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AFTER ACCESS:
CANADIAN EDUCATION AND COPYRIGHT REFORM

MICHAEL GEIST

FEW LEGAL ISSUES HAVE PROVEN AS DIVISIVE IN RECENT YEARS AS COPYRIGHT REFORM.

WITH THE DRAMATIC GROWTH OF THE INTERNET IN THE 1990S, THE CANADIAN government developed a well-regarded strategy for addressing the emerging issues posed by the "information highway." The strategy featured legal reforms to address privacy and e-commerce, administrative reforms for the government online initiative, and connectivity programs such as SchoolNet, designed to provide ubiquitous Internet connectivity in Canadian schools. SchoolNet was perhaps the biggest success as Canada became the first country in the world to connect every school to the Internet.

Several years later, the federal government is again faced with the need to develop a strategy with respect to the Internet and education. With connectivity now achieved, it must focus on how to use that access to its best advantage.

Copyright law poses significant challenges to the use of the network since alongside exciting new educational initiatives come questions about a copyright policy that strikes the appropriate balance between the needs of creators and users. Indeed, despite years of connectivity, there is a growing sense that Canada has failed to take full advantage of educational network connectivity and that copyright law is one reason why.

THE COPYRIGHT BALANCE

Few legal issues have proven as divisive in recent years as copyright reform. Proponents of stronger protections, fearing that the Internet and digital technologies will eviscerate traditional copyright protections, have actively lobbied for new powers to block unauthorized access to copyrighted material as well as for new compensation schemes to pay for new technological uses of old work.

Opponents of stronger protection, pointing to the recent Supreme Court of Canada CCH decision involving legal publications, argue that Canadian copyright law must adopt a balanced approach in which the interests of creators are addressed in parallel with the needs of users and the larger public interest. Considering the unexpected consequences of copyright reform in other jurisdictions, which has led to, among other things, jailed software developers, a chilling of scientific research, and copyright litigation over technologies such as garage door openers, opponents argue that Canada must navigate a balanced approach that avoids the mistakes made elsewhere.

While the notion of balance in copyright law has proven contentious in some quarters, it is in fact a well-established principle under Canadian intellectual property law. For example, under Canadian patent law, inventors receive a limited monopoly over their invention that grants them exclusive authority over how that invention is used. In return, the patent expires after a prescribed period at which time anyone may use the invention without prior authorization. Moreover, obtaining patent protection also requires inventors to fully disclose and describe their invention so that the public obtains the immediate benefit of that knowledge.

The Canadian Supreme Court has affirmed a similar balance in copyright. Creators enjoy a basket of exclusive rights such as the sole right to reproduce or perform the work. In return, the term of copyright protection is limited so that expired work becomes part of the public domain and may be used by anyone without permission or payment.

Furthermore, the Copyright Act establishes a series of exceptions known as "user rights," that enable the public to freely use portions of copyrighted work for such things as research, private study, news reporting, and criticism. While some parliamentarians have expressed concern that these exceptions lead to "freebies", in fact it is these exceptions that ensure that the Copyright Act retains the balance needed to give creators their exclusive rights.

EN BREF **Peu de questions n'ont divisé les opinions autant, durant les dernières années, que celle de la réforme du droit d'auteur. Le Canada doit modifier sa Loi sur le droit d'auteur afin que celle-ci puisse répondre aux besoins de la technologie numérique tout en maintenant les principes du juste équilibre et de l'utilisation équitable. En effet, c'est par le respect de ces principes que l'on pourra se prémunir contre les effets possiblement nuisibles des mesures de protection technologiques et faciliter la mise en œuvre d'une stratégie de numérisation nationale. Les éducateurs et les éducatrices peuvent jouer un rôle positif pour promouvoir le changement en appuyant activement une vision bien canadienne du droit d'auteur, laquelle dédommage les créateurs, facilite l'accès aux œuvres et fait la promotion de notre culture. L'accès à Internet étant généralisé dans nos écoles, il est maintenant temps de maximiser l'utilisation du réseau pour le bien de tous les Canadiens et Canadiennes.**

LOOKING AHEAD

In the early 1980s, the Trudeau Liberal government embarked on a major copyright reform initiative, commissioning more than 20 independent studies that led to "From Gutenberg to Telidon", a lengthy study that established a roadmap for future copyright reform. When Brian Mulroney's Progressive Conservative party assumed power in 1984, it replaced the Liberal plan with a new vision that provided the foundation for massive change to Canadian copyright law in the late 1980s and 1990s.

The Chretien and Martin Liberal governments held a public consultation on copyright in 2001, which led to Bill C-60, a collection of special interest copyright reforms. With a Conservative government now in Ottawa again, there is a very real possibility that history might repeat itself.

Bill C-60 has been relegated to the dustbin and the new Conservative Ministers responsible for copyright have provided some clues that change may be on the way. Industry Minister Maxime Bernier is reported to be a free market advocate, questioning the desirability of intrusive government regulation, while Canadian Heritage Minister Bev Oda, a broadcast industry veteran, has spoken of the need to justify governmental cultural support.

Together, the two Ministers may forge a new vision of Canadian copyright reform premised on a market-oriented approach. What could their vision look like?

COPYRIGHT EDUCATION

Rights holder groups frequently point to copyright education programs as essential for reducing infringement. While there is value in those programs, the education community should become more aware of the positive user rights that they enjoy as part of the copyright balance. A recent review of copyright guidance within Canadian universities revealed that most universities have not established a specific copyright liason position, do not reference recent changes in Canadian copyright law that broaden the scope for usage of copyrighted works, and remain heavily reliant on Access Copyright, a leading copyright collective, for information on copyright.

All three of these shortcomings should change and the government can assist in that regard. The establishment of a copyright advisory position within educational institutions is long overdue as that person could help foster greater awareness of copyright within the local education community. Moreover, the copyright advisor could work on institutional open access initiatives and the use of alternative licensing schemes.

The government should also encourage universities to re-consider their current copyright guidance. In keeping with the Supreme Court of Canada's interpretation of the Copyright Act, Canadian universities should be adopting aggressive interpretations of copyright law by taking full

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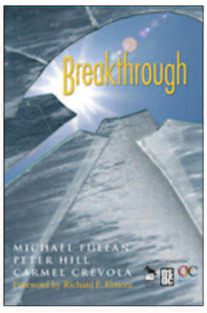

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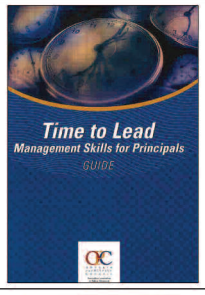

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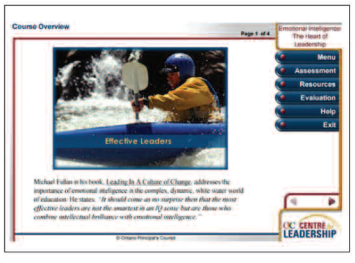

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advantage of their user rights and limiting the role that Access Copyright plays in interpreting the use of copyright works within the education community. The government can therefore consider establishing its own guidance document that points to the interpretation of fair dealing and highlights the full scope of the educational exemptions.

FAIR USE

The government should consider reform of the current fair dealing provision by adopting a "fair use" provision in its place. In the process, it should reject the education community's request for a new Internet exemption for Internet-based materials as well as Access Copyright's proposal for an extended licensing system.

One of the most important long-term effects of the Supreme Court of Canada's CCH decision was the court's strong support for the fair dealing provision, which it characterized as a user right. The Court emphasized the importance of a broad and liberal interpretation to fair dealing, which covers a series of prescribed uses including research, private study, criticism, and news reporting.

Unfortunately, the relatively rigid categorization of exceptions runs counter to the very notion of a broad and liberal approach. On this issue, the United States provides the ideal model since its fair use provision does not include such limiting language, thereby encouraging innovative, fair uses of existing work.

A full fair use provision – one that would amend the current *Copyright Act* so that the list of fair dealing rights would be illustrative rather than exhaustive – would help solve many difficult issues. These include the facilitation of a national digital library, discussed in further detail below, which is currently hampered by the limitations of fair dealing.

Similarly, a shift to fair use would help bridge the gap on the use of the Internet in Canadian schools by rejecting both the blanket Internet exception for school use proposed by some education groups and the comprehensive Internet licensing scheme advocated by Access Copyright. The change would clear the way for fair uses that are not currently covered by the private study or research fair dealing rights, but also ensure that creators are compensated for uses that extend beyond what might reasonably be viewed as fair use.

CAUTION APPROACH TO TECHNOLOGICAL PROTECTION MEASURES

Academic textbook publishers are increasingly recognizing the potential for electronic distribution of their materials. While digital distribution represents a growing market, its emergence raises important questions related to the use of technological protection measures. Owners of online databases and other digital content deploy technical protection measures (TPMs) to establish a layer of technical protection that is designed to provide greater control over content. For example, purchasers of electronic books often find that their e-books contain limitations restricting their copying, playback, or use on multiple systems. In fact, e-books are frequently saddled with far more restrictions than are found in their paper-based equivalents. While TPMs do not offer absolute protection – research suggests all TPMs can eventually be broken – companies continue to actively

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search for inventive new uses for their digital locks (note that digital rights management or DRM is a form of TPM).

The education community should be concerned with the use of TPMs for digital books since they can be used to eliminate the educational exceptions. For example, if the digital lock prohibits even limited copying, the effect will be to stop copying that is otherwise permitted by the Copyright Act. It is difficult to ascertain whether publisher TPMs include copying rights that incorporate fair dealing and the educational exceptions, though to date few have publicly indicated that they do.

Given the flawed protection that TPMs provide, content owners, represented by the powerful U.S. music and movie associations, have nonetheless lobbied for legal protections to support them. Although characterized as defending copyright, this type of legislation does not directly address the copying or use of copyrighted work. Instead, it focuses on the protection of the TPM itself, which in turn provides protection for the underlying copyrighted content.

Experience with legal protection of TPMs in the United States, which enacted anti-circumvention legislation as part of the *Digital Millennium Copyright Act* in 1998, demonstrates the detrimental impact of this policy approach. Consistent with fears expressed by the Act's critics, Americans have since suffered numerous abuses that compromise not only security and fair competition but also free speech and user rights under copyright.

From a free speech perspective, the threat of potential lawsuits has chilled research. For example, several years ago Princeton computer scientist Edward Felten sought to release an important study on encryption that included TPM circumvention information. When his plans became known, he was served with a warning from the Recording Industry Association of America that he faced potential legal liability if he publicly disclosed his findings, since the mere release of circumvention information might violate U.S. law.

Anti-circumvention legislation has also combined with TPMs to steadily eviscerate fair use rights, such as the ability to copy portions of a work for research or study purposes, since the blunt instrument of technology can be used to prevent all copying – even that which copyright law currently permits. They likewise have the potential to limit the size of the public domain, since in the future work may enter public domain as its copyright expires, yet remain practically inaccessible as it sits locked behind a TPM.

In light of experience elsewhere, where TPMs have had negative consequences but done little to address emerging issues such as peer-to-peer file sharing, it is evident that Canada does not need protection for TPMs, but rather protection from them. While the ideal approach would be to simply drop incorporating anti-circumvention measures into Canadian law, the government has proposed the next best alternative by refusing to criminalize devices that could be used to circumvent TPMs and by requiring a direct connection to traditional notions of copyright infringement. This approach deserves broad support since it avoids some of the more outrageous consequences visible in the United States.

NATIONAL DIGITIZATION STRATEGY

Canada has the opportunity to provide global leadership by becoming the first country in the world to create a comprehensive public national digital library. Fully accessible online, the library would contain a digitally scanned copy of every book, government report, and legal decision ever published in Canada.

A national digital library would provide unparalleled access to Canadian content in English and French along with aboriginal and heritage languages. It would serve as a focal point for the Internet in Canada, providing an invaluable resource to the education system and ensuring that access to knowledge is available to everyone, regardless of economic status or geographic location.

The general public would enjoy complete, full-text access to thousands of books that are now part of the public domain because the term of copyright associated with those books has expired. For books that remain subject to copyright, Canadians could still scan copies, but only be granted more modest access to the content, providing users with smaller excerpts of the work – a policy that is consistent with principles of fair dealing under copyright law.

From a cultural perspective, the library would provide an exceptional vehicle for promoting Canadian creativity to the world, leading to greater awareness of Canadian literature, science, and history.

CANADA HAS THE OPPORTUNITY TO PROVIDE GLOBAL LEADERSHIP BY BECOMING THE FIRST COUNTRY IN THE WORLD TO CREATE A COMPREHENSIVE PUBLIC NATIONAL DIGITAL LIBRARY.

While digitally scanning more than 10 million Canadian books and documents is a daunting task, Google is undertaking an even larger project at a cost of $10 per book. Assuming similar costs for a Canadian project and a five-year timeline, the $20 million annual price tag represents only a fraction of the total governmental commitment toward Canadian culture and Internet development. In fact, if Canada fails to move quickly on this initiative it may find itself seeking to catch up to European countries, which plan to digitize six million books by 2010.

CONCLUSION

The education community has the opportunity to emerge as a positive force for change by actively supporting a uniquely Canadian vision of copyright that compensates creators, facilitates access, and embraces Canadian culture. With Internet access now widespread within the Canadian education community, it is time to maximize the use of the network for the benefit of all Canadians.

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