Educational Use of the Internet Amendment: Is it Necessary? (Part II)

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The Council of Ministers of Education (CMEC) has issued the second in a series of Bulletins calling for an amendment to the Copyright Act to address educational uses of the Internet. In my previous comment, I identified six issues that need to be addressed on this topic.

But like the first installment, CMEC's second entry does little to justify their position. I'll address the points in their second bulletin paragraph by paragraph.

At the outset, I should indicate my agreement with CMEC's goals and ends. That is, classroom instructors and the students they teach must be able to take full advantage of the educational and instructional opportunities provided by the Internet. There is no disagreement about that. My quibble with CMEC on this issue is about the means to attain these worthwhile and legitimate ends in terms of the specifics of copyright policy.

The question of educational use of Internet resources is only part of the broader picture of how to make sure that the Copyright Act provides an appropriate balance between the rights of users, owners, and creators that is now enshrined in Canadian public policy.

CMEC's Paragraph 1:

Education organizations are asking the federal government to change the existing copyright law in order to make it clear that educational use of publicly available Internet material is not an infringement of copyright. The Canadian copyright law needs to be changed because the law is not clear about the extent to which teachers, students, and other educational users can legally engage in routine classroom activities such as downloading, saving, and sharing text or images that are freely available on the Internet.

I agree that an amendment to the Copyright Act would usefully clarify the state of uncertainty that has emerged with respect to this, and many other issues. But it should not be done as a special exemption applicable only in certain institutional-settings but rather through general fair-dealing.

Why is there so much uncertainty that an amendment is needed? After all, a reasonable reading of the CCH case would seem to resolve this question in favour of reasonable uses under fair-dealing, if it is even necessary to get to that stage in the analysis.

I think there are two reasons for the continuing uncertainty. First, educational administrators tend to be excessively risk-averse. So much of the "uncertainty" is self-imposed from the top-down by people with "can't-do" attitudes. But another reason for the uncertainty is the seemingly unending pressure that rights-holders groups and collectives place on institutions for payments, even in situations where there is already consent or where the end use would constitute fair dealing. In this regard, educational institutions are not alone.

CMEC's Paragraph 2:

The amendment being sought by education organizations deals only with the “free stuff” on the Internet — material posted there by the copyright owner without password protection or other technical restrictions on

access or use. This material is posted on the Internet with the intention that it be copied and shared by members of the public. It is publicly available for anyone who wants to use it. The problem is that the current copyright law may not protect schools, teachers, or students, even when they are making routine educational uses of this “free stuff.”

The use of the term "free stuff" is unfortunate. It's not a very precise term, and its usage does not befit an educational association. What they're trying to descibe though are those materials that are placed on the Internet without further technological access controls. It is indeed publicly available for anyone who wants to use it, and it is placed on the Internet for people to make reasonable uses of it. What we have in this situation is a form of consent, but not consent to do just anything with the material. The consent is to make reasonable uses of the material and is often now being evidenced by logos such as 'print' and 'e-mail'. Everyone who posts materials also knows that individual terminals displaying websites can easily be hooked up to over-head projectors, and that this equipment is readily available in most classrooms today. I would like to better understand why the proponents of the Amendment feel these routine uses of materials not otherwise marked are not within the scope of consent.

The problem with the term "free-stuff" is that these materials are not "free-stuff," they are not discards found on the side of the road for anyone to take and carry away. The owners have not relinquished their exclusive rights in these materials, they have simply consented to certain uses. I'm concerned that by using the term "free-stuff" CMEC may be belittling owners who have made their works available without technological restriction. I'm also concerned that these owners may simply withdraw their previous consent and adopt technological restrictions on access to their works.

It's important that we not under-estimate the scope of the consent that comes along with materials that are available on the Internet without technological restriction. Understanding the precise scope of this consent is an important threshhold issue because if there is consent for a paticular use, then there is no prima facie infringement; and if there is no such infringement, there is not even a need to resort to a fair dealing analysis.

Before conceding that the current laws of consent and fair dealing are inadequate for their needs, educational institutions should consider adopting and posting their own access and use policies (as did the Library in the CCH case, quoted with approval at para 61) that explains this broad view of consent and fair dealing along with its limits. But it's important that we avoid using terms like "free-stuff" when speaking about works in which copyright still subsists, lest the owners feel the need to take more restrictive measures so nobody mistakes their works for "free-stuff." We should be encouraging owners to be granting broad consents as much as possible and this is hardly the way to do it.

CMEC's Paragraph 3:

Educational institutions and the students, teachers, and staff that work in them, use the Internet in unique ways that may infringe copyright — even though many individual uses of the same material might be allowed under the Copyright Act. This legal uncertainty necessitates a change to the Copyright Act. There needs to be legal clarity about the use of publicly available Internet material for educational purposes.

This is where the argument absolutely falls apart. The notion that what goes on in a classroom is unique is simply not sustainable. In the course of modern social interactions, we often find ourselves in groups, be they formal or informal. Be it a scout troop, a church club, a business meeting, a volunteer association gathering, a story-telling session at a public library or countless other social settings, CMEC's claim that classrooms are somehow "unique" fails. This claim of institutional-exceptionalism is dismissive of how others use and share information resources. Whether you are in a classroom, at a campfire, in a club meeting, or at a public library program, there are certain limits on how you can use copyrighted works. With respect to materials that are posted on the Internet with technological limitation, it first comes down to the question of consent. Are you doing something that is within the consent (implied or express) of the owner. If you are, there is not infringement. If you are going beyond the consent, then ask whether the use is within fair dealing.

That goes for everyone, as it should as a matter of equity. The nature of the use is but one of the fair dealing factors, so different types of uses and users will be taken into account. If it is legal to do something inside a classroom, it should not

become illegal to do the same thing outside of the classroom, which is what this exception would be suggesting by implication.

CMEC's Paragraphs 4 & 5:

The Copyright Act provides rights to people who create copyrighted works — music, art, photographs, movies, books, and magazines, for example. These legal rights allow copyright owners to control who uses their works and to collect royalties for their use. These rights extend to allowing or refusing permission to make copies or communicate material over the Internet — downloading, saving, and e-mailing, for example.

The Copyright Act also provides rights to users of copyright works — teachers, students, educational institutions, and school libraries, for example. There are two kinds of “users’ rights” in the Copyright Act: specific and general. There are a number of specific users’ rights, for example, the right to reproduce a work protected by copyright for tests and examinations. An example of a general users’ right is “fair dealing,” which is available to any user, not just someone involved in education.

This is a generally accurate synopsis of how the Copyright Act works, although in the case of works that have been posted to the Internet without technological limitation it seems as if the permissions have been given for these routine uses. The distinction between specific and general users' rights and limitations is a good one.

CMEC's Paragraphs 6 & 7:

For a number of years now, several national education organizations have been asking the federal government to amend Canadian copyright law to introduce a new specific users’right saying that educational use of publicly available Internet works does not infringe copyright. The Council of Ministers of Education, Canada is one of the education organizations supporting this amendment.

The education amendment has many supporters in Canada’s education community. It is being championed by the Association of Canadian Community Colleges (ACCC), the Canadian Association of Research Libraries (CARL), the Association of Universities and Colleges of Canada (AUCC), the Canadian Teachers’ Federation (CTF), the Canadian School Boards Association (CSBA), the Canadian Home and School Federation, and the Copyright Consortium of the Council of Ministers of Education, Canada (CMEC), which is made up of the provincial and territorial ministers of education in every province and territory except Quebec.

These are all statements of fact. It's good to see that CMEC has softened some of their earlier claims that suggested they were speaking for the educational community as a whole.

CMEC's Paragraphs 8 & 9:

All these education organizations accept the principle that many individual uses of such works may be users’ rights under the Copyright Act. However, they collectively agree that the law is not clear about whether some educational uses of publicly available Internet material can occur without permission or payment. Examples of the kind of educational use that is surrounded by legal uncertainty is the making of multiple copies of an entire work like a photograph or article found on the Internet for all of the students in a class, or posting an item from the Internet on a class Web site.

The education amendment is necessary to clarify the law so that students and teachers can have the assurance that they will not infringe copyright law when they engage in routine uses of publicly available Internet works for educational

purposes.

There are many instances where longstanding practices, customs, and usages might not constituite fair-dealing if you take a strict reading of section 29, 29.1 and 29.2 of the Copyright Act. Parodists, software engineers, electronic consumer equipment manufacturers, appropriation artists, and individual end-users of a vareity of media are faced with the same problem. If every interested stakeholder was seeking a special amendment to the Copyright Act that applied just to their fact situation, we would be faced with a level of complexity that would not be sustainable. The other problem with special exemptions is that they are too inflexible and fail to take account of changing technology and practices. From a policy point of view, the interests of simplicity, technological neutrality, and flexibility are better served by adopting a few simple principles of general application, rather than enacting a special exemption that is only applicable to certain persons in certain settings.

Another weakness of the CMEC proposal is that it doesn't offer any benefits to creators who are not currently affiliated with particular institutions. At least under broadened fair-dealing, independant creators themselves can benefit. There is something very equitable about fair-dealing that just doesn't apply to special exemptions.

Unfortunately, CMEC is still not disclosing the details of its proposal, or anything substantive in terms of its justification. In my previous posting, I identified six issues that must be adressed. First, whether these uses are within the scope of the owners consent, and second, if they are not, are they fair-dealing? Third, if an amendment is indeed necessary, why shouldn't it be general rather than specific? Fourth is the need to avoid making arguments that undercut the position of other users outside of the institution, which is related to the fifth point, whether this proposal is divisive. Finally I asked whether there are better approaches to solving the problems of uncertainty that plague educators as well as many others.

CMEC's latest statement does not address these issues. Perhaps they will do this in the third installment of their Copyright Bulletin.