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Keeping Up with Copyright

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I was privileged to speak at the Super Conference here in 2004 on "Copyright Controversies":

That presentation is archived on the OLA site at http://www.accessola.com/superconference2004/fri/at3_45pm.html#810

Much has happened since then and I look forward to discussing those developments with you today.

Keeping up with Copyright

(1) Do libraries need the "library exemptions" or the "education institutions" exemptions in the Copyright Act?

(2) If we want, can we get "blanket licenses" to do what we want to do in libraries?

(3) Where do we go from here?

(1) Do libraries need the "library exemptions" or the "education institutions" exemptions in the Copyright Act?

The short answer to this question is "No".

For the longer version of this answer, you may wish to read my chapter:

> "Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries"
>
> in the recent book edited by Michael Geist entitled In the Public Interest: The Future of Canadian Copyright Law

Published this year by Irwin Law and available for sale in its entirety, each chapter, including mine, is also available free at www.irwinlaw.com

The medium length answer is what we can discuss together now!

Who gets the "library exemptions" or the "educational institutions" exemptions in the Copyright Act?

"libraries, archives and museums"

Became "LAMs" in 1997 when these provisions were added

(1) Not established or conducted for "profit"
- ➢OR
- ➢Does not form part of
  - •OR
  - •Is not administered by
    - ❖OR
    - ❖ directly or indirectly controlled by
- ➢A body that is established or conducted for profit

(2) AND in which is maintained a collection of documents and other materials

(3) AND that is open to the public or to researchers

OR as prescribed by regulation

"educational institutions"

- non-profit "schools"
- non-profit "colleges"
- government educational facilities
- non-profits added by regulation

NOT ALL LIBRARIES QUALIFY

If a library does qualify as a LAM, what does it get?

Libraries, Archives and Museums sections:

s.30.1 (1)
(2)
(3)
(4)

s.30.2 (1)
(2)
(3)
(4)
(5)
(5.1)
(6)

s. 30.21 (1)
(2)
(3)
(4)

Machines Installed in Educational Institutions, Libraries, Archives and Museums

s.30.3 (1)
(2)
(3)
(4)
(5)

Libraries, Archives and Museums in Educational Institutions

s.30.4

Library and Archives of Canada

s.30.5

And special Bonus!!!

Reg.99-325 – Exception for Education Institutions, Libraries, Archives and Museums Regulations (9 ss.)

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Why can it be said that libraries do not need these exceptions?

It all started in 1993 when Canadian legal publishers got cross with the Great Library

Janine Miller, Director of Libraries for the Law Society of Upper Canada

The "LAMs" exceptions had not yet been passed.

The Great Library, Osgoode Hall

The legal publishers had not yet joined AccessCopyright (then CANCOPY)

Custom photocopy service

CCH et al v. Law Society of Upper Canada

[2004] SCR 339

The SCC was interpreting the "fair dealing" provisions of the Copyright Act in the Law Society case:

The Canadian statute provides for fair dealing in five categories:

Research

Private study

Criticism *

Review *

News reporting *

*** if source and attribution mentioned**

The SCC specifically said:

"a library can always attempt to prove that its dealings with a copyrighted work are fair under section 29 of the Copyright Act. It is only if a library were unable to make out the fair dealing exception under section 29 that it would need to turn to the Copyright Act to prove that it qualified for the library exception."

(para.49)

How are libraries involved in research?

"research is not limited to non-commercial or private contexts." (para.51)

"Persons or institutions relying on the s.29 fair dealing exception need only provide that their own dealings with coyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practice and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

When the Great Library staff makes 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."

(From para.63 and 64)

How are libraries dealing fairly with works?

It may be possible to deal fairly with the whole work… for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. (from para.56)

Faxing works to patrons is not "communications to the public" – the SCC agreed with the trial judge that such communications "emanated from a single point and were each intended to be received at a single point" (para.77, quoting from the trial judgment) (although a series to the same patron might be a problem)

"…patrons … cannot reasonably be expected to always conduct their research on-site at the Great Library… it would be burdensome to expect them to travel … each time they wanted to track down a specific source" (para.60)

What did the Supreme Court of Canada declare about libraries?

all libraries can act as agents for their patrons (no need for the s.30.2 exceptions)	No need for s.30.2 and its specific regulations
no liability for photocopiers if you post signs such as that posted by the Great Hall Library at Osgoode Hall, the library of the Law Society of Upper Canada involved in the case	No need for s.30.3 and its conditions and the regulations that have been enacted under it.
if libraries make copies for research is OK and making whole copies is OK, then…	Arguably no need for s.30.1 and its conditions
	And ss.30.4 and 30.5 become redundant also!

Under the Regulations since 1997:

WARNING!

Works protected by copyright may be photocopied on this photocopier only if authorized by:

(a) the *Copyright Act* for the purposes of fair dealing or under specific exemptions set out in that Act;

(b) the copyright owner; or

(c) a license agreement between this institution and a collective society or a tariff, if any.

For details of authorized copying, please consult the license agreement or applicable tariff, if any, and other relevant information available from a staff member.

The *Copyright Act* provides for civil and criminal remedies for infringement of copyright.

Unnecessarily verbose

Approved by the SCC in 2004:

The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by the users of these machines.

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The Supreme Court of Canada in *CCH* v. *LSUC* did list a set of factors, first proposed in the Federal Court of Appeal, that judges should consider as a "useful analytic framework" in interpreting "fair dealing"

- **purpose of the dealing**:
  - must be an allowable purpose, one mentioned in the act
- **character of the dealing:**
  - how was the infringing work dealt with?
- **amount of the dealing:**
  - what was the amount and substantiality of portion used in relation to the whole work?
- **alternatives to the dealing**:
  - defense more likely allowed where no alternative available
- **nature of the work:**
  - i.e., strong public interest in access to legal resources
- **economic impact on owner:**
  - how is market for work impacted by fair-dealing in question?

Can the SCC be overruled by new legislation changing the position of libraries?

This may be the new battleground for us to follow the trail blazed by Janine Miller and her library.

Parliament may try to narrow the exceptions articulated by the Supreme Court for libraries, librarians and others.

Could a new Parliament "claw back" libraries' rights?

Why would Parliament try to narrow?

TRIPS and other agreements Canada has signed privilege copyright holders over users:

> Members [states] shall confine limitation or exceptions to exclusive rights
>
> > To certain special cases
> >
> > which do not conflict with a normal exploitation of the work
> >
> > And do not unreasonably prejudice the legitimate interests of the right holder

(the "3 step" test)

How would the SCC interpretation withstand any such attempt by Parliament?

The SCC, beginning some years ago in the Theberge case, and continuing forward to the 2004 decision in the Law Society case, has spoken of users' rights needing to be respected as well as those rights created under the copyright regime for copyright holders.

Rights language such as this may be interpreted as invoking the protection of the Charter value of freedom of expression (s.2(b)) – and Parliament's attempt to extend the rights of copyright holders might be found to be unconstitutional.

A system of constitutionally protected users' rights?

- "Canada's *Copyright Act* sets out the rights and obligations of both copyright owners and users." (para.11)
- "exceptions to copyright infringement, perhaps more properly understood as users' rights, … set out in ss. 29 and 30 [the fair dealing provisions] of the Act." (para.12)
- " "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained." (para.51)
- "The language [of s.29] is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works." (para.63)

(2) If we want, can we get "blanket licenses" to do what we want to do in libraries?

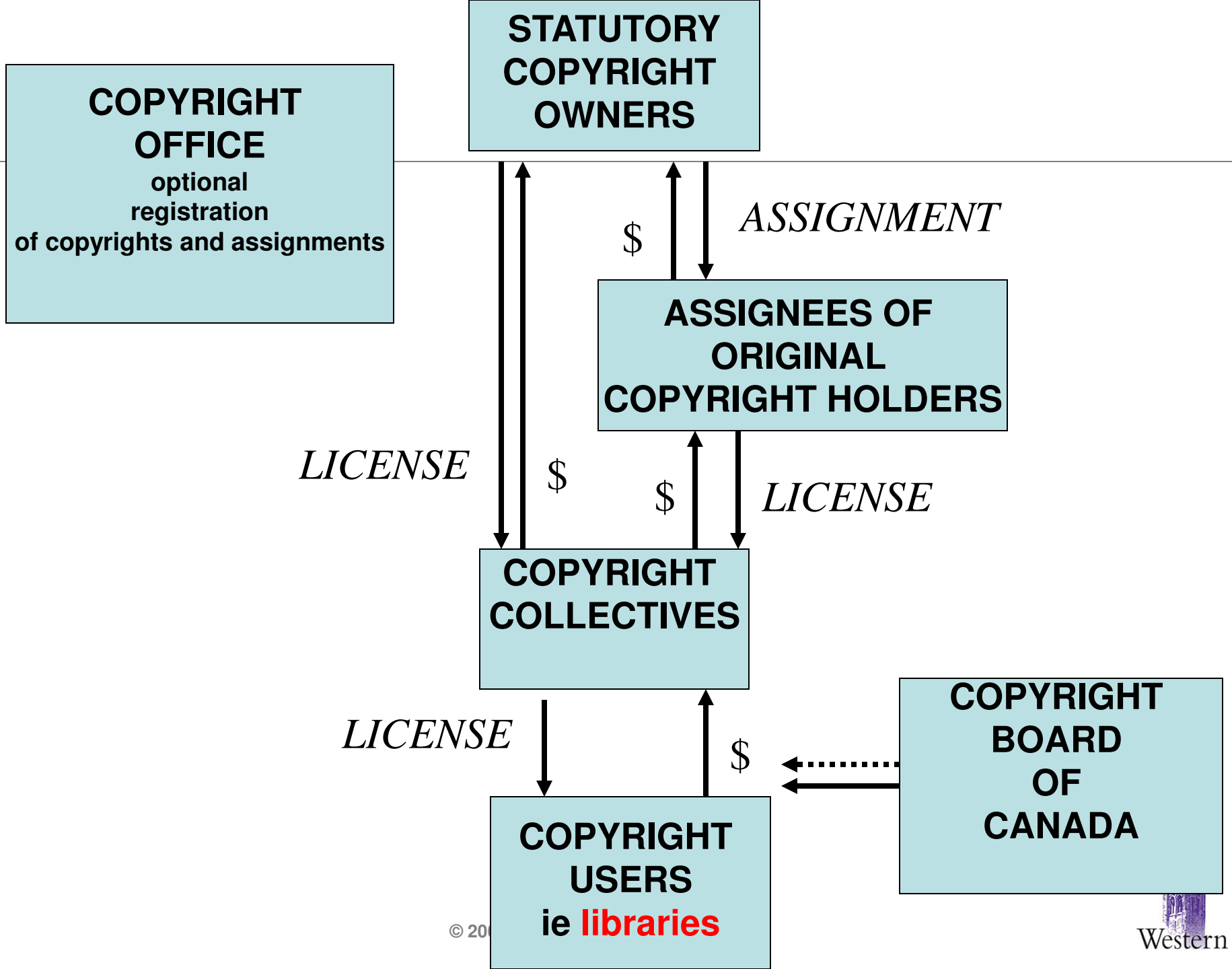
We would only require licenses in libraries for activities that we undertake that fall outside the ambit of fair dealing as defined by the SCC in the Law Society case.

Do we need the licenses we have?

Probably not

Can we buy the licenses we want?

Probably not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ASSIGNEES OF ORIGINAL COPYRIGHT HOLDERS
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COPYRIGHT COLLECTIVES
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ie libraries

AccessCopyright and UWO

Contract	**AccessCopyright has reciprocal agreements with COPIBEC in Quebec and other international organizations – it offers UWO protection from the claims of those who are affiliated with it, either directly or indirectly**
Only available to the parties	**It offers an indemnity clause to cover the costs involved if others sue**
Only available for the rights contracted	**reproduction rights for literary works (photocopy) available for sale**
Only available for the price negotiated	**The price has gone up with each renegotiation of the contract, despite the introduction of explicit exception in the legislation for educational institutions and LAMs (from which UWO benefited)**
Only available for the term negotiated	**No moral rights covered (attribution, integrity, association)**

Can we buy blanket licenses from a collective for electronic rights?

Can we post materials to websites?

- Blanket licenses are not available for purchase for this purpose..
  - Existing licenses between AccessCopyright and institutions do not provide for this use
  - AccessCopyright can provide some specific licenses for such uses, where it has obtained the right to do so from the rightsholder – but it has not chosen to offer blanket licenses for this use
  - It is not clear who owns the rights to post materials on the net once the right to publish has been assigned by the author - although settled in the United States by the Supreme Court in the Tasini case, in Canada, we await the decision in Robertson v. Thomson

Supreme Court of Canada on Copyright

THÉBERGE 2002 (7 sitting) (majority & minority)	CCH v LSUC March 2004 **UNANIMOUS**	SOCAN June 2004 **ALL CONCUR**	ROBERTSON v. THOMSON Heard December 14, 2005. Decision expected…
McLachlin, CJ	McLachlin, CJ *	McLachlin, CJ	McLachlin, CJ
Major	Major	Major	**Major - retiring**
Binnie *	Binnie	Binnie *	Binnie
	Arbour	Arbour	**ABELLA**
Iacobucci	Iacobucci	Iacobucci	**CHARRON**
	Bastarache	Bastarache	Bastarache
LeBel	LeBel	LeBel **(*concur)**	LeBel
L'Heureux-Dubé	Fish	Fish	Fish
Gonthier *	Deschamps	Deschamps	Deschamps

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Would AccessCopyright be able ever to meet all our needs?

SOCAN – performance and online distribution of musical works

SODRAC – distribution of visual art works

Audio Cine Films – films from certain commercial studios

Criterion Pictures – certain educational films and certain other commerical studios

National Film Board – represents its own repertoire (without being part of a collective)

CBC – represents its own repertoire (without being part of a collective)

The Copyright Board of Canada lists about 35 Canadian collectives on its website: at http://www.cb-cda.gc.ca/societies/index-e.html

What can we do about the prices charged by collectives?

You cannot "buy" rights from American sources, if the rightsholder is represented by a Canadian collective.

Librarians need to get active before the Copyright Board:

> The Board is an economic regulatory body empowered [under the Copyright Act] to establish, either mandatorily [because the Copyright Act says so for certain collectives] or at the request of an interested party [like a library?], the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective administration society
>
> (from the Board's website)

(3) Where do we go from here?

Bill C-60, An Act to Amend the Copyright Act, subject of so much concern in 2005, fell with the Liberal minority government before Christmas.

The Liberals had vowed to re-introduce it, if elected.

Liberal Minister of Canadian Heritage Liz Frulla lost her seat in the election …

The Conservatives have said that they “will work to strengthen opportunities and accessibility in both domestic and international markets for creative works”

Where do we go from here?

- Watch for the Thomson v. Robertson decision of the Supreme Court of Canada…
- Watch for the actions of this new minority government…
- Exercise the fair dealing rights confirmed as ours by the Supreme Court of Canada:
  - Don't pay for uses of material by contract in agreements with collectives or individual owners or vendors that we already possess by virtue of fair dealing…
  - Be prepared to challenge any attempts to limit our rights that are introduced in attempts to amend the Copyright Act
- Buy Canadian! Libraries in Canada can only be protected from the claims of rightsholders in Canada if we have bought or received free permissions for uses in Canada from the people or organizations that had the rights for Canada: American vendors are unlikely to hold the Canadian rights…
- Where we have to buy rights, haggle over price – either with the copyright owners or before the Copyright Board…

Thanks…