

Copyright Wars, Fair Dealing and Libraries



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Introduction

- Very Brief Copyright Introduction
- Fair Dealing and Fair Use
- Perceptual Disabilities
- Educational rights in the Copyright Act
- Recent Copyright History
- Bill C-11

Intellectual Property

There are three types of Intellectual Property:

- Copyright
- Patents
- Trademarks

What is Copyright?

Copyright is a government created monopoly to foster creative work and to promote the public interest through the dissemination of works.

What is Copyright? (2)

A fact or an idea cannot be copyrighted, but an expression of an idea can be copyrighted.

Only works that are original and fixed are protected by copyright. A work is "fixed" when it is produced onto any media, like paper or within a digital file. A work is considered "original" when it is the product of the author's own skill, judgment and creativity, has not been copied and demonstrates more than a trivial, mechanical level of skill and judgment. From Concordia University Copyright Guide

Term of Copyright

In Canada

- The term of copyright is the life of the author (creator) plus fifty years
- For some types of photography, crown copyright and copyright in anonymous works, the term of copyright is a straight 50 years.
- Canada's term of copyright is fully compliant with the Berne Convention.

Internationally

- The United States and EU countries have expanded the term of copyright to life plus 70 years.
- Canada is under growing pressure to expand to life plus 70.

Copyright Owner

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof...

Copyright Owner (2)

- (a) to produce, reproduce, perform or publish any translation of the work,
 - convert it into other genres and formats
 - control the means by which the work may be mechanically reproduced or performed
- (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
- (g) to present at a public exhibition

User Rights

Users have many rights to use copyrighted works without infringing copyright.

- Fair Dealing S29; S29.1; S29.2
- Perceptual Disabilities S32
- Educational Rights S29.3 – S30.3

Fair Dealing

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

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.

Fair Dealing in Canada

Before 2004, fair dealing was interpreted quite conservatively in Canada.

- Most Post Secondary institutions had a licence from a reprographic copyright collective to allow print copies to be made for classroom distribution.
- Research that was for profit was assumed to not be covered by fair dealing.

2004 CCH Supreme Court Judgment

Fair dealing greatly expanded by Supreme Court with positive implications for individuals and libraries.

- *"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. Para*

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The Six Factors

In the CCH Judgment, six factors were provided for deciding whether something was a fair dealing or not. The six factors are *purpose, character, amount, alternatives, nature, and effect*.

We will go through how the six factors can decide whether material can be used without copyright clearance.

Factor 1

The purpose of the dealing will be fair if it is for one of the allowable purposes under the Copyright Act, namely research, private study, criticism, review or news reporting...

Factor 2

The character of the dealing:

If multiple copies of works are being widely distributed, this will tend to be unfair...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.

Wide distribution is not fair dealing. Readings should never be posted to a publicly accessible website. Links are not copies. So sending a link is not the same as providing a copy to students.

Factor 3

The amount of the dealing

...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.

Lower standard for research and private study. For review and criticism, there is a higher standard of only copying enough to make the necessary point.

Factor 4

Alternatives to the dealing

Alternatives to dealing with the infringed work may affect the determination of fairness.

If there is a reasonable alternative to making a copy it isn't a fair dealing. If you can provide a URL for your students rather than putting a copy of a work on a website, you should be doing that.

Factor 5

The Nature of the work

If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.

Published material should meet factor 5. In the CCH ruling, the Supreme Court praised clear and limited copyright policies.

Factor 6

Effect of the dealing on the work

If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair.

Another reason for not posting readings to publicly accessible websites.

Perceptual Disabilities: Section 32

It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to (a) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;

Definition of Perceptual Disabilities

perceptual disability” means a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes such a disability resulting from

(a) severe or total impairment of sight or hearing or the inability to focus or move one’s eyes,

(b) the inability to hold or manipulate a book, or

(c) an impairment relating to comprehension;

Educational Rights

- Reproduction for Instruction S 29.4
- Performances S29.5
- News and Commentary S29.6
- Reproduction of Broadcast 29.7
- Musical Performance Rights S32.2(3)

Reproduction for Instruction

29.4 (1) It is not an infringement of copyright for an educational institution or a person ... under its authority

(a) to make a manual reproduction of a work onto a dry-erase board ... or ...similar surface intended for displaying handwritten material, or

(b) to make a copy of a work to be used to project an image of that copy using an overhead projector or similar device

Reproduction for examinations, etc.

(2) It is not an infringement of copyright for an educational institution or a person acting under its authority to (a) reproduce, translate or perform in public on the premises of the educational institution, or

(b) communicate by telecommunication to the public situated on the premises of the educational institution

Performances

29.5 It is not an infringement of copyright for an educational institution ...:

(a) the live performance in public, primarily by students of the educational institution, of a work;

(b) the performance in public of a sound recording or of a work or performer's performance that is embodied in a sound recording; and

(c) the performance in public of a work or other subject-matter at the time of its communication to the public by telecommunication.

What is missing from
Performances?

Films, Videos, DVDs

- Films, Videos and DVDS are missing from Section 29.5.
- Section 110 of US Copyright Law which is somewhat similar to S 29.5, doesn't limit by format, so films are ok to show in US classrooms.
- The definition of a “public performance” in the law is unclear as far as classrooms and educational institutions are concerned.

How do educational institutions handle films?

- Bill C-11 adds films to S 29.5.
- The film industry is very litigious and the law is unclear
- So most educational institutions pay for the public performance or educational rights to make sure that they are ok.
- Some educational institutions rather than paying public performance rights, tell their teachers or instructors not to show films.
- Not aware of any educational institution in Canada that is willing to risk court to clarify whether showing a film in a classroom is or is not a public performance.

Back to Fair Dealing Factor 3

The amount of the dealing

...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.

Lower standard for research and private study. For review and criticism, there is a higher standard of only copying enough to make the necessary point.

News and Commentary

29.6 ...it is not an infringement of copyright for an educational institution ...

(a) make, at the time of its communication to the public by telecommunication, a single copy of a news program or a news commentary program, excluding documentaries,

(b) perform the copy in public, at any time or times within one year after the making of a copy under paragraph (a), before an audience consisting primarily of students of the educational institution on its premises for educational or training purposes.

Reproduction of Broadcast

29.7 ...it is not an infringement of copyright for an educational institution ...

(a) make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication; and

(b) keep the copy for up to thirty days to decide whether to perform the copy for educational or training purposes.

Royalties for reproduction

(2) An educational institution that has not destroyed the copy by the expiration of the thirty days infringes copyright in the work or other subject-matter unless it pays any royalties,

S 29.8 & 29.9

These two sections provide rules on using the rights in section 29.6 and 29.7.

Section 32.2(3) – Musical Performances

(3) No religious organization or institution, educational institution and no charitable or fraternal organization shall be held liable to pay any compensation for doing any of the following acts in furtherance of a religious, educational or charitable object:

(a) the live performance in public of a musical work;

(b) the performance in public of a sound recording embodying a musical work or a performer's performance of a musical work; or

(c) the performance in public of a communication signal carrying

(i) the live performance in public of a musical work, or

(ii) a sound recording embodying a musical work or a performer's performance of a musical work.

Where are the Library rights?

What are the 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

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

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.

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.*

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

Copyright as Property

The assertion of copyright as property is a political strategy, intended to advance copyright owner's political objectives. Those objectives consist of two goals:

- (1) to continually expand the scope of copyright;*
- (2) to fight off any attempt to enact amendments or obtain court decisions that are in the public interest or that permit any unlicensed uses.*

Patry: Moral Panics and Copyright Wars p.124

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 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)

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 heard CMEC's appeal of the FCA judgment on December 6, 2011. Still waiting for a decision.

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: S29.4.
- 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.

AUCC/ACCC

- AUCC and ACCC represent their members in the hearings before the Copyright Board.
- The AUCC (Association of Universities and Colleges of Canada) and the ACCC (Association of Canadian Community Colleges) developed a fair dealing policy. Latest official version:

<http://collections.library.ubc.ca/copyright>.

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.

Why the deal?

- *Access informed the AUCC team that it would be filing a request with the Copyright Board that the Board order the freezing of all material held in course management systems at AUCC member institutions in the 2011-12 academic year.*
- *...costs for pursuing the case for AUCC were mounting quickly.*
- *Access...appeared more eager to reach consensus than they had previously, and acknowledged that they were feeling the financial impact of the institutions that had opted out of the tariff. Access was facing high legal costs, and continues to be involved in three other tariff cases, including two at the K-12 level.*

Why the deal? (2)

- *...universities operating without a licence that are found to have made infringing copies would have no alternative but to pay the annual rate per FTE student set by the Copyright Board... Use of even one work within Access Copyright's repertoire without permission would be enough to trigger payment of the full tariff fee*

Poor Timing

- C – 11 with expanded fair dealing for education is close to passing Parliament.
- We are still waiting for the Supreme Court's decision on the K-12 tariff.
- This is a long term deal without knowing what the rules will be.

What benefits does AUCC get?

- Cost certainty through 2015 at \$26.00 per FTE.
- They can claim that they got a slightly better deal than Toronto and Western, though worse than Quebec universities.
- By withdrawing from the tariff hearings, they have no further legal costs (for the short term).
- Relief from the interrogatories and surveys.
- A Course pack licence
- The right for instructors to distribute copies to the class

Problems with the model licence.

- a link is defined as a copy
- projecting and displaying copies already ed. Rights
- linking to reserve readings is something the licence pays for.
- it allows interlibrary loan

Longer term problems

- AUCC has withdrawn from the tariff hearings and it appears that ACCC might follow.
- Tariff applications with no opposition are usually approved at the rate asked for by the collective society.
- Access Copyright will be apply for a new tariff at price x .
- Tariff hearings will be about the difference between the old tariff and price X (not the difference of X and \$26 per FTE).

The good side of Bill C-11

- C-11 proposes adding Education, Parody, and Satire as purposes to fair dealing.
- Adding *cinematographic works* to Section 29.5. A public performance licence would clearly not be needed to watch a film, video, DVD in a classroom.
- Mashups, time and format shifting for consumers.

Bad Side of Bill C-11

- New proposed sections 30.02 and 30.03. This expands the powers of Access Copyright and Copibec into the digital realm and does allow them to force institutions to in effect pay twice for digital rights.
- The amendment to section 30.2 doesn't really satisfy any libraries.
- Copies the worst parts of the US DMCA on digital locks. Goes way beyond the requirements of the WIPO Copyright Treaty. Will lead to a much more locked digital environment in Canada.

Changes to S30.2 from Bill C-11

(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.

Questions?