

BRIEF PRESENTED TO THE STANDING COMMITTEE
ON INDUSTRY, SCIENCE AND TECHNOLOGY AS PART
OF THE REVIEW OF THE
COPYRIGHT ACT

Concordia University
McGill University
Université de Montréal
Université de Sherbrooke

Montréal, June 5, 2018

Brief by Concordia University, McGill University, Université de Montréal and Université de Sherbrooke, presented to the Standing Committee on Industry, Science and Technology

Concordia University, McGill University, the Université de Montréal and the Université de Sherbrooke wish to submit their position to the Standing Committee on Industry, Science and Technology as part of the review of the *Copyright Act* (CA).

The mission of the universities

The fundamental mission of universities is teaching and research. Within this context, documentary resources are an essential raw material for the entire university community.

Quebec universities want to provide accessible and quality education to their students, two key elements concerning documentary resources.

In Quebec universities there are creators, authors and publishers, all of whom are copyright holders, and there are users, all under one roof. In addition, many members of the university community are both copyright holders and users.

Because of this, Quebec universities are highly sensitive to copyright issues. They recognize and respect the rights of holders, but they have an equally important interest in the rights of users.

Understanding the unique position held by universities concerning copyright requires a contextual approach for the following reasons:

- a) Because of their roles and responsibilities, research professors in Quebec universities publish much of the educational material protected by copyright and used for the benefit of students. Research professors and students worldwide use research results for the advancement of knowledge.
- b) The dissemination of research allows students and researchers from around the world to access high-quality content thereby promoting knowledge sharing and the development of an innovative economy.
- c) The publication of research findings by research professors helps support the publishing community.¹

¹ The total of the acquisition budgets for Quebec university libraries in 2015-2016 was \$75,225,759 (2016-2017 statistics are not yet available publicly). Source: BCI statistics (in French only), page 7- http://www.bci-gc.ca/wp-content/uploads/2017/07/Statistics-generales_publication_2015-2016.pdf.

- d) Scientific publishing is controlled by five major international publishers who corner a market showing all the attributes of an oligopoly. Depending on the discipline, research professors are often required to publish with these companies to earn tenure and research grants. The publications of these publishers capture a significant portion of university library purchasing budgets and represent a significant portion of the texts stored as files in digital banks. In addition, in some cases, aside from their obligation to surrender some of their economic rights, some authors must pay to be published. Therefore, universities buy back the research results of authors at inflated prices; the authors' salaries and research grants come mainly from public funds.
- e) Research professors produce a large proportion of the content found in university libraries.

The 2012 legislative changes

Quebec universities welcomed the *Copyright Modernization Act*,² which amended section 29 of the CA to include, notably, education among the purposes covered by the fair dealing exception.

They underline the objective of the legislator, which is mainly stated in subparagraphs (c) and (d) of the summary of the Act:

Summary

This enactment amends the Copyright Act to...

(c) permit businesses, educators and libraries to make greater use of copyright material in digital form;

(d) allow educators and students to make greater use of copyright material. (Emphasis added)

Supreme Court of Canada jurisprudence:

Quebec universities support the principles applicable to the education community set out by the Supreme Court of Canada, including the following:

² *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

- a) The objective of the CA is to maintain a balance between the rights of users and those of copyright holders.³
- b) The right to use the fair dealing exception is a user's right and must not be interpreted restrictively.⁴
- c) Educational institutions use materials for teaching purposes. When using publications for students, a teacher's goal is to provide them with the teaching material necessary for them to learn. Teachers and students share a symbiotic purpose.⁵

Copyright management in Quebec

In Quebec, the Société québécoise de gestion collective des droits de reproduction (Copibec) manages the proprietary rights of many authors and publishers. Copibec offers to negotiate broad-based usage licences with Quebec universities ("global licences") that cover the usage rights of works, in particular, through reproduction in print or digital media. It also offers specific licences for uses not included in the global licence or that exceed the limits provided by the global licence, for example, the use of more than 15% of a work.

This licence simplifies the application and management of the proprietary rights of rights holders. This management model works reasonably well since all parties made compromises in negotiating the terms and conditions of the global licence.

Authors and publishers who have not entrusted Copibec with a management mandate, negotiate their proprietary rights themselves with the universities, as the case may be.

Royalties paid by Quebec universities

Universities that subscribe to the global licence pay user fees to Copibec based on the number of equivalent-to-full-time students ("EFTS").

³ *Théberge v. Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 (CanLII), at paras. 30 and 32: French version: <https://www.canlii.org/fr/ca/csc/doc/2002/2002csc34/2002csc34.html>

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

⁴ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), at paras. 10 and 48:

French version: <https://www.canlii.org/fr/ca/csc/doc/2004/2004csc13/2004csc13.html>

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

⁵ *Alberta (Education) v. Canadian Copyright Licensing Agency*, 2012 CSC 37 (CanLII), at para. 23:

French version: <https://www.canlii.org/fr/ca/csc/doc/2012/2012csc37/2012csc37.html>

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

Those negotiated fees cost \$25.50/EFTS in 2012-2013, \$21 in 2013-2014, \$15 in 2015-2017 and from 2017 to 2021, they were negotiated to \$13.50.

Since 2012, Concordia University, Université de Sherbrooke, Université de Montréal and McGill University have paid Copibec a total of approximately \$14,510,000 for the licence.

Furthermore, since 2012, those same universities have paid Copibec a total of approximately \$713,000 for specific usage requests.

Quebec universities support the publishing industry

Quebec universities have not reduced the purchase of new material for their libraries.

According to Statistics Canada, in 2016, sales of textbooks exceeded \$384 million (up 4.9% compared to sales of \$366.1 million in 2014).⁶

Expenditures by all Quebec universities for the purchase of documentation rose from \$59.8 million in 2009-2010 to \$76.4 million in 2016-2017, an increase of 27.8%.

Content purchases by libraries are changing and becoming increasingly digital. The acquisition of digital material by Quebec universities represented on average between 85% and 95% of their acquisition budget for 2017-2018.

The use of digital material far surpasses that of printed works. For example, at Concordia University, in 2016-2017, there were 32 million downloads of digital material versus 500,000 book loans in print format.

⁶ Statistics Canada, *Book Publishing Industry, 2016*, published in The Daily, Friday, March 23, 2018:
French version: <http://www.statcan.gc.ca/daily-quotidien/180323/dq180323c-fra.pdf> -
English version: <http://www.statcan.gc.ca/daily-quotidien/180323/dq180323c-eng.pdf>
Statistics Canada, *Book Publishing Industry, 2014*, published in The Daily, Thursday May 19, 2016:
French version: <http://www.statcan.gc.ca/daily-quotidien/160519/dq160519e-fra.pdf>
English version: <http://www.statcan.gc.ca/daily-quotidien/160519/dq160519e-eng.pdf>

Quebec universities place great importance on copyright compliance

Since 2012, Quebec universities have implemented significant measures that demonstrate the great importance they attach to copyright compliance. For example:

- a) Adoption of copyright policies, guidelines and guides;
- b) Staff training (librarians, technicians and clerks) to ensure compliance with policies, guidelines and guides;
- c) User training and awareness of copyright compliance;
- d) Establishment of a digital bank and purchase of software to ensure its proper management.

Observations and recommendations:

- a) The fair dealing exception must be maintained.
- b) The objective pursued by the legislator in 2012 is still relevant in 2018. Maintaining the fair dealing exception is in no way inconsistent with the balance sought between creator-rights holders and users, as evidenced by the harmonious coexistence of those two parties within the unique context of universities.
- c) We must stop viewing fair dealing as a way of pitting rights holders against users, particularly within the university environment. Backtracking would be counterproductive and would do disservice to the community. Education in the 21st century requires tools that are adapted to a rapidly changing world.
- d) Amending section 29 of the CA on fair dealing to limit its application “only to cases where access to works is otherwise impossible,” as some have already argued, would hinder the creation of new knowledge and restrict the dissemination and use of works.⁷
- e) Amending the CA to impose minimum and maximum penalties for each copyright infringement, regardless of its seriousness and without taking into consideration the discretionary powers of the courts, as some interveners have suggested in their briefs, would have the effect of introducing a systematic compensation structure, while copyright requires a nuanced application based on the facts of each case.

⁷ *Copyright Modernization Act* (S.C. 2012 c. 20), see the preamble.

- f) Universities must be able to use works in a fair manner for the benefit of students without fear of being sued in court.
- g) Limiting the scope of fair dealing would have significant impact on the cost of education for students as well as for the quality of teaching and accessibility to teaching materials.
- h) For all these reasons, Quebec universities consider it important to maintain all the other exceptions provided for in sections 29.21, 29.22, 30.01, 30.02, 30.04 and 30.06 of the CA.
- i) Finally, in light of the recent evolution of access to documentary resources by Quebec universities, we believe that the decline in revenues of copyright collectives, publishers and authors does not stem from the use of the fair dealing exception. It is more attributable to a diversification of access sources supported and accelerated by digitization, notably by the emergence of alternative and rights-free access licences able to adequately meet the needs of the university community.

Montréal, June 5, 2018