

Submission to the House of Commons Legislative Committee on Bill C-32

Submission by the Association of Universities and Colleges of Canada
regarding Bill C-32, *An Act to amend the Copyright Act*

January 31st, 2011

Introduction

The Association of Universities and Colleges of Canada (AUCC) represents 95 public and private not-for-profit universities and university-degree level colleges across Canada. The Association's mandate includes advocacy on public policy issues, such as copyright reform, on behalf of our member institutions.

Faculty members and students in Canadian universities are both substantial creators and users of copyright works. As a result, AUCC and its member institutions understand the need for a balance in copyright law between the rights of copyright owners and the needs of researchers, students and teachers who use copyright works.

In order to ensure this balance, AUCC recommends that legislators look to recent decisions of the Supreme Court of Canada, the structure of international copyright treaties and the copyright laws of comparable jurisdictions for guidance.

In a 2002 decision, *Théberge v. Galerie d'Art du Petit Champlain inc.*, and a 2004 decision, *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada described clearly the nature of the balance that underpins Canadian copyright law. The court stated that balance "lies not only in recognizing the creator's rights but in giving due weight to their limited nature." The court clarified further that "the fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right."

The concept of balance is incorporated into the structure of major international copyright treaties that permit countries to enact limitations on the rights of copyright owners for other public policy purposes, such as teaching and learning. The copyright laws of comparable jurisdictions, such as the U.S., Australia, and the United Kingdom all include this kind of "fair dealing" exception or its equivalent, and statutory exceptions to benefit educational and library users of copyright works.

AUCC urges the members of the Legislative Committee on Bill C-32 to be guided by the principle of balance during your consideration of Bill C-32.

Before commenting on specific issues in Bill C-32, AUCC would like to address the claim made by some organizations that fair dealing and statutory exceptions are "expropriations" of their copyrights. Such claims are incorrect.

Under Canadian copyright law, copyright owners do not own absolute rights in their works. The rights of copyright owners are those set out in the *Copyright Act*. The rights of users of copyright works are also set out in the Act in the form of fair dealing and statutory exceptions. In his seminal book, *Copyright Law*, Professor David Vaver of Osgoode Hall Law School explains that users' rights in the Canadian *Copyright Act* define the outer limits of the rights of copyright owners. He states that copyright owners cannot control acts falling under users' rights, such as fair dealing and statutory exceptions, because the rights of copyright owners do not extend that far.

Legislative amendments to fair dealing and educational and library exceptions are not "expropriations" of the rights of copyright owners. They are adjustments to the boundary between the rights of copyright owners and users' rights in the *Copyright Act*. Periodic legislative adjustments of the boundary between the two sets of rights reflects changing

public policy goals – for example, to facilitate online learning – and the need to adapt copyright law to new information and communications technologies.

AUCC supports Bill C-32 as a fair and reasonable balance between the rights of copyright owners and users of copyright works. Nevertheless, the bill could be strengthened by reasonable and fair amendments to certain of its provisions, as described below. We urge the Committee to make appropriate amendments and send Bill C-32 back to the House of Commons as soon as possible.

Key Issues and Recommendations

Online Lessons

More and more students are demanding opportunities to learn in innovative ways that accommodate their busy lives. Universities are working hard to respond to this demand. Students located off campus need to be able to receive instruction online in real time or at a time of their choosing. Proposed amendments in Bill C-32 will meet these needs.

Clause 27 of Bill C-32 would add a new section 30.01 to the *Copyright Act*. Section 30.01 would permit educational institutions to transmit lessons that include copyright materials over the Internet. This exception would greatly facilitate online learning, including the delivery of distance education programs to students in rural and remote locations, which includes many Aboriginal students. Students would be permitted to make a copy for their own use during a course. Similar changes were made to U.S. copyright law by the 2002 *Technology, Education, and Copyright Harmonization (TEACH) Act*.

However, under the proposed section 30.01, students [paragraph 30.01(5)(a)] and the educational institution [paragraph 30.01(6)(a)] would be required to destroy any recording of an online lesson within 30 days after the students who are enrolled in the course receive their evaluations. Institutions would be required to take measures to ensure students comply with this requirement. It is unclear how educational institutions could enforce this obligation.

Some academic courses build directly upon previous courses taken in the same program. Students in a particular program would benefit academically if they have future access to copies of selected lessons from courses taken previously in the same program. Those same materials could also be useful resources in a student's professional career following graduation.

AUCC recommends that this destruction requirement be deleted. Lessons are reused constantly in online and blended learning, especially for distance education. The course development costs associated with online learning are substantial. Requiring that lessons be redeveloped over and over again would waste educational resources and discourage the use of online learning in Canada. This restriction confers no benefit on a copyright owner.

Recommendation 1

AUCC recommends that proposed section 30.01 of the *Copyright Act* be amended to eliminate the requirement to destroy reproductions of lessons.

Statutory Damages

The statutory damages regime in the *Copyright Act* operates on the basis of strict liability. It allows a copyright holder to obtain an award in an amount ranging from \$500 to \$20,000 for each instance of copyright infringement without proving the amount of actual damages suffered. Statutory damages may apply even when a person is unaware that his or her activity infringes copyright. The size of these financial penalties is a clear indication that they are aimed at commercial piracy, not unintended infringements by individuals.

Clause 47 of Bill C-32 would add a new section 41.2 to the *Copyright Act*. Section 41.2 would provide that where a staff member of a library, archive, museum, or educational institution breaks a digital lock, but is not aware that his or her activity contravenes the prohibition against breaking digital locks, then an injunction to prohibit a recurrence of the action should be the only legal remedy available to a copyright owner. AUCC supports this change. Statutory damages are inappropriate in these circumstances.

AUCC recommends that this limitation on legal remedies should be extended to cases where a staff member of a library, archive, museum, or educational institution, or a student, has reasonable grounds to believe that the use of a copyrighted work is fair dealing, but discovers after the fact that the use infringed copyright. AUCC welcomes the proposed amendment of section 38.1 of the *Copyright Act* to lower the range of statutory damages available for non-commercial infringements to between \$100 and \$5,000 per infringement, but even this lower range of statutory damages is inappropriate where an individual has a reasonable belief that copying complies with copyright law. No public policy purpose is served by imposing severe economic penalties on individuals who infringe copyright unintentionally.

Canadian law in this area contrasts sharply with the treatment of intended fair use copying under the statutory damages regime in U.S. copyright law. Section 504 of the U.S. *Copyright Act* insulates non-profit educational institutions, libraries, and their employees from statutory damages where a person has reasonable grounds to believe a copy would qualify as fair use. Canadian law should provide similar protections.

Recommendation 2

AUCC recommends the proposed subsection 41.2 of the *Copyright Act* be amended to limit legal remedies to an injunction where a library, archive, museum or educational institution, or a staff member or student in such an institution, has reasonable grounds to believe that his or her use of a copyright work is fair dealing and unintentionally infringes copyright.

Other Issues and Recommendations

Fair dealing

Clause 21 of Bill C-32 amends section 29 (the fair dealing provision) of the *Copyright Act* by adding “education” to the closed list of fair dealing purposes. This change will permit modest and reasonable activities that otherwise would infringe copyright because there is no provision in the Act to cover them. For example, fair dealing for the purpose of education might permit a student to incorporate an excerpt from a text or audio-visual work, or a photograph, into a multimedia assignment for a course. It would also allow a professor to include a small excerpt of a copyright work, such as a graph, into a PowerPoint presentation to a class.

Concerns have been raised during the committee hearings on Bill C-32 that the term “education” is too vague and could include an excessively broad range of organizations and activities, and that the scope of educational copying under fair dealing is unknown and could lead to unfair and excessive copying.

While the term “education” is not defined in the *Copyright Act*, the term “educational institution” is defined in the Act. To address concerns about the vagueness of the term “education”, the Committee could consider linking “education” to an “educational institution” as defined in the Act.

With respect to concerns that the scope of fair dealing for the purpose of education is unknown, the *Copyright Act* provides no guidance on how to determine what uses are fair. However, a 2004 Supreme Court of Canada decision identified a two-step process to be used in assessing whether the use of a work is fair. The first step is to determine whether the use of a work is for one of the fair dealing purposes listed in the *Copyright Act*. The second step is to assess the fairness of the use against six factors, including the amount of the work used and the effect of the use on the market for the work. Codification of these fairness factors could alleviate these concerns.

Recommendation 3

AUCC recommends that the Committee consider amending the fair dealing exception to include the six fairness factors described by the Supreme Court of Canada in the 2004 CCH decision and to link the fair dealing purpose of “education” to an “educational institution” as defined in the *Copyright Act*.

Digital locks

Clause 47 of Bill C-32 would bring in a new prohibition against the breaking of digital locks (e.g., passwords, time-limited trial systems) that control access to copyright material in digital format. Exemptions from this prohibition would be permitted for a short list of prescribed purposes. Bill C-32 would also prohibit the provision, marketing or importation of devices, or the provision of services to enable the breaking of digital locks except for the prescribed purposes.

These strict prohibitions may unnecessarily undermine the use of fair dealing and other exceptions in the *Copyright Act*. For example, an exception in the Act allows the making of a copy of a work in a format specially designed for persons with perceptual disabilities. Under Bill C-32, it would not be permissible for an educational institution to break a digital lock to make such a copy for a student with a perceptual disability, or to obtain a device capable of doing so. The requirement to protect digital locks in the World Intellectual Property Organization's Copyright Treaty allows for a less strict approach, such as permitting digital locks to be broken for a legal purpose.

Recommendation 4

AUCC recommends that the Committee consider amending Bill C-32 to permit the breaking of digital locks for any purpose that does not infringe copyright, and to permit the provision, marketing or importation of devices and services to enable digital locks to be broken for a non-infringing purpose.

Library exceptions

Clause 28 of Bill C-32 amends section 30.01 of the *Copyright Act* that deals with the maintenance and management of library collections. The amendment would enable a library to transfer a work in its collection to a different format before the format is obsolete or the technology required to use the original copy is unavailable. AUCC welcomes this change.

In addition, clause 29 of Bill C-32 amends section 30.02 of the *Copyright Act*. That section deals with inter-library loans and other library copying activities. The current section 30.02 of the Act limits an inter-library loan copy to paper format only. Researchers increasingly prefer to obtain and keep materials in digital format.

The proposed amendments to section 30.02 would allow a library to transmit an inter-library loan copy to the patron of another library in digital format, but require that a library take measures to prevent the recipient from keeping a digital copy for more than five business days. Given that a researcher may retain an inter-library loan copy in paper format for an indefinite period of time, AUCC submits that it is unnecessary to require the destruction of a digital copy after five days. No harm would be done to copyright owners by permitting the retention of a digital copy, given safeguards to prevent further distribution of the copy.

Recommendation 5

AUCC recommends that the Committee consider amending Bill C-32 to permit a recipient of an inter-library loan copy to retain a copy in digital format indefinitely.

AUCC urges the Committee to support other amendments in Bill C-32 that enhance existing educational exceptions. These include technical amendments to facilitate the use of modern technologies in the classroom, amendments to allow the showing of films or

other pre-recorded audio-visual works for educational purposes, and amendments to allow the recording and instructional use of television and radio news and news commentary broadcasts.

Summary of AUCC recommendations

Recommendation 1

AUCC recommends that proposed section 30.01 of the *Copyright Act* be amended to eliminate the requirement to destroy reproductions of lessons.

Recommendation 2

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For more Information:

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