

Introduction to Copyright Policy and the Humanities

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Overview of presentation

- Relevance of Copyright policy to Literature, Arts and the Humanities
- Increasing importance of copyright policy for academic staff and students; Copyright as potential impediment to teaching, research and cultural production – sources of various 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)
- Venues of copyright policy making:
 - Parliament (C-11 has been enacted and is largely now in force)
 - Courts: Pentology (5 copyright cases) decided July 2012
 - Copyright Board (contested post-secondary tariff proceedings still pending)
 - Institutional policies, AC licences and institutional copyright policies

Some issues for the Humanities

- Humanities scholars are very much affected by copyright protections / restrictions
- They are at once **both** creative authors as well as users of existing works
- Humanists (and social scientists to some degree) take as their primary objects of study works that are or have once been copyrighted.
- The dissemination of knowledge, through teaching, publication and conferences, is the core outcome of the humanities . . .

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?

Copyright as an impediment to 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 of DMCA, various international agreements)
- risk-averse institutions (as reflected in restrictive institutional policies)
- lack of public awareness about users rights and exceptions to infringement (coupled with tendency to cede the area of copyright to law faculties and legal scholars)

safety valves in copyright laws have historically been used to prevent the undue hampering of users rights:

- fair dealing and other exceptions/limitations to infringement liability
- limits on copyright term and the eventuality of the public domain
- the idea/expression dichotomy and originality requirements

yet many of these doctrines are under increasing threat in the digital era

Criteria for Copyright to Subsist in works

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** (but not necessarily permanent)

Where is the threshold for originality?

Creative Spark SCC says too high

... more than a mere copy of another work but need not be creative, in the sense of being novel or unique...an exercise of skill and judgment is required.
...skill means the use of one's knowledge, developed aptitude or practised ability in producing the work.
...judgment means the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.
... exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. (see CCH v LSUC, para 16)

Sweat of the Brow SCC says too low

What is a Compilation?

Section 2 definition:

"**compilation**" means

(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or

(b) a work resulting from the selection or arrangement of data;

Section 2.1

(1) A compilation containing two or more of the categories of literary, dramatic, musical or artistic works shall be deemed to be a compilation of the category making up the most substantial part of the compilation.

(2) The mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work.

What is a Collective Work?

Section 2 definition:

"**collective work**" means

(a) an encyclopaedia, dictionary, year book or similar work,

(b) a newspaper, review, magazine or similar periodical, and

(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;

Ownership of Copyright

Section 13(1): ... the author of a work shall be the first owner of the copyright therein.

Section 13(3): Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright,

Section 13(4) a copyright owner may assign the right, wholly or partially, and either generally or subject to limitations (to territory, medium or market sector) for the whole term or any part of the term

[Note how the "bundle of rights" is very divisible]

Duration of Copyright

General rule in section 6:

...life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.

At the end of the copyright period, the work becomes part of the **public domain**.

Registration of Copyright

- Registration is NOT required for the copyright to be effective
- But there are advantages to registration:
 - Provides good evidence of the facts
 - Prevents defendant from claiming innocent infringement
- Most copyrights are not registered

Overview of Canadian Copyright Law

Owners exclusive rights in a work

Section 3(1):

"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 . . .

Overview of Canadian Copyright Law

Sec 3(1) also **includes** the **sole right**:

- (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 [...],
- (d) to **make any sound recording, film** or other contrivance by means of which the [...] work may be mechanically reproduced or performed,
- (e) to reproduce, **adapt** and publicly present the [...] work as a [film]
- (f) to **communicate** the [...] work to the public by telecommunication,
- (g) [public exhibition of artistic work]
- (h) [rental of computer program]
- (i) [rental of sound recording]
- (j) [sell or transfer tangible object where ownership never previously transferred]

and to **authorize** any such acts

Overview of Canadian Copyright Law

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

Overview of Canadian Copyright Law

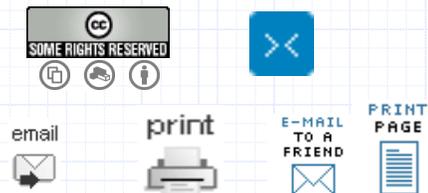
What is Copyright Infringement?

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.

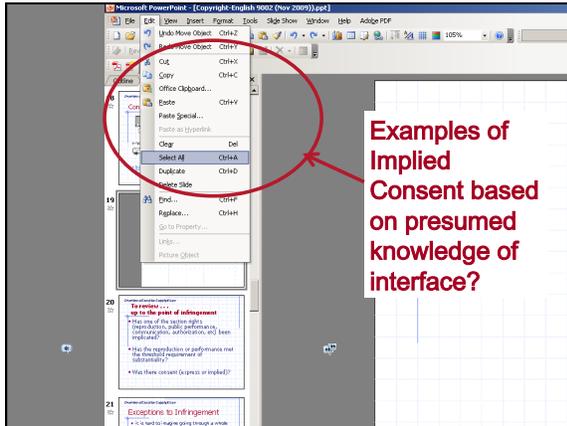
Note: Applies generally to works and other subject matter, so you need to refer back to the specific section that creates the rights (i.e. section 3 in the case of a work)

Overview of Canadian Copyright Law

Consent can be express or implied



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Overview of Canadian Copyright Law

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)?

But having determined there is a prima facie case of infringement is NOT the end of the analysis!

Overview of Canadian Copyright Law

Exceptions to Infringement

- it is hard to imagine going through a whole day of information-intensive activity where one would not commit numerous acts of technical infringement . . .
- . . . the difference between actionable infringement and infringement that is excused is often subtle, fact dependant, it is contingent on many factors
- Yet these distinctions are too often ignored or marginalized

Overview of Canadian Copyright Law

Exceptions to Infringement

- Fair dealing for the purpose of research, private study, education, parody or satire (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)
- Certain copying for persons with perceptual difficulties (section 32)
- Various new provisions under Bill C-11

Overview of Canadian Copyright Law

Current Canadian Fair-Dealing provisions

- 29. Fair dealing for the purpose of research, private study, education, parody or satire 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)

New provisions in Bill C-11

Sections 29.21- 29.24

- 29.21 (non-commercial UGC)
 - 29.22 (reproduction for private purposes)
 - 29.23 (reproduction for later listening or viewing)
 - 29.24 (back-up copies)
- note various counter-limitations and counter-exceptions

are these activities already permitted under fair dealing?

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."

paragraph 48

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

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

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)

The July 2012 "Pentology"

5 Supreme Court decisions of July 12th:

[Entertainment Software Assoc v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34](#)

[Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35](#)

[Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36](#)

[Alberta \(Education\) v. Canadian Copyright Licensing Agency \(Access Copyright\), 2012 SCC 37](#)

[Re:Sound v. Motion Picture Theatre Associations of Canada, 2012 SCC 38](#)

Relationship between License Agreements and Copyright Law

- especially with the broad scope of fair dealing, it is important to consider the relationship between the terms of various licenses (& proposed tariffs) and statutory provisions (esp. fair dealing)
- a particular problem in the educational/library setting where vendors/collectives often attempt to limit the broad users' rights that exist under copyright law
 - Individual licenses with publishers/vendors
 - Aggregate databases -often negotiated by consortium
 - Collective licenses (i.e. AUCC/Access Copyright model License, UWO/AC & UT/AC licenses, proposed tariff)
 - Important to recognize derogations of users' rights or licenses that grant what you already have a right to do

UWO, UToronto & AUCC Model License

- UWO and UT have separate license with AC
- AUCC Model license adopted at UVic, Alberta, Manitoba, McMaster, Brock, Ryerson, Ottawa, and Dalhousie, Wilfred Laurier, URegina
- Queens, Memorial, UNB, Carleton, Guelph, York, Windsor, Waterloo, Trent, USask, UBC, Calgary, SFU have declined license
- UWO and UT separately negotiated licenses will terminate at the end of 2013, not 2015 as under the Model License.
- ACCC-AC Model license adopted at 19 CCs, but ACCC has since advised members it is not needed (no such concession from AUCC)

Objections to the Proposed Access Copyright Post-Secondary Tariff and its Progeny Licenses: A Working Paper

- posted in the [FIMS Library and Information Science Publications](http://ir.lib.uwo.ca/fimspub/24) series at <http://ir.lib.uwo.ca/fimspub/24>.
- definitional problems: "copy" and "course collection" increase the scope of the statutory reproduction right and create other burdens.
- overbroad definitions are foundational problems with the tariff/licenses which not only exceed the scope of owners' statutory rights, but will have the potential to substantially impede the delivery of course materials, adversely impact faculty and student privacy rights, and ultimately threaten academic freedom.
- other problematic definition involves the "Secure Network," along with various limitations that flow from this definition.

Local Copyright Policy-making

- institutional policies are an important yet overlooked venue of copyright policy making
- often characterized as overly cautious, based on institutional inertia and undue risk-aversion
- over-reliance on licensing and permissions persists even post-pentology
- development and implementation of fair dealing guidelines (compare AUCC's, UT's and CAUT's)



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