Draft Statement For Members on 2018 Copyright Act Review

Fair dealing

CALL/ACBD thinks the Copyright Act should reflect the approaches taken by the Supreme Court of Canada in CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 SCR 339, 2004 SCC 13 (CanLII), http://canlii.ca/t/1glp0, and Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), [2012] 2 SCR 345, 2012 SCC 37 (CanLII), http://canlii.ca/t/fs0v5, which are flexible and responsive. From the perspective of law libraries, bright line tests are inappropriate given the context-specific nature of the law, and so amendments should not include bright lines (an example of a bright line test would be to say that an upper limit of a dealing that is fair is 15% of a work). Interpretation of what constitutes a dealing that is fair should continue to be left to the context.

Contract/license override of statutory provisions

It is a core function of law libraries to share resources (interlibrary loan, document delivery) when they are needed. The Copyright Act should to contain a statement disallowing license provisions that would override library exceptions or fair dealing user rights. Our licenses are often opaque, click-through or otherwise non-negotiable, or signed by someone other than the librarians, and the result of such overriding provisions is we would be inadvertently or inappropriately contractually limited from doing what Parliament has otherwise granted us the right to do.

Crown copyright

A recent E-Petition requested the House of Commons to add a s 12.1 to the Copyright Act, and the Minister responded by referring the matter to this review. The proposed s 12.1 would provide that works noted in s 12 would no longer be protected by copyright upon being made available to the public.

CALL/ACBD supports the proposition of that E-Petition. Access to justice will benefit from open use of works noted in s 12, once they are publicly available.

Over and above this, CALL/ACBD takes a second position in respect of s 12 in furtherance of access to justice and of the work of our member law libraries. CALL/ACBD believes that the correct interpretation of Canadian law is that the Copyright Act, in section 12 or in any other provision, does not govern legislation or case law. Interpretation of the Act and s 12 indicates that these materials aren't "works" within the meaning of the Act or its predecessors and have no identifiable "author" who can reasonably claim copyright in those things.

Thus, CALL/ACBD requests a further addition to section 12 (e.g. a s. 12.2):

- a provision confirming that legislation and case law are not "works" within the meaning of the Act and are not subject to its provisions;
- explicit provision that legislation and case law of the jurisdictions of Canada are not prepared or published by or under the direction or control of Her Majesty or any government department within the meaning of s. 12, and are therefore not subject to Crown copyright; or
- an explicit statement that legislation and case law are in the public domain

The impact for CALL/ACBD is our member organizations and their workers regularly use primary law in our daily work, and an even-footed and efficient system of laws requires this practice to continue unhindered by potential copyright concerns. Our members also will be unhindered in creating tools and resources to assist their stakeholders and the general public in accessing their laws.

Interlibrary Loans

CALL/ACBD requests an amendment to section 30.2 (5.02), regarding the statement that a library, archive or museum must take "measures to prevent the person" receiving materials from taking certain actions. CALL/ACBD asks that the section make clear that this provision does not create a positive obligation of a lending library to ensure and enforce the compliance of their borrowers. Some libraries, archives, and museums may have the technological capability to limit the usability of interlibrary loaned materials, but many do not have such means. Libraries, archives and museums cannot be accountable for behaviour of interlibrary borrowers or specifically their actions outside of the institution's location. Indeed such an onus would be contrary to principles of patron privacy to which libraries adhere. Should a provision such as 30.2(5.02) remain in the Act, it should instead set out a reasonable practice for libraries to follow to comply with this provision – such as issuing a copyright and terms of loan notice to the patron. At minimum, the word "reasonable" should be added before the word "measures."