

On the Road to Fair Dealing In Education

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February 25, 2016

Supreme Court of Canada



Purpose of Copyright

Common Law Tradition

- Copyright is a statutory construction
- Author rights do not derive from a natural right
- Copyright exists to serve the public interest
 - to encourage learning
 - to facilitate artistic and scientific progress
 - to encourage the wide dissemination and engagement with works
- Creators are granted a limited monopoly to encourage the creation and dissemination of works
- Users historically had broad latitude to use works

Purpose of Copyright

Théberge:

“...excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”
[para 32]

Purpose of Copyright

CCH establishes that users have **rights**

Vaver: “The court has, therefore, rightly rejected the idea that what users do are just exceptions carved out of owner’s rights.... One might equally view owner’s rights as little islands of exclusion, exceptions in an ocean of free expression and public access.”

*Vaver, David. Opinion. Intellectual Property Journal [25 LPJ]

Purpose of Copyright

- **CCH and Théberge** reinvigorated the place of fair dealing as a living part of the system of copyright, essential to achieving the larger purposes of copyright
- A vibrant public domain requires an active practice of fair dealing
- Fair dealing user rights provide the “breathing space” for engagement with works that are still in copyright



CCH and Fair Dealing

- **2004:** *CCH* established a framework for institutional fair dealing
- Supreme Court endorsed *Great Library Access to the Law* policy - noting the safeguards for copyright owners
- Librarians could assist with fair dealing assessments

CCH and Fair Dealing

- Demonstration of institutional fair practice more important than establishing that every dealing is fair
- “Industry” practice would help support a finding of fairness
- Commercial use did not preclude fair dealing
- CCH provided a framework for the application of fair dealing by educational institutions

After CCH

- **2004:** Access Copyright and other content groups downplayed the significance of *CCH*

Lost opportunity:

- Educational sector maintained Access licences
- No national fair dealing guidelines or practices were developed
- **2007:** Access licence automatically renewed
- **2010:** Licence negotiations quickly broke down and Access filed for the infamous tariff

Five Years

- **2010:** MacEwan University chose to opt out of all arrangements with Access Copyright
- CCH was the basis for the decision – keeping an eye on the Copyright Board
- MacEwan developed fair dealing guidelines allowing faculty to continue to provide supplementary readings to their classes – including electronic copies posted to Blackboard
- AUCC and ACCC provided guidelines prohibiting faculty from providing copies to students

Five Years

- Fair dealing plus transactional licensing of works
- Difficult transition
- Even with relatively restrictive fair dealing interpretation, costs were less than under the previous Access licence
- Opting out completely kept us free from any potential obligations under the interim or final tariff
- Do not be afraid to make a case for fair dealing in your institution
- Risk Management

Five Years

Copyright Board:

Copyright Board has shifted from a narrow application of fair dealing in 2009 (despite CCH) to a much more liberal application

- Provincial and Territorial Governments Tariff (May, 2015)
- K-12 Tariff (February 19, 2016)
- Post-Secondary Tariff (?)

Five Years

2015: SODRAC v. CBC:

Mandatory tariff issue

- Tariffs are not mandatory
- Users can opt to remain compliant with copyright via other means
- A single infringement will not require participation in or payment of a tariff
- Net neutrality issue may complicate participation in a tariff

Five Years

- **2010:** Just a handful of institutions opted at at the outset (most from Alberta) - others joined in August
- **2012:** We lost some to the Model Licence – but gained others and more colleges opted out
- **2014:** Toronto and Western opt out
- **2016:** Only a handful of institutions have an arrangement with Access

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