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2013

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7-6-2013

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Recommended Citation

Soper, Devin (2013) "The Copyright Modernization Act: A Guide for Post-Secondary Instructors," *The Canadian Journal for the Scholarship of Teaching and Learning*: Vol. 4: Iss. 1, Article 6.

DOI: <http://dx.doi.org/10.5206/cjsotl-rcacea.2013.1.6>

Available at: http://ir.lib.uwo.ca/cjsotl_rcacea/vol4/iss1/6

The Copyright Modernization Act: A Guide for Post-Secondary Instructors

Abstract

In November 2012, the educational provisions of the Copyright Modernization Act were proclaimed in force, thereby introducing a number of significant changes to the Canadian Copyright Act. These changes include the expansion of fair dealing to include the purpose of education, the addition of new educational exceptions for the online transmission of lessons and the use of work freely available through the internet, and a number of amendments that make existing educational exceptions more technologically accommodating. This paper considers the significance of these changes for post-secondary instructors, first contextualizing the changes in relation to recent fair dealing jurisprudence, and then considering their significance for everyday instructional practice. Drawing on influential court decisions and the commentary of academics and lawyers, the paper not only describes how the changes to the Copyright Act have expanded the rights and exceptions available to instructors, but also identifies a number of unresolved questions about how the changes should be applied in practice. Despite these areas of uncertainty, the paper concludes that the changes bode well for post-secondary instructors, as they relax many long-standing restrictions around the use of copyrighted works for educational purposes.

En novembre 2012, les dispositions éducatives de la Loi sur la modernisation du droit d'auteur ont été proclamées avec force. Elles apportaient un certain nombre de changements significatifs à la Loi du Canada sur le droit d'auteur. Ces changements comprennent l'élargissement de l'utilisation équitable pour y inclure le but de l'éducation, l'addition de nouvelles exceptions éducatives pour la transmission de leçons en ligne et l'utilisation de travaux disponibles à volonté sur internet, ainsi qu'un certain nombre de modifications aux exceptions éducatives existantes qui tiennent davantage compte de la technologie. Cet article examine la signification de ces changements pour les enseignants de niveau post-secondaire, tout d'abord en mettant en contexte les changements par rapport à la jurisprudence récente en matière d'élargissement de l'utilisation, ensuite en examinant leur signification pour la pratique de l'enseignement de tous les jours. L'article, qui met à profit les décisions de la cour et les commentaires d'universitaires et d'avocats, non seulement décrit la manière dont les changements apportés à la Loi du droit d'auteur ont élargi les droits et les exceptions à la disposition des enseignants, il identifie également un certain nombre de questions non résolues sur la manière dont les changements devraient être mis en pratique. Malgré ces zones d'incertitude, l'article en arrive à la conclusion que les changements sont de bon augure pour les enseignants de niveau post-secondaire car ils assouplissent de nombreuses restrictions qui existaient de longue date concernant l'utilisation de travaux protégés par le droit d'auteur pour les besoins éducatifs.

Keywords

Bill C-11, Copyright Modernization Act, copyright law, fair dealing

Cover Page Footnote

The author is not a legal professional, and the information contained in this paper should not be construed as legal advice. Moreover, the author is publishing this paper in a personal capacity: the views and opinions expressed herein are those of the author, and not those of the University of British Columbia.

In November 2012, most of the provisions of the *Copyright Modernization Act* were proclaimed in force, thereby bringing into effect a number of significant changes to the Canadian *Copyright Act*. These changes have already begun to alter the copyright environments at post-secondary institutions across Canada, and they promise to have an even greater impact in the future. This article outlines the amendments that pertain directly to the work of post-secondary instructors, speculates about the practical implications of these changes, and addresses some of the main controversies concerning the act as a whole. Moreover, this article examines these topics in terms of their significance for higher education, avoiding the broader debate about whether the amendments constitute good public policy or are in the interests of Canadian society. While the ensuing discussion is far from comprehensive, it aims to provide an overview of the main changes and the potential implications for everyday instructional practice.¹

Background

The *Copyright Modernization Act* (Bill C-11) was intended to update Canadian copyright law to accommodate the massive technological changes that have transpired since the *Copyright Act* was last amended in 1997 (Lithwick & Thibodeau, 2011). Even before Bill C-11, the Act included a number of exceptions that delineated the conditions under which individuals could use a copyrighted work without the permission of the copyright holder. As amended by Bill C-11, however, the Act includes a number of new educational exceptions that have expanded the ways in which post-secondary instructors can make use of copyrighted works for educational purposes.²

The most expansive of these exceptions is fair dealing, which identifies a number of specific purposes for which copyrighted works can be used without permission, provided that the use is fair. The question of what constitutes *fairness* is a fascinating one, and we will address it shortly. For now, suffice it to say that Bill C-11 has added *education* (as well as parody and satire) to the list of allowable fair dealing purposes, which was previously limited to private study, research, criticism or review, and news reporting.

In addition to fair dealing, the *Copyright Act* includes more specific exceptions that are only available to educational institutions, and Bill C-11 has revised and expanded these exceptions in ways that support the work of instructors. Apart from amendments that revise existing exceptions to accommodate the use of new technologies, for instance, there are also amendments that introduce new rights and exceptions around (a) the use of work (freely) available through the internet, (b) the online transmission of recorded lessons, and (c) the in-class display of films and news broadcasts (Industry Canada, 2011b).

Though they might sound entirely permissive, these educational provisions come with numerous requirements and limitations. There is also widespread concern that Bill C-11's provisions concerning technological protection measures (TPMs or "digital locks") will unduly restrict the rights and exceptions available to educators.³ We will address the controversy around

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² For ease of comparison, this article will refer to Bill C-11 throughout. However, it is important to note that Bill C-11's educational provisions have already come into force and so the actual topic of discussion is the *Copyright Act* as amended by Bill C-11.

³ See: Association of Universities and Colleges of Canada, 2010; Canadian Association of University Teachers, 2010; Canadian Library Association, 2010.

the Bill's TPM provisions at the end of this paper, after taking a closer look at the changes to fair dealing and the special educational exceptions.

The Road to Educational Fair Dealing

Of all the amendments enacted by Bill C-11, the expansion of fair dealing to include the purpose of education is arguably the most significant for post-secondary instructors (see [section 29](#)). In order to appreciate the significance of educational fair dealing, it is helpful to consider it in relation to two Supreme Court of Canada (SCC) decisions that have shaped the recent history of fair dealing jurisprudence. The first of these decisions is *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004), a landmark case that did much to clarify the official legal interpretation of fair dealing. The SCC ruling held that the exception "is a user's right," and that it "must not be interpreted restrictively" (para. 48). Further, the SCC stipulated that determinations of fair dealing involve a two-part test: in order to qualify as fair dealing, the dealing (or use of a copyrighted work) must not only be for an allowable purpose (e.g., research or criticism), but also be shown to be fair (para. 50).

Since the fairness of a dealing can change depending on the context, the SCC also endorsed a six-part analytical framework "to govern determinations of fairness in future cases" (para. 53). According to this framework, determinations of fairness depend on the following six factors: "(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work" (para. 53). Although these factors might seem vague at first glance, the SCC has provided a substantial amount of guidance on how they are to be applied, and the framework has become a useful tool for evaluating the fairness of a given use.⁴

Continuing the legacy of *CCH*, the SCC issued another profoundly influential fair dealing decision in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* (2012). This decision applied to the distribution of short excerpts of copyrighted material to students in the K-12 context, and the SCC again ruled strongly in favour of the defendant, contending that instructors share "a symbiotic purpose with the student/user who is engaging in research or private study," and that "[i]nstruction and research/private study are, in the school context, tautological" (*Alberta*, para. 23). In short, this decision not only clarified that instructors can distribute multiple short excerpts of copyrighted material to their students (under certain conditions), but also provided valuable guidance on how the fair dealing factors should be applied to the use of copyrighted works in educational settings (Trosow, 2012). Coming just four months before the enactment of Bill C-11, the SCC's ruling in *Alberta* also played a critical role in shaping emerging understandings of educational fair dealing. Indeed, when the educational provisions in C-11 were finally enacted in November 2012, both the Association of Canadian Community Colleges (ACCC) and the Association of Universities and Colleges of Canada (AUCC) had already issued updated fair dealing policies to their member institutions (Geist, 2012b). These policies have since been adopted by universities and colleges across Canada, and,

⁴ For an in-depth discussion of the guidance provided for each factor, see Geist, 2012a.

although some institutions have modified the policies to suit their operational requirements, the versions in place at each institution have remained substantially the same.⁵

Educational Fair Dealing in Practice

Fair dealing for the purpose of education is still subject to the six-part analytical framework for determining fairness (Geist, 2010). In other words, the expansion of fair dealing permits the use of a copyrighted work for the purposes of education, *but only provided that the use is fair*. This proviso is important because it places substantial limits on the ways in which instructors can use copyrighted works, even if these uses are unequivocally for the purpose of education. To illustrate this point, one need only look to the fair dealing policies mentioned above. These policies are intended to alleviate some of the uncertainty involved in determining the fairness of a given use, and, to that end, they outline the conditions under which copying is permitted and place specific limits on how much material can be reproduced.

Since these policies are also intended to minimize the risk of litigation for copyright infringement, they have historically been based on conservative interpretations of fair dealing rights (Trosow, 2010). The latest iterations of these policies are considerably more permissive than their predecessors, as they have been updated to reflect the SCC's decision in *Alberta* and the official introduction of education as a fair dealing category, but they still place clear limits on the use of copyrighted material for educational purposes. In practical terms, this means that most Canadian universities and colleges now sanction the distribution of short excerpts to students by their instructors, but only under specific circumstances and provided that the excerpts do not exceed certain copying thresholds. For instance, the ACCC and AUCC fair dealing policies both stipulate that short excerpts from books should not exceed a single chapter (or 10%, whichever is greater), and that electronic distribution of excerpts be done within a password-protected course management system, rather than on the open web.

While these policies have the potential to alleviate some uncertainty in the minds of instructors, they are far from comprehensive, and there are many common use-case scenarios that they do not address. For instance, the guidelines apply strictly to the distribution of excerpts to students by instructors and staff, and so they are silent on the question of whether such distribution would also be permitted in less formal educational contexts, such as by speakers at conferences, between instructors working collaboratively on course development, or even between researchers conducting systematic reviews with colleagues from around the globe. It is also worth pointing out that website “terms of use” agreements, institutional licences for electronic resources, and other legal contracts may in many cases supersede fair dealing and the other educational exceptions in the *Copyright Act*—which means that instructors will need to check the terms of such contracts before using many freely available and library-licensed educational resources for the purposes of course instruction. In spite of the guidance provided by fair dealing policies, then, instructors will still routinely encounter use-case scenarios that require them to evaluate the fairness with which they are using a copyrighted work.

Since post-secondary institutions have only recently updated their fair dealing guidelines, an in-depth discussion of the practical implications of educational fair dealing is arguably

⁵ These policies are not publicly available on the ACCC and AUCC websites but they appear prominently on the copyright information webpages of various post-secondary institutions. See, for instance, the version of the [ACCC policy](#) (2012) made available by Vancouver Community College Library, or the version of the [AUCC policy](#) (2012) made available by Memorial University.

premature. Discussions of general use-case scenarios are only useful up to a point, as determinations of fairness are always highly dependent on the circumstances around each particular case. Moreover, there is likely to be some variation between the copyright environments at different institutions, as many use-case scenarios are not adequately addressed by the ACCC & AUCC policies, and many institutions have developed additional guidelines and resources concerning copyright compliance. These policies and guidelines will likely continue to be revised and updated over the coming years, as institutions gradually come to grips with the open questions around educational fair dealing and the new educational exceptions, to which we now turn.

Special Exceptions for Educational Institutions

In addition to the fair dealing exception, the *Copyright Act* includes a number of special exceptions available to educational institutions and individuals acting under their authority ([section 29.4-30.04](#)). Bill C-11 not only updated many of these exceptions, but also introduced a number of new exceptions for educational institutions. These exceptions are more specific than fair dealing, as they apply to common educational use-case scenarios, such as in-class display and public performance of copyrighted works, use of material that is freely available through the internet, and the online transmission of recorded lessons. As the SCC explained in the *CCH* decision, these exceptions are in addition to fair dealing: “it is only when a use does not qualify for fair dealing that an educational institution would need to rely on them” (para. 49). While some commentators have questioned the utility of these exceptions in light of educational fair dealing, others have argued that they are still useful insofar as they provide a legislative “safe harbour”—such that, if a particular use were determined not to qualify as fair dealing, it might still be covered by one of the special exceptions (Trosow, 2010, p. 555). As we will see, each of these exceptions also includes numerous requirements, and the requirements introduced by Bill C-11 have been the subject of much debate.

Use of Publicly Available Online Materials

One of the most promising exceptions introduced by Bill C-11 concerns the use of publicly available online materials ([section 30.04](#)). This exception allows instructors to reproduce and communicate works that are publicly available on the internet, provided that the audience is comprised primarily of students (or other individuals acting under the institution’s authority), and that the works in question are (a) legitimately posted by the copyright holders, (b) not accompanied by a statement prohibiting such reproduction, and (c) not protected by Technological Protection Measures (TPMs) (Lithwick & Thibodeau, 2011). Although this exception seems like it would benefit instructors, and although it has enjoyed a largely favourable reception from prominent voices in the higher-education sector, there is also considerable concern over its requirements (Trosow, 2010). For instance, the requirement concerning notices of prohibition provides content creators with an easy means of nullifying the exception entirely, and, since section 30.04 does not stipulate what might constitute a “clearly visible notice,” but instead allows for clarification through future regulations, it is currently unclear whether content creators would need to mark individual works with a notice, or whether they could simply include a single statement on a “terms of use” page (or equivalent). It is also unclear to what extent the uses covered by this exception would already qualify as fair dealing

for the purpose of education (Trosow, 2010). Despite these areas of uncertainty, however, this exception has the potential to support the work of post-secondary instructors in a variety of ways, as it pertains directly to the educational use of digital texts, images, videos, and other media that are freely available through the internet, and many instructors already draw heavily upon these materials in the course of their everyday instructional practice.

Online Transmission of Lessons

Another important exception introduced by Bill C-11 concerns the transmission of lessons ([section 30.01](#)). This exception allows an educational institution or person acting under its authority to create “fixations” (including recordings) of lessons and to transmit these fixations to students over the internet, provided that the institution not only destroys the fixations within 30 days after students have received their final course evaluations, but also takes measures to prevent each student from reproducing more than a single copy of each lesson for personal use—copies which each student is also obligated to destroy by the above 30-day deadline (Lithwick & Thibodeau, 2011). Since this exception applies to lessons that contain copyrighted works, it effectively extends the exception for in-class display to the digital environment, providing distance-education instructors and students with a similar set of rights as those that have long been enjoyed in the classroom. It is unclear how the requirements of this exception will play out in practice, but the wording suggests that instructors will need to create new fixations for each iteration of a course, and that students will be required to destroy a significant portion of their learning materials shortly after completing a course (Brunet & Gray, 2010; Trosow, 2010). While the sentiment behind this exception may be commendable, then, the exception’s numerous requirements seem overly restrictive, and are emphatically not in the best interests of instructors or their students.

Amendments to Existing Educational Exceptions

Bill C-11 also amended a number of pre-existing educational exceptions to make them more permissive and technologically accommodating. The amendment to the exception for public performances ([section 29.5](#)) is probably the most broadly significant, as it introduces a new subsection that allows instructors to display films and other cinematographic works in class, provided that the works have been acquired legitimately (Industry Canada, 2011a). Prior to this amendment, instructors could only do this with films or videos that included non-theatrical public performance rights or a licence for in-class display, or that were displayed in a way that met the requirements for fair dealing. Coupled with the new exception for use of publicly available online materials, this amendment has helped to relax long-standing restrictions that previously prevented instructors from displaying much of the valuable educational content available through video-hosting websites like Youtube. The other amendments to existing exceptions are less significant. The exception for classroom display ([section 29.4](#)) has been amended to remove references to outdated technologies—and has thereby officially legitimized the already widespread practice of displaying presentation slides and other course materials on modern video projectors. The exception for classroom use of news broadcasts ([section 29.6](#)) has been amended to allow instructors to keep recordings for more than a year without having to pay royalties (Lithwick & Thibodeau, 2011).

Fair Dealing and Technological Protection Measures (TPMs)

One of the main controversies surrounding Bill C-11 concerns the question of whether the Bill's TPMs provisions ([section 41](#)) trump its educational provisions, including both the fair dealing exception and some of the special exceptions afforded to educational institutions. On the one hand, there are many who hold that the TPM provisions do trump the educational provisions, and that this situation threatens to negate the Bill's more progressive elements. This group is comprised mainly of concerned educators, librarians, and students, and is arguably championed by [Michael Geist](#). On the other hand, there are also many legal professionals who argue that the relationship between the Bill's TPM provisions and educational provisions is too complex to cast in such totalizing terms (Gannon, 2011a, 2011b; Glover, 2011; McCutcheon, 2011; Sookman, 2010, 2011).

Among the points raised by this second group is that Bill C-11 distinguishes between copy-control TPMs and access-control TPMs, and that, while the Bill clearly prohibits circumvention of the latter, it permits circumvention of the former for uses that are in accordance with the Bill's educational provisions. These categories of TPMs encompass a range of different technologies, but the primary difference between them is adequately conveyed by their names: access-control TPMs restrict access to works (e.g., through password protection), whereas copy-control TPMs restrict copying (e.g., through digital rights management technologies that prevent users from making copies of e-books). In explaining the practical implications of this distinction, Gannon (2011a) provides a helpful example:

[Fair dealing] allows users to make fair copies of portions of a work for certain purposes. It does not grant any user a right to free access to that work. A researcher must still legally obtain access to a work in order to make a fair dealing copy. . . . For example, if an academic article was only being provided behind a "paywall" (where the reader must pay a certain amount to access the article), users desiring to make fair dealing copies would still have to pay to access the article. However, once the content is legally accessed or acquired, users could circumvent any technology that prevents them from making fair dealing copies of the text of the article. (para. 15-16)

This same point has been made by other members of the second camp identified above (Glover, 2011; Sookman, 2010, 2011), and it suggests that the intention behind the TPM provisions is not to stifle fair dealing and other educational exceptions, but rather to help ensure that copyright holders receive fair compensation for their work. The members of this second camp also point out that Bill C-11 includes a section ([41.21](#)) that allows the government to swiftly introduce supplementary regulations that clarify how the TPM provisions are applied, and to do so specifically in the event that these provisions hamper uses that are legitimately covered under fair dealing (Gannon, 2011a, 2011b; McCutcheon, 2011; Sookman, 2010). Although Bill C-11 prohibits the circumvention of access-control TPMs, moreover, post-secondary instructors are already accustomed to accessing works protected by such controls through the legitimate channels provided by their institutions, and so the access-control prohibition may turn out to be something of a non-issue for many instructors (Gannon, 2011b). Against all this, Geist (2010) has argued that access- and copy-control TPMs are often bundled together (notably on ebooks and DVDs), and that the lack of clear definitions makes it difficult to say with confidence that a

work is protected by one and not the other. This uncertainty will likely persist until future regulations or court decisions provide further clarity, and it has the potential to cast doubt upon the application of fair dealing and the educational exceptions in a variety of different contexts.

Since it remains to be seen how this will all play out in practice, then, it would be premature to dismiss the more progressive elements of Bill C-11 on the basis that its TPM provisions may under certain circumstances trump its educational provisions. And, on a more practical note, one could argue that these provisions have little bearing on the categories of works that tend to raise the most copyright concerns for instructors: namely, images and film/video, both of which are widely available online in forms that are not protected by TPMs.

Conclusion

Together with the SCC's decision in *Alberta*, the enactment of the educational provisions in the *Copyright Modernization Act* introduced a number of dramatic changes to Canadian copyright law. On the whole, these changes bode well for post-secondary instructors, as they include a number of new rights and exceptions that were not previously available to instructors. The expansion of fair dealing to include the purpose of education, the new special exceptions for the use of publicly available online materials and the online transmission of lessons, the broadening of existing exceptions to accommodate the use of new technologies—all of these changes ease long-standing restrictions on the use of copyrighted materials for educational purposes. While the SCC's rulings in *CCH* and *Alberta* have done much to frame the emerging consensus on educational fair dealing, however, there has been no real guidance on how the new educational exceptions might be applied in practice, and there is also considerable uncertainty over the practical implications of the Bill's TPM provisions. Given that these new additions to the Copyright Act were introduced only four months ago, the uncertainty around them is understandable, and it will likely persist until further guidance is provided by regulations or by the courts. Until then, post-secondary institutions will need to make a concerted effort to provide their instructors with reasonable interpretations of the new exceptions and how they should be applied.

At present, educational institutions are still in the process of responding to the dramatic changes of the past year. The ACCC and AUCC policies are a good start, as they enable Canadian universities and colleges to present a united front in their interpretation of educational fair dealing. Other influential voices in the higher education community are beginning to contribute their interpretations, with the Canadian Association of University Teachers (2013) recently publishing its "Guidelines for the Use of Copyrighted Material". In addition to providing their own guidelines and information, many educational institutions have also appointed copyright specialists to support faculty and staff in resolving their copyright concerns. Ultimately, however, it will fall largely to instructors to interpret the available information and decide how fair dealing and the new educational exceptions should be applied in particular situations. Fulfilling this responsibility will be an ongoing challenge, especially given the uncertainty around the *Act's* new educational exceptions and TPM provisions. Nonetheless, it is important to emphasize that these exceptions are available for instructors to start exercising immediately, and that they have significantly expanded the rights and exceptions that were available to instructors in the past.

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