# STATEMENT ON COPYRIGHT REFORM

**Canadian Federation of Students**

Should copyright law lock down music and literature to protect the financial interests of rights-holders? Or should it promote broad access to, and use of, intellectual goods? These questions are at the core of the growing public debate over the need for fair and balanced copyright law, a debate that college and university students have a critical stake in.

As creators and owners of copyright material (essays, articles, theses and multi-media productions), students need to protect their work from unjust appropriation. But to study, research, write and create new knowledge, students also need ready access, at a reasonable cost, to the copyrighted works of others. This tri-part perspective—of use, creation and ownership of copyright—gives students special credibility in the struggle for fair and balanced copyright law.

## Copyright

Intellectual property is a legal concept governing the ownership and use of goods created by intellectual labour. Copyright is the intellectual property sub-category that protects expressive "works", including literary, dramatic, artistic and musical creations.

The *Canadian Copyright Act* gives copyright owners a bundle of economic rights (including the rights to publish, reproduce, exhibit or perform a work) and to creators a series of moral rights (including rights to protect the integrity of a work, to be associated or not associated with a work, and to preserve an author's honour and reputation in relation to a work).

Copyright is infringed when someone, without the consent of the copyright owner, does something with a work that only the owner of the work has the right to do. People found liable for infringing an owner's copyright are subject to a variety of financial penalties. The *Act* protects the public interest by limiting the duration of the copyright term (generally to the life of the author plus fifty years, after which the work enters the public domain), allowing certain exceptions to what would otherwise be infringement (for example, permitting the transfer of copyrighted works to formats accessible to visually impaired persons) and through fair dealing (the right to use works without permission in various circumstances).

## Copyright Act Reform

In the early 2000s the federal government began a round of copyright reform aimed at addressing developments in digital information technology. Advances in this technology have disrupted the traditional operation of the *Copyright Act*, simultaneously creating opportunities for complete copyright control by corporate rights-owners as well as mass, illegal, instantaneous duplication by commercial pirates. More subtly the new technology has also enhanced the ability of copyright users to become creators in their own right; breaking down old distinctions between creator and user, between broadcaster and audience, and even between educator and learner.

Good public policy must therefore ensure that digital technology protects the legitimate copyright interests of creators (artists, writers, musicians, researchers) and prevents copyright owners from using new technologies to restrict reasonable access to, and use of, information resources. Unfortunately, copyright policy in Canada has long been dominated by commercial

interests who reject such balance. Canada continues to be under intense pressure from the U.S. government and the international entertainment industry to grant sweeping new protections to rights-holders. In particular, successive Canadian governments have been urged to adopt a version of the U.S. *Digital Millennium Copyright Act* (DMCA), a controversial piece of legislation that locks down digital data.

In a break with tradition, a groundswell of grassroots opposition has prevented the federal government from bowing to this corporate pressure. A new generation of activists from the general public and specific groups such as students, teachers, consumers, librarians and even sectors of the business community has stopped the *Copyright Act* from being tipped further in favour of commercial rights holders at the expense of the public interest. While this is a great victory, the struggle now is moving from a defensive position to one from which actual improvements to the *Act* can be demanded. As users, creators, and owners of copyrighted works, students are well-placed to play a prominent role in the struggle for balanced copyright law. Key issues in this struggle are:

## 1. Fair Dealing

Fair dealing is the fundamental right to, in certain circumstances, access and use part or all of a work without permission or payment. More specifically, the *Act* provides that fair dealing for the purpose of research or private study does not infringe copyright. If certain attribution requirements are met, fair dealing also applies to criticism, review, and news reporting. While there is no precise formula defining exactly what fair dealing is, the law is guided by several factors including the nature of the use, as well as its character, purpose and amount.

Traditionally, fair-dealing was frowned on by Canadian courts and seen as a limited technical defence to claims of copyright infringement. But this restrictive view has been transformed as a result of a recent judgement by the Supreme Court of Canada. The key shift came in 2004 with the CCH Canadian Ltd. v. Law Society of Upper Canada decision. The court rejected the view that fair-dealing was simply a limited defense to infringement:

> *... Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.*

The court ruled that the actual fair dealing categories of research and private study need to be given a broad and liberal interpretation. In addition to broadening the scope of the fair-dealing categories and allowing it to be performed by an intermediary (a library for example), the Court also confirmed the list of factors that should guide a finding of fair dealing:

- the purpose of the use;
- the character of the dealing;
- the amount of the dealing;
- alternatives to the dealing;
- the nature of the original work; and
- the effect of the dealing on the work

The Supreme Court's recognition of a new copyright doctrine based on users' rights and the need for careful balancing of interests between the rights of owners and users now needs to be enshrined in the *Copyright Act*.

This open-ended approach reflects the meaning of the CCH case, and also serves the interests of students, teachers, librarians, and administrators; as well as other life-long learners who aren't affiliated with an institution. This general approach would avoid having to ask for special exceptions for educational institutions that are not available to the general public.

## 2. Exceptions for Educational Institutions

Asking for special institutional-based exemptions is the approach that was taken in the last round of copyright reform in 1997. It resulted in a complicated, and not very useful, set of narrow privileges for educational institutions. Unfortunately, this approach is still being pushed by groups representing a narrow band of university and college stakeholders: administrators. Seeking further special exemptions that are not available to the general public is a fundamentally flawed strategy. The better option is an expanded and open-ended definition in the *Act* of fair dealing that reflects the principles laid out in the CCH judgement.

## 3. DRMs, TPMs and other Anti-Circumvention Rules

To shield digital works from unauthorised access and/or monitor their use, some copyright owners are utilising encryption and other Technological Protection Measures (TPMs). TPMs have not proven to be the magic bullet rights-holders had hoped they would be because they are subject to circumvention. To shore up the efficacy of TPMs in the U.S. the DMCA prohibits both circumventing TPMs and the devices that facilitate circumvention. Canada is now under considerable pressure to adopt measures similar to the DMCA—pressure that must be resisted.

The danger of over-broad anti-circumvention legislation such as the DMCA is that, while it may have some minor effect on commercial piracy, it can also prevent otherwise lawful activity such as fair dealing, accessing works in the public domain, archival preservation, time and format shifting, device interoperability and library lending. To achieve balance in the *Copyright Act* Canada must reject DMCA style amendments. Any effort to address the issue of circumvention/anti-circumvention must not limit the ability of users to by-pass measures that undermine personal privacy or statutory rights of access. In particular, the *Copyright Act* must not prohibit devices capable of circumventing TPMs, as such devices are often used for purposes that do not infringe copyright.

## 4. Notice and Take-down

Under the DMCA, Internet Service Providers (ISPs) in the U.S. must comply with "Notice and Take Down" provisions to avoid liability for the acts of copyright infringement committed by their subscribers. Under "Notice and Take Down", if a copyright owner thinks there is infringing material online, they need only send a notice to the ISP ordering them to take it down in order to have the material removed. "Notice and Take Down" rules do not give the user a chance to respond to these allegations and not only allow for, but encourage a form of censorship.

The alternative is "Notice and Notice", for which the ISP only has to pass the notice on to the alleged infringer. This is a reasonable compromise. The idea that materials could be unilaterally removed from one's website based on unproven allegations of infringement is offensive not only to academic freedom but to everyone's rights to expression.

## 5. Statutory Damages

If a person is found liable for copyright infringement, the owner of the infringed work is entitled to actual or statutory damages. Actual damages, which may be a very small sum of money, are based either on the losses suffered by the owner, or the gains obtained by the infringer. Statutory damages, on the other hand, are set out in legislation and can result in payments from $500 to $20,000 for each work infringed. Because of their punitive nature, the very availability of statutory damages often acts as a constraint against exercising allowable user rights such as fair dealing. For user rights to be meaningful, statutory damages need to be limited. If someone acts with a good-faith belief that their use of a work was justified by fair dealing or some other limitation, they should not be held liable for statutory damages.

## 6. Crown Copyright

Crown copyright is the means by which the government is granted copyright in all work created under its direction. Government work is paid for by public tax dollars, and so the public should not have to pay twice in order to access and make use of that work. The elimination of crown copyright would increase public accountability and government transparency.

## 7. Moral Rights

Section 14.1 (1) of the *Copyright Act* says:

> *The author of a work has … the right to the integrity of the work and … the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.*

These rights, characterised as moral rights to distinguish them from the economic rights (to publish, reproduce, exhibit or perform a work) contained in the *Act*, protect an author's honour and reputation and cannot be sold or otherwise transferred. They can, however, be waived and creators often find themselves under enormous pressure from commercial publishers to do so. If a student is hired to write a report, for example, the contracting agency may wish to change the conclusion but still attach the student's name to the document. With moral rights intact, a student can prevent this from happening. If moral rights are waived, the student has no such power. To avoid these situations the *Copyright Act* should be amended to, at the very least, state that, in circumstances where a power imbalance exists in creator-distributor negotiations, moral rights shall be inalienable.

## Conclusion

Students are served by a *Copyright Act* that fairly balances the interests of users, creators, and owners of copyright works. It is only with such balance that a robust information commons—a place where information and knowledge exist as our shared heritage—can thrive.