

A Short History of Canadian Fair Dealing



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Library

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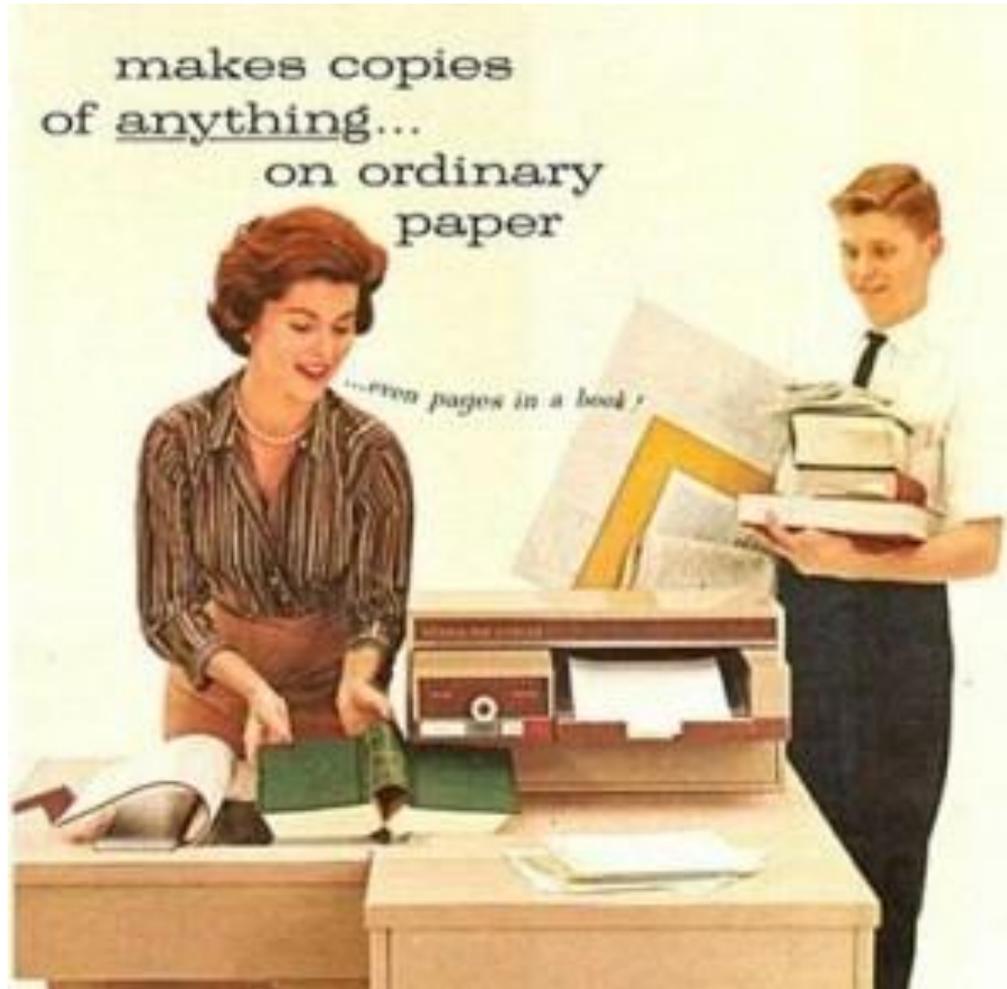
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Origins of Fair Dealing

- 1802 – Fair Dealing starts to appear as judicial law in the UK
- 1841 – Fair Use starts to emerge in judicial law in the US.
- 1911 – Fair Dealing codified in the UK (Imperial) Copyright Act
- 1921 – Fair Dealing codified in the first Canadian Copyright Act

Xerox 914 - 1959



The Modern Photocopier

- No more ripping pages out of books.
- Easy to make fair dealing copies.
- Interlibrary loan of journal articles.
- Handing out copies of articles in class to students.
- Placing Reserve Copies of articles in the Library

Authors Love/Hate Relationship with Libraries and Education

Marian Engel



On the one hand she loved libraries...

- Gave major credit to children's libraries in the province of Ontario as a reason why she became an author.
- Trustee for the Toronto Public Library Board: 1975 – 1978

But Engel was also one of the founders of the Writer's Union of Canada (TWUC) and she was its first chair in 1973.

G&M – October 6, 1973

As an author...I must now for my own protection consider the libraries as my enemy.

I walk in. On my right is a Xerox machine in contravention of the copyright limitation...Straight ahead is a woman in furs, who is taking out my book for nothing...

Toronto Star – Oct. 23, 1974

Did it ever occur to you, for example, that every time you borrow a library book or photocopy part of one, you are getting the benefit of an author's work while he is getting nothing?

1985 – Authors on Fair Dealing

Marilyn Kay of the Periodical Writers' Association of Canada said that private use and personal study are - along with research, criticism, review or newspaper summary - currently exempt from copyright legislation, and should not be. "It's just another word for theft of a writer's work."

A joint brief submitted by the Writers Union and the League of Poets said that photocopying or any other electronic reproduction of book pages should always be illegal.

G& M – June 11, 1985

John Degen's View of Fair Dealing

You can copy a little bit free because of fair dealing - that's how we quote and use short passages as examples. You can copy more, and do not have to buy a full text if (and only if) you buy a license to do so. Once you start copying substantially (up to the full text), you really need to buy the book.

John Degen, Executive Director - TWUC

Feb 8, 2013

<http://johndegen.blogspot.ca/2013/02/al-purdy-peed-on-my-car-or-conversation.html>

How Reliable is Fair
Dealing?

Canadian Copyright Act and Libraries

Before 1997, it was assumed that libraries could act on behalf of their users under fair dealing.

Albert Bowron - 1973

It has not been determined that the use of photocopying devices in libraries contravenes the Copyright Act. Libraries, universities, governments and publishers use them daily within the limits of fair practice.

G&M, 11 October 1973

Basil Stuart-Stubbs 1981

What the law does say is that if a person is “fair dealing” for the purposes of “private study, research, criticism, review or newspaper summary,” that person will not be infringing. What is fair dealing? It is not defined in the legislation. Nor is case law much help.

Canadian Library Journal, February 1981

Mock Copyright Trial - 1975

...copying is done automatically on request within the limit of one copy of one article or a small part of a book for each person. David Esplin, Acting Chief Librarian, U of T.

Now we can ask about fair dealing, which does refer to interference with the market, the potential for sale of the product. Again I stress to you that there is not one iota of evidence this morning that library photocopying has interfered with the market. Peter S. Grant, Lawyer for the Librarian side.

Canadian Library Journal, April 1976

Guelph Photocopying Guidelines - 1984

- Limit of 10% in copying from a single monograph
- Limit of one article in five from a journal issue, but not to exceed 10% of the issue
- Provisions for Library Reserves
- Single, not multiple, copies

Photocopying in Canadian Libraries - 1987

On average photocopies in a single transaction:

- 10 pages from a book
- 9 pages from a periodical

Libraries with photocopying policies:

- 23% of Academic Libraries
- 12% of Public Libraries
- 8% of Special Libraries
- 11% of All Libraries

Phase I of Copyright Reform

Keyes-Brunet Report - 1977

- 1. That photocopying not be the subject of any specific provisions.*
- 2. That any new Copyright Act allow, as it does presently, and encourage the formation of collectives to protect authors' and publishers' interests, under the supervision of a government tribunal.*

From Gutenberg to Telidon, 1984

- *Allowing new [copyright] societies to develop and function in the best interests of copyright owners and users... An example might be the collection of payments from institutions making extensive use, including photocopying, of copyright material.*
- *Ensuring protection of the public by maintaining continued and vigorous competition in the public interest through regulation of [copyright] societies.*

From Gutenberg to Telidon, (2)

- *Copyright societies representing authors and publishers will be allowed to negotiate with libraries for the legal reproduction of the societies' copyright material by library photocopying facilities.*
- *Fair dealing will be called "fair use" and will be clearly defined. A prioritized list of factors will be established to be considered in any determination of whether a particular use of a work is a fair use.*

Revision of Copyright SubCommittee

- 24. A specific right of reprographic reproduction should not be introduced.
- 25. No exception should be provided for reproduction by libraries.
- 82. The present fair dealing provisions should not be replaced by the substantially wider “fair use” concept.
- 83. The nature of fair dealing as a defence to an action of infringement should not be changed.
- 85. Factors to be considered by the court may be listed but should be illustrative only and not prioritized.

Definition of Fair Dealing

...it is not possible to define fair dealing without sacrificing essential flexibility. To be effective any fair dealing provision must be flexible. It must be left to the discretion of the courts to mould and shape according to technological developments and existing practices. (p64)

Abuse by Collectives

There is a danger that the unregulated collective exercise of rights could lead to abusive practices. If the only practical access is through a collective then there is potential that a collective, because of its dominant position, could occupy too strong a bargaining position vis a vis users. (p86)

- The solution to this is the Copyright Appeal Board, which will have the power to stop collectives from being abusive.

“Copyright Compliance” 1986

“One common example is that of a library photocopying an article in a periodical for a library patron. Such articles are generally protected by copyright and where the entire article is photocopied, in most cases there is infringement...The defence of fair dealing in these situations is not open to the librarian, since the librarian making copies for the patron...is not making copies for any of the five statutory purposes. Multiple copying for classroom use of a substantial part of a work...can never constitute “fair dealing.”

Librarian response to Publishers

But how would a judge interpret this case? Would the interpretation be strictly in terms of the letter of the law, or would it take into account the fact that the librarian was acting on behalf of the patron for one of the five purposes provided for under the law? ...no one will know the answer to this question until a court is called upon to decide the question.

Richard Hopkins, CLJ, Oct 1987.

Mulroney Government Changes

- There were to be two phases of copyright reform.
- In 1988, phase one of copyright reform which dealt with reforms for copyright owners passed Parliament.
- Phase two of copyright reform which was supposed to deal with reforms for copyright users never happened under the Mulroney Government.

Flora MacDonald has Librarians in a Huff

Author Carol Goar. **Toronto Star** pA27. December 3, 1987.

A roomful of librarians is not a group that most Canadians would identify as intimidating. ...these mild-mannered bibliophiles have turned on Communications Minister Flora MacDonald with a vengeance.

"Not only are libraries at present not paying creative royalties to the author or the writer," she charged, "they are actually using his or her work to subsidize their other activities. I don't think that is defensible."

MacDonald admitted afterward that it had not been one of her more pleasant speaking engagements. "But they needed to hear the truth," she insisted. "Theft is theft. And theft of intellectual property is theft."

In theory, [authors] should receive royalty payments every time someone uses their work. In fact, they get nothing for the hundreds of photocopies of their material that teachers routinely hand out, or that library users make. MacDonald believes that creators deserve more control over their work. So she is proposing that the Copyright Act be amended to allow authors to set up a collective to keep track of the number of photocopies of their work being made and to collect royalties on their behalf.

The Rise of Copyright Collectives

- In 1988 the Canadian Parliament expanded the power of the collective administration of copyright and not surprisingly the number of copyright collectives increased dramatically.
- Among the new collectives were two reprography collectives: Access Copyright (CanCopy 1988 - 2002) and Copibec.
- At least in English speaking Canada, the new collectives sparked a copyright war.
- Librarians, teachers and others were unwilling to pay for rights that they hadn't had to pay for previously. Rights they presumed that they had under fair dealing. And without Phase Two of Copyright Reform, users didn't know what their rights were.

Collective Attrition

1990

Edith Yeomans then Head of CanCopy makes the following quote about fair dealing.

Yeomans, who gets pretty exercised over this issue, said the question of exemptions is "all crap," and any exemption is "an expropriation of the creators' rights." Teachers and librarians have been making copies for free for so long, she said, "they now feel it is their inalienable right. But they've never had that right. from the Globe and Mail: Feb 24, 1990

1991 & 1992

- CanCopy signs an agreement with the Ontario Ministry of Education.
 - CanCopy signs an agreement with the Province of Manitoba to cover its schools.
-
- CanCopy distributes its first cheques to authors.

1993

- CanCopy signs an agreement with the Province of Alberta to cover its schools.

Ontario pulls out of its deal with CanCopy due to deficit issues. Andrew Martin the Executive Director of CanCopy makes the following statement in the Windsor Star 1993:

As of Monday morning every student in Ontario becomes a potential informer. The Copyright Act is clearly on our side and as of Monday we are in the business of collecting evidence.

- Three legal publishers sue the Law Society of Upper Canada, because the Law Society's Library 1) allows free standing photocopiers; and 2) has a custom photocopier service for library patrons.

1994

- The Province of Ontario signs a new agreement with CanCopy for the 1994-1995 school year.
- The Federal Government signs an agreement with CanCopy.
- AUCC signs an agreement with CanCopy.

1995

Concern that Canada did not have a section in the Copyright Act protecting libraries acting under fair dealing is demonstrated in the Canadian Library Association's 1995 Position Statement on Copyright:

- *1.4 A library must be able to enjoy all exceptions available under the Act, as well as the defence of fair dealing, which are enjoyed by its patrons;*
- *4. The Copyright Act should be amended to provide explicit clarification that fair dealing applies to the making of an electronic copy of a work and to the storage and transmission of that copy by electronic means.*

Phase II of Copyright Reform

1996

- The Chretien Government decides that phase 2 of copyright reform needs to happen.
- Margaret Atwood appears before the House of Commons's Canadian Heritage Committee which is reviewing copyright legislation. She compares photocopying in libraries to car theft:

Atwood argued that single copies can add up... "A single car theft isn't much, either," Atwood told the committee, "unless its your car." Ottawa Citizen: Nov 22, 1996

Phase II Copyright Reforms

Impact of the 1997 amendments to the Copyright Act on libraries and education:

- Section 30.1 allowed libraries under certain circumstances to make entire copies of copyrighted works for preservation purposes.
- Section 30.2 allowed libraries to act on behalf of their users for fair dealing.
- Section 30.3 confirmed the right of educational institutions, libraries, archives and museums to have self serve photocopiers, but they were required to have a licence from a reprographic copyright collective.

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.

Further impact of 30.2

- The restrictions in 30.2 became another impetus for libraries to sign licences with Access Copyright and Copibec. Otherwise interlibrary loan and copying services for library users were very restricted.
- The reprographic collectives didn't have digital rights, so signing a licence wouldn't have solved the digital delivery issue.
- S.30.2 only applies to libraries, archives and museums acting on behalf of individuals. The restrictions do not apply to fair dealing by individuals.

CCH

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

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*.

Self Serve 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."

CCH & Education???

Para. 55 of the Supreme Court Judgement CCH Canadian Vs. the Law Society of Upper Canada:

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.

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.

No Library Consensus on Paragraph 49

- After a slow start, many libraries are now providing interlibrary loan directly under fair dealing rather than using S30.2 as per paragraph 49 of CCH.
- There is still a large group of libraries appears to be reluctant to use the Supreme Court Judgment, preferring to wait for Parliament to change the law in the future.
- A third group in an interesting twist has interpreted CCH as allowing digital delivery from a library's own collection to its clients, but not from other libraries (interlibrary loan)

Education Tariffs

K - 12 from licence to tariff

- CMEC (the Council of 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.

Tariff vs. Licence

70.12 A collective society may, for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses,
(a) file a proposed tariff with the Board; or
(b) enter into agreements with users.

Access Copyright Tariffs

K – 12 School Boards

- Tariffs filed for 2005 – 2009 finalized in 2013
- and 2010 – 2012, 2013-2015

Post Secondary Institutions

- Interim tariff for 2011 – 2013 and,
- 2014 - 2017

Provincial and Territorial Governments

- Tariffs filed for 2005 – 2009 and 2010 – 2014
- \$24.00 per FTE (Civil Servant)
- Decision pending

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.

The Federal Court of Appeal

- CMEC appealed the Copyright Board's ruling to the Federal Court of Appeal.
- The Appeal Court ruled in favour of Access Copyright: *“Private study” presumably means just that: study by oneself... When students study material with their class as a whole, they engage not in “private” study but perhaps just “study.”* (P38)
- The Supreme Court heard CMEC's appeal of the FCA judgment on December 6, 2011.

Supreme Court Appeal

- The Supreme Court issued its 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)*

Council of Ministers of Education K-12

- As of January 2013, K-12 school boards opt out of the Access Copyright Tariff.
- April 8, 2013, Access Copyright files for an interim tariff with the Copyright Board trying to force CMEC & the school boards back into paying the tariff.
- May 30, 2013. Copyright Board approves an interim tariff.

Post Secondary Tariff

- The Access Copyright Post Secondary licences expired on August 31, 2010. A four month extension was signed by most institutions through December.
- Access Copyright applied for a tariff from the Copyright Board.
- The Copyright Board approved an interim tariff on December 23, 2010. The interim tariff is very similar to the old licence, except for Schedule G.
- Access Copyright is asking for \$45.00 per FTE student per year.

Post Secondaries opting out

As of August 2011, 26 Canadian universities either opted out of the interim tariff or were planning to opt out at the end of August.

Institutions that opt out of the tariff plan to depend upon a combination of fair dealing, existing licences for ejournals and books and as necessary transactional licences.

AUCC retreats

- January 2012, the AUCC secretly formed a negotiating team to try and strike a deal with Access Copyright.
- January 30, 2012, Access Copyright and the University of Toronto & Western University announce that have been secretly negotiating their own deal with Access Copyright.
- On April 16, 2012, AUCC announced its own similar deal with Access Copyright.
- On April 24, AUCC formally withdrew from the tariff hearings before the Copyright Board.

AUCC and Access Copyright

- Eventually 20 members of the AUCC decide to opt out of both the licence and the tariff.
- September 17, 2012. Access Copyright files a motion with the Copyright Board trying to get AUCC reinstated for the Tariff hearings, to represent the 20 AUCC members outside the licence or tariff.
- October 23, 2012, Access Copyright withdraws an application before the Copyright Board trying to force the opt out members of AUCC back into the tariff.
- April 8, 2013, Access Copyright sues York University trying to force it back into the tariff process

ACCC

- ACCC reaches agreement with Access Copyright on May 29, 2012. \$10.00 per FTE rather than \$26 per FTE for AUCC.
- Because of better timing with Bill C-11 and the Supreme Court Pentalogy, over 60% of ACCC institutions have opted out of the Access Copyright Licence.

New Angles for Tariff Enforcement?

Status Quo Ante

The applied for interim tariff will thus serve to maintain a relationship that has endured for nearly two decades and the financial status quo ante that has existed between the parties up to the end of December 2012. The interim tariff will provide continuity and certainty for all parties.

In the aggregate, the loss of all royalty payments from the elementary and secondary school sector would constitute a significant impairment to Access Copyright’s ability to fulfill its mandate as a collective society.

Section 68.2(1)

68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

Definition of Commercially Available

...it is not an infringement of copyright for an educational institution to copy a work as required for a test or examination. Subsection 29.4(3) (the “carve-out”) provides that subsection (2) does not apply if the work is commercially available...(para 9)

Paragraph (b) of the definition provides in addition that a work also is commercially available if, under the same conditions, a licence is available from a collective society. (para 19)

January 18, 2013 – Final Determination of K-12 Tariff

Examinations, Preservation & the Blind

The Copyright Board lists sections 29.4; 30.1; and 32 as sections in the Copyright Act that contain the “commercially available” wording.

According to the Copyright Board, reproduction for examinations, the library preservation right, and creation of alternate formats for the Blind would all require a licence from Access Copyright if AC offers a relevant licence.

Questions?