

Fair Dealing: A Copyright Two Step

A recent decision of the Copyright Board provides helpful guidance concerning the application of the fair dealing exceptions contained in the *Copyright Act*.

A decision of the Board is not binding on a court but can be persuasive. Given the nature of this decision it seems likely that it will be important because this case has already been to the Supreme Court of Canada once and careful consideration was given to the reasons for decision.

The Facts

The decision involves a dispute between Access Copyright and various provincial governments concerning the application of a tariff proposed by Access Copyright. The tariff in issue applies to all provincial and territorial governments except the government of Quebec. The tariff permits employees of these governments to make copies of published literary works, such as books, newspapers, journals and magazines within the limits set out within the tariff.

The *Copyright Act* provides that fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright. In determining whether the exception applies the Supreme Court of Canada has said that a two-step process should be used. First, it is determined whether the dealing is for one of the allowable purposes of “research, private study, education, parody or satire”. The second step is to determine whether the dealing is “fair”.

The Decision

The Board concluded that a large portion of copying by government employees did not generate remuneration under the tariff because this copying was permitted under the fair dealing provisions of the *Act* relating to work related research or private study.

Throughout the decision the Board refers to recent decisions of the Supreme Court of Canada and brings together the reasoning set out in those decisions.

The Board said that fair dealing can be made out either by demonstrating the existence of a general practice that is based on an enumerated fair dealing purpose, and is, in fact, fair, or by demonstrating that a particular copying event was fair dealing.

Step 1- Was the Dealing Done for an Allowable Purpose of Research, Private Study, Education, Parody or Satire?

In applying the two-step process the Board said that the relevant perspective when considering whether the dealing is for an allowable purpose is that of the user.

Unlike some other exceptions to copyright infringement in the *Act*, fair dealing need not be done for a “sole purpose.” Nor did the *Act* require that fair dealing be “mainly,” “chiefly,” or otherwise “predominantly” done for an allowable purpose.

In assessing step one, the Board said it was not an obstacle that a dealing was done for multiple purposes, as long as it was also done for an allowable purpose. Therefore, even when a dealing was not done predominantly for an allowable purpose, it could meet the threshold of the first step of the fair-dealing test. The effect of the other purposes could be considered in the “fairness” analysis of step two.

Step 2- Was the Dealing Fair?

The Supreme Court of Canada has said that six factors must be considered to determine whether a dealing is fair: the purpose, the character and the amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

In applying this step it is important to avoid double counting in assessing the fairness of a dealing by looking to the same aspect of the dealing under more than one factor.

a) The Purpose of the Dealing

When considering this factor an objective assessment must be made of the real purpose or motive behind using the copyrighted work. The evaluation of this factor involves considering the fairness of the goal for which the permitted activity took place.

The Board also said that whether a dealing was in the public interest was another factor to consider.

b) The Character of the Dealing

In assessing this factor courts must examine how the work in question was dealt with. For example, if multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing.

Given the ease and magnitude with which digital works are disseminated over the Internet, focusing on the “aggregate” amount of the dealing in cases involving digital works could lead to disproportionate findings of unfairness when compared with non-digital works.

Destruction of a copy may favour fairness where the copy would no longer be necessary to achieve the permitted purpose, and destruction helps ensure that it is not used for other, unfair, purposes. However this did not mean that non-destruction of the copy always favours unfairness. Where destruction does not help ensure that the copy is used for a permitted purpose, or where destruction would undermine the very reason why it was made, non-destruction of a copy may not have any effect on the evaluation of the “character” factor.

The character of the dealing helps ensure that the work will be used for an allowable purpose, this tends to make a dealing fair; where works are unnecessarily kept, or distributed unnecessarily, and where such acts create the risk that other unfair dealings will occur, this tends to make a dealing unfair.

c) The Importance and Amount of the Work Taken

This is an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what was disseminated.

The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

d) The Existence of Alternatives to the Dealing

Where there are reasonable alternatives to the dealing, that dealing may be less fair. For example, if there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered. In addition, it is useful to consider whether the dealing was reasonably necessary to achieve the ultimate purpose.

For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness. However, the alternative must be realistic, and must not simply be the availability of a licence.

Alternatives to the dealing *may* affect the determination of fairness but the existence of alternatives does not always affect the determination of fairness.

e) The Nature of the Work

The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work—one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.

f) The Effect of the Dealing on the Work

The Board said that the effect of the dealing on the work was another factor to be considered when attempting to determine whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. However, although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.

The Board's Conclusion

The Board concluded that the fair dealing factors were not criteria or elements. They are factors which are useful considerations in a fair dealing analysis, not conditions that must be met for a dealing to be fair. Since fair dealing involves the weighting of factors, the

presence of a single factor that would tend to make a dealing unfair does not automatically make that dealing unfair. While the factors assist in the determination of fairness, fair dealing is a matter of impression.

Comment

It seems likely that this decision and the approach followed will provide a roadmap to the application of the fair dealing exceptions. These exceptions are applicable in many cases particularly copying on the Internet. It is unfortunate that the road map is convoluted but nonetheless it is better than no roadmap at all.

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These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer.