Commentary: Bill C-60 and Copyright in Canada: Opportunities Lost and Found

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In spring 2005, after four years of consultation, Canada’s Liberal government tabled Bill C-60, a bill to amend the Copyright Act. At the time of writing (October 2005), it is unclear whether this bill will proceed to second reading before an election call. The bill is under attack for a variety of reasons from broadcasters, copyright collectives, consumers, educators, and American lobbyists; the consensus between the two parents of copyright policy in Canada, Industry Canada and Canadian Heritage, is only skin-deep; and the NDP does not like the bill. It is thus not surprising that the Liberals are stalling. But whether or not the bill becomes law, it is worth an examination: the issues are not going away, and C-60 will be an important touchstone for discussion of its successor. It hardly needs to be said that copyright law is of utmost importance to people working in the field of communications. Copyright law underpins the media industries as an incentive for collection and distribution of all sorts of materials, and to some extent it helps creators make a living off their labours. But digital technologies have provided a pretense for corporate copyright owners to lobby for insidious and severe limits on freedom of expression in the name of “protection of culture.” If citizens do not watch and make a lot of noise, copyright reform could kill off exciting newly enabled forms of communication, education, critique, and creation.

Before turning to C-60 itself, a brief introduction to principles and basic terminology of copyright may be useful. Copyright is a system of incentives for cultural production and accompanying economic activity. Since the eighteenth century, it has been understood to require balance between the needs of rights-holders and the needs of the public. This is why, for example, copyright term has never been perpetual: it is important to the public interest that at some point material enter the public domain, where it may be freely used and recycled. But we cannot always wait that long to engage with others’ work: the public interest in freedom of expression is also served by exceptions in the law whereby, for example, we can quote copyrighted material without permission, students can watch recent news programs without permission, and filmmakers do not require copyright clearance for “incidental” use of copyright material. The freedom to

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quote falls under section 29 of the Copyright Act, which states that “fair dealing for the purpose of research or private study does not infringe copyright.” The Act goes on to permit fair dealing for the purposes of criticism, review, and news reporting, provided that various attribution practices are followed. In CCH Canadian Ltd. v. Law Society of Upper Canada (2004), (CCH v. LSUC), the Supreme Court of Canada stated that “...the fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively” (CCH v. LSUC, para. 48). Scholars and students, as creators, purveyors, and consumers of copyrighted work, can see copyright policy from more points of view than many stakeholders, and they often expect copyright protection for their creations. But insofar as critique is central to their work, and insofar as their goals are not primarily commercial, they are uniquely dependent on a robust conception of users’ rights.

Increasingly, public-interest advocates are becoming aware that digital technologies pose a serious threat to fair dealing and other users’ rights, in that they give vendors new abilities to monitor and control use of their materials past the point of sale. However, big business has argued forcefully for twenty years that the essential feature of digital technologies is their ability to make and disseminate cheap perfect copies. The primary impetus behind the current round of copyright reform is the demand from large rights-holders and the United States government to give copyright owners new rights to protect their property against digital "piracy." These parties have been pressing Canada to implement two 1996 World Intellectual Property Organization (WIPO) treaties, and in fact to go beyond these by following the U.S. models of the Sonny Bono Copyright Term Extension Act of 1998 and the Digital Millenium Copyright Act (DMCA) of 2001. Given this pressure, it is all the more remarkable that in Bill C-60 as introduced, Canada has taken its own path. C-60 does not extend copyright term. It does not entirely criminalize circumvention of technological protections on digital materials as does the DMCA, but rather bans circumvention for the purposes of infringement (Canada, 2005, s. 27, pertaining to s. 34.02(1) of the Copyright Act). This is an important qualification: for example, it permits quotation from copy-protected digital material, use of public-domain material behind software walls, and the disabling of privacy-infringing software. Canada has also forged its own path by requiring Internet service providers to pass on notices of infringement to subscribers, rather than requiring them to take down material at the out-of-court behest of rights-holders. This is a much better strategy in terms of freedom of expression than that of the U.S. The U.S. will undoubtedly bring pressure through trade channels to alter Canada’s approach to WIPO implementation, so it is important to note the strengths of C-60 in this area.

There are, however, several areas of Bill C-60 that pose grave concerns for educators, intellectuals, and creators.
Chilling effect for legitimate circumvention of technological protections

DVDs already come “copy-protected,” and this is just the beginning of “digital rights management” (DRM) technology being developed. DRM can prevent users from exercising their rights. C-60 states that anyone who “provides a service to circumvent . . . and knows or ought to know that providing the service will result in an infringement” (Canada, 2005, s. 27, pertaining to 34.02(2) of the Act) is liable under the law. This will make it difficult for teachers, students, and researchers to get access to software they may legitimately need to exercise fair dealing and other users’ rights.

Privacy concerns

Digital rights management is given new protections under Bill C-60, without acknowledgment that DRM devices are not mere locks on content. As Ian Kerr points out, they may also involve monitoring and data collection; because there are no explicit demands for transparency here, consumers will not know about these invasions of their privacy (Kerr, 2005).

Notice and takedown for search engines

While Internet service providers can protect themselves from liability under C-60 by notifying subscribers of allegations of infringement, the same right is not extended to search engines. This means that if a rights-holder alleges infringement about some material indexed by a search engine, the search engine will essentially block access to that site in order to protect itself from lawsuits—and the case will never be heard by a judge. This is a threat to freedom of expression.

Photography-term extension

Currently, photographs are copyrighted to the holder of the negative for 50 years from their date of creation, but under C-60 they will be copyrighted to the photographer or employer for 50 years after his or her death. This may seem like a reasonable “harmonization” of the art of photography with other arts, but it is also an unacknowledged term extension that will primarily benefit corporate owners. Consumers who commission photographs will no longer own copyright in them, which raises privacy concerns, and the provision will complicate copyright clearance on photographs for artists and scholars, because suddenly the copyright owner and term of any photograph will become much more difficult to determine.

Useless educational exceptions

Bill C-60 contains exceptions to allow time and space shifting of lessons and digitization of print materials for the purposes of distance education. However, the constraints are ridiculous: the materials must be destroyed within 30 days of the end of the course, for example. There is also an exception to permit libraries to digitize print material to facilitate interlibrary loans (ILLs). But the libraries must arrange the technology so that ILL copies can only be printed once and so that they vanish from the recipient’s hard drive entirely after seven days. The ILL provision also seems altogether unnecessary in the light of the Supreme Court’s CCH
v. LSUC case (2004), which determined that faxing materials to users off-site did not constitute copyright infringement.

**No acknowledgment of recent Supreme Court cases**

More generally, Bill C-60 entirely disregards a suite of recent Supreme Court cases that articulated the need for balance between users’ and owners’ rights. The Court declared in Théberge v. Le Petit Galérié Champlain (2002) that:

> 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. 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. (Théberge, 2002, para. 31-32)

These words suggest that digital rights-management mechanisms ought not to prevent consumers from doing with digital materials what they can do with analog materials: share, lend, clip, and quote, for example. But instead, we get legal protection of the technical measures, with no positive acknowledgment of users’ rights.

In CCH v. LSUC, as we have already seen, the Supreme Court identified fair dealing as a “user’s right” and an “integral part of the Copyright Act,” which “must not be interpreted restrictively” (CCH v. LSUC, para. 48). But in C-60, the philosophy seems to be that any use not covered by a stated exception must be infringement. It is not illegitimate for Parliament to disregard non-Charter cases, but we might have hoped for some engagement with ideas articulated by the highest court. Parliament could have shown its awareness of the importance of the public interest in copyright by offering reform of statutory damages, regulation of “click-wrap” licences, attention to privacy concerns, or renunciation of Crown copyright. But nothing of the kind appears.

**Omission of an exception for educational Internet use**

I might note, notwithstanding the vociferous and misleading public-relations campaigns by Access Copyright and the Council of Ministers of Education, Canada (CMEC), that I do not believe the omission of an exception for educational Internet use from Bill C-60 to be a mistake. CMEC is of the opinion that Internet use in schools and universities constitutes copyright infringement under the current law, and that this must be corrected by means of a specific exception. Access Copyright proposes instead that we license educational use of the Internet. This debate over what is not in Bill C-60 has so far drowned out discussion of the bill itself, and while I find this deeply disturbing, it is worth reviewing the topic by way of clarification. CMEC’s position that using the Internet in schools constitutes infringement is utterly perplexing. The vast majority of Internet use is covered by implied consent (how can somebody sue you for pressing the “print” button on their website?), fair dealing (most educational use is for the purposes of research, private study, criticism, or review), or existing educational exceptions (sections 29.6 and 29.7 of the Copyright Act allow websites to be projected to
classes, for example). There are some uses for which students would need permission: reprinting Internet materials in the yearbook, for example, or in other published form. But in this case, surely it is best to instruct students in permission practices, rather than paying for reams of non-infringing uses by way of liability protection for a few infringing uses. Most of the Internet material students use has been put there expressly for them by museums, libraries, teachers, and generous souls—or else an educational institution has paid for their access via subscription. Why send millions of taxpayer dollars out of the country, when it would be impossible to distribute them fairly and efficiently to website proprietors? Licensing the Internet is an unworkable and expensive idea; it is against the interest of the public, and it does not help Canadian creators (see Murray, 2004). An exception for schools is unnecessary and unjustifiable. C-60’s silence on the issue is entirely appropriate.

The educational-Internet-exception debate emblematizes some of the problems in developing copyright policy in Canada that will continue long past Bill C-60: often, large institutions feel that it is cheaper and easier to pay into a protection scheme than to exercise the rights that the law offers. Fair dealing, for example, is not clearly delimited: we do not know exactly how many pages qualify, what “counts” as criticism to the courts, and so on. Rather than contributing to legal clarification by defending reasonable interpretations of users’ rights, Canadian universities and school boards tend to bow to assertions about the law made by large rights-holder mouthpieces such as Access Copyright. Simon Fraser University Library, for example, advises its graduate students that they must clear permissions for all images (Simon Fraser University Library, 2003)—even though in CCH v. LSUC the Supreme Court noted that in some instances it might be possible to deal fairly with a whole work (para. 56). Universities and schools pay millions of dollars to Access Copyright, when most of the copying performed under the umbrella of the comprehensive licences is fair dealing. Because Access Copyright is the main provider of information about copyright to academics and students (Geist, 2005, August 29), most of us do not know about rights that overlap with or go beyond the licence. For example, these licences do not cover the reproduction of advertisements, letters to the editor, or sheet music, nor do they permit copies “for use in association with partisan political activities, endorsement, or advertising of a product, service, cause or institution where the nature of the material to be copied and the proposed use would prejudice the author’s honour or reputation” (Access Copyright, 2003, sections 3, 7). Luckily, this does not mean scholars cannot copy these materials: in many cases, such use would constitute fair dealing. In short, we have to educate ourselves about our rights and exercise them. Excessive fear of copyright liability may distort academic practice, constrain freedom of expression, slow down judicial clarification of existing laws, and lead to bad new laws. Long after Bill C-60 is passed or abandoned, these will be issues of continuing concern for Canadian scholars.
Recommended reading


Geist, Michael. (Ed.). (2005). *In the public interest: The future of Canadian copyright law*. Toronto, ON: Irwin Law. (Also available for free on a Creative Commons licence at www.irwinlaw.com. This collection includes articles by 19 Canadian copyright scholars; it frames Bill C-60 in larger legal trends and concerns. Geist is a Canada Research Chair at the University of Ottawa law school. Look for his regular articles in the Toronto Star, posted at www.michaelgeist.ca.)

Murray, Laura. *Faircopyright.ca*. URL: www.faircopyright.ca. (I maintain this website as a resource and advocacy tool, with a focus on educational issues in copyright.)

References


