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The *Copyright Act* and Academic Staff

Introduction

Academic staff have a vital stake in the growing debate about copyright – a public policy issue that has moved from obscurity to centre stage in Canada. The public interest in copyright reflects the growing importance of information in a digital age. It also reflects an intensified struggle over access and use of information. On one side are advocates of more restrictions on copyrighted material to protect the proprietary interests of rights-owners. On the other side are those who want to ensure broader access and use. The intensity of this debate has been sharpened by the development of digital information technology that creates opportunities for both complete copyright control and, conversely, instantaneous illegal duplication.

This dichotomy presents policy makers with two challenges. The first is to ensure that digital technology is not used to undermine legitimate copyright interests. The second, and perhaps greater challenge, is to prevent copyright owners from utilizing new technologies to impose unreasonable restrictions on access to information.

Planned changes to Canadian copyright law will have profound implications for the creators, owners and users of copyright works. Rights-holders (publishing companies and the film and music industries) have traditionally lobbied for restrictive copyright rules that give them greater control both over what uses can be made of a work and how much users can be charged. Users, including individuals as well as organizations such as, museums, libraries, archives, educational institutions and consumer rights groups, have pressed for legislation that ensures rights of access. Creators have always been caught in the middle since they typically use other works as part of the creative process but also become rights-holders themselves.

Academic staff occupy an important position in this debate, sharing the concerns of owners, creators and users. As creators and owners of copyright material, academic staff understand the importance of protecting their scholarly work. As users of copyright material in their teaching and research, academic staff are also aware of the importance of ensuring access to copyrighted works in order to advance knowledge. Academic staff understand there is a clear need for a balanced approach to copyright legislation, one that does not over- or under-protect copyright material.

What is Copyright?

Copyright is one category of intellectual property, a legal concept governing the ownership and use of the fruits of intellectual labour. While other types of intellectual property rights include patents (inventions) and trademark (names or symbols identifying a product), copyright applies to expressions that have been fixed in a tangible medium such as paper, canvas or a saved file.

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Copyright protects a wide range of "works", including literary works (such as books, journals, newspapers, poetry, letters, lecture notes, computer software); dramatic works (such as feature films, radio and television programs, plays); artistic works (such as paintings, sculptures, photographs); and musical works (such as sheet music and songs). It also protects sound recordings (such as phonograms, audio tapes of speeches and lectures, oral history tapes, talking books); performer's performances (of authors, singers and musicians); and communication (broadcast) signals.

In Canada, copyright is a federal responsibility and its rules are set out in the *Copyright Act*. The *Act* provides a set of economic rights to the owners of works including the rights to publish, reproduce, exhibit or perform a work and the moral rights to the creators to maintain the integrity of a work, to be associated or not associated with a work, and to preserve honour and reputation in relation to a work.

The *Act* also protects the public interest in relation to copyright by limiting the duration of the copyright term (generally to the life of the author plus 50 years, after which the work enters the public domain), allowing certain exceptions to strict copyright rules (for example, permitting the transfer of copyright works to formats accessible to visually impaired persons) and through fair dealing (the right to use works without permission in certain circumstances).

Reforming Copyright in Canada

The *Copyright Act* has undergone a near continuous process of amendment since coming into force in 1924. The most recent round of reform, aimed at addressing developments in digital information technology, began in the early 2000s. In 2005, the federal government proposed Bill C-60, a comprehensive set of amendments that died on the order paper when the government fell. Renewed efforts to amend the *Act* are expected to be presented in the near future.

As users, creators and owners of copyright works, the interests of academic staff and the education community are best served by a balanced *Copyright Act*. For this to be achieved, changes to copyright legislation must address nine key issues.

1. Fair Dealing

Section 29 of the *Copyright Act* provides that "[f]air dealing for the purpose of research or private study does not infringe copyright."[1] Fair dealing, roughly defined, is the right to access and use part or all of a work in certain circumstances. There is no precise formula stating exactly what fair dealing is, but the law is guided by the nature, character, purpose and amount of use. While copying a portion of a work for private study would almost certainly qualify, making multiple copies of an entire book might not. Practical examples of fair dealing include: a private individual copying an audio track from one format to another to be able to play the work on modern equipment; a library copying a court decision for use by a patron; and, a professor copying a page from a database to use for research purposes.

For many years fair dealing was viewed by Canadian courts and commentators alike as a limited defence in cases where copyright infringement was claimed. The fair dealing categories in the *Act* (research, private study, criticism, review, and news reporting) were strictly construed and not given broad application. But as a result of several recent

Supreme Court of Canada decisions, this has all changed.

The shift began in 2002 when the Supreme Court held that the proper balance in copyright:

> ... lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.[2]

The court also stated that:

> [e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.[3]

In 2004, the Court took the next step in its historic decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*. In ruling that the provision of a fee-based document delivery service maintained by a law library constituted fair dealing, the court rejected the view that fair dealing was nothing more than a limited defense to infringement:

> ... Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. [4]

Later in 2004, the Supreme Court ruled, in a case involving internet service provider liability, that:

> [t]he capacity of the Internet to disseminate 'works of the arts and intellect' is one of the great innovations of the information age... . [i]ts use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.[5]

Additional points in the *CCH* fair dealing analysis case have particular significance, especially for librarians and educators. First, the court ruled that the actual categories of research and private study need to be given a broad and liberal interpretation.[6] Second, the court held that even though a library does not itself engage in research or private study, it may stand in the shoes of its patron who is engaging in research and private study.[7]

Additionally, the court ruled that fair dealing is always available to a library, and they need not rely on the special library exemptions:

> As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the

> *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.[8]

While the Court stated "the *Copyright Act* does not define what will be 'fair'; whether something is fair is a question of fact and depends on the facts of each case,"[9] they did set down six criteria which should guide the determination in individual cases:

- the purpose of the use;
- the character of the dealing;
- the amount of the dealing;
- alternatives to the dealing;
- the nature of the original work; and
- the effect of the dealing on the work.[10]

Applying these criteria to the facts of the case, and paying particular attention to the access policy of the defendant library, the court held that fair dealing had been established as a matter of law. [11]

With these cases the Supreme Court articulated a new copyright doctrine based on users' rights, and also stressed the need for careful balancing of interests between the rights of owners and users. While this development in case law is a welcome and massive step forward, it is also important that this advancement be recognized in the *Copyright Act* as well as in the practices of our academic institutions.

A solution could be as simple as recasting the *Act's* fair dealing provisions to say: "Fair dealing for purposes *such as* research, private study, criticism, review or news reporting does not infringe copyright," and then enumerate the fair dealing factors as they were described in the *CCH* case (again as non-exclusive factors). The important inclusion of the words "such as" would reflect the view that the categories are no longer rigid, limited and exclusive, but are better understood as broad and open-ended, leaving the substantive inquiry to be based on the facts of each case as viewed through the six enumerated factors.

This open-ended approach would reflect the meaning of the *CCH* case, would serve the interests of educators, researchers, librarians, students and other life-long learners not currently affiliated with an institution, and would avoid a situation where educational institutions are seeking exemptions not available to the general public.

This latter approach of specific exemptions for particular groups was taken in the last round of copyright reform in 1997. It resulted in a complex set of very narrow exemptions with specific limitations on the exemptions.[12] This sectoral approach continues to be supported by some educational associations that press for specific educational exemptions.

Such an approach is fundamentally flawed. It cannot be sufficiently flexible to meet changing user needs. For example, artists need more explicit rights of parody; teachers need more explicit classroom display and reproduction rights; and computer scientists need more explicit rights to engage in reverse engineering. As well, reliance on specific institution-based exemptions is divisive as it allows an oppressive copyright regime, but then exempts some users but not others. While seeking a range of specialized exemptions was understandable in the mid-1990s given the limited nature of fair dealing, a broader approach based on fair dealing is a preferable alternative in light of *CCH*. Rather than foster competition between many wor-

thy stakeholders for what might be limited legislative exemptions, a generalized solution is more sensible.

2. Anti-Circumvention Rules

Digital technology allows instantaneous copying and distribution of information, an advancement that has had a positive impact on research, scholarly communication and teaching. At the same time, the technology has also facilitated the commercial piracy of digital works, resulting in some owners protecting their digital property with technological measures such as encryption. These measures are themselves susceptible to circumvention and as a result, some copyright owners are demanding governments enact laws that prohibit such circumvention.

The difficulty with prohibiting circumvention is that while encryption, for example, may prevent illegal copying, it can also prevent the exercise of a range of statutory rights such as fair dealing, accessing works in the public domain, archival preservation and library lending. If the *Copyright Act* were amended to include a ban on the circumvention of technological measures and the devices that facilitate that purpose, the effect would be to deny many of the rights of access permitted under the law. Further, such a ban would also prevent the legitimate disabling of technological measures that infringe the privacy rights of users. It would also prevent librarians from correcting inaccurate, out-dated or inapplicable Rights Management Information (digital identification "tags") attached to a work.

To avoid this regime of unreasonable owner control, any amendment to the *Act* addressing the issue of circumvention/anti-circumvention must not limit the ability of users to by-pass measures that undermine personal privacy or statutory rights of access. In particular, the *Copyright Act* must not prohibit devices capable of circumventing technological measures, as such devices may be used for purposes that do not infringe copyright.

Recent history in the United States provides an example of the deleterious effects of over-broad anti-circumvention legislation. In 1998, the U.S. Congress enacted the *Digital Millennium Copyright Act* (DMCA), which contained highly restrictive measures designed to inhibit the circumvention of technological protections and to protect the integrity of rights management information, regardless of the purpose of the circumvention. The DMCA shifted the historical balance between owners and users of copyrighted works too far in the direction of increased proprietary control; being destructive of the privacy of users, and creating a chilling effect which could inhibit academic inquiry. While attention has focused on computer science research,[13] these concerns may be generalized to other fields including the humanities and social sciences.

Bill C-60 did not follow the anti-circumvention model adopted by the U.S. in the DMCA. Unfortunately, Canada is now under great pressure from the U.S. government and entertainment industries to implement changes similar to the American approach. This pressure must be resisted.

3. Internet Service Provider Liability

The liability of Internet Service Providers (ISPs) for copyright infringement is an ongoing controversy. The issue is to what extent ISPs should be liable to copyright owners for acts of infringement that occur through their system. On the one hand, owners would like to see ISPs held liable, as

they are usually in a better position to pay large damage awards than individual subscribers, many of whom may be judgment-proof or difficult to locate. On the other hand, ISPs maintain that they do not have (and do not want) enough control over their subscribers' activities to warrant liability. They also argue that the costs of such liability would be passed on to all consumers. From the perspective of those, including academic staff members, who post material on the internet, the liability issue raises freedom of expression concerns, with important implications as to whether or not the internet will be preserved as a space for the open and public exchange of ideas and information.

Under the terms of the American DMCA, ISPs in the United States must comply with "Notice and Take Down" provisions in order to maintain their immunity from infringement liability. If a content owner believes there is infringing material online, they send a notice to the ISP ordering them to take it down. ISPs are obligated to remove the material that allegedly infringes copyright provisions. While individuals may object to the removal of their materials once they have been taken down, the "Notice and Take Down" rules do not require advance warning and a chance to respond to the allegations of infringement.[14] The onus is then on the individual whose work was taken down to get it reinstated.

An alternative to "Notice and Take Down" is "Notice and Notice", under which the ISP must notify the alleged infringer of the complaint, but need not remove the materials in question. Bill C-60 contained this "notice and notice" provision, which avoids overbroad claims resulting in censorship. If the individual feels the notice is unfair, the onus is on the complainant to pursue the matter. This is a reasonable compromise, as the notion that material could be unilaterally removed from one's web page based on untested allegations of infringement is deeply offensive to academic freedom.

4. Limitations on Statutory Damages

When a defendant in a copyright infringement action is found liable, the owner of the copyright is usually entitled to some form of monetary damages. The standard measure of damages is based either on the actual losses sustained by the copyright owner, or the benefits wrongfully obtained by the infringer. In some cases, however, these damages might be minimal and the *Copyright Act* gives the owner the opportunity to elect an award of statutory damages in lieu of actual damages. Statutory damages can run anywhere from $500 to $20,000 for each work infringed, and although the court has discretion to reduce the amount in some cases, the very availability of statutory damages often acts as a constraint against the exercise of what would appear to be allowable uses of copyrighted works.

In order for fair dealing and other user rights to be at all meaningful, the availability of statutory damages needs to be restricted. Those who act with a good faith belief that their actions with respect to a work are justified by fair dealing or other limitations should not be liable for statutory damages. This safe-harbor should apply to individuals as well as institutions.

5. Standard Form Contracts

Standard Form Contracts, un-negotiated "agreements" imposed by vendors on the purchasers of digital works, pose a threat to user rights under the *Copyright Act*. Sometimes referred to as "shrink-wrap" or "click-

wrap" licenses, these contracts are associated with products such as computer software and digitized music, film and literature.

Consumers have no bargaining power with respect to the licensing terms contained in the contracts and are often unaware of their limitations. In contrast to a traditional book, which may be read, lent, transferred or copied (fairly) as its owner chooses, the licenses attaching to digital products often restrict these activities, leading in a worst-case scenario to a "pay-per-view" universe where the reading of each page of a digitized book could only be done on a particular device and would be monitored and billed by the vendor. An amendment to the *Copyright Act* stating that Standard Form Contracts have no effect to the extent they exclude or limit statutory user's rights (such as fair dealing) would correct this situation.

6. Retention of Current Copyright Term

The general copyright term under Canadian law is life of the author plus 50 years. This is the international standard that is required under international agreements such as the World Trade Organization's TRIPS Agreement and the Berne Convention. In the U.S. and Europe, the general copyright term has been extended to life of the author plus 70 years and there is increasing pressure on Canada to do the same.

This pressure needs to be resisted and the copyright term should not be further extended. Term extension would serve no public interest but simply inflate the profits of large commercial rights holders.

7. Moral Rights

In addition to the economic rights in copyright, authors in Canada hold moral rights in their works. Moral rights are an extension of the persona of the creator and include the rights to ensure the integrity of the work, a right to be associated with the work as its author by name or under a pseudonym, and the right to remain anonymous.

In Canada, moral rights cannot be assigned, but they can be waived in whole or in part. Corporations, government agencies, and other institutions often demand a contractual waiver of moral rights. Many creative artists and researchers feel they should be able to maintain the control over the integrity of their work provided by moral rights even in situations where they are assigning away the economic copyright interests in their work. Examples include visual artists who do not wish to see their works altered in a way that undermines its essence or professors who object to being named as an author of a report whose conclusions the contracting agency fundamentally changed.

To avoid these problems the *Copyright Act* should be amended to protect holders of moral rights either by recognizing them as non-waivable and inalienable personal rights, or by considering further limitations and conditions on such waivers.

8. "Orphan Works" (Unlocatable Copyright Owners)

Determining copyright ownership of recently purchased books or music is not difficult, as the necessary information is typically displayed with prominence. However, on other material, including older publications, photographs and archival material, the author's name may not be clearly marked. Even if the name is apparent, it may be difficult to locate the owner as the copyright in the work may have been transferred several times.

Difficulty in tracing ownership can leave

publishers, authors, students, teachers and researchers in the difficult situation of being unable to use needed works because the owner cannot be located and the necessary permission secured. In Canada, the Copyright Board manages a cumbersome clearance system for such "orphan works." In order to qualify for a license, one must first make a "reasonable effort" to locate the rights owner, after which one may apply to the Board for a license. In some cases, royalties may be assessed, and may be payable to a collective society with no relationship to the owner.

The United States and Europe have no such system in place, and have been studying how to approach the barrier to access and research posed by orphan works. Canada should also investigate a less cumbersome process to better facilitate the use, preservation and digitization of older works which are still in copyright but where the owners are not locatable.

9. Reform of Crown Copyright

Where any work has been prepared or published by or under the direction or control of the Government of Canada (or any government department), the copyright belongs to Her Majesty. Where copyright is owned by the Crown, its duration is 50 years following the end of the calendar year of its first publication. The potential severity of Crown Copyright has been ameliorated in recent years by grants of public licenses to use certain types of government documents including acts, regulations and court cases. Despite this reform, the need for Crown Copyright is questionable on the grounds that taxpayers have already paid for works produced by the government; arguably, there should not be further limitations on access. The government should develop a plan for the scaling back and eventual phasing out of Crown Copyright. The principles contained in the Reproduction of Federal Law Order should be incorporated into the *Act* and expanded to other classes of documents. In the United States, copyright does not subsist in works of the federal government.[15]

Conclusion

In the past, a coalition of commercial creators/owners has dominated discussion of copyright law, with user groups, including the educational sector, having very limited advocacy success. For a variety of reasons this pattern now appears to be changing. Advances in information and communications technology, and its diffusion throughout the population, mean that more Canadians have become engaged with copyright through activities such as file-sharing, time-shifting the playback of recorded television programs, and altering the format of digital works to play on multiple devices. As a result, politicians are hearing for the first time from the general public on copyright issues, not just from the traditional advocacy organizations.

While creators of new works have always depended on access to existing works to fuel their own productivity, the distinction between creators and users is diminishing In this era of ready access to easily alterable digital material, the overlap between user and creator is increasing, and their distinctions are lessening.

At the same time, the divide between creators and commercial owners is growing. As the publishing, media and entertainment industries merge into fewer and larger corporations, long-standing alliances between creators (such as TV writers) and owners (such as TV production companies) are under

strain, weakening the political voice of corporate owners who have traditionally, and with great success, utilized artists to speak for them on copyright matters.

There has also been a trend in Canadian case law towards a greater emphasis on the rights of users of copyrighted works. Courts had focused almost entirely on the concerns of owners, but this changed with the Supreme Court of Canada *CCH* decision which held that the rights of users were just as important as the rights of creators/owners. With the legitimacy of the Supreme Court behind them, advocates for a balanced *Copyright Act*, in which rights of access and use are prominent, received a boost.

Finally, the work of a new cohort of Canadian academic staff specializing in copyright has invigorated the discussion of a once arcane subject. This dynamic new voice of public intellectuals from a diverse array of disciplines has provided leadership to the general population on copyright matters and is having a growing influence on policy makers.

The conjunction of these factors present academic staff with a unique opportunity to influence the copyright reform process. A robust information commons, where ideas and information exist not simply as property but as the shared heritage of humanity, is fundamental to the scholarly process and to Canada's wider social, cultural and economic development. Advocating for a balanced *Copyright Act*, based on the nine issues set out above, will help ensure the health of this commons and thereby serve the public interest.∎

Endnotes

1. Sections 29.1 and 29.2 similarly provide that fair dealing for purposes of criticism and review, and news reporting, respectively, do not infringe copyright with some additional attribution requirements.

2. *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] S.C.R. 336, <www.canlii.org/ca/cas/scc/2002/2002scc34.html> at para. 31.

3. *Théberge* at para. 32.

4. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 (CanLII) (para 48). The court went on to say that: "[u]ser rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation." (citing David Vaver, *Copyright Law*, Toronto: Irwin Law, 2000, at 171).

5. *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v. Canadian Assn. of Internet Providers*, [2004] S.C.R. 427, 2004 SCC 45, at para. 40.

6. The court said: "The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. 'Research' must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, . . .that '[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research.' Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*." (para 51).

7. The court said that the "allowable purposes" (research, private study, criticism, review or news reporting) "should not be given a restrictive interpretation or this could result in the undue restriction of users' rights. This said, courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work." (*CCH* para 54) By looking at the purpose of either the defendant or the user, the court is greatly increasing the flexibility of the defense and allows intermediaries such as librarians and educators to look through to the purpose of the end-user should a case involving fair dealing arise.

8. *CCH*, para 49. This language is very important because of the great significance the library and education community had previously placed on the special exemptions that were added to the *Act* in 1997. The practical significance of applying fair dealing to institutions that were under specialized exemptions cannot be over-emphasized and it raises questions about whether the specific exemptions contained in sections 29.4 through 30.2 of the *Act* have much continuing importance.

9. *CCH*, para 52.

10. *CCH*, paras 52-60.

11. The court concluded that: "The factors discussed, considered together, suggest that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair. The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request. On these facts, I conclude that the Law Society's dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright." (*CCH*, para 73).

12. There were a number of amendments to the *Copyright Act* in 1997. In addition to special exceptions for libraries, museums and archives, the amendments contained new provisions for certain educational institutions. Like the corresponding library exceptions, the educational exceptions cover a very particular set of circumstances, and these rights were offset by counter-limitations, record-keeping requirements, or other constraints.

13. See Electronic Frontier Foundation, "Unintended Consequences: Seven Years under the DMCA" <http://www.eff.org/files/DMCA_unintended_v4.pdf> and Pamela Samuelson, "Towards More Sensible Anti-Circumvention Regulations" <http://people.ischool.berkeley.edu/~pam/papers/fincrypt2.pdf>.

14. For a summary of these provisions, see <http://www.chillingeffects.org/dmca512/> and <http://www.chillingeffects.org/dmca512/faq.cgi>.

15. Section 105 of the U.S. *Copyright Act* provides: "Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise." For arguments in favour of limiting Crown Copyright, see Elizabeth F. Judge, "Crown Copyright and Copyright Reform in Canada," in Michael Geist (ed.) *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) pp. 550-94.


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