Ebooks licensing and Canadian copyright legislation: a few considerations

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Abstract:

Ebooks have become increasingly common in collection development strategies in many libraries. The delivery of monographs in digital formats has gained significant popularity in many libraries, particularly in the academic sector. Licensing is the common method of acquiring ebooks, whether as a subscription or a purchase. Libraries have had to transform selection and workflow processes in order to acquire ebooks in an efficient manner. Not enough attention, however, has been paid to the interplay between licensing as a contractual arrangement and the statutory rights available under Canadian copyright law. Fair dealing is a concept of critical importance in Canadian copyright, as it provides the foundation for user rights in support of culture, learning, and innovation. There are other provisions of specific value to libraries, such as interlibrary loans and access by persons with perceptual disabilities. This article will examine these issues and proposes a few strategies that libraries can adopt to ensure that their interests are not eroded in licensing agreements.

Keywords:

Ebooks; copyright; licensing; Canada; strategies

The last two or three years have seen a renaissance of library interest in acquiring ebooks. Libraries have witnessed the success of journal literature delivered online, and are examining the challenges in implementing an ebook collection development strategy. Many commercial publishers are making e-versions of their books available, and are increasing the depth and breadth of their title list in order to become more appealing to buyers. Publishers have recognized the importance of offering a comprehensive collection including frontlist and backlist titles. There are pervasive marketing efforts aimed at establishing a sustainable ebook marketplace for ebooks in academia and other library sectors. The rapid expansion of the Google Book Project is creating much visibility for ebooks, and the recent settlement with the Association of American Publishers and the Authors' Guild has intensified the impact of digital books on libraries. A critical mass of content that can serve many purposes and dominate the book market is being assessed by the court. Scholarly publishers, such as university presses and societies, are also trying to shift their business models to take advantage of the major shift in user preference from print to electronic, and to compensate for the decline in print monograph sales to libraries. Third-party aggregators are also trying to muscle into the market with the allure of a single interface and content from multiple sources. Like Baskin & Robbins, there are at least thirty two flavours of ebook business models out there! Choosing among them is not easy.

In this climate it is important to step back and consider the terms under which we are acquiring ebooks. We rely heavily upon license agreements to determine the rights that govern how we can make ebooks accessible to our patrons. A comprehensive report from the Copyright Committee Task Group on E-Books of the Canadian Association of Research Libraries observes that, "Academic libraries are in a new, electronic environment where the delineation of access to scholarly materials is not universally shared and must be carved out afresh. Access achieved in print books must now be re-negotiated in licensing agreements for e-books. Libraries, therefore, must ensure that all negotiated contracts reflect the principles of access and reinforce their significance to the academic enterprise." (CARL 2) We invest significant energy in negotiating agreements that provide us with specific permissions regarding printing, downloading, perpetual access rights, unlimited simultaneous users, and the availability of quality MARC records. Much has been written on the challenges of licensing ebooks, and how different they are from ejournals. The state of ebook licensing is very fluid and immature compared to the ejournal marketplace. Over the past ten years, libraries and publishers have developed a level of comfort and consensus in licensing ejournals on a large scale. The same is not true for ebooks, as publishers have been quite skittish in migrating business models from print to a hybrid print-digital approach or more radically, an e-only strategy. Many business models have been put forward – keeping track of these variations and their implications is a full-time job for libraries that acquire ebooks from multiple providers. Approval plans and standing orders for print books only complicate the impact of this strategic development.

In this environment, copyright law has been trumped by contractual agreements. We sign license agreements that erode various user rights. The above-mentioned CARL report reminds us that, "…if a library and a publisher agree in a contract that fair dealing will not apply to activities that are specified in the contract, then the contract's provisions prevail regardless of what the *Copyright Act* provides." (CARL 9) What have we lost in committing ourselves to license agreements for ebooks and not incorporating the statutory provisions enjoyed under copyright legislation? This is a large and important question that affects how ebooks can be used for teaching, learning, and research within our institutions.

It should be recalled that library exceptions were not granted until 1997, following many years of lobbying and persistent advocacy by the Canadian Library Association and others. These exceptions permit reproduction for various purposes by non-profit LAMs (libraries, archives, museums) without requiring the permission of the content owner. Here are several noteworthy provisions from the Copyright Act:

1 – **Interlibrary loans.** Article 30.2(5) states:

"A library, archive or museum or a person acting under the authority of a library, archive or museum may do, on behalf of a person who is a patron of another library, archive or museum, anything under subsection (1) or (2) in relation to printed matter that it is authorized by this section to do on behalf of a person who is one of its patrons, but the copy given to the patron must not be in digital form."

However, ebook publishers (and this is even more true for third-party vendors) have typically been unwilling to allow interlibrary loans for ebooks, for fear of loss of revenue from print and the effects on their business model. Very few have made concessions in this area. As resource-sharing is critical to libraries, the loss or severe restriction on interlibrary lending of digital content has decreased our ability to share our book collections in ways that enhance our collective enterprise, and to share our cataloguing records with respect to ebook content. This works against our professional ethics and our sense of community.

2 – **Preservation**. Article 30.1 states:

"It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive or museum, a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection.(*a*) if the original is rare or unpublished and is (i) deteriorating, damaged or lost, or (ii) at risk of deterioration or becoming damaged or lost;"

Copyright law allows the library to create a copy of a work in order to preserve it for the collection; this practice is essential for maintaining the collection for future generations. Ebook license agreements typically don't provide such a clause, since the titles are not viewed as part of the library collection. This raises the disjunction between the need to manage the collection from a stewardship perspective and the intellectual property approach of various publishers. Preservation requires ownership, and this is not always available in license agreements for ebooks. Perpetual access rights are sometimes negotiated in license agreements, but typically this access is via a publisher's or vendor's server. Preservation of ebook content is not an issue that most libraries have the technical infrastructure to address, with the notable exception of the Scholars' Portal (operated by the Ontario Council of University Libraries). An archival and delivery ebook platform on Scholars Portal is being developed and will soon be available. The digital era means that preservation of e-content has to be considered in a collaborative fashion involving partnerships and the implementation of new policies and technologies that meet key standards and objectives.

3 – **Access by persons with perceptual disabilities**. Article 32.1 states:

" (1) It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to (*a*) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; (*b*) translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or (*c*) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability."

The conversion of the work into an alternative format for persons with visual disabilities is a statutory right that libraries enjoy. Typically license agreements don't provide for this capability, thus diminishing our capacity to serve this user group in a barrier-free manner, and to provide equitable service and access to our information resources. Publishers and vendors need to be strongly encouraged to provide the original digital files to libraries and trusted repositories (under specified conditions) to allow us to make them available in alternative formats; this would mean allowing us to decrypt the digital rights management code for authorized purposes. Significant negotiation and education would be required here.

4 – **Reproducing a work for a test or examination**: Article 29.4.2 states:

"It is not an infringement of copyright for an educational institution or a person acting under its authority to (*a*) reproduce, translate or perform in public on the premises of the educational institution, or (*b*) communicate by telecommunication to the public situated on the premises of the educational institution a work or other subject-matter as required for a test or examination."

This permission, not commonly known, gives libraries the latitude to reproduce a work in various forms in the context of a test or examination. It would be surprising if any commercial license agreement provided such an option. It would be necessary to ask permission from the content provider, and even if this were granted, to determine whether and how the work could be reproduced in an appropriate manner within time constraints. This would likely be prohibitive.

Copyright reform

The federal government's legislation Bill C-61, An Act to Amend the Copyright Act, was released in early June 2008. Although it died on the order paper of Parliament when the House of Commons was dissolved on September 7, 2008, it is instructive to consider some of the provisions that affected ebooks in a library context.

While Bill C-61 proposed to allow the provision of a digital copy of a printed document as an interlibrary loan, the accompanying limitations and requirements were quite onerous- the digital copy could not be used by the patron for more than five days and the patron could not make any reproduction, other than a print copy (section 30.2. 5.01). The issue of converting a work to an alternate format for persons with perceptual disabilities is fraught with problems, as this right does not apply to digital locks applied to materials that are borrowed or rented (section 41.15. 3). Moreover, the permission to remove digital locks for legitimate purposes is undermined by the requirement to not impair the protection mechanism once the alternate format has been created (section 41.16.2). This would be very difficult to do and constitutes a major barrier to access. On the positive side, it is worth noting that the Bill did recognize the importance of allowing libraries to copy works into new formats when the existing format is becoming obsolete or when the technology is becoming unavailable (section 30.1.(1)(c)). While this provides more flexibility for preservation of

content, the contractual arrangements under which ebooks are typically acquired make this a problematic issue.

While Bill C-61 is no longer on the table, it is important for the library community to prepare for the next round of copyright reform. Given the pressure from powerful rights holders groups for more robust protection of intellectual property, it will be important for the library community to remain vigilant in the defense of user rights and a balanced regime. A Briefing Note from the Canadian Library Association asserts that "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 3)

Strategies

It is important for us to use copyright legislation and key jurisprudence as our guide, in particular for 'fair dealing', to support information needs and reduce barriers for our user community, particularly as these relate to the exchange of knowledge, the encouragement of learning, and the provision of materials to a wide range of patrons. Here are a few ideas for negotiating an appropriate balance between licensing exigencies and copyright law, particularly with respect to ebooks:

1 – Request interlibrary lending privileges: this can be presented within certain modalities, such as the ability to print out the work, or a certain percentage of it, and to fulfill an ILL request within the parameters of the legislation. This should help allay publisher's concerns regarding illegal redistribution of intellectual property.

2 – Request a provision of access for persons with visual disabilities: this will allow us to be more inclusive in how we deliver materials. More generally, it would be important to ask for compliance with legislation addressing the needs of persons with disabilities, such as the Ontarians with Disabilities Act for Ontario-based agreements. This provides a legislative framework for identifying and reducing barriers for this group of persons, including educational barriers such as services and collections. It could be a model for other jurisdictions.

3 – Use every negotiating opportunity to educate the publisher or vendor about the library's interest in incorporating user rights found in copyright legislation into a license agreement. This will signal that we are aware of our statutory rights and their central importance for research, learning, and teaching. Advocating for these rights is in our interest. It is important to consider DRM (digital rights management) limitations on printing, saving and downloading in this light – does a license agreement unduly restrict these functions in a way that undermines the spirit of fair dealing? This is often the case. Publishers should be encouraged to eliminate DRM from ebook platforms, as Springer has done.

4 – Develop an ebook model license agreement to codify the interests of our user community in a pro-active manner. In so doing, we will be articulating the requirements and values of libraries which reflect the ways in which ebooks can be optimally used by students, faculty, and others. The Ontario Council of University Libraries (OCUL) has developed a model ebook license agreement (look under 'Products') which has been used successfully to negotiate agreements with ebook vendors. It reflects the educational interests of academia, and addresses various key issues in this context, but would be a useful resource for other sectors as well.

5 – Acquire ebooks via ownership, rather than subscription, whenever possible. This will ensure that your investment doesn't disappear when you can no longer afford an annual subscription to a publisher for an ebook collection or specific titles. Ownership also affords future options for alternative access methods.

6 - Request a secure archiving provision. This could be via an existing commercial venture such as Portico or LOCKSS, to ensure the long-term sustainability of access in case of a vendor's inability to do so. It could also be a provision to permit hosting of the files on a local ebook platform, should your library or consortium be in a position to develop this infrastructure. Be clear on the specifics of what archival rights mean and how they can be implemented. As preservation is a key library value, and as more and more of our book collections go digital, this looms large as a major challenge for libraries. Preservation is linked to long-term sustainable public access, and this in turn reflects the role of copyright doctrine as a policy instrument to ensure a balance between private and public interests in the distribution of information goods in a knowledge-based society.

Whatever strategies we adopt, we need to keep our focus on user rights in Canadian copyright legislation and in jurisprudence– this is the foundation on which we can build license agreements that meet the interests of the community we serve. This is particularly important as contractual agreements have become the key vehicle for delivering digital content in today's networked world. While respecting the publisher's intellectual property rights, we need to be vigilant that our users' interests are not eroded by licensing arrangements with publishers and vendors, in order to provide the broadest possible access to licensed material for legitimate purposes. This requires careful attention when negotiating the terms and conditions for acquiring digital ebooks, and includes analyzing key issues, sharing ideas with colleagues and learning from the best practices of others. The two Canadian reports cited in this paper are quite important in this regard. Marrying statutory rights and principles with contractual licensing will always be a challenge, and we need to develop nuanced approaches that recognize and promote our community's practices and best interests in a measured, strategic manner.

Works Cited

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