

# Limitations and Exceptions to Copyright in Canada

April, 2012

This overview on copyright flexibilities in Canada consists of two parts: first, answers to a questionnaire on the state of copyright law and second, a table organizing the limitations and exceptions to copyright in Canada's laws. The first part includes an analysis of copyright flexibilities and the current political context of copyright provided by Michael Geist. The questionnaire was given to participants at a meeting on Limitations and Exceptions to Copyright hosted by IViR and PIJIP last December. The authors reviewed the answers before this document was uploaded. The second part was compiled by PIJIP fellow Marcela Palacio Puerta. The compilation is part of a larger project to map flexibilities in copyright law, and input is appreciated. Please send comments, corrections, or suggestions to [pjip@wcl.american.edu](mailto:pjip@wcl.american.edu).

## I. Questionnaire on Copyright Flexibilities Answers by Michael Geist

**1. Please provide a short (e.g. 250 word) description of your country or region's copyright legal framework and current statutory provisions and judicial doctrines providing for copyright limitations and flexibilities. You may include a general categorization (e.g. - closed list only, list plus fair use, list plus fair dealing) as well as a description of any notable or novel aspects to the law (e.g. a flexible quotation right, any open-ended exceptions, provisions for equitable remuneration, etc.). Please include a copy or link to your law.**

Canada has a closed-list fair dealing provision. The Supreme Court of Canada has ruled that it should be interpreted in a broad and liberal manner. The current list includes research, private study, news reporting, criticism, and review.

In determining whether a particular use (or dealing) meets the fair dealing standard, the Supreme Court of Canada has established a two-part test.<sup>1</sup> First, the use must qualify for one of the fair dealing categories. Second, assuming the use does qualify under one of the categories, the court identified six factors to consider to gauge the fairness of the dealing:<sup>2</sup>

- A. The Purpose of the Dealing - the Court explained that "allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights." (p. 37-38)
- B. The Character of the Dealing - one should ask whether there was a single copy or were multiple copies made. It may be relevant to look at industry standards. (p. 38)
- C. The Amount of the Dealing - "Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness." (p. 39) The extent of the copying may be different according to the use.
- D. Alternatives to the Dealing - Was a "non-copyrighted equivalent of the work" available? (p. 39)

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<sup>1</sup> CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339 (Can.), *available at* <http://scc.lexum.org/en/2004/2004scc13/2004scc13.pdf>.

<sup>2</sup> Canada Copyright Act, R.S.C. 1985, c. C-42.

- E. The Nature of the Work - "If a work has not been published, the dealing may be more fair, in that its reproduction with acknowledgement could lead to a wider public dissemination of the work - one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair." (p. 40)
- F. Effect of the Dealing on the Work - Will copying the work affect the market of original work? "Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair." (p. 40)

## **2.a. How might your copyright law apply to use of illustrative (rather than critical) excerpts from a copyrighted fiction film in a commercial documentary?**

Provided the clips could be brought within one of the fair dealing categories, it may be possible to use the clips within a commercial documentary. The Supreme Court of Canada has ruled that commercial use is a factor to be considered in determining the fairness of the dealing, but it is not alone determinative.<sup>3</sup> The Documentary Organization of Canada recently produced a report on the fair dealing challenges faced by the documentary film community.<sup>4</sup>

## **2.b. How might your copyright law apply to digitization of a library's special collection for the purpose of providing some level of online access to the general public?**

There are many digitization initiatives under way in Canada, but virtually all rely on public domain materials (the term of copyright in Canada remains at life of the author plus 50 years<sup>5</sup>). For example, the University of Toronto has been actively working with Internet Archive Canada to digitize about 300,000 public domain books.<sup>6</sup> Meanwhile, the University of Alberta's Peel's Prairie Provinces digital collection has digitized nearly 3 million articles from 73 different newspapers.<sup>7</sup> Other universities from coast to coast have provincially-focused digitization initiatives. Memorial University's Digital Archives Initiative focuses on Newfoundland and Labrador, the University of Saskatchewan has a collection of digitized items including poetry, Saskatchewan post cards, magazines, books, paintings and historical documents.<sup>8</sup> Also, Simon Fraser University has digitized 250,000 pages of the Chinese Times daily newspaper, which was published in Vancouver from 1914 to 1992.<sup>9</sup> Reliance on fair dealing to digitize in-copyright works with public access would be considered legally risky.

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<sup>3</sup> CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339 (Can.), *available at* <http://scc.lexum.org/en/2004/2004scc13/2004scc13.pdf>.

<sup>4</sup> DOCUMENTARY ORGANIZATION OF CANADA, THE SEARCH FOR FAIR DEALING: REPORT ON THE DOC ROAD SHOW (2011), *available at* <http://infojustice.org/wp-content/uploads/2011/12/Geist-Questionnaire.pdf>.

<sup>5</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris, July 24, 1971, art. 7 ratified in Canadian law as Copyright Act, R.S.C. 1921, c. 24.

<sup>6</sup> Michael Geist, *Geist: Ottawa Awol but Others Busy Digitizing Canada's Heritage*, THE STAR (Jan 14, 2011), *available at* <http://www.thestar.com/business/sciencetech/article/921290--geist-ottawa-awol-but-others-busy-digitizing-canada-s-heritage>

<sup>7</sup> *Peel's Prairie Provinces*, University of Alberta (last visited March 22, 2012), <http://peel.library.ualberta.ca/index.html>.

<sup>8</sup> Digital Archives Initiative, Memorial University (last visited March 22, 2012), <http://collections.mun.ca/>.

<sup>9</sup> *Chinese Times*, Multicultural Canada <http://www.multiculturalcanada.ca/ctimes> (last visited March 22, 2012 10:42 AM),

**2.c. How might your copyright law apply to the following example of user-generated content that transforms a copyrighted work in a manner that is a spoof, but which lacks any criticism or comment on the copyrighted work itself: [bit.ly/jrLT9h](http://bit.ly/jrLT9h) (Guitar Baby).**

There is some concern that Canadian law would not allow this use to fit neatly into fair dealing or a similar exception. For that reason, Bill C-11, a copyright reform bill currently before the House of Commons, includes a specific user generated content provision designed specifically to address this form of work. The provision states:<sup>10</sup>

It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

- (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
- (b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
- (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
- (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

**3. Please provide a short (e.g. 250 words) description of the current political context around copyright law in your country. Please indicate, where relevant, whether any reform has been planned, the timeline for reform proposals, a description of any current or potential proposals or campaigns for expanding limitations and exceptions and any use cases that are prominent in the political conversation.**

Canada has been working toward copyright reform for over ten years with many bills failing due to election calls or political controversy. The current bill – Bill C-11 – is virtually certain<sup>11</sup> to pass in early 2012 as the government now has a majority mandate.<sup>12</sup> Much of the attention has been focused on the anti-circumvention provisions, which are very similar to those found in the US under the DMCA.

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<sup>10</sup> Copyright Modernization Act, Bill C-11 (2011).

<sup>11</sup> Michael Geist, Bill C-11 Committee Review Concludes: What Happened and What Comes Next, MICHAEL GEIST (Mar. 14, 2012), <http://www.michaelgeist.ca/content/view/6375/125/>.

<sup>12</sup> Copyright Modernization Act, Bill C-11 (2011).

However, the bill also includes many significant changes with respect to limitations and exceptions. The most notable of these include:

1. The addition of three new fair dealing categories: education, parody, and satire.
2. The inclusion of the non-commercial user generated content provision noted above.
3. Several consumer rights provisions including a time shifting provision, format shifting provision, and a backup copy provision. All these consumer provisions are subject to various conditions, most notably the presence of a TPM.
4. There are several education and library exceptions included in the bill as well. There is a general exception for Internet-based materials for educational use. There are also distance learning exceptions, but those feature significant restrictions.

In addition to the exception language, there are some further positive developments within the proposed legislation. The bill would establish a notice-and-notice system for intermediary liability with no requirement for takedown and no graduated response. Moreover, the bill would distinguish between commercial and non-commercial infringement for the purposes of statutory damages.

The copyright exceptions have also been the subject of several recent cases heard by the Supreme Court of Canada as the court heard five copyright cases over a two-day period in December 2011.<sup>13</sup> Those cases included one that addressed the question of whether song previews on services such as Apple iTunes can be treated as consumer research for the purposes of fair dealing.<sup>14</sup> Another case examined copying of materials for classroom use.<sup>15</sup> The Supreme Court of Canada has described fair dealing as a “users’ right” and emphasized the need for a large and liberal interpretation in order to achieve an appropriate copyright balance.

## II. Overview of Limitations and Exceptions in Canada

Prepared by PIJIP Fellow Marcela Palacio Puerta

**Exception framework:** closed list plus fair dealing. Closed list is interpreted in a broad and liberal manner.

[Copyright Act. \(R.S.C., 1985, c. C-42\)- Copyright Limitations and Exceptions](#)

<b>Fair dealing</b>	<ul style="list-style-type: none"><li>• Research or private study. (Art. 29)</li><li>• Criticism or review. (Art. 29.1)</li><li>• News reporting. (Art. 29.2)</li></ul>
<b>Educational Institutions</b>	<ul style="list-style-type: none"><li>• Reproduction for instruction and for examinations. (Art. 29.4)</li><li>• Performances. (Art. 29.5)</li><li>• News and commentary. (Art. 29.6)</li></ul>

<sup>13</sup> Jennifer Brown, *Feds Want Bill C-11 Pushed Through as SCC Prepares to Hear Copyright Cases*, *Legal Feeds*, <http://www.canadianlawyermag.com/legalfeeds/482/Feds-want-bill-C-11-pushed-through-as-SCC-prepares-to-hear-copyright-cases.html> (last visited Mar. 22, 2012, 10:57 AM).

<sup>14</sup> *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2010] F.C.A. 139.

<sup>15</sup> *Province of Alberta, as represented by the Minister of Education v. Access Copyright*, 2010 [FCA] 198.

	<ul style="list-style-type: none"> <li>• Reproduction of broadcast. (Art. 29.7)</li> <li>• Records and marking. (Art. 29.9)</li> <li>• Literary collections. (Art. 30)</li> </ul>
<b>Libraries, Archives and Museums</b>	<ul style="list-style-type: none"> <li>• Make a copy for Management and maintenance of collections. (Art. 30.1)</li> <li>• Make a copy for research or private study. (Art. 30.2)</li> <li>• Copies to patrons of other libraries. (Art. 30.2(5))</li> <li>• Copies deposited in archive. (Art. 30.21 (1))</li> </ul>
<b>Machines Installed in Educational Institutions, libraries, Archives or museums</b>	<ul style="list-style-type: none"> <li>• No infringement by educational institutions, library, archive or museum for using a machine for the making of copies of works in printed form. (Art. 30.3)</li> </ul>
<b>Libraries, Archives and museums in educational Institutions</b>	<ul style="list-style-type: none"> <li>• The previous exceptions apply to libraries, Archives within educational institutions. (Art. 30.4)</li> </ul>
<b>Library and Archives of Canada</b>	<ul style="list-style-type: none"> <li>• Make a copy of a work for the purpose of preservation. (Art. 30.5a)</li> <li>• Effect the fixation of a copy of a publication. (Art. 30.5b)</li> <li>• Make a copy of a recording. (Art.30.5c)</li> </ul>
<b>Computer programs</b>	<ul style="list-style-type: none"> <li>• It is not an infringement for a person who owns a copy to: make a single reproduction of the copy by adapting, modifying or converting. (Art. 30.6a)</li> <li>• Make a single reproduction for backup purposes. (Art. 30.6b)</li> </ul>
<b>Incidental inclusion</b>	<ul style="list-style-type: none"> <li>• Incidental use. (Art. 30.7)</li> </ul>
<b>Ephemeral Recordings</b>	<ul style="list-style-type: none"> <li>• Ephemeral recordings. (Art. 30.8)</li> <li>• Telecommunications by networks. (Art. 30.8(9))</li> <li>• Pre-recorded recordings. (Art. 30.9 (1))</li> </ul>
<b>Retransmission</b>	<ul style="list-style-type: none"> <li>• It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any work under certain circumstances. (Art. 31. 2)</li> </ul>
<b>Persons with Perceptual Disabilities</b>	<ul style="list-style-type: none"> <li>• Reproduction in alternate format. (Art. 32.1)</li> </ul>
<b>Statutory obligations</b>	<p>It is not an infringement:</p> <ul style="list-style-type: none"> <li>• To disclose a record pursuant to the Access to Information Act. (Art.</li> </ul>

	<p>32.1(1)a)</p> <ul style="list-style-type: none"> <li>• To disclose personal information, pursuant to the Privacy Act. (Art. 32.1(1)b)</li> <li>• To make a copy of an object referred to in section 14 of the cultural Property Export and Import Act. (Art. 32.1(1)c)</li> <li>• To make a fixation or copy of a work in order to comply with Broadcasting Act. (Art. 32.1(1)d)</li> </ul>
<b>Miscellaneous</b>	<ul style="list-style-type: none"> <li>• Reproduction of part of work in later work by the same author, when he is not the copyright owner. (Art.32.2(1)a)</li> <li>• To reproduce an architectural work, a sculpture or work of artistic craftsmanship that is permanently situated in a public place or building. (Art.32.2(1)b)</li> <li>• Report a lecture given in public for purpose of news. (Art.32.2(1)c)</li> <li>• Public reading of a reasonable extract of a published work. (Art.32.2(1)d)</li> <li>• To make or publish a report of an address of a political nature given in public meetings for purpose of news. (Art.32.2(1)e)</li> <li>• Without motive of gain at any agricultural or agricultural-industrial exhibition or fair that is held by its directors under federal, provincial or municipal authority: the live performance of a musical work, the performance in public of a sound recording embodying a musical work, the performance in public of a communication signal. (Art.32.2(2))</li> <li>• No religious organization or institution, educational institution and no charitable or fraternal organization shall be held liable to pay any compensation for doing any of the following acts in furtherance of a religious, educational or charitable object: the live performance of a musical work, the performance in public of a sound recording embodying a musical work, the performance in public of a communication signal. (Art.32.2(3))</li> </ul>