

REMUNERATION MODELS FOR ARTISTS AND CREATIVE INDUSTRIES IN THE CONTEXT OF COPYRIGHT BRIEF

Submitted by the Association of Manitoba Book Publishers, December 13, 2018

We write on behalf of the Association of Manitoba Book Publishers (AMBP). AMBP represents 14 diverse Manitoba publishing houses producing a wide variety of books in English, French, and several Indigenous languages. In short, certain changes to the Copyright Modernization Act in 2012 have harmed Canadian and Manitoban publishers and put at risk the continued creation and availability of Canadian content.

Our primary concern is that fair dealing in education needs to be clarified. Adding education as a purpose for fair dealing, in 2012, has caused significant damage to local publishers and is having a devastating economic and cultural impact.

Copyright and Fair Dealing

We wholeheartedly accept and support the concept of fair dealing in education. Independent Canadian publishers have always supported education and educators. Historically and now, we produce the content that Canadian educators and students want and need. For example, 80% of new books authored by Canadians are through Canadian publishing houses; in Manitoba, we publish 100+ Canadian-authored books annually.

Our concern is with the “fair dealing guidelines” adopted by K–12 and post-secondary institutions in Canada. These “guidelines” rest on interpretations of the use of “short excerpts.” The Act is not clear in its definition of “short excerpt.” K–12 institutions have essentially defined short excerpts as any amount of copying. Post-secondary institutions have adopted the so-called “10% or one chapter” guideline (essentially the terms of the last licence many agreed to with Access Copyright). Over the course of a year, K–12 educators may well copy 80% to 100% of a textbook – 10% a month, each month, for the duration of a course. In our view, wherever and whenever content is planned as part of a course of study, it falls outside a fair use of that copyrighted content. Such use is actually creating a “textbook,” even if it is being created for one course and for only the students enrolled in that course.

This practice has led to litigation, pitting Canadian publishers against educators. Fair dealing guidelines have been declared to not follow the tests, however vague, set out in the Act and in the jurisprudence. In *Access Copyright v. York University* (July 2017) the Federal Court of Canada ruled the copying guidelines created by York University, and by implication the practices of other post-secondary and K–12 institutions, to be unfair. Those practices do not represent fair dealing. The court also made clear that the tariffs certified by the Copyright Board of Canada are mandatory and enforceable. It seems to us that, through that ruling, the court is imploring educators and creators (writers and publishers) to cooperate – to get together to determine a fair system for creating and distributing education materials. The Quebec Superior Court recently ruled that Copibec could proceed with a class action suit against Laval University regarding their fair dealing guidelines, which mirror those used by York University. On June 19, 2018 Laval and Copibec announced that they have settled out of court on a licensing agreement for copying. This

agreement sets an example to other universities across Canada that have refused to pay for copying the works of writers and have wasted millions on pointless lawsuits.

Creative sector jobs and Canadian content are both at risk of being lost.

The Economic Impact

Copyright royalties are a key source of payment for work done by publishers. Be aware that “publishers” includes a large number of people, occupations, and tasks, including acquisition editors, development and substantive editors, designers and typesetters, copy editors, proofreaders, indexers, translators, marketing and promotion workers, sales representatives, and many others.

The cost of producing quality educational material – i.e., material that is accurate, based on current, quality research, and that is prepared for students – is substantial. Publishing for the educational market requires employing researchers, writers, scholars, cultural reviewers, editors, and illustrators to ensure quality of the content, as well as designers, printers, and those involved in marketing, warehousing, and distribution. Traditionally, copying revenues were part of the revenue stream that would be reissued to the publisher to reinvest in new materials. Without the reinvestment, publishing programs are put at risk.

Copyright payments are not some kind of “gravy.” They are a central part of how publishers are paid for the work we do (without it, the very modest payment for our work becomes less than modest). Historically, copyright revenue has been about 20% of creator income and 16% of independent publisher income, as shown in a study by PricewaterhouseCoopers. For many independent publishers, that 16% is the difference between continuing and closing our doors.

Revenue decreases experienced by Canadian and Manitoban publishers have occurred mainly because of “fair dealing guidelines” imposed by K–12 and post-secondary institutions. Copyright revenue for publishers has decreased dramatically since the 2012 version of the Act was passed. The loss of revenue in all of Canada has been approximately \$30 million annually since 2012. This is very harmful for independent Canadian publishers (and creators) in particular.

Manitoba publishers have experienced these dramatic negative effects. For instance, pre-2012 Access Copyright royalty payments to Fernwood Publishing were enough to support a full-time employee (both wages and overhead), and now the payments might support a 1/3-time worker. Since the imposed fair dealing guidelines that came into effect around 2014–15, payments from Access Copyright dropped by 64.7%. Revenue from copying permission requests directly from post-secondary schools has declined by 50.3% during that same period. Similarly, Les Éditions des Plaines immediately experienced a 35+% decrease in overall sales because of educational copying, and sales from educational material continue to decrease year after year. At Portage & Main Press, because of extensive copying, education sector revenue has declined dramatically. These diminished sales are not being balanced with K–12 copying tariffs – they are down 88% from 2013. Other Manitoba publishers report drops in Access Copyright revenues of between 75% and 90%.

Part of the rationale for supporting fair dealing guidelines adopted by education institutions is the (dramatically) increased price of educational resources (textbooks, etc.) seen/claimed by educators. The Canadian Association of University Teachers says that course book prices have increased by 200% in the past 20 years. While there have been price increases, they are not for

the books produced by independent Canadian publishers. At Fernwood Publishing, for example, a publisher of post-secondary books since 1991, average prices of these books have increased by 50% since 1995, about the same as general inflation for that period.

We also recognize that educational institutions continue to spend millions on educational resources, as they have done in the past. These are purchases mainly of print and digital books or licences for digital material for libraries, special collections, journal subscriptions, and so on – resources produced by publishers, even when the institutions were paying for copying parts of them.

In the end, copyright payment is actually not exorbitant but rather a good deal. For a few dollars per student annually, students and teachers would have unlimited access to all relevant independent Canadian-published content.

The Cultural Impact

The impact is as much cultural as it is economic. The loss of copyright revenue and protection has led some independent Canadian publishers who historically provided high-quality Canadian educational resources to decrease that production or leave it altogether.

For instance, Manitoba publisher Les Éditions des Plaines was highly impacted by the changes in the Copyright Act and the pursuant loss of revenue. In 2016, they completely ceased producing educational materials (as many other educational publishers have also done) because it was unsustainable. This move disappointed many educators, as Les Éditions des Plaines was one of the rare alternative sources for educational material in French outside of Quebec. Translators, scholars, and K-12 educators, who had been employed on the educational side, were casualties of this decision.

Portage & Main Press has experienced a similar impact. Its authors are facing a substantial drop in income as a result of declining royalties, the means by which they are paid for their work; many have taken other jobs, as writing no longer supports them. The publisher itself has quit publishing textbooks and other curriculum materials, as revenues no longer cover the costs that are necessary to attain the quality standards that are expected by educators and that the company has become known for.

The educational component of Fernwood's publishing program has decreased from over 75% to less than half of its sales. This has led Fernwood to produce fewer and fewer educational resources every year.

Some Manitoba publishers have also reported that they now receive orders for only one copy of a textbook for an entire school or school division.

In time, there will be little or nothing produced by local writers and publishers that reflects regional and national narratives for schools and teachers to copy.

At some point, however, teachers will find that the materials they have been copying are outdated; traditionally, publishers regularly revised their books to reflect new research in whatever field the books were written for, be it social studies, physics, or mathematics. With publishers no longer developing materials that reflect current scholarship and meet quality standards, teachers will have to find other sources for their classrooms. It will be a challenge to

find such materials, because, as mentioned, quality comes at a cost, and expertise must be compensated for. Ultimately, Canadian students are the losers.

Enforcement is also a major issue. Educational institutions now know that their fair dealing guidelines have been declared illegal, including ignoring Copyright Board tariffs. However, departments of education have not adjusted their guidelines. There is no way that publishers can monitor the amount of copying that occurs. Institutionalized copyright infringement is now firmly entrenched in Canadian schools.

All of this has had the devastating result of pitting independent Canadian publishers against educators when we have a clear, obvious similar interest. We as independent publishers do our work because of our commitment to education, not simply for the economic gain (but we do need to be paid for our work to continue producing these important materials).

Our Recommendations

There is a need to make changes quickly. While all this damage has been done to independent publishers, we have essentially been asked to continue waiting. Despite predicting the problems prior to 2012, we have been asked first to prove that damage was done, then wait for the FCC ruling and now for the appeal of this ruling, for legislative review, and very likely for an election. The latest litigation foray by the ministries of education will exacerbate the wait and is beyond the resources of Canada's independent publishers to defend. This process is too slow to halt the cultural and economic (revenue) harm to independent Canadian publishing.

We recommend an immediate end to unfair copying, which in itself helps to clarify fair dealing. We also recommended to the Committee on Industry, Science and Technology for that committee's Statutory Review of the Copyright act that the committee:

1. redefine fair dealing in the Act to focus on/include the intent of copying connected to a clearer definition of "short excerpt" – that is, where copying, whatever the amount, for the purpose of being part of a course of study, is not of a "short excerpt";
2. bring educators and independent Canadian publishers together to develop fair dealing regulations connected to the Act that are mutually beneficial and build on our common interests;
3. promote a return to collective licensing in the education sector. It works. It's simple;
4. increase statutory damages to discourage systematic infringement. The committee could take a leadership role in stopping the damage to publishers, in part through promoting effective operations of the Copyright Board;
5. ensure that Canada meets its international copyright treaty obligations.