
Abridged version of:

"Publicly Available" on the Internet

Report for the Working Group on
Educational Use of Publicly Available
Material on the Internet

Prepared at the request of the Canadian Publishers' Council

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Objective of Report

At the consultation meetings held in Ottawa in December it was agreed that there were sites on the Internet containing “publicly available” material. What was not agreed was the definition of “publicly available. The rightsholder and licensing communities felt that strongly that “publicly accessible” and “publicly available” were not equivalents.

The definition of “publicly available” content proposed by the educational community contained the following elements:

- No expectation of payment
- No technological protection measures.

The rightsholder community struggles with the assumption that this could include material that has clear copyright notices.

This report has been prepared to present a range of Internet sites to surface the issues raised by this proposed definition in order to assist the working group in reaching consensus on a workable definition of “publicly available”.

Of course, it is recognized that the achievement of a common understanding of “publicly available” is only the first step.

Methodology

First, a range of sites were selected to include the following:

- Portals
- Aggregators
- Online publisher
- Multi-media publisher
- Information e.g. government
- Corporate
- Personal, including self-promotion
- Mix of media (text, images, video)

To endeavour to reduce the subjectivity of the selection, an Internet resource book was used, YAHOO! the ultimate 2002 reference to the Web.¹ Then, general Canadian interest sites were selected including government, large publishers, large newspaper, leading magazine. The intent was not to be all-inclusive but to view a variety of content types and purposes.

Second, the sites were analyzed using a standard template.

- General Comments
- _____

¹ 2002, Pocket Books, a division of Simon and Schuster, Inc.

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- Apparent Purpose of Site
- Revenue Expectation
- Type of Information
- Published (if so, in what format)
- Notice re copyright, permission for use, terms and conditions
- Technological Protection Measures, and
- Implications of Exemption.

This analysis illustrated that the components of the definition had to be clarified.

Expectation of Payment

Unquestionably, the educational community views this to mean that the site anticipates revenue for the access to and use of the content. However, the examination of the websites indicates that the issue is more complex. There are many different business models that the content can be inextricably supporting. It is necessary to review some of these.

Disseminator of content for fee

Since these sites are clearly excluded from the proposed definition of “publicly available” examples have not been included. However, the online services like Infomart, QL Systems, WestlaweCarswell, and LexisNexis fall into this category. The information cannot be accessed without passwords and compensation is through subscription or transactional charges.

Service promotion

The Internet has become a powerful marketing tool for consultants, photographers, freelance writers, professionals, etc. These sites often include samples of the individual’s or company’s work to entice prospective clients. Obviously, the prospective client is an unknown and access should be as painless as possible. Requiring a user to obtain a password in order to view the work would be counter to the purpose of the site since it would discourage browsing. The content displayed is not always the final product. These sites are frequently to promote custom services. The revenue potential here is sale of services and the content supports that revenue potential. An example of this model is K.K. CAMPBELL & Company specializing in media consulting.

Portal

Many of the reference sites are portals. A site developer identifies a particular community of users and a particular range of topics. The site is designed to organize and facilitate access to other web resources and to provide connections between members of the community of users. These sites often have interactive tools, chat lines, surveys. Usually the revenue model is sponsorship and advertising. If the site is successful in its design, content offerings and resources, it

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can guarantee a level of user activity to advertisers (eyeballs). The uniqueness of the content and the vitality of the site are key factors in protecting the revenue stream. A good example of this type of site is Archaeologic.com.

Aggregator

The aggregator is similar to the portal but instead of linking out it collects the content and presents it on its own site. The aggregator can present a hybrid site – some free material to promote subscription to a broader collection. The revenue model can look similar to the portal with advertising and sponsorship revenue – as well as promoting sales of subscriptions. Again the content is the draw that guarantees the revenue. The ease of access to the resources supported by the advertisers is critical. An example of this model is Newseum.

Corporate

The corporate community has endorsed the Internet resoundingly using it as a vehicle to “brand”, provide information, connect with its market and, of course, sell. Giving its market the opportunity to browse the presented content easily is important. Equally, the management of the message and the presentation of its information products are essential to fulfilling the purpose of the site. Although the content is freely accessible it is clear that the content is entwined with the expected returns from this marketing tool. Kodak, McGraw-Hill Ryerson, Pearson, Globe and Mail and Macleans have been included in the examples.

Sharing of information

A multitude of organizations use the Internet to disseminate information: governments, lobbies, associations, charities, political parties to name just a few. There is usually no expectation of revenue from the content. Tax dollars, sponsorships and donations are part of the model but are driven more by connection with the broader objectives of the organization than the management of the content. The government sites, MADD and the Council of Canadians are examples of this type of site.

Copyright and Terms and Conditions Notices on Websites

After the review of all of these site examples, what do we know?

- Sites are making content accessible to anyone who accesses the site.
- The purpose of the site indicates that that the content is not intended to be “publicly available”, that is, reusable without permission.

Are efforts are being made to constrain the users? In almost all cases, the answer is yes. The effectiveness of those efforts varies.

Copyright notices protecting the site design and/or content appear usually at the bottom of the page, one of a series of links to “administrative” content. Terms and conditions of use information is included in a similar way. Both permissive and prohibitive strategies are evident – one tells the user what can be done, the other what can’t be done. General references to legislation may be included. The notice can be as minimal as a copyright

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symbol or as sophisticated as technological protection measures inhibiting print and download (Cornellier site an example). There may be interactive permission request forms to facilitate compliance.

If requiring technological protection measures to ensure that content is not considered to be “publicly available” is too extreme, is there another level where the line can be drawn? Certainly the examination of the sites illustrated that the copyright notices and terms of use are not always easily visible. It would seem extreme to suggest that we ignore, in the digital environment, the very symbols and language that is acceptable in print just because some sites have handled the presentation of these pieces of information ineffectively.

Content Types – Special Issues

Several of the sites (Digitalstoryteller, for example) illustrate the complexity of reproducing content with fair credit. The photojournals are text wrapped around images. When this is how the content is “published” in the digital environment would it be reasonable to suggest that the content is divisible as well as “publicly available”? Does that not raise significant issues of moral rights?

Collective Licensing

It is impossible to look at these examples, particularly on the issue of expectation of payment, without looking at collective licensing.

The rightsholder community, including publishers, have been supportive of collective licensing as a part of any solution to address educators’ unique concerns and needs. However, the terms of that licensing have been expected to align with the legitimate interests and concerns of the creator/producer community that their rights are secure in a licensing solution.

Licensing was discussed at length at the consultation as an alternative to a legislated exemption for the educational community. If licensing assumes the proposed definition of “publicly available” is the basis on which activity is licensed it will create the same dysfunction to several of the business models as the proposed exemption. Revenue received through a licence for the reproduction of content that is supporting advertising and sponsorship on a site will not replace revenue from advertisers and sponsors lost due to the site’s inability to maintain its uniqueness and value.

If licensing is a solution to the “chill factor” of not knowing whether permission is required, then potentially licensing arrangements could apply to content where there appears to be no copyright asserted or where there is real ambiguity.

To summarize the above, the rightsholders firmly believe that a licensing solution and licensing terms should not be so broad as to permit the reuse of all “publicly accessible” material. Licensing in the digital environment should still have limits on quantity. Where it is absolutely unambiguous that copyright is asserted, direct permission should still be required if the terms of the licence do not cover the desired activity.

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Other issues still need to be considered. Is the “work” the entire website or the content components in determining the permissible percentage of copying? What about images? How will systematic, cumulative copying be addressed in a digital environment?

What is “published”? Unpublished works are posted on the Internet regularly, often in the educational community for peer review. These normally would not be intended to be available for reproduction – is the posting publication? Clearly there is no expectation of payment and TPM would be onerous. So would these works be considered “publicly available”?

If the collectives are given limited liability, through an amendment to the Copyright Act, to protect themselves, in their role as licensors, from liability for “licensing” material outside the limits, the repertoire or affiliations, shouldn’t this carry with it an obligation to ensure that there is rigor in applying the terms of the licence? Does this require enlisting the Copyright Board to address compliance issues? Is there a need for a watchdog?

Summary

The intent of this report is not to recommend a definition of “publicly available”. The examples clearly indicate that the definition as proposed would dramatically change the dynamics of copyright and business. That definition would consider material that is unambiguously “copyrighted” and where terms of use are clearly stipulated to be “publicly available”. It is highly recommended that a less inclusive definition be determined before any discussion of “solutions”: legislated exemption, licensing or other.