

# Copyright Wars, Fair Dealing and Libraries

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RobTiessen/University of Calgary  
Library

# Introduction

- Quick review of 2012
- Copyright Wars and Fair Dealing
- Analysis of Bill C-11

# 2012 – The Copyright Year in Review

# Bombshell

- January 30, 2012, Access Copyright and the University of Toronto & Western University announce that have been secretly negotiating their own deal with Access Copyright.

# AUCC and Access Copyright

- January 2012, the AUCC secretly forms a negotiating team to try and strike a 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.
- June 30, Deadline for signing the best pricing deal with Access Copyright.

# AUCC and Access Copyright (2)

- 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.

# 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 ACCC Fair Dealing Policy released – August 30, 2012. The Policy replaces large parts of what used to be covered by the Access Copyright Licence..

# Council of Ministers of Education K-12

- According to Michael Geist, CMEC is recommending that school boards prepare to opt out of the Access Copyright Tariff in the Summer of 2013.



# Bill C-11

- 1<sup>st</sup> Reading House of Commons – Sept 29, 2011.
- Passed the House of Commons – June 18.
- Passed the Senate – June 29.
- Received Royal Assent from the GG – June 29.
- Still waiting for the Government to declare that the Bill is in force.

# Supreme Court Pentalogy

- 1990's: One Supreme Court Decision relating to copyright.
- 2000 – 2010. Two Supreme Court Decisions relating to copyright.
- July 12, 2012. Five Supreme Court Decisions relating to Copyright.

# Copyright Wars and Fair Dealing

# Fair Dealing

Fair Dealing is for the purposes of research, private study, review, criticism and news reporting.

Bill C-11 adds education, parody & satire as purposes.

Some sort of fair dealing exists in most British Commonwealth countries including Canada.

# What is Fair Use?

Fair Use is American and historically has been more liberal than fair dealing in British Commonwealth Countries.

*Fair use for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.*

# What are Copyright Wars?

- Disputes between copyright users and copyright owners about the limits of copyright.
- New innovations in technology often start copyright wars for example: the player piano in the early 1900's; VCRs in the 1980's; Napster in the 1990's.
- Rather than adapting to changed circumstances, corporate copyright interests accuse innovators of infringing copyright and encourage draconian changes to copyright law to either ban new technologies or to ensure that they are controlled by the copyright owner.

# Recent Copyright History

# Fair Dealing in Canada

Before 1988, fair dealing was interpreted quite liberally in Canada.

- Educators assumed that handing out photocopies to their students was covered by fair dealing.
- Libraries assumed that they could have photocopiers on their premises so that their users could photocopy under fair dealing.



# Canadian Copyright Act and Libraries

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

- There was nothing equivalent for example to S. 108 of US Copyright Law giving specific rights to libraries.

# 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.

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*

# Signing up with CanCopy

- 1991 - Ontario and Manitoba sign K-12 licences with CanCopy.
- 1993 – Alberta signs a K-12 licence with CanCopy
- 1994 – AUCC signs an agreement with CanCopy.
- 1994 - The Federal Government signs an agreement with CanCopy.

# CLA Copyright Statement in 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.*

## Copyright Reform Phase 2 - 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



# Canadian Copyright Act and Libraries

The 1997 amendments to the Copyright Act created new rights for Canadian libraries:

- 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 vs. the Law Society of Upper Canada

Great Library of the Law Society of Upper Canada sued by legal publishers in 1993 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*.

# 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."

## Interlibrary Loan since CCH

Since CCH Canadian libraries have the option of operating directly under fair dealing as per CCH or still using section 30.2 of the Copyright Act.



# Libraries seem to fall into three groups

- 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)

# 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.

# Current Access Copyright Tariffs

## **K – 12 School Boards**

- Tariffs filed for 2005 – 2009 and 2010 – 2012

## **Post Secondary Institutions**

- Interim tariff 2011 – 2013

## **Provincial and Territorial Governments**

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

# 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)*

# 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)*

# Numbers from the SCC Decision

- The provinces only appealed Category 4 Photocopying to the SCC
- Category 4 copying comprised only 7% of compensable photocopying in the K-12 survey.
- Only 2.3% of K-12 photocopying considered compensable.
- The definitions the Supreme Court used would apply to all fair dealing in education.



# Implications of SCC Decisions

- Don't need a licence for self serve photocopiers if there is appropriate signage. CCH para 39-46.
- Libraries can operate directly under fair dealing rather than under S30.2. CCH para 49.
- Handouts to students can qualify as a fair dealing. Alberta vs. Access Copyright para 25.

# Bill C-11

# Amending the Canadian Copyright Act

- The last major amendments to the Copyright Act were in 1997 by the Chretien Government.
- The last three bills to amend the Copyright act were in 2005, 2008 and 2010-2011.
- All three bills failed to pass the House of Commons before the next election.
- The Minister of Canadian Heritage promised that the next bill would have the exact same text as Bill C-32 from 2010 – 2011.

# Legislative History of Bill C-11

- Passed the House of Commons – June 18.
- Passed the Senate – June 29.
- Received Royal Assent from the GG – June 29.
- Still waiting for the Government to declare that the Bill is in force.

# Fair Dealing

- Fair Dealing is a user's right. Sections 29 – 29.2
- Fair Dealing is for the purposes of research, private study, review, criticism and news reporting.
- A copy made for a fair dealing purpose does not infringe copyright.

# Changes to Fair Dealing

Three new purposes are added to fair dealing:

- Education
- Parody
- Satire

# New Consumer Rights

- S29.21 – Non-commercial User Generated Content (mashups)
- S29.22 – Reproduction for Private Purposes (format shifting)
- S29.23 – Fixing Signals and Recording Programs for Later Listening or Viewing (time shifting)
- S29.24 – Back up Copies

# Mashups

## S29.21 – Non-commercial User Generated Content

- Take pre-existing works and combine them to create new content for posting to Youtube and similar social media.
- Have to be able to name the sources of your material.
- Legal, not pirated sources of original material.
- You cannot earn money from your mashups.



# Time and Format Shifting

S29.22 – Reproduction for Private Purposes

- Ripping music to your MP3 player

S29.23 – ...Recording Programs for Later Listening or Viewing

- Using your PVR to record a program to watch later.

Format and Time shifting clearly legal in US since 1984.

Format and Time shifting clearly legal in Australia since 2006.

# Back up Copies

## S29.24 – Back up Copies

- In addition to backing up software (S 30.6), Canadians can legally back up digital media that they own.
- Again no circumvention of digital locks is allowed.

# C-11 amends two of the Library Sections

- Section 30.1 allows libraries under certain circumstances to make entire copies of copyrighted works for preservation purposes.
- Section 30.2 allows libraries to act on behalf of their users for fair dealing.

## Section 30.1- Preservation

**Paragraph 30.1(1)(c) of *the Act* is replaced by the following:**

(c) in an alternative format if the library, archive or museum or a person acting under the authority of the library, archive or museum considers that the original is currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable;

# Implications of 30.1

- Libraries no longer need to wait until format is officially obsolete before migrating something to a new format that our users can use.
- All the other restrictions in 30.1 (commercially available) still apply
- No relief for something that is protected by a digital lock.

# 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.

# Text of S30.2 language from C-11

The Bill changes subsections (4) and (5) and adds subsections (5.01) and (5.02)

*(5.02) A library, archive or museum, or a person acting under the authority of one, may, under subsection (5), provide a copy in digital form to a person who has requested it through another library, archive or museum if the providing library, archive or museum or person takes measures to prevent the person who has requested it from*

*(a) making any reproduction of the digital copy, including any paper copies, other than printing one copy of it;*

*(b) communicating the digital copy to any other person; and*

*(c) using the digital copy for more than five business days from the day on which the person first uses it*

## Changes to 30.2

- The digital prohibition is removed from (5), but the digital lock requirements are added in (5.02).
- No changes to the date and genre restrictions, so a licence is still required if you don't want to work around that.
- If you are a library that operates directly under Fair Dealing because of CCH, you aren't going to go back to operating under S 30.2.
- If your library has decided that it has to operate under S30.2, you either need to work with digital locks or you would continue to deliver copies only in print.



# New Library Section for Digital Locks

**42(3.1)** If a court finds that a defendant that is a library, archive or museum or an educational institution has contravened subsection 41.1(1) and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction.

# Notice and Notice for ISPs

Sections 41.25 & 41.26 provide a *notice and notice* regime for Internet Service Providers.

This contrasts with *notice and takedown* regimes in countries such as the US, Australia, and South Korea.

Public libraries, school boards, universities and colleges often serve as ISPs.

# Exporting alternate format copies

S32 allows the creation of alternate format copies for folks with perceptual disabilities.

S32.01 is a new addition which allows export of those alternate format copies for use by people in other countries.

The Restrictions in the S32.01 are out of date compared with a proposed new WIPO treaty for people with print disabilities. CLA would like to see the law amended in light of that treaty.

There is also a section allowing very limited rights to circumvent digital locks for the perceptually disabled  
S41.16

# Changes to Educational Rights

- Changes to S29.4 (3) – Reproduction for Instruction
- Changes to S29.5 (d) – Performances
- Changes to S29.6 – News and Commentary
- No changes to S29.7 – Reproduction of Broadcast
- New 30.01 – Allowing reproduction of copyrighted material for online courses.
- New 30.02 & 30.03 – Entrenching Access Copyright and Copibec in online learning
- New 30.4 – Publically available material online

# Performances in the Classroom

## **S29.5 adds a new (d) with cinematographic works**

- No more public or educational performance licencing for films, DVDs or videos.

## **Deletes S29.6 (2)**

- Can keep copies of news and commentary broadcasts permanently, not just a year.
- No more royalties.

## **No changes to S29.7: Reproduction of Broadcasts**

# New Online Rights: S30.01

*(3) ...it is not an infringement of copyright for an educational institution or a person acting under its authority (a) to communicate a lesson to the public by telecommunication for educational or training purposes, if that public consists only of students who are enrolled in a course...*

*(5) It is not an infringement of copyright for a student who has received a lesson ...to reproduce the lesson in order to be able to listen to or view it at a more convenient time.*

All copies of the lesson held by both the institution and the students need to be destroyed 30 days after the class is over.

# New Online Rights: S30.04

Educational institutions can take material freely available on the Internet and do the following:

- Reproduce it
- Communicate it to students via a secure network
- Perform it to students in the class

With the following restrictions:

- Have to acknowledge the source
- If it is protected by a digital lock, you cannot use it.
- If there is a clear notice prohibiting educational use, you cannot use it.
- If the instructor knows or suspects that the copy on the Internet is an infringing copy, you shouldn't use it.

## Slight Weakening of 29.4

S29.4 makes it clear that instructors can display copyrighted works in the classroom without infringing copyright.

Subsection (3) is changed to reinforce the use of a licence when possible. This is a subtle reinforcement of licencing for Access Copyright and Copibec.

This seems to directly conflict with the expansion of fair dealing to include education.



## Collective Licencing: 30.02

Allows instructors at educational institutions with a licence to make digital copies of print articles to post to a secure network for their students.

- Not allowed to make a copy if they opt out of a licence or tariff, or if the copyright owner doesn't make a deal with the Collective Society.
- Reprographic Licences with Access Copyright and Copibec automatically give digital rights unless the copyright owner opts out.
- If the educational institution has a licence and mistakenly uses an unlicensed work, the court cannot award damages that exceed what the copyright owner would have received if they opted into the tariff.

## Collective Licencing: 30.03

If an institution pays transactional licences to a collective society and later opts into the full licence, the institution has to back pay the difference between the transactional licences and the full licence.

S30.03 is designed to make it punitive for an educational institution not to opt into a full licence with Access Copyright or Copibec.

## 30.02 and 30.03: Are they Dead on Arrival?

- These two sections directly conflict with the addition of education as a purpose for fair dealing.
- They also conflict with *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*.
- Educational institutions probably better off with a fair dealing policy that takes into account the six factors from CCH. Like the ACCC Policy:  
[http://www.michaelgeist.ca/component/option,com\\_docman/task,doc\\_download/gid,115/](http://www.michaelgeist.ca/component/option,com_docman/task,doc_download/gid,115/)

# Digital Locks

Bill C-11 makes it illegal to circumvent a digital lock with the following narrow exceptions:

- cryptography research
- alternative format copies for the perceptually disabled
- law enforcement

# The WIPO Copyright Treaty

The Digital Lock Provisions are to comply with Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Phonograms and Performances Treaty

*Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.*  
Article 11 of WCT

# Digital Locks and Libraries

Digital Locks conflict directly with:

- Fair Dealing
- Library Preservation
- Works out of copyright

# CLA Proposed Amendment to S41

The following definitions apply in this section and in sections 41.1 to 41.21.

“circumvent” means,

...

(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition “technological protection measure”, to avoid, bypass, remove, deactivate or impair the technological protection measure for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).

# Digital Locks and the Perceptually Disabled

S41.16 (2) *...to the extent that the services, technology, device or component do not unduly impair the technological protection measure.*

There is no efficient way to remove the TPMs and restore them after an alternate format has been created.



# New Library Section for Digital Locks

**41.2** If a court finds that a defendant that is a library, archive or museum or an educational institution has contravened subsection 41.1(1) and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction.

# Limited Penalties for Circumventing Digital Locks

Libraries, Archives and Museums, and Educational Institutions have liability for circumventing a digital lock limited to a court injunction, if you can convince the court that you didn't realize you were breaking the law.

Ordinary Canadians get:

*(a) on conviction on indictment*, to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding five years or to both; or  
*(b) on summary conviction*, to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding six months or to both.

# Questions?

My email is [tiessen@ucalgary.ca](mailto:tiessen@ucalgary.ca).