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# How Copyright Affects Interlibrary Loan and Electronic Resources in Canada

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# Introduction

- How the Copyright Act and court decisions affect ILL
- Copyright Collectives and ILL
- Licence terms and ILL

# 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.

# 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 in 1993  
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*.



# 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.

# 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.
- A larger 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)

# Amending the Canadian Copyright Act

- The last three bills to amend the 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 has now promised (Sept 2011) that the next bill will have the exact same text as the bill from 2010 – 2011.
- All three bills had a similar approach to interlibrary loan.

# Text of ILL language from Bill C-32

*(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*

# The proposed amendment isn't very useful

- None of the changes here are terribly appealing to libraries that are using CCH as a legal justification for digital delivery.
- It appears that a library would need to use digital rights management to prevent the user from making more than one copy and to ensure that the digital copy is no longer available after five business days.

# Copyright Collectives in Canada

- In 1988 the Canadian Parliament expanded the power of the collective administration of copyright and not surprisingly the number of copyright collectives increased.
- Among the new collectives were two reprography collectives: Access Copyright and Copibec.
- In the 1997 amendments to the Copyright Act added the new section 30.3 which confirmed the right of educational institutions, libraries, museums and archives to have self serve photocopiers on their premises, but required a licence with a reprographic collective.

# 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)
- The Supreme Court has now (May 5, 2011) agreed to hear CMEC's appeal of the FCA judgment.

# 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.
- Schedule G includes the worst parts of Access Copyright's tariff proposal.
- Access Copyright is asking for \$45.00 per FTE student per year.

# What's wrong with the tariff

- Access Copyright is trying to use the tariff process to make universities and colleges pay twice for digital rights.
- Claims that linking is protected under copyright
- Wants payment for projecting an image in a classroom already an educational right: \$29.4.
- For Universities, copyright royalties would go up 3.5 to 4 times the rate under the old licence.
- Invasion of privacy. The institution would have to go through faculty email and compile lists of all digital works they email to anyone.
- Access Copyright would receive full access to all of an institutions secure networks and course management systems.

# 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.

# Licencing Issues

- Normally when one purchases a print book or journal, there is no licence attached. One follows the Copyright Act.
- When a digital book or journal is purchased or subscribed to, there is almost always a licence or contract involved.
- In 2008, according to Canadian Association of Research Libraries statistics, the average university library spent 51% of their collections budget on digital collections.



# Jurisdictional Conflicts

Copyright law varies from country to country.

- Canadian libraries have to follow the Canadian Copyright Act.
- Many licences assume that the licensee will follow US copyright law.

# Section 108 g (2)

- Section 108 is similar to but not the same as sections 30.1 and 30.2 of the Canadian Copyright Act.
- There is nothing in Canadian copyright similar to section 108 g (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.*

# The CONTU Guidelines

The CONTU Guidelines were drawn up in the 1970's to provide guidance to US libraries on how to comply with S. 108(g)(2) and many US librarians consider the guidelines as binding as copyright law.

How they work:

- A borrowing library limits requests to no more than five articles from the most recent five years of a specific journal.
- A request for a sixth article violates the CONTU Guidelines.
- Libraries either pay copyright royalties after the 5th article is requested or subscribe to the journal.
- There are onerous record-keeping requirements in conjunction with the CONTU Guidelines.

# Examined 400 U of C licences

- 17 licences mentioned the word CONTU
- 72 licences mentioned the words interlibrary loan

# Licences that mentioned CONTU

Most of the licences with CONTU had language like this:

*Interlibrary Loan of articles or components in any electronic or digital form is allowed under CONTU (National Commission on New Technological Uses of Copyright Works)*

*[\[www.cni.org/docs/infopols/CONTU.html\]](http://www.cni.org/docs/infopols/CONTU.html)*

*guidelines, provided only a limited number of copies of such articles will be made and distributed.*

# CONTU Licences

- Two of the 17 licences had qualifiers which allowed the licensee to operate under either US copyright or under applicable international copyright.
- One didn't allow digital copies to be made
- One licence only allowed interlibrary loan in the same country as the licensee.

# 14 Licences with interlibrary loan

Looked at a sample of 14 licences out of 72 with the word interlibrary loan.

- Four of the licences explicitly banned digital copies.
- Three licences were quite explicit that the licensee had to follow the *interlibrary loan provisions of US Copyright Law*.
- One licence mentioned interlibrary loan to forbid it.