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Le réseau d'éducation et de formation à distance de l'Ontario

THE PERFECT STORM: CANADIAN COPYRIGHT LAW 2012

Making Sense of the Dramatic Changes and the Far-Reaching Implications for Online Learning

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Canadian copyright law has gone through a perfect storm with the statutory reforms to the *Copyright Act* that received Royal Assent in June 2012 and the subsequent five Supreme Court of Canada copyright decisions in July 2012.

This is no less than a seismic shift in the copyright law with far-reaching implications for post-secondary education, and online learning in particular. Let's try to:

- Understand the changes that have taken place;
- Explore the implications for faculty/instructors, academic administrators and policy makers and government funders; and
- Identify the steps that we all need to consider.

By virtue of the nature of this topic, we have to formulate this discussion in a legalistic way, although we have attempted to simplify the concepts wherever possible for all readers. A technical description of the changes is included in Part 3 for those requiring more detail.

While all efforts have been made to ensure factual correctness, we advise faculty/instructors, educational institutions and governments to obtain their own legal advice before proceeding with any of the suggested actions.

MAKING SENSE OF THE PERFECT STORM – WHAT YOU NEED TO KNOW

With these two events, copyright law in Canada has moved strongly towards user interests with the result that educational institutions, faculty/instructors, and students enjoy far greater flexibility in using and working with copyright materials.

This is particularly true for online learning and technology-assisted initiatives given the Court's emphasis on technological neutrality (see page 8 for greater discussion) as a governing principle of Canadian copyright law. The implications are very significant as they will allow faculty/instructors and educational institutions to more freely use materials for online learning purposes with reduced fear of liability.

In Parts 1, 2 and 3, we explore both the legislative changes and the Supreme Court's decisions in greater detail and suggest next steps for the post-secondary sector and policy makers and government funders.

PART 1 – UNDERSTANDING THE CHANGES TO COPYRIGHT LAW IN CANADA

In June/July 2012, the very foundation of Canadian copyright law shifted in a seismic way through two specific events.

Changes to the Copyright Act

The change began with the enactment of Bill C-11, the long-debated copyright reform bill in June 2012.

Although the bill has yet to take effect – it has received Royal Assent but will require an Orderin-Council from the government to do so – the reforms are expected to be operational before the end of the year.

Bill C-11 contained many provisions that will benefit the education community. The most notable positive educational reforms include:

1) The addition of education, parody, and satire to fair dealing. Fair dealing allows users to make use of excerpts or other portions of copyright works without the need for permission or payment.

2) The creation of a non-commercial user generated content (UGC) provision that creates a legal safe harbour for creators of non-commercial UGC (provided they meet four conditions in the law) and for sites that host such content. Educators can use the provision to create non-commercial materials.

3) The bill distinguishes between commercial and non-commercial infringement for the purposes of statutory damages. The change would apply to educational institutions engaged in non-commercial activity and significantly reduce their potential liability for infringement.

4) The implementation of a distance learning provision, though use of the exception features significant restrictions that require the destruction of lessons at the conclusion of the course.

5) The inclusion of an exception for publicly-available materials on the Internet. This covers the content found on millions of websites that can now be communicated and reproduced by educational institutions without the need for permission or compensation.

6) The adoption of a technology-neutral approach for the reproduction of materials for display purposes. The current law is limited to manual reproduction or on an overhead projector. The provision may be applicable in the online learning context.

7) The inclusion of a restrictive digital inter-library loans provision that will open the door to digital transmission of materials on an inter-library basis, increasing access to materials that have been acquired by university libraries.

8) A new exception for public performances in schools, which will reduce licensing costs for educational institutions.

Supreme Court of Canada Copyright Decisions

While the legislative reforms alone marked a major change in the law, the five Supreme Court of Canada decisions in July 2012 will create a seismic shift.

The five cases are as follows:

- Entertainment Software Association of Canada v. SOCAN (payment for music featured in a downloaded video game)
- Rogers Communications v. SOCAN (payment for streaming music)
- SOCAN v. Bell Canada (whether song previews on services such as iTunes qualify as research for the purposes of fair dealing)
- Alberta v. Access Copyright (teacher copies in the classroom as fair dealing)
- Re:Sound v. Motion Picture Theatre Association of Canada (tariff for soundtrack accompanying cinematographic works)

Three of these decisions are relevant for the purposes of education and online learning: the ESAC case (which establishes principles of technological neutrality) as well as the Bell Canada and Access Copyright cases (which focus on fair dealing). At a broad level, the decisions establish three key principles.

1. An Unequivocal Endorsement of Users' Rights

The Supreme Court first raised the notion of balancing creator rights and user rights in 2004. Publisher and creator groups had urged the Court during the December 2011 hearings to backtrack on its user rights approach, claiming it was merely a metaphor, yet the Court used these cases to re-emphasize its importance.

For educators and educational institutions, this confirms that all copyright cases will be assessed through a lens that ensures their rights as users are respected.

2. Technological Neutrality as a Foundational Principle of Copyright Law

The Supreme Court effectively embedded a technology-neutral principle into the law that will extend far beyond these particular cases, as future litigants will undoubtedly argue that existing exceptions can be applied to new uses of copyright works to ensure technological neutrality.

This is particularly important for online education initiatives, since the neutrality argument can be used to ensure that online rights are treated equally to offline rights.

3. Expansion of Fair Dealing

The Supreme Court continued its expansion of fair dealing by interpreting it in a broad and liberal manner. In the song previews case, where Bell Canada argued that 30 second song previews could be treated as consumer research and thus qualify for fair dealing, the Court agreed, concluding that "limiting research to creative purposes would also run counter to the ordinary meaning of "research", which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest."

Similarly in the Access Copyright case, the Court adopted an expansive view of private study (another fair dealing category) by ruling that it could include teacher instruction and that it "should not be understood as requiring users to view copyrighted works in splendid isolation."

Both decisions point to a very broad approach to fair dealing that can be used by education groups to make the case that innovative uses of copyright materials qualifies as fair dealing and therefore does not require prior permission or compensation. In the months ahead, the education community is likely to rethink its approach to copyright licensing in light of the decisions.

PART 2: FAR-REACHING IMPLICATIONS OF THE CHANGE IN COPYRIGHT LAW AND RECOMMENDATIONS FOR FACULTY/INSTRUCTORS, ACADEMIC ADMINISTRATORS AND POLICY MAKERS AND GOVERNMENT FUNDERS

By establishing technological neutrality as a foundational principle of Canadian copyright law, the Supreme Court has sent a clear signal that additional layers of restrictions or fees based on the delivery mechanism distort the copyright balance and harm users' rights. For institutions focused on online learning, this principle should colour all copyright policy and analysis, since it opens the door to more aggressive approaches to copying and dissemination of copyright materials.

Far-Reaching Implications

The changes to fair dealing will have a dramatic impact on all Canadian educational institutions. All copying within Canadian institutions now meets the fair dealing first stage purposes test and will be eligible for the stage two six-factor fair dealing analysis (see description of the tests starting on page 9). Given the Court's strong endorsement of research and private study, the inclusion of instruction within fair dealing, and the ability to focus on the student beneficiary of the copying, online learning institutions are well positioned to adopt copyright policies with fair dealing playing a central role.

Consider the following primary uses:

1. Online Course Delivery

Concerns regarding the delivery of course materials through online delivery channels have been significantly diminished by virtue of these decisions. The Court's technological neutrality principle may provide considerable protection for the online course delivery that largely mirrors offline or physical classroom-based learning. Moreover, the expanded fair dealing provisions may address many issues with the uses of copyright materials in those courses and reforms to Bill C-11 reduce liability concerns and provide support for web-based activities.

2. Online Course Materials

The fair dealing reforms are perhaps most important with respect to the development of online course materials. The creation of original course materials often borrows from existing copyright works. The fair dealing provisions – along with the Bill C-11 user generated content rule – grant considerable legal protection for the use of such materials in appropriate circumstances. While the law unsurprisingly will not permit wholesale copying of books, the use of reasonable excerpts is likely to be covered by fair dealing and may be freely disseminated to students regardless of their physical location.

3. Copyright collective payments

It will be very difficult for educational institutions to justify the Access Copyright licence in light of these decisions. This is not to say that entire books will be copied without compensation. They clearly won't since that copying would likely fail on most of the factors of the stage two six-factor test. However, for shorter excerpts – earlier case law indicated as much as a full article or chapter in a book - this copying will benefit from a strong fair dealing argument.

Since the Access Copyright model licence only covers up to ten percent of a print work, the licence largely duplicates fair dealing and is likely to be viewed by educational institutions as unnecessary.

The next steps for educators, administrators, and policy makers are crucial. In the months ahead, some rights holders and copyright collectives may emphasize lingering uncertainties and the prospect of renewed litigation in an effort to persuade educational institutions to avoid relying on fair dealing.

In light of the Court's decision – along with recent Bill C-11 reforms – there is no legal reason to adopt a tepid copyright policy response. The Court has provided considerable clarity on users' rights and opened the door to more aggressive reliance on those rights in developing educational copyright policies.

Steps we need to consider.

FACULTY/INSTRUCTORS

The decisions remove many concerns about copyright liability as part of their classroom copying and course material delivery. The Court has ruled that when copying is done for students, they share a symbiotic purpose with the students and qualify for an appropriate purpose.

You may want to encourage your institutions to develop updated copyright policies to reflect current legal flexibilities and provide the necessary administrative support.

You can now actively develop innovative materials with the assurance that copyright now provides a wide berth for the use of materials under fair dealing.

ACADEMIC ADMINISTRATORS

You may want to consider, as a top priority, revising existing copyright use policies to reflect current law. In recent years, there have been several competing fair dealing guides, with some criticized for offering very conservative interpretations of the law.

In light of the Court's decisions, a re-examination of copyright policies is encouraged. These policies, which can reflect the user rights emphasis of the Court, may be widely disseminated within the local academic community so that faculty/instructors and students better understand their rights and obligations under the law.

POLICY MAKERS AND GOVERNMENT FUNDERS

You may want to consider several affirmative steps now that Bill C-11 has been enacted and the Supreme Court's decision removed much uncertainty regarding fair dealing.

- Encouraging educational institutions to re-examine their licensing arrangements with a view to dropping licenses that do not provide sufficient value or have been rendered largely unnecessary. The cost savings may be significant and can be reallocated toward other educational priorities.
- Public education efforts so that the public better understands their user rights under the law.
- Working with their federal counterparts to identify potential education-oriented digital lock exceptions that could be added through regulation as the concerns with technological protections measures remains a serious issue

PART 3: THE LEGAL TECHNICAL DISCUSSION

Let's do a deeper legal analysis of the two key legal developments in the court cases: the emergence of technological neutrality as a fundamental copyright principle and the expansion of fair dealing.

1. Technological Neutrality

The articulation of technological neutrality as a foundational principle of Canadian copyright could have an enormous long-term impact on the law. The Court establishes this principle in the ESAC case, stating:

The principle of technological neutrality is reflected in s. 3(1) of the Act, which describes a right to produce or reproduce a work "in any material form whatever". In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.

The importance of technological neutrality is framed as a key consideration to ensure balance in copyright. In applying the principle to the dispute over music found in downloaded video games, the Court concludes:

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.

The technological neutrality principle has potential applications in a wide range of cases. For example, digitization initiatives may be on stronger legal ground, supported by a combination of fair dealing and technological neutrality. Online education is poised to become a prime beneficiary, since online education activities can use the principle to challenge new layers of protection or fees that are based solely on the electronic delivery of course materials.

2. Fair Dealing

Fair dealing is the most important user right (or exception) in the *Copyright Act*. The Canadian equivalent of the U.S. fair use provision, it permits the use of excerpts of copyright works without the need for permission or payment. Fair dealing involves a two-stage analysis. First, the dealing must qualify for one of the enumerated fair dealing purposes. This currently includes research, private study, news reporting, criticism, and review. Bill C-11 adds education, parody, and satire to the list. Assuming it meets part one, the second stage involves an analysis of whether the dealing itself is fair. In Canada, this involves a six-factor test discussed further below.

The Court's decisions add considerable flexibility to the application of the fair dealing provision. The decisions lower the threshold for the first stage purposes test such that it is now clear that all copying within Canadian schools (K-12 and post-secondary) qualifies under this test. The Court explicitly states that the first stage purposes test has a low threshold. Moreover, given the very broad approach to research (any personal interest) and private study (treated as personal study) as well as the addition of education as a purpose in Bill C-11, all copying within the education system will pass this step.

This means that all educational copying is eligible to be examined under the second stage six-factor fairness test. In addition to the Court's emphasis on users' rights, its analysis strongly favoured an education orientation for the majority of the six factors.

The biggest shift involves the first factor, the **purpose of the dealing.** This factor now clearly favours education:

(1) The Court concluded that the research purpose should be very broadly defined. In the song previews case, the Court stated:

Limiting research to creative purposes would also run counter to the ordinary meaning of "research", which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. It is true that research can be for the purpose of reaching new conclusions, but this should be seen as only one, not the primary component of the definitional framework.

By framing research as even including personal interest, virtually all educational copying will fall within a suitable purpose.

(2) The Court in the Access Copyright case concluded that the private study purpose should also be broadly defined, effectively expanding the purpose to include classroom activities and distance learning participants:

With respect, the word "private" in "private study" should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the concept of studying, the Board again artificially separated the teachers' instruction from the students' studying.

(3) The Court in the Access Copyright case also ruled that the purpose of the copying may include the purpose of the beneficiary since teachers and students share a symbiotic purpose. In other words, while a teacher may engage in the copying, where they do so for the benefit of students, the students' purpose can be considered:

Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of "instruction"; they are there to facilitate the students' research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/ private study are, in the school context, tautological.

While the second factor, the **character of the dealing**, will often side against education where there is a large amount of copying within an institution, the remaining four factors favour education.

The third factor is the **amount of the dealing**. The Court ruled this should be assessed based on the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated. The overall quantity of copying has long been a consistent argument for payment from groups such as Access Copyright, but the Court ruled it is not relevant in considering the amount of the dealing. This aspect of the decision ensures that the appropriate excerpts will qualify as fair dealing, even if there are multiple copies to accommodate all the students in a class.

The fourth factor, **alternatives to the dealing**, also favours education since the Court concluded that buying books for every excerpt for every student is not a realistic alternative. Moreover, the Court already ruled in 2004 that the availability of a licence is not relevant to deciding whether a particular dealing is fair.

The fifth factor, the **nature of the dealing**, examines whether the work is one that should be widely disseminated. It is also likely to favour education since the materials being copied presumably have some educational value.

The six factor, the **effect of the dealing** on the work also sided with education as a unanimous court said there was no evidence linking textbook sales declines to teacher copying. In other words, there was no evidence in the Access Copyright case that teacher copying had a negative financial impact on the copyright owner.

The cumulative effect is clear: educational institutions can rely more heavily on fair dealing for the copying that takes place on campus and in the classroom. This includes copies made by teachers for students for instructional purposes, copies that previously formed a core part of Access Copyright's claim of the necessity of a licence.