

**Association of Universities
and Colleges of Canada**



**Association des universités
et collèges du Canada**

**AUCC SUBMISSION TO THE MINISTERS OF INDUSTRY AND
CANADIAN HERITAGE CONCERNING COPYRIGHT LAW REFORM**

December 2007

Association of Universities
and Colleges of Canada



Association des universités
et collèges du Canada

Established in 1911, the Association of Universities and Colleges of Canada represents 92 Canadian public and private not-for-profit universities and university-degree level colleges. Our mandate is to foster and promote the interest of higher education, both within Canada and abroad.

The government announced in the Speech from the Throne on October 16 2007 that it will improve the protection of cultural and intellectual property rights in Canada, including copyright reform. This submission outlines AUCC's perspectives on some key copyright reform issues and makes recommendations in four areas.

The importance of balance in a modern and competitive copyright regime

The federal government's science and technology strategy, as set out earlier this year in *Mobilizing Science and Technology to Canada's Advantage*, notes the importance of balance in patent law, and, similarly, indicates that "Canada is committed to ensuring that its copyright framework provides the legal protection necessary to give copyright-based industries the confidence to invest in and roll out new business models that make full use of leading-edge technologies, while promoting the use of these technologies by researchers to gain access to the knowledge and information needed for innovation and competitiveness" (page 52).

AUCC strongly supports the principle of balance in our copyright law. As both substantial creators and users of copyright works, Canadian universities recognize the importance of the balance in copyright law between the desire of creators and other rights holders to receive fair remuneration for the use of copyright works and the public interest in maintaining reasonable access to copyright works for purposes such as research, education and the dissemination of knowledge.

In general, academic creators, who create a significant proportion of the works utilized in educational institutions and libraries – often with public research funding – have different motivations for creation and different views on issues such as exceptions and limitations than those who create for commercial purposes. While remuneration for use of their works is a consideration for academic creators, most university researchers and scholars are motivated as much or more by the need to disseminate their works to contribute to the advancement of knowledge and scholarship in their respective disciplines, and to further scholarly debate. In return, they require reasonable and timely access to cutting-edge scholarship and research works produced by other researchers. To this end, AUCC has long supported the fair dealing provision and other statutory exceptions in the *Copyright Act*.

The need for balance in copyright law has been endorsed by the Supreme Court of Canada in a series of recent cases. The Supreme Court's decisions in the *Théberge* and *CCH* cases, for example, emphasized that the proper balance in copyright law lies not only in recognizing a creator's rights but in giving due weight to their limited nature.

The S&T strategy also states that a modern intellectual property regime that is competitive with those of Canada's trading partners is critical for researchers and creators. AUCC strongly agrees with this proposition.

A robust fair dealing provision and statutory exceptions are key ingredients of a modern and competitive copyright regime. Support for this statement can be found in a recent study on fair use released by the U.S. Computer and Communications Industry Association. The study, entitled *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair*

Use, looked at a number of industries and sectors, including the education sector. It concluded that exceptions to copyright protection promote innovation and are a major catalyst of U.S. economic and productivity growth. Fair use and other limitations and exceptions accounted for \$4.5 trillion in revenues and \$2.2 billion in value added in 2006, or roughly 16.2 percent of GDP in the U.S.

Fair dealing and statutory damages

Unfortunately, 1997 amendments to the Canadian *Copyright Act* created an imbalance in the law that undermines the use of the fair dealing exception to facilitate the provision of information to researchers in Canada and places university researchers at a disadvantage in comparison with their colleagues in comparable jurisdictions.

In the U.S., the U.K. and Australia, educational institutions and academic libraries are able to utilize fair dealing, statutory exceptions, and modern information and communications technologies to satisfy the needs of researchers in their own institutions and in other institutions for timely and efficient access to scholarly, scientific and technical publications and to the works of their peers. In comparison, specific exceptions in the Canadian *Copyright Act*, insofar as they address this issue, permit a librarian to send only a paper format copy of a scholarly, scientific or technical work to a researcher located within the same institution or at another institution.

Our copyright law thus handicaps university researchers and damages their ability to conduct collaborative research utilizing new information and communications technologies. If Canadian researchers and the universities in which they conduct their research are constrained by undue administrative and financial burdens and legal restrictions that are not imposed on their colleagues in other jurisdictions, it makes it more difficult for them to compete in a highly competitive international research marketplace and impedes their efforts to mobilize science and technology to Canada's advantage.

Despite the gaps in our law compared to other jurisdictions, recent decisions of the Supreme Court of Canada have provided some clarification of the scope and nature of fair dealing, and this in turn has opened up the possibility that fair dealing can be used by Canadian educational institutions and libraries seeking to deliver scholarly, scientific and technical information electronically to the desktops of researchers. To do so, university and library staff must make judgments as to whether each copy falls within the scope of the fair dealing exception. However, the statutory damages regime in the *Copyright Act* poses the threat of high damage awards for infringement, even if the infringement is unintended. This threat provides a major incentive for university and library staff to emphasize risk aversion and a restrictive approach to fair dealing that discourages the use of modern technologies to distribute scholarly, scientific and technical research materials. This outcome is the direct opposite of the government's intent, as stated in the S&T strategy, to promote "the use of these technologies by researchers to gain access to the knowledge and information needed for innovation and competitiveness" (page 52).

The statutory damages regime in the Canadian *Copyright Act* operates on the basis of strict liability. It allows a copyright holder to obtain an award in an amount ranging from \$500 to \$20,000 for each instance of copyright infringement, even when a person is unaware that his or

her activity may infringe copyright. It is clear from the size of these financial penalties that the statutory damages regime is intended to address commercial piracy. The size of the possible awards is completely disproportionate in the context of copying under fair dealing by the staff of a not-for-profit educational institution or library.

Canadian law in this area contrasts sharply with the treatment of fair use copying under the statutory damages regime in U.S. copyright law. Our regime closely parallels the U.S. *Copyright Act*, but the Canadian Act omits a crucial element of the U.S. statutory damages framework. Section 504 of the U.S. *Copyright Act* insulates non-profit educational institutions, libraries, and their employees from a claim of statutory damages where a person making a copy has reasonable grounds to believe that the copy would qualify as fair use. U.S. law clearly recognizes that it is inappropriate to allow statutory damages to be awarded against individuals employed by not-for-profit public institutions who engage in good faith fair use copying.

This type of protection should be incorporated into Canadian law, and as a matter of principle, could be extended to prohibit an award of any type of damages against any individual who has reasonable grounds to believe that his or her copying is fair dealing. The current law punishes an individual who may have no intention of infringing copyright but makes an incorrect decision about the scope of fair dealing even though the exception has no clear boundaries so that it can remain flexible and adaptable to a wide variety of circumstances.

AUCC recommendation on fair dealing and statutory damages:

AUCC recommends that Canada's *Copyright Act* be amended to insulate any individual from a claim of damages where a person has reasonable grounds to believe that his or her copying qualifies as fair dealing.

The proposed amendment would further the S&T strategy's goals of promoting the use of new technologies by researchers to gain access to the knowledge and information needed for innovation and competitiveness and modernizing our copyright regime to make it competitive with the copyright regimes of our trading partners.

The educational use of the publicly available Internet

The S&T strategy states that Canada must develop the best-educated, most-skilled, and most flexible workforce in the world in order to create a *People Advantage*. It also notes that postsecondary institutions are critical in providing Canadians with the knowledge and skills they need to succeed in the labour market.

The Internet is one of the most important teaching and learning resources used in Canada's universities to provide Canadian students with the knowledge and skills they will require in the modern knowledge-based economy. This is particularly true for students in rural and remote communities, including Aboriginal students, who often have limited access to physical learning resources.

When students use the Internet in their learning they benefit not only from the vast wealth of information, available on the Internet, but also from the judgment they must exercise in finding relevant information sources, assessing their credibility, adapting the information to new and innovative uses such as inclusion in multimedia projects, and utilizing and developing new and innovative Internet-related technologies. A number of major Internet-related technologies were developed by students learning from and experimenting with the publicly available Internet. However, students, teachers and educational institutions need some assurance that copyright law will not discourage common teaching and learning activities that involve the use of the publicly available Internet. This is particularly important in light of the statutory damages regime in the *Copyright Act*.

While many individual uses of publicly available works on the Internet – such as printing a personal copy of an online newspaper article – may fall within the scope of the fair dealing exception or be subject to an “implied licence”, the situation is less clear in respect of some other uses, especially activities that involve group uses of online works. For example, it is not clear whether it is fair dealing or whether there is an implied licence if students incorporate a copy of a publicly available Internet work into a class multimedia project or if a professor takes a video that has been legally posted on a web site and plays it at the front of a class on a smart board or copies it to a restricted access course web site for asynchronous viewing at a time chosen by students who are learning from a distant location.

Over the past few years, AUCC and a number of other national education organizations, including the Copyright Consortium of the Council of Ministers of Education, Canada, have sought a new exception in the *Copyright Act* to permit educational use of publicly available works on the Internet. By the term “publicly available work”, we mean a work or other subject-matter that is communicated to the public by telecommunication, with the consent of the copyright owner, without expectation of payment, and without any technological measures such as a password, encryption, or similar techniques intended to limit access to or distribution of the work. The proposed exception would not apply where a professor or student has knowledge, or reasonable grounds to suspect, that a work has been posted on the Internet without the consent of the copyright owner.

One of the key assumptions underpinning our proposal is that an individual or organization that posts a work on the Internet (e.g., to a web page) without utilizing any technological measures to protect an online work does not normally have any intention of marketing the work commercially. Those who do have such intentions would utilize technological measures that limit access to or distribution of their works.

Our assumption regarding the intentions of those who make works publicly available on the Internet is supported by the findings of a 2003 study commissioned by Industry Canada that examined the economic impact of copyright on technology-enhanced learning. The study concluded that the education community’s proposal regarding the educational use of publicly available works on the Internet “can have no impact on creative incentives where works have been produced without any expectation of compensation. This situation applies to most of the material on public [web] sites.” The study went on to support the education community’s proposal as the best approach for addressing this issue and not the extended licensing proposal put forward by some rights holder organizations.

Given the lack of economic motive for the posting of the vast majority of publicly available Internet works, AUCC is confident that the education community's proposal meets the three-step test for exceptions and limitations set out in international copyright treaties and would not contravene Canada's obligations under those treaties. The three step test provides that parties to a treaty may enact exceptions and limitations to the rights given copyright owners under the treaty "in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

AUCC recommendation on the educational use of the publicly available Internet:

AUCC recommends that Canada's Copyright Act be amended to include a new exception to allow the educational use of publicly available works on the Internet without infringing copyright.

There are two other issues of importance to universities that will arise should the government choose to amend copyright law to ensure that it complies with the 1996 WIPO treaties. The two issues are the circumvention of technological measures used to protect digital works and the clarification of the rules relating to copyright as they apply to Internet Service Providers (ISPs).

Circumvention of technological measures

The WIPO copyright and neighbouring rights treaties require that countries adhering to the treaties must provide adequate legal protection and effective legal remedies against the circumvention of technological measures used to protect copyright works.

There are different options open to the government to meet this requirement. At one end of the spectrum is the extremely strict approach taken by the U.S. *Digital Millennium Copyright Act (DMCA)*. That Act prohibits the circumvention of a technological measure used by copyright owners to control access to their works and prohibits the manufacture, sale, distribution, or trafficking of tools and technologies that make circumvention possible. Only a few very narrow exceptions to the prohibition are permitted.

The U.S. approach goes much farther than is required by the WIPO treaties and has created a series of unintended consequences that have been well documented by the U.S. Electronic Frontier Foundation. The overly strict prohibition against the circumvention of technological measures in U.S. law undercuts fair use and other statutory exceptions in the U.S. *Copyright Act* by preventing access to works for legal purposes; causes a chill on computer security research because university researchers have been threatened with prosecution if they reveal security flaws at academic conferences; and prevents computer users from disabling programs like the "rootkit" copy-protection software on Sony music CDs that was secretly imbedded in the computers of CD purchasers and left their computers vulnerable to malicious viruses and hackers.

An overly strict prohibition against circumvention of technological measures would have a very negative impact on the balance between creators' interests and users' interests that is inherent in

Canadian copyright law. A 2001 discussion paper released by the Intellectual Property Policy Directorate of Industry Canada and the Copyright Policy Branch of the Department of Canadian Heritage, the *Consultation Paper on Digital Copyright Issues*, noted that a strict prohibition against circumvention of technological measures “could potentially result in a new right of access, the scope of which goes well beyond any existing right, and would represent a fundamental shift in Canadian copyright policy. It could serve to transform a measure designed for protection into a means of impeding legitimate uses”.

AUCC shares this concern. The underlying rationale for a prohibition against circumvention of technological measures is to deter copyright infringement. This goal is already met through existing provisions in the *Copyright Act* that prohibit infringement and make strong remedies available to copyright owners. An overly strict prohibition against circumvention of technological measures may do little to stop individuals intent on engaging in copyright infringement but it could do much to impede legitimate uses by persons and organizations that, in many cases, have already purchased a work. For example, an educational institution that is allowed by the *Copyright Act* to perform a sound recording in a classroom may be unable to do so if technological protections prevent performance of the CD on the institution’s equipment and the law prohibits circumvention of the technological measures.

A more moderate approach would be to prohibit the circumvention of a technological measure if the purpose of the circumvention is to infringe copyright. This approach meets the requirements of the WIPO treaties without creating the unintended collateral consequences attached to an overly strict prohibition.

AUCC recommendation on the circumvention of technological measures:

AUCC recommends that any legislated prohibition against the circumvention of technological measures apply only where the purpose of the circumvention is to infringe copyright.

The liability of Internet Service Providers

Another very important issue that will arise from ratification of the WIPO treaties is the need to clarify the rules regarding copyright liability for Internet Service Providers (ISPs). Most universities function as ISPs through the provision of Internet services to their faculty and students for the purposes of teaching, learning and research. There are really two distinct but related issues that must be addressed. The first is whether ISPs should be liable for their own technical activities and whether those activities constitute unauthorized communications of copyright works. The second is whether ISPs should be liable for authorizing infringements committed by users of their services.

The *Copyright Act* does not currently set out clear rules on these issues but some guidance can be found in the decision of the Supreme Court of Canada in the case *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* (the “Tariff 22” decision). In this decision, the Supreme Court of Canada ruled that Section 2.4(1)(b) of the *Copyright Act* (the “common carrier exception” that insulates telephone companies and similar

service providers from liability for the actions of their subscribers) applies to ISPs as well as long as an ISP does not alter the content of the communication and confines itself to the role of providing “a conduit” for information communicated by others. In the Court’s view, copies made by an ISP as part of the technical process of facilitating Internet communications, including the cached copies of Internet web pages stored on an ISP’s server to avoid bandwidth “bottlenecks”, fall within section 2.4(1)(b) of the *Copyright Act* and do not constitute infringing communications of copyright works. This ruling is consistent with the *Agreed Statements* concerning the WIPO treaties which state that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication under international copyright treaties.

AUCC recommendation on the liability of ISPs as conduits for Internet communications:

AUCC recommends that the *Copyright Act* be amended to clarify that an ISP is not liable for copyright infringement when it acts merely as a conduit for Internet communications and does not alter the content of the works communicated by users of its Internet services.

Neither the decision by the Supreme Court in the Tariff 22 case nor the law are clear about the liability of ISPs for authorizing infringement by users of its services. An example would be the situation where a user of an ISP’s services places infringing materials on a web site that is hosted (stored) on the ISP’s server. Does the ISP have liability for authorizing the web site owner’s infringement?

One legislative option to address this issue would be to introduce a “notice and notice” system under which an ISP must forward to its user an allegation by a copyright owner that material on the user’s web site infringes copyright. The ISP would be required to take steps to remove the material from the hosted web site only after there has been a finding of infringement by a court and the issuance by the court of a removal order. If an ISP failed to take the steps mandated by the court order, it would be liable for authorizing infringement. This “notice and notice” approach is the existing industry practice of ISPs in Canada and has worked well for both rights holders and for ISPs. The “notice and notice” approach is supported by the Canadian Association of Internet Providers, representing major Canadian ISPs.

An alternative legislative option promoted by some interests would see the introduction of a “notice and takedown” regime similar to the one set out in the *Digital Millennium Copyright Act (DMCA)* in the U.S. Under this approach, when an ISP is notified by a copyright owner that there is allegedly infringing material on a web site, the ISP must respond expeditiously to remove, or disable access to, the material that is claimed to be infringing. AUCC agrees with the view of the Canadian Association of Internet Providers that this approach has the serious disadvantage of putting ISPs in a “quasi-judicial” role that conflicts with the interests of the users of their services. A “notice and takedown” approach could create incentives for ISPs to take the path of least resistance by removing content without warning or evidence of actual infringement, and thereby harm freedom of expression. This is not a minor matter for universities given that many university faculty members maintain web sites, often related to the university courses that they teach and their research.

AUCC recommendation on the liability of ISPs for infringements by users of their services:

AUCC recommends that the *Copyright Act* be amended to codify a “notice and notice” system under which an ISP’s obligations would be to forward to its users any allegations of copyright infringement made by a copyright owner. An ISP should not be liable for infringing material that has been posted on a web site by a user of the ISP’s services unless, after a court has ruled that the material is infringing and orders its removal, the ISP fails to comply with the court order within a reasonable time.

Conclusion

AUCC believes that the following recommendations are in the best interests of Canadians and would contribute very significantly to the goals of the government’s science and technology strategy and to providing the necessary balance in Canadian copyright law:

1. AUCC recommendation on fair dealing and statutory damages:

AUCC recommends that Canada’s *Copyright Act* be amended to insulate any individual from a claim of damages where a person has reasonable grounds to believe that his or her copying qualifies as fair dealing.

2. AUCC recommendation on the educational use of the publicly available Internet:

AUCC recommends that Canada’s *Copyright Act* be amended to include a new exception to allow the educational use of publicly available works on the Internet without infringing copyright.

3. AUCC recommendation on the circumvention of technological measures:

AUCC recommends that any legislated prohibition against the circumvention of technological measures apply only where the purpose of the circumvention is to infringe copyright.

4. AUCC recommendation on the liability of ISPs as conduits for Internet communications:

AUCC recommends that the *Copyright Act* be amended to clarify that an ISP is not liable for copyright infringement when it acts merely as a conduit for Internet communications and does not alter the content of the works communicated by users of its Internet services.

5. *AUCC recommendation on the liability of ISPs for infringements by users of their services:*

AUCC recommends that the *Copyright Act* be amended to codify a “notice and notice” system under which an ISP’s obligations would be to forward to its users any allegations of copyright infringement made by a copyright owner. An ISP should not be liable for infringing material posted on the web site of a service user unless a court has found the material to be infringing and ordered its removal and the ISP fails to comply with the court order within a reasonable time.