



**Concerning the Educational Use of the Internet:
An Education Amendment Does Not Narrow Fair Dealing**

Education organizations are asking the federal government to change the existing copyright law by introducing a new education amendment to clarify that the educational use of publicly available Internet material is not an infringement of copyright. Current Canadian copyright law is unclear about the extent to which teachers, students, and other educational users can legally engage in routine classroom activities involving the use of text, images, or videos that are freely available on the Internet.

To clarify the law, Canada's education community has proposed an education amendment. This proposed amendment 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.

Some have raised the question, "Will the education amendment, if enacted, create an implication that everyone other than those in the education community will have to pay to use publicly available Internet material?" The argument would be that if the government explicitly gives a right to one group but not to another, then its intention is that the second group does not qualify for the right.

The Supreme Court of Canada provided us with some guidance on this issue in 2004, in a landmark copyright case commonly called the "CCH decision." The CCH decision suggests that everyone, whether in or outside of the education community, benefits from a provision in the Copyright Act called fair dealing. Fair dealing is a user's right that may be available for some uses of publicly available Internet material.

The Supreme Court of Canada in the CCH case established the approach to be taken in assessing whether an activity is an infringement of copyright. The Court stated emphatically that "fair dealing is always available." The Supreme Court did not even consider whether a specific statutory exception could apply to the use of a copyright work until it had carried out a fair dealing analysis. The first step is to determine whether the activity is fair dealing. If the activity is fair dealing that is the end of the matter. If it is not, the next step is to determine whether an exception is available that permits the activity in question.

The point to be emphasized is: enacting a specific statutory exception like the education amendment would not narrow fair dealing for those outside the education community. Why? Because the analysis applied by the Supreme Court in the CCH case tells us that a court would first conduct a fair dealing analysis, and only if the use did not fall within fair dealing, would the court then look to see whether a use could fall within a statutory exception like the education amendment.

It is also important to note that the approach to a determination of copyright infringement outlined by the Supreme Court in the CCH decision also explains why an amendment for educational use of publicly available Internet material is necessary. Given that it is not certain whether fair dealing applies to some routine educational uses of Internet works, a specific exception – the education amendment – is needed to clarify that all educational uses of publicly available Internet material are permissible without infringing copyright.

Specific exceptions, like the education amendment, should be put in the Copyright Act for the purpose of clarifying uncertainties in the law to avoid costly disputes in the courts. Exceptions like the proposed education amendment can overlap with fair dealing without narrowing its scope. The presence of one does not negate either the need or the legitimacy of the other.