Cultivating Copyright Custodians for the Digital Age

*Law, Libraries, & the Public Interest in Lending (Obsolete Formats)*
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CCH Canadian Ltd. v Law Society of Upper Canada, 2004 SCC 13

• **CCH, A Library Use Case:**

  “As an integral part of the scheme...the s.29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s.29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s.29 that it would need to turn to s.30.2 of the *Copyright Act to prove that it qualified for the library exemption*” [para 40]

  “The *Copyright Act* does not define what will be “fair”; whether something is fair is a question of fact and depends on the facts of each case.” [para 52].
Linden, J.A.: “Upon request from lawyers, articling students, the judiciary or other authorized researchers the Law Society will photocopy legal materials from the Great Library’s collection. Library users can pick up photocopies or have them forwarded by mail or facsimile. The photocopying service is intended to be carried out in accordance with the Law Society’s “Access to the Law Policy”[para 2, CCH Canadian Ltd v. Law Society of Upper Canada, (2002) 385 (Fed. CA) rev’d 2004 SCC]
Modern libraries, and particularly modern research libraries, are institutions with an “abiding commitment to the record of the past and of the future” that have a core function that not only preserves the cultural record, but “provides access to and ensure use of that record and, increasingly, to be involved in the creation of the cultural record as well.” - JP Wilkins, *Meanings of the Library Today*
The Great Library of Alexandria, O. Von Corven, 19th century
“The role of information institutions and professionals, including libraries and librarians, in modern society is to support the optimisation of the recording and representation of information and to provide access to it. Information service in the interest of social, cultural and economic well-being is at the heart of librarianship and therefore librarians have social responsibility.”
- IFLA Code of Ethics
“As gateways to knowledge and culture, libraries play a fundamental role in society. The resources and services they offer create opportunities for learning, support literacy and education, and help shape the new ideas and perspectives that are central to a creative and innovative society. They also help ensure an authentic record of knowledge created and accumulated by past generations. In a world without libraries, it would be difficult to advance research and human knowledge or preserve the world’s cumulative knowledge and heritage for future generations.”

- Ben White, 2012
“Guaranteeing Access to Knowledge: The Role of Libraries”

“Libraries are rich repositories of historically and culturally significant collections, many of which are not available anywhere else in the world. Without an appropriate copyright exception, a library could not preserve or replace a damaged work while it is still covered by copyright. For example, it could not lawfully copy or digitize an old newspaper or a unique sound recording to preserve it. Without appropriate library exceptions, this cultural heritage would be lost to future generations.

Today, many works are only “born digital”, such as websites or electronic journals, and are unavailable in print format. Without the legal means to preserve and replace works in a variety of media and formats – including format shifting and migrating electronic content from obsolete storage formats – many of these works will inevitably be lost to future generations of historians.” -Ben White, 2012
LAMS Exceptions to Copyright Infringement

• Management and maintenance of collection

30.1 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive or museum, a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection

(a) if the original is rare or unpublished and is
(i) deteriorating, damaged or lost, or
(ii) at risk of deterioration or becoming damaged or lost;
(b) for the purposes of on-site consultation if the original cannot be viewed, handled or listened to because of its condition or because of the atmospheric conditions in which it must be kept;
(c) in an alternative format if the library, archive or museum or a person acting under the authority of the library, archive or museum considers that the original is currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable;
(d) for the purposes of internal record-keeping and cataloguing;
(e) for insurance purposes or police investigations; or
(f) if necessary for restoration.

Limitation
(2) Paragraphs (1)(a) to (c) do not apply where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes of subsection (1).
The Need to Preserve Obsolete Formats

A situation where copyright and libraries naturally intersect

Image: Some rights reserved by jm3
“The library exceptions for preservation and replacement accordingly reflect a tension between meeting the needs of the library while protecting the interest of copyright owners. A typical statute permits the library to make the preservation or replacement copy, but only subject to conditions that might, for example, require the library to first check the market for the purchase of the work. Thus, the market is protected, but the library is allowed to make the copy if the owner is not currently selling the work in question.”

- Kenneth Crews, 2008 WIPO Standing Committee on Copyright and Related Rights
Management and Maintenance of Collection

- Allows libraries to make a copy of a work in an obsolete format (or on that is becoming obsolete after 2012)

- To use this section, the work must not be "commercially available in a medium and of a quality that is appropriate" for the permanent collection of the library

- Commercial availability includes licenses from collective societies
What could a standard approach look like?

• LAMS should be co-ordinating efforts
• Creating guidelines and standard practices for using this exception that could integrate with current library services
  – Infrastructure already exists that supports the catalogue, interlibrary loan, data management, and preservation of journal articles and ebooks
  – Libraries should do the same for the “at-risk” items that may be copied through this exception
Should we think about changing the exception?

• LAMS should consider lobbying for changes in this exception (and library exceptions generally)
  – International models: IFLA Copyright Limitations and Exceptions for libraries
  – Includes the right of preservation of library and archival materials (Article 8).
    • Much clearer than the Canadian right, does not require checking the market
    • Instead require aligning with best professional practice
    • Would provide LAMS with more flexibility, and would allow for the preservation of the most at-risk works
Solutions for temporary problem?

Will obsolete formats become obsolete?
Theberge: Balance where IPR v. Property Rights:
“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. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2…”[par 32]
“In my view, with respect, my colleague Gonthier J. gives too little scope to the property rights of the purchaser who owns the poster, i.e., the physical object incorporating the copyrighted expression, and excessive rights to the artist who authorized the printing and sale of the poster purchased.” [par 2]
•Death of Property- End of Ownership?
Without the legal means to preserve and replace works in a variety of media and formats – including format shifting and migrating electronic content from obsolete storage formats – many of these works will inevitably be lost to future generations of historians.” - Ben White, 2012
**Definition from License:** Continued access, archiving and use of Licensed Materials that survives any termination of the License Agreement and ensures continued access consistent with the then current standards in the publishing industry.

**2.2 Perpetual Access Rights:** The Licensor hereby grants to the Licensee and the Members a non-exclusive, royalty-free, perpetual license for Members and their Authorized Users to use, after the termination of this License Agreement, the Licensed Materials for which Perpetual Access rights are granted, as specified in Schedule 1. Such use shall be in accordance with the provisions of this License Agreement relating to the use of Licensed Materials, including restrictions on use and related liabilities, which provisions shall survive any termination of this License Agreement. The means by which the Members shall have access to such Licensed Materials shall be in a manner and form as specified in clause 10.5 [Termination].
Effectiveness and Weaknesses of Perpetual Access

- Most licenses for commercial publishers have an option for perpetual licenses
- Perpetual license clauses can be vague and inconsistent
- Some librarians “do not trust e-journal providers to continue archival access, even if it were guaranteed in a license agreement”
- Libraries may not have the means to carry out these provisions
- Perpetual access can cost more $$$
- Perpetual licenses may not apply to some formats of works
How is perpetual access provided?

• Of the respondents who indicated that their libraries were able to successfully provide perpetual access to their users, 87 percent did so by continuing to link to the publisher’s website; 56 percent provided access by linking to a membership archive such as LOCKSS, CLOCKSS, or Portico, 14 percent referred users to CD-ROMs, DVD, or external drives that can be access on request; and 9 percent linked or content stored on a library server. Another 7 percent selected “other” and specified details such as using EBSCO’s Electronic Journal Service or linking to content stored on a consortium server, or linking to an IR” pg. 145.
• **When the Wolf Finally Arrives: Big Deal Cancellations in North American Libraries**
  – Out of 31 libraries (or library systems), 24 of them have canceled Big Deal packages that remain canceled, including a few Canadian institutions.
  – 79% of them have taken place since 2015
  – We seem to be at a tipping point, particularly in Canada where the low Canadian dollar puts additional pressure on acquisitions budgets
Journal subscriptions come at a steep price. In 2011, CARL’s 29 academic research libraries paid CAD$167,289,860 collectively for subscriptions to electronic content (a large part of which is journals). By 2014, expenditures had reached CAD$215,224,792. Over 90% of these subscriptions are paid in foreign currencies. This year, given rising prices, the falling dollar, and libraries’ consequent diminished purchasing power, these same subscriptions will likely cost over $260M.

- [Canadian Association of Research Libraries](https://www.carl.org), 2016
Ebooks and other formats: Recapturing Property and Reclaiming LAMs User Rights

• Should libraries insist to own eBooks?

If the library doesn’t own an eBook, the rights holder is able to withdraw the title whenever he wants or the file could be removed from a digital distribution database without reason. And if the original files are damaged, the library is not able to reproduce or shift the format in order to preserve access for library users. The library doesn’t have the control over a well designed and professionally controlled information space any more. Companies, rights holders and commercial distributors are now able to decide who will have access to certain information. Without the non-commercial balance of libraries the commercial sector will have the command and define with pricing policies who will be able to afford what information.

• IFLA, Libraries, e-Lending and the Future of Public Access to Digital Content
Imagine a world where every book on every shelf across the world had different usage terms and conditions - this is the reality of the digital world we now live in.
Contracts should not be permitted to override exceptions and limitations

The goals and policies providing for exceptions are important statements of national and international principle and should not be varied by contract. Most digital products acquired by libraries are accompanied by licenses that override statutory exceptions and limitations supporting library activities. The private law of contract can thereby override the public law of copyright. Accordingly, license terms that seek to undermine copyright exceptions and limitations should not be enforceable against libraries. In addition to licenses for individual works, we see the emergence of broad license agreements that encompass a vast amount of materials and set tight restrictions. These agreements have the potential to redefine the rules of copyright for large portions of the intellectual heritage of a country. Licensing agreements should not redefine the rules of copyright.

- IFLA Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives
There are currently approximately 34,550 peer-reviewed scholarly journals being published worldwide, of which about 30% are open access; but they provide only about 12% of available peer-reviewed articles.

- Canadian Association of Research Libraries, 2016
In Summary

- LAMS need to work together to develop guidelines and infrastructure that support the use of the Maintenance and Management of Collection exception
- LAMS should also advocate for changes in the Act
  - The language in the Management and Maintenance of Collections section should be changed
  - LAMS exceptions should not be subject to override by contracts

Libraries need to maintain their gatekeeper roles, and keep advocating for new ways to preserve and provide access to “in-copyright” works
Serials expenditures percentage increase over 1986

- serial expenditures %+
- consumer price index %+


Percentage: 0%, 100%, 200%, 300%, 400%, 500%
Please don’t let this be...

The End!
Thank-you.