Fair dealing is a right, not a privilege

By David Robinson and Amanda Wakaruk

This week at schools and campuses across the country, teachers, students, and librarians are celebrating Fair Dealing Week. This annual event increases awareness of a little-known—but well-used—feature of the Copyright Act: fair dealing.

The Copyright Act touches all Canadians. At its core, copyright determines under what conditions artistic and literary works (including ebooks, computer software, and sound recordings) may be reproduced and shared. Thus, copyright plays a role in motivating creators and inspiring innovation, by both protecting new works and encouraging the (fair) use of existing works.

Fair dealing allows for the limited use of a copyright-protected work for one of eight purposes listed in the act, without payment or the need to seek permission.

The Supreme Court of Canada has repeatedly affirmed that fair dealing is an important right available to everyone. Most Canadians use this legal "breathing space" daily, by sharing email messages, social media posts, openly accessible news articles, memes, and screen captures.

At post-secondary institutions, students rely on fair dealing to excerpt images, tables, and graphs to illustrate ideas in assignments and graduate theses. In classrooms, it is becoming less and less common for instructors to lean on fair dealing when distributing course materials, as access to these materials is increasingly available under an open licence or purchased via e-licensed packages. Nonetheless, instructors need fair dealing to reproduce content for critical review and discussion (including displaying and sharing open web content and articles from less-accessible academic journals).

Fair dealing is useful for all Canadians, but its value to education makes it doubly important for society.

During the parliamentary review of the Copyright Act, which is in its last legs as the House Industry Committee conducting the study drafts its report, no topic received more attention than whether to expand or contract the scope of fair dealing. The potential damage from a contraction would be large and irreversible, compounded by Canada's recent copyright concessions in the Canada-United States-Mexico Agreement (CUSMA). By extending the post-mortem copyright term by 20 years, CUSMA concessions beg for the introduction of balancing mechanisms that will provide commensurate strength for user rights and better protections for the public domain.

There are two obvious and reasonable ways to encourage more creative work by Canadian residents: broaden the scope of available purposes for fair dealing; and make it clear that non-commercial reuse of copyright-protected works by cultural memory organizations for the purpose of education is fair.

A strong fair-dealing culture is respectful of creators, rights holders, and users of copyright-protected works. It affords all of us the confidence to engage creatively and critically with the world around us.

The Electronic Frontier Foundation (EFF) recently described fair use (fair dealing's fraternal twin) as providing a release valve in copyright law by "making sure that control of the right to copy and distribute does not become control of the right to create and innovate."

The ability to exercise and defend rights like these is always contingent on a public understanding of their existence and importance. As the parliamentary review of the Copyright Act comes to its conclusion, we hope you will join us this Fair Dealing Week, which began Feb. 25, in celebrating this important part of copyright law that allows researchers, writers, and performers to find inspiration from existing copyright-protected works. For a listing of Fair Dealing Week events happening across the country, see www.fair-dealing.ca/events.

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