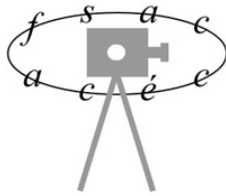


**Film Studies Association of Canada
Association Canadiennes d'Études Cinématographique
FSAC/ACÉC**



Statement on Copyright

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Preamble

This statement has been unanimously ratified by and represents the opinions of the membership of the Film Studies Association of Canada. It is a general statement on the legitimate uses made by film and media scholars and educators of copyrighted material, and it describes common practices at colleges, universities and other scholarly and educational institutions in Canada. It is being presented now as a response to copyright reform legislation (Bill C-61, tabled June 12, 2008), and as an expression of the dismay of FSAC members, who are deeply concerned that the proposed bill would severely limit our rights and freedoms as scholars and educators. We call for a truly balanced Copyright Act, which would protect the rights of creators and copyright holders, *and* the legitimate rights of users of copyrighted material, particularly the rights of scholars and educators.

1. Education, Research and Copyright

The Film Studies Association of Canada (FSAC) represents film and media scholars and educators in universities and colleges across the country, providing scholarly support, organising an annual meeting, publishing an academic journal (*The Canadian Journal of Film Studies*), and advocating on behalf of its members. A key issue facing film and media scholars today is the use and presentation of copyrighted material – still and moving visual imagery in particular – in the classroom and in our research and

scholarship. Digital technologies have provided us with a variety of new modes of access and engagement. However, we are restricted by copyright legislation that has not fully acknowledged the new technological environment, and which limits users' rights in favour of copyright owners. Given the importance of providing students with the critical tools necessary to analyse a complex visual media culture, of fostering a vital and dynamic field of film and media scholarship in Canadian colleges and universities, and of promoting a vibrant, democratic culture of exchange, discussion and debate, we need copyright legislation that strikes a fair balance between the rights of owners and the rights of users.

This statement is presented on behalf of FSAC members, describing the scholarly and educational uses of copyrighted material within the fields of film and media studies, and suggesting how copyright legislation may be changed to recognise the new technological conditions within which film and media education is undertaken, and to reflect new pedagogical strategies and scholarly research methods that have emerged. There are two main issues that we face. The first is the relatively restrictive language in present copyright legislation describing "fair dealing," which limits the legitimate use of copyrighted material in educational and scholarly contexts. A particular issue related to this is the obligation on the part of educational institutions to purchase classroom screening rights from "distributors," in addition to the original cost of purchasing video material. FSAC supports the adoption of a more expansive "fair dealing" provision in copyright legislation, comparable to the "fair use" provision in U.S. law, which would enlarge the scope of scholarly and educational use, and allow for less fettered access to copyrighted material – publicly circulating and archival material – for use in teaching, research, and scholarly publication. The second issue is the question of reproduction and "format-shifting." Digital video technologies have made this much easier and more effective, and have provided film and media educators and scholars with many new possibilities for critical and creative engagement with cultural materials. We are constrained, however, by current copyright legislation, which offers only vague and ambiguous guidance in an era of digital reproduction. FSAC opposes further restrictions on legitimate copying, and is particularly opposed to any blanket anti-circumvention provisions. We support the expansion of the rights to access and fair use. These issues will be considered in more detail below, following a brief account of the historical context of film and media education in Canada.

2. Film and Media Education in Context

Film study began in Canada in the late 1960s, with the increased availability of films on the 16mm, non-theatrical format. These were typically rented for classroom projection, and projection rights were included in the price of the rental. Universities were willing to pay the costs necessary to make films available in an era of relatively restricted access. Movies had historically been shown for only a brief period of time in theaters, and were not readily available to be seen again, except perhaps on broadcast television. The more portable format of 16mm made the "cinema" available for scholarly analysis in the same way that printed texts had made the study of "literature" possible. Still, 16mm projection limited the mode of engagement with film texts, which were

typically screened once, and then only subsequently discussed. By contrast, literary texts could be subjected to repeated reading and close analysis, given that they were in print form. They could be easily consulted after the initial reading, and passages could be read again, or read aloud in class. Some film programs used editing equipment, or else so-called “analytical” projectors, which allowed viewers to “re-view” scenes and sequences. Not every university owned such equipment, however, which was both expensive and not especially easy to use.

The academic study of film and other visual media expanded considerably in the 1980s, when video was introduced. This first of all allowed film educators to record films off of broadcast television, but very soon studios and distributors had made large portions of their film collections available on VHS, and film departments could begin to build extensive video libraries. This made films readily available for classroom screening, but also for relatively effortless re-viewing and close analysis, given the ease with which one could pause, rewind and fast-forward. Films had, practically speaking, become as “analysable” as literary texts. The effect of this new technology on the discipline of film studies cannot be underestimated, and in the last two decades the number of film studies departments and programs in Canadian universities and colleges has increased dramatically, and the discipline has become firmly established within academia.

New digital video and computer technologies have further increased the modes of engagement, and offered new possibilities for film and media teaching and research. New video formats, specifically DVD, have made the viewing and re-viewing of film texts even easier, and have made an even larger number of films available, often in far higher quality versions. Digital projectors have provided teachers and researchers with more opportunities to subject such material to critical analysis, and offered more pedagogical possibilities, allowing for the creative engagement with high quality images presented on classroom screens. With computers, it has become relatively easy to “shift” digital material from one format to another, to make copies, clips and excerpts from original sources for the purpose of study, analysis, and critique, and for re-presentation in classrooms and other teaching and scholarly contexts. We are able to move quickly from one image to another, allowing for effective comparisons and contrasts to be made, encouraging students to become even more discerning in their critical analyses of visual material.

The history of film and media studies is intimately tied to developments in video and information technologies. Our discipline is a necessarily “technological” one, and we have, as a result, a great stake in new copyright legislation, which will have a significant effect on our ability to critically engage with and effectively use new digital media. As film and media scholars are deploying new technologies, new pedagogical practices and research methods are being developed in universities and colleges across the country. Copyright legislation must reflect these new conditions and practices. FSAC is specifically concerned with two basic issues: the concepts of “users’ rights” and “fair dealing”; and the questions of reproduction and format-shifting.

3. The Rights of Users: ‘Fair Dealing’ or ‘Fair Use’?

The use of copyrighted material in educational contexts in Canada is governed by the “Fair Dealing” provision of the Copyright Act, where it is listed as one of the basic “exceptions” to copyright infringement. Section 29 states that, “Fair dealing for the purpose of research or private study does not infringe copyright,” and, in Sub-sections 29.1 and 29.2, the further categories of “criticism,” “review,” and “news reporting” are added to “research” and “private study.” Many commentators on the Copyright Act have noted that this is a restrictive list, and contrast this section with the provisions for “Fair Use” in U.S. legislation, which states in Section 107, in more suggestive or open-ended terms, that fair use is not an infringement of copyright when works are used “for purposes *such as* criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” (emphasis added). By including the phrase “such as,” U.S. legislation does not limit the realm of fair use, but instead provides illustrative examples of the sorts of areas where fair use provisions should apply, providing a stronger basis for the idea that there is a broad and dynamic range of legitimate *uses* of copyrighted material, and for the concomitant notion of “users’ rights.”

Recent judicial decisions by the Supreme Court of Canada have emphasised the importance of the fair dealing exception, which the court has defined precisely as “a user’s right.” In a 2004 decision (*CCH v. Law Society of Upper Canada*), the court stated that: “In order to maintain the proper balance between the rights of a copyright owner and users’ interests [the ‘fair dealing’ exception] must not be interpreted restrictively.” FSAC supports changes to the present legislation that would encourage just such non-restrictive interpretations, bringing it into line with current judicial thinking, which acknowledges the cultural and intellectual benefits of new technologies of reproduction and dissemination.

A non-restrictive fair use exception would also resolve a specific issue faced by film and media studies departments across this country. By allowing educators to show legitimately purchased, commercially available videos in classrooms and other educational contexts, according to a more expansive notion of fair use, departments and universities would be freed from the financial burden of having to continuously pay fees to the “rights holders” of these films – distribution companies that had, in the past, provided films *and* performance right, but who now only provide the rights. The two main companies, Audio Cine and Criterion, were and are in the business of acquiring Canadian rights to classroom rentals of major U.S. distributors’ releases. They used to provide 16mm prints in exchange for rental monies. Now, they simply sell the rights that they have acquired and do not supply the actual print or video copy. Audio-Cine’s and Criterion’s catalogues consist mainly of Hollywood feature films, and some other independent narrative and documentary works, largely from the U.S., films for which the actual DVDs (the dominant medium used in classrooms) are commercially available.

These companies no longer provide a service; rather, because copyright law in Canada does not allow for educational fair use, they sell blanket site licenses to Canadian universities, basically making money through a provision in the law. This creates an

unnecessary financial expense for universities. It is also a time waster for A-V libraries, which have to compile reports on films screened in classes for the two companies. Finally, this vestige of the pre-video era has driven many educators ‘underground,’ as instructors show DVDs or clips from DVDs that they own for educational purposes but do not declare the screening. New copyright legislation should acknowledge and reflect current conditions, practices and educational needs, and provide educators and scholars with less fettered access to copyrighted material, recognising the right to screen legitimately procured material within educational contexts without having to pay additional fees for each use.

A broader, and more expansive fair use exception would also strengthen and enlarge the basic scholarly freedom to access and use audio-visual material, either in public circulation or housed in archives, and to publish excerpts (film stills, “frame grabs,” publicity photos, and promotional material, for example) for the purposes of critique and analysis. The publication of an image alongside a scholarly article is equivalent to the use of quotation in other fields (e.g. literature, philosophy, classics, etc.), as support for a claim in an argument or as the actual object of analysis, and scholars need the freedom to do so. Film and media scholarship is also hampered by overly restrictive copyright requirements which prevent ready access to the archives of the CBC and the Library and Archives of Canada, the biggest repositories of Canadian audio-visual material. An effective fair use provision would safeguard rights of public access to film and television productions funded by the public purse, and allow scholars and students to engage more effectively with vital cultural material. The concept of fair use or fair dealing is the basis upon which a thriving research culture will be maintained and developed in Canada. FSAC supports the inclusion of a clear, and expansive fair use or fair dealing provision, with a broad and unambiguous scholarly and educational exception, in any reformed version of the Copyright Act.

4. Teaching and Technology: Reproduction and Format-Shifting

Most classrooms in Canadian universities and colleges are now equipped with a full range of video and computer technologies, allowing for very dynamic presentations of audio-visual material. Educators in all disciplines, but especially film and media educators, depend more and more on such presentations, and on the ability to gather, organise and *re-organise* material in order to teach and analyse media, and to provide students with opportunities for critical and creative engagement. Digital media allow for the integration of illustrative and exemplary material in presentations (such as “Powerpoint” slideshows), which can fulfill important analytical and critical purposes. Such presentations depend upon the ability to copy excerpts or capture stills from films or television programs, to alter and rearrange sounds and images, and to edit and re-edit audio-visual material which may now be easily “shifted” from one format to another. Such practices are only possible, however, if digital content is not “locked-up” – if it is not controlled by so-called “digital rights management” technologies, or copy protection systems, or if the circumvention of such controls under certain, legitimate circumstances is allowed according to the provisions of fair use or fair dealing. The fact that such control technologies exist, and that digital content is technically amenable to such

control, should not be the basis for the extension of the rights of copyright holders. New copyright legislation should recognise that such practices fall within a broadly conceived realm of fair use or fair dealing. The entrenchment of the right of fair use would place Canadian educators on par with standards adopted by sister scholarly organizations like the Society for Cinema and Media Studies, an international association based in the U.S.

The Copyright Act currently provides exceptions for Educational Institutions, which allow for reproduction for the purposes of education and training and for the administration of tests and examinations, but the language is vague and ambiguous. Sub-section 29.4 (1) states that, “It is not an infringement of copyright for an educational institution or a person acting under its authority to make a copy of a work ... (b) as an image projected using an overhead projector or similar device for the purposes of education.” Sub-section 29.4 (2) states, that, “It is not an infringement of copyright for an educational institution or a person acting under its authority to reproduce, perform in public or communicate to the public by telecommunication a work for any purpose related to the giving of an assignment, test or examination.” These provisions are rendered superfluous, though, in the case of digital media which are “locked-up” by copy protection systems, and if circumvention is broadly prohibited. New copyright legislation should reflect current educational and scholarly practice, and should follow recent judicial decisions, such as that of the Supreme Court of Canada in *Théberge v. Galerie d’art du Petit Champlain inc.*, which states that, “[o]nce an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.” The court went on to observe that, “[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”

Once purchased, the uses to which copyrighted material may be put should be governed by legislation that takes into account the context of use, as the law already acknowledges. This important qualification should not be superseded by the blanket application of content-control systems. The rights of copyright holders are not universal – they are subject to specific exceptions in order to balance the rights of users – but the effect of copy protection technology and blanket anti-circumvention prohibitions is to enlarge the rights of owners while severely limiting legitimate use. As it stands, the rights of users within educational contexts are unduly constrained by copy protection systems, which prevent the legitimate production of clips, excerpts and stills, and the reorganisation of such material for presentation in classrooms and other scholarly settings. FSAC calls for the explicit acknowledgement of the right of educators and students to produce copies of legitimately procured audio-visual materials for the purposes of study, analysis and critique, and the right to re-organise and re-present such material in educational and academic contexts and in scholarly publications. Such activity is already an integral element of film and media research and education, and is undertaken according to already existing academic protocols of quotation and acknowledgement. FSAC believes that new copyright legislation *should not* contain any elements comparable to the “anti-circumvention” provisions of U.S. 1998 Digital Millennium Copyright Act, which would limit the right to make legitimate copies of

copyrighted material within educational contexts, or which would force educators to illegally bypass copy protection systems in order to assert their legitimate rights to reproduce material for educational and scholarly purposes.

5. Copyright Legislation: The Balance of Rights

The primary goal of copyright legislation is to provide for the free but orderly circulation of ideas in order to foster creativity and innovation, and to foster the democratic right of critical engagement with cultural material. Copyright, as the Supreme Court has said, should function to “incorporate and embellish innovation in the long-term interests of society as a whole.” Canadian copyright legislation has historically struck a balance between the rights of owners and users, understood as a necessary balance to ensure such circulation and to serve broader societal interests by protecting the rights of creators. In the era of digital media, the balance appears to have been upset, as owners are discovering that new technologies provide the means for the far-reaching control of content, and as users are discovering that content may be easily copied and reproduced. FSAC is concerned that, in this context, the tendency is to legitimise greater technical control over copyrighted material, at the expense of the legitimate rights and interests of users. As an association representing film and media scholars and educators, for whom the freedom to engage critically and analytically with copyrighted material is a fundamental interest, we feel it is important to insist on the need to maintain a fair balance of rights. The free, open exchange of ideas, and the circulation of texts, documents, images and sounds that is necessary for such an exchange, is a basic social good that copyright legislation has historically been designed to support and protect. Educational and scholarly institutions play an essential role in fostering a dynamic culture of exchange and debate, and have traditionally been offered specific protections and exceptions in copyright legislation. As new technological innovations offer educators and researchers more pedagogical and scholarly opportunities, these protections and exceptions should not be eroded, but should be revised to reflect the current practices and methods being developed through creative and critical scholarly engagement with new digital media.

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