

**ASSOCIATION OF CANADIAN COMMUNITY COLLEGES**

**SUBMISSION TO THE**

**LEGISLATIVE COMMITTEE ON**

**BILL C-32**

**January 31, 2011**



**Serving Canada's colleges, institutes, polytechnics, cégeps and universities with a college mandate**



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## EXECUTIVE SUMMARY

Copyright affects teaching and learning at all levels. The educational sector respects copyright owners, collectives, and artists. Educational institutions currently pay for content and for copying materials, and, for the educational community, copyright law reform is not about having access to copyrighted works without cost. Rather, the educational community needs modern copyright legislation to set a legal framework for learning in the digital age.

The Copyright Modernization Act, Bill C-32, addresses the issues of copyright and education in Canada. It makes important amendments to fair dealing and the use of digital copies. It enables students and teachers to use Internet materials for their educational pursuits without the fear of copyright-infringement. However, the Bill could be strengthened with additional modifications.

### Educational Use of the Internet

The Association of Canadian Community Colleges (ACCC) supports the amendment on the educational use of the Internet as it appears in Bill C-32. This educational amendment provides Canadian teachers and students with the ability, during their routine educational activities, to use material made publicly available on the Internet, without breaking the law. The amendment is essential in a day and age when federal and provincial/territorial governments are increasing connectivity, positioning the country to be a leader in the information age, and supporting the use of the Internet in classrooms. The amendment on the educational use of the Internet will ensure that students reap the full benefits of governments' investment without harming the interests of copyright owners.

### Fair-Dealing Provision

Adding "education" to the list of allowable purposes in the fair-dealing provision is an important step forward. This change will make it clear that fair dealing is available to students and teachers. However, further clarification with this amendment is needed. The fair-dealing provision should expressly state that adding "education" as an allowable fair-dealing purpose includes "making multiple copies for class use." Teachers should have the ability to make multiple copies for class use provided that the dealing is "fair".

### Digital Locks

The lack of clarity on digital sources is why the educational community has been persistent over the past decade in urging the government to modernize the legislation. The sections on digital locks (a digital work that has been locked by a "technological measure") of the legislation need to be amended. The amendment as it stands will severely limit how one can access and use digital information. It should be modified to prohibit unlocking *only* when the purpose is to infringe copyright.

### Specific Recommendations

Our submission includes 19 specific recommendations and language for Bill C-32.

We urge the Government to enact the legislation with the modifications suggested. This is an opportunity to safeguard Canadians' learning objectives for generations to come.

## Introduction

The Association of Canadian Community Colleges (ACCC) welcomes the opportunity to provide comments to the Federal Legislative Committee on Bill C-32, *The Copyright Modernization Act*.

ACCC is the national and international voice of Canada's 150 colleges, institutes, polytechnics, cégeps, university-colleges and universities with a college mandate<sup>1</sup>. With campuses in 1,000 urban, rural and remote communities, 1.5 million learners, and 60,000 educators, these institutions draw students equally from all socio-economic quarters, and supply graduates with the advanced skills essential to Canada's economic growth and productivity.

Copyright affects teaching and learning at all levels across Canada. For years, ACCC has worked with the Education Coalition to propose a balanced approach to copyright. The Coalition is a group of leading national educational organizations comprising the Copyright Consortium of the Council of Ministers of Education, Canada (CMEC), the Association of Universities and Colleges of Canada, the Canadian Teachers' Federation, the Canadian School Boards Association, the Canadian Home and School Federation and ACCC, and represents millions of Canadians including teachers, school boards, parent groups, and educational institutions, as well as elected representatives and provincial/territorial governments.

With a focus on ensuring the quality of education in Canada, the Education Coalition members arrived at an important consensus on a range of amendments for education. Bill C-32 and its amendments for education are important to colleges. The new copyright legislation sets the necessary legal framework for learning in the digital age and, in doing so, improves Canada's competitive advantage in on-line learning and skills development.

ACCC seeks fair and reasonable access for college students and teachers in their educational pursuits. We urge the Government of Canada to make the necessary amendments and to enact this legislation to allow Canadian students and educators to grow and flourish in the digital world. This is an opportunity for the government to safeguard Canadians' learning objectives for generations to come.

## Amendment on the Educational Use of the Internet

- For years, the educational use of the Internet has been the educational community's priority concern. National education organizations representing seven million Canadians - from teachers to school boards, parent groups to educational institutions - have been vocal for more than a decade about the need to have fair and reasonable access to publicly available Internet material.
- The education community supports the amendment on the educational use of the Internet as it appears in Bill C-32. This education amendment provides Canadian teachers and students with the ability, during their routine educational activities, to use material made publicly available on the Internet, without breaking the law.
- The amendment on the educational use of the Internet establishes the legal framework for students and teachers to conduct the common everyday activities that are essential in our schools, colleges, universities, and institutes. These include activities such as copying publicly available material from the Internet, incorporating it into assignments, and exchanging it electronically with teachers or other students.

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<sup>1</sup> This document will hereinafter refer to colleges, institutes, polytechnics, cégeps, university-colleges and universities with a college mandate as colleges.

- The proposed amendment for education in Bill C-32 would permit teachers and students to access publicly available Internet material in the process of teaching and learning, while respecting the rights of those creators and other copyright holders who post materials on-line for commercial purposes. This is a reasonable, balanced approach to copyright.
- The proposed amendment applies only to material that has been posted to the Internet with the authorization of the copyright holder and without any barriers to restrict access such as encryption or password protection. It would not exempt institutions from paying for digital materials such as purchasable CD-ROMS, subscription databases, licensed software, on-line courses, or other curriculum resources. Copyright owners who wish to sell or otherwise limit access and distribution of their digital or on-line materials can continue to do so through subscription, password, and payment technologies. The proposed amendment for education would not apply to materials that are not publicly accessible, which allows content creators and copyright owners to continue to sell and receive payment for their works when they intend to do so.
- Copyright infringement is of key concern to educators. The education sector believes that clarity and balance in the *Copyright Act* must be vigorously championed, such that copyright infringement is eliminated and that every student and teacher can be assured of timely and fair access to Internet materials.
- It is important that Canada's *Copyright Act* establish the necessary legal framework to allow educators and students to use and copy publicly available digital materials. We were pleased to see the inclusion of this essential amendment in Bill C-61 and now in Bill C-32 and commend the Government for maintaining this principled approach to education and copyright through the last two drafts of this legislation.
- National educational organizations have long maintained that a modern and balanced copyright framework will protect the public interest. The amendment is essential in a day and age when federal and provincial/territorial governments are simultaneously increasing our levels of connectivity, positioning the country to be a leader in the information age, and supporting the use of the Internet in classrooms. The amendment on the educational use of the Internet will ensure that students reap the full benefits of governments' investment without harming the interests of copyright owners.

### **Inclusion of Education in Fair-Dealing Provision**

- The amendment to add "education" to the list of allowable purposes in the fair-dealing provision is an important amendment. This amendment would make it clear that fair dealing is available to students and teachers. However, we seek further clarification with this amendment and request that the fair-dealing provision expressly state that adding "education" as an allowable fair-dealing purpose includes "making multiple copies for class use."
- The clarification that fair dealing for the purpose of education includes making multiple copies for a class use would mean that Canadian "fair dealing" is the same as the United States' "fair use." The "fair use" provision, like "fair dealing" in Canada, also involves two tests to determine whether a "use" is fair. Under the first test, the enumerated purposes are "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." Educational organizations want Bill C-32 to provide a similar provision - that the new enumerated purpose be "education (including multiple copies for class use)," rather than simply "education." Such an amendment would make it clear that Canadian teachers, like their US counterparts, would be able to make copies for students in their class under the first test. The dealing would still have to be "fair" under the second test.
- Canadian schools should be afforded the same rights enjoyed by teachers and students in other countries - that is, teachers should have the ability to make multiple copies for class

use provided, of course, that the dealing is “fair” under the second test established by the Supreme Court in the *CCH* case.

### Digital Locks and Other Amendments that Require Revisions

- Bill C-32 has many sections that affect education. In concert with our educational partners, we have prepared a set of recommendations that address a number of amendments, from the provision on digital locks to the requirement that class notes be destroyed within 30 days.
- We wish to underline the significance to the education sector of two key amendments: 1) the amendment on the educational use of the Internet and 2) clarifying fair dealing to add “education” as an enumerated purpose that includes making multiple copies for class use. We also wish to state the relative importance of the appended recommendations as areas where changes need to be made to the current Bill C-32.
- Of the recommendations set out in this brief, the sections of Bill C-32 on technological measures deserve special comment. This amendment establishes a complex regime that gives rights holders new legal protection that has nothing to do with copyright protection for creative content - materials such as books, music, and movies. In essence, the new legislative measures extend protection to technology.
- The digital-locks amendment will, in effect, severely limit how one can access and use digital information. In practice, this would mean that educational institutions, teachers, and students would lose their rights under fair dealing, educational and library exceptions, or other users’ rights in copyright law to copy, perform, or share electronically a digital work that has been locked by a “technological measure.”
- The education community is but one group that believes that the sections on digital locks of the legislation need to be amended to provide that “circumvention of technological protection measures is prohibited only when the circumvention is for the purpose of infringing copyright.”
- We suggest an amendment to prohibit unlocking only when the purpose is to infringe copyright.

### FACT: Education Sector Pays for Content

- The education sector respects copyright (copyright owners, collectives, and artists). Educational institutions currently pay for content and for copying materials, and, for the education community; copyright-reform law is not about getting material for free. We have heard criticism of the amendments regarding education and fair dealing from Access Copyright and the publishing industry — that the education sector is simply trying to avoid compensating creators for Canadian content. This unfounded claim is totally false.
- There is a role for collectives. Creators and the publishing and marketing companies that market artists’ works should be compensated and remunerated. But the collectives’ reach in our country should not come at all costs. The education sector is defending the interests of educators, students, teachers, and taxpayers at the Copyright Board of Canada. For example, educators at the elementary, secondary, and postsecondary levels are now arguing different rate-increase proposals by Access Copyright to the Copyright Board that would substantially increase the costs of print material to the education sector.
- The education sector pays its fair share today. The fact is that, currently, provinces and territories pay approximately \$20 million per year to Access Copyright under an existing photocopying tariff of \$5.16 per student, per year, in the K–12 education sector. Each year, the postsecondary education sector pays more than a billion dollars to purchase textbooks and other copyright-protected materials.

- The Canadian education community currently pays its fair share of money to copyright owners; what is in dispute is how much more the education sector should pay and, in certain cases, whether it should be paying for copied materials from on-line resources that are publicly available.
- Is there room for both collectives and the amendment for education? Yes. The proposed amendments in Bill C-32 will permit the use of publicly accessible content legal in educational institutions. Collectives will continue to represent creators who seek remuneration for their creations and will act as a vehicle, for those institutions that desire it, for clearing rights and paying for content. Enactment of the amendments will clarify which materials can be used and under what conditions clearance and licenses must be obtained.
- Similarly, adding “education” (including multiple copies for class use) to fair dealing does not mean that teachers and students would be able to copy whatever they want without paying copyright royalties. Copying under fair dealing would still need to be “fair” in accordance with the factors established by the Supreme Court of Canada in 2004.

### Bill C-32 is Important for Education

- The education community is pleased that Copyright Bill C-32 has addressed the issues of copyright and education in Canada. The existing lack of clarity is why the education community has been persistent over the past decade in urging the government to clarify digital copyright law. Bill C-32 provides the necessary legal framework allowing for students and teachers to use Internet materials for their educational pursuits without the fear of copyright-infringement litigation. Bill C-32 also makes important amendments to fair dealing.
- The Government has approached this significant matter with the objective of striking a balance that would permit fair and reasonable access to materials for Canadians’ learning pursuits, while respecting the rights of copyright owners. Bill C-32 has done an admirable job of striking that balance, especially when it comes to the amendment on the educational use of the Internet and to fair dealing.
- However, there is still a need to adjust certain amendments in the legislation. Our recommendations for making certain important changes to the bill are included in this brief.
- On the greater question of the government’s approach to education and copyright, we support the legislation and hope the government is successful in making the necessary amendments to the legislation and in having it enacted at the earliest opportunity.. We would like to see this legislation passed to establish the necessary framework that allows Canadian students and educators to move forward in a digital world.
- By enacting balanced copyright legislation, addressing the needs of students and teachers, promoting access, and making other much-needed updates, Parliament has an extraordinary opportunity to safeguard Canadians’ learning objectives for generations to come.

### RECOMMENDATIONS

1. To ensure consistency with the wording of the current *Copyright Act*, section 30.04(5) should be amended to provide:
 

*(5) Subsection (1) does not apply if the educational institution or a person acting under its authority knew or could reasonably have been expected to know that the work or other subject matter was made available through the Internet without the consent of the copyright owner.*
2. The relationship between fair dealing and specific user rights should be clarified by amending the act to provide:

*Nothing in sections 29.4 through 32.2 of this Act is intended to limit or otherwise alter the scope of fair dealing.*

3. Support the amendment that deletes references to specific technologies in section 29.4, with a goal to rendering the *Copyright Act* more technologically neutral.
4. Support the amendment to the performance exception in section 29.5 of the *Copyright Act*, providing that the exception would apply only if the copy being performed is a non-infringing copy, or that the person responsible for the performance has no reasonable grounds to believe that the copy is an infringing copy.
5. Support the amendment to the performance exception to add to section 29.5 of the *Copyright Act* a new subsection (d) that extends the exception to audiovisual works.
6. Support eliminating the obligations to pay royalties and keep records of the making, erasing, performing, and method of identification of the copy of news and news commentary programs.
7. Section 30.01(5) should be amended to delete the requirement that any recording of an on-line lesson be destroyed within 30 days after students who are enrolled in a course receive their evaluations.
8. Reject the enactment of sections 30.02 and 30.03.
9. Clause 47 should be deleted and replaced by a regime that provides for the circumvention for the purpose of infringing copyright to be prohibited. This would be accomplished by the following amendment to Bill C-32:
  - 41.1 (1) An owner of copyright in a work, a performer's performance fixed in a sound recording, or a sound recording, and a holder of moral rights in respect of a work or such a performer's performance are, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up, and otherwise that are or may be conferred by law for the infringement of a right against a person who, without the consent of the copyright owner or moral rights holder, circumvents, removes, or in any way renders ineffective a technological protection measure protecting any material form of the work, the performer's performance, or the sound recording for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it or for the purpose of making a copy referred to in subsection 80(1).*
  - (2) If a technological protection measure protecting a material form of a work, a performer's performance, or a sound recording referred to in subsection (1) is removed or rendered ineffective in a manner that does not give rise to the remedies under that subsection, the owner of copyright or holder of moral rights nevertheless has those remedies against a person who knew or could reasonably be expected to know that the measure has been removed or rendered ineffective and, without the owner's or holder's consent, does any of the following acts with respect to the material form in question:
    - (a) sells it or rents it out;*
    - (b) distributes it to such an extent as to prejudicially affect the owner of the copyright;*
    - (c) by way of trade, distributes, exposes, or offers it for sale or rental or exhibits it in public; or*
    - (d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c).**

10. The definition of “technological measure” in Clause 31, section 41, should be deleted and the following substituted:  
*“technological measure” means any technology, device, or component that, in the ordinary course of its operation, restricts the doing — in respect of a material form of a work, a performer’s performance fixed in a sound recording, or a sound recording — of any act that is mentioned in sections 3, 15, or 18 or that could constitute an infringement of any applicable moral rights;*
11. Clause 47, sections 41 to 41.27, should be deleted and replaced with the following:  
*An owner of copyright in a work, a performer’s performance fixed in a sound recording, or a sound recording, and a holder of moral rights in respect of a work or such a performer’s performance are, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up, and otherwise that are or may be conferred by law for the infringement of a right against a person who offers or provides a service to circumvent, remove, or render ineffective a technological protection measure protecting a material form of the work, the performer’s performance, or the sound recording and knew or could reasonably be expected to know that providing the service will result in an infringement of the copyright or moral rights.*
12. Bill C-32 should be amended to provide that circumvention of technological measures and the provision of a circumvention service, technology, device, or component is prohibited only when the purpose of the circumvention is to infringe copyright. The wording of the necessary amendments to achieve this objective is set out earlier in recommendation 9.
13. Respecting persons with perceptual disabilities, support an amendment to Bill C-32 that deletes the “commercially availability” condition in section 32(3).
14. Support the introduction of technological neutrality in section 32, providing that it is not an infringement of copyright to produce materials in a format that is suitable for a person with a perceptual disability who requires the material.
15. Introduce an amendment to Bill C-32 to provide that no royalties are payable for sending a copy of special-format materials for a person with a print disability to another country.
16. The definition of “rights management information” in Clause 47, section 41.22(4), should be deleted and the following substituted:  
*“rights management information” means information that*
  - (a) the copyright owner or the holder of any right under copyright has attached to or embodied in a material form of a work, a performer’s performance fixed in a sound recording, or a sound recording, or appears in connection with its communication to the public by telecommunication, and*
  - (b) identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker, or any of them, or concerns the terms or conditions of its use;*
17. Clause 47, sections 41.22(1), (2), and (3) should be deleted and the following substituted:  
*(1) The owner of copyright in a work, a performer’s performance fixed in a sound recording, or a sound recording is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up, and otherwise that are or may be conferred by law for the infringement of a right against a person who, during the term of copyright and without the consent of the copyright owner, knowingly removes or alters any rights management information in electronic form that is attached to or*

*embodied in any material form of the work, the performer's performance, or the sound recording, or appears in connection with its communication to the public by telecommunication and knows, or ought to know, that the removal or alteration will facilitate or conceal any infringement of the owner's copyright.*

*(2) The owner of copyright referred to in subsection (1) has the same remedies against a person who, without the owner's consent, knowingly does any of the following acts with respect to any material form of the work, the performer's performance, or the sound recording and knows or ought to know that the rights management information has been removed or altered in a way that would give rise to a remedy under subsection (1):*

*(a) sells it or rents it out;*

*(b) distributes it to such an extent as to prejudicially affect the owner of the copyright;*

*(c) by way of trade, distributes, exposes, or offers it for sale or rental or exhibits it in public;*

*(d) imports it into Canada for the purpose of doing anything referred to in any of paragraphs (a) to (c); or*

*(e) communicates it to the public by telecommunication.*

*(3) The removal or alteration of rights management information with respect to any material form of the work, the performer's performance, or the sound recording is not an infringement of copyright where such information interferes unreasonably with the authorized display or reproduction of a copyright work or other subject matter.*

*(4) Rights management information is only an assertion made by a rights owner, which may or may not be legally binding in Canada.*

*(5) The owner of copyright in a work, a performer's performance fixed in a sound recording, or a sound recording is subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up, and otherwise that are or may be conferred by law for knowingly making false or misleading statements in rights management information that is attached to or embodied in any material form of the work, the performer's performance, or the sound recording, or appears in connection with its communication to the public by telecommunication.*

18. Bill C-32 should be amended to provide that fees to be paid related to notices forwarded by ISPs at the request of a rights holder be borne by the rights holder.

19. Clause 47, section 41.2, should be amended as follows:

*If a court finds that a defendant that is a library, archive, museum, or educational institution, or that is employed by or is a student or patron of such an institution, has contravened subsection 29, 29.1, 29.2, or 41.1(1), and the defendant satisfies the court that it, he, or she did not know, and could not reasonably be expected to know, that its, his, or her actions constituted a contravention of those sections, the plaintiff is not entitled to any remedy other than an injunction.*

Thank you for your consideration of our concerns.