

## Copyright in the School Setting: Interpreting “Private Study”

By Nelson Medeiros

### Decision commented on:

*Alberta (Education) v Canadian Copyright Licensing Agency*, [2012 SCC 37](#).

As a first year student last year, I remember various professors telling us that, due to the University of Calgary’s copyright policy, they were no longer able to post certain materials to Blackboard (a digital course management system); instead we were given instructions to download the materials ourselves. At the time I remember internally questioning this artificial distinction and how it really protected copyright since in either case I was responsible to read the required material at the direction of the professor.

*Alberta (Education) v Canadian Copyright Licensing Agency*, 2012 SCC 37 [*Access Copyright*], a recent decision of the Supreme Court of Canada, addresses copyright in the school setting and is likely to be relevant at the University of Calgary since the University has decided not to enter into a licensing agreement with Access Copyright for the use of copyrighted materials (see [here](#) for more information). When reading the case I wondered what impact this decision might have for professors posting digital copies to Blackboard.

### The Facts

The case concerns a dispute between Access Copyright and a coalition of provincial education ministries and school boards regarding the photocopying of copyrighted material for use in elementary and secondary school education programs.

Access Copyright is an organization that represents certain authors and publishers of original works in printed materials. Access Copyright may enter into licensing agreements with others to use and reproduce its repertoire of works and subsequently collects and distributes royalties to its affiliated copyright owners. When a licensing agreement is not in place Access Copyright may apply to the Copyright Board [the Board] to certify a royalty in the form of a tariff.

The provinces and territories [the Coalition], with the exception of Quebec, were unable to reach an agreement with Access Copyright concerning certain “copies of works made at the teachers’ initiative with instructions to students that they read the material. Teachers would photocopy short excerpts from textbooks and distribute those copies to students as a complement to the main textbook the students used” (at para 7) [the disputed copies].

After failing to reach a licensing agreement with the Coalition, Access Copyright applied to the Copyright Board for a tariff for the disputed copies. The Coalition argued that the copies represented ‘fair dealing’ and that section 29 of the *Copyright Act*, RSC 1985, c C-42, applied as students were using the materials in the course of research or private study. The Board concluded that the copies were not fair dealing and on appeal the Federal Court of Appeal found this determination to be reasonable (see *Alberta (Education) v Access Copyright*, 2010 FCA 198).

### **The Issue**

The issue before the Court was whether the conclusion of the Board that the disputed copies did not qualify as fair dealing under the *Copyright Act* was unreasonable (at para 11).

### **The Law**

Section 29 of the *Copyright Act* states the following: Fair Dealing for the purpose of research or private study does not infringe copyright. (Emphasis added)

In *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 [*CCH*], the Supreme Court articulated a two-step test for fair dealing. The first step is to determine if the use of the copyrighted material is for one of the enumerated purposes in sections 29 to 29.2 of the *Copyright Act*; the second step is to determine whether the dealing is fair. In *CCH* the Court stated that whether something is fair is a question of fact and will depend on the circumstances of each case (at para 52).

In order to assess whether a dealing is fair, the Court indicated that one must consider: (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 (*CCH* at para 53).

While the Court reviews all of the *CCH* factors in the *Access Copyright* decision, for the purpose of this blog I will focus only on the first factor concerning the purpose of the dealing.

### **Decision of the Copyright Board**

The Board found that because the copies were not made at the request of a student, and instead were made on the teacher’s own initiative as part of an organized course of instruction, the predominant purpose of the dealing was actually for instruction and therefore not private study (at para 15).

### **The Decision**

In a 5-4 decision the Supreme Court found that the Board misapplied the *CCH* factors. With respect to the first *CCH* factor, concerning the purpose of the dealing, two particular issues were considered: first, whose purpose matters for fair dealing; and second, whether learning in a classroom setting is discordant with the concept of private study?

#### *Issue 1*

For the first issue the Court applied *CCH*, which determined that the relevant perspective to consider is that of the user (i.e. the student) of the material (at para 22). The Court did, however, indicate that the perspective of the copier might be relevant in instances where the copier may have demonstrably commercial motives or some other purpose that results in unfair dealing (at paras 20 - 21).

The Court determined that instruction and research and private study were in fact a unified purpose since the purpose of the copies was to facilitate the research and private study of the student (at paras 23-24) and that there was no significant distinction between copies made at the request of a student versus those made on the initiative of the teacher (at para 25); therefore, the Court found the purpose of the copies was for the private study of students.

The dissent did not agree with the notion that “private study” could capture situations where teachers made large amounts of copies as part of an organized course of instruction (at para 49). The dissent appears to favour a contextual analysis for the first *CCH* factor since they acknowledge that in some cases teacher-initiated copies made for students could be for private study (at para 49). In contrast the majority declares that

[t]he teacher/copier ... shares a symbiotic purpose with the student/user who is engaging in research or private study ... [and that] ... [i]nstruction and research/private study are, in the school context, tautological (at para 23).

The majority does not conclude that copies made by a teacher for the use of a student would always be considered fair dealing under section 29 of the *Copyright Act*; instead, an analysis of the remainder of the *CCH* factors determines whether the scope, scale and impact of the teacher-initiated copies results in unfair dealing overall.

## *Issue 2*

For the second issue, the Court determined that students in a classroom setting could be engaged in “private study” and that the word “private” in “private study” does not require an individual to examine copyrighted works in isolation (at para 27).

Studying and learning are essentially personal endeavours, whether they are engaged with others or in solitude. By focusing on the geography of classroom instruction rather than on the *concept* of studying, the Board ... artificially separated the teachers’ instruction from the students’ studying (at para 27). [Emphasis in original]

The dissent declares that the use of the words “private study” in the *Copyright Act* illustrates that Parliament intended it to mean something different than ‘non-private study,’ and that the approach of the majority diminishes this difference (at para 47). The majority addresses this last concern directly by implying that the concept of studying is the important consideration (at para 27) and not the fact that studying might flow from an organized course of instruction or occur in the classroom setting.

The decision goes on to analyze the remainder of the *CCH* factors and holds that the Board’s finding of unfair dealing resulted from a misapplication of the *CCH* factors and that its decision was unreasonable (at para 37). The Court allowed the appeal and sent the matter back to the Board to reconsider its decision in accordance with the Court’s reasons.

## **Application to Post-Secondary Institutions and Blackboard Usage**

So what does this mean for post-secondary institutions then? This case was about copies made in the elementary and secondary school setting, but given the determination of the Court that instruction is symbiotic with private study (at para 23), the case is also applicable to instruction and studying in post-secondary institutions.

Thinking back to my initial comment about professors not being permitted to post certain materials on Blackboard, the decision in *Access Copyright* suggests that a blanket Blackboard restriction is unnecessary since a professor (i.e. a teacher) that posts digital copies of cases or articles on Blackboard so that the user (i.e. the student) can study them as part of an organized course of instruction is sufficiently analogous to the facts in *Access Copyright*. Of course, this doesn't mean that professors should indiscriminately post copies of copyrighted materials since they also need to consider the other *CCH* factors to determine if the digital copies are indeed fair dealing under section 29 of the *Copyright Act*.

As a point of interest Bill C-11, an Act to amend the *Copyright Act*, was given royal assent on June 29, 2012 (not yet in force, see [here](#)). The Bill includes an amendment to section 29 which would replace the current text with the following: *Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright* (Emphasis added). Some might view this amendment as reducing the significance of the *Access Copyright* decision since the enumeration of "education" as a purpose might necessarily include instruction, learning and studying (non-private?) within it, and private study must now mean something else. Notwithstanding, *Access Copyright* will still be helpful since it has provided additional clarity with respect to the application of the first *CCH* factor and the scope of the private study purpose in the school setting.

\* I would like to thank Professor Greg Hagen for his insightful comments on an earlier version of this blog.