Clearing Up the Copyright Confusion: Fair Dealing and Bill C-32

Michael Geist
Canada Research Chair in Internet and E-commerce Law
University of Ottawa, Faculty of Law

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Fair dealing has played a prominent role in the hearings on Bill C-32, with education and creator groups debating the merits and impact of the proposed reforms. Unfortunately, much of the discussion has confused rather than clarified the issue with misleading claims about potential losses, inaccurate comments on copyright and Internet materials, and dubious arguments about the compliance of the reforms under international copyright law.

Given the recent discussion, this lengthy post seeks to clear up the confusion with an opening basic introduction to fair dealing and the proposed reforms followed by answers to many of the questions that have been raised over the past few months.

Bill C-32 and Fair Dealing - The Basics

Fair Dealing Today

Canadian copyright law currently includes a fair dealing exception as well as specific exceptions for certain classes of works and certain users. These include exceptions for research, private study, news reporting, criticism, and review. Until fairly recently, the Canadian fair dealing provisions were generally viewed as quite restrictive, both with regard to the limited number of categories that statutorily qualify for fair dealing as well as in the way that the Canadian courts interpreted the provision.

That changed in 2004, when a unanimous Supreme Court strongly affirmed its support for a balanced approach to copyright law and in the process breathed new life into the Copyright Act's fair dealing provision in a case called Law Society of Upper Canada v. CCH Canadian. In reviewing copying practices in the law library of the Law Society of Upper Canada, the court stated:

The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.

In determining whether a particular use (or dealing) met the fair dealing standard, the Court established a two-part test. First, the use must qualify for one of the fair dealing categories. Second, assuming it does qualify under one of the categories, the court identified six factors to consider to gauge the fairness of the dealing:

1. **The Purpose of the Dealing** - the Court explained that "allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights."
2. **The Character of the Dealing** - one should ask whether there was a single copy or were multiple copies made. It may be relevant to look at industry standards.
3. **The Amount of the Dealing** - "Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness." The extent of the copying may be different according to the use.

4. **Alternatives to the Dealing** - Was a "non-copyrighted equivalent of the work" available?
5. **The Nature of the Work** - "If a work has not been published, the dealing may be more fair, in that its reproduction with acknowledgement could lead to a wider public dissemination of the work - one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair."
6. **Effect of the Dealing on the Work** - Will copying the work affect the market of original work? "Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.

Since the CCH case, there have been several noteworthy fair dealing cases, including a B.C. case which ruled that the defence of parody was not available under fair dealing (not covered as one of the categories), a Federal Court of Appeal decision that the research category includes consumer research (in a case involving song previews), and a Federal Court of Appeal decision that ruled that certain classroom copying qualified as a category of fair dealing but the dealing itself was not fair. Requests have been filed to have the Supreme Court of Canada consider appeals of the two Federal Court of Appeal decisions.

Fair Dealing Under Bill C-32

Bill C-32 introduces three new categories to the Copyright Act's fair dealing provision - parody, satire, and education. The proposed changes only change the first part of the fair dealing test by adding additional categories. The new categories - like the current categories - are still subject to a fairness test analysis.

The inclusion of three new categories represents a compromise position. During the 2009 copyright consultation, many stakeholders called for the implementation of the "such as" approach, which would have made the list of categories illustrative rather than exhaustive. In doing so, the approach would have made Canadian fair dealing more like the U.S. fair use provision, but backed by Canadian jurisprudence. At the other end of the spectrum, some stakeholders argued against the introduction of any new fair dealing categories. Bill C-32 strikes a middle ground by adding two categories requested by creator groups and one requested by user groups.

<u>Bill C-32 and Fair Dealing - The Questions</u>

The fair dealing reforms in Bill C-32 have generated considerable discussion and confusion. The following questions have been raised in committee and in the media.

1. Won't the fair dealing reforms allow education to make unlimited copies without compensation?

No. As noted above, Canadian fair dealing analysis involves a two-part test. First, does the use (or dealing) qualify for one of the fair dealing exceptions. Second, if it does

qualify, is the use itself fair. The extension of fair dealing to education only affects the first part of the test. In other words, while Bill C-32 will extend the categories of what qualifies as fair dealing, it does not change the need for the use itself to be fair.

While this means that the Canadian courts have already established limits on fair dealing, addressing ongoing concerns could involve codifying the six-part fairness text within the Copyright Act. This would ensure that judges would be required to assess the fairness of any use – including education – before it was treated as fair dealing.

2. Isn't the six factor test established by the Supreme Court too "ambiguous"?

No. While Douglas Arthur Brown of the Writers Union claimed the test is too ambiguous in his recent committee appearance, Access Copyright took a different view in a brief filed earlier this year with the Supreme Court, arguing that the flexibility in the test is a good thing:

Access Copyright submits that there is no benefit in having this Court determine for all future cases that, where multiple purposes exist, one person's purpose should prevail over another's, or that when multiple copies are made, the court should look to the aggregate amount of copying in preference to the amount copies from each individual work. Such determinations would clearly be counter-productive since they would confine the future application of the exception and limit the trial judge's appreciation of what is fair in each particular case.

This Court held in CCH that the six fairness factors provide a 'useful analytical framework' which 'could help determine whether or not a dealing is fair.' It is recognized that the factors 'may be more or less relevant' depending on the facts of each case, and that 'in some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.'

Thus, in CCH this Court stressed that fairness depends on the facts of each case. The 'bright lines' requested by the Applicants are simply not possible where a case by case analysis is required. The change of any one fact may render a situation that was fair, unfair.

In other words, even Access Copyright appears to support a flexible test that leaves some latitude to the courts.

3. Isn't the fair dealing reform an unbalanced approach that solely addresses education concerns?

No. As noted above, Bill C-32's fair dealing reforms represent the government's attempt to strike a balance between those seeking a U.S.-style fair use provision and those opposed to new exception categories altogether.

4. Won't extending fair dealing to education dramatically reshape the ability for education institutions to copy works without compensation?

No. Fair dealing in education is not new. Fair dealing already encompasses research, private study, news reporting, criticism, and review. These categories already cover a considerable amount of copying on Canadian campuses. These latest reforms are not revolutionary, but evolutionary – reforms that will help enable the use of new technologies in the classroom and support student creativity, innovation, and curiosity in their scholarly pursuits.

5. Isn't the fair dealing reforms really about saving money for education?

No. Educational institutions and students spend over a billion dollars each year on books and hundreds of millions of dollars on licencing for access to databases. That will not change with the inclusion of education within fair dealing.

Rather, the addition of education will open the door to the use of new technologies in the classroom without fear of potential liability. For example, one of my colleagues notes that he sometimes uses a photograph from court documents as part of his classroom discussion. Copying the photograph for research or private study purposes is clearly permitted, but extending the use to classroom instruction, podcasts, or webcasts raises potential concerns. Such uses would likely qualify as fair dealing. Similarly, group and collaborative studies, which may otherwise fall outside the private study definition, could be captured by the education category. Regardless of the specific use, all uses within education will still need to meet the fairness test.

6. Is the extension of fair dealing to education a violation of international copyright law?

No. Many countries have implemented far broader fair dealing (or fair use) reforms. The best known is the United States, which includes an open-ended fair use provision that includes specific mention of teaching including multiple copies for classroom use. Fair use can be found in other countries including Israel and the Philippines. The Israeli provision, adopted in 2007, features an illustrative list of categories that includes instruction and examination by an educational institution.

At international law, exceptions and limitations within copyright law, whether described as fair dealing, fair use, or simply enumerated exceptions, enjoy widespread acceptance. The Berne Convention's Article 10 includes a specific, though somewhat limited, fair use provision that focuses primarily on quotation, educational use, and attribution.

Since the Bill C-32 extension is limited by the existence of the six factor test adopted by the Supreme Court of Canada and the likelihood of an international challenge is incredibly remote.

7. Aren't educational institutions reducing payments to Access Copyright because of the C-32 fair dealing reforms?

No. Potential reductions in payments to Access Copyright have little to do with fair dealing. Post-secondary institutions and Access Copyright are currently before the Copyright Board on the issue of a potential tariff. To the extent payments may go down or education may reconsider its use of the Access Copyright licence, this primarily reflects changes in the way education accesses works, including campus-wide licencing of materials in databases, open access to materials, book purchases, and individual licencing.

8. Won't the extension of fair dealing to education result in massive new litigation?

No. It is always possible that there will be litigation on fair dealing - as noted above Access Copyright just won a major case on the far dealing issue - but the norms will not change with C-32 and there is no reason to believe that the bill will open fair dealing litigation floodgates (unlike the digital lock provisions, which are likely to face a constitutional challenge).

Publishers already have the right to sue to enforce copyright. This is how the copyright system works - rights holders have rights and the power to turn to the courts to enforce those rights. Over the past 30 years, there have only been occasional fair dealing cases and that seems likely to continue with or without reforms. Moreover, jurisdictions with even broader fair dealing or fair use provisions rarely experience significant litigation between publishers/authors and educational institutions. Indeed, even in far more litigious U.S., such cases are rare.

9. If massive litigation is unlikely, how will fair dealing rights and limits be respected?

Experience in other jurisdictions suggests that best practice guidelines will quickly emerge. The reality is that neither publishers/authors nor educational institutions want to engage in expensive litigation. The experience in Israel is instructive. A forthcoming article in the prestigious Journal of the Copyright Society of the USA describes the experience to date in developing fair use best practices for higher education institutions in Israel. That experience was based on similar efforts in the U.S.

10. Shouldn't the term "education" be defined to identify specific types of education institutions?

No. First, there is no need for greater guidance on the meaning of "education" and, even if there was, the guidance would be unlikely to change certain groups' concern with its inclusion in fair dealing. By using the word alone, the government has sent a clear signal that it means education in the broad sense. In fact, this is consistent with the Supreme Court of Canada, which ruled in Vancouver Society of Immigrant and Visible Minority Women v, M.N.R.:

There seems no logical or principled reason why the advancement of education should not be interpreted to include more informal training initiatives, aimed at teaching necessary life skills or providing information toward a practical end, so long as these are truly geared at the training of the mind and not just the promotion of a particular point of view...there is no good reason why non-traditional activities such as workshops, seminars, self-study, and the like should not be included alongside traditional, classroom-type instruction in a modern definition of "education."

While the government could limit the scope of who qualifies under "education", there is no doubt that any definition would include universities, colleges, and secondary schools, the very institutions that groups such as Access Copyright identify as raising concerns with the inclusion of education within fair dealing. The reality is that a broad definition should not raise concerns, since any use must still meet the fairness analysis.

11. Aren't the C-32 fair dealing reforms bad for the economy?

No. In fact, the opposite is true. The 2006 Gowers Report on Intellectual Property, the leading United Kingdom study on intellectual property reform, concluded that "'fair uses' of copyright can create economic value without damaging the interests of copyright owners."

12. Have the Canadian courts commented on the proposed C-32 fair dealing reforms?

Yes. The Federal Court of Appeal ruled this summer on the limits of fair dealing within education and noted that the inclusion of education as a category would not have changed its analysis. The court noted:

I am also aware that Bill C-32, An Act to amend the Copyright Act, 3rd Session, 40th Parliament, 59 Elizabeth II, 2010, section 21 would amend section 29 to state that "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright". However, this amendment serves only to create additional allowable purposes; it does not affect the fairness analysis. As the parties agree that the dealing in this case was for an allowable purpose, the proposed amendments to the Act do not affect the outcome of this case and no more will be said about Bill C-32.

13. Is it true that the digital lock rules contained in Bill C-32 trump fair dealing?

Yes. When asked directly about the issue during committee hearings, Canadian Heritage Assistant Deputy Minister Jean-Pierre Blais was unequivocal in confirming that digital locks trump educational fair dealing rights under Bill C-32.

While some have argued that the act distinguishes between access and copy controls for fair dealing purposes, the distinction between access controls (access to the work itself) and copy controls (copying the work) is a distinction without a difference for many of

today's digital locks. The digital locks used by Amazon or Apple on e-books or the locks on DVDs are both access and copy controls. In order to effectively circumvent to be able to copy, you have to circumvent access. The locks often permit access for some uses, but not others. In other words, Canadians will often need to circumvent access to get to the copying and therefore will still be infringing under the law.

Moreover, even if a consumer could distinguish between access and copy controls, the tools themselves that would be used to circumvent for copy purposes cannot be lawfully marketed or distributed. The notion that it is permissible to circumvent for copying but that the software needed to do so can't be distributed demonstrates how this distinction really makes no real difference.

Bill C-32 does include a number of limited exceptions, but there is not an exception for fair dealing.

14. Where can I learn more about fair dealing and Bill C-32?

Fair dealing is one of the most discussed issues in the recent book on Bill C-32 and Canadian copyright - From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda. Notable articles include:

- History in the Balance: Copyright and Access to Knowledge, Myra Tawfik, University of Windsor
- Fair Dealing at a Crossroads, Meera Nair, Simon Fraser University
- Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32, Carys Craig, Osgoode Hall Law School
- Towards a Right to Engage in the Fair Transformative Use of Copyright_Protected Expression, Graham Reynolds, Dalhousie Law School
- Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries, Margaret Ann Wilkinson, University of Western Ontario
- Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing, Samuel E. Trosow, University of Western Ontario