Libraries as Copyright Educators & Advocates

Mark Swartz
Copyright Specialist
Queen’s University

Sam Cheng
Copyright Coordinator
Sheridan
Agenda

- The intrinsic relationship between copyright and libraries
- Areas of the Copyright Act identified by libraries that need improvements (via “Hack the Act”)
Digital content and information technology create challenges for the application of copyright law
The digital resources and services that libraries provide to users require them to have a strong understanding of copyright law.
## Trends of Copyright Practices at Colleges & Universities

### Prior to 2011
- Many colleges and universities had a licence with Access Copyright.

### Context:
- In 2004, Supreme Court ruled on the landmark *CCH Canadian Limited v Law Society* case and established that fair dealing is a user’s right and is evaluated based on 6 factors.
- For document delivery, some academic libraries operated under fair dealing as per the *CCH* case while other libraries used s 30.2 of the *Copyright Act*.1

### 2011 – June 2012
- Starting in 2011, some institutions decided to opt out while some institutions operated under the interim tariff.
- Opted out institutions relied on options such as library licences of e-resources and fair dealing for using copyrighted works.

### Context:
- Access Copyright filed a post-secondary tariff for 2011-2013 with the Board (still pending).
- Copyright Board approved an interim tariff for 2011-2013.
- University of Toronto and Western University signed a licence with Access Copyright in January 2012.
- ACCC (now CICan) and AUCC developed fair dealing guidelines for members to adopt in 2011.

### After June 2012
- Since 2012, more institutions have opted out of the interim tariff or licence with Access Copyright.
- Opted out institutions have relied on options including library licences of e-resources, fair dealing and expanded educational exceptions for using copyrighted works.

### Context:
- On June 29, 2012, the Copyright Modernization Act was passed (in force November 2012).
- On July 12, 2012, Supreme Court ruled on 5 copyright cases.
- ACCC (now CICan) and AUCC created new fair dealing guidelines based on the legislative changes and case law in 2012.
- Access Copyright filed a post-secondary tariff for 2014-2017 with the Board (still pending).

---

Recent increase of copyright positions at colleges and universities

Studies:
- *Copyright Practices and Approaches at Canadian Universities* by Rumi Graham and Christina Winter presented at the 2016 ABC Conference

- *The University Copyright Specialist: A Cross-Canada Selfie* by Erin Patterson presented at the 2016 ABC Conference

“As the mediators between content and users, it is only natural that libraries take the lead in educating about copyright.”²

Libraries are posed to successfully engage in copyright policy issues due to the relationships they have built with stakeholders and power brokers.

Pending Copyright Cases

- Copyright Board ruling on the Post-Secondary Educational Institutions Tariff
- Federal Court ruling on the Access Copyright v York University case
- Federal Court of Appeal ruling on the Provincial and Territorial Governments Tariffs
- Federal Court of Appeal ruling on the Elementary and Secondary Schools Tariff
It is important to follow the progress of court decisions made about the Act:

- When a court decide what a section of the Copyright Act means through a legal decision or series of decisions, if the library community does not agree with that interpretation, the follow up can be to lobby Parliament to change the statute.

- Note that the courts do not make the law of copyright (which is statutory, see Section 89 of the Copyright Act), they interpret the law as enacted by Parliament.

For example:

In **2005**, the Federal Court of Appeal opined about infringement in *BMG Canada v John Doe [2005 FCA 193]*

In **2012**, Parliament added provisions to the Copyright Act about secondary infringement through the Copyright Amendment Act (SC 2012, c 20, s 18), which changed that area of law and rendered the BMG decision irrelevant concerning infringement of services.
Copyright Act, new (2012) Infringement of Services:

s 27 (2.3) It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

Factors

s 27 (2.4) In determining whether a person has infringed copyright under subsection (2.3), the court may consider

(a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;
(b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
(c) whether the service has significant uses other than to enable acts of copyright infringement;
(d) the person’s ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;
(e) any benefits the person received as a result of enabling the acts of copyright infringement; and
(f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.
Cross-Sectorial Advocacy Efforts for Libraries in Canada

- CLA Copyright Advisory Committee (now defunct)
- CFLA Copyright Committee (in the process of formation; more information is available on their website)
Outreach/Education at Ontario College Libraries

- OCLS model licence
- OCLS CLEAR Licensing Database
- HLLR Copyright Literacy Tutorials
- HLLR Copyright Interest Group
Outreach/Education at University Libraries

- Canadian Association of University Libraries
- Universities Canada
- Other groups
HACK THE ACT
Why did we do a session like this?

Parliament will review the Copyright Act in 2017. Interest groups across Canada will by lobbying for changes to the Act. Hacking the Act will identify strengths, weaknesses, areas of concern/importance, and will help CARL advocate for our members and for post-secondary institutions in general in future rounds of Copyright revisions.

Plus

It’s fun...
Hacking Facilitators
How it worked

• Split into groups
• Criticize or annotate section of the act, no re-writes
• Each group was provided with briefs on each section
• Each group prepared a presentation for the group
• We were available to help!
What did our participants come up with
We’re keen to start the conversation about how you would #hacktheact. What do you think would improve Canadian #copyright for higher ed?
@carlabrc How about a text and data mining exception, similar to the one in the UK CDPA: jisc.ac.uk/guides/text-an ...?

The text and data mining copyright exception: benefits and ...
Helping you to understand the legal implications of the new text and data mining copyright exception
jisc.ac.uk
Sections that we suggested for hacking

• Exceptions for Educational Institutions
• Exceptions for Individuals
• Exceptions for Libraries, Archives, and Museums
  – Communication by Telecommunication (Distance Education Exception)
• Exceptions for Persons with Perceptual Disabilities
• Fair Dealing
• Technical Protection Measures (digital locks)
• Traditional Knowledge (draft a new section for the Act!)… or something else

View all briefs: http://bit.ly/1szJDFX
In person sessions

- No participants selected Fair Dealing
- Every other section reflected in the briefs was addressed
- Three teams selected educational exceptions
Distance education

- Distance learners should be able to use the same exceptions as in-class learners
- Remove the 30-day deletion rule and any TPM restrictions

@carlabrc #hacktheact Eliminate the artificial distinction between in-person and online classes, eg. ditch 30.01 and make 29.4 tech neutral
Educational Exceptions

- These exceptions are often times much too specific and are less useful than Fair Dealing in most cases
- Commercial availability is too difficult to determine
- 29.5 should not specify audience or location
- The “clearly visible notice” requirement should be removed from the PAMs exception
- Educational exceptions should be available to any educational institution, not just not-for-profits

@heat13her @carlabrc We could get rid of 30.02 & 30.03 as well, while we are doing this.
Exceptions for Libraries, Archives and Museums:

- Certain requirements are unnecessary and unworkable; libraries should be able to do anything a patron can do on their behalf.
- The section on interlibrary loan either be removed (it can be done under fair dealing) or be expanded to include uses beyond fair dealing.
- Exceptions cannot be waived by contract.

Robert Tiessen
@robfromcalgary

#hacktheact Why not just delete all of S 30.2 from the Act? Libraries should rely on CCH for guidance for ILL.
Traditional knowledge:
• Asked the question “Do we need a structure for communal ownership of copyright?”
• Cultural institutions like libraries, museums and archives should start by adopting a cultural sensitivity policy
• An “indigenous domain”
• It is important to let the aboriginal population take the lead in this conversation
Persons with perceptual disabilities:
• Suggested removing the word “perceptual”
• Proposed removing the limitation that excludes films
• Suggested defining the royalties and reporting aspects more clearly

Technical protection measures:
• The way that this section is drafted eliminates most user rights
• Allow for “breaking locks” as long is doing so does not result in an infringement of copyright, e.g. : 41.1 (1) No person shall FOR THE PURPOSES OF INFRINGING COPYRIGHT / FOR UNLAWFUL PURPOSES circumvent a technological protection measure (etc.)
Rank the sections

• Exceptions for Educational Institutions
• Exceptions for Individuals
• Exceptions for Libraries, Archives, and Museums
  – Communication by Telecommunication (Distance Education Exception)
• Exceptions for Persons with Perceptual Disabilities
• Fair Dealing
• Technical Protection Measures (digital locks)
• Traditional Knowledge (draft a new section for the Act!)... or something else

View all briefs: http://bit.ly/1szJDfX
ABC Conference 2017

• June 29-30, 2017 at the Donald Gordon Conference Centre, Queen’s University, Kingston, Ontario
• Call-for-proposals coming out soon
• Registration will start in the new year
Thank You!

mark.swartz@queensu.ca
sam.cheng@sheridancollege.ca