Supreme Courts, Copyright and Photocopiers

How photocopier decisions in three countries still shape copyright?

CCH is actually part of two triplets

- CCH v. LSUC; Alberta v. Access Copyright; York University v. Access Copyright
  - Canadian lawsuits about fair dealing and the limits of reprographic copyright collectives
- Moorhouse; William & Wilkins; CCH
  - International lawsuits about photocopiers; licensing of library materials; and fair dealing\fair use

20 Years since CCH

- University of New South Wales v. Moorhouse
- William and Wilkins v. United States
- CCH Canadian LTD v. Law Society of Upper Canada
  - Photocopiers unlicensed by a copyright collective in the Library
  - Interlibrary loan without renumeration to a copyright collective or a publisher

Outline

- Moorhouse
- William & Wilkins
- The Australian decision’s effect on Canada pre-CCH
- CCH
- After CCH in Canada
- The Australian & US decisions effect on Canada post CCH

Moorhouse v. UNSW

- Paul Brennan (an alumnus of UNSW) photocopied a chapter or short story from the book *The Americans, Baby* at the UNSW Library. Author Frank Moorhouse; publisher Angus & Robertson; and the Australian Copyright Council use the evidence of his copying to launch the lawsuit.
- The Library had coin operated photocopiers and supervisors on duty – one of their jobs was to prevent copyright infringement
- Library guides advertise the photocopiers, but don't explain copyright infringement or explain fair dealing.
- Signage refers to S49 of the Copyright Act, which allows Library staff to make copies on behalf of users.

Moorhouse v. UNSW continued

- The Vice Chancellor's Guidance Rules recommend a notice containing stringent restrictions on copying be posted by University Photocopiers, but this wasn't done.
- The Vice Chancellor refused a request of the Australian Copyright Council to station an observer in the photocopier room
- Argument that a single chapter or story would be a substantial portion of the book and not a fair dealing; and therefore copyright infringement.

Moorhouse Timeline

- UNSW sued in the Supreme Court of New South Wales in 1974
- UNSW loses and appeals to the Australian High Court.
- UNSW loses on appeal to the Australian High Court in 1975.

Authorizing Copyright Infringement

- Because the UNSW Library
  - Exercised no control over their photocopiers
  - And no control over copyrighted books in their collection
  - *no adequate notice was placed on the machines for the purpose of informing users that the machines were not to be used in a manner that would constitute an infringement of copyright*.
- The Library was authorizing copyright infringement

It follows that in these circumstances when Mr. Brennan used the means provided by the University to make an infringing copy he was authorized by the University to do what he did.

Australian Copyright Council's Website

Memoriam

Vale Frank Moorhouse

29 June 2022

"He was the lead plaintiff in a 'test' case brought (with the support of the Australian Copyright Council (ACC) against the University of New South Wales regarding the photocopying of books/copyright material by university libraries: University of New South Wales v Moorhouse (1975) 133 CLR 1. "

"The Moorhouse case became the leading case on authorisation, and its principles are now codified in section 36(1A) of the Copyright Act 1968 (Cth). Copyright Agency was established to collect the licence fees that universities were required to pay following that judgement."

William & Wilkins v. United States

- Outraged that the NLM & the NIH were providing ILL copies of articles from their journals with no compensation to the publisher.
- Lawsuit filed at the US Court of Claims - 1967
  - Between 1957 & 1961 NLM provided 301,528 ILLs as photocopies
  - WW tried to license ILL copies for $0.02 per page
  - NLM refused – fair use.
  - ARL voted in 1967 to support NLM
  - The lawsuit was bifurcated into two suits – similar to York University v. Access Copyright.

Arguments in WW

- Publisher side
  - Every interlibrary loan photocopy represents a lost subscription and reduces revenue
- NLM side
  - Free photocopies do not injure publishers. WW couldn’t offer proof.
  - Copyright rules should be changed by Congress, not the Court.
  - Library photocopying had long been a custom to which publishers had acquiesced.

William & Wilkins

- US Supreme Court agreed to hear the appeal in 1974.
- Justice Harry Blackmun recused himself because of a perceived conflict of interest.
- The Supreme Court tied 4 – 4
- Since the US Court of Claim had ruled in NLM’s favour, the tie meant that the lower court’s judgment stayed in place.

Quotes from the US Court of Claims

- Also, NLM's policy is not to honor an excessive number of requests from an individual or an institution. As a general rule, not more than 20 requests from an individual, or not more than 30 requests from an institution, within a month, will be honored.
- The last component we mention, as bearing on "fair use", is the practice in foreign countries. The copyright legislation of the United Kingdom, New Zealand, Denmark, Finland, Italy, Norway, Sweden, France, the German Federal Republic, Lichtenstein, Mexico, the Netherlands, and the U.S.S.R. have specific provisions which we think would cover the photocopying activities of NLM and NIH. Canada, India, Ireland and South Africa, while having no specific provisions permitting copying of copyrighted works for the purposes of private research and study, do provide, more generally, that fair dealing for purposes of private study or research shall not be an infringement. [29] These provisions in foreign countries with problems and backgrounds comparable to our own are highly persuasive that the copying done here should be considered a "fair use," not an infringement.

A Pyrrhic Victory? 1976 Copyright Act

- NLM won the court battle, as the US Congress was in the process of working on a major revision of the US Copyright Act
- The lobbying focus moved to Section 108 of the Revised Act.
- What was systematic reproduction? What were “aggregate copies to substitute for subscription”?
- CONTU (National Commission on New Technological Uses of Copyrighted Works) came up with the Rule of Five.

Section 108 (g) (2)

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee

(2) ….nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

CONTU Guidelines – Rule of Five

- “Aggregate quantities” means copying more than five articles from the most recent five years of a subscription to a journal in a 12 month period.
- For borrowing libraries
- What happens when the limit of five is reached?
  - No interlibrary loan;
  - Or copyright royalties;
  - Or subscribing to the journal

US Fair Use & Interlibrary Loan

- Tracking
- Royalty Payments
- Inserting S 108 or the CONTU Guidelines into Library Licenses

Why did Moorhouse have such a big influence in Canada?

- The Imperial Copyright Act
- One Copyright Act for the whole British Empire – 1911
  - Ariel Katz: Debunking the Fair Use vs. Fair Dealing Myth
- The independent jurisdictions in the Empire were supposed to pass the act independently.
- Canada dragged its feet and became the last independent jurisdiction to pass the act in 1924
  - Sara Bannerman: Struggle for Canadian copyright

The Moorhouse Precedent

They may be aware of an Australian precedent, where the Supreme Court found that a library was guilty of infringement because it made a copying maching available to users and one of the users infringed on that machine. (Actually he was put up to it by the publishers in order to get a precedent on the books).

Basil Stuart-Stubbs from a 1981 article in the Canadian Library Journal.

CCH vs. the Law Society of Upper Canada 1993-2004

Great Library of the Law Society of Upper Canada sued by legal publishers for:

- Providing a photocopy service for patrons
- Providing self-service photocopiers in the library
- Faxing photocopy requests to patrons

- During the lawsuit, the Copyright Act was amended in 1997.

Relying on fair dealing not the library exemption

Para. 49 of the Supreme Court Judgement CCH Canadian Vs. the Law Society of Upper Canada:

… the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

Photocopiers

Para. 43 of the Supreme Court Judgement :

" …there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. As noted, a person does not authorize copyright infringement by authorizing the mere use of equipment (such as photocopiers) that could be used to infringe copyright. In fact, courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law.”

30.2 after CCH

- Many libraries now providing interlibrary loan directly under fair dealing rather than using S30.2 as per paragraph 49 of CCH.

- There is a large group of libraries that uses S30.2 as amended in 2012.

After CCH

- Alberta v. Access Copyright
- York v. Access Copyright

Education?

It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.

Para 55, CCH

K - 12 from licence to tariff

- CMEC (Provincial Ministers of Education) negotiated the last K – 12 Access Copyright licence.

- With the expiration of the last K-12 licence on August 31, 2005, Access Copyright opted to apply for a tariff from the Copyright Board of Canada.

The K – 12 Tariff

- In June 2009, the Copyright Board issued a four year tariff.

- The new tariff was $5.16 per student.

- For the years 2005/2006 through 2007/2008, the tariff was reduced to $4.64 per FTE.

- Since the school boards had already paid $2.45 per FTE, they owed a retroactive payment of $2.19 per FTE for the first three years and a payment of $2.71 per FTE for the last year.

- The Copyright Board denied that teacher handouts to students could be considered private study under fair dealing.

Supreme Court Appeal

- The Supreme Court issued it's Judgment on July 12, 2012.

- …*photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students. The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study.* (Para 25)

K-12 School Boards & Tariff

Because of

- Alberta vs. Access Copyright Supreme Court Decision
- Education added as a purpose for fair dealing in the Copyright Act

As of January 1, 2013, K-12 School Boards have stopped making tariff payments to Access Copyright.

Supreme Court Pentalogy

- Re:Sound v. Motion Picture Theatre Associations of Canada
- Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)
- Society of Composers, Authors and Music Publishers of Canada v. Bell Canada
- Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada
- Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada

16 Years of Post Secondary Licencing

- The AUCC (now Universities Canada) negotiated the first model licence with CanCopy in 1994.
- Negotiations over a new licence fell apart in 2010.
  - CCH
  - Copyright Modernization Act
    - Added education as a purpose for fair dealing
    - Made s30.2 easier to comply with
  - Alberta vs. Access Copyright

York Timeline

- 2013 York Lawsuit
- 2014 Bifurcation of the Lawsuit
- 2017 Federal Court Decision
- 2020 Federal Court of Appeal
- 2021 Supreme Court of Canada

York – What happened?

- 2017 – The Federal Court finds that the Copyright Board's Interim Tariff is mandatory and that York engaged in systematic or industrial level copying.
- 2020 - The FCA finds that Access Copyright doesn't have legal standing to sue, because it isn't the copyright owner of the works. However very concerned that York's fair dealing guidelines don't work because of industrial level copying.
- 2021 – The SCC agrees with the FCA that Access Copyright doesn't have legal standing to sue for copyright infringement; there is no mandatory tariff; heavily criticizes the lower courts fair dealing analysis.

York Judgment vs. US Section 108

105 *By extension, the character of the dealing factor must be carefully applied in the university context, where dealings conducted by larger universities on behalf of their students could lead to findings of unfairness when compared to smaller universities. This would be discordant with the nature of fair dealing as a user's right.*

Moorhouse and William & Wilkins after CCH?

- Access Copyright kept trying to replicate Moorhouse
  - and kept failing
  - Cannot see another lawsuit right away
- Will Access' new CEO take things in a different direction?
- William & Wilkins lost in court, but won in Congress
- Expect to see more lobbying in Parliament – targeting fair dealing

Questions? Conversation?

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