



Protecting the Public Interest

**Information for the Canadian library and information community
on Bill C-60, *An Act to Amend the Copyright Act*
from the Canadian Library Association**

JANUARY 2006

Explanatory Note:

The document that follows was prepared prior to the dissolution of Parliament on November 29, 2005. While Bill C-60, An Act to Amend the Copyright Act, died when the 38th Parliament was dissolved, CLA believes the principles that underpinned that legislation remain and some of the specific amendments within it could easily be resurrected in new legislation.

This document summarizes CLA's positions on 10 aspects of copyright in the digital age. Copyright is a complex issue, and this brief note is not intended to convey CLA's positions in a complete and thorough manner.

Preamble

This Briefing Note on federal legislation Bill C-60, *An Act to Amend the Copyright Act*, has been prepared by the Canadian Library Association (CLA) for its members and the Canadian library and information community. It identifies the provisions of the legislation that would appear to be of most direct interest to librarians, libraries, and others in the information community; and provides some analysis of those provisions from the librarian/library point-of-view. The Note also identifies key library copyright issues not addressed by Bill C-60.

The Canadian Library Association (CLA) is Canada's largest national and broad-based library association, representing the interests of public, academic, school and special libraries, professional librarians and library workers, and all those concerned about enhancing the quality of life of Canadians through information and literacy.

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. None is more critical at this time than copyright.

But more importantly, libraries and librarians speak on behalf of our users: millions of students, educators, scholars, researchers, lifelong learners, special library users and recreational readers, from children to seniors. Library users **are** the Canadian public: they are not members of a "special interest group" when it comes to copyright. The majority of CLA members work in publicly funded institutions serving the citizens of this country. The public interest is at the core of our work and it is on behalf of the millions of Canadians who regularly access our buildings, collections and services (tangible and virtual) that the Canadian Library Association presents our concerns about Bill C-60, *An Act to Amend the Copyright Act*. As tabled, the Bill does not represent a fair and equitable balance between the interests of the Canadian public and rights holders. The Government has consistently stated its intent to provide this balance in legislation addressing digital copyright. Substantive changes to Bill C-60 are necessary to deliver on this commitment.

General Comments

As an instrument of public policy, the *Copyright Act* has two primary objectives: to encourage the creation and dissemination of original works, and to promote access to

those works for the benefit of Canadian society as a whole. It is essential, therefore, that copyright reform respect the underlying principle of balance between the protection provided to the creators of original content and the guarantee of reasonable access by the public.

On the broadest level, CLA has serious concerns with the manner in which this Government is proceeding with copyright reform. We see an undervaluing of the public interest of Canadians, in favour of private-sector special interests and others with vested economic interests in attempting to restrict access to information.

Bill C-60 fails to achieve the goals set for it by the two ministers, Minister of Canadian Heritage Liza Frulla, and Industry Minister David Emerson, when they announced the new legislation promising Canadians “certainty and clarity that will allow them to take full advantage of the opportunities of the Internet.”

As tabled for first reading, Bill C-60 falls far short of this noble goal. Bill C-60 continues the counter-intuitive, and eventually futile, approach of limiting the potential of new technologies for individuals and for research and education. It demonstrates a lack of appreciation of the potential of the new technologies to deliver innovative new business models which meet the needs of content providers, creators and the Canadian public. It perpetuates a system that treats all information users as potential criminals, guilty until their behaviour can be justified as innocent, by interpreting fair dealing through narrowly defined exceptions. Bill C-60 disadvantages Canadians by constraining access to information in the classroom and through inter-library lending.

Bill C-60 ignores a fundamental principle of user rights clearly outlined in the unanimous Supreme Court of Canada judgment in *CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13* (the CCH case). The Canadian Library Association urges the government to address the copyright implications of the Internet and digital content with a balanced and thoughtful approach. Given the complexities, reach and inter-relatedness of copyright issues, it is not realistic to proceed in a piecemeal fashion as attempted by this legislation. Copyright reform in 2005 is significantly more complex than in the past, in that the government is now dealing with issues which impinge on a majority of Canadians in their homes, workplaces, libraries and classrooms.

Canadians will not – and should not – accept licences for uses covered by fair dealing for any format of content, nor limits on the time content may be held by users for research and private study, nor will they accept the application of statutory damages to the day to day activities of schoolchildren.

Copyright issues most relevant to libraries, and how they are addressed (or not) in Bill C-60

1) Libraries, Archives and Museums: Exceptions for Research and Private Study

The current exception for research and private study in Section 30.2(1) of the Act allows library staff to do anything on behalf of any person that the person may do personally under the fair dealing provisions in Sections 29 and 29.1.

There is a further exception in Section 30.2(2) that allows library staff to reproduce by reprographic means a work published in a scholarly, scientific or technical periodical, or a work (other than a work of fiction, or poetry or a dramatic or musical work) published in a newspaper or in any other type of periodical that was published more than one year before the copy is made. In order to exercise the exception in Section 30.2(2), the library must be satisfied that the person making the request will not use the copy for any purpose other than research or private study, and the library must provide the person only one copy of the work.

| Currently, there is a restriction placed on the exercise of the exceptions provided in Sections 30.2(1) and 30.2(2) when the request is made by a patron of another library, archive or museum: Section 30.2(5) stipulates that the copy given to the patron in that case must not be in digital form. Section 30.2(5) does not, however, restrict the form in which a copy is provided to one of the library's own patrons.

The proposed amendment to Section 30.2(5) in Bill C-60 lifts, in part, the restriction that applies to a copy provided to a patron of another library, archive or museum. Under the proposed amendment, if the request is made through another library, archive or museum, the person may be given a digital copy made from a printed original, on condition that the library providing the copy takes reasonable measures to prevent the use of the digital copy for any more than seven days. Furthermore, during that seven-day period, those measures must prevent the communication of the copy or any reproduction of it other than a single printing.

The proposed amendment to Section 30.2(5) is limited in scope, in that it applies only to making a digital copy from a print original: it would not allow the library to make a digital copy from a digital original in response to a request made through another library, archive or museum. Even if the amendment to Section 30.2(5) were revised to allow the making of a digital copy from a digital original, the exception would still have limited application inasmuch as it only applies to copies made in accordance with the provisions of Sections 30.2(1) and 30.2(2). Since the latter of those exceptions applies only to works that are "published", the making of a digital copy under Section 30.2(5) would not apply to a work that has been made available exclusively on the Internet.

CLA believes that the restrictions on library copying for users in the present and proposed Sections 30.2(2), 30.2(3) and 30.2(5) are unacceptable. The user right of fair

dealing must be format neutral and libraries should be able to do anything on behalf of a user, both directly and through inter-library loan, that the user can do for themselves.

2) Fair Dealing

As noted above, Bill C-60 appears to have been drafted without acceptance of the spirit of the most important recent copyright jurisprudence in Canada. This is an unacceptable omission.

The CCH case states that the scope of the fair dealing exception (Section 29) should not be restrictively interpreted and that “research” under that exception should be given a large and liberal interpretation. The Court held that the making of a single copy of various copyright protected works for private research or study was fair dealing. The Court set out six factors to consider when determining if a use is fair. In addition, the case highlights the importance for libraries to have policies and procedures that place reasonable limits on the amount of materials copied and enable staff to refer questionable requests to higher authorities for decision. Arguably, the case provides library staff with the right to provide copies to their users well beyond those permitted under the narrowly delineated Library, Archives and Museum exceptions in the *Act*, and perpetuated in Bill C-60.

The clear message given by the Court in striking a balance between the rights of creators and users when interpreting fair dealing must be acknowledged by Parliament when undertaking copyright reform. The decision provides useful guidance to users as to their fair dealing rights in relation to the use of copyrighted works and must be considered when amending or drafting current or proposed educational or library exemptions.

CLA believes the direction provided by the Supreme Court must be incorporated into Bill C-60. The Act should be amended to reflect the Court’s recognition of fair dealing as a user right which must not be interpreted restrictively. This should include recognition that fair dealing applies equally irrespective of the medium of the content including whether a work is “published” or “made available” on the Internet.

3) Technological Protection Measures (TPMs)

Bill C-60 brings Canada’s copyright legislation into conformity with our WIPO Treaty obligations by protecting technological measures that prevent access to information, while permitting bypassing a TPM for non-infringing purposes. This provision serves the purpose of ensuring that individuals and the institutions that serve them have the authority to exercise their rights to access intellectual property and reproduce it in certain circumstances. However CLA continues to believe TPMs can present significant barriers to access and permitted uses, particularly for the millions of Canadians who are print-disabled. The government must assure Canadians that they will be able to invoke their full rights as information users without complexity, significant expense or hardship.

4) Internet Service Provider (ISP) Liability

CLA supports the requirement that ISPs notify a user of their network that a complaint has been received regarding the legality of content the user has mounted, rather than

requiring them to remove the content (“notice-and-notice” versus “notice-and-takedown”). Placing the onus on the ISP to remove content on a network on the basis of unsubstantiated allegations from a self-declared rights owner would place the ISP in an untenable position: it is best left to the network user to determine and be liable for their actions.

5) Provisions on contractual limitations on exceptions and uses

Bill C-60 does not address the issue of standard form or unilateral contracts (a contract which is imposed by the rights owner without the opportunity to negotiate terms; e.g. a shrink-wrap or click-wrap licence). This is unacceptable: failure to protect individual users and institutions from imposed contractual terms which override their legislated rights undermines the public interest and negates the purpose of the legislation.

Bill C-60 should include an amendment to stipulate that the terms and conditions of a standard form or any other unilateral contract restricting the making of a copy, as permitted under the exceptions for libraries, archives and museums or to permit a user to invoke other rights, have no force. Contract law should not be allowed to trump legislative rights unless users knowingly and willingly agree to waive their rights for other considerations.

6) Materials Publicly Available on the Internet

CLA is pleased that the Government did not pursue the proposed licencing of the Internet for classrooms and libraries in educational institutions but is disappointed that the proposed educational use of the Internet amendment was not included in Bill C-60. CLA supports the position of the national education associations in their request for the educational use of the Internet amendment, as proposed by the Council of Ministers of Education of Canada, the Canadian Teachers’ Federation, the Association of Canadian Community Colleges, the Canadian School Boards Association, and the Canadian Home and School Association.

CLA believes that all Internet users should be able to access freely available Internet content without payment or licence for personal purposes, recognizing that copyright holders have the option of using technological protection measures to collect payment for certain uses should they wish.

7) Preservation

Restrictions within current exceptions, many of which are linked to older technologies, make it increasingly difficult for libraries to meet the challenges of preserving and making accessible the materials in their collections and to use digital technologies to provide the services their users need. Libraries find they need to “refresh” or “migrate” content to match the evolution/availability of current technology and not have to wait until the older format technology is obsolete. CLA believes Bill C-60 must be amended to include a provision that would permit the library to undertake the “refreshing” or “migration” process at the stage at which it is needed (i.e., before the deterioration of the carrier or the data reaches the point where the content is compromised, and while the technologies required to process the data are still readily available and effective).

8) Exceptions for the print-disabled

The exceptions for the print disabled must ensure that individuals have the same ability as others to access content. Current restrictions in legislation on specific alternate formats (large print books and adaptation of cinematographic works) are unacceptable. The limitation of alternate formats for the print-disabled to those formats especially designed for these users presents a restrictive and costly barrier for equal access to content for millions of Canadians. CLA urges the Government to remove this restriction on equitable access as it is in direct violation with core Canadian values, as spelled out in the Charter of Rights and Freedoms.

9) Copyright and Photography

While CLA is sympathetic to the principle that photographers should be treated the same as other creators, one of the changes proposed in Bill C-60 will result in undue hardship to the public. Eliminating the current provision (Section 13(2)) for ownership of the copyright in a photograph by the person who commissioned the work will mean, for example, that the copyright in a family's photographs taken by a commercial photographer will no longer belong to the person who ordered them. This contradicts entirely the statement issued by the Ministers when Bill C-60 was first tabled: "the interests of consumers in the use of photographs for domestic purposes is protected". Commissioned photographic works should continue to be owned by the commissioner, with appropriate "usage rights" for the photographer. It should also be recognized that deleting Section 10 will over time significantly further shrink the public domain of photographic images; CLA objects to any encroachment on the public domain.

10) Crown Copyright

With most government information now exclusively distributed by the Internet, there is a pressing need for clarity that making copies of this information for preservation and dissemination purposes does not violate copyright. The government should introduce legislation that clearly states that copyright does not apply to Crown publications and that all such publications are in the public domain.

Summary

In this Briefing Note, CLA identifies some of the many issues around the current effort to reform copyright legislation – those that will impact the largest segments of the Canadian library and information community – and presents commentary on them.

CLA members and all in the community interested and concerned about access to information and an appropriate balance between user and copyright holder rights are urged to make their opinions known to their Members of Parliament.