De Minimis Copying, MOOCs and Institutional Risk Avoidance: The Case of the Understanding Video Games MOOC

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Note: These slides are an abridged version of the conference presentation
Outline

A. The Story of the Understanding Video Games MOOC

B. Risk, Rights Holders and Pedagogy

C. Towards Substantial Guidelines on Substantiality
A-I. Context

- University of Alberta launches its first MOOC, Dino 101, in Sept 2013 on the Coursera Platform
  - Planning begins for second MOOC, Understanding Video Games (UVG), to run next fall with lead instructor Sean Gouglas

- UVG runs as a MOOC in fall 2014
  - 27,000 plus students from 154 countries
  - Topics include: game mechanics, but also issues of violence, sexism and racism in video games
Early 2014 – University of Alberta determines that inclusion of copyrighted material (specifically short (10-20 second) clips from video games) requires permission of the copyright holder

Summer 2014 – Stakeholder meeting to discussion the ‘permission required’ stance and its impact on pedagogy and university risk tolerance

January 2015 – formal letter sent by three professors to request revision to the permission required approach
  • Included a three prong argument as to why copyrighted materials could be included

March 2015 – University affirms its “get permission for everything” approach for use of copyright material in MOOCs
A-III. The Three Prong Argument

- Three prong argument for including copyright material
  - 1) Argue that the inclusion of content, video clips from games totaling less than 20 seconds, was insubstantial copying
  - 2) Suggest such copying was ‘quotation’ and covered by Article 10 of the Berne Convention
  - 3) Provide a thorough fair dealing argument

- De minimis argument based on CCH (2004); U & R Tax Services (1995); Delrina (2002); Breen (1985); Copyright Board (2009 and 2014)
B-I. U of A and Risk

U of A Risk Management Policy
• “In an environment of significant change and of increasing competition it is essential that the University recognize the importance of assuming a reasonable level of risk if it is to fulfill its vision, mission and strategic priorities.”

U of A Institutional Risk Policy Statement
• “The University acknowledges that there is an element of risk in any decision or activity and encourages risk taking when the risk is appropriately managed.”
• Also identifies “Reputational” risk as one of five risk categories
B-II. Perspectives of Rights Holders

- Rights holders often wanted to know the why/how their content would be used/portrayed

- Some, including major publishers, were quite permissive and viewed the use of short clips as fair dealing

- Others were concerned about the way in which their content was to be discussed, and refused permission for the inclusion of their materials

- “Get permission for everything” approach put copyright holders in control of how their content was used/discussed
  - This approach undermines the pedagogic integrity of the MOOC
B-III. The Results on Pedagogy: What Students Saw
B-IV. The Results on Pedagogy:
What Students Should Have Seen
C-I. *De Minimis* Brightlines? – “Frankly my dear, I don’t give a damn”

- Jurisprudence reveals a strong preference for considering substantiality in a qualitative and holistic manner, rather than in a quantitative (% of the work) approach
  - Copyright Board decisions do tend to be more quantitative

- In the case of video games there may be some (though very few) still images or short clips that are substantial

- Some of the matters that have been considered by courts in the past include:
  - a) the quality and quantity of the material taken;
  - b) the extent to which the defendant’s use adversely affects the plaintiff’s activities and diminishes the value of the plaintiff’s copyright;
  - c) whether the material taken is the proper subject-matter of a copyright;
  - d) whether the defendant intentionally appropriated the plaintiff’s work to save time and effort; and
  - e) whether the material taken is used in the same or similar fashion as the plaintiff’s (*U & R Tax Service v. H & R Block* at 268)
C-III. Warman v. Fournier (2012)


• Warman decision uses the U & R Tax five factors (para. 23)

• Decision based largely on U & R Tax’s first factor (qualitative and quantitative amount)

• Reproduction an article headline, three full paragraphs and part of a fourth out of an 11 paragraph article

• “Quantitatively, the reproduction constitutes less than half the work... Qualitatively, the portions reproduced are the opening ‘hook’ of the article, and the summary of the facts on which the article was based. Most of the commentary and original though expressed by the author is not reproduced.” (para. 25)
C-IV. Cinar Corp. v. Robinson, 2013
(Cinar Corporation v. Robinson 2013 SCC 73)

• “A substantial part of a work is a flexible notion” (para. 26)

• “a substantial part of a work is part of the work that represents a substantial portion of the author’s skill and judgement expressed therein.” (para. 26)

• “If the differences are so great that the work, viewed as a whole, is not an imitation but rather a new and original work, then there is no infringement.” (para. 40)

• Court rejected Cinar’s proposed three step test for assessing substantiality (which was similar to the American “abstraction-filtration-comparison” approach)

• Notably, U & R Tax/Warman framework not cited/adopted
C-V. Copyright Board – Satellite Radio Services Decision (2009)

- “…The rolling 4 to 6 seconds of a musical work is not an aggregate of an entire work. At no time does a subscriber possess a series of 4 to 6 second clips which when taken together would constitute a substantial part of the work. It matters not that over time the totality of all works transmitted are reproduced…” (para. 97)

- In our opinion, the 4 to 6 second buffer fails to satisfy the substantiability requirement. It is not a substantial part of the protected work…” (para. 98)
C-VI. Copyright Board – Provinces and Territorial Governments Decision (2015)

- Possible for two pages of a book to be substantial, though also possible more could be copied without being substantial (para. 203)

- Without qualitative analysis, 1-2 pages, not constituting more than 2.5% of the work is non-substantial
  - “… the percentage equivalent to what the Board had previously considered not to be substantial reproductions in its Satellite Radio Services decision.” (para. 204)

- For works of 40 to 79 pages one page is not substantial, and for works of 80 pages or more two pages is not substantial (para. 205)
C-VII. Copyright Board – Elementary and Secondary Schools Decision (2016)

- Substantiality a threshold question (para. 212) and “flexible notion” (citing Cinar, para. 213)

- “While it can be argued that the term ‘insubstantial’ is the opposite of ‘substantial,’ the term ‘insubstantial’ in our opinion, has a different connotation than the term ‘not substantial,’ which more closely mirrors the language in section 3 of the Act. Therefore a finding of ‘insubstantiality’ is not necessary to determine that a copy does not represent a substantial portion of the author’s skill and judgement.” (para. 216)

- Can’t mistake utility for the end user with the originality of the author (para. 217)

- No non-substantial copying with respect to newspapers and magazine articles (because of their shorter length) (para. 228)
C-VIII. Other Jurisprudence

• “[i]f the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement” (CCH at para. 56)

• *Breen v. Hancock* underscores the importance of considering the qualitative nature of the copying in addition to the quantitative amount (*Breen v. Hancock House Publishers Ltd.*, (1985) 6 C.P.R. (3rd) 433 at 436 (F.C.T.D.)).

• In *Delerina Corp. v. Triolet Systems Inc.*, 2002, 58 OR (3d) 339, it was noted that 40 lines of code copied from a program that had 14,000 lines of code was considered *de minimis* copying (*Derlina*, para 30).
C-IX. Towards (In)Substantiality Guidelines

**Fair Dealing’s Clear Trajectory**


**De Minimis’ Scattered Approach**

Cinar (2013) (S.C.C.)


C-IX(ii). Towards (In)Substantiality Guidelines

• Amount of guidance on substantiality varies among academic institutions in Canada
  • University of Western Ontario has a substantial guide (cites Warman):
    http://copyright.uwo.ca/guidelines_requirements/guidelines/substantiality_guidelines.html

• While *CCH* spoke to considering the practices of an industry in relation to the character of the dealing (para. 55), there is a need to also develop practice around substantiality

• Need to carefully consider *de minimis* in future advocacy work
Sources:

- Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright) [2012] 2 S.C.R. 245
- Cinar Corporation v. Robinson 2013 SCC 73
Image Sources:

Images:


• Slide C-I. “Metroid.” 2013. Screenshot by B Morse; Metroid copyright Nintendo. [Link to Image]