

# How Copyright Impedes Creativity and Learning, and How Canadian Media Studies Communities Can Take Action

Final Report of the  
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# How Copyright Impedes Creativity and Learning, and How Canadian Media Studies Communities Can Take Action

## Introduction

At its Spring 2021 conference, the Film Studies Association of Canada (FSAC) created a Media Access and Copyright (MAC) Working Group (See Appendix A for Terms/Mandate). The working group held its first meeting on 22 October 2021 (See Appendix B for Membership details). Its work is an extension of efforts made by FSAC toward copyright reform in 2008 and to address copyright and online screening concerns in 2020. Over several meetings, the working group identified many issues and opportunities. It soon became clear that we needed to find a way to focus our efforts. Given the amount of knowledge and expertise among members, the group decided to develop three areas for FSAC consideration and to host a workshop to explore them at the 2022 FSAC conference.

The three identified areas of focus are:

1. *Advocacy*: Advocating for changes to the Canadian *Copyright Act*
2. *Access and Exhibition*: Exploring issues and best practices pertaining to accessing and exhibiting media in educational settings
3. *Appropriation/Repurposing*: Developing guidelines for videographic work that uses fair dealing and other user's rights provided in copyright legislation.

The MAC Working Group put forward a proposal for consideration at the 2022 FSAC Annual General Meeting to create three new working groups, one for each area of focus. The proposal was approved by the FSAC membership.

## 1. Advocacy to amend the *Copyright Act*

A roundtable discussion, "Strategies and Struggles in On-Line Teaching During the Pandemic," held during last year's FSAC conference identified existing copyright-related difficulties which were exacerbated by the necessity of teaching online:

- an educational mandate to select and make available the best possible media content for students

- an adherence to existing copyright language that actively hampers said selection and accessibility
- an ethical incentive to avoid placing undue or complex financial burdens on students (*i.e.*, an expectation of offloading multiple streaming service subscriptions onto course registrants).

As elements within the *Copyright Act* are combining to create an artificial scarcity of usable content, it would be prudent to advocate for change. Amending exceptions<sup>1</sup> within the *Act* would allow institutions to make optimal use of existing media assets found in their library collections and other content found through streaming services.

The MAC Working Group recommends the following goals for advocacy:

- modify Canada's stance on technological protection measures (TPMs)
- obtain clarity that contractual terms cannot remove a statutory exception
- revise exceptions that predominantly exist in name only (those that are nullified if a license for use is obtainable)
- obtain clarity that measures necessary to assist persons with disabilities are governed by disability/human rights laws, not by copyright law.

Each of these four advocacy goals is explained in detail below.

### 1.1. Technological Protection Measures (also known as Digital Locks)

In 1996, TPMs were incorporated into the scope of copyright through treaties negotiated under the auspices of the World Intellectual Property Organization (WIPO). Those treaties only required that member nations “provide adequate legal protection and effective legal remedies against circumvention of effective technological measures,” (WIPO 1996), with flexibility afforded in the implementation thereof. However, the United States urged other nations to follow a

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<sup>1</sup> The grant of copyright as defined within the *Copyright Act* is primarily occupied with definition and enforcement of rights of control. That said, within the *Act* are *exceptions* to such control. Canada has an enviable history of support for the use of exceptions—multiple Supreme Court decisions spanning 2002 to 2021 have ensured that exceptions in Canada are recognized as “user rights” and are essential to the overall functioning of the system of copyright. See *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, <https://canlii.ca/t/51tn>; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, <https://canlii.ca/t/1qlp0>; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, <https://canlii.ca/t/1hddf>; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 34, <https://canlii.ca/t/fs0v7>; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 <https://canlii.ca/t/fs0vf>; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, <https://canlii.ca/t/fs0v5>; *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, <https://canlii.ca/t/jh8bc>.

stringent American interpretation whereby (among other details) circumvention of a TPM was deemed an infringing action regardless of the intent of the use of the underlying content (Geist 2010, 225-230).

Interestingly though, the United States has since softened its stance. Under their law, a triennial review allows Americans to present evidence as to why circumvention should be allowed in particular circumstances. Under this process, circumvention for using portions of audiovisual materials for film and media studies was permitted in 2006 (U.S. Copyright Office, 2006) and later expanded to other subject areas. While this process is cumbersome and permission must be repeatedly sought every three years, some uses of audiovisual materials towards educational objectives continue to be eligible for circumventing TPMs (U.S. Copyright Office, 2021). Yet when Canada amended the *Copyright Act* in 2012, Canadian law reflected the maximalist position of the United States in 1998 despite ample evidence that the United States had altered course.

It must be emphasized that during the 2017-2018 Copyright Review conducted by the Standing Committee on Industry, Science, and Technology, 41 of the submitted 192 briefs argued Canada's implementation of TPMs was flawed (Savage and Zerkee 2021). In their final report (Canada 2019), the Committee agreed "that circumvention of TPMs should be allowed for non-infringing purposes" (72).

**Recommendation 1:** The *Copyright Act* should be amended to ensure that circumvention of technological protection measures is permissible when use of the underlying content is lawful.

## 1.2. No Contractual Override of Exceptions

Educational communities have expressed concern that conditions of use set by licensors often conflict with practices supported by exceptions defined in the *Copyright Act*. National educational bodies have been reluctant to champion exceptions and instead taken the position that a contract takes precedence over the Act; for instance, in 2011, the Association of Universities and Colleges of Canada stated, "where there is a conflict between the terms of a licence agreement and the fair dealing policy, the terms of the licence agreement apply," (1). Whereas our own history offers a contrary opinion from our highest court; in *Potash v. Royal Trust* (1986), the Supreme Court of Canada declared that a statutory provision "enacted in the public interest" cannot be set aside, that in fact "the long-standing rule against contracting out or waiver should apply to it," (para 40).

But without clear support of this principle from the educational community, institutions are wary of making use of exceptions which conflict with license terms. This creates problems for Film/Media Studies given that film is often distributed by streaming services which tend to contractually exclude classroom use.

It behooves Canada to clearly indicate (as other nations have done),<sup>2</sup> that a contract cannot override a statutory public benefit. Such clarification was also sought by several contributors to the copyright review of 2019 (Savage and Zerkee 2020)

**Recommendation 2:** The *Copyright Act* should be amended to include an unambiguous acknowledgement that a contractual term cannot override a statutory exception.

### 1.3. Amend Exceptions Limited by Commercial Availability

Two exceptions within the *Copyright Act* appear supportive of teaching and learning in educational institutions by permitting copying of protected content for the purposes of education or training, and reformatting of content to keep up with technological change. These are:

- s. 29.4 – Reproduction for instruction<sup>3</sup>
- s. 30.1 – Management and maintenance of library collections

However, both exceptions are nullified if copies are commercially available in a medium suitable for the intended purposes. In the context of films, this suggests that even if the prohibition on circumvention of digital locks is lifted, institutions' lawfully acquired DVD collections are ineligible for streaming to online students given the availability of content through streaming services. But in practice, that would require having students obtain licenses for the services, as many of these services have Terms of Use that prohibit classroom use—a burden that is not appropriate. And even if these services permitted classroom use, institutions

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<sup>2</sup> For instance, the Irish copyright statute makes it plain that no limitation or exception to owners' rights prescribed by their Act can be annulled through contract; "Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act," (Ireland, 2000).

<sup>3</sup> Section 29.4 explicitly sets use as "on the premises of the educational institution." As technological neutrality underpins the *Copyright Act*, it should not be controversial to state that institutions' technological infrastructure (*i.e.*, MS Teams, Zoom, *etc.*) are a component of the premises. Furthermore, "premises" are defined in Section 30.01, Communication by Telecommunication: (4) A student who is enrolled in a course ... is deemed to be a person on the premises of the educational institution when the student participates in or receives the lesson by means of communication by telecommunication... ." (Canada 1985).

should not be required to duplicate their investment of existing content.<sup>4</sup> (Conversely, for a DVD where there is no commercially available streaming service, the presence of TPM renders that DVD unusable for streaming.)

It should be noted that in 2012, via *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, the majority of Supreme Court justices declared:

The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the Copyright Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies. (para 9)

In later Supreme Court jurisprudence, *CBC v. SODRAC* (2015), the waters of technological neutrality were somewhat muddied; however, the majority opinion agreed that two users deriving the same benefit through different technologies should not be treated differently with respect to copyright-licensing costs, (para 70). As with any question of copyright, each situation must be evaluated on a case-by-case analysis. But analysis suggests that neutrality supports recasting/communicating older content as necessary to create a learning experience that is functionally equivalent to prior practices.

**Recommendation 3:** The limitation of commercial availability should be removed from s. 29.4 and s. 30.1 of the *Copyright Act*.

#### 1.4. Meeting the needs of postsecondary community members who experience disability

As Blake Reid (2021) makes plain, the entangling of copyright within situations involving disability often means reduced access to suitable content for disabled persons— “the actual interests of people with disabilities to access copyright works [are subordinated] to the hypothetical interests of copyright holders who may withhold access without reason (2174).” This subordination occurs through a combination of the challenges noted so far: digital locks, contractual override, and limitation by commercial availability. In a recent presentation hosted by the Program on Information Justice and Intellectual Property, Reid (2022) convincingly

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<sup>4</sup> In fact, it is not merely a one-time duplication of investment for content, it will become a perpetual license fee endured by institutions for content they had previously, lawfully, acquired.

argues that the grant of copyright itself should be conditional on meeting the needs of all constituents, not merely the able-bodied. At bare minimum, copyright owners should not be permitted to stand in the way of efforts to make content more accessible.

For instance, despite Canada signing and ratifying in 2016 the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, Canadian implementation delivers less than what the treaty is capable of. The principal goal of the treaty was to encourage more content to be made in useable formats for people with visual disabilities and enable countries to share such works among themselves. Yet Canada's implementation adds conditions not found in the treaty; for instance, Canada opens the door for additional royalties to be set by copyright collectives and paid for by non-profit organizations serving visually disabled persons (*Copyright Act*, s. 32.01). Whereas "the Marrakesh Treaty does not require adding royalty payments and many countries (including the United States) do not have such a provision," (Geist, 2016).

**Recommendation 4a:** Ensure that if copyright-protected material requires editing/reformatting/transcription/captioning/*etc.* to be more perceptible to a person experiencing disability, that their needs are not only examined by copyright law but are also addressed by provincial disability/accessibility laws with an eye to upholding human rights.

**Recommendation 4b:** The principal exception for addressing accessibility, s. 32 of the *Copyright Act*, has long excluded cinematographic works. To enable protected films to be made more perceptible to a person experiencing disability, s. 32 should be amended such that cinematographic works become eligible for adaptation as needed.<sup>5</sup>

Additionally, the FSAC community, including members who experience disability, may be well served through another objective; namely, making robust use of fair dealing, set upon the principle of technological neutrality, in the online environment. Developing best practices to fulfill this goal would be beneficial.

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<sup>5</sup> For instance, s. 32 (1) states: "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 (a) reproduce a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability." We recommend that "other than a cinematographic work" be removed. Similarly, the same phrase should be removed from s. 32 (a.1), (b), (c), and from s. 32.01(1), a(i) and a(ii).

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## 2. Access and Exhibition

The “Strategies and Struggles in On-Line Teaching During the Pandemic” roundtable held during the 2021 FSAC Annual Conference followed up, in part, on media access issues raised in the August 2020 [FSAC Statement on Copyright and Online Screening](#). The FSAC Statement aptly notes that copyright law aims “to ensure a reasonable balance between the rights of content creators and the rights of users and consumers of that content.” Accessing and exhibiting media for educational purposes may be facilitated by the [Copyright Act’s](#) exceptions to infringement (referred to as user’s rights by the Supreme Court of Canada, [2004 SCC 13](#)) such as fair dealing ([s. 29](#)) and performance rights for educational institutions ([s. 29.5](#)).

When and how statutory user’s rights may be applicable to educational use of media materials, however, are often complex and convoluted conundrums to unpack. Key aspects that can be at issue are the temporality (synchronous/asynchronous) and duration (limited/extended) of the needed access; the media publication format (physical copy/streaming video); and in situations where streaming access is desired or is perhaps the only lawful format offered, the availability, affordability, and basis (individual title/aggregated database) on which educational licensing is obtainable.

The MAC Working Group recommends the following steps to begin an inclusive process of understanding, assessing, and proposing effective and equitable ameliorations for the wide range of access and exhibition challenges affecting not just film and media studies, but all disciplines that rely on media content as core materials needed for teaching, learning, or other scholarly or creative endeavours within the academy:

- develop guidelines or a code of best practices for educators and librarians for accessing and exhibiting media in educational contexts,
- develop guidelines or a code of best practices for libraries regarding preservation of media content that is commercially unavailable in a permanently fixed format,

- examine the potential application of Controlled Digital Lending to media content.

For each of the above-noted steps, some context and an overview of relevant discussions in the professional literature are summarized below.

## 2.1. Accessing and Exhibiting Media in Educational Settings

The COVID-19 pandemic surfaced a widespread need for online access to media when most educational institutions were compelled to switch to fully online teaching and learning. Nonetheless, challenges in accessing and using media online predated the pandemic by many years. In Hudson's view (2022, 2), fair dealing rationales relied on during the pandemic for making media available to students online "merely accelerated the emergence of new copyright norms and interpretations in relation to educational copying exceptions." Although Hudson's (2022) guidance on using media in online teaching pertains to U.K. copyright law, the fair dealing principles discussed are relevant in a Canadian context. Myriad intertwined issues must be negotiated, however.

### 2.1.1. *Synchronous or Asynchronous?*

The FSAC Statement (2020) suggests "AV content needs to be available to students in an asynchronous format" while noting that the format choice ultimately belongs to instructors. Synchronous (online or in-person) class screenings of media using lawful sources will normally be covered by s. 29.5(d) of the *Copyright Act*. But options may be less clear when students must access a media item asynchronously and the instructor or the library owns the media item only in a physical format (e.g. DVD). Placing a DVD on library reserve may suffice when students are able and willing to visit the library to sign out and view the DVD, but not when a course is taught entirely online and at least some enrolled students are studying at a distance from the physical campus.

In this regard, results of a survey of students pursuing a minor in film studies at one Canadian university are instructive. Rodgers (2018, 574) found that 69% of respondents said they never used library reserve to access films and no respondent said library reserve was their most preferred means of accessing films. As well, synchronous viewing was predominant, as the largest proportion of respondents (59%) said they always or usually access films required for their

courses by watching them in class and the top-ranked preferred mode of accessing required films was also to watch them in class (Rodgers 2018, 573-74).<sup>6</sup>

For large class sizes, asynchronous media access is sometimes the only viable option, as a small number of physical copies in the library is unlikely to meet the needs of the entire class in a timely manner. Spicer (2018, 238) comments that “in the past, instructors would have either been required to screen these titles in-class, reserve a space for out-of-class screening, or bypass the use of this material all together.” Without asynchronous on-demand access, students having to complete a response paper that may accompany a media viewing assignment would lack “ready access and playback control . . . which is useful for writing an effective response” (Spicer 2018, 238).

### *2.1.2. Perpetual or Time-Limited Licensing?*

When online access to a film is desired for course use, a common practice is first to check for the availability of an educational streaming license (e.g., Adams and Holland 2017; Hudson 2022; Perry and Grondin 2020; Towery et al. 2019). In some cases the film may be included in a subscription-based online collection or educational use may be available under a stand-alone license. In either case there may be options for time-limited educational licensing of varying durations (e.g., 1 year, 3 years, 5 years) or a perpetual license for the life of a copy of the film in a physical or downloadable format.

### *2.1.3. Digitization of Physical Media?*

If a media item is owned in a physical format by the library but educational streaming licensing appears to be unobtainable, some institutions assess the viability of locally converting the physical format to a streamable medium. In a recent survey that examined how Canadian and American academic libraries’ acquisitions, digitization, and streaming strategies are evolving, Cooper, Ruediger and Skinner (2022) found that 46% of libraries are digitizing their physical media (VHS tapes, DVD) collections, but are doing so on a relatively limited scale. Of libraries that convert VHS or DVD materials, 72% digitize fewer than 50 titles per year (Cooper, Ruediger, and Skinner 2022).

In 2013, Farrelly and Hutchison (2014) surveyed U.S. and Canadian academic libraries on their video streaming practices, yielding 336 valid responses. In this

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<sup>6</sup> Also notable is the finding that more than two-thirds of these students said it was extremely or very important to be able to access the films for free and at a time of their own choosing while under one-third of students felt legal access to films was extremely or very important (Rodgers 2018, 575).

survey, about 58% of respondents did not digitize from their physical video collections and of those who did digitize on request, 40% relied on licensed permission and 33% relied on statutory fair dealing or fair use Farrelly and Hutchison (2014, 74). In 2018, Perry and Grondin (2020) looked at the streaming video practice and policies of 22 U.S. academic peer institutions, finding that 10 libraries offered digitization and streaming services, 3 of which limited their services to video clips. The results of these studies suggests many academic institutions are leery of relying on statutory user rights alone for digitization.

#### *2.1.4. Local Digitization and Access Practices?*

What kinds of practices are followed at institutions that do rely to some extent on statutory provisions to convert entire physical media items to a streamable format? All sources reviewed for this report indicate that it is common practice to restrict access to locally converted media to students registered in a course for a specific term and to secure the content via passwording. At Arizona State University, factors that disallow local conversion to a streaming format include availability of the film via a personal subscription service like Netflix and easy availability of purchase (e.g., DVD) or rental options (Perry and Grondin 2018). At Texas State University, a fair use analysis is considered for possible local digitization only “if access to streaming is not available either through markets available to [the library] or the student and if there is no face-to-face component of the course” (Towery et al. 2019, 8-9).

Regarding the duration of access, Hudson (2022, 14) advises that converted media prepared under fair dealing provisions should be made available to students “only for a narrow window (e.g., up to a week)” although “it is acceptable for the same film to be available more than once . . . so long as this is justified by educational purposes.” Similarly, at the University of Baltimore, locally converted media are “only viewable for seven consecutive days, once per semester,” even though faculty who are used to continuous access to videos on Kanopy “are not always happy . . . as students cannot re-watch a video weeks later” (Lowe et al. 2020, 122-23). At other institutions, longer periods of access may be permitted. For example, Adams and Holland (2017, 17-18) explain that “digitized media will be made available for no more than a two-week period designated by the instructor,” but an additional access period of no more than one week “may be allowed, should the instructor desire students to review said digitized media in support of a cumulative written assessment, exam, or test.”

### *2.1.5. Student Subscriptions to Personal Streaming Services?*

The acceptability of asking students to take up personal subscriptions to commercial services in order to access required media for a course is clearly a contested matter. On the one hand, Adams and Holland (2017, 19) observe that “student cost to sign up for a media account or stream one-off titles may be interpreted as equivalent to purchasing a “textbook” required by an instructor for a course. In this case, expecting students to subscribe to a streaming service may be the most reasonable option in the current market.” Hudson’s (2022, 26) checklist of fair dealing factors to consider when applying s. 32 in U.K. copyright law includes “Market substitution: Uses that compete directly with the copyright owner’s work are less likely to be fair. Could the student use the [learning management system] in lieu of a Netflix subscription?”

On the other hand, Lamphere (2020, 33) notes that “while monthly streaming subscriptions are not costly, having to subscribe to several simultaneously can result in a hefty bill.” It is worth noting here that Gant (2022) lists at least 10 Canadian subscription-based streaming services that offer access to feature films of various kinds. King (2014, 293) asserts that “asking students to buy Netflix subscriptions may seem like a solution to a thorny problem for libraries and universities, but it would merely be the addition of another fee to the student financial burden without really solving the problem of long-term access to a rich variety of appropriate films.”

A webinar on the shift “from owning to streaming” media (DeLaurenti et al. 2022) advises us not to assume that all students have access to personal streaming services, that they have credit cards to rent or purchase media from commercial sources, that they have high-speed internet access that enables them to properly view a streamed film, or that it is safe for students to create an account with a specific distributor to access independent films. A webinar panelist raises the risk of film studies becoming a “cumbersome discipline that can only be for people who are financially secure.”

In a Masters thesis on “Why academic libraries hate Netflix,” Krause (2016) explores a range of challenges faced by libraries and instructors regarding the acquisition and classroom use of streaming media in higher education. Noting that Netflix will often provide verbal (but never written) permission for classroom screenings of its films, Krause (2016, 51) makes the following suggestions:

In the future, not only should the use of an instructor’s personal streaming account be allowed by the Terms of Use in the classroom, but Netflix and Amazon, as well as other streaming services, need to establish institutional

subscription accounts for universit[ies], colleges, and primary and secondary schools. When creating the institutional account for colleges or universities, Netflix and Amazon need to explicitly state that the institution has the right to stream the film in the classroom and that the service is intended for public (educational) use.

#### *2.1.6. Affordability or Sustainability of Educational Use Licensing?*

The ease of accessing media in streaming format is undeniable, while not necessarily universally so. But even when educational streaming licensing is readily available, the costs, often borne by the library, can be prohibitive or unsustainable (Adams and Holland 2017; King 2014; Krause 2016; Lowe et al. 2020). Adams and Holland (2017, 13) report that over a four-year period at George Mason University, almost \$25,000 was spent on licensing to make 57 individual films owned on DVD available in a streaming format, leading them to conclude that “the costs to acquire individual streaming media licenses are neither justifiable nor sustainable.”

Adams and Holland (2017, 10) also note that George Mason University policy requires materials acquired by the library to be made available to the entire academic community, which means on occasion it is more cost-effective to have the institution’s distance education office cover the fees for online access to media content when the needed access is limited to just one course or set of courses for a specific time period.

#### *2.1.7. Using Unauthorized Uploads to Public Platforms?*

While noting that higher education staff “should never link to websites whose predominant purpose is to facilitate the sharing of unauthorised material,” Hudson (2022, 7, 17) cautions against banning all links to unauthorized material on public sharing platforms such as YouTube and Vimeo because fair dealing could be a reasonably robust defense in some cases.

Towery et al. (2019, 12) offer another perspective on why the use of unauthorized but publicly accessible media may be inadvisable: “Private citizens often upload copyrighted videos without license or permission. Linking to these public, online versions of videos, though often available on YouTube or Vimeo without cost, is not an option, as those versions rarely contain compliant captions.”

A further consideration is that students may be placed in a regrettably precarious position when institution-provided access is unavailable to otherwise paywalled media content required for course work. In such situations, some students may feel

compelled to turn to unauthorized or non-copyright-compliant (“pirated”) sources for required media content if timely access to lawful sources is not readily available.

### *2.1.8. Pedagogical Integrity, Equity, Diversity, and Inclusion, and the Public Good*

Discussions of labyrinthian challenges in accessing and exhibiting media for scholarly use often focus on technological, legal, or economic matters, but equally important are pedagogical principles and the ultimate goals of educational endeavours, which benefit society at large and are therefore a public good. Hudson (2022, 6) acknowledges that while educational institutions must “allocate sufficient financial resources to purchasing access to video content,” it is also the case that “it would be unrealistic and undesirable to suggest that copyright should dictate the content of courses.” King (2014, 292) makes the case more forcefully:

Film studies and media arts have become important disciplines over the past several decades; failing to provide for these classes would lead to the evisceration of important academic disciplines. Furthermore, the nature of contemporary university education requires robust access to non-print popular culture items. Interdisciplinary programs such as gender, area, and ethnic studies are almost unimaginable without access to these sorts of materials.

King (2014, 293) points out that commercial services such as Netflix tend to provide content that is popular in nature, which “is apt to exclude items that are very far out on the so-called ‘long tail.’ . . . (The company has historically turned a profit by buying hot new releases in bulk at low prices.)” King (2014, 303) further warns that commercial media giants like Netflix and Warner Brothers “are doing nothing more than looking out for their own profits within the framework provided by a capitalist economy. Corporations are designed to provide revenue to their owners and shareholders, not to contribute to the public good.”

The public-interest mission of providing diverse, well-rounded and high quality higher education is the unique role of universities and colleges. We must not abdicate or compromise that role by limiting our curricula to media content that is selected, packaged and sold for profit by commercial entities whose purpose is not necessarily to further the public good.

**Recommendation 5:** Develop a code of best practices or guidelines, in consultation with film and media studies faculty and students, media studies liaison and collections librarians, and copyright specialists, that addresses issues pertaining to accessing and exhibiting media for scholarly use.

## 2.2. Preserving Permanent Access to Media Content

Adams and Holland (2017, 15) observe that locating media for use in face-to-face classes can be particularly challenging when “popular media are used as cultural texts to study topics like gender, racism, etc.” and when “physical media could not be used in classrooms even when available” due to decommissioning of playback equipment by the university. They go on to describe the unwieldy situation that emerges when equipment obsolescence prevents use of the library’s collection of media content assembled at great expense to the university: “The practice of purchasing licenses merely to view this content for educational and research purposes is unsustainable for most, if not all, academic libraries” (Adams and Holland, 2017, 17), which essentially renders the physical media collection unusable.

Furthermore, even if their licensing terms allow for educational use and are affordable, the business model used by commercial streaming services will never be reliable permanent media archives. Lamphere (2020, 33) points out that “streaming catalogs constantly rotate depending on the streaming rights contract agreed upon by production companies. . . . [and] because these contracts cost hundred of thousands of dollars, it is not fiscally possible to permanently purchase rights, even for streaming pioneers of the field like Netflix.”

The inability to rely on aggregated streaming media collections is widely recognized in the literature. According to Krause (2016, 50), “due to the strict licensing agreements that Netflix and Amazon sign with content owners, the content disappears from their streaming collection randomly, and sometimes this occurs without warning patrons. This fact would have a profound impact on a Cinema Studies professor.” Lowe et al. (2020, 126) suggest one reason for low use of a streaming media collection at Anne Arundel Community College may have been experiences similar to those of three faculty members who found “films they used as recently as a few months before were no longer in the collection, apparently disappearing because Alexander Street no longer had the rights to use them. As one faculty member said, ‘We are at their mercy.’”

In an overview of various models for accessing educational and documentary streaming video that considers the perspectives of both librarians and vendors, Handyman (2010) contrasts just-in-case with just-in-time collections and choices among delivery modes and licensing models. The time-honored, mission-critical work of libraries is to acquire culturally significant materials and then catalogue, preserve, and make them available for use, while just-in-time access provided on a pay-per-view basis is “purely commercial, ephemeral, and brokered outside of the

library” Handman (2010, 333), which circumvents the value-added work performed by library staff that traditionally preserves media access for posterity.

For King (2014, 293), perennially scarce funding for universities and “a culture of austerity and corporate-style efficiency” has led to a “mindset favor[ing] the rental of information rather than its purchase” and a preference for “both faculty and library resources that do not require any long-term obligations,” all of which has resulted in “diverting investment away from permanent library collections.” King identifies several repercussions of this trend on the ability of educators and students to access and exhibit media:

A subscription to a single database can cost an academic institution tens of thousands of dollars a year. And yet those that do offer feature films to libraries . . . do not provide librarians with opportunities to build comprehensive collections that could replace academic libraries’ DVD collections of feature films. . . . Furthermore, when database content is controlled by vendors . . . there is no guarantee that the films that are accessible one semester will be available the next, making it difficult for faculty to reliably build syllabi and lesson plans around them. Finally, should funding evaporate, an entire collection can be eliminated all at once when a subscription is not renewed. While the axing of databases is always painful, the impact is different for video databases than for say, articles databases. Articles at least have some potential to be obtained by patrons via interlibrary loan while streaming video allows for no such possibility (2014, 300).

While acknowledging that it may be easy to view film and media studies “as unaffordable luxuries,” King (2014, 302) nonetheless asserts that “defending access to the many types of information that have become essential to scholarly and pedagogical activity—regardless of perceived vocational relevance or evanescent educational trends—is the job of librarians.” King encourages librarians to resist “what may turn out to be transitory higher education fads” by mounting a “vigorous defense of media collections and media centers” that aims to build “hybrid media collections” and to reformat rather than abandon existing physical collections (2014, 302).

In a similar vein, Cross (2016) expresses great concern that in the not too distant future, libraries may lose their important role in permanently preserving and providing access to valuable cultural materials such as streaming media content. Viewing “consumer-licensed materials [as] the ‘new normal’,” Cross warns librarians that they “face a stark choice when evaluating these materials: either find

a way to collect these materials in a deliberate manner or abdicate their historical duty to their patrons and to society” (2016, 15).

**Recommendation 6:** Develop a code of best practices or guidelines, in consultation with film and media studies faculty, researchers who depend on media content, media studies liaison and collections librarians, and copyright specialists, that addresses issues pertaining to preserving permanent access to media content.

### 2.3. Controlled Digital Lending of Media Content

Controlled digital lending (CDL) is an approach to providing access to library materials that adapts traditional lending of physical items to a digital environment. Bailey et al. (2018) propose that “CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner [by] . . . only loan[ing] simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation.” CDL relies on the common law principle of exhaustion and the copyright doctrine of fair dealing/fair use (Bailey et al. 2018).

Within the context of U.S. copyright law, Hansen and Courtney (2018) discuss the legal rationale that underpins CDL as well as risk factors and practical issues that should be examined by libraries considering adoption of CDL. De Castell et al. (2022) provide similar guidance for Canadian libraries by adapting the content of Hansen and Courtney’s 2018 paper to CDL for library books in a Canadian copyright context. As noted by de Castell et al. (2022, 3), “the principal argument for controlled digital lending is that it permits libraries to do online what they have always done with physical collections: lend books.”

Some authors suggest that CDL may usefully be applied to provide lawful access to media content. For example, Cross (2016, 14) suggests “a licensed copy of a streaming service like Netflix should be understood as “lawfully made” for performance and display in a classroom just as a DVD borrowed from a library’s collection would be.” Lear (2022, 1) similarly “posits a possible solution to the [media access] issue through the application of controlled digital lending (CDL) to video resources for a pedagogical purpose.”

CDL was suddenly in the spotlight when the Internet Archive responded to the unprecedented mass closure of schools in March 2020 due to COVID-19 by temporarily suspending normal CDL practice and allowing immediate global access to its entire library of digitized books (Freeland, 2020). Four large U.S. publishers subsequently filed a copyright infringement suit alleging that “without

any license or any payment to authors or publishers, Internet Archive scans print books, uploads these illegally scanned books to its servers, and distributes verbatim digital copies of the books in whole via public-facing websites” (Machemer 2020). Neither the concept of CDL nor the publishers’ claims that it is illegal have yet been tested in the courts, but it is notable that CDL is endorsed by a growing number of organizations (e.g., Barlow 2021; CDL Co-Op 2021; Chief Officers of State Library Agencies 2020; International Federation of Library Associations 2021).

**Recommendation 7:** Convene a group of film and media studies faculty, media studies liaison and collections librarians, and copyright specialists to examine the legal and practical aspects of Controlled Digital Lending and explore its potential applicability to accessing and exhibiting media content.

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### 3. Appropriation/Repurposing

In addition to advocacy for *Copyright Act* amendments that would facilitate optimal educational use of media and codes of best practices for accessing and exhibiting media, the MAC Working Group recommends the development of a best practices guide on how scholars and creators may lawfully appropriate and repurpose media in educational, research and other settings. Guidance is needed because when a student, professional academic or artist, or ordinary citizen wishes to use part or all of a media item in a new creative work, determining whether there are copyright implications or impediments can be a dauntingly complex, confusing, and time-consuming task.

#### 3.1. Statutory Provisions for Reusing Media Content

A key reason for the complexity lies in the fact that a media item is often the result of original intellectual and creative efforts of many creators, each of whom may or may not be the current owners of copyrights in their individual works or performances. DeLaurenti (2022, 30:30) observes that the increasingly complex copyright and licensing landscape for filmmaking is amplified in digital spaces. A creator who wishes to appropriate or repurpose an existing copyrighted media item may thus find it next to impossible to sort out who the relevant rights holders are and the particular legal jurisdictions that may be implicated.

Anderson (2012) suggests, however, that “when publishers actively support an expanded view of fair use, authors are freed to incorporate primary media sources and archival materials more generously in their work”, which in turn may allow a scholar to “simultaneously analyze and *facilitate* access to collections of media” [emphasis in the original]. In a study of creator practices in user-generated video, Aufderheide and Jaszi (2008, 1) identify nine types of appropriation practices that suggest “a substantial amount of user-generated video uses copyrighted material in ways that are eligible for fair use consideration.”

Furthermore, the copyright laws of some jurisdictions may provide other media-friendly user’s rights besides fair dealing/fair use. One example is the non-commercial user-generated content provision, informally known as the UGC exception, in Canada’s *Copyright Act*, [s. 29.21](#). This provision allows an individual to appropriate or repurpose an existing copyrighted work or other subject-matter (e.g., a sound recording) in a new media creation if their purpose is non-commercial. Other conditions that must be met to qualify for the UGC exception include source attribution where possible and good-faith determinations that the source is non-infringing and that the intended use does not have a substantive

adverse effect on the actual or potential market for the source work. The UGC exception, however, is not as widely implemented as might be hoped. Awan (2015) points out the difficulty in defining amateur non-commercial use in a digitized world (where for example, works may not be monetized but a social media presence may be). As well, Craig and Tarantino (2020) note that the UGC exception is almost unusable when platforms use algorithms to identify and automatically take down potentially infringing content, regardless of applicability of the exception.

In a similar vein, infringement exceptions in U.K. copyright law that allow unauthorized reuse of copyrighted works in video essays include the exception for non-commercial research or private study and the exception for illustration for instruction ("Copyright Considerations" 2022). And in a brief overview of copyright law and fair use provisions that are available to videographic practitioners in the U.S., Mittell (2019) suggests a workable approach is to follow best practices within the field:

As these are the more common precedents of creative transformative uses that have not been found to be infringing—in most cases, rights holders do not object to transformative reuse, and thus we should consider the many instances of videos being published without objection as establishing community norms of best practice.

It is worth noting that the kinds of purposes for which fair use may be applicable is open-ended in U.S. copyright law, whereas in Canada the range of fair dealing purposes that may be applicable is generally perceived to be narrower because the *Copyright Act* contains a closed list of permitted purposes (Craig 2021). Given the widely held perception that Canadian fair dealing currently does not accommodate artistic purposes other than satire or parody, arguably there is room for further expansion of the statutory fair dealing purposes to support appropriation or repurposing of media works for creative endeavours, commercial or otherwise.

### 3.2. What's Wrong with Requiring Permission for Reuse?

Undoubtedly it can be useful to help scholars and creators become knowledgeable about the existence of user's rights (exceptions and limitations) in copyright law and how they may support the appropriation and repurposing of copyrighted media in the creation of new works. At the same time, over the past several decades our global society has in many respects become a risk-averse, permissions-based culture that threatens to stifle creativity and learning, the very things that copyright law was originally intended to encourage ([8 Anne. c. 19, 1710](#)). In this "permission" or "clearance" culture, distributors and producers tend to eschew media works that

rely on fair dealing, and instead often ask creators to clear all rights by acquiring copyright owner permission or licenses for appropriated or repurposed content.

Two decades ago Lessig (2001, 5-6) raised an alarm about a “blind spot in our culture” that threatens to snuff out human innovation and creativity if we allow inappropriate assumptions about the proper scope of property to go unquestioned and unchecked. A few years later, Lessig (2004, xiv) examined how our tradition of “free culture”—not “free” as in “free beer” but “free” as in “free speech” (Stallman, 2001)—can embrace the idea of property without succumbing to the entrapments of a “permission culture” in which “creators get to create only with the permission of the powerful, or of creators from the past.” Lessig (2008, xviii) followed up with an exploration of a deeply consequential moral question:

In a world in which technology begs all of us to create and spread creative work differently from how it was created and spread before, what kind of moral platform will sustain our kids, when their ordinary behavior is deemed criminal? Who will they become? What other crimes will to them seem natural?

Lessig’s considered recommendation for remediating our dysfunctional copyright system that criminalizes ordinary citizens and creators is to develop and deploy updated societal norms and copyright laws that protect creator’s ownership rights but also allow a Read/Write (RW) rather than a Read Only (RO) culture to flourish. This can happen only when ordinary citizens, creators, and scholars can lawfully “add to the culture they read by creating and re-creating the cultures around them” (Lessig 2008, 28), which brings us back to the importance of advocacy for copyright law reform outlined in section 1 of this report.

In practice, a key problem faced by many students, researchers, and artists (as well as copyright holders, lawyers, and judges) is uncertainty about what precisely constitutes lawful reuse or appropriation, which, in U.S. copyright law, is often referred to as “transformative use.” Statutory and case law on fair dealing and fair use identify various factors that may be relevant in assessing whether a particular dealing or use/reuse is “fair,” including the purpose, character, amount, and market effect of the proposed dealing or use/reuse. Importantly, in Canadian copyright law, transformative use has not been considered by the courts to be a distinct factor in determinations of the fairness of a dealing, although it may tilt the assessment of particular factors, such as the purpose or character of a dealing, toward fairness (Craig, 2021).

All the same, a fundamental issue at stake is the transformation of meaning, in which the signification of reused material is altered through its recontextualization in a new work (Baron 2014). The “how much” measure is essentially arbitrary. What needs to be more clearly defined is what constitutes a change in meaning. If the reused material is reframed for the purposes of analysis, critique, or contemplation within a new structure of meaning, this reuse is distinct from and does not appropriate the original meaning or purpose of the source material. It follows that only a reuse without resignification should be considered a possible instance of copyright infringement, and even then, only when no exceptions appear to be applicable.

### 3.3. Forms of Media Appropriation/Repurposing?

In this section we highlight some common forms in which media appropriation or repurposing may take place. Some appropriation works are primarily non-commercial and scholarly in nature, while others may be created partially or primarily for commercial purposes.

#### 3.3.1 *Documentary Films and Videos*

Documentary filmmakers often encounter a need to appropriate copyrighted content in order to fully examine, criticize, or evaluate a particular topic, be it an idea, phenomenon, event, or entity. The Documentary Organization of Canada (2010) guidelines on fair dealing for Canadian documentary filmmakers appear not to have been updated since the 2012 amendments to the *Copyright Act* came into force, but their overall thrust remains true today.

A case in point is a suit filed by the Vancouver Aquarium claiming that a documentary filmmaker’s unauthorized use of media from their website infringed their copyrights (Proctor, 2016). After a B.C. Supreme Court injunction ordering the filmmaker to delete 15 segments from the documentary was overturned by the B.C. Court of Appeal, the Aquarium dropped their suit, essentially confirming the filmmaker’s right to rely on the statutory provisions of fair dealing for research and criticism.

#### 3.3.2 *Video Essays/Videographic Criticism*

An extensively used and rapidly developing form of appropriation and repurposing of media in academic contexts is the video essay or videographic criticism: audio-visual works of cultural criticism or history (Mittel 2019). Such works are increasingly appearing in online peer-reviewed and professional publication venues. Some are authored by academics such as film and media studies faculty

who teach and research at post-secondary institutions. Video essays are also used by instructors as an alternative to traditional forms of class assignments.

Videographic criticism may also be undertaken by professional video artists and essayists whose work is either disseminated through professional channels (exhibitions/installations, public screenings, streaming services, paywalled websites, etc.), or is sponsored through crowdsourced forms of remuneration (e.g., Patreon). Examples of widely distributed and purposefully commercial feature-length video essays include [Reel Injun](#) (NFB, 2009), [Beyond Clueless](#) (2014), [Romantic Comedy](#) (MUBI, 2019), and even the Netflix series, [Voyeur](#) (2021 –). These works engage in the extensive transformation of meaning of their appropriated sources and the artists who produce them may do so with the hope of receiving a modicum of remuneration for their critical work.

### 3.3.3. *Fanvids*

Fanvids are one of the most predominant forms of creative media appropriation and repurposing. Turk argues that “one of the most interesting things about vidding is that it involves *both* interpreting commercial texts *and* producing new texts for an audience of fellow fans” (2015, 164, emphasis in original). Savin-Baden and Wimpenny (2014, 118) explain that “Vidding is where content is refashioned or recreated in order to present a different perspective, usually based on music videos and television programmes. The purpose of vidding is to critique, re-present and explore an aspect of the original media.”

Most fanvids likely fall within the fair use provisions of U.S. copyright law. Under Canadian copyright law, fanvids may also qualify as fair dealing or they may fit within the UGC exception if created by individuals for non-commercial purposes. Fanvids are distinguishable from videographic criticism as they are made by non-scholars (albeit often highly-skilled and well-informed) rather than students or faculty working in an academic context; they have a cultic/popular viewership in mind rather than a (traditionally) academic one; and they are generally produced for the purposes of acquiring subcultural capital and/or cultivating a fan community rather than making a (potentially peer-reviewed) contribution to the scholarly corpus.

### 3.3.4 *Experimental Films*

Some filmmakers specialize in the production of experimental films that recontextualize and repurpose footage appropriated from other media works. What is crucial to note is that while there may well be some new works that involve gray areas, most creative reuses of audiovisual materials in experimental films and other appropriation forms tend to clearly fall on the side of transformed meaning

(Baron 2012). Reuse of protected works in this manner should be allowable regardless of whether the new work is used for commercial or non-commercial purposes.

Examples of experimental films that extensively appropriate and repurpose images and footage from films, videos, and television shows include: [What Happened to Her](#) (Kristy Guevara-Flanagan, 2016), [Dear Britney](#) (Duke and Battersby, 2013), [Cropduster Octet](#) (Gregg Biermann, 2011), *Machine Language* (Robert Todd, 2012), [Only the Dead](#) (Aaron Valdez, 2016), [The Was](#) (Soda\_Jerk, 2016), and [Nothing a Little Soap and Water Can't Fix](#) (Jennifer Proctor, 2017).

### 3.4. Why Are Creative Appropriation/Repurposing Processes Important?

Although appropriation and repurposing of media content can take many forms, as suggested above, documentary and experimental filmmakers, academic authors of video essays, vidders, professional artists, and semi-professional YouTubers typically undertake a common fundamental activity: the production of creative works of cultural criticism via the repurposing of preexisting media forms. Outdated copyright laws should not be allowed to suppress or criminalize human creative processes when they yield new creative works that involve appropriation or repurposing of existing content for purposes that advance and benefit society without demonstrable harms to the copyright owners of the source works.

**Recommendation 8:** Consult widely with film and media studies faculty, artists whose creative processes involve appropriating and repurposing media content, media studies liaison and collections librarians, and copyright specialists to devise a best practices guide on how to apply relevant statutory user's rights for researchers, educators and students who engage in the production of scholarly or creative videographic works.

A best practices guide for creators of videographic works will likely be of interest to Canadian scholars, professional and academic media creators, educational institutions, and academic libraries as well as organizations such as the Film and Media Studies Association of Canada. In general, the guidance offered by Aufderheide and Jaszi (2018) may be of assistance in developing all of the best practices codes and guides referenced in the recommendations of this report.

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## Appendix A: Call for Members of MAC Working Group

### **Call Issued by FSAC President, July 7, 2021**

FSAC has a long history of advocating for fair use of media in an educational setting. See this 2008 statement:

<http://www.filmstudies.ca/category/news/copyright>. In spring 2020 with the pivot to online learning, an ad hoc committee was formed to articulate reasonable principles for teaching online using copyrighted material that created this statement thinking about digital equity and access: <http://www.filmstudies.ca/2020/08/fsac-statement-on-copyright-and-online-screening-declaration-sur-le-droit-dauteur-et-la-projection-en-ligne-de-lacec>.

At the spring 2021 conference, a roundtable on on-line teaching discussed issues arising from the pandemic and the possibility of broadening advocacy working with university librarians to see Federal copyright laws changed, etc. The Executive seeks a group of 3-5 members that will include Black, Indigenous, racialized scholars and makers, LGBTQ+, gender, and regionally diverse scholars and makers to continue this conversation and set out possible actions.

Duties: we anticipate the MAC will meet 4-5 times over the academic year to devise strategies for advocacy to draw attention to these issues and to report to members on best practices.

Application: email Shana MacDonald ([president@filmstudies.ca](mailto:president@filmstudies.ca)) with your expression of interest and a short biography by September 1st 2021.

[A similar call was circulated on the ABC Copyright list, [abccopyright@athabascau.ca](mailto:abccopyright@athabascau.ca), on September 14, 2021.]

## Appendix B: MAC Working Group Institutional Affiliations

<b>Member</b>	<b>Email</b>	<b>Institution</b>	<b>Academic Position</b>
Alec Christensen	<a href="mailto:alexander.c.christensen@gmail.com">alexander.c.christensen@gmail.com</a>	UBC	MA candidate, film studies
Jaimie Baron	<a href="mailto:jaimie1@ualberta.ca">jaimie1@ualberta.ca</a>	U Alberta	film studies faculty
Brianne Selman	<a href="mailto:b.selman@uwinnipeg.ca">b.selman@uwinnipeg.ca</a>	U Winnipeg	copyright librarian
Charles Tepperman	<a href="mailto:c.tepperman@ucalgary.ca">c.tepperman@ucalgary.ca</a>	U Calgary	film studies faculty
Charlotte Innerd	<a href="mailto:cinnerd@wlu.ca">cinnerd@wlu.ca</a>	Wilfrid Laurier U	OCUL Video Community Chair
Janelle Blankenship	<a href="mailto:blankenship.office@gmail.com">blankenship.office@gmail.com</a>	Western U	film studies faculty
Jenna Stidwill	<a href="mailto:jennastidwill@cunet.carleton.ca">jennastidwill@cunet.carleton.ca</a>	Carleton U	Cataloging & circulation coordinator, film/game studies instructor
Kate Langrell	<a href="mailto:kate.langrell@usask.ca">kate.langrell@usask.ca</a>	U Saskatchewan	copyright coordinator
Meera Nair	<a href="mailto:meeran@nait.ca">meeran@nait.ca</a>	NAIT	copyright specialist
Owen Lyons [Oct 2021 to Feb 2022]	<a href="mailto:owen.lyons@ryerson.ca">owen.lyons@ryerson.ca</a>	Ryerson U	film studies faculty
Thomas Rouleau	<a href="mailto:thomas.rouleau@uottawa.ca">thomas.rouleau@uottawa.ca</a>	U Ottawa	manager, copyright service
Valérie Rioux	<a href="mailto:valerie.rioux.3@umontreal.ca">valerie.rioux.3@umontreal.ca</a>	U Montréal	Bibliothécaire, études cinématographiques, études télévisuelles et études du jeu vidéo
Rumi Graham	<a href="mailto:grahry@uleth.ca">grahry@uleth.ca</a>	U Lethbridge	copyright advisor
Aaron Taylor	<a href="mailto:aaron.taylor@uleth.ca">aaron.taylor@uleth.ca</a>	U Lethbridge	film studies faculty