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Copyright Consultations Submission

Canadian Association of Research Libraries

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COPYRIGHT CONSULTATIONS SUBMISSION*

Canadian Association of Research Libraries[†]

This submission details reforms that the Canadian Association of Research Libraries (CARL) believes are necessary to balance fairly the interests of copyright holders and users of copyrighted materials so as both to encourage creation by ensuring payment for use and to safeguard equitable public access to and use of ideas. New copyright legislation must not restrict fair dealing. It must not make it illegal to circumvent a digital lock to use a copyrighted item for purposes that do not infringe copyright (doing so is not required by Canada's treaty obligations) or to convert a work into any format that is usable for a person with a disability. Further, it must also not make it illegal for a library to maintain long-term accessibility to materials by migrating them to new formats or to deliver to the end-user a digital copy of a print document. In addition, there should be a good faith defence from statutory damages for copyright infringement, a "notice and notice" rather than a "notice and takedown" system should be implemented for internet service providers, and a reformed Act should prohibit 'standard form' contracts from usurping rights granted under the Act, while a statement clarifying the permissibility of using Internet sources for educational use, without circumscribing a user's fair dealing rights, should be added.

INTRODUCTION

The Canadian Association of Research Libraries (CARL) counts as its members the 28 largest Canadian university libraries and the three major federal national libraries (Library and Archives Canada, the Canada Institute for Scientific and Technical Information CISTI, and the Library of Parliament). CARL strives to enhance the

* © 2009 Canadian Association of Research Libraries. This paper is a revised version of the Copyright Consultation submission of September 9, 2009.

[†] Prepared by Brent Roe, Executive Director, CARL, based upon work of the CARL Copyright Committee (Chairs, K. Mark Haslett, 2008, and William Maes, 2009) with commissioned advice of Wanda Noel, Barrister and Solicitor, Ottawa. Brent Roe is an academic librarian by profession; before going to CARL in 2008, he worked in the Libraries at York University, Toronto, from 1995.

capacity of Canada's research libraries to partner in research and higher education, seeking effective and sustainable scholarly communication and public policy encouraging of research and broad access to scholarly information. CARL member libraries in the 2006–2007 year spent almost \$261 million on library materials,¹ about half of which went to licensing access to digital content: Canada's research libraries have a considerable stake in digital copyright law.

CARL encourages the government in its efforts to bring Canadian copyright legislation into the 21st century. The public policy aims of copyright law are both to encourage creation by ensuring payment for use and to safeguard equitable public access to and use of ideas for further creation through fair dealing, particular exceptions, and a robust public domain. Copyright law reform must fairly balance the interests of copyright holders and users of copyrighted materials to achieve both of these aims.

The following areas of consideration in copyright law reform are ones that have special importance in research libraries and their educational contexts.

FAIR DEALING

As noted above, research libraries spend many millions of dollars to license access to digital content for their clientele. They also depend, however, upon the concept of fair dealing (and other exceptions in the *Copyright Act*²) in order to appropriately serve the students and researchers who need to obtain and use copyrighted materials for their learning, discovery, and innovation that will benefit Canadian society at large.

In 2004, the Supreme Court of Canada, in the unanimous *CCH Canadian Ltd. v. Law Society of Upper Canada* decision³, identified the fair dealing exception as a user right that "must not be interpreted restrictively."⁴ In any new copyright legislation, the ability of users of

¹ Table V – Library materials expenditures, *2006-2007 Statistics*, Canadian Association of Research Libraries (2008), at 22-23.

² *Copyright Act*, R.S.C., 1985, c. C-42 [*Copyright Act*]. Unless stated otherwise, all references to an "Act" are to the *Copyright Act*.

³ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

⁴ *Ibid.*

copyrighted materials to exercise their fair dealing rights must not be compromised.

Two important ways in which the enjoyment of fair dealing rights may be compromised are through digital locks ("technological measures" and sometimes "digital rights information" programming, in legislative language) and through the threat of large damages for even unintended infringement.

DIGITAL LOCKS

Copyright legislation must not make it illegal to circumvent a digital lock to use a copyrighted item for purposes that do not infringe copyright.

Digital locks can prevent users from interacting with copyrighted materials in ways that are perfectly legal in themselves. For example, a digital lock might improperly prevent a scholar from reproducing a small portion of an electronic book (necessary if more than simply quoting text may be required) in an online review of the book.

Digital locks on digital objects in libraries can prevent libraries from maintaining long-term accessibility to these materials. Even after a copyright holder may have long since gone out of business, a digital lock remains and can prevent, for example, the migration of the content to a new technological format when this becomes necessary. As well, digital locks can prevent a library from making digital materials usable by persons with print disabilities (again, by changing the format).

In order to satisfy WIPO treaty obligations,⁵ it is sufficient that Canadian copyright law afford protection to digital locks only to penalize the breaking of digital locks for purposes that infringe copyright law.

⁵ *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65 ; *WIPO Performances and Phonograms Treaty*, 20 December 1996, 36 I.L.M. 76.

DAMAGES

At present, the *Copyright Act* envisions the imposition of large statutory damages (beyond any real damages) on those infringing copyright.⁶ The threat of incurring crippling damages for an act whose legality is likely (say, as fair dealing), but not perfectly clear, dissuades some Canadians and Canadian institutions from exercising their full rights under copyright law.

Persons (or institutions such as libraries and their staff) who honestly and not unreasonably believe that they are using a work within the bounds of fair dealing or a particular exception should not be liable for statutory damages. Statutory damages have a chilling effect on full enjoyment of user rights.

EDUCATIONAL USE OF THE INTERNET

One area where use of copyrighted materials may or may not be, depending on the situation, fully within the bounds of fair dealing or an implied license is the educational use (e.g., copying or projecting) of materials that are publicly available on the Internet.

It would be helpful if there were an exception in the *Copyright Act* that clarified the permissibility of using, for educational purposes, materials that are openly available on websites. Most of the time, the copyright holders would not object to or expect payment for such uses in any case inasmuch as they desire wide dissemination of their content, but a clarifying exception in the Act would provide certainty for educational institutions, libraries, teachers, and students when using Internet content for educational purposes.

Also helpful would be a clarifying statement in the Act that this and all other particular exceptions are not intended to circumscribe a user's fair dealing rights, but rather to clarify and/or complement them.

⁶ *Copyright Act*, *supra* note 2.

EXCEPTION FOR PERSONS WITH DISABILITIES

In order to assist persons with print disabilities to benefit from a copyrighted work, it should be permissible for a library or educational institution to convert the work into any format that is usable for a person with a disability. It should be permissible to circumvent digital locks to do this. For students, especially those with print disabilities, time is of the essence: it is not always feasible for a library to seek and await permissions or locate, order, and await alternate formats for purchase.

DIGITAL INTERLIBRARY LOAN

Canadian libraries should be able to deliver with legal certainty an electronic copy to the desktop of a requester of an interlibrary loan; this is an advantage that researchers and students benefit from in the US and elsewhere. Depending upon the circumstances, this may well be fair dealing. However, insofar as Canadian libraries may rely upon an interlibrary loan exception in the *Copyright Act*, in the 21st century, it should not be required there that a library not deliver a digital copy of an article to a requester.

An amendment to the exception explicitly allowing the delivery to the end-user of a digital copy should apply to born-digital documents as well as to documents originally in paper format. As well, inasmuch as today's researchers increasingly prefer to retain materials in digital format for their research and private study, they should not have to print out a received document at all in order to have permanent access to it.

INTERNET SERVICE PROVIDER LIABILITY

Inasmuch as universities and sometimes even libraries act as Internet service providers (ISP's), and as a general matter of public good, we encourage a "notice and notice" approach to dealing with possible misuse of copyright materials on the Internet. An ISP should not be expected to "take down" a web site that may contain unauthorized copyright material just because a copyright holder has

claimed an infringement has occurred, an action that could unjustly interfere with a website owner's right to display non-infringing content.

In keeping with the view of an ISP as an information conduit, we believe that it is sufficient that an ISP pass along to a website owner a notice of a concern by a copyright holder. The website owner would then have the opportunity to remove voluntarily the content at issue; an unsatisfied copyright owner could seek an injunction from a court to force removal of possibly infringing content, a process that would ensure that content is removed for appropriate and good reason.

TECHNOLOGY-ENHANCED LEARNING

Inasmuch as libraries at universities provide instruction online to students whether distant or local, it would be helpful to have clear and reasonable language in the *Copyright Act* specifying how copyrighted materials can be used in technology-enhanced learning contexts.

Ideally, instructors would not have to destroy their lessons at the end of a course since they would normally use such lessons a number of times once created. A lesson should be available to a student for the duration of his or her academic program. Ideally too, students would be able to download lesson materials to a laptop or other portable device so that they could learn from them without having to be connected to the Internet, much as they could use a paper textbook while commuting or sitting in a cafe.

CONTRACTS

The *Copyright Act* should specify that the rights given to users in the Act will prevail when terms in an imposed contract (i.e., a "standard form," "click through," or "shrink wrap" contract) would limit actions of a user to a greater extent than would the terms of the Act itself. Only a contract that is actively negotiated by both parties could more fairly be more restrictive than the terms of the Act.

MAINTENANCE AND MANAGEMENT OF COLLECTIONS

Libraries should be able to migrate to a new format those copyrighted materials in formats that are approaching obsolescence: they should not have to wait until the original format is fully obsolete such that it is difficult to find equipment to read or convert the materials. The circumvention of digital locks for this purpose should also be permitted.

CONCLUSION

Bringing Canada's copyright law into the digital age requires a fair, balanced, and reasonable approach to copyright reform. An effective copyright regime is essential to effectively position Canada in the world economy. CARL's member libraries provide researchers with the information and knowledge they need to enable them to contribute to Canada both socially and economically. To compete nationally and internationally, researchers in Canada require a fair and balanced copyright regime that recognizes the importance of users' rights, which must not be limited or narrowed in the digital environment.

CARL thanks the Ministers of Industry and of Canadian Heritage and Official Languages for undertaking this consultation with Canadians to learn their opinions for the updating of Canada's *Copyright Act* to take account of the digital environment.