“No Time for Complacency”: Fair dealing at a Crossroads

Mark Swartz and Heather Martin
Current interpretations and guidance
Meaning and scope of fair dealing continues to evolve
Threats and challenges
Value of fair dealing
Urgent need for action
What is Fair Dealing?

“The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.”

SCC Decisions and CMA
• 2012

Provincial & Territorial Tariff Decision
• May 2015

K-12 Tariff Decision
• Feb 2016

Educational Fair Dealing Policies
• Fall 2012

SODRAC v. CBC
• November 2015
Alberta (Education) v. Access Copyright, and SOCAN v. Bell

Affirmed CCH - fair dealing is a user’s right

Purpose of the dealing is that of the end user

Teachers may make fair dealing copies for their students, for **private study and research**

Amount of dealing should be assessed in proportion to the work, not in aggregate
Addition of three new fair dealing purposes, including education

Revisions to existing educational exceptions

Addition of new exceptions for educational purposes

Parliamentary Review in 2017
Educational Fair Dealing Guidelines

Common interpretation for education sector - a safe harbour

Based on copyright laws and court decisions, negotiated agreements and settlements - in Canada and elsewhere

Provides definition of fair dealing in an educational context

Includes numerical definition of short excerpt

Considered to be a middle ground, a “reasonable” interpretation
Governments (provincial & territorial), and K-12 Schools

Endorsed the education sector’s interpretation of fair dealing, including amounts up to 10%

Affirmed that the fair dealing purpose should be that of the end-user.

Rejected using aggregate numbers of copies to assess the fairness of the amount.

Amounts of 1 or 2 pages (up to 2.5% of a work) is insubstantial copying.
Current litigation

- Judicial review of Government tariff decision
- Judicial review of K-12 tariff decision
- Post-secondary tariff decision
- York v. Access Copyright
Parliament will review the Copyright Act in 2017.

Interest groups across Canada will be lobbying for changes to the Act.

Authors and publishers groups have had 24 meetings on lobby register since November.

Stated objective: Amend fair dealing to limit the rights of educational users
In the press


Kate Taylor. “Kids will suffer if Canada’s copyright legislation doesn’t change” http://www.theglobeandmail.com/arts/books-and-media/kate-taylor-kids-will-suffer-if-canadas-copyright-legislation-doesnt-change/article29720114/ Published Friday, Apr. 22, 2016.
“...publishers are not merely suffering lower revenue from Access Copyright; more importantly, they are also losing sales. They suspect that schools are copying far more than 10 per cent: Where they used to get orders for classroom sets, they will now get an order for a single book”.

Kate Taylor, Globe and Mail
“The educational copying market for Canadian writing is, frankly, a mess that requires an immediate fix. Changes to the Copyright Act, enacted in good faith….in 2012, have since been broadly misinterpreted by Canada’s educational sector to mean payment for copying is often no longer required”.

John Degen. “Two ways to halt the decline of authorship in Canada.” John Degen Two ways to halt the decline of ... - The Globe and Mail. Published November 8, 2014.
Value of fair dealing to education

Fair Dealing covers everything!
No more double paying
It empowers libraries and library users
It saves students money
It is important to protect users rights.
“The Policy Battle is not over”

Educational users of fair dealing need to express their views on

  What the parliamentary review can include

  How it should be conducted

Strenuously oppose the opening up of the fair dealing provision - once opened it is completely up for grabs.

Oppose AC and the publishers and authors’ groups by providing evidence of copyright compliance.
Key Messages (Wanda Noel)

Let current litigation play out in the courts

Five years is not long enough to truly assess impact of changes

Invest in and commit to producing evidence of fair dealing compliance at our institutions (if you don’t have data, you don’t know if there is compliance)

Enough is enough - publishers and authors need to accept parliament’s and the courts’ views on fair dealing.
“Now is not the time for complacency”

Now is the time to deliver key messages to government officials and key MPs

On behalf of your institution

On behalf of a professional organization

As a concerned citizen

Don’t do form letters; customize your message.

Provide data and evidence to refute the claims made by AC, publishers and authors groups.