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Copyright & Licencing in Libraries

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Library

There are three types of Intellectual Property:

- Copyright
- Patents
- Trademarks

What is Copyright?

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

Copyright Modernization Act & Other Changes

- 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.
- Canada ratified Marrakesh in 2016
- CUSMA? (aka USMCA, MUSCA, or NAFTA 2.0)

Section 2 of the Copyright Act is the Definitions Section

library, archive or museum means

(a) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or

(b) any other non-profit institution prescribed by regulation; (*bibliothèque, musée ou service d'archives*)

educational institution means

(a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education,

(b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,

(c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b), or

(d) any other non-profit institution prescribed by regulation;
(*établissement d'enseignement*)

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; (*déficiences perceptuelle*)

circumvent means,

(a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition ***technological protection measure***, to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner; and

(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition ***technological protection measure***, to avoid, bypass, remove, deactivate or impair the technological protection measure. (*contourner*)

There is no definition of what a public performance is in the Copyright Act.

copyright means the rights described in

- (a) section 3, in the case of a work,
- (b) sections 15 and 26, in the case of a performer's performance,
- (c) section 18, in the case of a sound recording, or
- (d) section 21, in the case of a communication signal; (droit d'auteur)

...**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, and includes the sole right

- (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

In Canada

- The term of copyright is the life of the author (creator) plus fifty years
- Canada's term of copyright is fully compliant with the Berne Convention.
- Sections 6-9

Internationally

- The United States, and most EU countries have expanded the term of copyright to life plus 70 years.
- Canada is under growing pressure to expand to life plus 70. Ratification of CUSMA will force the issue.

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

- New Consumer Rights S29.21; S29.22; S29.23; S29.24
- Fair Dealing S29; S29.1; S29.2
- Perceptual Disabilities S32
- Educational Rights S29.3 – S30.3

- 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

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.

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 came to the UK in 2014.

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.

- 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.

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.

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.

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 51*

The Six Factors and EReserve

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.

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...

- Reserves would need to be for one of the five purposes above. For example for the research & private study of the students in your class.

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.

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.

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.

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.

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.

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;

- 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)
- Online Classes S30.01 – 30.03
- Work Available through the Internet S30.04

- 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

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.
- (d) the performance in public of a cinematographic work, as long as the work is not an infringing copy or the person responsible for the performance has no reasonable grounds to believe that it is an infringing copy.**

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.

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,

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

(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.

- Educational Institutions can put copyrighted material in online courses restricted to the students enrolled in the course.
- Any fixation of the course needs to be destroyed 30 days after the students have received their grades.
- Students cannot fix, reproduce, or communicate the lesson they receive online.
- Have to have a membership in a collective society ie Access Copyright or Copibec

- If a work is freely available online, it can be used by educational institutions.
- The audience has to be primarily students.
- Needs to be cited.
- Not allowed if the work is
 - Protected by a TPM
 - Has a clearly visible notice prohibiting educational use.

Canadian Copyright Act and Libraries

The 1997 amendments to the Copyright Act created new rights for Canadian libraries, archives and museums

- 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.
- Section 30.4 - the exceptions to infringement of copyright provided for under [sections 29.4](#) to [30.3](#) and [45](#) also apply in respect of a library, archive or museum that forms part of an educational institution.

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

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.

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."

- Many libraries now providing interlibrary loan directly under fair dealing rather than using S30.2 as per paragraph 49 of CCH.
- There is a large group of libraries that uses S30.2 as amended in 2012.

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.

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.

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.

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

- 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.

Section 41.1 of the Copyright Act

It is an infringement of copyright to:

- a) to circumvent a technological protection measure;
- b) to provide circumvention services to the public;
- c) to manufacture, import, distribute, offer for sale or rental or provide technology or devices that can circumvent a TPM.

Legal Exceptions for Circumvention

- Law Enforcement and National Security
- Interoperability of Computer Programs
- Encryption Research
- Personal Information (Privacy)
- Computer Security
- Creating alternate format copies for people with Perceptual Disabilities
- Broadcast Undertakings
- Radio Apparatus

Licencing

Because of several unique properties of digital information, agreements that govern the acquisition and maintenance of traditional paper collections are inadequate in the digital information context. **Unlike paper materials, digital information generally is not purchased by the library; rather it is licensed by the library from information providers.** A license usually takes the form of a written contract or agreement between the library and the owner of the rights to distribute digital information.

From the LIBLICENSE Project: <http://liblicense.crl.edu/>

- **LIBLICENSE** - <http://liblicense.crl.edu/licensing-information/model-license/>
- **COPPUL** - https://www.coppul.ca/sites/default/files/uploads/Model_license2013.pdf
- **OCUL** - <https://ocul.on.ca/collections/licenses>
- **CRKN** - <http://www.crkn-rcdr.ca/en/model-license>

- Jurisdiction
- Who is authorized to use the licenced material?
- Interlibrary Loan
- Copying Rights
- Reserves/Course Packs
- Linking
- Remote Access
- Perpetual Rights
- Indemnification

What happens if you find a clause you don't like?

- Negotiate
- Ask the vendor the purpose of a specific clause
- Know your bottom line and be prepared to walk away from a deal that you don't like

- Whose law governs the licence (contract) if something were ever to go to court?
- The University of Calgary always asks for Canadian jurisdiction and preferably Alberta
 - CRKN asks for Canada – Ontario
 - COPPUL asks for Canada – BC
- Sometimes a licence will have one jurisdiction for governing law & another for copyright law

(k) fair use under Section 107 of the U.S. Copyright Act, educational exceptions, or other similar provisions of the copyright laws or other intellectual property right laws in the United States.

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<https://about.jstor.org/terms/>

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- Is **authorized on-site patrons** the same as **walk-in user**?

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