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Public Health Professionals as Users and Creators of Information: Understanding Canadian Copyright is Key

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The policy makers in copyright:

1. Government

Copyright Act, Revised Statutes of Canada 1985, c.C-42, as amended

In Canada, the federal Parliament, NO provincial interest – recent Bill C-61 (now dead) – summer Copyright Consultation

- Because of the international principle of “national treatment” in international copyright agreements, all materials in Canada, for all practical purposes, are governed by Canadian law

Judiciary- since 2002 steadily confirming a large “public domain”

- In Canada, Parliament has tried to limit the role of the courts: s. 89 Copyright Act
- The Canadian Charter of Rights and Freedoms has never yet been applied directly to an intellectual property law situation (but the Supreme Court in the *Harvard Mouse* case in patent, *for example*, has said it will do so)

How will “users’ rights” be expressed and preserved in the future?

2. International Treaties

Formerly only on “UN side”, now also negotiated as part of trade treaties

Are Perceived, once entered into, as limiting Domestic National Policy Options

19th Century **Co-ordination** (e.g. Berne, Paris) - 1990's Trade **Coercion** (e.g. NAFTA, TRIPS)

Are irrelevant to Charter concerns, are not binding on Canadian legislatures; non-compliance runs the risk of sanctions in the trade context

3. Intellectual Property Owners, Themselves

Governments -- As Crown Copyright Holders

Copyright holders working together through Canadian Collectives

Other individual copyright holders – both domestic and foreign

TRIPS:

Article 13:

[Member states] shall confine limitations or exceptions to exclusive rights
to certain special cases
which do not conflict with a normal exploitation of the work
and do not unreasonably prejudice the legitimate interests of the
right holder.

The Information Roles of a Health Organization:

Who are you? (Organizational Identity)

What is the legal character of your organization?

Where does your organization draw its existence from?

Copyright Act definitions:

- Is your library or any part of your organization entitled to the “Libraries, Archives and Museums” (LAMs) exceptions?
- Are you entitled to the “Educations Institutions” exceptions?
- Is your organization part of the federal or provincial crown – noting that municipal institutions are not crown institutions – ?
If so, your organization will be limited to “Crown Copyright”

What information roles does your organization play?

Information user?

Information intermediary?

 Making available library resources?

 “Re-packaging” received information?

Authors creating new expressions of information?

Information publisher?

Do you create any of the following:

 Agendas, minutes, other internal communications?

 Brochures?

 Presentations?

 Website?

The context of the ownership of copyrighted works:

Copyright is a form of intellectual property. Other forms are:

- Patents
- Trademarks

Separate property rights exist in the physical manifestations of copyrighted works

Paintings are owned by those who purchase them, even though the copyrights are not sold to the painting purchasers...

You own books, although you have no copyright interest in them...

So what is it that we are dealing with when we deal with copyright holders (either as users or as owners ourselves)? What do they **own**?

What is copyrighted? Expressions and not data or facts per se

Works:

- Literary - Includes computer programs, tables
- Artistic - includes photographs, diagrams, maps, charts, etc.
- Musical
- Dramatic - Includes cinematographic works, with or without soundtrack

Compilations of works and Collective works

- Works resulting from the selection or arrangement of data or of other works or parts of other works and any work incorporating the work of different authors.

Other subject matter:

- Sound recordings
- Performers' performances
- Broadcasts

The © symbol is of no legal effect in Canada, but, practically, it does put a potential user on notice that you care about your copyright in this work.

Economic rights in works

- to produce, reproduce
- to perform in public
- to translate
- to convert from one type of work to another
- to make sound recordings or cinematographs
- to communicate the work by telecommunication
- to present art created after 1988 in public
- to rent computer programs

to authorize any of the above

Economic rights in “other subject matter”

- to communicate a **performer's performance** by telecommunication
- to “fix” a **performer's performance**
- to reproduce a fixed **performance**
- to rent out a sound recording of the **performance**

- to publish, reproduce or rent a **sound recording**

- to fix a **broadcast signal**
- to retransmit a **signal**

to authorize any of the above

The internet is governed by copyright and uses are controlled by copyright holders in that environment --

The Supreme Court has made it clear (in the “Tariff 22” case) that:

1. Posting a work on the net is *authorizing* its communication – and communication occurs when the item is retrieved by an end user, and
2. When a content provider intends the public to have access, that is a communication by telecommunication to the public...
Both rights only the copyright holder has – so, if posting such that the item is publicly accessible is done in Canada, Canadian courts will find in favour of copyright holders unless the user can establish a statutory exception.

The courts (Fed.C.A. in the “ringtones” case) have also established that

3. Just because the members of an intended group of recipients download postings separately does not change the fact that the postings when posted are being communicated “to the public” within the meaning of the Copyright Act.

And the Act only protects substantial portions or the whole of original expressions -

- In Canada, copyright holders have only the rights to produce, reproduce, publish or perform in public substantial portions or the whole of works:
 - If you are producing, reproducing, publishing or performing in public only insubstantial portions of copyrighted works, then you are not violating copyright
 - Unfortunately, what constitutes a substantial portion of a work is, in Canada, a qualitative test and therefore difficult to determine with certainty ahead of time...

So, who owns the copyright interests ...

The **individual authors**, who were not employees at the time of creation of the works, if they have not assigned those rights, own the rights in works – and, even if they were employees or assigned their economic rights, unless they have waived them, they continue to hold moral rights.

Employers who employed authors who created works will own the copyrights, but not the moral rights, in those works, unless they have assigned them.

Sound recording rights and rights in **performances** by performers will be owned by the makers and performers, respectively (unless assigned to others), even though the sound recordings or recorded performance may also carry other copyright interests, for example in musical works or film, that are owned, at least originally, by others.

Photographs are owned in Canada by the person commissioning them (if paid for) rather than the photographer. Otherwise the photographer owns them. (If photographs are owned by corporations now in Canada, the term of copyright is only 50 years, whereas if they are owned by individuals (or corporations an individual controls) the term is the life of the photographer + 50 years.)

Author is NOT the 1st owner of economic rights s.13(2),(3)

Author holds Economic Rights s.13

Author's Moral Rights

Date of creation of work

Non-author Copyright holder's rights

Author assigns economic rights s.13(4) – some or all rights in a given work

In all cases, the duration of monopoly protection is determined by the lifetime of the author + 50 Years

Death of Author

Reversion s.14(1)

50 years

Last 25 years of period

End of economic and moral rights: open competition, freely available for any use, "public domain"

Licenses and Permissions

It is the **copyright holder's prerogative**

- (a) to decide whether or not to grant permission (a license) to a requestor to make any particular use of a work (or other subject matter); **and**
- (b) if granting permission, to charge or not charge for that permission.

The charge for making use of materials is generally termed the **TARIFF** if it is an amount established by the Copyright Board of Canada in a situation involving a blanket license obtained from a copyright collective organization or a **ROYALTY** where an individual license is concerned.

Licenses under the Copyright Act are required to be in **writing** (s.13(4)) and so it is best to get all permissions in writing.

If you use a work without obtaining permission – or without obtaining permission from the correct rightsholder – you are using the work **AT RISK** of a suit for copyright infringement.

Merely acknowledging source and author may satisfy the moral rights requirements of the Copyright Act but does **not** provide a defense to a lawsuit for copyright infringement.

But what is this second set of rights represented in the Canadian Copyright Act, the MORAL RIGHTS?

The rights of the author over moral rights:

Section 28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

Not transferable... licensing not an option.

...what are “Moral Rights”?

In Canada, the author of a work has a right :

- to the **integrity** of the work (i.e. to prevent the work from being distorted, mutilated or otherwise modified *to the prejudice of the honour or reputation of the author*)
- where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym (as well as the right to remain anonymous) [often referred to as the right to **paternity**]
- to prevent the work from being used in association with a product, service, cause or institution *to the prejudice of the honour or reputation of the author* [commonly referred to as the right of **association**].

What is the difference between Copyright and Plagiarism?

COPYRIGHT is a legislated set of rights;

PLAGIARISM is a question of literary and cultural norms:

Certain institutions and groups, using contract law, can make plagiarism a wrong for which a person can be sanctioned. For example, at UWO, plagiarism exists as an “academic offence”:

Vis-à-vis **students**, it has been declared by Senate as an offence and enforced under the terms of the **contract** between the student and the university;

Vis-à-vis **faculty**, it was negotiated as an academic norm by the faculty union, The University of Western Ontario Faculty Association (UWOFA), and the University and is defined in the **Collective Agreement** and enforced by the University against faculty members through the disciplinary process created in the Agreement.

Other than in such special arrangements, plagiarism that does not amount to copyright or moral rights infringement is not actionable in law in Canada.

Why should institutions and individuals respect copyright and moral rights interests? : Liability issues

Implementation of a legal regime inevitably involves:

- enforcement and/or
- coercion and/or
- persuasion

Statutory enforcement is provided in 3 ways:

1. criminal sanctions
2. provisions for copyright holders to sue for infringement (civil redress)
3. administrative remedies – mandating Customs to seize infringing goods

In 1988 the criminal sanctions were dramatically beefed up –

- a demonstration to persuade

and certain streamlining of civil enforcement occurred

- coercion through increasing the bargaining power of the copyright holder?

In the summer of 2007, the **Criminal Code** was amended to prohibit the copying of movies by recording in movie theatres...new s.432

RISK FREE: create your own new material, instead of using those of others.

Writing or otherwise creating your own entirely new materials, without using diagrams or photos or overly lengthy quotations from other works.

One possibility should you err in some slight way by including, without permission, something copyrighted, in a larger project:

New since 1997: **s. 30.7 Incidental inclusion defence**

The risk -

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.

Section 28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

BUT there are also **USERS** (and intermediaries') **RIGHTS** in the Copyright Act...

Your health organization has four choices to make with respect to copyright material:

Should it rely on its connection to “**user rights**,” to provide “**exempt**” services to users, or on the philanthropy of rightsholders?

free

Should it buy **permissions** for uses of materials?

costly, temporary

Where user rights are not extensive enough and permissions are not available (at all, or, affordably), should it **curtail its uses** of copyright material? **less service**

Should it use material without permission and **risk enforcement** by rightsholder(s)? **risk assessment**

each **institution** must decide for itself...

Relying on users' rights (**FREE**);

Purchasing individual copies of materials from commercial publishers, to use or distribute to clients – or either employees of the Health Unit or clients borrowing from your library – traditional ways of using and disseminating knowledge:

Reading is not a use included in the copyright holders' bundle of rights;

Borrowing is not a use traditionally included in the copyright holders' bundle...

One exemption, probably heavily used in the environment of your private life, “Private copying,” is not a useful exemption at work --

The “private copying” exemption (Part VIII of the Copyright Act, ss. 79 ff.)

- only applies to sound recordings of musical works
- only applies to private uses
- it specifically does **not** apply if the recording is
 - distributed (whether or not it is sold)
 - communicated to the public by telecommunication
 - performed in public

On the other hand, a real possibility to allow **you to use** copyrighted work, at work or elsewhere, is FAIR DEALING. These rights override the copyright holders' rights if you are using the works for certain purposes.

The Canadian statute provides for fair dealing in five categories:

Research

Private study

Criticism *

Review *

News reporting *

*** if source and attribution mentioned**

2004 Supreme Court decision in *CCH et al v. The Law Society of Upper Canada*, the “**Law Society**” case:

The Supreme Court specifically said:

“a library can always attempt to prove that its dealings with a copyrighted work are fair under section 29 of the Copyright Act. It is only if a library were unable to make out the fair dealing exception under section 29 that it would need to turn to the Copyright Act to prove that it qualified for the library exception.”
(para.49)

The Supreme Court has now listed a non-statutory set of factors that judges should consider as a “useful analytic framework” in interpreting “fair dealing”:

- **purpose of the dealing:**
 - must be an allowable purpose, one mentioned in the act
- **character of the dealing:**
 - how was the infringing work dealt with?
- **amount of the dealing:**
 - what was the amount and substantiality of portion used in relation to the whole work?
- **alternatives to the dealing:**
 - defense more likely allowed where no alternative available
- **nature of the work:**
 - i.e., strong public interest in access to legal resources
- **economic impact on owner:**
 - how is market for work impacted by fair-dealing in question?

Users' rights, such as fair dealing, permit you to make certain uses of materials, but not others:

Information Roles typical in a health organization:

- Information user
- Information intermediary
 - Library resources
 - “Re-packaging” received information
- Author creating new expressions of information
- Information publisher
 - Agendas, minutes, other internal communications
 - Brochures
 - Presentations
 - Website (www.healthunit.com)

To “re- package” information (unless you completely re-express it), re-publish or redistribute it, you will need the permission of the copyright holders.

Whether you include older works as part of a new compilation you create (with permission), or you create your own (entirely new) works, your organization will become a copyright holder.

How do we get **CANADIAN** permissions from other copyright holders?

- Through permissions of the copyright holders given in advance (“open content licensing” or “creative commons”) (**FREE**) or
- Through permissions negotiated with copyright collectives in blanket licenses (where the right(s) you seek and the copyright holder of the work you are interested in are represented) (**\$\$**) or
- Through permissions negotiated directly, from time to time, with copyright holders (**\$\$** or **FREE –choice of copyright holder**).

Will AccessCopyright be able to meet all your needs? Can any one collective?

AccessCopyright has reciprocal agreements with COPIBEC in Quebec and other international organizations – it offers UWO protection from the claims of those who are affiliated with it, either directly or indirectly

Contract

Only available to the parties

AccessCopyright has offered an indemnity clause in the past to cover the costs involved if others sue – but can't if the Tariff is established by the Copyright Board instead of as an individual contract

reproduction rights for literary works (photocopy and electronic) available for sale

Only available for the rights contracted

UWO, for example, has only bought photocopy rights to date – there is no agreement in place for electronic rights because AccessCopyright isn't offering a blanket license for them because the business case isn't there yet for them...

Only available for the price negotiated

No moral rights covered (attribution, integrity, association)

Only available for the term negotiated

Users must make decisions about *their* uses of information but **Intellectual Property Owners** also make decisions -- What does **your health organization** do with the works that you and others create for it?

Decisions-

Assert intellectual property rights?

Assign to traditional publishers ?

Control with publishers, whether foreign or domestic.

Assign to alternative publishers (those who do not insist on full transfer of rights) ?

Some control with publishers, whether foreign or domestic, some rights remaining with copyright holder.

Grant certain permissions

Exercise rights collectively ?

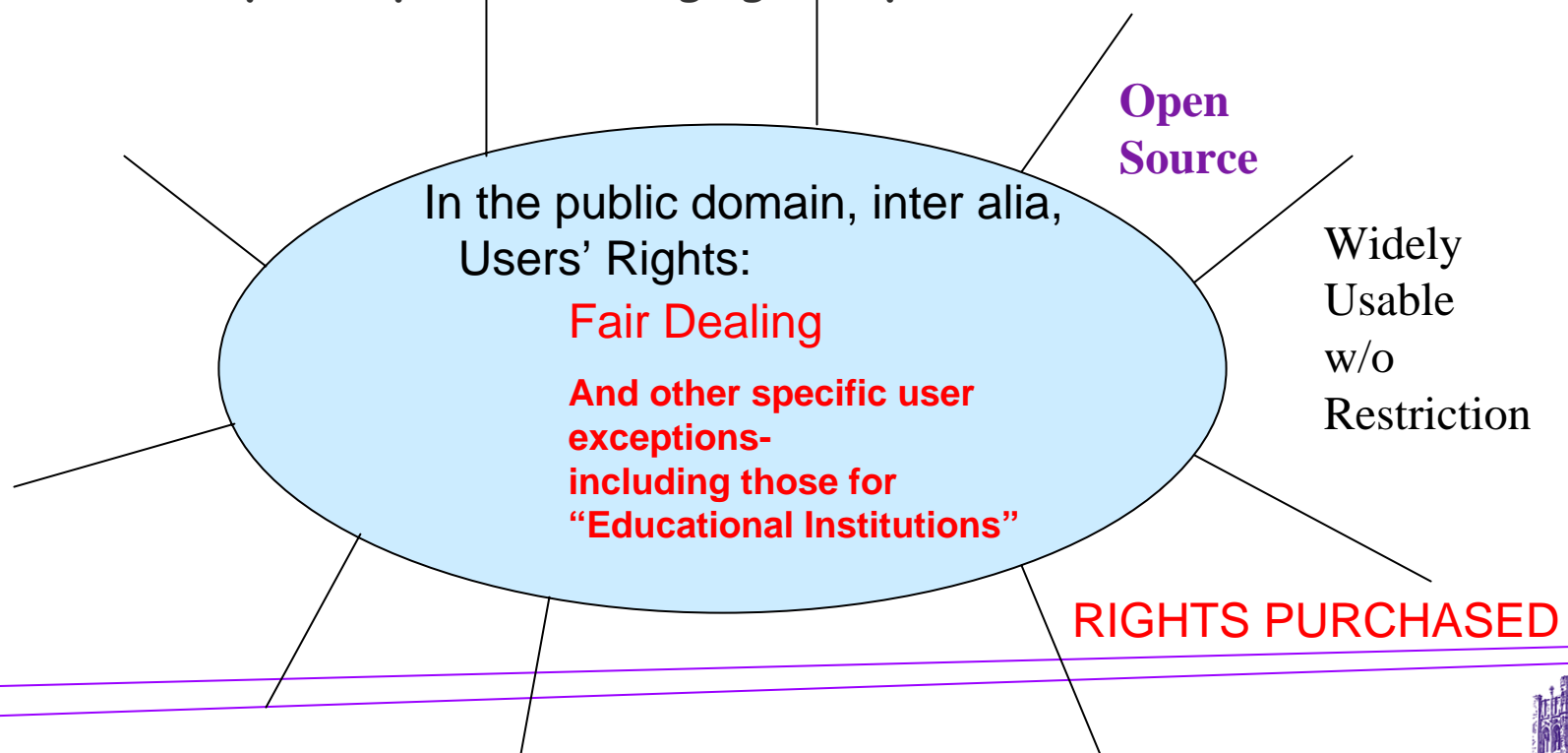
Individually little power of enforcement and therefore of control – but possible remuneration according to collective's policies and possible control through governance of collective

Renounce intellectual property rights?

No control and no further potential for economic value to that copyright holder
Works and “other subject matter” available to be exploited by others

Philanthropy vs. Entitlement

The philanthropy of copyright holders giving permissions or giving up the exercise of their copyrights (“open access, creative commons”) is more palatable from the point of view of the trade regimes...but it is contributing to the public interest, as is the exercise by government of Crown Copyright, rather than creating users’ rights or statutory exceptions, enlarging the public domain...



Where do we go from here?

- Watch for the actions of this minority government...
- **Exercise the fair dealing rights** confirmed by the Supreme Court:
 - Don't pay for uses of material by contract in agreements with collectives or individual owners or vendors that you already possess by virtue of fair dealing...
 - Be prepared to challenge any attempts to limit our rights that are introduced in attempts to amend the Copyright Act
- **Buy Canadian!** You can only be protected in Canada from the claims of rightsholders if you have bought or received free permissions for uses in Canada from the people or organizations that have the rights for Canada: American vendors are unlikely to hold the Canadian rights...
- Watch that “open source” and “Creative Commons” licenses you intend to rely upon cover Canada and are from the appropriate rightsholders...
- Where you have to buy rights, **haggle** over price – either with the copyright owners or before the Copyright Board...

Resources:

Wilkinson, Margaret Ann

- (2008) “Battleground between New and Old Orders: Control Conflicts between Copyright and Personal Data Protection,” in Ysolde Gendreau (ed) New Intellectual Property Paradigm: The Canadian Experience [Queen Mary Studies in Intellectual Property series edited by Uma Suthersanen] (London: Edward Elgar) at 227-266.
- (2009) (with doctoral student Natasha Gerolami) “The Author as Agent of Information Policy: The Relationship between Economic and Moral Rights in Copyright,” 26 *Government Information Quarterly*, 321-332.
- (2005) Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries – in Michael Geist, ed., In the Public Interest: The Future of Canadian Copyright Law (Toronto: Irwin Law) at 331-374. Download available at <http://www.irwinlaw.com/pages/content-commons/filtering-the-flow-from-the-fountains-of-knowledge--access-and-copyright-in-education-and-libraries--margaret-anne-wilkinson>
- (2009) “Open Access and Fair Dealing: Philanthropy or Rights?” in Mark Perry and Brian Fitzgerald (eds) Digital Copyright in a User-Generated World – *forthcoming Irwin Law*

Thank you