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The 2012 amendments to the *Copyright Act*, combined with the Supreme Court of Canada decision in *Alberta (Education) et al. v Access Copyright* carved out a small but significant fair dealing allowance for schools. However, those amendments did not eliminate the need for collective licensing in educational institutions. Nor do they justify copying practices that will have a devastating impact on the market for published materials.

In their copyright guidelines, the Council of Ministers of Education, Canada (CMEC), the Association of Universities and Colleges of Canada (AUCC) and the Association of Canadian Community Colleges (ACCC) have adopted an aggressive legal approach. Ending the K-12 and post-secondary licences contradicts the clear language of the Court's decision, and is incompatible with the evidence before the Court as well as with the *Copyright Modernization Act.* The guidelines push well beyond the loss of licence royalties, significant though that will be for many writers and publishers. They encourage wholesale cannibalizing of books, without permission or payment, and will ultimately expose teachers and their employers to more very expensive litigation.

So far, spokespersons for the K-12 and post-secondary communities have refused to talk.

We are open to reviewing and revising aspects of the licensing agreements, and negotiating new principles around fair dealing. This paper sets out our position, and a basis for moving forward.

The *Alberta (Education)* decision confirms that multiple copying for education-related purposes can be fair dealing

The Court first looked at photocopying in 2004, in the *CCH Canadian Ltd. v Law Society of Upper Canada.* It described fair dealing as a "user right" and decided, on the facts, that copying of legal materials, by a law librarian, for lawyers, was fair dealing, under the "research" purpose. On several counts, the recent *Alberta (Education)* case appeared to be different. It involved large-scale copying, with teachers making multiple copies for classroom use, which didn't seem to fit a valid fair dealing purpose as it wasn't specifically for research, or for private study. The Court ruled that "research" must be given a broad meaning, and gave no apparent effect to the word "private" in "private study". As the minority pointed out, that is a questionable way to interpret legislation. But with the recent addition of "education" as a fair dealing purpose, we accept that some copying for classroom distribution now meets the first test for what can be fair dealing - subject to the very important second test of fairness.

The Court also decided that fair dealing isn't confined to making single copies. There are differing international precedents on this point: in the UK, multiple copying for classroom use probably won't qualify as fair dealing; in the US it does. As this issue isn't likely to be revisited, though, we also accept that multiple copying for educational purposes *can* be fair dealing. This is an important qualifier: it *can* be fair dealing, but not all multiple copying is fair dealing. And it needs to be noted that while *CCH* was a unanimous 9-0 decision of the Supreme Court, the Court divided 5-4 in *Alberta (Education)* with a very powerful dissent.

Short means short

Purpose is only the first step. In deciding whether the photocopied classroom handouts were actually fair dealing, the 5-4 majority was very clear that these handouts involved "short excerpts". This is what Justice Abella said for the majority:

> "Teachers would copy short excerpts from textbooks and distribute those copies to students as a complement to the main textbook the students used."

To put this finding in context, the record shows that while most of the copying was from textbooks (more than 85%) the teachers also copied newspaper and magazine articles. And the term "textbooks" includes other categories of book such as novels. Clearly, though, a very high portion of the copying was from textbooks. The "16.9 million pages", spread across approximately 4 million students in K-12 classes outside Québec, averages between 4 and 4.5 pages annually per student. This is what CMEC said in its Supreme Court factum:

> "...a teacher might occasionally provide a page of math problems from a different math textbook to supplement the problems in a student's textbook..."

That assertion was confirmed by counsel for CMEC, who in answer to a question from the Bench, told the justices that the activities at issue involved the copying of:

> "short excerpts copied to supplement the main textbook....taking a few pages from another resource, a different book, to assist the students [and] taking short excerpts from a different resource, **and it is a very short excerpt**" (our emphasis)"

It was on these representations that the Court based key elements of its decision.

This leaves some unanswered questions. An article might be a short excerpt, and copying an entire article might be fair dealing. But it isn't clear from the CMEC/AUCC/ACCC guidelines whether there are any limitations. For example, in a recent edition of the National Post there was a brief news story about Blackberry. The same edition also carried a feature of more than 3,500 words that explores the issues in much greater depth, using photos and graphics. It is difficult to see how copying a 3,500 word article can be classified as a "short excerpt". The guidelines refer to a newspaper article, or a page from a newspaper. But this story was spread over four pages. The Supreme Court did say that it might be necessary to copy an entire work to achieve the desired purpose. It did not say that it is always allowable to copy an entire work regardless of length. In the context of "short excerpts" it's reasonable to assume it did also envisage limits.

According to the majority in *Alberta (Education)*, short excerpts, to complement assigned textbooks, and totaling four or so pages a year per student, may be fair dealing. It isn't the outcome that we wanted, but we accept that this is now settled law in this context.

Nothing in the Court's decision gets you to the CMEC/AUCC/ACCC guidelines

These guidelines have borrowed from the copying guidelines for the Access Copyright licences and categorized them as fair dealing guidelines. **The Court did not in any way sanction that approach.** Dealing with the 93% of copying that wasn't in dispute, the 5-4 majority noted the Copyright Board finding that the overall impact of photocopying was capable of competing with "original texts to an extent that made the dealing unfair." Justice Abella also noted that the quarter of a billion textbook pages copied by K-12 teachers each year "include the pages for which the schools already pay a tariff" and that "the copies in dispute account for under 7% of those pages".

It can be argued that the Supreme Court sets general principles, and that its decisions will often go beyond the specific facts of a dispute. However, the starting point must be what the 5-4 majority actually said, and that seems remarkably clear: they were looking at the disputed 7%, and the evidence advanced as to the nature of that copying. Rolling in the other 93% was outside the scope of the Court's analysis, and would have involved different facts and a completely different evaluation of the fair dealing tests.

There are many challenges that the CMEC/AUCC/ACCC guidelines face in trying to portray their guidelines as fair dealing. Those challenges include the Copyright Board's rejection of the guidelines in its most recent K-12 interim tariff *[Access Copyright Elementary and Secondary School Interim Tariff, 2013-2015]* where it was noted that given their authorship, the guidelines were at best self-serving:

> "The Objectors' decision to do without the tariff may be grounded in part in the conclusions set out in a document entitled Copyright Matters!, co-authored by one of the Objectors' counsel. In a nutshell, the document advances the view that anything the 2005-2009 tariff authorized constitutes fair dealing for an allowable purpose. That view relies on an interpretation of decisions of the Supreme Court of Canada which has yet to be tested before a competent forum. Indeed, the decision of the Court in Alberta (SCC) targeted only a small subset of copies: the positions the Objectors advanced during the redetermination of the matter before the Board clearly reflected this."

This strongly suggests that any legal effort to have the CMEC guidelines endorsed by the Copyright Board (or any court reviewing the Board's decisions) would be an uphill struggle, and that the guidelines are overreaching.

In climbing up that hill, there are other bumps that will be encountered. Here are a few:

- The Court looked only at photocopying of "short excerpts". It said nothing about digital delivery. And in *CCH*, the Court questioned whether it would have come to the same conclusions with other methods of copying and if longer excerpts were involved.

- Business models are changing. There is a trend towards serialization. Short stories are often published and sold separately. Plays, too, are typically sold on a standalone basis

and not always bundled into compilations. Does the fair dealing analysis really depend on whether you can find what you want to copy in an anthology (when it might be fair dealing, according to CMEC/AUCC/ACCC) as opposed to copying the same material sold separately (when it might not be fair dealing)?

➠ What about articles? These can vary from a few hundred words to several thousand words. Is copying an article fair dealing regardless of length? Does it make any difference whether the article is offered for sale through a database or website? Given the impact on the market, surely it must make a difference.

➠ The Court based its decision on short excerpts to complement the use of a textbook. So how does that stretch to coursepacks - which typically contain several hundred pages of not-so-short excerpts - and digitally distributed versions of these materials? It seems unlikely (improbable, in fact) that these merely complement a textbook. They are more likely to supplant the textbook. And what if the coursepack is produced not by the instructor or the educational institution, but by a commercial copyshop? The Court's analysis, and especially its delicate route around some earlier decisions, suggests that the copier's commercial motive (the "masked purpose") will take it outside fair dealing.

➠ The greater of a chapter or 10% of a book can in fact encompass a very substantial portion. This is clearly an extreme example, but Religion and Culture in Canadian Family Law (John Syrtash, Butterworths, 1992) has 180 pages and four chapters, of which the longest is 92 pages, or more than half of the book. Taking 92 pages cannot possibly be fair dealing. And it isn't only about length. Even a single (and short) chapter can represent the essence of the whole book.

➠ Given what are likely to be much more substantial copying activities in colleges and universities, and the likelihood that this copying does not complement but in some cases actually replaces assigned textbooks, the Court's decision cannot neatly apply to the post-secondary sector.

Putting all this another way, while some of the photocopying in schools and in colleges and universities is now fair dealing, guidelines that claim that almost all copying, regardless of length, delivery method and impact, is now fair dealing do not represent Canadian law. This is clear from what the Court said about the 93% of copying not in dispute.

The effect of the dealing

"If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair." [Justice Abella, in the Alberta (Education) decision]

This is in some ways the most challenging of the tests that Canadian courts use to assess fair dealing after *CCH*. It's challenging for two reasons. First, assessing the impact on the market for the original work can be difficult to prove, especially when the potential damage is downstream. This is partly why Canada has a statutory damages remedy. And secondly, even if there won't always be an obvious linear relationship between the copying on the one hand and the decline in sales on the other, copying may nonetheless compete with the market for the original work.

For example, look to the repertoire of newly-minted Nobel prize winner, Alice Munro. She's written 15 books of short stories. Her work is standard reading in most CanLit courses. The AUCC guidelines say that fair dealing allows copying of "up to 10% of a copyright-protected work" or "one chapter from a book". So it seems to follow that it's permissible to copy at least one story from each of the books. And then go back and do the same again, selecting different stories. Now, the CMEC guidelines do warn that "copying or communicating multiple short excerpts from the same copyright-protected work with the intention of copying or communicating **substantially the entire work** [our emphasis] is prohibited. There is no definition of "substantially" though, which strongly suggests that sequential copying that takes in a very large proportion of an entire work might still come within what these guidelines categorize as fair dealing.

Nor do the guidelines distinguish between required and supplementary readings, a critical distinction not addressed in the *Alberta (Education)* decision because the Court was looking only at the latter. Yet this is critical because it leads to other mix-and-match options that these guidelines seem to endorse. Teachers can select chapters from several texts to build their own, and then stop buying textbooks. In certain math courses, for instance, a package can be compiled that incorporates one publisher's method for solving quadratic equations, and another's approach to explaining the difference of squares. The same applies across most disciplines.

Both sets of guidelines - which encourage digital distribution as well as photocopying - completely ignore the "effect of the dealing" test. Inevitably, this kind of copying will have a damaging and possibly fatal impact on the original work. Also at risk are the new business models that offer additional chapters to supplement textbooks, and licensing of short stories and articles by writers who increasingly retain control of their work. But the guidelines say that chapters and short stories and entire articles are "short excerpts" and that emailing them to students, or posting them to a learning management system, is fair dealing.

Finally, there is the much greater volume of copying in the 93% that was outside the Court's review. Outside, it should be noted, because the ministries and boards of education took it as settled that that copying was properly licensed. The Court looked at the impact of 16.9 million pages, not more than 250 million pages. The 5-4 majority had no way of knowing what was included, the amounts of copying from any single work, how much of the copying was cumulative, or whether the total copying did in fact make it possible to cut purchases of additional materials. The framing of the new guidelines, and their very loose terminology, are destined and perhaps even intended to encourage copying at the expense of buying. This isn't some unfounded fear. Publishers report receiving orders not for class sets but for a single copy of a textbook. Moreover, one recently received a request for credit, and on opening the package found not its textbooks, but photocopies of them. Fair dealing?

In adding "education" to fair dealing, the federal government noted that "fair dealing is not a blank cheque"

Judges routinely interpret legislation, and it sometimes happens that their interpretations go in a different direction to what legislators had intended. Certainly the *CCH* case was unexpected, because the Supreme Court decided that the library exceptions in the *Copy right Act* were pretty much unnecessary - at least in a law library - since they didn't address anything that wasn't already fair dealing. Everyone else, including the people who drafted and enacted the legislation back in 1996 had assumed precisely the opposite. So it was also with the *Alberta (Education)* case, which overturned the long-held understanding that multiple copying generally wasn't fair dealing, that "private study" actually meant private, and that instruction wasn't the same as study, private or not. Some of that thinking clearly informed the Government of Canada, which stressed that while there were strong social policy reasons for adding "education" as a fair dealing purpose, emphasized that "fair dealing is not a blank cheque". And the Government also noted that "copyright owners and creators need to be fairly compensated for their work" and while schools would be able "to share copyrighted material with their students online" (i.e. digital course packs) this was "subject to fair compensation for the copyright holders." [www.balancedcopyright.gc.ca]

The CMEC/AUCC/ACCC guidelines and the termination of educational licences, torque the Supreme Court's decision far beyond what the Court intended, given that there was no controversy about the more than 230 million pages in K-12 schools that were validly licensed, and given that the decision said nothing about course packs or digital copying. The Government of Canada believes that collectives have a vital role to play in managing access to copyright content. In fact, the legislation assigns several functions and responsibilities to collectives that license literary works. It isn't likely, therefore, that the federal government will acquiesce in policies that make it difficult for collective licensing to continue.

Without an acceptable solution - in other words, the resumption of licensing for schools, colleges and universities - writers and publishers will have to pursue political as well as legal solutions. This is not their preference. There exists a long and valued relationship (symbiotic, even) among writers, publishers, educators and students. We believe that there is a better way forward.

The better way forward

The CMEC/AUCC/ACCC guidelines are unacceptable to Canadian creators and publishers.

We suggest that the first step is dialogue. The Council of Ministers of Education has refused to meet with publishers to discuss the impact of their guidelines. Nor has it been possible to engage with post-secondary representatives, at the institutional or association level. This can only harden positions. And yet our interests are not mutually exclusive. Copyright owners may not like but they do accept the *Alberta (Education)* decision, and that means accepting a lower value for Access Copyright licensing. We don't, though, accept that collective licensing is now unnecessary, which is what the guidelines imply.

Fair dealing is a complex balance of several factors. Hard guidelines cannot easily be produced, and even within the user community, some commentators question whether a "line in the sand" approach is helpful. And there are real inconsistencies between public positions and private arrangements. For example, one university, a staunch opponent of Access Copyright licensing, admits to having several publishers' site licences that restrict copying and redistribution to much lower limits than in the university's own fair dealing guidelines.

Canada's copyright owners will support whatever action is needed to reinstate collective licensing in schools, colleges and universities. The termination of these licences is contrary to Government of Canada policy. The *Alberta (Education)* decision was supported by a bare majority of the Supreme Court. Another case, with different facts, clear evidence of market impact, and before a differently-constituted Court, may be resolved quite differently. With pending litigation against York University, and K-12 and post-secondary tariffs expected in the next year from the Copyright Board, these are unsettled times for teachers and students.

And they are unsettled times for writers and publishers. In a letter sent a few months ago to university presidents, the CEO of a highly respected Canadian publisher noted that in the latter stages of his career he earns less than many assistant professors and that his company rarely makes a profit greater than its Access Copyright royalties. Yet the books published by his company are used extensively in schools and in post-secondary institutions. The decline in revenue if books are copied instead of bought will swiftly result in fewer titles being published. Other publishers will respond by going exclusively digital, with digital rights management and restrictive site licences to safeguard their content. And there will be pricing pressures on publishers as they attempt to recoup the losses caused by guide lines that are an open invitation to copy rather than buy. The guidelines will therefore trigger a self-defeating cycle that reduces choice, harms Canadian creators, undermines the Canadian cultural sector, and erodes the value of user rights.

The better way forward – which casts aside expensive, risky, and prolonged litigation - is to work together to develop principles that we can all live with. These should be compatible with what the Supreme Court actually said, allow the resumption of collective licensing at tariffs that reflect the scope of the licences, and must safeguard the incentive to create and disseminate content that is relevant to schools, colleges and universities.

What, then, might these principles look like? We think that the starting point must be what the Court understood it was reviewing, after which the dialogue can include what other kinds of copying would be consistent with the spirit of the Court's findings. There are, for instance, principles that can be drawn from negotiated guidelines in the US. These include looking at the length of the excerpts, the number of excerpts from the same author or the same work, whether the copying is spontaneous and non-systematic, whether the copying reduces purchases of published works, whether the copying is directed by the teacher or is mandated by a board or ministry of education, and whether the copies are retained/reused.

The final step would be to implement these guidelines through a collective licensing agreement, which could, as in the past, be facilitated through a Copyright Board tariff or through other mutually agreeable means flowing from our dialogue.

Summary and next steps

In most countries, copyright licensing is embedded in the educational system. Our Supreme Court recently expanded its user rights doctrine so that the scope of the Access Copyright licenses was reduced. **The Court's analysis acknowledged the validity of the K-12 schools licensing, with a clear reference to the volume under tariff.** It may be necessary to ask the Canadian courts to revisit these issues, but we believe that more litigation is not a desirable route. We accept that the landscape has changed. We do *not* accept that it has changed so dramatically that copyright is virtually eliminated as a factor in what is copied under fair dealing. Or that copying by educational institutions can be so extensive that it will undermine sales of books and other publications.

We are prepared to begin this dialogue immediately, and suggest that we convene a small committee representing writing, publishing and education to participate on behalf of these constituencies. We will be contacting the CMEC, AUCC and ACCC in the coming weeks to explore how this can be most effectively and beneficially done.