

Bulletin #3

Adding "education" to fair dealing does not mean teachers can copy whatever they want

The debate over Bill C-32, the *Copyright Modernization Act*, currently before Parliament, has already produced a number of false claims about education and copyright that misrepresent the facts. Canadian publishers, writers' organizations, and Access Copyright (the copyright collective that represents them) are falsely claiming that by adding "education" as an allowable fair dealing purpose, teachers will be able to copy whatever they want without having to pay a copyright fee. Let's correct the record with the facts.

Fair dealing is a user's right in the *Copyright Act* that permits the use of copyright material without permission or payment of royalties provided the "dealing," or use, is for one of the purposes set out in the fair dealing section of the *Copyright Act* and provided the "dealing" is "fair." Currently there are five enumerated purposes: research, private study, criticism, review, and news reporting. Bill C-32 proposes to add "education" as a new enumerated purpose.

In order to determine whether a dealing is fair, the Supreme Court of Canada, in the landmark 2004 *CCH* case, established two tests that must be used to determine whether the fair dealing provision applies. Both tests must be met.

1. Is the use of the copyrighted material for one of the *purposes* set out in the fair dealing provision?
2. Is the use of the copyrighted material *fair*, using the factors set out in *CCH*?

The claim that adding "education" as an additional fair dealing purpose will allow teachers to copy whatever they want without having to pay a copyright fee ignores the second test laid down by the Supreme Court in the *CCH* case. Adding "education" to the list of allowable purposes, as Bill C-32 proposes, would mean that copying by teachers for educational purposes only meets the first test.

A teacher copying for students would meet the second test only if the dealing is "fair." Whether a "dealing" is fair under the second test must be determined using the six factors established by the Supreme Court in the *CCH* case: the purpose, character and amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the market for the work. Copying by a teacher can only pass the second test if, by conducting a fair dealing analysis, it is concluded that the dealing is "fair." Copyright royalties are not payable only if both the first and second test are passed.

Education organizations, including the CMEC Copyright Consortium believe that Bill C-32 should clarify how fair dealing applies to copying by a teacher for students in his or her class. The CMEC Copyright Consortium believes that Bill C-32 must make it clear that "education" includes "making multiple copies for class use."

This clarification would result in a Canadian copyright law that is similar to the "fair use" provision in the United States *Copyright Act*. The "fair use" provision, like "fair dealing" in Canada, also involves two tests to determine whether a "use" is fair. Under the first test, the enumerated purposes are "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." Education organizations want Bill C-32 to provide a similar provision — that the new *enumerated purpose* be "education (including multiple copies for class use)," rather than simply "education." Such an amendment would make it clear that a Canadian teacher, like their US counterpart, can make copies for students in his or her class under the first test. The dealing would still have to be "fair" under the second test.

The suggested clarification would ensure that the first of the two tests — Is the use of the copyrighted material for an *enumerated purpose* under the *Copyright Act*? — is met. However, adding "education (including multiple copies for class use)" to the list of enumerated fair dealing purposes will **not** affect the second test — Is the dealing "fair"? — in any way.

Therefore, the claim that adding "education" as an allowable fair dealing purpose would permit teachers to copy whatever they want, without having to pay a copyright fee is false. An obvious example of a "dealing" that would fail the second test is copying an entire textbook.

*** *The CMEC Copyright Consortium is producing a series of information notes on Bill C-32, the Copyright Modernization Act. Future instalments will discuss other proposals in Bill C-32 that effect students and teachers.*