

CCH Canadian Ltd. v. Law Society of Upper Canada: What's it mean?

Purpose – to provide a brief overview of the main points considered in this decision and what they might mean for your library. A selected bibliography/webliography on the decision has been provided.

By way of background, you will recall that copyright subsists in every original literary, dramatic, musical and artistic work and entitles the copyright holder to the sole right to produce, reproduce and publish the work. In this case the Law Society of Upper Canada's Library provided a request-based photocopy service for its members, whereby legal materials were reproduced and delivered in person, by mail or by fax. It was sued for copyright infringement by several legal publishers.

I will review the findings made in the decision on the meaning of "an original work", self-service photocopiers, Fair Dealing and the need for a reprographic license.

Originality

- to be original a work requires "skill and judgment" but not creativity. A published judgment in a law report, being a compilation of the headnote (abstract of the facts and law), topical indexes, case summaries and the reported decision were found to be original and subject to copyright.
- this finding may provide guidance in determining whether other compilations found in your library, for example telephone directories or citation indexes, are subject to copyright.

Self-service Photocopiers

- the provision of these with appropriate copying warning signs and policy/procedures was not in itself found to be authorizing copyright infringement. Their use is presumed to be in accordance with the law unless this is rebutted where the facts show some degree of control between the alleged authorizer and the copyright infringer.
- the posting of copyright warning signs and the enforcement of an appropriate copyright policy should minimize the risk of being found liable for authorizing infringement by making photocopiers available to your patrons.

Fair Dealing

- this exception is provided by Section 29 of the Copyright Act, which provides that "Fair dealing for the for the purpose of research or private study does not infringe copyright." The Court found that making a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise for private research or study was fair dealing. In making this finding the Court noted that:

1. The scope of fair dealing should not be restrictively interpreted.

2. Research should be given “a large and liberal interpretation” and should not be “limited to non-commercial or private contexts.”
 3. Six factors should be considered when determining if a use is fair, being the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternative to the dealing and the effect of the dealing on the work.
 4. An appropriate copying policy is important and relied heavily on the Library’s Access Policy, which required patrons to identify the purpose for the materials, placed reasonable limits on the amount of materials copied and enabled staff to refer questionable requests to the reference librarian.
- the legal publishers have stated that this decision is of limited application and, for example, does not allow making a digital copy for private research or study or allow the distribution of materials to a patron for current awareness purposes or for use in their personal library.
 - there is nothing in the decision that precludes the application of fair dealing to digital materials or for current awareness activities. However, the tests outlined in the decision should be carefully considered when looking at the extension of fair dealing. Factors such as the nature of a digital work and its ease of duplication and distribution or how private research or study might apply to a current awareness service may be important considerations when considering if fair dealing applies.
 - If these questions are applicable in your library, they should be included in your copyright policies and be discussed with your legal advisors.

Requirements for a Reprographic License

- the Court noted that the availability of such a license is not a factor that is relevant to whether fair dealing applies.
- the question then arises whether fair dealing along with an appropriate and enforced copyright policy negates the need for an Access Copyright reprographic or their recently announced digital license. If a reprographic license is in place for your library, you are bound by its terms until it has expired. It provides protection from being sued for copyright infringement as well as a statutory defense from being sued for the provision of self-service photocopiers. However, such a license may be more restrictive than what is allowed under fair dealing and has significant cost and record keeping/administrative requirements.
- the Law Society of Upper Canada achieved much of what a reprographic license provides although at the expense of considerable litigation. If you are considering entering or renewing a reprographic license or entering a digital license, you need to seriously consider the use being made of your materials, the terms of the proposed license and obtain appropriate legal advice.

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