Copyright Reform is Not a Spectator Sport

The education community has the opportunity to emerge as a positive force for change by actively supporting a uniquely Canadian vision of copyright that compensates creators, facilitates access & embraces Canadian culture. Michael Geist argues it is time to get in the game.

By Michael Geist

Few policy issues generate as much passion and controversy as copyright reform. Balancing creator rights with broader societal interests presents an enormous challenge, especially when national economic policy and international treaty obligations are also factored into the equation.

Copyright is particularly important to the education community as both a major source of new Canadian creative works and also as a major user of copyrighted materials. Although the education community participates in the copyright reform process from both perspectives, recent government proposals, particularly those recommended in May by the standing committee on Canadian heritage, leave little doubt about where the community should lend its support.

It is time for teachers, researchers, education administrators, librarians and students to speak out loudly against proposed policies that threaten the use of the Internet within Canadian schools by establishing unnecessary copyright license fees that seek to extend the term of copyright to the detriment of Canadian historians, and that introduce new legal protections that threaten to chill scientific and security research. They should further seize this opportunity by presenting a positive vision of reform that could benefit Canadian research and the broader community.

The Copyright Reform Threat

The May 2004 heritage committee report has set off a firestorm within the education community by proposing a new license to cover Internet-based works. The proposal would require schools to pay yet another fee (the education community already hands over millions in license fees each year for content) for works found on the Internet.

Although the committee acknowledged that some work on the Internet is intended to be freely available, it recommended the adoption of the narrowest possible definition of "publicly available." Its vision of publicly available included only those works that are neither technologically nor password-protected and contain an explicit notice that the material can be used without prior payment or permission.

Rather than adopting an approach that facilitates the use of the Internet, the committee called for the creation of a restrictive regime in which nothing is allowed unless expressly permitted. The result would be an Internet in which schools will be required to pay to use Internet materials contrary to the
Canadian universities, colleges, and schools, which are struggling with 20th century budgets to provide a 21st century education, should respond to this proposed cash grab in two ways.

First, these institutions should call on the federal government to reject the proposal and instead adopt a balanced copyright approach that encourages the use of the Internet in Canadian schools. One possibility would be the establishment of a limited educational user right to publicly available work on the Internet. In keeping with longstanding and widely accepted practices on the Internet, publicly available work would include materials that are not protected by passwords, encryption or other means, i.e., information the author would appear to want to make widely available.

Second, the education community should stop wasting millions of dollars each year by paying unnecessary copy licenses to copyright collectives such as Access Copyright. While copyright collectives claim that education institutions need licenses to compensate for faculty and student copying, many copying activities are permitted under Canadian copyright law without the need for payment. The Copyright Act contains an explicit user right for copying for research or private study purposes (surely the most common uses of works on university campuses). The Supreme Court of Canada has ruled that this user right must be interpreted in a liberal fashion such that copying full articles may be lawful in certain circumstances.

The Act also contains several relevant exceptions for copying for teaching purposes. For example, copying work for classroom instruction is subject to an exception in the Act provided that no commercial alternative exists. There is another exception that allows teachers to show live broadcasts and Internet content in the classroom. Millions of web sites likely fall under these two exceptions since many are freely provided without expectation of compensation.

It is important to note that the use of these user rights and exceptions would enhance Canada's education system as well as enrich its authors and publishers. The money that would be saved could be directed toward purchasing new books to increase the size of university library collections, while at the same time generating handsome royalties and revenues for authors and publishers.

**Rejecting Copyright Term Extension**

The Canadian education community should also support policies that foster the growth of the public domain by resisting pressures to extend the term of copyright. Canadian copyright currently lasts for the life of the author plus an additional 50 years. While some countries have extended that term to 70 years after the author's death, the extension would not generate any further cultural products yet it would result in diminished public access to Canadian works.

For example, in 2003, the Canadian government introduced a bill dubbed the Lucy Maud Montgomery Copyright Term Extension Act that would have extended the term of copyright for certain works. While the heirs of the famous Canadian author would have benefited from the extension, the Canadian public would have paid the price, losing access for years not only to Montgomery's unpublished works but also to unpublished works from dozens of other prominent Canadians such as former prime ministers Sir Robert Borden and Richard Bennett. That bill was ultimately amended with the copyright term extension provisions excluded.

**Avoiding U.S.-Style Copyright Reform**

The proposed copyright reforms also pose a significant threat to the dissemination of research results, particularly security-based research.

In the United States, the enactment of the Digital Millennium Copyright Act has led directly to such a chill. For example, several years ago a Princeton researcher sought to release an important study on encryption. When he publicly disclosed his plans, he was served with a warning that he faced potential
legal liability under the DMCA if he publicly disclosed his findings. Similarly, in 2001, a Russian software programmer was arrested and spent the summer in a California jail after highlighting encryption weaknesses in an Adobe software product at a public conference.

These cases sent a wave of fear through the security research community, leading foreign researchers to avoid traveling to the U.S. and cybersecurity czar Richard Clarke to acknowledge that "a lot of people didn't realize that [the DMCA] would have this potential chilling effect on vulnerability research."

Canada can ill-afford to follow the U.S. down this path. In fact, by refusing to ratify the World Intellectual Property Organization's Internet treaties that serve as the basis for the DMCA, the federal government will maintain an environment that encourages the dissemination of research results and creates a competitive advantage that will attract security researchers to Canada.

Moreover, ratification of the DMCA would cause serious economic harm to Canada with the prospect for an additional $100 million in Canadian private copying royalties flowing south of the border.

Despite claims that Canadian artists would be harmed should Canada decide not to ratify the treaties, Canadian artists would in fact scarcely feel the effect of such a decision. Eighty percent of the world's population has not even signed the treaties, while many European countries have yet to formally ratify them. Furthermore, since Canada's most significant trading partners, notably the U.S. and Japan, provide Canada with national treatment status, Canadian artists would still enjoy benefits in those markets.

**A Positive Vision for Copyright Policy**

The Canadian education community should capitalize on this reform opportunity to place positive recommendations onto the public agenda.

First, Canada must begin to think about new ways to disseminate its publicly funded research. While the federal government has stressed the importance of focusing on commercializing Canadian research, this approach provides only a partial solution.

Under our current model, Canadians spend billions of dollars on university research through granting programs in the sciences, social sciences and health fields. Those research results are typically made available to the public in one of two ways. If the results have commercial value, they are often brought to market, generating new revenues for the researchers and their institutions. Alternatively (or in addition), researchers publish the results in expensive scientific journals, which often fetch thousands of dollars in annual subscription fees.

In other words, Canada spends billions of tax dollars on research only to "buy back" that funded research through the marketplace or by subsidizing universities, who are effectively forced to repurchase their own research through journal subscriptions.

The U.S. faces the same dilemma. A group of 25 Nobel prize winners recently issued a public letter calling on Congress to link public research funding with public dissemination of the results. Canada should jump at the chance to adopt a similar model that would tie free, public dissemination to publicly funded research. Such an approach would still leave room to commercialize the research results, while providing Canadians with both an unprecedented innovation opportunity and a more immediate return on research granting investment.

Second, the education community should support policies that ensure access to our culture and heritage is publicly available to all Canadians. The United Kingdom provides an excellent model for such policies. In recent months, the British Library has unveiled an ambitious plan to digitize and freely post on the Internet thousands of historical newspapers that are now in the public domain. Similarly, the BBC has established the BBC Creative Archive, which will allow users to download clips of BBC factual programming for non-commercial use, where they can be stored, manipulated and shared.
Although Canadian funding of the CBC is not identical to the television license fee approach used for the BBC, there are clear similarities between the two public broadcasters. CBC would take a significant step forward by returning its programming back to the taxpayers who provide the majority of its funding. In doing so, Canadians would be free to use CBC programs for non-commercial use much like residents in the U.K.

Copyright reform is not a spectator sport. The education community has the opportunity to emerge as a positive force for change by actively supporting a uniquely Canadian vision of copyright that compensates creators, facilitates access and embraces Canadian culture. It is time to get in the game.

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