Cultivating Copyright Custodians for the Digital Age:

Law, Libraries, & the Public Interest in Lending (Obsolete Formats)

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In 2004, the Supreme Court of Canada famously decided that the provision for fair dealing in Canada was not simply a defence to a claim of copyright infringement but an integral and constitutive part of the Canadian regulatory landscape as provided for by federal copyright legislation. *CCH*[3] has since become ubiquitous as the authority for users' rights in Canada. It is typically cited for two main propositions arising from the Supreme Court of Canada's pronouncements in the case: the test for originality and the six factors for determining whether dealing for an allowable purposes is in fact fair. Seldom is it emphasized that *CCH* was significantly a *library use* case. That a library use case would raise public interest considerations significantly shaping the outcome of legal interpretation for fair dealing, the most inclusive provision for user rights captured in the Canadian Copyright Act,[4] may be expected. It seems not to have attracted too extensive a scrutiny in its subsequent treatments, however. Yet, this has served users well in so far as it has allowed the scope of fair dealing to dynamically evolve in Canadian law into more than a robust exception that a reading narrowed and encumbered by the specific facts might otherwise allow for, particularly in a commercial use case. Commercial use remains an issue that often attracts a significant degree of contention because there are divergent stakeholder interests in the determination of whether dealing traverses the threshold of what's fair. CCH tells us that 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.*"[5] Indeed, "[i]t is only if a library were unable to make out the fair dealing exception…that it would need to turn to s.30.2 of the *Copyright Act* to prove that it qualified for the library exception." That a library related case was critical in the development of user rights in Canada also highlights the important and special role that libraries continue to hold in the law and in our society as stewards of the public interest in access to knowledge and knowledge goods.

In this paper, we dedicate our examination and treatment to the library exception in order to explore its potentiality for the digital age, independent of the fair dealing provisions. In examining the statutory allowances made for libraries within the *Act*,

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[3] CCH Canadian Ltd. *v.* Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13.
[4] R.S.C. 1985, c. C-42.
[5] Ibid, para 49.

we give particular attention to the provision for obsolete formats set out in paragraph 30.1(c) of the *Copyright Act* as we see the challenge of obsolete formats as one likely to proliferate in the short term, even while possibly extinguishing itself in the long run. Copyright owners are, effectively, information intermediaries; they can exert considerable, if not exclusive, control on users' access to information and content by controlling the material form of the expressive work. Contrary to any inclination towards conflation, the interests of authors and owners are not always aligned and so part of the purpose of this paper is to consider how works come to be obsolete and the historical role of libraries, also knowledge intermediaries, in provision of access to works that may (and often did given publication costs) become obsolete. Early libraries had an archival function. A more recent history shows that libraries have enjoyed a privileged and sacrosanct role in society, acting as a third party intermediary between creative works and consumers of such works, generally as a public good. To this end, we begin by exploring the historical role of libraries and the history of the special status that libraries, archives, and museums hold in the Canadian Copyright Act. Libraries have long served as custodians of knowledge and information goods, providing access to such goods and thereby, effectively, encouraging engagement in community.

We proceed to examine how technological and social shifts have put the traditional custodial role of libraries under increasing strain and the implications this has on their core mandate. Shifts in technology are always disruptive to business models and law's established relations. Technological changes have resulted in both rapid shifts in formats and in legal relations: holdings have given way to electronic subscriptions, property to licence, and collections to co-ordinated archives, seeking to preserve the relics of a prior age before digital and digitization. In these changing times, the role of the library and librarians has been up for renegotiation and redefinition, by society and even the institutions that house them. In this paper, we will explore what is a significant, if only temporary, problem in the evolution of libraries as they transition to meet the market demands of the digital age. We argue that the role of the library remains, in its essence, the same. We examine the Canadian Copyright Act to assess the legal treatment of lending obsolete formats which, we will argue, (pre)serves the public interest, and demands necessary and coordinated strategies amongst libraries to be given effect as part of their mandate, advancing their role as historical information intermediaries and custodians of copyright works (as artefacts) for the digital age. After considering the potential proliferation of obsolete formats, its implications for library holdings and lending practices, this paper's analysis comes to rest with the law, and the invitation it continues to offer for cultivating copyright custodians.