COPYRIGHT UPDATES:
What You Need to Know Now

BY JEANANNE KATHOL KIRWIN

EXPLAINING THE NEW FAIR DEALING PROVISION

In the recently enacted Copyright Modernization Act, Bill C-11, three additional "fair dealing" exceptions to copyright infringement are added — namely exceptions for use of copyright material for parody, satire and, more significantly, for "educational purposes." This last newly-added exception is a source of great concern for writers. So what exactly is "fair dealing"?

Essentially, copyright laws underpin writers' survival. The Copyright Act provides quite simply in Section 27 that copyright infringement consists in doing anything that only the copyright owner has the right to do unless the owner's permission is obtained. Section 29 then goes on to create "exceptions" to Section 27, thereby introducing interesting complexities. Before Bill C-11, only five "fair dealing" exceptions existed under Section 29: research, private study, criticism, review, and news reporting. With the last three exceptions, the use was only fair if certain attribution information was given, and none of the exceptions were fair unless they were conducted "without motive of gain," i.e. not used in an advertisement. Creators whose works are used in the context of permissible fair dealing are often stated to be "section 29-ed."

In the 2004 S.C.C. case CCH Canadian v. Law Society of Upper Canada, which dealt with fair dealing, the judges cautioned that fair dealing exceptions are "user's rights." The Court then established a six-part test to determine when the dealing is fair. Without delving too deeply into the law, the six criteria include: the purpose of the dealing; the character of the dealing; the amount of the dealing; alternatives to the dealing; and the nature of the work. It is the sixth criterion that is often most relevant to writers: the effect of the dealing on the work, i.e. whether the dealing is likely to affect the market of the original work. On this point, the Supreme Court of Canada said, "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."

How, then, does the new "educational purposes" exception affect writers? Extending the list of fair dealing exceptions to "educational purposes" will have a far-reaching effect upon Canada's literary landscape, Bill C-11, which was proclaimed in force in November 2012, will likely adversely affect writers as follows:

- Anyone claiming an education purpose could arguably copy substantial parts of copyright-protected literary works without permission or payment.
- Educational institutions and ministries will argue they do not have to pay Access Copyright for collective licenses to enable teachers and students to legally copy materials
- If Access Copyright is not paid for licenses, then its annual payments to creator and publisher affiliates will be much lower. Access advises that 80 per cent of its revenues come from ministries of education and educational institutions.

Member Kathryn Kuitenbrouwer was part of a TWUC intervention at an Association of Canadian Community Colleges meeting regarding their new policy toward copyright. For more information read John Degen's Executive Directions column on page 5 of this issue of Write and watch the video of the TWUC intervention at http://tinyurl.com/copyfair. – *Write*

> Further, Access Copyright predicts it will need to vigorously litigate the fairness of the taking of copyright works under the educational purposes exception. Since "educational purposes" is conceivably much broader than the existing "private study" exception, multiple copies for classroom use may be argued to be fair. Writers and publishers alike would lose significant income and as a result, the already precarious Canadian publishing industry would be weakened.

The writer most likely to be adversely affected by the educational purposes exception is the talented poet, playwright, novelist or historian whose work appears in a textbook anthology; their compensation and that of their publishers will now be much more tenuous. To the detriment of writers, publishers, and our students, new creative literary work is much less likely to be studied because even fewer Canadian publishers will exist to bring their work into the tapestry of Canadian culture. The educational purposes exception will thus have the effect of squelching both creators, often revered as the innovators and drivers of the knowledge industry, and publishers, who traditionally act as vehicles of expression.

Another potential adverse outcome of the "educational purposes" exception affects not only writers, but all Canadians: Content taught in Canadian classrooms will be less likely to originate in Canada. If Canadian content is not available, then foreign — quite likely U.S. — materials will be used.

All Canadians are penalized if Canadian content is diminished in classrooms in which the next generation of Canadians are taught. It is Canadian writers who write about Canada, our shared history, and our aspirations for the future. Canadian writers and publishers can only contribute if what they produce — their property — is protected by copyright law.

COPYRIGHT UPDATE: SUPREME COURT OF CANADA RULES AGAINST ACCESS COPYRIGHT IN CASE EXPLORING FAIR DEALING EXCEPTIONS.

On July 12, 2012 The Supreme Court of Canada simultaneously released five copyright decisions. One of these decisions relates to a dispute between various education ministries (led by the Alberta Minister of Education) and the Canadian Copyright Licensing Agency, well known among writers as Access Copyright.

The court was asked to review a decision of the Copyright Board that had examined whether copying by teachers of short excerpts of materials within the repertoire of Access Copyright, with instructions to students that they read those materials, was a fair dealing. The Copyright Board had ruled that such copying was made for the allowable purposes of "research or private study", among the five fair dealing exceptions, yet because of the scope of the copying, it did not constitute fair dealing and was therefore subject to the payment of a royalty. The Federal Court of Appeal had agreed with the Copyright Board, so the education ministries then appealed the decision to the Supreme Court of Canada. The Supreme Court judges ruled in a 5–4 split decision that the Copyright Board had a "skewed" approach to the law of fair dealing in the context of private study and research. The Supreme Court ordered the Copyright Board to reconsider whether the tariff applied in those circumstances, "on a reasonableness standard"

which it explained at some length in its decision of 17 single-spaced pages.

At the risk of over-simplifying, here is how the Supreme Court views "reasonableness" in the context of classroom copying: The test for fair dealing involves two steps. The first is to determine whether the dealing is for the allowable purposes of research or private study, criticism or review, or news reporting (and, now that the Copyright Modernization Act Bill C-11 is proclaimed in force, the purposes also of parody, satire, and education). The relevant perspective, when considering whether the dealing is for an allowable purpose, is that of the user, not the copier.

The term "private study" does not, in the words of the majority judge, require users of copyright materials "to view them in splendid isolation". Studying and learning are essentially personal endeavours whether they are engaged in a classroom or alone. On this point, the dissenting judge stated that the word "private" in "private study" was not to be stripped of all meaning. This judge would characterize the teachers' copying for classroom use as non-private study, or at the very least, "just study" rather than private study.

If the dealing does qualify under those fair dealing exceptions, i.e. the purpose is for research or private study, for example, then the court must take a second step of analysis, i.e. to determine whether such dealing is fair. The relevant perspective, when considering whether the dealing was fair, is that of the copier. "Copiers cannot camouflage their own distinct purpose (such as profit, in the case of copy shops) to conflate it with the research or study purposes of the ultimate user."

For the second step of the test, the following list of fairness factors should be considered: (1) the purpose of the dealing, (2) the character of the dealing, (3) the amount of the dealing, (4) the existence of any alternatives to the dealing, (5) the nature of the work, and (6) the effect of the dealing on the work. (That six-part analysis, as outlined in the 2004 decision CCH v. Law Society of Upper Canada, was reaffirmed in the Access Copyright case.)

The majority judge viewed teachers as having "no ulterior motive when providing copies to students [...] 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." The dissenting judge disagreed, stating that the teachers' main purpose was not private study, but rather instruction.

On the subject of the six-part test, the majority judge had this to say: "Buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. First, the schools have already purchased originals that are kept in the class or library, from which the teachers make copies. The teacher merely facilitates wider access to the limited number of texts [...] purchasing a greater number of original textbooks to distribute to students is unreasonable [because] teachers only photocopy short excerpts to complement existing textbooks."

On the same point the dissenting judge had this to say: "While teachers usually made short excerpts at any one time, this was offset by the fact that the teachers would return to copy other excerpts from the same books [...] thereby making the overall proportion of the copied pages unfair in relation to the entire work over a period of time." Thus in his view, buying books for each student may be reasonable.

What the dissenting judge says comforts those who take the contrary view to the majority judge: i.e. textbook publishers and writers. However, his view did not prevail. The Copyright Board of Canada did re-consider its decision on fair dealing in view of the SCC's "reasonableness standard" and in September 2012, issued its decision that the copying in question did constitute fair dealing and therefore was not subject to a tariff. In a press release issued after the release of the Copyright Board decision, Access Copyright indicated it "is disappointed but accepts the ... decision that a small proportion (7%) of the hundreds of millions of pages copied in the K-12 sector every year constitutes fair dealing and is therefore non-compensable. The Copyright Board said it based its decision on the record before it and on the findings of fact of the Supreme Court of Canada. This decision, however, has no impact on the requirement that royalties continue to be paid on the hundreds of millions of pages of student texts that are copied for use in K-12 classrooms every year."

Recent copyright law developments — namely the "reasonableness standard" set by the Supreme Court of Canada decision, the new fair dealing exception of educational purposes in the Copyright Modernization Act, and the tariff decision of the Copyright Board of Canada — have had a decidedly negative impact upon writers as creators, and in combination they blunt the tool of copyright as a means to protect writers' works.

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NOTICE TO MEMBERS: BEWARE PAM

The Copyright Modernization Act (Bill C-11) contains a new Publicly Available Material (PAM) exception. This means that any work published on the public internet that is not either protected by a technological protection measure (a password or some sort of copy-protection code) or a clearly worded notice spelling out copy restrictions, is fair game for anyone to copy and re-use. All TWUC members are advised to review the copyright notice on your blogs and website, and anywhere online where your work appears. We have been advised that a simple © All Rights Reserved will not be considered enough of a declaration. You must be explicit about your wish to have your work licensed for copying and further use. Here is the notice our executive director John Degen has on his blog (it appears on every page):

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