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Christina Winter, Mark Swartz, Victoria Owen, Ann Ludbrook, Brianne Selman, and Robert Tiessen

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Canadian Collaborations: Library Communications and Advocacy in the Time of COVID-19

Christina Winter, University of Regina

Mark Swartz, Queen's University/Canadian Association of Research Libraries

Victoria Owen, University of Toronto

Ann Ludbrook, Ryerson University, Toronto

Brianne Selman, University of Winnipeg

Robert Tiessen, University of Calgary

Author Note: Correspondence regarding this article should be directed to Christina Winter, University of Regina, christina.winter@uregina.ca.

Abstract

The novel coronavirus of 2019 (COVID-19) pandemic forced libraries to unexpectedly and suddenly close their physical locations, necessitating a remote working environment and a greater reliance on digital and virtual services. While libraries were in a better position than most sectors due to decades of experience in licensing and acquiring digital content and offering virtual services such as chat reference, there were still some services and resources that traditionally had been only offered in a face-to-face environment or were only available in print. Therefore, the Canadian library community had questions about how and if these programs could be delivered online and still comply with Canadian copyright law. This article will describe the access and copyright challenges that Canadian libraries faced during the first nine months of the pandemic (mid-March 2020 through November 2020) and will outline the collaborative efforts of the Canadian library copyright community to respond to these challenges.

Canadian Collaborations: Library Communications and Advocacy in the Time of COVID-19

The novel coronavirus of 2019 (COVID-19) pandemic forced libraries to unexpectedly and suddenly close their physical locations, necessitating a remote working environment and a greater reliance on digital and virtual services. While libraries were in a better position than most sectors due to decades of experience in licensing and acquiring digital content and offering virtual services such as chat reference, there were still some services and resources that traditionally had been only offered in a face-to-face environment or were only available in print. Therefore, the Canadian library community had questions about how and if these programs could be delivered online and still comply with Canadian copyright law. This article will describe the access and copyright challenges that Canadian libraries faced during the first nine months of the pandemic (mid-March 2020 through November 2020) and will outline the collaborative efforts of the Canadian library copyright community to respond to these challenges.¹ The second part of the article outlines the collaborative advocacy and communications efforts of the Canadian library copyright community that relate to the pandemic.

Pandemic Response

In the third week of March 2020, provincial and territorial governments in Canada declared their jurisdictions to be under various states of public-health emergencies in response to the COVID-19 pandemic (Boire-Schwab et al., 2020). The resulting COVID-19 countermeasures imposed limits on the number of people in public spaces; closed the physical locations of public libraries, schools, colleges, and universities; and shifted all in-person activities, programs, and services online. At the postsecondary level, all in-person instruction was canceled, and courses and exams were moved online in the span of a couple of weeks (Canadian Academic Libraries' Responses to COVID-19 Pandemic, n.d.). The sudden move to an online environment effectively shut off the public's access to libraries' physical holdings and exacerbated existing challenges that relate to remote access to content in electronic formats, such as electronic books (e-books), electronic textbooks (e-textbooks), and streaming video. Canada seemed to have a more closure-based response in the first two months of the pandemic compared to the U.S., where some

¹ The Canadian copyright landscape is not homogenous. Some educational institutions and libraries have a blanket copyright license with one of the two Canadian literary copyright collectives, Access Copyright and Copibec.

public and academic libraries never completely closed to users (PLA, 2020; Janicke-Hinchliffe & Wolff-Eisenberg, 2020).

Problems: Copyright and Access

The Canadian Copyright Act, 1985 operates in the global intellectual property ecosystem because Canada is a signatory of international conventions, treaties, and trade agreements. The Copyright Act provides copyright owners with significant control over their works by granting a set of exclusive rights. At the same time, the Copyright Act provides limitations and exceptions to those rights such as fair dealing for users and specific exceptions for libraries, archives, museums, and educational institutions. Tensions and problems can arise between owners' rights and users' rights, and librarians look to the law and to the courts' interpretation of the law to navigate these issues in the copyright environment. The restrictions on access and use during the pandemic have heightened previously known tensions and issues with copyright interpretation.

For example, when it comes to copying undertaken at nonprofit educational institutions, ss 29.4–30.04 of Canada's Copyright Act provide exceptions that permit the use of copyright-protected works for educational activities such as the following:

- reproduction for instruction and examinations;
- public performances of sound recordings and cinematographic works;
- and the copying of news and commentary, and broadcasts.

There are onerous and sometimes unclear conditions on these exceptions, such as commercial availability, the payment of royalties, and record-keeping requirements. In 2012, the Copyright Modernization Act introduced a new exception for educational institutions, with the intention of facilitating distance education by copying some on-site practices to the online environment. However, this new exception was accompanied by a number of burdensome conditions including a requirement for educational institutions and students to destroy any fixation of a lesson 30 days after a student received their final grade (ss 30.01 of the Copyright Act). Managing the destruction and subsequent rebuilding of course materials each time a course is offered requires significant administrative effort. The conditions of this exception run counter to the principle of technological neutrality,² which is meant to help maintain the balance between authors and users in the digital

² See *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.* (2015) at paras. 148–150.

environment. This false but persistent dichotomy creates unnecessary hardships for both educators and students.

Fortunately, the fair dealing exception is always available.³ While fair dealing has been examined in an educational setting,⁴ “education” was only added to section 29 of the Copyright Act in 2012, clarifying that fair dealing is available for the following enumerated purposes: research, private study, education, parody, satire, criticism and review, and news reporting (ss 29–29.2). However, many higher education institutions in Canada rely on institutional guidelines that limit the copying of materials up to 10% of a work or one chapter and require oversight from a designated copyright person for faculty to override these limits. In addition to such restrictions, many public and academic library digital resources rely on licenses with conditions that can constrain the application of fair dealing to digital works in their collections.

While there were copyright challenges in higher education’s remote education context, the majority of educational activities prior to the pandemic included both face-to-face and online components (Di Valentino, 2016). In mid-March 2020 this changed, forcing educators and educational institutions to deliver courses and share educational materials in an online environment. According to Craig and Tarantino (2020), “Copying protected works or extracts thereof for educational purposes and classroom distribution is, of course, nothing new; but the utter *reliance* on digital copies precipitated by the closure of libraries and physical obstacles to access has heightened the need for accessible digital content to new levels—and rendered undeniable the urgency of ensuring affordable access to educational materials” (p. 17).

Prior to the pandemic, libraries faced numerous restrictions when trying to access and purchase e-books and encountered difficulties purchasing streaming rights for many audiovisual works. Examples of issues that libraries face when licensing e-books include a lack of availability; limits on the number of concurrent users; high pricing; short-term purchase or subscription models; and for textbooks, expecting academic or school libraries to purchase single-user copies for every student in a specific class, privileging a business model that sells to individuals, not institutions. In addition, Canadian libraries have found that certain titles are unavailable for libraries to purchase in Canada even though they are available for

³ See *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004) para. 49.

⁴ See *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* (2012).

purchase by U.S. libraries. This is due to geographic restrictions in publisher and licensing agreements (Janyk & Lomness 2019).

Public and academic libraries also rely heavily on DVD (digital video discs) and Blu-ray discs because of issues with access, availability, and long-term control over the collection. Furthermore, physical media is more cost effective and easier to administer than streaming media for libraries. Not surprisingly, streaming video issues have many similarities to the problems that libraries have with e-books: videos only available on direct-to-consumer rather than library platforms; extremely high charges for libraries; subscriptions rather than purchases that leave libraries paying every year for content; popularity among users of demand-driven acquisition of videos that can easily overwhelm a library's deposit account for purchases, forcing libraries to subscribe to an entire service because individual films are too expensive; and subscribing also means the risk of losing access if the deal ends between the publisher and the distributor (or it is for a limited time where content disappears from the service when agreements expire and the consumer has to subscribe to yet another service to access it).

Problems of access intensified with libraries' physical closures due to the pandemic. For example, academic libraries that included print textbooks as part of their print reserve collections were left with very few options to provide access to this content to students. Most print reserve collections in Canada faced a complete closure during the early months of the pandemic and many remained closed for the September–December 2020 and January–April 2021 terms. Quarantining physical materials was a key component for those libraries that offered curbside service, further limiting access to print collections. Academic libraries struggled to provide students with alternative access and received many emails and virtual chat messages from instructors and students about this issue. Libraries responded in several ways but frequently encountered barriers to access. In many cases, librarians searching vendor databases for electronic textbooks that were available for purchase by libraries in the U.S. found them marked "Unavailable in your country". In other cases, publishers did not offer an electronic version of their textbooks or refused to sell libraries an electronic version in order to maximize direct sales to students. Library closures made physical, audiovisual collections inaccessible (as with e-books), and libraries tried to provide the same level of access by searching for and acquiring licenses or seeking permission from the rightsholders to convert the physical copy to a streaming version. These attempts were time consuming, expensive, and met with limited success. Libraries also

purchased additional streaming video packages with the consequence of having to absorb unbudgeted expenditures into already stretched library collections budgets.

Libraries across Canada contacted publishers and vendors requesting temporary access to digital versions of course materials and audiovisual resources until the end of the January–April 2020 term. While these requests often received favorable responses, they required significant time and effort during a global health crisis, when final exams were imminent, and when students required urgent access to content to complete their courses. Some audiovisual vendors relaxed streaming conditions that were limited to on-campus access only, but that did not solve the problem of audiovisual material unavailable to license in digital format, or potential local hosting issues if one-off licenses were granted. Some publishers opened access to their e-book collections and the purchasing of e-books during the initial lockdown; however, many publishers still restricted the ability of libraries to purchase e-books for their collections once these temporary access offers ended. Most of the programs where publishers extended access to content were made available on an emergency basis to help with the January–April 2020 term, but the same access was often not extended to support the September–December 2020 and January–April 2021 terms, when most classes remained online.

Public libraries experienced increasing budget pressure because of increased demand for digital content, exacerbated by the long-standing practice of excessively high pricing for libraries and limited term or limited-use licenses (Urban Libraries Council, n.d.). In addition, public libraries faced new copyright questions that arose in the transition of early literacy storytimes to digital formats. Reading-aloud programs are a signature activity offered by public libraries to develop early literacy skills in preschool-aged children and to develop a love of books and reading. With the shift to online, public libraries wanted to offer virtual storytimes but were unclear if this activity was permitted under Canadian copyright law. They did not know whether they needed to seek permission or pay to clear rights, or if they would be at risk if they did not. While many publishers made it clear they would allow online storytimes (SLJ Staff, 2020), these permissions were often limited to specific geographic regions (e.g., the U.S. and Australia) and seemed to cement the clearance-based approach to online storytime, potentially dissuading some Canadian public libraries from looking at whether this activity could be conducted using the fair dealing exception (ss 29–29.2 of the Copyright Act).

Existing problems related to accessing and reusing government information were also exacerbated due the pandemic. In Canadian copyright law, Crown copyright applies to works prepared by or under the direction of federal, provincial,

and territorial governments (ss 12 of the Copyright Act).⁵ Already a confusing process subject to unnecessary delays, copyright permissions requests were now being handled by individual government agencies with a reduced workforce and other priorities (CFLA & CARL September 21, 2020).

Access: Policy Gaps and Responses

In mid-March 2020, a number of library organizations released statements urging publishers to loosen access restrictions and open content more widely given the sudden onset of the pandemic, the most prominent example being a statement by the International Coalition of Library Consortia (ICOLC). This statement, which includes information about how the COVID-19 pandemic affects library services and operations and outlines a range of approaches that both libraries and publishers can take to help mitigate these impacts was adopted by libraries and library organizations around the world (ICOLC, 2020). It was the impetus for several Canadian statements that were released relating to learning, including the Canadian Association of Research Libraries' (CARL) "Statement on Optimal Equitable Access to Post-Secondary Learning Resources during COVID-19" (March 2020) and the Canadian Research Knowledge Network's (CRKN) "Statement on Economic Impact of COVID-19" (2020) in October.

The ICOLC statement and its adoptions and adaptations in Canada were not ignored by publishers. The ICOLC statement outlines a variety of possible solutions including both working with publishers and leveraging many of the exceptions or limitations to copyright infringement (or users' rights) in the Copyright Act. The Association of Canadian Publishers (ACP) objected to this strategy, and in April 2020 sent a letter to CARL, the Canadian Federation of Library Associations (CFLA), and a number of members of Parliament (MPs) and government officials in Ottawa outlining their concerns. The ACP letter emphasized the work that publishers had done to provide extended access during the pandemic and asserted that broadening exceptions and limitations would have a major negative impact on publishers as they try to recover from this "unprecedented global crisis" (ACP, personal communication, April 28, 2020).

CARL and CFLA responded jointly, stating that the ICOLC and related statements

⁵ Protection for Crown works has been part of Canadian copyright law since 1921, the year Canada introduced its own domestic copyright legislation. The term of protection for Crown copyright-protected works is fifty years from the first publication date, but for unpublished works the term of protection is perpetual.

- did not advocate to broaden any exceptions and limitations;
- clarified that users' rights are one of many legitimate strategies being used to provide access to works; and,
- emphasized that libraries are actively engaged with supporting publishers and increasing purchases of digital works.

This exchange illustrates the concerns on the part of the Canadian publishing sector regarding their perception of the threat of users' rights, as evidenced by their submissions to the recent Copyright Act review (Canada, House of Commons, Standing Committee on Industry, Science and Technology, 2019).

The University of Guelph Library released a bold statement called "Commercial Textbooks Present Challenges in a Virtual Environment" that was adopted by the Canadian library community (University of Guelph Library, 2020). The statement documented the problems faced by Canadian libraries in obtaining access to digital textbooks for courses. It reported that approximately 85% of textbooks are simply unavailable to libraries in any format other than print, and it called out the major textbook publishers that refuse to sell digital versions to libraries. The Guelph statement recommended that instructors adopt open educational resources (OER) or use university library e-books rather than commercial textbooks to counter the affordability and access issue for students.

This timely statement had immediate and enthusiastic uptake in the library community, with over 50 academic libraries requesting permission to adapt the statement. The University of Guelph received multiple emails, messages, and social media engagements commending the notice, and the statement was retweeted over 248 times and received much notice from librarians who responded to it as a useful messaging tool for instructors looking for libraries to buy classroom access and students facing financial hardships (Ecclestone et al. 2020; SPARC, 2020).

In partnership with the library staff from the University of Guelph, CARL expanded on the work and issued a complementary statement that outlines the major barriers that libraries face when providing access to materials used in educational contexts. As with the Guelph statement, CARL suggests OER as a viable alternative to commercial texts for instructors and encourages other measures, including "allowing sales of all published e-textbooks and e-books to libraries under a licensing model that allows for access at a cost that fairly reflects content and use, making the pricing and availability of e-textbooks and e-books stable and transparent, and offering license options that enable reasonable, equitable access to

educational content without the use of DRM [digital rights management]" (CARL, November 12, 2020).

Policy Gaps and Responses: Copyright

Copyright Guidance for Education and Fair Dealing

Messages that could be used across the library community were an important part of the creation of copyright guidance documents coming out of library associations and postsecondary institutions. In Canada, most higher education institutions rely on similar fair dealing guidelines, allowing for a short excerpt (up to 10% of a work or one chapter) to be used for educational purposes (Di Valentino, 2013). At least part of the higher education community felt that staying within the limits of this guideline would be helpful for institutions without in-house legal guidance. The goal of statements on copyright and fair dealing was to create templates and share guidance that institutions could easily adapt or follow. The COVID-19 pandemic necessitated immediate updated copyright guidance for the community during the extremely rapid transition to online teaching. Many institutions set up website hubs of information for faculty that included best practices for online teaching, and having updated COVID-19 specific copyright guidance was highly desirable. Copyright staff could more easily update their webpages and guides with the documents from their professional associations. Consistent messaging across institutions was also seen as desirable for some, especially in the context of ongoing litigation against higher education institutions.⁶

In March, CARL copyright specialists quickly developed two openly licensed templates, "Serving Student Access Needs as We Rapidly Shift to Online Course and Exam Delivery: Copyright Considerations" (March 19, 2020) and "Rapidly Shifting Your Course From In-Person to Online," which was adapted in part from a University of Minnesota Libraries statement (2020). The templates were adapted by the Canadian academic library community to help instructors with the copyright challenges that accompanied the sudden shift for many to a remote learning environment. These templates highlighted the various ways instructors could meet students' access needs remotely, focusing on the existing exceptions and interpretations of the Copyright Act and emphasizing the dual needs of digital access to course materials and in-class video use.

⁶ See especially *York University v. Canadian Copyright Licensing Agency ("Access Copyright")*.

As library staff everywhere scrambled to respond to requests for materials in often closed libraries, it became evident that additional guidance and communication about copyright exceptions and users' rights would be helpful for the entire Canadian library community. A strong "Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research" (2020) from U.S.-based copyright specialists provided both inspiration and a template for action. Trosow and Macklem (2020) responded with a Canadian analysis, "Fair Dealing and Emergency Remote Teaching in Canada," positing that the circumstances provoked by COVID-19 justified a broad interpretation and application of fair dealing.

The CFLA statement "Fair Dealing Guidance for Canadian Libraries during the Time of COVID-19" (May 4, 2020) was similarly developed by an expert subcommittee and was aimed particularly at the higher education community in Canada. It set out clear guidance regarding the six factors of fair dealing in Canada and emphasized the special circumstances of the pandemic that influenced the analysis of those factors. The extraordinary circumstances of closed facilities and lack of access to physical materials and copying devices altered the fairness equation with almost every factor. Additionally, CFLA provided recommendations to publishers and the Canadian government to alleviate some of the COVID-related difficulties libraries were experiencing in providing access to information. Its advice to members, publishers, and the government aligned with the advocacy and actions in other jurisdictions such as the European Union, where the *Ligue des Bibliothèques Européennes de Recherche* (LIBER) had urged governments to take action to support distance learning and research during the coronavirus pandemic through copyright action.

The pressures on copyright specialists and nonspecialists to provide access to physical materials in the circumstances of a global pandemic were greatly magnified, and many were not confident in their knowledge or empowered to make decisions to provide access to materials digitally. As part of the global response, the CARL and CFLA guidance was meant to help counteract the effect of copyright chill by making it clearer when and how copyright-protected materials could be made available for necessary purposes.

Reading Aloud

Reading aloud programs also created a more challenging transition to the digital environment. Reading aloud takes place in public libraries' children's programs, such as storytimes, and classrooms at all educational levels. A CFLA

working group formed with the aim of providing a guidance document for public libraries, clarifying that since the purpose of online storytimes is to develop early literacy skills in children, they have an educational purpose. Thus, the users' right of fair dealing for educational purposes should apply, and a storytime should not require either permission from or payment to the rightsholder. The Guidance ("Online Storytimes: Copyright Guidelines for Canadian Public Libraries during COVID-19") drew inspiration from the U.S. guide "Reading Aloud: Fair Use Enables Translating Classroom Practices to Online Learning" (Jacob et al., 2020).

CFLA noted in its guidelines for online storytime during the pandemic that fair dealing can cover reading aloud and its digital dissemination (CFLA, May 9, 2020). The guidelines walk through a fair dealing analysis for the purpose of education and present ideas for good practices, such as author and illustrator acknowledgments, length of time the video or recording will be available, and contact information for the library. In the CFLA guidelines, the law itself and the Supreme Court of Canada's fair dealing analysis framework in *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004) work in harmony to provide an operational approach to fair dealing in the time of COVID-19.

Crown Copyright

The primary public policy objective for the copyright system is to incentivize creators to create new works by granting a limited term monopoly over the reuse and distribution of their works. Crown copyright fits uneasily within this public policy objective because government-authored works do not require the same incentives as private actors because they have already been produced for and paid by the citizenry and are not subject to the same types of commercial pressures as other categories of copyright-protected works (Wakaruk, 2020; Judge, 2010; Colebatch, 2008). Crown copyright is also at odds with open government initiatives that call for increased transparency and accountability. Crown copyright and the Canadian government's unpredictable approach to the use of open licenses as well as inconsistent copyright information and copyright practices across government departments and websites create unnecessary barriers to citizens and memory institutions that seek to reproduce, preserve, and distribute government information (Wakaruk, May 2020; Judge, 2005).

Crown copyright reform has been a long-standing issue for the Canadian library and archival communities. In 2018, CFLA released a position statement on the modernization of Crown copyright that outlined the challenges it poses to memory institutions with regards to long-term preservation and access to

government information. It offered several recommendations, including the elimination of Crown copyright or making all government information available under an open copyright license (CFLA, 2018). Crown copyright was also highlighted during the most recent statutory review of the Canadian Copyright Act, with numerous library and archival associations submitting briefs on the need for reform (Canada, House of Commons, Standing Committee on Industry, Science and Technology, 2019). During the early days of the COVID-19 pandemic, there was a need for credible, accurate, and authoritative information. The public looks to federal, provincial, and territorial governments to provide the most up-to-date information on COVID-19. Crown copyright can prevent the sharing and reuse of vital taxpayer-funded government information.

In the fall of 2020, CFLA and CARL sent a joint letter to federal and provincial ministers to call for greater access to government information and recommend that all government information be released under a Creative Commons Attribution license (CC-BY) to facilitate the widest possible reuse and dissemination (CFLA, September 21, 2020).

Path Forward

The Canadian Copyright Act provides both the legal framework that permits libraries to operate in a time of national emergency and impediments that prevent access to learning and research. There are limitations and exceptions to copyright that the Supreme Court of Canada calls users' rights (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004) including fair dealing; exceptions for educational institutions; and exceptions for libraries, archives, and museums, among others. In other jurisdictions, such as Australia, Japan and Hungary, governments moved swiftly to modify their copyright laws to ensure a smooth transition to online learning and research (Ball et al., 2020). Actions in Australia included proposed amendments to the library exceptions; the introduction of a limited liability scheme for orphan works; a fair dealing exception for a noncommercial works; a library exception to allow for the digitization of print materials; the clarification of education restrictions and restoration of previous exceptions that produced unintended consequences of limiting access to sound recordings; and streamlining the government statutory licensing scheme (Australian Government Department of Infrastructure, Transport, Regional Development and Communication, 2020). At the time of writing, these amendments have not yet been enacted (Pappalardo, 2020). Hungary revised its educational exceptions to include the use of digital formats with a cross-border component for teaching activities (Keller, 2020), and Japan's

Copyright Act was revised to allow for online use of copyright works for teaching (Keisen Associates, 2020). Limited liability for our sector, especially for exceptions for orphan and out-of-commerce works, as well as the ability to digitize and lend in-copyright materials to fulfill our missions would benefit Canadian libraries. Additionally, the expansion of fair dealing to more closely resemble fair use could be achieved by changing the list of allowable purposes to be illustrative rather than exhaustive.

Conclusion

Canadian librarians addressed the copyright environment in Canada during the pandemic and offered users as many options as possible to access physical and electronic collections. However, the limits of the Copyright Act in a digital environment and the perceived risks of copyright infringement constrained the ability of Canadian libraries to fully transition some of their services online during the pandemic. The pandemic also highlighted the inability of the publishing sector to quickly pivot in a way that could meet libraries' needs, further highlighting the need for libraries to have mechanisms to make works available to benefit the public.

These tensions existed prior to COVID-19, but the pandemic exacerbated them and showed how important digital library services are. These examples provide an opportunity for legislators in Canada to more fully understand the unintended negative effects of certain elements of the Canadian copyright regime, and to reflect this in anticipated upcoming changes to the Copyright Act.

In a postpandemic world, Canadian libraries need to use the full scope of the Copyright Act's users' rights provisions, such as fair dealing and the various educational institution exceptions, in a way that is consistent with Canadian Supreme Court jurisprudence. Using the full scope of rights will allow libraries and educational institutions to fully provide online services, digital access to print books, online reading aloud programs to students, storytime programming to children, and many other valuable library and educational services that are constrained by practices under the current regime.

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