

KEY POINTS

- Fair use provisions serve to counteract the restrictive and innovation-hampering effects of copyright, reflecting the evolving norms regarding the reasonable use of protected content.
- Despite the recent expansion of fair use by the Copyright Modernization Act (CMA), Canadian copyright law imposes excessive costs on users that legally interact with protected content.
- Creating an arbitration mechanism to resolve fair use claims quicker and in a more cost-effective manner than litigation will reduce social costs imposed on the Canadian public by reducing the burden on the court system and expediting the evaluation of fair use claims.
- Funding for the proposed dispute mechanism should be generated by the mechanism itself.
- The technologically neutral stance taken in the CMA, which encourages the proliferation of technological protection measures (TPMs), should be re-evaluated.

STRENGTHENING CANADA'S COPYRIGHT SYSTEM: A FAIRER MECHANISM FOR FAIR USE CLAIMS

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INTRODUCTION

By granting limited monopolies to rights holders and securing profits from the sale and circulation of their works, copyright law is an important mechanism for incentivizing innovation and the creation of cultural content. However, limiting how users interact with protected materials also imposes a number of social costs, such as threatening the ability of individuals to express themselves by engaging with protected media and hindering cumulative innovation. Modern copyright law has sought to minimize these social costs through fair use provisions, which allow for the reasonable use of copyrighted material.

Fair use can be thought of as a safety valve in copyright law that permits infringement consistent with social norms of fairness (Collins 2010, 45). However, fairness is an elusive and dynamic concept influenced by changes in the processes by which content is produced, and the nature of the content itself. The trend toward Internet-based innovation and creativity has been accompanied by a dramatic increase in the infringement of copyrighted material and claims that these activities qualify as fair use. New forms of cultural expression found in user-generated content (UGC) — such as commentaries, remixes, mash-ups, parodies and edits — interact with protected content, blurring the line between producer and user.

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Traditionally, the legal construction of fairness has been left sufficiently vague to accommodate the evolving notion of what is considered the reasonable use of copyrighted material, and has been applied by the courts on a case-by-case basis. While many forms of technology-driven cultural expression are widely considered to constitute fair use, these evolving norms have not been reflected in the application of copyright law, as users have faced takedown notices and litigation.

Despite recent modifications to Canadian copyright law that have sought to modernize fair use provisions to accommodate the evolving notion of fairness, costs are still imposed disproportionately on users. Additionally, the controversial Bill S-4,¹ which makes it easier for rights holders to access user identities from Internet service providers (ISPs), threatens privacy and may remove an important obstacle preventing rights holders from initiating litigation in cases of fair use. Excessive litigation threatens the ability of an already overburdened court system to address legitimate cases, while placing excessive financial costs on users who may lack the resources to make and defend a fair use claim. This brief provides an analysis of the 2012 CMA treatment of fair use² and makes recommendations for an optimal balance between copyright protection and fair use in the Internet age.

THE CMA: CANADA'S AMENDMENT TO ITS COPYRIGHT ACT

In an effort to update its copyright law and balance the interests of rights holders and the broader interests of Canadian citizens, the Canadian government amended

1 Despite the recent Supreme Court decision, *R. v. Spencer*, which determined that voluntary disclosure to police may constitute illegal search, challenging its constitutionality, Bill S-4 was passed by the Senate on June 16, 2014.

2 While it is understood that Canada's exceptions to copyright are officially called "fair dealing," as it is in most commonwealth countries, Michael Geist (2013) has argued that the recent amendments more closely resemble "fair use."

its copyright law in 2012. The CMA made a number of important improvements to the existing legislation, including elaborating on the activities permissible under copyright law, such as the creation of non-commercial UGC and the replication of legally acquired copyrighted works for personal use. It also introduced a “notice and notice” system to address the illegal use of copyrighted content, requiring rights holders to submit a notice of infringement to the ISP, which is then forwarded to the user accused of infringement and may include the threat of litigation. The amendment also modernized the legal notion of fair use. While these changes reflect an acknowledgement by the Canadian government of the importance of fair use provisions in offsetting the social costs of copyright, the amendment does not go far enough to ensure that the expansion of fair use is adequately protected.

The CMA expanded fair use provisions in Canadian copyright law to include the use of copyrighted works for “the purpose of research, private study, education, parody or satire” (Government of Canada 2012, 17). Additionally, the CMA defines distinct and moderate statutory damages for commercial and non-commercial infringement. In particular, the CDN\$5,000 cap for non-commercial infringement serves as an important deterrent for the excessive enforcement of copyright by rights holders who may attempt to coerce settlement payments from users who may be unaware of the protections afforded them under fair use. However, despite these protections, rights holders have continued to pursue litigation in order to deter the use of their

copyrighted material and to create a culture where users are cautious to engage with protected material.³

While this expansion is commendable and should be considered an important step in updating Canada’s copyright law to reflect changing understandings of fairness in the Internet age, there are concerns about the implications of the CMA’s “technologically neutral” stance, which effectively encourages the use of TPMs by rights holders. The increased use of TPMs that limit and control the use of copyrighted material prevents users from legally interacting with protected content.

TPMs

New technologies have made it easier for users to access, replicate, modify and share content, increasing the threat of copyright infringement. Rights holders have responded by increasingly relying on TPMs to enforce their rights. Examples include digital locks such as cryptography and electronic signatures, which prevent users from accessing content without paying. Other TPMs, such as digital watermarks, control the use of content that has been legally obtained, while packet inspection technologies seek to monitor Internet traffic for copyright infringement. In addition to legitimate concerns about privacy, the use of TPMs effectively precludes fair use provisions and threatens freedom of expression (Reynolds 2006, 179).

Fair use is the primary mechanism for the protection of freedom of expression in the copyright context. The ability

³ A recent example of this is the case of *Voltage Pictures LLC v. John Doe & Jane Doe*, where Voltage sought the personal information of over 2,000 IP addresses. The ISP, Teksavvy, refused to voluntarily disclose the identities of its customers. It should be noted that ISPs have no legal obligation to protect this information, and that Bill S-4 may make voluntary disclosures easier. In February 2014, the Federal Court ruled that Teksavvy had to disclose the information to Voltage. However, the court ruled that only vital personal information should be divulged, and that such notifications sent to the users be worded without coercion and under the supervision of an appointed judge.

of users to legally access and use copyrighted material is intimately connected to the protection of fundamental rights. However, merely including fair use provisions in copyright law does not guarantee that freedom of expression receives adequate protection. TPMs prevent the unauthorized use of content, but are unable to distinguish between genuine infringement and fair use. By creating a “virtual fence” that limits how users can interact with content, TPMs impair free speech and other forms of expression (Kerr, Maurushat and Tacit 2002-2003, 13). As fair use is an evolving legal concept, which is applied on a case-by-case basis, the non-discriminatory nature of TPMs removes human agency from the process of determining whether content is used legally. Further, the arbitrary blocking of copyrighted material prevents users from exercising their right to fair use and serves to criminalize legitimate expression (UN Human Rights Council 2011, 10).

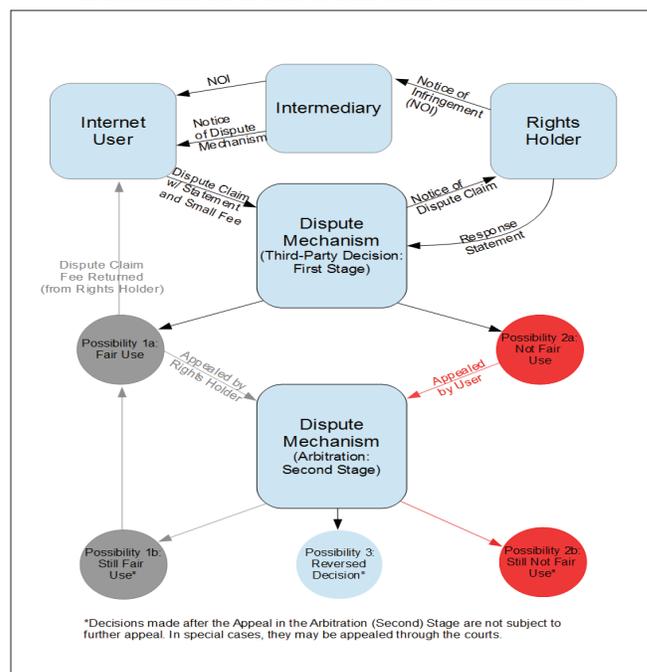
TRADITIONAL FAIR USE CLAIMS THROUGH LITIGATION

Currently, claims of fair use occur through a process of litigation, operating through judicial courts. Before copyright infringement cases are brought before a judge, rights holders must obtain the identity of the suspected user. Since rights holders only have access to the IP addresses of those suspected of infringement, they must request information about the user’s identity from the ISP. Thus far, Canadian ISPs have shown an unwillingness to acquiesce to these demands, forcing rights holders to take the relevant ISP to court, in order to obtain the information. However, the protection of user information by ISPs is not reinforced by law. Therefore, this important obstacle to the initiation of excessive litigation by rights holders is highly dependent on the practices of ISPs. Once initiated, the litigation process itself fails to resolve fair

use claims arising from Internet activity in an effective and efficient manner, and is particularly inappropriate for resolving small-scale, non-commercial claims made by individual users for the following reasons.

First, judges are not always experts on issues relating to new technologies, platforms and types of content. Second, the court process is slow. Third, there is often a heavy financial cost on both the involved parties and the government. The main problem with litigating fair use claims is that high costs discourage individual users and small groups from disputing notices and takedowns of lawful works, such as blog posts or video clips that interact with copyrighted content. Litigation is also costly for rights holders, particularly independent content producers.

FIGURE 1: DISPUTE SETTLEMENT



Source: Authors.

The CMA criminalizes the use of circumvention technology to evade TPMs, imposing significant fines on transgressors. The problems and inefficiencies within the litigation system, combined with the allowance of

TPMs to essentially override fair use provisions requires an alternative mechanism for resolving fair use claims. This mechanism must enable more individuals to defend their claims of fair use and address the lack of technical expertise of judicial bodies. Failure to address these impediments to an accessible and efficient process for making fair use claims counteracts the very purpose of fair use exceptions within copyright law and, therefore, challenges the effectiveness of the copyright system.

RECOMMENDATIONS

Industry Canada and the Department of Canadian Heritage and Official Languages should create a new mechanism for disputing fair use, as its reliance on the litigation process to adjudicate fair use claims threatens the effective application of fair use provisions in Canadian copyright law. In order for copyright law to balance the legitimate interests of rights holders while minimizing broader social costs, the Minister of Industry and the Minister of Canadian Heritage and Official Languages should support the creation of a dispute settlement mechanism to resolve fair use claims made by individuals and small groups accused of copyright infringement online (see Figure 1). This mechanism would provide benefits for users and encourage the more effective application of Canadian copyright law by lowering costs for individuals and small groups to make and defend fair use claims. The mechanism would protect the identities of users, thereby eliminating the process of acquiring this information from ISPs or through the courts. It would also utilize a cheaper and more flexible approach to resolving claims than litigation, and would allow for a more technically guided process that uses lawyers chosen for their expertise in online copyright infringement and fair use.

Upon receiving notice of a copyright infringement and/or takedown of a copyrighted work, an additional notification would be sent to the individual or small group accused of infringement (see Figure 1). This notice would inform the accused that they are able to submit a fair use claim. If the accused wishes to dispute the accusation of copyright infringement on fair use grounds, they must submit a written defence to the dispute body. In the first stage of the mechanism, the validity of the claim would be evaluated by a third party, according to the fair use provisions of the CMA. If the use of copyrighted material is covered under fair use, the rights holder that sent the notification to the user (via the ISP) would be subject to a penalty determined by a sliding scale based on gross annual revenue. If the claim is denied, the standard practice applies, with statutory damages capped at CDN\$5,000 for non-commercial infringement. However, both parties would have the option of making an appeal.

Although an appeal process may draw out the dispute resolution process, it is still significantly quicker and less costly than litigation. Moreover, the appeal process will only be initiated in the case of non-obvious decisions and are unlikely to be made for disputes arising from the non-commercial use of copyrighted content. Users should have the option to defend their claim in English or French, as the mechanism would be under operation of Canada's domestic law.

Funds for the proposed dispute mechanism should be self-generated and obtained from the parties using the mechanism. The costs incurred by the proposed dispute mechanism should not be borne by the Canadian government. Rather, necessary funds would be self-generated and obtained from the parties using the mechanism. Access to the dispute mechanism by fair use claimants would be contingent on paying a fee that is sufficiently high to deter excessive low-quality claims,

but low enough to allow reasonable access to individuals and small parties. In the event that the arbitrator decides in favour of the claimant, the cost would be reimbursed by the rights holder to the claimant. Access to the appeal process would also be subject to a fee; however, the size of this fee should be higher for rights holders, not claimants. Consideration should also be made toward redistributing some of the financial resources acquired from the dispute mechanism toward independent content creators. Initially, costs could be minimized by using lawyers and law students working pro-bono or through fellowships.

Industry Canada and the Department of Canadian Heritage and Official Languages should re-evaluate the technologically neutral stance taken in the CMA, which encourages the proliferation of TPMs. Although the creation of a dispute resolution mechanism addresses many of the issues impeding the effective application of fair use provisions in Canadian copyright law, the ability of TPMs to prevent and control access to content continues to threaten legal expression. Decisions regarding the legality of the use of copyrighted material online should not be made by tools unable to discriminate between legal and illegal behaviour. Rather, the application of copyright law and its fair use provisions should be carried out by experts who are able to apply the legal definition of fairness on a case-by-case basis. Harsh punishment for the use of circumvention technologies that may facilitate fair use are disproportional to the social costs they produce. A reassessment of the position taken on TPMs should be made in preparation for the review of the CMA in 2017.

CONCLUSION

The CMA made great strides toward updating Canadian copyright law to reflect changing norms regarding cultural expression and intellectual property in the Internet age. While its expansion of the legal definition of

fair use was an important step in acknowledging that the protection of the reasonable interaction with copyrighted materials brings about important social benefits, these rights have not received adequate protection under the current framework. The creation of a dispute resolution mechanism to arbitrate fair use claims would lower costs for users and strengthen an overburdened court system allowing Canadian copyright law to continue to incentivize and reward creativity, while not overly restricting access to content.

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