

Copyright & Libraries

What have been the big changes in
copyright since 2012?

Introduction

- The Copyright Modernization Act
- Alberta vs. Access Copyright
- Copyright Board Decision - January 2013
- Ongoing Strife Between Education & Access Copyright
- What Is Coming Next?

3 Recurring Themes

- Fair Dealing
- 1997 Amendments to the Copyright Act
- The CCH Supreme Court Judgment from 2004

Copyright Modernization Act

- Passed by Parliament on June 29, 2012
- Received Royal Assent on June 29, 2012.
- Most sections of Bill C-11 came into force on November 7, 2012.

Copyright Modernization Act

- Fair Dealing
- New Consumer Rights
- Library Rights: Preservation & ILL
- Education Rights
- Digital Locks

Fair Dealing?

- Fair dealing is the right to use part of a copyrighted work without permission from or payment to the copyright owner.
- 8 purposes in the Copyright Act for fair dealing: research; private study; **education**; **parody**; **satire**; criticism; review; news reporting.

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.

Format & Time 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.

Format and Time shifting coming to the UK in 2014.

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.
- No circumvention of digital locks is allowed.

CMA amended two 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.

Interlibrary Loan & Copying Services

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 Act giving specific rights to libraries.

Restrictions to Libraries in 30.2 (1997)

- 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.

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

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.

Libraries split into three groups

- After a slow start, many libraries are now providing copies directly under fair dealing rather than using S30.2 as per paragraph 49 of CCH.
- Another group of libraries appears to be reluctant to use the Supreme Court Judgment, preferring to operate under S30.2.
- 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)

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 those restrictions.
- 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.

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 – New support for licencing with Access Copyright and Copibec in online learning
- New 30.04 – 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

- These two sections directly conflict with the addition of education as a purpose for fair dealing.
- They are designed to discourage educational institutions from opting out of a collective licence or a tariff.
- Reminiscent of section 30.3 which requires licencing of self serve photocopiers.

Digital Locks

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

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

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

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.

Alberta vs. Access Copyright

Supreme Court Pentalogy

- Re:Sound v. Motion Picture Theatre Associations of Canada
- Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)
- Society of Composers, Authors and Music Publishers of Canada v. Bell Canada
- Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada
- Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada

1997 – Copyright Amendments

- **Photocopier Licence – 30.3**

Educational institutions, libraries, archives & museums require a licence from a reprographic collective

- **New rules for ILL and Copying Services – 30.2**

Format, genre & date restrictions make ILL & Copying Services almost impossible to operate without a licence from a reprographic collective.

2004 CCH Supreme Court Judgment

Three legal publishers sued the Great Library of the Law Society of Upper Canada in 1993 for:

- Allowing self serve photocopiers without a licence.
- Providing a photocopy services to its patrons
- Later on faxing photocopies to library patrons was added to the lawsuit.

No Photocopier Licence Needed

In summary, I conclude that evidence does not establish that the Law Society authorized copyright infringement by providing self-service photocopiers and copies of the respondent publishers' works for use by its patrons in the Great Library. Para 46

Photocopier licence dealt with in paragraphs 39-46.

Education?

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.

Para 55, CCH

K - 12 from licence to tariff

- CMEC (Provincial 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.

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.

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)*

K-12 School Boards & Tariff

Because of

- Alberta vs. Access Copyright Supreme Court Decision
- Education added as a purpose for fair dealing in the Copyright Act

As of January 1, 2013, K-12 School Boards have stopped making tariff payments to Access Copyright.

Copyright Board Decision – Jan 18, 2013

- A tiny number of rights in the copyright act can only be used if a work is not commercially available.
- Access Copyright successfully argued with the Copyright Board that its licence meant a work was commercially available.

Library Impact on S30.1

- Libraries use section 30.1 to make replacement copies of print books that are out of print.
- Does the decision mean that libraries, archives and museums need a licence from Access Copyright for making replacement copies of damaged or destroyed print books or journals that are out of print?

- Ongoing Strife Between
Education & Access
Copyright

Post Secondary Process

- S70.12 seems to envision tariffs or licences, but not both simultaneously.
- January & April 2012, Access Copyright announces model licences with Toronto, Western & then AUCC that have been secretly negotiating their own deal with Access Copyright.
- On April 24, AUCC formally withdrew from the tariff hearings before the Copyright Board.

Next for AC & Post Secondaries?

- Eventually 35% of AUCC members & 64% of ACCC members outside of Quebec decide to opt out of both the licence and the tariff.
- April 8, 2013, Access Copyright sues York University trying to force it back into the tariff process

Toronto & Western

Negotiations between the University of Toronto & Western University and Access Copyright break down on December 11, 2013.

As of January 1, 2014, two more large universities are now operating without a licence from Access Copyright.

75% of Revenue Comes From Education

This can be contrasted with the situation for Access Copyright where, according to the publishers' recent submission to me 'close to 75% of Access revenue comes from educational licenses.' The difference in the percentages in the two organizations is because of the educational exemption in the United States.

US Copyright Clearance Center - 12% of revenue from Education

2007 Friedland Report pp 24-25:

[http://www.accesscopyright.ca/media/8359/access copyri ght report -- february 15 2007.pdf](http://www.accesscopyright.ca/media/8359/access_copyri ght_report -- february 15 2007.pdf)

Whither Access Copyright?

- \$18 Million dollar loss in revenue for FY 2013 because K-12 School Boards have opted out of the tariff.
- Loss of revenue from Post Secondary Institutions
- 40% reduction in staff

Quill & Quire, July/August 2013

What is next?

Supporters of Access Copyright

- Are lobbying the current Federal Government to amend the Copyright Act.
- They especially want to amend the section on Fair Dealing.
- The Canadian Copyright Institute accuses Education of not wanting to speak with them.

K – 12 Tariff Hearings

There are hearings before the Copyright Board for the K-12 Tariffs for 2010 – 2012 & 2013 – 2015.

Post Secondary Tariff Hearings

The Post Secondary Tariff Hearings for 2010 – 2013 that were supposed to happen in February 2014 have now been postponed until Access Copyright responds to written questions from the Copyright Board.

The York Lawsuit

York lawsuit seems to depend upon Section 68.2 of the Copyright Act: *a collective society may...collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.*

WIPO Treaty for the Blind

Will Canada commit to signing the treaty
and when will it amend the Copyright Act?

Questions