



Canadian Library Association    Association  
canadienne  
des bibliothèques

## **Unlocking the Public Interest**

The views of the Canadian Library Association /  
*Association canadienne des bibliothèques*  
on Bill C-61, *An Act to Amend the Copyright Act*

September 2008

## **Preamble**

This Briefing Note on federal legislation Bill C-61, *An Act to Amend the Copyright Act*, has been prepared by the Canadian Library Association / Association canadienne des bibliothèques (CLA) for its members, the Canadian library and information community, and all those interested in the creation, dissemination and preservation of Canadian culture. 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-61.

CLA is aware that the dissolution of Parliament on September 7, 2008 means that Bill C-61 “died on the order paper”. However, CLA felt it was important to complete this Note on Bill C-61 since, although C-61 itself no longer exists, the principles it addressed are long-standing and deserving of comment.

CLA is Canada’s largest national 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 access to knowledge 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 collections, services (tangible and virtual) and buildings that CLA presents its analysis of Bill C-61, *An Act to Amend the Copyright Act*.

The Government has consistently stated its intent to provide a fair and equitable balance between the interests of the Canadian public and the content industry in legislation addressing digital copyright. Balance was not achieved, and substantive changes to Bill C-61 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 knowledge 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 private interests of the content industry and the guarantee of reasonable access by the public.

On the broadest public policy level, CLA has serious concerns with the manner in which copyright reform is proceeding. We see an undervaluing of the public interest of Canadians,

invalidating statutory rights of access and use. Instead we are protecting private-sector special interests and others with vested economic interests in attempting to restrict access to information. The bill reverses longstanding established practice and abrogates hard-won Canadian rights.

Bill C-61 was introduced by Minister of Industry Jim Prentice, and Canadian Heritage Minister Josee Verner as a "*made-in-Canada bill that balances the interests of Canadians who use digital technology and those who create content.*" A truly "made in Canada bill" would acknowledge the unique contribution of recent Canadian jurisprudence where the courts have identified users' rights and articulated broad interpretations of fair dealing. Further a "made in Canada bill" would continue to uphold Canadian values of access to knowledge and culture, by continuing to allow Canadians reasonable access under fair dealing and exceptions and limitations.

As tabled for first reading, Bill C-61 falls far short of this admirable goal. Bill C-61 continues the futile approach of limiting the potential of new technologies for individuals and for research and education. It allows digital locks and contract law to block users from statutory rights enjoyed in the analog era and shifts power toward the content owners. 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 establishes a system that treats all information users as potential criminals, guilty until their behaviour can be justified as innocent. Bill C-61 further disadvantages Canadians by constraining access to information in the classroom and through inter-library lending.

Bill C-61 ignores the fundamental principle of user rights as 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 Bill both fails to acknowledge and amend existing library, archive and museum exceptions and limitations made redundant by the CCH case; instead it introduces significant constraints on the ability of individuals and libraries to exercise their rights in the digital environment.

CLA urges the government to address the copyright implications of the Internet and digital content with a balanced and thoughtful public policy based approach that upholds and protects Canadian values and culture. Technology and the content provision industries are rapidly evolving and legislative attempts to force existing business models on Canadians by placing constraints on technology are both wrong and ultimately quixotic. The core principles in the WIPO Copyright treaties not already recognized in Canadian law do not require such a maximalist approach and can be incorporated without resorting to the type of technological constraints found in Bill C-61.

The government is now dealing with issues which impinge on a majority of Canadians in their homes, workplaces, libraries and classrooms. Given the complexities, reach and inter-relatedness of copyright issues, the government needs to engage all stakeholders in a broad reaching consultation about what copyright needs to be in the 21<sup>st</sup> Century.

Canadians will not – and should not – accept digital locks and imposed contracts that interfere with their statutory rights under fair dealing for any format of content, nor limits on how long legally acquired content may be retained by users for research and private study.

## **Copyright issues most relevant to libraries and Bill C-61**

### **1) Fair Dealing**

As noted above, Bill C-61 appears to have been drafted without acceptance of the spirit of one of the most important copyright legal decisions in Canada. This is an unacceptable omission.

The CCH case states that the scope of the fair dealing exception under Section 29 of the *Act* 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 digital and print copies to their users well beyond those permitted under the narrowly delineated Library, Archives and Museum exceptions in the *Act*, and expanded in Bill C-61.

The clear message given by the Court in striking a balance between the rights of creators and users when interpreting fair dealing should 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 should be considered when amending or drafting current or proposed library exemptions.

CLA believes the direction provided by the Supreme Court should be incorporated into Bill C-61. The *Act* should be amended to reflect the Court 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.

CLA also strongly believes that fair dealing as the fundamental user right must not be superseded by a copyright holder use of technological prevention measures or imposed contracts, as would be the case if Bill C-61 becomes law.

### **2) 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.

The amendment to Section 30.2(5) and (5.01) proposed in Bill C-61 lifts, in part, the restriction applying to a copy provided to a patron of another library, by allowing library staff to provide a digital copy of printed matter for interlibrary loan purposes. However, the library must take measures to prevent the requesting patron from: a) making any reproduction of the digital copy (other than a single print copy), b) communicating the digital copy to anyone, and c) using the digital copy for more than five business days. In addition, Bill C-61 adds section 30.2(6)(e) which provides for the making of a regulation to prescribe the manner and form of the above noted measures to be taken in relation to digital copies.

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. These provisions fall far short of what is required for libraries to provide effective reference and interlibrary loan services in the digital era. These constraints seek to protect economic interests that are not threatened by the limited amount of “private research and study” materials copied by Canadian libraries. CLA proposes that the library, archive and museum exceptions for private research and study be format-neutral and allow these institutions to do anything on behalf of a patron, both directly and through inter-library loan, that the patron can do for themselves.

### **3) Digital Locks**

#### ***[also known as Digital Rights Management (DRM) or Technological Measures (TMs) or Technical Protection Measures (TPMs)]***

The blanket prohibition on the circumvention of digital locks in Bill C-61 exceeds Canada obligations under WIPO copyright treaties and looks backwards, rather than forward, in protecting user rights and promoting Canadian innovation.

Bill C-61 makes it illegal to circumvent digital locks for most purposes including many legitimate purposes such as quotation (as per “fair dealing”) and the copying of content for which copyright has expired. This prohibition of the copying of locked material would treat Canadians who attempt to exercise their legal rights as criminals. It further undermines the protection of privacy in cases where the copyright owners monitor users through technological surveillance devices. Indeed, some digital locks may interfere with the users computer operations and may prohibit the use of legitimately purchased materials outside a user own geographic area. This new right for owners directly contravenes basic individual rights sanctioned in Canadian copyright law.

Digital rights management content may need to be altered to correct, update, and augment cataloguing and licensing information such as when a digital work enters the public domain.

The concentration on digital locks is already outdated. Many progressive business models in industry are abandoning the expense and complexity of developing digital locks in favour of more lucrative and more consumer-oriented digital delivery systems.

The US Digital Millennium Copyright Act (DMCA) has been a failure. There is no evidence demonstrating that US cultural industries have benefited from it. In fact, there is data which

suggests that the Canadian recording industry has outperformed its US counterpart during this decade despite the presumed protections provided by the DMCA. There are legislative precedents such as the Canadian Bill C-60 tabled in 2005, and current legislation in Denmark and New Zealand that make it legal to circumvent digital locks for non-infringing purposes.

We cannot support technological protection measures that prohibit legitimate acts of circumvention or otherwise restrict users' rights. Bypassing technological measures and the possession of devices for this purpose should not be illegal when there is no intent to infringe copyright.

CLA recommends that the government amend its proposed legislation to permit the circumvention of digital locks for non-infringing purposes. The Government must insure that Canadians will be able to invoke their full rights as information users without complexity, significant expense or hardship.

#### **4) Exceptions for the print disabled**

Equitable access to information is a fundamental Canadian right. The Charter of Rights and Freedoms and Canadian Human Rights legislation (federal and provincial), disallow discrimination on the basis of a disability. Yet, it is estimated that less than 5% of the works protected by copyright is accessible by people with perceptual disabilities. These people require adaptive technology and/or alternate format materials to make those works useable.

Bill C-61 does not adequately address how to provide those with perceptual disabilities access to content in all formats. Consumer groups, library associations, and educational groups have repeatedly requested that the Exceptions for Persons with Perceptual Disabilities be reformed to ensure format neutrality, something the current law fails to do.

In its preoccupation with digital locks, Bill C-61 provides a very restrictive exception for those with perceptual disabilities and the institutions serving them. The proposed amendments allow persons with perceptual disabilities and those acting on their behalf to remove digital locks for the purpose of producing materials in alternate formats. However, the Bill fails to recognize that, by their very nature, digital locks discriminate against access by persons with perceptual disabilities. Most persons lack the technical expertise as well as the means to employ such technical expertise that would be needed to effectively utilize this exception. Production agencies of alternate format materials will need to acquire the expertise either in-house or through IT contracts to remove the TMs, adding a significant step to the workflow, increasing the time, money and effort it takes to produce a suitable alternate format.

Further, the proposed amendment also requires that the TMs and DRMs be "put back" after the production of an alternate format, a requirement which is neither technically feasible nor workable. This onus would be analogous to putting the spine back on a book without tools after the spine has been cut off for efficient, legal scanning.

Further, the exception in the Bill does not apply to materials that are "borrowed or rented". In fact, the Bill exacerbates an already intolerable level of obstruction to access and discriminates against persons with perceptual disabilities who wish to utilize library services to the same degree as other Canadians. CLA believes that materials borrowed, rented, or purchased in one

format must be made available to persons with perceptual disabilities in alternate formats to provide equitable access to information.

The Bill would result in opening the option of copyright owners to avoid the operation of the current exception for perceptual disabilities through the use of contracts. As weak as the current exception is, CLA is concerned that C-61 will reduce its usefulness to the persons who it is intended to serve.

The amendment is not practical given the technological difficulties in implementing it and the fact that an imposed contract could prevent its application.

### **5) Provisions on contractual limitations on exceptions and uses**

The provisions on contracts and licenses, such as sections 29.21, 29.22 and 29.23 in Bill C-61 severely encroach on existing user rights and exceptions under current Canadian copyright law, including fair dealing, access to free material on the Internet, access rights for persons with disabilities, preservation and other user and library exceptions. The need for a balance of these rights was recognized in the CCH case. 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.

Standard form (e.g. shrink-wrap or click-wrap) or unilateral contracts are unacceptable if they negate existing Canadian law. If Bill C-61 is passed into law, copyright owners and those who repackage public domain material can override any provisions that provide a balance for user rights.

“One-way licenses” for material that have exclusive distribution by a sole distributor (often found with audiovisual materials) can have the same negative effect on user rights. In addition, material freely available on the Internet should not be subject to contract law to profit any organization, including organizations that have monopolies such as collectives.

Contracts accompanying permissions to use digital material from the US should not impose US law on the user. Under the Berne Convention, Canadian law should prevail.

CLA proposes that Bill C-61 should 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. Consumer protection must be seriously considered when these conflicting interests meet.

### **6) Statutory Damages**

The changes to the statutory damages provisions of the *Copyright Act* regarding infringement for private purposes do not provide any real relief for Canadians. Any infringement that involves circumventing digital rights management is exempted from the reduced statutory damages proposed in Bill C-61, so the much-heralded limit of \$500 to statutory damages really isn't going to have any impact. Those who act with a good faith belief that their actions with respect to a work are within fair dealing or are protected by some other user right should not be subject to

statutory damages at all, similar to the provisions in section 504 of US copyright law. This protection should apply to individual members of the public as well as libraries and educational institutions and their employees.

## **7) Special Educational Exceptions**

Bill C-61 contains several new provisions that would create limited exemptions available to educational institutions as defined in the *Act* and to those acting on their behalf or under their authority. As we have indicated above, we believe that fair dealing is the most equitable way to insure that proper balance in the *Act* is achieved. In particular, the legislation should clearly recognize that these exceptions in no way derogate from fair dealing rights as interpreted by the CCH case.

In addition, many of these provisions add unacceptable levels of complexity and will encourage an over-reliance on licensing. Any limited benefits for teachers and learners given in these sections quickly evaporate in the face of counter-limitations and requirements. As we have indicated above, we do not support digital locks that prohibit legitimate acts of circumvention or otherwise restrict existing user's rights. As drafted, these educational exceptions are vitiated where a technological protection measure has been employed. Even worse, they contain requirements for academic staff to impose and enforce these measures.

We also object to provisions that allow owners of works to unilaterally opt-out of user's rights either by terms of a contract, posting a notice on a website, installing a technological protection measure, or otherwise. We particularly find the requirements that educational materials be designed to be less useful or even destroyed at the end of the term to be inimical to our basic practices and values.

We would recommend that sections 30.01 through 30.04 be reviewed in light of our concerns and that these issues be addressed as part of a broad reaching public consultation.

## **8) 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. It is worth pointing out that in addition to the commercial ISPs there are many non-profit organizations that serve as ISPs including many public libraries, school boards, universities and colleges.

## **9) 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 and availability of current technology and not have to wait until the older format technology is



obsolete. Bill C-61 attempts to deal with this by changing wording to allow material *becoming obsolete* to be preserved. This is a positive step that threatens to be undermined by the anti-circumvention provisions for digital locks in other parts of the Bill.

## **10) 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-61 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.

Also, CLA notes that deleting Section 10 will significantly further shrink the public domain of photographic images over time. As a matter of principle, CLA objects to any encroachment on the public domain.

## **11) 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 who are 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.

CLA acknowledges the complexity of copyright, and applauds the government for defining balance between the concerns of creators, rights holders and content users as a key goal of continuing copyright reform. Bill C-61 does not achieve that balance. CLA will be pleased to continue to work with the creator and rights holders communities, and others in the user rights community, to develop balanced copyright legislation in the public interest.