

Canadian Copyright Reform, Technology and Users' Rights

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Only one thing is impossible for God: To find any sense in any copyright law on the planet. - Mark Twain

INTRODUCTION AND BACKGROUND

This paper is written to be presented at the Intellectual Property Law Update provided by the Legal Education Society of Alberta in Edmonton on February 8, 2011, and in Calgary on February 10, 2011.

This paper includes a summary overview of the changes to fair dealing and users' rights which will be effected by Bill C-32, the current proposed amendments to the *Copyright Act*. In addition, this paper will give explore and describe some of the current technologies which present challenges to copyright and other laws and the impact of the proposed amendments to the *Copyright Act*, including the digital lock provisions, on the use of those technologies.

FAIR DEALING - CURRENT USERS' RIGHTS UNDER THE *COPYRIGHT ACT*

Copyright is often described as a bargain between the author or creator and society - you create a new work, and society will give you a monopoly of sorts to exploit it for the period of protection, typically, in Canada, your life plus 50 years. However, this so-called monopoly is not absolute. Certain rights are reserved to society in the form of users rights, known in Canada as fair dealing.

Fair dealing under the current Copyright Act is fairly limited, and can be summarized as follows:

- Section 29 - "fair dealing for the purpose of research or private study does not infringe copyright". (see *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 - research is given a large and liberal interpretation and is not limited to non-commercial or private contexts.)
- Section 29.1 - Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

¹ Disclaimer: This paper is written from a general point of view and relates to topics of considerable legal and technical complexity. It is not to be relied on as legal, technical or business advice. Many aspects that could have been discussed have been omitted or truncated due to space considerations. Many concepts have been simplified and exceptions to general rules not stated.

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- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.
- Section 29.2 - Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:
 - (a) the source; and
 - (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

Typically, the courts have applied the following factors in determining whether a specific dealing with a work subject to copyright is fair:

- the purpose of the dealing,
- the character of the dealing,
- the amount of the dealing,
- the nature of the work,
- available alternatives to the dealing, and
- the effect of the dealing on the work (see *CCH Canadian Ltd.*, above).

Educational institutions have certain rights as well under the current *Copyright Act*, which can be summarized as follows:

- Section 29.4(1) - As long as there is no motive of gain, and the work or other subject matter is not commercially available in a medium suitable for the purpose, it is not an infringement of copyright for an educational institution or a person acting under its authority
 - (a) to make a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for displaying handwritten material, or