

Brief to the Standing Committee on Industry, Science and Technology for the Committee's 2018 Statutory Review of the Copyright Act

Submitted for Fernwood Publishing/Roseway Publishing by Wayne Antony, co-Publisher, July 5 2018

We write on behalf of the Fernwood Publishing/Roseway Publishing regarding the review of the Copyright Modernization Act.

Our primary concern is that fair dealing in education must be clarified. Adding education as a purpose for fair dealing, in 2012, has caused significant economic and cultural damage to our province, our country and to independent Canadian publishers. For Fernwood Publishing, the fair dealing in education clause has harmed us financially and decreased our capacity to create and distribute Canadian content for education. Creative sector jobs and Canadian content are both at risk of being lost.

Fernwood Publishing/Roseway Publishing

Fernwood Publishing has been in operation since 1991. Originally incorporated in Nova Scotia, we established in office in Winnipeg in 1994. In 2006 we acquired Roseway Publishing as our literary imprint. Fernwood/Roseway has nine employees but also uses the services of many freelance copy editors, development editors, designers and typesetters, illustrators, proofreaders, indexers, translators, marketing and promotion people and sales representatives.

Fernwood has 900 titles in print and we produce about 35 new titles per year. In all, we have published over 800 authors. We provide books for the post-secondary education (both core textbooks and supplementary course books), general trade (bookstores) and library markets, and we have a robust direct-to-consumer platform. Many of our books are published simultaneously in print and digital versions. Our publications include books that are translated into English and we sell rights for our English books and translations of our books into other languages to non-Canadian publishers.

Our revenues for the past three years have been around \$1 million annually. We pay royalties (approx. \$70,000 per year), as well as advances, to authors.

Post-secondary education has been extremely important to Fernwood. In our early years, revenue from course books and payments for parts of our books used in coursepacks (paid by copyright permission fees through ACCESS Copyright and copyright permission directly from us) accounted for 75+% of total sales. Our revenues continued at that proportion until around 2012, but have dropped significantly since 2014-15.

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 value and need. For example, annually 80% of new Canadian authors are published by independent Canadian publishers.

Our concern is with the “fair dealing guidelines” adopted by K-12 and post-secondary institutions in Canada. The fair dealing clause and the tests set out in early jurisprudence are vague. Much in those guidelines hinges on interpretations of the use of “short excerpts.” Post-secondary institutions (as well as K-12 schools) have adopted the so-called “10% or one chapter” guideline (which is essentially the terms of the last license many agreed to with ACCESS Copyright). In our view, however, wherever and whenever content is planned as part of a course of study, it falls outside fair use of copyrighted material. Such use is actually creating of a new “textbook,” even if it is being created for one course and for only the students enrolled in that course.

This situation has led to litigation pitting Canadian publishers against educators. Courts have found that the existing fair dealing guidelines are failing to meet even the vague tests set out in the Act and the jurisprudence; In July 2017, the Federal Court of Canada (FCC) ruled in *Access Copyright v. York University* that the fair dealing guidelines created by York University, and by implication those in other post-secondary and K-12 institutions, to be unfair. In the FCC Reasons for Judgement, one of our books was cited as an example of how York’s Fair Dealing Guidelines are “arbitrary” and “not soundly based in principle.” The FCC also made clear that copyright tariffs certified by the Copyright Board of Canada are mandatory and enforceable. These practices do not represent fair dealing. It seems to us that the court is, in part, imploring educators and creators (writers and publishers) to cooperate – to get together to determine a fair system for creating and distributing education materials. 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, 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.

The Economic Impact

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

Copyright payments are not some kind of “gravy.” They are a central part of how publishing occupations are paid for the work we do (without it, the very modest payment for our work becomes less than modest). As well, copying revenues were part of the revenue stream that

publishers reinvest in new materials. Without the reinvestment, publishing programs are put at risk.

Fernwood Publishing's copyright revenues decreases have occurred almost entirely because of "fair dealing guidelines" imposed by K-12 and post-secondary institutions. At Fernwood Publishing, pre-2012 Access Copyright royalty payments were enough to support a full-time employee (in terms of both wages and overhead). Now those payments might support a 1/3 part-time worker. Since the imposed fair dealing guidelines that started around 2014-15, payments from ACCESS Copyright dropped by 64.7%. Prior to 2014-15, payments from ACCESS Copyright to Fernwood/Roseway were \$73,723 but in the past fiscal year, they were \$26,845. Revenue from copying permission requests directly from post-secondary schools has declined by 50.3% during that same period from \$12,864 to \$6389, from 50-65 requests to under 20 for the past two years.

Moreover, Fernwood's revenue from post-secondary institution courses has plummeted from above 75% historically to just over 40% of total sales in the last fiscal year. The misuse of fair dealings has also impeded Fernwood's commitment to innovation: Fernwood has also been very reluctant to produce digital versions of books destined for the post-secondary market, unlike books destined for other markets which are produced simultaneously in print and digital. Given the unknown levels of copying, we are concerned that digital versions will simply be copied as course resources. For us, producing for the post-secondary market is becoming unsustainable.

Part of the rationale in support of fair dealing guidelines adopted by education institutions is the (dramatically) increased price of educational resources (textbooks, etc) seen/claimed by educators. CAUT, for example, says there has been 200% in the prices for course books in the past 20 years for post-secondary students. While there certainly have been price increases, they are not for the books produced by independent Canadian publishers. At Fernwood Publishing, average book prices have increased by 48% and textbook prices have increased by 49.9% since 1995. In that period, the level of general inflation has been about 50%. Moreover, the prices of such educational resources produced by Canadian independent publishers are much more accessible for students. Fernwood Publishing, for example, produces introductions to both Sociology and Criminology (two highly subscribed post-secondary courses). Prices for our editions are \$59.00 for Sociology and \$74.00 for Criminology, whereas general prices from non-Canadian publishers are in the \$115 range for a well-known Introduction to Criminology and average \$130 for introductory Sociology textbooks. In other words, Fernwood Publishing, like other independent Canadian educational publishers, is not contributing to the problem of inaccessible educational resources.

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

The Cultural Impact

The negative impact of education's fair dealing guidelines is as much cultural as it is economic. The loss of copyright revenue and protection has led some independent Canadian publishers who historically worked to provide high quality, Canadian educational resources to decrease that production or leave it altogether.

The educational component of Fernwood's publishing program, as indicated above, has decreased from over 70% of its sales to less than half in a few years. We are finding it more and more unsustainable to produce books only for the course market.

At some point, teachers will find that the materials that 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 that 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 costs, and expertise must be compensated for. Ultimately, Canadian students are the losers. In time, there will be little or nothing produced by local writers and publishers that reflect regional and national narratives for schools and teachers to copy.

This is clearly an unsustainable business model.

All of this has had the devastating result of pitting independent Canadian publishers against educators when we have a clear, obvious similar interest. Independent Canadian publishers provide educational resources 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 occurred to independent publishers, we have essentially been asked to continue waiting. Despite predicting these problems prior to 2012, we have been asked first to prove damage was done, then wait for the FCC ruling and now wait for appeal of the FCC 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 harm to independent Canadian publishing.

For this committee, we recommend an immediate end to unfair copying, which in itself helps to clarify fair dealing by:

1. redefining fair dealing in the Act, or through regulation, to focus on the intent of copying that would lead to a clearer definition of short excerpt – that is, where copying,

however much, is planned as part of course of study it is not a short excerpt and not fair dealing

2. using federal financial leverage and moral authority to move education institutions to rescind their current fair dealing guidelines and bring educators and independent Canadian publishers together to develop fair dealing regulations that are a mutually beneficial and build on our common interests
3. in addition, finding other means to support independent Canadian publishers to produce educational resources – programs specifically aimed at the sector or through procurement incentives to educational institutions; programs aimed to supplement the cost of Canadian resources purchased by students or teachers for their students
4. promoting a return to collective licensing in the education sector. It works. It's simple
5. increasing statutory damages to discourage systematic infringement, in particular by making it clear to users that tariffs established by the Copyright Board are mandatory and enforceable. Currently there are no enforcement mechanisms available to publishers, even though in the York case the FCC ruled such tariffs are mandatory. The committee could take a leadership role in stopping the damage.