Access Copyright v. York University

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This observation was written by Sarah Milligan.

At a glance:

Title	Access Copyright v. York University
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On July 12 2017, the Federal Court of Canada ruled against York University in its dispute with Access Copyright. Access Copyright is a non-profit collective organization that licenses materials to copyright users and distributes the proceeds to copyright holders. York University opted out of paying Access Copyright's interim tariff in 2011 and instead implemented its own set of fair dealing guidelines.

The court considered two questions: the main action of whether the interim tariff approved by the Copyright Board was enforceable against York and York's counterclaim that reproductions made within its Fair Dealing Guidelines constituted fair dealing as defined in the *Copyright Act*.[1] The judge, Michael L. Phelan, found the interim tariff to be mandatory and enforceable against York.

Further, he found York's Fair Dealing Guidelines

> "not fair in either their terms or their application" (para 14).

This judgement on the Fair Dealing Guidelines could have repercussions on fair dealing in higher education institutions across Canada. A complete version of York's Fair Dealing Guidelines is available in Schedule A of the judgement. Among other terms, they allowed York staff to copy and distribute a short excerpt of text, which was defined as:

> 10% or less of a Work, or no more than:
>
> a) one chapter from a book;
>
> b) a single article from a periodical;
>
> c) an entire artistic work (including a painting, photograph, diagram, drawing, map, chart and plan) from a Work containing other artistic works;
>
> d) an entire single poem or musical score from a Work containing other poems or musical scores; or
>
> e) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work,
>
> whichever is greater. (Schedule A)

According to the Guidelines, these reproductions may be distributed to students via handout, via an online learning management system, or as part of a course pack. The judge took issue with the Guidelines for many reasons, including that they would allow for the copying of "up to 100% of the work of a particular author, so long as the copying was divided up between courses" (para 20). This indicated, the judge claimed, that the Guidelines "are arbitrary and are not soundly based in principle" (para 20). The court concluded that York's Guidelines were not fair.

In a statement released following the judgement, Access Copyright called the decision "a big win for creators and publishers" (n. p.). York responded to the judgement by articulating in two different statements that their guidelines are intended to reflect a balance between the interests of creators and York's users, noting that the University spends millions of dollars per year on licences and acquisitions. In the second statement, York also announced its intention to appeal the decision.

Background on fair dealing in Canada

Canada's *Copyright Act* states that

> "[f]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright" (n. p.).

The Supreme Court judgement in *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004) is the primary case that has served to define fair dealing in Canada. Although it predates the inclusion of education as a purpose in the fair dealing clause of the *Copyright Act*, that case states: " 'Research' must

be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained" (para 51). Although claiming that fair dealing is "impossible to define (para 52), that same judgement proposes six non-exhaustive factors[2] that can be used to determine what is fair (para 53) and states that "it may be possible to deal fairly with a whole work" (para 56) such as an entire academic article. Another important case in fair dealing is the 2012 Supreme Court decision in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* when the SCC sided against Access Copyright and reinforced the need for a liberal approach to fair dealing in the education sector. The Supreme Court rejected the idea that making copies for the purposes of instruction was any different from making copies for the purposes of private study and/or research.[3] The Court noted that instructors provide copies to students purely for the purpose of instruction, that is, to facilitate the students' research and private study: "[i]nstruction and research/private study are, in the school context, tautological" (para 23). The Supreme Court also considered Access's argument that if not for the copying of short excerpts the books would be purchased instead as a "demonstrably unrealistic outcome" (para 32). The SCC expressed a belief that if copying did not take place, students "would simply go without the supplementary information, or be forced to consult the single copy already owned by the school." (para 36). Although four of the Justices dissented, the Supreme Court ultimately ruled in Alberta's favour. Another key document is the Copyright Board statement which said that the reproduction of up to 10% of a work "did not affect the fairness of the dealing" (para 288). These documents, including the 2012 *Copyright Act* reform that explicitly added education as a purpose for fair dealing, have defined fair dealing in Canada for the last five years.

Repercussions for the rest of the country

Both the trial judge and York acknowledged that "[f]air dealing practices are currently in use at universities across Canada" (York University, 31 July 2017, n. p.). Indeed, many Canadian universities and organizations have very similar fair dealing guidelines, including the same definition of a *short excerpt* which York provides above (see for example: University of Toronto, University of Victoria, Simon Fraser University). The similarity of these guidelines and definitions is not by coincidence; they derive from Universities Canada's fair dealing policy, which was itself influenced by the decisions of the major Canadian court cases described above.[4] It is because of these precedents that the Federal Court of Canada's decision in the Access Copyright v. York University has surprised many in the Canadian academic community.

Michael Geist, the Canada Research Chair in Internet and E-commerce law at the University of Ottawa, wrote a blog post the day after the decision entitled, "Ignoring the Supreme Court: Federal Court Judge Hands Access Copyright Fair Dealing Victory." Geist's 2013 book, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, covers the five Supreme Court decisions on copyright cases that were issued on the same day in the summer of 2012, including the Alberta case mentioned above. In his blog post, Geist focuses on the fair dealing analysis of the Access Copyright v. York University case, which he claims

> "frequently diverges or simply ignores Supreme Court jurisprudence" (n. p.)

and gives York very strong grounds for appeal. Geist points out that the Access Copyright v. York University trial judge's reasoning appears to have little to do with the six factors for determining fair dealing as established in the 2004 CCH case. Notably, the trial judge states that there are two users—the university which is responsible for the copying and the student who is the end user—a distinction which, as Geist notes, the Supreme Court explicitly stated did not exist in the 2012 Alberta case. Geist goes on to point to many other discrepancies between the trial judge's decision and those of the Supreme Court (especially in the CCH and Alberta cases, although also in the 2012 SOCAN v. Bell), including:

- The trial judge considers the aggregate amount of copying, which the SCC says is irrelevant.

- The trial judge dismisses the amount of content that York is permitted to copy per licences, or the amount of content that is already open access and does not require a licence.
- The trial judge claims that across the university, numerous parts of a work could be copied until the entire work is copied; further, those copies could be reproduced multiple times. However, the Supreme Court argues that the copies are for the use of the students, not the institution or the instructors. Therefore, each individual student is exercising their fair dealing rights.
- The trial judge expects the university to monitor compliance of the guidelines, which the Supreme Court does not believe to be necessary.
- The trial judge argues that York has not done enough to find alternatives although the Supreme Court considered alternatives unrealistic.
- The trial judge claims that fair dealing, as outlined in York's guidelines, does not promote dissemination, whereas the Supreme Court ruled that dissemination is one of the goals of fair dealing.
- Despite acknowledging the many forces acting upon the publishing industry and the limited evidence proving a link between the decline in sales and York's Guidelines, the trial judge considers all actual and likely impacts on Access Copyright—namely, a decrease in revenue. In both the CCH case and the Alberta case, the Supreme Court determined there was no evidence to prove a decline in sales was linked to fair dealing. In the Alberta case, the Court noted that many other factors could have contributed to this decline.

In all, Geist argues, the trial judge's analysis is inconsistent with Supreme Court jurisprudence.

In their September 2017 infographic, "Fair Dealing in Canada: Myths & Facts," the Canadian Association of Research Libraries (CARL) uses much of the same language as York's Guidelines. CARL has made several statements about fair dealing in the past, including that

> "we believe that fair dealing in the Copyright Act is serving its intended purpose: enabling fair portions from works of creativity or scholarship to be drawn upon in learning environments, thereby stimulating innovation and the creation of new research and new knowledge" (2016, n. p.).

The *Access Copyright v. York University* decision is also significant because Canadian copyright law is due to undergo a mandatory review in fall 2017. This is the first review since the 2012 legislative overhaul. Several experts, including Geist, have shared their thoughts on the copyright review on *Policy Options*. According to Geist, "Canada's copyright law is now widely regarded as one of the most innovative in the world," ("What's next, after the 2012 copyright overhaul?", n. p.). It is difficult to know what impact the case might have on the copyright review.

Rosanne Waters maintains that the fair-dealing exception for education is "a crucial mechanism for reducing financial barriers,[5] improving access to information and enhancing overall quality in Canadian post-secondary education" ("How copyright impacts post-secondary education" n. p.). Waters emphasizes that students continue to pay large sums for course textbooks, but claims that any changes to fair dealing would have a substantial impact on both the affordability of education and the overall quality of that education—like the Supreme Court in the Alberta case, Waters views alternatives to current fair dealing copying practices as unrealistic. Both Geist and Waters argue against notions that fair dealing is damaging to the Canadian publishing industry, but rather view reasonable policies as fundamental to Canadian education.

Indeed, it's impossible to discuss fair dealing and copyright in post-secondary education without considering the larger publishing crisis. Universities across the country each spend millions of dollars per year on licences and acquisitions. As academic libraries struggle to balance their budgets, balanced copyright legislation is all the more crucial. The definition of fair dealing of course extends beyond the academic sector, and has a lasting impact on the creation and circulation of cultural objects across the

country.

In their manifesto on fair dealing in *Dynamic Fair Dealing: Creating Canadian Culture Online* (2014), the editors warn of the risk of copyright law "obstructing rather than facilitating access to works" which they say

> "may be used to exert a chilling effect on Canadian cultural exchange" (Coombe, Wershler, and Zeilinger, 4).

This collection features essays from thirty-four scholars, activists and creative practitioners from a variety of fields which point to "a shared conviction that . . . to create, to share, and to learn by fairly engaging the wealth of expression and the communication channels available," which the editors believe is "sufficiently powerful to challenge and change the status quo" (39). For Access Copyright and York University, the battle over status quo far from over; on 22 September 2017, York submitted its notice of appeal which means that there is still no answer to the question: is it possible to define fair?

Footnotes

[1] Ariel Katz, Professor of Law at U of Toronto, has argued on many instances against the theory that "once the Copyright Board approves a tariff, the specified royalty rates and terms could be imposed not only on users who wish to obtain a licence under the tariff, but also on those who do not" ("Spectre", 152). Katz argues that whether these tariffs are mandatory (regardless if they are interim) should have been the central and only question of the case. According to Katz, if York used works outside of the bounds of fair dealing, it would be liable for copyright infringement, which only the copyright holder can sue for. Access Copyright is not the copyright holder and therefore cannot sue for infringement, therefore, "there was no need for York to defend itself against such allegations, and no need to file a counterclaim seeking a declaration that all of the reproductions made under its Fair Dealing Guidelines constituted fair dealing (and hence were non-infringing)" ("Access Copyright v. York University, n. p.). Katz argues that York's failure to make the argument that the tariffs are not mandatory is partially to blame for its loss in this case. Read his blog post here.

[2] These are: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work (para 53).

[3] The purposes of 'education, parody and satire' were only added to the fair dealing clause in the *Copyright Act* in November 2012.

[4] Universities Canada has yet to comment on the Access v York ruling.

[5] Waters cites a 2014 Statistics Canada report that educational titles continue to be one of the top two contributing commercial categories in domestic book sales, worth $366.1 million.

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