



COPYRIGHT ISSUES FOR PRIVATE LAW LIBRARIES

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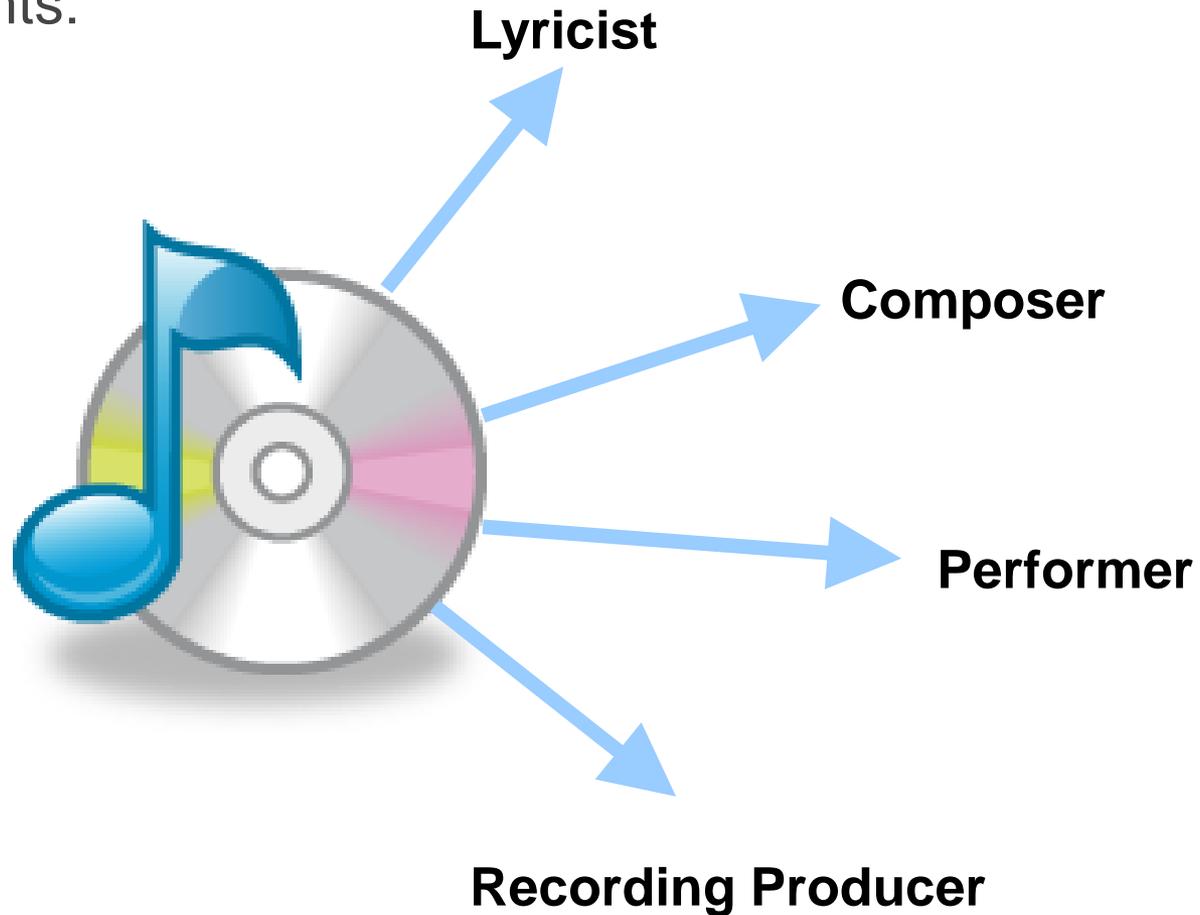
Canadian Association of Law Librarians

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- Copyright Overview
- Fair Dealing
- Crown Copyright
- Law Library Life

- governed by the *Copyright Act*
- protects literary, artistic, musical and dramatic expression (not ideas)
- automatic upon creation of an “**original**” work
- valid for the life of the author plus 50 years

layers of rights:



- exclusive rights:
 - produce or reproduce a work or any **substantial part** in any material form
 - publish
 - translate
 - telecommunicate
 - authorize

public interest in the
encouragement and
dissemination of works

vs.

just rewards for creators



- *Copyright Act* contains various user rights
- includes “fair dealing” exceptions that allow users to engage in activities that might otherwise be infringement
- SCC: user rights are not to be interpreted restrictively; fair dealing is an integral part of the *Copyright Act*, and must be properly balanced against owners’ rights

- doing, without copyright owner's consent, anything that only the copyright owner has the right to do
- includes reproducing, in a material form, all or a substantial part of a work
- can result in damages, injunctions, and other remedies

- copyright automatic upon the creation of “original” work
- “original” not defined in *Copyright Act*
- mixed meaning in case law - from low “sweat of the brow” standard up to completely creative, novel or new
- *CCH v Law Society of Upper Canada* (SCC 2004): more than a mere copy, but does not have to be novel or unique
 - not copied
 - reflects exercise in skill and judgment (not so trivial that it could be characterized as “purely mechanical”)
 - can be attributed to a human author

- no copyright in facts – but can have copyright in an “original” compilation of facts

- CCH decision says these are original:
 - reported judicial decisions that are a compilation of headnote and edited judicial reasons (not reasons alone), headnotes, annotated practice book, case summary, topical index, textbook, and monograph

- ABQB April 2016: raw and processed seismic survey data and information is “original”

- 1997: previous amendment to *Copyright Act*
- 2002: parliamentary review begins
- 2012: *Copyright Modernization Act* in force
 - large-scale public consultation and engagement
- 2017: next mandated review

- expanded fair dealing - adds education, parody and satire

- adds other exceptions:
 - format shifting*
 - time shifting*
 - backup copies*
 - non-commercial user-generated content

* subject to digital lock provisions

Digital Locks

- circumventing a digital lock is infringement even if the underlying activity is not infringement
- broader than treaty requirements; mirrors US DMCA
- trumps expanded fair dealing and other exceptions

- fair dealing
- reproduction for private purposes
- backup copies
- educational institutions
- libraries, archives and museums

- what is a library?
 - (a) an institution that is **not established or conducted for profit** or does not form a part of, or is not administered or controlled by a body that is established or conducted for profit, in which is held documents and materials that is open to the public or to researchers, or
 - (b) any other **non-profit institution** prescribed by regulation.

- does not include private law libraries

CCH v Law Society of Upper Canada (SCC 2004)

- Law Society of Upper Canada - Great Library at Osgoode Hall
- request-based photocopy service for Law Society members, the judiciary, and other authorized researchers.
- legal publishers claimed ownership of copyright in specific works and that LSUC was infringing copyright in those works
- SCC stated that fair dealing is a users' right that must not be interpreted restrictively.

2-part test:

1. Is the dealing for an **allowable purpose**?

2. Is the dealing **fair**?
 - purpose of dealing
 - character of dealing
 - amount of dealing
 - existence of alternative
 - nature of the work
 - effect of dealing on the work

1. Is it for an allowed purpose?



Research or private study (s 29)

- Research for purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is research.
- “Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*” (CCH at para 51).

Criticism or review (s 29.1)

News reporting (s 29.2)

2. Is it fair?	Fair in CCH because:
Purpose (research for commercial purposes may be less fair than research for charitable purposes)	Access guidelines provided safeguards
Character (quantification of total dissemination; destruction of copy)	Single copies of works for specific purposes allowed under Act
Amount of the dealing (amount copied vs. the entire work)	Generally honoured requests for 1 case, article, or reference, or < 5% of a secondary source
Alternatives to the dealing	None apparent - can't always conduct research at library itself
Nature of the work (confidential, published, etc.)	In public interest to provide access to judicial decisions and other works essential to legal research
Effect of the dealing (compete with original?)	No evidence to show market for publishers' works had decreased as a result of copies being made

Issues	Answers
Are publishers' materials "original works" protected by copyright?	Yes
Were the dealings with the works "fair dealing(s)"?	Yes
Were fax transmissions of the works communications "to the public"?	No, single transmissions are not
Did LSUC infringe copyright by selling copies?	No
Does Great Library run by Law Society qualify for an exemption as a "library"?	Yes - run by LSUC not for profit
Did LSUC breach copyright by providing custom photocopy service?	No
Did LSUC breach copyright or authorize infringement by maintaining self-service photocopiers?	No
If there was infringement, are publishers entitled to an injunction?	No infringement

- 5 SCC decisions released in 2012 that clarified (revolutionized?) Canadian copyright law
- build on earlier SCC decisions like *CCH* and *Théberge*
- emphasize **importance of users' rights** and distinct nature of Canadian copyright law, making foreign decisions of little value

1. *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, [2012 SCC 34](#)
 - **About:** music in video games.
 - **Issue:** are copyright owner's rights in a musical work, which were negotiated before video games are packaged for public sale, revived when the work is sold over the Internet instead of in a store (i.e. should the copyright owner of music in a video game get paid again each time someone purchases and downloads the game)?
 - **Short answer:** no.

2. *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, [2012 SCC 35](#)
 - **About:** online music services.
 - **Issue:** is a point-to-point transmission from an online music service website to any individual customer a public communication or private communication?
 - **Short answer:** Public communication.

3. *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, [2012 SCC 36](#)
 - **About:** online music services.
 - **Issue:** is allowing consumers to preview musical works before making a purchase “fair dealing”?
 - **Short answer:** yes.

4. *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345, [2012 SCC 37](#)
 - **About:** photocopies for class handouts.
 - **Issue:** are photocopies made by teachers to distribute to students as part of class instruction “fair dealing”?
 - **Short answer:** Yes.

5. *Re: Sound v Motion Picture Theatre Associations of Canada*, [2012] 2 SCR 376, [2012 SCC 38](#)
 - **About:** soundtracks.
 - **Issue:** are sound recordings (i.e. particular songs) incorporated into movie or TV soundtracks subject to a tariff under the Copyright Act?
 - **Short answer:** No. (not when played during the movie, so movie theatres don’t have to pay tariffs to song owners each time they play movie)

- courts have recognized that fair dealing is integral part of Canadian copyright regime
- not to be interpreted restrictively
- will depend on applicable factual circumstances
- remember digital locks
- can't stop rights-holders from being aggressive

“Fair dealing is not a blank cheque. It is a long standing feature of our copyright laws that permits individuals and businesses to make certain uses of copyrighted materials in ways that do not unduly threaten the interests of copyright holders, but which could have significant social benefits - but only if they are fair.”

Government of Canada, *What the Copyright Modernization Act Means for Teachers and Students*

Copyright Act, section 12:

- Where work is prepared or published by or under direction or control of Her Majesty or any government department, copyright belongs to Her Majesty subject to any agreement with the author, and continues for 50 years after publication.

- generally need permission if:
 - work will be distributed for commercial purposes
 - work is being revised, adapted or translated

- seek permission from:
 - Federal government: the department or agency that created the information (see <http://publications.gc.ca/site/eng/ccl/index.html>)

 - BC government: the Intellectual Property Program (see <http://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/intellectual-property/intellectual-property-program>)

Federal government:

- permission generally required when the reproduced work will be distributed for commercial purposes, or the work is being revised, adapted or translated.
- permission should be sought from the department or agency that created the information (see <http://publications.gc.ca/site/eng/ccl/index.html>)

BC government:

- for non-commercial purposes, seek permission from the Intellectual Property Program (“IPP”)
- for commercial purposes, obtain license agreement from the IPP
- see <http://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/intellectual-property/intellectual-property-program>

- tangled web
- need to pinpoint specific government entity
- identify that entity's rules and requirements

- licence agreements
 - hard copy vs. click-wrap vs. browse-wrap
 - scope of rights (geographic, number of users, time, etc.)
 - audit rights
 - remedies - contractual and other

- do you need a licence?
 - consider Access Copyright situation
 - are there non-infringing ways of accessing and using content?

using materials found online:

- using “substantial” part?
- identifiable rights-holder?
- other rights engaged (personality, defamation, etc.)?
- public domain? **publicly available ≠ public domain**
- permission to use?
 - e.g., Creative Commons - but beware
- fair dealing or other exception?

- ownership
- third-party content
- marking
- registration

- consider guidelines that consider:
 - the *CCH* factors and other case law
 - specific contracts and licences with service providers
 - methods of monitoring and ensuring compliance with the guidelines

- hard numbers:
 - impossible to set limits appropriate for all situations
 - generally, requests for one case, article, or reference OK
 - < 5% of a work probably fair; 5-10% neutral; >10% probably unfair
... but it always depends on the circumstances!

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