

BookNet Canada

Technology Forum 2007: Digitization and the Future of Canadian Publishing

“The Fight over Copyright”

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Technological Change and Copyright

- Technological change has dramatically changed the relationship between copyright and users.
- Technological change challenges old business models and how works are created and distributed.
- Everything changes when works are in digital form and can be copied and transmitted to the world at zero cost over the Internet by users.
- Technological change has caused imbalances in copyright regimes which were not designed to deal with either the potential of these technologies or the moral challenges associated with their potential.

Pre-Digital World

- Creator/publisher/distributor → users
- Use of works (reading) was non-infringing
- Copying was difficult and copies were degraded
- Copyright owners had limited ways of controlling how a work was used
- Capabilities to use a work for “fair dealing” were limited
- Copying by individuals was unavoidable “leakage”

Digital World

- Creator/publisher/distributor ↔ users
- Many uses of works involve copying
- Copying is simple and copies are perfect
- Unauthorized copies can be made available over the Internet and accessible to all
- Copyright owners can use DRMs to limit unauthorized access or copying, and provide user tailored services
- Digital technologies enable “remix” culture
- Unauthorized copying by individuals drastically affects markets for works

Users' Perspective

- Technical freedoms to copy create pressure to make uses legal e.g., copying onto mp3 players, p2p file sharing, digitization of books, remix of works
- Unprotected works can be used for fair or foul and users want nothing to interfere with fair uses
- Users want greater “rights” including expansion of exceptions to infringement e.g., expansion of private copying regime, “fair use” rather than “fair dealing”, greater access to works such as “orphan works”, shorter terms so works fall into public domain earlier, educational exemptions, unrestricted access to works
- User desires have major implications for rights holders

Rights Holders' Perspectives

- Copyright owners face loss of markets and sales. Estimated trade losses to book industry from piracy USD million: 606.5 (2005), 603 (2004). IIPA, 2006 *Special 301 Review*.
 - P2P systems enable individuals to be worldwide publishers - often with infringing content whose TPMs have been hacked.
 - Copyright owners want to offer new innovative services so want to stop p2p file sharing, use DRMs
 - Pirates hack through encryption, pick digital locks, and obliterate digital watermarks to unlock digital content.
 - Copyright owners want to recapture legal balance e.g, WIPO Copyright Treaty rights of “making available”, legal protection for TPMs, remedies against those who facilitate infringements, notice and take down processes
 - Copyright owners desires are perceived to negatively impact users.
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War and Peace

“It’s become conventional that we’re in the middle of a copyright war.”

- Jessica Litman “War and Peace: The 34th Annual Donald C. Brace Lecture, Journal”, Copyright Society of the U.S.A. 1 (Lecture April, 14, 2005)

Do Arguments Against Protection for TPMs Stand UP?

- Philosophical reasons
 - Is free good?
 - What really benefits consumers, authors and rights holders?
 - Changes the balance in copyright
 - Provide means for harnessing opportunities in digital environments. Conditional access business models rely on protection for TPMs.
 - Fears of “digital lock-up”
 - Misinformation about the DMCA
 - TPM’s are about “para-copyright” - “The law should not protect technologies that protect copyright.”
 - Privacy concerns
 - DRM systems give users choices and enable copyright holders to be paid for uses of works.
 - PIPEDA was passed to promote e-commerce knowing that personal information was going to be collected, used and disclosed.
 - Law should provide legal infrastructure to enable and support new business models and to curtail market inefficiencies caused by unauthorized uses.
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Origins of “User Rights” in Canadian Copyright Law

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“...the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. 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. As Professor Vaver, *supra*, has explained, at p. 171: ‘User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.’” *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13.

What did the Supreme Court Mean by “User Rights”?

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- Is it a defense to infringement?
 - Is it an important defense needed to maintain the balance between what can be controlled and what can't?
 - Is it a defense that is to be liberally construed?
 - Is it a right that can be asserted against a person if the person interferes with or prevents a “fair dealings” with a work?
 - Is it a right that can be asserted against a person if the person interferes with or prevents any dealing with a work that is covered by exception?
 - Is it a right that can be asserted against a person if the person interferes with or prevents any dealing with a work that is not within an exclusive right?
 - Is it a rule of construction that traditional freedoms and rights of use in chattels should not be interfered with unless provided?
 - Is it a broader statement reflecting that users have interests that ought to be protected?
 - Is it a metaphor, red-herring? Some combination?
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Some Final Remarks:

- Copyright is a crucial instrument in creating incentives for the production and dissemination of works
- The copyright landscape is in flux
- There is a growing recognition that copyright needs reform
- The Act reflects a balance among the interests of all parties - but it is not a zero sum game
- Re-adjustments to copyright law are needed to adapt to the global digital environment.

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