

Canadian Authors Association



**Submission to the Standing Committee on
Industry, Science and Technology on the
2017-2018 Statutory Review of the Copyright Modernization Act**

7 December, 2018

- A. Background and Perspective
- B. Recommendations
 - 1. Extending the Term of Copyright Protection
 - 2. Ensuring Creators benefit from Digital Uses of Their Works
 - 3. Repealing the Educational Purposes Fair Dealing Exception
- C. Conclusion

A. Background and Perspective

Founded in Montreal in 1921 by Stephen Leacock and a group of other prominent writers of the time, Canadian Authors Association (CAA) is now a federal not-for-profit corporation dedicated to promoting a flourishing community of writers across Canada and encouraging the development of works of literary and artistic merit. Its membership is open to writers living in Canada at all stages of their careers—from aspiring to emerging to professional—in every genre and across all writing-related professions. While the CAA is a Registered National Arts Service Organization with an Orillia, Ontario head office, it also has ten local branches and twigs across the provinces.

CAA's local presence enables it to deliver programs, guidance, help and support to its members, and its inclusive model permits CAA members to engage in mentorship. Most CAA activities are practical, with a focus on the craft of writing and helping members build audiences and promote their work. Promotion venues include CAA's membership catalogue, directory and newsletters, and through opportunities to partake in book fairs, public readings, author tours, and signings. CAA also provides members with learning opportunities both at a national level, through its annual CanWrite conference, website and webinars; and at a local level through monthly meetings with guest speakers, workshops,

writing circles and readings. CAA offers both national and local writing prizes and participates in arts events across the nation.

CAA is also a collaborator, partnering with other writer organizations, especially in fulfilling its mandate to advocate for the protection of writer's rights and to promote the fair and equitable treatment of writers. The organization was instrumental in the federal government's creation of the first Copyright Act in 1924; it joined dozens of other writing organizations in pressing for copyright law modernization and reform in the 1980s, and was especially active in that regard in 2011-2012 when the bill(s) that culminated in the *2012 Copyright Modernization Act* were debated. In particular, CAA strongly opposed the educational fair dealing exception that was proposed and was in fact enacted in the *2012 Copyright Modernization Act*, to be discussed below.

The stated mandate of the Standing Committee is to ensure creators are properly compensated, and to "effect a change of course." CAA welcomes the opportunity to use its perspective as a national organization with local presence, and as the sole national organization that represents creators of literary works at all levels of their careers, to advocate for important changes to copyright law that will promote the fair and equitable treatment of writers.

B. Recommendations

While numerous areas of the *Copyright Modernization Act* reform are welcome, CAA advocates in three main areas: extending the term of copyright protection; ensuring writers as creators benefit from digitization of their works; and the repeal or substantial clarification of the educational purposes fair dealing exception that was introduced in 2012.

1. Extending the Term of Copyright Protection

The *Copyright Act* currently provides that the term of copyright protection is the life of the author plus 50 years. That term was originally conceived as a way of benefiting two generations of an authors' heirs. As life expectations lengthen, it makes sense to extend the term of copyright protection. Most of Canada's major trading partners, including the United States, Mexico, the United Kingdom, members of the European Union, Australia, Israel, Norway, Switzerland, Peru, Brazil, Iceland, and Russia have adopted a term of copyright of the life of the author plus 70 years. The extended term of copyright is also required under the new Canada–United States–Mexico Agreement (CUSMA). Copyright-protected content is increasingly distributed across international borders, making legal harmonization even more desirable. The extended term promotes innovation and investment in intellectual property generally, including literary works which are naturally of prime concern to CAA's membership.

The CUSMA trade agreement contains language that extends the term of copyright protection to the duration of the author's life plus 70 years, and we assume the ratification of

this trade agreement will result in a corresponding amendment to the *Copyright Act* where it properly belongs. CAA also advocates for corresponding transitional provisions in the *Copyright Act* so that estates of creators who have died less than 50 years ago, and estates of creators who have died between 50 and 70 years ago, will also benefit from the additional 20 years. We note that moral rights expire upon the death of the creator under US law and advocate that this does not become part of the Canadian law by virtue of the CUSMA. Further we advocate that only future, not past, licensees of copyright material should benefit from the additional 20 years.

2. Ensuring Creators Benefit from Digital Uses of their Works

The rapid shift from print to digital publications has been part of the reason for a dramatic decrease in revenue for authors and other rightsholders. The ease of copying materials in digital form has led to some sectors (such as the education sector) asserting that because the manner in which it accesses materials has changed, collective licensing is somehow devalued.

Copyright protection of literary works is, and should remain, platform-neutral. No matter how the literary work is accessed—whether at performance readings, in print, via audio recordings, by way of photocopies, by way of facsimile reproduction, as digitally copied files, or by way of CD or other hard copy formats—the rights of the creator must be respected. Although the hundreds of millions of pages of photocopies made every year for educational use in Canada may eventually shift to copying of digital materials, this should have no implications for copyright law. The materials should be considered no different for licensing or fair dealing purposes.

For literary works published in Canada, a study on remuneration for writers¹ indicated a need for separately negotiated digital licenses for digital works, limited licensing terms (i.e. three years), and the reversion of rights based on sales volume. Given the rapid evolution of the sector, terms for online publications should be as short as possible.

Although the public perception may be that it doesn't cost a creator anything if someone lifts a photo, song, movie, poem, article, or book chapter, there is in fact a cost: creators are unpaid for use that was obviously valuable to others. Those unpaid uses add up, significantly.

3. Repealing the Educational Purposes Fair Dealing Exception

Fair dealing exceptions are statutory defenses to copyright infringement; they represent “user rights” that are intended to balance the rights of content owners and those of content users. Simply put, the introduction of the educational purposes fair dealing exception has tipped the scales too far in favour of users.

To be excused from copyright infringement, a user must meet a two-part test: he or she must firstly, “deal” in the work for one of the eight enumerated purposes listed in the *Act*,

¹ The Remuneration of Canadian Writers for Literary Works: A Benchmarking Study, Communications MDR, September 27, 2017

which, as of 2012, now includes “educational purposes”; and he or she must do so fairly, considering the six factors set out by the Supreme Court of Canada. Those six factors include (1) the purpose of the dealing, (2) the character of the dealing, (3) the amount and importance of the dealing, (4) the alternatives the user could have accessed to avoid the dealing, (5) the nature of the work being used, and (6) the effect of the dealing in the market on the owner. The enactment of the new educational purposes fair dealing exception has led many users, especially educational institutions, either to skip the second part of the test, i.e. the six-factor fairness evaluation, and assume that simply any educational purposes use is a fair one; or else to adopt fair use guidelines that are self-serving and unfair to creators. Since writers are the largest creator group producing work that would be consumed by educational users, writers are the group most adversely affected by the educational purposes fair dealing exception.

Studies conducted since the 2012 implementation of the educational purposes fair dealing exception show that writer incomes have dropped precipitously. The TWUC study of author compensation² and the PriceWaterhouseCoopers study of the effect of the new fair dealing guidelines³ make this case clearly.

The uncertainty caused by the introduction of an educational purposes exception; the obviously self-serving copying allowances that educational institutions have adopted, and the position taken by educational institutions since the 2012 enactment of the educational purposes exception that they need not pay mandatory tariffs or renew their Access Copyright or Copibec collective licenses; have contributed to an environment that has prompted expensive and time-consuming litigation. Instead of Access or Copibec distributing licence fees among its creator members, they have had to devote substantial resources to litigation in the current climate of uncertainty. Here is a brief overview of some litigation:

- Access Copyright, the creators’ collective, sued York University; York University counter-sued; Access Copyright succeeded in Federal Court. The ruling justice said: “York has not satisfied the fairness aspect... York created the guidelines and operated under them primarily to obtain for free that which they had previously paid for.”
- York University has since appealed this decision to the Federal Court of Appeal.
- Copibec sued Université Laval in 2014 for failure to renew its license—the university fought the litigation—the matter has recently been settled out of court.
- Most provincial Ministries of Education and the Ontario school boards filed a lawsuit against Access Copyright claiming the return of tariffs from before 2012

² *The Remuneration of Canadian Writers for Literary Works: A Benchmarking Study* (September 2015)

³ *Economic Impacts of the Education Sector’s Interpretation of “Fair Dealing”* (July 2015)

Further, we understand through our colleagues at IAF that Canada is the only country with an educational purposes fair dealing exception, and other nations are watching with dismay as Canadian writers grapple with the consequences. Canada's decision to implement a reduction in creator protections, when the European Union is taking steps to bolster those rights, gives Canada the reputation of being a cautionary tale showing writers' rights that are out of balance.

The introduction of the educational purposes fair dealing exception has led only to misunderstanding, under-compensation for writers, and profuse litigation. It should be repealed in the Canadian copyright legislation. If not repealed, it should be greatly expanded upon to ensure that the provision is clarified:

- To codify the Supreme Court of Canada's six-factor fairness evaluation in the context of educational purposes; and
- To state that the exception does not allow users to adopt their own "fair use" policies that deviate from what is fair.

C. Conclusion

Copyright law is intended to achieve a balance. With robust copyright protection, creators of literary works are fairly compensated. Without it, the converse is true, and an adverse effect on creator income leads to an adverse effect on creative output. If writers are not paid to write, then quality current Canadian literature will be rarer. The unauthorized copying of quality literary work proves it is desirable, and yet as a commodity, such literary work it will become more scarce—unless there is a change of course in Canadian copyright law.

In conclusion, CAA requests the Standing Committee rectify the *Copyright Act* in order to ensure:

1. The term of copyright and moral rights protection is extended to life plus 70 years;
2. That creator compensation is not dis-affected by digital uses of their works; and
3. That the educational purposes fair dealing exception is repealed.