

A Brave New World?

Access Copyright in its Own Words on Issues Affecting Research Libraries

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CARL is the leadership organization for the Canadian research library community. The Association's members represent Canada's major academic research libraries plus Library and Archives Canada, the Library of Parliament and the Canada Institute for Scientific and Technical Information (CISTI).



Executive Summary

The organization Access Copyright, formerly known as CANCOPY, has a number of strong views regarding copyright law, restrictions and exceptions. Many of these views pertain to issues which affect research libraries across Canada. As Access Copyright is the primary license holder for access to copyrighted works across Canada, its positions, particularly those which are quite strong, should be closely observed. The purpose of this report is to examine some of the stated positions of Access Copyright, and also to provide documentation of these positions. The methodology used for this report involved researching the Access Copyright website and the websites of its board members, and extensively examining the transcripts of the Parliamentary hearings at which Access Copyright appeared in relation to Bill C-32. Four of Access Copyright's stated positions will be presented in this report. Although Access Copyright's positions on a number of issues are a matter of record, they may not be prominently displayed. The intention of this report is to clearly and accurately illustrate some of Access Copyright's more controversial standpoints.

Example 1: The Blackboard Exception

During the Parliamentary hearing on copyright reform on Tuesday, November 19th, 1996, CANCOPY's representatives were asked to explain the reasoning behind some of their proposed amendments. In particular, the proposed subsection 29.4(1) was looked at. This section proposed allowing a 'blackboard' exception, only allowing material to be handwritten on blackboards. CANCOPY's justification for such a strict exception was that the educational exception proposed by the federal government could result in teachers using computers to put material up in front of the class, or to show a film. Andrew Martin also pointed out that "it has the potential to translate into digital delivery for distance education," which CANCOPY felt was improper to address in this particular exception. He then went on to state, though, that "[w]e don't truthfully have any concern with how teachers communicate material within the classroom. Indeed, we license most of what they do within the classroom... Our licences do not restrict them. Our concern, the mischief we were trying to prevent, was the way in which material could be sent in digital format outside the classroom."

(source: http://www.parl.gc.ca/committees352/heri/evidence/38_96-11-19/heri38_blk101.html)

Example 2: Photocopying and the Role of Photocopiers

The role of photocopying and photocopiers was also brought up during the November, 19th, 1996 Parliamentary hearing on copyright reform. Andrew Martin stated that although it appears as though photocopying services are essential in schools and libraries, CANCOPY's licensing schemes would "easily and inexpensively meet the needs of

teachers, students, and library users.” He later emphasized that the high speed copiers in the Metro Reference Library, which are equipped with automatic book page turning equipment, were “clearly... custom-made to infringe copyright.” He also stated that “I guess we feel doubly irritated by [the exception] because photocopying machines are generally profit centres; people who install them do not lose money on it. If you go up to a self-serve copier in a college, university or library, it will cost you between 10¢ and 20¢ to use it. Probably about one-third of that money goes to the supplier of the equipment. So we feel it's inappropriate for people to install equipment. They know perfectly well it's going to be used to infringe copyright and to make money off the back of it.”

(source: http://www.parl.gc.ca/committees352/heri/evidence/38_96-11-19/heri38_blk101.html)

During the Standing Senate Committee on Transport and Communications meeting of April 15th, 1997, CANCOPY discussed the “proposed immunity for self-serve photocopiers.” Allegedly, in the original version of Bill C-32, libraries and educational institutions would not face any legal liability for copyright infringement on photocopying machines installed by the institution, provided they posted signs near the machine warning people about the Copyright Act. The amendment to this proposal stated that in addition to posting signs, the institution or library should also to have a collective licence. CANCOPY felt this was a fair position to adopt, as steps had been taken to “address the vast majority of what will be copied and to pay for it and this protects them against maverick, inappropriate use of the machines.” Andrew Martin also stated that this amendment gave an unprecedented level of protection to libraries and academic intuitions. If one party was to be considered the “loser,” it would be “is the copyright owner who will then not be able to bring legal proceedings against a library or educational institution that does have a collective licence.” The amendment, he felt, would not in any way threaten those who use or install photocopy machines.

(source: <http://www.parl.gc.ca/english/senate/com-e/tran-e/14evb-e.htm>)

Example 3: Regarding Copyright Exceptions For Schools and Universities

During the November 19th, 1996 Parliamentary hearings on copyright reform, members from CANCOPY stated that it was their position that exceptions to the proposed law should only be granted if collective society agreements are not available. In other words, as Andrew Martin stated, “license it or lose it.”

Martin also stated the proposed exception stating that educational institutions would not be held responsible for copyright violation on its self-serve photocopiers or reprographic equipment was “unacceptable,” and that “it's allowing educational institutions, if they choose to, to walk away from their copyright responsibilities.” He also, however, stated that it had not been the experience of CANCOPY that the majority of institutions took an irresponsible approach to copyright. CANCOPY’s position was that the only way this

exception could be considered acceptable would be if the institution itself had a collective society licence.

Martin also spoke on the issue of interlibrary loans. As CANCOPY licences interlibrary loans, it would obviously be affected by any exceptions. An example provided by CANCOPY was that the revenue they receive from universities could be cut back as much as 45% due to the “interlibrary loan exception and because of the possibility that some of the multiple copying can be done by libraries.” If CANCOPY is able to licence a particular work, they should be allowed to do so, and that “if interlibrary loan is so important to academic libraries,” the exception should be limited “so that it will only apply if the work they need is not in [CANCOPY’s] repertoire.” Martin stated that restrictions such as those utilized in the United States would be beneficial in this instance, as this way, there would be a guideline on the number of times a library could perform an interlibrary loan under their copyright law. This way, interlibrary loan would not become “a substitute for purchasing subscription material.”

The issue of document delivery was also discussed. According to CANCOPY, “Bill C-32 will allow non-profit libraries to run commercial document delivery services for corporations and professional firms.” CANCOPY questioned whether this was an appropriate role for non-profit libraries: “Part of our concern is that many publishers and private document deliverers offer just-in-time fax or e-mail delivery services and they should not be undercut by non-profit libraries sheltered by a statutory exception and not paying copyright fees to authors or publishers.”

Finally, the issue of differential tariffs for universities and for-profit copy shops was discussed. Although CANCOPY had originally believed that universities should pay lower fees than for-profit organizations, they later rejected this idea on the basis that many for-profit copy shops were in fact, “the overwhelming majority of what [for profit copy shops] do is in fact educational material for educational users.” CANCOPY is not persuaded “that whether someone is for profit or not for profit fundamentally should make a difference in how they're treated under the copyright law.” Ultimately, differential tariffs for universities could be seen as an unfair and anti-competitive distinction.

(source: http://www.parl.gc.ca/committees352/heri/evidence/38_96-11-19/heri38_blk101.html)

On Tuesday, April 15th, 1997, the Standing Senate Committee on Transport and Communications met to consider the implications of Bill C-32. CANCOPY was one of the witnesses in attendance. Andrew Martin stated that Bill C-32 would in no way affect the activities of librarians and educators: “Let us be frank. The lack of exceptions in the current law has never impeded them and the very small limits that are now placed on some of the proposed exceptions will not interfere with how they operate, either.”

(source: <http://www.parl.gc.ca/english/senate/com-e/tran-e/14evb-e.htm>)

During the Parliamentary hearing on Tuesday, April 27th, 2004, on copyright reform, Roanie Levy, Director of Legal Services and Government Relations for Access Copyright, stated that “Exceptions are extreme measures that should only be resorted to when addressing extreme circumstances, such as when access cannot be provided by any other means.” This applied to the use of internet materials for educational purposes. Levy’s position was that many times, just because someone has put something on the internet does not mean it is automatically publicly available. Most of the time, she asserts, “the only thing the person who put it up there wanted you to do with their work is read it for personal use, not for educational purposes or other purposes. At the end of the day, what appears to be publicly available is truly not publicly available, and certainly not publicly available for educational purposes.”

(source: <http://www.parl.gc.ca/InfocomDoc/37/3/HERI/Meetings/Evidence/HERIEV10-E.HTM#Int-902697>)

On December 9th, 2002, Access Copyright released a document entitled, *Collective Licensing: Liability for Collectives and Users*. In this document, the issue of access to material placed on the internet was examined. Access Copyright feels that the demand for exemptions put forth by the Council of Ministers of Education, Canada (CMEC) would be extremely broad; “It would have an enormous impact both on what materials educators would choose to use in working with their students and on the extent to which rightsholders would try to protect their material from unauthorized access. The proposed amendment [by CMEC] would be completely unmanageable.” Access Copyright also stresses that “from a rightsholder perspective making a work ‘freely available’ does not mean making the work ‘available for free.’”

The document also states that over 70% of the royalties currently collected by Access Copyright and COPIBEC for rightsholders come from the educational sector. Exemptions such as the one put forth by CMEC would “profoundly affect how and what materials are used both on and off the Internet and consequently rightsholders’ revenues and potential revenues, as well as raise the cost of licensed uses provided by the Collectives.” Access Copyright openly acknowledges that both rightsholders and users “share the goal of reducing as much as possible the instances of infringement, although their solutions are diametrically opposed.”

Access Copyright feels that “[r]ightsholders cannot tolerate further erosion of their rights to control their creations and productions. New exemptions from infringement of copyright would complicate and undermine the ability of the Collectives to license existing and emerging markets particularly in the digital environment... Survival of the creators and producers of creative works is dependent on their being able to license effectively and to explore new licensing opportunities uneroded by new exemptions that will create an imbalance in the law.”

(source: <http://www.accesscopyright.ca/pdfs/annualreports/Collective%20Licensing%20liability%20limits%20for%20collectives%20and%20users.pdf>)

In March 2003, Christopher Moore, a board member of Access Copyright, posted his perspective on the exceptions desired by educational institutions on his personal website. According to Moore, “[t]he educational lobby (particularly Ministers of Education outside Quebec, supported by universities, libraries, academic groups, and other institutions we support with our taxes) is going hell-for-leather to impoverish us by gutting copyright protection for our works... Canadians deserve a Copyright Act based on principles of copyright, not on shopping lists of special conditions for special groups. That, and a Copyright Act without exemptions. Now that we have a comprehensive network of copyright collectives, legislated exemptions for use of copyright are unnecessary, because collectives can provide users access to anything they need under fair, efficient, and negotiable conditions. Exemptions simply undermine the smooth working of copyright systems. They encourage costly battles that make copyright too expensive to administer.”

(source: <http://www.christophermoore.ca/accesscopyright>)

Mr. Moore has also claimed that “[e]ducators are lobbying hard for a free ride on the backs of those who create and make learning materials available.” According to Moore, members of the Council of Ministers of Education in Canada are demanding the right to use copyrighted works on the Internet without compensating rightsholders, unless the work in question has been protected through technological protection measures. He believes that “[educators] want schools to be able to take and redistribute anything they need—and they want creators and publishers who create learning materials to get nothing for online uses of the material they provide to schools.” The “educational bureaucrats’ desperate campaign for a free ride has become the greatest obstacle to a digital future that works for everyone... Special exemptions for one privileged lobby group are no way to build a Copyright Act that works.”

Moore proposes the best option is to license all material available in digital form, so that schools and universities would not have to fear infringing copyright. He feels digital licensing should “broadly resemble the photocopy situation.”

(source: Moore, Christopher. “Licensing will solve the schools’ copyright challenge.” *The Hill Times*. Monday, October 3rd, 2005.)

Example 4: Extended Collective Licensing

During the Standing Senate Committee on Transport and Communications meeting of April 15th, 1997, the issue of collective licensing was brought forth by representatives from CANCOPY. It was stated that Bill C-32 would not give new powers to collective societies. Instead, it would give “quite unprecedented benefits and protection to people who use collective societies to license their uses of copyright material.”

(source: <http://www.parl.gc.ca/english/senate/com-e/tran-e/14evb-e.htm>)

On December 9th, 2002, Access Copyright released a document entitled, *Collective Licensing: Liability for Collectives and Users*. This document examined different types of licensing schemes, including extended collective licensing. Access Copyright would use a system of extended collective licensing “in conjunction with the Collectives’ current practice of an exclusions list, so as not to encroach on the rights of any rightholder who might not choose to participate in collective licensing altogether or in a particular license.” Access Copyright believes that “an extended licensing scheme will best serve rightholders, the Collectives and [their] licensees.”

(source: <http://www.accesscopyright.ca/pdfs/annualreports/Collective%20Licensing%20liability%20limits%20for%20collectives%20and%20users.pdf>)

On April 27th, 2004, at a hearing of the Standing Committee on Canadian Heritage, Roanie Levy discussed the Access Copyright position that “an extended collective licensing regime is the most efficient and effective path to such prosperity for users and creators.” Extended collective licensing “would allow the buyers and sellers to come together and mutually agree on how copyright-protected works on the Internet should be used. Extended collective licensing promises to be the cornerstone of an efficient and fair marketplace that both creators and users want and absolutely need in the digital age.” She also provided a brief description on the differences between voluntary licences, voluntary collectives, extended collective licensing, and compulsory licences: “Essentially, Access Copyright in the paper world operates under a voluntary licence. So we are not forced to come together and offer licences. We do it voluntarily. We ourselves determine what the terms and conditions of use are going to be and what the tariff is going to be. That's a voluntary system. A voluntary system works well when you can identify all of the rights owners...

“In the text world and in the visual images, such as photographs and graphic designs, the number of rights owners is limitless. At no point in time will you ever have all of the rights owners under one roof. That is why in these types of situations, particularly when the type of licensing is maybe high risk, such as digital licensing, a regime of extended collective licensing, which is a limitation in some instances to a voluntary licence--the negative option is a good way of describing it--is beneficial for a country. So in Canada, where for a lot of the works, which number in the millions, particularly for those on the Internet, it's difficult to identify the rights holders, partly because a lot of them are foreign, a regime of extended collective licensing works very well, while at the same time allowing the rights holders to determine when, how, and for how much the works are going to be licensed. So the market still plays a part.

“On compulsory licence, it's essentially an exception with remuneration. The rights holder doesn't determine when and for how much. It's often set in legislation, which means it's difficult to adapt to the changing needs of the users, etc.”

(source: <http://www.parl.gc.ca/InfocomDoc/37/3/HERI/Meetings/Evidence/HERIEV10-E.HTM#Int-902697>)

On May 12th, 2004, in a news release from Access Copyright, Fred Wardle, Executive Director of Access Copyright, commended the Standing Committee on Canadian Heritage for recommending extended collective licensing. Access Copyright's position is that although some groups are arguing for exceptions under the Copyright Act to access copyright protected works, collective licensing would make this unnecessary. Roanie Levy, Director of Legal Services and Government Relations for Access Copyright, in the same news release stated that "Exceptions to the Copyright Act just don't work. They're not flexible, and in an environment that's evolving as rapidly as the digital realm is, collective licensing is the most responsive solution to meet people's needs, now and in the future."

(source: <http://www.accesscopyright.ca/resources.asp?a=147>)

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