Discussion Paper On Digital Copyright Issues

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Canadian Library Association
Canadian Museums Association
Canadian School Boards Association
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Copyright Consortium of the Council of Ministers of Education, Canada
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1. Introduction 1

The Copyright Forum serves as a venue for the discussion of digital copyright issues of interest to Canadian educational institutions, libraries, archives and museums. The Forum currently comprises thirteen national associations. The members of the participating associations are both creators and users of digital intellectual content and a number of institutional members act as Internet service providers.

The institutions represented in the Copyright Forum play a major role in furthering education, learning, research, and social, cultural and economic development in Canada. They also function as key players in the provision of public access to Canada's cultural and heritage resources. As such, they are recognized partners and stakeholders in a broad range of strategic government initiatives aimed at:

accelerating the transition to a knowledge based economy;

providing young Canadians more and earlier opportunities to get involved, develop their talents and expand their skills;

providing Canadians digital access to their cultural and historical heritage;

improving the knowledge infrastructure by attracting the best researchers and encouraging Canadian graduates to put their talents to work here at home;

improving access to Internet based content through schools and libraries; and

positioning Canadians to compete effectively in a global knowledge-based economy.

The associations participating in the Copyright Forum believe that the role played by educational institutions, libraries, archives and museums must be viewed as a key element in any consideration of public policy related to

the digital environment. In that context, it is essential to ensure that the Copyright Act maintains an appropriate balance between the rights of creators to benefit from the use of their works and the needs of users to access and use those works on reasonable terms.

The purpose of this discussion paper is to outline the Forum's perspective on major issues that have to be addressed in revising the Copyright Act in order to make it a more effective instrument for achieving public policy objectives in a digital environment. The paper highlights the key issues, sets out a number of principles underlying the Forum's approach, and makes a series of specific recommendations relating to the revision of the Copyright Act.

2. Context and Key Issues

As bandwidth and transmission speeds increase and compression technologies become more sophisticated, new opportunities are emerging. Digital technologies are the catalyst—and the means—for enormous changes in the way Canadians function at work, at home and in schools, libraries, archives and museums.

The trend toward globalized economies, itself deeply influenced by technological advances, is now being paralleled by the internationalization of copyright laws applying to digital technology, particularly the Internet. Canada has signed two new international agreements on copyright prepared under the auspices of the World Intellectual Property Organization (WIPO). By signing these treaties, Canada has signaled its intention to take the next step of ratifying them. These treaties raise a number of issues for Canadian copyright law and may be the impetus for significant amendments to the law. However, the WIPO treaties form only part of the overall context for change. Outlined below are other elements that form an integral part of this context.

Balance

he Canadian Copyright Act provides a carefully crafted balance between two competing public policy objectives. The first objective is to provide adequate and effective legal protection to the creators of literary, dramatic, musical and artistic works in order to encourage further creation and dissemination of new creative works to the public. The second objective is to ensure that these works are as accessible as possible for the benefit of society as a whole. The Copyright Act provides creators with legal rights over their creations to enable them to enjoy the

fruits of their labour—in economic terms, to be paid for the use of their work. The Act provides a counter balance by limiting the rights of creators through exceptions that permit reasonable access to those works for purposes of education, research and private study.

In a digital environment, where many creators are concerned about the ease with which works can be reproduced and transmitted electronically, the task will be to amend the Copyright Act in a way that maintains appropriate incentives for creators while allowing appropriate exceptions that permit reasonable uses of digitally formatted works. From the Forum's perspective, it is essential to address both sides of the issues emerging from the application of digital technologies simultaneously. Exceptions and limitations have to be addressed at one and the same time as new protections and new sanctions are considered.

There is also another dimension to the balancing issue—the public domain. Copyright law grants a limited monopoly to copyright owners; copyright protection does not extend beyond original expression, nor does it hold for an indefinite period of time. Facts and ideas remain outside the scope of copyright, and at the end of a specified period of time even protected works fall into the public domain. In the Forum's view, safeguarding the public domain is as fundamentally important as protecting the rights of individual owners of copyright.

Licensing

Licensing, under the rubric of contract law, is being used more and more frequently to control the distribution of digital products. Increasingly contract law is taking the place of copyright law. There is, however, a very important difference between copyright and contract law. Copyright law involves a carefully considered public policy balance that is not reflected in contract law. As a result, standard form contracts used in merchandising digital products often introduce a significant imbalance with respect to the interests of the parties to the contract.

This issue is addressed in further detail under section 4.1.

Technological Protection

In addition to contractual means, copyright owners now have at their disposal an array of technological measures that can be used to protect their rights. Such measures, however, also have the potential to distort

the balance between the interests of owners and the interests of users that is reflected in copyright law.

Copyright owners argue the case for an outright ban on any bypassing of encryption or other technological protection measures in the belief that such activity, if permitted, would lead to widespread piracy. Many users of digitally formatted works take the position that an outright ban on the circumvention of technological protection measures would prevent the exercise of fair dealing and statutory exceptions such as preservation copying, as well as restrict access to public domain material.

The complexities of this issue are discussed further under section 4.2.

Digital Learning

Although copyright law has always controlled the use of material by educators, digital technology is pushing copyright into the forefront because, in varying degrees, traditional distance learning and school-based forms of education are being supplemented by on-line instruction in which learning and teaching occur on the World Wide Web. Learners of all ages can engage in learning through computers on campus, at work, or at home. They are able to access directly materials and experts electronically anywhere in the world. Learning materials themselves may now integrate text, graphics, sound, and images in ways never before possible.

Copyright law has not kept pace with these technological changes. The Copyright Act needs to be changed to allow the educational opportunities created by digital technology to be realized. Students and teachers must be able to use the Internet legally (without infringing copyright) if they are to develop the skills required to position Canada in the global information and knowledge economy.

This issue is addressed further under section 4.3, with reference to a proposed exception for educational use of the Internet.

Digital Communications

Although the operational aspects of digital technologies are complex, technical exceptions dealing with the operation of digital networks are extremely important in the overall process of amending the copyright law to take into account digital technologies. In the European Union, the United States and Australia, the scope and substance of these technical

provisions formed an important part of the legislative debate on amendments to their respective copyright laws. Canada's copyright laws are also in need of a number of amendments to address the technical realities of a digital environment.

Issues relating to service provider liability are discussed further under section 4.4.

Issues relating to the making of temporary copies in the context of electronic transmission, browsing, and caching are discussed further under section 4.5.

Administration of Copyright

Digital technology has magnified a chronic copyright problem: obtaining permission to use a work protected by copyright in a timely manner. The process of obtaining permission to reproduce text, music, images and other copyright material in a multimedia product involves identifying the rights holders, successfully locating and contacting them, and then negotiating agreements for the use of the work. It is not uncommon to require permission from a multiplicity of owners of copyright in the photographs, images, and video clips, performances and music contained in a typical multimedia work. In a digital environment, mechanisms must be found to make it easier to obtain copyright permission from owners.

Although this discussion paper does not address the issue of administration of copyright in further detail, it is essential to underscore the importance of developing administrative systems to facilitate the clearance of rights for use of works in a digital environment.

3. Guiding Principles

The following core principles form the basis for the Copyright Forum's recommendations:

Balance in Copyright Law

Copyright law must serve the public interest by providing a reasonable balance between the rights of copyright owners and the rights of citizens to reasonable access to copyrighted works.

Primacy of the Copyright Act

The rights granted to users of copyright content by the Copyright Act must not be allowed to be unilaterally overridden by contract. The contractual licensing of copyright works does not replace or fully achieve the public policy objectives of copyright law.

Technological Neutrality

Copyright laws must remain "technology neutral" in the sense that the provisions they embody ensure that technological developments detract neither from the rights of copyright owners nor from the legitimate rights of users to have reasonable access to protected works.

The Right to Read

Individuals must retain the right to read lawfully obtained copyright content.

The Right to Lend

The non-profit public lending of legally obtained copyright content is one of the cornerstones of a democratic society and must be permitted to continue irrespective of the format of the content.

A Robust Public Domain

A robust public domain is an essential element of an informed and participatory society.

Facts are Not Copyrightable

It is essential that individuals maintain their ability to access and use facts. It would be inappropriate to extend a sui generis property right to compilations of facts.

Privacy

The right of individuals and institutions to retain their privacy relating to choice of reading or research content must be protected.

4. Introduction of New Provisions

4.1 Standard Form Contracts

Recommendation

Amend the Copyright Act to provide that the terms of a standard form contract (a contract in which the terms have been unilaterally imposed by one party on the other) prohibiting the doing of an act in relation to a work or other subject-matter protected by copyright are of no effect in so far as they purport to prohibit what is permitted under the provisions of the Copyright Act.

When a person or institution buys a digital product, the purchaser is usually obliged to enter into a contract with the digital product vendor. This type of contract, called a "standard form agreement", is drafted entirely by the vendor without consultation or negotiation with the purchaser. Examples are a "shrink wrap licence" in retail transactions and a "click wrap licence" or "web wrap licence" in on-line transactions. By breaking open the cellophane packaging or clicking the mouse after loading the program, the purchaser may be required to agree to a contract prohibiting copying or lending. The increasing use of standard form agreements to govern the use of digital products is creating a growing number of conflicts between the prohibitions embedded in contracts and uses permitted by copyright law.

The lending of CD-ROMs by Canadian libraries is illustrative of this problem. The Canadian Copyright Act provides copyright owners with a bundle of exclusive legal rights allowing them to control specified uses of their works. One of these rights is the right to "rent" a computer program. Since many CD-ROMs contain computer programs, for the purposes of the Act many CD-ROMs are protected as computer programs.

This raises the question of what can be done to ensure that the normal activities of educational institutions, libraries, archives and museums that are permitted by the Copyright Act will not be undermined by the imposition of contractual obligations over which an institution has no effective control. A legislated solution is recommended, using the United Kingdom's Copyright Act for guidance.

The United Kingdom's Copyright Act addresses a similar, but not identical, issue to the one flagged above. Section 36(4) of the U.K. Copyright Act provides:

36(4) The terms of a licence granted to an educational establishment authorizing the reprographic copying for the purpose of instruction of passages from published literary, dramatic or musical works are of no

effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.

This section has the legal effect of rendering licence terms ineffective insofar as they purport to override statutory provisions in the copyright law, thus preserving the carefully thought out policy balance in the U.K. copyright law. Section 36(4) has been used as a model for a proposed legislative solution that would ensure, for example, that the terms of a standard form licence prohibiting lending a work are of no effect as far as they purport to restrict lending that is permitted under the copyright law.

4.2 Technological Protection Measures

Recommendation

Canada should postpone taking a position on this issue until after a clearer international trend is established and the impact on stakeholders is fully assessed.

Both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty set out obligations on states that join the treaties to provide adequate legal protection and effective legal remedies against the circumvention of technological protection measures used by authors to protect their copyright. Technological protection measures envisaged in these treaty obligations include passwords, encryption, signatures, access codes, and key systems.

Options under consideration in Canada are (a) an outright ban on any devices that could be used to circumvent technological protection measures employed by copyright owners to protect their works, or (b) sanctions against the use of such devices for purposes of infringing copyright. Educational institutions, libraries, archives and museums are concerned that an outright ban on such devices would undermine fair dealing, prevent the exercise of other statutory exceptions such as preservation copying, and restrict access to public domain material.

Institutions whose role is to acquire, preserve and make available material of permanent value must consider the issue of access, both in the near future, and potentially for hundreds of years. The Copyright Act provides a number of exceptions that permit use of copyright material by such institutions for specific purposes (e.g., for the management and maintenance of collections, to enable fair dealing by patrons, and in carrying out statutory obligations under access or privacy legislation).

Making it illegal to have access to devices that might be needed to circumvent technological protection measures in order to make legitimate use of a work thwarts the intention of the exceptions that support such uses, both in the short term and in the longer term.

Libraries, archives and museums have an additional concern that by the time a work eventually falls into the public domain, the technology needed to "unlock" its content may no longer be readily available. If there is an outright ban on devices that might be needed to circumvent any technological measures that had been employed by the copyright owner to protect the work, the term of protection could effectively be extended indefinitely. In other words, a work that by law should fall within the public domain may in practice remain inaccessible.

If the experience in other countries is any example, amendments dealing with technological protection measures will be controversial.

The passage of the digital copyright amending legislation in the United States in 1998 illustrates clearly the issues being faced by countries implementing the treaty obligations on technological protection measures. Although the Digital Millennium Copyright Act outlaws software devices used to circumvent technological protection measures, it postponed implementation of the sections prohibiting circumvention of technological protection measures until October 2000. The postponement was prompted by strongly divergent views from competing commercial and public interest groups, and was intended to give the Librarian of Congress time to assess whether users, including libraries and educational institutions, would be adversely affected in their ability to make non-infringing uses of a particular class of copyright works. By October, the Librarian of Congress will identify which classes of works should be exempt from the prohibition on circumvention, for a three-year trial period, in order to allow access for non-infringing purposes.

In Australia, section 116A of the Australian Copyright Amendment (Digital Agenda) Bill 1999, which received Royal Assent in August 2000, makes civil and criminal remedies available to copyright owners against those who make or import devices capable of circumventing effective technological protection measures. This prohibition against importation of the devices where the use of the device is for a "permitted purpose", which includes certain non-infringing acts set out in the Copyright Act such as library preservation and system administration. The actual use of circumvention devices and services is not specifically prohibited, although a copyright owner may bring a civil action for conversion or detention in

relation to any circumvention device used to make infringing copies. The report of the Australian Parliamentary Committee that studied the Bill noted that copyright owners opposed exceptions for permitted purposes altogether, while copyright users advocated the expansion of "permitted purposes" to include all non- infringing purposes. The committee concluded that an appropriate balance had been struck between copyright owners and users in specifying key non-infringing uses.

A different approach has been taken in the European Union. Article 6 of the European Commission's proposal for a Directive Harmonizing Aspects of Rules on Copyright and Related Rights in the Information Society proposes to explicitly forbid circumvention of technological protection measures, although a person must have knowledge, or have reasonable grounds to know, that he or she is engaging in circumvention of technological protection measures.

How this issue is resolved in other jurisdictions, and in particular in the United States copyright legislation in October 2000, will set an important precedent for other countries, including Canada2. A great deal of work has been done in the United States on this issue. This work—and the amendments to the United States' copyright law resulting from it—will provide valuable background information and analytical material for consideration of this issue in Canada.

4.3 Educational Use of the Internet

Recommendation

Amend the Copyright Act to permit an educational institution or a person acting under its authority, including a student, to do the following acts in relation to all or part of a work or other subject-matter that has been made publicly available on a communication network, provided the act is done in a place where a student is participating in a program of learning under the authority of an educational institution, is done for educational or training purposes, and is not for profit, and provided that the source is mentioned, and, if given in the source, the name of the author, performer, maker or broadcaster:

(a) use a computer for reproduction, including making multiple reproductions for use in the course for instruction;

(b) perform in public before an audience consisting primarily of students of the educational institution, instructors acting under the authority of the educational institution, or any person who is directly responsible for setting curriculum for the educational institution; and

(c) communicate to the public by telecommunication to or from a place where a person is participating in a program of learning under the authority of an educational institution.

The term "publicly available" should be defined to mean, for the purposes of this exception, a work or other subject-matter that is communicated to the public by telecommunication, with the consent of the copyright owner, without expectation of payment, and without any technological protection measures, such as a password, encryption, or similar techniques intended to limit access or distribution.

The exception should not apply if the educational institution or a person acting under its authority has knowledge that the work or other subject-matter has been made available to the public on a communication network without the consent of the copyright owner.

The purpose of the exception for educational use of the Internet is to permit students and teachers to make effective use of the Internet as part of a program of learning. This includes copying certain material from the Internet, performing music or a play on line for students, incorporating text or images in assignments, and exchanging materials with teachers or other students electronically.

The recommended exception is not open-ended. To be entitled to use the exception, a student or teacher would need to be participating in a program of learning under the authority of a publicly funded educational institution. The scope of the exception is also limited by the condition that the material must have been made "publicly available" on a communications network, by or with the authority of the copyright owner, without restrictions on access to it.

These conditions of entitlement to the exception are very important. The challenge is to devise an exception that permits students and teachers to use digital technologies to their fullest potential as an educational tool while at the same time ensuring that the rights of the copyright owner to exploit his or her works in the marketplace are not impeded. It would be inappropriate for the exception to cover uses for which educational institutions currently pay. Examples include subscription databases, licensed software, purchased CD-ROMs, and on-line courses and curriculum resources that include copyright materials.

However, use of material made freely available on the Internet should be covered by an exception for educational use. Students and teachers

routinely copy material from the Internet for class work and assignments. In fact, teachers encourage this practice and the material, once copied, is communicated by e-mail, on a regular basis, between students and teachers.

The argument for a new exception covering educational use of the Internet is based on the following considerations:

negative financial impact on copyright owners resulting from this exception is unlikely since it would only apply to material that is put on the Internet without any expectation of payment;

if the assumption regarding expectation of payment is incorrect, there is little likelihood that collectives will make available blanket licences for items accessible on the Internet;

the absence of blanket licences, obtaining copyright clearance for real-time classroom use of the Internet by students and teachers is not practical or possible within any acceptable time limits; if a student wants to include an image or text from the Internet in a class assignment, there is no time to obtain permission, even if the copyright owner can be identified and contacted, since copyright owners of digital works can come from all over the world;

recommended exception would not be available if the copyright owner has taken steps to prevent access to the material by using passwords, encryption, or other technological protection measures; it would only apply to material placed on the Internet with unrestricted access;

federal government invests millions of dollars in projects designed to develop Internet skills among Canadian students, while current policy, as reflected in the copyright law, makes much of what students do under these federally funded projects illegal.

Since this exception applies only to material made publicly available without expectation of payment for use, the exception does not violate the provision of the Berne Convention prohibiting the introduction of an exception that conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author. When an author makes a work publicly available on line, without seeking compensation or restricting access, there is no economic exploitation envisaged. The recommended exception cannot conflict with an exploitation that does not exist or prejudice the interests of a copyright owner who has already implicitly authorized use on the Internet without restriction.

An issue arising in connection with the definition of "publicly available" is how to address the situation where a work has been communicated without the consent of the copyright owner. A teacher or student using the exception will not know whether a work has been communicated with or without "the consent of the copyright owner". Yet a requirement that the work be communicated with the copyright owner's consent is a reasonable safeguard in the exception from the copyright owner's point of view. It is recommended that the teacher or student be required to have knowledge that the work or other subject-matter was communicated without the copyright owner's consent before she or he loses the benefit of the exception for educational use of the Internet.

4.4 Service Providers—Hosting

Recommendation

Amend the Copyright Act to permit a service provider to store a work or other subject-matter whose content is provided by, and stored at the request of, a recipient of the service as long as:

(a) the service provider does not have knowledge that the activity is infringing;

(b) the service provider is not aware of facts or circumstances from which infringing activity is apparent, and

(c) the service provider, upon obtaining knowledge or awareness that the activity is alleged to be infringing investigates the activity, and if it determines that the activity may be an infringement, acts expeditiously to remove or disable access to the information.

A service provider should be under no obligation to monitor content provided by, and stored at the request of, a recipient of its service, nor be required to seek facts or circumstances indicating infringing activity.

The term "service provider" should be defined in the Copyright Act.

Many educational institutions, libraries, archives and museums now provide Internet services to their respective teachers, students and patrons. A clear definition of the term "service provider" is required in the Copyright Act to ensure that these institutions qualify for the purposes of any exemption aimed at insulating service providers from the activities of the users of their Internet services.

A recommended model for a definition of "service provider" is the United States' Digital Millennium Copyright Act, which defines the term as follows:

> "service provider" means
> (a) an entity offering the transmission, routing, or providing of connections for digital on-line communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material sent or received.
> (b) a provider of on-line services or network access, or the operator of facilities therefor, and includes an entity described in (a).

One of the key functions of service providers is to host content, such as the web pages of subscribers, over which the service provider exercises no control. It is impossible, in practice, to monitor or screen the activities of users of network services. On that basis, service providers need legal protection similar to that already given under the law to "common carriers", such as telephone companies, for infringements committed by their patrons. This view is consistent with the Agreed Statements Concerning the WIPO Copyright Treaty, which states that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication, as well as with the December 1999 decision of the Copyright Board of Canada on "Tariff 22", in which the Board concluded that a service provider should be able to benefit from the common carrier exemption as long as it merely provides facilities and its activities fall short of communicating or authorizing the communication of a work or other subject-matter.

In addition, in light of the impossibility, in practice, of monitoring or screening the activities of users of network services, educational institutions, libraries, archives and museums acting as service providers should have no obligation to monitor what they transmit or to seek facts or circumstances indicating illegal activity. The Copyright Forum's recommendation in this regard is based on Article 15(1) of the European Union's Directive on Electronic Commerce. The European Union's approach is preferred over that of the United States, which is viewed as being too complex. The Forum recommends, however, that there not be a provision relating to temporary surveillance activities, as is proposed in Article 15(2) of the European Union's Directive on Electronic Commerce.

4.5 Temporary Copies

Under the Copyright Act, a copyright owner in a work or other subject-matter is provided with the exclusive right to reproduce that work or subject-matter or a substantial part thereof. Temporary reproductions are often made in the course of the technical process of communicating a work or other subject-matter on a communications network, including the Internet. These temporary reproductions might be considered an infringement of copyright.

Exceptions permitting the making of a temporary copy for the following three purposes are recommended:

transmitting
browsing
caching

(a) Temporary Copy Exception. To Transmit, Route, and Provide Connections or Access

Recommendation

Amend the Copyright Act to permit a service provider to make a transient copy of material provided by the recipient of the service in order to transmit, route, or provide network connections, or to provide access to a communications network, without infringing copyright, on condition that the service provider does not:

(a) initiate the service;
(b) select the receiver of the transmission; or
(c) select or modify the information contained in the transmission.

This exception would permit the automatic, intermediate, and transient storage of the information transmitted. The information could not be stored for a time longer than is reasonably necessary in order to effect the transmission.

The proposed exception is similar in nature to Article 12, the "mere conduit" exception, in the European Union's Directive on Electronic Commerce. The purpose of the mere conduit exception is to permit the making of transient copies as part of the technical process of operating an on-line communications system, without infringing copyright.

Temporary Copy Exception: Browsing

Recommendation

Amend the Copyright Act to permit the making of temporary copies in the course of browsing a work or other subject-matter in a digital format.

The term "browsing" should be defined to mean the making of a temporary copy of a work on a video screen, television monitor or similar device, or the performance of the audio portion of a work on a speaker or similar device by a user. The definition should exclude the making of a permanent reproduction of the work in any material form.

The proposed exception would permit browsing or simple viewing or playing of a protected work or other subject-matter, or any portion thereof, that is made publicly available without the requirement to obtain the explicit authorization of the copyright owner to reproduce the work.

Making temporary reproductions in the course of browsing a work in a digital format is necessary in order to view it on a computer screen or to listen to the audio portion of the work. The recommended browsing exception would exclude from the scope of the existing reproduction right temporary copies made in the course of browsing. In technical terms, the exception would permit the operation of the technical processes that are integral to digital access and playback.

In its report to the Information Highway Advisory Council, the Copyright Subcommittee of the Council concluded that the act of browsing a work in a digital environment should be considered an act of reproduction and as such should require authorization by the copyright owner. In its final report, the Council supported the notion that copyright owners should be able to determine whether and when browsing should be permitted, and recommended that the Copyright Act should be amended to provide clarification of what constitutes "browsing" and what works are "publicly available".

The proposed amendment is based on the assumption that in making a work or portion of a work or other subject-matter publicly available (in the sense defined in the proposed exception for educational use of the Internet), the copyright owner is giving implicit authorization for browsing. The proposed exception for temporary copying for purposes of browsing simply clarifies the right of the user to browse what the copyright owner has made publicly available without obtaining explicit authorization to reproduce it.

Temporary Copy Exception: Automatic Caching

Recommendation

Amend the Copyright Act to permit a temporary copy of a work or other subject-matter to be stored as part of the automatic technical process of receiving a communication.

Recommendation

Amend the Copyright Act to permit a service provider to make a temporary copy of a work or other subject-matter through an automatic and technical process for the purpose of making more efficient onward transmission to a recipient of a service, at the request of the recipient. The service provider:

(a) must not modify the material;

(b) must comply with the conditions on access as specified in the material;

(c) must comply with common practices regarding the updating of the material, or the updating requirements specified in the material itself;

(d) must not interfere with the technology commonly used to obtain data on the use of the material; and

(e) must act expeditiously to remove or to bar access to the material upon obtaining knowledge of one of the following:

(i) the material has been removed from the communications network at the initial source of the transmission;

(ii) access to the material or to the communications network has been denied; or

(iii) a competent authority has ordered removal or barring of the material.

A cache is a mechanism for temporarily storing a copy of on-line materials so that, for example, when a person wishes to return to a web page that has been viewed recently, the person's Internet browser can retrieve a copy of the document from the cache of the person's computer or similar device rather than from the server where the document originated. Common types of caches on a computer are "cache memory", a type of random access memory that can be read more quickly than normal RAM, and a "disk cache", which is usually a part of the hard disk of a computer. In addition, the design of networks can create temporary cached copies of works or other subject-matter on their networks, using an automatic and technical process, for the purpose of making such materials available in an efficient manner to the users of their networks. All of these types of caches are of a limited size, so that they are emptied out automatically as new copies enter the cache and replace older cached

copies. In addition, caches are usually programmed to delete temporary copies after a fixed period of time (e.g. once a week).

The purpose of the proposed exceptions is, first, to ensure that temporary copies that are made and stored in the cache of person's computer or similar device do not infringe copyright, and second, to ensure that a service provider can make temporary cached copies on a network, through an automatic and technical process, for use by network patrons without infringing copyright.

Temporary Copy Exception: Intentional Caching

Recommendation

Amend the Copyright Act to permit a service provider to intentionally store a temporary copy of a publicly available work or other subject-matter for the purpose of making more efficient its onward transmission to a recipient of a service, at the request of the recipient. The service provider:

(a) must not modify the material;

(b) must comply with the conditions on access as specified in the material;

(c) must comply with common practices regarding the updating of the material, or the updating requirements specified in the material itself;

(d) must not interfere with the technology commonly used to obtain data on the use of the material; and

(e) must act expeditiously to remove or to bar access to the material upon obtaining knowledge of one of the following:

(i) the material has been removed from the communications network at the initial source of the transmission;

(ii) access to the material or to the communications network has been denied; or

(iii) a competent authority has ordered removal or barring of the material.

Intentional caching can be used by many types of service providers, but it is particularly important for service providers whose networks have limited bandwidth, thereby requiring careful management to avoid the creation of network "bottlenecks". For example, some educational institutions deliberately download and store copies of frequently used materials onto their local and wide area networks. When a student or teacher tries to access materials that have been cached, the system

diverts them to the cached copy rather than to the Internet. The purposes of intentional caching by educational institutions include reducing telecommunications costs, increasing access speeds for students and teachers to the stored materials, and providing schools with some control over what students may access using school computers.

The purpose of the intentional caching exception is to permit a service provider to choose when to make a temporary copy of a work on a communications network in order to store it for use by network users, without infringing copyright. Intentional caching makes use of the Internet, as well as local and wide area networks, more efficient and less expensive.

The use of caching, whether intentional or automatic, confers no benefit to either service providers or to end users deriving from the content of the cached works themselves. The only benefits derive from technical efficiencies and, with regard to intentional caching, the ability to control access to certain content.

Since the proposed intentional caching exception applies only to material that has been made publicly available without expectation of payment for use, the exception does not violate the provision of the Berne Convention prohibiting the introduction of an exception that conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author. The recommended exception cannot conflict with an exploitation that does not exist or prejudice the interests of a copyright owner who has already implicitly authorized use on the Internet without restriction.

Both the European Union and the United States have caching exceptions in their laws. In both jurisdictions, a number of obligations must be met by service providers before the caching exception is available. It is recommended that Canadian service providers be subject to similar obligations.

Footnote 2. On October 27, 2000, the Librarian of Congress, on the recommendation of the Register of copyrights, released recommendations on exemptions from the prohibition on circumvention of technological measures that control access to copyrighted works. These recommendations can be found online at http://www.loc.gov/copyright/1201/anticirc.html

5. Adaptation of Existing Provisions to a Digital Context

This section discusses how certain provisions in the current law need to be changed and updated to reflect digital technologies

5.1 Electronic Publication

Recommendation

Amend the Copyright Act to make it clear that "electronic publication" (i.e., the making available to the public of a work in such a way that members of the public may access the work from a place and at a time individually chosen by them) is the equivalent of "publication" for the purposes of the Act.

The term "publication" has significant import in the Copyright Act. For example, whether or not a work or other subject matter is protected by copyright in Canada is in certain cases dependent on where the work was first published, the term of protection is in certain cases dependent on the date of first publication, and certain exceptions apply only to published works. With the advent of the Internet and the World Wide Web, "electronic publishing" has emerged as an alternative to conventional means of making copies of a work available to the public. For all intents and purposes, works made available to the public via the Internet, the World Wide Web, or similar means of communication are "published" works.

The status of such works under the Copyright Act, however, is problematic. For the purposes of the Act, the term "publication" is defined so as to specifically exclude "communication to the public by telecommunication" as a mode of "publication". As a consequence, works "published" via the Internet, etc. technically remain "unpublished" works, unless they are also "published" through conventional means of distributing copies.

Amendments are required to make it clear that communicating a work on the Internet is effectively the same as publishing the work and that for the purposes of the Act such works have the same status as "published" works. The notion of electronic publishing is also relevant to fair dealing. If, as it is sometimes argued, fair dealing applies only to published works, it is important to establish whether "electronic publications" are, for the purposes of fair dealing, "published" works. If they are not, and as a result are deemed to fall outside the scope of fair dealing, fair dealing will in

practice become an increasingly meaningless concept as more and more works are made available exclusively in a networked mode.

5.2 Exceptions for Educational Institutions

Note. The following recommendations are based on the assumption that the proposed new exception for educational use of the Internet will be included in the revised law. In the event that the new exception is not included, the recommendations that follow for existing exceptions will have to be revisited.

(a) Reproduction for Instruction (section 29.4)

If the proposed new exception for educational use of the Internet is included in the revised law, section 29.4 need not be amended to include a reference to digital use.

(b) Performances (section 29.5)

Recommendation

Amend section 29.5 of the Copyright Act to add "communication to the public by telecommunication" to the list of permitted activities. The three specific activities to be included are:

(a) communication by telecommunication of a live performance of a work to a student at a distance or to a virtual school where there are no "seats";

(b) communication by telecommunication of a sound recording of a work, or of a performer's performance that is embodied in a sound recording, to a student at a distance or to a virtual school where there are no "seats"; and

(c) communication by telecommunication of a performance in public of a work or other subject-matter to a student at a distance or to a virtual school where there are no "seats", at the time of its communication to the public by telecommunication.

The existing section 29.5 permits the performance of works in a classroom setting.

An amendment is required to permit the activities allowed under section 29.5 to take place at a distance. If the students in the classroom perform a play, play a sound recording, or turn on the television, the same material should also be accessible to distant students in the same

program of instruction. This would require an amendment to the Copyright Act to permit the communication of performances on line for the purposes of education.

(c) Taping Radio and Television Programs (sections 29.6, 29.7, 29.8, and 29.9)

Recommendation

Amend sections 29.6 (permitting copying and performance of news and news commentary programs) and 29.7 (permitting copying and performance of other broadcast programs) of the Copyright Act to permit students and teachers to replay these programs on line for students located outside the classroom.

The Copyright Act currently permits the taping of radio and television programs and replaying the tapes, subject to a number of conditions, for educational purposes. The existing sections permit the making and performing of the copy, but not its communication by telecommunication.

The proposed amendment would extend the radio and television copying and public performance scheme to allow for the communication of copies made under the scheme. The amended exceptions would permit, for example, distance education students to receive the same program as students in a face-to-face learning situation. The proposed amendment is not intended to extend the scope of the exception, but rather to make the same exception available in non-face-to-face teaching situations.

The recently passed copyright amendments in Australia extend their educational radio and television copying scheme to include the communication of copies.

(d) Clarifying the meaning of "under the authority of an educational institution"

Recommendation

Amend sections 29.4 through 29.7 of the Copyright Act to clarify that students are included in the phrase "an educational institution or a person acting under its authority".

Some of the educational exceptions in the existing Copyright Act permit persons acting under the authority of an educational institution to benefit from the educational exceptions. It should be made absolutely clear that students are included in the phrase "an educational institution or a person

acting under its authority". This could be accomplished by adding the words "including a student" where appropriate.

(e) Literary Collections (section 30)

If the proposed new exception for educational use of the Internet is included in the revised law, section 30 need not be amended to include a reference to digital use.

5.3 Exceptions for Libraries, Archives and Museums

(a) Management and maintenance of collections (section 30.1)

Recommendation

Amend section 30.1 of the Copyright Act to permit the making of a copy in an alternative format when the format of the original is at risk of becoming obsolete or the technology required to use the original is at risk of becoming unavailable.

The exception that permits a library, archive or museum to make a copy of a work, under certain circumstances, for the purpose of maintaining or managing its permanent collection, includes a provision relating to technological obsolescence.

The provision, however, is problematic, in that, as it is written, it would appear to apply only after the format of the original has become obsolete or the technology required to use the original has become unavailable. In order to effectively manage and maintain works in their collections that are in digital formats, libraries, archives and museums will have to migrate those works to new formats and to new technological environments while the technology that enables them to "access" and "read" the original digital format is still available. Once the technology becomes unavailable migrating the work may in fact be impossible.

(b) Research and Private Study (section 30.2)

Recommendation

Amend section 30.2 of the Copyright Act to remove the restrictions that currently limit the exception to "printed matter" and "reprographic reproduction" so as to permit a library, archive or museum to make a copy of a legally obtained, digitally encoded original that forms part of its collection, and/or to provide a digital copy to a patron, provided the copy is used only for the purpose of research or private study. The exception

would apply both in the case of a request made directly to the library, archive or museum and in the case of a request made through another library, archive or museum on behalf of one of its patrons.

Place the following safeguards on the making of a digital copy under the exception in Section 30.2:

(a) all intermediate copies must be destroyed once the transaction is complete;
(b) the library, archive or museum must employ reasonable technological measures to prevent unauthorized use of the digital copy that is provided to the patron;
(c) the library, archive or museum must not circumvent any technological measures used by the copyright owner to protect the work, except where a specific limitation to the prohibition against circumvention has been provided for in the Act;
(d) the library, archive or museum must not remove or alter rights management information accompanying the work, except in cases where the rights management information interferes unreasonably with the authorized display or reproduction of the work;
(e) the library, archive or museum must warn patrons against infringement of copyright and provide them with ready access to information on the Copyright Act and any relevant tariffs, licences, etc.;
(f) the library, archive or museum must maintain records on digital copying done under the exceptions in subsections 30.2(2) and 30.2(5), as required by regulation.

The exceptions in section 30.2 of the Copyright Act permit a library, archive or museum (a) to act on behalf of a person engaged in fair dealing, and (b) subject to certain restrictions, to make a copy of an article published in a newspaper or periodical for a person requesting to use the copy for research or private study. The exceptions apply to requests made by patrons of other libraries, archives and museums as well as to those made directly by patrons of the library, archive or museum answering the request.

Within a digital environment the application of this set of exceptions to facilitate research and private study is problematic in a number of respects:
scope of application of the exception in subsection 30.2(1) is dependent on clarification of the applicability of fair dealing in a digital environment;

scope of application of the exceptions in subsections 30.2(2) and 30.2(5) is dependent on whether a work made available originally or exclusively via the Internet, World Wide Web or similar means of communication is considered to have been "published"; and,

of the present exception are circumscribed by language that deals only with printed matter and reprographic reproduction.

The need for clarification of fair dealing and the uncertainty surrounding "publication" in a digital environment are discussed in the section on "Electronic Publication". Section 30.2 of the Act must be clarified in relation to both of those issues.

In addition, subsections 30.2(2) and 30.2(5) require revision so as not to prevent a library, archive or museum from using digital technology to achieve efficiencies in support of research and private study. In recognition of the fact that the use of digital technology introduces new risks of diminished control over the work for the rights holder, appropriate safeguards should be built into the exceptions to ensure that their application continues to be linked to private study or research use.

5.4 Institutional Exemption From Liability (section 30.3)

Recommendation

Amend section 30.3 of the Copyright Act to exempt an educational institution, library, archive or museum from liability for infringement of copyright where:

(a) a copy of a work or other subject-matter is made using a computer or similar device;

(b) the computer or similar device is installed by or with the approval of the educational institution, library, archive or museum on its premises for use by students, instructors, or staff at the educational institution, or by persons using the library, archive or museum; and

(c) the educational institution, library, archive or museum makes reasonable efforts to inform students, instructors, staff and patrons about copyright law and warn against copyright infringement.

Section 30.3 of the Copyright Act provides educational institutions, libraries, archives and museums with an exemption from liability, under certain conditions, for any infringements committed by persons using self-serve photocopiers in their institutions. Because this exemption applies only to reprographic reproduction, and because some of the conditions attached to the exemption could not apply to reproduction of

on-line works and other subject-matter—such as the requirement for licensing, since no collective represents all the rights holders in the digital world—a new technologically-neutral exemption is required to cover the use of computers and similar devices furnished by institutions for students, staff, teachers and patrons.

6. Other Issues

6.1 Term of Protection

Recommendation

Maintain the existing term of copyright protection of the life of the author plus 50 years. Amend the Copyright Act in order to treat Crown works the same as other works as far as term of protection is concerned.

Both the European Union and the United States have recently extended the term of copyright to life of the author plus 70 years. Under the terms of the international treaties it has signed, Canada is not obliged to follow suit, but the political realities of a global economy and the proximity of the United States make it likely that Canada will be under heavy international pressure to extend its term of protection.

The Copyright Forum opposes such an extension of term. The Forum strongly believes that effective public policy must maintain a balance between a robust public domain and appropriate protections for the rights of copyright owners.

Under the current Copyright Act, any work that is prepared or published by or for the Crown is protected until it is published and for an additional 50 years after publication. The result is that Crown works that remain unpublished are protected by copyright indefinitely. In Phase II of the revision process, a similar provision for non-Crown unpublished works was replaced by a new provision that gives the same term of protection whether a work is published or not. Unpublished works protected by Crown copyright are the only works that remain protected by copyright indefinitely. The Copyright Forum believes that there is no valid reason to justify such a difference.

6.2 Crown Copyright

Recommendation

Amend the Copyright Act to place legislative material and court decisions in the public domain.

Retain copyright protection on all other types of government documents until a more in-depth analysis of the issue of Crown copyright within a digital environment has been completed.

Under section 12 of the Copyright Act, the Crown holds copyright for any work prepared or published by or for any federal or provincial government organization.

The question of whether Crown copyright should continue to exist in Canada is an issue that has been the object of numerous discussions, studies and reports, mainly because in the United States there is no copyright in government works, all material produced by the U.S. government being in the public domain as it is created. The U.S. approach is based on the notion that taxpayers have paid for the creation of government works and should therefore not be required to ask permission to use those works. But the Commonwealth tradition has always considered Crown copyright as being an important prerogative, and favours the retention of Crown copyright. In 1997, through an Order-in-Council, the federal government made an exception to the Crown copyright principle by allowing federal laws and federal court and tribunal decisions to be reproduced without requesting permission.

Access to government information is one the pillars of a democratic society and it is obvious that digital technology—and more specifically the Internet—should enable all Canadians to have better access to basic democratic material such as the law of the land and the court decisions affecting their daily life. While there is not yet a consensus on the future existence of Crown copyright in Canada, the Copyright Forum strongly believes that a statutory exception should be made at least for all legislative material, including parliamentary material such as debates and committee proceedings and reports.

Governments are among the most important providers of information, sometimes on a statutory basis and in other cases based on their moral obligation as guardian of democratic values. While there is general agreement that government information should be made available as easily as possible and at a minimal cost, it is important as well that it be controlled in order to avoid inappropriate use, such as abusive commercial use. Crown copyright being among the tools available to exercise such control, it cannot simply be abolished without a thorough study of the issue.

The United Kingdom recently announced a new access policy applicable to government information. The basic policy principles adopted by the U.K. government are two-fold: first, to maintain the integrity and status of works produced within the government by stating that Crown copyright will continue to exist; and second, to encourage the widest possible dissemination of and access to government content. Significantly, the new policy treats Crown works differently depending on whether or not they have been published. The U.K. government waives its copyright in public records that are available to the public, and that were unpublished when they were transferred to the national public records office (in England, Scotland, Wales or Northern Ireland). The Canadian archival community and the researchers they serve would welcome a similar approach.

More and more government information, including specialized reports and studies, is now made available exclusively on the Internet through departmental web sites. As well, growing numbers of Canadians now have access to the Internet as a result of the implementation of government policies aimed at facilitating public use of the Internet. Within such a context, there is an urgent need to clarify the status of Crown copyright in order to avoid a conflicting situation where citizens would be legally denied the right to reproduce and/or use material that is being made available to them as part of national public policy.

6.3 Rights Management Information

Recommendation

Legal restrictions on the removal or alteration of rights management information should apply only where the term of copyright protection of the attached work or other subject-matter is still in force.

The removal or alteration of rights management information should be permissible where such information interferes unreasonably with the authorized display or reproduction of a copyright work or other subject-matter.

Any provision for the protection of rights management information added to the Copyright Act should be explicit about what is encompassed within the meaning of the term "rights management information".

The WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty both contain provisions requiring that member states enact remedies against the removal or alteration of "rights management information" attached to works or other subject-matter, and against the

distribution of works or other subject-matter in the knowledge that such information has been removed or altered. "Rights management information" is broadly defined in the WIPO treaties to mean information attached to a work or other subject-matter that identifies the work or other subject-matter, author, performer, performance, producer of a sound recording, copyright owner, or any information regarding the terms and conditions for use or the work or other subject-matter.

The discussion papers commissioned by the federal government in relation to the WIPO treaties recommended a new section in the Copyright Act to deal with rights management information.

Canadian law needs to be very clear on what constitutes "rights management information" for the purposes of the Act, and standards need to be established for the presentation of such information.

Any new provision of this nature in Canadian law must be drafted carefully so as to avoid hindering legitimate activities. For example, when the term of copyright protection for a work has expired, it should be permissible to remove rights management information attached to the work.

6.4 Database Protection

Recommendation

If the Government decides to enact legislation to strengthen the legal protection of databases, the increased protection should be achieved through minor amendments to the Copyright Act that will maintain an appropriate balance in our copyright laws and ensure that fair dealing and copyright law exceptions will continue to apply to databases.

There is some uncertainty in Canadian law regarding the extent to which the Copyright Act protects "sweat of the brow" databases. In limited cases, these databases may require extensive time, labour and expense to compile but may not pass the minimal threshold test of "originality" to qualify for copyright protection. As a result, certain members of the database industry have expressed concerns about the vulnerability of digital databases to unfair commercial copying and asked the government to enact additional legal protections for databases, including possible new forms of intellectual property protection for databases. Legitimate concerns about unfair commercial copying, however, should not lead to the introduction of a new sui generis database protection law that may go

beyond the curtailment of industrial piracy and threaten public access to facts and public domain works.

If the government seeks to strengthen the protection of databases, it should do so through minor amendments to the Copyright Act that will maintain balance in our laws while addressing reasonable concerns about unfair commercial competition.

Careful consideration needs to be given to the scope of protection that is provided to databases to ensure that users have reasonable access to the content of a database. Caution also needs to be exercised to ensure that the protection provided does not have the effect of giving the producer of the database exclusive control over the intellectual content of the database for a protracted period of time.