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Canadian Copyright Update 2013

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Canadian Copyright Update

CLA Copyright Committee Members
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Canadian Copyright Update:

- Supreme Court Pentalogy: implications for librarians
 - Jeannie Bail, Information Services Librarian, Queen Elizabeth II Library, Memorial University of Newfoundland
 - jbail@mun.ca
- Copyright Modernization Act & Bill C-56
 - Margaret Ann Wilkinson, Professor of Law, Western University
 - (with assistance of Law Student Ken Farrell)
 - mawilk@uwo.ca
- Fair Dealing and Libraries
 - Rob Tiessen, Liaison Librarian for Communication and Culture, University of Calgary Library
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- Questions and Discussion

Timeline of Events



September 29, 2011
Bill C-11, *Copyright
Modernization Act*, was
introduced in
Parliament

June 29, 2012
Bill C-11
received Royal
Assent

July 12, 2012
Supreme
Court rulings

November 7, 2012
Bill C-11 was
proclaimed, and
brought into force

The “Copyright Pentalogy”

Or, five cases involving copyright law

Supreme Court of Canada

- Rulings issued on July 12, 2012
- 5 copyright cases, 2 focus on Fair Dealing
 - Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34
 - Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35
 - Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36
 - Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37
 - Re:Sound v. Motion Picture Theatre Associations of Canada, 2012 SCC 38

Fair Dealing-2 step analysis

- What is the purpose of the dealing?
 - Research or private study
 - News reporting
 - Criticism or review
 - The Pentalogy cases were decided under these five Fair Dealing categories, without amendment.
- Is the dealing fair?
 - Purpose of the dealing
 - Character of the dealing (including the aggregate amount of the taking)
 - Amount of the dealing (including the importance of the work)
 - Alternatives to the dealing
 - The nature of the work
 - Effect of the dealing on the work

Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36

- Case: Do online song previews = research?
- SOCAN argued that they did not, and sought royalties for the use of previews. Stated that research is “the systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions”
- This is a very narrow definition that runs counter to CCH, which embraced an expansive view of the category of research.

Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36

- What did the court say? Yes. Song previews are research, and constitute fair dealing under the Act, because...
- “consumers used the previews for the purpose of conducting research to identify which music to purchase...”
- “ ‘Research’ need not be for creative purposes only. Permitting only creative purposes to qualify as ‘research’ would ignore the fact that one of the objectives of the Copyright Act is the dissemination of the works themselves. Limiting ‘research’ to creative purposes would also run counter to the ordinary meaning of ‘research’, which includes many activities that do not require the establishment of new facts or conclusions.”

Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37

- Case: Does the copying of required readings (short excerpts of textbooks) by teachers for students constitute research or private study? If so, is the purpose of the dealing fair?
- AC argued that teachers were engaging in instruction, and this was not research or private study. The teachers were not making the copies at the request of students

Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37

- What did the court say? Yes, copying small excerpts for student use is fair – although the case is premised upon the students already having had texts purchased for them; the case only involves the question of supplementary texts...
- “The word ‘private’ in ‘private study’ should not be understood as requiring users to view copyrighted works in splendid isolation.”
- “The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study.”
- As for the “effect of the dealing on the work” factor, there was no evidence of a link between photocopying short excerpts and a decline in textbook sales.

Decision Implications

- Minimum analysis given to whether dealing falls into one of the enumerated purposes
- The user of the copied material is the main focus, not who made the copies
- The amount of the dealing is calculated by the percentage of the original work, not in the aggregate (which is part of the character of the work factor)
- Technological neutrality is a “foundational principle”

The Copyright Modernization Act and Bill C-56

1. The Technological Protection Measures provisions from the *Copyright Modernization Act* now in effect in the *Copyright Act*
2. Changes to Part VII “Copyright Board and Collective Administration” from the Copyright Modernization Act also now in effect in the *Copyright Act* but very minor
3. Changes to the *Copyright Act* proposed in Bill C-56 “An Act to amend the Copyright Act and the Trade-marks Act and to make consequential amendments to other Acts”

Further Notes on the Copyright Modernization Act

The *CMA* made changes regarding “Libraries, Archives and Museums” and “Educational Institutions”

However, these exceptions are likely less vital now due to the significant changes to Fair Dealing (more on this next from Rob Tiessen)

Under the LAM and EI headings, a number of sections say regulations will be provided, but no regulations have yet been issued.

“circumvent” means

to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure

Section 41.1 prohibits three types of acts:

- a) circumventing access controls;
- b) offering circumvention services to the public;
and,
- c) manufacturing, importing, distributing, selling, renting or providing devices, technologies or components whose primary purpose is circumvention.

Understanding the implications of TPMs

A TPM cannot be circumvented even if the use of the work behind the TPM would be otherwise non-infringing, unless an express exception exists.

Contracts, such as those with online vendors, should now include a clause that addresses the possibility and ramifications of TPMs.

The *Act* does include specific exceptions to TPMs for the purposes of:

- law enforcement and national security;
- making computer programs interoperable;
- encryption research;
- the collection or communication of personal info;
- security testing of computer systems;
- accessibility for persons with disabilities;
- broadcasters ; and
- unlocking cell phones

There is NO exception for “libraries, archives, or museums” or “educational institutions”

Note:

Where a “library, archive, or museum” is involved, if the institution is unaware and had no reasonable grounds to believe that its acts contravened the TPM provisions, the only remedy available to the copyright owner is an injunction.

Even if unaware or reasonable grounds to believe exist, you can still be sued or charged, only the remedies against you on conviction are limited...

Criminal penalties attached to the circumvention of TPMs:

- On indictment, the penalty is a fine of up to \$1,000,000 and/or imprisonment of up to five years.
- On summary conviction, the penalty is a fine of up to \$25,000 and/or imprisonment of up to six months.

“rights management information” (RMI)

- RMI can identify the owner or author of the work and define the types of permitted access users can make and track usages and transmit information back to the
- The removal or alteration of RMI is prohibited, unless the person removing or altering the RMI did not know that doing so would either facilitate or conceal infringement of copyright.
- If the RMI provisions are contravened, the copyright owner is entitled to all the remedies for copyright infringement.

Part VII of the *Copyright Act*

The *Copyright Modernization Act* made no changes to Part VII of the *Copyright Act*, which establishes the Copyright Board and the Collective Management of Copyright, except

- amendments necessary for the inclusion of new provisions
- to remove references to repealed sections
- to reference new sections where necessary

The functions and procedures of the Board have not changed.

Bill C-56

March 1, 2013: Introduction and first reading of *An Act to amend the Copyright Act and the Trade-marks Act and to make consequential amendments to other Acts*

Key Proposal: the *Copyright Act* would be expanded to further prohibit the **exportation** of protected works.

Bill C-56

The addition of the provisions prohibiting the act of exporting works in violation of copyright might have an affect international inter-library loans.

Where such loans are requested:

The interaction of fair dealing and the rules around LAMs will also be factors. Each unique situation should be individually considered.

Bill C-56

Note: The punishment for criminal infringement of copyright would be moved to a new section, but would be otherwise unchanged.

S. 42(2.1) Every person who commits an offence under subsection (1) or (2) is liable

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

Fair Dealing and Libraries

Fair Dealing is not copyright infringement and doesn't require permission from the copyright owner. It is part of user's rights.

The amendments to the Copyright Act which have come into effect through the Copyright Modernization have increased the number of Fair Dealing categories.

Fair Dealing is now for the purposes of research, private study, **education**, **parody**, **satire**, review, criticism and news reporting.

How the courts will interpret these new categories is not known because there has not yet been litigation involving them.

copying based on where your institution sits



Opt-Out

1. Materials licensed from creators or others will not be affected by the decision to opt-out of any relationship with Access Copyright;
2. Proceed to copy under the “Users’ Rights” exceptions in the Copyright Act, including
 - i. Fair Dealing
 - ii. Educational Institutions
 - iii. LAMs
3. Can use all materials, all formats, as permitted in these sections;
4. Guidelines may help your institution provide evidence of its compliance with the requirements of “Fair Dealing” under the Act
5. If Users’ Rights exceptions don’t apply, seek permission or do not use the material.

Tariff

1. Materials licensed from others not affected by this Tariff;
2. Proceed to copy under terms of the Tariff;
3. Can use only Access Copyright repertoire of materials under Tariff: no audio-visual, musical materials;
4. Guidelines may help your community understand how to comply with the terms of the Tariff;
5. “Fair Dealing” NOT in here directly but will factor into the Board’s valuation formula for setting the Tariff.

Access Copyright License

1. Materials licensed from others not affected by this License;
2. Proceed to copy under terms of the license agreement;
3. Can use only Access Copyright repertoire of materials under this License: no audio-visual, musical materials;
4. Guidelines may help your community understand how to comply with the terms of the license agreement;
5. “Fair Dealing” IS recognized under the current AC license and its extent may factor into renegotiation of the price of the license when the current license expires.

Large & liberal interpretation

Para. 51 of the Supreme Court judgment :

““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*. “

Amount of the Dealing

Para. 56 of the Supreme Court judgment *CCH Canadian v Law Society of Upper Canada*:

“For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.”

As part of considering the 6 factors mentioned by Jeannie, the Court said:

Para. 55 of the Supreme Court judgment *CCH Canadian v 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.”

1997 Certain Libraries in the Copyright Act

- The 1997 amendments to the Copyright Act created new rights for most Canadian libraries (those who fit into the definition of LAMs):
- Section 30.1 allowed such libraries under certain circumstances to make entire copies of copyrighted works for preservation purposes.
- Section 30.2 allowed such 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.

Relying on fair dealing instead of the LAMs exemptions

Para. 49 of the Supreme Court judgment *CCH Canadian v 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.”

Libraries now seem to fall into three groups with respect to ILL

- 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 operate under 30.2. Debating how to make it work after the changes in 2012.
- 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)

Post Secondary Institutions and Access Copyright this past year:

- April & May of 2012, AUCC & ACCC negotiate licences with Access Copyright.
- On April 24, 2012 AUCC formally withdrew from the tariff hearings before the Copyright Board.
- Eventually 20 members of the AUCC decide to opt out of both the licence and the tariff. Over 60% of ACCC members opt out.
- 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 still part of Post Secondary Tariff hearings.

Payments to Access Copyright under various current post-secondary models

	Opt Out*	Tariff (2011-2013)	Tariff (2014-2017)	AC License (2012-2015)	AC License (2012-2013)
Universities	\$0	\$45	\$35	\$26	\$27.50 (UofT & UWO)
Colleges	\$0	\$35	\$25	\$10	n/a

* Note that there is considerable institutional investment required for opt-out option.

Where do the Tariffs before the Copyright Board sit?

- Access Copyright **K-12** 2005 – 2009
 - ☞ Determination now completed (Tariff released Jan 19, 2013)
 - ☞ **\$4.81 per student per year; down from \$5.16 originally awarded by the Board...**
- Access Copyright **K-12** 2010-2012
 - ☞ Filed with the Board 2009...
- Access Copyright **K-12** 2013 – 2015
 - ☞ filed with the Board (published in Canada Gazette June 16, 2012)
 - ☞ **K-12 2010-12 & 2013-15 to be heard together April 29, 2014**
- Access Copyright **Provincial and Territorial Governments** 2005-2009 AND 2010-2014
 - ☞ Heard by the Board; **decision pending**
- Access Copyright **Post-secondary** 2011-2013
 - ☞ **Set for hearing by the Board Feb 14, 2014**
- Access Copyright **Post-secondary** 2014 – 2017
 - **Filed by Access Copyright and posted to Canada Gazette May 18, 2013.**

Council of Ministers of Education K-12 and Post-Secondary

- As of January 2013, with respect to K-12, Provinces and most Ontario school boards announce they will 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.
- CLA Statement on Access Copyright lawsuit against York University
http://www.cla.ca/Content/NavigationMenu/Resources/Copyright/CLA_Statement_on_Access_Copyright-York_may13.pdf

Supreme Court & Fair Dealing

- 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 for their users rather than under S30.2. CCH para 49.
- An entire academic article is a fair dealing for research and private study. CCH para 56
- Handouts to students can qualify as fair dealing for research & private study – at least where the question is providing supplementary materials in addition to texts already purchased. Alberta vs. Access Copyright para 25.

Further Reading

Geist, M. (ed.). (2013). *The copyright pentalogy: How the Supreme Court of Canada shook the foundations of Canadian copyright law*. Ottawa: U. of Ottawa Press. <http://www.press.uottawa.ca/the-copyright-pentalogy> including chapter 3, “The Context of the Supreme Court’s Copyright Cases” by M.A. Wilkinson, 71-92.

Robert Tiessen (2012), “How copyright affects interlibrary loan and electronic resources in Canada” *Interlending & Document Supply*, Vol. 40 No.1, 49 – 54

Owen, Victoria (2012) “Who Safeguards the Public Interest in Canada?” *Journal of the Copyright Society of the USA*, Vol.59 No.4, 803-842.

Wilkinson, Margaret Ann (2010), "[Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries](#)" in Michael Geist (ed.) *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law), 503-540.

Copyright Flowchart

Institutional considerations

