

## **Queen's University Submission to Government Copyright Consultation 4 September 2009**

### Preamble

As the primary source of advanced training and basic research in today's knowledge economy, universities are key participants in copyright policy discussions. Copyright is a legal system which provides incentives and rewards for innovation and creativity. Professors, researchers, librarians, and students play multiple roles in the copyright system: we are users, creators, analysts, preservers, and transmitters of copyrighted material. Because of our multiple activities, we share the opinion of the Supreme Court of Canada that the effectiveness of copyright "lies not only in recognizing the creator's rights but in giving due weight to their limited nature" (Théberge 2002).

Academic research demonstrates authority and builds on previous knowledge by displaying the materials on which its claims are founded. In many cases, that evidence consists of copyrighted material. Fair dealing, the Copyright Act's mechanism for permitting some unauthorized reproduction of copyrighted work for purposes of review, criticism, research, or private study, is thus essential to academic work. Universities seek a copyright law that recognizes the right of creators to make decisions about the reproduction of their work, and also promotes a broader social imperative that copyrighted works be accessible as resources for the next generation of innovators and scholars.

### Positions

Although there are myriad copyright issues of importance, we will limit ourselves to four:

#### **1. Protection of digital locks must not impede users' rights.**

Quoting from a book or a newspaper is established fair dealing, and it ought to follow that quoting from a digital file would constitute fair dealing too. If such fair dealing is prevented by digital locks, and those are given an extra level of legal protection, scholars and students will only be able to engage with an increasingly limited portion of the world around us. Courses will become removed from the cultural context of the times; critique and creativity will be stymied. Teachers, students, and researchers need to be permitted to show and recontextualize clips from digital media, or sequences of software code, just as they were in the analog age permitted to copy "fairly" for purposes of criticism, review, research, or private study. The Supreme Court stated in *CCH v. LSUC* (2004) that "the fair dealing exception is... an integral part of the Copyright Act.... Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right." The prevention of fair dealing with digital locks would thus be not only a major threat to innovation and teaching, but a major distortion of the Copyright Act as understood by our highest Court.

#### **2. Fair dealing ought to be amplified and clarified in the light of recent Supreme Court rulings.**

Scholars and students have relied upon and will continue to rely upon fair dealing as the most useful mechanism to permit limited and reasonable copying of copyrighted materials. The *CCH* case (SCC 2004) lists factors that a court might consider in assessing whether a given

dealing was “fair” or not. What we are seeking in copyright reform is the integration of some of the language of the CCH into the statute to give copyright owners and users greater confidence and clarity. We also seek some degree of flexibility in fair dealing so that, for example, reasonable teaching or artistic uses might fall under its umbrella. All that may be needed is a “such as” clause to make the existing categories suggestive rather than exhaustive. Rendering fair dealing more flexible will not erode copyright, but rather enhance it, by making it a system offering benefits to all parties.

### **3. Specialized exceptions ought to be used sparingly and carefully.**

The “exception” approach to users’ rights is inherently piecemeal, bureaucratic, and bound to lag behind new technologies; it will never adequately enable the full range of reasonable research and educational practices. Expanded fair dealing would be a more visionary way to handle users’ rights, and it would be easier for ordinary Canadians to understand. Examples of the pitfalls of exceptions can be seen in Bill C-61. Its digital interlibrary loan provision stipulated that digitized materials evaporate after 5 business days, far too short a time for busy researchers. Its consumer time and format-shifting exceptions would have been of no use to teachers because they required the use be contained within the home. Its digitization exception carried with it unreasonable record-keeping and cost expectations. And the distance education provision was also limited in impractical and costly ways: it required destruction of materials after a course is over (surely an unwise practice for an institution trying to save costs), and would have placed the burden of encryption of lessons onto educational institutions.

### **4. Licensing mechanisms ought not to be seen as a substitute for users’ rights.**

The licensing of copyright through collectives has advantages for creators, owners, and users alike. It can indeed improve access to copyrighted works and revenue flow-through for creators and owners. However, users’ rights are not a mere placeholder pending the development of licensing mechanisms. Users’ rights are important both in practice and in principle. Because expression often requires the reproduction of the expression of others (for example, to criticize a statesman or scientist, we may need to repeat what they said), the foundation of users’ rights lies in Section 2(b) of the Charter of Rights and Freedoms, freedom of expression. While digital technologies may permit us to monetize various new uses of copyrighted texts, this does not mean that laws need encourage it in every sphere, particularly when there are compelling reasons against it. Instead, a balancing approach ought always to guide our decisions. There is a fiscal policy dimension of this issue as well: a “license maximization” approach will cause Canada to bear much higher costs in the educational sector than its trade partners.

### Conclusion

While we are fully supportive of efforts to contain and reduce commercial-scale piracy of copyrighted works, we also insist that users’ rights are an essential part of a working copyright system, and we are confident that there are ways of combatting piracy without extensive collateral damage to scholars, students, taxpayers, and citizens.

We thank you very much for offering us this opportunity to comment on this important policy issue.

We wish you the very best in crafting appropriate copyright legislation.

Sincerely,

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Dr. Kerry Rowe, Vice-Principal Research

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