

THE EFFECT OF FAIR DEALING FOR DIGITAL CONTENT IN CANADIAN EDUCATION SYSTEM – DISTANCE EDUCATION

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ABSTRACT

The presentation is about copyright reforms in Canada and how it affects distance education. Distance educators develop course content, course books and digital material, which become available on the Internet. These educators need to be aware of copyright laws because by accessing information, they may be unknowingly stepping upon legal boundaries. The paper refers to the CCH (2004) case, which established that fair dealing encompasses the use of copyrighted material for educational purposes. Bill C-32 tabled in June 2010 contains new exceptions to copyrighted material for parody, satire and educational purposes. The presentation explores Bill C-32 and fair dealing for educational purposes.

INTRODUCTION

This paper is about Canada's move towards copyright reform and how it affects Distance Education. Copyright affects education in many ways since faculty and students use books, articles, and other information that fall under the Copyright Act. Technology allows us easy access to huge amounts of copyrighted material. Distance education depends on the technology that allows us this enormous access, and it depends on telecommunication and digitalized content. Therefore, it is important that students and instructors involved in online courses are aware of copyright laws and clearance procedures (Wallace, 2004).

Statement of the Problem

Distance educators are the developers of academic and course content for this form of education. They should be fully aware of copyright laws as well as their rights according to fair dealing. The CCH (2004) case established that fair dealing encompasses use of copyrighted material for private study purposes. Bill C-32 takes matters further by including education under fair dealing thus aiding distance educators in compiling course materials. However, Bill C-32 contains provisions that prohibit the use of materials in digital formats, which are digitally locked. These provisions are detrimental to distance education as they exclude legal uses of copyrighted material due to digital locks (Guest, 2010; Chan, 2009). Based on these developments, distance educators and instructors should make sure that they and their students do not violate the complicated copyright laws by circumventing digital locks. This paper focuses on the consequences of copyright laws and fair dealing on digital content and distance education with reference to the CCH (2004) case. It covers TRIPS/WIPO influences on Canadian Copyright Laws, the analysis of Bill C-32 and the link between distance education and digital content. This paper outlines how copyright issues and the recent developments will affect course developers and course content.

The purpose of this paper is to explore the concept of fair dealing and the implications for Distance Education.

Research Questions

1. What is Canada's copyright reform in context?
2. Why has Canada moved towards a "fair dealing" concept?
3. What is the effect of fair dealing on distance education?

Distance education is a field of education that relies on technology to provide education to those who cannot be physically present in a traditional classroom or campus. The evolution of technology, a changing workplace and the advent of contractual work has resulted in distance education becoming a vital tool in providing personal attention and communication to students internationally. In Canada, distance education is important due to Canada's vast area and an unevenly distributed population (Shale, 2002). Distance education in Canada has different setups.

Distance education in Canada takes many forms; there are universities that provide only distance education through the Internet and video conferencing; there are universities offering both distance and conventional forms of education and then there are universities that prefer the conventional classroom and campus education but also offer distance education (Education, 1999). "Shared" programming has been developed (Shale, 2002). It assists in the transfer of course credits and formalises articulation of programs to bridge the college/technical institute and university gap. The Canadian "open universities", Athabasca University, the Open Learning Agency, and the Tele-university, have had mechanisms in place to support this kind of activity. The University of Northern British Columbia is mainly campus based, regionally as well as centrally. It is an example of the traditional style of distance education, but with well planned execution to facilitate the transfer of previously earned credits and to articulate programs with colleges in the northern British Columbia region (Shale, 2002). Distance education involves the use of technology to educate students and most course materials are considered digital content.

Digital Content denotes any information that is published or distributed digitally. This includes text, data, sound recordings, photographs, images, motion pictures, and software. In distance education, course materials make up digital content. This leads to issues related to copyright and intellectual ownership. Selling courseware makes money. In distance education there is this issue regarding who gets paid what as well as what courses and what material should be developed by faculty members. There is intense debate regarding the legitimacy of the concept of commercialization in higher education (Shale, 2002). Instructors and course designers make great use of digital content in distance education, as the primary means of communication is digital

delivery. As digital content is an integral part of distance education, copyright issues emerge.

CANADA'S COPYRIGHT REFORM IN CONTEXT

Copyrights are rights granted to the author or creator of an original work. They include the exclusive rights to make changes and distribute the work. The Copyright Act of Canada was first passed in 1921 and amended in 1988 and 1997. In 2005, an attempt to amend the Canadian Copyright Act was made, but Bill C-60 did not pass into law. The Parliament was dissolved in November 2005. Another attempt was made in 2008, but Bill C-61 was dissolved due to elections in September 2008. Bill C-32 was passed in June 2010. The Copyright Act gives exclusive rights to the copyright owner regarding reproduction of the work. Copyright becomes a question when the work is created until the author dies. An exception exists in the case of photographs as the copyright last for fifty years from the end of the year in which it was taken. Moral rights are protected under the Copyright law; it is the author's right to stop the work from being changed or used in any manner. They remain with the author even when the work or copyright has been sold (Kerr, 2007). The exception to the exclusive copyrights are fair dealing laws that protect public interest.

Fair dealing is an exception to the copyright laws. It allows use of copyrighted material in specific cases. The Canadian concept of fair dealing is a part of the Canadian Copyright Act (Wilkinson, 2010), which allows users to carry out activities related to research, private study, criticism, review and news reporting. The user must mention the source of the material, and the name of the author he cites (Wilkinson, 2010). Fair dealing is an important issue for the public as it allows use of copyrighted material without purchasing licenses. It is especially important for education, as students and institutions bear high cost of licenses that add to the cost of education. It is important to focus on where the law stands on fair dealing as it is of great importance in distance education.

CANADA'S MOVE TOWARDS A FAIR DEALING CONCEPT

Where is the Canadian Copyright Act on fair dealing?

The Law Society of Upper Canada (LSUC) is a statutory, non-profit organization. The Great Library at LSUC provided photocopying services to its patrons. These included students, members, and the judiciary and authorized researchers. Single copies of legal articles, statutes and decisions were available to those who needed them and visitors were allowed to make copies of works in the library as well. Canada's three largest law publishers sued LSUC for copyright infringement in its photocopying activities. They claimed copyright for these works and a permanent injunction was passed, stopping the library from reproducing published works. The Law Society was of the view that the services did not infringe the publishers' copyrights by providing copies or by allowing access to photocopiers. It argued that these works were not easily accessible and these services were necessary to provide equal access to the library's

collection. This case exemplified the concept of fair dealing in Canada (CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC, 2004).

The court stated that fair dealing exception is an important part of the Copyright Act and is not merely a defence. Any activity that is within fair dealing is not an infringement of copyright. It is necessary to maintain a balance between the users' and the copyright owner's rights. The Court held that the Law Society did not infringe any copyrights when single copies of decisions, statutes, regulations, etc. were made by the library or by its patrons. The court ruled that the publishers' materials were protected by copyright but the Law Society's activities fell under 'fair dealing'.

The court stated the criteria for fair dealing that has become the norm for fair dealing:

The Purpose of the Dealing; if it is for review, research, criticism and private study, it is within the user's rights.

The Character of the Dealing; how many copies were made, whether they were widely distributed and if it were the industry's norm to do so.

The Amount of the Dealing; how much work was used and in what context.

Alternatives to the Dealing; was it necessary to do so or were other alternatives available.

The Nature of the Work; copying from confidential work would not be fair. If copying a private work (that is not confidential) would promote it in a good way, then it could be considered fair.

Effect of the Dealing on the Work; is it likely to affect the market of the original work?

These criteria made it clear for the courts' stance on fair dealing exceptions. The Copyright Act states that the copying should fall within the fair dealing exceptions and the use itself should be fair to ensure that there is no copyright infringement. In the case of Robertson Vs Thomson, (2006) the court ruled that The *Globe* and *Mail* ("Globe") could not republish freelance articles in separate databases. The right to reproduce a collective work under the *Copyright Act* does not include the right to republish freelance articles as part of an entirely different collective work. On the other hand, CD-ROMs were considered as a part of the *Globe's* right to reproduce its collective work. The CD-ROMs can be viewed as a collection of daily newspapers in a way that databases cannot (Robertson v Thomson Corp., 2006). The exceptions of fair dealing are considered the right of the users and copyright reform was expected to strengthen these rights. Bill C-32 was the newest Bill for copyright reform after the failure of Bill C-60 and C-61.

Bill C-32 tabled in June 2010, contains new exceptions to copyrights that includes use of copyrighted material for parody, satire and educational purposes. After the CCH

(2004) decision the scope of fair dealing was broadened. In Canada, fair dealing was never a defence; it was always an exception. What CCH (2004) introduced was the rational criteria approach, rather than narrow exceptions. Fair dealing was established as the right of the users. Bill C-32 now encompasses more areas under fair dealing that has led to backlash from the content industry. They are unhappy with the inclusion of education under fair dealing (Trosow, 2010). In addition to the inclusion of education under the fair dealing exceptions, Bill C-32, (2010) has other provisions that affect educational institutions.

Education is a broad term that includes formal and informal learning in any institution. Although provisions to other sections in the copyright acts limit the positive aspects of this inclusion, it is still a step in the right direction. Some positive provisions include the allowance of reproduction of any work on the premises of an educational institution, which is solely for the purpose of imparting training and educating students. This includes performances, sound recordings and broadcasts. But this is not applicable if the works are 'commercially available'. Educational institutions are also allowed to take works freely available on the Internet and communicate them to an audience that consists mainly of students (Lithwick, 2010). This also comes under the broader fair dealing provision that if the work is publicly available with no digital locks, and if any party apart from the defined educational institutions use it for educational purposes, it would be allowed. Thus, course designers and instructors will have more resources at their disposal. Libraries, archives, museums and educational institutions are allowed to make digital and backup copies of works under this amendment. The special exemption for lessons provides authorities to use copyright works for lessons, tests and exams. But at the end of the course, the lessons must be destroyed, whether they are with the instructor or the students. This exemption is unrealistic as instructors cannot be expected to keep making and destroying lessons and students may need to refer to the course content at a later date (Wilkinson, 2010). This will affect course designers in distance education as they will need to destroy their lessons at the end of every line semester and they cannot control the use of digital content by the students after the term is over. Other amendments in Bill C-32, (2010) are not directly linked to education.

The issue of digital locks is addressed in Bill C-32. Bill C-32 makes it illegal to evade digital locks even for most legitimate purposes such as fair dealing exceptions, library preservation, and the copying of content for which there is no copyright (facts and information) or if copyright has expired. People with perceptual difficulties are allowed to use digital content but only in a way that does not impair the technological protection measure (TPM); Section 41.16(1) (Lithwick, 2010). Digital locks cannot be removed and then restored after a different format has been created. Even in the exception provided to educational institutions, libraries, archives and museums regarding usage of work available on the internet, the presence of technical protection measures (TPM) or a notice prohibiting usage will restrict user rights to that content (CLA, Protecting the Public Interest in the Digital World, 2010). Owing to this amendment, authors can restrict course designers from using their material without copyright. On the other hand, instructors in distance education can implement TPMs to prevent unauthorized use of their copyrighted productions by students and other users.

With the passing of Bill C-32, another matter that comes to light is the role of collectives and licensing.

Access Copyright is the main collective rights of owners' writings and academics. In January 2004, Access Copyright reached multi-year licensing agreements with Canadian educational institutions. The agreements expired in 2007 and were extended till August 2010. Payments were kept at the 2006–07 rates of \$3.38 per Full Time Equivalent (FTE) student plus 10 cents per page for materials in course packs. Although this rate is considered an educational fee, it is passed on to the students as per page pack charges when they purchase a course pack (Board Copyright, Canada, 2010). The license grants non-exclusive rights to the institution to reproduce works that come under the collective and they are indemnified by the collective (Wilkinson, 2010). Educational institutions and public libraries have had agreements with Access Copyright (The Canadian Copyright Licensing Agency, 2010). These licensing agreements were based on negotiation but recently the licensing process has been changed due to Access's actions.

On 30 March 2010, Access Copyright bypassed negotiations and went straight to the Copyright Board for the broad imposition of tariff, which is applicable on all educational institutions (under the copyright act's definition) and government libraries except in Quebec. Under the tariff the rate will increase from \$3.38 per FTE to \$45 per FTE for universities. The tariff is lower for primary and secondary educational institutions. The scope of the license will be expanded to include scanning, faxing, e-mailing, uploading, displaying and projecting (Access-copyrights-post-secondary-school-tariff-filing, 2010). On the other hand, Bill C-32 will also allow these activities under section 30.02(1) for educational and training purposes. But Bill C-32 has conditions that only allow an institution that has a reprographic reproduction license with a collective to do. The institution would also have to pay royalties where they would have been applicable if a print copy was made and comply with license regulations (Trosow, 2010). These tariffs will affect the cost of distance education as well through the cost of course materials. Course designers and instructors who are employed by the institution with licenses will have wider use of materials, whereas those that are not will be restricted. The effect of the tariff and the amendments has not been positive.

These amendments give rights to users with so many conditions that it effectively super-imposes license agreements. Following the appeal against the tariff by the educational institutions, the Federal Court of Appeal upheld the Copyright Board's decision regarding photocopying and using works for general classroom use and ordered the review of the number of copies used for examination purposes that are not commercially available (to be deducted). This reduces the initial amount of the tariff but maintains the imposition of tariff (Wilkinson, 2010). The framework of the Bill C-32 provisions has been greatly affected by international trade agreements thus, it is important to understand how they operate.

Influence of International Trade Agreements: TRIPS and WIPO

The international trade agreement that Canada has ratified or is going to ratify, influence the formation of laws. The copyright laws have to comply with the guidelines set by these agreements. The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) concentrates on the global system of rules, institutions, and practices governing the ownership and flow of knowledge, technology, and other intellectual assets. The conclusion of TRIPS represents a big step in the history of Intellectual Property protection (Deere, 2009). The UN created the World Intellectual Property Organization (WIPO) in 1967. The WIPO copyright treaty act extends copyright protection to digital work, technology and software. It requires every signatory to ratify a law that protects works in digital formats. The WIPO Internet Treaties provide rights and protections for authors, for makers and performers of sound recordings and audio works, and for reinforcing the existing international guidelines found in the Berne and Rome conventions (Khurana, 2008). Major trading partners of Canada such as the EU, USA and China have already ratified these treaties (Questions and Answers, 2010), and Canada is also in the process of ratifying them.

Canada was a founding member of the World Trade Organization and thus, is bound by the *Trade-Related Aspects of Intellectual Property Rights Agreement [TRIPS]*. TRIPS give right owners protection from copyright infringement. It gives the three-step test for copyrights; that the exceptions to the exclusive copyrights should be limited to special cases, actions that do not constitute exploitation of work and those that do not jeopardize the right holders' interests. TRIPS includes the provisions of the *Berne Convention 1971*, that state the right owners have the exclusive right to authorize reproduction of their works and that each country's respective legislation can establish their own special cases as long as they are not in conflict with the three-step test (Wilkinson, 2008,). Thus TRIPS has an influence on domestic policy.

These international trade agreements restrict the government while trying to balance user rights with the right owners' in legislation. Amendments in copyright laws now need to be considered in the context of trade. As these treaties focus on Intellectual Property rights rather than the public's rights to fair access, their ratification enhances copyright holders' rights rather than giving exceptions to those rights. The existence of strong collectives, the power of the publishing industry and the presence of foreign publishers in Canada constrains domestic policy from establishing exceptions to copyrights that would 'not be unreasonably prejudiced to the legitimate interests of the author' (TRIPs article 13) (Wilkinson, 2008). The government policy in turn affects education and distance educators by placing limitations on copyrighted content. The effect of TRIPS on domestic policy has been revealed in the provision of Bill C-32.

Bill C-32 is affected by TRIPS in the sense that, though it has broadened fair dealing to include education, the Bill still has many caveats that limit the use of copyrighted material for education. The Bill differentiates between various institutions on the basis of ownership, thus giving some more access to works than others. In the proposed amendment regarding the telecommunication of works in an educational set up and the conversion and communication to digital formats, the rights' owners can use technological prevention measures to restrict access under this measure. Bill C-32

establishes distribution rights for real goods and the 'making available' right and protects rights managing information. It also provides legal protection for technological protection measures (TPM). The TPM provisions are consistent with TRIPS and WIPO, which require legal protection and effective legal solutions against the circumvention of TPMs.

According to Sookman (2010) Bill C-32 has exemptions for security testing and research, and reverse engineering. The Bill allows people with perceptual abilities to access work and assists consumers in protecting personal information. Two new exceptions that did not exist in Bill C-61 are for temporary recordings made by broadcast activities and unlocking wireless devices. The bill is flexible in retaining and enhancing those exceptions that serve public welfare (Sookman, 2010). The bill generally benefits education but the TPMs provisions are detrimental. Although TRIPS has influenced the new Bill greatly, the concept of fair dealing remains beyond its guidelines.

TRIPS and WIPO require that member countries follow their regulations on intellectual property rights but it is the country's legislation that decides on the exceptions to those rights. Thus fair dealing exceptions fall entirely under Canadian copyright law. TRIPS and WIPO oppose enhancement of special exceptions to copyrights and advocate the right holders' interests regarding all forms of their work and the three step test required under TRIPS may come into conflict with the fair dealing exceptions in the Copyright Act (Tawfik, 2005). TRIPS and WIPO opposition affects education adversely by making copyrighted material more elusive. Instructors and course designers in distance education, who are involved in creating material that is their copyright, benefit as the agreements advocate their rights. Instructors and institutions face conflict regarding copyrights in work created under contract. WIPO and TRIPS encourage copyrights rather than exceptions to them. The Supreme Court of Canada advocates the balance of user rights and rights owners' interests compared to the biases towards rights holders' interests signaled by the mandatory language in the *Berne Convention*, *NAFTA*, and *TRIPS* agreements and fair dealing falls under its jurisdiction (Wilkinson, 2008). But, as these agreements are pro-authors' rights, they have enabled Access Copyright to apply for a higher tariff and succeed.

International trade organizations regulate copyright issues to protect the authors of works from being exploited. Access Copyright Tariff was influenced by these organizations as they provide the right to digital locks to prevent access to digital content. Access Copyright provides works to academic institutions and the collective represents foreign authors as well. Under WIPO and TRIPS, the authors must receive remuneration on the use and reproduction of their works. The concept of user rights does not exist in these agreements and only specific exceptions are allowed. The Copyright board approved the application of tariff by Access Copyright as it must comply with the international trade agreements and ensure that the interests of the authors are protected (Wilkinson, 2008).

TRIPS and WIPO affect the Canadian education system adversely. WIPO's restriction on use of digital content limits educational institutions, students, and the public from accessing material freely available on the Internet. While TRIPS outlines copyright infringement generally, it increases the cost of knowledge and educational texts required by students. These treaties move domestic copyright laws from a broad view of exceptions to a closed view. This can be seen in the inclusion of education under fair dealing; the stipulations regarding this differentiate between types of educational institutions and specific situations rather than being generally applicable. Instead of facilitating education and development these treaties promote restrictions on content and protect right owners' profits (Wilkinson, 2008). This affects course content and designers by complicating copyright issues. Thus designers face uncertainty regarding copyright issues while creating course content. Distance education has been influenced by these treaties and the tariff to a greater extent as copyright issues are more complex when it comes to digital content.

THE EFFECT OF FAIR DEALING ON DISTANCE EDUCATION

The copyright laws have a direct effect on distance education. Distance education greatly relies on digital content and delivery of course materials. Thus copyright laws on digital content can greatly harm or benefit distance educators and students. In order for delivery of course content to be efficient, digital content must be copied and distributed such as text, diagrams and lectures. But the laws are confusing and burdensome, thus, unawareness about them may lead to copyright infringement putting the institution at risk. Owing to the complex nature of the laws that govern copyright, instructors and designers may unknowingly stepping on legal boundaries (Wallace, 2004).

The outcomes of Bill C-32 for digital education are directly related to the extent of the effects on the quality and cost-effectiveness of the course content available (Trosow, 2010). Firstly, the inclusion of education under fair dealing is beneficial to distance education as the copyrights issues are complex and this allows general use of content. Distance education mainly involves the use of telecommunication and digital formats. Under this amendment students and institutions can use and transfer works for educational purposes more easily. Section 30.02(1) of Bill C-32 would allow an educational institution to make a digital reproduction of a work and communicate it by telecommunication for educational purposes; this would facilitate distance education by decreasing the cost of course content. It would enable course designers to use copyrighted content more freely. But, it only applies to educational institutions that are non-profit and have reprographic reproduction licenses with a collective society. The institution will, however, have to pay royalties for the reproduction and communication of the digital copy if it would have been applicable on the print copy of the same. This amendment does not hold any major positive implications on distance education and course designers generally due to its many limitations. Course designers and instructors working for private educational institutions do not enjoy the positive aspects of these provisions. Other provisions that affect libraries, archives and museums have an effect on distance education as well. Libraries would no longer be obligated to distribute interlibrary loans in paper form; electronic delivery of works such as journal

articles would be allowed (Trosow, 2008). This would aid distance learning as course designers will be able to disseminate content more easily and students will be able to access it easily. Section 30.04 would create an exception for educational institutions to reproduce, perform and communicate through telecommunication works that are publicly available on the Internet. This would give course instructors easy access to data and the ability to use numerous works in their lectures. This should have a positive outcome for distance education but again the stipulations regarding this provision limit its effectiveness. This does not apply to work and websites where there are digital locks in place or a notice prohibiting use. The stipulation for digital locks encourages authors to use them to limit access to their work online. However, the clarification of the legality of accessing material on the internet may pave the way for more relaxed usage of the available content by educational institutions, instructors and students, thus aiding those involved in distance education (Lithwick, 2010).

Distance education and digital content fair dealing is a complex issue as Bill C-32 enforces the right of digital locks over the use of digital content. Digital content is an integral part of distance education. Course content, quizzes, assignments and other materials are communicated in digital form. The fact that right owners just have to put digital locks on their works to make their usage copyright infringement, even if they are available on the Internet freely, violates the rights of the users under fair dealing (CLA, Protecting the Public Interest in the Digital World). Fair dealing provides exceptions to the rights of the authors for specific users, and, regardless of the presence of digital locks the work should be accessible. According to Michael Geist, the new bill establishes that a digital lock, on any work trumps all other rights of the users (Geist, 2010). Digital locks adversely affect instructors and students as they limit fair access to work and increase costs through license requirements. Digital locks and license agreements favouring authors are advocated by the international agreements TRIPS and WIPO (Edmonds, 2006; Chan, 2009; Hobbs, 2010).

Distance education is affected by international agreements on intellectual property as they pertain to digital content and copyright laws. TRIPS affects distance education as it inhibits the government from widening the exceptions to copyrights. NDP MP, Charlie Angus, who believes that the TPM amendments limit Canadians' legal rights to access, argues the contrary. According to him the government is giving the impression that this unyielding approach to digital locks is essential to bring Canada in line with WIPO and the Berne Convention. He believes that the government is setting contradictory rights. Bill C-32 offers rights that consumers will not be allowed to exercise. This makes the claim that the bill is balanced and pro-consumer, invalid (Geist, 2010). These restrictions that are in line with international agreements hinder the growth of distance education by limiting access to content that is not easily available to remote users. Course designers and instructors face obstacles in using copyrighted material and thus enriching the learning material for students. It also impedes the fair dealing exceptions by giving greater rights to the copyright owners and collectives rather than users (Geist, 2010). These rights help collectives such as Access Copyright demand greater tariffs for licenses.

The digital locks issue works in favour of collective societies, specifically the Access Copyright, (2010). The increase in tariff and the increase in scope of the word 'copying' to digital copies affect educational institutions. Bill C-32 provides for making digital copies for educational purposes but a license is necessary. Thus, it basically reinforces the need for having a licensing agreement with Access Copyright in distance education. It also requires educational institutions to take measures to ensure that the student (Alberta (Education) v Access Copyright, (2010) does not make more than one digital copy. These amendments combined with the increase in tariff and the end of negotiable agreements will decrease the cost effectiveness and diminish the ease of distance education as course content will be more expensive. In cases where course designers and instructors create their own copyrighted material, they will be able to stop the institutions from using their material without licenses. This will have an unfavourable impact on the future of distance education and fair dealing.

Many proposed amendments of Bill C-32 may need to be reviewed to assess their impact on user rights. Fair dealing exceptions are immensely important for distance education, as they will make more content and material available to users all over Canada. This will increase the ease of access to education for those in remote areas. It will enable instructors and teachers to use copyrighted data without fear of copyright infringement. The inclusion of education under Bill C-32 promises to promote distance education by balancing users' rights with the authors', whereas digital content seems to be locked securely under WIPO regulations and Bill C-32 amendments. It is very important for the Bill C-32 to amend the policy on digital content not to be locked for those who are legal on the terms of fair dealing. This will enable the distance education to expand rapidly in the future.

THE FUTURE OF DISTANCE EDUCATION IN CANADA

Distance education is facing rapid growth in Canada. Canada requires educated and trained manpower to compete with the globalized economy. Distance education reaches to students that do not have easy access to education due to logistical, financial and other reasons. In order for distance education to become mainstream education, it needs to be far-reaching and profitable. Higher education institutions are in a situation where distance education seems logical and profitable. Most of these institutions and colleges are developing programs that enable them to operate as dual mode institutions. The learning institutions are now expanding their distance education departments (Shale, 2002). The expansion of distance education is dependent on growing technology tools as a means to deliver education to anyone anywhere. Distance education materials are usually in the form of digital content. Online access to databases, emails and digital content comprise educational materials in distance education. Delivery of course content through postal mail is now on the decline. Although the fair dealing exceptions and their scope as demonstrated by the CCH (2004) case were a positive step for distance education and user rights, a lot of debate has arisen on the issue of Access Copyrights' tariff and Bill C-32; as they give contradictory rights for educational purposes. Copyright laws and digital locks are some of the complex issues, which will determine the future of distance education in Canada:

- The explosion of technology and the importance of the Internet as the premier mode of communication will greatly expand distance education. Distance education has become a feasible and profitable method of education for universities and learning institutes. It has also developed as cost-effective and flexible means for students. Easy access to knowledge as well as effortless dissemination of information through the Internet has been beneficial for distance education (Shale, 2002).
- The inclusion of education to the fair dealing exceptions will increase the use of varied resources in distance education. Course content will encompass diverse sources and references due to no threat of copyright infringement.
- However, the digital locks provision will enable copyright owners to restrict legal access to their works (even for educational purposes). This will be damaging for distance education, as it will limit access to content and increase the need for licences.
- Access Copyright's new tariff is detrimental to all educational institutions as well as distance educators. It will increase licensing costs drastically while placing increased restrictions on digital copies. Bill C-32 superimposes Access Copyrights licensing agreements on educational institutions thus making it necessary for them to attain licences.
- In Canada, distance education systems should always be aware of the debates and decisions by policy makers, as they determine their future. TRIPS and WIPO also affect distance education directly. Canada has to follow international treaties on intellectual property rights, which advocate stricter copyright laws.

The progress of distance education is going to be hindered due to complicated copyright laws. The contradictions in the Bill will make educators more hesitant and unsure of the legalities involved. However, the acceptance of education as a fair dealing provision will give the required freedom of content usage to a certain degree. It will allow digital courses to incorporate important works under the new law. The future of distance education is dependent on the ratification of international treaties and the power of copyright collectives such as Access Copyright. Currently, distance education stands to gain from Bill C-32 but not to a great extent.

The future of digital content from the perspective of the instructional designer is that, due to digital locks, more authors will use TPMs to prevent fair dealing usage of their works, however in the absence of TPMs, course designers will be able to use copyrighted material without the need of licenses.

As a result of these provisions and their effect on distance education, course designers will be able to develop course outlines that include varied resources available on the Internet, however they must make sure that they do not contain digital locks. Course

designers should firstly familiarize themselves with the complexities of the copyright law in order to avoid infringements. They should be aware of the nature of their education institute, as there are separate laws for non-profit educational institutions. Once the course designer is familiar with the nature of these things, it will be easier to work in the parameters defined by them. If the distance education institution is non-profit, then there are more resources available due to copyright relaxations. However, if it's a private institution, then there is a definite need for a licensing agreement. As the laws and the institute policies limit course designers, their course designs' structure and resources are limited as well. The resources they use in developing courses might come under the Access Copyright's tariff and licensing or their communication over the Internet may not be allowed. A major aspect that affects course designers is the provision that enables institutions to make copies for lessons, tests and exams; however, the copies must be destroyed after the course is over. Literally, it means that course designers will have to destroy their material, which have copyrights at the end of the term, and then create it again at the beginning of the next term for new students. Course designers should make sure that they are either licensed, or are exempted or they should just refrain from using the material. The course designers should use copyrighted material in such a way that it comes under fair dealing and repeated infringement does not take place. For example, a presentation of a topic sent to students may contain digital locks that disallow them from copying, pasting or editing the document. Thus, the course will contain the required material without stepping on laws.

On the other hand, when course designers and instructors create material, it becomes their intellectual property and not the institution's. The new copyright laws will favour the course designers in protecting their material through digital locks. In the case of distance education, copyright infringement is common as it is easy for students to break codes, and use the abundant data online. However, now instructors can prevent their material from being used by unauthorised users through TPMs. The course designers should use digital locks if they feel their material needs to be protected.

CONCLUSION

Copyright laws in Canada are in the process of being amended. Fair dealing in Canada gives users the right to copyrighted material and this has been upheld by the Supreme Court in the CCH case (2004). There have been several attempts to modernize Canadian copyright laws but they have failed. Bill C-32 has been proposed which broadens the realms of fair dealing exceptions but limits the effectiveness of the enhancement by creating unnecessary stipulations. It provides for digital locks on digital content to supplant fair dealing exceptions thus placing the power with the right holders and the collective societies. This affects distance education directly.

Distance education is largely dependent on digital content to be copied and distributed. Students are in different geographical areas and communication is mostly through the Internet. Course content is sent through email or fax. In Bill C-32, education has been included under fair dealing; which means that distance educators and students are free

to use copyrighted material for education purposes. This will facilitate the transfer of knowledge and information in distance education. The risk of copyright infringement has lessened and this will encourage the use of resources available on the Internet. However, the digital locks provision will inhibit this progress.

Under Bill C-32 it has been deemed illegal to circumvent digital locks; distance educators will not be able to use information available on the Internet that has digital locks. The imposition of a higher tariff by Access Copyright will increase costs for institutions and students. Different rules for different types of educational institutions, libraries, archives and museums are not beneficial for the public users. The copyright reforms are contradictory and it is difficult to judge whether they will benefit or harm distance education. Instead of creating a balance between user rights and copy owners' rights, the bill is decidedly in favour of the copy owners' rights.

Fair dealing has become synonymous with user rights in copyright law. The enhancement of the exceptions that come under fair dealing such as education and parody/satire is a positive step that will aid distance education in the delivery of digital content. It will also help course designers in using the abundant material available, which was not legally accessible before. Advocates of user rights and innovation all over the world to combat exploitation by copyright owners have championed the concepts of fair use and fair dealing. The prohibition of circumventing digital locks, even for fair dealing exceptions, is a negative development for distance education. It will constrain the rights under fair dealing and encourage right owners to use TPMs on their digital content. This will limit access to information and increase licensing costs. It will allow copyright owners to prevent access to material even for legal uses such as education. Copyright laws and Bill C-32 needs to be reviewed in order to maintain a fair balance of rights; presently it does not offer substantial advantages to distance education.

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