

Submission to the House of Commons Legislative Committee on Bill C-11

Submission by Access Copyright, The Canadian Copyright Licensing Agency regarding Bill C-11, *An Act to amend The Copyright Act*

March 7, 2012

A MODERN VISION OF COPYRIGHT

1. The digitization of content has revolutionized the way society experiences the creative process. We live in a world in which users are able to create, publish, share and reuse content in seamless, inexpensive and instantaneous ways – usually without ever thinking about rights or licensing. Both the content and the technology are there for the taking, and users understandably take full advantage of the opportunities.
2. For rightsholders, however, the picture is more complex. Most authors and publishers welcome the opportunity to have their work reach a larger audience in new and innovative ways, but the basic economic equation has not changed. In order to continue to create the content that users value, and for which Canada has become well-known, rightsholders still need to be paid. The advantages of the digital age cannot come at their expense.
3. Too often, the response to this conundrum is to claim that copyright just “does not work” in the digital age – that the lack of practical and lawful means for users to use protected materials in modern ways, points to a fundamental disconnect that cannot be reconciled. This response is sometimes coupled with an indifference or even hostility to the entitlement of creators to be compensated and recognized for their work. For some, copyright has become little more than an outdated nuisance – a roadblock that serves no function other than to annoy, and occasionally to threaten, those who choose to take full advantage of the vast array of content that can now be accessed so easily, usually free of charge.
4. However, to paraphrase Mark Twain, the rumours of copyright’s death have been greatly exaggerated. In fact, the digital age holds great promise for anyone who is serious about balancing the rights of creators with the interests of users. The potential exists for creators, distributors, users and legislators, working together, to create a comprehensive network of licensing arrangements that permit the seamless use of content in most any context, with rightsholders benefitting from revenue streams that in many cases will be practically imperceptible to the average user. Care must be taken to ensure that, as consumption patterns evolve, so do methods of compensation. As always, value must be given for value received, but in ways that promote, rather than hinder, the rapid and borderless ways in which we are now used to living and working.
5. A strong and flexible copyright law is crucial to this vision. The *Copyright Act* needs to be reformed in ways that preserve the ability of rightsholders to place reasonable limits on the use of their work and to be paid for economically significant uses, while also creating meaningful incentives for them to make their work available in useful and convenient ways and at reasonable prices. It must also help to restore respect for copyright law, which has been seriously damaged by the uncoordinated and inconsistent responses of both industry and government to years of unauthorized file sharing and piracy.

The Promise of Collective Licensing

6. Collective licensing plays an important role in ensuring an effective and efficient digital ecosystem for the circulation of content on and offline: a system that both promotes easy access for users and ensures fair remuneration for authors and publishers for many types of secondary uses.
7. In a collective licensing system, rightsholders authorize collective societies to administer their rights by negotiating licences, monitoring usage and collecting and distributing royalties. From the user’s standpoint, collective licensing has many benefits. Obtaining the necessary rights to use a work from a collective society is much easier than trying to locate and negotiate directly with individual

rightsholders. The benefit is even greater when multiple works are at issue and the user can simply *obtain* a blanket licence to use, with commercial certainty, a vast, worldwide repertoire with value that far exceeds the benefit of any legislated exception. Individual rightsholders agree to relinquish their exclusive control over the terms of licensing to a collective society and/or the Copyright Board.

8. The benefits to rightsholders are also significant. By pooling their rights and resources, rightsholders are better able both to protect and to exploit their rights, eliminating their own transaction costs and greatly reducing transaction costs to users. Especially when users are widely dispersed and per-transaction value is relatively low, but the total value of multiple copying transactions is substantial, collective licensing is the only practical approach. Without collective licensing, it would be impossible for rightsholders to be compensated for the widespread use of their works, whether it is photocopying of literary works in schools and universities or the playing of music by radio stations. Although the secondary use of copyright-protected materials is a business of pennies, every transaction counts, and many tiny transactions add up to a critical source of revenue.
9. These mutually beneficial outcomes help explain why Canada and the vast majority of other developed countries have long used collective licensing to achieve an effective balance between access and compensation. The *Copyright Act* contains effective safeguards to ensure that the royalties charged by collectives are fair and reasonable, with the Copyright Board as an expert tribunal for this very purpose. And the system has worked. Where rightsholders lack the resources to engage in costly, time-consuming, impractical individual licensing efforts, collective licensing has reduced their costs and enabled them to deal efficiently with users, providing users with certainty and significant new opportunities for innovative, authorized use at a low cost. The economic benefit for rightsholders has been significant.

Unintended Consequences of Bill C-11

10. One of the unintended consequences of the modernization of the *Act* is the introduction of uncertainties that weaken the ability of rights owners to exploit their copyrights. While the Bill restores some level of control by giving rightsholders tools to enforce individual rights against individual infringers, it fails to recognize that control is sometimes illusory or not always the preferred business model. Apart from the practical difficulty of tracking infringement and locating infringers, individual enforcement also means extensive and expensive litigation, a prospect that most rightsholders and users can ill afford. In the end, rightsholders' interests rarely lie in preventing access; their strong preference is to encourage it as long as a payment model is attached.
11. By creating expansive exceptions for the education sector, without the opportunity of compensation for rightsholders for uses of their works, rightsholders will have no choice but to rely on a patchwork of rights and remedies, including use of digital locks, to protect their rights. The resulting unintended consequence is that access to published works will be actively discouraged since broad exceptions that provide access without compensation are a strong inducement to copyright owners to prohibit, rather than facilitate, the use of their work.
12. The potential effect of the Bill on educational publishing and the creators who support it is especially troubling. Every year, Canada's education sector is responsible for copying more than 500 million pages of text – the equivalent of about three million books – for classroom use. Those copies are currently subject to tariffs and agreements administered by Access Copyright and COPIBEC, and the royalties generated from those uses are a critical source of revenue for many authors and publishers. The Bill jeopardizes that lifeline and introduces additional market uncertainty by expanding existing

exceptions, introducing broad new ones, and by adding education as an allowable purpose under the fair dealing doctrine.

13. For these reasons, and others discussed in more detail below, Access Copyright calls upon the Committee to ask the Government to:
 - Clearly delineate fair dealing to ensure that the dealing does not negatively impact the market or the ability of creators to be fairly compensated for the use of their works; and
 - Amend the other proposed educational and library exceptions to avoid unintended consequences and, in the public interest, to balance through collective licensing both broad access to works for educational and library purposes and fair compensation to rightsholders for the use of those works.

ABOUT ACCESS COPYRIGHT

14. Access Copyright, The Canadian Copyright Licensing Agency, is a not-for-profit collective society whose members are organizations representing authors and publishers of copyright protected works published in books, magazines, journals and newspapers.
15. Since 1988, Access Copyright has been striving to meet the needs of businesses, educators, governments and other organizations across Canada with its innovative copyright licensing solutions. Through affiliation agreements with Canadian copyright owners, as well as through reciprocal agreements with collective societies in 30 other jurisdictions, Access Copyright provides licensees with access to a growing repertoire of more than 20 million books, magazines, newspapers and other publications.

EDUCATION AND BILL C-11

16. Access Copyright strongly supports the modernization of the *Copyright Act* to ensure that Canadian students benefit from seamless access to the best content available and the best technology available to use that content in ways that promote their education and growth. However, this should not come at the expense of fair compensation to authors and publishers. By achieving a true balance between access and compensation, the *Act* would better promote the interests of teachers, students and the economy – enhancing the breadth of materials available to educational institutions while promoting, rather than hindering, the creation and distribution of more and better resources.

Fair Dealing for Education, s. 29

17. In the continuing debate over the proper scope of fair dealing, one essential truth is often overlooked: fair dealing is *free dealing*. When a use is subject to the exception, rightsholders do not get paid for it.
18. The fact that fair dealing must be assessed within the framework provided by the Supreme Court in *CCH Canadian v. Law Society of Upper Canada* is of little comfort to rightsholders, who will once again be forced into expensive and costly litigation to defend their rights. The “fairness factors” in *CCH* are vague and remain subject to judicial interpretation, with two decisions pending before the Supreme Court. Meanwhile, the relevance of the more nuanced existing exceptions for educational institutions will be thrown into question – along with Canada’s compliance with its international obligations.

19. The unintended consequence of adding “education” to fair dealing can be stated simply: it could devastate both the primary market for textbooks and the secondary market for reproduction of works for educational purposes, forcing many Canadian authors (especially authors who are not salaried teachers and professors) and publishers out of the business of writing and publishing for Canadian educational institutions. That practical reality will take hold long before the courts have passed judgment on the many difficult legal issues. By the time the dust settles, it will be much too late for many authors and publishers.
20. In materials released with the Bill, the Government has suggested that the proposed amendment is limited only to enabling “the use of copyrighted materials for the purpose of education in a structured context,” and that it would comply with international standards – in particular, the Berne Convention and the TRIPS Agreement – by its assurances that the dealings would not “harm the market for a work,” “harm the legitimate interests of the copyright owner,” or “unduly threaten the legitimate interests of copyright owners.” However, these qualifications appear nowhere in the Bill itself, nor are they borne out by the existing judicial interpretation of fair dealing. On the contrary, both the *CCH* case and subsequent appellate decisions have affirmed repeatedly that allowable purposes are to be given a “large and liberal interpretation”. In addition, the Supreme Court of Canada stated in *CCH* that the fairness factor of “the effect on the market” is not the only factor or even the most important factor to consider in deciding whether a dealing is fair. The Government should not rely on courts to place restrictions on the scope of “education” unless this is done in the Bill itself.
21. Several representatives from the education sector came before the C-32 Legislative Committee proclaiming that adding education to fair dealing will not change what uses they have traditionally paid for, thereby insinuating that the claims by the publishing industry, including those made by Access Copyright, are grossly exaggerated. The reality shows otherwise. The market has already been negatively affected in anticipation of fair dealing for “education” and other exceptions being added to the *Copyright Act*.
22. For example, Access Copyright recently signed an agreement with two large Canadian post-secondary universities for the photocopying and digital copying of copyright protected material by professors, students and staff. By putting an end (for the universities that have signed the agreement) to a protracted and often acrimonious tariff setting process before the Copyright Board the parties hope that such an agreement will boost a mutually supportive partnership between publishers and educators that in the past permitted the development of innovative educational resources. Instead of encouraging this kind of collaborative effort that has the creators, producers and users of content working together to establish working business models for the digital environment, some observers from the education sector, including the Canadian Association of University Teachers, decried the agreement as, among other things, undermining the upcoming Bill C-11 changes to fair dealing.
23. The reliance by some key players in the education sector on the “upcoming” changes to fair dealing in order to use copyright protected works without compensation to the creators and publishers of those works highlights how imperative it is for the Government to amend Bill C-11. Bill C-11 must be amended so as to promote a collaborative environment which maximizes for Canadian students the use of empowering technologies of the digital economy by ensuring that creators and publishers of learning resources are compensated when their works are used.
24. In order to mitigate the unintended disruption to the market caused by adding “education” to fair dealing, Access Copyright recommends that fair dealing be clarified by ensuring that:

- education is limited to a structured context;
- the dealing would not be fair if it has a negative effect on the market or potential market for the work; and
- fair dealing does not apply if the dealing is already covered by another exception in the Act.

Reproduction for Instruction, Tests and Examinations, section 29.4

25. Section 29.4 of the Act, enacted in 1997, provides a limited exception for the reproduction of works by educational institutions for certain specific purposes: to make and project a copy of a copyright work by using an overhead projector or other similar device, or to use it as required for a test or examination. Its application is straightforward and simple: it applies only to specific uses and is available only where the work in question is not “commercially available” in a medium that is appropriate for the particular purpose – that is, there is no exception either if the work is available for purchase in an appropriate format or a licence is available from a collective society to permit the educational institution to use it as necessary for the purpose.
26. As currently drafted, this exception gives rightsholders a powerful incentive to take appropriate steps to make their work available for educational purposes, either by selling it in appropriate formats or by authorizing a collective society to license it. After all, if a rightsholder fails to do either—thus forcing educational users to seek individual licences or simply depriving them of access to the work in a suitable format – the exclusive reproduction right simply gives way to an uncompensated exception.
27. Bill C-11, however, would expand the existing exception at the expense of rightsholders. The exception would now apply any time an educational institution either reproduces a work or does *any other necessary act* in order to “display” it. Moreover, the drafting of the amendment suggests that, as long as the acts taken in order to display a work are performed on the premises of an educational institution, the exception may apply to the display of works *outside* those premises. As classroom instruction moves rapidly from a physical location and physical materials to digital alternatives, this sort of ambiguity threatens to leave authors and publishers with little or no compensation for the use of their works – not only in the classroom but also, potentially, on websites hosted on school premises but accessible from home and elsewhere (another obvious form of “display”).
28. Replacing a well-defined subset of exempted uses with a broad and undefined categorical exception deprives rightsholders and users of certainty, inviting almost certain litigation to determine the actual scope of the provision. It would also make the exception applicable *even if a licence is available from a collective society*. In other words, even guaranteed access at a reasonable (and regulated) price is not enough; unless the work is available for purchase on the Canadian market in precisely the format required for the educational institution’s particular purposes, the institution is entitled to reproduce the entire work without a licence. This puts an impossible onus on rightsholders, who would need to anticipate every potential use of their work in an educational context, and to incur the risk and expense of making every work available for purchase in every potentially suitable format, in order to avoid the expropriation of their rights.
29. The carve-out for collective licensing is, on the other hand, flexible and therefore an essential component of the current exception. To eliminate it is in effect to ensure that rightsholders will only rarely be compensated when their work is used in the classroom, whether for teaching purposes or as part of a test or exam.

30. If current section 29.4 is to be amended at all, it should be done in a way that avoids the unjustified and unnecessary expropriation of the rights of authors and publishers. This might be accomplished by:
- Making clear that the instruction exception applies only to acts taken for the purpose of illustration for teaching – not for any and all “purposes of education or training”;
 - Further limiting the instruction exception to the temporary display of works on the premises of the educational institution; and
 - Maintaining the existing caveat that the exception is not available where a licence for the intended use – be it instruction, tests or exams – is available from a collective society.

Lessons, section 30.01

31. Proposed section 30.01 introduces a broad new exception for communicating a “lesson” to the public by telecommunication, as well as for making a fixation of the lesson or doing any other act that is necessary for that purpose. Essentially, this exception permits anything that happens in the physical classroom to be transmitted online, provided that certain measures are taken to restrict the further distribution of the material. Students who are enrolled in the course of which the lesson forms a part are also entitled to reproduce the lesson in order to listen to or view it at a more convenient time, provided that the reproduction is destroyed within 30 days after the students receive their final evaluations in the course.
32. Properly crafted, this exception would be a sensible way to extend the borders of the physical classroom, enabling students to participate remotely in a course without depriving rightsholders of reasonable compensation. Authors and educational publishers can and should be the partners of educators in these efforts by making quality materials easily available at a reasonable price. However, the exception must be tailored to recognize that there are at least two different types of “distance education” – courses that involve a classroom component where students either attend in person or view or listen to the classroom action via radio, television or the Internet, and courses that are delivered entirely by regular or online correspondence, using written and multimedia teaching materials but no live instruction. The exception should apply only to the former category, since the latter is already subject to existing licence agreements and proposed tariffs.
33. The uncertainty caused by the interaction of the “lesson” exception with other exceptions in the Bill must also be considered. For example, when a classroom features multiple digital displays for instructional purposes, teachers often use them to display, for illustration purposes, multiple pages from textbooks assigned to the class. The proposed amendments to section 29.4 would create an uncompensated exception for this sort of use, with the potential consequences discussed above. Integrated into online “lessons”, though, the digital content so displayed could become a sort of online coursepack, giving students free online access to virtually all course materials and reducing or eliminating any incentive to purchase textbooks or coursepacks.
34. To avoid these unintended consequences, Access Copyright recommends that proposed section 30.01 be amended to clarify that the definition of lesson is limited to acts that would be exempted in the course of copying for display, performances, news and commentary under specified exceptions.

Work Available Through the Internet, section 30.04

35. Proposed section 30.04 of the Bill – commonly known as the “PAM exception” – would create an extremely broad exception for the use of copyright material available through the Internet. An educational institution, or any person acting under its authority, is entitled, for “educational purposes” to reproduce, communicate, perform and do any other necessary act in relation to the work, unless the copyright owner has taken positive steps to prohibit the use of a particular work (either by protecting it with a TPM or by posting a “clearly visible notice” to that effect, and not merely the copyright symbol), or unless the user “knows or should have known” that the work was made available without the consent of the owner .
36. The PAM exception sends precisely the wrong message to students and teachers alike. Instead of learning about the importance of balancing user access with respect for the rights of creators, which would promote the goals of reducing online piracy and infringement, students will instead come to believe that material available through the Internet is free unless someone specifically indicates otherwise. This would create an unimaginable challenge to the future of copyright.
37. In fact, perhaps more so than any other existing or proposed exception, the PAM exception turns copyright upside down. The Berne Convention and other international treaties require that the exclusive rights of copyright owners be available without formality – including any requirement to mark protected works with a copyright notice or otherwise. The practical effect of the exception would be to impose a *de facto* formality requirement on *all works*. Requiring either a TPM or a notice of prohibition as a prerequisite to the enforcement of rights whenever a work is available through the Internet would – in effect – violate Canada’s international obligations, i.e. in the absence of these “formalities”.
38. The exception also violates the three-step test, set out in the Berne Convention, the TRIPS agreement, and other international treaties, which requires that exceptions be limited to certain special cases that do not interfere with the normal exploitation of works or unreasonably prejudice the legitimate interests of authors. “Educational purposes” or “training purposes” are far too broad to be considered “certain special cases,” and the fact that at least 14 collective societies around the world already license this type of use shows that the exception would interfere with the normal exploitation of the affected works. As for the third step, it is hard to imagine an exception that would be *more* prejudicial to the legitimate interests of authors than choking off what could potentially become a critical source of revenue for authors and publishers.
39. Further, the meaning of “available through the Internet” is extremely unclear; as drafted, it appears to include not only content deliberately made “publicly available,” but also content that was not intended for general public viewing but has become accessible nonetheless. In fact, the plain language of the exception seems to apply just as readily to *physical* copies of works that are “available through the Internet” via online retailers of print books such as Indigo or Amazon.
40. In order to mitigate unintended consequences, Access Copyright recommends that technical amendments be made to the provision such as to:
 - Include an appropriately narrow definition of “available through the Internet”, encompassing only material that is actually posted, in digital format, on an Internet website, not simply “available” through other online means;

- Ensure that the exception does not apply where the work or site is protected by any TPM,
- Ensure that the notice prohibiting the act can be accessible through a hyperlink;
- Ensure that the provision is in conformity with Canada’s international obligations, and
- Ensure that the exception does not apply if a use violates an agreement.

Digital Reproduction, sections 30.02 and 30.03

41. Access Copyright supports the introduction of sections 30.02 and 30.03, which effectively create a *compensated* exception for educational institutions by expanding existing reprography agreements to allow the making of digital copies as well. This is an efficient and effective way to promote technological neutrality.
42. To better achieve the underlying purpose of these sections, and to avoid unintended consequences, further technical amendments are proposed to:
- Clarify that the existing licence comes from a collective society;
 - Harmonize the standards for preventing misuse;
 - Clarify that the exception does not apply if a tariff has been fixed by the board.

REPRODUCTION BY LIBRARIES, ARCHIVES AND MUSEUMS (“LAMs”)

Inter-Library Loans, section 30.2

43. Currently, section 30.2 allows LAMs to make copies of scholarly, scientific and technical periodicals, as well as certain other newspapers and periodicals, to be used by their patrons for research and private study. The proposed amendments would permit a LAM to provide a copy of an article, in digital format, to a person who requests it through *another* LAM, as long as certain precautionary measures are taken.
44. In the digital environment, the traditional rationale for library copying exceptions no longer applies. The availability of journals and periodicals in digital format means that LAMs no longer need to rely on the collections of other institutions in order to fulfill their patrons’ needs; the content is broadly available not only to subscribers but also to others who wish to purchase individual articles online. Rightsholders and collective societies also offer licences to LAMs, allowing them to provide copies to their patrons in accordance with terms and conditions set by contract.
45. An unintended consequence of the proposed exception is to threaten these developing business models, which have been designed to meet the needs of users and to compensate rightsholders at reasonable prices. By permitting the same content to be made available for free, Bill C-11 would both disrupt an existing and well-established market and create a dangerous situation in which the coordination of inter-library requests could well mean that a single subscription to a given periodical could suffice for all of Canada. It would become impossible for the publishers of these materials to stay in business.

46. Technical amendments should be brought to subsection 30.2(5.02) to ensure that the provision does not undermine the market for scholarly, scientific or technical periodicals or other works by
- Harmonizing the standard to prevent misuse;
 - Preventing digital interlibrary loans in contravention of agreements, including agreements from collective societies, or where the work is protected by a TPM.

Copying Works Deposited in Archives, section 30.21

47. A technologically neutral interpretation of section 30.21 suggests that a copy of an unpublished work deposited in an archive may be provided to a person, for research or private study, in either physical or digital format. In order to prevent this from leading to the widespread dissemination of unpublished works, contrary to the apparent intent of their authors, the section should contain the same restrictions on LAM patrons who receive digital copies as in new subsection 30.2(5.02).

OTHER PROVISIONS

Interpretation, Proposed New Section 32.3

48. Bill C-11 introduces many new exceptions into Canada's *Copyright act*, some of which exist nowhere else in the world. The government has repeatedly indicated its intention to conform with Canada's international obligations. Since treaties are not self-executing in Canada, they must be made part of a legislation to ensure that they are part of the body of laws that courts must consider when interpreting the *Copyright Act*.
49. In order to ensure that the government's stated intention that the Canadian Copyright Act be compliant with international obligations, Access Copyright recommends the addition of an interpretation section that explicitly directs the courts to Canada's international obligations. Access Copyright supports the introduction of a new section 32.3 as proposed by the Canadian Conference of the Arts on behalf of over 70 associations

Non-Commercial User Generated Content, section 29.21

50. Access Copyright believes that, as drafted, the proposed new exception for non-commercial user-generated content ("UGC") would result in serious unintended consequences that, among other things, would extend the ambit of the exception far beyond the creation and online distribution of mash-ups, remixes and other familiar forms of UGC and permit so-called "intermediaries" to profit from the dissemination of UGC, as long as the individuals who created the UGC did so for "non-commercial" purposes.
51. Considering that the bulk of Access Copyright's licensees are educational institutions, government departments and other "non-commercial" entities, this new exception could have a significant impact on the royalties available to authors and publishers for a wide variety of uses. This is of particular concern given that a significant portion of the royalties received by publishers and creators through Access Copyright is for customized textbooks or coursepacks which may, under the current wording of this exception, fall under the user-generated exception. As pointed out in the submission filed by the Canadian Conference of the Arts on behalf of over 70 associations including Access Copyright, the wording in this exception would also wind up authorizing the posting of almost any new work that is a derivative of an original work, including translations, adaptations, synchronizations and new works in series.

52. Access Copyright supports the amendments to section 29.21 proposed by the Canadian Conference of the Arts on behalf of over 70 associations.

Statutory Damages, section 38.1

53. The Government has indicated that one of the goals of Bill C-11 is to “[protect] Canadians from unreasonable penalties by distinguishing between commercial and non-commercial infringement,” including by “introducing the concept of proportionality in statutory damages.” Unfortunately, the amendments proposed in Bill C-11 may have the unintended effect of rendering the system of statutory damages ineffective. The risk is that statutory damages may have little or no deterrent effect on potential infringers – both individuals and, notably, educational institutions.
54. Like collective licensing, an effective statutory damages regime should form an integral part of a truly “modernized” *Copyright Act*. When infringement occurs instead of licensing, and actual damages are difficult to prove, statutory damages are a critical tool for enforcement. But for statutory damages to have any deterrent effect at all, users need to take them seriously. They need to be seen as more than just a cost of doing business or a licence fee for unauthorized use.
55. Access Copyright recommends that the current statutory damages regime be maintained and that courts be given greater discretion in non-commercial cases to reduce the statutory damage awards. Access Copyright supports the amendments to section 38.1 proposed by the Canadian Conference of the Arts on behalf of over 70 associations.

CONCLUSION

56. After a decade of debate, and two previous attempts at legislative reform, copyright law in Canada is at a vital crossroads. By characterizing Bill C-11 as an attempt to modernize copyright, the Government sounded an encouraging note. To Access Copyright, modernizing copyright means enabling new and innovative business models that provide users with extensive access to the content they need through efficient licensing regimes that generate fair and reasonable compensation for rightsholders. It is important that amendments be made to the Bill to ensure that it does not result in unintended consequences that significantly impact the ability of authors and publishers to get reasonable compensation when their works are used and that jeopardize existing business models or stifle emerging ones.