

Copyright Brief to the INDU Copyright
Review Committee

Submitted by Kenneth Field
Trent University Copyright Officer
Aug. 11, 2018

Trent University is a primarily undergraduate institution with approximately 9000 students on two campuses in Peterborough and Oshawa, Ontario.

The primary focus of this brief is the inclusion of “education” in the stated fair dealing purposes in section 29 of the *Copyright Modernization Act of 2012* (S.C. 2012, c. 20.).

Fair dealing has been a part of the Canadian Copyright Act since 1921. In 2004 the Supreme Court of Canada (SCC) in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 provided clarification and guidance on the role and application of fair dealing in Canadian copyright law. At paragraph 48 it states that:

The fair dealing exception, ..., is a user’s right. In order to maintain the proper balance between the rights of the copyright owner and the users’ interests, it must not be interpreted restrictively.

And at paragraph 51 it states:

The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work for the purpose of research or private study. “Research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained.

The Court then goes on to name and describe the six factors that can be used in determining whether a dealing is for an enumerated purpose and is fair.

In *Alberta (Education) v. Access Copyright*, [2012] 2 SCR 326, 2012 SCC 36., the SCC provided further guidance with respect to the purpose of fair dealing:

The Board concluded that since the Category 4 copies were not made as a result of a student request, they were no longer for the purpose of **research or private study** at the second stage. This was based on its observation that in *CCH*, the Great Library was making copies at the request of lawyers. Because there was no such request for Category 4 copies, the Board concluded that the *predominant* purpose was that of the teacher, namely, “**instruction**” or “**non-private study**”. [para. 15] (emphasis added)

However, the SCC found that:

Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of “**instruction**”; they are there to facilitate the students’ **research and private study**. ... **Instruction and research/private study are, in the school context, tautological**. [para. 23] (emphasis added)

Lastly, the SCC provided clarity on the issue of “private study”:

With respect, the word “private” in “private study” should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the *concept* of studying, the Board again artificially separated the teachers’ instruction from the students’ studying. [para. 27]

It is apparent from these two decisions that the concept of “research” is not to be viewed in a restrictive manner and that “instruction” and “research and private study” are one and the same. Therefore, the addition of “education”, which is defined by the *Oxford English Dictionary* as, “The systematic **instruction**, teaching or training in various academic and non-academic subjects given to or received by a child, typically at school...” (emphasis added), in sect. 29 of the *Copyright Act* can be seen as the codification of the reasoning of the SCC in the above cases, but in particular *Alberta*.

Much has been made since the inclusion of “education” in sect. 29 of the *Copyright Act* of its deleterious effect on creators, publishers and particularly Access Copyright. The Canadian Publishers’ Council in its submission to the INDU Committee Statutory Review of the Copyright Act in May 2018 claims that:

...since the Last Copyright Reform, a significant number of Canadian publishers have seen an erosion of their businesses largely because the K-12 and post-secondary education sectors have routinized their free reproduction of copyright-protected works in Canada on a massive, institutional scale all in the name of ‘fair dealing for the purpose of education’ p. 1
(<http://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9897131>)

John Degen, Executive Director of the Writers’ Union of Canada, stated before the Committee:

We know that the 2012 imposition of education as a category of fair dealing has delivered none of its intended benefits and has caused exactly the economic damage many of us predicted...Fully 80% of our licensing income has simply disappeared because schools now copy for free what they used to pay for.” April 26, 2018
(<http://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9897131>)

And, according to Roanie Levy, President and Chief Executive Officer of Access Copyright (AC), in her testimony before the Committee stated:

The true purpose of the 2012 amendments, as represented by the education sector to the legislative committee, was to clarify that fair dealing can be relied on by educational institutions when the copying of a work is not covered by licenses or easily available through the rights holders, not to do away with collective licensing. May 22, 2018
(<http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-116/evidence#Int-10139484>)

The erosion of the market for publications in the K-12 and post secondary education (PSE) sectors has been attributed to more than just fair dealing. In its *Canadian Copyright Licensing Agency v. British Columbia (Ministry of Education)*, 2017 FCA 16 decision the Federal Court of Appeal, when discussing the effect of the fair dealing in this case on the market, noted that:

It [The Copyright Board] reached this conclusion after considering the testimony of Dr. McIntyre who, on cross-examination by counsel for the Consortium, agreed that the open educational resources movement, digital sharing and the general emergence of new technologies could be responsible for declining book sales (Reasons at para. 322). [para. 98]

And

The Board did not disregard the parties' evidence. It simply found that Access had only demonstrated that the copying was only one of many causes attributed to a decrease in book sales (i.e. the market of the original works). [para. 99]

Michael Geist in his blog entry of May 22, 2018, entitled *Canadian Copyright, Fair Dealing and Education, Part One: Making Sense of the Spending*, (<http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartone/>), draws attention to the annual reports of both Cambridge University Press for 2017, (<http://www.cambridge.org/about-us/annual-report-2017/academic-publishing>), and Oxford University Press 2016/17 (<https://annualreport.oup.com/2017/>) in which changes in the education market are attributed to the emergence of open educational resources, shifts in purchasing habits and the rise in textbook rentals.

Campus Stores Canada in its report *Copyright and the Evolving Learning Materials Market* (2018, <https://www.scribd.com/document/363248925/Copyright-and-the-Evolving-Learning-Materials-Market-Campus-Stores-Canada>) writes:

The unaffordable prices of some course material has led to a decreased demand for expensive textbooks that may have been only slightly updated. In addition, there has been significant market saturation of print learning material, with increased competition through the growth of textbook rentals, imported international editions, peer to peer selling and increased demand for less expensive, older editions. p. 3-4

In the study *Digital Trends and Initiatives in Education: The Changing Landscape for Canadian Content*, prepared by Susan Howell and Brian O'Donnell for the Association of Canadian Publishers in March 2017, they highlight:

The ubiquity of low cost, free, or open educational resources continues to negatively impact Canadian-owned publishing companies and their publishing programs. p. 5 (<http://www.omdc.on.ca/Assets/Research/Research+Reports/Digital+Trends+and+Initiatives+in+Education/Digital+Trends+and+Initiatives+in+Education.pdf>)

Despite all of this Geist points out that Canadian publishers are not suffering:

The Canadian publisher data from Statistics Canada that shows the Canadian publishing market largely unaffected by fair dealing given the other changes taking place in the market. The data released in late March of this year [2018] shows that Canadian publisher operating profit margin has increased since the copyright reforms in 2012 as it stood at [9.4% in 2012](#), 9.6% in 2014, and [10.2% in 2016](#).

As for the education publishing market, the Statscan data shows sales increasing for [educational titles from Canadian publishers](#): \$376.6 million in 2014 to \$395.1 million in 2016. (<http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartone/>)

With respect to the contention of John Degen that the decrease in revenue to AC and consequently to authors is as a result of rampant free copying, the reasons for this are actually quite different. Since 2012 there has been an exodus away from the AC License for PSE institutions as a result of a shift from print on paper resources to digital resources, the licenses for which often include reproduction and distribution rights, and a growing recognition of the inadequacy of an AC License to address the needs of PSE students.

Michael Geist in his *Canadian Copyright, Fair Dealing and Education, Part Three: Exploring the Impact of Site Licensing at Canadian Universities*

(<http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartthree/>), writes:

Site licensing now comprises the lion share of acquisition budgets at Canadian libraries, who have widely adopted digital-first policies. The specific terms of the licences vary, but most grant rights for use in course management systems or e-reserves, which effectively replaces photocopies with paid digital access. Moreover, many licences are purchased in perpetuity, meaning that the rights to the works have been fully compensated for an unlimited period. The vast majority of these licenses have been purchased since 2012, yet another confirmation that fair dealing has not resulted in less spending on copyright works.

And further relates that:

It is these licences, together with open access and freely available online materials, that have largely replaced the Access Copyright licence, with fair dealing playing a secondary role.

Trent, like many, if not most, Canadian Universities has adopted a digital first purchasing policy for its acquisitions. The trend at Trent away from print on paper to digital is clearly evident from the spending on acquisitions between 2014/15 and 2016/17. During that period spending on print monographs went from \$30,102 to \$5722, a decline of 80%, whereas spending on ebooks went from \$43,901 to \$97,985, an increase of 46%, over the same period. Spending on electronic subscriptions through the two major consortia, the Canadian Research Knowledge Network (CRKN) and the Ontario Council of University Libraries (OCUL) Scholars Portal for the same period consumed 91% of the total Library acquisitions budget of \$1.3 million.

The shift away from print on paper resources and their reproduction is further corroborated by the decline in Trent University's revenue from photocopying by students between 2012/13 and 2016/17; it went from \$3630 to \$361, a decline of 91%.

AC's remuneration system, called the Payback System, is only for the reproduction of print on paper publications and excludes all works older than 20 years. Given the trend away from print on paper at universities it is clear that the value of the AC License is quickly diminishing and that the monies that it claims to be losing as a result of fair dealing are instead the result of the significant shift in the types of material being acquired by Canadian universities. That being said, "Fair dealing is an essential component of copyright law, but it is not the foundation for accessing works in Canadian educational institutions." (Geist, <http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartthree/>)

In conclusion, given the changes in the educational publishing environment and the shift from print on paper to digital resource acquisitions in Canadian libraries, for which the rights for the use of in

educational institutions are built into their site licences, there seems to be a very weak case for the removal of “education” from sect. 29 of the *Copyright Act*.

On the other hand with strong decisions from the SCC confirming the centrality of fair dealing as a users’ right and that education cum instruction is the equivalent of research, and the codification of this reasoning with the inclusion of “education” in sect. 29 of the *Copyright Act* there are compelling reasons why it should remain a part of the fair dealing purposes in the *Copyright Act*.

Respectfully Submitted

Aug. 11, 2018