Christine F. Smith, Concordia University, Montreal, QC, Canada
Rumi Graham, University of Lethbridge, Lethbridge, AB, Canada
Eva Revitt, MacEwan University, Edmonton, AB, Canada

LEAPS IN MEDIA ACCESS & REUSE:

COPYRIGHT CODES OF BEST PRACTICE (Paper)

Abstract:

> Academic librarians and media scholars face increasing pressures to preserve, provide access to, and reuse media technology. Simultaneously, technological advances add complexities to assessing the applicability of fair dealing to unauthorized scholarly uses of copyright-protected content. To address these challenges, concerned members of these two communities have joined forces to create the Media Access and Copyright (MAC) Working Group. This paper provides an overview of MAC's structure and achievements as well as its current research project, the development of two codes of best practices aimed at supporting informed decision making in the application of fair dealing by scholars and practitioners.

1. Introduction

The ability to access and use media content is vital for media scholars and students. Academic librarians, with expertise in developing, preserving, and providing access to collections, are cultural stewards who play a key role in advancing the scholarly, artistic, and academic missions of Canada's universities and GLAM institutions. However, accessing, developing, using, and preserving media collections in a reliable and copyright-aligned way is increasingly difficult as physical media becomes obsolete and content shifts to proprietary streaming platforms. Copyright anxiety (Wakaruk et al., 2021) and complexities of assessing the applicability of fair dealing to scholarly uses of copyright-protected content further complicates the situation.

The Media Access and Copyright (MAC) Working Group, originally convened by the Film and Media Studies Association of Canada, is a team of concerned individuals who have partnered on media access and copyright education and advocacy. MAC members include academic librarians, legal and copyright experts, artists, and media scholars. Together, they have spearheaded initiatives that include a report advocating for the creation of best practices developed by and for scholars and librarians regarding fair dealing and other copyright users' rights (Taylor et al., 2022), and a public policy advocacy brief highlighting the need for copyright reform (Nair, 2023).

1

2. Objective

The objective of this research project is to use a grassroots process to collaboratively create two codes of best practices for incorporating fair dealing into everyday scholarly and academic activities: one for media scholars, and a second for academic librarians. The overarching aim of this project is to help achieve better balance between copyright's social and economic goals by creating sound, practical tools that enable scholars and librarians to exercise user rights knowledgeably. In turn, confident and consistent application of user rights can enhance scholarly, creative, and preservation processes and encourage learning throughout Canadian society for students, educators, and ordinary citizens.

3. Background and Research Literature

As the Canadian Copyright Act lacks an explicit purpose statement, we look to judicial interpretation for copyright's public policy rationale. In a landmark ruling, the Supreme Court of Canada stated that the Copyright Act "is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (Théberge, 2002). The instrumental purpose of copyright in Canada is thus to balance private and public interests in the copyright ecosystem.

Fair dealing in Canadian copyright law is a close cousin of fair use in U.S. copyright law. Both aim to balance the rights of copyright owners with the rights of the public to use copyright-protected works without permission when the use is, on the whole, fair (D'Agostino, 2008). Fair use is often viewed to be more flexible due to its open-ended applicability to any purpose if the use is fair, whereas fair dealing is usually construed as being applicable only to the fair dealing purposes enumerated in the Copyright Act. However, Geist (2013) argues that in 2012, amendments to the Copyright Act and Supreme Court decisions in a set of five copyright cases had the effect of shifting Canadian fair dealing much closer to U.S. fair use. It remains the case, however, that scholars tend to be unsure of the applicability of fair dealing to media access, preservation, and reuse challenges.

The crux of the problem of scholarly access to media works is the growing impermanence of access to moving-image works arising from an accelerated shift toward access via limited-term licensing for personal, non-commercial uses (Lemley, 2020). Current distribution practices, including the use of technological protection measures, are pushing the accessibility of media content toward untenable precarity, which may result in irrecoverable loss of access to unique cultural works for future scholars, research-creators, and society at large (Lee, 2021).

The media access problem is also an issue of equity, diversity, and inclusion, as "the actual interests of people with disabilities to access copyright works [are subordinated] to the hypothetical interests of copyright holders who may withhold access without reason" (Reid,

2021). Librarians striving to provide equitable access to collections are often stymied by accessibility provisions in copyright law that only seem to account for the needs of people with visual impairments, and by ableist decisions of media distributors to forgo accessibility accommodations for users with perceptual disabilities (Wentz et al., 2023). Best practice codes outlining opportunities for equitable and lawful access can support media-dependent activities of all scholars, whether perceptually disabled or not (Clark, 2022).

The media preservation problem stems from mainstream providers' disinterest in adopting robust archival mandates. The "end of ownership" of personal copies of media content (Perzanowski & Schultz, 2016) is linked to the business practices of distributors that have shifted from retailing physical media to offering subscription-based, time-limited access to digital files usable only on proprietary platforms without the option of physical or durable digital download formats (Handman, 2010; Lamphere, 2020; DeLaurenti et al., 2022). Such media content may disappear once a subscription expires or a provider chooses to withdraw its own unique content (Lemley, 2020; Lee, 2021). The resulting "asymmetrical" distribution economy renders "users and content originators . . . particularly vulnerable," (Colbjørnsen, 2021), especially media-dependent academics who are responsible for developing and preserving such content.

The media reuse problem is the challenge of safeguarding academic (Moscon, 2015) and expressive (Amani, 2014) freedoms involving appropriation and recontextualization of copyright-protected media. The freedom to make scholarly uses of protected media is essential, given that such uses create new meaning for reused content and are fundamentally important to core creative and scholarly practices (Baron, 2012; Baron, 2014). Scholarly reuse of media in documentaries and experimental video often fall within copyright law's exceptions and limitations, which allow use of works for purposes such as research and education, when the use can be shown to be fair (Aufderheide & Jaszi, 2008). But the applicability of statutory user rights to scholarly media reuse is widely misunderstood (Anderson, 2012). Although the Canadian Copyright Act contains a non-commercial user-generated content provision, scholars have questioned its practical utility in light of automatic infringement and takedown notices generated by media sharing platforms (Craig & Tarantino, 2021) and unsettled distinctions between "non-commercial" and "commercial" uses (Awan, 2016).

This research was motivated by a belief that new norms are needed in the scholarly community to dispel the "pervasive and well-founded culture of fear with respect to copyright" (Soar, 2014). Such worries can hobble the mission-critical activities of those in media-intensive fields who wish to excerpt media in lessons and assignments, use media in their own creative expressions, and share their works publicly (Rodgers, 2018). Habitual disuse of user rights in copyright law can perpetuate permissions overdependence and a culture of fear, which may eventually strip those rights of their power to effectively counterbalance owners' rights. Such an outcome would

compromise cultural participation (Geiger, 2016) and copyright's core purpose of encouraging learning (Tawfik, 2023; Statute of Anne, 1710).

4. Methods

The methods used in this project are based on a seminal work by Aufderheide and Jaszi, *Reclaiming Fair Use* (2018), which outlines a stepped approach to developing a code of best practices.

Step 1
The first step identifies communities of practice in which to socialize the idea of a code of best practices. This will be accomplished by hosting information sessions or making presentations at relevant conferences, such as CAIS. A project website will also be developed.

Step 2
The second step discovers how copyright problems are experienced by members of the concerned communities and invites them to participate in a survey and focus group discussions. Using Likert-scale and open-ended questions, the survey will probe issues of media use. These methods will allow the researchers to capture levels of agreement and feelings on these topics with the goal of empirically grounding copyright-related problems pertaining to media access, preservations, and reuse, and illuminating how members cope with them.

The researchers will convene five focus groups to gather stories that exemplify the problems. A focus group is a qualitative research method that includes a small sample of 6 to 10 participants who contribute to a discussion on a topic of interest to the researchers. Focus group dynamics, the absence of gatekeepers, and open group structure allow participants to speak freely and to question, support, or build upon the perspectives of others (Stewart, Shamdasani, Rook, 2007). A key advantage of focus group discussions is their potential to yield nuanced and novel insights that may not emerge from individual interviews (Catterall & Maclaran, 1997; Ritchie et al., 2014).

In the first half of each focus group, participants will share perceptions, beliefs, and experiences—their "stories"—of interacting with media in their day-to-day scholarly or professional practice. Stories are essential for the creation of codes of best practices because they illustrate how members experience the problems in their daily work. Through dialogue and interaction, focus group participants will collectively construct shared "realities" or "understandings" about the use of copyrighted media. The social interactions encourage an exchange of ideas, promote a variety of perspectives, and may reveal complex behaviours, (mis)understandings, and motivations that provide the researchers with valuable insights into the norms, values, and beliefs shaping participants' actions and opinions (Catterall & Maclaran, 1997; Ritchie et al., 2014).

Step 3
Taking place in the second half of each focus group, the third step builds a shared understanding among research participants of common uses of media that may be fair dealing and will "imagine their practice outside the constraints, fears, or misinformation about the use of copyright material" (Aufderheide & Jaszi, 2018).

Within a social constructivist framework, the research team will interpret the focus group and survey data using an inductive content analysis approach to make "replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use," (Krippendorff, 2019). Once ideas arising from data analyses are synthesized, the team will draft codes of best practices that reflect areas of participant consensus about common unpaid uses of media content that can qualify as fair dealing or another user right.

This research will pull from parallel experiences of best practices applications found elsewhere including best practices for using media works in film education in the United Kingdom (Meletti et al., 2023).

5. Selected Concrete Contributions

The codes developed in this project aim to support informed decision-making when applying fair dealing and other statutory user rights to media use in education, preservation, and research-creation settings. The researchers' goal is to collaboratively develop codes of best practices in applying user rights to activities involving access to and preservation and reuse of media. These codes will provide concrete, sound guidance to scholars and librarians who work in media-intensive fields. Additionally, the codes may inspire other communities and professional fields to learn from the codes, customize them for their community-specific needs, or perhaps to develop their own best practices. Our research may also benefit the judiciary and administrators, as best practices codes can demonstrate reasonable and customary community norms and reduce institutional risk.

References

Amani, B. (2014). Copyright and freedom of expression: Fair dealing between work and play. In R. Coombe, D. Wershler, & M. Zeilinger (Eds.), *Dynamic fair dealing: Creating Canadian culture online* (pp. 43-55). University of Toronto Press.

Anderson, S. (2012). Fair use and media studies in the digital age. *Frames Cinema Journal*, 1. http://framescinemajournal.com/article/fair-use-and-media-studies-in-the-digital-age/

Aufderheide, P., & Jaszi, P. (2008). *Recut, reframe, recycle: Quoting copyrighted material in user-generated video*. Center for Social Media. https://cmsimpact.org/resource/recut-reframe-recycle/

Aufderheide, P., & Jaszi, P. (2018). *Reclaiming fair use: How to put balance back in copyright* (2nd ed.). University of Chicago Press.

Awan, M. (2016). The user-generated content exception: Moving away from a non-commercial requirement. *Canadian Intellectual Property Review, 32*(1), 11-32. https://ipic.ca/_uploads/iskng0dp.pdf

Baron, J. (2012). The image as direct quotation: Identity, transformation, and the case for fair use. *Frames Cinema Journal*, 1. http://framescinemajournal.com/article/the-image-as-direct-quotation/

Baron, J. (2014). Introduction. In *The archive effect: Found footage and the audiovisual experience of history* (pp. 1-15). Routledge.

Catterall, M., & Maclaran, P. (1997). Focus group data and qualitative analysis programs: Coding the moving picture as well as the snapshots. *Sociological Research Online, 2*(1), 41-49. https://doi.org/10.5153/sro.67

Center for Media & Social Impact. (2019) *Code of best practices in fair use for software preservation.* Rev. Center for Media & Social Impact. https://cmsimpact.org/code/fair-use-software-preservation/

Clark, A. K. (2022, November 14). How accessibility for disabled university students can benefit all students. *The Conversation*. https://theconversation.com/how-accessibility-for-disabled-university-students-can-benefit-all-students-189180

Colbjørnsen, T. (2021). The streaming network: Conceptualizing distribution economy, technology, and power in streaming media services. *Convergence, 27*(5), 1264-1287. https://doi.org/10.1177/1354856520966911

Copyright Act, Revised Statutes of Canada (1985, c. C-42). Retrieved from the Justice Laws website: https://laws-lois.justice.gc.ca/eng/acts/C-42/

Craig, C., & Tarantino, B. (2021). 'An hundred stories in ten days': COVID-19 lessons for culture, learning, and copyright law. *Osgoode Hall Law Journal, 57*(3), 567-604. https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss3/3

DeLaurenti, K., Paulsen, K., Cook, C., & Prelinger, R. (2022, January 10). *From owning to streaming: The transition to digital media in education* [webinar]. Library Futures, Internet Archive. https://archive.org/details/from-owning-to-streaming

Geiger, C. (2016). Copyright as an access right: Securing cultural participation through the protection of creators' interests. In R. Giblin & K. Weatherall (Eds.), *What if we could reimagine copyright?* (pp. 73-109). Australian National University. http://press-files.anu.edu.au/downloads/press/n2190/pdf/book.pdf?referer=2190

Handman, G. (2010). License to look: Evolving models for library video acquisition and access. *Library Trends, 58*(3), 324-334. https://doi.org/10.1353/lib.0.0094

Jacob, M., Jaszi, P., Adler, P.S. & Cross, W. (2021) *Code of best practices in fair use for open educational resources: A guide for authors, adapters & adopters of openly licensed teaching and learning materials.* American University. https://oer.pressbooks.pub/fairuse/

Krippendorff, K. (2019). *Content analysis: An introduction to its methodology.* (4th ed.). Sage. https://doi.org/10.4135/9781071878781

Lamphere, C. (2020). Streaming media: An access and preservation game changer. *Online Searcher, 44*(3), 31-34.

Lee, T. B. (2021, October 6). Why streaming content keeps vanishing—and how to stop it. *Full Stack Economics.* https://www.fullstackeconomics.com/p/why-streaming-content-keeps-vanishing-and-how-to-stop-it

Lemley, M. A. (2021). Disappearing content. *Boston University Law Review, 101*(4), 1255-1288. https://doi.org/10.2139/ssrn.3715133

Meletti, B., Morrison, C. & Secker, J. (2023). *Code of fair practice for the use of audiovisual works in film education.* Published online. https://learningonscreen.ac.uk/copyright-guidance/code-of-fair-practice/

Moscon, V. (2015). Academic freedom, copyright, and access to scholarly works: A comparative perspective. In R. Caso & F. Giovanella (Eds.), *Balancing copyright law in the digital age: Comparative perspectives* (pp. 99-135). Springer Berlin Heidelberg. https://doi.org/10.1007/978-3-662-44648-5_4

Nair, M. (2023). *Copyright advocacy.* Published online. https://docs.google.com/document/d/17bTdZ4iH-jngD9mOW7FbBZyiH97hBNfB/edit?usp=sharing&ouid=100745508961072058253&rtpof=true&sd=true

Perzanowski, A., & Schultz, J. (2016). *The end of ownership: Personal property in the digital economy.* MIT Press. https://ssrn.com/abstract=3573549

Reid, B. E. (2021). Copyright and disability. *California Law Review, 109*, 2173-2225. https://www.californialawreview.org/print/copyright-and-disability/

Ritchie, J., Lewis, J., McNaughton Nicholls, C., & Ormston, R. (Eds.). (2014). *Qualitative research practice: A guide for social science students and researchers* (2nd ed.). Sage.

Rodgers, W. (2018). Buy, borrow, or steal? Film access for film studies students. *College & Research Libraries, 79*(4), 568-591. https://doi.org/10.5860/crl.79.4.568

Soar, M. (2014). If you're asking, it's not fair dealing: Animating Canadian copyright issues in a "read-write" classroom. In R. Coombe, D. Wershler, & M. Zeilinger (Eds.), *Dynamic fair dealing: Creating Canadian culture online* (pp. 154-163). University of Toronto Press. https://mattsoar.com/fairdealing/SoarFairDealing.pdf

Statute of Anne 1710, 8 Ann., c. 19 (Gr. Brit.). https://avalon.law.yale.edu/18th_century/anne_1710.asp

Stewart, D.W., Shamdasani, P.N., & Rook, D.W. (2007). *Focus groups: Theory and practice*. 2nd ed. Sage. https://methods.sagepub.com/book/focus-groups

Tawfik, M. J. (2023). *For the encouragement of learning: The origins of Canadian copyright law*. University of Toronto Press. https://utorontopress.com/9781487545253/for-the-encouragement-of-learning/

Taylor, A., et al. (2022). *How copyright impedes creativity and learning, and how Canadian media studies communities can take action: Final report of the Media Access and Copyright Working Group,* Film and Media Studies Association of Canada. https://www.filmstudies.ca/wpdev/wp-content/uploads/2022/08/FSAC-MAC-Full-Report-final.pdf

Théberge v Galerie d'Art du Petit Champlain inc., 2002 SCC 34. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1973/index.do

Wakaruk, A., Gareau-Brennan, C., & Pietrosanu, M. (2021). Introducing the Copyright Anxiety Scale. *Journal of Copyright in Education & Librarianship, 5*(1). https://doi.org/10.17161/jcel.v5i1.15212

Wentz, B., Gorham, U., & Jaeger, P. T. (2023). Academic libraries and their legal obligation for content accessibility. *First Monday, 28*(1/2). https://doi.org/10.5210/fm.v28i1.12892