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Changes to Canada's Copyright Act

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Last year at this time, we were Considering Copyright:

Our 2008 Topics of Interest:

- The Latest from the Supreme Court
  - Robertson v. Thomson – October 2006
  - Vis-à-vis the earlier Law Society decision…
- Access Copyright matters
  - License renewals
  - Current proceeding before the Copyright Board of Canada
- The Latest from Parliament
  - Copyright in the Criminal Code – Summer 2007
  - Introduction of a new bill
    - CLA and OLA in lobbying

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This year, in 2009 -

- Access Copyright still matters…
  - License renewals are still pending
  - We still await a decision in the current proceeding before the Copyright Board of Canada
- We are still court-watching – but different courts this year!
  - Copyright in the Criminal Code – Summer 2007
  - The American lawsuit against Google Books
- And, again, still, we watch Parliament with interest!
  - What happened to Bill C-61?
  - Did librarians' lobbying have any effect?
  - Will there be introduction of a new bill?

This year -

- Access Copyright still matters
  - License renewals are still pending
  - We still await a decision in the current proceeding before the Copyright Board of Canada

Dr. Margaret Ann Wilkinson 2009

Reprographic Reproduction (2005-2009)
Access Copyright Tariff for Educational Institutions

-- A tariff sought for all schools K-12 in all provinces except Quebec

The Copyright Board of Canada has been asked by the parties to establish what should be paid for school photocopying…

Previous contracts were negotiated between the parties without the Copyright Board's involvement…

There would not be a fee per student as in previous contracts since the Board has no jurisdiction to make such an order – schools would now be assessed for copies made that are covered by the licence…

One key question will be how users' rights to fair dealing factor into the appropriate compensation for rightsholders… Very important to the question of the appropriate amounts to be involved in future library contracts…

[I have been privileged to participate in the Board hearing process, particularly with respect to this issue…]

The amount paid would only permit photocopying, not digital copies or other formats…

Reserved decision now – expected anytime…

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From my brief, part of the case prepared for the Ministers of Education, filed before, and accepted by, the Board:

1. Fair dealing is not an economic concept…
2. Fair dealing is about users' rights to use works, just as economic and moral rights in copyright concern uses of works: none of the interests under the copyright regime should be analyzed focussing only on the works;
3. Fair dealing contributes to the flow of *information* in society and the economy: the rights of rightsholders must be viewed as a limited device involving certain controls of works which, complimenting fair dealing, are also meant to encourage the flow of information in society;
4. The need for balance between the rights of users, the rights of copyright holders and the moral rights of authors within the copyright regime makes it clear that copyright, a form of *intellectual property*, cannot be analogized directly with property;
5. The Supreme Court, in *CCH et al v. Law Society of Upper Canada*, has clarified fair dealing in Canadian law and fair dealing must be applied from that perspective.

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This year -

- We are still court-watching
  - Copyright in the Criminal Code – Summer 2007
  - The American lawsuit brought against Google Books

An Act to Amend the Criminal Code (unauthorized recording of a movie), S.C.2007, c.28

- Received Royal Assent June 22, 2007
- Introduced new s.432 to the Criminal Code (not the Copyright Act)
- Applies to recording the movie itself or recording the sound track

- **For simply recording the maximum penalties are**
  - **Up to 2 years if the Crown chooses to proceed by indictment**
  - **Or less if the Crown chooses to seek summary conviction**
  - **Plus forfeiture of equipment used (if that equipment belongs to the person convicted…**

- **For recording for sale the maximum penalty on indictment is**
  - **Up to 5 years in jail if the Crown chooses to proceed by indictment…**
  - **Or less if the Crown proceeds for summary conviction…**
  - **Plus forfeiture**

1st Conviction under the new criminal law

Richard Craig Lissaman, 21

Charged in Calgary for recording Johnny Depp's "Sweeney Todd" on opening day December 21, 2007

Pled guilty November 14, 2008

Sentenced to: fine of $1,495
plus 1 year probation including not being in any theatres and not owning any recording equipment, including a cellphone

This year -

- We are still court-watching
  - Copyright in the Criminal Code – Summer 2007
  - The American lawsuit brought against Google Books

American civil lawsuit against Google settled

Book authors, the Authors Guild, publishers representing the Association of American Publishers all sued Google over its Google Library Project, part of its Google Book Search program

The allegation was copyright infringement in the United States by digitizing or scanning books and other writings, creating an electronic database of books, and displaying short excerpts without the copyright owners' permission

There is a settlement of the action proposed in the United States District Court for the Southern District of New York, announced this month and being worked through right now…

In a settlement, the defendant typically, and in this case, continues to deny wrongdoing and liability – and the court never rules on the issues… BUT

For books and other works published prior to January 5, 2009:

Authors and publishers will get:

- 63% of the revenues earned from Google's sale of subscriptions to an electronic Books database, sale of online access to Books, advertising revenues, and other commercial uses;
- US $34.5 million paid by Google to establish and maintain a Book Rights Registry to collect revenues from Google and distribute those revenues to copyright owners;
- The right of copyright owners to determine whether and to what extent Google may use their works;
- US $45 million paid by Google to copyright owners whose Books and Inserts Google digitized without permission on or before May 5, 2009.

This agreement includes authors and publishers in Canada who hold rights in works in the United States. AccessCopyright is acting to help coordinate efforts for Canadians in ensuring recovery.

American libraries are included in the Settlement:

Fully participating libraries: libraries that are allowing Google to digitize Books in their collections and to which Google is providing a "library digital copy" of those books.

- The Agreement provides these libraries will be able to make certain uses of these digital books:
  - Columbia University, Cornell University, Harvard University, New York Public Library, Princeton University, Stanford University, Universities of California, Michigan, Texas, Virginia and Wisconsin
  - Also listed are the Committee on Institutional Cooperation which consists of Indiana, Michigan State, Northwestern, Ohio State and Purdue Universities as well as the Universities of Chicago, Illinois at Chicago, Illinois at Urbana-Champaign, Iowa and Minnesota.
- The Agreement states that Google will attempt to expand the number of these libraries and include libraries currently falling under the other categories as defined in the settlement:
  - Cooperating libraries
  - Public domain libraries
  - Other libraries
- Further details can be accessed through the AccessCopyright website, at http://www.accesscopyright.ca/Default.aspx?id=243

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This year -

- And, again, we watch Parliament with interest
  - Last year at OLA we reported predictions that a new Copyright Bill would be introduced into Parliament by February – it *was* introduced, but not until June and then…
  - What happened to Bill C-61?
  - Did librarians' lobbying have any apparent effect?
  - Will there be introduction of a new bill?

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Recall CLA AGM May 26, 2007 – Resolution 2

MOVED: Rob Tiessen
On behalf of the Copyright Working Group, Committee on Intellectual Property and Public Access

[PREAMBLE]

Whereas libraries are institutions that foster wealth and learning in their communities by providing access to knowledge and preserving our shared heritage; and
Whereas the federal government is committed to introducing significant changes to the Copyright Act; and
Whereas these changes to the Act have the potential to unduly constrain how individuals and the libraries which serve them are able to use content; and
Whereas the Supreme Court of Canada has recognized the importance of user rights in its legal decisions; and
Whereas it is the position of the Canadian Library Association/Association canadienne des bibliothèques that copyright should be neutral in regards to technology or format;

Therefore be it resolved that it is the position of the Canadian Library Association/Association canadienne des bibliothèques that any new copyright legislation:

- **Protect the broad interpretation of fair dealing as a user's right in the spirit of the Great Library of the Law Society of Upper Canada's victory in the CCH Canadian v. Law Society of Upper Canada Supreme Court of Canada decision;**
- **Ensure that any legal protection of technological protection measures should be specifically limited to acts of infringement, should not include device prohibitions, and should not impinge on the exercise of fair dealing or other user rights;**
- **Recognize that government documents and government data belongs to all Canadians and that all Canadians should have liberal access to these materials;**
- **Recognize that exceptions for print-disabled individuals must ensure that these individuals have the same ability as others to access content.**

CARRIED

Recall that, following up from the Resolution -

- CLA sent letters to relevant federal Ministers in September, 2007
- OLA sent letters to relevant provincial Ministers in November, 2007
- Other provincial associations sent letters to relevant provincial players during the fall, 2007
- Throughout the fall, 2007, Rob Tiessen, University of Calgary, Chair of the Copyright Committee, had various conversations with appropriate copyright-interested parties…
- WE HOPE, INTO SPRING 2008, YOU WERE ABLE TO USE THE CLA LOBBYING PACKAGE POSTED ON THE CLA WEBSITE

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The Brief History of Bill C-61 !

- Introduced into the House and given First Reading June 12, 2008
  - The bill was only intended to amend the Copyright Act, not replace it
  - 41 sections long
  - The existing definitions in the Copyright Act governed the Bill, except where the Bill made explicit changes
    - **thus, amendments proposed for "Libraries, archives and museums" (LAMs) would have applied only to LAMs as currently defined and would not have applied to libraries owned by for-profit institutions.**
    - **Marginalization of many special libraries was continued – and any other for-profit-owned libraries (e.g. a library within Westervelt College in London – a private, for-profit educator)**
  - Parliament was dissolved September 7, 2008 and an election called so Bill C-61 became history.

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CLA Resolution 1: on users' rights and the Law Society case

- Bill C-61 Preamble used language about "users access" not "users rights"
- S.17 of the Bill would have modified FAIR DEALING s.29.21, 29.22 and 29.23 for reproduction of works or other subject-matter, music, and time-shifting broadcasts with all kinds of conditions on reproduction AND would have made the fair dealing rights subordinate to any CONTRACTUAL rights the user had entered into in the INTERNET context

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With respect to "special exceptions" – which, as many of you are aware I have written, the Supreme Court has made generally redundant for LAMs, with its wide scope of Fair Dealing

LAMs exceptions in Bill C-61

• would have clarified that LAMs can make replacements where those in the LAM consider that the original is or is becoming obsolete or unavailable;

• would have clarified inter-library loans for LAMs: a LAM can do anything with respect to printed matter on behalf of a patron of another that that other LAM could do for its patrons – *appeared to permit digital transmission of paper original but maybe not digital transmission of a digital original (but certainly wouldn't have overridden digital licenses on the point)…*

The amendments to the exceptions for Educational Institutions in Bill C-61 were acceptable to the Council of Ministers of Education of Canada – they are currently focused on collective licensing and the current proceeding we have discussed that was and still is before the Copyright Board of Canada.

One amendment that would have affected anyone engaged in any kind of teaching environment would have been an additional definition in the Act of "lessons" where any unauthorized person dealing with lessons who should have known they were lessons could have been liable for secondary infringement (Bill C-61, s.14)

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2 of CLA's 4 concerns were not really addressed in Bill C-61:

CLA RESOLUTION 2 about access to government documents

Not dealt with at all in Bill C-61.

CLA RESOLUTION 4 about recognizing exceptions for the print disabled

Only dealt with in Bill C-61 in the context of technological measures – where the anti-circumvention measures in the Bill were not to apply in the case of persons who are perceptually disabled or who are acting for such persons (s.32 of the Bill)

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CLA's Resolution 3, that legal protection of technological protection measures should be specifically limited to acts of infringement, did seem to have had some impact on the drafting:

"No person shall offer services to the public or provide services if (i) the services are provided primarily for the purposes of circumventing a technological measure." (s.31 of the Bill, to amend s.41 of the Act)

Since libraries do not provide services primarily for the purposes of circumvention but rather provide services primarily for users under the mandates of the institutions in which they exist, it would seem this section was not aimed at libraries.

In s.41.19 however, it seemed that libraries were contemplated to have possibly run into trouble – but it gave some of us special relief: "If a court finds that a LAM or EI has contravened s.41.1(1) and the defendant satisfied the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction."

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More provisions from now defunct Bill C-61, on TPMs

"Every person, except a person who is acting on behalf of a LAM or EI, is guilty of an offence for knowingly circumventing…" – on indictment $1 mil or 5 years or both; on summary conviction $25,000 or 6 months or both. (s.32 of the Bill, to amend s.42 of the Act)

IN GENERAL for everyone, therefore including all libraries,

- Technological protection measures would not have applied where the person is just trying to make their technology interoperable (s.41.11(3))
- S.41.14(1) would have made the provisions protecting technological protection measures inoperable if the technology does not respect an individual's personal data protection rights
- Bill C-61 provided that CABINET would have been able to add more exceptions to the anti-circumvention measures (s.41.2(1) and (2)(a)) BUT CABINET could NOT have added more anti-circumvention measures.

Other provisions of Bill C-61 not within the realm of CLA's position:

- Would have added a **new right for copyright holders**: "In the case of a work that can be put into circulation as a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as the ownership of the tangible object has never previously been transferred with the authorization of the author in or outside Canada" in addition to the right, in the case of any work "to communicate the work to the public by telecommunication" (s.3(1)(f))
- Would have **added rights to sound recording rights holders** (in s.18)
- Would have **changed the period of protection for performers' performance in sound recordings and protection of the sound recordings** themselves from the current 50 years after the year of performance or making of the sound recording to lengthen the protections to up to 99 years from the year of performance or recording
- Would have **extended moral rights** (now held only in works and not in performers' performance, sound recordings or broadcasts) to include the moral rights of paternity and integrity (but not association) to live aural performances and performances fixed in sound recordings… but the succession provisions were special (for the period after the death of the artists – and seemed a bit odd)
- **Ownership of photographs** in Canada would have become like ownership of any other art – first owner would be the photographer (with transitional provisions to leave current owners in place)…

Were the contents of Bill C-61 affected by the advance activities of librarians in the winter & spring before the Bill?

It is difficult to know for sure at this time.

It is my own assessment that LAMs *were* considered by the drafters of Bill C-61 -- because Bill C-61 of 2008 was better for libraries than its predecessor, Bill C-60 of 2005 (which also fell with the government after 1st Reading because of an election call)…

If I am correct, it is because of :

(1) your actions in lobbying and getting the message out,
(2) the actions of the public on your behalf,
(3) the determination of librarian Janine Miller, then at the Great Library of the Law Society of Upper Canada, and the support she got from her institution in defending against the demands of the legal publishers, and finally
(4) the strength of the support of the Supreme Court in the Law Society decision for the value of librarians' efforts.

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What reaction was there to the Bill?

Between June 12 and September 7, 2008, CLA's Copyright Committee worked furiously – analyzing the Bill and working to develop a consensus on strategy and message…

One element that was perhaps not emphasized as it might have been was the problem that "libraries" continue to be fragmented into:

"LAMs," the majority of us – covered with special exceptions already (whether necessary to us or not) and given special treatment in Bill C-61

AND

"not-LAMs" – but yet still libraries, like the LAMs from all LIS perspectives.

It seems important to get this message to policy-makers – all libraries deserve the same treatment

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And since then what has happened?

- General Election: Conservatives returned to power in another minority government
- 40th Parliament, 1st Session
  - November 18- December 4, 2008
    - 4 government Bills introduced and given 1st reading – none on Copyright
  - Parliament Prorogued
- 40th Parliament, 2nd Session
  - Speech from the Throne: Monday January 26, 2009 – *no copyright mentioned or knowledge economy or anything related…*
  - Budget delivered Tuesday January 27 with enough opposition support (Liberal) guaranteed Wednesday January 28… *again, nothing related to copyright mentioned…*

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Considering copyright as we move forward…

There is anticipation that, yet again, a new bill will now be introduced into Parliament …

Although, I believe, perhaps not immediately, given other concerns…

(1) Continue to stay tuned,
(2) Let your associations know your views on copyright, and
(3) Continue to support your associations as they work to represent
    (a) libraries' interests,
    (b) patrons' interests and
    (c) the public interest
    in these many varied processes involving copyright…

Further resources …

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Further Resources and References

- Ysolde Gendreau (ed.), ***New Intellectual Property Paradigm -- The Canadian Experience*** [Queen Mary Studies in Intellectual Property series] (Cheltenham (UK): Edward Elgar, 2008)
  - which includes Margaret Ann Wilkinson, "Battleground between New and Old Orders: Control Conflicts between Copyright and Personal Data Protection," pp. 227-266.
- Margaret Ann Wilkinson and Natasha Gerolami (UWO LIS doctoral student) "The Author as Agent of Information Policy: The Relationship between Economic and Moral Rights in Copyright," forthcoming in *Government Information Quarterly* and now available online at http://dx.doi.org/10.1016/j.giq.2008.12.002
- Margaret Ann Wilkinson "Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries" – in Michael Geist (ed.), ***In the Public Interest: The Future of Canadian Copyright Law*** (Toronto: Irwin Law, 2005), pp. 331-374.
- Margaret Ann Wilkinson, "Open Access and Fair Dealing: Philanthropy or Rights?" in Mark Perry and Brian Fitzgerald (eds), ***Digital Copyright in a User-Generated World*** – forthcoming from Irwin Law

Thank you…