



Université Laval

Brief prepared for

**The Standing Committee on Industry, Science and
Technology**

As a contribution to the review of the *Copyright Act*

Quebec City, September 14, 2018

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Introduction

The Université Laval was founded in 1852 and is the very first French-speaking university in the Americas.

Imbued with our culture of sustainable development, the Université Laval is one of Canada's principal research universities. With \$377 million provided last year, we rank 6th in research funding. The university has 3,730 professors, instructors and other members of the teaching and research staff who share their knowledge with more than 43,000 students, 25% of whom are enrolled in graduate studies. As the oldest French-speaking university in North America, the Université Laval has trained more than 300,000 people to date, all participating in their own way to society and its progress.

The Université Laval is open to the world and a leader in the Francophonie. We are committed to excellence in teaching and research, the dual foundations of our mission.¹

The Université Laval attaches great importance to protecting copyright

In the wake of the Supreme Court of Canada's five major decisions on copyright (the Pentalogy), including *Alberta*², and of the 2012 changes to the *Copyright Act*, the Université Laval decided, in May 2014, not to come to an agreement with Copibec, the collective rights management organization, on a comprehensive user licence, and chose to manage royalty payments itself through its own copyright office [Bureau du droit d'auteur].

The Université Laval then took serious measures to demonstrate the great importance that we attach to protecting copyright. Some of those measures are:

¹ www.ulaval.ca.

² *Alberta (Education) v. Canadian Copyright Licensing Agency*, 2012 SCC 37 (CanLII), par. 23
French version: <https://www.canlii.org/fr/ca/csc/doc/2012/2012csc37/2012csc37.html?resultIndex=1>;
English version: <https://www.canlii.org/en/ca/scc/doc/2012/2012scc37/2012scc37.html>.

- a) A policy and guidelines on the use of the works of others in teaching, learning, research and private study. Specifically, this included a threshold that limits the use of a work to 10%.³
- b) Opening a copyright office [Bureau du droit d'auteur] to ensure compliance with the policies and guidelines, and to provide services and advice to educators, students and a range of users.
- c) The copyright office set up a website⁴ for users, providing access to a copyright guide,⁵ an assistance tool,⁶ and a number of videos explaining the need to protect copyright.⁷
- d) Staff training (for librarians, technicians and support staff).
- e) Many opportunities for training and awareness about protecting copyright for university departments, teaching staff and students.
- f) Establishing verification measures, including auditing and monitoring teaching staff as to their teaching material.

These measures were adopted in the spirit of maintaining the balance that the *Copyright Act* seeks to establish between the rights of authors and those of users.

While the Université Laval will, by the end of 2018, once more be part of the Copibec licence negotiated with the other Quebec universities in 2017, we still intend to maintain our copyright office internally. We will continue our awareness campaigns on protecting copyright with the university community, as we continue to uphold the principle of fair dealing in fulfilling our mission.

³ After negotiating and reaching an agreement in principle with the management organization Copibec, which had launched a class-action lawsuit, the policy and guidelines were suspended, and the Université Laval signed on to the Copibec licence that applies to the other universities in Quebec until 2021.

⁴ <https://www.bda.ulaval.ca/> [The BDA sources in footnotes 5, 6 and 7 are available in French only].

⁵ *Guide du droit d'auteur, de l'utilisation de l'œuvre d'autrui et d'autres considérations juridiques relatives aux activités d'enseignement, d'apprentissage, de recherche et d'étude privée à l'Université Laval*, 2014: https://www.bda.ulaval.ca/wp-content/uploads/2014/05/GuideJuridique_DroitDauteur_Version_1.0.pdf.

⁶ Tools to help in decision making: <https://www.bda.ulaval.ca/guide-decisionnel/page-1/>.

⁷ Dominique LAPIERRE, *L'utilisation de l'œuvre d'autrui à des fins d'enseignement*. Université Laval, April 23, 2014: <https://www.bda.ulaval.ca/video-gestion/>;

Bureau du droit d'auteur, Université Laval, in collaboration with the Faculté des sciences et de génie, **Le droit d'auteur à l'Université : Comment procéder?** <https://www.bda.ulaval.ca/tutoriels/comment-proceder/>;

Bureau du Droit d'auteur, Université Laval, in collaboration with the Faculté des sciences et de génie, **Diffusion de PDF d'articles**, <https://www.bda.ulaval.ca/tutoriels/articles/>;

Bureau du Droit d'auteur, Université Laval, in collaboration with the Faculté des sciences et de génie, **Utiliser une image du web**; <https://www.bda.ulaval.ca/tutoriels/images-web/>.

Education: one of the uses covered by the fair dealing exception

The Université Laval welcomed the *Copyright Modernization Act*⁸ when, in 2012, it amended section 29 of the *Copyright Act* to add **education** to the uses covered by the fair dealing exception.

However, the Université Laval must make it clear that, since 2012, the fair dealing exception has been encountering some difficulties in application. The difficulties stem from the lack of specific indicators in the *Copyright Act* as to the limits of permitted use and from the lack of analysis of the issue of fair dealing. In this respect, the criteria established by the Supreme Court of Canada in *CCH Canadian Ltd v. Law Society of Upper Canada*⁹ remain difficult to apply for those working in the field of education.

The Université Laval supports the principles that apply to the field of education, as set out by the Supreme Court of Canada. They include:

- a) The objective of the *Copyright Act* is to maintain a balance between the rights of users and those of copyright holders.¹⁰
- b) The fair dealing exception is a user's right and must not be interpreted restrictively.¹¹
- c) Educational institutions use material for teaching purposes. The goal of teachers when they use publications is to provide the educational material the students need for their learning. Teachers and students share a symbiotic purpose.¹²

This was the context in which, in 2014, the Université Laval decided not to come to an agreement with Copibec, the collective rights management organization, on a comprehensive user licence, and chose to manage royalty payments itself through its Bureau du droit d'auteur.

⁸ *Copyright Modernization Act* (S.C. 2012 c. 20):

French version: http://lois.justice.gc.ca/fra/LoisAnnuelles/2012_20/TexteCompleet.html

English version: http://lois.justice.gc.ca/eng/AnnualStatutes/2012_20/FullText.html.

⁹ *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), par. 53

French version:

<https://www.canlii.org/fr/ca/csc/doc/2004/2004csc13/2004csc13.html?autocompleteStr=2004%20CSC%2013&autocompletePos=1>

English version: <https://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>.

¹⁰ *Théberge v. Galerie d'art du Petit Champlain*, 2002 SCC 34 (CanLII), par. 30 and 32: French version:

<https://www.canlii.org/fr/ca/csc/doc/2002/2002csc34/2002csc34.html?autocompleteStr=th%C3%A9berge&autocompletePos=1>;

English version: <https://www.canlii.org/en/ca/scc/doc/2002/2002scc34/2002scc34.html>.

¹¹ *CCH Canadian v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), par. 10 and 48.

¹² *Alberta (Education) v. Canadian Copyright Licensing Agency*, 2012 SCC 37 (CanLII), par. 23

French version: <https://www.canlii.org/fr/ca/csc/doc/2012/2012csc37/2012csc37.html?resultIndex=1>;

English version: <https://www.canlii.org/en/ca/scc/doc/2012/2012scc37/2012scc37.html>.

The Federal Court of Appeal¹³ recently upheld two decisions of the Copyright Board¹⁴ that establish the following criteria as to the limits of the uses that may constitute “fair dealing”:

- a) Reproducing one to two pages of a work that does not exceed 2.5% of that work does not constitute a major portion and therefore does not require an analysis of fair dealing.
- b) When the part of a work that is copied represents 5% or less of that work, the extent of the use is likely fair.
- c) When the part of a work that is copied represents more than 5%, and does not exceed 10%, the extent of the use does not affect the fairness of that use.
- d) When the part that is copied represents more than 10%, the extent of the use likely makes that use unfair.

Like the Université Laval, many universities in Canada have adopted a policy on copyright that establishes a maximum usage threshold of 10% of a work.¹⁵

The recent decisions of the Federal Court of Appeal and the Copyright Board seem to support Canadian universities on the 10% threshold established for their policies on fair dealing.

The Université Laval supports the publishing industry

By virtue of their roles and responsibilities, the Université Laval’s research scholars publish much of the copyright-protected teaching material used to benefit the students. As a result, they are supporting the publishing industry.

¹³ *Access Copyright v. British Columbia (Education)*, 2017 FCA 16 (CanLII): <https://www.canlii.org/en/ca/fca/doc/2017/2017fca16/2017fca16.html?resultIndex=1>; *Canadian Copyright Agency v. Canada*, 2018 FCA 58 (CanLII), par. 127 and 128: <https://www.canlii.org/en/ca/fca/doc/2018/2018fca58/2018fca58.html?resultIndex=1>.

¹⁴ Copyright Board Canada – Statement of Royalties to be collected by Access Copyright for the reprographic reproduction, in Canada, of works in its repertoire – Provincial and Territorial Governments, 2005-2014 (May 22, 2015), par. 204 and 205: <http://www.cb-cda.gc.ca/avis-notice/active/2015/access1-22052015-2.pdf>;
Copyright Board Canada – Statement of Royalties to be collected by Access Copyright for the reprographic reproduction, in Canada, of works in its repertoire – Elementary and Secondary Schools 2010-2015 (February 19, 2016), par. 288: <http://www.cb-cda.gc.ca/decisions/2016/DEC-K-122010-2015-19-02-06.pdf>.

¹⁵ Study conducted by Lisa DI VALENTINO, *Review of Canadian University Fair Dealing Policies*, (2013) FIMS WORKING PAPERS, <http://ir.lib.uwo.ca/fimswp/2>.

In addition, in recent years, the Université Laval has allocated a budget to acquire new material for its library.

In the 2012-2013 year, the Université Laval's library acquisition budget was \$12,284,163, 64% of which was reserved for digital material. In 2017-2018, the budget was \$12,172,273, but 85% of that amount is to acquire digital material.

The use of digital material at the Université Laval greatly exceeds the use of print material. For example, in 2016-2017, there were more than 3,240,000 downloads of digital material compared to 215,408 print loans.

The emergence of licences for the use of digital material means that the Université Laval can make most of its acquisitions in digital format.

The Université Laval also supports scientific publishing. However, we must point out that this medium is controlled by five large international publishers that operate the market like an oligarchy. Depending on their area of study, our research scholars are often required to publish with those publishers in order to secure their tenure and their research grants. In addition, in certain cases, they are forced to pay the publishers in order to be published, and to give up some of their rights.

Works released by these scientific publishing houses take up a significant part of the Université Laval's library acquisition budget. The university is therefore paying a high price to buy back the research results of authors whose salaries and research grants come essentially from public funds.

Observations and Recommendations

(a) The fair dealing exception in section 29 of the *Copyright Act* constitutes a users' right that must be freely exercised.

(b) The Université Laval recommends that the exception be maintained, but that section 29 of the Copyright Act be amended to include clear guidelines describing this right in practical terms for the field of education.

(c) The establishment of a copyright office [Bureau du droit d'auteur], and of a policy on the fair use of works enable the Université Laval to demonstrate that the exception is both practical and viable. Our experience in recent years has taught us that the exception would be even more practical if guidelines as described were in place.

(d) Educational institutions must be able to use works fairly for the benefit of the students without fear of being taken to court.

(e) Rescinding the fair dealing exception, as some briefs have called for, would compromise research work. It would also hamper the creation of new works, the sharing of knowledge and the availability of those works. But these are the objectives championed by the *Copyright Modernization Act* that came into effect in 2012.

(f) For all these reasons, the Université Laval considers it important to maintain all the other exceptions described in sections 29.21, 29.22, 30.01, 30.02, 30.04 and 30.06 of the *Copyright Act*.

(g) Finally, no finger can be pointed at fair dealing as the cause of all the difficulties that publishers and authors may encounter in the market. Publishing is presently going through major changes, just like other sectors of the economy that are affected by the digital revolution.

(h) The decline in revenue to, and in royalties distributed to authors by, management organizations, instead stems essentially from the shift to digital use and the emergence of licences other than those that the management organizations provide.

(i) In the 21st century, the mission of education and the imperatives of access to knowledge for the greatest number mean that copyright management tools must be tailored to the societal changes that the digital transformation requires.

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