The Librarian’s Role in the Interpretation of Copyright Law: Acting in the Public Interest

Margaret Ann Wilkinson (mawilk@uwo.ca) is CLA Copyright Committee editor for the Copyright Column. If you have suggestions for future columns please contact her or John Tooth (je.tooth@uwinnipeg.ca). Feliciter’s copyright columns are authored by members of CLA’s Copyright Committee, and are published after peer-review by the rest of the Committee. The opinions expressed in these columns are those of the authors and do not necessarily represent the position of the Committee or of CLA on any given topic. No column is intended to provide legal advice.

The copyright environment in Canada evolves continuously. Recent amendments to legislation, new court decisions, widespread relinquishing of reprographic licences, and tariff applications influence and reshape this environment. Librarians are intricately involved in this complex public policy space and are developing expertise in dealing with a great variety of issues that relate to copyright law and library users. Understanding the law and the role of librarians in its application requires comprehending copyright, libraries, and the societal role of librarians as intermediaries acting in the public interest.

Copyright

Copyright is one of those parts of Canada’s public system of intellectual property rights that is legislated by Parliament, a public system that confers private rights, like copyright, in return for societal benefits. There is, therefore, in its inception, a public interest stake in Canada’s copyright regime. In copyright, the public interest is served through limitations and exceptions to copyright, such as the “fair dealing” users’ right through which the public can use copyrighted works and other subject matter for specific purposes without copyright holders’ permission. In the two largest of the other intellectual property regimes enacted by Parliament, patent and registered trademark, the public interest manifests differently; in patents, the laying open of the patent to public inspection and the ultimate availability of new inventions in the marketplace serve the public interest, and in trademark law the protection of consumers against confusion over source, sponsorship, or approval of goods and services in the marketplace is deemed to be in the public interest.¹

In terms of the public interest in copyright, in 2004, a unanimous Supreme Court of Canada decision informed us that

the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.²

Canada’s legislation is descended from the Statute of Anne, England’s first law on copyright. The full title of the statute, “An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein mentioned,”³ connects the benefits to society—the public interest—to the purpose of copyright.

Copyright’s original purpose, as determined by the British Parliament, was specified to be the encouragement of learning. Copyright’s limited monopoly, for a restricted period of time, for the ultimate societal benefit of learning, was Parliament’s instrument to encourage learning. In 1710, copyright expired after fourteen years, unless renewed for one additional fourteen-year period. Upon expiration of copyright, the works became part of the public domain—that is,
available freely to everyone, to do with as each person wished. Canada’s Supreme Court has recognized and reiterated this tradition by asserting that the public interest should not only reflect “promoting the encouragement and dissemination of works of the arts and intellect” (i.e., learning) but should be balanced with “obtaining a just reward for the creator.”4

It is the notion of the “public interest” that requires the balancing of the interests of the public in learning with the private interest of rewarding creators. The librarian’s role encompasses dissemination of knowledge, and therefore an understanding of the “public interest” and “balance” are essential in rounding out expertise in the copyright arena. Limitations and exceptions to copyright, ss. 29 to 32.2 of Canada’s Copyright Act,5 styled by Canada’s Supreme Court as “users’ rights,”6 represent the public interest in copyright.

The concept of the public interest is closely linked with other terms that relate to it. In her doctoral thesis on library consortial purchases, Catherine Maskell defines three related terms: “public goods,” “public sphere,” and “public domain.” First, “[p]ublic goods” are described as existing “for the greater social and cultural benefit of society [and] are not considered part of the market economic system.” They are considered “non-commodifiable” and “should be maintained for the good of the whole, that is, for the good of society or the economy.”7

Later authors have identified libraries as such public goods.8 Second, Maskell states,

[the “public sphere” is clarified as a real or virtual space in which the public, the community, or the enlightened citizenry, can discuss, criticize and inform each other as to the government and economic policies of the day . . . . For the public sphere to operate efficiently it is important to make sure that all the necessary information is available for use by the citizenry in order for them to fully participate in their community.9

Finally, Maskell indicates that

[t]he “public domain” refers to works “that cannot be owned by anyone and therefore are freely available for the public to use.”10

The conception of the public domain in the Théberge decision from the Supreme Court connected the public domain with fair dealing, giving the public domain another meaning:

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, which seek to protect the public domain in traditional ways such as fair dealing for the purpose of criticism or review and to add new protections to reflect new technology.11

In the Court’s conception, the public domain is interpreted to mean that use and enhancement of works guarantees the proper utilization of works by society and cannot improperly be constrained by rights holders. The Court’s statement aligns the meaning of the public domain with the public’s legitimate use of works as articulated in the Copyright Act under sections 29 to 32.2, fair dealing and other exceptions to the creator’s exclusive rights (the users’ rights).

The Role of Librarians and the Public Interest

Librarians have long championed a professional philosophy on dissemination of works and access to knowledge. Canadian library associations are advocates of information as a public good and align their positions with the protection of intellectual freedom as a societal norm. The Canadian Library Association’s Intellectual Freedom statement declares:

All persons in Canada have the fundamental right, as embodied in the nation’s Bill of Rights and the Canadian Charter of Rights and Freedoms, to have access to all expressions of knowledge, creativity and intellectual activity, and to express their thoughts publicly.
This right to intellectual freedom, under the law, is essential to the health and development of Canadian society.\textsuperscript{12}

The Canadian Association of Research Libraries’ (CARL’s) Policy Statement on Freedom of Expression proclaims:

It is the responsibility of research libraries to facilitate access to all expressions of knowledge, opinion, intellectual activity and creativity from all periods of history to the current era including those which some may consider unconventional, unpopular, unorthodox or unacceptable. To this end research libraries shall acquire and make available, through purchase or resource sharing, the widest variety of materials that support the scholarly pursuits of their communities.\textsuperscript{13}

CARL’s statement bridges between the concepts of access and freedom of expression as societal values and the acquisition, purchase, and resource-sharing of works. The statement echoes the Supreme Court’s position on the purpose of copyright in \textit{Théberge}:

The \textit{Copyright Act} is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).\textsuperscript{14}

These statements from Canadian library associations all identify the public interest with access to works and freedom of expression.

As the Supreme Court noted in its unanimous full court decision in \textit{CCH},\textsuperscript{15} the \textit{Copyright Act} itself confers a special status for librarians in interpreting fair dealing in section 30.2(1):

It is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1.

In the \textit{Copyright Act}, as amended in 2012, in the new provisions dealing with Circumvention of Technological Protection Measures, Parliament again created a special exception for librarians:

Every person, except a person who is acting on behalf of a library, archive or museum or an educational institution, is guilty of an offence who knowingly and for commercial purposes contravenes section 41.1.\textsuperscript{16}

Librarians operate at the core of copyright’s balance: they reward the creator through the purchase of works and other copyrighted subject matter and they disseminate knowledge and encourage learning, thus fulfilling the purpose of copyright law as set out by the Supreme Court of Canada in \textit{CCH}.

The Supreme Court of Canada acknowledged the role of librarians in assuring that neither creators nor users’ rights overreach their proper limits. In \textit{CCH}, regarding the factors to be applied in a fair dealing analysis, the Court stated:

The Access Policy [of the Law Society of Upper Canada’s Great Library] and its safeguards weigh in favour of finding that the dealings were fair. It specifies that individuals requesting copies must identify the purpose of the request for these requests to be honoured, and provides that concerns that a request is not for one of the legitimate purposes under the fair dealing exceptions in the Copyright Act are referred to the Reference Librarian. This policy provides reasonable safeguards that the materials are being used for the purpose of research and private study.\textsuperscript{17}

The Court reasoned that review by the librarian of any use of the work that might be of concern offered sufficient oversight to warrant that the purpose of the dealing was fair. The Court made a similar statement about librarians in determining the amount of the dealing\textsuperscript{18} and implied as much in considering the nature of the work\textsuperscript{19} in a fair dealing analysis.

In an article on the purpose of copyright, Daniel Gervais acknowledges the special recognition of librarians and advocates for the protection of their role.
[Librarians] allow end-users to access human knowledge, whether in the form of print (CCH) or via the internet. Those end-users have a right of access and that right must not be interfered with lightly. As facilitators of this kind of access . . librarians’ and ISPs’ interests must be safeguarded.20

With the Supreme Court’s confirmation of the role of librarians in determining the limits of fair dealing clearly stated, the Court further charged librarians not to restrictively interpret a users’ right:

[T]he fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively. As Professor Vaver, supra, has explained, at p. 171: “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading.”21

In addition, the Court took special care in directing the approach to the fair dealing purpose of research and private study:

“Research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts.22

Librarians can rely on Parliament’s designation of authority in s. 30.2 (1) that, as librarians, they can act on behalf of library users in making use of works for the purpose of fair dealing. In addition, as explained, the Supreme Court of Canada has broadly interpreted the role of librarians in shaping the public interest in copyright through their exercise of fair dealing and the other statutory exceptions to the rights of copyright holders that comprise the users’ rights. Librarians have a responsibility to fully inhabit their role by giving a large and liberal interpretation to users’ rights to enable “the proper use of copyrighted works for the good of society as a whole.”23

Summary

In Théberge, the Supreme Court stated that due weight must be given to the limited nature of creator’s rights,24 and in CCH the Court specified that other rights (users’ rights) arise from the statutory exceptions that limit the reach of the creators’ exclusive rights. The interplay of both sets of rights is the point at which balance is achieved. In CCH the Court formally recognized the role of librarians in determining whether a use is fair.

As we have seen, Canada’s copyright law is a public policy instrument and librarians have a responsibility to liberally interpret fair dealing and those other exceptions that comprise the users’ right “for the good of society as a whole.”25 Librarians are actors in the public interest.

Victoria Owen (owen@utsc.utoronto.ca) is Chief Librarian at the University of Toronto Scarborough. She holds a Master’s in Library Science and a Master’s in Law, specializing in intellectual property.

Notes

6. CCH.
7. Catherine Maskell, Consortia Activity in Academic Libraries: Anti-competitive or in the Public Good? (Ph.D. dissertation, the University of Western Ontario, 2006), iii.
9. Maskell, iii.
10. Ibid.
11. Théberge, para 32.


15. CCH, para 83.

16. Copyright Act, s.42(3.1)

17. CCH, para 66.

18. Ibid, para 68.


22. CCH, para 51. Note that “I” in the quotation is the Chief Justice, who wrote the judgment, referring to herself.

23. Ibid, 41.


25. CCH, para 41.

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But how often do we fail to fight these things within our own organizations, or our own professional lives? We suppress problems we don’t know how to solve. We allocate time and resources for what we like, or what’s easy. We resist change when it means we have to admit our own ignorance.

This is not a self-help editorial. There’s a reason why I had trouble writing about organizational change: it’s difficult, it’s tricky, it involves politics and budgets and there is no simple answer, and often one person is not enough. But if it’s necessary for me to editorialize, I will advocate for embracing panic.

Embracing panic is a two-step process. First, one names one’s fear; second, one identifies why it makes one panic. And you haven’t really embraced it, haven’t really bear-hugged your panic until you do the second. The what isn’t actionable; it’s only by knowing the why that one can decide how, and if, to face it. Note: very, very often the answer to step two is because I’ll look dumb—a fear that fail camps are thankfully trying to combat.

So, what about it? Does the thought of social tagging in institutions keep you up at night? Does Amazon’s subscription service turn your stomach? Are you terrified to tweet? Cough it up, if only to yourself. And remember:

We look forward to the challenge of embracing panic.

Anne Dabrowski, Clinical Research Coordinator at Mount Sinai Hospital, manages data collection for a national longitudinal cancer research project. She has diverse experience in data management, from libraries to not-for-profit organizations, specializing in optimizing and simplifying information systems. She tweets and tumbls from time to time; you can read her series on social media on InsideOLITA, the blog of the Ontario Library Information Technology Association. A graduate of U of T’s iSchool, Anne lives and bikes in Toronto. Feel free to contact her at @annetompkins (twitter) – dabrowskia (tumblr) – or adabrowski@mtsinai.on.ca.