

Users' Rights and Realities: CCH, Fair Dealing, and the Experiences at Canadian Cultural Institutions

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Recent research is shining a new light onto the Supreme Court of Canada's (SCC) decision that is said to have "reconceptualized" fair dealing as an integral part of copyright law in Canada (Craig, p. 449). During a 29 September 2014 lecture in the *IPOsgoode Speaks Series*, Dr. Emily Hudson, the Career Development Fellow in Intellectual Property Law at the *Oxford Intellectual Property Research Centre* at the University of Oxford, questioned the prevailing legal and academic perceptions of the *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004 SCC 13) judgment in a research presentation entitled: "Copyright Exceptions as Users' Rights? An Empirical Critique".

As Dr. Hudson pointed out during her presentation, the *CCH* ruling is often regarded as a defining moment for clarifying the rights of users with respect to the fair dealing exceptions contained within Canadian copyright law. Writing on the tenth anniversary of the decision, legal scholar *Michael Geist, the Canada Research Chair in Internet and E-Commerce Law*, stated that *CCH* "has grown in stature as the leading the users' rights copyright decision by a high court in the world" (sic). However, Dr. Hudson's presentation and on-going research calls into question the connections between legal and academic interpretations of the law and the effects that this "law in the books" has on the real-world activities of users themselves.

Dr. Hudson's research is based on ongoing fieldwork and interviews conducted at leading cultural institutions in Canada as well as Australia, the United States, and the United Kingdom since 2004. This research focuses on practitioners and their experiences in relation to copyright law and user-rights exceptions, such as fair dealing and fair use. The objective of Dr. Hudson's research is to undertake an empirical and qualitative study of users experiences with copyright law and fair dealing exceptions in order to see if, and how, Canada's cultural organizations have altered their practices and policies in response to the *CCH* decision. Dr. Hudson's work examines if the *CCH* decision has contributed to greater reliance on fair dealing principles in their everyday work.

In the Canadian context, this research has found a significant gap between the academic and judicial responses to *CCH* when compared to the responses of cultural practitioners working at Canadian cultural institutions. For example, despite the *CCH* ruling, when compared to their counterparts in the United States, practitioners at cultural institutions in Canada demonstrate an "extremely limited reliance on fair dealing" and a "muted" response to *CCH* more generally.

For Dr. Hudson, this disconnect demonstrates that drafting legislation by primarily focusing on the "law in the books" misses the contextual nuances associated with how the law is understood and used in practice. Structural, political and economic conditions may be contributing factors to this, as her research shows that in the United States there are often a greater number of centralized and specialist copyrights managers than those found in Canadian cultural institutions.

Her research also points to how other factors, including the risk preferences of individual organizations, historical and philosophical factors, institutional factors, and government or funding mandates contribute to how different cultural institutions create and update their copyright management techniques.

In order for cultural institutions in Canada, and elsewhere, to benefit from the flexibilities provided by fair dealing or fair use exceptions, Dr. Hudson argues that there needs to be a "rethinking, dismantling, and rebuilding" of existing copyright management processes and not just "attitudinal shift". She cautions that

this rebuilding needs to be realistic about the specific social and economic contexts and circumstances that cultural institutions are implicated in, in order to propose and implement appropriate levels of change.

Dr. Hudson's research empirically highlights many of the so-called "chilling effects" that dissuade users from benefitting from legal exceptions to copyright law. Unfamiliarity with the nuance of copyright law as well as the actions and campaigns of rights-holders to discourage the use of their goods may deter users from exerting the rights they have been granted under copyright law. For example, even if the use of copyrighted materials accords with fair dealing exceptions, users may still have a fear of litigation from rights-holders and avoid putting themselves in such a position. In their recent volume, *Dynamic Fair Dealing: Creating Canadian Culture Online*, Drs. [Rosemary J. Coombe](#), [Darren Wershler](#), and [Martin Zeilinger](#), argue that this subtle discouragement has the "tendency to control and contain culture is extending into all dimensions of Canadian social life" (p. 38). It is important to highlight the legal aspect of these exceptions and their role in Canada's copyright system.

The *CCH* ruling finds that Canada's fair dealing exceptions are "[properly understood as an integral part of the Copyright Act](#)" (3(a) para.48). These exceptions are designed to balance the needs of users and creators for the betterment of Canadian society at large. However, the *CCH* ruling also rightly notes that it is not always easy to determine when certain uses are or are not "fair" and legal. The SCC maintains that we must therefore consider the purpose (3(a)i), character (3(a)ii), amount (3(a)iii), availability of alternatives (3(a)iv), nature (3(a)v), and effects (3(a)vi) of each use when determining its "fairness".

The use of fair dealing exceptions raises other questions, including how these uses may or may not detract from future creativity and the strength of Canada's content and culture industries. This IPOsgoode Speaks Series event ended with a lively debate on the role that academics, through their legal criticism and analysis, play in the Canadian cultural sector and media and content industries. Attendees discussed whether or not scholarly activities advocating for the use of fair dealing exceptions detracted from investment in commercial activities and undercut the livelihoods of the country's artists and creators.

Dr. Hudson's research helps to ground and illuminate such discussions by offering empirical evidence into how users and practitioners in Canada's cultural institutions interpret and interact with the country's copyright laws and fair dealing exceptions.

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