Court File No.: 33888

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE PROVINCE OF ALBERTA AS REPRESENTED BY THE MINISTER OF EDUCATION AND OTHERS*

APPELLANTS
(APPLICANTS)

- and -

THE CANADIAN COPYRIGHT LICENSING AGENCY OPERATING AS "ACCESS COPYRIGHT"

RESPONDENT
(RESPONDENT)

- and -

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS AND CANADIAN FEDERATION OF STUDENTS, ASSOCIATION OF UNIVERSITIES .AND COLLEGES OF CANADA AND ASSOCIATION OF CANADIAN COMMUNITY COLLEGES, CANADIAN PUBLISHERS' COUNCIL, ASSOCIATION OF CANADIAN PUBLISHERS, AND CANADIAN EDUCATIONAL RESOURCES COUNCIL, CMRRA-SODRAC INC, PROFESSIONAL WRITERS ASSOCIATION OF CANADA AND WRITERS UNION OF CANADA, CENTRE FOR INNOVATION LAW AND POLICY OF THE FACULTY OF LAW UNIVERSITY OF TORONTO, CANADIAN AUTHORS ASSOCIATION, CANADIAN FREELANCE UNION, CANADIAN SOCIETY OF CHILDREN'S AUTHORS, ILLUSTRATORS AND PERFORMERS, LEAGUE OF CANADIAN POETS, LITERARY TRANSLATORS' ASSOCIATION OF CANADA, PLAYWRIGHTS GUILD OF CANADA

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THE PROVINCE OF MANITOBA AS REPRESENTED BY THE MINISTER OF EDUCATION, CITIZENSHIP AND YOUTH;
THE PROVINCE OF NEW BRUNSWICK AS REPRESENTED BY THE MINISTER OF EDUCATION;
THE PROVINCE OF NEWFOUNDLAND AND LABRADOR AS REPRESENTED BY THE MINISTER OF EDUCATION;
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THE PROVINCE OF PRINCE EDWARD ISLAND AS REPRESENTED BY THE MINISTER OF EDUCATION;
THE PROVINCE OF SASKATCHEWAN AS REPRESENTED BY THE MINISTER OF EDUCATION;
THE YUKON TERRITORY AS REPRESENTED BY THE MINISTER OF EDUCATION;
THE AIRY AND SABINE DISTRICT SCHOOL AREA BOARD;
THE ALGOMA DISTRICT SCHOOL BOARD;
THE ALGONQUIN AND LAKESHORE CATHOLIC DISTRICT SCHOOL BOARD;
THE ASQUITH-GARVEY DISTRICT SCHOOL AREA BOARD;
THE ATIKOKAN ROMAN CATHOLIC SEPARATE SCHOOL BOARD;
THE AVON MAITLAND DISTRICT SCHOOL BOARD;
THE BLOORVIEW MACMILLAN SCHOOL AUTHORITY;
THE BLUEWATER DISTRICT SCHOOL BOARD;
THE BRANT HALDIMAND NORFOLK CATHOLIC DISTRICT SCHOOL BOARD;
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THE HAMILTON-WENTWORTH CATHOLIC DISTRICT SCHOOL BOARD;
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PART I – OVERVIEW

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC").is a public interest technology law clinic at the Centre for Law, Technology and Society at the University of Ottawa. CIPPIC intervenes in this case to assist the Court in analyzing the fair dealing defense in the educational environment.

2. The Court of Appeal below reviewed the Copyright Board's decision at first instance on the question of fair dealing on a basis of reasonableness. In so doing, the of Appeal ignored prior jurisprudence that had already satisfactorily determined – as correctness – the standard of review applicable to the Copyright Board's interpretation and application of generally applicable provisions of the *Copyright Act*. Regardless, in analyzing the factors relevant to a determination of the appropriate standard of review, the Court of Appeal mischaracterized this case as not of general significance when it is, in fact, of general importance to a determination of the scope of the fair dealing defence generally, and, in addition, failed to appreciate that interpretation of fair dealing is space "shared" with the courts and to which the Board is owed no deference.

3. This case involves the proper interpretation of the *Copyright Act*'s fair dealing defense. The Court of Appeal failed to apply the robust interpretation of fair dealing as a user right established by the prior jurisprudence of this Court.

4. Copyright and the *Charter of Rights and Freedoms* both concern themselves with rights in expression. It follows that the *Copyright Act* ought to be interpreted consistently with the values enshrined in the *Charter*, the supreme law of the land. Properly interpreted, the fair dealing defense is one of copyright law's key mechanisms for accommodating *Charter* values. Accordingly, dealings whose purposes lie in the core of values protected by the *Charter* ought to tend to be fair.

5. These same considerations compel consideration of the whole of the dealing in assessing fairness, and the ends sought by the dealing. Accordingly, the Court of Appeal erred in failing to consider the purposes of students in making use of dealings undertaken for their benefit by teachers.

6. Similarly, the Court of Appeal erred in considering aggregate use instead of individual use.

PART II – ISSUES

7. CIPPIC will offer submissions with respect to the following issues before the Court:

   (a) the applicable standard of review;

   (b) the analytical approach to fair dealing;

   (c) the role *Charter* values play in the interpretation of fair dealing;

   (d) the relevance of students to the question of fair dealing in educational settings; and

   (e) the influence of aggregation on the question of fair dealing.

PART III – ARGUMENT

A. STANDARD OF REVIEW

8. The standard of review applicable to the Board's decision is correctness.

9. In *Dunsmuir*, this Court summarized the simple two-step process for identifying the applicable standard of review. First, if the standard applicable to a particular kind of question addressed by an administrative tribunal has already been satisfactorily determined, then reference to precedent resolves this issue for the reviewing court. Only where the standard of review has not already been satisfactorily determined is an analysis of various relevant factors required. The Court of Appeal did not follow this process.

Dunsmuir v. New Brunswick, 2008 SCC 9 at para. 62.

10. The Court of Appeal ignored well-settled jurisprudence applying the standard of correctness to the Copyright Board's interpretation and application of generally applicable provisions of the *Copyright Act*. The question in this case is the same category of question—the legal interpretation of a generally applicable provision of the *Copyright Act*—reviewed in *SOCAN v. CAIP* by the Court of Appeal and this Court on the standard of correctness.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45 at paras. 48-50, affirming in part 2002 FCA 166 at paras. 104-7.

11. The question of interpretation of a generally applicable provision of the *Copyright Act* in this case is also essentially the same as other legal questions that were held to be reviewable for correctness by the Court of Appeal, both pre- and post-*Dunsmuir*. For example, the Court of Appeal recently required the Board to correctly resolve questions relating to rights-holders' entitlement to collect royalties from satellite radio service providers. It is also well settled that the Board must correctly interpret the generally applicable definitions in Part VIII of the *Copyright Act*.

Sirius Canada Inc. v. CMRRA/SODRAC Inc., 2010 FCA 348 at para. 8; *Apple Canada Inc. v. Canadian Private Copying Collective*, 2008 FCA 9 at para. 2; *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 at para. 145-7.

12. Alternatively, if the Court of Appeal, by ignoring the settled jurisprudence, implied that the standard of review had not already been satisfactorily determined, it misinterpreted the factors relevant to making that determination. Justice Evans conducted the most thorough judicial analysis of these factors pertaining to the Copyright Board in the Court of Appeal's decision in *SOCAN v. CAIP*, which was subsequently endorsed by this Court. After a meticulous review of the governing legal principles, he concluded that the decisive factor settling correctness as the applicable standard was the fact that the provisions at issue—particularly section 3 of the *Copyright Act*—were not within the Board's "exclusive domain" or "home territory", but rather were in "shared space" with the courts.

SOCAN v. CAIP (FCA), at paras. 36-107, especially paras. 87, 104; *SOCAN v. CAIP* (SCC) at para. 48.

13. In error, the Court of Appeal in this judicial review focused on paragraph 54 *Dunsmuir* regarding the relevance of tribunals interpreting their "own" statute. Moreover, in focusing on this factor, the Court of Appeal contradicted the analysis by Justice Evans that has become the touchstone test of the standard applicable to Copyright Board decisions. Although the Board often deals with the *Copyright Act* and not other statutes, the *Copyright Act* is more often dealt with by courts and not the Board.

14. It is admittedly arguable that deference to the Board may be appropriate on questions involving the application of clearly settled copyright law to particular facts proved by evidence. In the Court of Appeal's decision in *SOCAN v. CAIP*, Justice Evans acknowledged that the standard of reasonableness might apply in so far as a question "essentially involves the application, rather than the interpretation of the statute." But the question of the proper interpretation of the fair dealing defense is a question of legal interpretation, not factual application. As this Court held in *SOCAN v. CAIP*, the standard of review is correctness because it is not the application of the facts themselves, but "the legal significance" of the facts that is in issue.

SOCAN v. CAIP (FCA) at para. 107; *SOCAN v. CAIP* (SCC) at para. 50.

15. The Court of Appeal also erroneously considered this case to be lacking "wide ranging legal significance". This case's interpretation of the scope of the fair dealing defense will have "wide ranging legal significance" for a variety of industries – from documentary film-making to innovative online content delivery services – that rely on copyright and look to the courts for guidance on the scope of authors' and users' rights.

B. ANALYTICAL APPROACH TO FAIR DEALING

16. This case presents a contrast between competing approaches to fair dealing:

(1) the purposive approach adopted by this Court in *Law Society of Upper Canada v. CCH Canadian Limited*, 2004 SCC 13, in which fair dealing is regarded as a user right, integral to the scheme of the Act as a whole; and

(2) a starker perspective that regards fair dealing sceptically, as a mere exception to author's rights, to be narrowly construed.

17. CIPPIC submits that the decision under review and the decision of the Copyright Board that it affirms are animated by the latter perspective. In framing its analysis, the Board characterized fair dealing (at para. 57) as follows:

> Several provisions of the Act allow a protected work to be used without permission. One of those exceptions, now elevated by the Supreme Court of Canada to a user's right, concerns fair dealing.

18. CIPPIC submits that these words evidence scepticism for *Law Society's* approach to the scheme of copyright as a whole, which views exceptions and limitations as meriting the same protection as authors' and owners' rights. Such scepticism is misplaced. As the unanimous decision in Law Society makes clear, fair dealing is a user right and merits the "fair and balanced reading that befits remedial legislation."

Law Society of Upper Canada v. CCH Canadian Limited, 2004 SCC 13 at para. 48 [*Law Society*].

C. *CHARTER* VALUES AND THE INTERPRETATION OF FAIR DEALING

19. The law of copyright and the *Charter of Rights and Freedoms* both govern rights and liberties in expression. Copyright law, by definition, balances rights in authors' expression. Indeed, it is a cornerstone of copyright that it vests *only* in expression, and not facts or ideas. Expression is, however, also the domain of section 2(b) of the *Charter of Rights and Freedoms*, which guarantees freedom of expression. The Supremacy Clause dictates that the constitutional guarantee of freedom of expression "is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The law of copyright ought, then, to be consistent with the values that underlie freedom of expression.

Canadian Charter of Rights and Freedoms, s. 2(b) and s. 52, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

20. This Court has identified three purposes that lie at the core of freedom of expression:

(1) The pursuit of truth: "[S]eeking and attaining the truth is an inherently good activity."
(2) Participation in the community: "[P]articipation in social and political decision-making is to be fostered and encouraged."
(3) Individual self-fulfillment and human flourishing: "[T]he diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed."

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 976 [Irwin Toy].

21. CIPPIC submits that these *Charter* values and the law of copyright are, indeed, generally consistent with one another. But we ought to aim for more than consistency. Copyright will serve us best when it *resonates* with the values of the *Charter*: courts ought to interpret both authors' and users' rights in a manner that serves the objects of freedom of expression. Grounding copyright on the firm foundation of the *Charter* will provide crucial guidance in the interpretation and mediation of the competing rights of

copyright's myriads stakeholders.

22. The *Copyright Act* seeks to accommodate the objects of the *Charter's* guarantee of freedom of expression through its balancing of rights. Copyright's grant of rights to authors serves as an incentive to expressive activity, while the limited nature of those rights, and copyright's additional grant of user rights, provides "breathing space" or a "safety valve" for expressive interests. This balancing seeks to ensure that the law of copyright, as a whole, facilitates expressive activity.

23. In the United States, a jurisdiction with copyright laws similar to Canada's and a similar constitutional commitment to freedom of expression, takes precisely this view of the overlap between copyright and freedom of expression. In *Eldred* v. *Ashcroft*, the majority of the United States Supreme Court endorsed the view that copyright, taken as a whole, is an "engine of free expression."

Eldred v. *Ashcroft*, 537 U.S. 186 (2003).

24. The overlap and potential conflict between *Charter* values and the law of copyright has gained acceptance among Canadian commentators on copyright law. Professor David Vaver notes that overprotection of intellectual property, in general, abridges freedoms:

> [T]he decision to protect, once taken, must be matched by an equally careful decision on how far to protect. IP abridges freedoms and so needs to be constantly justified. Overprotection imposes social costs by stopping or discouraging others from pursuing otherwise desirably activities.
>
> David Vaver, *Intellectual Property Laws: Copyright, Patents, Trade-marks*, 2nd ed. (Toronto: Irwin Law, 2011 at 23-24 [Vaver].

25. Professor Vaver also notes the overlap between copyright and the *Charter*, recognizing that *Charter* values must "trump" copyright where the Act does not properly accommodate freedom of expression:

> The guarantees of freedom of the media and of expression in the *Canadian Charter of Rights and Freedoms* and corresponding provincial charters may affect the interpretation or exercise of IP rights, particularly copyrights and trade-marks. *Charter* values are already supposed to be partially reflected in the mix of rights established by the IP statutes – and so they should, because copyright and trade-mark laws are essentially laws that regulate expression. But, being first written in *pre-Charter* times, they often reflect *pre-Charter* attitudes and give priority to the expressive rights of those they call IP owners over everyone else. It took a *post-Charter* court to recognize that others – IP users – had rights too, and that those rights deserved equal consideration and respect [referring to *Law Society*].
>
> The language of balance, fairness, and proportion is now a staple of IP law. It may cause many IP and *Charter* free expression rights to be regarded as embodying a single set of values that promote "communication and discursive interaction" within society, instead of rights in constant conflict. Until that occurs, we may expect Charter values to "trump" IP rights as the jurisprudence continues to develop, especially where the IP statutes have not foreseen or adequately covered the particular event. Striking out a free speech *Charter* argument as irrelevant to any copyright or trade-mark infringement claim should therefore occur only in the plainest case.

Vaver at p. 46-47.

26. Many academic commentators also appreciate the relevance of freedom of expression to copyright. Professor Jane Bailey notes that user rights, in particular, perform the crucial task of preserving essential user liberties in the face of copyright's grant of exclusivity:

> Protection of users' rights is essential to maintaining a balance within the Act consistent with that constitutional guarantee [of freedom of expression].
>
> Jane Bailey, "Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2006) 125 at 127.

27. Indeed, recognition of the overlap between copyright and freedom of expression has even made its way into the Library of Parliament's Legislative Summary of Bill C-11, *An Act to Amend the Copyright Act*. Bill C-11, now before Parliament, proposes to introduce a new suite of rights to protect copyright owners' use of "technological protection measures" to protect works. "Technological protection measures" – sometimes called "TPMs" or "digital locks" – are technological tools used by content distributors to control access to or copying of digital content. Bill C-11 contains no exception to liability for the exercise of many user rights, including fair dealing. The Library of Parliament notes that this omission raises *Charter* concerns:

> The wide use of TPMs or rights management information could also have an impact of Canadians' freedom of expression rights. This could lead to *Canadian Charter of Rights and Freedoms* challenges to the provisions if they result in restrictions on freedom of expression.
>
> Library of Parliament's Legislative Summary of Bill C-11, *An Act to Amend the Copyright Act* Publication No. 41-1-C11=E (14 October 2011) at 21 [citations omitted].

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28. Fair dealing is the cardinal user right in the *Copyright Act*. In the *Law Society* case, a unanimous decision, this Court illuminated the role the fair dealing exception plays in the scheme of Canadian copyright law:

> 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.
>
> *Law Society* at para. 48.

29. Quoting Professor Vaver, the Court concluded that

> User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.

Law Society at para 48 (citations omitted).

30. This Court's purposive construction of fair dealing in *Law Society* ensured that fair dealing would function as a crucial "safety valve" to help reconcile copyright with the *Charter*. The decision of the Court of Appeal below scales back the reach of that decision.

31. In *Law Society*, this Court directed that a defendant seeking to qualify for the fair dealing defense must show that its dealing was for a purpose identified in the Act and that it was fair. In assessing fairness, this Court acknowledged that the purpose of the dealing was a relevant consideration.

32. **The *Charter* and the Purpose of the Dealing.** CIPPIC submits that under the fairness test, the closer a user's purpose in undertaking a dealing with a work revolves around the core of values enshrined in the *Charter*, the fairer the dealing will tend to be.

33. This is not to say that any dealing with a work that lays claim to a *Charter* value will qualify as a fair dealing. Any dealing must undergo the full "fairness test", and may be disqualified for the defense for another reason – quantity of the dealing, competing in the marketplace with the original, *etc.*

34. **One Inquiry into Purpose of the Dealing.** CIPPIC submits that it was not the ruling of this Court in *Law Society* that the inquiry into the purpose of the dealing in assessing fairness was distinct from the assessment of whether the dealing was for a purpose allowed by the Act. In fact, the Court undertook but a single assessment of the defendant's purpose: compare *Law Society* at paras. 61-64 to para. 66.

35. The Copyright Board at first instance undertook distinct purposive inquiries. The Board accepted the concession of Access Copyright that the dealings under review were for an allowable purpose. The Board then undertook a narrowing inquiry under the fairness analysis to throw certain dealings beyond the reach of the fair dealing defense. The Court of Appeal found no error in this approach.

36. Respectfully, this analysis is incoherent and internally inconsistent. The analysis urged on the Board by Access Copyright is a two-step designed to avoid the "large and liberal" interpretation of the allowable categories of fair dealing mandated by this Court in favour of fair dealing defense that is narrower than *Law Society* mandates.

37. **Effect of Overlapping Purposes.** The Court below also failed to appreciate the implications of overlapping purposes for a dealing. In CIPPIC's submission, so long as a dealing implicates a purpose that embraces even *one* of the enumerated allowable purposes, then a reviewing Court must assess the fairness of that purpose. The contrary view, identifying a "predominate" purpose, will inevitably disfavour some speech with a collateral purpose that lies at the core of *Charter* values but whose "predominant purpose" lies outside the meaning of one of the enumerated allowable purposes.

D. STUDENTS AND FAIR DEALING

38. The Copyright Board in assessing the purpose of the dealing identified categories of dealings in

which copies of excerpts made on the teacher's initiative for his or her students or at the student's request. For these dealings, the Board stated that it was the teacher's purpose that must predominate in assessing the purpose of the dealing. The Board went on to state (at para. 98) that:

> Most of the time, this real or predominant purpose is instruction or "non-private" study…. A teacher, in deciding what to copy and for whom, just as when directing students' conduct, is doing his or her job, which is to instruct students. According to this criterion, the dealing therefore tends to be unfair.

The Court of Appeal found no error in this analysis.

39. This analysis constitutes an error of law. In considering the dealing, the Board must consider the dealing as a whole. This means all parties to the dealing – the teacher, the student, and the school – are implicated in the dealing.

40. The purpose of the teachers' dealing, considered as a whole, is not merely to "instruct students", but to provide Canadian children with an education. This is an activity with roots deep within the core values of the Charter. An educated populace is crucial to democracy and the pursuit of truth in public discourse. It is also essential to the pursuit of individual self-fulfilment.

41. No aspect of the Board's decision is more remarkable than the conclusion that educating children "tends to be unfair".

42. The Board erred in its approach by confusing ends and means. The instruction of students is the means by which Canadian society achieves its true ends: an educated populace. Moreover, the Board failed to appreciate how even the simple activity of "instructing students" carries within it deeper purposes that fall within the core of allowable purposes enumerated in the *Copyright Act*. For example, reproduction of a poem for use in class is likely for the purposes of criticism, review, or private study. In electing as a purpose "instruction", the Board buried the purposes and values associated with instruction. These are values at the core of the Charter – and of fair dealing.

43. The approach adopted by the Board and approved by the Court of Appeal is also inconsistent with this Court's decision in *Law Society* permitting lawyer's reproduction of materials on behalf of a client, who similarly had little say in the material copied.

44. Finally, this approach has perverse effects on educational opportunities. As students age, they take on a more active role in selecting the materials required for their studies. A high school student might select articles for copying for research and would qualify for the fair dealing defense under the Board's analysis. A young primary student researching a similar topic could not be expected to select appropriate materials and would rely on the teacher's judgment and, in so doing, would not qualify for fair dealing. Yet in both cases, the interests served are the same.

E. AGGREGATION

45. The amount of copying, to the extent that it is a consideration for the purposes of assessing fairness, should be assessed on the individual basis, and not on an aggregate. To do otherwise would again introduce perverse inequities into the Act. For example, home-schooled children who copy a finite number of pages might qualify as fair, while children attending private and public schools might not. This would again offer educational opportunities to one group denied the other for reasons that have nothing to do with the equities of the dealing.

46. Aggregate dealing is, in any event, better dealt with in an analysis of the effect of the dealing on the market as a whole.

PART IV – COSTS

47. CIPPIC does not seek costs and asks that not costs be awarded against it.

PART V – ORDER SOUGHT

48. CIPPIC respectfully requests that it be permitted to make oral submissions at the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of November, 2011.

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PART VI – TABLE OF AUTHORITIES

Authority	Reference to para. in Argument
Cases	
Dunsmuir v. New Brunswick, 2008 SCC 9	9
Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45	10
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Canadian Charter of Rights and Freedoms, s. 2(b) and s. 52, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11	4, 7, 19-22, 24-27, 30, 32-33, 37, 40, 42
Secondary Resources	
David Vaver, *Intellectual Property Laws: Copyright, Patents, Trade-marks*, 2nd ed. (Toronto: Irwin Law, 2011)	24-25
Jane Bailey, "Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2006) 125	26
Library of Parliament's Legislative Summary of Bill C-11, *An Act to Amend the Copyright Act* Publication No. 41-1-C11=E (14 October 2011)	27