Copyright in the Public Interest

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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. Since then, four bills have been tabled to amend the Copyright Act for the digital era. Three of which: C-60 in 2005, C-61 in 2008 and C-32 in 2010 died on the Order Paper. Introduced in fall 2011, the newest version of the bill, C-11, An Act to amend the Copyright Act, received Royal Assent on June 29, 2012 and came into force on November 7, 2012.

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 materials. Restricting access to copyrighted works has significant and far-reaching implications for the education community.

What is the Copyright Act?

Copyright has historically been based on the idea that knowledge must be shared to encourage creation. 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, like 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, organisations, researchers, schools, and individuals from around the world. With this increased access to knowledge, new opportunities have been created 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 spent 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. 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 changes that severely restrict users' rights. The campaign led by the publishing and entertainment industries has resulted in a strong focus in draft legislation on restrictions of users' rights, likely intended to shut down file sharing.

Fair Dealing

The most fundamental user right in the Act is the right to fair dealing. Fair dealing allows users to, in certain circumstances, 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. In 2004, the Supreme Court set out six factors to consider when determining if a use is "fair": 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 effect of the use 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. 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. Bill C-11 has expanded the scope of fair dealing to include not only parody and satire, but also educational provisions, a measure long advocated by students, staff, and faculty. In particular, this expanded notion of fair dealing allows a school or a person acting under its authority to reproduce and display works within the institution and to communicate by telecommunications, or perform for students, works that are available on the internet as long as it is for the purpose of education and training. In addition, it implements provisions for distance education, allows for libraries to make copies of their collection in an alternate format if the original format is obsolete, and introduces greater flexibility for the transmission of materials for the purpose of interlibrary loans.[2] These amendments provide clearer guidelines on when students and educators can access works without permission or payment and when a license or negotiated agreement is required.

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

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.

Bill C-11 included amendments lobbied for by the entertainment industry that would make it illegal to circumvent a digital lock, regardless of whether or not the use was otherwise legal. Such a provision means that whenever a digital lock is placed on a copyrighted work, users lose all of their rights. For example, it would be illegal for an individual to play a European region-coded DVD on a DVD player purchased in Canada. Even though the individual has paid for the right to watch the DVD, it would be illegal, as doing so would require the user to circumvent a digital lock. In addition, although there are some exceptions granted to persons with perceptual disabilities, these remain quite restrictive.

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 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. 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 a court.

In spite of intense pressure from corporate industry giants, the federal government has maintained support for the less invasive notice model, though the current "notice and notice" provisions have yet to take effect.

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 new amendments to the Copyright Act remain flawed, many provide extensive new provisions to protect user rights that will help ensure a balance between access to and compensation for works that facilitate education, research, and creation.

Sources:
1. Law Society of Upper Canada v. CCH Limited, [2004] S.C.J. No.12, (2004) 236 D.L.R (4th) 395.
2. Geist, Michael. (2012) Canadian Copyright Reform in Force: Expanded User Rights Now the Law.