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Libraries, Copyright, Ereserves and Fair Dealing

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Calgary Library



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Overview

- *Libraries and Copyright*
- *The CCH Decision*
- *The Supreme Court's Six Factors and how that led to the U of C Ereserve Policy*



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What is Copyright?

According to the copyright act:

“copyright” means the rights described in

(a) section 3, in the case of a work,

(b) sections 15 and 26, in the case of a performer’s performance,

(c) section 18, in the case of a sound recording, or

(d) section 21, in the case of a communication signal;



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Copyright?

A fact or an idea cannot be copyrighted, but an expression of an idea can be copyrighted.

Only works that are original and fixed are protected by copyright. A work is "fixed" when it is produced onto any media, like paper or within a digital file. A work is considered "original" when it is the product of the author's own skill, judgment and creativity, has not been copied and demonstrates more than a trivial, mechanical level of skill and judgment. From Concordia University Copyright Guide

There are three Intellectual Properties:

- Copyright
- Patents
- Trademarks



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Rights that our users have

Fair Dealing: Sections 29, 29.1 and 29.2

Fair dealing for the purposes of research, private study, review, criticism or news reporting does not infringe copyright.

Perceptual Disabilities: Section 32:

It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to (a) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;

Rights...(2)



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Copying for Private Use: Section 80

Subject to subsection (2), the act of reproducing all or any substantial part of (a) a musical work embodied in a sound recording ... onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording.



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Copyright and Libraries

The Copyright Act gives special rights to Libraries, Archives and Museums:

30.1 Management and Maintenance of a Collection

30.2 Research or Private Study

30.3 Machines installed in Educational Institutions, Libraries, Archives and Museums



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Section 30.1

It is not an infringement of copyright for a library... to make for the maintenance or management of its permanent collection ..., a copy of a work or other subject-matter... in its permanent collection



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When to use Section 30.1?

Some of the conditions when the copying is allowed:

- *...if the original cannot be viewed, handled or listened to because of its condition...*
- *...if the original is currently in an obsolete format...*
- *...for insurance purposes or police investigations...*

But:

- *Paragraphs (1)(a) to (c) do not apply where an appropriate copy is commercially available...*



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Fair Dealing for our patrons

Section 30.2 allows libraries to act on behalf of their patrons in fair dealing.

It is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1.



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Restrictions to Libraries in 30.2

- 30.2(5) states that *the copy given to the patron must not be in digital form.*
- If an article is being photocopied from a newspaper or periodical other than a scholarly, research or technical periodical, the article has to be at least one year old.
- Works of fiction, poetry, drama or musical works in non-scholarly periodicals are not allowed.



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CCH and Section 30.2

Paragraph 49 of the CCH Supreme Court Judgment makes section 30.2 irrelevant:

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.



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S30.3: Machines...

Section 30.3 legally allows libraries, archives, museums and educational institutions to have self serve photocopiers, but:

- *there is affixed...a notice warning of infringement of copyright.*
- *the ... library... has entered into an agreement with a collective society*



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CCH vs. the Law Society of Upper Canada

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



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.



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Large & liberal interpretation

Para. 51 of the Supreme Court Judgement :

"Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained.... Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.



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CCH and Photocopiers

- *...the notice was posted for the purpose of reminding the Great Library's patrons that copyright law governs the making of photocopies in the library. Para 44*
- *...evidence does not establish that the Law Society authorized copyright infringement by providing self-service photocopiers and copies of the respondent publishers' works for use by its patrons in the Great Library. Para 46*



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Ereserves and the six factors

- U of C's original ereserve policy
- How that changed with the six factors from the CCH Supreme Court Case



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EReserve, until 2007

Many faculty wanted eReserves but...

- The deadline for clearing copyright was 2 ½ months before the beginning of the Semester. All readings had to receive clearance.
- Not unusual for instructors to find out they are teaching a class two weeks before it starts.
- With the rise of courseware like BlackBoard, it is easy for instructors to post articles without library participation.



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Rethinking E-Reserves

- The trend especially in the US is away from standalone E-Reserves software and integrating E-Reserves with courseware such as BlackBoard.
- The CCH Supreme Court Judgment and its six factors for fair dealing.



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The Six Factors and EReserve

- Is copyright clearance required everytime that we put something on eReserve? Specifically clearance for digitizing print materials?
- Or can the six factors be used to define boundaries around which print materials can be digitized as a fair dealing?



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Factor 1

The purpose of the dealing will be fair if it is for one of the allowable purposes under the Copyright Act, namely research, private study, criticism, review or news reporting...(P45)

- Reserves would need to be for one of the five purposes above. For example for the research & private study of the students in your class.



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Factor 2

The character of the dealing:

If multiple copies of works are being widely distributed, this will tend to be unfair...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. (P55)

Wide distribution is not fair dealing.

Readings should never be posted to a publicly accessible website. Only the students in the class should have access.



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Factor 3

The amount of the dealing

...for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision..(p56)

If you need to use more than one article from an issue of a journal or more than one chapter of a book, that may not be a fair dealing. You should consult with the library or the copyright office. You may need copyright clearance, which takes a long time.



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Factor 4

Alternatives to the dealing

*Alternatives to dealing with the infringed work may affect the determination of fairness.
(P57)*

If there is a reasonable alternative to making a copy it isn't a fair dealing. If you can provide a URL for your students rather than putting a copy of a work on a website, you should be doing that.



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Factor 5

The Nature of the work

If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair. (P58)

Published material should meet factor 5. In the CCH ruling, the Supreme Court praised clear and limited copyright policies.



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Factor 6

Effect of the dealing on the work

If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. (P59)

Another reason for not posting readings to publicly accessible websites.



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A link to our policy

<http://library.ucalgary.ca/services/faculty/placing-reserve-readings/ereserves>



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Things we remind faculty

The next few slides have some things we like to remind our faculty.



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Options if I need to copy more than fair dealing?

- Copyright clearance via the Copyright Office. This requires significant lead time.
- Linking is not copying. If the Library provides access to an eresource or if it is available on the open web, just link to it.
- Create a print coursepack using the material. The students will pay the copyright royalties.
- Don't use the reading or find an alternative.



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Posting PDF's of material already available digitally

- Some of our licences allow posting pdf's from ejournals to reserve reading websites and some don't. Linking is safer. Use the following prefix for any material that is licenced by the library:
- <http://ezproxy.lib.ucalgary.ca:2048/login?url=>
- <http://library.ucalgary.ca/services/information-faculty/creating-persistent-urls/>



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Copyright in Open Access Journals

- Material posted on the open web is covered by copyright, unless there is an explicit notice to the contrary.
- *Although access is free, almost all the material available through the PMC site is protected by U.S. and/or foreign copyright laws...Transmission or reproduction of protected material, beyond that allowed by the fair use principles of the copyright laws, requires the written permission of the copyright owners. PubMed Central Copyright Notice.*



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How long does copyright clearance last?

- Typically, the university pays for copyright clearance for one semester or one year.
- If copyright clearance is needed for readings, the Copyright Office needs to renew the clearance every time the reading is used for another class.



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Questions?

