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The sky is not falling--A discussion about the Fair Dealing Guidelines

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Due to time constraints, not all of the following material was presented.

The view from the Canadian judiciary – Meera Nair

Slide 1: Title screen: “The fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act Any act falling within the fair dealing exception will not be an infringement of copyright.”

... When Heather and I started imagine what a fresh set of fair dealing guidelines would look like, I felt the judicial backstop really had to be the CCH decision and the principals embodied through it. So, at the risk of telling you what you already know, I’m going to give us all a review.

Slide 2 – Fair dealing, circa 2004 [At the time of CCH; here is what S.29 looked like – only about research and private study.]

At issue was the conduct of the Library of the Law Society of Upper Canada, where, at the request of patrons, some material would be copied from the reference collection and sent by mail or facsimile. The library had first an informal and then formal policy by which to consider requests for copies; modest requests – asking for one reported decision, one case summary, etc. were routinely filled. However, if a patron asked for more, a reference librarian would examine the request and give it appropriate consideration.

Some publishers contended that the Law Society was committing infringement. But, in 2004 the Supreme Court of Canada declared:

Slide 3: The Law Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its access policy (emphasis mine).

As to what were those limited selections ... refer back to the first court challenge – heard at the Trial Division of the Federal Court. It is laid out in detail in one account of the case. [Although, a curious side note I have to share – the account provided through CanLII, these amounts are omitted.]

In any case, the amount copied ranged from a few pages of a topical index to

Slide 4: ... the copying from Forensic Evidence in Canada amounted to the copying of the whole of a 32-page monograph within a 713-page textbook, which amounted to 13 percent of the whole of the textbook. In the case of the textbook Economic Negligence, which is 306 pages in length, 69 pages were copied amounting to 93 percent of one chapter and 21 percent of the pages of the textbook

This sounds generous in unauthorized copying. And Judge Gibson largely found in favour of the publishers. Infringement was the outcome. Judge Gibson relied on Section 3.1,

Slide 4: copyright is the right to produce or reproduce a work, or a substantial part thereof.

The amounts copied were deemed substantial, and thus infringement was the outcome. [Judge Gibson did point out that a question of substantiality is a matter of both quantitative and qualitative assessment, but pretty much relied on quantity.]

It's important to remember that this did not change between the trial court and the Supreme Court. Substantial reproduction had happened. But the Supreme Court declared it acceptable under fair dealing.

Returning to CCH - As to how one determines what is fair, the Supreme Court was emphatic that it is a matter of context. We must ask questions –we must explore the situation from many angles. The Court provided its framework – what has come to be known as the six-factor analysis – but also emphasized that different situations may require different questions. The Court made a point of stating that the custom or practice within a particular setting might be relevant.

And something that was not made enough of at the time, perhaps because libraries already had it as a direct exception, the Court effectively stated that fair dealing was transferrable – that one person could copy as per fair dealing on behalf of another.

Another aspect that the High Court emphasized (which also has roots in the lowest court), is the aspect of licenses being irrelevant to a decision of fair dealing.

To sum up then, in 2004, our highest court in the land with unanimity, declared the behavior of the Law Society's library, in terms of substantial reproduction according to its practices, to be fair dealing, even though among the beneficiaries of that decision were commercial law firms. And, that the library was not liable for what patrons did with the library collection.

So, from 2004, we get the contours of fair dealing; based on

Slide 6:

- **Each situation must be assessed on its own merits**
- **A license is not relevant**
- **FD is transferrable**
- **No liability for secondary uses by patrons (extends nicely to students)**
- **Commercial uses can be FD**
- **Prevailing practices may be relevant.**

I'm going to cheat a little and in the interests of time, just throw in two more take-aways, from two other decisions (one before and one after 2004); decisions that implicitly and explicitly follow CCH:

In 1997, the Ontario Court of Appeal sanctioned the use of an entire magazine cover, by a commercial newspaper as fair dealing, using the same contextual approach as the Supreme Court did in 2004

Slide 7 [Torstar image]

And in 2012, the famed Access v. Education decision, the Supreme Court decided that teachers could distribute supplemental materials through fair dealing, with explicit reference to CCH.

Slide 8

and remember that Section 29 of the Act was still limited to research and private study.

So adding that to the attributes of fair dealing

Slide 9:

- **Each situation must be assessed on its own merits**
- **A license is not relevant**
- **FD is transferrable**
- **No liability for secondary uses by patrons (extends nicely to students)**
- **Commercial uses can be FD**
- **Prevailing practices may be relevant**
- **Entire images may be used in the practice of fair dealing**
- **Distribution of supplemental materials for students' learning may be fair dealing.**

With this foundation – how might existing practices at that time fit to this map?