November 10, 2017

Fair Dealing on Trial
Lisa Di Valentino, University of Massachusetts Amherst

This work is licensed under a Creative Commons CC_BY-SA International License.

Available at: https://works.bepress.com/lisa-divalentino/1/
FAIR DEALING ON TRIAL

Access Copyright v. York University

Lisa Di Valentino
Law & Public Policy Librarian
University of Massachusetts Amherst

E-Reserves conference
Carleton University, Ottawa
November 10, 2017

© 2017 Lisa Di Valentino CC-BY-SA
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** – “...the judgment is, with respect, so clearly and consistently wrong that there is a strong likelihood of a successful appeal.”

• **Katz** – York “snatched defeat from the jaws of victory” because they failed to focus on the issue of whether Copyright Board tariffs are mandatory

• **CAUT** – “a setback for balanced copyright”

• **CASA** – “deeply concerned”; ruling has “potential to disrupt the balance between protecting both user and creator rights”
NON-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 (25/40) 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”)
- Western changed practice seemingly due to decision but then later claimed it was for efficiency reasons (“automated book burning approach” – Knopf)
- York had claimed that PDFs could not be loaded into the LMS, but has now reworded (Knopf)
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