The Canadian Copyright Law and Common Educational Reprography Practices

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This article provides a contextual exposition of the Canadian Copyright Act (1988) as it affects educator practices. I offer background on the development and content of the Act, then describe what it says about infringements of copyright and how the Act might be applied in school contexts. Finally, I consider several ethical constraints and rationalizations with respect to copyright infringement.

Cet article offre un exposé contextuel de la Loi canadienne des droits d'auteur (1988) et de son influence sur les pratiques des enseignants. D'abord, on traite des antécédents du développement et du contenu de cette loi. Ensuite, il est question de descriptions concernant le non-respect des droits d'auteurs ainsi que des applications de cette loi dans des contextes scolaires. Finalement, plusieurs contraintes éthiques et rationalisations sont prises en considération quant au non-respect des droits d'auteurs.

Only one thing is impossible for God: to find any sense in any copyright law on the planet. (Mark Twain in Helm, 1986, p. 9)

Who owns the copyright for the graffiti on the school washroom stalls?

INTRODUCTION

In its present form,[1] the Canadian copyright law is jurisprudentially unprincipled, in the sense that no meaningful judicial interpretations of the statute have yet been made regarding school-based reprography. Educational stakeholders currently derive their understandings of the law, and its application to practice, more by economic and political means than by legal or ethical considerations. The issues raised by copyright, however, are far too important to be ignored or sidelined by either casual or irresponsible consideration.

Whether one sees educators as victims of an unjust or immature law, villains of systemic civil disobedience, or virtuous exemplars, the underlying concepts of right to copy need to be carefully examined by educators in the context of their common reprography practices. In this article I provide a contextual exposition of the Canadian Copyright Act (1988) as it pertains to educators and their school practices. After furnishing a brief background to the development and content of the Copyright Act, I describe what the Act says regarding rights and use expectations and exceptions that apply to school contexts. Finally, I identify

several constraints and rationalizations with respect to copyright infringements. The article is not so much a textual as a contextual exegesis of the Copyright Act, as it pertains to educators.

THE PRESENTING PROBLEM

The leitmotive for this article emerged from my encounter with a group of 25–30 educational administrators in a workshop I presented on ethical decision making. During my customary "bear-pit session" at the end of the session, I was asked to comment on whether photocopying copyrighted materials was ethical. When the question was turned around, the administrators, with three exceptions, were either neutral or indifferent to the issue. The common response may be typified by the rhetorical question, "It goes on all the time — what are we supposed to do about it?"

What one is "supposed to do" is the stuff that ethical questions are made of, so I was interested in the positions of the exceptions in this group. These positions assumed opposite sides of the question. The first side, held by one lonely-among-colleagues principal, was that photocopying copyrighted material was both legally and ethically wrong. This principal reasoned that participating in an illegal activity was professionally unethical and that photocopying copyrighted material without license or permission was, indeed, illegal. In the presence of his uncomfortable peers, he concluded that if they were allowing such practices in their schools, they were engaged in illegal and unethical activity or passive contribution to it. The other two exceptions stoked each other's defiance of copyright restrictions on four basic grounds. First, "big publishing companies in far away places do not care what goes on in schools." Second, the copyright law is "an unjust law; it does not take into consideration the spontaneity of truly good teaching." In fact, one of these administrators suggested that, in his school, the teachers who photocopy copyrighted material are his best teachers. Third, the law is "impractical" to keep. It is just too much trouble and bureaucratic hassle to write for permissions or to buy class sets in times when budgets are shrinking. Fourth, the educational ends of helping children to learn is a legitimate defense for breaking a law that surely did not intend to harm children.

Technology has only recently introduced new practices and habits to the rituals of teaching. Over the last twenty years photocopy machines, video and tape recorders, compact disc recorders, and computers have become readily available to the general public and to educators. Not until 1959 was the first commercially successful photocopier, the XEROX 914, introduced (Gagnon, 1990). The success stories associated with photocopy technologies and paper companies and the convenience of quick copies of teaching materials have exacerbated a conflict between creators and users of copyrighted material. Unfortunately, the technologies may have advanced far ahead of political, ethical, social, and educational thinking; collective wills; and social contracts.

My reflections, readings, and conversations with educators have led me to make several observations that may, I speculate, apply to many educators in Canada. First, copyright infringement is common among educators (Weiner, 1989). Second, many educational leaders choose not to involve themselves in confronting issues such as copyright compliance or rights education. This passive indifference is probably reinforced by observing all the educational benefits on one hand, but observing no tangible negative consequences on the other. Third, some educators are conscious of the legal and ethical ramifications surrounding the issues of copyright, but they work in a culture of quiet noncompliance. Finally, some educators have developed sophisticated rationalizations or defenses to justify the practice of copyright infringement in ways that should be identified and described. The absence of recent empirical evidence to the contrary does not validate these hunches, and subsequent discussions with a cross-section of educational leaders affirms these observed positions as not at all exceptional.

BACKGROUND TO THE CANADIAN COPYRIGHT LAW

Until 1988, the Copyright Act "had not been materially altered since it came into force in 1924" (Herbert, 1990, p. 1). The technological advances of the intervening 60 years had complicated the traditional notions of copyright. Those pressing for reforms believed that such technologies as photocopying machines, audiovisual apparatus, and computers were eroding the protection afforded to copyright owners under the Act. In May 1987, Bill C-60 was introduced to amend the 1924 Copyright Act. Royal Assent was given to Bill C-60 on 8 June 1988, and the final portions of the Bill were proclaimed on 1 February 1989.

Gagnon (1990) indicates that Bill C-60 raised the level of copyright knowledge and caused "long standing practices to be scrutinized and in the majority of cases found these to be illegal, much to the horror of some of the most creative and innovative teachers in our schools" (p. 2). The 1988 amendments gave authors moral rights to be associated with their work(s) as well as the right to the sustained integrity of their works. The amendment extended copyright protection to computer programs; strengthened creators' moral rights over their work; granted the copyright owners of artistic works the exclusive right to exhibit works in public; provided stiffer penalties for copyright infringement (up to $1 million fines and/or five years of incarceration); and provided a way for copyright owners to administer their rights collectively through "licensing bodies" without fear of prosecution.

Development and Operation of Collectives

Pursuant to sections 67 and 70.1 of the Copyright Act, a number of collectives have been organized to administer copyright oversight for their member-clients. CANCOPY, organized in 1989 to represent publishing and author groups, targets

the larger users and abusers of intellectual print property. This particular collective enters into reprography negotiations and contracts with the largest print copy users, such as provincial governments and, particularly, ministries of education and training.

Provincial governments and other institutions have been slow to enter negotiations for a number of reasons. High costs are involved in paying licensing fees to collectives. Many governments have been waiting for other governments (such as Ontario) to test the agreement. Various points of view exist regarding what materials should be paid for and to whom the royalties or payment should be directed. For example, educators, particularly librarians, have a unique view regarding legitimate defenses under the Act for copying the materials of others. Diverse views primarily revolve around the two notions of substantive copying (quantities) and fair dealing.

Belanger (1988, as cited in Gagnon, 1989) predicted that reprography collectives would have a "significant impact on education, both positively, through allowing teachers to reproduce, in good conscience, any copyrighted material under the control of the collective, and, negatively, through a massive drain, estimated by the publishers themselves at 50 million dollars per year for the print collective alone, on the education purse" (in Gagnon, 1989, p. 17). Recently CANCOPY appointed a manager of compliance who is responsible for enforcement of affiliates' copyrights. The new manager says,

> I'm going to take a two-pronged approach to copyright compliance — education and enforcement. Knowledge about copyright is still alarmingly low in the general population, so education is vital. . . . CANCOPY is also prepared to use "the big stick" when education doesn't change users' behavior. Compliance is a support function for licensing efforts . . . as each user group is contacted, my job will be to educate them about the importance of copyright . . . if licensing fails, I will identify infringers for legal action. (Carrigg, 1993, p. 2)

Obviously the development of collectives has provided copyright holders with a corporate means for receiving some revenues and for pursuing some offenders of their copyrights through identification and, subsequently, through the courts.

The Throes of Phase II

In 1984 the federal Liberal government initiated a move away from the 1924 "fair dealing" concept to a more liberal concept, exercised in the United States (Government of Canada, Consumer and Corporate Affairs/Department of Communications, 1984). In 1985, the new Conservative government's Sub-Committee on the Revision of Copyright issued *A Charter of Rights for Creators* (1985) and recommended the retention of the original "fair dealing" concept. In February 1986, the government responded to this report of the Sub-Committee by agreeing

in principle to the retention of the "fair dealing" exception. The first set of revisions was brought before the House in spring 1987 (Bill C-60). Kratz (1989) recollects that Phase I (the 1988 revisions of the Copyright Act) had to be passed through Parliament before the federal election because of the prominence of the free trade agreement debate. He says, "An attempt was made to include only non-controversial items in the first phase, but that did not work" (p. 86). Kratz (1989) indicates that concerns about Phase II cluster "around the fact that increased rights for creators are established by Phase I, but that the balance of copyright exemptions are not in place" (p. 87). Bazillion (1991) concurs and predicts that the promised Phase II will result in "educational institutions enjoy[ing] no special status or exemption because of what they do. That is the aspect that annoys many educators" (p. 4). It remains to be seen how the current Liberal government will handle the Phase II amendments. From a political perspective, the education lobby tends to be weak because the educational partners are divided into provincial and territorial jurisdictions and are further fragmented into K–12 and post-secondary institutions. Gagnon (1989) cites Duncan (1987), who says that "Educators have been remiss in not speaking out; their silence may turn into a tragic whine in the years ahead unless we can act immediately to gain the needed exemptions" (in Gagnon, 1989, p. 18).

BASIC COPYRIGHT CONCEPTS

Definition of Copyright

Copyright is the right to publish, copy, or reproduce any original literary, dramatic, musical, or artistic work. Copyright law protects what is known as intellectual property or the products of creators' minds (Gagnon, 1990, p. 1). As Weiner (1989) puts it, "when you buy a book, record or tape, you buy the container not the content. The content remains the property of the creator" (p. 6).

Copy Rights

The premise underlying copyright is that the creator or owner of the copyrights should have control over the pecuniary benefits, the nature of utilization, and the integrity of their creations. Pecuniary rights provide creators with an opportunity to profit from their work and to exploit their work in the marketplace for financial gain. To deny royalties to those who create or produce is thought, by some, to steal away the economic incentive to produce (Dratler, 1990). Moral rights protect work from distortion, mutilation, or any other modification to the integrity of the work such that would prejudice the creator's honour or reputation. Creators are given, then, control over distribution, adaptation, public performance, and public display of their works. The Act gives authors the right to restrain the use of their work from being associated with a product, service,

cause, or institution. Moral rights also include the right to claim authorship of a work by name or under a pseudonym and the right to remain anonymous.

The Nature of Copyright Law

A question is raised regarding the nature of copyright law: whether the law is a creation of the state to provide particular cultural or economic functions or a natural law recognized by the state to safeguard the inherent rights of authors (Herbert, 1990). Much discussion of copyright in Canada has denied the plurality of philosophic and jurisprudential views with respect to copyright but has rather attended to conflicts between lobby groups representing creators, users, and commercial interests.

Copyright-ability

Copyright-ability determines just what may be copyrighted. According to Dratler (1990), "copyright does not protect knowledge, ideas, facts, or principles in the abstract, but only their mode of expression in particular works of authorship when the works are fixed in a tangible medium of expression—this is referred to as the idea/expression dichotomy" (p. 6). Mackay (1987) says the point of copyright is to

> create a kind of monopoly for the original creator of the work; a monopoly in that he or she is given the actual property interest in the work. . . . copyright law gives you a protected interest in the expression, including the mode of expression of that idea—but not in the idea itself. Ideas themselves are not actually copyrighted. (p. 23)

Herbert (1990) indicates the following conditions under which works may be considered copyrighted property:

1. The work must be expressed in some material form, be capable of identification and have a more or less permanent endurance.
2. The work must have originated with its creator, who, in its production, applied skill, judgement, labour and learning. (p. 4)

Information may under some conditions be considered intellectual property and, in such instances, copyright arises automatically[2] for both published and unpublished works.[3]

Infringement of Copyright

The obvious conflict in copyright is linked to disputed or threatened rights to copy. The remedies provided to those who own copyrights against those who

would infringe on these rights include injunctions, action for damages, and penal sanctions. The Act sets out a description of infringement and prescribes, for the courts, certain categories and limitations for remedies in Sections 27(1), 27(4), 35(1), and 42 of the Copyright Act.

Defenses Against Charges of Copyright Infringement

Although copyright creates a monopoly for creators of intellectual property, some provisions in the Act defend users against certain exceptions from typical infringement practices. These exceptions are referred to as the "fair dealing" exception clauses of the Act. The term "fair dealing" is not specifically defined in the Act but "was originally included . . . at a time when reproducing copyright materials meant copying out by hand. As such, the fair dealing provision applied to the use of quotes and 'small' passages" (Harris, 1992, p. 110). According to Harris (1992), the American "fair use" notion, which "allows many more free uses of copyright materials," is broader that the Canadian provision (p. 110). In fact, she suggests that the "fair dealing" provision does not give permission in advance to use copyright material.

Canadian educators are cautioned to avoid confusing the "fair use" concept (from the United States) with the Canadian "fair dealing" concept. Title 17 of the United States *Federal Statutory Law (Section 107)* (Copyright Act of 1976) provides for limited use of copyrighted material without the permission of the owner. Fair use is assessed in American law by using the criteria of:

> the purpose and character of uses; the nature of copyrighted work; the amount and substantiality of the portion of the work to be copied; and the effect of copying upon the potential market for the work.[4] . . . Rather, it is a defense which may be raised in a copyright violation. (Harris, 1992, p. 110)

In Canada, the recently revised[5] Section 27 of the Copyright Act states:

> 27(2) The following acts do not constitute an infringement of copyright:
> a) any fair dealing with any work for the purposes of private study or research;
> a.1) criticism, review or newspaper summary, if (i) the source, and (ii) the author's name, if given in the source, are mentioned;
> d) the publication in a collection, mainly composed of non-copyright matter, intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists, if not more than two of the passages from works by the same author are published by the same publisher within five years, and the source from which the passages are taken is acknowledged.

The courts have had no recent occasions to provide interpretations of these clauses and, consequently, these clauses are the subject of much debate and

displeasure, in both the creator and the user communities. Moline (1989) says that "in most cases photocopying 'unsubstantial' parts of works in class sets may be permissible if it can be shown the teacher is exercising the 'personal exemption' on behalf of students" (p. 16). In other words, teachers may contend that they should be characterized as agents of students, using the fair dealing or personal exemption right of each student in their classes, when they (the teachers) copy and distribute copyrighted items. What constitutes "substantial" or "insubstantial" amounts of photocopying is a difficult to determine. The Act itself is not clear on this but, according to Weiner (1989)

> insubstantial has been defined by jurisprudence as insignificant. Substantial would by extension be considered significant. For example, a court deemed reproduction of the quote "Frankly, my dear, I don't give a damn" a substantial part of the novel *Gone with the Wind.* (p. 6)[6]

The tensions over copyright infringement in schools do not seem to have abated, despite the initiative of CANCOPY and other collectives in securing agreements throughout Canada. Librarian and educator groups suggest that collectives give permission to those included by the agreements to do what they already have rights to and that these agreements merely place the signing provinces in positions that are more closely scrutinized. News reports of Royal Canadian Mounted Police raids on copy centres and university bookstores, threats of legal action against school boards, and large civil judgments on behalf of plaintiffs/collectives have had the positive effect of raising concern and prompting attention to this area of law. Collectives' attention to copyright non-compliance and enforcement has increased significantly and the financial incentive to avoid prosecution has also been raised since the 1988 amendments.

The complexity of the copyright maze is exacerbated by the paucity of Canadian jurisprudence in the area of copyright infringement involving educational institutions or personnel. This shortfall of meaningful interpretative guidance gives rise to much dis-ease and controversy amongst users (Kratz, 1989). As the public expectations for educators' performance have apparently intensified, the financial resources available to teachers have been severely limited. Technological advances have provided access to materials otherwise unaffordable and unavailable. This access has occurred together with the demands for resource-based curricula. Copyright infringement has become common practice in Canadian schools. The hope that Phase II may balance the favours imputed to creators in Phase I with the claims of users has had some effect on the readiness of governments and associations to deal with the collectives. It remains to be seen what effect new agreements between users and collectives together with legislative reform will have on the practices of everyday teaching in Canada.

Educators seem to want to disseminate knowledge "as quickly and widely as possible and to add to the storehouse of existing knowledge as rapidly and

effectively as possible" (Dratler, 1990, p. 6). The educators' mandate demands continual dissemination and use of others' copyrighted materials. Dratler (1990) expresses the tension this way:

> Unfortunately, no one can be an effective educator without trespassing, to some extent, on the exclusive rights. As teachers strive to disseminate knowledge as effectively and widely as possible, they inevitably copy, distribute, perform and display others' copyrighted works. . . . Like other users of copyrighted works, educators in theory have the option of paying the price to license the uses that they require. In practice, however, several factors often render payment unrealistic. First, the educator must have sufficient financial support, and that financial support must be sufficiently flexible, to permit purchase of appropriate rights in copyrighted works as they are generated. (pp. 9, 10)

Commenting from an American perspective, Dratler (1990) says "photocopying for educational purposes [is] perhaps the most significant educational copyright issue in modern times — into the maw of that monster of vagueness and uncertainty — the doctrine of 'fair use'" (pp. 22–23). Current "guidelines" are said to "impose unrealistic limits on educators operating in the modern information society" (Dratler, 1990, p. 27). Dratler (1990) adds that

> Educators less versed in copyright law may be more intimidated by these guidelines. To the extent they are, they reduce their spontaneity and effectiveness as educators. To the extent they study the matter to inform themselves, they divert their time and energy from their primary mission, unless of course they also happen to be professors of intellectual property law. To the extent they determine that copying is not authorized by law, they must seek permission from copyright holders — a dubious and wasteful proposition. The result of all this is a considerable expenditure of time and energy on the part of educators, their administrators and legal counsel at the time when our beleaguered educational system can ill-afford [sic] to divert its attention to nonessential matters. (p. 29)

Dratler, an intellectual property scholar, raises some important compliance questions. His message is certainly different from those working as agents of copyright owners. The conflicts between user and creator interests remain unresolved.

QUESTIONING SOME DEFENSES OF INFRINGEMENT

Ethical agnosticism, ethical imperialism, ethical relativism, and ethical pragmatism are four rationalizations or defenses educators use as defenses for copyright infringement. For the purposes of this discussion, I define "rationalizations" as those defenses that attempt to override what one in conscience, spirit, or intuition apprehends to be wrong, bad, vicious, or improper. Alternatively, one may define "rationalizations" as those inner transactions aimed at harmonizing and ameliorating ethical dissonance. The reader may recall, from the introduction of this

paper, that educators offered several different explanations as grounds justifying copyright infringements.

The first defense educators use is that of ethical agnosticism. Educators may say that their common copyright practices are legitimate because it is impossible to know what constitutes copyright infringement. This position is represented by forms of a number of "law-neutralizing" doctrines. In other words, proponents argue that we cannot say if copyright infringements are legal or illegal. The concepts associated with breach of copyright are either too complex for our finitudes or too "soft" to merit meaningful normative responses. We cannot possibly know or anticipate the myriad interests and rights implied by questions of possible infringement. Some will say, in the extreme, that copyright infringement may be considered an economic, political, or practical question that does not have an inherently ethical dimension.

The second defense of infringement is contrasted with the first in that it places the ethical knowledge of one party (the educator-user) in a superior position, a priori, to that of another party (the creator or owner of copyright). This stance, which I shall call ethical imperialism, assumes that the "ethical high ground" most properly resides with the educator. Those maintaining this position argue, for example, that the educational practice of photocopying copyrighted material without the owner's permission is legitimate, in law, because it represents the exercise of freedom of expression. It is an appropriate use of ideas within the public domain. It is altruistically motivated and provides otherwise inaccessible material to be conveyed to students while saving tax dollars. There is virtually no impact on the potential market because the efforts of educators to use materials are self-motivated, not market motivated. This argument asserts that educators help creators when they pass on the fruit of their intellectual efforts to students who could not possibly afford or be expected to gain access to this information by other means. In other words, educators' dissemination of copyrighted materials is an educational service that ought to be regarded as highly ethical social activity. Another approach is to ameliorate the conflict between the Copyright Act and educational practice by vilifying the copyright holders for profiting from creative works. One's ethical and legal culpability seems less severe if those you offend are characterized as removed, faceless, greedy, and independent from more local and highly valued educational realities. This argument asserts that copyright owners and creators are unaffected by, and independent of, the "infringement" practices of educators. There is a similar view, of a rather cynical nature, that considers the world determinatively unethical. It is said that "this is a dog-eat-dog world." The big publishing companies have no social conscience and are simply gouging users and exploiting creators. "I refuse," some might say, "to encourage them by giving them what they want." Furthermore, other educators might say, "our political leaders continue to perpetuate a corrupt system by indulging the publishing company and collective group lobby and by their

ignorance of, or dispassion for, the 'children's best interests.'" With these claims, infringing educators attempt to take the moral high ground.

A third common educator defense for copyright infringement is based on "statistical morality." This approach to defending copyright infringement is expressed by the view that whereas educators may not be responding in a "totally ethical" fashion, they are at least better than a lot of other professions: the doctrine of "relative filth." Probably educators, like others, tend to judge themselves by their own best intentions and others by their worst acts. A common practice is to weigh one's own good actions against one's bad actions in the hope that the good acts will offset any unethical acts. A number of educators have told me that they "obey every law in the country except copyright rules." The argument is often asserted that copyright infringement "cannot be all that wrong if everyone is doing it and no one is going to court over it." "If our administrators know we are doing it and are not coming down on us, what can be wrong with the practice?" The argument of minimal enforcement is extended by suggesting that educators are minor infringers. "They ought to be going after the big fish," say educators. With non-profit educators the damage to copyright holders is thought to be slight and the risk of enforcement unthreatening to current practice.

A fourth defensive argument is that the copyright law is too impractical to keep. It is too much trouble to write for permission, to buy class sets, or to pay fees to a collective when education budgets are shrinking. This argument underlines the pragmatic impetus for educators to infringe copyright laws, in order to succeed in their mission to educate. Educators are given no alternative but to break copyright if they are to do their duties, as set forth in provincial education statutes. From this perspective, the trap of necessity trumps law-abidingness. Although some would see such thinking as irresponsible, others would claim that such reasoning expresses a fundamental conflict around the age-old expediency versus ethics dialectic. "The impracticalities of copyright consist of more than the mere inconveniences that are entailed," say some educators. "These rules are unreasonable burdens that should be reformed." That the ethical and legal constraints of copyright should take precedence over practical educational purposes is an argument countered by those who claim that facilitating learning is a much weightier moral, legal, and pragmatic mandate for educators.

An extension of the impracticality argument stems from the belief that lawmakers and copyright holders may be unappreciative of the professional educative process and good educational practice. As a consequence of developing a resource-based approach to learning, educators have to be ready for student-initiated inquiry and need to provide spontaneous access to materials without having to wait for permission from publishers or institutional purse-string holders.

In the process of imparting knowledge to others, educators must package their educational content in digestible form. Writers such as Dratler (1990) have claimed that exemptions should be made for educators on the practical grounds

of availability. In his view, teachers would be exempt from liability for using copyrighted material if it is not readily available at a reasonable cost (pp. 37–49). Thus necessity could establish the grounds for their copyright infringement practices. For example, some educators may argue that textbooks are too slow being published and too soon out of date. Perhaps the current publishing practices do not fit current educational needs. Educators' exemptions based on the notion of commercial availability would support the fundamental goal of copyright protection to provide incentives for more authorship and faster publication.

Teachers suggests that helping children to learn is a sufficiently strong end to legitimate breaking copyright laws, which were never intended to harm children. "Les miserables-type" sympathies are evoked in those hearing the appeal of educators as the "best interests of children" are pitted against the pecuniary and administrative interests of adults. Some would argue that this is a false conflict, but others would claim that the struggle entails using illegitimate means to serve noble ends (an instance where the end does justify the means). This conflict may be reframed in light of the classical deontological versus utilitarian conflict. Both sides may take either position. The creators may suggest that educators have a duty to respect the persons who have created these works and to pay them the dignity of their rights as owners of intellectual property. The educators may suggest that they have a duty to provide a resource-based, relevant educational experience that must never be allowed to be thwarted by the details and incapacitating rules of copyright. In other words, our act of educating constitutes a high ethical duty that, in effect, trumps the petty and archaic laws of the country that "recommend" pecuniary rights to creators.

A further utilitarian argument is that the damages incurred subsequent to infringement on intellectual property are not nearly as serious as those infringing on children's best interests. Using copyrighted material is not the same as stealing. According to Gagnon (1990),

> [teachers] simply reflected the habits of all good citizens who would never consider stealing apples from a neighbour's tree but would not hesitate to photocopy complete articles from magazines, large portions of books, complete poems, cartoons and countless other copyrighted materials which are easily reproduced on photocopy machines. (p. 1)

On the other hand, creator rights advocates claim that without the legal monopoly of creators and copyright owners there would be no control over scarcity of materials, no exclusivity, and, consequently, diminished control over the economic value of copyrighted material. If creators do not have such controls over their property, they will not be willing to continue their creative endeavours.

The legitimation of the practice of copyright infringement is excused, by some, because it does not appear to hurt anyone materially and, in fact, may actually benefit children. Educators argue that they receive nothing in return for their use of the material. They simply use it to enhance children's best interests.

"Only our students gain and no one loses" is the refrain from educators using this defense. "This is strictly for the students' benefit, with no return to me." "In fact it costs our school system a significant amount of money to keep the photocopier going, and if we have to pay royalties as well as for photocopy operations then we ultimately take dollars away from the education of children." It simply costs too much to recast the original author's ideas into expressions created by the educator-user.

MORAL CONSTRAINTS AND ETHICAL RESPONSIBILITIES

The way educators currently view their moral constraints and defend their ethical responsibilities with respect to copyright is important. I contend that educators' primary ethical responsibilities are those within their personal and professional control: thoughts, attitudes, and actions. These may be referred to as educators' ethical goals. It is possible to confuse such goals with one's legitimate moral desires. Educators ought to have both goals and desires; but they should not confuse what they ought to and can do (ethical goals) with what they wish others would do (moral desires). Fulfilment of moral desires depends on ethical consciousness, commitment, competency, and choice. In other words, educators should focus their attention, in the ethical domain, on their own personal and professional attitudes and actions before they enter into the more difficult and constraining arena of social attitudes and actions. I am, therefore, commending the old adage that one should judge oneself before exercising one's legitimate moral desire for change at the organizational, systemic, or societal level. I am also responding, here, to people's tendency to start at distal rather than proximal points and to excuse their own behaviour because of contrived or artificial constraints. Professional educators should only be expected to do those things over which they may exercise ethical control. If someone can block my ethical goal then it is not a goal at all: it is a desire.

Ethical responsibility should be delimited by those things that are within educators' power and influence to change. For example, I have an ethical desire to see the Canadian Copyright Act changed to allow for a more just balance between creator and user rights and to clarify the legitimacy of certain educator uses of intellectual property: this is an moral desire or aspiration. My goal is to be an ethically thoughtful, committed, and courageous educator with respect to the issues of copyright: this is an ethical goal. In this instance, if I am sustaining the integrity of ethical attitudes and actions, this behaviour qualifies me to pursue my ethical desires by influencing others. In short, as educators we are constrained by our own imperfections, interdependence, and finitude. We must be aware of our personal limits and the choices of others, but at the same time we must be vitally aware of our ethical potential to do good, to be right, virtuous, and proper—to be ethical "lights." I argue that we are sometimes constrained by factors beyond our control and that ethical empowerment comes by embracing

the ethically responsible actions and attitudes that cannot be frustrated because they are within the educator's personal and profession realm of choice. The process of choosing should include the elimination of pseudo-defenses or rationalizations that are ethically unacceptable.

CONCLUSIONS

In this article I have merely identified some infringement defenses meriting scrutiny. Pseudo-defenses or rationalizations repress healthy ethical thinking. Educators properly pride themselves on their ethical uprightness and law-abidingness. A perception persists, however, that copyright infringement is somehow all right and that it is a "small and necessary sin" forced upon educators by scarce resources, expedience, and the greater good of educating children. In short, this area of copyright infringement may be characterized as one wherein teachers and school administrators have been found to hold themselves above the law. Whether our current copyright law is just and prudent should be questioned, but the Canadian educators need to examine critically the issue of conscious and unconscious misdeeds against the law and its undergirding principles.

NOTES

[1] In considering the jurisprudence cited, readers should note that this article was accepted for publication in fall 1994.

[2] According to Mackay (1987), "there is actually no legal requirement in Canada that you register anything. Once you create something, the copyright for your creation is automatically vest in you. It does not matter whether you put a little 'c' in the corner or whether you send it off to some registry or not" (p. 23). Moline (1989) says the copyright symbol in a circle, year of publication, and name of copyright holder must be shown on an item to be copyrighted in certain foreign countries that are signatories, as Canada is, to the *Universal Copyright Convention.*

[3] The usual term of copyright is for the life of the author plus 50 years.

[4] The case of *Basic Books, Inc. et al. v. Kinko's Graphics Corporation,* dealing with "professor publishing" by an off-campus printing company, found that copying full chapters from copyrighted books and materials (up to 100 pages from the same sources) was unfair use.

[5] Paragraph 27(2)(a) has been repealed and the above text substituted (1993, c.44, s.64[1]).

[6] According to Andrew Martin (1994), Executive Director of CANCOPY, "the most restrictive licences . . . allow copying of up to 10% of a publication, but with an over-ride that permits the whole of a periodical article, chapter of a book, or a short story to be copied" (p. 7). He indicates that these reasonable limitations are intended to support the "teachable moment" concept, primarily for elementary and high schools. Martin also indicates that "if records are kept of what has been copied then CANCOPY allows copying of up to 15% of a publication [plus over-rides, as above]" (p. 7).

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