Canadian Copyright Issues
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The Canadian Copyright Act (http://www.canlii.org/ca/sta/c-42/) is a federal law that applies across the country and fits into many transnational agreements. It grants creators many transferable property-like rights over original works, including literary, dramatic, musical, artistic, and certain other intellectual works. Although these rights are far reaching, they do not offer a complete monopoly over copyrighted works.

In fact, the Copyright Act and subsequent court rulings have identified certain opposing rights, such as user rights, that allow others to avail themselves of works without seeking permission. For example, “fair dealing” exceptions allow for private study, research, criticism, review and news reporting while other specific exceptions cover other cases, including some educational uses.

Copyright issues seem so complex because they oppose two very important goals. On the one-hand, creators must be recognized for their labours and receive appropriate economic compensation. This is achieved by the property-like monopoly on the economic exploitation of works. On the other, a free and democratic society must be able to discuss, participate and share in our common culture and knowledge in a fair and equitable manner. Again, “fair dealing” and other user rights allow for this. What is fair is often a matter of opinion and a strong consensus is sometimes difficult to establish, especially since social uses of copyrighted works may dilute the potency of certain business models. To make matters worse, changes in information technology have brought new stakeholders to the copyright debate.

In the pre-Internet era, copyright legislation was designed as an industrial application: creators would assign or license rights to corporations by contract, acting as “rights-holders”, which could trade or sell rights between them. Novels were thus published, eventually adapted to movies and perhaps broadcasted on television. Those concerned were media companies, broadcasters and creators, who themselves could be seen as professionals practicing a particular trade, such as freelance writing. The layperson or consumer was rarely concerned with copyright issues, apart from purchasing books or records or watching TV.

The advent of networked digital environments of course changed this balance. Said bluntly, one can now easily be capable of being a creator, a broadcaster or a publisher as well as a simple consumer of their own creations and the copyrighted content of others. This is self evident with music. One could not only trade songs with friends with file sharing software, but also use simple software to transform these into their own versions and send them around the world. While many voices have spoken up to decry or celebrate this new reality, one thing is certain: the foundations of copyright-based industries have been shaken beyond recognition.

Of course, corporations have tried to exert pressure on governments to modernize copyright legislation to ensure the stability of their operations. Most notably, they successfully lobbied the

World Intellectual Property Organization (WIPO) in 1996 to enact two treaties to address digital uses of copyrighted works. Provisions included new categories of rights, such as the “making available right” to enable only rights-holders the power to post works online and “anti-circumvention rights” to render illegal the tampering with digital encryption and other technological protection measures (TPM), preferably as a criminal offense. This has lead to the Digital Millennium Copyright Act (DMCA) in the United-States and a European Directive. But Canada has yet to substantially modify its Copyright Act.

Following the WIPO Internet treaties, Canada amended its legislation in 1997 to provide some quick fixes and pledged to embark on national consultations to determine the best course of action for a full copyright reform. The goal was to have most issues covered within 5 years, but bitter squabbling, new business practices and minority governments with more urgent matters to settle have left copyright reform behind. Again, a consensus is difficult to identify.

Well-established creators and major media companies stand to lose the most from the potential of new technologies. Because they are the target of digital piracy, they usually clamor for stronger copyrights, such as a longer duration beyond 50 years after the death of an author, the ratification of the WIPO Internet Treaties and the diminishing of “user rights” such as the weakening of fair dealing by imposing constraints.

The goal of these heavy hitters is to create a regime where digital devices are crippled by legal or contractual means and enforced by technological measures to emulate the pre-Internet golden days. One could only copy a song from the Internet to a music player if they have obtained this right, usually for a fee. Although civil libertarians and technologists have decried this approach, it is the one that best guarantees the survival of their business models. The ultimate test, it seems, rests on the shoulders of consumers, if they buy into this approach – quite literally.

Conversely, creators and media companies, especially ones operating in the margins, have explored new technologies as a way to promote their works or find new markets. For example, musicians and authors, including renowned ones, post their creations for free and invite fans to purchase merchandise or attend shows. This has attracted much attention, even prompting some large and established corporations to test these new business models.

Similarly, the trend of user-generated content, also called Web 2.0, has yielded an unwavering tide of content, available for free. While one could question the quality of these cultural products, their popularity and impact on our daily digital lives are now commonplace. As well, the growing trend by large libraries and corporations like Google to digitize works that are out-of-copyright or in the public domain also provides pressure to the approach retained by large media companies. These are part of our cultural heritage and are, after all, free alternatives to new content.

It is important to understand that copyright applies to works in digital format. What is unclear is how some provisions are applied to these new categories of works and new categories of uses. Because copyright exists to foster fair markets of cultural goods, how individuals consume works in the digital arena is almost as important, if not more, to copyright reform than any claim

by rights-holders. You may want to sell a proverbial digital widget in a particular manner, but you cannot force a consumer to adhere to your terms if there are alternatives.

Certain consumer groups have taken sides in the copyright reform debate. Unbeknown to many, Canadian Libraries, particularly in Universities, have begun to purchase vast quantities of digital works. This includes not only academic writings, but also music, digitized versions of paintings and sound recordings. It is not surprising then that Librarians, University Professors and Administrators have been actively following the reform process and proposed their points of views.

As well, consumer groups have followed suit. Most notably, many questions remain concerning contract law and consumer protection. The consumption of digital works, be them software or music, involves the adherence to contracts, which terms have been unilaterally determined by media corporations. These are usually complex, long, if not illegible to the layperson, far-reaching and where negotiating terms is not an option. A similar worry deals with Internet network traffic management strategies adhered to by certain telecommunications firms such as Bell Canada, for which the CRTC is currently seeking comments. The power of a single individual in these cases is rather theoretical.

It seems ironic that consumers and creators do not seek to join hands in the copyright reform debate. In fact, creators are a very special kind of consumer of copyrighted works. How could one aspire to become a writer without consuming, deconstructing, discussing, quoting and learning about contemporary and more ancient texts? The same holds true for all the categories of works protected by copyright.

In that sense, the biggest threat to creators, rights-holders and consumers alike stems from an unbalanced approach to copyright reform. On the one hand, property rights are the recognized method to ensure the emergence of a market in cultural goods. On the other, this property right cannot prohibit social uses of protected works, for education, news reporting and criticism, all of which are required in a free and democratic society.