The Honourable Gordon Brown
Chair, Legislative Committee on Bill C-32 (CC32)
CC32@parl.gc.ca
House of Commons
Ottawa, Ontario K1A 0A6

From: Canadian Association of Law Libraries (CALL)/ L'Association canadienne des bibliothèques de droit

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CALL/ACBD) represents approximately 500 academic, private, corporate, court, law society and government legal information professionals working in Canada's law firm, academic, attorneys general, law society and courthouse libraries. We provide access to legal information to legal researchers which include lawyers, judges, students, faculty, parliamentarians and members of the public.

CALL/ACBD members are supportive of changes to the copyright legislation, which we view as necessary to preserving the balance of rights to both copyright owners, intermediaries and users of copyrighted materials in a digital environment. The institutions and libraries in which we are employed are significant consumers of content in both print and electronic formats, and play a role in disseminating legal information and providing access to legislative and regulatory information, increasingly only available in digital format. Our members thus are very interested in both Crown copyright and digital copyright law.

Originally submitted in September 2009 as a submission to the Copyright Consultations http://www.ic.gc/eic/008.nsf/eng/02174.html this document has been updated to reflect current concerns of **CALL/ACBD** members

Fair Dealing
The parameters of fair dealing have been clearly articulated by the Supreme Court of Canada in *CCH Canadian v The Law Society of Upper Canada [2004].* The new *Copyright Act* should integrate the concept of fair dealing as a user right rather than as an exception. Specifically, it should be made explicit that fair dealing needs to be given a broad and liberal interpretation and that knowledge institutions (libraries, archives and museums that serve both educational and other institutions and the public) are recognized as standing in the shoes of patrons engaged in research and private study. This principle of agency should not be limited to educational institutions only. Knowledge institutions are not necessarily representative of educational institutions alone. They represent the independent nature of study and research across a broad spectrum of educational interests.

Recommendation 1:
The Federal government should clearly recognize the concept of fair dealing as a user right, and extend a broad and liberal interpretation to fair dealing.

Crown copyright

Over a long period of time there have been calls for revision of the section of the *Copyright Act* that relates to Crown copyright. The control over a work product which is in essence paid for by the Canadian public is archaic in a time when there is a presumption that government materials belong in the public domain, to be freely used without prior permission or compensation. The *Reproduction of Federal Law Order* and the announcement, in December 2010, that permission to reproduce Government of Canada works is no longer required, for personal or public non-commercial purposes, are welcomed as important steps towards open access to government information.

Recommendation 2:
The Federal government should repeal provisions in the statute relating to Crown copyright. Judgments, statutes and regulations are not "owned" by anyone, they are the law. Claiming copyright in these works restricts the purpose for which they were created. The public needs to have free access to these materials in order to make the law accessible and provide access to justice. Open access to government information is an essential characteristic of modern democracy and is the foundation of Canada's Access to Information legislation.

Recommendation 3:
All federal, provincial and municipal laws, the proceedings of legislative bodies, and decisions of judges and administrative tribunals should be freed from copyright. There should be unrestricted access to all materials produced by the government such as bills, by-laws, proclamations, parliamentary papers, and reports of commissions.

The government has a duty to disseminate the information it produces. Copyright should not be a means for the government to restrict access to information and as a result use it as a means to create an instrument of censorship. The government has as strong an interest as the public in promoting the widest possible access to the laws applying in Canada.

Canada's argument has been that Crown copyright promotes the accuracy and integrity of official government publications. This argument is not persuasive as it is in the interest of re-publishers of primary legal material to make every effort to ensure the accuracy of what they publish. Their reputation is dependent on the integrity, authority and access of the materials they publish. There have been several examples where the ramifications of Crown copyright legislation have had a negative impact on attempts to make laws and regulations freely accessible to the public through digitization efforts. This has been particularly true in the area of provincial Crown copyright, where attempts to digitize historical sessional papers and gazettes have failed.

We agree that Canada needs an updated copyright regime which protects creators and rights holders. However, we strongly urge the government at the same time not to restrict the public's rights to access what should be in the public domain freely accessible and without the restrictions of Crown copyright.

Technological Protection Measures (Digital Rights Management and Digital Locks)
Earlier legislation proposed in the 39th Parliament, 2nd session as Bill C-61 included provisions which established/imposed technological restrictions on electronic media, variously called Digital Rights Management, Digital Restrictions Management (DRM), or digital locks. A similar scheme in the United States, the "Digital Millennium Copyright Act" (DMCA) permits publishers to place arbitrary restrictions on electronic media and makes it an offense to circumvent technological protection measures (TPMs), except in limited circumstances. In July 2010, a decision of the U.S. 5th Circuit Appellate Court, *MGE UPS Sys. v. GE Consumer & Indus*., 612 F.3d 760 (5th Cir. Tex. 2010), held that, "The DMCA prohibits only forms of access that would violate or impinge on the protections that the *Copyright Act* otherwise affords copyright owners." This has been widely interpreted to mean that “fair use” will not trigger the anticircumvention provisions of the DMCA.

Legislation proposed in Bill C-61 also implied that libraries providing document delivery services in response to inter-library loan requests from other libraries would be required to implement DRM software in their institutions, and would limit the ability to transmit copies of journal articles and excerpts of electronic books in electronic format unless our institutions could ensure that no more than one print copy could be made of the work, and that any electronic format would be destroyed after transmission, whether or not the use of the copy was an infringing use. The law library community encourages the government to strike an appropriate balance between rights holders, intermediaries, and users in the digital environment.

Recommendation 4:
Copyright should be medium neutral. TPMs restrict the use of digital files and can control file access (number of views, length of views) and use (copying, printing, saving) which affect our use of the content. With the proposed wording in Bill C-32, TPMs could also impose more restrictive measures on the use of copyrighted materials than are permitted under the fair dealing clauses of the Act.

Libraries and other knowledge institutions are increasingly dependent on works in digital form and are acutely affected by the deployment of TPMs to limit access to or use of copyrighted materials. Vendors should not be permitted to undermine the balanced rights users have been granted by the fair dealing clauses of the Act. Vendors should not be permitted, as part of their business model, to make otherwise fair (and therefore legal) dealings with copyrighted materials effectively illegal. Effecting what is or is not legal in our society is the job of our legislature. To say that this issue is fairly resolved because purchasers have a choice not to buy materials with digital locks is disingenuous and misleading. Vendors often have exclusive rights to sell particular content, and libraries and knowledge institutions have a mandate to meet all of the research and educational needs of their users. It is rarely possible for us to purchase the same content from any alternative vendor, let alone one who has chosen not to prevent what are legal uses of the material under the Copyright Act.

Our clients want to transfer content to portable devices for use in courtrooms, classrooms and at home, for legitimate research and academic scholarship. Technological means are being applied to electronic media in our libraries, whereas our clients were previously able to borrow print materials for home use and study. Increasingly, users of legal information who are not affiliated with a library, such as lay litigants, members of the public and some students, are being deprived of access to the law because of licensing restrictions. Such information,

previously provided in book form on open library shelves, now lies on the other side of the digital divide.

Recommendation 5:
We recommend that the proposed wording in Bill C-32 be changed so that any uses that qualify under the fair dealing provisions would not be subject to the anticircumvention prohibitions in the Act. This will prevent the erosion of user rights in the Act, ensure that fair dealing will remain technologically neutral, and ensure that TPMs are designed to accommodate fair dealing in the digital environment.

Conclusion:
This is an opportunity for legislators to carefully review all aspects of copyright and not to be swayed by those with a commercial interest. The Act needs to clarify the rights of those of copyright holders while at the same time protecting the public interest. Fair dealing has been distinguished in *CCH v The Law Society of Upper Canada* but needs to be enshrined in legislation.