

Copyright for the Public Interest

Overview

In 2000, the federal government began a formal review of Canada's Copyright Act, primarily for the purpose of addressing the impact of digital technology on the copyright landscape. Since then, three bills have been tabled to amend the Copyright Act for the digital era—C-60 in 2005, C-61 in 2008 and C-32 in 2010 all died on the Order Paper.

In the last decade the publishing, entertainment, and software industries have exerted significant pressure on the federal government to give additional rights to the owners of copyrighted works, and restrict users' rights to copy and access copyrighted materials. Restricting access to copyrighted works would have significant and far-reaching implications for the education community. It could require new fees on students or educational institutions and would undoubtedly limit how students and teachers can use copyrighted works in teaching, learning and research.

What is the Copyright Act?

Copyright has historically been based around the idea that to encourage creation, knowledge must be shared. To encourage this process, from its beginnings copyright law has been designed to facilitate education—the first piece of copyright legislation ever adopted was Britain's Act for the Encouragement of Learning. Canada's Copyright Act was designed to encourage the development of creative works, such as books, music, and software, by providing rights to creators over how their works can be used, and rights to users that ensure the public has reasonable access to the works of others. As the Supreme Court of Canada has outlined, the role of the Act is to strike a balance between "the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."¹

Responding to the Digital Revolution

The Internet has increased democratic engagement on a global scale, granting immediate access to information from governments, non governmental-organisations, scholars, educational institutions, and individuals from around the world. While the Internet has increased access

to knowledge, it has also created new opportunities for large-scale copyright infringement.

In response to the ability to easily share music, videos and other copyrighted materials the publishing and entertainment industries have exerted significant resources to shift the perception of copyright from its original purpose of facilitating production and use of intellectual works towards the profitability of their industries. In particular, the Canadian Recording Industry Association has argued that the act needs to be amended to impose severe punishments on those who download music. Many Canadian musicians have opposed this position, arguing that such restrictions criminalise their fans and deny the rights of the Canadian public to access their works.

Masked as a concern for the livelihood of creators, these industries have lobbied for legal environments that severely restrict users' rights. The campaign led by the publishing and entertainment industry has resulted in a strong focus in draft legislation on restrictions of users' rights, ostensibly intended to curtail file sharing.

The Main Issues

Fair Dealing

The most fundamental user right in the act is the right to fair dealing. Fair dealing allows users to, in certain circumstances, make a copy of a work without providing permission or payment. In order for the use to qualify as fair dealing it must meet two conditions: the use must be for the purpose of research, private study, criticism, review or news reporting, and the use must be fair. In 2004, the Supreme Court set out six factors to consider in determining if a use is fair: the character of the dealing; the amount of the dealing; the nature of the work; available alternatives to the dealing; and the effect of the dealing on the work. The consideration of these factors ensures both that users have reasonable access to copyrighted works, and that creators are compensated fairly for their work. In addition, the court set out that the categories of fair dealing, which had previously been interpreted in quite narrow terms, should be given a broad and liberal interpretation.

Although Canada's fair dealing provision recognises the

need to make copyrighted works available to encourage reasonable access for educational purposes, it is far more restrictive than similar provisions in other countries. For example, the United States' fair use clause is applicable for any use, not simply one prescribed for by legislation, and specifically allocates rights to educational institutions including the right to make multiple reproductions of a work for classroom use.

Digital Locks: Restricting users' rights

Digital locks, including technological protection measures (TPMs) and digital rights management (DRM), are methods of encrypting digital media to restrict access to it, by preventing it from being copied or limiting what users can do with the work.

In recent years, the entertainment industry has lobbied for amendments to the Act that would make it illegal to circumvent a digital lock, regardless of whether the use infringed the copyright in the work. Such a provision would mean that whenever a digital lock is placed on a copyrighted work the user would lose all of their rights. For example, it would be illegal for an individual to play a European region coded DVD that they purchased in Canada. Even though the individual has paid for the right to view the DVD it would be illegal, as doing so would require the user to circumvent a digital lock.

Digital locks also threaten privacy rights by giving the copyright owner the ability to monitor uses of their works by installing spyware on a user's computer. In January 2007, electronics corporate giant Sony was forced to settle a legal case in the United States after placing a TPM on CDs that installed a "rootkit"—an insidious software program that would send the information on the user to Sony. In addition to infringing privacy, the computer on which it was secretly installed became more susceptible to viruses and hacking. Sony was forced to pay damages and agreed to restrict the use of TPMs in the future. The case illustrates the need for the Canadian government to place restrictions on the use of TPMs and other digital locks.

Internet Service Provider Liability

An amended Copyright Act will likely clarify the responsibility of Internet Service Providers (ISPs) for the activities of their clients. This is especially pertinent for the education community given that virtually every educational institution acts as an ISP to its students, staff and faculty.

The United States' "notice and takedown" model requires ISPs to police Internet users. ISPs are legally required to remove content and, in some cases entire websites, when a rights holder claims that the content infringes copyright. This model has proved problematic. Thousands of websites have been taken down on the basis of unproven

accusations. It has also been used as a tool to impinge on free speech and facilitate censorship. The Church of Scientology has instigated the removal of several web sites critical of its activities. The preferred choice of many in the entertainment industry is a graduated response system, which exists in France and a small number of other countries. Under the French system, once a subscriber has received three warnings of alleged copyright infringement, they are cut off from access to the Internet.

The approach proposed in the three copyright Bills tabled in Canada since the year 2000 has mirrored that taken in much of Europe. Under what is called a "notice and notice" regime, ISP are only required to notify clients suspected of infringing activities and request that they voluntarily remove the material in question. Should they refuse to do so, it is the responsibility of the rights holder to pursue them.

Statutory Damages

If a person is found liable for copyright infringement, the owner of the infringed work is entitled to either actual or statutory damages. Actual damages are based either on the actual losses suffered by the owner, or the gains obtained by the infringing party. Statutory damages, on the other hand, are predetermined amounts, set out in legislation that can result in substantially larger payments for each infringement. The Copyright Act currently allows for statutory damages of up to \$20,000 per act of infringement.

The punitive nature of statutory damages ignores the intent behind the use and intimidates users which prevents them from exercising their rights to use copyrighted works.

The Big Picture

Copyright is intended to protect the rights of creators without stifling the use of works. Access to intellectual works is imperative for students, scholars, researchers, artists, and the public, but the Copyright Act does not do enough to ensure fair access for educational use of copyrighted works. Expanding "fair dealing" to match the USA's interpretation would go a long way toward providing this much needed access.

An overly restrictive Copyright regime, as advocated by the recording and publishing industry, discourages creation and is bad public policy. All creators build on the work of others. Overly restrictive copyright protections smother the development of new ideas, thereby discouraging social and cultural innovation, and ultimately economic growth.

Endnotes

1. Law Society of Upper Canada v. CCH Limited, [2004] S.C.J. No.12, (2004) 236 D.L.R. (4th) 395.