Digital repository

- SIP
- Archival storage system
- Access system (Atom)
- DIP

Born-digital records
Digitized copies of analog records
The copyright problem

Derives from the intersection of:

- The nature of copyright: ownership grounded in authorship
- The nature of archives: aggregates of records made or received
- The nature of the internet: resembles an act of publishing
The conservative approach

Avoid liability, disseminate archival materials via the internet only if:

- Material is already in the public domain
- Repository owns copyright
- Copyright owner has given permission
In the analog repository ...

Conservative approach does not hinder access:

- Clear distinction between allowing consultation (access) vs making a copy (reproduction)
- Archives can make single copies for individual researchers under fair dealing and LAM exceptions
But in the digital repository …

1. Access system blurs the distinction between access and reproduction

2. Transfers of born-digital records will include protected materials that must be actively managed, but item-level review is untenable

3. Archival bond must be preserved, but conservative approach results in patchwork access threatening archival integrity
Recent US initiatives

Well-intentioned practice for putting digitized collections of unpublished materials online (W-iP guidelines, 2010)

- [http://www.oclc.org/research/activities/rights.html](http://www.oclc.org/research/activities/rights.html)


Canadian copyright landscape

2012 Canada Copyright Modernization Act expanded list of allowable purposes under fair dealing

In a series of cases since 2002 Supreme Court has articulated a “user rights” approach to copyright

- CCH Canada Ltd v Law Society of Upper Canada (2004)
- Five copyright decisions in 2012 (“copyright pentalogy”)
## CCH fair dealing tests

<table>
<thead>
<tr>
<th>Test</th>
<th>Tends to fairness</th>
<th>Tends to unfairness</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Purpose of the dealing</td>
<td>Dissemination supports research / private study, is free, and the principles governing the practice are documented in policy</td>
<td>Dissemination is a for-profit service for which users must pay (for-profit service)</td>
</tr>
<tr>
<td></td>
<td>Decision-making is conducted in an ad hoc manner</td>
<td></td>
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<tr>
<td>2. Character of the dealing</td>
<td>The access system distinguishes between provision of access (temporary consultation of records in the virtual reading room) vs. reproduction (creation of a new durable object outside the repository)</td>
<td>The access system provides routine access by creating durable new copies on researcher’s computer that become the user’s physical property (download)</td>
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<td>The system's approach reflects best practices within the archival profession</td>
<td>The system is designed without reference to professional best practice</td>
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<td><strong>3. Amount of the dealing</strong></td>
<td>Dissemination of entire work is appropriate to research purpose&lt;br&gt;Originality of the material (degree of skill and judgment required in production) is low</td>
<td>Research purpose does not require access to entire work&lt;br&gt;Originality of the material (degree of skill and judgment required in production) is high</td>
</tr>
<tr>
<td><strong>4. Alternatives to the dealing</strong></td>
<td>Potential commercial value of material to the owner is low&lt;br&gt;Objects disseminated are unique records for which there are no alternates&lt;br&gt;Online access system implements controls that mirror onsite systems</td>
<td>Potential commercial value of material to the owner is high&lt;br&gt;Objects disseminated include non-record materials (publications) that exist in multiple copies&lt;br&gt;Online access system does not implement same controls as onsite access system</td>
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# CCH fair dealing tests

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<td><strong>5. Nature of the work</strong></td>
<td>There is a public interest in access, records are unique and unpublished, and dissemination expands access. Materials disseminated are unique, unpublished archival records with relatively low level of creative originality.</td>
<td>Works are readily available elsewhere, or there are legitimate expectations of confidentiality / privacy that reasonably limit demand for access.</td>
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<td><strong>6. Effect of dealing on the work</strong></td>
<td>Works are readily available elsewhere, or there are legitimate expectations of confidentiality / privacy that reasonably limit demand for access. Materials disseminated include commercially available publications, creative works of high originality, or records which have been published elsewhere by the copyright owner.</td>
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Risk management: elements

1. Policy explicitly aligns archival mission with public policy goals of copyright
2. Criteria for risk assessment
3. Virtual reading room recovering distinction between access / reproduction
4. Notice-and-takedown procedure for complaint resolution
Criteria

Does the record - considered as a self-contained work circulating as an "article of commerce" - have a commercial value from which its owner could reasonably expect to accrue economic benefits?

The greater the potential commercial value, the greater the risk in disseminating the record without permission.
Criteria

Identifying potential commercial value:

- Published
- Created with commercial intent
- Creatively original
- Author is prominent individual in their field
## Risk value

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<th>Description</th>
<th>Outcome</th>
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<td>No risk</td>
<td>Records fail to meet the minimum requirements for originality; not protected by copyright</td>
<td>Disseminate without restrictions</td>
</tr>
<tr>
<td>Low risk</td>
<td>Records judged to have no potential commercial value to copyright owner</td>
<td>Disseminate with no effort to identify, locate and obtain owner’s permission</td>
</tr>
<tr>
<td>High risk</td>
<td>Records judged to have potential commercial value to the copyright owner</td>
<td>Try to identify and locate the owner and typically only disseminate with owner’s permission. The default for orphan works is dissemination, but evaluate on a case-by-case basis</td>
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Conclusion