by Rob Tiessen

What Could Have Been? The Impact on Libraries if Either Bill C-60 or Bill C-61 Had Become Law

Since 2004, copyright has regularly been part of the Canadian news, and Canada has been under increasing pressure from other countries (especially the United States) to ratify and implement both the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In the summer of 2009, the Harper government conducted consultations on the future of copyright law, which received a substantial public response. In December 2009, the European Union finally ratified the WIPO treaties, putting more pressure on Canada to do the same. Canada is a participating nation in the Anti-Counterfeiting Trade Agreement (ACTA). The negotiations for ACTA have been unusually secretive, but based on leaked information ACTA would have a much bigger impact on copyright law than on criminal law.

In 2005 and 2008, both the Martin (Bill C-60)[1] and Harper (Bill C-61)[2] governments attempted to amend the *Copyright Act*.[3] Both bills quickly bogged down in controversy and were never referred to a parliamentary committee. Like any other unfinished bills, both bills died on the order paper. The bills show what the Martin and Harper governments considered to be the most important copyright issues at that time. By studying the impact these bills would have had on libraries, we can better understand some of the issues that keep coming back to haunt us.

Fair dealing

Probably the biggest issue with both bills was that they ignored fair dealing and especially the 2004 Supreme Court judgment in the CCH case. The CCH judgment clarified many issues surrounding fair dealing in a beneficial way, but Parliament acted as though CCH hadn't happened.

So what is fair dealing? Sections 29 through 29.2 of the *Copyright Act* set out five purposes for fair dealing: research, private study, review, criticism and news reporting. The Supreme Court explains fair dealing in the following way:

> Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.[4]

So copying within the bounds of fair dealing is not copyright infringement.

The Supreme Court also clarified that "research" should be given a large and liberal interpretation. Even research for profit is fair dealing: "Lawyers carrying on the business of law for profit are conducting research within the meaning of section 29 of the Copyright Act."[v]

The Supreme Court gave six factors for determining whether or not copying falls within fair dealing: purpose, character, amount, alternatives, nature and effect. For example, the traditional library argument has been that fair dealing for research and private study includes making copies of single chapters of books and single articles from an issue of a journal. In discussing the factor of amount, the Court backed the library argument: "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."[5]

Unfortunately, neither bill to amend the *Copyright Act* saw fit to include the Supreme Court's six factors in the *Copyright Act*. Thus, neither bill tried to maintain a proper balance between the rights of the owner and users' interests. The lack of balance becomes especially apparent when it comes to the issue of digital locks.

Digital locks

To ratify and implement the WCT and the WPPT, Canada needs to change its *Copyright Act* to provide legal protection for digital locks (also known as "digital rights management," "technical protection measures" or "technological measures"). That said, experts and lobbyists disagree on how much protection is needed. The two bills treated digital locks differently.

Bill C-60 took the minimalist approach. Quoting from section 34.02 (1): "… for the purpose of an act that is an infringement of the copyright in it… ." In other words, it would be illegal break a digital lock to infringe copyright. So breaking a digital lock to make and sell counterfeit copies would be illegal. But presumably breaking a digital lock for legal purposes such as fair dealing or for providing an alternative-format copy for someone who was perceptually disabled would be legal.

Bill C-61 followed the American approach of criminalizing almost any circumvention of a digital lock. It would even be a violation of the law to circumvent a digital lock that is protecting a work where the copyright has expired. However, C-61 allowed narrow exceptions for law enforcement, research and creating alternative formats for perceptually disabled users.

If Bill C-61 had become law, it would have jeopardized the ability of information users to circumvent digital locks under fair dealing. It would also have jeopardized the ability of libraries to circumvent digital locks on behalf of users and to make preservation copies under section 30.1. Once a digital lock had been removed to make an alternative-format copy for perceptually disabled users, Bill C-61 would have required reinsertion of the digital lock, something experts aren't sure is possible.[vii]

Interlibrary loan

Section 30.2 (1) of the *Copyright Act* gives libraries, archives and museums the right to act on behalf of their users in fair dealing. Traditionally, libraries have used section 30.2 as the legal justification for interlibrary loan and certain types of photocopying services. Unfortunately, section 30.2 has a number of restrictions that limit the ability of libraries to do things on behalf of their users. Library users can do these things on their own under fair dealing, but libraries cannot do them on their behalf. The most annoying restriction is the digital copy prohibition under 30.2 (5): a library can provide a user with a photocopy of a journal article, but isn't allowed to provide a digital copy. As a result of this restriction, Canadian libraries are among the last libraries in the world to adopt desktop delivery of interlibrary loans.

Fortunately, the Supreme Court judgment in the CCH case provided a way around the restrictions in section 30.2:

> As an integral part of the scheme of copyright law, 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.[8]

In other words, libraries can act on behalf of their users directly under fair dealing (section 29) rather than using section 30.2. Under fair dealing, there are no format restrictions. Providing a digital copy becomes a matter of what format is most appropriate for the user and the library, as opposed to which format is legal.

However, the framers of both C-60 and C-61 chose to ignore the Supreme Court on this as well. Both bills C-60 and C-61 amended 30.2 to allow digital copies, but in a very restrictive manner, allowing restricted access to a digital copy for either a week or five business days. The user would have been able to make only a single print copy and would not have been able to keep the digital copy. Presumably, libraries would have to lock down digital copies with digital locks to make this happen. Given the expense and technical commitment involved, what library would choose to provide digital copies with these types of restrictions? Would amending 30.2 put libraries into legal limbo when deciding whether to follow the Supreme Court's CCH judgment or a revised section 30.2?

Preservation copies

Section 30.1 of the *Copyright Act* allows libraries, archives and museums to make preservation copies of material in their permanent collections. Certain conditions need to be met for this to happen such as the following:

- "… 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."[9]

If one of these conditions is met and an appropriate copy is not commercially available, then a library can make a preservation copy.

Bill C-61 proposed expanding section 30.1 by changing the wording to include formats that are *becoming* obsolete. Unfortunately, the provisions for digital locks in Bill C-61 seemed to outweigh any good that this change would make. As library collections become more and more digital, having a workable way to deal with digital locks when preserving material in obsolete formats becomes more and more important.

Future developments

With the European Union's final ratification of the two WIPO treaties, Canada will continue to face pressure to ratify both treaties. Certainly the U.S. and the corporate lobby will expect Canada to accept the American interpretation of the WIPO treaties and to closely copy the U.S.'s *Digital Millennium Copyright Act*. If the Anti-Counterfeiting Trade Agreement is successfully negotiated, Canada will be under further pressure regarding digital locks.

How can libraries and other user groups successfully counter some of these approaches and argue for an approach that better considers the needs of users in a digital age? If we cannot successfully lobby the government, we will have to learn to live with much more restrictive copyright then we currently have.

Rob Tiessen developed a strong interest in copyright after moving back to Canada from the United States and wondering why libraries in the U.S. could do desktop delivery of inter-library loans and Canadian libraries couldn't. Currently, Rob is Head of Access Services for the University of Calgary Library. He was chair of CLA's Copyright Working Group from 2006 to 2009. He can be reached at tiessen@ucalgary.ca

Notes

1. *Bill C-60: An Act to Amend the Copyright Act,* House of Commons 2004-2005 (www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-60&parl=38&ses=1&language=E).
2. *Bill C-61: An Act to Amend the Copyright Act*, House of Commons 2007-2008 (www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=39&Ses=2&Mode=1&Pub=Bill&Doc=C-61_1).
3. See the Canadian Library Association's response to both bills at CLA's Copyright Information Centre (www.cla.ca/AM/Template.cfm?Section=Copyright_Information&Template=/CM/HTMLDisplay.cfm&ContentID=8001).
4. *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 2004 SCC 13, para 48 (www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html).
5. Ibid., para. 51.
6. Ibid., para. 56.
7. Canadian Library Association, *Unlocking the Public Interest* (Ottawa: CLA, 2008).
8. *CCH Canadian Ltd. v. Law Society of Upper Canada,* op. cit., para. 49.
9. These are three of the allowable conditions for making a preservation copy under section 30.1 (1) of the *Copyright Act* (www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html).