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The Copyright Debate: Finding the Right Balance for Teaching, Research, and Cultural Expression

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The Copyright Debate: Finding the Right Balance for Teaching Research and Cultural Expression

**a Presentation
sponsored by the UWO Libraries**

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Overview of Presentation

- Copyright as a potential impediment to teaching, research and cultural production – sources of various several threats
- overview of the nature and scope of copyright, what interests does copyright protect, requirements for copyright to subsist
- owners' exclusive rights in copyright and exceptions / limitations to owners exclusive rights (fair dealing and others)
- understanding the relationship between fair dealing and the access copyright license access to information and information equity

How does Copyright become an impediment to information access and equity concerns

- threats of overly aggressive enforcement by rights holders;
- uncertainty in current law coupled with penalties (statutory damages)
- spectre of even more onerous laws (Canadian version of DMCA, various international agreements)
- risk-averse institutions
- lack of public awareness about users rights and exceptions to infringement

What prevents Copyright from becoming an undue burden to access to information?

Various safety valves built into copyright laws have historically been used to prevent the copyright monopoly from unduly hampering users rights:

- fair dealing and other exceptions to infringement liability
- limits on duration and the public domain
- originality requirements
- the idea/expression dichotomy

many of these safety valves were under threat by the provisions of Bill C-61

Emerging information & communication technologies (ICTs) unsettle old practices:

- new ICTs present owners with powerful means of expanding their control over information goods past “points of sale” that can be access-destructive
- and new ICTs also provide means for mass copying;
- old business models that rely on scarcity and high entry-costs are challenged;
- old dichotomies between creators/consumers, broadcaster/audience are collapsing;
- tools for creativity/transformativity more diffused;
- Why are these changes important from equity perspective?

Overview of Canadian Copyright Law

For the full text of the Act, see

<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42>

What interests does copyright protect?

Section 2: "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;

It is very important to distinguish between **WORKS** and the other subject matter as different rules apply. This presentation will focus on **WORKS**

Criteria for Copyright to Subsist

In order to qualify for copyright protection, a work must be both:

- Original (no clear definition in Act, mostly based on case law, last word from SCC in *CCH v LSUC*)
- Fixed

Owners exclusive rights in a work

Every original literary, dramatic, musical and artistic work is protected whatever may be the mode or form of its expression.

Section 3:

"copyright", in relation to a work, means 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 . . .

Copyright in works- includes the **sole right** to:

- (a) to produce, reproduce, perform or publish any translation of the work,
- (b) to convert [a dramatic work] into a novel or other non-dramatic work,
- (c) to convert [a novel or other non-dramatic work] into a dramatic work, by way of performance in public or otherwise,
- (d) to make any sound recording, film or other contrivance by means of which the [literary, dramatic or musical] work may be mechanically reproduced or performed,
- (e) to reproduce, adapt and publicly present the [literary, dramatic, musical or artistic] work as a cinematographic work,

cont'd...

Copyright in works- includes the **sole right to:**

- (f) to communicate the [literary, dramatic, musical or Artistic] work to the public by telecommunication,
- (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,
- (h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and
- (i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts

Think of each of these rights as a separate stick in a bundle, as they are separately assignable. Any infringement analysis must be based on one or more of these sole rights

importance of the *sole* right

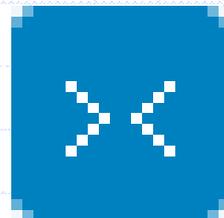
- copyright is a statutory monopoly
- the owner's section 3 rights are not just rights for the owner to do certain things with respect to the work
- they are **sole** rights,
- . . . meaning **exclusive** rights
- which includes the right to **exclude** all others

What is Copyright Infringement?

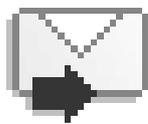
Section 27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

Note: Applies generally to works and other subject matter, so you need to refer back to the specific section that creates the rights (i.e. section 3 in the case of a work)

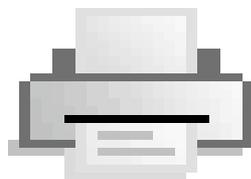
Consent can be express or implied



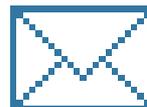
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To review . . . up to the point of infringement

- Has one of the section rights (reproduction, public performance, communication, authorization, etc) been implicated?
- Has the reproduction or performance met the threshold requirement of substantiality?
- Was there consent (express or implied)?

Exceptions to Infringement

- it is hard to imagine going through a whole day in an activity that is information intensive where one would not commit numerous acts of what technically constitute infringement . . .
- . . . the difference between **actionable infringement** and infringement that is excused is often subtle, fact dependant, it is contingent on many factors

Exceptions to Infringement

- Fair dealing for the purpose of research or private study (section 29)
- Fair dealing for the purpose of criticism, review or news reporting if certain attributions are made (section 29.1, 29.2)
- Certain acts of educational institutions, Libraries, Archives and Museums (sections 29.4-30.5, SOR/99-325 effective September 1999)
- Certain copying for persons with perceptual difficulties (section 32)
- Others

Current Canadian Fair-Dealing provisions

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned: (same as 29.1)

**A pronouncement from the Supreme Court
about the proper balance in copyright law:**

“Excessive 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.”

Théberge v. Galerie d’Art *paragraph 32*

...foreshadowing their ruling in CCH v LSUC.

CCH v LSUC

2004 SCC 13

“important to clarify some general considerations about exceptions... Procedurally, a defendant is required to prove that .. 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.”

CCH v LSUC expands fair dealing. . .

“User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”

(para 48)

“research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. (includes work done by lawyers carrying out commercial practice)

(para 51)

SCC also says: that section 29 is always available to a library, resort to s. 30.2 only necessary if library cannot make out the fair dealing exception.

CCH v LSUC

2004 SCC 13

SCC adopts list of factors. . .

- 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

"...a useful analytical framework to govern determinations of fairness in future cases" (para 53)

CCH v LSUC

2004 SCC 13

Character of the dealing [para 55]

- examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair.
- but if a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing.
- If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness.
- 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.

(note how last factor gives rise to rights accretion risks)

CCH v LSUC

2004 SCC 13

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act's balance between owner's rights and user's interests.

para 70

contrast with importance of 4th factor under US fair-use

Conclusion on weighing of factors:

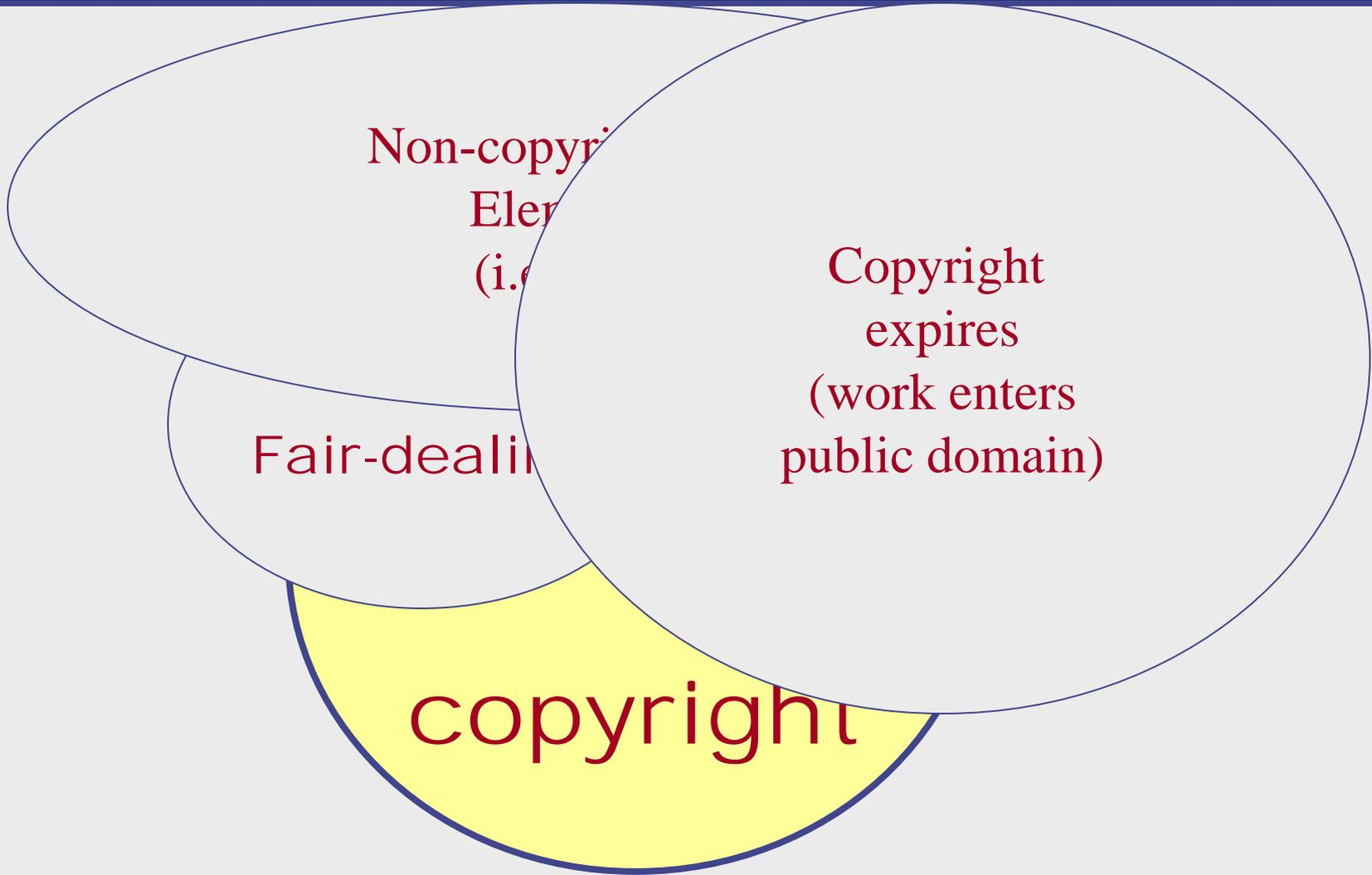
“factors ... considered together, suggest that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair.

- Access Policy places appropriate limits on type of copying LS will do.
- states that not all requests will be honoured -- request rejected if doesn't appear to be for the purpose of research, criticism, review or private study
- **If question arises as to whether the stated purpose is legitimate, Librarian will review** (note discretion is vested in librarian-- court is recognizing the expertise of librarians in this area)
- Policy limits the amount of work that will be copied, and Librarian reviews requests that seem excessive and has the right to reject

Court concludes that LS' dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright.” [para 73]

Disposition of *CCH vs LSUC* case

- Law Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made in accordance with its "Access to the Law Policy".
- Law Society does not authorize copyright infringement by maintaining photocopiers in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright.
- fax transmissions did not constitute communications to the public
- court would have found that Great Library qualifies for the library exemption (were it necessary)



no
copyright

Relationship between Access Copyright License and Fair Dealing

- especially now, given the broad scope of fair dealing, it is important to consider the relationship between the Access Copyright License and fair dealing provisions
- Basically the two are designed to co-exist, it is not the intention for the AC license to supersede or otherwise limit fair dealing
- See provisions in AC agreement . . .

Preamble to Access Copyright-UWO agreement:

http://www.lib.uwo.ca/copyright/access/access_preamble.shtml

* * *

AND WHEREAS 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 under the *Copyright Act* R.S.C. 1985 c.C-42, as amended;

AND WHEREAS the parties do not agree on the scope of the said fair dealing;

Agreement terms:

3. This Agreement does not cover:

* * *

(c) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary;

and paragraph 4 adds:

4. By entering into this Agreement neither party is agreeing or representing in any way, either directly or indirectly, that the making of a single copy of all or a portion of a periodical article of a scientific, technical or scholarly nature and a single copy of a portion of any other Published Work, without the permission of the owner of copyright therein, is or is not an infringement of copyright.

Note that agreement predates CCH decision but has not been significantly altered to reflect the reality of the court decision. . .



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Department

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(p.2)*

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<http://www.lib.sfu.ca/researchhelp/writing/thesesformatting/WorkingWithinCopyright.pdf>

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COPYING ON CAMPUS

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Can I copy something not covered by Access Copyright?

* If you want to make copies of materials not covered by the Access Copyright licence and the material is not in the public domain, then permission must be obtained from the copyright owner before copying can be done .

Recommendations for UWO Libraries:

- Copyright information must better a more accurate relationship between fair-dealing and the access copyright license;
- Pages need to be wholly redone
- Library needs to rise to the CCH Challenge, not only in terms of better reflecting the law, but also in terms of giving the library a stronger role in copyright policy (as per para

Some “better” university library copyright websites to consider:

- <http://library.ucalgary.ca/copyright>
- <http://www.lib.unb.ca/copyright/>

Make better use of Resources from CAUT:

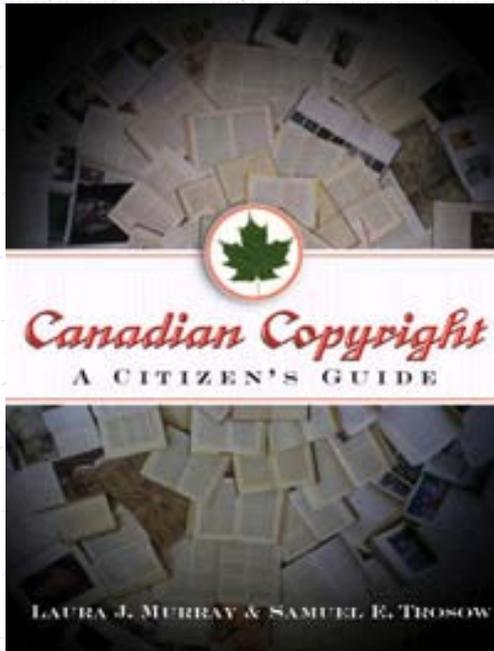
[Ownership and Authorship of Collaborative Academic Work \(No. 2\)](#)
(Intellectual Property Advisory, Jul 2008)

[Retaining Copyright in Journal Articles \(No. 1\)](#) (Intellectual Property Advisory, July 2008)

[The Copyright Act and Academic Staff \(Vol. 10 No. 1\)](#) (Education Review, Feb 2008)

IP Advisory on Fair Dealing

<http://www.caut.ca/uploads/IP-Advisory3-en.pdf>



Canadian Copyright Guide: A Citizen's Guide

by Laura Murray and Samuel Trosow

published by Between the Lines (Oct 2007)

ISBN: 978-1897071-30-4 (224 pgs, \$24.95)

http://www.btlbooks.com/Links/ordering_info.htm

Introduction:

<http://samtrosow.ca/images/introduction.pdf>

Chapter 1: Copyright's Rationales:

http://www.openbooktoronto.com/magazine/fall_2007/articles/canadian_copyright



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