

Submission Regarding a Prospective New Canadian *Copyright Act*

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1. How do Canada's copyright laws affect you? How should existing laws be modernized?

I am a professor of criminology at a Canadian university. I write articles and books based on my research and have varying connections to copyright – sometimes solely mine, sometimes signed away, sometimes shared with those who distribute my work. Whenever the copyright is solely mine, I post a copy of the work on my web site where anyone can access it because my preference is for a free internet and because I believe that part of what has made the internet the incredible resource it is today are the legions and legions of people who want to share what they do with the rest of the world. As a producer, I have no problems with copyright laws as they exist today.

As a professor I am also a consumer of the works of others. I cite and quote others' work in my own works and when I teach. I use software that has been created by others. I use video and other media in my lectures because I find that the current generation of students relates far better to video material, or a mixture of video and text, than they do to text alone. The main difficulty I experience with respect to video materials is the ambiguity surrounding how "fair use" translates into the video medium. When I buy or rent a video, I assume the creator has received a royalty for their production and, having paid my fee, now feel I have that right to use that material however I see fit as long as I am not claiming or distributing it as my own or reproducing it for further distribution for profit. As Supreme Court of Canada said in *Théberge v Galerie d'Art du Petit Champlain* (2002),

Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. (at 31)

There should be no lock on the material so that I can make back-up copies, can place/activate it in/on whatever new devices I purchase, or use software to change its format or select parts of it for other uses. Any new *Copyright Act* should entrench a liberal definition of "fair use," recognize "honest and reasonable belief of fair use" as a defence in any challenge, and pay particular heed to the research and teaching community's need for cultural material for analysis and critique.

As a citizen and parent, I am concerned that any proliferation of Digital Restriction Technologies will create an even greater gulf between rich and poor in our society, and between the completely healthy and handicapped, and that less free exchange of ideas (whether these be in articles, books, songs, or video media) will act to suppress social analysis, criticism, and innovation. I am also concerned that DRM technologies are a violation of privacy; content distributors should

have no right to invade the living rooms, computers, communications devices and digital media players of the nation.

I find it fascinating that most of those I see advocating for the proliferation of digital locks, criminalization of anti-circumvention technologies and who seek greater licensing and control are not the original creators – who, from what I have seen of the submissions, seem for the most part to be arguing with consumers for an approach that balances creator and consumer rights -- but the “middle men” and distributors whose technologies and business models are rooted in the 19th and 20th centuries. While there will always be a place for those who have the capital and infrastructure to engage projects none of the rest of us can, digital technologies and especially the Internet now also allow for more direct connection between creator and consumer, and it is there where innovation both in “product” (whatever that product may happen to be) and distributive models will be greatest. This diversity should be encouraged rather than suppressed.

2. Based on Canadian values and interests, how should copyright changes be made in order to withstand the test of time?

The digital landscape is changing so quickly that any legislation that names specific technologies is bound to be obsolete by the time it is passed into law. Accordingly, any new *Act* should be technologically neutral – both in the media that are used to distribute content and in the specific mechanisms that distributors might use to limit its distribution -- and should outline in generic terms the principles that should guide provisions of both “fair use” and “unfair use.” I further suggest that the legal emphasis be placed on the definition of “unfair use” with the onus of proof on those who believe unfair use has occurred, rather than on those who believe what they do falls within the purview of “fair use.” I have suggested above that “fair use” should be defined liberally, and implicitly that “unfair use” be defined narrowly – in keeping not only with Supreme Court decisions that recognize that both creators and consumers have rights and interests, but also with the sorts of freedoms of use that should exist in a free and democratic society -- with neither dominating the other. As the Supreme Court of Canada recognized in *Théberge* (2002),

The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. ... Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. (at 31-32)

The requirements of a free and democratic society imply for me rights of personal use as defined by the purchaser (short of plagiarism or reproducing and distributing the creation for profit), and would include (at minimum) being able to use the work for criticism, research, teaching, review and parody. [This list is not necessarily exhaustive; no doubt other contributors to this consultation will note other reasonable uses that I have not considered.]

A free and democratic society also requires any “punitive” actions against those who are thought to be violating copyright to be grounded in due process (e.g., Internet users should not have their access taken away on the basis of allegations alone) and proportional in its reach (e.g., financial penalties should be limited to a demonstration of actual damage done, thereby precluding the

“show trials” we see in the United States where persons are being sued for six and seven figure amounts for downloading fewer than a dozen songs).

3. What sorts of copyright changes do you believe would best foster innovation and creativity in Canada?

Just as we believe economies thrive in free markets, innovation and creativity thrive in a climate of free exchange of ideas. Copyright protection should help ensure that creators are appropriately rewarded for the fruits of their labours, but the creations of any one generation are the foundation of innovation for the next; we will all lose if a fetish of proprietarism causes us to put a price tag on everything and charge and re-charge for each variation on the same theme. I believe such a model – which is evident among those who favour a proliferation of “digital locks” and other Digital Restriction Technologies – is actually quite self-defeating both for the creators and industries themselves (e.g., software, music, film) and for society in general. It places primary emphasis on short-term profit but ignores the manner in which the underground “illicit” market contributes to the growth of markets for its products.

For example, when I teach courses in Research Methods, I often use taped scenes from a TV program called *House* – the central character of which is a physician who excels at diagnostics in a large hospital – to illustrate the inferential logic that is involved in the diagnostic process and to draw parallels to the same process of eliminating rival plausible explanations that underlies research. I believe that this time shifting and “distribution” of copyrighted content on my part is within the realm of “fair use” given the current *Copyright Act*. One thing that surprised me was how many students told me afterward how the exposure I gave them to *House* in class roused their curiosity about the program, which they then began to watch. What would happen if my behaviour were suddenly to be declared “illegal”? Would I go and purchase copies of *House* videos with explicit licensing permissions for my classroom situation? No. Who loses? Me, perhaps, because that lecture will be less interesting until I find some free resource I can access on the internet that will allow me to illustrate the same point. My students, perhaps, but in fact they will not know what they are missing. The main people who lose in this scenario are the producers of *House* and the networks that hope my students and I will watch their program because one strand of program interest generated through word of mouth is lost. “Protectionist” legislation not only diminishes my ability to be innovative and creative in what/how I teach; it also undermines the very markets producers of content wish to foster. I often wonder how much ostensibly “illicit use” (as the corporate end of the film/music/software industries depict it) is actually a precursor to other “licit” use by the word of mouth that is created, or is the basis for other forms of consumption (e.g., the student downloads the music from a p2p web site, but then buys tickets for the group’s concert and buys a T-shirt while there).

This example raises another point about the economic losses these industries assert they experience when they equate lost revenue with “theft.” One would think that there is a bottomless pit of money in the world and if only every transaction and every new exposure to a song or film or piece of software or art could be controlled, those who create and distribute them would be appropriately recompensed for their investment and innovation and creativity would be fostered. But the numbers and the social sources of creativity and innovation it imagines are illusory. There is not a bottomless pit of money in the world. If copyright laws were to require it, I would

not buy one copy of a CD for my car, and another of the same CD for my house, and another for my iPod. And when my students – many of whom are in debt for their educations and most of whom are worried about paying their rent and wondering how they will pay for their books for next semester -- explain their downloading practices to me, it is never with a sense that they would go out and buy the films and CDs they download if downloading were no longer possible.

One would also think from the major corporations and lobby groups who argue for more protectionist approaches that they are also the major sources of innovation and creativity in life, but that, too, is a falsity. Google was invented by two university students; Microsoft was born by Bill Gates's initiatives when he was a student; the same is true of Napster, Facebook and to some degree Twitter. As huge companies, they now can acquire other companies and engage in long-term development initiatives, but the innovative and creative roots of those companies are in a basement office. In the realm of music, do we really believe that company creations like the Jonas Brothers will lead the next generation of contemporary music? Or will it emerge out of a garage somewhere, as occurred with the Rolling Stones, Nirvana and the Tragically Hip? Ironically, while record companies are among the most aggressive in protecting their turf, their monopoly over elements that gave them that privileged position – ownership of high quality recording studios and control over broad distribution networks – is now disappearing through ever-improving digital recording hardware and software that can be run through your personal computer, and the internet, which gives everyone access to the world. One could make the same argument about film; big studios are still the only ones at this time who can make and distribute *Batman* or *Harry Potter*, but we are now in the position where any aspiring writer-director with a high-definition camera from Future Shop, the editing capability of Adobe Premiere and some talented actor friends or the interviewing chutzpah of Michael Moore can produce a broadcast-worthy drama or documentary. There will always be a unique role that big corporations can play because of the amalgamation of talent and infrastructure that their capital can bring together, but, particularly with the democratization of processes that digitization is bringing to one creative domain after another, we shoot ourselves in the collective foot if we make it so that indebted students and the often financially marginal members of our artistic communities cannot partake in consumption of contemporary culture through fringe activities.

A fair use policy that recognizes not only the rights of creators, but also the limits of those rights, will help ensure diverse sources of innovation and a culturally diverse pool of talent that will feed both corporate and independent producers. The restrictive policies that some contributors to this discussion seek are in neither their nor society's long-term benefit as they will restrict the innovative and creative activity that forms the basis of a healthy and thriving economy.

4. What sorts of copyright changes do you believe would best foster competition and investment in Canada?

Canada should honour its obligations under the WIPO treaty it signed in the interests of honouring its international obligations, but should do so in a "Canadian" manner that does not simply parrot US protectionist approaches. As outlined above, this should include a balanced interpretation of "fair use," and a limited definition of "unfair use" that addresses any allegations of copyright violation in due process. Penalties should not exceed demonstrable damages.

That said, the heavy protectionist hand of the United States is clearly evident in the WIPO treaty, particularly in Articles 11 (“Obligations concerning Technological Measures”) and 12 (“Obligations concerning Rights Management Information”). Canadian legislation should deal with this by limiting anti-circumvention technologies only in connection with Copyright violations and not when in the context of fair use.

One element of the WIPO treaty that would seem more problematic, is Article 3, which states that “Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.” Of particular concern is Article 6*bis*, which deals with “moral rights” and states,

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

I have not researched the jurisprudence in relation to this Article but am concerned it may violate Canada’s *Charter* guarantee of freedom of expression to the extent it could be used to block parody, which may be done as ridicule, which specifically sets out to be “prejudicial to [the original author’s] honor or reputation.” Protections for creators should not include a right to censor others.

More generally, Canada should maintain an international leadership role in encouraging innovation and competition through open access approaches to the tools of creation – the internet (e.g., developing high-speed access outside urban settings; promoting open access in urban settings; requiring net neutrality); open source software; common digital standards as appropriate (to encourage platform-independent applications); open academic journals; no copyright on government data bases (with appropriate confidentiality protections), and p2p networking. A culture of open information sharing and a strong research sector will promote innovation, which in turn encourages competition and investment.

5. What kinds of changes would best position Canada as a leader in the global, digital economy?

The digital world of 2009 is already almost unrecognizable from the digital world of twenty years ago, but it is still in its infancy. Every year brings new developments and some new “must have,” but we are still at that stage where new software developments interact with infrastructure developments, which interact with shifts in price points, which affect accessibility, which creates new opportunities for software, and so on. Canada – a vast country with a small but culturally and geographically diverse populace – serves only to benefit by the greater connectedness that digital technologies, with the internet at its core, can offer. A central tenet of Canadian identity is that we do not overemphasize individual rights at the expense of the collective, as the United States does, nor the collective at the expense of the individual, as far too many other nations do. The “Canadian way” is to seek balance between these two extremes and reward and respect individual interests while acknowledging that we are a diverse populace and that no rights should be considered in isolation of the rest of society.

Copyright policy should reflect that identity; a new *Copyright Act* should reward innovation through protection while limiting those rewards in both time (the current life plus 50 years would seem more than enough) and space (after legitimately acquiring a song or film or software the creator should have no further say in its use; consumers should be able to time and format shift; circumvention technologies should be encouraged except when they are used to violate copyright for commercial gain). Penalties for copyright violation should be limited to demonstrated damage experienced in order to avoid the “show” trials we have seen in the United States where wealthy corporations absolutely trample relatively powerless individuals who contravene the corporation’s narrow sense of corporate interest.

Innovation and creativity are encouraged by free trade and the free exchange of information and ideas. A new Canadian *Copyright Act* will achieve balance by protecting the interests of creators while simultaneously affirming limits to creator control. A fetish of control undermines our long-term collective interest and suppresses the innovation and creativity that is the foundation of both economic development and a free and democratic society.