

Update on Copyright Policy with Sam Trosow

By Sandra Wong.

Following the day-long "Annual Gathering of Librarians Interested in Government and Legal Information" on Friday, May 13th, Sam Trosow, an Associate Professor at the University of Western Ontario, jointly appointed to the Faculty of Law and the Faculty of Information and Media Studies (FIMS), delivered an informative and engaging talk on "Canadian Copyright in a Changing Political Environment" at Simon Fraser University's Harbour Centre, Vancouver campus, sponsored by the [BCLA Information Policy Committee](#). Speaking to an audience made up of primarily academic librarians, Dr. Trosow gave a summary of the current state of copyright policy in Canada.

The Copyright Act and fair dealing

Dr. Trosow provided a brief history of the copyright environment and the meaning of fair dealing prior to the landmark [2004 CCH Canadian Ltd. v. Law Society of Upper Canada, Supreme Court of Canada](#) decision that essentially developed the current policy language surrounding fair dealing in Canada.

[Section 29](#) of the *Copyright Act* (R.S.C., 1985, c. C-42) lists the fair dealing exceptions to copyright infringement:

- Research or private study
- Criticism or review
- News reporting

Prior to the 2004 *CCH v. Law Society* ruling, a clear definition of how fair dealing should be applied was not considered viable. That changed in 2004 when the Supreme Court of Canada outlined "the factors" to determine whether a copyright infringement was allowed under fair dealing:

- *the purpose of the dealing,*
- *the character of the dealing,*
- *the amount of the dealing,*
- *the nature of the work,*
- *available alternatives to the dealing,*
- *and the effect of the dealing on the work.*

As stated in the ruling:

"Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained, and is not limited to non-commercial or private contexts.

Bill C-32, An Act to amend the Copyright Act

Dr. Trosow then provided a summary of the recently proposed [Bill C-32](#), which died when a federal election was called on March 26th, 2011.

Dr. Trosow was heartened to see that the federal government had actually implemented changes in Bill C-32 that reflected the criticisms of the government's previous attempt to reform the *Copyright Act*, [Bill C-61](#) (2008) that also failed when Parliament dissolved due to an election call.

However, Bill C-32 was not without some criticism. The criminalization of circumventing digital locks and the introduction of statutory damages for infringing behavior were outstanding issues for many advocates of users' rights. Dr. Trosow also speculated on whether Bill C-32 would be re-introduced as is, given that the Conservative Party now has a majority government, or with further revisions.

Access Copyright

Access Copyright (formerly Cancopy) is the collective licensing agency that educational institutions negotiate with for rights to make copies. Access Copyright collects these fees for copying activity in schools and post-secondary institutions and disperses a portion of them as royalties to authors.

On June 12th, 2010, the Canada Gazette officially published the [Statement of Proposed Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire, Post-Secondary Educational Institutions \(2011-2013\)](#). With the publication of such a statement, Access Copyright has proposed a tariff (as allowed under the *Copyright Act*) for the collection of fees for the

reproduction of literary works in lieu of a license agreement.

Since the Statement's publication, many organizations, such as the Association of Universities and Colleges in Canada (AUCC), the Association of Canadian Community Colleges (ACCC), and even the Canadian Library Association (CLA) have voiced their [objections](#) to the proposed tariff arguing that the tariff does not recognize fair dealing exceptions under the *CCH v. Law Society* Supreme Court ruling, that the reporting obligations required by institutions under the proposed tariff are burdensome and invasive, that the increase in FTE student fee assessments, from \$3.38 per FTE student in addition to a 10 cents per page charge for course packs to a flat fee of \$45 per FTE student, is excessive and unjustified, and especially that the definition of "copying" for digital works, is overly broad.

While the Copyright Board considers Access Copyright's proposed tariff, an [interim tariff](#) has been issued (December 23, 2010) which has since been [amended](#) (April 7, 2011).

Dr. Trosow speculates that this proposed tariff will be under review by the Copyright Board for years to come. He explains that the K-12 sector tariff had been under review for six years before the Copyright Board made their [decision](#) (in favour of Access Copyright).

Most offensive in the proposed tariff for post-secondary institutions is Access Copyright's definition of a "copy" which states:

any reproduction, in any material form whatever, including a Digital Copy, that is made by or as a consequence of any of the following activities:

- (j) displaying a Digital Copy on a computer or other device; and*
- (k) posting a link or hyperlink to a Digital Copy.*

[See page 4 of the [Proposed Tariff](#)]

In addition, the proposed tariff's definition of a "Course Collection" includes:

- (b) Digital Copies of Published Works that are*
 - (i) emailed, linked or hyperlinked to.*

[See page 4 of the [Proposed Tariff](#)]

Dr. Trosow argues that creating hyperlinks is not a "copyright relevant event." Displaying a digital copy on a computer is also not a "compensable event" and that requiring institutions to report or investigate whether faculty or instructors have included a hyperlink to a Published Work in an email is an invasion of privacy.

Indeed, since Dr. Trosow's talk, the Writers' Union of Canada passed a motion at its Annual General Meeting on May 29th, 2011 calling for a review and investigation into the "reform of collective licensing in Canada" and expressed members' displeasure "*that creators receive an inadequate share of the revenues of Access Copyright and are unable to control how the copyright income raised in their name is managed.*" The entire text of the resolution is provided in a [blog post](#) by Michael Geist, the Canada Research Chair in Internet and E-commerce Law and law professor at the University of Ottawa. Michael Geist is also the person behind the popular Facebook group [Fair Copyright for Canada](#) when the first copyright reform Bill (the failed Bill C-61) was introduced in 2008.

Dr. Trosow also recommended that librarians keep an eye on two cases currently being reviewed by the Supreme Court of Canada that may have future implications for fair dealing and the proposed Access Copyright Tariff for Post-Secondary Institutions.

[SOCAN v. Bell Canada et al.](#) SOCAN (the Society of Composers, Authors and Music Publishers of Canada) tried to argue that a short preview of a song was compensable, however the Copyright Board as well as the Supreme Court ruled that these previews could be considered consumer research strengthening the broad definition of "research" vis-a-vis the *CCH v. Law Society* ruling on fair dealing. SOCAN has filed [an appeal](#) to this ruling.

[Alberta \(Education\) v. Access Copyright.](#) The Council of Ministers of Education (CMEC), represented by Alberta in the case name, is seeking to appeal the [Access Copyright Elementary and Secondary School Tariff, 2005-2009](#) approved by the Copyright Board where the definition of fair dealing has been narrowly defined for the K-12 sector.

The copyright climate in Canada looks to be very interesting for the next several years with much potential for future controversy.

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