UPDATED:
Brief on the Copyright Modernisation Act

Submitted by 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, seeking effective and sustainable scholarly communication and encouraging 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 full-time 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.

Canadian university libraries spend over $300 Million per year to purchase or license content for use by their campus communities.

Canadians' ability to access and use copyrighted materials for their professional and personal research, as well as for their learning and creative activities, is of central importance to Canadian research libraries. As Canada competes in the digital economy, it is necessary that Canadian students, researchers, instructors and librarians have a fair and balanced copyright law to allow them to take full advantage of the technological advances that can enhance research, teaching and learning in today's digital environment.

Some significant provisions that CARL supports

CARL would like to note specific provisions in Bill C-11 that permit libraries and educational institutions, subject to certain specific conditions, to modernize the ways in which services are provided.

Fair Dealing

- CARL strongly supports Clause 21, which recognizes education as a fair dealing purpose. We consider it to be very important that education be recognized as fair dealing purpose in the Copyright Act and that education remain undefined. Clause 21 is thoroughly discussed on pages 4-7 of our brief, which was submitted when CARL testified before the Legislative committee on C-32 in February of 2011.
- CARL supports the exceptions in Clause 22.
    - The addition of 29.21, the user generated content (UGC) or 'mash-up' clause, permits creative new use of technology that promotes innovation.
    - 29.22 permits format shifting, an important exception as technologies continue to change.
    - 29.23 allows for broadcast to be time shifted so that they can be more conveniently viewed.

Educational Institutions

- CARL is especially pleased to see some of the exceptions in Clause 27.
    - 30.01 facilitates the process of distance education by permitting instructors to transmit materials to students in digital formats in the context of technologically enhanced teaching and students are permitted to consult their lessons both on and off line.
    - 30.04 clarified that instructors can reproduce publicly available materials on the internet, provided that the material is legitimately posted and subject to website labeling.

Libraries, Archives and Museums

- CARL strongly supports the following clauses:
    - Clause 28 which makes it possible for libraries to migrate content to a new format in advance of a format becoming obsolete. Current legislation only permits such migration once the existing format has become obsolete.
    - Clause 29 permits a library, under the inter-library loan exception, to deliver content directly to the desktop of a requester whether the original was in print or digital form. This is important as today's researchers and students prefer to receive materials in electronic format[1].

Further Exceptions

- Clause 37 is of great importance to CARL as it permits non-profit organisations to make a copy of a work on behalf of a person with print disability in a format specifically designed for people with print disabilities'. It also makes possible the sharing of this copy internationally subject to certain specific conditions.

[1] While Clause 29 is a great improvement, and very important to CARL, we would suggest that the requester not be obliged print out the received document in order to retain access to it. Increasingly academics and students retain and use items in digital format as resources for their private study and research. Cautioning the requester against sharing the digital copy of specific content should be sufficient to curtail such sharing.

Damages

- Clause 46 improves the rules applicable to the award of statutory damages. Lower limits placed on statutory damages for non-commercial infringement represent significant movement toward an equitable damages regime.

Internet Service Providers

- CARL was also very pleased to see that Clause 47, sections 41.25 and 41.26 set out that internet service providers (ISPs) and search engines will continue to employ a notice-and-notice regime for balancing a user's privacy with owners' rights.

The improvements listed above represent great progress for Canadian copyright, and CARL is pleased to support these important changes.

CARL's concerns about technological protection measures (TPMs)

CARL's chief concern with Bill C-11 is the anti-circumvention language found in Clause 47, section 41. We are concerned that this 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 TPMs to infringing purposes.

If this cannot be achieved, we would recommend an additional specific exception to the anti-circumvention provisions which would facilitate library preservation work.

In order to ensure that libraries, archives and museums are able to fulfill their role of preserving knowledge and culture for future generations, CARL recommends the following amendments to Bill C-11. This is a particular exception to the general prohibition on circumventing a TPM that would allow a library, archive or museum to do what is consistent with Section 30.1 of the current Copyright Act. We would propose that it be added where appropriate among sections 41.11-41.18.

Management and maintenance of collections

(1) Paragraph 41.1(1)(a) does not apply to a library, archive or museum or a person acting under the authority of a library, archive or museum that circumvents a technological protection measure that protects a work or a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection for the sole purpose of maintaining or managing its permanent collection or the permanent collection of another library, archive or museum.

(2) Paragraphs 41.1(1)(b) and (c) do not apply to a person who offers or provides services to persons or organizations referred to in subsection (1), or manufactures, imports or provides a technology, device or component, for the purposes of enabling those persons or organizations to circumvent a technological protection measure in accordance with that subsection, to the extent that the services, technology, device or component do not unduly impair the technological protection measure.

CARL is pleased that certain exceptions already appear in Clause 47, such as the provisions ensuring access for individuals with perceptual difficulties (contained in section 41.16) and section 41.2 of the bill, which provides that an injunction is the only remedy that can be taken against a library where the circumvention of a TPM occurs in error through not-unreasonable ignorance of the law by a staff member. We hope members of the committee will also consider an exception for the management and maintenance of collections when examining the bill.

Finally CARL would encourage Committee members to consider the Canadian Library Association's Technical Amendments to Clause 28 of the bill, which proposes the following amendment:

> Section 30.1(1)
>
> (c) in ~~an~~ alternative format<u>s</u>
>
> Rationale: This change will clarify that multiple alternative formats of materials can be made by libraries, archives and museums for preservation purposes. Data degradation rates for new digital formats are not certain. Best preservation practice dictates that some items may need to be kept in multiple formats until a stable medium can be determined. [2]

CARL's submission in advance of our appearance before the Legislative Committee on C-32, a comprehensive consideration of Clause 21

February 13, 2011

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.

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

[2] The full text of the CLA amendments can be found at: http://www.cla.ca/Content/NavigationMenu/Resources/Copyright/Bill_C-11_technical_amendments_feb12final.pdf

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 by 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 only some of this can be done 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 copy of a book chapter or a copy of an article might be 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 specifically authorized for copying, it is currently 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 should 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 purpose 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 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.[3] The Supreme Court of Canada, in its 2004 *CCH vs. LSUC* decision, has already

[3] 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

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.[4]

It is most important to note that, among the six factors referenced above, the sixth factor "the effect of the dealing on the work" suggests that if the amount or type of copying from a work were to have a negative 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.

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 supported by university library purchasing. 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 the most current scholarship. Whether 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 have little 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. If education were to become a fair dealing purpose, universities would 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.

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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])

[4] "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). 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)

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 many of 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 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.

For more information, please contact:

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