

BRIEF TO THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TRADE (INDU) AS PART OF THE REVIEW OF THE COPYRIGHT ACT

INTRODUCTION

The Canadian Urban Libraries Council (CULC) / Conseil des Bibliothèques Urbaines du Canada (CBUC) was formally incorporated in 2008. Our members collectively serve more than 7.5 million active users from our 700 locations and virtual services. In 2015, we loaned in excess of 185,000,000 items and had more than 385,000,000 uses in person and online. CULC/CBUC member libraries expend over \$80 million on collections annually and employ more than 12,000 library workers. More than 65% of all Canadians are served by a CULC/CBUC member library, and the activity in our libraries comprises more than 80% of Canada's public library activity.

Canada's public libraries recognize and celebrate diverse voices and ensure that all Canadian residents can seek information and ideas free from economic barriers. Canada's *Copyright Act* recognizes the functions of libraries to support lifelong learning and preserve Canada's heritage through the Act's exceptions and limitations.

SUMMARY

Canada's public libraries spend 20-30% of their materials budgets on digital content, and use of that content continues to grow. Public libraries seek amendments to the *Copyright Act* that will ensure user and library rights related to print content are not lost in the digital environment. Copyright legislation must ensure that agreements libraries sign with content providers do not override user and library rights granted through legislation.

Public libraries continue to value existing exceptions for users including fair dealing in sections 29, 29.1 and 29.2; non-commercial user-generated content in 29.21; and reproduction for private purposes in 29.22. Public libraries also value and rely on exceptions for libraries, archives and museums for managing and maintaining collections in 30.1, and for acting on behalf of users in 30.2.

Access to information in Canada must remain equitable regardless of an individual's economic circumstances. Publishers withhold ebooks from libraries, or use excessive pricing and restrictive licensing to make purchasing functionally impossible for some libraries. This situation will deteriorate if the Canadian government does not take action.

We encourage the Government of Canada to seek opportunities beyond the *Copyright Act* to support the creation and sharing of Canadian stories and ideas.

Recommendations

The Government of Canada should amend the Canadian *Copyright Act* to ensure that exceptions granted in legislation cannot be overridden by contracts.

The Government of Canada should leave Sections 29, 29.1, 29.2, and 29.21 of the *Copyright Act* unchanged to retain current allowable uses, and maintain the exceptions for libraries, archives and museums in 30.1 and 30.2.

The Government of Canada should ensure access to ebook content from all publishers by identifying a policy solution that prevents restrictive licensing and pricing practices.

The Government of Canada should seek alternative ways to support the earnings of creators in Canada, outside of copyright, through increased publicly available research on publishing and reading, and through other cultural heritage support.

BACKGROUND

Library Content in a Digital Environment

Canada's urban public libraries now spend 20-30% of their materials budgets on digital content. This content includes ebooks and downloadable audiobooks; digital newspapers and magazines; and streaming film, music, and learning resources. Public libraries acquire this content through licenses generally on an annual basis. In the digital environment, public libraries rarely have the opportunity to purchase on a permanent basis and ensure future access to Canadian content.

Digital products are offered predominantly by vendors from outside Canada that act as intermediaries and aggregate content from different publishers. An urban library in Canada pays license fees annually to each intermediary, ranging from a few thousand per year to more than \$80,000 at the largest libraries. A significant portion of the sums paid by libraries go to these intermediaries, such as OverDrive or EBSCO, rather than to authors, creators, and publishers.

When libraries pay intermediaries, they do not have access to information about how much of the funds intermediaries retain, however, from anecdotal information, libraries know that for some products it is in the range of 15-25% of the funds paid by libraries. At an urban public library with annual digital spending of \$1 million, this means that \$150,000 that likely would have reached publishers for distribution to authors in a print environment does not reach them in the digital environment. Intermediaries pay publishers and rights holders based on confidential agreements. Greater transparency on agreement terms would be valuable for both libraries and creators.

RECOMMENDATIONS

Protecting Copyright Exceptions from Contract Override

Licence agreements govern how libraries and their users can use digital content. While Canada's *Copyright Act* sets out exceptions for fair dealing that library users depended on in the print environment, the exceptions can be overridden by contract terms for digital. Agreements that libraries sign may prevent the copying of digital content or its interlibrary loan, even when the *Copyright Act* would permit this.

Other jurisdictions have recognized that agreements prevent access policy makers intended to ensure, and have enacted solutions through copyright legislation. These jurisdictions include the United Kingdom, where individual exceptions are protected from contract override, and Ireland, where legislation states the following:

“Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.”¹

Compounding this problem, licenses in public libraries are rarely negotiated by legal experts. Typically, they are negotiated between a librarian with little, if any, specialized training, and a salesperson from an intermediary, using an agreement prepared by the legal counsel of the intermediary. In many cases, the library's choice is to accept the terms or be unable to offer the content. In other situations, the librarian negotiating the agreement does not understand that the terms can be negotiated, as they

¹ <http://www.irishstatutebook.ie/eli/2000/act/28/section/2/enacted/en/html#sec2>

do not have legal training. The most effective protection for Canada's public that will ensure they can exercise exceptions is to implement measures that protect these exceptions from contract override. The negotiation of contracts by non-expert parties, with libraries in the weaker position, should not govern content use in Canada.

Recommendation: The Government of Canada should amend the *Canadian Copyright Act* to make it clear no exception to copyright can be overridden by contract, using the Irish legislation as a model.

Ensuring Access to Ebooks from all Publishers

Since 2010, ebook use has exploded among consumers and in libraries across the country. BookNet Canada reports that for leisure time reading, 67% of books were read in print, 24% were read digitally, and 9% were audiobooks. Public libraries have tried to respond to this demand to ensure that library users have the format that they prefer, supporting a reading and learning culture in Canada.

Because this content is licensed, publishers can choose to withhold ebooks from libraries for a period of time, they can charge libraries higher prices than they charge consumers, and they can limit how long a library can use an ebook before the library has to purchase it again. All of these restrictions are being exercised by publishers, and the situation has not improved over the past eight years of broad eBook availability.

Libraries are charged pricing that ranges from near consumer prices for an ebook (\$11-18) to rates ten times higher (\$92-\$120). These ebooks are available to only one person at a time, so the use itself mimics print. The highest prices are charged by Hachette, a multinational publisher. While other publishers usually charge less, they often restrict the duration or number of uses for the license, so that after one or two years, or a certain number of loans, the library must buy another copy. Many print books last long past two years in public libraries, and their availability is ensured for future generations. With ebooks, this access is lost.

This time and loan-limited approach is true of HarperCollins, Macmillan and Simon & Schuster, and has recently been announced by Penguin RandomHouse, publisher of many Canadian imprints that control access to critical cultural heritage. It is Penguin RandomHouse that holds the rights to the books published by historic Canadian publisher McClelland & Stewart. When Canadian public libraries cannot purchase these ebooks because of restrictive licenses and excessive prices, access to Canadian heritage is compromised. As the content environment continues its shift to digital, access may be lost entirely.

Some publishers completely withhold new ebooks from libraries. TOR, an imprint of Macmillan, recently announced that they will withhold new publications from libraries for four months. If this practice spreads, Canadians will be prevented from fully participating in conversations about culture if they depend on libraries for access to content.

In the print environment, Canadian libraries can purchase books from other countries when they are not available in Canada, described in section 27.1 of the Copyright Act and governed by the Book Importation Regulations. In the digital environment, if an ebook is not available with a Canadian licence, libraries cannot acquire it at all. From one country to another, access to content from multinational publishers varies considerably, as demonstrated in an Australian study from Monash University.²

Canadian municipalities approved a resolution calling for action by the federal government on bringing down ebook prices for public libraries on 5 March 2016.³

² http://elendingproject.org/focused_international.html

³ <https://www.cbc.ca/news/canada/ottawa/tim-tierney-s-call-for-fair-e-book-prices-for-libraries-adopted-by-fcm-1.3478154>

Recommendation: The Government of Canada should ensure access to ebook content from all publishers by identifying a policy solution to restrictive licensing and pricing practices.

Existing Exceptions for Libraries and their Users

CULC/CBUC members recognize the value of the fair dealing exceptions in the *Act* and the exceptions for libraries. Public libraries value the addition of the user-generated content exception for the opportunity it offers the public as they learn and create. Users come to libraries to increase their digital literacy through programs, to access computers with digital creation software, and to experiment with creating new works that build on popular content. These uses support learning, experimentation and future creation, while serving no commercial purpose. This exception helps to ensure that library staff do not feel obligated to discourage this type of experimentation and creation when it is taking place in our spaces.

Recommendation: The Government of Canada should leave Sections 29, 29.1, 29.2, and 29.21 of the *Copyright Act* unchanged to retain current allowable uses, and maintain the exceptions for libraries, archives and museums in 30.1 and 30.2.

Supporting Canada's Creators through Research and Cultural Heritage Programs

Every day, Canada's public libraries support authors as they conduct research, offer quiet space to write, and provide technology for those who need it. They offer programs that support aspiring authors to learn about writing and publishing. Public libraries promote new authors and local content, encourage literacy for all ages, and celebrate Canada's heritage.

CULC/CBUC members see many ways the government can support authors and publishers outside of copyright. The Public Lending Right program's recent expansion to ebooks and audiobooks, as well as the increased funding, effectively serves this purpose. Canada's government programs that offer operating grants to independent Canadian publishers, such as the Canada Book Fund, and support for industry associations are critical to ensuring the continuity of the Canadian voice.

Canadian research on literacy and reading for pleasure and life long learning would help organizations that work in these areas, including libraries and publishers, to promote books and reading. Understanding how the use of books is changing would ensure that books are not lost as new forms of learning and entertainment emerge.

The Canadian government could provide further support by helping authors and publishers understand and value the stories and ideas that most Canadians choose to read and pay for. The highest sales of fiction in Canada are in genres such as thrillers and romance, yet these areas are not encouraged by Canada's federal grant programs. Publicly available research encourages the writing and publishing of more of the content that Canadians want to read would increase the financial wellbeing of Canada's authors and publishers, and cause Canadians and Canadian libraries to choose Canadian content more often over international works.

For further information:

Jefferson Gilbert,
Executive Director,

Canadian Urban Libraries Council / Conseil des Bibliothèques Urbaines du Canada (CULC/CBUC)

416-699-1938

jgilbert@culc.ca

www.culc.ca