Educational Use of the Internet Amendment: Is it Necessary?

Thursday, 31 January 2008

Â The Council of Ministers of Education (CMEC) issued a Bulletin today calling for an amendment to the Copyright Act to address educational uses of the Internet.Â

CMEC asserts: Â â€œâ€¦schools, teachers, and students need the permission of rights holders â€" and can be required to pay royalties â€" for some educational uses of material on the Internet. These rules apply even to â€œfree stuffâ€• on the Internet. â€œFree stuffâ€• refers to material posted on the Internet by the copyright owner without password protection or other technological restrictions on access or use. â€œFree stuffâ€• is posted on the Internet with the intention that it be copied and shared by members of the public using the Internet. It is publicly available for anyone who wants to use it, but the current copyright law may not protect schools, teachers, or students even when they are making normal educational uses of this 'free stuff.' â€• Â As a result, CMEC is asking for what they are calling the â€œEducational Use of the Internet Amendment.â€• While the Bulletin does not enumerate the specific text of the proposed Amendment, it does indicate it will have the following conditions attached to it: Â â€œFirst, the material must be posted on the Internet with the consent of the rights holder. If the educational user knows, or has reasonable grounds to suspect, that the owner has not consented to its use for educational purposes, the material can not be used without permission. Second, rights holders can opt out of the amendment by using passwords or technology that limits access or use of the Internet material. Rights holders can also opt out by informing Internet users that the material cannot be used for educational purposes. Third, the amendment applies only to educational uses that take place under an official program of learning, provided by a school, college, or university.â€• Â On examination, several issues arise: Â 1. If materials are publicly posted on the Internet without technological restrictions, hasnâ€™t the owner consented (implicitly if not explicitly) to reasonable uses of the content? If there is consent, there is no infringement and it is not even necessary to resort to a fair dealing analysis. [more to follow] Â 2. Even if there is no consent to use the materials, arenâ€™t reasonable uses covered by fair dealing? [more to follow] Â 3. Even if there is no consent and there is no fair dealing, and it is necessary to amend the Copyright Act to clarify the availability of these uses, why should the exception apply only to those under the auspices of an official program in an educational institution. [more to follow] Â 4. Â By making such unequivocal arguments that these uses go beyond consent and go beyond fair-dealing, are the proponents in any way undercutting the ability of others to assert these usersâ€™ rights? Â [more to follow] Â 5. What will the effect of seeking this special amendment be on the broader usersâ€™ rights coalition that seems to be emerging? Will it be helpful, or will it be divisive? Â [more to follow] Â 6.Â Are there better approaches to dealing with the problems of uncertainty that continue to plague users wishing to lawfully assert their rights under the Copyright Act without incurring undue risks of liability? [more to follow] Â I think that proponents of a special educational exemption have the burden of showing a substantial and persuasive rationale for it.Â They need to show that there is some reason why it is needed and particularly why their circumstances are distinguishable from anyone who would not be covered by the special exemption. While the first installment of CMECâ€™s Copyright Bulletin fails to address these issues, it will be interesting to watch for their subsequent entries. Â And I will treat each of these and other questions in some greater detail in future postings as well.