# Considerations on an Inclusion: "Education" as an Explicit Fair Dealing Purpose

**The Canadian Association of Research Libraries**

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***The Canadian Association of Research Libraries*** *is the leadership organization for the Canadian research library community. CARL strives to enhance the capacity of member libraries to partner in research and higher education, to seek effective and sustainable scholarly communication, and to encourage public policy supportive of research and broad access to scholarly and scientific information. Our members include the 29 largest Canadian university libraries.*

*Our member libraries serve approximately 650,000 full-time and 180,000 part-time students, nearly 32,500 full-time faculty members; and they employ over 6,000 Canadians while providing part-time employment to more than 5,000 university students. They assist in some 2.2 million research inquiries yearly, while facilitating discovery and innovation by providing the library resources and services Canadian university researchers need: about 88% of sponsored research occurs at the universities of the CARL libraries. Our libraries manage collections of over 85 million books and 1.2 million periodical titles (both paper and electronic)—among many other resources—to support research, teaching, and learning across Canada*

The Canadian Association of Research Libraries (CARL) believes that learning, discovery, and innovation are best served when educational institutions and their libraries can maximize the benefits of their expenditures by linking closely research and instruction. In this submission, therefore, we focus our comments on the inclusion of "education" as an explicit fair dealing purpose. CARL considers this to be an appropriate inclusion of great value for the work of Canadian educational institutions and their libraries and an important response to a user need that is crucial to the intended balance of Bill C-32.

1. **Fair dealing has a place in copyright law and an additional purpose will not result in more litigation**

Fair dealing has been identified by the Supreme Court of Canada as a user right. It permits restricted amounts of copying for particular purposes without the need to seek permission from a rights holder or pay a royalty. This allows individuals to reproduce content in order to study it, evaluate it, report on it, and, in other countries, teach it.

In the discussion around adding "education" to the list of fair dealing purposes, the concept of fair dealing itself has been called into question by some commentators. These commentators feel that fair dealing is an attack on the revenue stream of creators and publishers. Fair dealing, however, has a long-recognized validity, in both legislation and common law practice, as an integral part of the intellectual property ecology.

For more than a century, the concept of fair dealing has been an explicit part of copyright law in common law countries. There have been a small number of fair dealing-related cases in Canadian legal history. Those that have been argued have been instrumental in giving direction to the application of fair dealing in practice. The benefit of this judicial guidance, already in existence in the context of other fair dealing purposes, would extend to questions of "education" as well if this were included as another explicit fair dealing purpose. It is our view that the addition of "education" to the current list of fair dealing purposes may well prevent litigation, since the necessary but difficult distinction between instruction and the other fair dealing purposes would no longer be necessary. This is in direct contrast to the ominous spectre of endless litigation that has been invoked by others.

2. **"Education" as fair dealing allows instructors and librarians to dispense with some arbitrary distinctions**

Decision-making around what can be done in the academy based on a distinction between "instruction" and "research or private study" is both philosophically and practically problematic. In the modern university classroom, both instructors and students use content from a wide variety of sources and in a multitude of digital and analogue formats to illustrate their lectures and student presentations. Matter that was consulted in the course of research or private study one day may be projected, played, or otherwise shared for the purpose of teaching and learning on another day. Students learn by interacting with materials, discovered or assigned, and then discussing them using examples and excerpts brought together in new and interesting ways, using the range of information and communication technologies that are available to them. The present reality in Canada is that some things will be done and some things not because of the distinction between "research and private study", where fair dealing copying can occur, and "teaching", in which fair dealing copying cannot presently occur.

In the application of the Copyright Act in the university library context, one example of the strange distinction that must be made because teaching (or "education") is not a fair dealing purpose is found in the context of a course reserve service. In a course reserve service, a book, a copy of a chapter, a copy or an article, or other content is placed "on reserve" by the library at the request of a course instructor. The purpose for doing this is so students in a class can all have the chance to consult a given reading within a short time-frame. This would not be possible if they all had to simultaneously consult the original book or journal volume in the main, open collection.

Unless a copy for a course reserve service is authorized for copying, it is necessary to make a distinction between what is a "required" reading and what is "supplemental." If students are asked to read a copy of an item on

reserve by their course instructor, especially if they will be tested on it, then that copy is considered to have been made for teaching or education and would not qualify as a fair dealing copy. If, however, a copy of a reading were placed on reserve for students to consult, but with no specific direction from the course instructor to the students to read it, that copy may well be permissible as fair dealing. Knowing that the library has purchased the original content for the benefit of the campus community for all academic purposes, teaching as well as research, this distinction seems counter intuitive. One would suppose that the copy of greatest importance to a student be the one that is permissible under the law as fair dealing.

While even librarians and course instructors struggle with this distinction, they carefully maintain it. Abiding by the law is of the highest importance to Canadian research libraries, both because librarians respect the prerogatives of creators and because the established regime of statutory damages and other penalties strongly discourages infringement. Nevertheless, this unnatural separation of research/private study and teaching remains problematic in a modern university environment, and the inclusion of "education" as a fair dealing provision would bring a great deal of simplicity to the situation.

University teaching (and student presentations) in Canada, when compared to teaching in the US, where fair use is permitted, is impoverished for the inability to easily use illustrative content in the classroom. The inclusion of education among other fair dealing purposes will liberate instructors to experiment with new and innovative teaching methods, while encouraging student creativity though broader use of information in all formats.

### 3. The amount (and other factors) of copying that is permissible as fair dealing is restricted

By definition, a "fair dealing" use of a copyrighted item must be "fair."In their decisions, Canadian courts and the Copyright Board have consistently ensured that this is so. Clearly, any copying under "fair dealing" must be sufficiently restrictive so that it does not adversely affect the market for the work.

The Federal Court of Appeal noted in recent a decision that were "education" already included in the list of fair dealing uses, it would simply be one more possible fair dealing purpose; all dealings are still subject to a fairness test[1]. The Supreme Court of Canada, in its 2004 *CCH vs. LSUC* decision, has already provided a two-step test of fair dealing. The first step is to ascertain whether the stated purpose is one of the few enumerated fair dealing purposes. The second step is to consider whether the dealing is consistent with the six non-exhaustive factors established in the ruling. This "fairness test" applies to any copying done in the context of fair dealing.[2]

These six factors constitute the criteria of "fair" copying.[3] It is most important to note that, among the factors, the sixth factor "the effect of the dealing on the work", would suggest that if the amount or type of copying from a work were to have an effect on the market of the work then the use would not be considered fair. Instructors and librarians recognize that the copying of content that does not fit into one of the enumerated fair dealing purposes and that does not satisfy the fairness test cannot be considered "fair" dealing according to the law and must be compensated.

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[1] The Board also distinguished the purpose inquiry at the first step of the *CCH* case from that at the second step at paragraph 88 of its reasons: [I]n our opinion *CCH* established a simple, clear-cut rule for this aspect of the exception, leaving the finer assessment (establishing the predominant purpose) to the analysis of what is or is not fair. Accordingly, as soon as the logging sticker mentions that the dealing is for an allowable purpose, we must proceed to the next step. Whether the predominant purpose is or is not an allowable purpose is one of the factors that must be taken into account in deciding whether or not the dealing is fair. (Federal Court of Appeal, 2010, THE PROVINCE OF ALBERTA ET AL. v. CANADIAN COPYRIGHT LICENSING AGENCY ET AL. at [23])

[2] "In order to show that a dealing was fair under section 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair" (*CCH* at paragraph 50).

[3] The Court laid out six non-exhaustive factors that make up a fairness inquiry: "…(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work." (CCH, at paragraph 53)

**4. The economic effect of "education" as a fair dealing purpose would be negligible**

The arts thrive in educated societies and Canada's universities encourage and support Canadian creativity. Many of Canada's creators work on Canadian campuses and their endeavors are directly supported by university libraries. The education sector generally contributes to the Canadian economy through the purchasing and licensing of works by Canadian creators. This would not change with the inclusion of "education" as a fair dealing purpose.

Currently Canadian university libraries alone spend over $300 million annually on purchasing or licensing content. This is money that the libraries will continue to spend in order to gain access to the latest content, so that their collections can properly support research and learning with current scholarship. Were some additional copying of works became allowable as fair dealing for "education" or not will have no effect on this large expenditure.

There is always new content to purchase or license that would be valuable for campus teaching, learning, and research activities. Claims that the market in Canadian published materials will collapse (or even be noticeably affected) with the addition of "education" to the list of fair dealing purposes are without merit. Money flowing from university libraries to purchase content will continue to flow to vendors and ultimately to creators regardless of what copying purposes are allowed as fair dealing.

Canadian universities have annually paid a considerable sum in licensing fees to copyright collectives in recent years. This is in addition to amounts paid to other content management collectives for licensing uses of works. If "education" were to become a fair dealing purpose, universities will still be required to pay royalties to account for any copying that occurs outside the limitations of fair dealing (or other exceptions and vendor licenses).

**5. We can meet our international obligations and include "education" as a fair dealing purpose**

It has been suggested by some that the inclusion of "education" in the list of fair dealing purposes would go against the Berne Convention, the TRIPS Agreement, or other international copyright agreements. This seems unlikely when one considers that both the US and the UK (among other countries) already have provisions within their legislation that permit some uncompensated copying of copyright materials for the purposes of teaching.

For example, Sec. 107 of the U.S. Copyright Act explicitly includes education when it states that "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

Furthermore, Art. 10.2 of the Berne Convention specifies that: "It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice." Teaching is explicitly remitted to the discretion of the signatory nation; it is within the rights of the Parliament of Canada to make education a fair dealing purpose if it chooses. Canada can live up to its international responsibilities while giving its students and teachers an advantage already enjoyed by their peers in other countries.

Some have claimed that the output of creators will diminish or collapse because their work would not be sufficiently rewarded if fair dealing were extended to include education. Yet the U.S. and the U.K. both have thriving creative industries, and both allow fair dealing-like copying in schools and universities for the purposes of teaching.

**In conclusion:**

Presently, the ways in which individuals experience and exchange information is changing. In amending the Copyright Act, Parliament has a duty to protect Canada's creators from the theft and misuse of their products. However, it has a further duty to uphold the rights of users. The Act does not exist to impose corrective measures on the market, or seek to change the ways in which individuals experience information; some responsibilities rest with publishers to adapt to new demands as they arise.

CARL believes that creators and consumers alike will be best served when educational institutions can confidently use content for education purposes according to fair dealing criteria. After all, we are educating future creators and consumers. Public educational institutions in Canada are primarily funded through taxpayer and donor contributions and student tuition fees. Canadian universities and their libraries want to support creators through their purchasing and licensing of content. The inclusion of "education" as a fair dealing purpose will enable us to support teaching more effectively in the service of the public good.

We feel that Bill C-32 responds to the concerns expressed by the library and education community during the summer 2009 copyright consultation process. Bill C-32 represents, overall, a very helpful updating of the *Copyright Act* and we would support its passage. We consider it of great importance to the balance of this bill that "education" remain an explicit fair dealing purpose and that other key education and library exceptions (see Appendix) remain in the Bill at time of passage.

Thank you for taking the time to read our submission. If you have any questions we are available to speak with you or your staff at your convenience.

# Appendix:

## Brief CARL Assessment of Bill C-32

In January 2008, CARL issued a statement listing four key copyright reform issues that the Association continues to consider to be of great importance. We would like to use these four points as a framework for our comments on Bill C-32 in this appendix.

***(1) Fair dealing –*** *Fair dealing is critical to a balanced and fair copyright regime. Copyright law reform must not limit or narrow fair dealing.*

On fair dealing, CARL considers the inclusion of education in the list of explicit fair dealing uses to be an appropriate inclusion of great importance for the work of educational institutions and their libraries. We recognize that the fair dealing use of copyrighted materials would still have to be fair to copyright holders according to the tests enumerated by the Supreme Court of Canada. In addition, the Copyright Board has established a restrictive interpretation of fair dealing in the context of education, ruling that multiple copies made by a teacher for each student in a class are not fair dealing. For these reasons, this amendment would not damage the Canadian market in scholarly and educational materials

***(2) Damages and fair dealing –*** *A change in the law should ensure that a user of a copyrighted work is not subject to damages where he or she had reasonable grounds to believe that an activity is fair dealing.*

While we continue to support our statement on damages and fair dealing, we believe that the limits placed on statutory damages for non-commercial infringement in Bill C-32 represent significant movement toward an equitable damages regime. We are also pleased that the bill provides for the imposing of just an injunction on a library where a technological protection measure is circumvented through not-unreasonable ignorance of the law by a staff member. With this in mind we recommend that the Act be amended to also limit legal penalties for a library, archive, museum or educational institution, or a staff member or student in such an institution, who reasonably believes that the use of a work is in compliance with copyright law, and discovers after the fact that they have unintentionally infringed.

***(3) Educational use of the Internet –*** *The* Copyright Act *should be amended to provide that students, teachers and educational institutions do not infringe copyright when they use publicly available material on the Internet for educational purposes.*

On the educational use of materials publicly available on the Internet, we are satisfied with the language in Bill C-32. It provides the clarity sought by teachers and librarians on this matter.

We applaud as well in Bill C-32 a number of other exceptions (new or improved) affecting how libraries and educational institutions, subject to certain conditions, could provide their services:

- Libraries could move content to a new format when one format is becoming obsolete.
- Libraries could, under the inter-library loan exception, deliver interlibrary loan content directly to the desktop of a requester and that this could be done whether the original were in print or digital form.
- Materials could be displayed in a classroom using any technology and that cinematic works could be shown.
- Materials could be transmitted to students in digital formats in technologically enhanced learning classes and that students could use lessons offline.
- Materials converted to special formats for those with perceptual disabilities could be sent outside of Canada.
- There is a notice-and-notice approach to Internet service provider (ISP) liability for infringing content on their networks (many universities act as ISP's).

***(4) Technological protection measures –*** *Circumventing technical measures that prevent access or copying should be permitted if the purpose of the circumvention is not an infringement of copyright.*

On technological protection measures (TPM's—digital locks), CARL is concerned that the anti-circumvention language will potentially prevent otherwise legal uses, such as fair dealing, of copyrighted materials when a TPM is applied to digital item. We would have preferred to see language in the bill limiting the penalization of the circumvention of TPM's to infringing purposes. If this cannot be achieved, we would recommend an additional exception to the anti-circumvention provisions (for library preservation), which we describe below.
While there is much in the bill that we would like to see brought into the *Copyright Act*, there are some particular amendments that we hope that the government will consider as the bill is discussed in the House or in committee:

- **Digital Interlibrary loan** - While we are very pleased to see explicit provision in the bill for interlibrary loan delivery of materials to the desktop of the requester, inasmuch as today's researchers increasingly prefer to retain materials in digital format for their research and private study, we believe that they should not have to print out a received document at all in order to have permanent access to it. They should be able to use the digital copy for an unlimited period, rather than just for five days from first use, so we would request removal of what would be Section 30.2 (5.02) (c) of the *Act* were the bill to pass.

- **Persons with print disabilities** - In order to assist a person with print disabilities to benefit from a work, it should be permissible for a library or educational institution to convert the work into any format that is usable for the disabled person. We would ask that there be provision in the bill for the removal from the current *Act* of clause 32 (2), which forbids the making of a large-print book, insofar as 32 (3) seems sufficient to protect commercial interests even in the case of large print books.

- **Library preservation and TPM's** - We would like to see in the bill a particular exception to the general prohibition of the circumvention of TPM's such that for preservation purposes, as described in Section 30.1 of the *Act*, a TPM could be legally circumvented by a library. Inasmuch as libraries are responsible for the long term preservation of and access to scholarly and cultural materials, such a provision would be especially important when the copyright holder applying the TPM (generally a company) ceased to exist or when the copyrighted material entered the public domain.

- **Fair dealing and particular exceptions** - We believe that it would be helpful if there were a clarifying statement in the *Act*, perhaps early in Section 29, that would note that all particular exceptions are not intended to circumscribe a user's fair dealing rights, but rather to clarify and/or complement them.