

Slide 1 — Introduction

In this session I'm going to talk about something that has been on a lot of people's minds, especially since the expansion of fair dealing in the courts and in legislation, and the addition of new exceptions to copyright such as for user-generated content. The question is: "Do restrictive terms of use in licence agreements trump the user rights granted in copyright law?" You might assume that they do, but I think there is a strong argument to be made that they don't, and that's what I'm going to discuss today.

Slide 2 — Western's copyright guidelines

I'd like to talk a bit about what's happening at my school, the University of Western Ontario. As some of you might know, Western and the University of Toronto have not renewed their blanket licence agreement with Access Copyright, and they were unable to negotiate a new one. Prior to this year, Western did not have any substantive copyright guidelines posted on its web site, but since the relationship with Access copyright has ended, the school has put together a temporary copyright committee headed by Tom Adam, who is a librarian. The committee have developed a set of guidelines, and more will be added as time goes on. So far, the Western copyright web site has the following:

- Copyright Decision Map
- Fair Dealing Exception Guidelines
- Educational Exception Guidelines
- Personal Exception Guidelines
- Frequently Asked Questions

There are also plans for copyright literacy training in the form of classes and workshops.

Slide 3 — Fair dealing exception guidelines

So as an example, let's have a look at Western's fair dealing exception guidelines. I won't go through the whole document, but here's a bit I'd like to point out:

“As a general guideline, your copies may be provided or communicated to each student enrolled in your class or course as:

- a print handout
- a posting to a secure (password-protected) learning management system restricted to Western students, such as OWL
- [or as] part of a [printed] course pack”

So it's saying that instructors can make multiple copies of short excerpts of works, and distribute them in print or electronically to a course management system.

Slide 4 — Fair dealing generally

This is what might be called an “expansive” view of fair dealing. But it's not out of line with how the Supreme Court interprets the exception. They've said that fair dealing should be read broadly, that it's an integral part of the copyright regime, and it's a user's right.

But what happens if a licence agreement for electronic works prohibits the use of the material in a way consistent with fair dealing or some other copyright exception? The courts have not really addressed this. In *CCH v Law Society of Upper Canada*, the court said that the availability of a licence does not relevant to deciding whether a dealing has been fair. Even if there is a licence available for the intended use, it may still be fair dealing. In other words, just because the

copyright owner is offering you permission, it doesn't necessarily mean that you would require permission.

Slide 5 — Contract vs copyright

But that doesn't mean that licences are irrelevant. Access to journals in colleges and universities is increasingly electronic. A study by the Ontario Council of University Libraries found that, in 2010, member universities collectively had subscriptions to 80,000 print serial titles, and 847,000 electronic serial titles. From 2002 to 2009, electronic journal expenditures of members of the Association of Research Libraries tripled, while total library material expenditures went up only by a factor of 1.3. It's not hard to see why electronic access is preferred: the material does not take up any shelf space, it's very convenient to use from the point of view of faculty and students, and it can be more cost efficient when all considerations are taken into account.

But what the libraries are paying for, in most cases, is access to the material, not ownership of a copy of it. And the access is granted and delineated by means of a licensing contract. This is something separate from copyright. Fair dealing might not be copyright infringement, but is it a breach of contract? What happens if the licence agreement forbids it?

Here are a couple of examples to illustrate:

The MIT Press Journals institutional licence has the following clause:

- “[users] may not... make multiple copies in either digital or paper form; or store any electronic file of such material on any intranet...”

Mind you, MIT Press Journals is an American company, but they do a lot of business in Canada.

And in Canada, this term conflicts with the Supreme Court's ruling in *Alberta v Access*

Copyright that multiple copies of excerpts for classroom use may be fair dealing.

The Chronical of Higher Education's user agreement, which applies to anyone using the web site, ironically forbids the creation of "educational materials":

- "You may not... create course books or educational materials using any of the Site content..."

The Harvard Business Review took this to an extreme and caused controversy last year by restricting the use of its material as assigned course materials. Even linking to an article was forbidden under the standard licence agreement — but of course you *could* pay extra if you wanted to do that.

Slide 6 — Contract vs copyright

What to do then? Where can we find guidance to help us solve this conflict? One place a librarian or instructor might look is the policies and guidelines of her institution. Fair dealing policies approach this issue in different ways. My research from last year showed that 64% of the largest Canadian universities outside Quebec had policies explicitly saying that the terms of a licence agreement trump fair dealing.

The AUCC Fair Dealing Application Guidelines, which have been adopted by a few schools, state that: "Any copying and/or distribution restrictions contained in a licence that permits access to a copyright-protected work will take precedence over the Fair Dealing Policy." In 2008, the Canadian Association of Research Libraries issued a report on e-books, saying that "if a library

and a publisher agree in a contract that fair dealing will not apply to activities that are specified in the contract, then the contract's provision prevail regardless of what the Copyright Act provides.”

The Western Fair Dealing Guidelines, do not make specific mention of licence terms that conflict with user rights. All it says is that a licence might permit certain intended uses of a work, and then a fair dealing analysis would not be necessary. But it doesn't address what might happen if a licence agreement forbids the use of a work that is otherwise covered under an exception.

Slide 7 — Canadian law

Does the legislation have anything to say about the issue? There is nothing in the Copyright Act about conflict between licence terms and copyright exceptions. In section 89, all the way at the end, we find the following:

“No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.”

What this means is that copyright only exists because there is a federal statute that creates it. We know that this means that provincial legislatures and regulatory bodies cannot create or alter copyright. But what about private contracts?

As I already mentioned, it's not been directly tested in court. But we can still tease out some clues from the law to see how the courts might decide in a situation where a university is sued for breach of contract where a copyright exception is involved.

Slide 8 — Canadian law

Government is *generally* unwilling to interfere with a person's freedom to enter into contracts. If you know what you're getting into, and the contract is properly entered into, and there's no fraud involved, the courts prefer to let the agreement stand. You are allowed to give up a right or property in exchange for something else — it happens every day; you go to the store, you give up some money, and in exchange you get a good or service.

But sometimes courts will not give effect to certain contracts or terms — for example, you cannot contract to do something illegal. Well, you can, but you can't enforce it legally. You will probably go to jail.

Additionally, there are certain rights that cannot be waived or exchanged. These are known as “statutory rights”. As you can imagine, a statutory right is one that is set out in a statute. For example, certain guarantees are set out in the Ontario New Home Warranties Act. The vendor is deemed to guarantee that the home is free of defects, that it's suitable to live in, and things like that. And furthermore, it can't be waived by contract. Section 13(6) of the act says that “The warranties... apply despite any agreement or waiver to the contrary...”

You will also find statutory rights in the Employment Standards Act, which say that employees cannot contract out of the standards set by the law.

Slide 9 — Canadian law

The statute itself does not have to explicitly state that certain rights cannot be waived by contract. This can be inferred by looking to the purpose of the statute as a whole, and the purpose of specific provisions. If the purpose of the right is to protect the public at large, then allowing

individuals to waive it could weaken its effect. If employees could waive employment standards by contract, employers would offer them some kind of incentive (or threat) to do so, and the Employment Standards Act would be basically useless.

Now if we look at the purpose of the Copyright Act — the courts have said that the purpose of copyright law is to promote progress in the arts and in science, for the benefit of society as a whole. In *Théberge v. Galerie d'Art du Petit Champlain*, a case that preceded *CCH*, the Supreme Court said that “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.” In *CCH* the court said that provisions excepting certain uses from the need of permission or payment are necessary to maintain balance between the rights of copyright owners and the ability to use works in certain ways.

Slide 10 — Canadian law

Now I said that it's not settled law whether licence agreements can trump copyright exceptions. But there is a recent-ish Supreme Court case that can shed a lot of light on the question. It's from 2012 and it's called *Reference re: Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, or the CRTC Reference for short.

In this case, the CRTC wanted to allow private broadcasters the opportunity to negotiate with broadcast distribution undertakings (or BDUs) for compensation to retransmit signals. However, the Copyright Act already provides for an exception whereby BDUs can retransmit local signals without permission or payment of royalties.

The majority of the court ruled that the CRTC's proposed regulation creates a conflict with that exception, which would upset the balance created by Parliament in enacting the exception. The

court said that “[A]lthough the exception to copyright infringement established in section 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works.” Interestingly, it was the *dissent* that characterized the exception as a “statutory right”, but they disagreed with the final ruling for different reasons.

Now you might ask yourself, if statutory rights are intended to protect the public, and they cannot be waived or transferred by contract, how can an author assign her copyright to, say, a publisher? She can do that because it is specifically provided for in the Copyright Act, namely, section 13(4), as long as the assignment is in writing.

Slide 11 — Conclusion

So to sum up — it appears, then, that copyright exceptions are statutory rights. The Supreme Court has referred to them as “user’s rights”, and their purpose is to preserve the user’s ability to deal with works in certain ways, which is ultimately in the public’s interest. Allowing them to be waived would compromise their ability to preserve the balance in copyright that was set by Parliament. Therefore, a strong argument can be made that copyright exceptions cannot be waived in contract.

Slide 12 — Practical questions

This presentation has primarily focused on the legal aspect of contracts and copyright. But there are practical considerations as well, for libraries, for administrators, and for users. I don’t have answers for them, but they are important nonetheless. For example, if licence agreements do not trump user rights, how are copyright owners and database publishers going to react? Their

business model is based in part on the idea that they can limit certain uses of works contractually, outside the copyright environment. Will they increase prices to make up for the extra copying, even though copyright exceptions are non-compensable? Will they turn to technological protection measures? Will they simply refuse to enter into contracts with universities? It's hard to say at this point.

My conclusions are based on analysis of legislation and judicial precedents, but the courts have not specifically addressed the interaction between copyright exceptions and private contracts. It is understandable, then, that libraries might not want to take a chance on being sued for breach of contract, or don't want to deal with the potential practical considerations I've talked about. In that case, there are other options to ensure that user's rights are protected within the context of licensing for access to electronic resources, specifically, making sure that exceptions are explicitly negotiated into the contracts.