



# Copyright Update

## Issues Affecting Libraries

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## Overview

- Copyright – relevant to law libraries
  - Different sources = different permissions
  - Understanding the fair dealing exemption
  - Specific library exemptions
- Copyright Reform
- General Questions

# Copyright

## ■ **Relevance to Law Libraries**

# Copyright Law

- **Copyright law is economic legislation**
- Copyright law provides a **balance** between **creators** and **users**
- “the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”
- *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336
- Creators need rewards to encourage continued creativity
- Users and society need access to works to enable future creativity
- The challenge is to find the right balance
- **The librarian and library are often at the fulcrum of that balance**

# Law Libraries

- Contain vast amounts of information
  - Value sought is access to the information
  - Information is stored in digital and tangible forms
  
- Primary sources
  - Statutes, regulatory materials, government reports
  - Legal decisions
  
- Secondary sources
  - Text books, articles, commentary

# Law Libraries

- Traditional uses vs. modern uses
  - Work from the original document itself
    - Vs.
  - Work from a copy, text remains available to other users
  - Share the copy
- Copyright content
  - Crown copyright materials – statutory, regulatory, reports, etc.
  - Publisher's materials – text books, loose leaf services, articles, reviews
  - Excludes public domain materials

# Law Libraries

## ■ Pressures:

- Time constraints
- User demands
- Access demands
- Demands for copies
- Economic constraints
- Litigation risk

- Presentation - understand what you can take and use and mitigation of litigation risk

# Copyright and Libraries

- **Different sources = different permissions**

# Public Domain

- Importance of the public domain
- Important that “ .... there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.”
- *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13

## Public Domain

- “Public domain” is informally used to describe works that belong to the public or works which can be used free of charge and do not require permission for use
- Works can be in the public domain for many reasons
  - Old works, the term of the copyright has expired
  - The work is not eligible for copyright protection
  - The copyright owner has authorized the public to use the work without permission or payment
- By definition no consent is required if the work is in the public domain
- However it is not trivial to determine if something is in the public domain.

## Different Authors, Owners

- Crown Copyright
  
- Private copyright owners
  - Publishers (by assignment or operation of law)
    - Law book publishers
    - Other publishers (law firms, institutes, etc.)
  - Publishers licensed by authors
  - Authors directly

## Crown Copyright

- Is there a copyright?
  - U.S. law 17 USC § 105
  - "Copyright protection ... is not available for any work of the United States Government ..."
- *UK* – Regulation
  - <http://www.opsi.gov.uk/advice/crown-copyright>
  - Licensing of Crown copyright in accordance with the Regulations on the Re-use of Public Sector Information
- Canada – Regulation SI-97-5
  - Reproduction of Federal Law Order

## **Reproduction of Federal Law Order SI-97-5**

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.

## Publisher's Works

### ■ **Internet based materials**

- Original materials may be available on certain web sites and may be licensed by the author under licenses such as, for example:
  - Creative Commons Attribution-Sharealike (CC-BY-SA)
  - GNU Free Documentation (GFDL)
- Many web sites provide copyright terms in their Terms of Use
- Some web sites provide materials on a subscription basis
  - The terms of that agreement define what conduct is permitted
  - Provided there was assent

## Publisher's Works

- **Hard copy and non-Internet digital materials**
  - Made available on a basis of individual purchase or subscription agreement
  - Need to consult specific copyright terms, if any

# Copyright Infringement

- Understanding litigation risk means to understand the rights available to a copyright owner to enforce their rights
- Owner's obligation to police its rights
- Infringement - conduct the owner has the right to do S. 27
- Broad relief available S. 34(1)
- Accounting and damages S. 35(1)
- Delivery up S. 38(1)
- Statutory damages S. 38.1
- Wide injunction S. 39.1

# Enforcement of Copyright

- Criminal Prosecution

- *Criminal Code*

- *Copyright Act*

- For very serious cases

- Typically sale of copyright infringing goods or widespread distribution of copyright infringing materials

- Commercially competitive activity

## Defenses

- Mitigation of litigation risk includes understanding what may be lawfully done
- Consent
  - Express (License)
  - Implied
- Term has Expired
- Non-Substantial Taking
- Taking only non-copyright matter
- Exemptions (“User’s Rights”)

## Consent / License

- Express terms regarding use of a book, web site or other content
  - Is it legally effective?
    - Clarity of terms
    - Communication of terms
    - Affirmative or passive
- Considerations on copyright cautions
  - Contractually effective
  - Overreaching prohibitions?
  - Limitations on uses
  - Permissions and terms for use

## Consent / License

- Other Sources of Consent
- Role of collectives
- Statutory Consent – S. 77
  - unlocatable copyright owner
- Getting Consent
  - Document the permission

## Documenting the Consent

- One can give / obtain permission to copy or use other rights of the copyright owner
- Consent should be in writing to avoid dispute or misunderstanding
- Key terms:
  - Term
  - Scope of permission (use, application, etc.)
  - Payment or other terms (attribution, etc.)
- Other terms:
  - Representations, warranties, indemnities, limits on liability
  - Territory

# Understanding the fair dealing exemption

- ***CCH Canadian Ltd. v. Law Society of Upper Canada***

## *CCH Canadian Ltd. v. LSUC*

- All major law book publishers were parties to test case
- Test of photocopying and faxing of legal materials by the Law Society under its Access to Law Policy
- Great Library, Osgoode Hall, reference and research library, one of Canada's largest collections of legal materials
- Library provides request-based photocopy service for Law Society members, the judiciary and other researchers delivered in person or by fax
- Self-service photocopiers in the library
- Subject matter: headnotes, case summary, topical index and compilation of reported judicial decisions

## *CCH Canadian Ltd. v. LSUC*

<b>Subject Matter</b>	<b>Federal Court</b>	<b>Court of Appeal</b>
3 reported judicial decisions	No	Yes
3 headnotes	No	Yes
Annotated statute	Yes	Yes
Case summary	No	Yes
Topical Index	No	Yes
Textbook	Yes	Yes
Monograph, chapter of textbook	Yes	Yes

## *CCH Canadian Ltd. v. LSUC*

- Federal Court had applied FCA's earlier *Tele-Direct* decision on originality, requiring creativity to be original
- FCA applied the “sweat of the brow” approach and found originality
- FCA decision, 2002, did not find that the fair dealing exemption was made out
- FCA did find that the library had authorized the copying
- .... Resulting in .....

## Law Libraries - Access Copyright

- Late July 2003 Access Copyright approached major law firms and offered a license for the copies made internally
- One year license
- Annual royalty \$35 per FTE professional, \$100 minimum, plus 5% administration cost and applicable taxes
- Annual reporting on number of FTE professionals
- Adjustment if change by 15% during the year

## Access Copyright

- Repertoire – published works of rights holders affiliates with Access Copyright
- Exclusions:
  - Works outside of Australia, Canada, France, Germany, Iceland, Italy, Liechtenstein, Malta, Netherlands, New Zealand, Norway, South Africa, Spain, Switzerland, United Kingdom, and the United States of America
  - Crown copyright (e.g. statutes, regulations, etc.)
  - Newsletters
  - All works from a list of excluded publishers

## *CCH Canadian Ltd. v. LSUC*

- **Supreme Court** decision (2004)
- Conduct of the LSUC was “fair dealing” – no infringement if library makes a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise under the Library’s Access Policy
- Research uses of library users were in within permitted conduct
- Library lacks sufficient control over the patrons use of photocopiers to be liable for infringements made on them (if any)
- No need to consider application of the additional defense for libraries S. 30.2

## *CCH Canadian Ltd. v. LSUC*

- **Consider liability of the library and librarians**
- **Scope of the fair dealing right**

## Liability of the Library / Librarians

- Liable for authorizing infringement by users of the library?
- FCA cite *Moorhouse v. University of New South Wales* [1976] R.P.C. 151 Australian HC, concluded Law Society implicitly authorized copyright infringement of the publishers' works by failing to control copying
- SCC finds: “a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright”
- “the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.”

## Liability of the Library / Librarians

- “Finally, even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library’s patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement. The Law Society and Great Library patrons are not in a master-servant or employer-employee relationship such that the Law Society can be said to exercise control over the patrons who might commit infringement. Nor does the Law Society exercise control over which works the patrons choose to copy, the patron’s purposes for copying or the photocopiers themselves. “

## Liability of the Library / Librarians

- Individual conduct comes within the fair dealing right
- “When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. ... Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society’s custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the *Copyright Act*. “

# Fair Dealing

- Balance of creators rights *vs.* users rights
- Fair Dealing (Canada)
  - Private Study or Research – S. 29
  - Criticism or Review – S. 29.1
  - News Reporting – S. 29.2
- Must show both “fair dealing” and the permitted purpose
  - Must consider what is “fair”
- “research” – given a large and liberal interpretation
  - not limited to non-commercial or private context

## Fair Dealing

- Fair dealing is a user's right – must not be interpreted restrictively
- Factors that may be considered to determine if the dealing is “fair” may include:
  - question of degree
  - purpose of the dealing
  - character of the dealing
  - amount of the dealing
  - alternatives to the dealing
  - nature of the work
  - effect of the dealing on the work

## U.S. Fair Use Exemption

- *Fair Use* (U.S.) Factors 17 U.S.C. § 107, guide a court's fair use determination.
  - (1) the purpose and character of the use;
  - (2) the nature of the copyrighted work;
  - (3) the "amount and substantiality of the portion used" in relation to the work as a whole; and
  - (4) the effect of the use upon the potential market for the work or the value of the work.
- 
- Note the SCC expressly considered and included these factors within its Fair Dealing factors

# Copyright and Libraries

## ■ **Additional Specific Library Exemptions**

# Special Exemptions

- In addition to the Fair Dealing right there are other exemptions, including:
  - Educational Institutions (non-profit)
    - Instruction S. 29.4(1), Examination, S. 29.4(2)
    - Performances, S. 29.5
    - News and Commentary, S. 29.6
    - Reproduction of Broadcasts, S. 29.7
  - Literary Collections, S. 30
  - Libraries, Archives and Museums, S. 30.1, 30.2
  - Educational institution photocopiers, S. 30.3
  - Copying sound recordings for private use – S. 80(1)
    - But not for distribution – S. 80(2)

## Libraries, Archives and Museums

- Specific exemptions available for non-profit libraries
- Supreme Court did not find it necessary to consider this narrower exemption
  - But if required would have found the exemption applicable

## Libraries, Archives and Museums, S. 30.1

- **30.1** (1) It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive or museum, a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection
  - (a) if the original is rare or unpublished and is
    - (i) deteriorating, damaged or lost, or
    - (ii) at risk of deterioration or becoming damaged or lost;
  - (b) for the purposes of on-site consultation if the original cannot be viewed, handled or listened to because of its condition or because of the atmospheric conditions in which it must be kept;
  - (c) in an alternative format if the original is currently in an obsolete format or the technology required to use the original is unavailable;
  - (d) for the purposes of internal record-keeping and cataloguing;
  - (e) for insurance purposes or police investigations; or
  - (f) if necessary for restoration.

## Libraries, Archives and Museums, S. 30.1

- **30.1** (2) Paragraphs (1)(a) to (c) do not apply where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes of subsection (1).
- (3) If a person must make an intermediate copy in order to make a copy under subsection (1), the person must destroy the intermediate copy as soon as it is no longer needed.
- (4) The Governor in Council may make regulations with respect to the procedure for making copies under subsection (1).

## Libraries, Archives and Museums, S. 30.2

- S. 30.2 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1.
  - SCC would have found this applied, if necessary in *CCH*
- (2) It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, by reprographic reproduction, for any person requesting to use the copy for research or private study, a copy of a work that is, or that is contained in, an article published in
  - (a) a scholarly, scientific or technical periodical; or
  - (b) a newspaper or periodical, other than a scholarly, scientific or technical periodical, if the newspaper or periodical was published more than one year before the copy is made.
- (3) Paragraph (2)(b) does not apply in respect of a work of fiction or poetry or a dramatic or musical work.

## Libraries, Archives and Museums, S. 30.2

- (4) A library, archive or museum may make a copy under subsection (2) only on condition that
  - (a) the person for whom the copy will be made has satisfied the library, archive or museum that the person will not use the copy for a purpose other than research or private study; and
  - (b) the person is provided with a single copy of the work.
- (5) A library, archive or museum or a person acting under the authority of a library, archive or museum may do, on behalf of a person who is a patron of another library, archive or museum, anything under subsection (1) or (2) in relation to printed matter that it is authorized by this section to do on behalf of a person who is one of its patrons, but the copy given to the patron must not be in digital form.

## Libraries, Archives and Museums, S. 30.2

- (5.1) Where an intermediate copy is made in order to copy a work referred to in subsection (5), once the copy is given to the patron, the intermediate copy must be destroyed.
- (6) The Governor in Council may, for the purposes of this section, make regulations
  - (a) defining “newspaper” and “periodical”;
  - (b) defining scholarly, scientific and technical periodicals;
  - (c) prescribing the information to be recorded about any action taken under subsection (1) or (5) and the manner and form in which the information is to be kept; and
  - (d) prescribing the manner and form in which the conditions set out in subsection (4) are to be met.

## Specific Library Exemptions

- The specific library exemption would also have been found to be applicable
- To qualify the library must:
  - Not be established for profit
  - Must not be administered by a body established for profit
  - Must hold or maintain a collection open to the public or to researchers
- In any event the Supreme Court's decision means that the fair dealing exemption is broader and effective for all libraries

## Lessons for Library / Librarians

- **Lessons of the *CCH* decision for Libraries and Librarians**
- Application of the Access to Law Policy was approved
- A disclaimer of liability is not harmful and does not admit liability
- It is sufficient for the library to show its general practices establish fair dealing, need not do so in each case
- Librarian's role to assess purposes, volume of copying was supported
- Library exemption may be available in some circumstances
- Fair dealing is a broad user's right

## Other Developments

- June 26, 2009 the Copyright Board issued a photocopy tariff to Access Copyright for use of photocopied materials in primary and secondary schools in Canada
- The inaugural tariff is \$5.16 per student per year
- This Copyright Consortium of the Council of Ministers of Education (cmec) sought judicial review of the decision including the aspects of the decisions:
  - Requiring the schools to have a policy similar to the Access Policy in *CCH*
  - That making photocopies by teachers was not within fair dealing, whether distributed for all students or whether at the student's request
- Important to monitor how the Court applies *CCH* to this fair dealing challenge

# Law Reform

## ■ **Bill C-61 - Consultation Process**

## Bill C-61

- Three main thrusts
- Provide for digital rights management and technological prevention measures, and anti-circumvention legal recognition
- Provide for specific limited exemptions
- Define liability of Internet Service Providers
- Introduced in 2008, to be reintroduced?
- Consultations during summer 2009, ended September 13

## C-61

- Replace 30.1(c) with:
- *(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;*
- Add
- *(5) A library, archive or museum, or a person acting under the authority of one, may do, on behalf of a patron of another library, archive or museum, anything under subsection (1) or (2) in relation to printed matter that it is authorized by this section to do on behalf of one of its own patrons.*

## C-61

- Add
- (5.01) A library, archive or museum, or a person acting under the authority of one, may, under subsection (5), make a copy of printed matter in digital form and provide it 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.
- Add regulation making power concerning the S. 5.01 items.

## Canadian Libraries Association Position

- Currently, there is a restriction placed on the exercise of the exceptions provided in Sections 30.2(1) and 30.2(2) when the request is made by a patron of another library, archive or museum: Section 30.2(5) stipulates that the copy given to the patron in that case must not be in digital form.
- The amendment to Section 30.2(5) and (5.01) proposed by Bill C-61 lifts, in part, the restriction applying to a copy provided to a patron of another library. [subject to new restrictions] ...

- CLA Submission

## Canadian Libraries Association Position

- “CLA believes that the restrictions on library copying for users in the present and proposed Sections 30.2(2), 30.2(3) and 30.2(5) are unacceptable. These provisions fall far short of what is required for libraries to provide effective reference and interlibrary loan services in the digital era. These constraints seek to protect economic interests that are not threatened by the limited amount of "private research and study" materials copied by Canadian libraries. CLA proposes that the library, archive and museum exceptions for private research and study be format-neutral and allow these institutions to do anything on behalf of a patron, both directly and through inter-library loan, that the patron can do for themselves.”

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- CLA Submission

# Copyright and Libraries

## ■ Mitigation of the risk

## Protecting Libraries and Librarians

- *Get consent* where the amount, purpose or substantiality of copying appears beyond fair dealing
- *Negotiate* for sufficient rights from publishers / collectives for practical needs of the library and its users
- *Post* adequate copyright *notices* and copyright *disclaimers*
- Adopt *appropriate policies* on usage
- Support librarian's *supervision of such policies*
- *Do not facilitate* clear infringements
- *Do not be willfully blind* to infringements
- *Shift risk* to users
- Assess adequacy of *insurance coverage*

# Protecting Libraries and Librarians

- Share best practices
  - Policies
  - Practices
  - Experiences
- Continue your education on the topic
  - Basic copyright education for some user groups?
- Work through your associations to seek to influence the evolving government policy and legislative drafting

## Role of Libraries, Librarians

- Effectively the Supreme Court finds that the Library and law librarians are
  - an integral part of the legal research process
  - essential to ensure the ability of the legal profession to conduct the practice of law

# Questions?

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## Access to the Law Policy

The Law Society of Upper Canada, with the assistance of the resources of the Great Library, supports the administration of justice and the rule of law in the Province of Ontario. The Great Library's comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers. Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, may be provided to users of the Great Library.

This service supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian Copyright Act.

### Guidelines to Access

1. The Access to the Law service provides single copies for specific purposes, identified in advance to library staff.
2. The specific purposes are research, review, private study and criticism, as well as use in court, tribunal and government proceedings. Any doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.
3. The individual must identify him/herself and the purpose at the time of making the request. A request form will be completed by library staff, based on information provided by the requesting party.
4. As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.
5. This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.

When the Access Policy was introduced, the Law Society specified that it reflected the policy that the Great Library had been following in the past; it did not change the Law Society's approach to its custom photocopy service.

Department of Justice  
CanadaMinistère de la Justice  
Canada

Canada

**Reproduction of Federal Law Order (SI-97-5)**

Regulation current to August 12th, 2009

Attention: See coming into force provision and notes, where applicable.

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SI/97-5

Registration January 8, 1997

OTHER THAN STATUTORY AUTHORITY

Reproduction of Federal Law Order

P.C. 1996-1995 December 19, 1996

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And whereas the Government of Canada wishes to facilitate access to its law by licensing the reproduction of federal law without charge or permission;

Therefore His Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, the Minister of Industry, the Minister of Public Works and Government Services, the Minister of Justice and the Treasury Board, hereby makes the annexed *Reproduction of Federal Law Order*.

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SI/98-113(F).

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