



Canadian Association of  
Research Libraries

Association des bibliothèques  
de recherche du Canada

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Mr. Albert Cloutier,  
Director  
Copyright and International Intellectual Property Policy  
Industry Canada  
235 Queen Street, Room 1046A,  
Ottawa, ON  
K1A 0H5

Mr. Jean Paul Boulay  
Director  
Copyright Policy Branch  
Heritage Canada  
275 Slater Street, 7<sup>th</sup> Floor,  
Room 39  
Ottawa, ON  
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Dear Mr. Cloutier and Mr. Boulay,

On March 4, 2008, CARL representatives met with you and other members of your staff to discuss copyright reform issues. This letter follows-up on that meeting and, in particular, on the issue of limiting damages under fair dealing. Since this is a new issue, it is useful to further explain CARL's views on this matter. CARL thanks both departments for the opportunity to present its views and looks forward to a constructive and continuing dialogue on this issue.

### **Two key amendments**

On February 1, 2008, CARL posted a document describing its four key copyright reform issues on its web site: "*A Canadian Approach to Digital Copyright*".<sup>1</sup> Two

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<sup>1</sup> [http://www.carl-abrc.ca/projects/copyright/CARL\\_digitalcopyright\\_statement-Jan2008-e.pdf](http://www.carl-abrc.ca/projects/copyright/CARL_digitalcopyright_statement-Jan2008-e.pdf).

of the four key issues relate to fair dealing. First, CARL believes that fair dealing is critical to a balanced and fair copyright regime. Copyright law reform must not limit or narrow fair dealing. Second, the *Copyright Act* should be amended to ensure that a user of a copyrighted work is not subject to damages, where he or she had reasonable grounds to believe an activity is fair dealing.

### **What is fair dealing?**

The *Copyright Act* provides that it is not an infringement of copyright to “deal fairly” with a work for five specified purposes: research, private study, criticism, review, or news reporting. The *Act* does not define what is “fair,” nor does it define what is included in research, private study, criticism, or review. It is left up to the judgment of a user to decide whether a use is “fair.” This is a difficult exercise for someone who is not knowledgeable about copyright. What one person thinks of as “fair,” another may not. If a copyright owner disagrees with someone’s interpretation of fair dealing, he or she can sue the user for copyright infringement.

The Supreme Court of Canada has given guidance on the scope of fair dealing. Nonetheless, users may still be uncertain when an activity is fair dealing. Users risk being sued for copyright infringement if they interpret the situation incorrectly. Research libraries, for instance, who are trusted agencies and are careful to observe the law, may seek copyright authorization in circumstances where it might not be needed. Rather than risk being sued, they may seek copyright clearance “to be safe.” Aversion to the risks associated with law suits can create a “permissions mentality” that can erode the full scope and potential of fair dealing. Over time, there is the risk that unnecessary licensing could unduly narrow and possibly even replace fair dealing, which the Supreme Court of Canada has called a users right.

### **CARL’s recommendation**

The amendment proposed by CARL would remove part of this risk by providing that anyone who has reasonable grounds to believe that an activity is fair dealing is not subject to damages. Although copyright holders would continue to have the right to sue for alleged infringement, the defendant, by acting reasonably, could not be made to pay damages. It should be noted, however, that the cost of defending a law suit remains under the suggested amendment.

### **Preserving the benefits and potential of the CCH decision**

Amending the fair dealing section itself opens up the entire fair dealing provision to other amendments - to a narrowing as well as a broadening. Some copyright holders view the *CCH* case as having interpreted fair dealing too broadly and would like to see the user benefits of that decision scaled back. The possibility of narrowing fair dealing is avoided if the fair dealing provision is not opened at all. The suggested amendment does not open fair dealing. It amends the remedy sections instead. CARL sees this as an opportunity for all Canadians.

### **Removing some of the risk**

If the amendment proposed by CARL is enacted, the application of fair dealing as interpreted by the Supreme Court in the *CCH* case could be exercised and explored free from the threat of potentially punishing damage awards. Exercising due diligence, for example, by getting a legal opinion that an activity is fair dealing, could be sufficient to proceed to apply fair dealing, with potential costs being limited to the cost of defending a copyright infringement suit. If a court disagrees with the interpretation, the only cost would be the litigation costs.

An important benefit of the amendment limiting damage awards under fair dealing would be court decisions interpreting what is permitted under fair dealing on the facts of the case being litigated. The amendment would allow users to interpret and apply the *CCH* case in circumstances when they might otherwise be reluctant to do so. Without the suggested amendment users who are risk adverse and/or responsible fiscal decision-makers for their institution, or who interpret the *Act* in a restrictive manner, could unnecessarily narrow the scope of fair dealing in practice.

### **Onus is on the user**

The amendment is limited to “reasonable” interpretations of fair dealing. It places the onus on the user to show that it is “reasonable” to conclude that a particular use is fair. If the conclusion is unreasonable, the proposed limitation of damages will not apply. A user availing him or her self of the proposed amendment cannot simply assert that he or she thought it was fair. More is required. He or she must demonstrate due diligence – for example, by getting a legal opinion that the activity is fair.

Judicial decisions on what is, and is not, fair dealing will have long term benefits. Decisions interpreting fair dealing in a variety of situations will guide users and copyright owners alike in interpreting fair dealing. The suggested amendment is a way to create an environment that will allow the copyright community to

develop and apply the principles in the *CCH* case. Once a court decided that a particular use is either infringing or fair dealing, it will be clear whether uses of that kind require permission or not. The parameters of the CCH interpretation of fair dealing can be implemented based on the cost of the litigation, without the fear of damage awards.

### **Comparing section 504 of the United States copyright law**

Section 504 of the United States *Copyright Act* provides that an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment, or such institution, library, or archives itself is not liable for statutory damages where the user believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107. This provision has been in the United States *Copyright Act* since 1976,<sup>2</sup> and the United States Copyright Office reports that they have not raised any serious objection, either domestically or internationally. The provisions limit otherwise available infringement remedies based on the user's knowledge and the reasonableness of the user's beliefs. They reduce, in certain cases, the exposure that inevitably results from the uncertainty inherent in the flexible concept of fair use. For example, if the user is an employee of a library who is contemplating a use that will infringe a work if it is not fair use, but the user has reasonable grounds for believing, and actually does believe, that the contemplated use is fair use, the user can go forward with the use without fear of the ordinary minimum statutory damage award, which under section 504(c)(1) is \$750. Section 504(c)(2)'s reduction of the minimum from \$750 to zero can benefit the library in its planning, especially when multiple uses of multiple works come within this provision.

In Canada, a provision similar to section 504(c)(2) could encourage the use of works by reducing infringement exposure in situations in which the user is not sure whether fair dealing applies. CARL's proposed amendment is broader than the United States provision, however. The amendment proposed by CARL would benefit any user and would insulate them from any damages – criminal, statutory or civil. CARL believes that individuals as well as institutional users should not be subject to damages when they have no intention of infringing copyright but make an incorrect, but reasonable, decision about the scope of fair dealing.

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<sup>2</sup> Public Law No. 94-553, § 504(c)(2), 90 Stat. 2541, 2585 (1976). The minimum amount was raised from \$100 to \$200 in 1988. Berne Convention Implementation Act of 1988, Public Law No. 100-568, 102 Stat. 2853, 2860.

## **Conclusion**

In brief, the Supreme Court of Canada provided us with guidance on fair dealing, broadening its scope and noting that it is a “users right”. The continuing presence in the Act of potentially significant damages unduly limits the ability of Canadians to exercise and explore their fair dealing rights. Canada is at a unique juncture and has an opportunity to enact legislation which would benefit all Canadians.

CARL proposes that the remedy provisions in the *Copyright Act* be amended to provide that anyone who has reasonable grounds to believe that his or her use of copyright material is fair dealing is not liable for civil, criminal or statutory damages.

If you require more information or require clarification of the matters discussed in this letter, please contact Mr. Brent Roe, CARL, Executive Director, at 613.562.5385, or e-mail [carl@uottawa.ca](mailto:carl@uottawa.ca).

Yours truly,

Signed

K. Mark Haslett,  
Chair, CARL Copyright Committee

cc. Ms. Leslie Weir, CARL President  
Mr. Brent Roe, CARL Executive Director