

# CAUT Education Review

## The Parliamentary Review of the *Copyright Act*

Copyright law plays a significant role in academic life, regulating the creation, use, and ownership of literary and artistic works. Because of the law's importance, the education community worked for decades to ensure it would better serve the public good. This advocacy paid off, with legal victories at the Supreme Court of Canada in 2012 affirming the rights of students, teachers and researchers to use and share works. In the same year, Parliament passed the education-friendly *Copyright Modernization Act*. As the federal government engages in a review of copyright law, these victories must be defended, and new rights advanced.

### How we got to where we are today

Until recently, the formulation of copyright policy was the near-exclusive purview of large corporate content owners who were determined to establish a legislative framework that allowed them to maximize profits by restricting access to works. Under this old regime, one of the few classroom perks educators enjoyed was the right to manually reproduce a work onto a dry-erase chalkboard. Pushing back against this unreasonable constraint to accessing learning resources, academic staff moved forward with new approaches to creating and sharing scholarly material. For example, as private textbook companies, journal operators, and publisher cartels priced themselves past the public's ability to pay,

academic staff created free, internet-based Open Access journals<sup>1</sup> and Open Educational Resources.<sup>2</sup> Universities and colleges also established more efficient forms of direct licensing with publishers, sidelining cartels and ensuring the wise expenditure of scarce public education funding.

In addition to these innovations, educators also moved ahead with fair dealing. In 2004, the Supreme Court of Canada held that this doctrine made it lawful to copy — without payment or permission, and for the purposes of research or private study — a journal article or a book chapter.<sup>3</sup> The importance of this essential public right was re-affirmed by parliament in 2012 with passage of the *Copyright Modernization Act*, and in a series of Supreme Court decisions from the same year. Fair dealing now plays a critical role in education, allowing teachers, students, and researchers to share and build on knowledge.

1. Open Access is the free, immediate, online availability of research articles coupled with the rights to use these articles fully in the digital environment.
2. Open educational resources (OER) are freely accessible, openly licensed documents and media that are useful for teaching, learning, and assessing as well as for research purposes.
3. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13.

## What's next for copyright?

Academic staff, students, and administrators have ushered in a new copyright era in which the concerns of creators, users, and owners of literary and artistic works have been brought into balance to serve the interests of all Canadians. It is now important for our sector to make its voice heard to defend this progress. It is also essential that educators, in addition to protecting past gains, push copyright reform in new directions by outlining a wider perspective on what constitutes legislative balance. In this regard CAUT is advocating that the *Act* recognize the rights of Aboriginal People to fully control the creative works of their communities, something the legislation currently fails to do.

## Five issues

The *Copyright Act* is an important and complex piece of legislation, raising a myriad of challenges and concerns. For the current parliamentary review of the law, CAUT has focussed on five issues:

- Mitigating the damage caused by term extension
- Fair dealing
- Indigenous Peoples and Copyright
- Digital locks
- Crown copyright

### 1) Mitigate term extension

The general copyright term in Canada has been life of the author, plus 50 years. This provided creators of literary and artistic works ample time to benefit from their efforts, and still allowed room for a meaningful public domain (the repository of humanity's cultural heritage). Unfortunately, at the behest of U.S. President Donald Trump, the new United States-Mexico-Canada trade agreement (USMCA) extends copyright term in Canada from 50 years after the death of the author to 70 years.

As a result, works that would have been freely available to all to be copied, shared, altered and republished will be locked down for another 20 years. This will cost the education sector and inhibit authors, artists, students, teachers, researchers, and ordinary Canadians in their pursuit of creativity, free expression and learning opportunities.

With term extension now imposed as a by-product of the USMCA, the careful balance in Canadian copyright law has been upended in favour of corporate content owners. To correct this, the current review of the *Copyright Act* should advance expanded user rights within the legislation — including broader fair dealing provisions, stronger educational exceptions, better access to orphan works, and reformed Crown Copyright. The United States has forcefully imposed the interests of its corporations on the Canadian public. Canada must push back.

### 2) Expand fair dealing

Fair dealing, set out in Section 29 of the *Copyright Act*, provides a limited right to copy literary and artistic works without permission from, or payment to, the owner of the work.

In a series of decisions dating back to 2004, the Supreme Court of Canada has repeatedly re-affirmed the central importance of fair dealing to the structure of the *Copyright Act* by ruling that it be given a large and liberal interpretation. In 2012, the Parliament codified existing educational fair dealing jurisprudence and practice into the *Copyright Act*. To ensure the success of the law, the education community created guidelines to assist teachers, researchers and students with its implementation.<sup>4</sup>

With term extension disrupting broader balance in the *Copyright Act*, Parliament needs to do more than simply preserve fair dealing in its current form. The right must be expanded. A simple way to do this would be to add the words “such as” before the current list of fair dealing purposes enumerated in the Act (research, private study, education, parody, satire, criticism, review, and news reporting). This would broaden the ambit of our legislation, ironically making the right more like the one set out in U.S. legislation.

4. For example, see CAUT Guidelines for the use of Copyright Material at [http://www.caut.ca/docs/default-source/copyright/revise-caut-guidelines-for-the-use-of-copyrighted-material-\(feb-2013\).pdf?sfvrsn=4](http://www.caut.ca/docs/default-source/copyright/revise-caut-guidelines-for-the-use-of-copyrighted-material-(feb-2013).pdf?sfvrsn=4).

Strengthening fair dealing will require political courage. While fair dealing has been of assistance to the education sector, and the general public, not everyone is happy with the practice. The content owner cartel Access Copyright has led a campaign against it, falsely blaming it for financial woes in the publishing industry and incorrectly claiming that the post-secondary education sector refuses to pay for content.

While the rise of fair dealing in Canada does correlate with a decline in Access Copyright's revenue stream, there is no causal relationship. We know this because in the absence of changes to fair dealing regimes in other jurisdictions, publisher groups around the world are facing the same financial challenges as Access Copyright. In fact, austerity-damaged Canadian colleges and universities continue to pay hundreds of millions of scarce dollars every year to publishers and authors for access to works. Students spend additional millions each year on books and other material. While Access Copyright's business model is failing, some individual academic publishers continue to thrive<sup>5</sup> and rake in vast profits.<sup>6</sup> Moreover, we also know that fair dealing has a minimal impact on a vulnerable group of Canadian writers, authors of Canadian fiction. This is because less than 5% of a typical university library collection is creative literature (novels, poetry, etc.) — and less than 1% of that amount is actually Canadian. Simply put, the bulk of fair dealing involves scientific journals and technical manuscripts.

So why is Access Copyright's revenue declining?

- Institutions have banded together to purchase licenses directly from individual publishers, cutting Access Copyright's take while still spending millions on content.<sup>7</sup>
- In response to inflated prices for private academic journals, the academic community invented and implemented Open Access publishing, which makes publically-funded research available free to world (with no cut to Access Copyright). In Canada, almost half of all research publications are now freely available online.
- With students no longer able to subsidize the inflated profits of textbook publishing corporations, the education sector invented Open Education Resources (OER) that have enabled, by the author's choice, free access to OER textbooks and other learning material. This is saving Canadian students and their parents millions of dollars a year, but it does limit the flow of money to Access Copyright — and has nothing to do with fair dealing.

In short, where difficulties exist in sub-sectors of publishing, they stem from structural changes in the industry and the rise of alternative ways of creating, licensing, and sharing works, not from fair dealing. CAUT forcefully acknowledges the need to address the chronic and long-standing impoverishment of authors and other creators in Canada by their corporate employers, and would embrace innovative public policy solutions to ensure decent remuneration for these workers. We reject, however, a return to laundering cultural subsidies through the education system. Such schemes are inefficient, paying pennies on the dollar to actual creators. They also avoid actually championing the arts and defending the necessity of generous support on its own merits.

5. <http://www.cbc.ca/news/technology/academic-publishers-reap-huge-profits-as-libraries-go-broke-1.3111535>.

6. *The Oligopoly of Academic Publishers in the Digital Era*, Vincent Larivière, Stefanie Haustein, Philippe Mongeon PLOS Published: June 10, 2015 <http://dx.doi.org/10.1371/journal.pone.0127502>.

7. For example, the Canadian Research Knowledge Network (CRKN), a partnership of 75 Canadian universities representing 1.2 million researchers and students, has entered into thousands of agreements with publishers to offer access to their members. Last year, CRKN spent over \$100 million in licensing fees for electronic content.

Fair dealing is operating as it should, as a limited right to allow students, teachers, and researchers to access and build upon existing literary and artistic works. Academic staff must work to defend the practice and ensure copyright law does not revert back to the day when educators enjoyed only token rights, such as manually reproducing copies of works on dry erase chalkboards.

**Recommendation:**

Expand fair dealing

**3) Reconcile Indigenous peoples & copyright**

The Truth and Reconciliation Commission of Canada has called upon educational institutions to engage with indigenous communities and be leaders in reconciliation. The current review of the *Copyright Act* presents an opportunity to do this.

Some aspects of the damage inflicted by European colonialism are familiar — the expropriation of land, the destruction of traditional livelihoods, and the genocidal policy of residential schools. Unexpectedly, the Canadian *Copyright Act* has also proved to be an additional tool of oppression. As one example, in the early 1970s elders from the Maliseet First Nation recounted their stories to a university researcher. As the recordist, the *Copyright Act* gave the researcher copyright in the recordings. Tragically, this ownership rule meant the desire of the elders to see their work published became mired in a decades-long legal struggle over use of the tapes. None of the storytellers lived to see their work in a book, nor did most of their children. This heart-breaking situation is not unique. Across Canada there have been many instances where intellectual property legislation has either been unable to serve the interests of Aboriginal Peoples, or has actively worked against such interests.

At the core of this unacceptable situation is a fundamental conflict between Western concepts of intellectual property, and Aboriginal understandings of the origin, use and control of creative works. For Aboriginal communities, such works:

- Arise from close, multi-generational attachment to the broad natural and spiritual worlds — not simply from sudden bursts of inspiration, laboratory research, or specific field work;
- Are embedded in local cultural traditions including language, land use practices, and spirituality — not subservient components of a globalized, homogenous legal/commercial system; and
- Exist under the permanent custodianship of communities or designated elements within communities — not privately owned for finite time periods.

These differences in approach give rise to incompatibilities between the systems. Some issues, however destructive, are technical and specific, such as the assignment of oral history tape ownership to the recordists. There are also more fundamental contradictions. For example, copyright law requires that a work have an identifiable, relatively recent creation date. Aboriginal art and literature rooted deeply in past generations may not meet this test. Such works are arguably outside the “life plus 70” term of copyright and are thus in the public domain, precluding a community from establishing a copyright claim in its own cultural heritage and leaving its works vulnerable to outside appropriation. Further, even if means were found to bring such works within copyright, the establishment of a fixed creation date would end the community’s permanent custodianship and turn it into a time-limited ownership right (life of author plus seventy years).

In addition to a creation date, copyright law also requires a recognized creator, again presenting difficulties with some traditional Aboriginal works. First, the absence of a specific human author means such works may not be amenable to copyright protection, leaving them open to outside appropriation and exploitation. Second, and even more insidiously, appropriated and “re-authored” works may themselves be subject to copyright, resulting in Aboriginal communities being legally prevented from utilizing their own creations. Finally, copyright only protects works that are in a fixed form; that is, set in some permanent medium. This excludes stories and

histories passed down orally from generation to generation — unless they are recorded, in which case the recording's copyright is owned by the recordist, not the storyteller. This feature of the law has denied Aboriginal communities opportunities to access their own culture.

In the face of this, there are efforts to investigate and implement new systems of protection for Aboriginal communities, systems that will exist alongside, not within, Western intellectual property regimes. Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples states:

1. *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
2. *In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

The principles set out in the declaration, and the requirement that national governments ensure their implementation, provide a powerful foundation upon which Aboriginal communities can assert control over their knowledge and creative works. Aboriginal communities can develop and impose rules on how the results of their creativity are shared, ensuring that custodianship, dissemination and compensation occur according to their own traditions.

**Recommendation:**

Recognize the unique relationship between Aboriginal communities and the creative works they produce. In consultation with First Nations, Inuit and Métis organizations, devote resources to explore and develop specific legal frameworks to protect those works.

**4) Allow circumvention of digital locks for non-infringing purposes**

Digital technology allows instantaneous copying and distribution of information, an advancement that has had a positive impact on research, scholarly communication and teaching. At the same time, this technology has also facilitated the commercial piracy of digital works, resulting in some owners shielding content with Technological Protection Measures (TPMs). As TPMs are susceptible to circumvention, some copyright owners have also insisted upon the enactment of “anti-circumvention” laws that prohibit the breaking of these digital locks.

The difficulty with prohibiting circumvention is that while digital locks may prevent illegal copying, they can also prevent the exercise of fundamental rights such as fair dealing, accessing works in the public domain, archival preservation, and library lending. In its current state, the *Copyright Act's* near absolute ban on circumvention also hinders the legitimate disabling of TPMs that infringe the privacy rights of users and prevent the correction of erroneous digital identification “tags” attached to a work.

**Recommendation:**

To ensure Canadians can fully enjoy the legitimate exercise of their statutory rights, the *Copyright Act* should be amended to allow the use, manufacture, or importation of devices capable of circumventing technological protection measures in cases where the circumvention is carried out for non-infringing purposes.

## 5) Reform crown copyright

Section 12 of the *Copyright Act* provides:

*Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.*

Unfortunately, this outdated system has diminished the ability of Canadians to use works produced by the government. Interpretations of existing Crown Copyright terms of use are inconsistent and confusing, inhibiting public access to government works and leading to the delay or cancellation of library projects meant to preserve and disseminate archival material. In contrast, works produced by the U.S. government directly enter the public domain.

### **Recommendation:**

Given that access to government information, and the ability to distribute and encourage its re-use, is of fundamental importance to a democratic society — and that the public has already paid for works produced by the government — the use of Crown Copyright should be minimized with a view to its eventual abolishment.

## Conclusion

Advocacy from the education sector has added an important balance to copyright law in Canada. Once dominated by commercial content owners, copyright policy now reflects the interests of the broader public — including teachers, students and researchers.

To defend this progress, it is important for academic staff to make their voices heard as the federal government reviews the *Copyright Act*. Join CAUT's campaign for Fair Copyright; learn more at [copyright.caut.ca](http://copyright.caut.ca).