

Copyright for the Public Interest

Overview

In 2000 the federal government commenced a formal review of Canada's Copyright Act, primarily for the purpose of addressing the impact of digital technology on access to information.

Since then, the content production, publishing and software industries have exerted significant pressure on the federal government to pass legislation that significantly restricts access to copyrighted materials. In particular, the Canadian Recording Industry Association has argued that the Act needs to be amended to impose major restrictions on file sharing to protect the artists' interests. This position is not supported by many Canadian musicians who are concerned that such restrictions would criminalise their fans and ignore the rights of the Canadian public.

More restrictive access would have significant and far-reaching implications for public education in Canada. Restrictive amendments would negatively affect education by imposing new fees on educational institutions and infringing on privacy and user rights that currently exist.

What is the Copyright Act?

Canada's Copyright Act was created to encourage the development of artistic literary and authorial works, such as books, music, and software by providing certain rights to authors over how their works are used. One of the most important of these is the right to control the replication of a work. Copyright also protects the "moral rights" of creators by prohibiting users from defacing their works.

At the same time, the Act ensures the public the rights to access and use copyrighted works. The Act provides rights for users, including limited rights to make copies without permission through exceptions, including "fair dealing". As such, a core principle of copyright is that knowledge must be shared to encourage creativity.

The Act strives to strike a balance between the interests of owners and users of copyrighted material. A 2004 Supreme Court of Canada ruling confirmed that the purpose of the Copyright Act is to serve the public interest by encouraging both the creation and use of works.

Current Context: Responding to the Digital Revolution

The Internet has increased democratic engagement on a global scale, by providing citizens access to information from government, non governmental-organisations, scholars, educational institutions, and individuals. Students, researchers, artists, and instructors increasingly use online media to gather, store, and share information, and audio and visual works.

As publishing and entertainment companies amalgamate into more powerful corporations, the copyright debate has shifted towards the profitability of the content industry. These corporations have been heavily invested in creating the perception of the Internet as a commercial space that should be regulated as such. The campaign led by the publishing and entertainment industry has resulted in a strong focus in draft legislation on developing law to manage music file sharing that would have the effect of restricting many other uses of the Internet.

The Main Issues

Fair Dealing

The existing Copyright Act includes a "fair dealing" provision that allows for single copies to be made of portions of works for narrow categories of use, including for "research and private study".

Although Canada's fair dealing provision recognises the need to make copyrighted works available to encourage reasonable access for educational purposes, it is inferior to those of many other nations with more extensive provisions for educational use. Unlike the American "fair use" clause, the Canadian provision does not even include the right to make multiple reproductions of a work for classroom use.

TPMs and DRM : Restricting access and users' rights

Technological Protection Measures (TPMs) and Digital Rights Management (DRM) are methods of encrypting digital media to restrict access to it, either by preventing it from being copied or limiting its availability.

A TPM acts as a digital lock. By restricting access to digital works, they prevent fair dealing. For example, even though

“The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.”

Supreme Court of Canada ruling from CCH v. LSUC (SCC 2004)

“Legislative proposals that would facilitate lawsuits against our fans or increase the labels’ control over the enjoyment of music are made not in our names, but on behalf of the labels’ foreign parent companies.”

Canadian Music Creators Coalition



fair dealing allows for the use of quotations of works, TPMs would restrict students from using digital quotes in a Powerpoint presentation or other multi-media project.

TPMs also threaten privacy rights by giving the copyright owner the ability to monitor all 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 using a copy-protection TPM on CDs, that installed a “rootkit”—a software program on an individual’s computer used to monitor internet usage. In addition to infringing the users privacy, the computer on which it was secretly installed became more susceptible to viruses and hacking. Sony was liable for damages for using the rootkit and agreed to restrict the use of TPMs in the future. The case illustrates the need for the Canadian government to place severe restrictions on the use of TPMs.

Internet Licensing

Educational institutions are already paying millions of dollars in copyright licensing fees each year. Internet licensing would impose additional costs, and likely force Internet service providers to monitor Internet use. Since almost all content that is on the Internet is there because it has been made “publicly available”, imposing new fees could require universities and colleges to pay for materials that were intended to be shared freely.

New and complicated exceptions for Internet licensing have been proposed as an alternative for educational institutions; however, expanding rights for users through fair dealing would be the most straightforward way to protect the rights of users.

Internet Service Provider Liability

An amended Copyright Act will likely clarify the role of Internet Service Providers (ISPs) in monitoring online activities.

The “notice and takedown” model, used in the USA, requires ISPs to police Internet users and allows ISPs to remove selected content and in some cases even entire websites when they receive notice of alleged infringement. This model has proved problematic. Thousands of websites have been taken down on the basis of unproven accusations that they contained

content that violated copyright law. It has also been used as a tool in the USA to impinge on free speech and facilitate censorship. For example, the Church of Scientology has instigated the removal of web sites critical of its activities.

In Europe, a “notice and notice” monitoring system, under which the ISP would merely notify clients suspected of infringing activities and request that they voluntarily remove material in question, is more commonly utilized.

Statutory Damages

If a person is found liable for copyright infringement, the owner of the infringed work is entitled to “actual” or “statutory” damages. Actual damages are based either on the actual losses suffered by the owner, or the gains obtained by the infringer. Statutory damages, on the other hand, are pre-determined amounts, set out in legislation that can result in substantially larger payments for each infringement.

Because of their punitive nature, that ignores the intent behind the works use, statutory damages can intimidate users, preventing them from exercising their legitimate 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 materials is imperative for students, scholars, researchers, artists, and the general public, but the current Copyright Act does not do enough to define reasonable access for educational use of digital materials. Instead of taking measures to ensure reasonable access to digital materials, the federal government appears poised to restrict access to public materials with new amendments to the Copyright Act. Extending “fair dealing” to match the USA’s interpretation would significantly improve access to documents for educational purposes.

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