Copyright in the Public Interest

Canadian Federation of Students

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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. In 2012, the legislation was updated for the digital age. Since then, further changes have been proposed in the various free trade agreements being negotiated by the federal government.

Over the last 15 years, the publishing, entertainment, and software industries have put increasing pressure on the government to give additional rights to the owners of copyrighted works and restrict users' rights to copy and access materials. Unfair restrictions on copyrighted works have major implications for the education community.

What is the Copyright Act?

Historically, copyright has been based on the idea that there must be a balance between the rights of the creators of a work and the rights of the public to access and modify that work. 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—with the understanding that knowledge must be shared in order to fuel creation.

Canada's Copyright Act was designed to encourage the development of creative works, like books, music, and software, by providing rights to creators over how their works can be used—allowing them to profit off their own creations—and rights to users—allowing the public 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."

Locking Up Works for Life

The Internet has increased democratic engagement on a global scale, granting immediate access to information from governments, organisations, researchers, schools, and individuals from around the world. With this increased access to knowledge, new opportunities have also been created for large-scale copyright infringement.

In response to how easily people share music, videos, and other copyrighted materials, the publishing and entertainment industries have spent major resources to shift the general purpose of copyright from its original mission—helping people produce and use works—to making as much money as possible for their industries. Masked as a concern for the livelihood of creators, these industries have lobbied for legal changes that severely restrict users' rights. For example, Music Canada (formerly the Canadian Recording Industry Association) has fought to have the law changed to impose harsh punishments on anyone who downloads music and to extend their copyright to beyond the current limit: the lifetime of the creator plus 50 years.

In April 2015, the federal government proposed extending the copyright limit so that copyright holders would own works until 70 years beyond the death of the person who created the work. In response to this, the President of Music Canada said, "With each passing day, Canadian [music is]… lost to the public domain. This is not in the public interest. It does not benefit the creator or their investors and it will have an adverse impact on the Canadian economy."

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.

Fair Dealing

The most important user right in the Act is the right to *fair dealing*. *Fair dealing* allows users to, in specific situations, modify or make a copy of a work without asking permission from, or making a payment to, the copyright holder. 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.

The Supreme Court set out six factors to consider when determining if a use is "fair":

- the purpose of the use;
- the character of the use;
- how much the work is used or how many copies are made;
- the nature of the work itself;
- if there are available alternatives to the use;
- and the impact of the use on the work.

These factors ensure both that people have reasonable access to copyrighted works, and that creators are compensated fairly for their work.

The Court also set out that the categories of *fair dealing*, which had previously been narrowly interpreted, should be given a "broad and liberal" interpretation. Federal law has expanded the scope of *fair dealing* to include not only parody and satire, but also educational uses, something students, staff, and faculty have long advocated for. In particular, this expanded notion of *fair dealing* allows a school or a person acting under its authority to reproduce and display works for students, including works that are available online, as long as it is for the purpose of education and training. It also makes it easier to send course materials for distance education, allows libraries to make copies of their collection in a different format if the original format is obsolete, and makes interlibrary loans more flexible.

These guidelines clarify when students and educators can access works without permission or payment and when a license or negotiated agreement is required.

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. The changes to the Copyright Act in 2012 included introducing broad digital lock protection that make it illegal to circumvent a digital lock for otherwise legal reasons. In effect, users lose all of their rights to any work that has a digital lock. For example, it would be illegal to play a European-coded DVD on a DVD player purchased in Canada, even though the user paid for both the disc and the player, because it would require circumventing a digital lock. The few exceptions that are granted to people with perceptual disabilities are still unnecessarily restrictive. In 2013, Canadian negotiators worked to finalize an international treaty through the World Intellectual Property Organization to expand access to works for the blind and visually impaired. Curiously, Canada is one of a handful of countries that still hasn't ratified the treaty, even though Canada's major trading partners, including the United States, United Kingdom, France, China, and Brazil, have all done so.

> "The Canadian digital lock rules are amongst the most restrictive in the world."
> Michael Geist

Individual privacy is also threatened 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 an insidious software program that sent 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. The case illustrates the need for the Canadian government to place restrictions on the use of TPMs and other digital locks. In spite of this example, however, a review in March 2012 saw the government rejecting proposed amendments from opposition parties.

Internet Service Provider Liability

The Act sets out the responsibilities of Internet Service Providers (ISPs) for the actions of their subscribers. 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 model included in the Act is called "Notice and Notice," where a copyright holder informs the ISP of a potential infringement and the ISP forwards that notice along to the individual subscriber and requests that the material be removed. Beyond that, it is up to the copyright holder to decide to press charges for infringement. The ISPs face hefty fines if they do not forward along the notice, and recent industry data have clarified that the vast majority of individuals who receive a notice comply and voluntarily remove the material.

This model is different than others in place elsewhere in the world. For example, 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 is deeply flawed. 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. Under the French "graduated response" system, once a subscriber has received three warnings of alleged copyright infringement, they are cut off from access to the Internet, even if none of the accusations are proven in court.

In spite of intense pressure from corporate industry giants, the federal government has maintained support for the less invasive notice model.

The Big Picture

Copyright is intended to protect the rights of creators without stifling the use of works. An overly restrictive Copyright regime, as advocated by the recording and publishing industries, 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, discouraging social and cultural innovation and ultimately economic growth. Although some of the newer amendments to the Copyright Act remain flawed, many provide extensive new protections for user rights that will help ensure a balance between both access to and compensation for works that facilitate education, research, and creation.

Recommended Reading:

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

Geist, Michael. (2012) Canadian Copyright Reform in Force: Expanded User Rights Now the Law.