

A Short History of Canadian Fair Dealing



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Library

Introduction

- Introduction
- TWUC and Fair Dealing
- Is Fair Dealing Reliable?

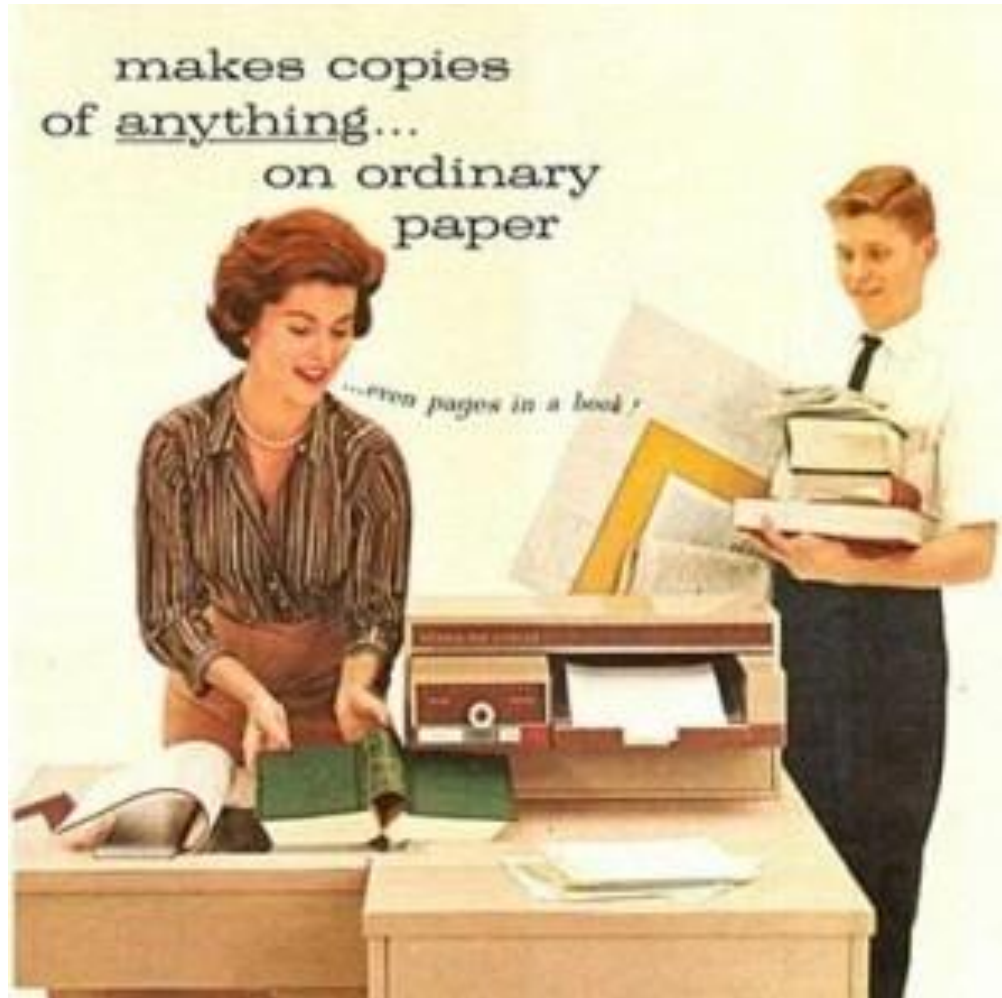
- Phase I of Copyright Reform
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Origins of Fair Dealing

- 1802 – Fair Dealing starts to appear as judicial law in the UK
- 1841 – Fair Use starts to emerge in judicial law in the US.
- 1911 – Fair Dealing codified in the UK (Imperial) Copyright Act
- 1921 – Fair Dealing codified in the Canadian Copyright Act

Xerox 914 - 1959



The Modern Photocopier

- No more ripping pages out of books.
- Easy to make copies.
- Interlibrary loan of journal articles.
- Handing out copies of articles in class to students.
- Placing Reserve Copies of articles in the Library

TWUC and Fair Dealing

1973 & the Present

Marian Engel



On the one hand she loved libraries...

- Gave major credit to children's libraries in the province of Ontario as a reason why she became an author.

- Trustee for the Toronto Public Library Board: 1975 – 1978

But Engel was also one of the founders of the Writer's Union of Canada (TWUC) and she was its first chair in 1973.

G&M – October 6, 1973

As an author...I must now for my own protection consider the libraries as my enemy.

I walk in. On my right is a Xerox machine in contravention of the copyright limitation...Straight ahead is a woman in furs, who is taking out my book for nothing...

John Degen's View of Fair Dealing

You can copy a little bit free because of fair dealing - that's how we quote and use short passages as examples. You can copy more, and do not have to buy a full text if (and only if) you buy a license to do so. Once you start copying substantially (up to the full text), you really need to buy the book.

John Degen, Executive Director - TWUC

Feb 8, 2013

<http://johndegen.blogspot.ca/2013/02/al-purdy-peed-on-my-car-or-conversation.html>

How Reliable is Fair Dealing?

1970's & 1980's

Fair Dealing: 1921 - 1993

27. (2) Acts not constituting infringement of copyright

27. (2) (a) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary;

Canadian Copyright Act and Libraries

Before 1997, it was assumed that libraries could act on behalf of their users under fair dealing.

Albert Bowron - 1973

It has not been determined that the use of photocopying devices in libraries contravenes the Copyright Act. Libraries, universities, governments and publishers use them daily within the limits of fair practice.

G&M, 11 October 1973

Mock Copyright Trial - 1975

...copying is done automatically on request within the limit of one copy of one article or a small part of a book for each person. David Esplin, Acting Chief Librarian, U of T.

Now we can ask about fair dealing, which does refer to interference with the market, the potential for sale of the product. Again I stress to you that there is not one iota of evidence this morning that library photocopying has interfered with the market. Peter S. Grant, Lawyer for the Librarian side.

Canadian Library Journal, April 1976

Basil Stuart-Stubbs 1981

What the law does say is that if a person is “fair dealing” for the purposes of “private study, research, criticism, review or newspaper summary,” that person will not be infringing. What is fair dealing? It is not defined in the legislation. Nor is case law much help.

Canadian Library Journal, February 1981

Guelph Photocopying Guidelines - 1984

- Limit of 10% in copying from a single monograph
- Limit of one article in five from a journal issue, but not to exceed 10% of the issue
- Provisions for Library Reserves
- Single, not multiple, copies

Photocopying in Canadian Libraries - 1987

On average photocopies in a single transaction:

- 10 pages from a book
- 9 pages from a periodical

Libraries with photocopying policies:

- 23% of Academic Libraries
- 12% of Public Libraries
- 8% of Special Libraries
- 11% of All Libraries

Phase I of Copyright Reform

1985 - 1988

Charter of Rights for Creators

- 24. A specific right of reprographic reproduction should not be introduced.
- 25. No exception should be provided for reproduction by libraries.
- 82. The present fair dealing provisions should not be replaced by the substantially wider “fair use” concept.
- 83. The nature of fair dealing as a defence to an action of infringement should not be changed.
- 85. Factors to be considered by the court may be listed but should be illustrative only and not prioritized.

Fair Use and Fair Dealing

The American concept of fair use is vastly different from the concept of fair dealing. (p63)

Definition of Fair Dealing

...it is not possible to define fair dealing without sacrificing essential flexibility. To be effective any fair dealing provision must be flexible. It must be left to the discretion of the courts to mould and shape according to technological developments and existing practices. (p64)

Abuse by Collectives

There is a danger that the unregulated collective exercise of rights could lead to abusive practices. If the only practical access is through a collective then there is potential that a collective, because of its dominant position, could occupy too strong a bargaining position vis a vis users. (p86)

- The solution to this is the Copyright Appeal Board, which will have the power to stop collectives from being abusive.

Mulroney Government Changes

- There were to be two phases of copyright reform.
- In 1988, phase one of copyright reform which dealt with reforms for copyright owners passed Parliament.
- Phase two of copyright reform which was supposed to deal with reforms for copyright users never happened under the Mulroney Government.

Flora MacDonald has Librarians in a Huff

Author Carol Goar. **Toronto Star** pA27. December 3, 1987.

A roomful of librarians is not a group that most Canadians would identify as intimidating. ...these mild-mannered bibliophiles have turned on Communications Minister Flora MacDonald with a vengeance.

"Not only are libraries at present not paying creative royalties to the author or the writer," she charged, "they are actually using his or her work to subsidize their other activities. I don't think that is defensible."

MacDonald admitted afterward that it had not been one of her more pleasant speaking engagements. "But they needed to hear the truth," she insisted. "Theft is theft. And theft of intellectual property is theft."

In theory, [authors] should receive royalty payments every time someone uses their work. In fact, they get nothing for the hundreds of photocopies of their material that teachers routinely hand out, or that library users make. MacDonald believes that creators deserve more control over their work. So she is proposing that the Copyright Act be amended to allow authors to set up a collective to keep track of the number of photocopies of their work being made and to collect royalties on their behalf.

The Rise of Copyright Collectives

- In 1988 the Canadian Parliament expanded the power of the collective administration of copyright and not surprisingly the number of copyright collectives increased dramatically.
- Among the new collectives were two reprography collectives: Access Copyright (CanCopy 1989 - 2002) and Copibec.
- At least in English speaking Canada, the new collectives sparked a copyright war.
- Librarians, teachers and others were unwilling to pay for rights that they hadn't had to pay for previously. Rights they presumed that they had under fair dealing. And without Phase Two of Copyright Reform, users didn't know what their rights were.

Growth of Collectives

1989 - 1995

1991 & 1992

- CanCopy signs an agreement with the Ontario Ministry of Education.
 - CanCopy signs an agreement with the Province of Manitoba to cover its schools.
-
- CanCopy distributes its first cheques to authors.

1993

- CanCopy signs an agreement with the Province of Alberta to cover its schools.

Ontario pulls out of its deal with CanCopy due to deficit issues. Andrew Martin the Executive Director of CanCopy makes the following statement in the Windsor Star 1993:

As of Monday morning every student in Ontario becomes a potential informer. The Copyright Act is clearly on our side and as of Monday we are in the business of collecting evidence.

- Three legal publishers sue the Law Society of Upper Canada, because the Law Society's Library 1) allows free standing photocopiers; and 2) has a custom photocopier service for library patrons.

Fair Dealing: 1993-1997

27. (2) (a) any fair dealing with any work for the purposes of private study or research;

27. (2) (a.1) any fair dealing with any work for the purposes of criticism, review or newspaper summary; if

- (i) the source, and
- (ii) the author's name if given in the source,

1994

- The Province of Ontario signs a new agreement with CanCopy for the 1994-1995 school year.
- The Federal Government signs an agreement with CanCopy.
- AUCC signs an agreement with CanCopy.

AUCC & Negotiating w. CanCopy

Obviously after C-60 – the bill that set up CANCOPY – was enacted, we began to negotiate a licence. There was a great fear that we would up licencing away rights to which we should be legally entitled. People thought that if we started negotiating licences, well you could kiss phase II good-bye.

Graham Hill, University Librarian at McMaster.

CARL representative on the AUCC Negotiating Team
Presentation to ARL on Canadian Copyright in 1996.

Phase II of Copyright Reform

1996 - 1997

1996

- The Chretien Government decides that phase 2 of copyright reform needs to happen.
- Margaret Atwood appears before the House of Commons's Canadian Heritage Committee which is reviewing copyright legislation. She compares photocopying in libraries to car theft:

Atwood argued that single copies can add up... "A single car theft isn't much, either," Atwood told the committee, "unless its your car." Ottawa Citizen: Nov 22, 1996

Fair Dealing: 1997-2012

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

Same subsections (a) & (b) as 29.1.

Phase II Copyright Reforms

Impact of the 1997 amendments to the Copyright Act on libraries and education:

- Section 30.1 allowed libraries under certain circumstances to make entire copies of copyrighted works for preservation purposes.
- Section 30.2 allowed libraries to act on behalf of their users for fair dealing.
- Section 30.3 confirmed the right of educational institutions, libraries, archives and museums to have self serve photocopiers, but they were required to have a licence from a reprographic copyright collective.

Restrictions to Libraries in 30.2

- 30.2(5) states that *the copy given to the patron must not be in digital form.*
- If an article is being photocopied from a newspaper or periodical other than a scholarly, research or technical periodical, the article has to be at least one year old.
- Works of fiction, poetry, drama or musical works in non-scholarly periodicals are not allowed.

Further impact of 30.2

- The restrictions in 30.2 became another impetus for libraries to sign licences with Access Copyright and Copibec. Otherwise interlibrary loan and copying services for library users were very restricted.
- The reprographic collectives didn't have digital rights, so signing a licence wouldn't have solved the digital delivery issue.
- S.30.2 only applies to libraries, archives and museums acting on behalf of individuals. The restrictions do not apply to fair dealing by individuals.

CCH

2004

CCH vs. the Law Society of Upper Canada

Great Library of the Law Society of Upper Canada sued by legal publishers for:

- Providing a photocopy service for patrons
- Providing self-serve photocopiers in the library
- Faxing photocopy requests to patrons

Large & liberal interpretation

Para. 51 of the Supreme Court Judgment :

"Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained.... Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

Self Serve Photocopiers

Para. 43 of the Supreme Court Judgment :

" ...there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. As noted, a person does not authorize copyright infringement by authorizing the mere use of equipment (such as photocopiers) that could be used to infringe copyright. In fact, courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law."

CCH & Education???

**Para. 55 of the Supreme Court Judgment CCH
Canadian Vs. the Law Society of Upper Canada:**

It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.

An Entire Article

For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. (Para 56)

Relying on fair dealing not the library exemption

Para. 49 of the Supreme Court Judgment CCH Canadian Vs. the Law Society of Upper Canada:

... the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

No Library Consensus on Paragraph 49

- After a slow start, many libraries are now providing interlibrary loan directly under fair dealing rather than using S30.2 as per paragraph 49 of CCH.
- There is still a large group of libraries that continue to use S30.2 rather than acting under fair dealing. With the changes to 30.2 in 2012, many of them are trying to find a way forward with digital delivery under the new rules.
- A third group in an interesting twist has interpreted CCH as allowing digital delivery from a library's own collection to its clients, but not from other libraries (interlibrary loan)

Education Tariffs

2005 - 2013

K - 12 from licence to tariff

- CMEC (the Council of Ministers of Education) negotiated the last K – 12 Access Copyright licence.
- With the expiration of the last K-12 licence on August 31, 2005, Access Copyright opted to apply for a tariff from the Copyright Board of Canada.

Tariff vs. Licence

70.12 A collective society may, for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses,
(a) file a proposed tariff with the Board; or
(b) enter into agreements with users.

The K – 12 Tariff

- In June 2009, the Copyright Board issued a four year tariff.
- The new tariff was \$5.16 per student.
- For the years 2005/2006 through 2007/2008, the tariff was reduced to \$4.64 per FTE.
- Since the school boards had already paid \$2.45 per FTE, they owed a retroactive payment of \$2.19 per FTE for the first three years and a payment of \$2.71 per FTE for the last year.
- The Copyright Board denied that teacher handouts to students could be considered private study under fair dealing.

The Federal Court of Appeal

- CMEC appealed the Copyright Board's ruling to the Federal Court of Appeal.
- The Appeal Court ruled in favour of Access Copyright: *“Private study” presumably means just that: study by oneself... When students study material with their class as a whole, they engage not in “private” study but perhaps just “study.”* (P38)
- The Supreme Court heard CMEC's appeal of the FCA judgment on December 6, 2011.

Supreme Court Appeal

- The Supreme Court issued its Judgment on July 12, 2012.
- *...photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students. The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study. (Para 25)*

Fair Dealing: Nov 7, 2012

29. Fair dealing for the purpose of research, private study, **education, parody or satire** does not infringe copyright.

Council of Ministers of Education K-12

- As of January 2013, K-12 school boards opt out of the Access Copyright Tariff.
- April 8, 2013, Access Copyright files for an interim tariff with the Copyright Board trying to force CMEC & the school boards back into paying the tariff.
- May 30, 2013. Copyright Board approves an interim tariff.

Post Secondary Tariff

AUCC retreats

- January 2012, the AUCC secretly formed a negotiating team to try and strike a deal with Access Copyright.
- January 30, 2012, Access Copyright and the University of Toronto & Western University announce that have been secretly negotiating their own deal with Access Copyright.
- On April 16, 2012, AUCC announced its own similar deal with Access Copyright.
- On April 24, AUCC formally withdrew from the tariff hearings before the Copyright Board.

AUCC and Access Copyright

- Eventually 20 members of the AUCC decide to opt out of both the licence and the tariff.
- September 17, 2012. Access Copyright files a motion with the Copyright Board trying to get AUCC reinstated for the Tariff hearings, to represent the 20 AUCC members outside the licence or tariff.
- October 23, 2012, Access Copyright withdraws an application before the Copyright Board trying to force the opt out members of AUCC back into the tariff.
- April 8, 2013, Access Copyright sues York University trying to force it back into the tariff process

ACCC

- ACCC reaches agreement with Access Copyright on May 29, 2012. \$10.00 per FTE rather than \$26 per FTE for AUCC.
- Because of better timing with Bill C-11 and the Supreme Court Pentalogy, 64% of ACCC institutions have opted out of the Access Copyright Licence.

Where do things go next?

Stephen Toope – President UBC

The Parliament and the Supreme Court of Canada have established a legal framework that recognizes the rights of both authors and users. I assure you that UBC respects these rights and is committed to meeting its legal obligations.

Letter to TWUC Sept 13, 2013

Roanie Levy – ED Access Copyright

...the copyright guidelines promoted by the Association of Universities and Colleges of Canada and adopted by some institutions are an aggressive approach to attempt to eliminate a 20-year history of licensing the use of copyright-protected works. They are not reflective of the law of fair dealing in Canada; rather, they reflect a broad self-interpretation of what the institutions would like the law to be. Fair dealing remains a case-by-case analysis.

Law Times, Oct 28, 2013

Section 68.2(1)

68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

The Rise of Digital Licencing

Owning vs. Leasing

Print

- Copyright Law

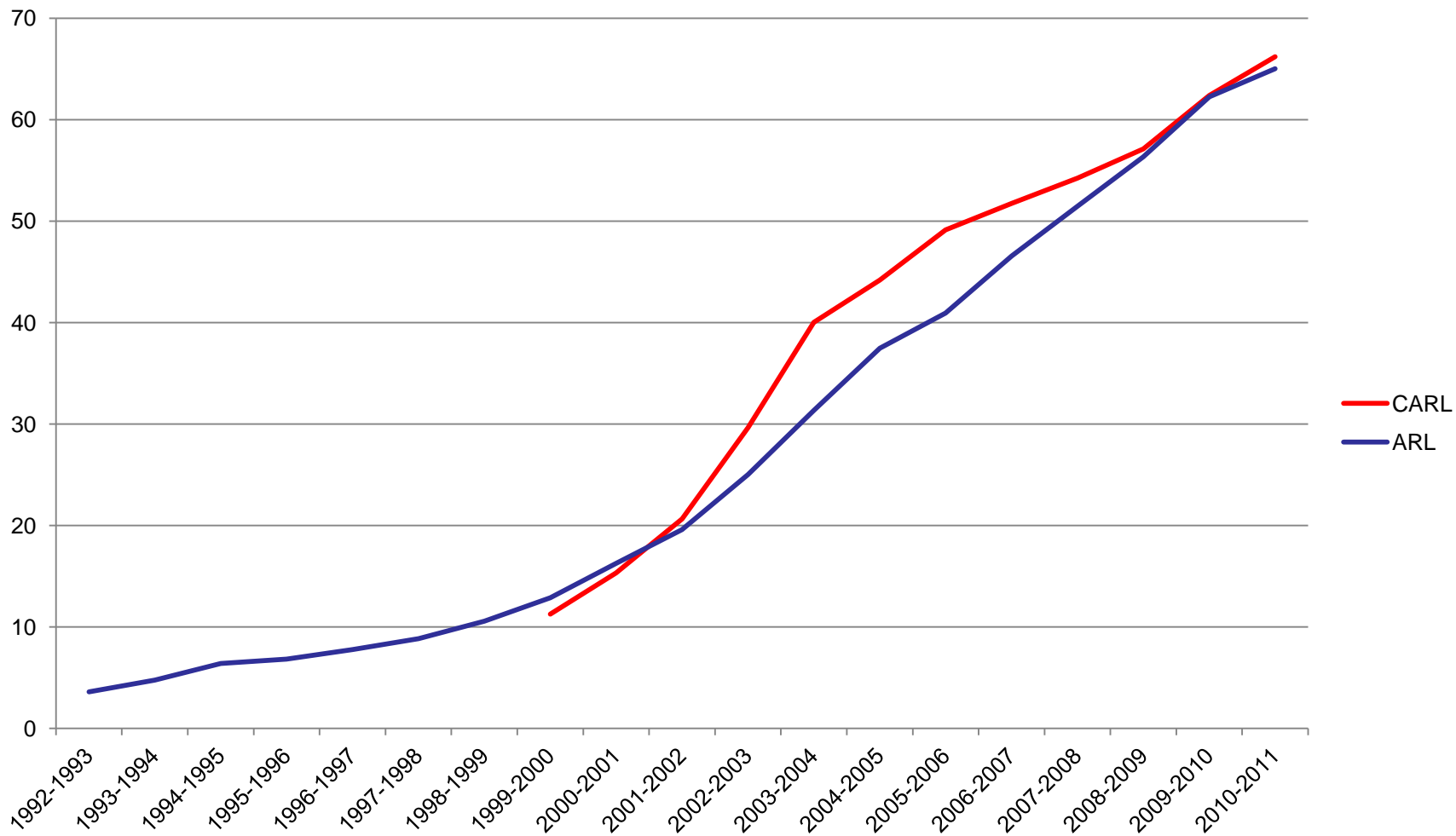
Licensed Digital Resources

- Copyright Law
- Licence with the Vendor

Areas that Licencing Can Affect

- Fair Dealing
- Reserves
- Education and Teaching
- Electronic Links or Hyperlinks
- Scholar Sharing – Authorized users may transmit to a third party colleague insubstantial amounts of licenced material for personal or scholarly uses.
- Interlibrary Loan
- Canadian libraries being required to follow copyright laws or sections of lawsof another country.

Electronic Resources as % of Collections Budget



Questions?