

April 18, 2008

Brief to House of Commons Standing Committee on Industry, Science & Technology regarding its Study into Canadian Science and Technology

The Canadian Library Association (CLA) welcomes the opportunity to present a brief to the House of Commons Standing Committee on Industry, Science and Technology. CLA represents the interests of approximately 57,000 library staff and thousands of libraries of all kinds across Canada on a range of public policy issues. But more importantly, libraries and librarians speak on behalf of our users: millions of students, educators, scholars, researchers, businesses, lifelong learners, special library users, recreational readers, from children to seniors. Library users **are** the Canadian public.

Two of the themes of your study of Canadian Science and Technology are very relevant to libraries, and affect how we provide information to millions of Canadians:

- Commercialization, venture capital and intellectual property;
- Federally funded research performed in government and higher education.

Most of the information that Canadian libraries provide to their users is copyrighted. So intellectual property, or more specifically copyright, and how it affects research at Canadian universities, research institutes and business is something that libraries deal with everyday. Likewise libraries play a huge role in making sure that federally funded research is disseminated to Canadians.

The most positive change in recent years to Canadian copyright was the 2004 *CCH Canadian*¹ Supreme Court Judgment. The CCH Judgment greatly strengthened the role of fair dealing in Canadian copyright. Fair dealing allows Canadian researchers and others to make limited copies of copyrighted works for the purposes of research, private study, review, criticism and news reporting without permission from the copyright holder. The US *Computer and Communications Industry Association*² published a study in 2007 examining the impact of fair use (the rough equivalent to fair dealing in Canada) in the US. This is the first study that we are aware of where the fair dealing/fair use impact on the economy of a country has been measured. In the US, companies that benefit from fair use generate approximately one-sixth of the GDP of the US economy. The average productivity of employees in industries benefiting from fair use was \$128,000.00 USD per employee as compared to the US average employee productivity of \$90,000 per employee. It is clear from this study that a robust fair use regime in the US has contributed greatly to their economy's productivity.

The government of the United Kingdom asked Andrew Gowers to conduct an independent review into the UK Intellectual Property Framework. Like the Canadian government, the UK government wants to ensure that its country is competitive in the

knowledge economy. The Gower Review³ published in 2006, looked at many issues including fair dealing. The Gower Review was concerned that UK fair dealing was not robust enough to compete with the US knowledge economy:

There is concern that at present the UK exceptions are too narrow and that this is stunting new creators from producing work and generating new value. (p61)

Unfortunately many Canadian institutions still tend to pay for copyright uses that would be considered fair dealing or fair use in other jurisdictions, even after the CCH Supreme Court Judgment. For example, most Canadian universities pay annual copyright fees to copyright collectives for providing self-serve photocopiers to faculty and students. This should be covered by fair dealing. This is but one example of copyright expenditures that could be better spent competing with universities in other jurisdictions.

Fear of copyright litigation has kept Canadian institutions from taking full advantage of fair dealing. Canadian universities need to be able to take full advantage of a robust fair dealing regime to compete with universities in other jurisdictions. The statutory damages regime in the *Copyright Act* should be revised to protect people who attempt to utilize users rights such as fair dealing. Those who act with a good faith belief that their actions with respect to a work are within fair dealing or protected by some other user right should not be subject to statutory damages. This protection should apply to individuals as well as libraries and educational institutions and their employees. This kind of reform will make sure that Canadian fair dealing is on a level playing field.

If Parliament chooses to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms treaty, it needs to ensure that any legal protection of technological protection measures (TPMs) should be specifically limited to acts of copyright infringement, should not include device prohibitions, and should not impinge on the exercise of fair dealing or other user rights. Ebooks with TPMs often prevent researchers from printing off a chapter of a book, something that would be commonly accepted as fair dealing in print. Likewise TPMs can prevent libraries from providing a fair dealing copy of a chapter of a book to another library via interlibrary loan. The UK Gower Review notes the following issues with digital rights management (DRM) which are the mostly commonly used technical protection measures.

- *Technical protections can enable restrictions that go beyond protecting content to price discrimination in different EU markets.*
- *DRMs can prevent uses permitted under fair dealing exceptions and DRM tools do not necessarily expire when copyright expires.*
- *DRMs can damage users' computers and can put limits on what users can and can't do with the products.*

Currently under section 30.1 of the Copyright Act, libraries, museums and archives have the right to make copies of entire copyrighted works for the preservation and maintenance of their collections. For example section 30.1 allows for making a copy to migrate from an obsolete format to a format that is still in use. Libraries have migrated material on beta videocassettes to DVDs under the provisions of section 30.1. If TPMs are legally protected beyond copyright infringement, this will prevent libraries, museums and archives from migrating obsolete digital collections to new formats that researchers can actually use in the future.

Increasingly, library collections are migrating from print to digital formats. *Canadian Association of Research Libraries*⁴ (CARL) statistics show that in 2005/06, the average percentage of digital expenditures per CARL member libraries was 46% of the collections budget. CARL membership includes the largest university libraries in Canada. Canadian libraries, especially university libraries, are rapidly moving from print to digital collections. Researchers will depend primarily on digital collections in the future. Canada risks putting the knowledge researchers need to innovate behind digital locks, if TPMs are given legal protection beyond the bare minimum necessary in the WIPO treaties.

We also need to recognize that all members of Canadian society need to have access to the new knowledge economy. A knowledge economy that leaves some members behind means that our society is less fair and less competitive than others. Changes to the Copyright Act need to ensure that the perceptually disabled have the same ability to access content as other Canadians. Section 32 of the Copyright Act allows individuals and nonprofit organizations to assist the perceptually disabled to convert copyrighted material to alternate formats. As we move to an increasingly digital knowledge economy, we again need to ensure that digital locks (TPMs) don't block the perceptually disabled from the knowledge that they need.

Government documents and government data belong to all Canadians and all Canadians should have liberal access to these materials, including free access to electronic versions distributed via the Internet. Canadians often pay for government information several times over. For example, provincial and municipal governments must purchase Statistics Canada census material that Canadian taxpayers have already paid for once. Crown copyright needs to ensure that nonprofit use by Canadians of all government information doesn't require permission from or payment to the government. Acknowledgment that information has been taken from a government source should be all that is needed.

Federally funded research, regardless as to whether it comes from a government department or agency or whether it comes from a university, should be available to all

Canadians. CLA supports open access to federally funded research. Below is a definition of open access from the Budapest Open Access Initiative:

By "open access" to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.

As of 2008, the Canadian Institute of Health Research now requires all grant recipients to ensure that their peer-reviewed publications are freely accessible through the Publisher's website or an online repository as soon as possible and in any event within six months of publication. The US National Institutes of Health has a similar policy which came into effect on April 7, 2008. Research funding agencies and universities around the world are developing policies requiring open access to the results of research that they fund. All of the Research Councils in the UK have committed to developing open access policies, and most of the Councils have already implemented policies. The European Universities Association recently announced a unanimous decision to develop open access policies and support at all members - more than 700 universities, in more than 40 countries. The EUA Recommendations are an excellent role model for open access policy in Canada. The Recommendations call for the development of institutional repositories, and a requirement for faculty to deposit peer-reviewed research results in these repositories. What is good enough for Canadian federally funded health research, should become standard for all federally funded research. Government funded research should not be protected by copyright from the people who paid for it, Canadian taxpayers. Open access ensures that Canadian research, the vast majority published outside Canada, is accessible to all Canadians. Libraries assist in the process of disseminating government research by maintaining institutional repositories that make research freely available to anyone with an Internet connection. Libraries also support and in some cases run open access journals. Projects such as Synergies ensure that Canadian journals that are in print will be able to make the transition to the digital realm in an open access environment.

Summary

In summary, CLA recommends that the Government of Canada implement the following steps to ensure that Canada continues to have a strong position in the knowledge economy:

- Protect and enhance the broad interpretation of fair dealing as a user's right in the spirit of the Great Library of the Law Society of Upper Canada's victory in the *CCH Canadian v. Law Society of Upper Canada* Supreme Court of Canada decision.
- Revise the statutory damages regime in the *Copyright Act* to protect people who attempt to utilize user's rights such as fair dealing. Individuals who act with a good faith belief that their actions with respect to a work are within fair dealing or protected by some other user right should not be subject to statutory damages.
- Ensure that any legal protection of technological protection measures should be specifically limited to acts of infringement, should not include device prohibitions, and should not impinge on the exercise of fair dealing or other user rights.
- Recognize that exceptions for print-disabled individuals must ensure that these individuals have the same ability as others to access content.
- Recognize that government documents and government data belongs to all Canadians and that all Canadians should have liberal access to these materials.
- Ensure that federally funded research is disseminated to all Canadians via open access.

CLA would be happy to further discuss the strengthening of Canada's position in the knowledge economy. Please contact our Executive Director, Don Butcher at 613-232-9625 ext. 306 or dbutcher@cla.ca to arrange for further information or discussion of these important issues.

¹ Drassinower, A. (2005). Taking user rights seriously. In M. Geist (ed), *In the Public Interest: the Future of Canadian Copyright*. (pp462-480). Toronto: Irwin Law.

² Rogers, T & Szamoszegi, A. (2007). *Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use*. Washington: Computer and Communications Industry

Association.<http://www.cciainet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf>

³ Gowers, Andrew. (2006). *Gowers Review of Intellectual Property*. Norwich, UK: HMSO.http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf

⁴ The Canadian Association of Research Libraries is also submitting a brief to the House of Commons Standing Committee on Industry, Science and Technology.