involves a two-step analysis: purposes of use and fairness. Being applied only to the use of a work for enumerated purposes, fair dealing in Canada, similar to the UK fair
dealing, had traditionally been characterized as restrictive. However, as the following chapter will discuss, in Théberge v. Galerie d'Art du Petit Champlain Inc. (2002), the Supreme Court of Canada explicitly considered the copyright balance between promoting the public interest and creators. Finally, in CCH Canadian v. Law Society of Upper Canada (2004), the Supreme Court of Canada rejected its traditionally narrow interpretation of fair dealing. It started to acknowledge that fair dealing and other copyright exceptions are “users’ rights.” Following cases after CCH, such as SOCAN v. Bell Canada (2012), affirmed its broad approach to the enumerated purposes under fair dealing. The following cases provided guidance on the broad and liberal interpretation of factors of fair dealing test. In this thesis, I will take the position that Canada’s fair dealing is more appropriate than US fair use in the context of legal transplant. First, the legal duality of Canadian copyright law would provide Canada’s fair dealing more compatibility with Korean copyright law, which is based on the civil law tradition. Second, Canada’s fair dealing could provide more certainty and more consistency with the three-step test than US fair use, given it requires the two-step analysis. Third, considering fair dealing as user’s right provides sufficient flexibility than other fair dealing models in that it has an expansive approach to purposes under fair dealing.

To this end, I will offer three recommendations for Korean fair use reform. These suggestions will cover the revision of legislation, the role of the courts, and legal experts,

highlighting the important role of fair use doctrine. For revision of legislation, I will consider two ways. First, the compatibility of US fair use with Korean copyright law should be reconsidered and Canada’s fair dealing is suggested. The adoption of Canada’s fair dealing would be more compatible than US fair use with Korean copyright law. Second, if the current fair use model (fairness test only) is retained, the current Korean fair use provision should be modified to give further guidance and clarity in terms of relationship with the three-step test and previous exceptions. Such a modification would enhance legal certainty while maintaining sufficient flexibility. For the role of the courts and legal experts in the improvement of Korean fair use, I will suggest emphasizing the importance of conducting comprehensive studies on Korean fair use that are based on an understanding of the purpose and nature of Korean copyright. Additionally, adopting a liberal approach to fair use should be encouraged.

1.4 Structure

In this thesis, I will begin by a discussion of legal transplant theory and what should be considered for the successful legal transplant in Chapter 2 for the following discussion: whether US fair use is compatible with Korean copyright law and whether Canadian fair dealing is more compatible with Korean copyright law.

I will provide an overview of Korean copyright law in Chapter 3 before proceeding to analyze fair use in Korea. The Korean legal system is briefly introduced, followed by an overview of Korean copyright law. In doing so, I will trace back to the history of copyright in Korea and explore the nature and purpose of copyright from the perspective of the Constitution of Korea. Limitations and exceptions in Korean copyright law with relevant court cases will also be discussed.
In Chapter 4, I will analyze Korean fair use, beginning with the background of its adoption into Korean copyright law. A detailed review of US fair use is beyond the scope of this thesis, which has been commonly researched in the literature on fair use. Rather than offering comprehensive account of US fair use, I will briefly trace the origin of US fair use and US legislation, and critics to evaluate problems of Korean fair use. I will then identify the status of Korean fair use by reviewing the provision context, including amendment, and structure, along with criticism against it. Since there is no judicial pronouncement on fair use by the Supreme Court of Korea yet, decisions involving the exception of quotation will be reviewed instead. The lower court decisions on fair use are also reviewed, but the more limited aim of this review is to offer critics to unclear interpretation of fair use. Finally, I will present the problems with Korean fair use based on the above analysis. First, the compatibility of US style fair use with Korean copyright law is discussed. Second, the uncertainty caused by structure of the Korean fair use provision, which combines the three-step test and fair use, is addressed. Third, the unclear boundary between the exception for quotation and fair use in Korean copyright law is presented.

As a comparative approach, I will discuss Canada’s fair dealing in Chapter 5. I will briefly trace the origin and purpose of Copyright of Canada before reviewing the fair dealing framework in Canada. I will then examine the origins of fair dealing and how Canada fair dealing has been developed, which features are different from US fair use. Since Canada’s approach to fair dealing shifted in CCH and was reaffirmed by the following cases, I will more focus on analyzing CCH decision and its impact to politics and scholarship. Drawing upon the CCH and the following Supreme Court of Canada cases, I will discuss how the Court of Canada interprets and applies fair dealing to specific cases. Ultimately, I will conclude that Canada’s fair
dealing model is more appropriate than US fair use, given the consideration of successful legal transplants.

In Chapter 6, I will present some suggestions for the improvement of Korean fair use based on the above analysis. Several suggestions are discussed composed of the revision of legislation, the role of the Courts and legal experts, highlighting the important role of Korean fair use in the context of the purpose of Korean copyright.

1.5 Review of Relevant Literature

This section provides a literature review divided into three categories. First, Korean scholarship on fair use before 2011 and more recent literature will be reviewed. Second, literature on fair use discussing the compatibility of US fair use with EU copyright or the legal transplant of US fair use to different jurisdictions will be examined. Lastly, scholarship on Canada’s fair dealing will be introduced, which addresses a different aspect of fair dealing in comparison to US fair use. It concludes with an explanation of the author’s contribution to the previous literature.

Most of Korean scholarship on fair use has focused on US fair use. Literature before the statutory amendment aimed to introduce the US fair use principle to the Korean copyright law. Literature around 2011, when fair use was adopted into the Korean Copyright Act, paid attention to two key aspects: how to interpret the four factors of fair use in light of the US court’s

\[\text{Jun-seok Park, “The Change of Interpretation on the Quotation Provision in the Korean Copyright Act and the Review of It,” Seoul Law Journal 57, no. 3. (2016): 174-147 (US Copyright law has influenced Korean Copyright law since the amendment of the Korean Copyright Act in 1986).}\]

\[\text{See e.g., Dae Hee Lee, “Jeojakwonbeopsangui gongjeongiyongui beomnie gwanhan bigyobeopjeong yeongu [A comparative study of fair use in copyright],” Journal of Business Administration & Law 10 (2000): 341-361; Korea Copyright Commission, A study on the amendment of Copyright Act to comply obligations of the KORUS FTA (Korea Copyright Commission, 2008), 278 (Reviewing the fair use provision in the US Copyright Act); Gyoo Ho Lee and Jae Kweon Seo, Gongjeongiyong pandangijun dochureul wihan sarye yeongu [Case study for test factors for fair use] (Korea Copyright Commission, 2009).}\]
interpretation, and how to comply with the three-step test laid out in the Berne convention, TRIPS and WIPO Treaties. Although some research on other nations’ fair use or fair dealing can be found, it appears that fair dealing in Canada has not been studied extensively.

Scholars who advocated the adoption of fair use were aware that Korean copyright law needs to practice and interpret fair use differently than in the US due to differences between the US legal system and the Korean legal system. However, fundamental questions have not been extensively researched, such as whether US fair use model is compatible with Korean copyright law, or why other models are not preferable, to what extent can be adopted or customized. Although fair use was adopted into the Korean Copyright Act in 2011, these questions still remain unclear. Therefore, there is still a need for further research on to what extent US fair use can be adopted or customized to the Korean context.

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23 See e.g., Korea Copyright Commission, Study on Amendment for KORUS FTA, 278; Haewan Lee, “New Copyright Issues in Digital Environment.” (Presented, the Copyright Forum, Korea, November 25, 2009) (Supporting the Bill adopting US fair use in the Korean Copyright Act with presenting suggestions).

24 See e.g., Korea Copyright Commission, Study on Amendment for KORUS FTA, 278-279 (Reviewing US Copyright Act fair only). But see e.g., Byungil Kim, “Limitations on Copyright.” (Presented, the Copyright Forum, Korea, November 25, 2009). (Briefly Reviewing three ways to limit copyright and arguing that fair dealing model is appropriate with Korean copyright law); Kye Won Suh, “An Empirical Study on Adoption of Fair Use to Copyright Law in Korea,” Law Review (Pusan National University) 51, no. 4 (2010): 159-192. (Reviewing fair use or fair dealing principle with a need for open-ended principle in Korean copyright law and providing several suggestions to consider in adopting fair use in Korea).
Recently, some scholars expressed concern about the lack of clear guidance on fair use and fair use cases in Korea, despite its important role in copyright law. Nevertheless, most scholars try to find answer by focusing on US cases, suggesting guidelines for interpreting fair use through a review of several landmark court cases in the US. Some scholars emphasize applying fair use to new technology such as Artificial Intelligence, Text and Data Mining (TDM), and big data. Meanwhile, Ill-ho Lee takes a different approach to researching fair use by being skeptical of the previously US focused literature in a 2021 article. To determine whether US fair use model is compatible with Korean copyright law, Lee explores different aspects of general legal culture between common law countries and civil law countries, specifically the US and Korea. Lee concludes that US fair use model cannot be fully transplanted into Korean copyright law due to different legal culture and the fair use’s unique history.

Scholars' interest in US fair use is not limited to Korean scholars. In fact, US fair use has been discussed across the world to adopt it into their copyright system. While there seems no consensus whether US fair use is compatible with other jurisdictions, there is broad agreement among scholars that copyright law needs flexibility in a digital era. Several European literatures discuss whether fair use principle can be introduced to civil law traditions. In his 2017 article,

26 See e.g., Choi, Proposal to Apply Copyright Act 35-3, 35-70 (recognizing a need for guidelines of fair use in Korea and suggesting a guideline by examining the US Courts’ cases); Sung Jai Choi et al., A Study on a Guideline of Fair Use by Analyzing Cases Within and Across Countries (Korea Copyright Commission, 2019).
29 Lee, Effectiveness of Fair Use, 35, 59.
30 Korea, Israel, Liberia, Malaysia, the Philippines, Singapore, Sri Lanka and Taiwan have adopted US fair use. Australia, Hong Kong and Ireland have advanced proposals to facilitate such adoption.
31 See Hugenholtz, Flexible Copyright, 275-291.
P. Bernt Hugenholtz explores copyright flexibilities in EU copyright law from an author’s right perspective (or civil law). In explaining why European copyright law has become less flexible than U.S copyright law, Hugenholtz reviews the systemic and philosophical differences between European civil law jurisdictions and common law jurisdictions, particularly the US. Because of these differences and drawbacks of US fair use, Hugenholtz argues that US fair use doctrine cannot be transplanted into civil law jurisdictions. Nevertheless, he emphasizes that EU copyright law needs a statutory system of limitations and exceptions that guarantees both a level of legal certainty and fairness by combining relatively precise norms with sufficient flexibility to respond to rapid technological change. In a 2017 article, Martin Senftleben compares civil law traditions and common law traditions in the era of copyright limitation. Stressing the need for US fair use in the civil law system, particularly in EU copyright law, Senftleben continues to explore whether open norms can be applied in the civil law system. Peter K. Yu, in a 2018 article, focuses on transplantation of US fair use. Yu identifies eight different models of fair use when fair use is adopted in different jurisdictions including Korea. Korean fair use is introduced as an example of adding the three-step test into the fair use provision to avoid WTO disputes. Yu explains that it would minimize the chance of WTO disputes. However, with requiring additional legal analysis, Yu calls for caution that restrictive interpretation would hinder the success of the transplant-based reform.

In Canada, following the CCH case, scholarship has focused on the changes and improvements of Canada’s fair dealing through judicial action. For example, Carys Craig explores the role of terminology of “users’ rights” used by the Supreme court of Canada in the CCH case

to promote public interest in copyright law in a 2017 article.\(^\text{34}\) Although Craig warns of the potential risk of right-based reasoning that has obscured public interests in copyright law, Craig ultimately argues that the adoption of “users’ right” by the court has played a significant role in balancing the interests of owners and users in copyright law.\(^\text{35}\) Michael Geist examines how Canada’s fair dealing has come to resemble US fair use after the \textit{CCH} case.\(^\text{36}\) Giuseppina D’Agostino employs a comparative study of Canadian fair dealing and US fair use to suggest ways of improving fair dealing after the \textit{CCH} case.\(^\text{37}\) While many scholars recognize that the Supreme Court of Canada has expanded the scope of fair dealing with its changed approach, Ariel Katz argues that Canadian courts has not expanded fair dealing in a 2013 article.\(^\text{38}\) Katz characterizes the distinction between fair use and fair dealing as a “myth.” To demonstrate this, Katz analyzes the origin of Canadian fair dealing and US fair use by reviewing the enactment of the Copyright Act of 1911 and 1921. Fair dealing codified in the Canadian Copyright Act did not intend to limit the scope of fair dealing. Therefore, rather than expanding its scope, Katz suggests that the Court’s liberal approach to fair dealing has aligned with the historical record.

This thesis aims to contribute to the existing literature on Korean fair use by examining it in the context of legal transplant theory and providing suggestions for the improvement of Korean fair use. Unlike the previous research that has generally focused on US fair use, this study begins by questioning the compatibility of US fair use with Korean copyright law and

\(^{34}\) See Craig, \textit{Globalizing User Rights Talk}, 1-74.
\(^{36}\) See Geist, \textit{The Canadian Copyright Story}.
identifying it as a problem in Korean fair use. I agree with Lee’s conclusion that the current fair use model has problems and therefore further research is needed. Building upon Lee’s critique of Korean fair use, my aim is to examine the issues of Korean fair use within the framework of legal transplant theory. Furthermore, I will employ comparative research on Canada’s fair dealing and explore its compatibility with Korean copyright law. This topic has received relatively little attention in Korean scholarship. Additionally, this thesis contributes to the existing literature on Canada’s fair dealing by focusing on its compatibility with Korean copyright law in the context of historical and cultural aspects.
Chapter 2: Legal Transplant of Fair Use

2.1 Legal Transplant in Copyright Law

Why does legal transplant occur in copyright law? Literary and artistic works are now rapidly moving across national boundaries due to the digital environment and the internet. Consequently, a growing need for ensuring consistent copyright law across countries has promoted the harmonization and standardization of copyright law globally. Legal transplant has been a common tool for the harmonization of law.\(^3^9\) It could save time and effort as it draws on recognized and established doctrine. The Berne Convention has served as the most important instrument for transplanting copyright law worldwide.\(^4^0\) Berne countries enforce national laws that either implement or directly apply Berne Convention’s minimum rights. Later, the TRIPS based on the Berne Convention provisions extends the Berne rights to non-Berne members who are bound by the GATT Uruguay Round. Legal transplant could be efficient and beneficial as long as it is carefully selected and appropriately customized. Translating laws, however, can be neither effective nor suitable in the new jurisdiction.\(^4^1\) It could lead to legal uncertainty and confusion, which will be discussed in the following Korean fair use chapter.

The intention of this chapter is to provide a theoretical foundation for the questions of whether the legal transplant of US fair use doctrine to Korean copyright law is successful and


whether Canadian fair dealing is more compatible with Korean copyright law. This chapter will provide a brief discussion of legal transplant and what should be considered for a successful legal transplant. An understanding of legal transplant provides an important foundation that not only guides a comparative study of Canadian fair dealing but also offers suggestions for the improvement of Korean fair use in later chapters.

2.2 Scholarship on Legal Transplant

2.2.1 Watson’s Legal Transplant Theory

Legal historian and comparativist Alan Watson introduced the term "legal transplant" during the 1970s. Watson defines legal transplant as the moving of a rule from one country to another, or from one person to another. Watson found from the study of customary laws in 13th century Germany and France, before the adoption of Roman law that legal transplant occurred on a large scale. Rules were borrowed from other towns and transplanted into other locations, ultimately creating a more coherent and unified body of law. He argues that the development of law is primarily due to legal transplant.

2.2.2 Legal Transplant in the Context of Legal Culture

Watson’s account of autonomous transplant, however, could overlook the extent to which law is influenced and shaped by a society’s unique culture and history. In this regard, Pierre Legrand


provides a critique of Watson’s theory of legal transplant. Legrand argues that Watson’s theory fails to account for the complex and multifaceted nature of legal development.\textsuperscript{44} It simplifies the law to a set of rules and statements, without acknowledging that these rules are actively constructed and interpreted by communities.\textsuperscript{45} Instead, the law should be understood as a “polysemic signifier,” meaning that it has multiple meanings or interpretations that reflect a variety of cultural, political, sociological, historical, anthropological, linguistic, psychological, and economic influences.\textsuperscript{46} Legrand suggests that the comparatist should view the law as a complex and multifaceted concept that carries meaning more than just its technical legal definitions.\textsuperscript{47}

Legrand’s culturalist perspective critique of Watson’s theory influenced the discussion of legal transplant theory and method of legal comparison.\textsuperscript{48} For example, Gunther Teubner emphasizes that legal transplant is not a simple process. Instead, it requires assimilation into the deep structures of the new law, taking into account the unique social constructions of different legal cultures.\textsuperscript{49} Accordingly, when legal norms are transplanted from one cultural context to another, they may be understood and applied in very different ways.\textsuperscript{50} By the end of the 1990s, the idea of legal culture became a common term in comparative law, alongside concepts like legal tradition. This was an effort by scholars to move beyond basic positivism, functionalism, and ideas like the "legal family."\textsuperscript{51} Instead of using the term legal family, H. Patrick Glenn uses

\begin{itemize}
\item \textsuperscript{44} Pierre Legrand, “The Impossibility of ‘Legal Transplants,’” \textit{Maastricht Journal of European and Comparative Law} 4, no. 2 (1997): 120-122.
\item \textsuperscript{45} Legrand, \textit{Impossibility of Legal Transplants}, 120, 124.
\item \textsuperscript{46} Legrand, \textit{Impossibility of Legal Transplants}, 116.
\item \textsuperscript{47} Legrand, \textit{Impossibility of Legal Transplants}, 116, 123, 124.
\item \textsuperscript{48} Cairns, \textit{History of Legal Transplants}, 683.
\item \textsuperscript{49} Teubner, \textit{Legal Irritants}, 19, 21.
\item \textsuperscript{50} Teubner, \textit{Legal Irritants}, 24.
\item \textsuperscript{51} Cairns, \textit{History of Legal Transplants}, 685.
\end{itemize}
the term legal tradition. Legal traditions encompass abundant and readily exchangeable information. They are not isolated but rather interact and influence each other.

2.3 Conclusion: For Successful Legal Transplant

To summarize, transplanting legal norms or devices requires understanding the nature of the legal norms as well as the social and cultural context of the law. In this context, when laws are transplanted, customization or adaptation of law could be required to assimilate to the recipient legal system. Even once the laws have been adopted, they should be continuously evaluated for further adjustments to assimilate them to local conditions. Therefore, whether legal transplant becomes effective and successful depends on the process by which they are transplanted.

Returning to the subject of the thesis, US fair use is clearly one of the examples of legal devices developed by its unique culture, history and legal conditions. Thus, an understanding of the different cultural and historical contexts of US fair use and Korea’s local condition is also required for successful legal transplant. Given this consideration, the thesis explores the history, nature and purpose of copyright in Korea and how US fair use evolved under US copyright law. Based on this analysis, it then evaluates whether US fair use doctrine has been successfully transplanted. As well, customization of the current Korean fair use provision considering Korea’s copyright conditions will be discussed. This thesis will further explore another open-ended exception model, Canada’s fair dealing. Undertaking a comparative analysis of Canadian fair dealing is worthwhile because, as Watson warns, focusing solely on one legal system (the US)

53 Glenn, Legal Traditions Incommensurable, 140.
54 Glenn, Legal Traditions Incommensurable, 140-143.
55 Yu, Customizing Fair Use Transplants, 3.
may lead to the failure to identify similar changes and developments in other legal systems, which may result in the missed opportunity to learn from comparative legal studies.\textsuperscript{56} Additionally, the concept of legal traditions allows a more useful issue-by-issue basis of comparison rather than relying on legal families.\textsuperscript{57} It could help reason why Canada’s fair dealing model could be better fitted into Korea’s copyright law, even though Korea and Canada do not share the same legal families.

\textsuperscript{56} Watson, \textit{Legal Change}, 1122.

\textsuperscript{57} Korea’s legal system is based on civil law tradition, whereas the US and Canada’s legal systems are based on common law tradition.
Chapter 3: Korean Copyright Overview

This chapter provides a concise overview of Korean copyright law. Beginning by introducing the Korean legal system, the history of copyright, the nature and purpose of copyright from the perspective of the Constitution of Korea, and limitations and exceptions in the Korean copyright are discussed in respective sub-chapter. The aim of this chapter is to understand Korean copyright law for the following discussion of Korean fair use.

3.1 Korean Legal System Overview

3.1.1 Development of the Korean Legal System

Korea has a long history of more than 4,300 years. Throughout its history, Korea developed its own legal system and customary laws, although its development was influenced by Confucian and China. The modern democratic government and legal system in its present form started in 1948 when the Republic of Korea (Korea), usually called South Korea, was formally established. The Korean Legal system has a civil law tradition that was influenced by the European civil law or Japanese legal system at the beginning of the Republic of Korea. This is mainly because Japanese-revised versions of German law impacted the Korean legal system. Meanwhile, with the growing relationship with the US from political to economic area, the influence of US law

58 For the history of Korea, available at https://www.korea.net/AboutKorea/History.
59 See generally Kipyo Kim, “Overview”, in Introduction to Korean Law, ed., Korea Legislation Research Institute (Springer, 2013): 1-4 (for example, the code was influenced by China, but the ingenious and traditional customs of Korea were considered).
60 Korea was a colony of Japan from 1910 until the Second World War ended in 1945.
61 See e.g., Kim, Overview, 6; Sang Hyun Song, Introduction to the Law and Legal System of Korea (Seoul: Kyungmunsa, 1983).
can be seen increasing in the Korean legal system\textsuperscript{62} such as adopting a jury system in criminal procedure in 2008\textsuperscript{63} and amending copyright law which will be discussed in the next chapter.

Korean law consists of a Constitution, Acts and administrative legislation to implement the Acts.\textsuperscript{64} The Constitution of Korea has been amended nine times, most recently in 1987.\textsuperscript{65} The current amended Constitution of Korea\textsuperscript{66} guarantees fundamental rights and principles and provides duties. Rights to enjoy the freedom of speech, learning, property, etc.\textsuperscript{67} are recognized as rights to citizens, and the duty to pay taxes and national defense, etc.\textsuperscript{68} are provided as the duty of citizens. However, the freedoms and rights of citizens can be limited by Acts for national security, maintenance of law and order or public welfare so long as they do not violate fundamental aspects of the freedoms or rights.\textsuperscript{69} It is noted that court decisions are not a primary source of law in Korea.\textsuperscript{70} The Supreme Court’s decisions are regarded as a secondary source of law, as lower courts tend to follow the legal interpretation or rules set forth by the Supreme Court of Korea.\textsuperscript{71}

\textsuperscript{62} Kim, \textit{Overview}, 6.
\textsuperscript{63} However, the jury is advisory and jury verdicts are acting as recommendations, unlike the Jury system of the US. See \textit{generally} Sangjoon Kim, Jaihyun Park, Kwangbai Park & Jin-Sup Eom, “Judge-Jury Agreement in Criminal Cases: The First Three Years of the Korean Jury System,” \textit{Journal of Empirical Legal Studies} 10, no.1. (2013): 35-53.
\textsuperscript{64} For an English translation of Korean statutes, \textit{available at} http://elaw.klri.re.kr.
\textsuperscript{65} Honbeop [Constitution], Preamble. [hereinafter \textit{Korean Constitution}]
\textsuperscript{67} \textit{Korean Constitution}, art. 21, 22, 23.
\textsuperscript{68} \textit{Korean Constitution}, art. 38, 39.
\textsuperscript{69} \textit{Korean Constitution}, art. 37.
\textsuperscript{70} Kim, \textit{Overview}, 16.
\textsuperscript{71} Kim, \textit{Overview}, 16.
3.1.2 Korean Legal Institution

The Constitution of Korea creates a separation of constitutional powers into Legislature, Executive, and Judiciary. In this part, I will briefly introduce each institution in order to better understand the Korean legal system. The legislature called the National Assembly enacts, amends, and abolishes statutory law, which is a primary source of law in Korea. When a bill is introduced to the National Assembly, it goes through a review by Standing Committees and then is referred to the Plenary session. Once a bill is approved by the National Assembly and promulgated through the President, it becomes law and comes into force on a date provided for within the act.

The President is the head of the Executive (Government). Unlike the US Constitution, the Executive of Korea has the constitutional power to submit bills to the National Assembly. The government minister in charge of copyright policies is the Ministry of Culture, Sports and Tourism.

The Judiciary has the constitutional power to judge all legal disputes unless otherwise provided by the Constitution. With the basic three-tier system, general courts consist of the Supreme Court, High Court (Appeal Court), and District Court. The Judiciary of Korea has specialized courts including the Patent Court, Family Court, Administrative Court, and

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73 Korean Constitution, art. 40.
75 National Assembly Act, art. 98.
76 Korean Constitution, art. 66.
77 Korean Constitution, art. 52.
78 Jeongbujojikbeop [Government Organization Act], art. 35.
79 Korean Constitution, art. 101.
80 But see e.g., Hunbeobjaepanso [Const. Ct.], June 26, 1992. 90Hunba25 (the Court held that it is not considered as constitutional right)
81 Beobwonjojikbeop [Court Organization Act], art. 3, 11, 14, 28. [hereinafter Court Organization Act]
Bankruptcy Court.\textsuperscript{82} A higher court’s decision on a matter binds the lower court on that particular matter.\textsuperscript{83} However, unlike the common law tradition, the Judiciary of Korea does not adopt the \textit{stare decisis} principle.\textsuperscript{84} This means that precedent decisions are not legally binding. The Constitutional Court, which was established in 1988,\textsuperscript{85} is based on the German Constitutional Court model. Unlike the German Constitutional Court, the Constitutional Court of Korea is a separate court from the Supreme Court of Korea.\textsuperscript{86} It has jurisdiction over the constitutionality of statutes, impeachment of high-ranking government officials, dissolution of a political party, competence disputes between government institutes and constitutional complaints.\textsuperscript{87}

### 3.2 The History of Korean Copyright

#### 3.2.1 Cultural Tradition Before the 20th Century.

Copyright was not a significant issue in Korea prior to the 20\textsuperscript{th} century, because the publication and distribution of print material in Korea were strictly under government control until the 20\textsuperscript{th} century.\textsuperscript{88} Although the printing press was invented in Korea in the early 13\textsuperscript{th} century, it was

\textsuperscript{82} Court Organization Act, art. 3.
\textsuperscript{83} Court Organization Act, art. 8. (“Any decision made in a judgment of a higher court shall bind the court of lower instance with respect to the case in question”).
\textsuperscript{84} \textit{Stare Decisis} [Latin “to stand by things decided”], Black’s Law Dictionary (11th ed. 2019) 1696 (defining it as “the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation”).
\textsuperscript{85} https://english.ccourt.go.kr/site/eng/01/1010301000002020081101.jsp
\textsuperscript{87} Korean Constitution, art. 111.
used only by selected people in the government. The governmental licensing of the printing press in premodern Korea is similar to the politically motivated tactic employed by the Crown in England during the 14th and 15th centuries.

Moreover, the government did not formally protect the author’s work during the five centuries of the Yi dynasty (or Joseon) era. Confucian is considered one of the main reasons for the slow acceptance of copyright. Politics, social thoughts and institution, economics and cultural patterns in the Yi dynasty period was influenced by Confucian theory. Under the Confucian theory, ideas and author’s work were considered as a public good and authors gained honorable status through authorship. In other words, Confucian does not recognize the rights-based concept of copyright. Rather, it tends to devalue the monetary compensation for creators.

It was in 1880 that Korea first encounter the concept of copyright. Seokyeong Ji, a Joseon period physician, suggested the need to adopt a copyright system to the King. Another record shows that a newspaper published by the royal government of the Yi Dynasty introduced the copyright concept in 1884. However, it did not result in the creation of a copyright system, such as the enacting of a Copyright Act.

89 See e.g., Youm, Copyright in Korea, 278; Choi, Development of Copyright Protection in Korea, 670.
90 Youm, Copyright in Korea, 278.
91 Yi dynasty (Joseon) was the last dynasty of Korea from the late 14th century to the early 20th century. See Youm, Copyright in Korea, 278-81.
92 Lee, Culturally Based Copyright System, 1121 (“This influence appears to be a matter of general knowledge and acceptable”).
93 See e.g., Youm, Copyright in Korea, 279.
94 Lee, Culturally Based Copyright System, 1121-1124 (Presenting several features that prevailed in Korea influenced by Confucian values). Choi, Development of Copyright Protection in Korea, 670 (“Making money through writing book was not acceptable to an educated person”).
95 Youm, Copyright in Korea, 279 (“Koreans’ initial contact with copyright in the 1890s was not unique. China also first encountered copyright in the late 1800s”).
96 Kyong-Soo Choe, Early History of Copyright Law in Korea (Korea Copyright Commission, 2017), 8-9.
97 See e.g., Youm, Copyright in Korea, 279.
Japanese statutes on copyright were applied to Korea through the US and Japanese Treaty on Protection of Industrial Property in Korea, which came to effect in 1908. Following the Japanese annexation of Korea in 1910, the Japanese Copyright Act was enforced from 1910 to 1945 under Imperial Ordinance No. 338 on the implementation of the Copyright Act in Korea. It is not clear how and to what extent Japanese Copyright was enforced in Korea, but it does not seem to have been a top policy priority for the Japanese ruler in Korea.

3.2.2 Constitution of 1948 and Enactment of the Copyright Act of 1957

With the formal establishment of the Republic of Korea in 1948, the Constitution of 1948 started to recognize copyright as a constitutional right, stating “All citizens shall have freedom of science and art. Rights of authors, inventors, and artists shall be protected by Act.” It is suggested that Korean Constitution recognized the importance of the protection of the rights of authors, inventors and artists but emphasized it as a way to promote development in science, art and technology. Accordingly, the Copyright Act of Korea was enacted in 1957. Nevertheless, copyright cases were rarely found in Korea due to the country's long-standing Confucian traditions, which did not emphasize the importance of copyright. Additionally, economic

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98 US and Japan, Treaty between the United States and Japan concerning the Protection of Trademarks, etc. in Korea, May 19, 1908, art. 1.
99 Youm, Copyright in Korea, 281.
100 Youm, Copyright in Korea, 281.
102 The 1st National Assembly Records (No. 23), Quoted in Kyung Mi Seo, “The Normative Meaning of the Article 22 Section 2 of the Constitution in Judicial Review,” Journal of Constitutional Justice 6, no.2 (2019): 191-194 (detailing Korean Constitution found the justification of copyright more weighed on the utilitarian theory). But see also, Dong Ki Lee, A Study on the Constitutional Foundation of Copyright (Korean Copyright Commission: 2020), 29 (justification of copyright in Korea can be also found from Locke’s theory given that it provides moral rights to creators).
hardship after the Korean War meant that intellectual property rights protection was not a top priority.  

3.2.3 The Copyright Act of 1986

As the Korean economy has begun rapidly growing since 1962, the need to modernize the Copyright Act increased. The Copyright Act of 1957 needed to be amended to respond to the changing society. There were also concerns that The Copyright Act of 1957 did not protect Copyright and did not meet international copyright standards. Korea launched legislative action to modernize the Copyright Act in 1976, but a revision of the Copyright Act in 1986 was triggered by the trade negotiation between the US and Korea. The US complained of piracy of its intellectual property, requiring Korea to enact new and comprehensive copyright legislation to protect foreign authors’ rights, enforce the new laws and join international copyright conventions. The Copyright Act of 1957 was finally revised in 1986, increasing protection by expanding the coverage of copyrighted work and the duration of protection and recognizing the copyright of foreign authors.

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103 Lee, Culturally Based Copyright System, 1156.
104 Kyungsso Choi, Analysis on the amendment of Copyright Act of 1986 (Korean Copyright Commission, 2021), 20.
105 Choi, amendment of Copyright Act, 11.
107 Youm, Copyright in Korea, 299.
3.2.4 Amendments of the Copyright Act

Since 1986, the development of copyright protection has been quite rapid. Korean Copyright Act has been continuously amended to respond to new technology and the environment including increasing the awareness of copyright and complying with the international treaties reflecting the internationally recognized norms. Harmonization driven by international treaties and trade negotiations between the US has influenced the development of the Korean Copyright Act. Among the amendments, the following three are considered the major amendments in the history of the Korean Copyright Act. First, the Korean Copyright Act was amended in 1994 to meet its obligations from the international Korea-America Intellectual Property Trade Negotiation and Uruguay Round Agreements. Second was an amendment in 1995 to comply with commitments under the TRIPS and Berne convention. Lastly, the major amendment was the 20th amendment in 2011, to comply with a commitment made under the Free Trade Agreement between the US and Korea.

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108 Lee, Culturally Based Copyright System, 1156.
109 Korea was placed on the US watch list on intellectual property rights violation before, but not on the watch list anymore since 2009.
110 Korea joins the copyright-related international treaties and conventions as follows: Convention Establishing the World Intellectual Property Organization; Berne Convention for the Protection of Literary and Artistic Works; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite; Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms; WTO - Agreement of Trade-Related Aspects of Intellectual Property Rights; WIPO Copyright Treaty; WIPO Performances and Phonograms Treaty; Beijing Treaty on Audiovisual Performances; Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled; Universal Copyright Convention. For the date of adoption and entry into force, Available at https://www.copyright.or.kr/eng/laws-and-treaties/treaties.do
111 For the discussion on the history of amendments of the Korean Copyright Act, See Korea Copyright Commission, Introduction of the Korean Copyright System (Korea Copyright Commission, 2015), 9-19. https://www.copyright.or.kr/kcc/koreacopyright/info/data/download.do?brdctsno=39627&brdctsfileno=10800
3.3 The Nature and Purpose of Korean Copyright Law

3.3.1 Theories of Justification of Copyright

The following pages provide a concise overview of the theories of copyright for discussing the nature of Korean copyright law. Scholars generally identify two main theories that have influenced the development of copyright: the natural rights theory and the utilitarian theory. Understanding these fundamental theories underlying copyright law enables one to comprehend the purpose of copyright and evaluate Korean copyright law or practice which applies to fair use doctrine. Thus, the next step is to examine how Korean legislation and court define the nature and purpose of copyright, in light of these copyright theories.

Pursuant to the natural right theory, copyrighted works express “the author's own intellectual creation” or reflect “the author's personality.” There are different perspectives on the natural right theory: the Lockean labor theory and the Hegelian personality theory. The Lockean labor theory is based on the “root idea” of the Lockean theory that “people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry.” The Lockean justification for copyright finds the reason to protect copyright in the author’s work, having exerted mental labor in its creation. Lockean influences rights-based and author-reasoning in copyright discourse. Given copyrights are a reward for the labor, authors deserve

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113 It should be noted that none of the current legislative models are influenced by a single copyright theory due to the harmonization or standardization of copyright.


by virtue of having created their works. On the other hand, in Hegel, externalizing personality is the justification of property.\textsuperscript{117} The connection between property and personality in Hegelian thought strongly reinforces the understanding of authors' rights in terms of ownership and influences the establishment of moral rights.\textsuperscript{118} The natural right theory has influenced European Copyright law and civil law jurisdictions where copyright is generally considered as a matter of "droit d'auteur."\textsuperscript{119}

The utilitarian theory, based on utilitarianism, understands the justification of copyright as a benefit for society or maximizing social welfare by incentivizing creative production or efficient allocation.\textsuperscript{120} It is based on the understanding that giving incentives, such as exclusive rights in creative works, encourages the progress of science or creativity. As the reason for providing copyright protection to creators is to encourage them to produce socially valuable works, thereby maximizing social welfare, copyrights are limited in time and scope.\textsuperscript{121} Extensive exclusive rights granted by copyright can lead to limited access to valuable works and hinder the ability of subsequent creators to build upon previous works. Thus, copyright law ensures that protected works eventually enter the public domain, and third parties are free to use them for certain socially beneficial purposes.\textsuperscript{122}

3.3.2 Legislation: Constitution and Copyright Act

- Article 22 of the Constitution

\textsuperscript{117} Sganga, Propertizaing European Copyright, 24.
\textsuperscript{118} Sganga, Propertizaing European Copyright, 24-25.
\textsuperscript{119} Sganga, Propertizaing European Copyright, 25.
\textsuperscript{120} Hyung-doo Nam, “History and Philosophy Copyright,” Journal of Industrial Property, no. 26 (2008): 289.
\textsuperscript{122} Lemley, Intellectual Property Law, 999.
Since the first Constitution, the Constitution of Korea has provided for the protection of copyright, stating in Section 2 of Article 22 that “All citizens shall enjoy the freedom of learning and the arts. The right of authors, inventors, scientists, engineers, and artists shall be protected by the Act.”\(^{124}\) Since this article is generally considered as the basis for the protection of copyright,\(^{125}\) reviewing the intention of this article could offer a better understanding of the nature of copyright in Korea. As noted earlier in Chapter 2.2, the idea or authors’ works was traditionally considered public domain during the Yi dynasty era. Therefore, when discussing the formation of the Constitution of 1948, legislators emphasized the necessity of protecting intellectual property explicitly to promote the advancement of science and art.\(^{126}\) They considered the protection of copyright as a way to promote further invention and culture. In this regard, it is suggested that the justification of copyright in Korea can be closely found in the utilitarian theory.\(^{127}\)

- **Article 1 of the Copyright Act**

Protecting and promoting Korean culture has been a consistent aim of the Korean Copyright Act. The first Korean Copyright Act was enacted in 1957 to promote Korean culture by protecting authors of academic or artistic works.\(^{128}\) Since then, the purpose of copyright has been clearly stated in Article 1. The Act has evolved to not only protect authors and their rights but also

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\(^{123}\) Korean Constitution of 1948, art. 14. (The provision moved to art. 22 and some words were amended).

\(^{124}\) Korean Constitution, sec. 2 of art. 22. Since this provision states the rights are protected by the Act, there is a discussion about whether it is a constitutional right or not. For discussion on this, see e.g., Seo, *Normative Meaning of Article*, 183-194 (detailing the provision does not state government should enact laws but provide copyright as a constitutional right).

\(^{125}\) Seo, *Normative Meaning of Article*, 189 (c.f., US and German Constitutions state copyright, but as a way to separate the power of federal and states).

\(^{126}\) The 1st National Assembly (No. 23), quoted in Seo, *Normative Meaning of Article*, 192.

\(^{127}\) See e.g., Seo, *Normative Meaning of Article*, 194.

\(^{128}\) Korean Copyright Act of 1957, art. 1.
promote fair use of works for cultural and industrial development. Thus, Article 1 of the current Korean Copyright Act states the purpose of the Act is to “protect the rights of authors and the rights neighboring on them and to promote fair use of works in order to contribute to the improvement and development of culture and related industries.”

3.3.3 Court’s View on the Purpose of Copyright

In light of the Constitution and the purpose of the Copyright Act, the Supreme Court of Korea reaffirmed that the purpose of copyright is to achieve a balance between protecting copyright works and encouraging fair use. When a user downloaded a program onto main memory (RAM) while running a computer program installed in auxiliary memory (HDD), the court considered whether such use constitutes allowed temporary reproduction. The court stated that the intention of the limitation provision to copyright is to find an optimal balance between protecting copyright and enabling the convenient use and distribution of copyrighted works, without excessively restricting them.

Additionally, the Constitutional Court of Korea considered the purpose of copyright in reviewing the constitutionality of a provision in the Korean Copyright Act. The first case concerned whether Section 2, Article 29 of the Korean Copyright Act, which permits the playing and performing of commercial phonograms in public under certain circumstances, infringed fundamental rights to the property of authors. The Court ruled that the provision at

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129 Korean Copyright Act, art. 1. The current provision is based on the Korean Copyright Act of 1986 and “development of related industries” was added in 2009.
131 Korean Copyright Act, art. 29 (2): (“It shall be permissible to play and perform publicly any commercial phonograms or cinematographic works made public for commercial purposes for the general public, if no benefit in return for the relevant public performance is received from audience or spectators.”)
issue “serves a legitimate legislative purpose, which is to ensure that the public enjoys cultural benefits through the use of copyrighted works” and “is an appropriate means of achieving a legislative purpose” because it increases the level of cultural benefits enjoyed by the public. In another case, the court found the aim of Articles 104 and 140 of the Copyright Act with respect to disabling unauthorized transmission of original work was consistent with the constitution as it is “to protect copyrights and to improve culture and develop related industries.”

3.3.4 Conclusion

Given the intention and context of legislation and the court’s decisions, the rationale behind copyright in Korea aligns closely with utilitarian theory eventually promoting the progress of culture by protecting copyrighted works. Natural rights theory, however, also influenced Korean copyright law which was initially based on German copyright law. Therefore, the purpose of Korean copyright law is to not only safeguard authors and their rights but also to encourage the equitable utilization of works for the advancement of culture and related industries. This purpose should be considered in the evaluation and interpretation of Korean fair use which will be discussed later.

3.4 Copyrights and Limitations and Exceptions to Copyright

The Constitution of Korea states that copyright is protected by law, but it does not explain the specific rights protected or the scope of protection. Instead, it grants discretion to the legislators enacting the copyright law as long as it is consistent with the Constitution. Legislators possess

134 Seo, Normative Meaning of Article, 201.
broader discretion over the scope of protection of copyright than over general property rights, given that copyrighted work is based on the works of others and the justification of copyright is concerned with the purpose of public interest.\textsuperscript{135} This section provides a brief review of the rights and remedies provided by the Korean Copyright Act and the limitations and exceptions to copyright in Korea. Rather than providing a comprehensive account of the Korean Copyright Act, the aim of this chapter is limited to understanding the role of limitation and exception to copyright including fair use in Korean copyright law.

3.4.1 Right of Authors and Remedies

Only creative production that expresses human thoughts and emotions is protected under the Copyright Act.\textsuperscript{136} The Supreme Court of Korea requires the originality of works for protection in interpreting creative production. In order to qualify originality, a work should not merely copy others’ work but should include independent expression of its creator reflecting thoughts and feelings.\textsuperscript{137} Once qualifying copyright protection, the Korean Copyright Act protects not only the author’s economic rights but also the author’s moral rights, which are influenced by European civil law countries, especially Germany.\textsuperscript{138}

The remedies for the infringement of copyright are provided under the Korean Copyright Act. Under the Act, civil and criminal remedies are available to the copyright owner against the infringement. Civil remedies include injunctions, the remedy of damages and accounts of profit and restoration of honor (in the case of infringement to the author’s moral right).\textsuperscript{139}

\textsuperscript{135} Seo, \textit{Normative Meaning of Article}, 201.
\textsuperscript{136} Korean Copyright Act, art. 2 (1).
\textsuperscript{138} Youm, \textit{Copyright in Korea}, 299.
\textsuperscript{139} Korean Copyright Act, art. 123, 125, 127.
penalties\textsuperscript{140} can result in fines of up to KRW 50,000,000 (CAD 5,000,000) and/or prison sentences of up to 5 years.\textsuperscript{141}

### 3.4.2 Limitations and Exceptions to Copyright\textsuperscript{142}

As discussed above, copyright is not an obsolete right, but rather includes inherent limitations and exceptions. The Korean Copyright Act has been amended toward defining appropriate limits to copyright in order to achieve the proper balance between the protection and use of copyrighted works, in light of the nature and the purpose of copyright. The current Korean Copyright Act has specific limitation provisions\textsuperscript{143} as well as an open-ended limitation provision, fair use which is adopted in 2011.\textsuperscript{144}

Until the Korean Copyright Act adopted the fair use provision in 2011, the Act had closed lists of permissible exceptions that provide the types of users, type of uses, and types of works, as most civil law jurisdictions have. The Copyright Act of 1957 allowed the use of copyrighted works for specific purposes and circumstances such as exceptions for quotation and use for education.\textsuperscript{145} The Copyright Act of 1986 included more specific exceptions for reproduction for judicial proceedings; use for educational purposes; reporting current events;

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\textsuperscript{140} See Korea Copyright Commission, \textit{Copyright Statistics 2022}, 163. Since copyright owners can seek criminal remedies for all kinds of infringement regardless of how serious it is and take advantage of these to reach a monetary settlement or to build a case for a civil lawsuit, Korea has about 10,000 criminal cases every year. Recently, frivolous or unnecessary criminal lawsuits is criticized for discouraging people to enjoy the culture and freedom of expression. Criminal charges may be laid on the infringement depending on its seriousness according to the recent amendment Bill.

\textsuperscript{141} Korean Copyright Act, art. 136.

\textsuperscript{142} The terms “exceptions” and “limitations” are often used interchangeably and the distinction between the two terms is not clear. See Pamela Samuelson, “Justifications for Copyright Limitations and Exceptions,” in \textit{Copyright Law in an Age of Limitations and Exceptions}, ed., Ruth L. Okediji (New York: Cambridge University Press, 2017), 13; See also Greenleaf et al., \textit{Copyright Exceptions and Limitations}, 326-327 (stating that a distinction between the two term is commonly not drawn in civil law systems).

\textsuperscript{143} Korean Copyright Act, art. 23-35-4, 36.

\textsuperscript{144} Korean Copyright Act, art. 35-5.

\textsuperscript{145} Korean Copyright Act of 1957, art. 64.
\end{flushleft}
quotations; reproduction for private use; reproduction in libraries; reproduction for examination questions; ephemeral copying by broadcasters; reproduction for a visually impaired person, and reproduction of works of art installed in a public place.\textsuperscript{146} Later, several closed lists of exceptions, such as the exception for temporary reproduction of a computer program,\textsuperscript{147} are added to respond to the development of new technologies and new uses.

3.4.3 Role of Limitations and Exceptions to Copyright

- Specific Limitations and Exceptions

As noted above, the purpose of Korean copyright law is to contribute to the progress of culture by protecting the rights of authors while promoting fair use of works. A balance between the interest of protecting and promoting the use of copyright work is required for fulfilling the purpose. Limitations and exceptions to copyright generally play a role in balancing the various stakeholder interests of creators, owners, users and the public,\textsuperscript{148} and contributing to economic development.\textsuperscript{149} Whether the approach to limitations and exceptions is narrow or liberal plays a significant role in achieving the balance. The Supreme Court of Korea generally recognizes that the exception to copyright helps to promote a balance between the protection of copyright and the use of copyrighted works.\textsuperscript{150} Meanwhile, the Court adopted two different approaches to exceptions to copyright in interpreting specific cases, namely narrow and liberal approaches.

\textsuperscript{146} Korean Copyright Act of 1987, art. 22-34.
\textsuperscript{147} Korean Copyright Act, art. 35-2.
\textsuperscript{148} See Samuelson, Justifications for Copyright Limitations and Exceptions, 25; Greenleaf et al., Copyright Exceptions and Limitations, 326.
\textsuperscript{149} See e.g., Computer & Communications Industry Association, “Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use (CCIA: 2017). According to the report, fair use is crucial to new innovation in the U.S. economy.
\textsuperscript{150} See e.g., Daebeobwon [S. Ct.], Nov. 23, 2017. 2015Da1017, 1024, 1031, 1048.
The Starbucks case\textsuperscript{151} concerned the interpretation of “commercial music records” in Article 29(2) of the Copyright Act. It allowed the playing of any commercial music records unless no benefit in return for the public performance. The Article did not specify whether commercial music records should be intended for sale to the public. The scope of free use of copyrighted work in the Article depends on the approach taken. The Supreme Court of Korea took a narrow approach to this Article stating that the scope of free use of copyrighted work in this Article should be restrictive to music records intended to be sold to the public in order to avoid infringing the copyright holder’s interests. In this case, Starbucks played a CD that was intended only for use in Starbucks stores, not for sale to the public. Therefore, the Court ruled that it did not qualify as a commercial music record under Article 29 (2) and Starbucks infringed the copyright.\textsuperscript{152}

By contrast, The Supreme Court of Korea applied a liberal approach to interpreting the exception for a quotation.\textsuperscript{153} The Court broadened the scope of the quotation to include the use of thumbnail images in the following case.\textsuperscript{154} The case involved a dispute between a photographer who has a copyright of his images and Korean companies operating Internet search engines. Korean search engine companies provided thumbnail images of the plaintiff’s photograph in search results. The Supreme Court of Korea ruled that the use of thumbnail images in search results by Korean Internet search engines was qualified under the quotation exception. Similarly,

\textsuperscript{152} However, this provision was later amended to include any commercial phonograms or cinematographic works, in contrast to the Supreme Court’s decision. See Korean Copyright Act, art. 29 (2) (“It shall be permissible to play and perform publicly any commercial phonograms or cinematographic works made public for commercial purposes for the general public if no benefit in return for the relevant public performance is received from audience or spectators: Provided, That the same shall not apply to the cases as prescribed by Presidential Decree.”) [emphasis added]
\textsuperscript{153} Korean Copyright Act, art. 28. (“Works already made public may be quoted for news report, criticism, education, research, etc., in compliance with the fair practices within the reasonable extent.”)
the US court ruled in similar cases\textsuperscript{155} that the creation and use of thumbnails in the search engine did not infringe the copyright because the use of thumbnails was fair use. The Supreme Court of Korea considered similar US fair use factors in interpreting “the fair practices within the reasonable extent” of the provision: “Purpose of Quotation,” “The Nature of the quoted work,” “The content and amount of the quoted portion,” “The Possibility of displacement of the Market demand for the original work.”\textsuperscript{156}

The lower court followed the broad and liberal approach of the Supreme Court of Korea in a case concerning the use of a Korean singer’s song in creating a video and unloading it to a website. In this case,\textsuperscript{157} a user created a 53-second video by recording his daughter’s singing a popular Korean singer’s song with dancing and uploading it to a website. By extending the scope of the quotation, the Seoul High Court found that the use of a song in this video was allowed under the quotation exception. The Court reasoned that the purpose of use was for non-profit purposes, a relatively short portion of the song was used, and the poor sound quality hardly displace the market demand for the song.

As seen in the cases above, the courts of Korea relied upon the exception for quotation to attain the copyright balance in cases where specific exceptions cannot deal with new technology and use before the fair use principle was introduced in the Korean Copyright Act.\textsuperscript{158} However,

\textsuperscript{155} Kelly v. Arriba Soft Corp., 336 F. 3d 811 (9th Cir. 2003); Perfect 10, Inc. v. Amazon, 508 F. 3d 1146 (9th Cir. 2007).
\textsuperscript{156} See Park, \textit{Change of Interpretation on the Quotation Provision}, 174-192 (detailing the influence of US copyright law on the Court of Korea in interoperating the exceptions of quotation).
since fair use was adopted, the exception of quotation provision should not be interpreted broadly but be limited to the scope of the definition of quotation.\textsuperscript{159}

- **Fair Use Provision**

As the following discussion, the fair use provision was introduced to Korean copyright law in 2011 to attain a balance between the interests of copyright owners and the public interest, particularly in response to the need for more flexibility in the face of rapidly changed technology in a digital age. As well, the Supreme Court of Korea has recognized that fair use doctrine was developed through the balancing of competing tensions between the interests of copyright holders and the public interest.\textsuperscript{160} What is different from previous exceptions is that flexibility of fair use allows copyright law to adapt new technology and new types of uses. Given the purpose of copyright and the role of fair use, fair use should be frequently relied upon as a tool to fulfill the purpose of copyright.

\textsuperscript{159} Jun-seok Park, as well, argues that the exception of quotation provision should be limited to the ordinary scope of quotation. See, Park, *Change of Interpretation on the Quotation Provision*, 198, 201.

\textsuperscript{160} Daebeobwon [S. Ct.], February 15, 2013, 2011Do5835 (Criminal).
Chapter 4: Fair Use in Korea

This chapter addresses Korean fair use and its problems in the context of successful legal transplants. First, since Korean fair use is based on US fair use, I present a brief review of the origins of US fair use, legislation, and its critics. Second, I explore the background and process of the adoption of fair use by reviewing the purposes of adoption and bills. The aim here is to analyze whether there was reasonable evaluation of compatibility with Korean copyright law. Third, I analyze the Korean fair use provision and court cases whether the customization of fair use doctrine was successful to ensure compatibility with Korean copyright law, particularly in terms of legal certainty. Finally, I discuss the problems with the current Korean fair use provision based on the above analysis.

4.1 US Fair Use Overview

In this section, I overview US fair use doctrine, paying particular attention to its origin, legislative process (including its intentions and context), and criticisms. This section aims to trace the origin and criticisms of US fair use doctrine to examine its compatibility with Korean copyright law in the context of legal transplant, which will be discussed later.

4.1.1 Origin of US Fair Use

From the foundation of the US to the mid-nineteenth century, US copyright law protected a much narrower scope of copyright than it does now and interpreted copyright’s exclusive rights
rather narrowly.\textsuperscript{161} In fact, the US favored ideas, literary creations and scientific inventions freely as it was one of the developing nations during that time.\textsuperscript{162} Exact or near-exact copying of protected works was considered as infringement.\textsuperscript{163} This narrow scope of copyright aligns with English copyright law since most copyright case law in the US was developed from English case law.\textsuperscript{164}

By 1841, Justice Story’s decision in \textit{Folsom v. Marsh}\textsuperscript{165} is credited as the source of the four-factor fair use test.\textsuperscript{166} The decision is also viewed as a transition towards the expansion of copyright as it drew a distinction from the previous infringement standards.\textsuperscript{167} This case concerned whether a biographer’s unauthorized excerpting of 353 pages of George Washington’s letters from a twelve-volume biography was an infringement. Marsh argued that the accused work was a fair abridgment that did not infringe, which was a plausible defense given that similar abridgments had been allowed by numerous English courts.\textsuperscript{168} However, Justice Story found infringement, stating that “a mere selection, or a different arrangement of parts of the original work, so as to bring the work into a smaller compass did not constitute a fair

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\textsuperscript{161} Samuelson, \textit{Justifications for Limitations and Exceptions}, 16-17. (because of the narrow scope of protection during the first hundred years, US law had no limitations and exceptions); Nam, \textit{History and Philosophy Copyright}, 263-265 (In the earlier, the US tended to favor a liberal use of copyright in the name of public interest). see also Matthew Sa, “The Prehistory of Fair Use,” \textit{Brooklyn Law Review} 76 (2011): 1371, 1380-87 (detailing this view originated from the apparently narrow grant of rights in the Statute of Anne, 1710, 8 Ann. C. 19 (Eng.) and earliest cases).


\textsuperscript{163} Samuelson, \textit{Justifications for Limitations and Exceptions}, 17.

\textsuperscript{164} Sa, \textit{The Prehistory of Fair Use}, 1379.

\textsuperscript{165} Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (no. 4901).

\textsuperscript{166} Samuelson, \textit{Justifications for Limitations and Exceptions}, 17, \textit{But see} Sa, \textit{The Prehistory of Fair Use}, 1371-1412 (the decision draws upon English common law’s fair abridgment. Thus, an evaluation of the case’s significance in the development of US copyright law requires an understanding of the development of premodern English copyright law).

\textsuperscript{167} Sa, \textit{The Prehistory of Fair Use}, 1377-1378.

\textsuperscript{168} Sa, \textit{The Prehistory of Fair Use}, 1375.
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abridgment.”\textsuperscript{169} Consideration was given to “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”\textsuperscript{170}

\subsection{Legislation of US Fair Use}

Since \textit{Folsom v. Marsh}, fair use doctrine and its criteria have been developed by the courts over a period of many years. It remained an uncodified common law principle until it was first codified in the Copyright Act of 1976. The aim of codification was the recognition of the importance of fair use doctrine as a limitation on the rights of copyright owners and its frequent application. It should be emphasized that it was not to change, narrow, or enlarge it, but rather to offer some guidance and restate the present judicial doctrine of fair use.\textsuperscript{171} The general scope of fair use doctrine became indicated in the statute - albeit it is difficult to prescribe rules suitable for all situations.\textsuperscript{172} Hence, the US fair use provision in Section 107 of the Copyright Act provides that:

\begin{quote}
[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether
\end{quote}

\textsuperscript{169} Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (no. 4901).
\textsuperscript{170} Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (no. 4901).
\textsuperscript{172} For discussion and recommendation before the revision of US Copyright law in the 1960s, see United States Copyright Office, "Report of the Register of Copyrights of the General Revision of the U.S. Copyright Law" (Washington, D.C.: U.S. Government Printing Office, 1961), 24-25(for fair use). [hereinafter Register’s report 1961]. It gives some idea of the sort of activities that might be regarded as fair use by the courts under the circumstances: “quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.” It also recommends that the statute should include a provision affirming and indicating the scope of the principle that fair use does not infringe on the copyright owner’s rights.
the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.173

The specific wording of Section 107 is the result of a process of accretion and a long controversy over the related problems of fair use, primarily the reproduction of copyrighted material for educational and scholarly purposes.174 There was a requirement to offer more certainty and protection specifically for teachers in Section 107.175 For example, “by reproduction in copies or phonorecords or by any other means” or “multiple copies for classroom use” referred in the first sentence was intended to make it clear that fair use is applied under the proper circumstances of fairness.176

The four standards adopted in Section 107 were based on the criteria developed by the US courts. These criteria are interrelated, so the courts explore them together in light of the purpose of copyright.177 However, their relative significance may vary, as the courts must be free

173 This sentence was inserted since the amendment of 1992 (Pub. L. 102-492).
174 House of Representative Report. No. 94-1476. (1976), 66
175 Another effort to meet this need was to provide guidelines for classroom reproduction of printed material, music, and audio-visual materials. See, House of Representative Report. No. 94-1476. (1976), 67-74.
176 House of Representative Report. No. 94-1476. (1976), 66 (“most of the discussion of section 107 has centered around questions of classroom reproduction, particularly photocopying”).
177 See e.g., Campbell, 577-578.
to determine the doctrine on a case-by-case basis.\(^{178}\) Therefore, fair use doctrine continues the common law tradition of fair use permitting courts to avoid rigid application of it.\(^{179}\)

### 4.1.3 Flexibility and Critics of US Fair Use

Typically, US fair use is considered an affirmative defense to copyright infringement in the US.\(^{180}\) It is a crucial aspect of how copyright law balances the need to compensate creators and facilitate the growth of art, along with the public benefits that arise from it. Moreover, fair use promotes freedom of speech and expression guaranteed in the First Amendment.\(^{181}\)

What distinguishes the feature of US fair use doctrine from other exceptions lies in its flexibility. Its open-ended term and case-by-case analysis allow for a wide range of uses, enabling copyright law to adapt to new technology. On the flip side, however, this often results in unpredictability, which is said to arise from the fact-intensive, case-by-case nature of fair use analysis and the lack of judicial consensus on the fundamental principles underlying fair use.\(^{182}\)

Such an open-ended character is likely to be problematic because whether the use is legitimate

\(^{178}\)Register’s report 1961, 24.

\(^{179}\)See e.g., Campbell, 569 (“Section 107 continues the common law tradition of fair use adjudication and requires case-by-case analysis rather than bright-line rules.”).


\(^{181}\)See e.g., Eldred v. Ashcroft, 537 U.S. 186 (2003), 219 (“the fair use defense allows the public to use not only facts and ideas contained in a copyrighted work but also expression itself in certain circumstances”).

\(^{182}\)See e.g., Lawrence Lessig, Free Culture: How Big Media Uses Technology And the Law to Lock Down Culture and Control Creativity (The Penguin Press, 2004), 187 (characterizing fair use as “the right to hire a lawyer”); Neil Weinstock Netanel, Copyright’s Paradox (Oxford University Press, 2008), 66 (“Given the doctrine’s open-ended, case-specific cast and inconsistent application, it is exceedingly difficult to predict whether a given use in a given case will qualify.”). But see also Samuelson, Justifications for Copyright Limitations and Exceptions, 49 (criticism has been overstated since fair use is not a completely open-ended doctrine. The statute directs courts to consider various factors and the provision provides a set of favored purposes); Samuelson, Unbundling Fair Uses, 2541-2544 (arguing fair use is coherent and predictable, suggesting categorizing fair use cases into “policy-relevant clusters” based on the preamble to Section 107 of the US Copyright Act which set forth six favored uses, three main policies underlie the six preambular uses: promoting free speech and expression interests of subsequent authors and the public, the ongoing progress of authorship, and learning.
becomes clarified after expensive litigation. Some users who want to use copyrighted material fairly may be risk-averse to begin with.¹⁸³ That uncertainty often hinders the progress of culture and science.¹⁸⁴

There has been a lot of discussion about the unpredictability of fair use, particularly its first factor and the transformative. Transformative inquiry is not specifically listed in the US Copyright Act. The US courts, however, have defined transformative in different ways.¹⁸⁵ The definition of transformative the most widely used comes from Campbell v. Acuff-Rose Music, Inc. That definition states “[t]he central purpose of this investigation [under the first fair use factor] is to see… whether the new work merely ‘supersede[s] the objects’ of the original creation, …or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”¹⁸⁶ One of the primary reasons why transformative uses are favored is because they often promote the type of novelty and are less likely to have a negative impact on the original creator’s profit.¹⁸⁷ However, it is not always clear what qualifies as transformative, how much a second user must change an original, and which perspective matters when interpreting the purpose of the work. This lack of clarity has led to inconsistencies in case law.¹⁸⁸

¹⁸³ D’Agostino, Healing Fair Dealing, 351.
¹⁸⁴ Brian Sites, “Fair Use and the New Transformative,” Columbia Journal of Law & the Arts 39 (2016), 515-516 (detailing that confusion stems from uncertainty about the parameters of fair use leads art historians, artists, graduate students to avoid or abandon works).
¹⁸⁶ Campbell, 578-579.
¹⁸⁷ Sites, Fair Use, 519.
¹⁸⁸ For a comprehensive discussion on this, see Sites, Fair Use, 519-549 (e.g., Seltzer v. Green Day, Inc. 725 F.3d 1170, 1181 and Cariou v. Prince, 714 F.3d 694, 698 created inconsistency).
4.1.4 Conclusion

To summarize, US fair use has evolved within its unique legal, cultural, and policy contexts of the US. It is the most flexible exception to copyright in its application and potentially broad in its scope, whereby it enables US copyright law to respond to new technology and uses. Fair use encourages the advancement of both the objectives of copyright and the protection of freedom of speech and expression, as guaranteed by the First Amendment. While fair use plays a significant role in achieving the purpose of US copyright and constitution, its application is criticized for its unpredictability. In this regard, providing certainty and protection for users in education was considered when fair use was codified. Additionally, numerous precedent cases in the US offer guidance and context for interpreting fair use. Therefore, the background behind the evolution of US fair use with a high level of flexibility, as well as how the balance between certainty and flexibility is achieved, should also be considered when transplanting US fair use to a foreign legal system.

4.2 Adoption of US Fair Use into Korean Copyright Law

In this section, I examine the background and process of the adoption of fair use by reviewing the purposes of adoption and bills. This section aims to analyze whether there was a reasonable evaluation of the compatibility of US fair use with Korean copyright law before the adoption of fair use.
4.2.1 A Need for Copyright Balance after KORUS FTA

The Korean Copyright Act was amended on June 30, 2011, and December 2, 2011, to undertake obligations of the KORUS FTA and the Free Trade Agreement with the European Union. Most of them were for expanding the scope of copyright protection. The statutory definition of reproduction has covered temporary fixation in a tangible medium. The duration of copyrights and neighboring rights has been expanded from fifty years to seventy years. Exemptions to online service provider liabilities have been more specified, and prohibition regarding the circumvention of Technological Protection Measures (TPM) has been adopted.

The fair use provision was introduced into the Korean Copyright Act during these amendments in 2011. However, introducing the fair use principle to the Korean Copyright Act was not one of the obligations of the KORUS FTA. Instead, whether the definition of reproduction covers temporary fixation was highly controversial during the negotiation of the KORUS FTA. Korea opposed the US proposal for temporary storage from the first round of talks in 2006 until the final official round of talks in March 2007, arguing that it could discourage users from accessing copyright works or knowledge. Korea ended up changing its position later, and a footnote regarding fair use was introduced to the final text of the KORUS FTA, as

190 It entered into force provisionally on July 1, 2011, and was formally ratified in December 2015. (hereinafter “KOREU FTA”).
191 Korean Copyright Act of Dec. 2011, art. 2.
follows.\textsuperscript{196} It considered Korea’s concerns about expanding the scope of reproduction rights,\textsuperscript{197} which would lead to losing a balance between protection and the use of copyrighted works.

**ARTICLE 18.4: COPYRIGHT AND RELATED RIGHTS**

1. Each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works, performances, and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).\textsuperscript{11}

Footnote 11

Each Party shall confine limitations or exceptions to the rights described in paragraph 1 to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder. *For greater certainty, each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in the previous sentence.* [Emphasis added]

Given the negotiation process and the final text of the KORUS FTA, it seems clear that fair use was introduced to achieve a balance between protection and the use of copyright works in copyright law. The report of the National Assembly, as well, explained two reasons for adopting the fair use provision in 2011.\textsuperscript{198} First, Korean copyright law needed flexible limitations and exceptions in the digital era.\textsuperscript{199} Second, and most importantly, the Korean Copyright Act needed a balance between protection and use of copyrighted works especially since it had to ensure a high level of copyright protection due to the KORUS FTA and KOREU FTA.

\textsuperscript{196} KORUS FTA was signed by both countries on June 30, 2007. Entire text is available at https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.
\textsuperscript{197} Korea Copyright Commission, *Study on Amendment for KORUS FTA*, 15, 73; See also Nam, *How Fair Use get into Korea*.
\textsuperscript{198} The National Assembly of the Republic of Korea Culture, Sports & Tourism Committee, *A Report on Amendment of Copyright Act* (February 2009), 64-68; See also, Park, *Change of Interpretation on the Quotation Provision*, 194.
\textsuperscript{199} Although the courts had interpreted the quotation exception liberally, the way in which the quotation exception had been interpreted went beyond the scope of the original meaning of the quotation or the legislator’s intention.
There, however, still remains a question of why US fair use doctrine was chosen. As seen in Footnote 11, the KORUS FTA does not mandate the adoption of US fair use doctrine nor be limited to US fair use doctrine when adopting limitations or exceptions. Rather, the US report expressed concerns about adopting fair use in Korea, given that “since Korea is a civil law system which lacks the precedential background against which US fair use exception has developed, implementation of any new fair use provision will be extremely difficult and is likely to increase sharply the unpredictability of Korean copyright law.” To explore the transplantation of US fair use into Korean copyright law, the following chapters involve reviewing the bill and the discussions surrounding the adoption of fair use.

4.2.2 Discussion Around the Adoption of Fair Use

While the report on the amendment for the KORUS FTA employed by the Korea Copyright Commission indicated how the Korean fair use provision was developed, it did not provide a clear answer as to why Korea should adopt the US model. The discussion in the report appears to be based on the assumption that US fair use was to be adopted. The report primarily reviewed the US Copyright Act briefly and examined whether adopting US fair use complies with the


201 Korea Copyright Commission, Study on Amendment for KORUS FTA. The report was employed before the Korean government presented the Bill for the amendment of the Korean Copyright Act to undertake the obligations of the KORUS FTA. The Korea Copyright Commission is the organization under the Korean Copyright Act. One of its roles is researching policies and legislation on copyright.

202 Korea Copyright Commission, Study on Amendment for KORUS FTA, 276-283. The author could not find other official reports on the adoption of fair use in Korea.
three-step test and civil law system. In the end, it presented a draft for the Korean fair use provision as follows.

**Tentative Article 35-3 (Fair Use of Works)**

(1) Except as provided in articles 23 through 35-2\textsuperscript{203}, where a person does not unreasonably undermine an author's legitimate interest without conflicting with the normal exploitation of works, he or she is entitled to use such works.

(2) In determining whether an act of using works falls under paragraph (1), the following matters shall be considered:

1. Purposes and characteristics of use; such as for-profit or non-profit;
2. Types and purposes of works;
3. Amount and substantiality of portion used in relation to the whole works;
4. Effect of the use of works on the existing or potential market for the works or current or potential value thereof.

As seen above, this draft includes the three-step test in Section 1 of the fair use.

Therefore, the draft of the fair use provision is composed of two sections: the three-step test and US fair use. Its intention was to address the concern that adopting US fair use may not comply with the three-step test in the Berne Convention and TRIPS. In doing so, the Korea Copyright Commission stressed that Korean fair use is only allowed under the scope of the three-step test.\textsuperscript{204} Later bills for fair use were built upon this draft provision.

Meanwhile, the adoption of fair use into Korean copyright law was controversial prior to enactment, especially after the Korean government presented the draft Bill for the Copyright Act amendment.\textsuperscript{205} For example, the Korean government held public hearings for the Copyright Act amendment that reflected the obligations of the KORUS FTA on September 12, 2007. Some

\textsuperscript{203} These Articles refer to specific exceptions and Limitations in the Korean Copyright Act.
\textsuperscript{204} Korea Copyright Commission, *Study on Amendment for KORUS FTA*, 279.
\textsuperscript{205} This draft had the same clauses for fair use as in the report of *Study on Amendment for KORUS FTA* by the Korea Copyright Commission. After public hearings on this draft, the Bill proposing fair use by Korean Government was introduced to the National Assembly on September 10, 2008(No. 1801513).
scholars supported the adoption of fair use, but many scholars in the public hearings also expressed concerns about fair use adoption that reduces legal certainty (“Debate over New Fair Use Provision in Public Hearings for The Copyright Act Amendment,” Beomnyulsinmun [The Law times], September 27, 2007). Fair use was also discussed in the Copyright Forum held in the same year. Byungil Kim proposed fair dealing since fair dealing could enhance legal certainty by providing purposes, whereas US fair use could reduce legal certainty. Jongsoo Yoon called for caution on injecting the three-step test into the Korean Copyright Act, bringing up the possible result of a restrictive interpretation of the three-step test language.

4.2.3 The Fair Use Provision in the Copyright Act of 2011

Despite the controversial debate surrounding it, the fair use provision was finally introduced to the Korean Copyright Act in 2011. The Bill regarding the amendment of the Copyright Act for obligations of KORUS FTA was referred to the plenary session directly without a standing committee’s review. Therefore, further discussion on fair use during the legislative process cannot be found. Its structure and contents were based on the first Bill introduced by the Korean Government. There were no major changes except for the addition of example

206 Kim, Limitations on Copyright.
207 Jongsoo Yoon, “Fair use” (Presented, Copyright Forum, Korea, November 25, 2009).
208 Korea National Assembly, Education Culture Sports Tourism Committee, Report on the Review of Bill 6167 (2016), 22 (Due to conflicts between parties on KORUS FTA).
209 See Minsoo Choi, Korea National Assembly, Education Culture Sports Tourism Committee, Report on the Review of Bill from legislator Byun Jaeil, etc. (2009), 64-68 (Supporting the Bill to adopt fair use, it explained a need to adopt flexible open-ended limitations and exceptions to copyright. However, it also mentioned legal uncertainty caused by the open-ended norm. Nevertheless, this report did not further discuss other types of open-ended exceptions, such as fair dealing).
210 The Government presented Bill of 1801513 expired after the regular session, but it became the basis of the passed Bill (No. 1813727).
purposes of use in Section 1. The fair use provision introduced in the Korean Copyright Act in 2011 was as follows:

**Article 35-3 (Fair Use of Works)**

(1) Except as provided in Articles 23 through 35-2 and 101-3 through 101-5, where a person does not unduly harm an author's legitimate profits without conflicting with the usual method of using works, etc., he/she may use such works, etc. for the purposes of coverage (News Reporting), criticism, education, research, etc. [emphasis added]

(2) In determining whether an act of using works, etc. falls under paragraph (1), the following matters shall be considered:

1. Purposes and characters of use, such as for-profit or non-profit;
2. Types and uses of works, etc.;
3. Proportions of used parts in the entire works, etc. and their importance;
4. Influence of the use of works, etc. over the current market or value or potential market or value of such works, etc.

### 4.3 Fair Use in Korean Legislation and Court Decisions

As discussed above, when laws are transplanted, even after the adoption, there may be a need for customization or adaptation to align them with the recipient’s legal system. In this section, I analyze whether US fair use doctrine has been successfully customized with Korean copyright law. The primary focus of the analysis is the uncertainty pertaining to Korean fair use. I explore whether the introduction of the three-step phrases and the amendment of the context within the Korean fair use provision have led to an increase in this uncertainty. Subsequently, I examine court decisions involving fair use and how they increase uncertainty surrounding fair use.
4.3.1 The Current Fair Use Provision After Amendment

Since its adoption, the context of the fair use provision has undergone an amendment once in 2016.\(^\text{211}\) Two parts of the fair use provision were amended. Firstly, the examples of purposes, such as "news reporting, criticism, education, research," in Section 1 of Article 35-3, were removed. Secondly, the examples of purposes and characters of use, such as "profit or non-profit," described in Section 2 of Article 35-3, were also eliminated. The Korean National Assembly reports on reviews of the Bill emphasized that the purpose of the amendment was to increase flexibility in response to new use and technology.\(^\text{212}\) The amended provision as follows:

**Article 35-3\(^\text{213}\) (Fair Use of Works)**

(1) Except as provided in Articles 23 through 35-4 and 101-3 through 101-5, where a person does not unreasonably undermine an author's legitimate interest without conflicting with the normal exploitation of works, he or she is entitled to use such works [emphasis added].

(2) In determining whether an act of using works falls under paragraph (1), the following matters shall be considered:

1. *Purposes and characteristics of use*; [emphasis added].
2. Types and purposes of works;
3. Amount and substantiality of portion used in relation to the whole works;
4. Effect of the use of works on the existing or potential market for the works or current or potential value thereof.

- **Amendment in Section 1**

The reports of the Bill suggested two reasons for deleting the example purposes of uses, such as "the purpose of news reporting, criticism, education and research.” That is, limitations and

\(^{211}\) Bill for the amendment was presented in 2013.
\(^{213}\) There was a change in article number only from 35-3 to 35-5 in 2019.
exceptions for this purpose of use are already provided in the Korean Copyright Act. Presenting them in fair use provision does not comply with the nature of fair use which should not limit the purposes of uses.

However, in my view, this explanation is not entirely accurate. First, specific limitations and exceptions for education, news reporting, quotation, library, and examination\(^\text{214}\) are different from fair use. The use of copyrighted works should fall within particular categories of users, types of uses, and types of works that each specific exception requires. For example, the exception for quotation provision describes not only purposes of uses but also quotation (types of uses) and published works (types of works). Even though the purposes of use are the same between specific limitations and exceptions and fair use, some types of uses may not qualify for specific limitations and exceptions but would qualify for fair use.

Second, providing examples of use does not necessarily contradict the nature of fair use. The expressions "such as" or "etc." used in the provision merely provide examples of fair use and do not restrict its application to the purposes described in the fair use provision. Moreover, as noted above, the US fair use provision has a similar expression when describing the purposes of use. Therefore, it is worth considering the background and intention of the wording in the US fair use provision. The US fair use provision presents “including such use by reproduction in copies

\(^{214}\) Korean Copyright Act, art. 25 (Use for Purpose of School Education): ("A work already made public may be reproduced in curriculum books to the extent deemed necessary for the purpose of education at high schools, their equivalents or lower-level schools. …") art. 26 (Use for News Reporting): ("In cases of reporting current events by means of broadcasts or newspapers, or by other means, it shall be permissible to reproduce, distribute, perform publicly, transmit publicly a work seen or heard in the relevant courses, to the extent justified by the reporting purpose.") art. 28 (Quotation from Works Made Public): ("Works already made public may be quoted for news report, criticism, education, research, etc., in compliance with the fair practices within the reasonable extent.") art. 31 (Reproductions in Libraries): ("Libraries among facilities which provide books designed for public access, may reproduce the works by using books, when it falls under any of the following subparagraphs. …") art. 32 (Reproduction to Be Used as Questions in Examination): ("It shall be permissible to reproduce, distribute, or publicly transmit a work already made public in questions for entrance examinations or other examinations that test knowledge and skills, within the reasonable extent deemed necessary for that purpose.").
or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” 215 The House of Representatives Report explained that the intention was to mainly provide clarity to meet the need for certainty, especially in education, not to give any special status under the fair use provision. 216 This phrase is often used in the argument that US fair use is predictable. 217 Additionally, there is no argument that the US courts interpret fair use doctrine limited to the purposes of use due to its expression of the provision. In my view, providing sufficient guidance to users is not necessarily inconsistent with the nature of fair use. Instead, excessive flexibility leads to unpredictability, which may make users hesitant to use copyrighted works. As argued later, it is important to attain a balance between certainty and flexibility in fair use.

- **Amendment in Section 2**

Section 2 was amended to remove the phrase “such as for profit or non-profit,” which was an additional explanation for “the purposes and character of the use” factor. The reports of the Bill explained that this phrase could cause courts to place more weight on whether uses are commercial or non-profit, potentially leading to outcomes where commercial use is not considered fair use.

However, it is not accurate that the phrase “such as for profit or non-profit” could lead to fair use not being applied to commercial uses. As the Supreme Court of Korea has not provided a judicial pronouncement on the fair use defense, I refer to similar cases here. It is true that the

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215 US Copyright Act, sec. 107.
Supreme Court of Korea stated that it is less likely to find that commercial uses are fair practices than non-profit uses are.\textsuperscript{218} Nevertheless, it is not clear that the Court would not apply fair use doctrine to commercial use, especially because of this phrase in the fair use provision.\textsuperscript{219} In the thumbnail image case (2006),\textsuperscript{220} for example, the Court ruled that quotation for commercial use qualified to the exceptions of a quotation by balancing the purpose of use factor against the other factors.

Second, it seems unclear that the reports review the intention of the phrase in the provision. Given that there is no official review of this phrase when adopting fair use in Korea, the intention of this part of the US provision is worth to be reviewed in this part. As seen above, “whether such use is of a commercial nature or is for non-profit educational purposes” is included in the first criterion of the US fair use provision. This is intended to explicitly state that the first factor includes a consideration of commercial or nonprofit, “an express recognition that the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors.”\textsuperscript{221} Unlike the concern in the Korean report, the Report of the US explained that this wording is introduced in order to explicitly state that fair use is not limited to non-profit uses.

In this regard, the explanation provided by the Korean reports on the Bill for the amendment of 2016 appears to be inaccurate. Instead, the amendment seems to have resulted in a

\textsuperscript{218} Daebeobwon [S. Ct.], November 25, 1997. 97Do2227. Whether the use is commercial or not is a significant factor when determining fair use in the US or UK. See D’Agostino, Healing Fair Dealing, 356-357 (explaining the purpose and commercial nature of uses factors are the most significant factor in the UK and the US); Park, Change of Interpretation on the Quotation Provision, 198 (whether the purpose is commercial or not is considered with other factors. Since it is a relatively more significant factor in the US, it is a more determinative factor. Korea Court’s interpretation does not seem different).

\textsuperscript{219} Park, as well, explains that this amendment does not lead to any significant change in the Court decision. See Park, Change of Interpretation on the Quotation Provision, 197-198.


\textsuperscript{221} House of Representative Report. No. 94-1476. (1976), 66.
rise in uncertainty and unpredictability. Additional explanations are required to justify the amendment more comprehensively.

4.3.2 Combination of the Three-Step Test and US Fair Use

Section 1 in the fair use provision includes that “where a person does not unreasonably prejudice an author’s legitimate interest without conflicting with the normal exploitation of works, he/she may use such works,” reflecting the three-step test in the Berne Convention and TRIPS. The three-step test is a principle agreed by member states of treaties, including Korea, on limitations and exceptions to copyright under national law. The question then arises as to why the three-step test of international treaties is codified in the fair use provision of the Korean Copyright Act. There was concern about a conflict with international treaties regarding the three-step test in the adoption of open-ended and flexible US fair use. Due to its flexibility, US fair use has raised significant concerns regarding its consistency with the three-step test, particularly with the requirement of “certain special cases” of the test. Moreover, the three-step test received more attention after the WTO dispute-settlement in 2000. In this sense, a possible answer is that a

222 Berne Conventions, art. 9 (2): “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” [Emphasis added]
223 TRIPS, art. 13 (Limitations and Exceptions): “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” [Emphasis added]
224 The most differentiation between the Berne Convention and TRIPS is that TRIPS provides strong enforcement such as trade sanctions if the WTO panel found a violation of its copyright obligation under the TRIPS. For instance, the EU challenged to the US Copyright Act in 2000.
Korean legislator sought a way to ensure the provision compatible with international treaties by stating the three-step test criteria together.\textsuperscript{227}

A detailed analysis of the three-step test is beyond the scope of this chapter. Instead, it is worth noting that the interpretation of the three-step test inherently involves vague and abstract criteria: \textsuperscript{228} certain special cases, not conflicting with normal exploitation, and not unreasonably prejudicing the legitimate interests. Interpretation and implementation of the three-step test is arguably controversial.\textsuperscript{229} There are no precedent cases dealing with the three-step test except the WTO dispute-settlement panel report in 2000. Nevertheless, the WTO panel report is criticized for its restrictive interpretation.\textsuperscript{230} The dispute could reach a different result depending on the different interpretations of the requirements laid down in the three-step test.\textsuperscript{231}

Besides the abstractness of the criteria itself, another problem here is that the provision embracing two abstract formulas offers room for different interpretations, particularly in terms of the hierarchy of two principles. One approach is that the four factors of US fair use in Section 2 should be mainly considered.\textsuperscript{232} Another approach is the courts of Korea should ascribe more weight to the three-step test factors in interpreting Article 35-3.\textsuperscript{233} Given the desire for flexibility in the fair use provision and the intention of the legislator to adopt a flexible approach,\textsuperscript{234} it is

\textsuperscript{227} See Lee, Effectiveness of Fair Use, 52-54; Moon, Three-step Test and Article 35-3, 103; Korea Copyright Commission, Study on Amendment for KORUS FTA, 279 (supporting the Bill as it stresses that fair use is permitted under the three-step test in fair use provision although the adoption of fair use seems less likely to raise concern on the three-step test).

\textsuperscript{228} Christophe Geiger, Daniel J. Gervais, and Martin Senftleben "The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law," American University International Law Review 29 no. 3 (2014): 591 (detailing how the three-step test was formed, and the broad and vague formation is a way to ensure success in order to be accepted by both open-ended clause countries and closed list countries).

\textsuperscript{229} Geiger et al., Three Step Test Revisited, 626.

\textsuperscript{230} See e.g., Geiger et al., Three Step Test Revisited, 593.

\textsuperscript{231} See e.g., Geiger et al., Three Step Test Revisited, 593-607 (detailing the interpretation by WTO panels and alternative approach to the three-step test).

\textsuperscript{232} See e.g., Lee, Effectiveness of Fair Use, 52; Moon, Three-step Test and Article 35-3, 103-104.

\textsuperscript{233} See e.g., Kim, Relationship between Fair use and Three-step Test, 158-161.

\textsuperscript{234} The three-step test was mentioned because of the concern about violating international treaties.
reasonable to prioritize the fair use principle. As the following chapter discusses, the hierarchy between fair use and the three-step test is still unclear in court decisions. This ambiguity could lead to inconsistent interpretations and applications of the law.

All things considered, incorporating the three-step test phrase into the fair use provision increases vagueness and unpredictability in fair use.

### 4.3.3 Supreme Court Cases on Fairness Factors

Under Article 35-5 of the Korean Copyright Act, the decision of whether a particular use qualifies as fair use considers four factors: the purpose and character of the use, the nature of the works, the amount and substantiality of the use, and its effect on the potential market value of the copyright. Fair use is decided on a case-by-case basis by a court based on these criteria, analyzing specific cases is needed in this part. Given the significant impact of the Supreme Court case, it is unfortunate that the Supreme Court of Korea has not provided a judicial pronouncement on Korean fair use. In this part, I provide a brief review of the Court’s interpretation of similar factors of fair use in other cases. The Supreme Court of Korea had considered factors similar to fair use factors in interpreting “Fair practices within the reasonable extent” of the exception of quotation. This presumes this interpretation would be valid in fair use factors in a place where there is no interpretation of the Supreme Court of Korea on fair use

*See e.g., Korea Copyright Commission, Study on Amendment for KORUS FTA, 276-278.*  
235 The Supreme Court of Korea has recognized that fair use doctrine was developed through the balancing of competing tensions between the interests of copyright holders and the public interest. However, the Court did not further provide a judicial pronouncement on the fair use defense. This was a case involving copyright infringement under the former Korean Copyright Act of 2011 before the fair use provision was adopted. The Court ruled that fair use defense was not allowed in this case, stating that such a defense was only permitted in circumstances where it was explicitly provided for in the Korean Copyright Act. *See*, Daebeobwon [S. Ct.], February 15, 2013, 2011Do5835 (Criminal).  
236 Korean Copyright Act, art. 28. *See e.g.*, Daebeobwon [S. Ct.], November 25, 1997. 97Do2227.
since its adoption. Among the four factors, my review is focused on two factors: the purpose and character of the use and the effect of the use on the potential market.

- **The Purpose and Character of the Use**

In this factor, non-profit purposes are generally favored over commercial uses. In a case where the defendant used the university’s entrance exam questions in their exam preparation book for commercial purposes, the Supreme Court of Korea found that the purpose of commercial education was acceptable but commercial educational purposes are allowed for a narrower scope than non-profit educational purposes. Another case concerned providing thumbnail images of the plaintiff’s photograph in search engine research. The Supreme Court of Korea ruled in favor of internet search engine companies, explaining that their purpose in showing thumbnails was to provide Internet users with the source of images for better service, rather than displaying the plaintiff’s photography on the website. Indeed, the Court also considered that search engine offers social benefits by providing complete information with thumbnail images.

- **The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work**

In the Exam case, the Court found that the use of a university test undermined the plaintiff’s potential market, considering the fact that the defendant copied texts as a whole. But in the

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237 I should point out that although I borrow the interpretation of exception of quotation in this part, exception of quotation and fair use are distinguished terms in that fair use does not limit to the type of use including the quotation.

238 Daebeobwon [S. Ct.], November 25, 1997. 97Do2227. [Exam case]

239 Daebeobwon [S. Ct.], Feb. 9, 2006. 2005Do7793. For critics of this decision, See Choi, Problems and Proposal of fair use, 85 (the purpose of providing thumbnail images is not limited to offering a search result, but eventually for getting profit from the search engine). [Thumbnail case]

240 Cf., Perfect 10, Inc. v. Amazon, 508 F. 3d 1146 (9th Cir. 2007).
thumbnail case, the Court held that thumbnail images were not a substitute for the demand for full-size images, given the poor quality of thumbnail images. Instead, users considered thumbnail images to get better search result.

4.3.4 Lower Court Decisions on Fair Use

This chapter is based on Il-ho Lee’s recent empirical study\(^{241}\) of fair use decisions.\(^{242}\) The aim of this chapter is to discuss whether the court’s decisions increase unpredictability. Therefore, rather than analyzing court decisions on a case-by-case basis, this chapter focuses on the unclear or incoherent interpretation of fair use by the courts.\(^{243}\)

First of all, there is no clear interpretation of the hierarchy of the three-step test (Section 1) and fair use criteria (Section 2). The first case considers explicitly the four factors of fair use (Courts may consider whether the use complies with the three-step test, but it is not clearly addressed). For instance, in a case concerning whether making a video of a golf course for an indoor golf simulator using the plaintiff’s golf course images was considered fair use or not, the Seoul High Court mainly addressed fair use factors of Section 2. The Court ruled that the use of

\(^{241}\) Lee, Fair Use under Korean Copyright Law. Lee employed case research on decisions from April 2012 to January 2022 from all levels of courts in Korea using websites as follows: the Supreme Court of Korea, BubgoulLx 2018 of the Supreme Court Library, Ministry of Government legislation website, LAWnB of Thomson Reuters, CaseNote, LBox, Bigcase, Korean Copyright Commission website, etc. In keyword research, Lee uses the following keywords: Gongjeong iyong [Fair use] or “Gongjeonghan iyong [fairly use]” and the Copyright Act; the Copyright Act and Article 35-3; the Copyright Act and Article 35-5. Lee found 59 fair use cases including cases that simply mentioned “fair use.” Its qualitative assessment of the fair use decision provides an overall review of decisions since fair use was adopted.

\(^{242}\) The reason I chose this method is that I have limited access to Court decisions provided by the Court of Korea due to residing outside of Korea while I research. I found Lee’s case search results reliable from its appropriate keywords employed in a broad scope of data. Based on Lee’s case list, I chose cases for further review and found decisions by accessing the database of the Court of Korea using my own account or assistance from a staff of the Court library or my colleagues in Korea if it is not accessible from overseas.

\(^{243}\) For consideration that the intention of the thesis is to present the problem of fair use in Korea, a review of all 59 cases is beyond the scope of the thesis. Moreover, most lower court decisions on fair use defense did not provide detailed reasoning, so a detailed review of every case seems not available in this thesis.
a golf course image was not qualified as fair use, given that the purpose of use was commercial, and the amount and substantiality of the use were significant. The video displayed every hole of the golf course, and using the golf course image in an indoor golf simulator would undermine the plaintiff’s future market. On the other hand, another case addresses clearly only the three-step test factors of Section 1. For example, the Seoul Central District Court considered whether copying the plaintiff’s copyrighted program unreasonably undermined the plaintiff’s legitimate interest without conflicting with the normal exploitation of works subject to Section 1, without further addressing fair use factors in Section 2. Overall, it is not clear to recognize how to interpret Sections 1 and 2 of the fair use provision, such as which factor is determinative and the relationship between them, from court decisions.

Second, the reasoning of fair use is not clearly distinguishable from the exception of quotation provision in several cases. In some cases, courts did not provide a judicial pronouncement separately on whether the use of copyrighted work qualified as fair use or the exception of quotation. In a case concerning whether uploading exam material to a website infringed the copyright of poetry or artwork contained in the material, the issues were whether the use qualified as the exception of quotation or fair use. The Seoul High Court reviewed these two defenses together, rather than providing separate reasoning for the exception of quotation and fair use. I assume this stems from the previous practice of the Court of Korea, which expanded the application of the exception of quotation to non-quotation cases and interpreted the exception of quotation provision by applying similar fair use factors.

244 Seoul Godeungbeobwon [Seoul High Ct.] December 1, 2016. 2016Na2016239.
Another aspect that lacks coherence is whether the party should provide citations to satisfy the fair use defense. The fair use provision *per se* does not require citation. Several cases can be found where citing the copyrighted work was considered,\(^{247}\) or even considered as a determinative factor in fair use.\(^{248}\) This is partly due to Article 37 of the Korean Copyright Act,\(^{249}\) which requires citing the source for exceptions provision in general. In my view, citation should not be considered a mandatory factor of fair use, as fair use could be applied to new types of use where citation may not be feasible. Nevertheless, it appears that clear guidelines or amendments are necessary to determine whether the citation is another factor to be considered when determining fair use.

### 4.4 Problem of the Current Korean Fair Use

#### 4.4.1 A Lack of Balance between Flexibility and Certainty

So, what could make it difficult to transplant US fair use doctrine to Korean copyright law successfully? As discussed earlier in the context of legal transplants, the success of such a transplant depends on the process followed, including (1) understanding the nature of the foreign law as well as the social and cultural context it operates in, (2) evaluating and selecting a model that is most compatible with the recipient legal system, and (3) customizing the chosen model to ensure its compatibility with the recipient legal system's conditions.

As fair use was introduced for providing more flexibility in copyright law, it is crucial to attain a balance between the need for flexibility and legal certainty based on Korea's legal

\(^{247}\) It is assumed that Article 37 of the Korean Copyright Act (citation of copyrighted work) is considered.

\(^{248}\) *See.* e.g., Seoul Joonangiibangbeobwon [Seoul Central District Ct.], January 27, 2016. 2015Gahab513706.

\(^{249}\) “A person who uses a work under this subsection (Limitations and exceptions to copyright) shall indicate its sources.”
traditions and conditions. While flexibility is necessary to achieve a fair outcome in a digital era, excessive flexibility may lead to uncertainties or indeterminacies that impede fair use. Ignoring these uncertainties and indeterminacies could undermine the role of fair use and one of the purposes of copyright, which is to promote the fair use of works.

In my view, these uncertainties and indeterminacies were not adequately addressed during the transplantation of US fair use doctrine in Korea. This has created a lack of reliance on fair use. In the following section, I will present several reasons that contribute to these uncertainties.

4.4.2 US Fair Use’s Incompatibility with Korean Copyright Law

As seen above, an open-ended and flexible exception was needed in Korean copyright law to adapt to new uses of works made possible by new technology. However, the increasing need for flexibility does not necessarily mean that the US fair use provision should be adopted into Korean copyright law. Instead, one should seek a legal device that adds flexibility but is better fitted to Korean copyright law.

During the process of transplanting US fair use into Korean copyright law, it is important to evaluate its compatibility in the context of historical and cultural context of US fair use and Korean legal condition. US fair use doctrine has been codified after more than 150 years of judicial interpretation that gave the doctrine meaning and boundaries. In fact, US fair use has been developed in its unique social, economic and legal environment. It is thus necessary to understand not only the practical arrangements and specific environments in which the fair use

defense operates but also to consider certain aspects of US legal culture: a complex web of understandings, agreements, and policy statements that support the legislative provisions, which might prove impossible to replicate in another jurisdiction.\textsuperscript{251} The policies underlying fair use include promoting the purpose of copyright as well as freedom of speech and expression guaranteed in the First Amendment.\textsuperscript{252}

On the other hand, Korean copyright law has different culture and history. Prior to the adoption of fair use in Korean copyright law, a compromise between certainty and flexibility was achieved by providing precisely defined exceptions, albeit with relatively abstract legal provisions such as 'fair practices within a reasonable extent' of the exception of quotation provision.\textsuperscript{253} Moreover, given that copyright cases often involve criminal charges, it becomes even more crucial to have certainty in the application of the law. Since Korean fair use was initially introduced through codification, the lack of judicial interpretation or guidelines in Korean fair use has resulted in excessive flexibility, leading to unclear and unpredictable outcomes. It should be noted that US cases are not easily transferable to Korean copyright law due to the different cultures, histories, and legal systems upon which Korean and US copyright laws are based.\textsuperscript{254} Such a highly flexible doctrine would not be compatible with Korean copyright law, rather it introduces unpredictability and increases legal uncertainty. This

\textsuperscript{252} See Samuelson, Unbundling Fair Uses, 2542.
\textsuperscript{253} See Hugenholtz, Flexible Copyright, 279 (detailing civil law traditions compromise between certainty and fairness by the general rules without impeding civil courts to apply general normative principles, such as “reasonableness and fairness”).
\textsuperscript{254} Even in Canada where copyright law roots in England and is mainly based on common law like in the US, the Supreme Court of Canada repeatedly cleared that “US copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation.” in CCH para 22; “has cautioned against the automatic portability of American copyright concepts into the Canadian arena, given the fundamental differences in the respective legislative schemes: Compo co. v. Blue Crest Music Inc. [1980] 1 S.C.R. 357 at 367. This caution has resonance in the fair dealing context.” in Bell para 25.
uncertainty has been a significant issue in the fair use adoption debate and has contributed to the reluctance to its adoption in many countries.255

4.4.3 Ineffective Customization of Fair Use 1: Deleting A set of Example Purposes

As US fair use could introduce excessive flexibility to Korean copyright law, providing sufficient guidelines through customization of US fair use would minimize uncertainty. However, during the amendment in 2016, a set of example purposes was removed. As I have argued, this removal has resulted in an increase in uncertainty and unpredictability. Having a set of example purposes could serve as a necessary means of providing sufficient guidelines in a context where there is a lack of judicial interpretation or guidelines in Korean fair use. Fair use is not limited to a set of example purposes. Rather, these examples would work towards enhancing predictability. As noted earlier, the US fair use provision in Section 107 of the US Copyright Act sets forth a set of example purposes to provide clarity to meet the need for certainty. Moreover, based on six favored uses, Samuelson suggests common patterns or policy relevant clusters as a way of reducing uncertainty: three main policies underlie the six preambular uses, namely promoting free speech and expression interests of subsequent authors and the public, the ongoing progress of authorship, and learning.256

255 See. e.g., European Commission, “Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules (2014), 34 quoted in Senftleben, The Perfect Match, 232 (note 2); Sookman et al., Why Should Not Adopt Fair Use.; See also, Hugenholtz, Flexible Copyright, 281 (“Simply transplanting this doctrine into civil law-based droit d’auteur might lead to unintended consequences and ultimately systemic rejection.”).

256 Samuelson, Justifications for Copyright Limitations and Exceptions, 49.
4.4.4 Ineffective Customization of Fair Use 2: Including Three-Step Test Phrases

Adding the three-step test into the fair use provision is another ineffective customization. The inherently broad and relatively vague form of the three-step test and its arguable interpretation add more vagueness to Korean fair use. Even 10 years after the fair use provision was adopted, there are still no bright-line rules or official interpretations of the three-step test. But more than this, when two abstract principles, the three-step test and fair use, are combined in one provision like the Korean fair use provision, it raises the risk of causing confusion more. Furthermore, Korean courts have not provided clear guidelines for interpreting the two components of the fair use provision. It is true that the intention of including the three-step test was to avoid violation of international treaties. However, this approach of customization raises more uncertainty in fair use.

4.4.5 Unclear Boundary Between Fair Use and Exception for Quotation

Prior to the adoption of fair use, the exception for quotation was relied upon to achieve copyright balance. Although it was originally expected to be applied only to the specific types of use known as, “quotation,” the court’s liberal and flexible approach enabled it to play a role as fair use doctrine by allowing for the application of other types of uses. Furthermore, the Supreme Court of Korea considered similar factors of fair use in deciding whether a particular quotation qualifies as a fair practice under the provision for the exception of quotation.

However, after the adoption of the fair use provision, the relationship between the exception for quotation and fair use should be clear. The exception for quotation should only be

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257 Geiger et al., Three Step Test Revisited.
258 Lee, Fair Use under Korean Copyright Law, 76-77.
applied to the cases where it was originally intended, namely "quotation." On the other hand, fair use is not limited to specific types of uses. Its adoption was meant to respond to new and unanticipated types of uses. Without clarifying the interpretation and operation of each exception, fair use, which is relatively new and has no precedent cases, would not be relied upon by users and courts.

4.5 Conclusion

The fair use provision was introduced into the Korean Copyright Act in order to achieve a balance between the rights of authors/creators and the need for use, especially in a digital era. However, it has not been significantly relied upon by courts, primarily because of its excessive flexibility, which has resulted in problems of uncertainty and unpredictability. This chapter has discussed several issues that contribute to this uncertainty. Firstly, the compatibility of US fair use with Korean copyright law is in question. The unique social, economic, and legal environment in the US has influenced the formation of fair use doctrine. On the other hand, Korean copyright law has a different cultural and historical background, which poses challenges to the successful transplantation of US fair use. Nonetheless, it seems compatibility was not adequately discussed during the transplantation of US fair use doctrine in Korea. Secondly, ineffective customization of US fair use has resulted in increased uncertainty. Removing a set of examples and the inclusion of abstract phrases from the three-step test in the fair use provision adds confusion and uncertainty to the interpretation and application of fair use. Lastly, the lack

259 Park, as well, argued that there is no need to expand the scope of the exception of quotation (Park, Change of Interpretation on the Quotation Provision, 198-209).
of a well-defined boundary between the exception for quotation and fair use remains unclear, hindering the development of fair use doctrine in Korea.
Chapter 5: Canada’s Fair Dealing

This chapter discusses the nature, history, and cultural context of Canada's fair dealing and its compatibility with Korean copyright law. It begins with a brief review of the origin, nature, and purpose of copyright in Canada for a better understanding of Canada's fair dealing. Since Canadian copyright traces its roots from the UK, the earlier UK fair dealing is overviewed in order to understand the origin of Canada's fair dealing. Then, the development of Canada's fair dealing after its codification in the Canadian Copyright Act is discussed by analyzing both legislation and cases. The case of CCH is analyzed, focusing on how the Court of Canada shifted from its traditional narrow interpretation and provided guidance to future cases. The impacts of CCH on politics and society in Canada are discussed, followed by an analysis of post-CCH court decisions. Lastly, whether Canada's fair dealing model is more appropriate than the US fair use is suggested in the context of legal transplant.

5.1 Introduction

5.1.1 The Origin of Copyright in Canada

Canadian Copyright jurisprudence has inherited from the English copyright tradition with a civil law tradition of *droit d'auteur* from France. In the *Théberge v. Galerie D’Art* case, the

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260 Canadian Copyright provides economic rights and moral rights. See *Théberge v. Galerie d'Art du Petit Champlain inc. [2002] 2 S.C.R. 336*(discussing traditions of Canadian copyright law), specifically para 62 (“while “copyright” has historically been associated with economic rights in common law jurisdictions, the term “droit d’auteur (Author’s right)” is the venerable French term that embraces a bundle of rights which include elements of both economic rights and moral rights”). See also para. 116: (“Canadian copyright law derives from multiple sources and draws on both common law tradition and continental civil law concepts”). [Théberge]. See also Information Highway Advisory Council, Copyright and the Information Highway (1994), 26, (“The Canadian Act is based on very different principles [than US Act]: the recognition of the property of authors in their creation and the
majority of the Supreme Court of Canada clarified that Canadian copyright has mainly the English copyright tradition, stating that “[g]enerally, Canadian copyright has traditionally been more concerned with economic than moral rights… as Canadian original Copyright Act tracked the English Copyright Act, 1911.”

Therefore, the Copyright Act of Canada is traced from the 1911 UK copyright law as the Copyright Act of 1921, the basis of the current Act, was a substantial copy of it.

5.1.2 The Nature and Purpose of Copyright in Canada

While the purpose of copyright is not explicitly provided in the Canadian Copyright Act, the courts have commented on it. Earlier before Théberge (2002), the courts had an author-centric approach to the nature and purpose of copyright, viewing copyright as a granting right to authors and protecting copyright owners. In Bishop v Stevens (1990), the Supreme Court of Canada addressed the Copyright Act of 1911 (the basis of the Canadian Copyright Act), stating that it was adopted with “a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic, or musical.”

This approach can also be found in Michelin v CAW
Canada (1997), where the Federal Court considered the purpose of copyright as “[t]he protection of authors and ensuring that they are recompensed for their creative energies and works.267” The Bishop and Michelin approach had continued for ten years, including throughout the 1997 Copyright Act reform process.268 Under the author-centric approach to copyright, owner’s rights are to be interpreted broadly, while exceptions to copyright infringement are to be interpreted narrowly.269 It focused on the exclusive right of authors and copyright owners regarding how their works were used in the marketplace.270

Théberge was a shifting moment from the previous author-centric approach, to focus on another important objective of copyright in promoting the public interest.271 In Théberge, the Supreme Court of Canada stated two purposes of copyright as follows: to promote the public interest in the encouragement and dissemination of works of the arts and intellect and to protect and reward the intellectual effort of the author in the work.272 Under this approach, the purpose of copyright in Canada is to encourage and disseminate the arts and intellect by granting incentives to authors, and by facilitating the dissemination of works of the arts and intellect.273

Moreover, the Supreme Court of Canada recognized a balance between two objectives of copyright in Théberge. The case concerned whether an art gallery infringed the copyright of

268 Geist, Fairness Found, 166.
271 See e.g., Craig, Globalizing User Rights Talk, 20-21. Reynolds, Reasonableness, Fairness and Public Interest, 17-19 (referring to this approach to copyright as “the instrumental-public interest approach”).
272 Théberge para. 30, 123.
Claude Théberge, a painter with an international reputation. The art gallery had purchased posters of Théberge’s works and proceeded to transfer the images from paper to canvas by lifting the ink off the poster and transferring it to the canvas. It was not actually creating new images or reproductions of the work as the poster paper was left blank after being transferred to the canvas.\textsuperscript{274} The majority of the Court, Binnie J stated that:

\begin{quote}
[T]he proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature... Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.\textsuperscript{275}
\end{quote}

Binnie J also emphasized the dangers of interpreting the rights of copyright owners too broadly at the expense of both the public and the innovation process,\textsuperscript{276} stating that “[e]xcessive control by holders of copyrights and other forms of intellectual innovation in the long-term interests of society as a whole or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement… which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology.”\textsuperscript{277} The plaintiff’s assertion was denied since it “ignored the balance of rights and interests that lie at the basis of copyright law.”\textsuperscript{278}

\begin{flushright}
\textsuperscript{274} Geist, \textit{Fairness Found}, 166-167.
\textsuperscript{275} Théberge para. 31.
\textsuperscript{276} Reynolds, \textit{Reasonableness, Fairness and Public Interest}, 18; Geist, \textit{Fairness Found}, 167.
\textsuperscript{277} Théberge para. 32.
\textsuperscript{278} Théberge, 338, para. 75 (“The image “fixed” in ink on the posters was not reproduced. An expansive reading of the economic rights whereby substitution of one backing for another constitutes a new “reproduction” that infringes the copyright holder’s rights even if the result is not prejudicial to his reputation tilts the balance too far in favor of the copyright holder.”).
\end{flushright}
The purpose of copyright addressed in *Théberge* appears in preambles to legislation.\(^{279}\) It has been affirmed by the following decisions\(^ {280}\) which will be discussed in the next chapter.

### 5.1.3 Rights and Exceptions in the Canadian Copyright Act

The federal government has the authority to enact the Canadian Copyright Act.\(^ {281}\) Copyright protects only the expression of ideas, and work requires originality.\(^ {282}\) In *CCH* case, the Court ruled that original work is “one that originates from an author and is not copied from another work…In addition, an original work must be the product of an author’s exercise of skill and judgement…creativity is not required to make a work original.”\(^ {283}\)

The Canadian Copyright Act sets two kinds of copyright: economic rights and moral rights. Section 3 of the Act outlines the economic rights of the authors, which protect economic interests including the right to reproduce the work and to perform the work in public. Moral rights of the authors protect the personality of the author expressed in the work, including the right of attribution, the right of integrity and the right of associations.\(^ {284}\)

Infringement of copyrights are addressed in Section 27, while exceptions to copyright infringement are set out in Sections 29 and 30 of the Act. Fair dealing is provided in Sections 29

\(^{279}\) *See e.g.*, 3d Sess., 40th. Parl., 2010, [Bill C-32] quoted in Geist, *Fairness Found*, 166. Proposing to amend the Canadian Copyright Act (“Whereas the Government of Canada is committed to enhancing the protection of copyright works or other subject-matter, including through the recognition of technological protection measures, in a manner that promotes culture and innovation, competition and investment in the Canadian economy; And whereas Canada’s ability to participate in a knowledge economy driven by innovation and network connectivity is fostered by encouraging the use of digital technologies for research and education”) [emphasis added]

\(^{280}\) *See e.g.*, *CCH* para. 23. (considered the purpose of copyright in deciding “Originality” stating that “When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author’s or creator’s rights, at the loss of society’s interest in maintaining a robust public domain that could help foster future creative innovation”).

\(^{281}\) The Canadian Constitution Acts, sec. 91, 23.

\(^{282}\) Canadian Copyright Act, sec. 5.

\(^{283}\) *CCH* para. 25.

\(^{284}\) Canadian Copyright Act, sec. 14. (sec. 17. For aural performances and sound recordings).
to 29.2. Sections from 29.4 to 30 provide specific exceptions to infringement for educational institutions, libraries, archives, and museums. The Act provides remedies for copyright infringement, such as damages and injunctions, in Sections 34 and 42.

5.2 The History of Fair Dealing in Canada

5.2.1 The Origins of Fair Dealing

The history of fair dealing in Canada is based on fair dealing (or fair abridgment) in the UK\textsuperscript{285} The Statute of Anne,\textsuperscript{286} the first copyright statute which went into effect in 1710, did not contain exceptions to copyright. Although the scope of copyright in the pre-modern era was narrower than it is today,\textsuperscript{287} fair dealing or fair use was introduced and developed in British common law over the hundred years between 1740 and 1840.\textsuperscript{288} For example, in \textit{Cary v. Kearsley},\textsuperscript{289} fair dealing was defined as being for the promotion of science and the benefit of the public, and it was distinguished from capturing the essence of the original work in a reduced form. When determining fair dealing, the amount copied as well as the relevance of the effect on the market for the original work were considered in determining abridgment.\textsuperscript{290}

By early in the nineteenth century, fair dealing defense began to resemble its modern form, and it gradually became concretized by the courts.\textsuperscript{291} Mere repetition of the plaintiff’s

\textsuperscript{286} The Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).
\textsuperscript{287} Sa, \textit{Prehistory of Fair Use}, 1379-1380, 1387 (The scope of premodern copyright was narrower than it is today as the Statute of Anne granted narrow scope of rights).
\textsuperscript{288} Craig, \textit{Fair dealing}, 157-160 (The concept of fair use was first recognized as distinguished from fair abridgment in Cary v. Kearsley).
\textsuperscript{289} Cary v. Kearsley, 4 Esp. 168 (1802).
\textsuperscript{290} See e.g., Dodsley v. Kindersley, (1761) 27 Eng. Repl. 270, 271; Craig, \textit{Fair dealing}, 158.
\textsuperscript{291} Craig, \textit{Fair dealing}, 158.
work was refused as fair dealing because it did not benefit for the public. In this regard, the origins of fair dealing or fair use defense suggest that it was permitted because it promoted the progress of science and thereby benefited the public.

5.2.2 Codification of Fair Dealing

Fair dealing or fair use doctrine that had developed by the courts was first codified in Section 2(1)(i) of the Copyright Act of 1911 in the UK. The Act provided that “any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary” shall not constitute an infringement of copyright. The introduction of limited purposes to fair dealing provisions looks to restrict fair dealing to the enumerated purposes, although the evidence suggested that this provision was intended to codify the existing law developed by the UK courts.

Since the fair dealing provision was codified in the Act providing enumerated purposes of use, a restrictive view of fair dealing, confined to the list of approved purposes, has appeared gradually in the UK.

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292 Craig, *Fair dealing*, 159.
293 Lewis v. Fullarton 2 Beav. 6 (1839); Craig, *Fair dealing*, 159 (“Fair use in respect of extracting first appeared in the case”).
294 The Copyright Act of 1911 in the UK.
295 For a discussion of the UK Parliament’s intention, see Katz, *Fair Use 2.0*, 114-140.
297 See e.g., University of London Press, Ltd. v. University Tutorial Press, Ltd. (1916), 2 1916 Ch 601; British Oxygen Co. v. Liquid Air Ltd. (1925), 1 Ch 383, Hawkes & Son Ltd. v. Paramount Film Service Ltd. (1934), 1 1934 Ch 593, Quoted in Craig, *Fair dealing*, 160; For detailed analysis on these cases, see Katz, *Fair Use 2.0*, 104-113 (“these decisions set the tone for a castrated version of fair dealing, confining fair dealing to the list of enumerated purposes and then by constraining them narrowly”).
5.3 Legislation of Fair Dealing in Canada

5.3.1 Fair Dealing in the Copyright Act

In Canada, fair dealing was codified in the Canadian Copyright Act of 1921\(^\text{298}\) in the same terms as the Copyright Act of the UK. Pursuant to the fair dealing provision, any fair dealing for the purposes of private study, research, criticism, review, or newspaper summary would not constitute an infringement of copyright.\(^\text{299}\) Unlike the US fair use provision, the fair dealing provision in Canada identifies specific categories or purposes for which fair dealing is permitted.\(^\text{300}\) It creates a two-step analysis: purposes of use and fairness criteria.\(^\text{301}\) Thus, the scope of permissible purposes and whether they are illustrative or exhaustive have been arguably discussed in Canada, as further discussed.

Fair dealing reform has been discussed in Canada. In 1984, a Canadian White Paper proposed a new Act, “providing both a definition of fair dealing (to be termed ‘fair use’) and a prioritized list of factors to be considered in determining whether a particular use of a work is a fair use.”\(^\text{302}\) However, the Sub-Committee on the Revision of Copyright\(^\text{303}\) advised against the proposed fair use model, and significant expansion of the fair dealing provision did not proceed.\(^\text{304}\)

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\(^{298}\) Canadian Copyright Act of 1921, c. 24.

\(^{299}\) Canadian Copyright Act of 1921, c. 24, s 16(1)(i).

\(^{300}\) Geist, *Fairness Found*, 158. *Cf.* the US fair use provision in section 107 of the US Copyright Act.

\(^{301}\) *Bell* para. 13; *See also* Geist, *Fairness Found*, 158. *Cf.* fair use typically considers fairness criteria.


\(^{304}\) Craig, *Fair dealing*, 163.
Fair dealing reform was not included in the amendment of the Copyright Act Bill until 2012, except for amendments of language.\textsuperscript{305} In 2012, “education, parody, and satire” were added for the purposes of use alongside research and private study. Therefore, the current fair dealing provision in the Canadian Copyright Act\textsuperscript{306} is as follows.

**Fair Dealing**

**Research, private study, etc.**

29 Fair dealing for the purpose of research, private study, *education, parody or satire* does not infringe copyright. [Emphasis added]

**Criticism or review**

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,
(ii) performer, in the case of a performer’s performance,
(iii) maker, in the case of a sound recording, or
(iv) broadcaster, in the case of a communication signal.

**News reporting**

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,
(ii) performer, in the case of a performer’s performance,
(iii) maker, in the case of a sound recording, or
(iv) broadcaster, in the case of a communication signal.

### 5.3.2 Restrictive Approach to Fair Dealing Before CCH

Like the UK, the Canadian fair dealing provision was also viewed as restricted not only with regard to the enumerated purposes that statutorily qualify for fair dealing, but also in the way that

\textsuperscript{305} Katz, *Fair Use 2.0*, 103 (Attribution requirements were added to criticism, review, and newspaper summary in 1993. In 1997, “Newspaper summary” was replaced with the wider “news reporting”, the phrase “private study or research” was modified to “research or private study.” The reference to “work” was deleted to expand fair dealing to sound recordings, performers’ performances, and communication signals).

\textsuperscript{306} Canadian Copyright Act, RSC 1985, c-42.
the Canadian courts interpreted the provision until the *CCH*. In other words, the Canadian courts tended to reject the fair dealing defense either because the use was necessarily unfair, or it was not for an enumerated purpose. Fair dealing test proceeded in two steps. First, the purpose of particular dealing must be one of those listed in the Act. Second, the fairness test of a particular dealing only proceeded if it qualified for at least one of these specific purposes.

The *Michelin* case illustrates the restrictive interpretation of the enumerated purposes by the Canadian Courts. The case involved the use of the image of the Michelin man logo in a labor union’s distribution of leaflets during a labor dispute. The union argued that the use of the logo was a parody, and parody is a form of criticism under the fair dealing exception. The Federal Court, however, rejected the union’s argument, stating that “under the Copyright Act, criticism is not synonymous with parody…. *Exceptions to copyright infringement should be strictly interpreted.*”  

It is suggested that the specific statutory formation of fair dealing is not the only reason why Canadian fair dealing differs from US fair use. The author-centric approach to copyright, which was the dominant view of Canadian Courts before the *Théberge* case, would also be closely related to the restrictive view of fair dealing. Under the author-centric approach, exceptions to copyright infringement such as fair dealing tend to be interpreted narrowly and

307 Geist, *Fairness Found*, 166.
309 See e.g., Hager v. ECW Press Ltd., [1999] 2 F.C. 287, 304 (Can. Fed. Ct.) (finding that biography was not a work of research because "the use contemplated by private study and research is not one in which the copied work is communicated to the public."); Boudreau v. Lin, [1997] 150 D.L.R. 4th 324, 331 (Can. Ont. Gen. Div.) (holding that a university's copying and sale of course materials was not for the purposes of "private study" because the materials were distributed to all members of a class); Craig, *Globalizing User Rights Talk*, 16.
310 Craig, *Fair dealing*, 163, 165 (“By automatically excluding a particular use from the protective sphere of fair dealing, a court can avoid analyzing the interests at stake or inquiring into the purpose of the copyright law.”).
311 *Michelin*, 309.
312 Craig, *Fair dealing*, 162.
applied rarely. As Craig described, “fair dealing has long been at the mercy of copyright system whose justifications have been framed in terms of the author’s entitlement. The way in which fair dealing serves the public purposes of the system is easily obscured beneath the mass of individual property rights and economic interests.” Hence, although the Théberge case did not deal with fair dealing, it marked the start of a shift in the Canadian copyright landscape. The Supreme Court of Canada articulated that copyright is not solely for authors, but rather a balance between promoting the public interest, recognizing the limited rights of creators and owners for the public interest.

5.4 Analysis of CCH Case

5.4.1 Introduction

Two years later after the Théberg case, the case of CCH marked a shift away from the traditional narrow interpretation that had dominated Canadian courts. The case concerned the photocopying service provided by the Great Library to its patrons. The defendant maintained the Great Library and offered a request-based photocopy service for Law Society members, whereby legal materials were reproduced by Great Library staff and delivered to requesters. There were self-service photocopiers available for patrons to use. The plaintiffs

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313 Reynolds, Reasonableness, Fairness and Public Interest, 17.
314 Craig, Fair dealing, 162.
316 Craig, Globalizing User Rights Talk, 20-21 (“a pivotal case”).
317 See e.g., Craig, Globalizing User Rights Talk, 18 (“the landmark case”); Craig, Fair dealing, 157, 166; Reynolds, Reasonableness, Fairness and Public Interest, 9; Katz, Fair Use 2.0, 94 (“fair dealing was reborn in Canada”); Geist, Fairness Found, 169 (“breathed new life into the Copyright Act’s fair dealing provision”).
318 CCH, 346 (“Located at Osgoode Hall in Toronto, a reference and research library with one of the largest collections of legal materials in Canada.”).
319 CCH, 345 (“A statutory non-profit corporation that has regulated the legal profession in Ontario since 1822”).
(publishers) alleged that the Great Library had infringed on their copyright by reproducing publishers’ headnotes, case summary, topical index and compilation of reported judicial decisions. The defendant argued that the purpose of the photocopy service was for research, and therefore it fell within the meaning of fair dealing in the Act. The Supreme Court of Canada unanimously ruled that the defendant had not infringed the publisher’s copyright, nor had they authorized others to do so.

5.4.2 Recognition of User’s Rights and Expanded Purposes

The Supreme Court of Canada clarified that fair dealing is not simply a defense, but an integral part of the Copyright Act. Emphasizing that exceptions to copyright are user’s rights, the Court ruled that fair dealing must not be interpreted restrictively in order to maintain the proper balance between the rights of a copyright owner and the interests of users. This rejected traditional jurisprudence on fair dealing, such as Michelin where the Court stated that exceptions to copyright infringement should be strictly interpreted. This liberal approach in CCH could make Canadian fair dealing less rigid and restrictive than UK fair dealing in its operation.

It is also important to note that the Court recognized fair dealing or exceptions to copyright as “user’s rights.” As Craig explains, “When the abstract concept of the public interest

320 CCH, 340-341.
321 CCH, 341, para. 47.
322 CCH, 341, para. 6.
323 CCH para. 48.
324 CCH para. 48.
325 C.f., CCH para 62. (The trial judge interpreted fair dealing exception strictly construed, so copyright for the custom photocopy service was not for the purpose of research or study. The Court of Appeal and the Supreme Court of Canada rejected this argument that fair dealing should be interpreted restrictively).
326 Michelin, 309.
327 D’Agostino, Healing Fair Dealing, 337-344.
found more concrete expression in the form of user’s rights, its weight on copyright’s balancing scales heavier.”328 The concept of user’s rights, therefore, is a powerful legal tool that can shift the balance between owners and users and have a practical result for users of copyright works and for the public interest.329

In fact, the Court’s liberal interpretation of “research” corresponds to the recognition of fair dealing as a user’s right. In CCH, lawyers who were carrying on the business of law for profit were held to be conducting research, as research must be given a large and liberal interpretation and not limited to non-commercial or private contexts.330

### 5.4.3 Presenting Fairness Criteria

In CCH, the Court introduced a six-factor test to determine fairness, which has subsequently been relied upon in later cases. The Court of Appeal presented factors to test fairness, drawing on the decision in the Hubbard v. Vosper case from the UK331 as well as US fair use doctrine.332 These factors include (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) effect of the dealing on the work.333 The Supreme Court applied these six factors in deciding the case.334

328 Craig, Globalizing User Rights Talk, 23. See also, D’Agostino, Healing Fair Dealing, 315 (“the Court has now raised [fair dealing] to the level of a general principle”).
330 CCH para. 51. But see CCH para. 54 (“some dealings may be more or less fair than others. The commercial purpose may not be as fair as research for charitable purposes”).
331 Hubbard v. Vosper, [1972] 1 All E.R. 1023 (C.A.); See also Geist, Fairness Found, 170 (detailing the case).
332 For a comparative study of US fair use criteria and Canada’s six-factor test, see D’Agostino, Healing Fair Dealing.
333 CCH para. 53.
334 CCH para. 53-73.
• **Purpose of the Dealing**

The Court affirmed that enumerated purposes “should not be given a restrictive interpretation or this should result in the undue restriction of users’ rights.”335 The Court attempted an objective assessment of the user’s real purpose or motive in using the copyrighted work.336 As the Law Society’s custom photocopy service was provided for the purpose of research, review, and private study, making copies of the requested materials was also considered for the purpose of research. Even though it was not done for the staffs themselves, it was part of the research process, and there was no purpose of the dealing except for research. The Court found that it was allowable purpose given it was an integral part of the legal research process.337

• **Character of the Dealing**

For this factor, the Court examined how the works were dealt with. Multiple copies of works can be unfair, whereas a single copy of a work for a specific legitimate purpose may be a favor of a finding of fairness. The Court ruled that the Law Society’s dealing was fair because it provided single copies of works for specific purposes.338 It is noted that the Court also considered the copy of the work was destroyed, and the custom or practice in the industry to determine the character of the dealing.339 However, as D’Agostino explains, reliance on custom can be dangerous, as the custom is often unilateral and leads to different results on fair dealing tests, depending on whose perspective in the industry should be valued.340

335 *CCH* para. 54.  
336 *CCH* para. 54.  
337 *CCH* para. 64.  
338 *CCH* para. 67.  
339 *CCH* para. 55.  
- The Amount of the Dealing

The amount taken from a work is examined when assessing fairness, although it is not necessarily determinative.341 However, the amount taken may be more or less fair depending on the purpose. The Court provided examples, stating that copying an entire academic article may be essential for the purpose of research or private study, but not likely to be fair for the purpose of criticism.342 In this case, the Court found that the Law Society’s dealings were fair, reasoning that the Policy of the Great Library indicates that the amount of dealing with copyrighted works will be reasonable.343 The Policy stated that one case was copied, and requests for a copy of more than five percent of a work may be refused.344

- Alternatives to the Dealing

For this factor, the Court considered whether “a non-copyrighted equivalent of the work” was available instead of the copyrighted work and whether “the dealing was reasonably necessary to achieve the ultimate purpose.”345 In CCH, the Court did not find reasonable alternatives to the dealing in this case, given the residence of the requesters and the volume of legal collection and research.346

341 CCH para. 56.
342 CCH para. 56.
343 CCH para. 56. D’Agostino, Healing Fair Dealing, 322 (“User Practices informed the Court’s reasoning”).
344 CCH para. 61.
345 CCH para. 57.
346 CCH para 69 (20 percent of requesters live outside the Toronto Area; researchers are not allowed to borrow materials from the library; note-taking in the library seems not reasonable given the volume of research).
• **The Nature of the Work**

The Court noted that if a work has not been published, the dealing is more likely to be fair, as its reproduction could serve one of the goals of copyright law, which is wider public dissemination of the work.\(^{347}\) In *CCH*, the nature of the works qualified for fairness, as access to judicial decisions and other works is generally not to be unjustifiably restrained.\(^{348}\) Allowing requests for research, private study, criticism, and review in legal proceedings only was also considered in determining fairness.\(^{349}\)

• **Effect of the Dealing on the Work**

If the reproduced work competes with the market of the original work, the dealing is less likely to be fair. The Court added a note that this factor is not the only factor, nor the most important factor in deciding fairness.\(^{350}\) In *CCH*, no evidence was submitted to show that the market for the publishers’ works had decreased. Rather, the Court suggested the burden of proof may be reversed if the defendant cannot access evidence about the effect of the dealing on the market. In contrast, evidence of a negative effect on the market would have been in the publishers’ interest at trial.\(^{351}\)

\(^{347}\) *CCH* para. 58. *But See* D’Agostino, *Healing Fair Dealing*, 323 (this approach is contrary to UK and US case law); Samuelson, *Unbundling Fair Uses*, 2563. *See also*, Section 107 in the US Copyright Act also makes clear that “the work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all other factors.”

\(^{348}\) *CCH* para. 71.

\(^{349}\) *CCH* para. 71.


\(^{351}\) *CCH*, para. 72; *See also* D’Agostino, *Healing Fair Dealing*, 324.
5.5 Debate and Politics After CCH

Given the above analysis, it is fair to say that CCH is an initial indicator of a shift from the traditional restrictive view of fair dealing to an elevated view of fair dealing as a user’s right.\textsuperscript{352} The decision brought about considerable debate over the scope of the fair dealing provision. The academic community welcomed the decision, stressing an important shift in copyright, whereas the rights holder community raised copyright concerns about the broader interpretation of fair dealing or denied the status users’ rights.\textsuperscript{353}

In the political world, Bill C-60,\textsuperscript{354} suggested in June 2005, was arguably controversial from both sides.\textsuperscript{355} However, its flexible anti-circumvention rules\textsuperscript{356} and lack of significant new user exceptions were not successful.\textsuperscript{357} The next bill, Bill C-61\textsuperscript{358} was introduced soon after the Anti-Camcorder Bill\textsuperscript{359} concerning recording a movie in a movie theatre without the consent of the theater’s manager was passed in June 2007. Despite the growing interest of users in copyright reform,\textsuperscript{360} the Bill received criticism for greater enforcement and restriction on the use of digital

\textsuperscript{352} See e.g., Geist, Fairness Found, 169; Craig, Globalizing User Rights Talk, 23.
\textsuperscript{353} For a detailed discussion, See Geist, Canadian Copyright Story, 182-183.
\textsuperscript{354} Bill C-60, An Act to amend the Copyright Act, 1\textsuperscript{st} Sess, 38th Parl, 2005.
\textsuperscript{355} Geist, Canadian Copyright Story, 179-180 (New exceptions were restrictive for users. The US copyright industry raised concerns with anti-circumvention rules and Internet service provider liability standards in the Bill).
\textsuperscript{356} Prohibit TPM (Technical Protection Measures) or so-called “digital locks” circumvention devices (WIPO Copyright Treaty, art. 11.).
\textsuperscript{357} Geist, Canadian Copyright Story, 181 (The Bill died later with the election).
\textsuperscript{358} Bill C-61, An Act to amend the Copyright Act, 2\textsuperscript{nd} Sess, 39\textsuperscript{th} Parl, 2008. The bill appeared on the House of Commons notice paper with a plan to table it on December 10, 2007. For a detailed discussion of a response to the notice paper, See Geist, Canadian Copyright Story, 187-188 (Groups of users raised their voices to the Bill that the plan in the notice paper was introducing a bill without advance public consultation. Hence, Bill C-61 was delayed in being introduced).
\textsuperscript{359} Bill C-59, An Act to amend the Criminal Code (unauthorized recording of a movie), 1\textsuperscript{st} Sess, 39\textsuperscript{th} Parl, 2007.
\textsuperscript{360} Geist, Canadian Copyright Story, 181, 184, 185 (Scholarship and new groups focusing on users’ rights and copyright emerged. e.g., the Canadian Music Creators Coalition in 2006 and Appropriation Art: A Coalition of Arts Professionals included arts organizations from Alberta, BC, Quebec, Ontario, and Saskatchewan along with hundreds of artists from across Canada. Moreover, calling for the adoption for the adoption of a fair use model in Canada was increasingly discussed including in the corporative sector in 2006. E.g., TELUS, one of the large telecommunication companies in Canada).
content.\textsuperscript{361} First, the Bill did not include fair dealing reform.\textsuperscript{362} It did not reflect the concern that certain uses, such as parody and satire, were adequately protected by Canadian copyright law, despite the \textit{CCH} decision.\textsuperscript{363} Second, the anti-circumvention rules were far more restrictive than the previous Bill C-60.\textsuperscript{364}

A couple of years later, in June 2010, Bill C-32\textsuperscript{365} was introduced after undertaking a large scale copyright consultation and participation process from both users and traditional stakeholders.\textsuperscript{366} The Bill included new rights for copyright stakeholders, new exceptions for Canadian broadcasters, new liability for search services, and the legalization of common consumer activities.\textsuperscript{367} For fair dealing reform, several additional purposes, “education, satire and parody” were added to the permissible purposes of fair dealing.\textsuperscript{368} Nonetheless, there were concerns that the anti-circumvention rules in the Bill\textsuperscript{369} would undermine the effort to expand the

\begin{footnotesize}
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\item \textsuperscript{361} Geist, \textit{Canadian Copyright Story}, 188-190 (Bill C-61 also died later as there was an election call in 2008).
\item \textsuperscript{362} However, it provided a series of new consumer-focused exceptions.
\item \textsuperscript{363} Industry Canada, Advice Paper, Treatment of Parody and Satire under the Current Copyright Exceptions Framework (May 21, 2008), Quoted in Geist, \textit{Canadian Copyright Story}, 189.
\item \textsuperscript{364} For a detailed discussion on the issue, See Geist, \textit{Canadian Copyright Story}, 189-190.
\item \textsuperscript{365} Bill C-32, An Act to amend the Copyright Act, 3d Sess, 40\textsuperscript{th} Parl, 2010.
\item \textsuperscript{366} For a detailed discussion on the consultation process, See Geist, \textit{Canadian Copyright Story}, 190-192; Carys Craig, “Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of Prescriptive Parallelism,” \textit{The Journal of World Intellectual Property} 13, no. 4 (2010): 503-539 (Bill 60 and Bill 61).
\item \textsuperscript{367} For a detailed review of the Bill, see generally Michael Geist, ed., \textit{Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda} (Toronto: Irwin Law, 2010).
\item \textsuperscript{368} See Reynolds, \textit{Fair Transformative Use of Copyright}, 409-416; Geist, \textit{Canadian Copyright Story}, 193 (“it seemed compromising both arguments of no changes in fair dealing as well as of a more flexible fair dealing”).
\item \textsuperscript{369} Geist, \textit{Canadian Copyright Story}, 194 (“adopted a foundational principle that anytime a digital lock is used, it trumps virtually all other rights”).
\end{itemize}
\end{footnotesize}
scope of fair dealing. In the end, Bill C-11, identical to Bill C-32, was introduced in 2011 and came into force in 2012.

In addition to the Copyright Act Amendment in 2012, the Supreme Court of Canada released five copyright judgments in the summer of the same year, referred to as the “pentalogy” among scholars. These cases, *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*; *Bell; Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* and *Re:Sound v. Motion Picture Theatre Associations of Canada*, dealt with different facets of the copyright regime and were reviewed as a landmark in the history of the Supreme Court jurisprudence. Two of these cases, *Bell* and *Alberta*, addressed the fair dealing provisions directly, which will be analyzed in the next chapter.

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370 For a discussion of this issue, see Michael Geist and Keith Rose, “Fixing Bill C-32: Proposed Amendments to the Digital Lock Provisions.” (2010); Graham Reynolds, “Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression,” in *Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda*, ed. Michael Geist (Toronto: Irwin Law, 2010), 395-422 (describing this restrictive anticircumvention provision undermines fair dealing developments); Myra Tawfik, “History in the Balance: Copyright and Access to Knowledge,” in *Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda*, ed. Michael Geist (Toronto: Irwin Law, 2010), 85-89 (“the recognition and enhancement of user rights in Bill C-32 may well be nothing but smoke and mirrors when considered in the light of the provisions relating to “technological protection measures” (TPMs”)”.
371 Bill C-11, An Act to amend the Copyright Act, 1st Sess, 41st Parl, 2011.
372 Copyright Modernization Act, SC 2012, c 20.
378 Wilkinson, *Context of Supreme Court’s Copyright Cases*, 76.
5.6 Analyzing Fair Dealing Cases after CCH

A broad and liberal interpretation of fair dealing arising from CCH has been reaffirmed in the subsequent cases\(^{379}\): Bell and Alberta in 2012, and York University v. Canadian Copyright Licensing Agency (Access Copyright) in 2021.\(^{380}\) I will review these cases, focusing on the reasoning of how CCH’s approach was confirmed, and how the scope of fair dealing was able to be expanded.

Before proceeding to review, I will briefly mention the Copyright Board (Board) since the above cases are the Judicial review of the Board’s decision in Canada. The Board is the expert tribunal established under the Canadian Copyright Act to set tariffs for the use of copyrighted material.\(^{381}\) The Federal Court Appeal has jurisdiction over judicial review made by federal boards, commissions or tribunals including the Board.\(^{382}\) In Dunsmuir v. New Brunswick,\(^{383}\) the Supreme Court addressed the general principles of judicial review of decisions of administrative tribunals, providing two standards of review: reasonableness and correctness.\(^{384}\) In copyright cases, different views are presented on which standard of review ought to apply to

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\(^{379}\) Geist, *Fairness Found*, 170.

\(^{380}\) York University v. Canadian Copyright Licensing Agency (Access Copyright), 2021 SCC 32, [York]

\(^{381}\) Canadian Copyright Act, art.2, ss. 66 (1). The members of the Board are appointed by the Governor in Council. The chairman of the Copyright Board must be a judge, either sitting or retired of a superior, county or district court (ss. 66(3)).

\(^{382}\) The Federal Courts Act, RSC 1985, c- F-7, sec. 28(1), (J).

\(^{383}\) Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 SCR 190. [Dunsmuir]

\(^{384}\) Dunsmuir para. 34; para. 48 (“Reasonableness is a deferential standard…concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”). *But see also* para. 50 (“When applying the correctness standard, a reviewing court will not show deference… it will rather undertake its own analysis of the question”).
questions of law decided by the Board, depending on the differing views of the role and mandate of the Board.

5.6.1 Bell: Providing Preview Music and Purpose of Research

Bell Canada operated online music services that sold downloads of digital files of musical works. It provided customers with previews, which consist of 30 to 90 seconds excerpts of musical works through an online “stream” prior to purchasing the music. The Society of Composers, Authors and Music Publishers of Canada (SOCAN) argued tariffs for the previews, but the Board decided that SOCAN did not have the right to collect royalties for previews. The Bell case involved the question of whether those previews constituted fair dealing, and the Supreme Court of Canada unanimously ruled that those previews qualified for fair dealing.

In testing for fair dealing, the Court cited CCH, emphasizing the purpose of fair dealing analysis for achieving a proper balance between the protection of the exclusive rights of authors and copyright owners and access to their works by the public.” For the first step of the fair dealing test, the Court recaptured CCH’s interpretation that “research” must be given a large and

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386 For discussion of judicial review of the Board decision particularly with respect to the 2012 decisions, see Reynolds, Reasonableness, Fairness and Public Interest, Paul Daly, “Courts and Copyright; Some Thoughts on Standard of Review,” in The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law, ed. Michael Geist (Ottawa: University of Ottawa Press, 2014), 47-64.

387 Apple Canada Inc., Rogers Communications Inc., Rogers Wireless Partnership, Shaw Cable systems G.P. and TELUS Communications Inc. were Respondents too.

388 It represents composers, authors and music publishers and administers their performing and communication rights.

389 61 C.P.R. (4th) 353.

390 Bell, 327.

391 Bell, 327.
Based on this approach, Abella J found that the previews amounted to “research purpose” under the Copyright Act, as consumers used the previews for the purpose of conducting research to identify which music to purchase. SOCAN argued that research should be limited to creative purposes. The Court, however, reasoned that permitting only creative purposes to qualify as research would be contrary to the ordinary meaning of research, which can include many activities that do not require the establishment of new facts or conclusions. Moreover, it would ignore the fact that dissemination of work is also one of the purposes of Copyright, regardless of creativity or not.

Assessing the purpose of the dealing in the second step of the fair dealing test involves two issues: whether there is a qualifying purpose, and whose purpose should be considered. With respect to whose purpose, the purpose of the dealing was assessed from the perspective of the consumer, who are the ultimate users of the previews. This was consistent with “real purpose or motive” as identified in CCH. Even though the consumers’ purpose of the previews was viewed as commercial, it was qualified as fair in that the previews were streamed, short and often poor quality, which the Court found as reasonable safeguards.

The Court continued to confirm other fairness tests identified in CCH. First, no copy existed after the previews met the character of the dealing criteria. Given the amount of the

392 Bell para. 15.
393 Bell para. 15, 17, 18, 30.
394 Bell para. 22 (“It can be piecemeal, informal, exploratory, or confirmatory… for no purpose except personal interest”).
395 Bell para. 21.
396 Geist, Fairness Found, 172.
397 For discussion on this issue, see Giuseppina D’Agostino, “The Arithmetic of Fair Dealing at the Supreme Court of Canada.” in the Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law, ed. Michael Geist (Ottawa: University of Ottawa, 2014), 198 (“While it was clear that users’ rights count, it was unclear whose perspective should carry more weight.”).
398 Bell para. 33, 34.
399 Bell para. 35, 36.
400 Bell para. 37, 38.
dealing factor refers to the individual copy because fair dealing is the users’ right, the proportion of the excerpt used in relation to the whole work was examined.\textsuperscript{401} In the digital age in particular, the Court added a warning that focusing on the aggregate amount of dealing could lead to “disproportionate findings of unfairness when compared with non-digital works.”\textsuperscript{402} Next, none of the other suggested alternatives by SOCAN can be alternatives to the dealing.\textsuperscript{403} Lastly, the Court found that the preview did not bring a negative impact on the work, rather, it increased the sale of musical works.\textsuperscript{404}

5.6.2  Alberta: Teacher’s Copy for Students and Purpose of Research

The main issue in Alberta is whether copies made at teachers’ initiative with instruction to students that they read the material meet the second step of the fair dealing test.\textsuperscript{405} Teachers photocopied short excerpts from textbooks and distributed those copies to students as a complement to the main textbook the students used. The Supreme Court held that the Board’s finding of unfairness was based on a misapplication of the CCH factors.

First, with respect to the purpose of dealing, the Supreme Court found that there was no separation purpose between teachers and students, whereas the Board and the Federal Court of Appeal saw the purpose of the dealing as instruction or non-private study from the teacher’s perspective.\textsuperscript{406} The majority of the Supreme Court\textsuperscript{407} concluded that teachers/copiers share a

\textsuperscript{401} Bell para. 39, 40, 41.
\textsuperscript{402} Bell para. 43.
\textsuperscript{403} Bell para. 44, 45, 46.
\textsuperscript{404} Bell para. 47, 48.
\textsuperscript{405} Alberta para. 14. The Copyright Board and the Federal Court of Appeal agreed that copies were made for the allowable purpose of research or private study in the first step. They, however, concluded it did not amount to fair dealing.
\textsuperscript{406} Alberta para. 15.
\textsuperscript{407} Cf., Alberta, 351. Rothstein J (Dissenting) stated that whether a dealing is fair is a question of fact that should be treated with deference and a reasonableness standard should be applied on judicial review.
symbiotic purpose with the students/users in that teachers provided copies to enable the students to have the material they need for the purpose of studying.\textsuperscript{408} It was also added that whether copies were provided on request did not change the fact that the copies were an “essential element in student’s research and private study” by confirming what \textit{CCH} suggested.\textsuperscript{409} Such a different approach between the Supreme Court and the Board in identifying the purpose of copies\textsuperscript{410} brings different outcomes not only for this factor but also for other factors, as discussed below.

Second, with respect to the amount of the dealing factor, it has to be assessed whether the proportion of each of the short excerpts of copies in relation to the whole work is fair, rather than focusing on the repeated copyright of the same class set of books for multiple classes or students.\textsuperscript{411} The Supreme Court found that the teacher made copies for the use of the students, not for making multiple copies of the class set for their own use. Moreover, as noted in \textit{Bell}, it is assessed based on the portion of the excerpt in the entire work, not the overall quantity of what is disseminated.\textsuperscript{412}

With regard to alternatives to the dealing factor, the Board focused on the teacher’s purpose of instruction and found that institutions had an alternative to photocopying textbooks, such as buying the original texts.\textsuperscript{413} The Supreme Court, however, did not agree with the Board’s
conclusion, considering that copies were only short excerpts to complement existing textbooks.\footnote{\textit{Alberta} para. 32.}

Lastly, the Supreme Court relied on \textit{CCH}, which stated that the detrimental impact had not been demonstrated if there was no evidence to show a market decline as a result of the copies. Here, the Court found that not only was there no sufficient evidence on this matter but also a lack of possibility to compete with the market for textbooks.

\subsection*{5.6.3 York: University’s Copy for Students’ Education}

This case arose after the amendment of the Copyright Act added “education” as a permissible purpose. It concerned enforcing interim tariffs for making copies of published works at York University. Here, the Supreme Court did not determine fair dealing defense of York University as the plaintiff’s appeal was dismissed.\footnote{\textit{York} para. 83.} However, it addressed some errors in the analysis of fairness factors (the second step of fair dealing test) by the Federal Court and the Federal Court of Appeal,\footnote{\textit{York} para. 88.} emphasizing the purpose of copyright, the copyright balance and the role of fair dealing.\footnote{\textit{York} para. 91 (copyright balance between public and copyright), 92 (public access and dissemination of artistic and intellectual works as a primary goal of copyright), 93 (proper balance ensuring creators’ rights), 94 (copyright goals and proper copyright balance between them); 90, 95 (proper role of fair dealing and other exceptions).} What is significant in \textit{York} is that it reconfirmed the importance of the copyright balance and the approach to fair dealing as a user’s right, as identified in the prior cases, \textit{CCH, Bell and Alberta}.\footnote{\textit{Michael Geist, “Copyright Vindication: Supreme Court Confirms Access Copyright Tariff Not Mandatory, Lower Court Fair Dealing Analysis Was “Tainted”” (August 3, 2021). https://www.michaelgeist.ca/2021/08/copyright-vindication-supreme-court-confirms-access-copyright-tariff-not-mandatory-lower-court-fair-dealing-analysis-was-tainted/}}
The Supreme Court stated that the main problem with the analysis was that a user’s right (or individual students’ right) was overlooked by approaching the fairness analysis exclusively from the institutional perspective.\footnote{York para. 89, 98.} This resonates with the \emph{Alberta} case where the Board and the Federal Court of Appeal assessed the purpose of dealing from the teachers’ perspective.\footnote{Alberta para. 15; York para. 99.} The error of the analysis was therefore excluding the purpose of copying for student use and student education, while all relevant facts should be taken into account to determine fairness.\footnote{York para. 102, 103.}

In addition, the Supreme Court corrected the trial judge’s view, which was based on the assumption that distributing different portions of a single work to students could end up distributing an author’s entire work.\footnote{Bell para. 41, Alberta para. 29, York para. 104.} The amount of the dealing should be assessed based on the individual use, considering fair dealing is a user’s right. The Court cautioned that larger universities could lead to findings of unfairness in terms of aggregate dissemination under the character of the dealing factor. The Court also suggested that it should be assessed at the end whether a university’s fair dealing practice actualizes the students’ right to receive course material for educational purposes in a fair manner.

\subsection*{5.6.4 Federal Court Cases on Fair Dealing}\footnote{For this part, I chose fair dealing cases for other purposes that the Supreme Court did not address yet such as criticism and news reporting.}

A recent decision of the Federal Court provided judicial pronouncements on fair dealing for criticism. In \emph{Canadian Broadcasting Corporation (CBC) v. Conservative Party of Canada (CPC)},\footnote{Canadian Broadcasting Corporation v. Conservative Party of Canada, 2021 FC 425.} CPC used CBC’s news clip without the consent of CBC in CPC’s political
advertisements that criticized the Prime Minister of Canada and his government for the 2019 Federal Election.\footnote{CPC published an advertisement called “Look at What We’ve Done.” It was 1.46 minutes long and was one of a series of negative ads – “Justin Trudeau – Not As Advertised.”} The Court found that it constituted fair dealing for the purpose of criticism. In keeping with the \emph{CCH} decision, the Court ruled that the purpose of criticism was not restricted to criticism of the copied work itself, rejecting CBC’s argument.\footnote{Meanwhile, CPC relied on the allowable purposes of criticism and review, satire and education, but the Court found that criticism was at issue here (para. 73).}

In \emph{Stross v. Trend Hunter Inc.},\footnote{Stross v. Trend Hunter Inc., 2021 FC 955.} the Federal Court of Appeal ruled that the use of Stross’ photographs in a website post did not constitute fair dealing. It did not fall under fair dealing for the purpose of news reporting, as website posts did not meet the requirements for news reporting.\footnote{Canadian Copyright Act, sec. 29.2. (There are two requirements: First, to mention the source. Second, to provide the author’s name).} Nonetheless, the Court found that it qualified for the purpose of research,\footnote{para. 22 (“A computerized market research that measures consumer interaction and preferences for the purpose of generating data for clients.”).} as research was to be given a large and liberal interpretation. The Court, however, concluded that the dealing was not amount to fairness in the second step of the fair dealing test. For example, the purpose of dealing was commercial in nature for the benefit of Trend Hunter and its clients, with no benefits to Stross and no broader public interest purpose, while creators could benefit in \emph{Bell}. Moreover, the images were essentially reproduced, distinguishable from music previews in \emph{Bell}.

\section{5.7 Conclusion: Canada’s Fair Dealing in the Context of Legal Transplant}

This section provides the conclusion of this chapter, evaluating the compatibility of Canada's fair dealing in the context of legal transplant. When evaluating and selecting the best model for
Korea's copyright law, the following features of Canada's fair dealing would be considered to determine its appropriateness to Korean copyright law.

5.7.1 **Legal Duality Provides More Compatibility**

As seen above, Canadian copyright law combines the common law tradition and civil law tradition. Being a federal statute, the Copyright Act considers the legal duality of Canada from its draft to operation and interpretation in all provinces. This feature of Canadian copyright law provides a unique advantage in harmonizing civil law and common law tradition in the field of copyright area.

As discussed in Chapter 2, Korean copyright law is primarily based on the civil law tradition but is also significantly influenced by the common law tradition. While it grants moral rights to authors in line with the civil law tradition, the justification for copyright is closely tied to utilitarian theory. The Korean Copyright Act has incorporated elements of the common law tradition, influenced by US copyright law. Therefore, for Korean copyright law, Canada's fair dealing model would be more compatible than US fair use, given the presence of Canadian legal duality.

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430 Due to legal duality, Canadian law is traditionally “legal dualism” or “Bijuralism (The co-existence of the common law and the civil law in Canada).” However, it should note that there is a discussion on that the Canadian legislative is a Tri-jural system in the sense that it should reflect the Indigenous legal traditions.


5.7.2 Two-Step Analysis Offers More Legal Certainty than US Fair Use

As discussed above, fair dealing in Canada requires the two-step analysis: first, whether the purpose of use meets one of the permitted purposes set out in the Canadian Copyright Act, such as research or private study, education, parody or satire, criticism or review, and news reporting.\textsuperscript{432} Second, whether the use meets the fairness criteria. Therefore, once a court is satisfied that the purpose of the use falls within one of the permitted purposes, it then assesses the fairness of the dealing. With respect to the fairness criteria, the fair dealing provision does not include a list of criteria that is different from the US fair use provision. However, since \textit{CCH} addressed six factors to consider, the court has applied these factors to assess fairness: the purpose of the dealing; the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.\textsuperscript{433}

In contrast to the Canadian provision, US fair use allows any use of a work to be fair. The provision of fair use still provides six example uses, introduced with the expression “such as.”\textsuperscript{434} It thus requires only a fairness test considering four factors similar to the six factors of fair dealing: the purpose of the use (including whether it is for commercial or noncommercial purposes); the nature of the copyrighted work; the substantiality of the taking; and the potential for harm to the market for the work.\textsuperscript{435} Since it has a fairness test only, not limiting the purpose of uses, US Fair use is more flexible and open-ended exception than Canadian fair dealing. However, as discussed in Chapter 4, US fair use doctrine is criticized for its unpredictability due

\textsuperscript{432} Canadian Copyright Act, RSC 1985, c-42, sec 29. For criticism or review and news reporting, the sufficient acknowledgment should be given.
\textsuperscript{433} \textit{CCH} para. 53.
\textsuperscript{434} US Copyright Act, sec. 107, preamble (“Criticism, comment, news reporting, teaching, scholarship, and research”).
\textsuperscript{435} US Copyright Act, sec. 107 (It also makes clear that other factors can be taken into account).
to the fact-intensive, case-by-case nature of fair use analysis, and the lack of judicial consensus on the fundamental principles that underlie fair use.

Based on the analysis provided in Chapter 4, the issue with Korean fair use is the lack of balance between flexibility and certainty. While it is important for Korean fair use to provide an appropriate level of both certainty and flexibility, the current Korean fair use, which is based on the US fair use system, has resulted in an excessive level of flexibility within copyright law. In my view, fair dealing in Canada gives a higher degree of legal certainty than US fair use test given that it provides another dimension of “permissible purposes.” This helps to predict whether a use is likely to be fair or unfair providing sufficient guidelines. It is often suggested that since CCH, the Court has interpreted permissible purposes with a large and liberal approach. The first step has become relatively easy to meet, and the “analytical heavy-hitting” is done in fairness analysis.\textsuperscript{436} Nevertheless, the Supreme Court in Bell was clear that “given the “fundamental differences” in the respective legislative schemes…unlike the American approach of proceeding straight to the fairness assessment, we do not engage in the fairness analysis in Canada until we are satisfied that the dealing is for one of the allowable purposes enumerated in the Copyright Act.”\textsuperscript{437}

\textsuperscript{436} Bell para. 27. See Geist, Fairness Found, 178 (considering it is one of the developments responsible for the shift from fair dealing to fair use).

5.7.3 More Consistent with the Three-Step Test than US Fair Use

Under the three-step test in the Berne Convention and TRIPS, fair use or fair dealing is supposed to be applied only for certain special cases and should not interfere with the normal exploitation of protected works, nor unreasonably prejudice the legitimate interest of authors and other rights holders.438

Whether US fair use satisfies the three-step test under these treaties has been controversial, due to the generality of US fair use and its seeming indeterminacy.439 As discussed above, Korean fair use incorporates the three-step test into the fair use provision to minimize the risk of violation of the three-step test. However, I have argued that this is one of the reasons that Korean fair use creates uncertainty and unpredictability.

Canadian fair dealing, on the other hand, is generally less likely to raise significant concerns over compliance with the Berne Convention and TRIPS than US fair use,440 due to its two-step test. While the provision on fair dealing for the purpose of education is controversial,441 covering specific purposes of use easily complies with the three-step test than US fair use that employs the use of the phrase “such as” to present a range of examples that demonstrate applicable contexts. Therefore, Canadian fair dealing would not need to be customized to include

438 Berne Convention, art. 9(2), TRIPS art. 13.
440 Geist, Fairness Found, 180-181. See also Sookman et al., Why Should Not Adopt Fair Use, 160-163 (expressing concerns that adopting US fair use to Canada raises an issue of the violation of the three-step test). But see also, Geiger et al., Three Step Test Revisited, 612 (fair dealing is categorized with fair use since traditionally both courts determine case-by-case based upon a set of principles and/or rules).
441 See, Gendreau, Canada and the Three-Step Test, 320-323 (discussing that fair dealing for the purpose of education is so broadly drafted that it goes against the three-step of the Berne Convention and TRIPS).
extra safeguards, such as incorporating the three-step test into the provision, in order to minimize the risk of violating international norms.

### 5.7.4 Recognition of User’s Right Gives Sufficient Flexibility

Since CCH, the Supreme Court of Canada has repeatedly confirmed fair dealing as a “user’s right” and recognized its role in balancing the interests of copyright owners and users. The adoption of the language of “user’s rights” in Canada plays a crucial role in attaining this copyright balance. It guides courts and various copyright stakeholders in interpreting and applying fair dealing with an approach that is not narrow and restrictive. By doing so, Canadian fair dealing is less restrictive in the operation of fair dealing compared to UK fair dealing.

As seen above, flexibility is necessary for Korean copyright law to achieve a fair outcome in the digital era. However, the problem with Korean fair use stems from the unsuccessful transplantation of US fair use, which has resulted in excessive flexibility. This excessive flexibility has led to unpredictability and undermined the reliability of Korean fair use. In my view, Canadian fair dealing could offer Korean copyright law not excessive, but rather

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442 See Bell, Alberta and York. See also Margaret Ann Wilkinson, “Copyright Users’ Rights in International Law,” L. Publications 60 (2014): 9, 10 (“virtually every other county in the world has less clearly enshrined users’ rights than has Canadian Law”).

443 See Greenleaf et al., Copyright Exceptions and Limitation, 348 (“The user-oriented Canadian approach shows the difficulty in drawing overly rigid distinctions between fair dealing and fair use”); For a detailed discussion on the role of “User’s right” in advancing the public interest in copyright, See generally Craig, Globalizing User Rights Talk.

444 See e.g., Bell para. 29 (“This is consistent with the Court’s approach in CCH, where it described fair dealing as a user’s right). York para. 89 (“By anchoring the analysis in the institutional nature of the copyright and York’s purported commercial purpose, the nature of fair dealing as a user’s right was overlooked and fairness assessment was over before it began”).

445 See. e.g., D’Agostino, Healing Fair Dealing, 337- 344 (comparing the UK fair dealing framework and CCH).
sufficient flexibility through the two-step analysis and a liberal approach that recognizes fair dealing as a user's right.
Chapter 6: Suggestions for Improving Korean Fair Use

Fair use should be utilized as an important tool for balancing the interests of copyright protection and the utilization of copyrighted works, thereby fulfilling the purpose of Korean copyright law. This thesis has argued that the reason why Korean fair use has not been relied upon is due to the unsuccessful legal transplantation of US fair use, which has resulted in too much flexibility and uncertainty. Subsequently, this section will discuss several suggestions for the improvement of Korean fair use provision in the context of successful legal transplant theory. The suggestions are composed of the revision of legislation, the role of the Courts and legal experts.

6.1 Revision of Legislation

In terms of legal reform, there are primarily two suggestions to consider as follows: one could reconsider the compatibility of US fair use with Korean copyright law and consider the Canadian fair dealing model in the context of legal transplant; another could be retaining the current US fair use model (fairness test only) but revise to give further guidance to fair use doctrine for the successful transplant of US fair use. This includes providing purpose examples and deleting the phrase of the three-step test in the provision. Lastly, this section suggests the need for several explicit clarifications in terms of the relationship with the quotation exception.

6.1.1 Reconsider US Fair Use and Consider Canadian Fair Dealing Model

As discussed in Chapter 4, there is doubt that US fair use is compatible with Korean copyright law. The different legal history, system, and culture could make US fair use difficult to play the same role in Korean copyright law as it does in the US. In other words, the unsuccessful legal
transplantation of US fair use into Korean copyright law has resulted in a lack of reliance on fair use. The history and critics of US fair use doctrine and its compatibility with Korean copyright law do not need to be fully repeated here. Instead, a few highlights will be mentioned.

US fair use has been developed by courts within the unique US legal and social culture for a significant period of time. It is the most flexible open-ended exception that relies on a case-by-case analysis. While it is notoriously criticized for its unpredictability, the abundant precedent cases and literature plays a role in guiding US fair use doctrine. On the other hand, Korean copyright law still lacks many precedent cases. It traditionally had specific limitations and exceptions which in turn provided predictability and legal certainty. Cherry picking US fair use without a comprehensive consideration of its compatibility with the Korean legal system results in uncertainty of the principle and ultimately leads to a lack of reliance on fair use.

When seeking the best-fitted model from comparative legal studies, comprehensive research of more than one legal system is crucial.\(^{446}\) Given that Korean literature has focused solely on the US legal system, evaluating Canada’s fair dealing model as an alternative is worth considering. As analyzed in Chapter 5, Canadian fair dealing would be more compatible with Korean copyright law, considering factors for successful legal transplants:\(^{447}\) (1) Canadian copyright law combines common law and civil law tradition; (2) Canadian fair dealing could provide more predictability and certainty than US fair use by operating the two-step test;\(^{448}\) (3) The two-step test ensures that Canadian fair dealing is more compliant with the three-step test.

\(^{446}\) Watson, *Legal Change*, 1122.

\(^{447}\) See Chapter 2.3.

\(^{448}\) See Chapter 4.7. See also Kim, *Limitations on Copyright*, 122-123 (suggesting fair dealing model (UK) to Korea since permissible purposes of fair dealing could enhance predictability).
than US fair use, and (4) it has proper flexibility with a liberal approach to fair dealing compared to UK fair dealing by recognizing fair dealing as users’ rights.449

Customization of Canadian fair dealing model might be needed to assimilate it into Korean copyright law. A detailed analysis of this customization is beyond the scope of this thesis and will be addressed through further studies. Instead, this thesis notes that customization, such as determining the enumerated purposes that qualify for fair dealing, should be decided based on Korean legal conditions. The initiative for enumerated purposes could refer to the permissible purposes of Canadian fair dealing, which includes a list of example purposes such as news reporting, criticism, education, and research, similar to the previous fair use provision in the Korean Copyright Act. Additionally, it should be emphasized that Canadian fair dealing offers more flexibility than other fair dealing models, such as that of the UK, due to its liberal and broad approach to fair dealing. Such flexibility would allow for a proper balance between flexibility and certainty. Although Canadian fair dealing cases cannot be easily transplanted into the Korean system, a liberal and broad approach to interpreting permissible purposes of use could be considered when implementing it in Korea. As Canadian courts state that fair dealing is a users' right, it could be clarified by Korean courts that Korean fair use is a users' right, thereby emphasizing the significance of this approach.

6.1.2 Revision of the Current Fair Use Provision450

- Providing Example Purposes of Uses

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449 D’Agostino, Healing Fair Dealing, 337.
450 This section presumes that Korean fair use retains the current US fair use model. Although the main argument in this thesis is that Canadian fair dealing is more appropriate with Korean copyright law, this section is based on the recognition that abrupt changes may introduce additional unpredictability, especially considering that the current Korean fair use has been in place for over 10 years.
The current fair use provision no longer provides a set of examples purposes after its amendment in 2016. As I argued in Chapter 4, this amendment gives rise to a higher degree of uncertainty than the US fair use provision itself.\textsuperscript{451} Legislating example purposes of uses in the provision, in fact, enhances certainty and predictability of Korean fair use, particularly where there are no precedent practices on fair use. In the search for flexible doctrine, providing certainty should not be overlooked. A set of example purposes would reduce uncertainty, giving users and owners reasonable predictability regarding the scope of fair use. The intention of the US fair use provision in setting forth a set of example purposes was to make clear the application of fair use.\textsuperscript{452} Likewise, a similar reasoning is found in a US study, where the six uses in the US fair use provision are used to find common patterns of fair use, thereby reducing the uncertainty of fair use and making it compatible with the three-step test.\textsuperscript{453} Furthermore, it would not cause fair use to be limited to the purposes of use.

\begin{itemize}
  \item **Revision of Phrase of Three-Step Test**
\end{itemize}

Phrases of the three-step test were introduced to avoid concerns about violating international treaty obligations. However, the inclusion of phrases from the three-step test in the fair use provision creates uncertainty and confusion. As noted above, it is arguable whether US fair use complies with the three-step test and to what extent it is consistent. Nevertheless, incorporating the three-step test phrase into the fair use provision does not simply make fair use doctrine compliant with the three-step test. Instead, when two abstract principles, the three-step test and

\textsuperscript{451} US Copyright Act, sec. 107. (“for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”).
\textsuperscript{452} See Chapter 4.
\textsuperscript{453} Samuelson, *Justifications for Copyright Limitations and Exceptions*, 49; Samuelson et al., *US Fair Use Compatible with Bern and TRIPS*, 5-7.
fair use, are combined in one provision, it only increases the risk of causing confusion and uncertainty.

Given the high risk of uncertainty caused by the current provision, the abstract phrases of the three-step test in the fair use provision should be recalibrated. This requires substantial changes to the existing framework of the provision. The three-step test has evolved as a flexible framework, allowing each national legislator to enjoy the freedom of adopting copyright limitations to satisfy their specific domestic environment. National legislators should thus tailor copyright limitations and exceptions to their specific domestic needs.\textsuperscript{454} Several ways should be taken into account for improvement: deleting the entire phrases regarding the three-step test and leaving courts to interpret fair use in a manner that is compliant with the three-step test, or refining phrases to provide specific criteria that align with the three-step test.

6.1.3 Explicit Clarifications

Based on the analysis of lower court cases on fair use presented above, several clarifications are needed to increase predictability and certainty in fair use. First, the relationship between fair use and other exceptions needs to be clarified in the Korean Copyright Act. The Korean fair use provision itself does not explicitly mention it. Moreover, unclear statements by the courts contribute to growing and persistent uncertainty surrounding Korean fair use. This clarification is especially important for the relationship with the exception of quotation and fair use since the exception of quotation played a similar role to fair use prior to its adoption. Either the Courts or the provision should explicitly address the relationship between them. To enhance clarity, it is recommended to include an explicit statement on the relationship in the Korean Copyright Act.

\textsuperscript{454} See e.g., Senftleben, \textit{The Perfect Match}, 268.
For example, Section 108 of the US Copyright Act, which specifically addresses library and archive exceptions, clarifies the relationship with fair use by stating that “(f) Noting in this section (4) in any way affects the right of fair use as provided by section 107.” This phrase clarifies that the provisions of Section 108 do not diminish or restrict the right of fair use provided under Section 107 of the US Copyright Act.

Second, it is unclear whether a user needs to provide a reference to satisfy fair use. As per the above analysis, it does not seem to be coherence among court decisions regarding whether citing the sources is considered in determining fair use. While the fair use provision does not specify the need to indicate sources, Article 37 of the Korean Copyright Act requires indicating sources to qualify for exceptions to copyright. Thus, clarification regarding citation is needed to provide a coherent interpretation of fair use. There are two ways to clarify this: One option could be to state explicitly that Article 37 does not apply to the fair use provision, and the other option could be to state explicitly that Article 37 does apply to certain types of uses. To provide an example of the latter, the Canadian Copyright Act explicitly requires mentioning the source, the name of the author, etc., for the purpose of criticism or review and news reporting. However, for other fair dealing categories, users are not required to mention the source.

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455 US Copyright Act, sec. 108: Limitations on exclusive rights: Reproduction by libraries and archives.
456 House of Representatives Report. no. 94-1476. (1976), 66. (“The doctrine of fair use applies to the section 108. No provision of section 108 is intended to take away any rights existing under the fair use doctrine.”).
457 See, Chapter 4.3.4.
458 A person who uses a work under this subsection [Limitations on Author’s Economic Rights] shall indicate its source.
459 Canadian Copyright Act, sec. 29.1, 29.2. For the purposes of criticism or review and news reporting need to mention the source, the name of the author, etc.
6.2 The Role of Courts in Improving Fair Use

The establishment of sufficient jurisprudence on fair use doctrine by Korean courts could increase the predictability of fair use in Korea. The courts, therefore, play a significant role in improving Korean fair use, as seen in the development of US fair use of Canadian fair dealing over time through court decisions.

6.2.1 Coherent Interpretation

As discussed in Chapter 4, there is a lack of coherent interpretation of the fair use provision among court decisions. This includes the interpretation of the four fairness factors, the relationship between the previous exception for quotation, and whether the requirement to provide sources or references must have been given and to what extent.\textsuperscript{460} A comprehensive analysis of Korean fair use cases is needed to provide a more coherent interpretation. The provision of a coherent interpretation by the courts could result in clear guidelines for the parties involved. Moreover, the importance of the statutory interpretation of fair use by the Supreme Court of Korea cannot be overestimated. At this moment, it is clear that statutory interpretation by the Supreme Court of Korea is especially necessary to improve Korean fair use. Even in cases where the use of copyrighted work does not constitute fair use, a judicial pronouncement by the Supreme Court of Korea regarding fair use plays a significant role in guiding lower courts and legal scholarship, ultimately increasing legal certainty.

\textsuperscript{460} Canada’s fair dealing requires locating the sources where the purpose of the use is criticism, review or news reporting (Canadian Copyright Act, sec. 29.1, 29.2).
6.2.2 Liberal Approach to Fair Use in Light of the Purpose of Copyright

Different approaches can be taken toward fair use, reflecting different underlying purposes of copyright. Therefore, when analyzing Korean fair use, it is important to revisit the entire copyright framework and its objectives. With this purpose in mind, the role of exceptions to copyright and the proper balance between protections and exceptions should be considered.

The Constitution of Korea recognizes the significance of protecting copyright for the progress of art and science and grants legislators more discretion in enacting copyright laws compared to other constitutional rights. Accordingly, the purpose of the Korean Copyright Act includes promoting the use of copyrighted works to improve and develop culture. Fair use serves as a tool to ensure a balance between the interests of protection and the use of works. Indeed, it not only promotes the purpose of copyright but also upholds other constitutional rights or values, such as freedom of expression and speech. Most importantly, fair use allows copyright law to adapt to new and unanticipated technology easier than other specific exceptions. It is with this purpose and role in mind that we should take a liberal approach to fair use.

As noted above, while the Supreme Court of Korea has adopted a broad and liberal approach to the exception of quotation, its approach has been often restrictive in certain cases such as the Starbucks case. This narrow approach can also be observed in several lower court cases on fair use. Such a narrow approach implies that the purpose of copyright primarily focuses on rewarding and protecting authors and copyright owners, which is not consistent with the true purpose of Korean copyright law. In the above analysis, the purpose of Korean copyright law ultimately contributes to the progress of culture by providing incentives for the creation and

461 See Chapter 3.4.
462 Lee, Fair Use under Korean Copyright Law, 99, 117.
dissemination of works. Under this approach, fair use is not merely limiting copyrights but plays a vital role in fulfilling this purpose by maintaining a balance. Therefore, given the role of fair use in copyright law, the courts of Korea should adopt a broad and liberal approach to fair use in order to fulfill the purpose of Korean copyright law.

6.3 The Role of Legal Experts in Improving Fair Use

Legal experts, including lawyers and scholars, also play a significant role in developing Korean fair use, as courts can only adjudicate cases brought before them. Finding an appropriate case and employing sound reasoning for fair use, based on legal scholarship, could result in ample precedent for fair use cases. Therefore, a comprehensive analysis of fair use doctrine is necessary. However, previous Korean literature on fair use has primarily focused on analyzing US court cases. Given the previous discourse in the thesis, particularly lessons from legal transplants scholarship, research on fair use requires not only an understanding of the US fair use cases but also the social and cultural context surrounding US fair use. In other words, it involves studying how US fair use evolved and developed within the specific legal and cultural context while understanding the history, nature, and purpose of Korean copyright law. Furthermore, the significance of expanding research on fair use to jurisdictions beyond the US should not be underestimated. The expanded research scope allows for the identification of best practices from different jurisdictions and a wider range of approaches to balancing copyright protection and user rights.

Legal experts also could improve Korean fair use by actively participating in the development of Korean fair use best practices across various sectors. In the US, for example, there are existing best practice guidelines for groups of creators who typically reuse parts of
existing works in developing new ones.463 These guidelines contribute to creating a sense of predictability regarding the scope of fair use.464 Similarly, when US fair use was codified, guidelines specifically tailored to the education sector were suggested to address the need for certainty among teachers.465 Best practice guidelines can be categorized into three levels: industry-wide (e.g., the film industry); sector-specific (e.g., documentary filmmakers), and institutional-specific (e.g., library).466 Considering the success of sector-specific best practices in the US, it is more realistic to initiate similar efforts in Korea starting from sector-specific or institutional-specific levels. Legal experts can collaborate with sector-specific groups to provide legal advice and guidance in the establishment of these best practice guidelines. By actively participating in these initiatives, legal experts can contribute their expertise and help ensure that fair use is applied in a consistent and balanced manner across various sectors in Korea.

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466 D’Agostino, Healing Fair Dealing, 361.
Chapter 7: Conclusion

Fair use was introduced into the Korean Copyright Act to attain a balance between the rights of authors/creators and users, and to provide flexibility to adapt to new technology. Throughout the thesis, I have argued that Korean fair use should be relied upon frequently to achieve this goal. Strong and robust fair use could fulfill the purpose of Korean copyright law, which is to progress the culture by granting incentives to creators and promoting the use of works.

In this thesis, I have evaluated the legal transplant of US fair use into Korean law and identified the incompatibility of US fair use as the problem of Korean fair use. Understanding foreign rules and the recipient’s local conditions in the context of history and culture is needed for evaluating compatibility with the recipient’s legal system. In light of this approach, I have examined the compatibility of US fair use with Korean copyright law. I have argued that the unsuccessful transplantation of US fair use into Korean copyright law has created excessive flexibility in Korean fair use causing problems of uncertainty and unpredictability. Legal certainty is crucial in Korean copyright law while US fair use provides a high level of flexibility. Unlike the US, there is a lack of devices to minimize uncertainty or unpredictability caused by excessive flexibility in Korean fair use. Korean copyright law does not have many precedent cases that relied on, whereas US fair use has been developed by courts and based on ample court cases. Furthermore, ineffective customization has resulted in ongoing uncertainty. Adding abstract phrases from the three-step test in the fair use provision gives confusion and uncertainty in the interpretation and application of fair use. The unclear relationship between the exception for quotation and fair use has obscured the development of fair use doctrine in Korea.
Based on the analysis of Canada’s fair dealing, I have argued that Canada’s fair dealing is more compatible with Korean copyright law than US fair use for several reasons. Canadian copyright law is based on both the common law and civil law traditions. Additionally, its two-step analysis would provide more certainty and ensure compliance with the three-step test. Moreover, the recognition of the user’s right based on the understating of copyright balance provides sufficient flexibility than other fair dealing models.

In the end, for the successful legal transplantation of fair use or fair dealing into Korean copyright law, Korean copyright law requires the identification of the most suitable model and its customization to fit its unique legal culture and system in Korea. For example, while US fair use and Canadian fair dealing have a shared origin in UK case law on fair abridgment, they have developed differently due to distinct legal cultures, contract laws, and copyright policies in each country. This highlights the potential success of legal transplants while emphasizing the need to understand fair use or fair dealing within the specific context of a country's legal conditions.

Given that excessive flexibility is a concern in the current Korean fair use, and legal certainty holds importance in Korean copyright law, ensuring a balance between providing certainty for right holders and users as well as a need for flexibility for new types of use becomes crucial for fair use to play its role. To achieve this balance, several suggestions have been proposed in this thesis. Firstly, the legislation revision could introduce a two-step analysis based on Canadian fair dealing. If Korean copyright law retains the current fair use model, however, it could modify the current fair use provision to offer more clarity and certainty to right holders and users. Rather than adding the abstract phrase of the three-step test into the fair use provision, I have suggested leaving it to the courts to interpret fair use in compliance with the three-step test or refining the language to be more specific. An explicit statement is also needed to clarify the
relationship between fair use and other exceptions. Secondly, ensuring coherence and predictability in the application of Korean fair use requires a comprehensive analysis of Korean fair use decisions, taking into account the nature and purpose of copyright law. In this regard, the role of legal experts is emphasized, as they can raise fair use issues before the courts based on comprehensive research. Moreover, for the development and strengthening of fair use, Korean courts should adopt a liberal approach, similar to Canadian courts. These suggestions enable Korean fair use to be strongly relied upon by courts and to achieve a balance between certainty and flexibility, ultimately fulfilling the core purpose of Korean copyright law.
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