



**Key Considerations of the Canadian Association of Research
Libraries for a New Copyright Bill with Reference to the 2008 *Bill
C-61: An Act to Amend the Copyright Act***

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On June 12, 2008, the Government tabled *Bill C-61: An Act to Amend the Copyright Act*, which was intended to bring the *Copyright Act* into the digital age. The Canadian Association of Research Libraries (CARL) studied the text of this bill over the summer. With the announcement on September 7, 2008, of the federal election, *Bill C-61* fell off the Order Paper before a full debate about its content could occur. Given that the Speech from the Throne indicated that the Government will introduce another copyright bill in the 40th Parliament, we offer here a brief assessment of *Bill C-61* on points that relate to university research libraries and to CARL's priorities for any new copyright legislation:

- It must not narrow the scope of fair dealing
- It should remove penalties for actions reasonably thought to be fair dealing
- It should not penalize the circumvention of digital locks ("technological measures") when this occurs for permissible uses of copyright materials
- It should include an exception clarifying the permissibility of using for teaching purposes publicly available materials on the Internet

When introducing *Bill C-61*, the Government stated that it wished to:

- balance the rights of copyright holders and users of copyright works
- provide "clear, predictable, and fair rules" to foster innovation
- ensure that Canada's copyright framework for the Internet is in line with international standards

CARL commends these intentions and concurs that the *Copyright Act* must be brought into the digital age. Adapting to the digital age requires a range of amendments to allow Canadians to take full advantage of digital technology and use the Internet to learn, research, teach, create, and provide services that enable further discovery and innovation while respecting the legitimate rights of copyright holders.

Some of the amendments proposed in *Bill C-61* (and described below) provided helpful clarifications and exceptions to libraries and their users. Unfortunately, some of the limitations on the exceptions seemed to discourage unnecessarily the full exploitation of digital technology that could facilitate achievement by Canadian researchers and students. Other amendments proposed, especially those on "technological measures," were of significant concern to CARL because they may have had the effect of narrowing or limiting in the digital environment fair dealing and other user rights that are critical to a balanced and fair copyright regime.



Technological Measures

Because of their potential to limit or narrow fair dealing and other user rights, CARL was very concerned about the proposed amendments in *Bill C-61* on technological measures (TM's—also known as “digital locks”). CARL recognizes that TM's are a reality of the digital environment, but we believe that the protections for TM's that were proposed in that bill would prevent users of copyright material from exercising rights that they otherwise have under current copyright law.

As *Bill C-61* was written, it would have been an infringement of copyright law to circumvent a TM that controls access to a work except for a small number of defined purposes: national security, law enforcement, software interoperability, encryption research, prevention of collection of personal information, computer system security, usability for persons with perceptual disabilities, and timely broadcasting. CARL would strongly recommend in a new bill, in addition to such a list of non-infringing purposes, a general clause asserting that circumvention of a TM is permissible for any other purpose that is not otherwise an infringement of copyright. CARL was pleased to see that *Bill C-61* did envision that there may be additional non-infringing purposes for the circumvention of a TM and that the *Bill* provided for the making of regulations to allow them. We believe, however, that a general provision within the text of an amended *Copyright Act* would be fairer to users than just the regulatory authority for the adding of exemptions. Such a general provision would allow, for example, the circumvention of a TM for library collection maintenance and management purposes and for any fair dealing purposes.

CARL was concerned that *Bill C-61* sought to limit the provision of circumvention services and the availability of circumvention technology except for some of the enumerated exceptions to the general prohibition against TM circumvention. It should be made explicit in a new bill that the availability of technology (and not just the provision of the service) for making materials usable by those with perceptual disabilities would be legal. Both should also be legal for library collection maintenance and management, fair dealing, and any other purposes that do not infringe copyright.

Damages

CARL was pleased to see in *Bill C-61* that an individual who circumvented a TM only for his or her own private purposes would not be liable to statutory damages and that a court could reduce or remit other damages for the unintended violation of this measure. We were also pleased to note that if a library, archive, or museum were found to have illegally circumvented a TM without realizing the illegality of the action, it would be subject only to an injunction. We strongly recommend that such provisions in a new bill be broadened to give more general protection to Canadians acting in good faith: it is a key copyright position of CARL that a user of copyright matter who had reasonable grounds to believe that an activity is fair dealing should not be subject to damages — especially statutory damages. Statutory damages have a chilling effect that prevents users from fully exercising their fair dealing rights out of fear of incurring crippling damages. Statutory damages are unfair to users who are not willfully violating copyright and shift the balance too far toward the rights of copyright holders.

Digital Interlibrary Loan

We welcomed the clarification in *Bill C-61* to the effect that libraries could deliver a digital copy of a work to a requester through an interlibrary loan (ILL). However, that *Bill* seemed only to refer to the digital delivery of “printed matter;” a 21st-century bill should also provide for the digital ILL of “born-digital” materials. As well, the five-day availability of the digital copy to the receiver (so that the receiver could *print* the item) seemed unduly limiting: today's researchers increasingly prefer to retain materials in digital format for their research and private study. Finally, an unintended consequence of the wording in *Bill C-61* was that a library could deliver

an item digitally to a requester from another library, but the same provision did not seem to apply to a library's own users, who would presumably still have to receive the item in paper format. Any new bill should be worded such that this inconsistency is avoided: digital delivery should be available to all ILL requesters.

Maintenance and Management of Collections

CARL was very pleased that *Bill C-61* proposed that libraries be allowed to reproduce copyright materials in an alternative format when it appears that a current format (or the technology required for its use) is becoming obsolete—rather than their having to wait until the current format or technology is obsolete already. CARL considers it important, however, that libraries also be allowed to circumvent TM's for the purpose of migrating works to new formats or performing related collection maintenance and management operations already allowed in the Copyright Act: there should be language in a new bill to address this. This is important inasmuch as libraries have the task of preserving and ensuring access to Canada's digital heritage for future generations.

Educational Use of the Internet

CARL appreciated the proposed exception in *Bill C-61* that would clarify the legality of use for educational purposes of materials publicly available on the Internet; it addressed one of CARL's key copyright positions. In the text of a new bill, CARL would also strongly recommend a general clarifying statement to the effect that this and other exceptions in the *Copyright Act* are not intended to circumscribe fair dealing rights.

Internet Service Provider Liability

Universities and academic libraries often act as Internet service providers (ISP's). CARL was pleased that *Bill C-61* proposed that an ISP does not infringe copyright in the course of providing network services when it reproduces copyright matter in a cache or when it hosts materials of users that may contain third-party copyright matter. We were pleased as well to see in that *Bill* that an ISP would be expected only to notify a user of a copyright holder's concern and would not be required to remove content alleged to be infringing unless it were directed to do so by a court order. We were also pleased that the *Bill* would clarify that reproduction of copyright matter is allowable in the context of the operation of an "information location tool" (search engine). These provisions should appear in any new bill.

Contracts

Bill C-61 proposed that terms of a contract governing how copyright matter can be used would prevail over what would be otherwise be allowed in the *Copyright Act* in the case of inconsistency between the contract and the *Act*. In the case of a contract whose terms are dictated to a user by a content provider (a "standard form" contract—as opposed to a contract that is actively negotiated by both parties), CARL believes that the terms of the contract should not be enforceable insofar as they restrict acts that are otherwise permitted under the *Copyright Act*.

Technology Enhanced Learning

Inasmuch as libraries have a teaching role, CARL was pleased to see in *Bill C-61* some proposals whose intent was to allow the use of copyrighted materials in the electronic (online) classroom. However, the puzzling requirement that fixations of "lessons" be destroyed 30 days after final course evaluations have occurred was problematic because re-creation of such lessons for each occurrence of a course would be overly onerous to educational institutions and libraries: lessons in any format are normally re-used multiple times. We would prefer to see this requirement removed in a new bill. As well, a helpful and bold provision in a new bill would be

explicitly to allow students to fix or reproduce a lesson on a mobile device so that they can learn from it even when away from an Internet connection.

Conclusion

CARL urges the Government to ensure that when it re-introduces amendments to the *Copyright Act*, it does not unduly restrict and disadvantage the exploitation by Canadians of new technologies that can enhance their learning and their research productivity. Given the history of amendments to the *Copyright Act*, and given that it will likely be considerable time before it is opened again, Parliament must be cognizant that any provision that can become obsolete simply due to technological advancement will unwittingly curtail long-established rights of Canadians to use their legally-obtained copyrighted materials when new technologies succeed old ones.

CARL encourages the new Government to consult widely when preparing a new copyright bill. We would be pleased to work with the Government in this process so that the stated intentions of *Bill C-61* might be realized in the language of a new bill.

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