



**BRIEF SUBMITTED TO THE LEGISLATIVE  
COMMITTEE ON BILL C-11, AN ACT TO  
AMEND THE COPYRIGHT ACT**

**ASSOCIATION  
NATIONALE  
DES ÉDITEURS  
DE LIVRES**



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## **A BILL THAT WEAKENS OUR INDUSTRY AND OUR NATIONAL EDUCATION SYSTEM**

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## **A BILL THAT WEAKENS OUR INDUSTRY AND OUR NATIONAL EDUCATION SYSTEM**

### **ANEL AND COPYRIGHT**

The Association nationale des éditeurs de livres (ANEL) represents a hundred French Canadian book publishing firms of all sizes, operating in all fields: literature, general literature, as well as school, scientific or technical book publishing.

On the issue of copyright, the ANEL has voiced its position on all previous bills, consistently asking for the reaffirmation and strengthening of our copyright law as well as its harmonization with the copyright laws of other countries so that our publishing firms may compete on a level playing field with the other players in the book business. The ANEL has requested that our Canadian copyright legislation promotes legal offer and ensures accountability among all actors of the digital economy, including the education sector: “to ensure that access to knowledge resources is a true access to knowledge, the legislator must have the courage to educate the public, the teachers and the students on the value of copyright and working methods allowing intellectual rigour and critical thinking in this new economy of knowledge.” (2009 presentation) Unfortunately Bill C11 does not reflect any of our demands. We especially fault this Bill on three issues: it creates numerous new exceptions while a 2004 jurisprudence sets them up as user rights, it creates legal loopholes which will generate instability, and it strips all actors of the digital economy of their responsibilities, except for the creators and the creative industries.

In Québec, opposition to this Bill has been and remains unanimous. Already to 14 875 petitioners have endorsed the Fair Culture petition and their number is still growing; amongst them thousands of creators, major cultural institutions, the Québec National Assembly and even, to the contrary of all other Canadian provinces, the Québec School Board Federation (see the list in appendix). As well, most of the major international publishing associations have registered their opposition to the Bill (International Publishers Association, French Minister of Culture, Scientific, Medical and Technical Publishers Association, France National Publishers Syndicate, European Publishers Association, International Federation of Reproduction Rights Organisations, etc.).

Aware of the urgent need for a law and a good law, we accepted the guidelines set down by the government in 2011 namely proposing only technical amendments or amendments correcting unintended negative consequences of the Bill. The ANEL has worked toward that goal with 70 other cultural associations (15 are from Québec), in an unprecedented effort to reach a consensus and to present our common amendments in both official languages,

thus facilitating the work of the legislator. Revenue losses assessed in the process are not potential losses, but real revenues put at risk by the Bill.

The book publishing industry is specifically concerned by seven of those exceptions: the fair dealing exception, the interpretation, the digital reproduction of works, the user-generated content, the reproduction for instruction, the lesson and the works posted on the Internet. The Committee shall refer to the document entitled *Proposed amendments to Bill C-11: Towards a competitive Canadian digital economy at the service of innovation and knowledge* for the justifications and wording of those provisions.

Today, we will focus on one topic: the fair dealing exception for education, the measure by far the most likely to cut off our sources of income and to compromise our capacity to evolve in the new digital era. Here again, we will rely on real practices revealing there is already a C-11 effect, we will discuss some current uses of works that are harmful and we will demonstrate that the combination of this exception with other exceptions and lost prerogatives stemming from the digital revolution paints a gloomy picture of the future of the book publishing industry.



## **INTRODUCTION**

We are all familiar with the close connection between cultural industries, culture and identity. The growing proportion of dematerialized added value in products which create collective wealth and the steady increase of the cultural works' contribution to national economies also lead most observers to consider cultural vitality as an indicator of sustainable development. It is crucial to realize that the legal environment of the intellectual property is the primary factor in providing the support for and increasing the value of this dematerialized property for the economic success of not only the cultural industries but of all economic sectors that depend on the production of original content, particularly the education sector.

We need a clear legal framework which guaranties the necessary stability to motivate investment in and increase of the creation of Canadian cultural products, to ensure that the innovation, production and distribution of Canadian contents becomes more attractive to creators and talented workers and to guaranty our education system will have at its disposal the valuable teaching resources for tomorrow's digital classrooms.



## **STILL A FRAGILE INDUSTRY**

Cultural industries participate in sustainable development through their major annual contribution to the Canadian GDP, the creation of jobs and the value added to our society, especially in education. Their contribution to the Canadian GDP amounts to \$46 billions per year and they employ 630,000 people, while the book publishing industry, although discrete, provides a large part of that contribution. Even if these figures seem interesting in a Canadian perspective, they are less than the averages of 30 countries (5.4 %) studied by the World Intellectual Property Organization (WIPO), as released in a January 2012 study, and dramatically less than the USA (11.1%) and Australia (10.3%). As for the employment, the average contribution of the cultural industries of these countries is 5.9%. By comparison, Canada is at 3.8% while the USA is 8.19 % and Australia at 8.0%.

Book publishing in Canada encompasses 3,879 writers, 45,000 books (printed or digital) published annually, \$2.1 billions of sales, \$140 millions of investment in design and production, \$71 millions in royalties to authors and 9,700 front line jobs. Needless to say, the economic footprint of the Canadian publishing industry is significant. However, the WIPO study reveals that the media and literature sector is the most important producer of added value, contributing to 40.5% of all cultural industries; in Canada (25%) there is room for improvement. An explanation of this situation lies in the fact that Canadians authors and publishers must compete with giants, mainly the USA and France, who have for years held a large part of the Canadian market.

Québec's publishers, Canadian or foreign owned, control today more than 51% of the their market, which represents a huge improvement since the 1970's, when they could barely claim more than 20%. It took them more than 40 years of development and investment to build a strong tradition of professionalism and expertise, to seduce and slowly but surely conquer their home market.

It is noteworthy that the French Canadian book industry has shown forward thinking and innovation on digital books, investing largely and collectively in the development of a joint platform for the promotion, sale and distribution of digital books. This new model is original and so efficient that it has inspired publishers from France, Italy and the USA to join, and not only the smaller ones. It ensures the safeguard and the value of the works, develops agreements with resellers across the French-speaking world. In short, it facilitates the distribution of legitimate and quality published works, with correct and complete metadata, and establishes commercial transactions which respect copyright, both for schools and the general public. In the early days of March 2012, the ANEL-De Marque digital platform offered 7,986 works, from 116 publishers. Statistics show that the works were downloaded 132,550 times and were browsed 882,219 times

online, and all these figures are growing at a fast pace. French Canadian publishers have also initiated agreements with more than 1,000 public libraries who can now loan Canadian digital books in French thanks to chronodegradable technology. The total investment of the French Canadian book industry in the development of the digital platform, ebook production and technological training amounts to more than \$25 millions. The books most expensive to produce, i.e. textbooks and enhanced educational ebooks, are protected by digital locks, while the large majority of French Canadian publishers elect to protect their books with digital watermarking.

Here again this success has to be contextualized. Besides the weaknesses resulting from the relative small size of our markets, the vast majority of publishers have minimal profit margins; they are at the root of a chain which promises to remunerate all its actors: authors, writers, publishers, copy editors, proofreaders, graphic artists, computer graphics designers, illustrators, photographers, searchers, consultants, printers, distributors, booksellers, etc. Publishers take all the risks associated to the development of contents (new voices in literature, new contents in sciences, and compliance to school curriculum in textbooks) and the marketing in every format, print or digital.

## **AN ARTIFICIAL TIDAL WAVE**

We have yet to complete the occupation of our market and our contribution to collective wealth could still increase if it were not for the pressure of globalization and of the digital revolution which set enormous challenges to a dynamic but still fragile industry. Now, it is recognized that the legal environment of intellectual property is the main factor of success for cultural industries and the countries where cultural industries contribute the most to the collective wealth are those with legislations that effectively support the economy of intellectual products.

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to the market rules brought by C-11 will  
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market's "natural" evolution due to the digital era.

It has to be often repeated: intellectual property is the main asset of all publishing firms. Even though this asset is not tangible, it gives meaning to the whole publishing economy. Any lessening of the exclusivity of the use of this property will ultimately result in a loss of revenues on the part of the publishers

and other rights holders. It will also impact on the capacity of the book industry to innovate and produce cultural goods in this new digital era, thus the absolute necessity to limit and contain the exceptions to copyright violations. Any exceptions are a lessening and Bill C-11 introduces 40 new ones. According to many political, economic and cultural observers, they are equivalent to author expropriation.

Publishing industries are ready to adapt to new models in society and on the markets, to new business models linked to the digital world. French Canadian publishers through ANEL have demonstrated that they can meet those new challenges with the implementation of their digital book platform and distribution system in the French-speaking world and elsewhere. At a time when the digital economy with its rapid evolution already stresses the publishing industry, to impose new market rules which put the industry at a disadvantage is against the collective wellbeing.

The fundamental changes to the market rules that C-11 will bring, if it is adopted as introduced, will institute a market disruption unrelated to the market's "natural" evolution caused by the progress of digital technologies. To be assured that their rights are respected, content creators must have complete confidence in the new economic agents which circulate their works. The book publishing industry will not resist to this imposed and artificial tidal wave.

To risk a market reorganization, through mergers and takeovers, and believe that the end result of this imposed revolution will be bigger more competitive publishing groups is a failure to understand what drives the book industry. This industry is made of very small, small, and large businesses interconnected in such a way as to ensure the efficiency of each category and niche, the permanent discovery and development of talent as well as the book industry's general welfare. It fails to understand the reality of content creation. Can we risk emphasizing a bestsellerization of the content, a decrease of French Canadian original creation, the decline of the market share we acquired at high price, a loss of our cultural diversity?

## **BOOK PRIMACY IN EDUCATION**

Authors and publishers are active players of the cultural life of the country. They are building and nurturing our collective imagination and that of the future generations. They make readable and understandable the discoveries of the research and the developments of science. They lead the learning methods with the elaboration and production of various and diversified teaching aids, printed and digital. They organize contents, illustrations, tables, examples, hyperlinks, in fact all the ways to access knowledge with respect to teaching methods, school

curricula/study programs, technological environments and the cognitive characteristics of students as to their age and level of study.

In short, the book industry plays a large role in the success of our national educational program, because it is first and foremost an industry of content creation. It makes available a large range of support products to learning, from children's books to educational games, workbooks, tutorials, game books or enhanced digital books. It also migrates rapidly to teaching aids for interactive whiteboards, etablets and other electronic devices. In addition, the book industry assists teachers during transition periods between curriculum changes.

The great know-how of authors and educational publishers is the cornerstone of our education system. This unique expertise in the production of high-quality school documents, an expertise acknowledged abroad, requires a \$1 to \$1.5 million investment for each schoolbook and teacher's guide used in any k-12 school program. Technical and scientific books are also very expensive to develop. In short, the book industry is the educational resources Research & Development division of our educational system, an unmatched arrangement to get the private sector to invest in the public sector.

**The book industry is  
the Educational resources R & D division  
of the educational system.**

The investment in human resources is shared between research, conception and writing (50 to 70%), graphic design and layout (5 to 10%), research of illustrations and excerpts and negotiations of reproduction rights (10 to 25%) and printing (5 to 10%). Cultural workers in publishing are Publishers, Educators and Techno-educators, specialists of digital ergonomics, graphic artists, illustrators, acquisition of rights agents, scientific editors, technical editors, proofreaders, photography specialists, etc. School book publishers are also the biggest buyers of reproduction rights: for Canadian French school publishers only, the purchase of rights reaches a figure of \$2 millions per year and triples on years of curriculum change. A quick look to the credits page of any given schoolbook is ample illustration of the rights that need to be purchased to publish textbooks.

At a time when the Québec Government is investing \$240 millions in a series of measures to bring the classrooms into the digital era, of which \$198 millions for the acquisition of electronic material (15% of the class rooms are already equipped with interactive whiteboards), the training of teachers and \$42 millions digital for the acquisition of learning resources, it is important to ensure the same level of investment in the development of print and digital

documents. To achieve that, publishing firms must be assured of a fair return on their investment through sales of printed and digital books, sales of rights or licensing transactions. In a society which does not succeed to turn the mass distribution of works in revenues for its creators, there cannot be a long-term investment in the talent and the professionalization of content creators. We should never lose sight of the fact that the teachers, professors and other professionals working in the education system are our authors, consultants, pedagogical/instructional and scientific editors of today. Their students are our authors and collaborators of tomorrow. It is the close cooperation between our national educational system and the publishing industry that grows Canadian know-how in the development of educational resources.

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## **WHEN THE EXCEPTION BECOMES THE RULE**

If there were a single most important thing one could do to improve this law, it would be to leave out the word “education” from the fair dealing exception. Because it gives educational institutions and all other commercial or non-commercial private training businesses the right to use any copyright protected work without permission or compensation, it is the one exception that will have the direst consequences on the book industry. Given the tight relation between the book and education, this exception will induce a contraction of 20% of the book/writing sector in the next two years, which would jeopardize the viability and the digital innovation of the book industry in Canada. As it stands, it will have a negative impact on all publishers: the academic publishers who will see their textbooks largely reproduced without compensation and the literary publishers who will lose the benefits of having one of their works studied in class.

Moreover, this right is created even though educational institutions have no problem accessing material thanks to the copyright licensing agencies; this puts at risk the \$41 millions per year the collectives collect and distribute to authors and publishers in Canada, \$11 millions in French Canada alone: it represents a mere half of 1% of the total budget for education in Canada which hovers around \$70 billions per year. In Québec, the book collective represents

22,000 writers, 668 businesses where book publishing is the only, the principal or part of their activities, and 700 users with agreements that allow them precisely not to worry about copyright. Why jeopardize a model recognized worldwide and by the UNESCO as "one of the most appropriate means of assuring respect for exploited works and a fair remuneration for creative effort of cultural wealth, while permitting rapid access by the public to a constantly enriched living culture"? (*Guide to the collective administration of authors' rights: The Administration Society at the Service of Authors and Users*, Paula Schepens, 2000, p. 9).

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Without a precise definition of fair dealing, everything has been said about this exception. The government says it means restricted to "a structured context, including private training but not for the public in general", the Canadian Federation of School Boards fears it does and warns against such a restriction, the Canadian University Teachers Association defines fair dealing as "the right, within limits, to reproduce a substantial amount of a copyrighted work without permission from, or payment to, the copyright owner" while the Conference of Directors and Principals of Québec universities says that the proposed exception "does not mean in any way the end of compensation for creators".

Let us resolve this issue: it is open ended, free and without permission, as long as it is fair.

### **AS LONG AS THE USE IS FAIR**

This one and only restriction to the free use of any given material for educational purposes does not protect the book industry in any way.

### **UNDULY LITIGATION**

Establishing what is fair under the new law will lead to litigation and judicial proceedings, not the normal litigation expected with any new law but unduly and unwarranted litigation due to ill drafted and sometimes contradictory measures. Let us rely on the assessment of the Québec Bar in this matter:



"In several respects, the Bill introduces a legal uncertainty that will foster the judicialization of the relations between authors, providers and consumers-users. The new conditions underpinning the rights are many and complex (see subsections 9(1) (2) (3), 11(1) (2) (3) (4) and section 15). [...] The new exceptions often depend on unrealistic or unverifiable conditions (see sections 18 and 22 and, in particular, the new measures in subsections 29.21, 29.22 and 29.23). These exceptions are in turn annihilated by the TPM measures. [...] Finally, adding the word «education» to section 29 as a fair dealing purpose for the use of works gives an extremely wide and imprecise scope to the exception, especially in the light of the numerous new exceptions created for the benefit of educational establishments. [...] The Supreme Court decision in the CCH case in 2004 set the parameters for fair dealing and adding the word «education» to section 29 would bring an unlimited scope to the word. Numerous courts case are to be expected." (Letter to Minister Tony Clement and Minister James Moore, October 14, 2010, p. 3)

**The resulting climate of uncertainty and the costs  
of judicialization will jeopardize  
middle and long-term investments.**

The sheer fact that no one agrees on the scope of the new exceptions, especially fair dealing for education, is proof enough that there is a "crafting" argument to be made. The resulting climate of uncertainty and the costs of judicialization will jeopardize middle and long-term investments until the Courts have ruled on which uses are fair and which are not. In this regard, fair dealing is a real free for all.

### **THE EFFECT ON THE MARKET FACTOR AND THREE STEP TEST**

The Supreme Court developed a non-exhaustive list of six factors to assist in determining whether a use is "fair": purpose, character and amount of the use, alternatives to the dealing, nature of the work and effect of the dealing on the work's market.

The problem however, is the Court ruled that : "Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair" (§ 59). In other words, a court could conclude that dealing is fair even if it harms the market for a work. In contrast, in the "fair use" regime of the United States this factor is the "most important, and indeed, central

fair use factor" [Nimmer on Copyright, § 13.05[A][4] at 13-64 (1982)]. This gives American publishers the comfort they need to invest in innovative educational resources. If C-11 passes as written, Canadian publishers and foreign investors would not have the same comfort level.

The second most important thing to do to improve our law would be to make sure the three-step test of the Berne Convention is incorporated into our legislation.

Given the educational publishers create books expressly for the educational market, one can reasonably project that, with the effect on the market factor not being the determining nor the principal factor to rule the fairness of a use, the market for textbooks will collapse. The consequences for the economy are overwhelming. France understood this and voted an educational exception where textbooks are excluded from the measure. The business model of educational publishers stands exclusively on the educational market; they are not diversified in other sectors, education is their sole revenue source. The closing-down of these publishers will come with direct and indirect job losses and lost revenues for all the related professionals and businesses of the book supply chain.

Moreover, publishers will also not engage in the production of value-added digital materials (enhanced etextbooks) because they will know that flash animation and other features will never get a return on investment, teachers "borrowing" them saying: "It's not that bad, it's only 2 minutes long"; educational users will not realize what considerable time and resources went into the production of this added value.

This is why the second most important thing to do to improve our law would be to make sure the "three-step test" of the Berne Convention is incorporated into our legislation so as to become the basis on which courts will rely for the interpretation of fair dealing. This would among other things ensure that the effect of the use on the work would be prioritized in the determination of what is fair and by the same token ensure our copyright law meets our international obligations. Since International treaties are not self-executing in Canada, the three-step test must be incorporated into our law.

## **EDUCATIONAL PRACTICES AND FAIRNESS**

We are often told that the other factors for the interpretation of what is fair will prevent abuses, that the character of the work or the amount of the use will deter unfair behaviors, that digital locks will help protect our works, in short that our considerations are driven by the fear of the unknown. This is not true.

An established practice  
in a particular domain might well be considered a  
fair dealing by the courts.

Let us remember that CCH says that it may be relevant to consider the custom or practice in a particular sector of activity to determine whether or not the character of the dealing is fair. And CCH adds that the word "dealing" connotes not individual acts, but a practice or system: "This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works" (p. 43). Therefore, an established practice in a particular domain might well be considered a fair dealing by the courts. This is so true that there are thinkers now encouraging the universities and educational institutions to interpret fair dealing as widely as possible so new practices can in time be considered established, thus fair.

The 15 years it took to update our copyright law for the digital age helped establish numerous digital practices in education. Moreover, Bill C-32 and its successor Bill C-11 accelerated new behaviors stemming from the understanding of what the law would eventually permit under fair dealing, which resulted in what we called the C-32 effect. Our concerns are thus based on the reality of present practices and not on the unknown, as well as the continuing and unpredictable synergies between forever growing digital capabilities and numerous new exceptions.

## **END OF COLLECTIVE MANAGEMENT**

Since Bill C-32, then C-11, was put forward in Parliament, 35 English language universities, anticipating its adoption as is, decided to opt out of Access Copyright. Collectives are there to avoid suing for abuses; they are safeguards and facilitators. So it is not altogether surprising that two universities have since re-opted in. Nonetheless, it is obvious that C-11 is having an impact on the negotiation of agreements between all educational institutions (schools, colleges, universities) and the collectives. Already the CREPUQ mentioned to the ANEL

that: “the fair dealing of works [...] will have to be taken into account in the negotiations for the renewal of their agreements with the rights holders and representatives, publishers or collectives.” Worse, agreements for right holders will not only have an impact on royalties for writers and publishers but will also impact on the parameters and perception of fair dealing. The end result will be a broader and more widespread fair dealing exception, with an inevitable rise in violations and litigations.

## **FORMAT SHIFTING, DISPLAY EXCEPTION AND WHOLE WORKS**

Some practices stemming from the digital era translated into the loss for publishers of rights and practices that presided over their business model. One such right is the right to format shifting. Publishers traditionally published their works in a carefully thought out business model, from hard cover to pocket book or other more prestigious formats to maximize revenues. These practices were consistent with the ISBN system of identification which required that every format be a different edition. The ebook format was quickly forced out of this model by pirates who managed to publish a scanned copy of a new award-winning work the same day the paper format came out. The sheer easiness with which whole works can now be digitally copied forever excludes the e-format from this business model. Every one now is able to legally or illegally reproduce whole works.

For the first time, since the intent of Bill C-11 is to create a technologically neutral environment, format shifting is an implicit right in all of the exceptions as it allows reproduction whatever the format. With the spreading of interactive whiteboard (IWB), touchpads and other display technologies, teachers will be able to use the new reproduction for instruction exception to scan paper works without having to recommend its purchase. For the first time also, the Copyright Act will allow for the reproduction of whole works in schools without permission or compensation, since this exception is not required to meet the fair dealing test. Up to now it was the agreements signed with the collectives that determined what number of pages it was reasonable to use without a licence, and it was limited to precise portions of the works. In a context where those agreements and the collectives will be weakened, how will our institutions manage to distinguish between this reproduction of whole works from the amount of work criteria in the fair dealing exception? Will there still be incentives for the purchase of books?

Already schools, school boards, colleges and universities say they need more learning resources in digital formats. It is one thing to see the market evolve towards more learning resources in digital formats: we are already investing large sums in their development. It is another one altogether to have classes all over Québec and Canada buy one class set instead of one resource per student and relying on class display with smart boards and touchpads to do

so. Cégeps and private colleges already are advertising classes with iPads to attract students. All the while paper books' sales are declining and sales of digital resources are stymied by the educational institutions' current inability to provide digital access to all students. There has to be a compensation for this exception. If revenues are dried up too quickly publishers will not be able to go forward with investments in new digital materials. Copyright must stay strong during this transitional period.

## **COURSE PACKS**

Course packs are compilations of various photocopied extracts from different sources intended to help students follow the teaching of a specific course. Under the present Copyright Act, these course packs are violations of copyright, as in the USA where courts ruled they were not fair use. Permission and compensation have to be made.

With the adoption of C-11, everything will be changed. The practice will be subjected to the fairness test and will most probably pass it, given the present criteria. The use of course packs is a long standing practice, well established amongst all our institutions, from kindergarten to university level. This perfectly illustrates the differences between the American “fair use” and the Canadian “fair dealing” provisions. In the US, where the effect on the market is the most important criteria and where the possibility of licensing through a collective is deemed an alternate solution, the courts ruled that course packs are not fair use.

Original content — what copyright is designed  
to protect — is the single most important  
driving force in a knowledge-based economy.

In fact, since the C-32 effect, a whole course pack industry is getting under way. The Internet giants already understood the good revenue stream course packs represent. In its first 2008 Settlement, Google had already planned for the elaboration of course packs using the books it had scanned (and there are millions, of which the great majority are to this day still illegally scanned). Others developed software helping with the development of educational materials, Apple with its iBooksAuthor and Amazon with CreateSpace, not to mention the smartboards manufacturers who offer content organizing softwares with their boards, for example Promethean and its ActivOffice. We are also seeing startups dedicated to the development of course packs, founded by students who saw a business opportunity out of students wanting to avoid paying the fee for accessing titles in their library's reserve list.

The teachers' and professors' workload, their need for flexibility and their appetite for tailor made contents are such that we can reasonably project that the temptation to amalgamate extracts from various approved textbooks will be very strong, as the prevalent course pack practices demonstrate. With C-11, not only will the revenue losses from the collectives be important, but publishers will face the competition of a parallel industry thriving on the appropriation of their work and the competition for their own targeted market, the teachers and professors. Once again, the interests of technology will prevail over copyright protection of original content.

As a footnote, let us point out that after having contributed to the devaluation of content, the Internet giants are now reinvesting in original content because their numbers are stalling (Google and the transformation of YouTube into a TV station with its 25 hours of original programming). This is proof, if ever there was, that original content — what copyright is designed to protect — is the single most important driving force in a knowledge-based economy.

## **UNLAWFUL COMPETITION**

In the printing environment, where equipment and paper are costly, the publishers are already faced with an unlawful competition making them lose millions of dollars. On January 25th 2011, the RCMP seized in photocopying centers around universities in the Montreal region 2,700 counterfeited books and course packs that were sold for a quarter of the market price. The value of these counterfeited goods amounted to approximately \$540,000. These centers had been operating and thriving for years, so one can imagine the losses for publishers.

In the digital environment, identical copies (ready to be printed) are not labelled counterfeit but illegal downloads or peer-to-peer exchanges. The words seem less harsh, but it is the same unlawful competition. The \$ billions earned by Megaupload attest very well to that. Nonetheless, the only targeted Internet providers (ISP) in bill C-11 are those “designed primarily to enable acts of copyright infringement”. With the growing integration of businesses and activities on the Internet, a large number of downloading and file sharing facilitators are and will be able to go on doing business as usual, if necessary by merging their activities or by integrating their illegal activities as part of a bigger business operation. Sites also could work in concert while still being different legal entities, as were the two sites closed down in Germany in February 2012 (Library.nu and iFile.it).

There are already numerous sites where whole works created in French in Québec and Canada are being offered for illegal downloading or sharing. This

includes literary works and numerous textbooks, as on Ebooke. Moreover, some sites host online forums where specific titles are requested. Others enable the downloading and sharing of answer books.

Holding these sites accountable only if they primarily enable copyright infringements not only denies the authors and publishers of revenue sources but puts a supplementary burden on the teachers and professors that could undermine their ability to ensure proper evaluation.

What will happen with Internet sites operated by educational institutions that harbour the same kind of illegal activities? Their Intranets cannot be monitored from the outside and they make copyright protected works downloadable free without any licence. Recently, a teacher scanned all of an educational resource and put it online, including the answer book. Unfortunately other establishments of the Education's network had also bought the same resource with the intent of using it for exams. The end result was that one teacher rendered unusable what the others had purchased for evaluation purposes.

College and university intranets are designed to serve as teacher/student forums, but there is sizeable traffic in sharing of protected works. With the arrival on the market of software, like the brand new iTunes University, designed to facilitate documents exchanges between universities, and the use of Dropbox (both apps available on iPads), the practices of legal and illegal sharing will explode. Without mandatory declaration of reproductions and strong collectives, what will become of our ability to monitor the situation and to make sure the writers and publishers get fair compensation?

Experience shows that school boards can be the first to unlawfully compete with publishers all the while using public funds to do so. One case has already been put forward and brokered by Copibec. FGA Montérégie, in association with 11 school boards, collected digital audio files for teaching language bought by separate school boards and made them available to all the schools of the region. The schools simply had to log on the database and freely download whatever files they wished. So there was only one purchase, followed by unfettered sharing without compensation through an institutional databank available for all without additional compensation.

## **DOUBLE STANDARD...**

With the present definition of fair dealing for education, all types of non-academic, community and private courses on domains as various as cooking, personal growth, massage, yoga, personal finance, sports training and language schools, would be authorized to photocopy or distribute a scanned copy of a protected work without having to compensate writers and publishers, all the while

charging fees for their courses including the learning material. This is a blunt appropriation of another person's work. A few years ago, students sued the Collège Marsan for the poor quality of its education. The students sent a copy of their mandatory course packs to two publishers (Chenelière and Educalivres) only to find out that they were in fact photocopies of two complete titles, one in management and one in economy. Not surprisingly the institution had not asked for permission nor paid any fee, but it cashed the full value of students' registration fees.

In the face of ever increasing  
technological innovation,  
copyright law must stay strong.

Buying rights for textbooks is quite costly for publishers \$2 millions per year for all French Canadian publishers, and \$6 millions on the years of curriculum renewal. But the cost of managing these rights is as high if not higher, since there is the work of the professionals for the identification of the rights holders and negotiations of the value of the rights to be acquired.

Is it fair to expect major investments from publishers in research and development, innovation, purchase and management of rights —they do this for educational purposes after all — while community and private trainers can appropriate their work without even having to ask for it, let alone pay for it? Why should all those who teach or train have the benefit of the exception except the publishers?

## **USELESSNESS OF DIGITAL LOCKS**

To attenuate the effects of fair dealing for education, C-11 offers us the solution to put copyrighted works under locks (TPMs). But locks are already outsmarted and outdated when it comes to the latest technologies. Free software and shareware are made available every day to crack files while information circulation is moving to new platforms and technologies fast becoming stealthier: clouds, Wi-Fi, streaming, etc.

Can one put a lock on a paper book? NO.

Can one put a lock on a screen capture? NO.

Can one put a lock on a Wi-Fi transmission? NO.



Digital technologies and their convergence are moving so fast that digital locks will always be one step away from being unlocked. Who would want to rely on them? That is why protection must be automatic and without formality the moment a work is created, as it is since the Berne convention. In the face of ever increasing technological innovation, copyright law must stay strong. Last but not least, for the e-books most publishers, especially literary publishers, prefer to rely on information rights management (IRM), watermarks and traceability to protect their works. Watermarks should be included in the C-11 definition of IRM [section 41.22(4)], and their bypassing or elimination be a violation subject to sanctions.

## **PAPER TECHNOLOGY AND PHOTOCOPIES**

There is no reason to foresee that paper-format will stop being used, especially not in education.

First, paper remains the least expensive and most convenient way to distribute materials to students where there is limited computer or tablet infrastructure. As a result, the vast majority of works used by the education system are still in paper form, irrespective of the form in which the material is originally produced or distributed.

Secondly, even if there were a TPM (lock) on the materials originally distributed by the publisher in digital format, once on paper, a digital copy can be recreated through a simple scan. A digital copy created, or recreated, can then be widely distributed without a TPM. TPMs are simply not useful or effective for materials distributed to students. With format shifting possible for all exceptions, it will become very easy to capture the information one way or the other and to transfer it from format to format until it becomes readable on a wide range of equipment as well as being printable.

Thirdly, there is no way copying practices will stop soon. The current copying licenses give educational institutions, from the preschool to university, permission to copy millions of works. The Copyright Board of Canada says that Canada's K-12 schools alone photocopy more than 10 billion pages annually, the equivalent of 50 million 200-page books, of which only 250 million pages, or 2.5%, are subject to copyright fees. The data collected from Québec's institutions shows an annual volume equivalent to 2.7 million 200 pages-books, which seems much but is actually much less than what is being photocopied.

Finally, the current rate of investments in digital classes and the pace of their implementation, with the buying and installation of the equipment, the technological personnel and the teachers training it requires, brings us to the next decade.

In the face of the new transitory practices already in place and growing (one resource per class, display on computers, smartboards and pads, course packs and tailor made educational materials), we can reasonably anticipate an increase in photocopying and in the distribution of copies without compensation, which will surely damage the publishing industry, perhaps irreparably.

## **FOR A QUALITY EDUCATION**

Let us dissipate once and for all the illusion of savings for our educational system. The cost of buying, installing and maintaining electronic equipment, of hiring the technical personnel to do it, of technical and instructional training for teachers to optimize their use in the teaching performance, of financing the extra workload for the preparation of local materials, of buying and managing equipment for students to ensure equal opportunities for all, are and will require investments that outweigh the cost of printed and digital books or collective licensing.

The first and foremost reason for such investments is to improve learning. It is clear educational establishments are starting to use these technologies to motivate students and attract new clientele, but up until now access to new technologies has not transformed students in better learners. In post-secondary education, studies on the use of touchpad technology in classes showed that they were largely used to reproduce traditional teaching strategies.

The blurring of the line  
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of fair dealing.

What is at stake here is our ability to turn the exponential opportunities of these technologies (prototyping, brainstorming, class forum, kinesthetic learning, collaborative work, common video streaming, etc.) into performing learning tools. And here we are with C-11 and the fear that, because of the UGC exception, it will increase the circulation of amateurish products reproducing thousands of works or extracts without the proper credits, of files with no or erroneous metadata or of untested contents which will complicate tracing of original works and ultimately reduce the frequentation of originals works. We are afraid that the blurring of the line between plagiarism and fair dealing soon migrates from the

private to the commercial sphere and further widens the interpretation of fair dealing.

Plagiarism is now growing at a fast rate all over Europe and North America. There is mounting evidence that it is becoming more common and widespread, some say it reached epidemic level with the increased access to digital material. A growing copy/paste culture permeates every level of education (teachers, administrators, researchers, students) and educational authorities are getting serious about it. For example, in 2009, 100 students at the Ottawa University were found guilty of plagiarism and given sanctions. Many institutions are already implementing plagiarism detection software. Should it not be one of the responsibilities of our educational system to educate to the respect of copyright not only for moral reasons but to safeguard and promote intellectual integrity and capacity for innovation? Who will be our content creators of tomorrow?

Can our educational system risk the loss of the filiation to the original works and its ability to know for sure whether a work is complete, truncated or otherwise tampered with? Can the educational system risk its long-standing partnership with the publishers who, denied of their rights, will stop investing in new cognitive strategies in keeping with the principles of digital ergonomics?

Who will generate the contents in all the necessary formats to further the learning experience? Who will produce the enriched eBooks, multimedia and animated textbooks for tomorrow's digital classes? Is our educational system ready to sacrifice years of exemplary cooperation in the creation of educational materials which return expertise in the school system in some form or other?

## **CONCLUSION**

Publishers and authors do share the common goals of the education sector and of the government: to ensure that the regulatory framework protects the copyright holder and encourages the ongoing creation and use of our content, in a manner that is effective, efficient and fair. However we have demonstrated how over and above loss of revenues, it is the creation of innovative educational materials and the performance of our national education system that could be at risk with Bill C11.

Only a clear delineation of the fair dealing provision will meet the publishers' legitimate expectation of a reasonable return when it comes to resources used in the education sector. Only a clear system of compensation for use will mean that Canadian novels, textbooks, articles, plays and poems will be available to succeeding generations of Canadian students.

Education sector advocates maintain that they have no intention of using this provision in such a way as to reduce the current flow of revenue to rights holders. We seek, by means of our proposed amendments to "fair dealing", clear wording which ensures this will be the case. By including our amendments, the government will establish favorable conditions and a secure market for the continued supply of high quality French Canadian learning resources in all formats. In the absence such conditions, Canadian students will become increasingly reliant on learning materials produced elsewhere.

The fairness factors of the CCH ruling do not ensure the viability of the publishing industry and would ultimately reduce the incentive to create original French Canadian digital and print materials needed by students and educators. Our proposed amendments to the fair dealing sections as well as insertion of the Berne "three-step test" into the Copyright Act, or an equivalent Canadian version of it, is essential.