

FAIR DEALING ON TRIAL

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*Access Copyright v. York
University*

Fair Dealing Week
University of Alberta
February 28, 2018



HISTORY OF THE CASE

- April 2013 lawsuit was commenced
- end of 2010 many Canadian universities declined to enter into copying licence with Access Copyright collective society (AC)
- AC sought a tariff from the Copyright Board; approved in 2010
- York (and others) 'opted out' in 2011, instead relying on other permissions from publishers, open access materials, and rights under copyright law (e.g. fair dealing)
- in suit AC claimed that York University was subject to the terms of the Interim Tariff for post-secondary institutions because some of their copying was outside fair dealing

CLAIMS OF THE CASE

- that the tariff was mandatory and universities could not opt out of being subject to it
- that faculty of York university made copies of AC repertoire works outside of the scope of fair dealing
- therefore York must pay royalties for the term of the tariff (2011-2013) - \$3.38 per year per FTE + \$0.10 per page + interest
- York's defence is that the tariff is voluntary and their copies were fair dealing or otherwise permitted
- counterclaim seeking declaration that copying guidelines are representative of fair dealing

THE FEDERAL COURT'S DECISION

- Federal Court handed down decision on July 12, 2017
- tariff is mandatory and binding on all who make copies within its scope
- York's fair dealing guidelines are not, in fact, fair dealing, according to the Supreme Court's test
 1. purpose of the dealing – part of York's purpose was for self-serving reasons, to increase student enrolment and to “obtain for free what they had previously paid for”
 2. character of the dealing – York did not keep reliable records so this tends toward unfairness
 3. amount of the dealing – high volume of copying in the aggregate by Canadian universities; sometimes copying 100% of the work; qualitative significance of the portion copied

THE FEDERAL COURT'S DECISION

- fair dealing test, cont'd
 4. alternatives to the dealing – York did not consider alternatives to the copying such as purchasing individual articles from the publisher or using custom book services
 5. nature of the work – “significant work, research, skill and expense” involved in publishing
 6. effect of the dealing on the work – decline in the sale of works produced for the post-secondary market

ANALYSIS OF THE DECISION

- decision misapplies Supreme Court's fair dealing analysis
- engages in logical circularity
 1. purpose – ultimate purpose is that of the end user (per *CCH v. Law Society of Upper Canada* and 4-3 in *Alberta v. Access Copyright*), in this case, the student
 2. character – what if York's data were more reliable? why does it tend to unfairness rather than neutrality?
 3. amount – aggregate use is not the point of this factor; copying an entire work can conceivably be fair use according to SCC depending on purpose; circular reasoning re: importance of portion

ANALYSIS OF THE DECISION

4. alternatives – SCC had in mind non-copyrighted (or open access) alternatives, explicit that licences were not relevant in this factor; fair dealing = no payment
5. nature of the work – “work, research, skills, expense” / “making a living” are not part of the fair dealing analysis (although a certain measure of skill and judgment is necessary for a work to be protected under copyright)
6. effect on the work – chicken-and-egg effect? decline in sales may be due to any number of things, e.g. universities realizing they didn’t have to pay for copying that they earlier assumed they did

REACTIONS

- Geist – “The Supreme Court’s emphasis on copyright balance, user’s rights, and a large and liberal interpretation to fair dealing, are largely missing from the ruling.”
- Knopf – “... so clearly and consistently wrong...”
- Katz – focus of the arguments should have been on whether tariff is mandatory
- CAUT – “a setback for balanced copyright”
- CASA – “deeply concerned”; ruling has “potential to disrupt the balance between protecting both user and creator rights”

REACTIONS

- CFLA – no statement
- OLA – overview of decision (M.A. Wilkinson) but no position taken
- UnivCan – “reviewing” decision (in July), nothing since

UNIVERSITY RESPONSE

- how have universities responded to the decision (at least publicly)?
- 40 largest universities outside Quebec + UPEI (subjects of previous studies)
- looked at web sites and Twitter for statement or acknowledgment of decision
- change in fair dealing policy or practice?
- note that the decision was handed down in July, not long before syllabi and reserve requests would be coming in



UNIVERSITY RESPONSE

- most (25/41) had some kind of public acknowledgment of decision (“reviewing”)
- three had a more thorough statement
- three have apparently changed their fair dealing policy or practice due to the decision (“update for clarity”; “editorial change”)
- one changed practice seemingly due to decision but then later claimed it was for efficiency reasons

WHAT NEXT?

- appeal by York to Federal Court of Appeal
- tariff issue
 - not mandatory or enforceable without consent
- fair dealing issue
 - user's right of students
 - conflating fairness factors
- Canadian school boards and provincial Ministries of Education sue Access Copyright