

# CANADIAN COPYRIGHT INSTITUTE

*Established to promote a better understanding of copyright and to encourage its use in the public interest*

SUITE 107 192 SPADINA AVENUE, TORONTO, ON M5T 2C2  
1756

TELEPHONE 416-975-

FAX  
E-mail

416-975-1839  
[Info@theCCL.ca](mailto:Info@theCCL.ca)

## **Intervention by the CCI to the Standing Committee on Copyright and Related Rights (SCCR 29) of the World Intellectual Property Organization (WIPO)**

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### The negative effects of changes to Canada's Copyright Act

In November of 2012, Canada's Copyright Act was changed. Some of the changes were welcomed by the creative community. But one highly contested addition to the existing fair dealing provision caused great concern. In brief, the Act was changed to allow the following:

"Fair dealing for the purpose of research, private study, **education, parody or satire** does not infringe copyright."

The three exceptions for education, parody or satire [in bold] were new. Creators and publishers have no issue with parody and satire being included in exceptions as long as it is fair.

Education as a broad, undefined category of fair dealing is another matter. Canada's educators photocopy or digitally scan hundreds of millions of pages of copyright-protected content every year. They use these copies to compile course packs – essentially, purpose-built anthologies of required reading – as part of their curriculum. Collectively licensed course pack anthologies, whether they are delivered as photocopies or as part of an online reading platform, are an established, valuable and vital market for Canada's creators and publishers. Revenue from the education sectors – schools, colleges and universities – make up a significant percentage of sales for many Canadian publishers. For Canadian writers, income from collective licensing is an irreplaceable part of the modest living they make from their professional work.

The educational sector gave assurances to the Canadian government that the addition of "education" to our fair dealing exception would not impact royalty and revenue streams for the publishing and writing sector in Canada.

Since the introduction of the exception, however, here is how educational fair dealing is now being defined by universities, colleges, and schools in Canada.

Both the Association of Universities and Colleges of Canada and the Council of Ministers of Education have posted these guidelines, which have been adopted by many college and university administrations as new faculty policy. They say that the copying must be "fair" but they then tell teachers and instructors they may provide or communicate "short excerpts" to each student enrolled in a class or course. What are short excerpts in the view of AUCC and CMEC?

Up to a full 10% of a copyright protected work

One complete chapter from a book

An entire single article from a periodical

An entire poem from a copyright protected work containing other poems

Since nothing in either our Copyright Act or case law has established such guidelines, I think they reflect what the educational community would like the law to be – not what it is. In fact these guidelines mirror some of the copying limits authorized by the licences granted by Canada’s collective societies, under which almost all educational institutions in Canada were licensed for more than two decades.

Let us use a couple of simple examples of how these new fair dealing policies could be used.

Under the AUCC/CMEC guidelines, a teacher could design lesson plans that include the handing out of copies of a short story to her class every week throughout a semester, copied from several different short story anthologies although he or she may be careful not to copy substantially all of any one published anthology.

Alice Munro, our country’s Nobel prize-winning writer, has published fourteen collections of short stories. Under the AUCC/CMEC guidelines, a professor or instructor could copy one story from each collection, publish them anthology-style, distribute them as an Alice Munro reader, and offer this reader to students without Ms. Munro or her publisher receiving compensation. Even this – drawing on the work of a single author – is theoretically possible under these guidelines, but we will not know for a very long time what the courts may eventually disallow as “unfair”, as any litigation of such issues, if not too expensive for rightsholders to undertake at all, will progress very slowly.

Creators and publishers alike in Canada contend that these guidelines would allow excessive copying and are unfair. Unfortunately, the publication of these guidelines has emboldened universities, colleges and schools to back away from their licences with Access Copyright, our collective reproduction rights organization for Canada outside Quebec.

So, since January of 2013, there has been dramatic erosion of revenues flowing to creators and publishers in Canada from secondary uses.

1. Since January 2013 payments to authors and publishers for copying of copyright material through Access Copyright for kindergarten to Grade 12 schools have declined by \$13.5 million per year.
2. The projected losses from college and university payments through Access Copyright are \$17.1 million per year by 2016.
3. The projected total losses from Access Copyright collective e licensing income alone as a result of the educational sector’s interpretation of the new educational fair dealing exception is projected to be \$30.6 million per year starting in 2016.

#### Loss in Direct sales of Original Works

In the education (K – 12) sector, sales of educational publishers have declined by 11%. Sales of original materials to universities have declined as well, as schools choose to use assembled course packs rather than publisher-produced anthologies or textbooks. Previously, to a considerable extent, this decline was offset by revenues received from Access Copyright course pack licences. This current decline damages small educational publishers as well as multinationals. Broadview Press, for example, one of Canada’s premier publishers for the university course market, has seen a decline of 70% in sales of their key poetry anthology.

To ensure their compliance with what they interpret as expanded fair dealing exceptions in our Copyright Act, many universities and colleges have set up copyright offices on campus, for the stated purpose of seeking transactional licences for the secondary use of copyright material which falls outside their fair dealing guidelines.

Yet, when members of the Association of Canadian Publishers were asked to quantify their revenues from such transactional licences, or permissions, they noted that, on average their direct transactional revenue had declined from \$33,000 per year in 2010 to \$8,000 so far in 2014.

What is the cost to Canada of this loss of revenue to creators and publishers?

77% of publishers in our survey have said they will reduce the number of books they publish for the educational market.

46% will reduce staff.

61% will have less to invest in the development of digital materials.

Writers in Canada have very recently widely reported extreme reductions of licensing payments.

All this we know. But many of us speculate that the long-term effect will be even more damaging. Already one major educational publisher, Oxford University Press, has closed its school business in Canada, citing reduced royalties from Access Copyright as one of the reasons.

Oxford and other multinational publishers have long provided an essential service to the Canadian educational community by publishing materials with a strong Canadian focus. I doubt that this specialized publishing will continue for long, given the erosion of revenues caused, in part, by the fair dealing extension.

And what of our writers? According to The Writers' Union of Canada, the average income of a Canadian book author has fallen to around \$10,000 per year. A significant amount of this income comes from, or came from, secondary use of material in schools. In fact, many older Canadian writers have been counting on that income from continued educational use as part of their pension for retirement. How long will writers continue to develop Canadian stories for Canadian children in Canadian schools if they cannot make a reasonable living at it?

The attraction to governments of free content is obvious. It is, after all, free. But the unintended consequence of too much free use of content created at great expense by creator and publishers will be the hollowing out of the writing and publishing sector in Canada. The full effect of this may take several years to be felt but there has already been an impact. For the time being at least, there is lots of wonderful material which, under the fair dealing guidelines, is now purportedly free for the taking. There is also confusion in place of licensing supported by several new amendments in 2012 intended to facilitate collective licensing and at the same time to provide specific exceptions for educational institutions in the digital environment - changes to our Copyright Act that are currently being treated as irrelevant by educational institutions operating under self-proclaimed copying guidelines.

I offer this analysis and speculation as a cautionary tale to countries who may be tempted to follow the same path as Canada in extending educational exemptions. You may get more, or in fact, less, than you thought.

Bill Harnum  
Chair, Canadian Copyright Institute

