

	<p style="text-align: right;">Date : 11/10/2007</p> <p>The Librarian's Perspective</p> <p>Victoria Owen Head Librarian University of Toronto Scarborough Library owen@utsc.utoronto.ca</p>
Meeting:	153 Copyright and other Legal Matters
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The following is a librarian's perspective on "Debunking Myths about Collecting Societies, to discuss the Good, the Bad and the Ugly aspects of working with collecting societies. Reprographic licenses are negotiated with collecting societies.

The reprographic license described in this paper is in effect in all provinces in Canada except Québec, where its license is negotiated with Copibec. The distinction is significant in the Canadian context and results from our history. There are two different traditions in our legal framework. In the province of Québec the French civil code left its influence while in the other provinces, including Ontario, English common law dominated.

The paper begins with what might be considered the Good. In Canada the reprographic license for academic institutions is negotiated by the Association of Universities and Colleges of Canada (AUCC) with one of Canada's many (37 at a recent count¹) licensing organization called Access Copyright. The first license was signed in 1994. At the time it was thought that such a license would be advantageous for 3 reasons: 1) it would simplify copyright clearance procedures and 2) it could be done at fair price and 3) it would indemnify institutions against any claim of copyright infringement.²

What does the license cover? It is a voluntary license.
Part (a) of the license covers all single copies of copyrighted works.
Part (b) covers copies made for sale to students, such as coursepacks
(Coursepacks are assembled selections of materials from various sources)
Part (c) covers interlibrary loans

Part (d) covers copying for preservation
Part (e) covers copying for replacement due to loss or damage
Part (f) covers alternate format copies

In that any of the advantages worked in favour of the institutions is a matter of ongoing debate. Many faculty and librarians are intimidated³ by terms the license and err on the side of caution when copying; the price is no longer considered fair, and indemnification, if pushed, may be problematic⁴. The advantages to the institutions identified in 1994 don't seem like advantages today.

There are significant disadvantages to the license.

At the time of the first license not all institutions were in favour of a national license. The difficulty for the institution, it was thought, was that by remaining outside the agreement, a red flag would be raised to Access Copyright and place the institution under increased scrutiny and therefore at a greater risk for infringement actions. This implied threat influenced dissenters to acquiesce to the terms of the license.⁵ The threat has diminished significantly with the support of recent case law, giving academic institutions and libraries defensible positions to protect their legitimate rights. Dissenting voices continue to speak out against national licensing. This is evident in recent publications such as *In the Public Interest*, a collection of position papers on copyright written by high profile Canadian academics, and in conference papers in library and academic circles. Remaining outside a national license agreement is now considered a manageable risk.

Another disadvantage is the price. With each subsequent license renewal, Access Copyright attempted to raise copying fees - both per page rates and per capita fees. For example in 1996, the initial request was for a 60% increase in fees. There was no consultation or reasonable negotiation. The pattern for renewals has been that Access Copyright unilaterally presents its fee structure to AUCC, without substantiation for the increase and with prior discussion or negotiation. AUCC negotiated a lower rate than the original 60% proposed by Access Copyright, but felt compelled to agree to a higher than fair price in order to avoid a costly presentation before the tariff-setting Copyright Board⁶.

What began as an advantage, a fair price, becomes increasingly disadvantageous with every renewal. It may now make strategic and economic sense to move from blanket licenses to transactional permissions, when required. This would transform the role of the institutions from licensee to a more active administrative role and it is unlikely to exceed the current \$2 million collective costs of the license.

Another drawback to the license is the burdensome administrative task of reporting all copies, except for Part (a) copying. In addition to record keeping, there are scheduled inspections. This year, Access Copyright will be scrutinizing the eLogs of licensees to compare the logs with their observations and with purchased coursepacks. Based on past practices and representations by Access Copyright and its members, the questionable fairness of a one-sided analysis will further entrench the disparate positions for both parties and do little to advance understanding or the changing nature of the digital environment.

A further disadvantage to faculty and students is the overpayment for materials assembled in coursepacks. In a small, internal library study, a random selection of coursepacks was found to have fully one-third of its content available as licensed material in the University Library. Double payment is collected routinely and unnecessarily for use of this material.

Another problem with the license is that many academic publishers (especially American publishers) have been added to the exclusions list making the licence increasingly useless for post-secondary education. The exclusion list is too extensive for administrative staffs to use, and even more challenging for faculty and students who do not regularly deal with the license. The growing list of exclusions could ultimately make it pointless for many institutions to continue with the licence.

Further hamstringing the institutions' ability to operate, a 2004 agreement between Access Copyright and the U.S. based Copyright Clearance Center (CCC) prevented Canadian institutions from taking advantage of digital licencing for electronic reserves through the CCC. Prior to July 2004, Canadian universities requested permission through the CCC to license U.S. journal articles for electronic course reserves. The CCC was quick and efficient with a turnaround time of two weeks or less. With Access Copyright it can now take 2-3 months to get a digital permission. It is unworkable for faculty to plan for courses so far in advance and it becomes impossible to provide timely access to those requiring alternate formats. Universities can often get permission directly from the copyright holder more quickly than Access Copyright, although the individual requests add a tremendous administrative burden. The educational process is not well served by such troublesome procedures.

One of the biggest problems facing educational institutions today is the dearth of digital resources in the Access Copyright repertory. Publishers are not providing their digital files to Access Copyright. Librarians and other educators know that the trend to digital content has dramatically reduced paper copies. Photocopying rates are in steep decline at most campuses in Canada. According to Daniel Gervais in *“Collective Management of Copyright and Neighbouring Rights in Canada”* “acquisition of rights ... is perhaps the most important regulatory aspect of the activities of Collective Management Organizations. To a large extent, the credibility of CMOs vis-à-vis users depends on its ability to license the works and rights that users want... the *critical phase is thus usually the acquisition of the necessary licensing authority from the rightsholders concerned.*”⁷ Without a digital repertory the Access Copyright license may become of marginal value.

Another difficulty with the license is the requirement for keeping the alternate format intact (with no change of font, or addition of descriptive narration, etc.). It is unrealistic and unhelpful to the students and faculty that need the large print format. Often it is specifically the font that makes the material inaccessible.

A **major** problem with the license is the inclusion of rights that have already been granted through the Copyright Act. The licence attempts to subsume non-infringing activities such as fair dealing (which allows copying for research and private study), interlibrary loans, copies made for preservation, and alternate format materials for people with perceptual disabilities. ~~(The license does allow for the production of large print, which the Copyright~~

Act disallows.) The most significant point of divergence has been the interpretation of fair dealing.

In Canada, section 29 of the Copyright Act states that “Fair dealing for the purpose of research or private study does not infringe copyright.” The preamble to the license states that “the Institution is an educational institution established for the purpose of education, research and higher learning” and “the Institution desires to continue to secure the right to reproduce copyright works for the purposes of education, research and higher learning which reproductions would be outside the scope of fair dealing...” and that “the parties do not agree on the scope of said private dealing”. Part (a) of the AUCC license, which covers all single copies, it is contended, would be considered fair dealing for the purpose of research and private study. While much of the fault can be attributed to over-stepping collecting societies, libraries and academic institutions countenanced the signing of these agreements. It is important to note that in the Québec all single copies are excluded from its license. In this point the Québec situation contrasts with the Access Copyright license and removing Part (a) should be considered in any future license agreements.

In the intervening years since the first licenses some significant case law has clarified the scope of fair dealing, interlibrary loans, the requirement of a license, and the Supreme Court of Canada’s view of users’ rights. There are three cases that have transformed the landscape.

In 2004 with the landmark Supreme Court of Canada decision in the CCH case, there is now long-awaited jurisprudence that interprets fair dealing, removes the implied requirement for licensing, and articulates users’ rights in the overall copyright equation.

Here is the essence of the case, for our purposes:

A suit was brought by CCH (a legal publisher) along with a number of other publishers and Access Copyright against The Law Society of Upper Canada. The Law Society maintains and operates the Great Library which supplies a request-based photocopy service for Law Society members, the judiciary, and other researchers. The Great Library also had a self-service photocopier for the use of its patrons. In 1993, the publishers commenced copyright infringement actions for the following:

- infringement of copyright when copies of specific works were made; and
- infringement of copyright both by faxing and selling copies of copyrighted works through its custom photocopy service.

The Law Society counter claimed that copyright is not infringement when a single copy is made by the library staff or its patrons on a self-serve copier for the purpose of research.

The Supreme Court of Canada unanimously agreed that the Great Library’s actions did not infringe copyright and ruled the following:

On Fair Dealing

The Court ruled that the Law Society does not infringe copyright when a single copy is made in accordance with its access policy. The Court identified six factors to be

considered when deciding whether or not the particular use of a work constitutes fair dealing. The six factors are: (i) the purpose of the dealing; (ii) the character of the dealing;

(iii) the amount of the dealing; (iv) alternatives to dealing; (v) the nature of the work; and (vi) the effect on the dealing on the work (paras 54-59).

On Licensing

The Court ruled that the availability of a licence was in no way relevant to the question of whether or not a particular dealing was fair. A user who intends to deal fairly need not obtain a license from the rightsholder, and the rightsholder cannot use the user's failure to obtain a license as a basis for a claim of copyright infringement.

On the Use of Photocopiers

The Court ruled that the Law Society does not authorize the infringement of copyright by maintaining a copier for the use of its patrons and posting a notice that it will not be responsible for copies made in infringement of copyright. The case states that failing to control copying as an authorization to infringe "shifts the balance 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."⁸ The mere provision of equipment does not authorize infringement. Based on this ruling Part (a) of the AUCC license could be eliminated, similar to the license in Québec.

On Fax Transmissions

The Court ruled that fax transmissions were not communications to the public, and the Law Society did not sell the publishers' works. This ruling has implications for interlibrary loans and its removal from the license.

On Users' Rights

The Court made a strong pronouncement in favour of users' rights. In this regard it pointed out that "research must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained". The statement on users' rights reiterates the Court's earlier findings in the 2002 Théberge case: First it states: "The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator..." and goes on to say "Proper balance lies not only in recognizing the creator's rights but in giving due weight to their limited nature."⁹ In light of these two cases, and a third with SOCAN, another collecting society, the Court is giving the clear message that end-users have users rights of access to knowledge regardless of format (print or electronic) and the right of access is not to be unduly constrained.¹⁰

While these rulings have strengthened the position of institutions vis-à-vis licensing, AUCC allowed the current license to roll over and renew without change. This was a great disappointment to the academic library community and prompted independent action from some University Librarians. Various academic libraries have sought legal advice to proceed beyond the terms of the license, to act on behalf of users as per recent interpretations of the Copyright Act.

In Summary...

As is understood from the foregoing, institutional licensing should be approached with caution. Now is the time for libraries and institutions to be ascendant with licenses.

Review requirements

Institutions in Canada and those considering licensing agreements must conduct a complete and balanced review of the advantages and disadvantages of licenses with collecting societies.

Know your rights

Institutions must negotiate licenses for rights that are above and beyond the Copyright Law. Any areas of contention may be included “without prejudice”, so that no precedent is set. Librarians must **not** allow users’ rights to be taken away by contract law or licensing precedents in other jurisdictions.

Librarians need to know that we cannot be intimidated by the threat of legal action. Courts are taking a hard line on threats of action in copyright situations. The New York Times reported on August 3, 2007 that computer and communication companies have filed a complaint with the Department of Trade against book publishers that have overstated copyright warnings by a “systematic misrepresentation of consumer rights to use legally acquired content”¹¹. In Canada, librarians and educators pressured Access Copyright to withdraw its propaganda-styled web tool, Captain Copyright, as it misrepresented fair dealing, private copying and public domain provisions of the Copyright Act.¹² In another American case, Prof. Carol Shloss prevailed in her lawsuit against the estate of James Joyce to publish materials free from the threat of unsubstantiated copyright infringement liabilities. The Joyce estate tried to prevent fair use of published works and letters.¹³

Negotiate effectively

Academics and librarians must change the dynamic of license negotiation. In our sphere of influence librarians have the authority to significantly alter the agreements and correct many of the flaws mentioned above. In a voluntary licensing situation librarians can stand firm until the terms of the license suit the needs of the user community. This may require short-term inconveniences, such as transactional clearances, but with the relief from the fees, it may be workable.

Be strategic

Academics and librarians must negotiate licenses that are future-looking and reflect the way institutions work with print and digital materials. Our institutions must learn from the lobbying efforts of licensing organization that are strenuously bent on the “furtherance of ... members’ rights and interests”.¹⁴ Librarians must effectively and relentlessly lobby for the furtherance of users’ rights and interests. Are we strenuously bent on our agenda to integrate the principles of access to information into licensing agreements?

Notes

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- ¹ Daniel Gervais "Collective Management of Copyright and Neighbouring Rights in Canada" http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/collective/02_e.cfm Annex 1. accessed July 27, 2007
- ² Telephone conversation with Steve Wills, Manager, Legal Affairs, Association of Universities and Colleges of Canada, July 30, 2007
- ³ Keith D. Walker, "The Canadian Copyright Law and Common Educational Reprography Practices" The Canadian Journal of Education/Revue canadienne de l'éducation, Vol. 21, No 1 (Winter 1996) p. 58
- ⁴ Howard P. Knopf, "Copyright Collectivity in the Canadian Academic Community: An Alternative to the Status Quo?," Intellectual Property Journal, Vol 14, no 1, Carswell: Toronto 2000, p. 122
- ⁵ Conversation with Carole Moore, Chief Librarian, University of Toronto Libraries, August 3, 2007
- ⁶ Telephone conversation with Steve Wills, Manager, Legal Affairs, Association of Universities and Colleges of Canada, July 30, 2007
- ⁷ Daniel Gervais "Collective Management of Copyright and Neighbouring Rights in Canada" http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/collective/02_e.cfm accessed July 27, 2007
- ⁸ CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, [2004] 1 S.C.R. 339 <http://scc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html> accessed July 27, 2007
- ⁹ Théberge v. Galerie d'Art du Petit Champlain inc., 2002 SCC 34, [2002] 2 S.C.R. 336 <http://scc.lexum.umontreal.ca/en/2002/2002scc34/2002scc34.html> accessed July 27, 2007
- ¹⁰ Daniel G. Gervais, "The Purpose of Copyright Law in Canada" University of Ottawa Law and Technology Journal, 2005 www.uoltj.ca accessed August 1, 2007
- ¹¹ New York Times http://www.nytimes.com/2007/08/02/business/media/02copyright.html?_r=2&adxnnl=1&oref=slogin&ref=business&adxnnlx=1186154004-XtYmZ9EX%2BfiPSbPhdsj/Uw&oref=slogin accessed August 5, 2007
- ¹² "2006 Annual Report", Access Copyright: Toronto [2007], p 7
- ¹³ Los Angeles Times <http://www.latimes.com/news/opinion/la-oew-cavanaugh5jun05,0,2402066.story?coll=la-opinion-center> accessed August 5, 2007
- ¹⁴ David Vaver, Colloquium on the Collective Administration of Copyright, Ross Mayot Associates, Toronto, 1995 p.176