

**Submission of the Association of Universities and
Colleges of Canada to the House of Commons
Legislative Committee on Bill C-11**

**Addendum to the AUCC Submission on Bill C-32,
*An Act to Amend the Copyright Act***

March 9, 2012

Introduction

Early in 2011, the Association of Universities and Colleges of Canada submitted a written brief and testified before the Legislative Committee on Bill C-32 (*An Act to Amend the Copyright Act*). In accordance with a motion passed on February 14, 2012 by the Legislative Committee on Bill C-11 (the *Copyright Modernization Act*), organizations that made submissions and appeared before the Legislative Committee on Bill C-32 are entitled to submit supplementary evidence to the Legislative Committee on Bill C-11 as an addendum to their submissions on Bill C-32. This document contains supplementary evidence from AUCC to assist the Legislative Committee in its study of Bill C-11.

The 95 member institutions of AUCC consider Bill C-11 an important step forward in providing a balance between the interests of creators and users of copyright works.

Canada's universities are both creators and users of copyright works. We believe Bill C-11 clarifies important questions. It will allow universities to harness new technologies, including the Internet, to deliver research and learning materials to faculty members and students. It contains many of the changes the university community suggested during the public consultations of 2009, including exceptions permitting the educational use of Internet materials and the recording and Internet transmission of lessons. These changes will facilitate online learning, including distance education, and make university education more accessible for Aboriginals and mature students.

AUCC wishes to comment on recommendations for amendments relating to fair dealing made by witnesses that appeared before the Legislative Committee on Bill C-32.

Bill C-11, like Bill C-32, would add "education" as a new purpose for fair dealing under the *Copyright Act*. Some organizations testifying before the Legislative Committee on Bill C-32 suggested that the addition of this new purpose for fair dealing would be so broad and so undefined as to create enormous uncertainty. One organization recommended that the "three-step test" found in international intellectual property treaties be enshrined in the *Copyright Act* as a "helpful way to narrow the scope of an educational fair dealing."

AUCC strongly opposes the suggestion that the scope of educational fair dealing be defined or narrowed in the *Copyright Act*. The Association also strongly opposes the adoption of a "three-step test" in the *Copyright Act*.

Fair dealing, by design, is intended to be flexible and adaptable to the factual context of any allegedly infringing dealing. The lack of certainty about the scope of fair dealing for the purpose of education is not only appropriate but necessary because, as the Supreme Court of Canada stated in its landmark CCH ruling in 2004, "The *Copyright Act* does not define what will be "fair"; whether something is fair is a question of fact and depends on the facts of each case." It would conflict with the very nature of fair dealing to define it or seek to narrow its scope arbitrarily in the *Copyright Act*.

If the Committee considers that amendments to the *Copyright Act* are desirable to provide more guidance on the interpretation of fair dealing for the purpose of education, the three-step test is not the appropriate mechanism to utilize. The three-step test is a tool used to determine whether a statutory exception in the national law of a country is compatible with the terms of an international copyright treaty. It is not a test that is specifically tailored to the fair dealing exception found in the Canadian *Copyright Act* and its meaning in relation to fair dealing has never been tested. The introduction of the three-step test in Canadian copyright law would create more uncertainty, not more clarity.

Instead, AUCC recommends that the Committee take a “made in Canada” approach by considering whether Canadian copyright law should incorporate the six fairness factors set out by the Supreme Court of Canada in its 2004 CCH decision. The six factors set out by the Supreme Court - the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work – are specifically intended to help determine whether the use of a copyright work falls under fair dealing in the context of Canadian copyright law. AUCC would support such a change if the integrity of the CCH decision is maintained by making the list of factors illustrative, not closed, and by ensuring that none of the six factors is given more importance in the law than the other factors.

The Association greatly appreciates having had the opportunity to provide this supplementary evidence to the Legislative Committee on Bill C-11.