Canadian Library Association
Association canadienne des bibliothèques

Call to Action on Copyright

January 2012

Bill C-11

www.CLA.ca

Call to Action

There is no doubt that Canadians continue to voice their concerns when it comes to the critical issue of copyright. Librarians across the country have heard and continue to hear from public library users that copyright laws must reflect the public interest. In fact, over 21 million library users are seriously concerned about the shape Canadian copyright legislation continues to take.

As the voice of library users and professionals, the Canadian Library Association (CLA) is committed to getting the crucial message across to the government that copyright issues do indeed strike a chord with the general public.

On September 29, 2011, the Honourable Christian Paradis, Minister of Industry, and the Honourable James Moore, Minister of Canadian Heritage and Official Languages, announced the reintroduction of the Government of Canada's *Copyright Modernization Act*, Bill C-11. CLA applauds significant improvements to Canada's copyright regime contained in Bill C-11; however, changes are required to ensure the legislation ultimately succeeds in its objectives.

As a CLA Member, we need your help to get our vital message across! In joining this grassroots fight, you will not be alone. You will be joined by other committed CLA members, who will be focused on ensuring that federal decision makers understand and hear the growing concerns of library users, member librarians, and many average Canadians.

Bill C-11: Key Messages

General Messaging

1. CLA applauds the addition of education, parody and satire in the fair dealing section of the Act. CLA continues to strongly believe that fair dealing, as interpreted in the Supreme Court of Canada judgment in *CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13* (the *CCH* case), is a fundamental users' right which must not be superseded by a copyright holder's use of technological protection measures. Bill C-11's continued prohibitions on the circumvention of digital locks for legal, non-infringing purposes fails to achieve a proper balance between the legitimate interests of copyright holders and the public interest in legitimate uses of copyrighted materials in the digital world. Further, CLA believes that recent developments regarding the collective licensing of copyrighted materials are also creating an imbalance between these two legitimate interests.

2. CLA urges the government to address the copyright implications of the Internet and digital content with a balanced and thoughtful public policy-based approach that upholds and protects Canadian values and culture and user rights as reinforced by the Supreme Court of Canada.

3. Canadian libraries, acting in the public interest, will have great difficulty in fulfilling their mandates if digital locks trump access for legitimate purposes. Technological tools such as digital locks and imposed contracts interfere with statutory rights under fair dealing and impose time limits on how long legally acquired content may be retained by users for research and private study. Exceptions for libraries, archives and museums will enable Parliament to deliver the balance required in recognizing the legitimate interests of right holders and the public interest.

4. CLA acknowledges the complexity of copyright in the 21st century and applauds the Government's attempt to define the balance between the concerns of creators, content providers and users as a key goal of continuing copyright reform. While sections of Bill C-11 indicate that the concerns expressed by thousands of Canadians during the recent copyright consultations were heard, taken as a whole, the Bill does not yet achieve an acceptable balance from the Canadian library perspective.

Copyright issues most relevant to libraries and Bill C-11

1) Fair Dealing

CLA applauds and strongly supports Bill C-11's proposed inclusion of education, parody and satire into the fair dealing provisions in Section 29 of the Act. Although a more flexible approach would be to include the words "such as" before the purposes enumerated in this section, the proposed amendment is a positive step towards reflecting the CCH case's recognition of this fundamental user right. CLA urges the Government not to bow to the pressure of commercial and economic interests that would seek to limit fair dealing uses for the purposes of education and research. CLA also strongly believes that fair dealing must not be superseded by a copyright holder's use of technological protection measures.

2) Digital Locks
[also known as Digital Rights Management (DRM) or Technological Measures (TMs) or Technical Protection Measures (TPMs)]

The prohibitions on the circumvention of digital locks in Bill C-11 exceed Canada's obligations under WIPO copyright treaties. Bill C-11 gives a new right to copyright owners negating the flexibilities in the Internet Treaties and directly contravening the basic, longstanding individual rights sanctioned in Canadian copyright law. With this provision, Canada is allowing a technical feature to override a nuanced information policy, permitting owners' rights to overreach their legitimate limits, and impinging on the ability of libraries to fulfill their public interest mandate.

Bill C-11: Key Messages

3) Exceptions for the print disabled

CLA notes that Bill C-11 has made improvements to clarify and extend user rights relating to exceptions for people with perceptual disabilities. However, CLA believes the Bill as drafted has the potential to significantly constrain or render Section 32 (1) moot or inoperable. CLA strongly suggests the Bill provide that "it is not an infringement of copyright for a person with a perceptual disability, for a person acting at the request of such a person, or for a non-profit organization acting for the benefit of such a person, to make a copy of a work, and sound recording or another format suitable for persons with a perceptual disability provided that the item is not commercially available in the appropriate format."

4) Libraries, Archives and Museums: Exceptions for Research and Private Study

Bill C-11 falls short of what is required for libraries to provide effective reference and interlibrary loan services in the digital era. The constraints the Bill seeks to impose protect economic interests that are not threatened by the limited amount of "private research and study" materials copied by Canadian libraries for their patrons or for interlibrary loan.

CLA continues to believe that the library, archive and museum exceptions for research and private study in section 30.2 of the Act must be truly format-neutral and must allow these institutions to do anything on behalf of a patron, both directly and through interlibrary loan, which patrons can do for themselves under fair dealing. To achieve this, given the prohibitions on digital locks in Bill C-11, CLA proposes that section 30.2 consist only of:

1. an amended section 30.2(1) allowing libraries, archives and museums or any person acting under their authority to do anything on behalf of their patrons or the patrons of another library, archive or museum that those patrons could do under sections 29 and 29.1 of the Act; and
2. a new section 30.2(2) allowing libraries, archives and museums or any person acting under their authority to circumvent technological protection measures for the purposes of section 30.2(1).

5) Preservation: Exceptions for Management and Maintenance of Collections

Restrictions within the current exceptions in Section 30.1 of the Act, many of which are linked to older technologies, make it increasingly difficult for libraries to fulfill their mandate of preserving and making accessible the materials in their collections and to use digital technologies to provide the services their users need. CLA continues to believe that the prohibitions on digital locks in Bill C-11 undermine the Bill's proposed positive changes to section 30.1 of the Act, which allow for the preservation of material the library considers is becoming obsolete or where the technology required to use that material is becoming unavailable. CLA proposes that section 30.1 in Bill C-11 be amended to allow libraries, archives and museums or any person acting under their authority to circumvent technological protection measures for the purposes of that section.

Bill C-11: Key Messages

6) Educational Issues

Bill C-11 contains several new provisions that would create limited exemptions available to educational institutions as defined in the *Act* and to those acting on their behalf or under their authority. As indicated above, CLA strongly supports the proposed inclusion of education in section 29 of the Act. As also outlined above, we believe that the definition of "Educational Institution" in Section 2 of the Act should be broadened to include all such institutions, regardless of their ownership and, therefore, that the extensions of rights to "educational institutions" proposed in Bill C-11 would extend to all Canadian educational institutions.

7) Collective Licensing

CLA believes that the process under the Act for the collective licensing of copyrighted material constitutes a growing threat to fair dealing. The CCH case makes it clear that a library may exercise a fair dealing right without having a collective license.

CLA proposes that Part VII of the Act (and, in particular, Section 70.12 and Section 70.2(1)) be amended to require that a collective society must make application to the Board, prior to proposing a tariff, and present evidence that the users to be targeted by a proposed tariff application have been approached to enter into contractual relations, where possible, and, if such an approach has been made, that the collective society and those users have been unable to agree on the royalties to be paid for the rights included in the proposed tariff. This amendment should provide that, if, upon this application, the Board agrees that the parties cannot establish an agreement for royalties, then the Board may permit the collective to file the proposed tariff.

8) Contractual Limitations on Exceptions and Uses

The provisions in contracts and licenses can severely encroach on existing user rights and exceptions under copyright law, including fair dealing, access rights for persons with disabilities, preservation and other user and library exceptions. Failure to protect individual users and institutions from imposed contractual terms which override their legislated rights undermines the public interest and negates the purpose of the Act.

CLA proposes that Bill C-11 be amended to specify that the terms and conditions of a standard form or any other unilateral contract restricting the making of a copy, as permitted under the exceptions for libraries, archives and museums or to permit a user to invoke other rights, including fair dealing, have no force.

9) Internet Service Provider (ISP) Liability

CLA supports the proposed requirement in Section 41.23 of Bill C-11 that ISPs notify a user of their network that a complaint has been received regarding the legality of content the user has mounted, rather than requiring them to remove the content (“notice and notice” versus “notice and takedown”). Placing the onus on the ISP to remove content on a network on the basis of unsubstantiated allegations from a self-declared rights owner would place the ISP in an untenable position: it is best left to the network user to determine and be liable for their actions. It is worth pointing out that in addition to the commercial ISPs there are many non-profit organizations that serve as ISPs including many public libraries, school boards, universities and colleges.

Getting the Key Messages Across

Enclosed you will find a sample letter, along with key background information, for your local Member of Parliament (M.P.). We need you to personalize this letter to reflect your own views and situations. Then print your advocacy letter on your letterhead and mail or fax it to your M.P.'s Constituency Office(s). Do not forget that personalized letters have the greatest impact! You should also feel free to involve your colleagues and concerned citizens in the letter writing campaign.

Be sure to follow up with your local M.P. by requesting a meeting on these issues. If your M.P. is difficult to meet with, insist that you at least talk to him/her by telephone so that you can express your views directly.

Prior to meeting with your local M.P., please review the enclosed guidelines to help you prepare. Once you have concluded the meeting, report on your efforts to CLA by filling out the enclosed feedback sheet.

If you need help finding your local M.P., please consult the website below. Simply enter your postal code where prompted, and it will provide you with your M.P. information. Remember to enter your office and home postal codes, as the M.P. may be different depending on your locations. The more M.P.'s we meet, the louder our message will be heard!

Website to find M.P.:

http://www2.parl.gc.ca/Parlinfo/Compilations/HouseOfCommons/MemberByPostalCode.aspx?Language=E&Menu=HOC

Meeting Guide

Most M.P.s will generally afford you only 15-30 minutes for your meeting, therefore you should be brief and to the point. Open your meeting by thanking the M.P. for having taken the time from his/her busy schedule to meet with you and discuss this important issue. Remind the M.P. of your name and who you represent.

Say a few words about the purpose and aim of your meeting:

- To discuss the serious concerns about the shape of Canadian copyright legislation.

- To encourage the creation of a balanced legislation that supports all three stakeholders: the creators of artistic works and information, the rights holders and the consumers.

Do not hesitate to share personal anecdotes with your M.P. They can be particularly receptive to information that evokes emotion. Pay attention to the time you have been allotted. Your M.P. will appreciate you respecting his/her many commitments and busy schedule.

At the end of the meeting, briefly summarize the key points discussed. Be sure to add that if he/she has any questions, to either personally contact you, or Kelly Moore, CLA Executive Director at (613) 232-9625.

Meeting Feedback Sheet

Name of M.P. or official that you met with: _____

Name of Riding: _____

Date of meeting: _____

Political Party:

Liberal	o
Conservative	o
NDP	o
Bloc	o
Other	o

Duration of the Meeting:

15 Minutes or Less	o
15-30 Minutes	o
30 Minutes or more	o

I found this individual to be:

Knowledgeable of the library community's concerns about copyright legislation	Yes o	No o
Supportive of CLA's essential role in major public policy initiatives of concern to its members	Yes o	No o
This M.P. is interested in more information	Yes o	No o

Comments and Follow-up:

_____
_____
_____
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_____
_____
_____
_____

Feedback Sheet completed by: _____

Contact Information (phone/e-mail): _____

Please complete and return by fax to Kelly Moore at 613.563.9895 or by email at kmoore@cla.ca

Sample M.P. Letter

{insert address}

{insert date}

Dear {insert name}:

As a constituent in your riding and a {insert role} in your community, I want to take this opportunity to share with you the growing concerns of the Canadian Library Association (CLA), as well as many Canadians, regarding Bill C-11, *An Act to Amend the Copyright Act*.

CLA is Canada's largest national library association, representing the interests of public, academic, school and special libraries, professional librarians, library workers, library trustees, and all those concerned about enhancing the quality of life of Canadians through access to knowledge and literacy. CLA represents the interests of approximately 57,000 library staff and thousands of libraries of all kinds across Canada on a range of public policy issues. None is more critical at this time than copyright.

It is crucial to note that libraries and librarians speak on behalf of our users: millions of students, educators, scholars, researchers, lifelong learners, special library users and recreational readers, from children to seniors. Library users **are** the Canadian public: they are not members of a "special interest group" when it comes to copyright.

The Government has stated its intent to provide copyright legislation which is both balanced and technologically neutral. While CLA applauds significant improvements to Canada's copyright regime introduced in Bill C-11, critical modifications are required if the legislation is to ultimately succeed in its objectives.

There are several issues of concern that are relevant to libraries and Bill C-32, which include, but are not limited to fair dealing, digital locks, exceptions for the print disabled, preservation, educational issues and collective licensing.

CLA applauds the addition of education, parody and satire in the fair dealing section of the Act. CLA continues to strongly believe that fair dealing, as interpreted in the Supreme Court of Canada judgment in *CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13* (the *CCH* case), is a fundamental users' right which must not be superseded by a copyright holder's use of technological protection measures. Bill C-11's continued prohibitions on the circumvention of digital locks for legal, non-infringing purposes fails to achieve a proper balance between the legitimate interests of copyright holders and the public interest in legitimate uses of copyrighted materials in the digital world.

CLA urges the government to address the copyright implications of the Internet and digital content with a balanced and thoughtful public policy-based approach that upholds and protects Canadian values and culture and user rights as reinforced by the Supreme Court of Canada. Canadian libraries, acting in the public interest, will have great difficulty in fulfilling their mandates if digital locks trump access for legitimate purposes. Exceptions for libraries, archives and museums will enable Parliament to deliver the balance required in recognizing the legitimate interests of right holders and the public interest.

I urge you, as a Member of Parliament, to not let our concerns go unheard. I would greatly appreciate the opportunity to meet with you to discuss these key concerns in greater detail and the role the library community plays in providing Canadians access to all forms of material. This access to information is integral to ensuring that Canadians are regular contributors to the economic, social and cultural success of their communities.

Please contact me at {insert phone number} to coordinate a meeting. As we build a relationship together, I look forward to your support.

Sincerely,

Key Background Information

Press Release

CLA
Canadian Library Association
Association canadienne des bibliothèques

-For Immediate Release-

Canadian Library Association Says Copyright Legislation "Almost There"

User Rights Still Tempered by Digital Locks

(Ottawa, September 29, 2011) – The Canadian Library Association (CLA) is pleased to see the re-introduction of copyright legislation in the House of Commons. The fact that this legislation has been introduced so early in the session shows there is a real commitment from the Government to this issue. Following the much anticipated re-introduction of the *Copyright Modernization Act*, CLA says a few important modifications are still needed in order to address the concerns of the library community.

CLA acknowledges the complexity of copyright in the 21st century, and the Government's attempt to balance the concerns of creators and content providers with those in the public interest. What the bill needs now is to reflect an acceptable balance from the users' perspective without interference to statutory rights.

Librarians across the country understand that copyright laws must reflect the public interest.

"It is very positive to see the re-introduction of copyright legislation, as this remains a key concern for the library community," says CLA President Karen Adams. "We are happy to see that improvements introduced in the last bill have been maintained; however, modifications are required if the legislation is to ultimately succeed in its objectives, those being both balanced and technologically neutral."

CLA is pleased that Canadians with perceptual disabilities will have use of material in accessible formats imported from other jurisdictions. The presence of education, parody and satire in the fair dealing section of the Act is also applauded. CLA's main concern is the unnecessarily proscriptive protections for digital locks, which dramatically limit the additions and reduce the impact of the exceptions to fair dealing. "Legislation which does not include the right to bypass digital locks for non-infringing purposes is fundamentally flawed," says CLA Copyright Committee Chair Victoria Owen. "We are seeking an improvement in the language regarding technological measures and the removal of constraints to non-infringing activity."

The library community plays a vital role in providing Canadians access to all forms of material. This access to information is integral to ensuring that Canadians are regular contributors to the economic, social and cultural well-being of their communities.

"We must continue to work together with government, and CLA is committed to doing so, to develop balanced copyright legislation that is in the public interest," concludes Adams.

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The Canadian Library Association/Association canadienne des bibliothèques (CLA) is Canada's largest national and broad-based library association, representing the interests of public, academic, school and special libraries, professional librarians and library workers, and all those concerned about enhancing the quality of life of Canadians through information and literacy.

For more information or to schedule an interview, please contact:

Kelly Moore, CLA Executive Director or Victoria Owen, CLA Copyright Committee Chair
Tel.: 613-232-9625

Key Background Information

Letter to Minister Moore

Canadian Library Association / Association canadienne des bibliothèques

16 December 2011

The Honourable James Moore, P.C., M.P.
Minister of Canadian Heritage and Official Languages
Canadian Heritage
15 Eddy Street
Gatineau, Quebec K1A 0M5

Dear Minister Moore,

The Canadian Library Association (CLA) is Canada's largest national and broad-based library association, representing the interests of public, academic, school and special libraries, professional librarians, library workers, library trustees, and all those concerned about enhancing the quality of life of Canadians through information and literacy.

Libraries and librarians speak on behalf of all users: millions of students, educators, scholars, researchers, lifelong learners, special library users, and recreational readers, from children to seniors. CLA, along with our wide community of library users, continues to embrace copyright legislation as one of our key priorities. The need for balance between the rights of copyright holders and those who wish to make use of copyrighted material is essential for the economic, social and cultural well-being of our country.

In the context of the recently re-introduced copyright legislation, enclosed you will find CLA's Position Statement "Protecting the Public Interest in the Digital World Revisited for Bill C-11: The views of the Canadian Library Association / Association canadienne des bibliothèques on Bill C-11, *An Act to Amend the Copyright Act"*. This Statement outlines the copyright issues of greatest importance and concern to the library community.

I would greatly appreciate the opportunity to meet with you to discuss our concerns and the crucial role the library community plays in providing access to information and all forms of material to the 21 million Canadians who are members and regular users of libraries in this country.

Please have your scheduling assistant contact Alana Fontaine at (613) 233-8906 to discuss your availability. If you have any immediate questions about copyright or other issues of importance to the Canadian library community, please contact me at (613) 232-9625 ext.306.

Sincerely,

Kelly Moore
Executive Director

Canadian Library Association / Association canadienne des bibliothèques
1150 Morrison Drive, Suite 400, Ottawa, Ontario K2H 8S9
Tel: 613.232.9625 • Fax: 613.563.9895 • www.cla.ca

Key Background Information

Letter to Minister Paradis

CLA
Canadian Library Association
Association canadienne des bibliothèques

16 December 2011

The Honourable Christian Paradis, P.C., M.P.
Minister of Industry
235 Queen Street
Ottawa, Ontario K1A 0H5

Dear Minister Paradis,

The Canadian Library Association (CLA) is Canada's largest national and broad-based library association, representing the interests of public, academic, school and special libraries, professional librarians, library workers, library trustees, and all those concerned about enhancing the quality of life of Canadians through information and literacy.

Libraries and librarians speak on behalf of all users: millions of students, educators, scholars, researchers, lifelong learners, special library users, and recreational readers, from children to seniors. CLA, along with our wide community of library users, continues to embrace copyright legislation as one of our key priorities. The need for balance between the rights of copyright holders and those who wish to make use of copyrighted material is essential for the economic, social and cultural well-being of our country.

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Sincerely,

KMoore

Kelly Moore
Executive Director

Canadian Library Association
Association canadienne des bibliothèques

1150 Morrison Drive, Suite 400, Ottawa, Ontario K2H 8S9
Tel: 613.232.9625 • Fax: 613.563.9895 • www.cla.ca

Key Background Information

CLA Position Statement - December 12, 2011

Protecting the Public Interest in the Digital World Revisited for Bill C-11: The views of the Canadian Library Association / Association canadienne des biblioth è ques on Bill C-11, *An Act to Amend the Copyright Act*

Preamble

This analysis of Bill C-11, *An Act to Amend the Copyright Act,* has been prepared by the Canadian Library Association / Association canadienne des bibliothèques (CLA) on behalf of its members, the Canadian library and information community, and all those interested in the creation, dissemination and preservation of Canadian culture. It identifies the provisions of the legislation that would appear to be of most direct interest to librarians, libraries, and others in the information community; and provides some analysis of those provisions from this perspective.

CLA is Canada's largest national library association, representing the interests of public, academic, school and special libraries, professional librarians, library workers, library trustees, and all those concerned with enhancing the quality of life of Canadians through access to knowledge, literacy and lifelong learning.

CLA represents the interests of approximately 57,000 library staff and thousands of libraries of all kinds across Canada on a range of public policy issues. The majority of CLA members work in publicly funded institutions serving the citizens of this country. The public interest is at the core of our work and it is on behalf of the millions of Canadians who regularly access our collections, services (tangible and virtual) and buildings that CLA presents its analysis of Bill C-11, *An Act to Amend the Copyright Act*. Information policy involves every aspect of the role of libraries in Canadian society and copyright is critical to the effectiveness of the public interest mandate of these community institutions.

The Government has stated its intent to provide copyright legislation which is both balanced and technologically neutral. CLA applauds significant improvements to Canada's copyright regime contained in Bill C-11, such as the addition of education, parody and satire in the fair dealing section, and the amendments to the statutory damages provisions. However we note that changes are required to ensure the legislation ultimately succeeds in its objectives.

CLA would like to draw the government's attention to recent documents dealing with limitations and exceptions for libraries and archives presented at the World Intellectual Property Organization (WIPO) in November 2011 by Brazil (SCCR /23/3), the United States of America (SCCR/23/4), Brazil, Ecuador and Uruguay (SCCR/23/5) and the earlier document from the African Group (SCCR/22/12). Pertinent to Bill C-11 these documents deal with exceptions for libraries and archives such as preservation, technological protection measures, contract, and limitations on liability. CLA endorses SCCR/23/3 and notes that Bill C-11 adds constraints to libraries and archives beyond that which is under discussion at WIPO. CLA urges the government not to exceed the minimum international standards of exceptions for libraries and archives currently under active discussion at WIPO.

General Comments

As an instrument of public policy, the *Copyright Act* (the Act) has two primary objectives: to encourage the creation and dissemination of original works, and to promote access to knowledge for the benefit of Canadian society as a whole. It is essential, therefore, that copyright reform respect the underlying principle of balance and equity among the content industries, the creators and the users of the content.

CLA applauds the addition of education, parody and satire in the fair dealing section of the Act. CLA continues to strongly believe that fair dealing, as interpreted in the Supreme Court of Canada judgment in *CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13* (the *CCH* case), is a fundamental users' right which must not be superseded by a copyright holder's use of technological protection measures. Bill C-11's continued prohibitions on the circumvention of digital locks for legal, non-infringing purposes fails to achieve a proper balance between the legitimate interests of copyright holders and the public interest in legitimate uses of copyrighted materials in the digital world. Further, CLA believes that recent developments regarding the collective licensing of copyrighted materials are also creating an imbalance between these two legitimate interests.

CLA urges the government to address the copyright implications of the Internet and digital content with a balanced and thoughtful public policy-based approach that upholds and protects Canadian values and culture and user rights as reinforced by the Supreme Court of Canada. Technology and the content industries are rapidly evolving, and legislative attempts to force existing business models on Canadians by placing constraints on their legitimate use of works through the application and blanket protection of digital locks are both wrong and ultimately quixotic. The core principles in the WIPO Copyright treaties do not require such a maximalist approach and can be incorporated without resorting to the type of barriers to non-infringing uses found in Bill C-11.

Canadian libraries, acting in the public interest, will have great difficulty in fulfilling their mandates if digital locks trump access for legitimate purposes. Technological tools such as digital locks and imposed contracts interfere with statutory rights under fair dealing and impose time limits on how long legally acquired content may be retained by users for research and private study. Exceptions for libraries, archives and museums will enable Parliament to deliver the balance required in recognizing the legitimate interests of right holders and the public interest.

Bill C-11's overarching protections of digital locks and its silence on imposed contracts overriding statutory rights combine to undermine the progressive sections of the legislation.

Copyright issues most relevant to libraries and Bill C-11

1) Fair Dealing

CLA applauds and strongly supports Bill C-11's proposed inclusion of education, parody and satire into the fair dealing provisions in Section 29 of the Act. Although a more flexible approach would be to include the words "such as" before the purposes enumerated in this section, the proposed amendment is a positive step towards reflecting the CCH case's recognition of this fundamental user right. Education, parody and satire are appropriate purposes for fair dealing and are in line with similar provisions in other countries. CLA urges the Government not to bow to the pressure of commercial and economic interests that would seek to limit fair dealing uses for the purposes of education and research.

CLA strongly believes that fair dealing must not be superseded by a copyright holder's use of technological protection measures, as more fully outlined below.

CLA notes that Bill C-11 proposes the addition of Sections 29.21 to 29.24 to the Fair Dealing provisions of the Act. These sections properly attempt to recognize various emerging uses of new technology. However, these uses contain various limitations and counter exceptions which unnecessarily limit their use. Rather than legislate specific limits or counter exceptions, CLA supports dealing with such uses as part of the entire fair dealing analysis.

We are also concerned that these provisions may be read as substitutive rather than additive to Section 29, and therefore suggest that these specific sections be moved to a different sub-heading. In particular: while Section 29.21 is a positive recognition of the growing importance of user generated content, the language is too restrictive and does not take into account the importance of this emerging form of creativity. Section 29.22 not only contains the fundamental flaw of being superseded by digital locks and the inclusion of overly broad destruction requirements, but it also excludes typical lawful uses of library materials. Section 29.24 is similarly and unnecessarily restrictive.

2) Digital Locks
[also known as Digital Rights Management (DRM) or Technological Measures (TMs) or Technical Protection Measures (TPMs)]

The prohibitions on the circumvention of digital locks in Bill C-11 exceed Canada's obligations under WIPO copyright treaties. Canada agreed to distinctive wording and flexibilities inherent in WIPO Internet Treaties. WCT art.11 and WPPT art. 18 both protect the right holders but also allow flexibility in national laws for permitted legal uses. Bill C-11 gives a new right to copyright owners negating the flexibilities in the Internet Treaties and directly contravening the basic, longstanding individual rights sanctioned in Canadian copyright law. With this provision, Canada is allowing a technical feature to override a nuanced information policy, permitting owners' rights to overreach their legitimate limits, and impinging on the ability of libraries to fulfill their public interest mandate.

Bill C-11 makes it illegal to circumvent digital locks for most legal purposes including quotation, parody and satire (fair dealing uses), library preservation, and the copying of content for which there is no copyright (facts and information) or where copyright has expired. The Government's attempt to exempt persons with perceptual disabilities from the constraints of digital locks (Section 41.16(1)) is nullified by the condition "to not unduly impair the technological protection measure," and we recommend that this condition be deleted from the Bill. There is no efficient way to remove the TPMs and restore them after an alternate format has been created.

CLA believes Canadians deserve regard for their statutory rights in the digital environment. Section 41 of Bill C-11 can be simply amended. The definition of "circumvent" in Section 41 (a) and (b) must include the words "for any infringing use" thus insuring Canadians' ability to invoke their full rights as information users.

CLA appreciates the Government's special treatment of libraries, archives, museums and educational institutions in Section 41.2. However, we note this section could be strengthened by the creation of an exception to deal with this issue rather than relying on the section as a mere defence.

3) Exceptions for the print disabled

CLA notes that Bill C-11 has made improvements to clarify and extend user rights relating to exceptions for people with perceptual disabilities. There is an explicit right for a "person with a perceptual disability, for a person acting at the request of such a person, or for a non-profit organization acting for the benefit of such a person to make a copy of a work for the purpose of creating an alternate format." There is a conditional exception to the prohibition of circumventing technological protection measures for the "sole purpose of making a work, a performer's performance fixed in a sound recording or a sound recording perceptible to the person with a perceptual disability." (Section 41.16(1)). Sending copies of alternate formats outside Canada is permitted under specific conditions. (Section 32.0.1.1). The Bill preserves the continued exemption from the Blank Audio Recording Media levy for societies, associations or corporations that represent persons with a perceptual disability. (Section 82).

However, CLA believes the Bill as drafted has the potential to significantly constrain or render Section 32 (1) moot or inoperable. For example, despite the Government's intent that the Bill be technologically neutral, it does not provide a generic exception for all alternate format materials for people with print disabilities. CLA strongly suggests the Bill provide that "it is not an infringement of copyright for a person with a perceptual disability, for a person acting at the request of such a person, or for a non-profit organization acting for the benefit of such a person, to make a copy of a work, and sound recording or another format suitable for persons with a perceptual disability provided that the item is not commercially available in the appropriate format." There should be no prohibition on sign language or captioning of cinematographic works (motion pictures) by a non-profit organization.

If Bill C-11 maintains its overreaching prohibition on the circumvention of digital locks, it should be made clear that the proposed requirement "to not unduly impair the technological protection measure" does not operationally hinder the exercise of the exception for people with print disabilities. Further, Bill C-11 should clarify the jurisdiction, royalties and reporting requirements for alternate formats related to collective societies.

While CLA is pleased that the Government has proposed changes to section 32.01 of the Act addressing the issue of cross border lending of alternate format content for use by individuals with a print disability, CLA does not endorse the constraints applied to this activity in Bill C-11. The Bill (potentially subject to new regulations) calls for limits on what works can be loaned based on author nationality, payment of a royalty, whether or not the right holder can be located, and a reporting regime.

WIPO is considering a "Proposal on an international instrument on limitations and exceptions for persons with print disabilities" presented by 13 countries in June 2011. The presenting countries include the United States and the European Union and its member states. CLA strongly endorses this proposal and notes that the constraints on the cross border movement of alternate formats are greater in Bill C-11 than in the WIPO proposal, specifically the nationality and royalty payment requirements. Indeed the WIPO proposal permits the cross border movement of an alternate format "without the authorization of the rightholder" with no requirement for royalty payment or reporting to "an authority".

The Government of Canada should not introduce constraints into the Act exceeding those in the WIPO proposal while it is under active consideration. Canada has an opportunity to assume an international leadership role in championing the rights of the print disabled to access the world's written heritage.

Accordingly, CLA proposes that section 32.01(1) be amended to:

1. allow the making of a copy of a work formatted for persons with a print disability for movement across borders without the requirement that "the author of the work that is reformatted" be a Canadian citizen or permanent resident or a citizen or resident of the country to which the work is sent; and remove the limitation, royalty, reporting and regulatory requirements proposed under sections 32.01(2), (4), (5), (6) and (7).

CLA urges the Government to review all of the sections in the Bill that affect access for people with perceptual disabilities to ensure they do not make equitable access more difficult, or indeed impossible. The main point is to "do no harm" to any access available to users with print disabilities.

4) Libraries, Archives and Museums: Exceptions for Research and Private Study

Bill C-11 falls short of what is required for libraries to provide effective reference and interlibrary loan services in the digital era. The constraints the Bill seeks to impose protect economic interests that are not threatened by the limited amount of "private research and study" materials copied by Canadian libraries for their patrons or for interlibrary loan.

CLA continues to believe that the library, archive and museum exceptions for research and private study in section 30.2 of the Act must be truly format-neutral and must allow these institutions to do anything on behalf of a patron, both directly and through interlibrary loan, which patrons can do for themselves under fair dealing. To achieve this, given the prohibitions on digital locks in Bill C-11, CLA proposes that section 30.2 consist only of:

1. an amended section 30.2(1) allowing libraries, archives and museums or any person acting under their authority to do anything on behalf of their patrons or the patrons of another library, archive or museum that those patrons could do under sections 29 and 29.1 of the Act; and
2. a new section 30.2(2) allowing libraries, archives and museums or any person acting under their authority to circumvent technological protection measures for the purposes of section 30.2(1).

The World Intellectual Property Organization (WIPO) has recommended the use of "trusted intermediaries" for the visually impaired persons (blind, visually impaired, and other reading-impaired persons). CLA suggests that there are legitimate cases where Canadians will need to circumvent digital locks to use library materials for fair dealing, but where the prohibitions on circumventing digital locks in Bill C-11 will prevent this. Libraries could act as trusted intermediaries to circumvent digital locks on behalf of Canadians with a legitimate fair dealing interest. Rather than leaving Canadians trapped between fair dealing and anti-circumvention provisions, libraries, archives and museums could fill the gap.

There is a further exception in Section 30.2(2) that allows library staff to reproduce by reprographic means a work published in a scholarly, scientific or technical periodical, or a work (other than a work of fiction, or poetry or a dramatic or musical work) published in a newspaper or in any other type of periodical that was published more than one year before the copy is made. In order to exercise the exception in Section 30.2(2), Bill C-11 proposes an amendment to Section 30.2(4) that would require the library to inform the person making the request that the copy is to be used for research or private study and that use of the copy for another purpose may require the authorization of the copyright owner.

Currently, there is a restriction placed on the exercise of the exceptions provided in Sections 30.2(1) and 30.2(2) when the request is made by a patron of another library, archive or museum, as section 30.2(5) stipulates that the copy given to the patron in that case must not be in digital form. The amendments to Section 30.2(5), (5.01) and (5.02) proposed in Bill C-11 lift this restriction by allowing library staff to provide a digital copy of a work for interlibrary loan purposes. However under Section 30.2(5.02), the library must take measures to prevent the requesting patron from: a) making any reproduction of the digital copy (other than a single print copy), b) communicating the digital copy to anyone, and c) using the digital copy for more than five business days from the day on which it is first used.

CLA believes the restrictions on library copying for users in the present and proposed Sections 30.2(2), 30.2(3) and 30.2(5) are unworkable and overly restrictive. These provisions are unworkable, as existing interlibrary loan software does not allow libraries to apply the unreasonable restrictions required under the proposed Section 30.2(5.02). Further, these provisions are overly restrictive when considering the liberal interpretation of research and private study set out in the CCH case, which, provided the dealing is fair, does not restrict the reproduction of single copies of works to the publications enumerated in Section 30.2(2) or only to print copies as provided in the current Section 30.2(5).

Bill C-11 continues the practice of segregating important Canadian institutions according whether they are owned by non-profit organizations or not. This seems inconsistent with the federal Government's support in other initiatives for Private-Public Partnerships and is also completely inappropriate when the Government says that it is making the amendments to "permit ... educators and libraries to make greater use of copyright material in digital form" and "allow educators and students to make greater use of copyright material" ((c) and (d) from the Summary). In fact the Government in Bill C-11 is only allowing certain select libraries, educational institutions, archives and museums to have increased use. Users should have equitable access in all environments.

CLA calls upon the Government to extend the exceptions now reserved for defined groups of institutions (i.e. a "Library, Archive or Museum" or "Educational Institution" as defined in Section 2 of the Act) to all users making educational uses of material or serving the needs of users of information or, at least, to broaden the definitions in Section 2 of the Act to encompass all educational institutions, both public and private, and all libraries, archives and museums, both public and private, regardless of whether a library, archive or museum holds a collection open to researchers or the public. Recent restructuring of the federal government's own Health Canada Library has recently caused it to be closed to "outsiders," likely disqualifying it for the "Libraries, Archives and Museums" exceptions in the Act.

5) Preservation: Exceptions for Management and Maintenance of Collections

Restrictions within the current exceptions in Section 30.1 of the Act, many of which are linked to older technologies, make it increasingly difficult for libraries to fulfill their mandate of preserving and making accessible the materials in their collections and to use digital technologies to provide the services their users need. Libraries find they need to "refresh" or "migrate" content to match the evolution and availability of current technology and not have to wait until the older format technology is obsolete.

CLA continues to believe that the prohibitions on digital locks in Bill C-11 undermine the Bill's proposed positive changes to section 30.1 of the Act, which allow for the preservation of material the library considers is becoming obsolete or where the technology required to use that material is becoming unavailable. CLA proposes that section 30.1 in Bill C-11 be amended to allow libraries, archives and museums or any person acting under their authority to circumvent technological protection measures for the purposes of that section. In order to ensure the ability to access and migrate digital materials, libraries, archives and museums must be able to circumvent digital locks to enable continued preservation. Otherwise, a large portion of our national heritage may be lost forever.

Also, it is not clear from the proposed section 30.1 whether libraries, archives or museums can make a copy of a work in multiple alternative formats where this is necessary for the purpose of preservation. Data degradation rates for new digital formats are not certain. Accordingly, best preservation practice dictates that some items may need to be kept in multiple formats until a stable medium can be determined. For example, the contents of a Crown Corporation's recordings were lost as the digital medium chosen for the transfer (DAT – Digital Audio Tape) from analogue to digital proved to be unstable. CLA proposes that it be made clear in section 30.1(1)(c) that multiple alternative formats can be made under that section where necessary.

6) Educational Issues

Bill C-11 contains several new provisions that would create limited exemptions available to educational institutions as defined in the *Act* and to those acting on their behalf or under their authority. As indicated above, CLA strongly supports the proposed inclusion of education in section 29 of the Act. As also outlined above, we believe that the definition of "Educational Institution" in Section 2 of the Act should be broadened to include all such institutions, regardless of their ownership and, therefore, that the extensions of rights to "educational institutions" proposed in Bill C-11 would extend to all Canadian educational institutions.

CLA welcomes the amendments to section 29.4 as a move toward technological neutrality and recognition of the continuing advancement in classroom display technology. Similarly we see the additions of 29.5 as positive reflections of the importance of multimedia in the classroom. We support section 29.6 and 29.9(1)(a) and suggest the same treatment be afforded to section 29.7.

However, the provisions proposed for Sections 30.01 and 30.04 add unacceptable levels of complexity and will encourage an over-reliance on licensing. Any limited benefits for teachers and learners given in these sections quickly evaporate in the face of counter-limitations and requirements. As we have indicated above, we do not support digital locks that prohibit legitimate acts of circumvention or otherwise restrict existing user's rights. As drafted, these educational exceptions are vitiated where a technological protection measure has been employed. Even worse, they contain requirements for academic staff to impose and enforce these measures.

Although it does not explicitly mandate any particular level of record keeping, the effect of 30.03 would impose burdensome new record keeping requirements for institutions, contrary to the direction taken in sections 29.6 and 29.9(1)(a). We oppose sections 30.02 and 30.03 as the relationship between licensing collectives and institutions should not be unduly disrupted by legislation which favours one side.

7) <u>Collective Licensing</u>

CLA believes that the process under the Act for the collective licensing of copyrighted material constitutes a growing threat to fair dealing. The CCH case makes it clear that a library may exercise a fair dealing right without having a collective license.

Since the CCH case, Access Copyright, a reprographic collective society for English-speaking Canada, has filed five tariff applications with the Copyright Board of Canada in respect of Kindergarten to Grade 12 School Boards (for 2005 to 2009 and 2010 to 2012), Post Secondary Institutions (for 2011 to 2013) and the Provincial and Territorial Governments, apart from Québec (for 2005 to 2009 and 2010 to 2014). These applications fail to take into account the fair dealing rights outlined in the CCH case. These applications also fail to take into account the current business model for the licensing of digital materials. Under that model, many of the entities targeted by these tariff applications already have licenses with copyright holders, including directly with creators, to access a significant amount of digital material. This access should not be subject to an additional charge.

CLA also believes these tariff applications subject the targeted entities to a lengthy, expensive and an administratively burdensome process. Further, to date only one of these applications (the 2005-2009 School Tariff) has resulted in a decision. That decision was issued at the end of the term of the tariff, resulting in schools boards having to pay a significant amount of retroactive tariff fees into trust pending the outcome of litigation resulting from that application.

Section 70.12 of the Act provides a "collective society may ... (a) file a proposed tariff with the Board". Section 70.2(1) of the Act provides that "[w]here a collective society and [users] ... are unable to agree on the royalties to be paid for the right ..., either of them ... may... apply to the Board to fix the royalties..."

CLA proposes that Part VII of the Act (and, in particular, these two sections) be amended to require that a collective society must make application to the Board, prior to proposing a tariff, and present evidence that the users to be targeted by a proposed tariff application have been approached to enter into contractual relations, where possible, and, if such an approach has been made, that the collective society and those users have been unable to agree on the royalties to be paid for the rights included in the proposed tariff. This amendment should provide that, if, upon this application, the Board agrees that the parties cannot establish an agreement for royalties, then the Board may permit the collective to file the proposed tariff.

Further, CLA notes there was an indemnity provision under the blanket license arrangements previously negotiated between Access Copyright and many user groups, including the 1999-2004 Pan Canadian School Copyright Agreement (and its predecessors) and the model license negotiated with the Association of Universities and Colleges of Canada (and subsequently adopted by colleges and universities across Canada in their individual blanket licenses with Access Copyright). Under this provision Access Copyright agreed to reimburse institutions for all expenses incurred (costs and damages) in connection with any infringement lawsuit in respect of the class of rights represented by Access Copyright brought against the institution or its members by any copyright holder not represented by Access Copyright. This indemnity has not been included by Access Copyright in any of the five tariff applications noted above.

Accordingly, beginning with the 2005-2009 School Tariff, institutions have lost (or will lose) this protection as the Copyright Board does not have the statutory authority to impose an agreement for indemnification as part of the Tariff process. This leaves institutions exposed financially to lawsuits filed by those not represented by Access Copyright. Therefore CLA recommends that the government expand the powers of the Copyright Board of Canada to enable it to order an indemnification clause as part of a proposed tariff in appropriate circumstances.

8) Contractual Limitations on Exceptions and Uses

The provisions in contracts and licenses can severely encroach on existing user rights and exceptions under copyright law, including fair dealing, access rights for persons with disabilities, preservation and other user and library exceptions. Failure to protect individual users and institutions from imposed contractual terms which override their legislated rights undermines the public interest and negates the purpose of the Act.

CLA proposes that Bill C-11 be amended to specify that the terms and conditions of a standard form or any other unilateral contract restricting the making of a copy, as permitted under the exceptions for libraries, archives and museums or to permit a user to invoke other rights, including fair dealing, have no force. Contract law should not be allowed to trump legislative rights unless users knowingly and willingly agree to waive their rights for other considerations. Consumer protection must be given priority when these conflicting interests meet.

9) Internet Service Provider (ISP) Liability

CLA supports the proposed requirement in Section 41.23 of Bill C-11 that ISPs notify a user of their network that a complaint has been received regarding the legality of content the user has mounted, rather than requiring them to remove the content ("notice and notice" versus "notice and takedown"). Placing the onus on the ISP to remove content on a network on the basis of unsubstantiated allegations from a self-declared rights owner would place the ISP in an untenable position: it is best left to the network user to determine and be liable for their actions. It is worth pointing out that in addition to the commercial ISPs there are many non-profit organizations that serve as ISPs including many public libraries, school boards, universities and colleges.

Summary

CLA acknowledges the complexity of copyright in the 21st century and applauds the Government's attempt to define the balance between the concerns of creators, content providers and users as a key goal of continuing copyright reform. While sections of Bill C-11 indicate that the concerns expressed by thousands of Canadians during the recent copyright consultations were heard, taken as a whole, the Bill does not yet achieve an acceptable balance from the Canadian library perspective. By amending s 41.1 to allow circumvention of technical protection measures for non-infringing uses Bill C-11 would deliver on its potential to modernize Canadian copyright law in a fair and balanced manner and in so doing represent the legitimate interests of the public and the interests of the right holders.

CLA is pleased to continue to work with the Government to develop balanced copyright legislation in the public interest. As the Bill moves through the legislative process, CLA and its members will join with library users and a wide range of other institutions and organizations to vigorously support the progressive sections of the Bill and seek amendments to address the deficiencies outlined in this analysis.