

**SUBMISSION TO THE LEGISLATIVE
COMMITTEE
BY THE CMEC COPYRIGHT CONSORTIUM**

EDUCATION ISSUES IN BILL C-32
Introduced in the House of Commons on June 2, 2010

March 24, 2011

1. INTRODUCTION

The CMEC Copyright Consortium [hereafter the “CMEC Consortium”] comprises the Ministers of Education in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon, and Nunavut. The CMEC Consortium believes that the *Copyright Modernization Act*, Bill C-32, introduced in the House of Commons on June 2, 2010, represents a fair and balanced approach towards meeting the needs of the education sector and creators and copyright holders. The CMEC Consortium has been actively examining copyright and its implications for the education sector for several years. As copyright law has significant implications for Canada’s education sector, the CMEC Consortium welcomes the opportunity to comment on Bill C-32.

2. EDUCATION ISSUES IN BILL C-32

Many of the provisions in Bill C-32, if enacted, will impact the provision of education programs and services to Canadians. Although all the amendments reviewed in this submission will have an impact on the education of Canadian students, two amendments are particularly significant. One is the amendment providing for a new users’ right to educational use of publicly available Internet material. The other is the amendment adding “education” as a new allowable purpose in the fair dealing provision.

3. EDUCATIONAL USE OF THE INTERNET

The educational use of the Internet amendment permits educational institutions, teachers, and students to use publicly available Internet materials while engaged in activities associated with teaching and learning. The amendment makes it clear that common everyday activities currently occurring in our schools, colleges, universities, and technical institutions are permitted. These activities include copying publicly available material from the Internet, incorporating it into homework assignments, performing music or plays online among peers, reposting a work on a restricted-access course Web site, and exchanging material electronically with teachers or other students.

This amendment is essential in a day and age when federal, provincial, and territorial governments are simultaneously increasing the levels of connectivity, positioning the country to be a leader in the information age, and supporting the use of the Internet in classrooms. To encourage copyright awareness and respect in all circumstances, the proposed amendment provides that students and educators would be required to cite the source of the Internet materials they use.

The amendment applies strictly to the use of **publicly available materials** on the Internet. Publicly available materials are those posted online by content creators and copyright

holders without any technological protection measures, such as a password, encryption system, or similar technology intended to limit access or distribution, and without a clearly visible notice prohibiting educational use. These publicly available materials, intended to be widely accessed and shared, may include text, images, music recordings, audiovisual works, theatrical performances, or instructional demonstrations. The proposed education amendment will have no application to materials that are not publicly available.

The proposed educational use of the Internet amendment provides necessary clarity in copyright law. Parliamentary passage of this amendment will avoid litigation to determine how fair dealing and an implied licence may apply to educational uses of Internet materials.

National education organizations representing seven million Canadians—from teachers to school boards, parent groups to educational institutions—have been vocal about the need for educators and students to have fair and reasonable access to publicly available Internet material. The educational use of the Internet amendment has been advocated by the Consortium for more than nine years and it remains as one of two key amendments in the copyright-reform process.

Many other national educational organizations, including the Association of Canadian Community Colleges, the Association of Universities and Colleges of Canada, the Canadian Teachers' Federation, the Canadian School Boards Association, and the Canadian Home and School Federation to name a few, strongly support Parliamentary passage of the educational use of the Internet amendment in Bill C-32.

The educational use of the Internet amendment is a fair and reasonable approach for creators, and/copyright holders, and users because it is conditional. The proposed amendment would not apply to Internet materials that are not publicly accessible. The amendment would apply only to authorized educational use of publicly available materials posted on the Internet with no expectation of payment for their use, materials such as those on Web sites of The Canadian Encyclopedia or the Canadian Space Agency. The proposed amendment has struck an important balance between the rights of creators and collectives and the needs of the Canadian education community.

4. FAIR DEALING

The *Copyright Act* has contained a fair dealing provision for many years. It is not an infringement of copyright to deal fairly with a work protected by copyright for five enumerated purposes: research, private study, criticism, review, or news reporting. Bill C-32 proposes that “education” be added to the list of purposes for which fair dealing is available. Adding “education” to the fair dealing purposes is the second key amendment

for the CMEC Consortium because it will make it clear that fair dealing can apply in an education context.

The debate over this particular amendment in Bill C-32 has produced a number of false claims about education and copyright that misrepresents the consequences of adding “education” as a new fair dealing purpose. The false claims are 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. This is incorrect.

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 and met to determine whether the fair dealing provision applies:

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 making copies for distribution to 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. These are: 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.” The copying is exempt from the payment of copyright royalties only if both the first and second tests are passed.

The CMEC Consortium believes that Bill C-32 needs to clarify how fair dealing applies to copying by a teacher for students in his or her class. 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 American “fair use” provision, like “fair dealing” in Canada, 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.”

The CMEC Consortium recommends that Bill C-32 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 distribution to students in his or her class under the first test. The dealing would still have to be shown 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 completely false. An obvious example of a “dealing” that would fail the second test is copying an entire textbook.

5. OTHER EDUCATION ISSUES IN BILL C-32

There are eleven additional amendments in Bill C-32 that are important for education.

(i) Reproduction for Instruction

Bill C-32 changes an existing education exception that can be used to make copies for instruction by removing references to specific technologies. References to dry-erase boards, flip charts, surfaces intended for displaying handwritten material, and overhead projectors are removed. This provision has come under ever-increasing criticism by educators because its application does not meet current or future technology-enhanced learning needs. It is characterized as a “blackboard exception” in a digital age. Bill C-32 would permit a teacher to make a copy of a work in order to display it. Any type of display technology could be used. For example, this amendment will permit the use of Smart boards and similar tools without infringing copyright. The Consortium supports the Parliamentary passage of the amendment deleting references to specific technologies in section 29.4 and supports amendments that render the *Copyright Act* more technologically neutral.

(ii) Performing Audiovisual Material in Schools

An existing exception in the *Copyright Act* allows material such as a sound recording or a play to be performed live in the classroom provided the performance is for education or training purposes. The existing exception also permits using radios and televisions and playing sound recordings in the classroom for educational purposes. The existing

exception does not permit the performance, without prior permission from the copyright owner, of “cinematographic works” (e.g., rented or purchased movies, television programs and videos, and other audiovisual material) [hereafter “audiovisual materials”].

There are two changes to the performance exception. First, the exception will only apply if the copy being performed is a non-infringing copy or the person responsible for the performance has no reasonable grounds to believe it is an infringing copy. Second, the exception will be extended to also apply to audiovisual materials.

The Consortium supports the Parliamentary passage of the amendment to this performance exception.

(iii) News and News Commentary Programs

An existing exception in the *Copyright Act* permits a person acting under the authority of a non-profit educational institution to make a single copy of a news program or a news commentary program and to perform the copy on the school premises for educational and training purposes. The copy can be made only at the time the program is aired. The audience must consist primarily of students of the educational institution. Documentaries are specifically excluded from the exception. The existing exception permits the copy to be made and shown an unlimited number of times without the permission of the copyright owner or the payment of royalties for up to one year from the date the copy is made. After one year, the copy must either be erased or paid for. The educational institution is required to provide the copyright owner, or a collective representing the owner, upon request, information relating to the making, erasing, performing, and method of identification of the copy if the copy is retained more than 72 hours. Under the existing exception, copies that are not erased after one year will be subject to payment and to terms and conditions relating to use, as established by the copyright collective or copyright owner, whether or not the copies are ever used.

Bill C-32 will eliminate the need to pay copyright royalties for news and news commentary programs—even if they are kept or performed after one year from the time the copy is made. The record-keeping obligations are also eliminated.

The Consortium supports the Parliamentary passage of the amendment to the news and news commentary exception.

(iv) Online Learning

This new exception is intended to put students who are receiving instruction “online” in a similar position as students receiving instruction in a “face-to-face” teaching situation.

This exception is important for the delivery of distance education programs—a common method of delivery in many parts of Canada. Classroom activities permitted by the exceptions in the *Copyright Act* are extended to the same activities that take place online.¹ Educational institutions will be required to “take measures” to limit further communication by students.

The amendment will permit educational institutions to transmit lessons to students over the Internet. For example, a student in a remote location would be able to access an online course containing copyright material offered by an educational institution in any other part of his or her province or territory. The student, pursuant to subsection 30.01(5), is permitted to make a copy of the lesson and keep the copy until 30 days after the final evaluation is received.

The Consortium recommends that the requirement to destroy lessons within 30 days after the students who are enrolled in the course receive their evaluations be removed. The 30-day destruction requirement does not reflect the way online learning is reused by teachers and students in educational institutions, over time in successive courses. Online courses are reused. Destroying them is an unnecessary waste of resources.

(v) Digital Delivery of Course Material

This new exception will permit schools to share copyright material with their students online, subject to a complex regime that requires fair compensation to copyright owners. This new exception addresses digital delivery of course packs—an activity that occurs primarily at the post-secondary level. The amendment is usually referred to as the “course-pack provision.” This exception is also important for distance education programs that deliver course materials electronically. The section effectively creates a compulsory licence for digital copying and transmission of works (where there is a reprographic reproduction licence in place), as the only damages for infringement are amounts recoverable under a licence. The Consortium does not support the enactment of sections 30.02 and 30.03 because of its complexity and questionable utility in elementary and secondary schools.

(vi) Technological Protection Measures (TPMs)

The *Copyright Act* provides a number of users’ rights that permit use of copyright material for educational purposes. Enacting laws prohibiting circumvention, or possession of

¹ For reference, the exceptions in sections 29.4 to 29.6 and 29.7(3) are section 29.4 on reproduction for instruction, section 29.5 on live performances, playing radios and televisions in the classroom, section 29.6 on recording and showing news and news commentary programs, and section 29.7(3) on recording and showing documentaries, if royalties are paid.

devices for the purposes of circumvention, would prevent users from exercising the rights given to them under the *Copyright Act* by successive Parliaments over many decades. The recommended approach is to provide that circumvention of TPMs is prohibited only when the circumvention is for the purpose of infringing copyright. The CMEC Consortium has seven reasons for this position:

- (i) Copyright should protect creative works, not technology.
- (ii) Users' rights should be defined by Parliament.
- (iii) TPM provisions exceed WIPO treaty requirements.
- (iv) Users' rights are not a regulatory matter.
- (v) TPM provisions are open to constitutional challenge.
- (vi) Distinguishing "access" and "use" TPMs is unworkable.
- (vii) Distinguishing between "access" and "use" TPMs is outdated.

For these reasons, the Consortium recommends replacing the sections in Bill C-32 on digital locks with a regime that permits circumvention when the purpose of the circumvention is not an infringement of copyright.

(vii) Circumvention Services and Devices

Bill C-32 prohibits the offering or providing of services primarily for the purpose of circumventing a technological protection measure (TPM) and prohibits the importation, manufacture, and providing of any technology, device, or component designed or produced primarily for the purpose of circumventing a TPM.

The Consortium believes that circumvention services and devices should be permitted for a purpose that is not an infringement of copyright or moral rights. This is consistent with the recommended amendment regarding TPMs. Since the CMEC Consortium believes circumvention of TPMs for non-infringing purposes should be permitted, so should circumvention services, technology, devices, and components be available for non-infringing purposes. If users circumvent TPMs for non-infringing purposes, they will need circumvention services, technology, devices, and components that enable circumvention.

(viii) Print and Perceptually Disabled Exception

The CMEC Consortium has four recommended amendments to Bill C-32's sections on the print and perceptually disabled. First, the CMEC Consortium recommends that circumvention of technological protection measures and the provision of a circumvention service, technology, device, or component are permitted when doing any act pursuant to the print or perceptually disabled exception. The CMEC Consortium makes the same recommendation regarding all the exceptions in the *Copyright Act*.

Second, the CMEC Consortium recommends an amendment to Bill C-32, deleting the “commercially available” condition in section 32(3).

Third, section 32 should be rendered technologically neutral by providing that it is not an infringement of copyright to produce materials in a format suitable for a person with a perceptual disability who requires the material.

Fourth, Bill C-32 should be amended to provide that no royalties are payable for sending a copy of special-format materials for a person with a print disability to another country.

(ix) Rights Management Information

The CMEC Consortium recommends four amendments to the provisions in Bill C-32 dealing with rights management information.

First, the definition of rights management information should be limited to information provided by the copyright owner or the holder of any right under copyright.

Second, the removal or alteration of rights management information should not be subject to remedies where the information interferes unreasonably with an authorized display or reproduction.

Third, the fact that rights management information may not be legally binding in Canada should be recognized in the *Copyright Act*. Protecting rights management information should not be construed as confirming the legal validity of the information.

Fourth, the copyright *owner* or the holder of any right under copyright should be made subject to the same remedies (injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law) for knowingly making false or misleading statements in rights management information.

(x) Internet Service Provider (ISP) Liability

The manner in which Bill C-32 deals with ISP liability and the obligations regarding notice of alleged infringement is reasonable. A service provider should be under no obligation to monitor content provided by, and stored at the request of, a recipient of its service nor be required to seek facts or circumstances indicating infringing activity. Many educational institutions provide Internet connections to their respective teachers, students, and staff. It is impossible, in practice, to monitor or screen the activities of users of their network services. On that basis, educational institutions and libraries, when they act as service

providers, need legal protection similar to that already given under the law to “common carriers,” such as telephone companies, for infringements committed by their subscribers. The record-keeping obligations placed on ISPs in Bill C-32 are also reasonable and necessary. The Consortium does, however, recommend an amendment to Bill C-32 which provides that fees to be paid related to notices forwarded by ISPs at the request of a rights holder be borne by the rights holder.

(xi) Remedies

Bill C-32 provides that the only remedy that can be awarded against an educational institution engaged in a prohibited act of circumventing a technological protection measure (TPM) is an injunction, if a court is satisfied the defendant was not aware, and had no reasonable grounds to believe, that the defendant’s circumvention was prohibited.

The CMEC Consortium believes this section is too narrow. Its legislative intent should be extended to include fair dealing as well as circumvention of TPMs. An injunction, only, should be available against a user of a copyrighted work who has reasonable grounds to believe his or her dealing with a protected work is fair.

The possibility of damages, and particularly statutory damages, being awarded against a student, teacher, staff, or educational institution, has made many reluctant to exercise users’ rights under fair dealing for fear of being wrong.

Very high damage awards are possible under the statutory damages regime that allows a copyright holder to obtain an award in an amount ranging from \$500 to \$20 000 for each instance of copyright infringement, even when a person is unaware that his or her activity may infringe copyright. It is true that Bill C-32 amends section 38.1 of the *Copyright Act* to lower the range of statutory damages available for non-commercial infringement to between \$100 and \$5000 per infringement. This is not a satisfactory amendment because no damages should be payable when a person is unaware that his or her activity may infringe copyright.

Canadian law in this area contrasts sharply with the treatment of fair use copying under the statutory damages regime in U.S. copyright law. Section 504 of the U.S. *Copyright Act* insulates non-profit educational institutions, libraries, and their employees from a claim of statutory damages where a person making a copy has reasonable grounds to believe the copy would qualify as fair use. United States’ law clearly recognizes it is inappropriate to allow statutory damages to be awarded against individuals employed by not-for-profit public institutions who, in good faith, engage in fair use copying.

6. CONCLUSION

The CMEC Consortium is very pleased that Bill C-32 has addressed the issues of copyright and education in Canada. The existing lack of clarity is why the education community has been persistent over the past decade in urging the government to clarify the copyright law. Bill C-32 provides an appropriate legal framework for students and teachers to use Internet materials for their educational pursuits without the fear of copyright-infringement litigation. Bill C-32 also makes an important clarification to fair dealing.

The government has approached copyright reform with the objective of striking a balance that would permit fair and reasonable access to materials for Canadians' learning pursuits while respecting the rights of copyright owners. Bill C-32 has done an admirable job of striking that balance, especially when it comes to the amendment on the educational use of the Internet and to fair dealing.

However, there is still a need to adjust certain amendments in the legislation. Our recommendations for making certain important changes to the bill are described here in Section 5 Other Education Issues in Bill C-32.

On the greater question of the government's approach to education and copyright, the CMEC Consortium supports the legislation and hopes the government is successful in having it passed by this Parliament. The CMEC Consortium would like to see this legislation passed because it establishes a necessary and appropriate legal framework for Canadian students and educators in a digital world.

By enacting balanced copyright legislation, addressing the needs of students and teachers, promoting access, and making other much-needed updates, Parliament has an extraordinary opportunity to safeguard Canadians' learning objectives for generations to come.